

# The Journal of Insurance & Indemnity Law

A QUARTERLY PUBLICATION OF THE STATE BAR OF MICHIGAN'S INSURANCE AND INDEMNITY LAW SECTION

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Opinions expressed herein are those of the authors or the editor and do not necessarily reflect the opinions of the section council or the membership.

## From the Chair



Hal O. Carroll

Welcome to our brand new section. We are the first new State Bar section to be created in more than a decade, and we are off to a good start. We already have more than 200 members, and as the news spreads, we expect to gain quite a few more.

A fair question to ask is "Why?" Where did the idea come from, and once the idea appeared, why did a few of us start the process of setting up a new section?

The short answer is that we think there is a need for us. Indemnity and insurance topics intersect with so many areas of practice that the questions that come up are important to the Bar as a whole, yet there has not been—until now—a section where those of us whose practices focus in this area can exchange our views and share our experience.

But there is more to it than just serving our own professional interests. Because these areas intersect so many other areas of practice, we think that our section, perhaps more than most, can serve as a resource for other sections. For that reason, we plan to distribute this *Journal* as widely beyond our own membership as possible, so as to spread the word among persons who we think may have an interest in our area and how it impacts theirs. So if you have an idea for an article (whether you are a member or not) send it in.

Another of our plans (still in its early stages) is to provide speakers for other sections and for other bar and business groups when they have a topic that they would like to learn about. If you are a member of our section and are interested in joining our list of speakers, please let us know. Or if you are in a separate group and would like to have a speaker, please contact us and we will try to accommodate you.

We hope to cover the entire range of topics, and from all perspectives—insureds as well as insurers, and potential indemnitors as well as indemnities—so whatever your perspective, we think our new section will be a valuable resource.

*Hal O. Carroll*

## Casey on Coverage

# Reading the Insurance Policy

By Timothy F. Casey, Kelley, Casey & Moyer PC, [tcasey@kcmlaw.com](mailto:tcasey@kcmlaw.com)

*Editor's note: This is the first of a continuing series on various topics relating to insurance.*

For this inaugural issue of the *Journal*, this column addresses some insurance contract essentials. While insurance agreements typically are referred to as “policies,” they are contracts. There are numerous types of insurance contracts, with some of the more commonly litigated types including general liability, auto, homeowners, property, professional liability, primary, excess, and umbrella policies. Surplus lines insurance may be available for specialized, unique, or certain higher risk coverages. Many insurance carriers use various insurance policy forms obtained through the Insurance Services Office (ISO), but carriers also prepare their own forms, and policies can be customized for individual needs, which may be called “manuscript” policies.

When evaluating insurance coverage matters, all potentially applicable policies should be obtained, and it is best to have a certified copy of the policy being reviewed, including the declarations page and all endorsements. Michigan courts construe an insurance policy the same as any other contract. *Auto-Owners Ins Co v Churchman*, 440 Mich 560; 489 NW2d 431 (1992). The cardinal rule in interpreting a contract is to ascertain the intent of the parties. *City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188; 732 NW2d 106 (2005).

Insurance contracts are read as a whole, *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 665 NW2d 776 (2003), which is particularly important since policy definitions need to be examined when interpreting policy insuring agreements, exclusions, and conditions. Ambiguities in an insurance contract are construed in favor of the insured, but courts will not create ambiguity where the terms of the contract are clear. *Henderson v State Farm Fire and Cas. Co.*, 460 Mich. 348;

596 NW2d 190 (1999). Exclusions are strictly construed in favor of the insured, but clear exclusions are given effect and there is no coverage if any one exclusion applies. *Brown v Farm Bureau General Insurance Co. of Michigan*, 273 Mich App 658; 730 NW2d 518 (2007). Michigan has rejected the rule of reasonable expectations as an approach to contract interpretation. *Wilkie, supra*. The policyholder is obligated to read the policy and is held to knowledge of its terms and conditions even if the policyholder did not actually read the policy. *Farm Bureau Mutual Ins Co of Michigan v Hoag*, 136 Mich App 326; 356 NW2d 630 (1984).

