Be mindful of boilerplate language in insurance policies

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It is well understood that insurance practitioners must be cognizant of the impact and interplay of every word, term and condition of insurance policies. It is also important to account for the fact that, while courts will typically not go out of their way to find policy ambiguities where none exist, even the most common and boilerplate form language may be brought into issue in insurance coverage litigation.

Recently, the Insurance Services Office, Inc. (ISO) standard policy form language — "ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED" — which is contained (or language substantially similar to it) at the bottom of most, if not all, ISO-based policy endorsements, has been the subject of litigation as to the "ambiguousness" of that language. This article will explore the history of this standard form language and the current issues surrounding it in litigation.

In *Kinsale Ins. Co. v. Flyin' Diesel Performance & Offroad, LLC*, (W.D. Tex. Mar. 31, 2023), the Federal District court sitting in the Western District of Texas ruled on a coverage dispute arising out of a fatal auto accident at an amateur drag racing event. The declaratory judgment coverage lawsuit involves the insured event organizer and its insurer, and arises out of a disclaimer of coverage issued as a result of the applicability of certain exclusionary endorsements contained in the subject policy.

The fundamental dispute between the insurer and insured — a race organizer — was whether a conflict existed due to several exclusionary endorsements (i.e. — an "auto accident exclusion" endorsement and a "competition exclusion" endorsement), which would have precluded coverage for the accident, and the "event coverage" endorsement, which specifically provided coverage for the subject event.

According to the District Court's decision, the main policy form — absent the "event coverage" endorsement — would have provided coverage for the event. The insured argued — and the District Court agreed — that an "ambiguity is created by conflicts between the policy's endorsements."

Specifically, "the language in each of the endorsements that states 'ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED' creates a conflict between the endorsement that provides for coverage for the [event] and the endorsements that purport to eliminate coverage for [the event]."

As the District Court held, "The simultaneously created endorsements make the policy ambiguous by creating uncertainty as to the scope of coverage provided by the [event endorsement] in light of exclusionary endorsements. With each endorsement stating that all other terms and conditions of the policy remain unchanged, it is unclear that each of them or any of them apply to the [event endorsement]."

Recently, the Insurance Services Office, Inc. (ISO) standard policy form language — "ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED" ... has been the subject of litigation as to the "ambiguousness" of that language.

While the District Court referenced the boilerplate language in support of its holding, it is notable that the Court's holding was also based on a perceived direct conflict between the wording in the event endorsement that specifically afforded coverage for the event and the wording in the exclusionary endorsements that removed coverage for the same event. In reaching its decision, the District Court also explained that the insured "procured a one-day insurance policy to specifically cover [the] event." Due to the ambiguity found by the District Court, the Court ruled in favor of the insured and found a duty to defend exists. This case is now pending before the 5th U.S. Circuit Court of Appeals on appeal.

The District Court's concern regarding the form language 'ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED' is surprising since that language can be found throughout the majority of standard ISO form policy endorsements. It is further remarkable since this language has been before hundreds of courts for nearly a century without findings of ambiguity. To that end, the first case we could locate where such language was discussed by the court was in *Am. All. Ins. Co. v. Brady Transfer & Storage Co.,* an 8th U.S. Circuit Court of Appeals case from 1939, wherein the court held that the inclusion of the "all other

terms and conditions of the policy remain unchanged" language to the subject endorsement in question was unambiguous and consistent with the other terms and conditions contained in the policy.

While different courts use different standards, as a general rule in construing the language of an insurance policy, courts determine its purpose and effect and the apparent intent of the parties by reading the policy as whole.

Moreover since this language was first litigated and deemed unambiguous in 1939, it has continued to be used throughout the insurance industry and upheld throughout the courts. For example, in *Rick Franklin Corp. v. State ex rel. Depot of Transp.*, (Or. App. Ct. 2006), it was determined that this subject language was unambiguous and evidenced an intent by the insurer to have the endorsement in question apply to all coverage under the policy. More recently, in *CBX Res., LLC v. Ace Am. Ins. Co.*, (W.D. Tex. 2017), the court again found that this same standard language unambiguously operated to prevent the subject endorsement from changing other parts of the subject policy.

Of course, the key question that any court, insurance practitioner or underwriter needs to resolve to determine if an ambiguity exists is not the age or frequency of use of any policy language, but rather whether such language can be read together with the rest of the policy and related endorsements to provide, limit and/or exclude coverage.

While different courts use different standards, as a general rule in construing the language of an insurance policy, courts determine its purpose and effect and the apparent intent of the parties by reading the policy as whole. The policy terms will be deemed ambiguous and interpreted in favor of the insured only if, after reading the policy and all such endorsements, there is a reasonable basis for difference of opinion as to the meaning of the policy, as displayed in *MIC Gen. Ins. Co. v. Allen*, (2d Cir. 2017) and *Mid-Continent Cas. Co. v. Bay Rock Operating Co.* (5th Cir. 2010).

Clearly, the language "ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED" is form boilerplate language and — on its own — should not render a policy or policy provision ambiguous. It has been examined (and ignored) enough times through the courts for nearly a century for insurers and insureds to be able to rely on such language to have its desired effect. However, the decision and appeal in *Kinsale* serves as a reminder that even boilerplate form language may be subject to scrutiny when analyzed in conjunction with specific policy terms and particular facts of the claim.

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