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Cryptic Exclusion Endorsements on Automobile Insurance Policies are Enforceable

Mona E. Dajani

Elkhart argued that because CERCLA speaks of "disposal," and "disposal" includes accidental spillage, Detrex should be held accountable for Transport Services' TCE spillage. The Seventh Circuit decided that in this particular context of a product's transportation, "disposal" excludes accidental spillage because one does not arrange for an accident. Therefore, CERCLA's words "arranged with a transporter for transport for disposal or treatment" refer to the case where an individual desires to dispose of hazardous waste and hires a transportation company to carry the waste to a disposal site.

In such a case, the shipper would be a responsible person and liable for cleanup costs. However, when the shipper arranges for the delivery of a useful hazardous product with a common carrier, it is not a responsible person under CERCLA if spillage occurs en route. Hence, under CERCLA, Detrex was only liable for the spillage of TCE from its own trucks, and not from the trucks of Transport Services. ❖

— Benjamin Malkin

Cryptic Exclusion Endorsements on Automobile Insurance Policies Are Enforceable

In ***Dungey v. Haines & Britton, Ltd.***, 614 N.E.2d 1205, (Ill. 1993), the Illinois Supreme Court held that a renewed insurance policy assumes the conditions of the original contract. Therefore, a previous exclusion endorsement becomes part of a renewed contract. In reversing the court of appeals, the supreme court affirmed the circuit court's judgment that a renewed policy was unambiguous, and a driver named in an initial exclusion endorsement was excluded from coverage under a renewed insurance policy.

Appellate Court Finds Exclusionary Clause Ambiguous

In 1981, John and Shirley Dungey obtained automobile insurance coverage through Haines & Britton, Ltd. (Haines), an insurance broker. The Economy Fire and Casualty Company (Economy) issued Shirley Dungey an insurance policy for a 1980 Plymouth Horizon she owned with her husband. As part of the policy, Shirley Dungey signed a statement, called a "named drivers exclusion endorsement," which excluded her husband, John Dungey, from coverage due to his poor driving record. At the bottom of the endorsement, appeared the notation "CE-180."

One year later, when Shirley Dungey renewed her insurance policy, she again signed a named drivers exclusion endorsement excluding John Dungey from coverage. The notation "CE-303" appeared at the bottom of this second endorsement. Shirley Dungey subsequently renewed the auto insurance policy on the Plymouth Horizon many times. Yet, Economy never again asked her to sign a named driver exclusion endorsement. Instead, she received a declaration statement from Economy each time she renewed her policy. The declaration statement contained a preprinted line entitled "Endorsement(s)," after which were a series of numbers, including "CE-303." This number correlated with the second named drivers exclusion attached to the original policy which Shirley Dungey signed to indicate that John Dungey was excluded from insurance coverage.

In 1983, the Dungeys obtained a second policy from Economy. Shirley Dungey's son was listed as the primary driver on this policy. Moreover, two cars previously insured under the first policy, although at different times, were insured under this second policy. The premiums were higher and the policy periods shorter on this policy than on the first policy. No endorsement excluding John Dungey was required under this policy and the declaration statements sent to Shirley upon renewal of this policy did not contain the notation "CE-303."

In 1985, the Dungeys purchased a 1985 Chevrolet Sportsvan. Although Shirley recalled telling her insurance broker that John would be the primary driver, the insurance company excluded her husband from the policy because the van was added to the original 1981 policy.

On the same day the Dungeys added the Chevrolet van to the first policy, they obtained a third policy from Economy for a 1984 Chrysler Laser which had previously been insured under Shirley's first policy. Both John and Shirley were listed as drivers on this policy that also had higher premiums and shorter periods than the first policy.

On March 29, 1986, while John Dungey was driving the 1985 van insured under the first policy, he had an accident. The van was destroyed and John was injured. Economy denied the Dungeys' claim for coverage because Economy claimed the first policy excluded John Dungey from coverage.

The Dungeys filed a lawsuit to recover damages for breach of contract and negligence against both Haines and Economy. The plaintiffs and Economy filed motions for summary judgment. The trial judge granted Economy's motion for summary judgment, finding as a matter of law that the named drivers exclusion contained in the policy excluded coverage and was unambiguous. The trial court also found that Haines was not an agent of Economy and that Economy would not be liable for Haines.

The plaintiffs appealed the trial court's decision. The appellate court, with one justice dissenting, reversed the trial court's judgment. The appellate court held that the exclusionary clause was ambiguous and that there was a genuine issue of material fact concerning the intent of the parties as to the exclusion clause. Economy filed a petition for leave to appeal, which the Illinois Supreme Court granted.

