Policyholder Playbook Episode 32: The Policy Language Details, Pt. 1—Delaware Ruling That an 'Insured,' and Not an Uninsured Parent or Affiliate, Must Satisfy a Self-Insured Retention

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PRACTICES Insurance Recovery, Litigation

In Part One of our Policy Language Details series, we discuss a recent Delaware Superior Court decision that held that, based on the precise words of the policy, an "Insured," and not another entity in the corporate family, must satisfy a self-insured retention.

When an insurance company denies coverage, it will often point to some minute and perhaps overlooked detail in the contract as the basis for its denial. A word, clause or some other detail—they all matter. And courts back that up, as nearly every court across the country has articulated some version of the principle that, when "construing insurance policies, courts must give effect to every word, clause and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory."[1]

Against that backdrop, we introduce the Policy Language Details series, which will feature claims and disputes where coverage turned on a minute detail. Where, for example, a single word was dispositive of coverage. The series will highlight the importance of reading and analyzing your insurance policies—every word and every detail. And the series will also highlight the utility, at least in some instances, of engaging insurance coverage counsel early in the claims process to ensure that no word or detail is overlooked.

Our first example of the details mattering—unfortunately to the detriment of a policyholder—is the Delaware Superior Court's recent and widely publicized decision in *Aearo Technologies LLC v. ACE American Insurance Co.* In *Aearo*, the Delaware Superior Court ruled that $370 million in payments made by the parent company of an "Insured" could not and did not count against and satisfy a series of $250,000 self-insured retentions.[2]

In issuing that decision, the Delaware Superior Court focused on the details—the words of the insurance policies—and ignored, in some practitioners' minds, common sense. Common sense tells us there is no practical difference between a parent company paying money on behalf of an insured-subsidiary, and the insured-subsidiary paying money itself. Indeed, the insured in Aearo argued it would be a "pointless formality" to require the insured-subsidiary to pay instead of the parent on behalf of the insured-subsidiary, because if the former were required, then a simple end-around would be to have the parent transfer money to the insured-subsidiary, who then would pay and satisfy the retention.[3] The court disagreed.[4]

To frame its analysis, the court began by noting it was required to read each "contract as a whole and [to] give each provision and term effect, so as not to render any part of [each] contract mere surplusage."[5] The court then focused on the literal words of the policies, specifically the provisions

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that stated different iterations of "the self-insured retention . . . must be paid by the insured before this policy requires any payments."[6] The court threw out the insured's "pointless formality" argument, stating it was "contrary to the plain language of the . . . policies." And that was that.

The Delaware Supreme Court recently agreed to hear an appeal of the Superior Court's decision. In the meantime, we can debate whether the Delaware Superior Court's ruling was doctrinally correct, and we can point to, for example, other instances where courts routinely do not apply the precise words of insurance policies when doing so would lead to absurd results or "pointless formalities"—the interpretation of anti-assignment provisions in liability policies comes to mind—but the point is that this (interim) decision highlights that details matter. The words matter.

And so, with self-insured retentions and other policy conditions, we must ask who, according to the terms of the insurance policy, can satisfy the retention or condition. The words of the policy will tell us, and they certainly tell us that we would be unwise to assume that a parent company or another affiliate of an insured can satisfy the retention or condition. Instead of assuming, we must read the words.

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[1] *Vector Cap., L.L.C. v. Sec. Life of Denver Ins. Co.*, No. 22-10114, 2024 WL 3221416, at *3 (E.D. Mich. Feb. 29, 2024).

[2] C.A. No. N23C-06-255-SKR CCLD (Del. Super. Ct. July 15, 2024).

[3] *See id.* at *14–15.

[4] *See id.* at *15.

[5] *Id.* at *12.

[6] *Id.* *13, n.61 (emphasis added; cleaned up).

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