Policyholder Playbook Episode 36: Call a Coverage Limitation an 'Exclusion,' Even if it's Not in the 'Exclusions' Section of the Policy

February 18, 2025 Greg Van Houten

PRACTICES Insurance Recovery, Litigation

Quick Overview of the Play – The best policyholder advocates call coverage limitations "exclusions," even if the limitation is not found in the "exclusions" section of the policy. They do so because insurers bear the burden of proving the applicability of exclusions, and exclusions are strictly and narrowly construed against insurers.

Insurance policies are often filled with hidden exclusions—policy provisions that are not found in the exclusions section of the policy but nevertheless have an exclusionary effect. Consider the bump-up provision found in many directors' and officers' liability policies. The provision generally provides that the policy will not cover an increase in consideration due to shareholders after the execution of certain acquisitions. The provision sounds a lot like an exclusion, but it typically isn't found in the exclusions section of the policy; rather, it typically appears as a carve-out to the definition of "loss."

Courts generally say it doesn't matter whether limiting language is found in the exclusions section of the policy or elsewhere—if it walks and talks like an exclusion, it's treated like an exclusion, no matter where it's found. And that's critically important because insurers bear the burden of establishing that exclusions apply, and exclusions are, as a matter of insurance policy interpretation, construed strictly and narrowly.[1]

In *Viacom*, a Delaware trial court considered this very issue: whether the bump-up provision should be treated as an exclusion.[2] The court observed the provision "is in the defined terms section, rather than in the section enumerating exclusions."[3] But the court then noted that the provision reduces coverage—what constitutes "loss"—and so "operates as an exclusion."[4] The court ultimately held that because the provision operates as an exclusion, the insurers had the burden of proof.[5] For a number of reasons, the court held the insurers could not meet that burden; so, the court ruled in favor of the policyholders.

This principle has been articulated in many jurisdictions outside of Delaware, including in New York.[6]

The bottom line is that limitations on coverage are exclusions, and insurers have the burden of proving the applicability of exclusions. The best policyholder advocates hold insurers to that burden no matter where in the policy the limitation (i.e., the exclusion) is found.

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[1] *See, e.g.*, *Viacom Inc. v. U.S. Specialty Ins. Co.*, No. N22C-06-016, 2023 WL 5224690, at *6 (Del. Super. Ct. Aug. 10, 2023) ("Courts will interpret exclusionary clauses with a strict and narrow construction and give effect to such exclusionary language only where it is found to be specific, clear, plain, conspicuous, and not contrary to public policy.") (cleaned up).

[2] *Id.* at *7.

[3] *Id.*

[4] *Id.*

[5] *See id.*

[6] *See, e.g.*, *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 183 N.E.3d 443 (N.Y. 2021) ("[B]efore an insurance company is permitted to avoid policy coverage, it must satisfy the burden of establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation. This standard may be implicated even when an insurer relies on limiting language in the definition of coverage instead of language in the exclusions section of the policy because, in some circumstances, that limiting language functions as an exclusion.").