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Consider This Commonsense On Contra Proferentem

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Courts applying the doctrine of contra proferentem construe ambiguities in contract language against the drafter. In most insurance contract disputes, this doctrine has historically benefited insureds because insurers typically draft insurance contracts. Today, many commercial policyholders use insurance brokers to place coverage. Large insurance brokers, including Aon PLC and Marsh & McLennan Companies Inc., have drafted their own policy forms and may require insurers to use these instead of traditional, insurer-drafted policies.

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This raises an interesting question for applying the contra proferentem doctrine. Since insurance brokers are generally considered to be agents of the insured, will courts interpreting ambiguities in broker-drafted policies construe these ambiguities against the insured? Under traditional contract interpretation and agency principles, the logical answer is yes.

Courts and Commentators Recognize Ambiguities in Broker-Drafted Policies Should Be Construed Against Insured

While not deciding the issue, several courts have suggested that ambiguities in broker-drafted policies should be construed against insureds. In Fireman's Fund Insurance Co. v. Fibreboard Corp.[1], for example, a California appellate court found that asbestos exclusions in broker-drafted liability policies unambiguously precluded coverage, but in dicta suggested that any ambiguities should be construed against Fibreboard because its broker drafted the policy:

Here, ... the typical relationship (unequal bargaining strength, use of standardized language by more powerful insurer-draftsman) simply did not exist. Rather, two large corporate entities, each represented by specialized insurance brokers or risk managers, negotiated the terms of the insurance contract. Neither Truck nor other respondents drafted or controlled the policy language: ... In fact, the record clearly shows that Fibreboard itself proposed or drafted language for the asbestos exclusion.

None of the authorities relied upon by Fibreboard reflects a comparable factual situation where the

insured itself drafted or proposed the policy language. Moreover, to the extent that any ambiguity exists, ordinarily it would be interpreted against Fibreboard, the party who caused the uncertainty to exist.[2]

In Metpath Inc. v. Birmingham Fire Insurance Co. of Pennsylvania,[3] a New York appellate court made a similar observation. The court held that the policy's seven-day waiting period for extra expense coverage was unambiguous and precluded coverage but noted that, even if the policy language was ambiguous, the ambiguity would be resolved against the insured because its broker drafted the policy:

[E]ven if the policy language is considered ambiguous or open to doubt, any ambiguity or doubt must be resolved against Metpath and in favor of Birmingham since the drafter of the insurance policy was Metpath's agent, J&H, and those provisions requested by Metpath's representatives are the very provisions which limit the coverage to the period of the strike.[4]

Commentators have also recognized the appropriateness of applying the contra proferentem doctrine to construe ambiguities against the insured when the insured or its broker drafts the policy:

Almost everyone would agree that where a policyholder or its bonafide agent drafts a contract term, the rule of contra proferentem should not operate in its favor. On the contrary, in these instances, the ambiguity principle should operate in favor of the insurer and against the insured. Although this might shock consumer advocates, it is a sensible approach. Contra proferentem becomes an untenable, unprincipled doctrine if it comes to mean the insurer always loses regardless of the situation.[5]

Yet, in a March 13, 2015, decision, the Chancery Court for Davidson County, Tennessee, in Opry Mills Mall Ltd. Partnership v. Arch Insurance Co., case number 10-1504, considered this issue and concluded that the broker acted as an agent for the insurers — not the insured — to the extent it drafted the policies. Accordingly, the court construed ambiguities in the policies against the insurers and in favor of the insured.

Opry Mills Facts

In May 2010, the Opry Mills Mall, an enclosed regional shopping mall, in Nashville was damaged due to flooding by the Cumberland River. The entire mall was flooded with several feet of water and closed. The damage to the mall exceeded $50 million.

The Opry Mills Mall was insured under Simon Property Group LP's property insurance program through policies issued by numerous insurers. This insurance program was brokered for the mall owners by Aon Risk Services Central Inc. Aon also drafted some of the policies. The policies provided $200 million in flood coverage, with a $50 million high-hazard flood sublimit for properties in high-hazard flood locations.

Following the flood, the insurers paid the mall owners $50 million, claiming the mall was in a "High-Hazard Flood Zone" and subject to the high-hazard flood sublimit. The mall owners and their bank sued the insurers, claiming $200 million in flood coverage was available to them because the Opry Mills Mall was not included in the list of "High-Hazard Flood Locations" in the policies. They also sued Aon, arguing in the alternative that, if the court determined the $50 million sublimit applied, Aon is liable under

negligence and other theories.

The parties filed cross-motions for summary judgment. The primary issue for the court was whether the Opry Mills Mall was located in a high-hazard flood zone under the terms of the various policies and, therefore, subject to the $50 million high-hazard flood sublimit. A secondary issue was the application of the doctrine of contra proferentem.

