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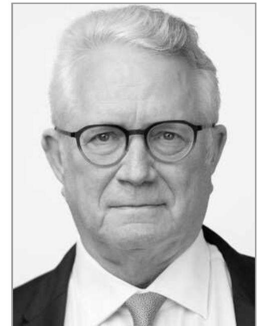
Insurance Lessons From 11th Circ. Ruling On Policy Grammar

By **Hugh Lumpkin and Garrett Nemeroff** (August 13, 2024, 5:14 PM EDT)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The U.S. Court of Appeals for the Eleventh Circuit's Aug. 1 **decision** in ECB USA Inc. v. Chubb Insurance Co. of New Jersey provides several important lessons for corporate policyholders faced with potential coverage issues arising from their consulting or professional services.

The issue in ECB was whether Chubb's professional services liability policy applied to claims against an accounting firm arising from a faulty audit performed for a food services company, Schratter Foods Inc.

Looking to rules of grammar and canons of construction to interpret the policy, the court ruled in favor of Chubb, and found that coverage was restricted to accounting services for financial institutions and thus did not apply to the Schratter Foods audit.

As we explain below, the ECB decision highlights the complexities and uncertainty that can arise when insurance policies are interpreted based on technical rules of grammar and linguistics, which can be deployed to reach a result at odds with the policyholder's expectations of coverage.

The decision also serves as a reminder about the importance of ensuring that policy language aligns with the company's current business activities — particularly at the time of renewal.

Finally, the decision illustrates the risks for corporate policyholders in jurisdictions that construe policy language differently depending on whether the insured is deemed sophisticated.

The ECB Opinion

In 2001, Chubb sold a professional services liability policy to the accounting firm Constantin Associates LLP. Constantin renewed its Chubb policy for several years, ultimately culminating in a renewal policy issued in December 2017.[1]

The court's opinion notes that the policy provided liability coverage for "Wrongful Acts ... in the performance of (1) 'Computer Consulting including computer system architecture and design'; (2) 'Temporary Placement Agency Services'; and, critically (3) 'Management consulting services.'"[2]

Chubb defined "management consulting services" as: "services directed toward expertise in banking finance, accounting, risk and systems analysis, design and implementation, asset recovery and strategy planning for financial institutions."[3]

Constantin performed an audit for Schratter Foods in connection with an acquisition between Schratter and a third party — ECB.[4] According to the opinion, the "audit allegedly did not go well," and ECB sued Constantin for alleged negligence in auditing Schratter's financial statements, which ultimately led to a settlement.[5]

ECB then sued Chubb to enforce Constantin's rights under the policy, arguing that Chubb breached

the policy by refusing to defend and indemnify Constantin for the underlying suit and settlement.[6]

As framed by the Eleventh Circuit, the case came "down to grammar and canons of construction."[7] Specifically, the issue under New Jersey law was framed as "whether the phrase 'for financial institutions' modifies 'accounting.'"[8]

To answer that question, the court first weighed different grammatical canons of construction, starting with the last-antecedent canon and the nearest-reasonable-referent canon.

Under those canons, ECB argued that the phrase "for financial institutions" only referred to the immediately preceding phrase, "asset recovery and strategy planning."[9]

Thus, ECB argued, the phrase "for financial institutions" did not limit the scope of covered "accounting services," listed as a stand-alone service in the same provision.

ECB also argued that, under the doctrine of contra proferentem, the ambiguity in Chubb's policy must be resolved against the insurer and in favor of coverage.[10]

Chubb, on the other hand, urged the court to apply the series-qualifier canon. Under the series-qualifier canon, Chubb argued, "a postpositive modifier like 'for financial institutions' modifies all the terms in a list of parallel items" — including "accounting."[11] Chubb argued that the accounting firm was not entitled to coverage because the audit in question was performed for Schratter Foods, not a financial institution.

