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# Board of Contributors: Supreme Court ruling affects insurers in Chinese drywall suits

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It had long been a maxim of Florida insurance law that courts would not look beyond the four corners of an insurance policy when analyzing coverage issues. So it was a watershed moment when the Florida Supreme Court began showing a willingness to consider drafting history, in-house manuals, marketing materials and other extrinsic evidence as aids in interpreting the terms of an insurance policy. As a result, insurers will no longer be able to argue to courts that a policy provision means one thing while telling consumers and regulators that it means something entirely different. The implications are momentous, particularly in cases like the current wave of lawsuits stemming from insurance claims over installation of Chinese drywall in homes.

In a pair of cases in the 1990s (Deni Associates v. State Farm Fire & Casualty Co. and Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp.), the Supreme Court held that, to determine the meaning of a provision of an insurance policy, Florida courts were to focus strictly on the words of the policy unless those words were ambiguous.

In recent years, however, Florida courts have begun considering outside evidence even without a finding of ambiguity. In its landmark 2007 decision in U.S. Fire Insurance Co. v. J.S.U.B., Inc., for example, the Supreme Court considered drafting history and insurance-industry interpretative materials, after concluding that the meaning of the policy provisions at issue could best be divined by analyzing the changes the industry had made to the wording over the years.

In J.S.U.B., a general contractor sought coverage under its liability policy after it was sued by homeowners who claimed their walls were sinking and cracking because of faulty soil-preparation work. When the insurance company denied the claim, the contractor asked the courts to declare that there was in fact coverage under the policy. The policy covered "property damage" caused by an "occurrence," and the key issues in the case were whether faulty workmanship by subcontractors met the definitions of "occurrence" and "property damage" in the policy.

The case ended up before the Florida Supreme Court, which decided in favor of the contractor. To arrive at that conclusion, the justices looked at changes the insurance industry's trade group had made to the standard liability policy during the past 20 years.

Earlier this year, the U.S. District Court for the Middle District of Florida considered interpretative materials in reaching its decision in Natarajan v. Paul Revere Life Insurance Co., while also finding that the policy was not ambiguous. In that case, a cardiologist sued his insurer after it denied coverage under his long-term disability plan. One of the issues involved the meaning of the phrase "your occupation" in the insurance policy. The court decided that "your occupation" was unambiguous, but still analyzed the insurer's claims manual to determine how the insurance company used the phrase for its own purposes.

This change in approach is likely to play a role in determining the outcome of the raft of Chinese drywall lawsuits that are pending in Florida, where nearly 60 percent of the nation's Chinese drywall claims have been filed. A key issue in those lawsuits is whether the substances emitted by the drywall constitute "pollutants," since the typical liability insurance policy contains an exclusion that bars coverage for damage caused by "pollutants."

Florida courts have held that the standard pollution exclusion is not ambiguous, so judges would have been reluctant to consider extrinsic evidence in the days before J.S.U.B. Now, however, the courts are free to analyze the history of the exclusion, and they will see that it was never intended — by the insurance industry or policyholders — to apply outside the environmental pollution context to product-liability claims. No Florida appellate court has yet decided this issue.

The most immediate impact of this interpretative shift is apparent in the discovery stage of litigation, during which the defendant insurance company generally resists turning over internal documents to the plaintiff policyholder. Pre-J.S.U.B., the insurer could argue, often successfully, that internal memos, claims manuals and other interpretative materials would not lead to evidence that was relevant to the question of whether there was coverage — because all that mattered were the actual words of the insurance policy.

Now, however, the policyholder need only point out that the Florida Supreme Court considered such documents to be relevant when they invoked them in J.S.U.B. The U.S. District Court for the Southern District of Florida has expressly held, in Del Monte Fresh Produce B.V. v. Ace American Insurance Co., that the drafting history of the insurance policy is relevant and discoverable, regardless of whether the documents are ultimately admissible at trial.

Perhaps the Dimmitt/Deni era is best viewed as an aberration, since Florida courts' renewed willingness to consider extrinsic evidence is supported by well-established rules of contract law.

As the U.S. District Court for the Southern District of Florida wrote three years ago in F.W.F., Inc. v. Detroit Diesel Corp., "There is generally no requirement that an agreement be ambiguous before evidence of trade usage or course of dealing can be used to establish, supplement or qualify terms or conditions of a contract."

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