American Educational Institute, Inc.

CLAIMS LAW UPDATE

A SUPPLEMENT TO CLAIMS LAW COURSES IN CASUALTY, PROPERTY, WORKERS COMPENSATION, FRAUD INVESTIGATION AND AUTOMOBILE

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AEI CLAIMS LAW QUIZ

WHAT IS MEANT BY "DATE OF LOSS" IN A LAWSUIT LIMITATION PROVISION?

[Ref. Property Insurance Principles, Para 3.05]

FACTS: The plaintiff, Brillman, claimed that her property sustained water damage as a result of an incident that occurred on January 18, 2010. She was insured under a homeowner's policy issued by New England Guaranty Insurance Company. She reported the loss as required by the policy. The two parties negotiated the value of the loss for several years. The insurer made its final payment on February 16, 2017, more than seven years after the loss occurred. Brillman wasn't satisfied and requested an appraisal. When the insurer failed to act on her request, she filed suit against the insurer on February 12, 2018, alleging, among other things, that the insurer breached the contract.

The policy included the following language:

> Suit Against Us. No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss.

"Date of loss" was not defined in the policy.

The insurer moved for summary judgment, arguing that the insured failed to file suit within the policy's one year suit limitation period, which the insurer construed as running from the date that the water damage occurred. Brillman opposed the insurer's motion, arguing that the lawsuit was timely filed because the term "date of loss" wasn't defined in the policy and could therefore reasonably be construed as running from February 16, 2017, the date she alleged the insurer breached the contract.

The court concluded that the undefined term "date of loss" was ambiguous, interpreted the policy in the insured's favor, and concluded that her suit was timely filed. The insurer appealed, arguing that the suit limitation provision in the policy was clear and unambiguous.

QUESTION: Does the term "date of loss," as used in the lawsuit limitation provision, unambiguously refer to the date of the occurrence?

ANSWER: Yes, according to the Supreme Court of Vermont in *Brillman v. New England Guaranty Ins. Co.*, 228 A3d 636 (Vt. 2020), because the plain meaning of the term is clear, it is reinforced by other language in the policy, and it is consistent with a majority of courts that have considered the question.

The Supreme Court of Vermont began its analysis by reviewing the relevant law. Although the statute of limitations for breach of contract in Vermont is six years, insurance contracts may include provisions that shorten the statute of limitations if the limitation is unambiguous and consistent with statutory requirements. The parties to an insurance contract may therefore agree to a shorter limitation period, but by state statute, 8 V.S.A. § 3663, that period cannot be less than one year.

In this case the insurance policy provided for a one year limitation period running from the date of loss. The meaning of the term "date of loss" was at the heart of this dispute. The insurer contended that the one year limitation period began to run on January 18, 2010, the date of the occurrence that gave rise to the claim for coverage. Brillman contended that because the term "date of loss" wasn't clear and wasn't defined in the policy, it was reasonable for her, as an insured, to believe that the one year limitation period didn't begin to run until February 16, 2017, the date the insurer allegedly breached its obligation to compensate her for the loss.

The proper construction of language in an insurance contract is a matter of law to be decided by the court. The terms in an insurance policy must be given their plain and ordinary meaning. A court will look at a policy as a whole to determine the plain meaning of a term. Since an insurance policy is prepared by the insurer with little or no input from the insured, courts construe ambiguities in a policy against the insurer. Words and terms in an insurance policy are ambiguous if they are fairly susceptible of more than one meaning. Courts, however, will not rewrite unambiguous terms in a policy to give one party a better bargain than the one it made.

After considering the parties' arguments about the meaning of "date of loss," the Vermont Supreme Court concluded that it clearly means the date of the occurrence giving rise to a claim for coverage under the policy. The court explained:

> In the context of this policy, the term "loss" plainly refers to the covered loss for which the insurer is liable to the homeowner. See, e.g., *Loss*, Black's Law Dictionary (11th ed. 2019) (defining "loss" in context of insurance as "amount of financial detriment caused by ... an insured property's damage, for which the insurer becomes liable).
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> The other policy provisions in the contract using the term "loss" reinforce this interpretation. In each instance, the term "loss" is used to mean the event causing damage for which the homeowner seeks coverage. For example, the policy states that it "insures against risk of direct loss to property." It excludes "loss" involving or caused by a host of specified perils. The policy also lists a homeowner's "Duties After Loss," which include notifying insurer of the loss to covered property. By its terms, the policy expressly applies only to "loss" that occurs during the policy period. Even the definition section, upon which homeowner relies, supports this construction. Although "date of loss" is not defined in the policy, the policy defines occurrence as an accident which results in "bodily injury" or "property damage." Property damage is in turn defined as "physical injury to, destruction of, or loss of use of tangible property." At no point is loss used to refer to the date coverage is denied or

> final payment is made. It would strain the plain language of the policy and create confusion to interpret "loss" as meaning the date on which coverage is denied or the date on which the cause of action accrues in all or some of these instances. We accordingly conclude that loss as used in the suit limitation provision unambiguously refers to the occurrence giving rise to coverage.
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> A majority of other courts that have considered the question agree that suit limitation provisions using the term "loss" unambiguously refer to the event causing damage.

The supreme court held that date of loss clearly and unambiguously refers to the date when the occurrence giving rise to the claimed loss took place and not the date when it was alleged that the insurer breached the contract. The court held that the insured's suit was not timely filed and overturned the decision of the lower court.

The supreme court also considered another issue, one that the insured alleged in her suit, but that the lower court hadn't considered because it reached its decision on other grounds. That issue was the insured's contention that the insurer waived its right to rely on the lawsuit limitation provision. The supreme court recognized that an insurer can waive its right to rely on a policy limitation period by, for example, negotiating with its insured in a way that indicates the insurer's intent to relinquish its right to assert a defense based on the policy's suit limitation provision. The supreme court remanded the case to the lower court to determine whether the facts of the case supported the plaintiff's waiver argument.

CONCLUSION: As the court said in *Brillman,* most courts that have considered the meaning of the term "date of loss" in a suit limitation provision have concluded that the term unambiguously refers to the date of the occurrence that gave rise to a claim for coverage under the policy.

- *Zuckerman v. Transamerica Ins. Co.,* 650 P2d 441 (Ariz. 1982), (concluding that an insurance policy provision limiting filing of suit to twelve months after "inception of the loss" unambiguously began to run at the time when the damage resulting in the loss occurred).
- *Bowen v. Buchanan County Mutual Ins. Co*, 834 SW2d 203 (Mo. App. 1992), (concluding that an insurance policy provision requiring suit to be "commenced within twelve months next after the loss" was "clear and unambiguous" in referring to the time the damage occurred).
- *Riteway Builders, Inc. v. First National Ins. Co. of America,* 126 NW2d 24 (Wis. 1964), (holding that a suit limitation phrase requiring suit to be commenced within twelve months "after inception of the loss" meant twelve months from the date the damage was sustained).