Insurance policy analysis thus includes an examination of the entire policy pursuant to well-established rules of construction. The analysis typically includes confirming the applicable policy dates in relation to the underlying incident—a basic matter but sometimes overlooked, particularly since policies may be renewed for several years and include different forms or endorsements over the years. The analysis also includes a determination of the person or entity insured, including potential additional insureds by endorsement, as well as a determination of the appropriate location, property, subject matter, or risk insured. Policy limits need to be verified, including a determination of whether there has been any exhaustion of the limits applicable to the type of claim at issue. This is followed by an examination of the insuring agreement, exclusions, conditions, and endorsements in the context of the particular facts involved.

Future columns will address some specific insurance policy provisions as well as various aspects of claims and litigation of insurance disputes. ■

## Send us your article!

The *Journal* is a medium for the exchange of views and expertise, both within the section and for interested persons outside the section.

If you have a topic in mind, send us an article or give us a call to discuss it.

Length: Flexible, but around 1,000-1,200 words. Include a photo and a short biographical statement.

E-mail the editor for detailed author's guidelines: [hcarroll@VGpcLAW.com](mailto:hcarroll@VGpcLAW.com)

Due dates:

■ January Issue: December 1

■ April Issue: March 1

■ July Issue: June 1

■ October Issue: September 1

## INDEMNITY CASE NOTE:

### Lanzo Construction v Wayne Steel Erectors, 477 Mich 983 (2007)

#### Indemnatee's Lack of Sole Negligence Demonstrated by Underlying Plaintiff's Testimony

By Noreen L. Slank, Collins, Einhorn, Farrell & Ulanoff, PC, noreen.slank@ceflawyers.com

##### The Decision

After grant of oral argument on the plaintiff/indemnatee's application for leave to appeal, the Supreme Court reversed the lower courts and ruled the indemnatee was entitled to summary disposition. The underlying plaintiff's description of how he was injured was deemed to establish comparative fault, as a matter of law, so that the indemnatee was not even potentially the solely negligent party.

##### The Lower Courts' Opinions

The contract of indemnity ran in favor of Lanzo Construction and against Wayne Steel, the employer of a worker (Agueros) who sued Lanzo for his construction accident injuries. Agueros fell while he was tossing rebar down to the floor of the building under construction, after the leading end of the rebar struck a column. The contract was a broad one that did not expressly exclude Lanzo's sole negligence from its scope, but the lower courts understood that MCL 691.991 required that such an exception be read into the contract. Both lower courts decided that the proofs and the pleadings could not be construed except as providing support for only Lanzo being negligent. Wayne Steel secured summary disposition in its favor. *Lanzo Construction v Wayne Steel Erectors*, unpublished opinion per curiam of the court of appeals, issued January 26, 2006 (Docket No. 264165), 2006 Mich App LEXIS 243 (2006).

##### The Supreme Court's View

In a 6-1 order, the majority peremptorily reversed the court of appeals and remanded the case to the trial court for entry of an order granting Lanzo's motion for summary disposition. The order at 477 Mich 983 states that Agueros "had a duty to proceed with reasonable caution for his own safety," citing *Lugo v Ameritech Corp*, 464 Mich 512, 522 (2001). The court recited how Agueros agreed he misjudged the distance to the column while he was swinging the rebar down, which the Supreme Court characterized as an "admission." The court held that this foreclosed Lanzo's sole negligence:

Agueros's negligence was at least partially responsible for his accident, so the plaintiff could not have been solely responsible for Agueros's accident, and MCL 691.991 is inapplicable.

##### A Behind-the-Scenes Look

This was the deposition testimony that won the day for Lanzo:

Q. *The thing that caused you to lose your balance was striking the rebar on the column*; would you agree with that?

A. I would agree that had something to do with it.

\*\*\*

Q. You didn't see the column there as you were swinging the rebar down?

A. I seen that it was there but I, you know, actually it was such to where I did it so many times, *I just miscalculated it*, you know, how much room I had, actually had, you know.

There was a great deal of testimony about Lanzo's fault in the accident. But the Supreme Court, quite properly, had no interest in that. It searched only for the fault of another, in this case a comparatively at-fault plaintiff. The Supreme Court saw fault as a matter of law, not an issue of fact.

