"Carve-back" Provision Does Not Render Policy Ambiguous

Article By:

Sharon Angelino

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UNITEDHEALTH GROUP, INC. v. COLUMBIA CASUALTY COMPANY (D. Minn. Jan. 19, 2010)

UnitedHealth Group, Inc. brought suit against Columbia Casualty Company seeking coverage for some seventeen claims made by third parties against UnitedHealth. After a Special Master was appointed to help manage the litigation and make recommendations, UnitedHealth filed a motion for partial summary judgment with respect to two of the claims at issue. In its motion for partial summary judgment, UnitedHealth sought coverage under its excess policy for the *Samuelson* claim which arose when a doctor and professional association filed suit claiming that UnitedHealth had illegally changed the reimbursement formula it had used to calculate payments to medical providers. In addition, UnitedHealth sought coverage for the *McRand* and *Murphy* claims which alleged that UnitedHealth misrepresented and concealed the standards by which it made coverage determinations.

Initially, the court noted that the terms of the policy were negotiated by both UnitedHealth and the insurer. Accordingly, where the policy was jointly negotiated, the risk of ambiguity should be jointly shared. Therefore, the rule that any ambiguity be interpreted in favor of the policyholder did not apply.

Turning to the merits of the coverage dispute, the court initially considered whether the *Samuelson* and *McRand/Murphy* claims were within the initial grant of coverage. The court stated that the policy agreed to provide coverage for damages and claims expenses resulting from the policyholder's operations, including any wrongful acts. Here, given that the definition of damages included more than just compensatory damages and contemplated other things such as equitable and punitive damages, the underlying claims were within the initial scope of coverage.

Turning to the exclusions provided in the policy, the court initially addressed a conclusion reached by the Special Master. Despite not being raised by UnitedHealth itself, the Special Master concluded that the latter portion of an exclusion was a “carve-back” provision and represented an affirmative grant of coverage which overruled the exclusions relied upon by the insurer. Apparently the Special Master found that the second clause was not merely a carve-back, that is, an exception to the exclusion but rather, was a broadening of coverage.

The provision at issue stated that the insurer would pay claim expenses incurred by a protected person in the defense of a claim for liability that results from the activity of administering the benefit claims. In discussing this carve-back provision, the court stated that whether a carve-back is a grant of coverage will not be determined by whether the provision uses positive phrasing, (such as “we will pay” or “we will cover”), or negative phrasing. Instead, the determining factor is whether the policy as a whole is ambiguous such that a reasonable person would conclude that the coverage saved by the carve-back overrides any exclusionary language in the policy. Particularly if the coverage that is saved by the carve-back is completely eliminated by another exclusion in the policy, the policy as a whole is ambiguous.

In this case, the court held that the exclusions relied upon by the insurer did not contradict each other and were not preempted by the purported carve-back provision relied upon by UnitedHealth.

Further, the court held that the blanket billing exclusion which excluded coverage for any claims alleging “discounting” applied to the *Samuelson* claim and precluded coverage.

Finally, the court held that the *McRand* and *Murphy* claim were interrelated with a prior claim under which the insurer had paid the full per claim limit. Accordingly, UnitedHealth’s motion for partial summary judgment was denied.

Impact: This decision is notable for its discussion of the purported carve-back provision. This principle presents another argument a policyholder can raise in an effort to create an ambiguity. It is not uncommon for an exclusion to include within its provisions an exception. To the extent this exception contradicts other provisions contained in the policy, there is a possibility the policyholder can argue the policy is ambiguous. In this case, the carve-back provision did not contradict the exclusions, and the policyholder was not able to take advantage of this argument. That said, an insurer must pay heed to the exceptions contained within the policy exclusions.

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