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Case Study

## Terms Clearly Defined in Insurance Policies Trump Ordinary Meanings

— by Jeffrey D. Eberhard

**Claims Pointer:** Courts will apply the plain and unambiguous language of a policy when determining whether coverage is excluded. Courts will also apply a limited definition contained in the policy rather than apply an “ordinary meaning” of a term which would render the policy’s definition meaningless. Therefore, the court upheld the policy’s “earth movement” exclusion and held there was no coverage under the policy.

When an insured first acquires an insurance policy protecting his or her property from loss, the insured only seems to read the cover page that indicates his or her property is covered by an insurance policy and ignores the policy’s terms and exclusions that limit the insurers’ obligations to provide compensation for certain losses. However, once an insured suffers a loss and is informed by his or her agent that the loss is not or may not be covered under the policy, the insured quickly begins reading his or her policy’s exclusions searching for exceptions and ambiguities that would obligate his or her insurer to provide coverage for the loss. An Oregon Court of Appeals case, *Ruede v. City of Florence*, analyzed one insured’s attempt to circumvent a policy’s exclusions in order to obtain coverage for property damage after the insurer denied coverage. Case No. A137660, in the Court of Appeals in the State of Oregon (October 28, 2009).

Rick and Rebecca Ruede owned West Coast Auto-body, Inc. in Florence, Oregon. Their store was built on a concrete slab foundation and had cinder block walls. Approximately 10-15 feet below the Ruedes’ building slab, there was a four-foot-wide culvert that received water drain-off from property that bordered the Ruedes’ property. After the city removed blockage from the drain near the Ruedes’ property, a subsequent inspection of the culvert revealed there was a gap between two sections of the culvert. When the blockage caused the culvert to fill

with water, sand and earth under Ruedes’ concrete slab sifted away into the culvert leaving large empty voids beneath the concrete slab. The lack of support under the concrete slab eventually caused the slab to sink approximately 7 inches, causing the walls to tilt and separate from the foundation. The Ruedes filed a claim under their insurance policy with Farmers Insurance to repair the damage. But Farmers denied coverage arguing the “cause of loss” was not covered by the insurance policy. The Insureds sued Farmers for, among other claims, breach of contract. At trial Farmers moved for summary judgment arguing the policy excluded coverage because the loss was excluded under the “earth movement” cause of loss provision. The trial court agreed with Farmers and dismissed the claim.

On appeal, the Insureds argued the trial court erred because: (1) the earth movement exclusion did not apply to movement precipitated by human action; and (2) the court should have applied the ordinary meaning of “sinkhole collapse” and not the limited definition provided under the policy. Farmers’ policy defined “sinkhole collapse” as “the sudden sinking or collapse of land into underground empty spaces created by the action of water on limestone or dolomite.” The Oregon Court of Appeals disagreed with each of the Insureds’ arguments and held that when determining the meaning of a term in a contract, a court will apply the clear and unambiguous meaning of the policy term and the insured bears the burden in proving the claim is within an exception to the coverage exclusion. The court held the policy language that excluded damage caused by any earth movement “regardless of any other cause or event that contributes...to the loss,” was broad enough to include human action and clearly included any rising or shifting of soil that caused foundational settling or cracking.

Additionally, the court rejected the Insureds’ argument that the ordinary meaning of “sinkhole collapse” should apply rather than the limited definition in the policy because: (1) the term “sinkhole collapse” was clearly and unambiguously defined under the terms of the contract and it is not the court’s place to rewrite contracts; and (2) courts cannot interpret policy definitions in a manner that makes a policy’s definition meaningless. The court refused to adopt the Insureds’ argument because it

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would rewrite the insurance policy and nullify the definition provided under Farmers' policy. Thus, the court of appeals held that the Insureds failed to prove there was an exception under the "earth movement" cause of loss exclusion and the trial court did not err when it granted the Insurer's summary judgment motion. ❖

— Full case is available at: [www.publications.ojd.state.or.us/A137660.htm](http://www.publications.ojd.state.or.us/A137660.htm)

— If you would like to be notified of these new cases, please send an email to [caseupdate@smithfreed.com](mailto:caseupdate@smithfreed.com).

