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For Some Insurance Claims, Plain Language Isn't Enough

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The most obvious way to ascertain the "plain meaning" of the words in an insurance policy is to consult a dictionary. But dictionaries can also *create* interpretive problems. Sometimes, words have two meanings, and a court might be inclined to rule that one of them—even if it is a common or familiar one—takes the contract beyond what the parties intended, or otherwise produces an unfair result. For those times, there are maxims. "*Noscitur a sociis*" means, "it is known by its associates." This month, in *Kostin v. Pacific Indemn. Co.*, No. 3:17-cv-1320 (D. Conn. April 10, 2018), that define-by-association approach provided the answer to an intriguing coverage question: whether the action of a bankruptcy trustee to avoid a transfer of funds can qualify as a claim for "personal injury."

The Company Line

"In the construction of insurance policies, Connecticut ... subscribes to the maxim of 'nos[c]itur a sociis.'" *Trumbull Ins. Co. v. Braunstein & Todisco, LLC*, 37 Conn. L. Rptr. 324 (Conn. App. Ct. 2004). Under that doctrine, "[i]f two or more words are grouped together, it is possible to ascertain the meaning of a particular word by reference to its relationship with other associated words and phrases." *State v. Indrisano*, 228 Conn. 795 (1994).

The maxim most often comes into play for the purpose of *eliminating* one possible definition of a contractual term. For example, in *Smedley Co. v. Employers Mut. Liability Ins. Co.*, 143 Conn. 510 (1956), an insured warehouse stored two different products on behalf of an ice cream manufacturer. When the warehouse negligently turned over the wrong product to the manufacturer's trucker, an entire production run was ruined. The warehouse's insurer denied coverage for the subsequent lawsuit, citing an exclusion for claims involving products that were "manufactured, sold, handled, or distributed by" the warehouse.

Because the dictionary definitions of "handle" include, "touch ..., take up, move, or otherwise affect with the hand," the insurer argued that the warehouse had "handled" the product, by physically turning it over to the trucker. Connecticut's Supreme Court held, however, that the presence of the words "manufactured," "sold" and "distributed" made it "*apparent*" that that the insurer had intended to "restrict" the word "handle" to the sense of "buy and sell; ... deal, or trade in." It explained: "[U]nder the maxim 'noscitur a sociis,' *[words] are known by the company they keep*."

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In practice, *noscitur* is more flexible than this case might suggest. Whereas the doctrine was used in *Smedley* to overcome the ambiguity associated with multiple definitions of a particular word, there are also cases in which the maxim can establish the presence of ambiguity. In the recent decision in *R.T. Vanderbilt Company, Inc. v. Hartford Accident & Indemn. Co.*, 171 Conn.App. 61 (2017), for example, the court found that even a single definition can be ambiguous, if it can reasonably be applied in more than one set of circumstances.

Between 1948 and 2008, the plaintiff in *Vanderbilt* produced industrial talc—a combination of minerals that was used primarily in the manufacture of ceramic bathroom fixtures and paint. Between 1972 and 1992, OSHA regulated one of the components of the plaintiff's talc as a form of asbestos. From the 1980s onward, the company was named in thousands of individual lawsuits, alleging either that the talc contained asbestos (which the company denies), or that it otherwise caused asbestos-related diseases (such as mesothelioma) in individuals who were exposed to it.

The plaintiff had purchased policies from more than two dozen primary and excess liability insurers, and some of those policies contained pollution exclusions. One typical example barred coverage for claims based on

the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any watercourse or body of water ... .

In the plaintiff's coverage suit, one of the insurers contended that the underlying cases alleged the "discharge, dispersal, release or escape" of asbestos, which, it maintained, constituted a "toxic chemical" or "other irritant, contaminant or pollutant." The Appellate Court rejected that argument—but without ruling that the substance in question could not be a "pollutant" or "toxic chemical" that had been "dispersed" in various workplaces. Instead, it found that "the parties did not intend to exclude coverage for harms inflicted by *all* toxic chemicals, irritants, and contaminants." It found that the pollution exclusions *as a whole* applied only in cases involving "contamination of the natural environment"—and not to claims based on "exposure to toxic substances ... in indoor environments and/or in the course of their intended use."

The court defended its conclusion in several ways, including reference to *noscitur a sociis*. It cited, for example, the reasoning of *Lefrak Organization, Inc. v. Chubb Custom Ins. Co.*, 942 F.Supp. 949 (S.D.N.Y. 1996), which had held that a similar pollution exclusion did not bar claims based on exposure to lead paint. In *Lefrak*, the court found that the specific "substances" named in the exclusion "are either products used to operate equipment or machinery or byproducts of the operation of equipment or machinery." On the basis of that description, the court in *Vanderbilt* found that "[o]ne plausible interpretation of the policy language ... is that it was intended to exclude only those harms and injuries resulting from *the dross of industrial production*."

