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# Illinois Coverage Basics

## Illinois Appellate Court Modifies Anti-Drafter Rule For Cases Involving Sophisticated Insureds

Illinois courts have traditionally held that ambiguities in the language of an insurance policy must be construed against the insurer that drafted the policy. To invoke the "anti-drafter rule," an insured need only show that the language of the insurance policy is fairly susceptible to more than one reasonable interpretation. Thus, the "anti-drafter rule" has become one of the most common obstacles encountered by insurers in coverage litigation in Illinois.

However, a recent decision of the Illinois Appellate Court appears to impose a new and important limitation on the "anti-drafter rule." In Baxter International, Inc. v. American Guarantee & Liability Ins. Co., 2006 WL 3780684 (December 26, 2006), the First District Appellate Court held that the "anti-drafter rule" should not apply where the insured "is a sophisticated entity with bargaining power equal to that of [the insurer]."

The Baxter case involved a dispute under a first party policy that insured Baxter International, Inc. for business interruption and damage to inventory. Baxter International suffered a multi-million dollar loss when Hurricane George damaged one of its Puerto Rican facilities. The insurer, American Guarantee, paid $30.7 million for the insured's inventory that was lost as a result of the storm, including lost profits on the lost inventory. However, the parties disagreed as to whether the insurance payments for damaged inventory should be considered in calculating insured's business interruption loss.

American Guarantee maintained that its payment for lost profits on the damaged inventory should be credited against the calculation of Baxter International's insured business interruption. However, Baxter International maintained that payments the insurer made under the personal property provision of the policy should not reduce the insurer's obligation under the business interruption coverage. The dispute between the insurer and the insured hinged on the meaning of the phrase "actual loss sustained" within the business interruption provisions of the American Guarantee policy.

The Appellate Court acknowledged that under ordinary circumstances the "anti-drafter rule" would apply, resulting in a construction of the policy against American Guarantee and in favor of a finding of coverage. However, after the Appellate Court examined the analytical bases for the "anti-drafter rule" it defined a significant limitation on its application, as follows:

> "The anti-drafter rule is intended to aid the party with less bargaining power during the drafting process and is not appropriate

> when the parties are equally sophisticated . . . We believe the rule is inappropriate because Baxter is a sophisticated entity with bargaining power equal to that of American. [Citation omitted.] So, rather than applying the rule as a default in favor of Baxter, we turn to general principles governing contract interpretation."

The question of what qualifies as a "sophisticated insured" under the Baxter analysis appears to focus upon the insured's relative bargaining power, rather than upon the insured's understanding of insurance policy language and concepts.

Baxter provides insurers with a potentially powerful new response to combat insureds' arguments based on contentions of policy language ambiguity. Importantly, the Baxter decision was not limited in application to new cases; consequently, it should apply to all pending and future coverage disputes involving sophisticated insureds.

While the Appellate Court's ruling appears to establish a significant development in the law governing the "anti-drafter rule" in Illinois, there are some reasons why caution should be exercised by insurers seeking to rely on the Baxter opinion:

- At this writing, the Baxter opinion remains subject to rehearing in the Appellate Court and possible further review in the Illinois Supreme Court.

- The Baxter opinion stands alone in its recognition of the "sophisticated insured" exception to the "anti-drafter rule" under Illinois law. The case law relied upon by the Baxter court for its conclusion was Alberto-Culver Co. v. Aon Corp., 351 Ill.App.3d 123, 812 N.E.2d 369 (1st Dist. 2004), which was a dispute between two insurers. Not surprisingly, the Alberto-Culver court found that the "anti-drafter rule" is not appropriate in disputes between insurers. Baxter is the first decision to expand the Alberto-Culver holding to situations where one of the parties is not an insurer.

- The Appellate Court's ruling in Baxter ignored the Illinois Supreme Court's decision in Outboard Marine Corp. v. Liberty Mutual Ins. Co., 154 Ill.2d 90 (1993) and is facially inconsistent with Outboard Marine. In Outboard Marine, the Illinois Supreme Court specifically found that the relative sophistication of an insured does *not* warrant a departure from the "anti-drafter rule." The Appellate Court in Baxter held to the contrary to Outboard Marine on this point. However, this apparent inconsistency might be explained by noting that both the Illinois Supreme Court in Outboard Marine and the Appellate Court in Baxter agreed that application of the "anti-drafter rule" should consider whether the insured had an opportunity to negotiate the terms of the policy.

Thus, while the impact of the Appellate Court's Baxter opinion remains somewhat uncertain, it may have significant influence on coverage disputes under Illinois law involving sophisticated insureds.

If you have questions or would like to discuss the subject of this article further, please feel free to contact James K. Horstman at Cray Huber Horstman Heil & VanAusdal LLC, 303 West Madison Street, Suite 2200, Chicago IL 60606; 312-332-8494; or jkh@crayhuber.com.

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