##### Practice Implications

When representing an indemnatee whose contract cannot shift liability in the presence of its sole negligence, do not overlook that an injured party's comparative fault can sometimes be proven by the physical facts of the accident or the injured party's own testimony of how the accident happened. Resist being overwhelmed by facts showing the indemnatee's own negligence and search for *some* percentage of fault even when that fault does not implicate the indemnitor. ■

Don't forget to check the website

Important section information, including this newsletter, can be found at  
<http://www.michbar.org/insurance/>

## Our First Photos



The Organizational Meeting.



The Officers: Mark G. Cooper, secretary; Hal O. Carroll, chairperson; Timothy F. Casey, chairperson elect; Elaine Murphy Pohl, treasurer.



The Officers and Council Members

Seated: Hal O. Carroll, chairperson; Mark G. Cooper, secretary; Timothy F. Casey, chairperson-elect; Elaine Murphy Pohl, treasurer. Standing: council members Marty Brown, Edward Freeland, D. Andrew Portinga, Kathleen Lopilato, Daniel Steele, Deborah Herbert, and Amy Iannone.

Not shown: M. J. Stephen Fox.

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## 2007 in Review: Significant Insurance Decisions

By Deborah A. Hebert, Collins, Einhorn, Farrell & Ulanaoff, [deborah.hebert@ceflawyers.com](mailto:deborah.hebert@ceflawyers.com)

### Advertising Injury

*Citizens Ins Co v Pro-Seal Service Group, Inc,*  
477 Mich 75 (2007)

In 2007, the Michigan Supreme Court took its first-ever look at coverage for “advertising injury” under a CGL policy. The insured, Pro-Seal, sold and repaired mechanical seals. Its main competitor, Flowserve, discovered that when Pro-Seal repaired Flowserve seals, it returned them to the owners in Flowserve packaging, with Pro-Seal labels affixed to the outside. Flowserve sued Pro-Seal for creating confusion in the market place, for infringement of trademark and product marks, and for misrepresentation in sales practices.

Pro-Seal’s CGL policy with Citizens contained the standard insuring agreement for “sums that the insured becomes legally obligated to pay because of ‘personal and advertising injury’ to which this insurance applies.” Advertising injury was defined to include “the use of another’s advertising idea in your advertisement,” and also “[i]nfringing upon another’s copyright, trade dress or slogan in your advertisement.” Pro-Seal’s umbrella policy similarly described advertising injury as including “[m]isappropriation of advertising ideas or style of doing business” and “[i]nfringement of copyright, title or slogan.”

Citizens denied Pro-Seal a defense to Flowserve’s lawsuit, and the Supreme Court upheld that decision because the claim did not arise out of an advertising injury as defined by the policy. “[T]he act of shipping a product in a competitor’s packaging with one’s own name affixed to it is insufficient to satisfy the CGL policy’s definition of an ‘advertisement.’” In so holding, the Supreme Court rejected the court of appeals’ broader view of “advertising injury” as unsupported by the language of the policy. “Advertising” required some public dissemination of information about the insured’s goods and services. The act of affixing its seal to another manufacturer’s packaging prior to mailing to a specific customer did not fit the bill.

In addition to its specific holding on advertising injury insurance, this opinion is a worthwhile read for its discussion of how the courts are to approach policy definitions.

### Independent Medical Examinations in PIP Cases

*Muci v State Farm Auto Ins Co, 478 Mich 178 (2007)*

Independent medical examinations in PIP cases are controlled by the no-fault act and the contract of insurance, not the court rules governing discovery.

State Farm, upon being sued by its insured for PIP benefits, demanded an unconditional medical examination as provided under MCL 500.3151. The insured refused, and petitioned the trial court for limitations under MCR 2.311(A). Many of plaintiff’s requests were granted, including a requirement that the physician produce financial records of his IME earnings. The court of appeals affirmed (Saad, J. dissenting), on the theory that the court rules governing discovery supplemented the no-fault statute and the insurance contract. But the Supreme Court reversed. It held that the legislature designed a statutory scheme that would promote the prompt handling of PIP claims, with built-in protections for the insured against harassment by the insurer and built-in protections for the insurer against fraudulent claims. PIP claims were *not* “just another species of civil litigation,” subject to general discovery rules in all respects. Because a specific statute guaranteed insurers a right to unconditional IMEs, that statute, which was substantive, trumped the court rules.

