A Potential "Stuckeyville" in the Insurance World

by Jonathan M. Stern

Last May marked the end of a network television series about a young lawyer who: (1) moved from New York to the fictional town of Stuckeyville, Ohio; (2) bought and operated a bowling alley; and (3) practiced law on the side. The impetus for “Ed’s” move from New York, aside from finding his wife in bed with the mailman, was that he misplaced a comma in a lengthy contract that he drafted, costing his client and his high-powered Wall Street law firm boatloads of money and him his job.
Ed’s career terminator is particularly relevant to those involved in drafting insurance policy language, where the use of proper grammar may mean the difference between a loss being covered or not. By way of example, a Minneapolis-based law firm has the following promotional language posted on its website:

Our client’s office was flooded during the “100-year” rainstorm. A flood exclusion purported to bar coverage for the property damage, but a comma in that exclusion rendered the clause ambiguous. We consulted a professor of linguistics who agreed. On behalf of our client, we filed suit and obtained summary judgment for the entire amount of the loss.

Manuscript Policies

A “manuscript policy” is an insurance policy that is uniquely tailored to the coverage needs of an insured, often a large commercial insured. It comes into existence when standardized policies (such as the ISO CGL forms) do not provide the needed coverage or a broker or risk manager requests unique coverage terms and the insurer accedes to the request. A now well-known example of a manuscript policy is that which became known in the World Trade Center insurance coverage litigation as the “WilProp form”; the WilProp form defined an occurrence as “all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one occurrence irrespective of the period of time or area over which such losses occur.” On the basis of this definition, which was found to be unambiguous, insurers found to have been bound by this form were deemed responsible for no more than a single occurrence. World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co., 345 F.3d 154 (2d Cir. 2003).

Manuscript policies may, from a technical perspective, only be single-use documents. Nonetheless, for purposes of discussing Stuckeyville-type risks, “manuscript policies” can range from a minor alteration of a standard form by specially prepared endorsement to a policy that is written from scratch. Undoubtedly, manuscript policies were used to underwrite some of the unusual risks reportedly insured through Lloyd’s of London, such as Cutty Sark’s million British Pound offer for the capture of the Loch Ness Monster, the palates of wine tasters, Jennifer Lopez’s derriere, the legs of actresses Angie Dickinson and Jamie Lee Curtis, and Jimmy Durante’s schnozzola. See, Lloyd’s of London, A Sketch History (Addison Design); Lloyd’s of London Insures Chest Hair, The Washington Times (June 16, 2004) (last viewed at http://washingtontimes.com/upi-breaking/20040616-112347-7031.htm on January 19, 2005); Paul Bannister, World’s biggest insurer takes on all risks (Bankrate.com Sep. 23, 2003) (last viewed at http://www.bankrate.com/bmr/news/insurance/old-lloyds1.asp on January 19, 2005).

A hallmark of the manuscript policy is that it deviates from standardized forms that are tried and tested (although not always true). Because it is usually a large commercial insured that needs or requests a manuscript policy, it often happens that the untested and untried language is combined with large policy limits, thus creating the Stuckeyville potential.

To a lesser, but still substantial, degree, policies outside the run-of-the-mill often are similar to manuscript policies insofar as they deviate from tried and tested standardized forms. For example, aviation and marine risks are often underwritten using variations of standard commercial general liability coverages. Although aviation and marine underwriters use “forms” (i.e., standard policies they have created for their peculiar risks), these forms themselves are variations of the truly standardized (again, think tried and tested) policies. The larger commercial marine and aviation insureds simply have policies that deviate more substantially from tried and tested forms; it is a matter of degree.

Principles of Contract Interpretation

A review of several basic principles of contract law is helpful to an understanding of the potential for the Stuckeyville problem. First, courts will endeavor to construe contracts to avoid ambiguity. Thus, if a contract can reasonably be read to be unambiguous, it will be. Ambiguity exists when a contract is reasonably susceptible of two or more interpretations. The very first sentence of this article provides a good example. Without the numbers (1), (2), and (3), it may have been cumbersome or even confusing. Nonetheless, it would not have been reasonably susceptible of two different meanings and, therefore, it would not have been ambiguous. Use of the (1), (2), and (3) simply made it easier to read.

