26 N.Y.3d 649
Court of Appeals of New York.

SELECTIVE INSURANCE COMPANY OF AMERICA et al., Respondents–Appellants,
v.
COUNTY OF RENSSELAER, Appellant–Respondent.

Feb. 11, 2016.

Synopsis

Background: County's liability insurer brought action for money damages against county after county refused to pay insurer more than a single deductible payment toward settlement reached in class action challenging illegal strip-search policy at county jail. The Supreme Court, Rensselaer County, Patrick J. McGrath, J., determined that a separate deductible payment applied to each class member and that all legal fees could be allocated to one policy, and county appealed. The Supreme Court, Appellate Division, 113 A.D.3d 974, 979 N.Y.S.2d 550, affirmed, and leave to appeal was granted.

Holdings: The Court of Appeals, Abdus–Salaam, J., held that:

[1] county's improper strip searches of arrestees prior to their admission into county jail over a four-year period constituted separate occurrences subject to separate deductible payment;

[2] insurer did not act in bad faith by not challenging class certification and reaching a settlement that made county liable for all the damages recovered by the class members; and

[3] attorney's fees generated in defending class action were properly allocated to the named plaintiff only, rather than ratably among the deductibles for each class member.

Affirmed.

West Headnotes (10)

[1] **Insurance**
Rules of Construction

In determining a dispute over insurance coverage, courts first look to the language of the policy.

3 Cases that cite this headnote

[2] **Insurance**
Plain, ordinary or popular sense of language

Unambiguous provisions of an insurance contract must be given their plain and ordinary meaning.

1 Cases that cite this headnote

[3] **Contracts**
Existence of ambiguity

Contracts
Rewriting, remaking, or revising contract

A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion; therefore, if a contract on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity.

3 Cases that cite this headnote

[4] **Insurance**
Ambiguity in general

Insurance
Construction as a whole

Insurance
Construction to be fair

Insurance policies must be construed in a way that affords a fair meaning to all of the language employed by the parties in the

contract and leaves no provision without force and effect; consistent with that view, a reviewing court must then decide whether there is a reasonable basis for a difference of opinion as to the meaning of the policy.

2 Cases that cite this headnote

[5] Insurance
Ambiguity in general
Insurance
Ambiguity, Uncertainty or Conflict

If there is a reasonable basis for a difference of opinion as to the meaning of an insurance policy, the language at issue is deemed to be ambiguous and thus interpreted in favor of the insured.

1 Cases that cite this headnote

[6] Insurance
Deductibles

County's improper strip searches of arrestees prior to their admission into county jail over a four-year period constituted separate occurrences within meaning of its liability policies, making county responsible for a deductible payment for each class member; policies' definition of "occurrence" as "an event" resulting in personal injury "by any person" made it clear that they covered personal injuries to an individual person as a result of a harmful condition, and did not permit the grouping of multiple individuals who were harmed by the same condition.

Cases that cite this headnote

[7] Insurance
Duty to settle within or pay policy limits

To establish a prima facie case of bad faith by liability insurer, the insured must establish that the insurer's conduct constituted a gross disregard of the insured's interests—that is, a deliberate or reckless failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer.

Cases that cite this headnote

[8] Insurance
Insurer's right to settle
Insurance
Insurer's settlement duties in general

County's liability insurer did not act in bad faith by not challenging class certification and reaching a settlement that made county liable for all the damages recovered by the class members in class action brought by arrestees subject to illegal strip searches; policies gave insurer discretion to investigate and settle any claim or suit commenced against county, and insurer hired competent attorneys to defend county and played an active role in settlement negotiations.

Cases that cite this headnote

[9] Insurance
Deductibles

Attorney's fees generated in defending class action brought against insured county were properly allocated to the named plaintiff only, rather than ratably among the deductibles for each class member, where county's liability policies were silent as to how attorney's fees would be allocated in class actions, warranting interpretation in favor of county.

Cases that cite this headnote

[10] Insurance
Ambiguity, Uncertainty or Conflict

Where the language of insurance policy at issue is ambiguous, and both parties' interpretation of the language is reasonable, the policy language should be interpreted in favor of the insured.

2 Cases that cite this headnote

Attorneys and Law Firms

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Galbo & Associates, Buffalo (Richard A. Galbo and Leo C. Kellett of counsel), for respondents-appellants.

OPINION OF THE COURT

ABDUS–SALAAM, J.

