Focus

LOS ANGELES DAILY JOURNAL • THURSDAY, JUNE 3, 2004 • PAGE 7

Court Fails to Clarify Use of Policy's Drafting History

By Mitchell C. Tilner

The state Supreme Court's recent decision in *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th at 635 (2003), further muddies an already confused area of insurance law: the proper role of extrinsic evidence, particularly the "drafting history" of standard form policy provisions, in insurance policy interpretation.

MacKinnon cited *Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal. 4th at 645, 670-71 (1995), for the proposition that "[t]he history and purpose of [a] clause, while not determinative, may properly be used by courts as an aid to discern the meaning of disputed policy language." 31 Cal. 4th at 653-54.

But in *Montrose*, the Supreme Court did not consider the history or purpose of disputed policy language as an aid to discern its meaning.

Rather, the court relied on the history and purpose of policy language to rebut an insurer's claim that the court's proposed interpretation of the provision would be an unfair surprise to the insurance industry: "In this case, we find the drafting history relevant in evaluating Admiral's argument that, from a public policy standpoint, the insurance industry will be harmed by the adoption of a continuous injury trigger that the industry assertedly never anticipated would be applied to these policies." *Montrose*, 10 Cal. 4th at 671.

Both before and after *Montrose*, the lower courts have been in conflict on the issue whether they may or should consider drafting history and industry interpretive publications when construing a policy.

In *Maryland Casualty Co. v. Reeder*, 221 Cal. App. 3d 961 (1990), the court, citing no authority, explained that "[t]he presence of the standard provisions in the Maryland policy and the concomitant availability of interpretative literature is of considerable assistance in determining precisely what risks the Maryland policies cover." Id. at 968.

The court proceeded to consider that "interpretative literature." See id. at 971-72, 976-78. It is not apparent from the opinion whether the parties raised any question about the propriety of considering drafting history or "interpretative literature."

Reeder was immediately questioned in *American Star Ins. Co. v. Insurance Co. of the West*, 232 Cal. App. 3d 1320, 1330 (1991), where the court noted that *Reeder's* approach to policy interpretation "would appear to contravene the established principle that words in an insurance contract are to be interpreted as a layperson would interpret them." Id. at p. 1331.

In *ACL Technologies Inc. v. Northbrook Property & Casualty Ins. Co.*, 17 Cal. App. 4th 1773 (1993), the same court that decided *American Star* reiterated its criticism of *Reeder*, noting that "the interpretation of an insurance contract should not depend on access to industry publications." Id. at 1793 n.47. The court cited four reasons why it would not consider the drafting history of language in an insurance policy.

First, consideration of drafting history would be "inconsistent with the rules of insurance contract interpretation articulated in" Supreme Court opinions, which "clearly require a showing of ambiguity before extrinsic evidence may be admitted to shed light on that ambiguity." *ACL Technologies*, 17 Cal. App. 4th at 1790-91, (citing *Bank of the West v. Superior Court*, 2 Cal. 4th at 1254 (1992), and *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807 (1990)).

Second, "reliance on extrinsic drafting history contradicts the basic rule that words in insurance policies should be interpreted as laypersons would interpret them." Id. at 1791.

Third, "the drafting history argument assumes that individual insurers should be bound by statements made by 'industry spokesmen' years before. Yet there is no authority cited requiring they should be so bound." Id. at 1792.

Finally and fundamentally, "there is no legal authority for the use of drafting history." Id.

Then, in *Prudential-LMI Commercial Ins. Co. v. Reliance Ins. Co.*, 22 Cal. App. 4th 1508 (1994), the court that decided *Reeder* stood by its earlier decision: "As we implied in [*Reeder*], insurance industry publications are particularly persuasive as interpretive aids where they support coverage on behalf of the insured. Ultimately, the test is whether coverage is 'consistent with the insured's objectively reasonable expectations.' [Citation.] But it is difficult to characterize as 'objectively unreasonable' an interpretation which would result in coverage which is proffered and supported by insurance industry experts." Id. at 1512-13 (footnote omitted).

