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Summary of Powell v. Liberty Mutual Fire Insurance Co., 127 Nev. Adv. Op. No. 14

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Powell v. Liberty Mutual Fire Insurance Co., 127 Nev. Adv. Op. No. 14 (May 05, 2011)[1]
INSURANCE LAW – BREACH OF CONTRACT; CONTRACT CONSTRUCTION

Summary

An appeal from a grant of partial summary judgment in a breach-of-contract action arising from a denial of a homeowner's insurance claim under the policy's "earth movement exclusion" clause.

Disposition and Outcome

The Supreme Court of Nevada reversed and remanded the district court's grant of partial summary judgment, finding : (1) a genuine issue of material fact existed as to whether the "earth movement exclusion" clause excluded coverage for damages to Appellant's house, and (2) the district court improperly relied on *Schroeder v. State Farm Fire & Cas. Co.* to support its conclusion that Respondent properly disclaimed coverage.[2]

Facts and Procedural History

Appellant Mildred Powell ("Powell") obtained homeowner's insurance from Respondent, Liberty Mutual Fire Insurance Company ("Liberty"). The standard form insurance policy contained an "earth movement exclusion" clause, which excluded losses caused by "(e)arth movement, meaning earthquake including land shock waves or tremors before, during or after a volcanic eruption; landslide, mine subsidence; mudflow; earth sinking, rising or shifting." The policy also contained a "settling" clause, which further excludes losses resulting from "settling, shrinking, bulging or expansion, including resultant cracking, of pavement, patios, foundations, walls, floors, roofs, or ceilings."

In July 2005, a water pipe in Powell's house exploded, flooding the dirt sub-basement. Thereafter, her house suffered a shift in its foundation, and extensive separation in the walls and ceilings of several rooms. Powell filed a claim based on these damages under the homeowner insurance policy she purchased from Liberty. An expert chosen by Powell and hired by Liberty concluded that the house was being affected by an expansion of supporting clay soil "likely present in lesser degrees in the past," but "severely aggravated by the intrusion of a significant amount of water" due to the exploding water pipe. Liberty nonetheless denied Powell's claim, citing the policy's earth movement exclusion clause.

Powell subsequently hired two civil engineering professors to conduct a second inspection of the house. The professors found no evidence of earth movement, and concluded that the structural damages resulted from swelling of the foundational clay facilitated by access to water. With these conclusions, Powell made another request for reconsideration, which Liberty again denied.

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[1] By Michael Li.
[2] Schroeder v. State Farm Fire & Cas. Co., 770 F. Supp. 558 (D. Nev. 1991)

Consequently, Powell filed a complaint in the Second Judicial District Court, alleging: (1) breach of contract, (2) breach of duty of good-faith and fair-dealing, and (3) breach of Nevada Unfair Claims Settlement Practices Act.[3] Liberty filed a motion for partial summary judgment with respect to the breach-of-contract and bad-faith claims. The district court granted the motion as to the bad-faith claim,[4] but initially denied the motion as to Powell's breach-of-contract claim, finding a genuine issue existed as to what caused the damage to Powell's house.[5] Thereafter, both parties hired experts to re-inspect Powell's house. Based on conclusions derived from these inspections, Liberty renewed its motion for partial summary judgment of the breach-of-contract claim.

The district court granted Liberty's renewed motion for partial summary judgment, concluding that: (1) there was movement in the earth below the house, which either directly or indirectly caused the damage to Powell's house, and (2) the policy underlying *Schroeder*, where a similar earth movement exclusion clause was at issue, explicitly excluded any damage caused directly or indirectly by soil movement.

Discussion[6]

The Earth Movement Exclusion Clause is Ambiguous

Powell claimed the district court erred in concluding that soil expansion caused by a water leak from a pipe fits within the scope of the earth movement exclusion clause, as defined in Respondent's policy. The Court noted that under Nevada's common-law, it will interpret and enforce the plain and ordinary meaning of a contract provision if the language is unambiguous.[7] Whether an insurance contract is unambiguous turns on whether it creates a reasonable expectation of coverage as drafted.[8] Any ambiguity in the policy language will be construed against the insurer, as the policy's drafter.[9] Clauses excluding coverage must be interpreted narrowly "as to effectuate the reasonable expectations of the insured."[10]

The Court next turned its attention to earth movement exclusion clauses in general. Historically, earth movement exclusion clauses were created to protect insurers from catastrophic events that are nearly impossible to insure against, due to their unpredictability. Other