*652 **459 We conclude that the underlying class action civil rights suit at issue does not constitute one occurrence under the relevant policies' definition of "occurrence" and that the attorney's fees *653 generated in defending that suit were properly allocated to the named plaintiff. Therefore, we affirm the order of the Appellate Division.

I.

The County of Rensselaer implemented a policy of strip-searching all people who were admitted into its jail, regardless of the type of crime the person was alleged to have committed. At that time, the Second Circuit's precedent suggested that such a policy was unconstitutional (*see Weber v. Dell,* 804 F.2d 796 [1986] [holding that strip-searching an arrestee is unconstitutional when he or she is alleged to have committed a misdemeanor and jail authorities have no reasonable suspicion that the arrestee is concealing weapons or other contraband]). Believing the County's strip-search policy to be unconstitutional, Nathaniel Bruce and other named arrestees commenced a proposed class action **460 ***94 suit in 2002 against the County in federal court. Seeking to defend itself against the suit, the County invoked plaintiff Selective Insurance Company's duty to provide a defense under the policies that the company sold to the County.

In 1999, the County obtained year-long liability insurance coverage from Selective for, among other things, personal injury arising out of the conduct of its law enforcement activities. As relevant here, the County renewed the policy in 2000, 2001, and 2002. Each policy defines personal injury as including "injury ... arising out of one or more of the following offenses: ... [h]umiliation or mental anguish [or] ... [v]iolation of civil rights protected under 42 USC [§] 1981." Where the County is sued based on a covered personal injury, each policy provides that Selective's "obligation ... to pay damages on behalf of the insured applies only to the amount of damages in excess of any deductible amount stated in the [d]eclarations." The deductible was $10,000 per claim under the 1999, 2000, and 2001 policies and $15,000 under the 2002 policy. The deductible applied to all covered damages "sustained by one person or organization as the result of any one 'occurrence.' " Additionally, the County's deductible amount applied to each "occurrence" and "include[d] loss payments and adjustment, investigative and legal fees and costs, whether or not loss payment [wa]s involved." An "occurrence" was defined as follows:

> " 'Occurrence' means an event, including continuous or repeated exposure to substantially the same *654 general harmful conditions, which results in ... 'personal injury' ... by any person or organization and arising out of the insured's law enforcement duties.
>
> "All claims arising out of (a) a riot or insurrection, (b) a civil disturbance resulting in an official proclamation of a state of emergency, (c) a temporary curfew, or (d) martial law are agreed to constitute one 'occurrence'."

Selective agreed to defend the County in the action, subject to the insurance policy limits and the deductible, for personal injury damages that resulted from the suit. Selective retained counsel to represent the County, who purportedly were experts in class action suits. Ultimately, during negotiations, the County and Selective's counsel agreed to settle the case instead of challenging class certification, as Selective's counsel informed the County that there were no viable defenses. Selective's counsel began settlement negotiations with the *Bruce* plaintiffs. The plaintiffs, however, missed several filing deadlines, and eventually their case was dismissed on those procedural grounds. The *Bruce* plaintiffs appealed and their counsel filed a second, similar class action soon thereafter, the *Kahler* action.

Selective's counsel and the County agreed to settle both actions for $1,000 per plaintiff, later determined to be sightly over 800 individuals in total, with additional attorney's fees also being recoverable. Thereafter, the *Bruce* and *Kahler* actions were consolidated and the

federal district court, in accordance with the terms of the negotiated settlement, certified the class, approved a $5,000 payment to the named plaintiff, Nathaniel Bruce, and a $1,000 payment to all other class members. The settlement also set the members' attorney's fees at $442,701.74. Selective abided by the terms of the settlement. The County then refused to pay Selective anything more than a single deductible payment.

In turn, Selective commenced this action for money damages, arguing that each class member was subject to a separate deductible. The County moved to dismiss the action, arguing that the $10,000 deductible **461 ***95 it paid was the only amount due and that even if the court determined that a new deductible applied to each class member, the legal fees generated in that *655 action should be allocated to only one policy. Selective cross-moved for partial summary judgment on its claims, seeking a declaratory judgment that the County owes it a separate deductible for each class member, and that both the class members' and Selective's attorney's fees should be calculated by allocating the settled amount of fees ratably to each occurrence. The County opposed Selective's cross motion, raising its prior arguments and also asserted that Selective exercised bad faith by settling the underlying action without challenging class certification and then contending that because the harm to each class member is a separate occurrence, the County is responsible for a deductible payment for each class member.