### No-Fault Benefits Payable to Improperly Incorporated Providers?

*Miller v Allstate Ins Co, lv granted*

In *Miller v Allstate Ins Co (On Remand)*, 275 Mich App 649 (2007), the court of appeals held that no-fault benefits were payable even though the corporate provider was not properly incorporated under the professional services corporation act. It reasoned that the treatment was administered by a licensed physical therapist and was thus payable. On November 21, 2007, the Supreme Court granted Allstate’s application for leave (Docket Nos. 134393 and 124406), directing the parties to brief:

1. whether defendant PT Works, Inc., a provider of physical therapy, was required to be incorporated under the Professional Services Corporations Act (MCL 450.221, et. seq.); and

2. if so, whether the failure to so incorporate means that the treatment provided by PT Works to Allstate's insured was not lawfully rendered under the no-fault act.

The Court invited amicus briefs from a number of interested organizations, including the Insurance Institute of Michigan. At least two other Supreme Court applications have been held in abeyance pending a decision in *Miller: Allstate Ins Co v A&A Medical Transportation Services, et. al*, Docket No. 133348-49, and *Preferred Medicine, Inc, et al v Allstate Ins Co*, Docket No. 132955.

### Comparable Health Insurance Services and No-Fault Benefits

#### *Michigan Rehabilitation Clinic v Auto Club Group Ins Co*

Auto Club's no-fault policy exempted benefits if a health insurer offered "comparable services." In its unpublished decision in *Michigan Rehabilitation Clinic v Auto Club Group Ins Co* (Docket No. 263835), the court of appeals ordered Auto Club to pay for chiropractic services not covered under the insured's health insurance policy, even though plaintiff could have continued successful physical therapy treatment covered by her health insurance. The Supreme Court summarily reversed, by order of October 19, 2007, \_\_\_ Mich \_\_\_; 739 NW2d 638 (2007). Because the no-fault policy issued by Auto Club exempted benefits that could have been rendered through "comparable services" under a health policy, the insured's entitlement to no-fault benefits was dependent on an analysis of comparable services. If the physical therapy covered by health insurance was a "comparable service," Auto Club would not be required to pay benefits for the chiropractic services per its contract. The case was remanded for a determination of that question.

### Supreme Court Stops Short of Addressing CGL Coverage for Construction Defects

#### *Hastings Mutual v Mosher Dolan*

On May 23, 2007, the Supreme Court granted leave in *Hastings Mutual v Mosher, Dolan, Cataldo & Kelly* (Docket No. 131546) to consider (1) whether a subcontractor's defective work was an "occurrence" within the meaning of the insured general contractor's CGL policies, and (2) whether the "Damage to Your Own Work Exclusion" or "Fungi Exclusion" were applicable. Trigger issues were also raised. But after briefing and oral arguments, the Supreme Court issued an order on October 8, 2007, denying leave, because it was no longer persuaded that the questions should be reviewed. This important area of insurance coverage will have to wait for another day.

### Penalty Interest for Untimely Paid Claims

#### *Special Panel Decision in Griswold Properties v Lexington Ins Co*

In *Griswold Properties, LLC v Lexington Ins Co*, \_\_\_ Mich App \_\_\_ (2007) (a consolidation of three cases), the court of appeals, by special panel, resolved a conflict over the right of first party insureds to collect 12 percent penalty interest for untimely paid claims, regardless of the reasonableness of the delay in payment. The right to penalty interest is created under MCL 500.2006, a provision of the Uniform Trade Practices Act. Because the statute does not condition interest on the reasonableness of the insurer's decision, penalty interest must be awarded for any delayed payment of a claim. The other two cases consolidated in this decision are *Gainors Meat Packing, Inc v Home-Owners Ins Co* and *Gardner v Harleysville Lake States Ins Co*.

### Quick Summaries of Selected Published Decisions of the Court of Appeals

**Motorized Land Conveyance.** Forklift leased by insured for use on her property was a "motorized land conveyance" within the meaning of an exclusion in her homeowner's policy. *Brown v Nationsrent*, 273 Mich App 658 (2007).

**Settlement Without Consent.** Plaintiff minor child was injured in an auto accident with an uninsured vehicle. Her representative settled with the driver's insurer for policy limits (where the driver could not be located), which caused her to lose her right to UIM benefits for failure to obtain her own insurer's consent to the settlement. Her motion to set aside the settlement on this ground was denied. *Peterson v Auto-Owners*, 274 Mich App 407 (2007).

