## 19 INSURANCE POLICY INTERPRETATION & CONSTRUCTION

Insurance policies are considered contracts of adhesion. Accordingly, they are construed to provide the coverage that a layperson would have reasonably expected from a lay interpretation of the policy terms.[1] The terms of the policy will be interpreted in their ordinary and popular sense, as they would be read and understood by a person of average intelligence and experience.[2]

It is not necessary for an Alaska Court to first find an ambiguity in the insurance contract as a condition precedent for construing the policy to provide the coverage that a layperson would reasonably have expected to receive.[3] However, where a clause in a policy is ambiguous -- meaning that it is reasonably susceptible to more than one interpretation -- an Alaska Court will accept the interpretation that most favors the insured.[4] The court will construe coverage grants in favor of the insured, while exclusions will be narrowly construed against the insurer.[5]

Alaska 's courts construe insurance contracts to provide that coverage which a layperson would have reasonably expected from a lay interpretation of the policy terms.[6] However, the insured's expectations about coverage must be objectively reasonable. Consequently, a finding of coverage beyond the clear terms of the policy will not be made on the bare allegations of the policyholder that he expected such coverage.[7] Rather, the insured must demonstrate through extrinsic evidence that his or her expectation of coverage was based on specific facts, which made those expectations reasonable.[8]

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[1] *U.S. Fire Ins. Co. v. Colver*, 600 P.2d 1, 3 (Alaska 1979).

[2] *Jarvis v. Aetna Cas. and Sur. Co.*, 633 P.2d 1359, 1363 (Alaska 1981).

[3] *West v. Umialik Ins. Co.*, 8 P.3d 1135, 1138 (Alaska 2000).

[4] *Starry v. Horace Mann Ins. Co.*, 649 P.2d 937, 939 (Alaska 1982).

[5] *Hahn v. Alaska Title Guar. Co.*, 557 P.2d 143, 145 (Alaska 1976).

[6] *Serradell v. Hartford Acc. & Indem. Co.*, 843 P.2d 639, 641 (Alaska 1992).

[7] *State Farm Fire and Cas. Co. v. Bongen*, 925 P.2d 1042, 1047 (Alaska 1996) ("to determine the reasonable expectations of the parties, we look to (1) the language of the disputed policy provisions; (2) the language of other policy provisions; (3) relevant extrinsic evidence; and (4) case law interpreting similar provisions).

[8] *O'Neill Investigations v. Illinois Emp. Ins. of Wausau*, 636 P.2d 1170, 1177 (Alaska 1981).

The Alaska Supreme Court has gone to great length to validate what it perceives to be the insured's reasonable expectations.[9] In *Bering Straits*, the court held that an all-risk policy on a school building covered the extra cost of bringing the structure up to code, despite the presence of a "civil authority" exclusion that stated that the policy did not insure against loss or increased cost occasioned by any civil authority's enforcement of any ordinance or law. Focusing on the term "occasioned," the court held that the exclusion could be construed to mean that it only applied in situations where a civil authority actually caused the loss by enforcing an ordinance, not where the loss was caused by other causes, such as fire.

Even clear and unambiguous policy provisions may not be enforced in view of the strong societal interest in preserving insurance coverage for accident victims. Consequently, the Alaska Supreme Court has held that an insurer must prove actual prejudice before it can enforce a provision requiring prompt notice of loss.[10]

Similarly, the court has held that clauses imposing time limits on the commencement of suit against an insurer, or duties to cooperate, should all be reviewed to determine if their application advances the purpose for which they were included in the policy, and whether they satisfy the consumer's reasonable expectation that coverage will not be defeated on arbitrary procedural grounds.[11]

However, the Alaska Supreme Court has, on occasion, enforced unambiguous policy exclusions even when there is a line of authority from other jurisdictions that would permit the court to deny effect to such an exclusion.[12] In *Bongen*, the court enforced the insurer's "earth movement" exclusion – which the court found to be unambiguous – despite the fact that other jurisdictions including California and Washington have concluded that exclusions which seek to escape the "efficient proximate cause" doctrine violate public policy and are therefore unenforceable. The court aligned itself with the courts of those jurisdictions which have held that an insurer may expressly preclude coverage when damage to an insured's property is caused by both a covered and an excluded risk. Alaska statutory law has been modified to prohibit the denial of coverage in cases of loss caused by multiple causes, where an excluded cause is not the "dominant" cause of the loss.[13]

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[9] *Bering Straits School District v. RLI Insurance Co.*, 873 P.2d 1292 (Alaska 1994).