Second, ambiguous provisions in contracts—if they cannot be resolved through extrinsic evidence (i.e., evidence other than the language of the contract)—are
resolved against the drafter of the ambiguous language. Third, in the specific context of insurance contracts, courts in many (but not all) jurisdictions will not consider extrinsic evidence to resolve ambiguity in insurer-drafted policies. Insurers in particular should be seeing the problems they can face in issuing manuscript policies.

The risk to the insurer is not always limited to situations in which it has drafted the manuscript policy. Very large commercial policyholders may have sufficient bargaining power to obtain language, the effect of which is to treat the insurer as the drafter of a manuscript policy actually authored by the policyholder and its broker. (Admittedly, I have seen this only in a policy with very high annual premiums, but the liability limits were multi-billion dollar.) Where the policyholder or its representative is the drafter of non-standard language, it may be faced with the problems that result from ambiguity.

A Comma Made, or Would Have Made, All the Difference
You may ask whether the Stuckeyville scenario is a realistic possibility in the insurance world. Is it really possible that the addition or deletion of a comma will have a multi-million—even multi-billion—dollar result? My answer is “yes.” Indeed, the lack of a comma has provided the basis for finding coverage under a standard CGL form where coverage would not exist had a comma been present. See New Castle County v. National Union Fire Ins. Co., 174 F.3d 338 (3d Cir. 1999). The United States Court of Appeals for the Third Circuit upheld personal injury coverage where there was no comma separating “invasion of the right of private occupancy of a room, dwelling or premises that a person occupies” from “by or on behalf of its owner, landlord or lessor” in the following recitation of one of the covered “offenses”:

The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor.

The case involved a land developer’s suits against a Delaware county. The developer contended that his constitutional rights were violated when the county denied him a building permit and that his civil rights were violated when a county ordinance resulted in the rezoning of one of his properties. One of the insurer’s arguments was that the “by or on behalf of” language in the offense description limited coverage to situations in which the insured commits a “wrongful eviction,” “wrongful entry,” or “invasion” as the owner, landlord, or lessor of the property at issue. In other words, the insurer argued that “by or on behalf of” modified “invasion.” Because the county was not the owner, landlord, or lessor of the properties, there was no potential for coverage. The county, on the other hand, argued that “by or on behalf of” pertained to “breathe” in between the terms “that a person occupies” and “by or on behalf of,” presumably to break the natural link between the two phrases. Yet in drafting this policy, the insurer could easily have inserted a comma in between “occupies” and “by or on behalf of” to function as an “interruption in continuity of thought or sentence structure.” That is, a comma would have alerted the reader that [the insurer] did not intend for “by or on behalf of” to flow uninterrupted from “that a person occupies.” (The insurer) chose instead, however, to assume that the reader would “breathe” in between “by” and “occupies.” In making this choice, the insurer also assumed the risk that the language might be misconstrued. And, “convoluted or confusing terms are the problem of” the insurer, not the county.

The court’s conclusion that the words used to define the offense were ambiguous is questionable. In order to be ambiguous, the words must reasonably be susceptible of more than one meaning. It seems a stretch to say that a reasonable person would read “by or on behalf of its owner, landlord or lessor” as pertaining to the person’s occupation because landlords and lessors do not occupy rooms, dwellings, or premises (at least not the ones as to which they are the landlord or lessor) and it would be a horribly cumbersome way to express the concept of rightful occupation, which is already expressed by the “wrongful” preceding “eviction” and “entry” and the “right of private occupancy” that is invaded. Nonetheless, the holding highlights the importance not only of using unambiguous language, but also of using the clearest language possible, in drafting insurance policies.