Plaintiffs Claim Exclusion Endorsement Language and Defendant's Actions Were Ambiguous

The plaintiffs argued that Shirley Dungey's first policy, which eventually covered the van involved in the accident, was ambiguous and should be construed strictly against Economy. The Dungeys asserted that the notation "CE-303" did not explicitly state that John Dungey was excluded from coverage and, at best, had to be interpreted by reference to the original policy. The plaintiffs also contended that Economy's actions augmented the policy's ambiguity when they insured John Dungey as the driver of another car under a separate policy. Furthermore, after Shirley signed the drivers exclusion endorsement pertaining to the first policy on two separate occasions, she was not asked to sign the endorsement again. Thus, a reasonable inference existed that John was covered to drive the 1985 van. Nonetheless, Economy argued that the endorsement notation "CE-303" clearly and unambiguously excluded John Dungey from coverage and insisted that the renewed contract must be applied as written.

Ambiguity Claim Unfounded

The Illinois Supreme Court reversed the judgment of the court of appeals, holding that the exclusionary clause was unambiguous and that the intent of the parties was clear. The court referred to its decision in *Economy Fire & Casualty Co. v. Pearce*, 399 N.E.2d 151 (Ill. 1979), where it recognized that as a general rule, when a policy renewal is made, the original endorsement becomes part of the renewed contract of insurance. In the instant case, the court determined that since the notation "CE-303" appeared on the renewed policies with the word "Endorsement(s)," it was sufficient to convey to the plaintiffs that the notation referred to the policy's endorsement, even though reference was made to the exclusion clause by two different numbers: "CE-180" in the original policy and "CE-303" in subsequent renewals. The court held that the policy could be construed in only one way: that John Dungey was excluded from coverage under his wife's first policy.

The court also rejected the plaintiffs' second claim that Economy's actions were a source of ambiguity. To determine whether ambiguity exists in an insurance contract, the court should consider the subject matter of the contract, the facts surrounding its execution, the situation of the parties, and the predominate purpose of the contract, which is to indemnify the insured. The court determined that since Shirley Dungey signed exclusion endorsement "CE-180" on the original policy, exclusion form "CE-303" at the time of first renewal, and that each subsequent renewal referred to endorsement "CE-303," she should have reasonably believed that her husband was excluded from coverage.

Finally, the court rejected the plaintiffs' claim that the original exclusion endorsement was no longer in effect. The court found that the Dungeys' belief that Economy no longer had reservations about covering John was misguided, since the other policies the family purchased from Economy had higher premiums and shorter coverage periods. Thus, the court ruled that the factual circumstances did not render the Dungeys' policy on their van ambiguous, and the plaintiffs were correctly denied coverage.

Dissent Argues Holding Contravenes Principles of Law Applicable to Insurance Contracts

In his dissent, Justice Bilandic maintained that the majority's decision contravened accepted principles of law governing the construction of insurance policies. In construing an insurance contract, the primary purpose is to give effect to the intentions of the parties as expressed in the contract. When an insurance policy contains ambiguous terms, it must be construed most strongly against the insurer who prepared the contract.

Bilandic found that the factual circumstances surrounding the renewal of the Dungeys' policy in 1982 demonstrated that the parties did not intend for the original exclusion endorsement, which Shirley executed in 1981, to become part of the renewal contract in 1982. Instead, he argued that because Economy specifically required Shirley to execute a new endorsement, the terms of the original policy did not become part of the renewal contract of insurance. Thus, according to Bilandic, the general rule on which the majority relied — that upon policy renewal, the terms of the original policy become part of the renewed contract unless indicated otherwise — was not applicable to the Dungeys' situation.

The justice further asserted that the key inquiry in construing policy coverage is not what the drafters actually intended, but whether they expressed their alleged intent in the language of the policy itself, so that the insured understood the policy's terms. The rule that insurers should gain no advantage from their own drafting ambiguities should be applied rigorously.

In this case, Bilandic insisted that ambiguity existed as to whether the parties intended to make the second exclusion endorsement part of the insurance contract during subsequent renewal periods. Also, since the note "Endorsements" followed by "CE-303" was not defined in the original policy or the declaration sheet, it should be afforded its plain, ordinary, and popular meaning. In Bilandic's opinion, the cryptic hieroglyphics "CE-303" could not have been understood by the average insurance consumer. Although Economy knew what the symbol meant, it failed to provide the Dungeys with any means of deciphering the code.