**Domestic Partnerships.** The recently passed "marriage amendment" to the Michigan Constitution, article 1, § 25, precludes public employers from extending health insurance benefits to domestic partners of the same sex. *National Pride at Work, Inc v Governor of Michigan*, 274 Mich App 147 (2007), lv granted 478 Mich 862 (2007).

**Notice of Claim.** The insured's general notice of the occurrence of an auto accident does not satisfy the requirement of a notice of claim for UIM benefits. A specific UIM claim made more than a year later was untimely. *McGraw v Farm Bureau General Ins Co of Michigan*, 274 Mich App 298 (2007).

**No-Fault Priorities.** Where the injured person is not insured under a no-fault policy and the involved vehicle is uninsured, the insurer of the operator of the involved vehicle is next in priority for no-fault coverage. Because the operator was insured as a member of the household under his wife's no-fault policy, that policy was responsible for his PIP benefits. *Amerisure Ins*

*Co v Titan Ins Co*, 274 Mich App 432 (2007). But compare *Dobbelaere II v Auto-Owners*, 275 Mich App 527 (2007).

**Refusal of Medical Examination.** It is not unreasonable for insurers to suspend payment of benefits in response to an insured's repeated failure or refusal to submit to medical examinations authorized under MCL 500.3151, as long as there is a bona fide question about injuries; penalties for late payment will not be assessed. *Roberts v Farmers Ins Exchange*, 275 Mich App 58 (2007).

**Failure to Cooperate—Third Party Claims.** An insured's failure to cooperate with his or her no-fault insurer is not a valid defense against a third party claim for compulsory, residual liability insurance benefits. But under Michigan law, the benefits are limited to the minimum liability insurance required under the financial responsibility laws of the place in which the injury or damage occurs. In *Abalos*, the accident occurred in Ohio, which meant that Ohio's minimum insurance requirements controlled. *Farm Bureau Ins Co v Abalos*, \_\_\_ Mich App \_\_\_ (2007).

**IME and Termination of Benefits.** Insurer may not rely solely on the findings of independent medical examiner to

terminate benefits without at least consulting treating physicians. "The trial court concluded that defendant knew other doctors had been involved, and it was 'incumbent upon the carrier to go beyond' just the IME doctor's opinion and' could have sought further information before exercising the draconian termination of critical benefits for one who is injured. We agree." *Moore v Secura Ins*, 276 Mich App 195 (2007).

**No-Fault: Unlicensed Service Provider.** Services provided by a facility not licensed to perform the services rendered are not recoverable under no-fault (distinguishing *Miller, supra*, which involved defects in corporate structure). *Healing Place at North Oakland Medical Center v Allstate Ins Co*, \_\_\_ Mich App \_\_\_ (2007).

**Catastrophic Claims Reimbursement.** MCCA must reimburse insurer for actual payments above the statutory amounts, and cannot limit reimbursement to sums it deems reasonable; however, if MCCA determines that the insurer is failing in its obligation to monitor for reasonableness, it may contract with another person to perform that adjustment function. *USF&G v Michigan Catastrophic Claims Assoc*, 274 Mich App 184 (2007). ■

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## Need a Speaker? Want to Be a Speaker?

If you belong to a group that would like to have a speaker from the Insurance and Indemnity Law Section speak on a topic of interest, just let us know the topic, and we'll try to arrange a speaker. If you are not sure of a topic, call anyway, and we'll work something out.

If you are a member of the section and would like to be on our list of speakers, please contact:

Hal O. Carroll, hcarroll@VGpcLAW.com  
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## NO-FAULT FIRST PARTY CASE REPORT

### Supreme Court Activity in First Party No-Fault Cases

By Daniel Steele, Vandevveer Garzia, PC, [dsteele@VGpcLAW.com](mailto:dsteele@VGpcLAW.com)

*During the last year, the Michigan Supreme Court has been quite active in the area of first party no-fault benefits. Here are a few highlights.*

**IMEs governed by statute.** In *Muci v State Farm*, 478 Mich 178 (2007), the Supreme Court ruled that the no-fault statute, MCL 500.3151, rather than the court rule, MCR 2.311(A), controlled how IMEs would proceed in PIP cases. The plaintiff had refused to submit to an IME unless it was videotaped and her lawyer was present. The trial court had agreed to impose some 19 conditions requested by the plaintiff, but the Supreme Court reversed, holding that the court rules control only where the No-Fault Act is silent, and that the specific provisions of the No-Fault Act regarding IMEs govern to the exclusion of the court rule. The effect is to limit the conditions that a trial court judge may place on a defense independent medication examination.