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In other words, the court ruled that the presence of particular examples in the pollution exclusion had the effect of limiting the meaning of the provision as a whole—essentially, adding a reference to the "natural environment"—even without the use of any explicit terms of limitation.[1]

The Madoff Case Gets Personal

Although it was not invoked by name, *noscitur a sociis* resurfaced this month. The plaintiff in *Kostin* was a victim of Bernie Madoff's notorious Ponzi scheme. Her late husband had established a family partnership, which maintained an account with Bernard L. Madoff Investment Securities, LLC ("BLMIS"). In 2007 and 2008, the plaintiff made withdrawals from the account, in a total amount of $3.75 million. After the fraud was uncovered, the bankruptcy trustee for BLMIS brought an action against the plaintiff—who had already lost the remainder of her family's investment—to recover the amount of the withdrawals.

Because the BLMIS account was part of a pyramid scheme in which the contributions of new investors were used to create "fictitious profits," the trustee maintained that the withdrawals represented "other people's money," and that BLMIS had executed them simply "to avoid detection of the fraud, to retain existing investors, and to lure other investors into the ... scheme." On that basis, he alleged that the payments to the family partnership could be avoided as fraudulent conveyances, and that they could be recovered from the plaintiff in *Kostin*, a subsequent transferee, under Sections 548 and 550 of the Bankruptcy Code. The trustee did not allege that the plaintiff had known about the fraudulent nature of the withdrawals, or that she had participated in the scheme in any other way. His suit against the plaintiff was based solely on wrongful acts committed by Madoff.

The plaintiff tendered the trustee's action to the issuers of her homeowners and excess insurance policies. The homeowners policy covered claims for damages that the policyholder became "legally obligated to pay for personal injury or property damage**.**" The plaintiff's provocative theory was that the trustee's suit to avoid a conveyance under bankruptcy law was a claim based on *personal injury*.

The policy defined "personal injury" to include:

bodily injury; shock, mental anguish, or mental injury; false arrest, false imprisonment, or wrongful detention; *wrongful entry or eviction*; malicious prosecution or humiliation; and libel, slander, defamation of character, or invasion of privacy.

The plaintiff contended that the trustee had sought damages for "wrongful entry," in two different senses.

First, she cited *Black's Law Dictionary*, which defines "entry" as an "*item written in a record; a notation*." The trustee's action, plaintiff observed, arose out of Madoff's "wrongfully writing ... profits ... that were fictitious" in the records of the plaintiff's account. Since the policy itself did not define the term "entry," plaintiff maintained that this fact would, at a minimum, establish that the policy was ambiguous.

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Additionally, the plaintiff argued that a "wrongful entry" need not involve a *physical* intrusion, and that Madoff had wrongfully "entered" or "intruded into" the plaintiff's account, when he added other clients' funds to it for the purpose of keeping his scheme in operation.

Restricted Entry

When construing a provision in an insurance policy, "it is appropriate to look to the dictionary definition of the term." *Buell Industries, Inc. v. Greater New York Mut. Ins. Co.*, 259 Conn. 527, 539 (2002). But in *Kostin*, the court declined to apply the dictionary definition cited by the plaintiff. It noted that the policy placed the word "entry" in the phrase, "wrongful entry or eviction," and that this phrase appears in a list of covered injuries that were "grouped thematically around different types of torts and categories of harm."

[I]n the context in which it appears, "wrongful entry" cannot be reasonably read to encompass *any* imaginable type of entry that is somehow wrongful. The phrase's meaning is cabined, instead, to the range of meanings possible given that it is part of a disjunctive pair with the word "eviction" **... .**

Accordingly, the court found that "'wrongful entry' must be read to mean something akin to an *unauthorized or tortious intrusion*." Because the creation of a fraudulent accounting record does not, in itself, constitute such an intrusion, the plaintiff's first argument was rejected.

The plaintiff's second argument failed because of the underlying facts, rather than as a matter of contract interpretation. The court agreed with the premise of that argument—it found that the policy language could "encompass trespassory intrusions into non-real property." But the court also noted that Madoff's "entry" into plaintiff's account for the purpose of depositing funds would have been authorized by the terms of plaintiff's agreement with BLMIS. "[T]he 'wrongful entry' at issue here was not a tortious act of entering or intrusion but ... a fraudulent act of making or entering a record."

The insurer's motion to dismiss the complaint was granted.

When Plain Won't Do

"A court construing an insurance policy starts with the plain language of the policy, ... and if that language is unambiguous, it governs." *Lombardi v. Universal N. Am. Ins. Co.*, 59 Conn. L. Rptr. 774 (Conn. Super. Ct. 2015). Ambiguity can arise where a policy uses words that have multiple meanings, but also where a rule or concept can pertain to multiple, divergent circumstances. That is, courts sometimes find a need to *reject* familiar and common understandings of policy language, even when that language consists of everyday words used in a commonplace way. *Noscitur a sociis* can protect parties from results that they never intended at the time of contracting. It can also provide support for surprisingly broad pronouncements on policy.

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[1] Full disclosure: Pullman & Comley LLC represented one of the insurers in *Vanderbilt*; the author did not participate in the case.

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