Bilandic concluded that the majority's holding contravenes the long-standing judicial policy favoring a liberal interpretation of insurance coverage. He urged the court to require insurance companies to enclose a brief description of the nature

of endorsements when a person renews an insurance policy. ❖

— Mona E. Dajani

New Jersey Real Estate Brokers Have a Duty to Inspect and Warn

In ***Hopkins v. Fox & Lago Realtors***, 625 A.2d 1110 (N.J. 1993), the Supreme Court of New Jersey held that a real estate broker conducting an open house has a duty to inspect the premises if given the opportunity. The real estate broker must then warn prospective buyers and visitors of any dangerous conditions that are reasonably discoverable through an ordinary inspection.

Camouflaged Step

On April 26, 1987, plaintiff, Emily Hopkins, accompanied her son and daughter-in-law to an open house conducted by a real estate broker employed by defendant, Fox & Lago Realtors. The realtor met the Hopkins party and permitted them to inspect the premises on their own. While her son and daughter-in-law toured the home's patio and grounds, Hopkins waited in the family room. Upon hearing the others re-enter the home through the foyer, Hopkins attempted to join them. She proceeded down the hallway towards the foyer, but did not see that a step led down from the hallway into the foyer. Consequently, Hopkins stumbled and fell, fracturing her ankle. She brought suit against the broker, claiming that the use of the same vinyl flooring on both levels camouflaged the step and that the broker had a legal duty to warn her of any known risks or risks that a reasonable inspection would have revealed.

The trial court dismissed the plaintiff's complaint, concluding that the broker did not owe her any duty with respect to the dangerous condition of the property. On appeal, however, the appellate court determined that such a duty existed and reversed the trial court.

The appellate court agreed with the plaintiff's contentions that an open house visitor resembled an invitee or a business guest of the defendant. Moreover, the court concluded that the defendant broker was, in effect, a functional occupier of the premises. Having analogized the position of the broker to that of a proprietor of the home, the appellate court applied the common law principle of premises liability. Premises liability imposes on the landowner a duty of reasonable care to guard against any discoverable dangerous conditions on her property for the protection of her business invitees.

The defendant broker appealed, claiming that because a real estate broker is not the actual owner or occupier of the premises, but merely an agent of the homeowner, the broker does not owe a duty to inspect the premises and warn invitees of any dangerous conditions.

Supreme Court Finds Duty to Inspect and Warn

The Supreme Court of New Jersey upheld the appellate court's decision, reversing the trial court's dismissal of plaintiff's complaint and remanding the matter for trial. In reaching its decision, however, the court refused to follow the appellate court's strict application of the traditional common law doctrine governing premises liability. Rather, the court traced the history of premises liability law, arguing that as modern society has developed, so has the legal relationship of people to property. As a result, the court found that the rigid constructs of traditional common law premises liability could not adequately accommodate the legal relationship that exists between a broker and an open-house visitor. Since any attempt to classify the parties into the traditional common law categories would be strained and awkward, the court preferred a more flexible approach to premises liability law.

The supreme court found that the best way to determine whether a duty existed was an inquiry into the fairness and justice of imposing such a duty in light of the actual relationship between the parties. This inquiry involved identifying and weighing several factors, including "the relationship of the parties, the nature of the attendant risk, the opportunity and the ability to exercise care, and the public interest in the proposed solution."

The court noted that the broker was authorized to invite visitors and offer various professional services, including his expertise with regard to the marketability of the premises and the physical features that affect marketability. Therefore, the court found that implicit in the offering of such services was the broker's familiarity with the premises on which an open-house visitor could reasonably rely. Furthermore, the court found that the broker received tangible economic benefits from this relationship, including the opportunity to earn commissions and cultivate future clients. Based on these findings, the court concluded that the broker's invitation to potential customers implied a commensurate degree of responsibility for the visitors' safety.

The defendant broker argued that imposing a duty on brokers was unfair because the homeowner is in the best position to guard against unreasonable dangers. The court agreed with the defendant's contention that homeowners have a pre-existing, nondelegable duty to guard against any reasonably discoverable defects. Nevertheless, the court concluded that a homeowner's pre-existing duty to prevent any foreseeable harm to invitees did not in any way affect the broker's own duty because two parties can possess similar duties with respect to a third party. In defining the scope of this newly created duty, the court ruled that the relevant questions include: what risks to others a reasonably prudent real estate broker conducting an open house would fore-