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## PERSPECTIVES ON THE LAW

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### Expert Witness

— by Tim Heinson

Expert witnesses can be expensive, and the decision whether to employ one in a particular case depends upon the facts of that case. A good expert, however, can go a long way toward getting a favorable result.

A recent trial emphasized the value of a medical expert. Plaintiffs' had their chiropractor testify to permanent impairment and non-ending treatment. My expert, also a chiropractor, was very knowledgeable and, I thought, testified effectively, although as he testified I was concerned that he might be going into too much detail. We received a very good result and, since this was a Washington case, I had the opportunity to interview the jury after the verdict was returned. All of the jurors said that they were very impressed with my expert. When asked if they thought he had spoken too long or in too much detail, the answer was an emphatic "no." By contrast, they all said that they were eager to hear factual information that they could use in making their decision.

Not all experts are as good as that one, but some considerations in hiring an expert are as follows:

#### 1. Do You Need an Expert?

Oregon Evidence Code Rule 702 provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

#### 2. Know your Expert

The most important attribute of an expert witness is integrity. Although often accused by plaintiffs' counsel of simply selling their opinions to the highest bidder, my experience has been that most defense experts are honest in their analysis and testimony. In fact, the only questionable testimony I have seen in the courtroom has been from the other side. Lawyers, can acquire reputations. Make sure yours has a reputation for truthfulness.

Before hiring an expert, find out if she is willing to testify in court, if that is where the case is likely headed. Communication with your expert is obviously very important, so make sure she is willing to work with you and your attorney in case and trial preparation.

#### 3. Speak the Language

Experts are, by definition, experts in their field of expertise, not necessarily in effective communication. A good lawyer can assist with this, but the expert must be able to speak in plain language that an average juror will understand. An effective expert also speaks directly to the jury. Some of the jurors in my recent case remarked on how professorial my expert appeared as he looked at them, took off his glasses, and explained his findings and opinions.

#### 4. Help with Case Preparation

A good expert can assist in identifying weaknesses in your case, and what she expects the plaintiff's witness to say. Hiring such an expert early on, even

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pre-litigation, may be beneficial in building a defense strategy, or determining a settlement posture.

### 5. Stand up for Themselves

Experts are generally well-educated and fairly sophisticated, so they may enjoy the intellectual challenge of testimony. In doing so, they may appreciate the nuances of opposing counsel's questions without an equal appreciation of the danger the question poses. For instance, the opposing attorney may carefully limit a question to a specific fact, in order to build a theory for closing argument. The expert may agree with that specific fact, but at that point must be willing and able to stand up for her opinion and explain why this fact is irrelevant or otherwise does not affect her analysis. The expert has to remember that she, not opposing counsel, is the expert on this particular subject.

### 6. Experienced or Hired Gun?

The obvious advantage to having an expert with lots of litigation experience is that she is familiar with the proceedings and comfortable testifying under oath. The obvious disadvantage is that your opponent can characterize the expert as being a hired gun, just providing favorable opinions to the other

side in hopes of more referrals. It is helpful if the expert provides services to both sides, but in reality, the defense is far more likely to need an independent expert, particularly in an injury claim. After all, the plaintiff already has a treating doctor to testify. In my experience, juries seem to understand that experts (on both sides) are paid pretty well and don't penalize an expert for earning a good living doing IMEs.

### 7. Anything We Should Know About?

An experienced expert witness will be aware of methods of cross-examination used against her in the past. This will sometimes involve disciplinary proceedings or other potentially damaging information. Ask your expert about these, and any other issues that would be potentially embarrassing should it come out. Discuss how best to handle it if it does come up.

Having an effective expert at trial is a dream-come-true, and having one fall apart is a nightmare. Carefully researching your expert before you hire her will maximize the chances of the former and minimize the risks of the latter. ❖

*— Please direct any questions in this area of law to the author, Tim Heinson, at 503-768-9600, or by email to [tim@lerlaw.com](mailto:tim@lerlaw.com).*