The *Prudential-LMI* court stated that it was "unpersuaded by the criticism of [*Reeder*] contained in" *American Star* and *ACL Technologies*. *Prudential-LMI*, 22 Cal. App. 4th at 1513 n.3.

At that point in the development of the law, the Supreme Court decided *Montrose*. The court there cited *Reeder* for the proposition that "the presence of standardized industry provisions and the availability of interpretative literature are of considerable assistance in determining coverage issues." *Montrose*, 10 Cal. 4th at 670.

The court also cited *American Star* for the proposition that "'[w]hile insurance industry publications are helpful

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in understanding the scope of coverage insurers are trying to delineate in any given policy, they are by no means dispositive.'" Id. at 671.

The court did not mention *ACL Technologies* nor did it acknowledge that *American Star* had criticized *Reeder*. As noted above, the *Montrose* court proceeded to rely on the history and purpose of policy language not to interpret the language but to rebut an insurer's claim that the insurance industry had not anticipated the court's proposed interpretation of the language.

Montrose plainly did not settle the debate. In *Lebas Fashion Imports of USA Inc. v. ITT Hartford Ins. Group*, 50 Cal. App. 4th 548 (1996), the court seemed uncertain whether *Montrose* did or did not permit the court to consider drafting history for the purpose of interpreting an insurance policy:

"We recognize that drafting history documents may provide some evidence of a contrary intent on the part of those responsible for drafting the 1986 ISO policy changes.

"However, whatever use may properly be made of drafting history (see, e.g., *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 673 [42 Cal.Rptr.2d 324, 897 P.2d 1]), it may not be considered to defeat an insured's objectively reasonable expectations of coverage arising from the policy language utilized by the insurance industry draftsmen." Id. at 566 n.13.

At least two post-*Montrose* decisions have cited and followed *ACL Technologies*, refusing to consider insurance policy drafting history. See *Mez Industries Inc. v. Pacific Nat. Ins. Co.*, 76 Cal. App. 4th 856, 871 n.15 (1999); *FMC Corp. v. Plaisted & Companies*, 61 Cal. App. 4th 1132, 1146 (1998).

In *Ray v. Valley Forge Ins. Co.*, 77 Cal. App. 4th 1039 (1999), the court cited both *Montrose* and *ACL Technologies* for seemingly inconsistent propositions: "Courts may consider 'interpretative literature' in construing standardized insurance policy provisions. But if the language of the policy is clear and unambiguous, we do not consider extrinsic evidence." Id. at 1044.

Most recently, the court that decided *Reeder* reaffirmed its commitment to that decision, but without acknowledging the contrary decisions in *ACL Technologies*, *Mez Industries* or *FMC Corp.* See *Golden Eagle Ins. Co. v. Insurance Co. of the West*, 99 Cal. App. 4th 837, 848 (2002) (reliance on an insurance industry interpretive bulletin "'is appropriate under Civil Code section 1645 which provides: "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense"'); see also *Cunningham v. Universal Underwriters*, 98 Cal. App. 4th 1141, 1153 (2002) ("We agree that a definition of an insurance term contained in an insurance industry bulletin may be relevant to defeat an insurer's contention that the term in a standard commercial liability policy should be more narrowly construed.").

Against this backdrop of inconsistent decisions, the Supreme Court filed its opinion in *MacKinnon*. The court relied heavily on insurance industry drafting history to interpret an insurance policy provision. See *MacKinnon*, 31 Cal. 4th at 643-45.

But the court did not explain why drafting history is relevant nor did it acknowledge or reconcile the divergent lower court decisions on the propriety of considering drafting history.

The court's citation to *Montrose* sheds little light on the matter because, as noted, *Montrose* itself did not rely on drafting history to interpret policy language and, as later decisions make clear, did not resolve the issue.

In sum, until the Supreme Court clarifies the matter, parties seeking to rely on insurance industry drafting history to interpret a policy should cite *MacKinnon*, in which the court relied on extrinsic evidence of that sort.

On the other hand, parties opposing the court's consideration of such evidence should argue that *MacKinnon* did not squarely address or resolve the issue whether a court may properly rely on such evidence. Those parties should cite the several cases providing cogent reasons why such evidence should not be considered.

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