[10] *Weaver Bros. v. Chappel*, 684 P.2d 123 (Alaska 1984).

[11] *Estes v. Alaska Ins. Guar. Ass'n*, 774 P.2d 1315, 1318 (Alaska 1989).

[12] *State Farm Fire & Cas. Co. v. Bongen*, 925 P.2d 1042 (Alaska 1996).

[13] AS 21.36.212.

In *Nelson v. Progressive Casualty Insurance Company,*[14] Guess and Rudd successfully argued that a named driver exclusion is neither ambiguous nor susceptible to reformation based on the theory of reasonable expectations of the insured. In *Nelson*, the parents excluded their son from their insurance policy to reduce their premium. The son then was allowed to drive the parents' vehicle and had an accident. The injured party sued the parents for negligent entrustment of the vehicle. The court rejected the parent's argument that their automobile liability policy provided coverage for the claim against them for negligent entrustment. The court held that such a claim arose from the operation of the vehicle by the expressly excluded driver and that the policy clearly excluded coverage for any claim arising out of such conduct.

Additionally, the Alaska Supreme Court has affirmed an arbitration panel's reformation of an insurance policy to conform with statutory requirements.[15] The court concluded that the arbitration panel correctly determined that the statutory language of AS 21.89.020(f)(1) – that an automobile policy must provide that all expenses and fees incurred because of arbitration shall be paid as determined by the arbitrator – controlled over the clear policy language that each side shall bear its own expert witness fees.

In *Blood v. Kenneth A. Murray Insurance, Inc.*,[16] Guess and Rudd successfully defended an insurer which had denied coverage for a UM/UIM claim arising out of an accident occurring after termination-of-coverage notices had been mailed to the plaintiff, but returned undeliverable. The court found that the insurance agency had met its statutory duty to inform the insured of policy termination by mailing the notices to his last known address. The court further held that insurance companies do not have a separate, non-delegable duty to inform the insured of terminated coverage.

## Insurance Policy Limits

The question of what constitutes an insurer's "policy limits" can be extremely thorny as "policy limits" in Alaska are seldom, if ever, limited to the limit of liability stated on the Declarations Page of the policy. Not only does Alaska law routinely recognize certain additional items of coverage, but specific policy language has been interpreted to greatly expand the indemnification obligation.

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[14] 162 P.3d 1228 (Alaska 2007).

[15] *Wing v. GEICO Ins. Co.*, 17 P.3d 783, 788 (Alaska 2001).

[16] 151 P.3d 428 (Alaska 2006).

In addition to the stated per person/per accident limits of liability, Rule 82 attorney's fees should be considered an additional item of coverage under the policy.[17] Generally, in determining policy limits, attorney's fees should be calculated pursuant to the "contested" schedule set forth in Civil Rule 82.[18] Several cases have raised the issue of whether an insurer must include Civil Rule 82 attorney fees when calculating policy limits in claims where the claimant is not represented by counsel. The Alaska Supreme Court has previously held that *pro se* litigants are not entitled to an award of Rule 82 attorney fees.[19] This rule does not apply to attorneys who are *pro se* litigants.[20] In the only superior court decision to address the issue of *pro se* Civil Rule 82 attorney fees as a component of policy limits, the court applied *Bernhardt* and rejected the argument.[21]

Insurers are permitted to limit their liability for Civil Rule 82 attorney's fees by clearly disclosing to their insureds both the limitation and the insured's potential liability for attorney's fees if the judgment exceeds the liability limits of the policy.[22] Whether the insurer effectively limited its liability for attorney's fees has been the subject of considerable debate among litigants in recent years.[23] Unfortunately, because policy language varies from carrier to carrier and even from policy to policy issued by the same insurer, a decision regarding the interpretation of one policy's Civil Rule 82 endorsement is not likely to be determinative of another insurer's contractual obligations. In 1996, the Alaska Division of Insurance provided regulatory guidance to insurers in Bulletin B-96-04, a copy of which is appended to Tab 14. Insurance companies which adopt the "safe harbor" language recommended by the Division will have effectively limited their liability for Civil Rule 82 fees.[24]

Automobile liability insurance policies providing the minimum coverage mandated by law ($50,000 per person/$100,000 per accident) obligate the carrier to pay prejudgment interest on the minimum policy limits *in addition* to the stated amount of

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[17] *Schultz v. Travelers Indem. Co.*, 754 P.2d 265 (Alaska 1988).