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[3] NEV. REV. STAT. § 686A.310 (2007).
[4] Appellant did not challenge the district court's dismissal of her bad-faith claim.
[5] The issue of proximate cause was also invoked on appeal, but because the Court concluded the policy language to be ambiguous, it never addressed the proximate cause issue.
[6] Appellant's sole challenge on appeal relates to the district court's dismissal of her breach-of-contract claim. Although she did not present arguments supporting her § 686A.310 claim, the Court reversed the district court's dismissal with respect to this claim as well, based on its failure to evaluate the § 686A.310 claim independently from the breach-of-contract claim.
[7] Farmers Ins. Exch. v. Neal, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003).
[8] United Nat'l Ins. Co. v. Frontier Ins. Co., 120 Nev. 678, 684, 99 P.3d 1153, 1157 (2004).
[9] National Union Fire Ins. v. Reno's Exec. Air, 100 Nev. 360, 365, 682 P.2d 1380, 1383 (1984).
[10] *Id.*

jurisdictions have often found these exclusion clauses to be ambiguous, and have thus construed them narrowly to include only naturally-occurring events.[11]

The Court then examined the earth movement exclusion clause in Liberty's policy. The Court noted that the definition of "earth movement" in Liberty's policy contained both examples of man-made events (e.g. mine subsidence), and naturally-occurring catastrophes (e.g. earthquake). The policy also contained a generalized reference to "sinking, rising, and shifting earth" without any clarifying cause. Since Liberty's policy neither limited "earth movement" to any particular category of events, nor stated explicitly that the clause excluded damages caused by any category of events, the Court found the exclusion clause to be ambiguous.[12] Therefore, the Court reversed summary judgment based on a genuine issue as to whether Liberty's policy excludes the type of damages suffered by Powell's house.

The Court went on to outline several requirements for insurers seeking to exclude coverage by virtue of an exclusion clause in its policy. First, the insurer must write the exclusion in obvious and unambiguous language in its policy. Second, the insurer must establish that the interpretation excluding coverage is the only interpretation that could fairly be made. Finally, the insurer must establish that the exclusion clearly applies to the particular case under review. Since Liberty's policy failed to meet this criterion, the Court further concluded that Liberty is unable to deny coverage of the claim if the district court determines that the damage was caused by a ruptured pipe. Thus, the district court erred in granting Liberty's motion for summary judgment.

Distinguishing Schroeder

Powell also claimed the district erred in relying on *Schroeder* to support its conclusion that Respondent's policy disclaimed coverage. In *Schroeder*, water from a ruptured pipe caused soil to settle, which led to damages to a building insured by the Defendant. Although the cause of damage was similar in both cases, the Court distinguished *Schroeder* from the present case based on differences in the respective "earth movement exclusion" clauses. First, the *Schroeder* policy made clear the list of events is non-exhaustive, whereas Liberty's policy does not. Second, *Schroeder*'s anti-concurrent clause made clear that damages are excluded based on any movement in the earth, notwithstanding the cause. Finally, *Schroeder*'s clause explicitly referenced earth movement combined with water, whereas Liberty's definition does not. Because *Schroeder*'s holding rests on the specific language of the policy, language which is absent from Liberty's policy, the Court concluded that *Schroeder* does not control the outcome in the case at bar.

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[11] *See* Sentinel Assoc. v. American Mfrs. Mut. Ins., 804 F. Supp. 815, 818 (E.D. Va. 1992); Fayad v. Clarendon Nat. Ins. Co., 899 So. 2d 1082, 1088 (Fla. 2005); Henning Nelson Const. Co. v. Fireman's Fund, 383 N.W.2d 645, 653 (Minn. 1986); United Nuclear Corp. v. Allendale Mut. Ins., 709 P.2d 649, 652 (N.M. 1985).

[12] The Court also rejected Respondent's argument that the "settling" clause helped rectify the ambiguity of "earth movement" because (1) the district court did not rely on the "settling" clause in reaching its conclusion and (2) other jurisdictions interpreting similar "settling" clauses also narrowly construed them to encompass only naturally-occurring events.

Conclusion

As the drafter of the insurance policy, insurance providers carry the burden of establishing that damages or losses filed by the policyholder are properly disclaimed under any expressed earth movement exclusion clauses contained within the insurance policy. In particular, the language of the exclusion clause must be obvious and unambiguous. Any ambiguity will be interpreted against the insurer as to effectuate the reasonable expectation of the insured at the time of drafting.