Weighing the grammatical implications of the policy language, the court ultimately found that Chubb had the better reading.[12] For instance, the court found that the canons advanced by ECB were not on point because the parts of speech typically associated with those canons — including pronouns, relative pronouns and demonstrative adjectives — were missing from the policy.[13]

ECB also conceded that "for financial institutions" applied at least to "asset recovery and strategy planning," which the court viewed as "more than the nearest reasonable referent."[14]

More importantly, ECB conceded that the policy language contained parallel terms, and the court concluded that these canons don't apply "when the syntax involves a parallel series of nouns or verbs."[15] Focusing on ECB's concession, the court instead found the series-qualifier canon appropriate for resolving the dispute.[16]

Specifically, the court reasoned that "the parallel nature of the terms links them together so that the postpositive modifier 'for financial institutions' can naturally apply to every item in the list, not just the last one or two."[17]

Because the audit was not performed for a financial institution, the court held that there was no coverage for the underlying claims arising from the Schratter Foods audit, though conceding that this limitation could have been stated more clearly by the addition of a comma.

The court next analyzed whether to apply the doctrine of contra proferentem, which provides that courts should construe ambiguous policy language against the party that drafted the policy — inevitably, the insurance company.[18]

But despite what could at best be fairly described as sloppy policy language drafted by Chubb, the court declined to construe the policy against Chubb, finding that Chubb had the better reading and emphasizing that Constantin was also a "sophisticated commercial entity."[19]

Key Lessons for Corporate Policyholders

The decision in ECB offers several important takeaways, particularly for corporate policyholders.

First, the decision highlights the complications and uncertainty that can arise when courts interpret insurance policy language based on grammatical canons. These are obscure, linguistic presumptions that few, if any, policyholders — or their brokers — are familiar with. There is also no indication that insurance companies themselves consider grammar or linguistics when drafting insurance policies.

On a more practical level, the decision illustrates the difficulty of predicting how a court might resolve any given dispute using these canons of construction — a growing concern in modern textualism.[20]

In ECB, the court resolved the coverage dispute by choosing between competing canons of construction that turned on the parts of speech and linguistic structure of the policy provision, leading to an outcome where the very last phrase in the provision applied to — and restricted — the earlier reference to "accounting," removing coverage for any accounting services performed for nonfinancial institutions.

Further highlighting the range of potential outcomes here, the court seemingly could have looked to an entirely different canon — the canon against surplusage — to find that coverage did exist. Because some of the services listed in the policy already referred to banking or finance, applying the financial institutions modifier to those same terms would be entirely redundant.

Compounding this issue is the court's comment about commas. While the court acknowledged that placing a comma before the phrase "for financial institutions" certainly would have established "with more certainty that it applies across every term in the list," the court opined that commas are "discretionary" — though the "let's eat, grandma" example suggests this is not always the case.[21] The court cited a 1971 U.S. Supreme Court case, U.S. v. Bass, which did not involve insurance policy interpretation.

In the insurance context, courts have explained that an insurer seeking to limit coverage "must clearly and unambiguously draft a policy provision to achieve that result."[22] While commas might be discretionary from a pure linguistics standpoint, they should not be discretionary from an insurance policy drafting standpoint. Suggesting that insurers have discretion to draft less-than-clear policy language incentivizes insurers to make careless drafting choices in their insurance policies.

Equally important is the court's discussion of ambiguities in insurance policy language and how those ambiguities are resolved — at least under New Jersey law and that of similar jurisdictions.

Let's take the second question first. The court found that, even assuming the policy contained an ambiguity on the "for financial institutions" issue, New Jersey law did not require the policy to be construed in favor of coverage to resolve that ambiguity because the accounting firm was also a "sophisticated commercial entity."[23]

To be sure, some jurisdictions, including Florida, do not recognize a sophisticated-insured exception, and instead apply the general rule that ambiguous policy language will be construed against the insurance company that drafted and sold the policy.

