No. 11-1099 – *New Hampshire Insurance Company v. RRK, Inc., d/b/a Showboat Marina*

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Ketchum, Chief Justice, with whom Justice McHugh joins, dissenting:

I dissent from the majority's opinion. I believe that the majority opinion has taken a doctrine designed to interpret *ambiguous* insurance policy language where a policy in fact was provided to an insured, and applied it to a situation where the policy language is clear and unambiguous.

The exclusions in the insurance policy at issue were conspicuous, plain and unambiguous. The majority opinion correctly finds:

> 1) "Notably, at the top of the first substantive page of the mailed policy, language was included in boldface and capitol 12-point font excluding coverage of property damaged by 'wear, tear, and/or deterioration.'";
>
> 2) "The parties do not dispute the exclusion at issue was conspicuous in the policy";
>
> 3) "No person with RRK (the plaintiff) read the mailed policy." RRK received the initial policy and, approximately a year later, a new policy. Neither policy was read.

It has always been our law that insureds are bound by a plain and unambiguous exclusion in their policy. "Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." Syllabus, *Keffer v. Prudential Ins. Co.*, 153 W.Va. 813, 172 S.E.2d 714 (1970).

If the policy language is ambiguous, then the policy can be interpreted by applying the reasonable expectations of the insured, that is to say, the objectively reasonable expectations of the insured regarding the ambiguous terms of the insurance contract will be honored. However, when a policy is provided to an insured the doctrine of reasonable expectations is limited to those instances in which the policy language is ambiguous. *National Mutual Ins. Co., v. McMahon*, 177 W.Va. 734, 742, 356 S.E.2d 488, 496 (1987).

I am troubled by the majority's opinion because, although the exclusions in the plaintiff's insurance policy were conspicuous, plain, and unambiguous, we apply the reasonable expectation doctrine. I realize that the plaintiff was faxed a coverage form that did not contain an exclusion that was in the policy received by plaintiff about 30 days later, and that this may have engendered some confusion by the plaintiff. Nonetheless, it is established that the plaintiff did not read the policy, relying instead on the representations in a faxed coverage form which predated the issuance of the policy. The majority opinion says that the doctrine of reasonable expectations may have application to these facts to determine the extent of coverage.

This brings us to the legal issue which the majority opinion does not clearly resolve. The opinion cites as authority two cases that apply the doctrine of reasonable expectation of coverage in circumstances not involving ambiguous insurance policy language, because in each of these cases the insured never received an insurance policy or a certificate of insurance. Does the rationale in these two cases apply here where the plaintiff did receive a policy – actually two policies – with plain and conspicuous exclusions?

The first case is *Romano v. New England Mut. Life Ins. Co.*, 178 W.Va. 523, 362 S.E.2d 334 (1987). The plaintiff purchased a group policy. He did not receive a policy or certificate of insurance. The insurance company denied coverage because of a policy exclusion in the group policy. We refused to apply the policy exclusion because the only coverage information supplied to the insured was in promotional materials which did not alert him to the exclusion.

The second case, *Keller v. First National Bank*, 184 W.Va. 681, 403 S.E.2d 424 (1991), involved credit life insurance sold by a bank. The plaintiff did not receive a certificate of insurance or insurance policy. The bank accepted the plaintiff's premiums. Later, the bank denied coverage stating that the offer to insure was a mistake. We concluded that "procedures which foster a misconception about the insurance to be purchased may be considered with regard to the doctrine of reasonable expectation of insurance." *Costello v. Costello*, 195 W.Va. 349, 352, 465 S.E.2d 620, 623 (1995) (discussing *Keller*, 184 W.Va. at 685, 403 S.E.2d at 428).

The case *sub judice* is different. The plaintiff received two policies containing the conspicuous, plain and unambiguous exclusion. I fear that the majority's opinion has stretched our law of reasonable expectations into areas where it was not designed to go and undermines the long-established principle that "[a] party to a contract has a duty to read the instrument." *Soliva v. Shand, Morahan & Co., Inc.*, 176 W.Va. 430, 345 S.E.2d 33 (1986).

In view of the foregoing concern, I respectfully dissent. I am authorized to state that Justice McHugh joins in this separate opinion.