

Policyholder Playbook Episode 41: Show the Court How the Insurer's Interpretation Adds or Subtracts Words From the Actual Policy Language, Using Bracketed Text and Strikethrough

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PRACTICES Insurance Recovery, Litigation

Quick Overview of the Play – Use bracketed text and strikethrough to visually demonstrate the words the insurer's interpretation effectively adds to or strikes from the actual policy language.

The best policyholder advocates impress upon the court that the insurer's interpretation of the relevant policy language is at odds with the actual words used and, in effect, is an attempt to rewrite the policy. That's because nearly every court across the country has articulated some version of the principle that "it is not the function of a court to rewrite insurance policies."¹

Knowing as much, a strategy used by the best policyholder advocates is to utilize bracketed text [like this] and strikethrough (~~like this~~) to demonstrate how the insurer's interpretation of the relevant policy language effectively adds words to, or strikes words from, the actual policy language. Underscoring the utility of this technique, the Fourth Circuit used it this past March, in *JW Aluminum Co. v. ACE Am. Ins. Co.*, to demonstrate how the District Court's ruling in a coverage case was arguably at odds with the actual policy language.² The case centered on whether the policyholder's losses arising out of an accident at an aluminum processing facility were subject to a \$10 million sublimit for harms "cause[d] by heat from Molten Material."³ The insurer argued they were, because the harms "arose out of" the discharge of molten metal, and the District Court agreed.⁴

But the Fourth Circuit reversed.⁵ The Fourth Circuit held that the District Court had arguably broadened the scope of the sublimit by effectively changing the "caused by heat" language to "stemming from Molten Material."⁶ To emphasize this, the Fourth Circuit used strikethrough to highlight the words the District Court had effectively cut from the clause and italicized text in brackets to highlight the words the District Court had effectively added to the clause.⁷ The Fourth Circuit wrote:

In effect, the district court read the Molten Material provision as if it said, "direct physical loss or damage ~~cause by~~ [stemming] ~~from~~ Molten Material, which has been accidentally discharged from equipment."⁸

The Fourth Circuit ultimately held that the District Court's interpretation was not "the unambiguously correct one," and that the policy language was therefore ambiguous.⁹ The Fourth Circuit accordingly reversed the District Court's ruling that the policyholder's "total recovery is capped at \$10 million as a matter of law."¹⁰

The bottom line: Consider using bracketed text [like this] and strikethrough (~~like this~~) to demonstrate how the insurer's interpretation of the relevant policy language effectively adds words to or strikes words from the actual policy language.

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¹ *Francis v. INA Life Ins. Co. of New York*, 809 F.2d 183, 185 (2d Cir. 1987).

² No. 24-1229, 2025 WL 753373, at *2 (4th Cir. Mar. 10, 2025).

³ *Id.* at *1.

⁴ *Id.*

⁵ *Id.* at *1–4.

⁶ *Id.* *2.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at *2–3.

¹⁰ *Id.* at *3.