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Does the Word "The" Change an Exclusion's Meaning?

By Kevin LaCroix on July 13, 2025

Insurance practitioners know that policy language matters. Insurance coverage advocates are also well aware that the application of the canons of construction can significantly affect contested coverage matters. These two considerations came together in a recent Fifth Circuit opinion, in which the placement of a single word — the word "the" — proved to be outcome determinative. The appellate court's decision so clearly presents these fundamental policy interpretation issues, it should be mandatory reading for anyone involved in insurance policy wording issues. A copy of the Fifth Circuit's opinion can be found **here**. A July 10, 2025 *LinkedIn* post about the decision by Geoffrey Fehling of the Hunton Andrews Kurth law firm can be found **here**.

Background

Paloma Resources's competitor, Continental Resources, sued Paloma in Oklahoma state court, alleging that Mauricio Toro, a Paloma employee, colluded with two Continental employees to steal

and transfer confidential information from Continental to Paloma's computer network so Paloma could "unfairly compete with Continental." Paloma and Continental ultimately settled the Oklahoma lawsuit, with Paloma stipulating, among other things, that the suit involved the unauthorized disclosure of and access to Continental's confidential information.

Paloma sought insurance coverage from its D&O insurer for its costs of defending and settling the Oklahoma lawsuit. The insurer denied coverage for the lawsuit, in reliance on the policy's Intellectual Property (IP) exclusion. Paloma sued its insurer, seeking a judicial declaration that the insurer improperly denied coverage. The insurer moved for summary judgment in the insurance coverage action on the grounds that the IP exclusion precluded coverage. The district court granted the insurer's summary judgment motion. Paloma appealed the district court's ruling to the Fifth Circuit.

Relevant Policy Language

The IP Exclusion states:

The Insurer shall not be liable under Insuring Agreement C. Company Liability for Loss on account of any Claim … based upon, arising out of, directly or indirectly resulting from, and in consequence of, or in any way involving any actual or alleged infringement of copyright, patent, trademark, trade name, trade dress, or service mark or the misappropriation of ideas or trade secrets, or the unauthorized disclosure of or access to confidential information; provided that this exclusion shall not apply to Loss on account of a securities Claim, a Securityholder Derivative Demand, or a derivative action.

The July 7, 2025, Opinion

In a July 7, 2025, opinion written by Judge **Priscilla Richman** for a unanimous three-judge and designated not for publication, the Fifth Circuit, applying Texas law, vacated the district court's grant of summary judgment and remanded the case to the district court for further proceedings.

In arguing that the district court had erred in granting the insurer's summary judgment motion based on the IP exclusion, Paloma argued, in reliance on the exclusion's wording, that the placement of the determiner "the" immediately preceding the phrase "misappropriation of ideas or trade secrets" suggests no carryover modification by the phrase "actual or alleged" to the clause – the result being *actual*, as opposed to *alleged*, misappropriation of trade secrets is required to trigger application of the exclusion. Paloma argued further that it makes no sense grammatically to read the exclusion as applying to "any actual or alleged … the misappropriation of trade secrets"

and that the inclusion of the determiner "the" before "misappropriation" signals a break from the series of infringement actions modified by the phrase "actual or alleged."

The appellate court agreed, saying that "Paloma's construction is reasonable," adding that "it makes no sense grammatically, in everyday English or otherwise, to read the exclusion as applying to 'any actual or alleged … the misappropriation of trade secrets'."

In concluding that Paloma's construction of the policy language was sufficient for the appellate court to reverse the district court's holding, the appellate court applied to certain principles of policy construction under Texas law. Applying these principles, the court said that it need not assess whether the construction Paloma urged is the most natural reading, or even whether or not it is reasonable in comparison to the construction the insurer urged. The appellate court said that it "need only conclude that the construction urged by Paloma is itself reasonable, irrespective of the construction urged by" the insurer.

Under Texas law, the appellate court said, when language in an insurance policy is "susceptible to more than one construction," it is to be "construed strictly against the insurer and liberally in favor of the insured." Under Texas law, the appellate court said, courts must "adopt the construction of an exclusionary clause urges by the insured, as long as that construction is not itself unreasonable."

Because Paloma had set forth a reasonable construction of the exclusion, the appellate court, applying the principles of construction, vacated the district court's grant of summary judgment and remanded the case to the district court for further proceedings.

Discussion

I am sure that the insurer in this case finds the appellate court's ruling in this case frustrating. The exclusion was clearly meant to preclude coverage for certain specified types of IP claims, and the underlying claim here was clearly the type of IP claim for which the exclusion was intended to preclude coverage.

Of course, the actual words used in an insurance policy determine the policy's operation, not the insurer's intent. There is no doubt that the language used in this exclusion, on close scrutiny, has a kind of busted bicycle wheel rhythm to it. A reader scanning the lines hits that word "the" before the phrase "misappropriation of trade secrets" with a kind of a thud. It is, at a minimum, an infelicitous wording. But is the inclusion of the word "the" before the "misappropriation" phrase sufficient to negate the prior modifier "actual or alleged" such that the exclusions preclusive effect applies only to *actual* misappropriation, not *alleged* misappropriation?

In this case, the Texas rules of policy construction arguably were outcome determinative. Based on these principles, Paloma did not have to show that its construction of the exclusion's language was the only possible construction, or even that it is the most reasonable construction; it only had to show that its construction was reasonable. Having presented the court with a construction the appellate court found reasonable, Paloma was, again by operation the Texas principles of insurance policy construction, entitled to have the court adopt its construction of the exclusionary clause.

For me there are two takeaways here. The first is that the principles of policy construction can be a powerful tool. As this case shows, at least under Texas law, an insured need only show that its construction of contested policy language is reasonable, and need not show that its construction is either the only construction or even the best construction. These policyholder-friendly principles can, as this case demonstrates, make huge difference in the policyholder's favor in the event of an insurance coverage dispute.

The second takeaway here, and arguably the far more important point, is that the words matter. It is often said in the insurance business not just that the actual words used make an important difference, but in fact a single word can make all the difference. As was the case here. Indeed, it could be argued that this case represents something of a classic example – of the kind that students of insurance may want to study – to understand and appreciate not just that policy wording matters, but that the placement of a single word can make the difference in whether or not coverage applies.

For those of us who are called upon from time to time to draft policy wording, this case is a cautionary tale. I have no doubt that the outcome here was completely unintended and unanticipated from the insurer's perspective. The opening for the insured to argue that the exclusion's preclusive effect did not apply here is a word arrangement that until this insured pointed out the odd phrasing was probably not previously questioned. (I suspect that the persons who drafted this language are probably startled by the insured's construction of the phrase, not to mention that the appellate court found the construction reasonable.)

One way that the policy wording problem here becomes more apparent is if the policy language is read aloud. On an out-loud reading, the exclusion's awkward phrasing becomes much more noticeable. I frequently read policy language out loud, as meaning often becomes more apparent through the oral reading. This is particularly true with respect to long, multi-clause phrases or sentences. Upon an out-loud reading, the meaning of the words used can become clearer – or problems can be identified.

In any event, the appellate court's opinion makes for interesting reading, for anyone involved with questions of insurance policy operation and construction. I hope that insurance advocates – on both sides – are circulating this opinion to their colleagues. The ultimate lesson here is that policy wording matters.

Special thanks to the loyal readers who sent me a link to the Fifth Circuit's opinion.