My earlier references to “tried and tested” policy forms reflect the process of review and revision that the standardized forms receive. The ISO-issued forms undergo a constant evolutionary process that takes into account court interpretations. Shortly before the Third Circuit issued the New Castle County decision (and likely brought on by one or two similar court decisions), the ISO CGL form was amended so that the offense now reads (with changes shown in italics) as follows:

The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor.

Thus, the benefit of the industry-standardized forms over policies containing
untested language is that they have undergone an evolutionary process that makes them more reliable in terms of their word choice, word placement, and punctuation.

In one case where the policyholder and its broker had drafted the manuscript language, the dispute was over whether the “occurrence” or the “event” causing the occurrence had to take place during the policy period in order to trigger coverage. The manuscript policy provided this definition of “Occurrence”: “[A]ny happening or series of happenings, arising out of or due to one event taking place during the term of this contract in respect to all the Assured’s operations.” The dispute revolved around the phrase “taking place during the term of this contract” and whether this phrase modified “happening” as the policyholder contended, or “event,” as the insurer contended. Applying the last antecedent rule, the court rejected the policyholder’s interpretation:

Such an interpretation requires the court to ignore the plain import of the sentence; it would have this court apply a phrase at the end of the sentence to a phrase at the beginning of the sentence without regard to any of the material which lies between. Given the fact that the temporal restriction follows the term “event” and is contained in an independent phrase separated from the description of happening by a comma, the plain meaning of the sentence is that the event, not the happening, must occur during the term of the contract.

During the oral argument on the motions filed in the trial court, the policyholder made an argument that, perhaps, our fictional Ed should have tried: “[T]here appears to be a comma missing,” argued the policyholder. The court rejected the “missing comma theory,” noting that its job was to construe the contract as drafted. Babcock & Wilcox Co. v. Arkwright-Boston Manufacturing Mutual Ins. Co., 53 F.3d 762 (6th Cir. 1995).

In another case, Auto-Owners Ins. Co. v. Sarata, No. 01-2102, 2002 U.S. App. LEXIS 8017 (4th Cir. Apr. 29, 2002), coverage turned on whether the named insured’s son, who did not live with him, was his “relative,” as that term was defined in the policy. The policy stated that “Relative” means:

(a) your relative; or
(b) anyone else, under the age of 21, in your care; who resides in your household.

The insurer unsuccessfully argued that the household residence requirement in clause (b) applied to the “relative” in clause (a). In the insurer’s view, the use of semicolons in the definition created an exception to the last antecedent rule. The United States Court of Appeals for the Fourth Circuit found, “[i]n view of the non-standard and confusing use of semicolons and, more importantly, the misplacement of the final clause, ‘who resides in your household,’ the definition of the term ‘relative’ does not unambiguously limit coverage to only those relatives who reside in the insured’s household. Specifically, the reader could reasonably conclude that the clause ‘who resides in your household’ modifies only line (b) and not the phrase ‘your relative’ in line (a). The words ‘your relative’ appear to stand alone.”

In order for the insurer to make clear that even relatives must reside in the named insured’s household in order to be considered “Relatives,” they would have to use different word placement. Moving the “who resides in your household” phrase below clause (b) to make it apparent that it modified both clause (a) and clause (b) would be one approach. The better (and more certain of success) approach would be to completely restructure the definition as follows:

“Relative” means a person who resides in your household who is:

(a) your relative;
(b) under the age of 21 and in your care; or
(c) both (a) and (b).

The last antecedent rule was in play again in another case where the question was whether a particular company was an additional insured. Cincinnati Ins. Co. v. Dawes Rigging & Crane Rental, Inc., No. 02-2208 (C.D. Ill. June 16, 2004). The pertinent policy defined additional insured as “[t]he person or organization shown in the Schedule…” and it included a schedule that provided “[a]ny person or organization for whom [the named insured is] required in a written contract, oral agreement or oral contract where there is a certificate of insurance showing that person as an ADDITIONAL INSURED under this policy.” The litigated issue was whether an organization required by written contract to be made an additional insured but as to whom no certificate of insurance had been issued was an additional insured.