**One-Year Back Rule.** Late last year, in *Cameron v Auto Club Insurance Association*, 476 Mich 55 (2006), the Court held that with respect to a minor, tolling affects the statute of limitations; however, it does not affect the damage limitations of the No-Fault Act. Therefore, benefits for home attendant care are subject to the one-year back rule, even where the injured person is a minor. Plaintiffs have asserted alternative theories such as common law fraud, negligence, violation of the Michigan Consumer Protection Act, or the Uniform Trade Practices Act. The Supreme Court has granted leave in *Cooper v Auto Club*, court of appeals no. 261736, to address this issue.

**Statute of Limitations.** The Supreme Court has also granted leave in *McDonald v Farm Bureau*, an unpublished

court of appeals opinion, to address the issue of whether a contractual period of limitations is tolled by the actions of the carrier. In *Devillers v ACIA*, 473 Mich 562 (2005), the Supreme Court held that the statute of limitations under the No-Fault Act was not tolled while the carrier had the claim under consideration but did not resolve the issue as to a contractual period.

**Wage Loss Claims of Self-Employed.** The Supreme Court has granted leave in *Ross v Auto Club Group*, 269 Mich App 356 (2006). The Court will address how to evaluate wage loss claims of the self-employed and sole shareholders of S corporations. The Court is also expected to clarify when an award of attorney's fees is appropriate following an insurer's denial of benefits; MCL 500.3148(1).

**Improperly Incorporated Service Provider.** The Supreme Court recently granted leave in *Miller v Allstate*, 275 Mich App 649 (2007). This is the second time the Supreme Court has granted leave. The most recent opinion of the court of appeals, following a remand from the Supreme Court, ruled that a physical therapist who was incorporated under the Business Corporations Act, rather than the Professional Services Corporation Act, was not disqualified from receiving no-fault payments, even though the therapist was improperly incorporated. The Supreme Court's order granting leave asks the parties to brief whether or not the services were "lawfully provided." ■

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## The Drafting Table

# Terrorism Liability Coverage: Defining "Terrorism"

By Hal O. Carroll, *Vandevveer Garzia, PC*, [hcarroll@VGpcLAW.com](mailto:hcarroll@VGpcLAW.com)

Terrorism coverage has become popular lately, for obvious reasons. From the perspective of an insurer, the need to draft a completely new form, whether to extend or to limit coverage, presents a challenge. There is no single best way that a clause can be written, and we can use this topic to illustrate two different approaches.

By "terrorism coverage," we mean coverage for liability that may result from an inadequate response or failure to respond to an act of terrorism. This is the kind of liability that might be faced by anyone who operates a public building, such as a school, a casino, or an office complex, if it is sued because of an allegedly inadequate response to a terrorist incident.

Here is the definition in a policy that is widely available in the United Kingdom:

For the purpose of this Insurance, an Act of Terrorism means an act, including the use of force or violence, of any person(s) or group(s) of persons, whether acting alone or on behalf of or in connection with any organisation(s), committed for political, religious or ideological purposes including the intention to influence any government and/or to put the public in fear for such purposes.

The seller of this insurance promotes the coverage as especially broad, and that is certainly true if we look only at the core concept of this definition. Every definition has a core concept, the definition's heart. Often it is concealed, but the way to get at it is to remove language that elaborates on it. For example, we can delete the phrase beginning with "including," since the word "including" means that the terms that follow are not essential to the coverage. The concluding phrase "including the intention . . ." can also be ignored, for the same reason.

The phrase "person(s) or group(s) of persons" simply means any human activity, so we can also put that aside for the time being. This leaves us with the following core definition of a terrorist act:

"Any act . . . committed for political, religious or ideological purposes."