Other jurisdictions recognize a limited carveout, but with additional caveats — such as California, which requires evidence that the policyholder was actually involved in negotiating and drafting the policy.[24] In fact, the Eleventh Circuit itself has recognized that the policyholder's interpretation need not be the most reasonable one — or even the correct one — in order for the policy to be deemed ambiguous and construed against the insurer, per its 2005 decision in Continental Insurance Co. v. Roberts.[25]

And as the ECB decision illustrates, there are good reasons to be wary of sophisticated-insured exceptions. The opinion indicates that Constantin had "many different options to purchase liability insurance," but those options are never specifically discussed, and the reality is that policyholders often have very few choices, and even less bargaining power, when it comes to negotiating actual policy language.[26]

There is no indication, for example, that this was a manuscript-type policy where Constantin actually had a say in crafting the precise policy language. Even sophisticated insureds who negotiate for better pricing or cover are typically negotiating over insurance-industry form language, not writing from scratch.

The opinion also glosses over the fact that the policyholder was a "relatively small office with few employees."[27] The court brushed this aside by observing that "size does not necessarily equate to a lack of commercial sophistication," but the converse is also true: Just because Constantin was, as

the court said, "composed of accounting professionals" does not mean the firm was sophisticated from an insurance coverage standpoint.

Thus, the ECB decision highlights significant risks policyholders face in jurisdictions that consider the sophistication of the insured in determining coverage, including the risk that a court will deem the company "sophisticated" regardless of size, and regardless of its actual level of sophistication, areas of sophistication, or whether it had any actual bargaining power or involvement in negotiating or drafting the policy.

In jurisdictions that follow the approach reflected by ECB, such policyholders may not get the benefit of the doubt when later seeking coverage under their insurance policies.

Finally, the ECB decision serves as a cautionary tale for corporate policyholders with evolving or wide-ranging business operations. When Constantin first obtained insurance from Chubb in 2001, the company might have been performing accounting services solely or primarily for financial institutions, and wouldn't think twice about the "financial institutions" phrase at the end of the policy's definition of management consulting services.

By 2017, when the policy came up for renewal, Constantin might have expanded its client-base to other industries, including food service companies like Schratter Foods, without reexamining the Chubb policy against its current operations. In that respect, ECB also highlights the importance of carefully and continuously examining coverage against the company's current business activities — particularly at the time of renewal.

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[1] ECB USA Inc. v. Chubb Ins. Co. of N.J., No. 22-10811, 2024 U.S. App. LEXIS 19221, at *3 (11th Cir. Aug. 1, 2024).

[2] Id. at *4.

[3] Id.

[4] Id. at *5.

[5] Id.

[6] Id.

[7] Id. at *2.

[8] Id. at *11. The parties agreed that New Jersey law governed the dispute.

[9] Id. at *3.

[10] Id. at *13.

[11] Id. at *2-3.

[12] Id. at *22.

[13] Id.

[14] Id. at *23.

[15] Id.

[16] Id.

[17] Id. at *24.

[18] Id. at *29.

[19] Id.

[20] See William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, Textualism's Defining Moment, 123 Colum. L. Rev. 1611, 1648-49 (2023) (explaining that "more systematic research ... should be done to test the reliability of canons that purport to show ordinary meaning").

[21] ECB USA, Inc., 2024 U.S. App. LEXIS 19221, at *26.

[22] See Geico Gen. Ins. Co. v. Virtual Imaging Servs. , 141 So. 3d 147, 157 (Fla. 2013).

[23] Id. at *31.

[24] See Cachet Fin. Servs. v. Berkley Ins. Co. , No. 23-55217, 2024 U.S. App. LEXIS 5765, at *5-6 (9th Cir. 2024).

[25] See Cont'l Ins. Co. v. Roberts , 410 F.3d 1331, 1333-34 (11th Cir. 2005).

[26] See ECB USA, Inc., 2024 U.S. App. LEXIS 19221, at *31.

[27] Id.

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