The readily apparent problem is that the description of additional insureds in the schedule makes no sense; there seems to be a section missing from the middle of the sentence that would describe what it is that the named insured was, by the written contract, required to do. Rather than getting caught in the middle of this mess, the court used the punctuation to find in favor of additional insured status:

The comma after “written contract” seems to separate that type of agreement from the next two mentioned—“oral agreement or oral contract”—and there is no comma separating the oral agreement and contract from the clause requiring the certificate. Construing this drafting liberally in favor of the insured, this court agrees with Dawes and Kelly had a written contract—the Equipment Lease—requiring insurance.

In yet another case, application of the last antecedent rule would have supported the insurer’s no coverage position for a wrongful death case involving an airplane crash. American National Fire Ins. Co. v. Rose Acre Farms, Inc., 107 F.3d 451 (7th Cir. 1997). The court, implicitly recognizing that one cannot assume the use of proper grammar, held instead that the following “aircraft exclusion” was ambiguous:

5. This policy does not apply, except to the extent that coverage is available to the “Insured” in the “underlying insurance,” to:

(a) the use of an aircraft, whether or not flown by the insured, during a period of use, loading or unloading of an aircraft, if such aircraft is owned...
or hired without pilot or crew by or on behalf of the “Insured.”

The insurer argued that this language unambiguously excluded coverage for aircraft owned by the insured or for aircraft hired without crew or pilot on behalf of the insured. The policyholder agreed that the exclusion was unambiguous but argued that it meant “owned without pilot or crew or hired without pilot or crew;” in each case by or on behalf of the insured. Before reciting the policyholder’s technical grammatical argument for its construction, the court explained, “At this point we recognize that it pays not to daydream in grade school English class.”

“What would help [the insurer],” concluded the court, “is the insertion of a comma after ‘owned.’ . . . [T]he comma would prevent the adverbial phrase “without pilot or crew” from modifying both terms in the compound predicate. However, when construing an insurance contract, we may not rewrite unambiguous policy language…. So the comma stays out.”

Confusing language was again the problem. In my view, the insurer intended by this language to exclude coverage for claims arising out of mishaps involving an aircraft owned by the insured. After all, construing one alternative for the exclusion’s applicability to be “owned without pilot or crew” just makes no sense. If the policyholder owns the aircraft but it has no pilot and crew, then it would be highly doubtful there would be a crash and a wrongful death case in the first place. “Hired without pilot or crew;” on the other hand, would describe the situation where the policyholder hires an airplane but uses its own pilot and crew to operate it. The principal problem with the language is that the phrase “if such aircraft is owned,” by itself, is meaningless. All aircraft are owned by someone. Therefore, to make sense of the sentence, one would have to splice the “by or on behalf of the “Insured” onto “owned,” and, once you have to do that, the “without pilot or crew” is coming with it—at least if you’re the insurer who drafted the language.

It is relatively easy to craft far clearer language to effectuate the intent by fixing this problem. For example, the following exclusion likely would have resulted in a better outcome for the insurer:

5. Except to the extent that coverage is available to the “Insured” in the “underlying insurance,” this policy does not apply to:
   c. Injury arising out of the ownership, maintenance, operation, use, loading or unloading of an aircraft if such aircraft is
      (a) owned by the “Insured” or
      (b) hired by or on behalf of the “Insured”

in each case without pilot or crew.

The judgment creditor seeking to recover punitive damages from the insurer argued that the punitive damage award was not “imposed for violation of any civil or criminal statute, administrative regulation or county or municipal ordinance;” arguing that this latter language modified punitive and exemplary damages as well as fines or penalties. The court disagreed:

A comma separates the “punitive and exemplary damages” clause from the remainder of the exclusion. In our view, that comma divides the provision into two portions, creating an exclusion for punitive damages and a separate exclusion for fines or penalties threatened or imposed for violation of any civil or criminal statute, administrative regulation, or county or municipal ordinance. As such, the structure of the language compels the conclusion that the policy exclusion for punitive damages is not limited to damages imposed or threatened due to violation of a statute, ordinance, or similar provision. We find no ambiguity in the exclusion, and we conclude that the language of the memorandum of coverage expressly excludes coverage for all punitive damages.