If breadth were the goal, this would be a winner. Voting, going to church, picketing related to abortion issues, all qualify as acts of terrorism under this language. Voting is a political act, going to church has a religious purpose, and issue advocacy is ideological. There is not a lot of humor in the world of policy drafting, but with all due respect to our English cousins, this may qualify.

Now, the policy drafters across the pond are not fools. They temper this with no fewer than 17 exclusions, one of which is for any "warlike act," and another for acts of "persons acting maliciously."

The question is: From the perspective of an attorney who is asked to draft some kind of terrorism coverage, is this good language or not? Let's try to formulate our own.

First, a bit of philosophy: it is **never** the drafting attorney's job to tell the insurer what risks it **should cover**, but **always** the attorney's job to explain, as best he or she can, what risk the insurer **is actually covering** with the words he chooses.

The structure of the English policy makes it hard to know what is or is not covered. It is hard because the insuring language is basically content-free, leaving all the heavy lifting to the exclusions. So many acts are covered that it is not worth the effort of trying to deduce from the insuring language alone what acts are not covered. The only way to answer that is to read and tabulate the 17 exclusions.

It is also worth considering, from the point of view of insurer-insured relations, that the insured may find this language particularly difficult to follow. Whether that is important depends in part on the nature of the insurer. The insured's relationship to a commercial insurer and to a risk retention group are quite different. Feedback from risk retention group participants is much more frequent and more vigorous.

If we assume that part of the purpose of a policy is to communicate with the insured—and it should be—the English policy is lacking. It ought to be possible to put some actual substance into the definition of terrorism. The elements are pretty well understood by most of us, even if we don't usually take the time to articulate them. Here is where the challenge of drafting comes in.

We begin at the same place. A terrorist act is necessarily some sort of act. It is usually a violent act, though it may merely involve a threat of violence. So far we have:

Act of Terrorism means an act, involving force or the threat of force . . .

Just any threat? Al Quaeda, for example, is in perpetual threat mode. So we need some reference to the imminence of the threat. Also, the force or threat could be aimed at persons or be intended to destroy property, so we should add a reference to that. We can also add a reference to a single

person or a group of persons as the putative terrorists. We get something like this:

Act of Terrorism means an act that involves the use of force or violence or the specific and imminent threat of the use of force or violence, directed at persons or property, by any person or any group or groups of persons, whether acting alone or on behalf of or in concert with any organization or organizations . . .

This language is still too broad. It would include any violent crime, or any act of vandalism, or even a personal threat of the kind that leads to Personal Protection Orders. We need some reference to the underlying motivation of the act.

Act of Terrorism means an act that involves the use of force or violence or the specific and imminent threat of the use of force or violence, directed at persons or property, by any person or any group or groups of persons, whether acting alone or on behalf of or in concert with any organization or organizations, **when** the act is committed for political, religious or ideological purposes . . .

Note the use of the word “when.” Unlike “including,” which merely expands the scope of the preceding language, “when” creates a condition of coverage. Little words mean a lot.

The word “purposes” tells us something of the motivation of the bad actors, but that is not quite the same thing as their “intent.” “Purpose” relates to **why** they did something. “Intent” relates to **what result** they hope will follow.

Most terrorists seem to want to influence things. They want governments to change their policies and stop what they are doing or do something they have refused to do. Let’s add something about that. This is what we get:

Act of Terrorism means an act that involves the use of force or violence or the specific and imminent threat of the use of force or violence, directed at persons or property, by any person or any group or groups of persons, whether acting alone or on behalf of or in concert with any organization or organizations, when the act is committed for political, religious, or ideological purposes, with the intent of influencing, disrupting, or interfering with government . . .

That’s beginning to look like a definition. Some acts of terrorism, though, seem to have no reasonable prospect of influencing a government. Public fear seems to be the primary goal.

Act of Terrorism means an act that involves the use of force or violence or the specific and imminent threat of the use of force or violence, directed at persons or property, by any person or any group or groups of persons, whether acting alone or on

behalf of or in concert with any organization or organizations, when the act is committed for political, religious, or ideological purposes, with the intent of influencing, disrupting, or interfering with government or influencing public opinion by putting the public in fear.