The Court's Opinion

In considering the first issue, the court analyzed language in the policies defining the term "High-Hazard Flood Zones" to include "all property at a 'location' that is partially or totally situated in an area which at the time of loss or damage has been designated on a Flood Insurance Rate Map (FIRM) to be a Special Flood Hazard Area (SFHA)." The court noted that the Opry Mills Mall is, in fact, situated in a High-Hazard Flood Zone as defined by the policy. It noted "[i]f the policies had stopped there, the insurers would likely prevail here, as the sublimit would probably apply. The policies, however, go on to define 'High-Hazard Flood Locations' by adopting a list of particular shopping malls."

The policies contained a list of "High-Hazard Flood Locations," directly underneath the definition of "High-Hazard Flood Zones," that included 16 properties but did not list the Opry Mills Mall. The court concluded that the policy language was awkward but not ambiguous and that "a mall situated in a High-Hazard Flood Zone had to be listed as a High-Hazard Flood Location to be subject to the $50 million sublimit." Said another way, the court found that the least-strained interpretation of the policy language leads to the conclusion that: "The failure to put a mall on the High-Hazard Flood Locations list means that a mall that is not listed as a High-Hazard Flood Location is not subject to the $50 million sublimit." Ultimately, the court held the $50 million high-hazard flood sublimit did not apply to the malls owners' claims.

Despite concluding that the policies were not ambiguous, the court alternatively discussed "potential ambiguities" in the policies and Aon's role as the broker. Initially, the court noted there are circumstances where Aon may have acted as an agent for the insured, for the insurers, or as a dual agent for both the insured and insurers. The court then stated: "Here, it appears clear to the court that Aon was acting as the agent for the insurers when it put together the policies."

To support this position, the court relied on the fact that the mall owners were not in the business of issuing insurance policies and were not licensed to do so. It then noted, "To the extent that Aon may have actually drafted or compiled the policies, it was doing so on behalf of the insurers." Thus the court was "required to construe the policies against the insurers to resolve any ambiguities in the policies in favor of the insured." The court concluded in the alternative and as a matter of law that the $50 million high-hazard flood sublimit did not apply based on the doctrine of contra proferentem.

Analysis

Whether ambiguities in a broker-drafted policy should be construed against the insured is a question that lies at the intersection of contract interpretation and agency law. Typically, insurance brokers are considered agents of the insured.[6] And under generally accepted principles of agency law, the broker's intentions, statements, conduct and actions are imputed or attributed to its principal: the insured. Under the doctrine of contra proferentem, courts construe ambiguities in contract language against the drafter. When applying these principles, the logical result is to construe ambiguities in broker-drafted policies against the insured. At a minimum, fairness seems to dictate that courts decline to construe

ambiguities in broker-drafted policies against insurers.

The court in Opry Mills Mall, however, ignored accepted principles of agency and fairness when it determined that ambiguities in broker-drafted policies should be construed against the insurer under the doctrine of contra proferentem. Courts have generally refused to apply the doctrine of contra proferentem against insurers where the insured or its broker drafts the policy or the policy is jointly drafted.[7] And as discussed above, other courts have resolved ambiguities in broker-drafted policies without application of the contra proferentem doctrine but indicated in dicta that ambiguities in these policies should be construed against the insured as the "drafter."[8]

Given the court's conclusion that Aon acted as the insurers' agent, one wonders if the insurers have a viable negligence claim against Aon for failing to include the mall in the list of high-hazard flood locations.

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[1] 121 Cal. Rptr. 2d 682 (Calif. Ct. App. 2002).

[2] Id. at 206-07 (citations and footnote omitted).

[3] 449 N.Y.S.2d 986 (N.Y. App. Div. 1982).

[4] Id. at 989.

[5] 1 JEFFREY W. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES § 4.11[f], at 4-201 (2d ed. 2002).

[6] See, e.g., Nautilus Ins. Co. v. First Nat'l Ins. Inc., 837 P.2d 409, 411 (Mont. 1992); State Sec. Ins. Co. v. Frank B. Hall & Co., 630 N.E.2d 940, 946 (Ill. App. Ct. 1994); Evvtex Co. Inc. v. Hartley Cooper Assocs. Ltd., 911 F. Supp. 732, 738 (S.D.N.Y. 1996) (citing Bohlinger v. Zanger, 117 N.E.2d 338, 339 (N.Y. 1954)).

[7] See, e.g., Six Flags Inc. v. Westchester Surplus Lines Ins. Co., 565 F.3d 948, 958 (5th Cir. 2009); Newport Assocs. Dev. Co. v. Travelers Indem. Co., 162 F.3d 789, 794 (3rd Cir. 1998); Vought Aircraft Indus. Inc. v. Falvey Cargo Underwriting Ltd., 729 F. Supp. 2d 814, 824 (N.D. Texas 2010).

[8] See, e.g., Fireman's Fund Ins. Co. v. Fibreboard Corp., 182 Cal. App. 3d 462, 467-68 (Calif. Ct. App. 1986); Metpath Inc. v. Birmingham Fire Ins. Co., 86 A.D.2d 407, 449 (N.Y. App. Div. 1982); E. Associated Coal Corp. v. Aetna Cas. & Sur. Co., 632 F.2d 1068, 1075 (3d Cir. 1980).