[18] *Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin*, 828 P.2d 745, 749 n.3 (Alaska 1992).

[19] *Alaska Federal Sav. & Loan Ass'n of Juneau v. Bernhardt*, 794 P.2d 579 (Alaska 1990).

[20] *Sherry v. Sherry*, 622 P.2d 960, 966 (Alaska 1981).

[21] *Maloney v. Hansen, McCartney and Progressive Specialty Ins. Co.*, Case No. 3AN-00-8017 CI (July 18, 2002).

[22] *See* 3 AAC 26.500-550.

[23] *See, e.g., Russell v. Criterion Ins. Co.*, 917 P.2d 664 (Alaska 1996).

[24] *Therchik v. Grant Aviation, Inc.*, 74 P.3d 191 (Opinion No. 5715 - July 25, 2003).

coverage and any Alaska Rule 82 amendatory endorsement.[25] Since most non-standard or high risk automobile insurance policies provide the minimum coverages established by law, they will subject the insurer to increased liability for prejudgment interest.

A careful reading of *Hughes* indicated that prejudgment interest is an additional item of coverage under the policy only when an automobile policy provides the minimum limits required by law. The Alaska Supreme Court has since held that, for policies with limits greater than the statutory minimum, prejudgment interest is not owed by the insurer above and beyond the facial limit.[26]

When the amount of policy limits remains in dispute, an agreement to settle for "policy limits" is not a binding and enforceable settlement.[27] In *Davis*, the Alaska Supreme Court held that the claimant's "offer" to settle for policy limits neglected to include an essential term, namely the dollar amount of the settlement. Absent an offer, which encompassed such essential terms, the parties could not have formed a settlement agreement. The policy at issue provided unlimited Rule 82 attorney's fees in addition to the stated limits of $100,000 and prejudgment interest. Although all parties realized that the claimant's damages exceed policy limits, they had failed to reach a meeting of the minds regarding either the amount of a projected verdict or the mechanism for determining a projected verdict.

Appendices:

3 AAC 26.500-550
AS 21.36.125
AS 21.36.212

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[25] *Hughes v. Harrelson*, 844 P.2d 1106 (Alaska 1993).

[26] *Farquhar v. Alaska National Ins. Co.*, 30 P.3d 577 (Alaska 2001).

[27] *Davis v. Dykman*, 938 P.2d 1002 (Alaska 1997).

**Sec. 21.36.125. Unfair claim settlement practices. [See delayed amendment note.]** (a) A person may not commit any of the following acts or practices:

(1) misrepresent facts or policy provisions relating to coverage of an insurance policy;

(2) fail to acknowledge and act promptly upon communications regarding a claim arising under an insurance policy;

(3) fail to adopt and implement reasonable standards for prompt investigation of claims;

(4) refuse to pay a claim without a reasonable investigation of all of the available information and an explanation of the basis for denial of the claim or for an offer of compromise settlement;

(5) fail to affirm or deny coverage of claims within a reasonable time of the completion of proof-of-loss statements;

(6) fail to attempt in good faith to make prompt and equitable settlement of claims in which liability is reasonably clear;

(7) engage in a pattern or practice of compelling insureds to litigate for recovery of amounts due under insurance policies by offering substantially less than the amounts ultimately recovered in actions brought by those insureds;

(8) compel an insured or third-party claimant in a case in which liability is clear to litigate for recovery of an amount due under an insurance policy by offering an amount that does not have an objectively reasonable basis in law and fact and that has not been documented in the insurer's file;

(9) attempt to make an unreasonably low settlement by reference to printed advertising matter accompanying or included in an application;

(10) attempt to settle a claim on the basis of an application that has been altered without the consent of the insured;

