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Where There Is No Meeting Of The Minds About The Scope Of Coverage, Must The Insurer Pay The Claim?

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When a consumer buys an insurance policy and an important limitation on coverage is not expressed clearly and conspicuously, many courts will not enforce that limitation. Some courts hold that provisions in a preprinted policy offered to the consumer on a take-it-or-leave-it basis – that is, a contract of adhesion – are unenforceable to the extent they contradict laws governing insurance or public policies established by the courts. Other courts conclude that where a policy excludes a certain risk by way of small print or technical language, the policy is considered ambiguous and construed against the drafter (the insurance company). Those rules of construction rest on the assumption that the parties to the insurance policy do not have equal bargaining power. The purpose of these rules is to level the playing field.

If a particular policy term is specifically and mutually negotiated and drafted (*e.g.*, manuscripted), a court interpreting it may be reluctant to construe the language automatically in favor of coverage. This is because the rules of construction designed to level the playing field when the carrier is the sole drafter of the policy may not be appropriate when both parties were involved in the drafting of particular policy terms.

When a big company buys insurance, it often is represented by a team of

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insurance professionals to help identify the risks it faces and negotiate coverage that absorbs them. The insurance company has its own team of underwriters and marketing people tasked with deciding the scope of risk the carrier is willing to insure and setting the price for doing so. These teams may work together over a series of renewal periods. For example, the corporate policyholder might draft key policy provisions, with the language pored over by insurance professionals on both sides. Where both parties to the insurance contract share full responsibility for drafting policy language, the result may be a general, mutual understanding of the unique risks faced by the policyholder and the extent to which the insurer is willing to cover them. But what if, after the policy is bought and paid for, some risk arises that no one thought about during such negotiations? For example, what if there is a change in law that expands the policyholder's covered liability? The change was not anticipated by any of the insurance professionals who negotiated the policy, yet the resulting increase in exposure falls squarely within its four corners.

Insurance companies often deny claims in these circumstances because the parties never considered the possibility that an unexpected event might fundamentally change the carrier's financial responsibility. This argument misses the fact that an insurance policy represents a compensated transfer of risk. Under this risk transfer, the carrier agrees to pay claims that fit within the contours of the policy, even if a claim represents a risk no one considered at the time the policy was issued. The risk of some undiscussed and unexpected loss coming within the scope of coverage is uniquely that of the insurance company, never the insured. This is because planning for the unexpected – for a price – is what the carrier does for a living. Every insurance contract, even manuscript policies, rests on this premise.

Careful negotiation of the terms of an insurance policy is a good thing. Anything insurers and insureds can do to reduce uncertainty, prevent ambiguity, and make clear their expectations of each other helps avoid coverage disputes and preserve relationships. But in the event of an unanticipated risk that is not negotiated between a policyholder and the carrier, the fact that the parties never formed a mutual intent to cover it or not cover it should be irrelevant. The meeting of the minds that lies at the core of the bargain is the agreement to transfer the risk described in the policy, even if that risk changes in an unexpected way after formation of the contract.