Some Tips for Staying out of Stuckeyville

The examples described in this article should make it abundantly clear that the person who drafts a manuscript policy, whether he or she represents the policyholder or the insurer, is easily in danger of taking a long trip to Stuckeyville. Accordingly, in this section I offer several tips and suggestions for the preparation and review of manuscripts.

Changing Standardized Policies

Underwriters and brokers who craft manuscript policies frequently start with a standardized form and make changes to it. This is a prudent approach because, again, the standardized forms have been put through the proverbial ringer. The drafters must recognize, however, that the standardized forms fit together much like
Outdated Forms May Prove Perilous

Insurers will sometimes prepare a manuscript policy using an outdated industry standard form as a model. This, too, is risky. The standardized forms have evolved for a reason, usually insurer-adverse decisions by appellate courts. Using circa 1966 policy language in 2004 is not likely to put the insurer in good stead when a coverage dispute arises. Even if the earlier language was not truly ambiguous, a court may be quicker to find it so in the face of evidence that the industry saw fit to change it well prior to the issuance of the policy being disputed. So, for example, an insurer that omits the word “physical” from the definition of “property damage” likely will have a difficult time excluding coverage for diminution in value claims.

Clarity over Brevity

Where the intent can be expressed more clearly with repetition of a word or phrase, indentation, lettering or numbering, or division into separate lines, do so. While brevity is an admirable quality in writing, it should not be used to shortchange clarity.

Avoid Ambiguity—Focus On Modifiers

One of the most important rules of grammar to keep in mind is that, whenever possible, modifiers should be placed as close as possible to the words or phrases they modify. Breach of this rule frequently leads to confusion and, therefore, ambiguity. As William Strunk, Jr., and E.B. White explain in The Elements of Style (4th ed. 2000):

“The position of the words in a sentence is the principal means of showing their relationship. Confusion and ambiguity result when words are badly placed. The writer must, therefore, bring together the words and groups of words that are related in thought and keep apart those that are not so related.

By way of example, if an indemnity agreement provides that one party will indemnify the owner for damages “caused by its negligent acts, omissions, or errors,” there may be room for argument as to whether errors and omissions not rising to the level of negligence (i.e., not deviating from the standard of care) are subject to the indemnity agreement. In other words, the parties may debate whether “negligent” modifies all three nouns in the series or only the first. While there may be rules of grammar that support the conclusion that “negligent” modifies all three nouns in the series, the problem easily could be avoided by different drafting (e.g., “caused by its negligent acts, negligent omissions, or negligent errors” or—simply—“caused by its negligence”).

Place Value on Pre-policy Consultation

When big bucks are on the line—as they often are when a manuscript policy is being prepared—it will be money well spent to consult with insurance coverage counsel and a grammarian (like the linguistics professor that the Minnesota law firm hired after the flood). The cost of such advice before the policy is in force is often far less than the cost of litigation after the fact.

Conclusion

The two most important points to take away from this article are the following:

1. Seemingly inconsequential changes in wording, word placement, and punctuation can have vast ramifications; and
2. The drafter—or in some cases the entity deemed to be the drafter—must ensure that the language is not susceptible of multiple meanings. This standard does not require the best and clearest drafting, although that is always desired. Rather, what must be assured is that the language will not be reasonably susceptible of more than one interpretation, at least on important points. However, as we have seen, some courts will characterize confusing language as ambiguous even though it is not reasonably susceptible of more than one meaning.

These tips, if followed, should help keep drafters of manuscript policies out of Stuckeyville.