By this time, we have a pretty robust definition, though the job is not finished. It is insured-friendly because it communicates, in generally common sense terms, what is covered. There is more that could be said, of course. For example, a terrorist might release or deliver a toxic substance without any application of force (remember the anthrax envelopes). We might want to include “the release of toxic substances.” Fake substances can cause fear, too. Another basic question is whether the terrorism is foreign or domestic (such as Earth Liberation Front). If foreign, do we need to be more precise about the “sponsor”? Does it matter if it is an actual government or not? All of these questions, and more, need to be addressed, so this could become “the delivery or release of substances which are or appear to be toxic.” But at least we won’t need 17 exclusions, as the English policy did. The English policy described at the outset apparently satisfies insureds in the UK, however different it is from a typical American format, and to be fair, a policy drafter should always keep in mind that it is easier to criticize someone else’s clause as poorly written than it is to write a good one. Drafting a good clause is slow, careful, and even tedious work. ■

About the Author

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# OFIS Bans Discretionary Clauses in Insurance Policies

By D. Andrew Portinga, *Miller Johnson*, Grand Rapids

On February 23, 2007, the Office of Financial and Insurance Services (OFIS) approved regulations that prohibit “discretionary clauses” in insurance policies.<sup>1</sup> “Discretionary clauses” are provisions in policies that grant deference to an insurer’s interpretation of the terms of a policy or determination of eligibility for benefits under a policy.<sup>2</sup>

Discretionary clauses are common in insurance policies that involve employee benefits, such as disability benefits. They are the outgrowth of the United States Supreme Court’s decision in *Firestone Tire & Rubber Co v Bruch*.<sup>3</sup> In that case, the Supreme Court held that, under the Employee Retirement Income Security Act (ERISA), a court should review a claims administrator’s decision regarding the provision of benefits under the *de novo* standard of review, unless the ERISA plan gives the administrator discretionary authority to determine eligibility for benefits or to construe the terms of the plan. A corollary of *Firestone* is that, if a plan does grant discretionary authority to a claims administrator, then the denial of benefits can only be reviewed for abuse of discretion.<sup>4</sup>

After *Firestone*, insurers commonly inserted discretionary clauses into ERISA-regulated policies. These clauses limit a federal court’s review of an insurer’s decision to deny benefits in ERISA cases. That is, under ERISA, if an insurer is granted discretion to determine a person’s eligibility for benefits, a court may only overturn that decision if the decision is arbitrary and capricious.

Several state insurance commissioners have reacted to the proliferation of discretionary clauses by promulgating regulations that prohibit such clauses in insurance policies. In February 2004, the California Department of Insurance issued a letter opinion ruling that discretionary clauses were illegal under California law because, according to the insurance commissioner, they created an illusory contract.

Other states, including Illinois and Hawaii, have also prohibited discretionary clauses. New York is considering the issue, and it may promulgate regulations that prohibit discretionary clauses. Indiana and Utah prohibit discretionary clauses in insurance policies, except for policies that are governed by ERISA.

Michigan is the latest state to prohibit discretionary clauses in insurance contracts. Michigan’s regulations became effective March 1, 2007. They are prospective only, and only apply to policies that are issued or revised after March 1, 2007. Michigan’s regulations apply to all policies. There is no exception for ERISA-governed policies.

A group of insurers has filed suit against the commissioner of OFIS, arguing that the regulations are invalid to the extent that they apply to ERISA-governed policies.<sup>5</sup> The insurers argue that ERISA preempts these regulations. This case is currently pending before Judge Richard Alan Enslen in the Western District of Michigan. Both parties have filed motions for summary judgment, but, at this time, the court has not issued a ruling.

## About the Author

*D. Andrew Portinga is a member of Miller Johnson in Grand Rapids, where he litigates ERISA and insurance coverage cases. Mr. Portinga is a member of the council of the Insurance and Indemnity Law Section of the State Bar of Michigan, a member of the United States Courts Committee, and formerly a commissioner of the State Bar.*

## Endnotes

- 1 2007 AACCS R 500.2201 et seq.
- 2 R 500.2201(c).
- 3 489 US 101 (1989)
- 4 See, e.g., *Glenn v MetroLife Ins Co*, 461 F3d 660, 666 (6<sup>th</sup> Cir. 2006).
- 5 See *American Council of Life Insurers v. Watters*, Case No. 07-CV-00631 (W.D. Mich.).

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