(11) make a claims payment without including a statement of the coverage under which the payment is made;

(12) make known to an insured or third-party claimant a policy of appealing from an arbitration award in favor of an insured or third-party claimant for the purpose of compelling the insured or third-party claimant to accept a settlement or compromise less than the amount awarded in arbitration;

(13) delay investigation or payment of claims by requiring submission of unnecessary or substantially repetitive claims reports and proof-of-loss forms;

(14) fail to promptly settle claims under one portion of a policy for the purpose of influencing settlements under other portions of the policy;

(15) fail to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement; or

(16) offer a form of settlement or pay a judgment in any manner prohibited by AS 21.89.030;

(17) **[Effective July 1, 2001.]** violate a provision contained in AS 21.07.

(b) **[Effective July 1, 2001.]** The provisions of this section do not create or imply a private cause of action for a violation of this section. (§ 6 ch 163 SLA 1976; am §§ 5, 6 ch 97 SLA 2000; am § 3 ch 99 SLA 2000)

**3 AAC 26.410. UNFAIR DISCRIMINATION; BLINDNESS OR PARTIAL BLINDNESS.** (a) The following acts constitute unfair discrimination between individuals of the same class when based solely on blindness or partial blindness:

(1) refusing to insure;

(2) refusing to continue to insure;

(3) limiting the amount, extent, or kind of insurance coverage available; or

(4) charging an individual a different rate for the same coverage.

(b) With respect to all other conditions, including the underlying cause of the blindness or partial blindness, this section may not be interpreted to prohibit the refusal to insure, the limitation of insurance coverage, or a rate differential if that act is based on sound actuarial principles or is related to actual, demonstrated experience or to experience that can be reasonably anticipated.

(c) For the purpose of this section, the term"refusing to insure" includes declining to insure an individual who is blind or partially blind because the insurance policy for which application is made contains a provision that presumes either total, permanent, or partial disability in the event that an insured person becomes blind or partially blind and would result in a valid claim under the policy. However, an insurer may, by policy provision, written rider, or endorsement, exclude from coverage disabilities consisting solely of blindness or partial blindness if either condition is in existence at the time the policy is issued. (Eff. 3/29/90, Register 113)

**Authority:** AS 21.06.090 AS 21.36.090

## ARTICLE 3. COVERAGE FOR ATTORNEY FEES TAXABLE AS COSTS AGAINST AN INSURED ACCORDING TO ALASKA RULE OF CIVIL PROCEDURE 82.



**3 AAC 26.500. MINIMUM STANDARDS.** Minimum acceptable standards for limitation of coverage for attorney fees taxable against an insured under Alaska Rule of Civil Procedure 82 and disclosure are established under 3 AAC 26.510 — 3 AAC 26.550 for all policies written on risks in this state or relative to a subject resident, located or to be performed in this state. (Eff. 7/1/96, Register 138)

**Authority:** AS 21.06.090 AS 21.36.150

**3 AAC 26.510. DUTY TO DEFEND POLICY.** A policy under which an insurer has a right or duty to provide a defense for an insured must provide coverage for the payment of attorney fees taxable as costs against the insured under Alaska Rule of Civil Procedure 82 subject to the following minimum limits:

(1) as an additional amount of coverage, a policy that provides a defense in addition to the limit of liability must provide for payment of attorney fees awarded as costs against an insured under Alaska Rule of Civil Procedure 82 that is not less than the amount calculated by applying the schedule for contested cases in Alaska Rule of Civil Procedure 82(b)(1) to the limit of liability of the applicable coverage;

(2) as an additional amount of coverage, a policy that provides a defense within an applicable limit of liability less than $1,000,000 must provide for payment of attorney fees awarded as costs against an insured under Alaska Rule of Civil Procedure 82 that is not less than the greater of

(A) the amount calculated by applying the schedule for contested cases in Alaska Rule of Civil Procedure 82(b)(1) to the limit of liability of the applicable coverage; or

(B) $10,000;

(3) a policy that provides a defense within an applicable limit of liability of $1,000,000 or more may include within its limit of liability coverage for attorney fees awarded as costs against an insured under Alaska Rule of Civil Procedure 82. (Eff. 7/1/96, Register 138)

**Authority:** AS 21.06.090 AS 21.36.150 AS 21.42.120 AS 21.42.130 AS 21.42.160

**3 AAC 26.520. INDEMNITY POLICY WITH A DEFENSE COST OBLIGATION.** A policy under which an insurer has neither a right nor a duty to provide a defense but agrees to indemnify an insured for the costs of defense must provide coverage to indemnify an insured for the payment of attorney fees taxed as costs against the insured under Alaska Rule of Civil Procedure 82 subject to the following minimum limits:

(1) as an additional amount of coverage, a policy with an applicable limit of liability less than $1,000,000 must provide for payment of attorney fees awarded as costs against an insured under Alaska Rule of Civil Procedure 82 that is not less than the greater of

(A) an amount calculated by applying the schedule for contested cases in Alaska Rule of Civil Procedure 82(b)(1) to the limit of liability of the applicable coverage; or

(B) $10,000;

(2) a policy with an applicable limit of liability of $1,000,000 or more may include within its limit of liability coverage for attorney

fees awarded as costs against an insured under Alaska Rule of Civil Procedure 82. (Eff. 7/1/96, Register 138)

**Authority:** AS 21.06.090 AS 21.42.120 AS 21.42.160
AS 21.36.150 AS 21.42.130

**3 AAC 26.530. POLICY WITH NO DEFENSE COST OBLIGATION.** An insurer is not required to provide coverage for the payment of attorney fees awarded as costs under Alaska Rule of Civil Procedure 82 against an insured in a policy under which an insurer has no right or duty to provide a defense or in a policy under which an insurer has not agreed to indemnify the insured for the costs of defense. Nothing in this section affects an insurer's right to participate in the defense of its insured at its own cost if that right is part of the policy. (Eff. 7/1/96, Register 138)

**Authority:** AS 21.06.090 AS 21.42.120 AS 21.42.160
AS 21.36.150 AS 21.42.130

**3 AAC 26.540. NO ADDITIONAL PREMIUM CHARGE FOR MINIMUM COVERAGE.** An insurer may not charge a separate premium for the minimum coverage required under 3 AAC 26.510 or 3 AAC 26.520. An insurer may charge a separate premium for coverage in excess of the minimum required. An admitted insurer shall secure from the director prior approval for premiums charged as required under AS 21.39.040. (Eff. 7/1/96, Register 138)

**Authority:** AS 21.06.090 AS 21.39.020 AS 21.39.040
AS 21.36.150 AS 21.39.030

**3 AAC 26.550. REQUIRED NOTICE.** (a) A policy issued by an insurer that limits coverage as permitted under 3 AAC 26.510, 3 AAC 26.520, or 3 AAC 26.530 must include a policyholder notice regarding Alaska Rule of Civil Procedure 82.

(b) The notice required by (a) of this section must

(1) conform with the division's

(A) Attorney Fees Coverage Notice A, dated March 29, 1996, and hereby adopted by reference, for a policy with a duty to defend in addition to its limit of liability;

(B) Attorney Fees Coverage Notice B, dated March 29, 1996, and hereby adopted by reference, for a policy with a duty to defend within its limit of liability;

(C) Attorney Fees Coverage Notice C, dated March 29, 1996, and hereby adopted by reference, for an indemnity policy that covers defense costs; or

(D) Attorney Fees Coverage Notice D, dated March 29, 1996, and hereby adopted by reference, for a policy with no defense cost obligations; or

(2) be approved in writing by the director upon a determination that the proposed notice is substantially equivalent to the division's Attorney Fees Coverage Notice A, B, C, or D. (Eff. 7/1/96, Register 138)

**Authority:** AS 21.06.090 AS 21.36.150 AS 21.42.120 AS 21.42.130 AS 21.42.160

**Editor's note:** A copy of the notices required by 3 AAC 26.550 may be obtained from the division of insurance, Department of Community and Economic Development, P.O. Box 110805, Juneau, Alaska 99811-0805.

As of Register 151 (October 1999), the regulations attorney made technical revisions under AS 44.62.125(b)(6) to reflect the name change of the Department of Commerce and Economic Development to the Department of Community and Economic Development made by ch. 58, SLA 1999 and the corresponding title change of the commissioner of commerce and economic development.