Supreme Court determined that a separate deductible payment applied to each class member and that all legal fees should be allocated to one policy (51 Misc.3d 255, 2011 N.Y. Slip Op. 21490, 27 N.Y.S.3d 316 [2011]). The Appellate Division affirmed (*see* 113 A.D.3d 974, 979 N.Y.S.2d 550 [3d Dept.2014]). This Court granted leave to appeal to both parties.

II.

[1] [2] [3] "In determining a dispute over insurance coverage, we first look to the language of the policy" (*Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.,* 98 N.Y.2d 208, 221, 746 N.Y.S.2d 622, 774 N.E.2d 687 [2002], citing *Breed v. Insurance Co. of N. Am.,* 46 N.Y.2d 351, 354, 413 N.Y.S.2d 352, 385 N.E.2d 1280 [1978]). "[U]nambiguous provisions of an insurance contract must be given their plain and ordinary meaning" (*White v. Continental Cas. Co.,* 9 N.Y.3d 264, 267, 848 N.Y.S.2d 603, 878 N.E.2d 1019 [2007]). "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion' " (*Greenfield v. Philles Records,* 98 N.Y.2d 562, 569, 750 N.Y.S.2d 565, 780 N.E.2d 166 [2002]). Therefore, if a contract "on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity" (*Greenfield,* 98 N.Y.2d at 569–570, 750 N.Y.S.2d 565, 780 N.E.2d 166 [citations omitted]).

[4] [5] Insurance policies must be "construe[d] ... in a way that 'affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect' " (*Consolidated Edison,* 98 N.Y.2d at 221–222, 746 N.Y.S.2d 622, 774 N.E.2d 687, quoting *Hooper Assoc. v. AGS Computers,* 74 N.Y.2d 487, 493, 549 N.Y.S.2d 365, 548 N.E.2d 903 [1989]). Consistent with that view, "[a] reviewing court must [then] decide whether ... there is a reasonable basis for a difference *656 of opinion as to the meaning of the policy. If this is the case, the language at issue would be deemed to be ambiguous and thus interpreted in favor of the insured" (*Federal Ins. Co. v. International Bus. Machs. Corp.,* 18 N.Y.3d 642, 646, 942 N.Y.S.2d 432, 965 N.E.2d 934 [2012] [citations and internal quotation marks omitted]; *see White,* 9 N.Y.3d at 267, 848 N.Y.S.2d 603, 878 N.E.2d 1019; *Breed v. Insurance Co. of N. Am.,* 46 N.Y.2d 351, 353, 413 N.Y.S.2d 352, 385 N.E.2d 1280 [1978]).

[6] The plain language of the insurance policies indicates that the improper strip searches of the arrestees over a four-year period constitute separate occurrences under the policies at issue. Contrary to the County's argument, the definition of "occurrence **462 ***96 in the policies is not ambiguous. The policies define "occurrence" as "an event, including continuous or repeated exposure to substantially the same general harmful conditions, which results in ... 'personal injury' ... by any *person* or organization and arising out of the insured's law enforcement duties" (emphasis added). Thus, the language of the insurance policies makes clear that they cover personal injuries to an individual person as a result of a harmful condition. The definition does not permit the grouping of multiple individuals who were

harmed by the same condition, unless that group is an organization, which is clearly not the case here. The harm each experienced was as an individual, and each of the strip searches constitutes a single occurrence. *

Moreover, the policies' definition of "occurrence" specifically describes four large-scale events that may constitute a single occurrence: (1) a riot or insurrection, (2) a civil disturbance resulting in an official proclamation of a state of emergency, (3) a temporary curfew, or (4) martial law. None of these listed circumstances encompasses a civil class action suit based upon a common policy. Thus, under the plain language of the insurance policies, each strip search of the class members is a separate and distinct occurrence subject to a single deductible payment.

[7] **[8]** The County also asserts that Selective exhibited bad faith by not challenging the class certification in the underlying action and reaching a settlement that made the County liable for all the damages recovered by the class members. This Court has ***657** stated that "an insurer may be held liable for the breach of its duty of 'good faith' in defending and settling claims over which it exercises exclusive control on behalf of its insured" (*Pavia v. State Farm Mut. Auto. Ins. Co.,* 82 N.Y.2d 445, 452, 605 N.Y.S.2d 208, 626 N.E.2d 24 [1993]).

> "[T]o establish a prima facie case of bad faith, the [insured] must establish that the insurer's conduct constituted a 'gross disregard' of the insured's interests —that is, a deliberate or reckless failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer" (*id.* at 453, 605 N.Y.S.2d 208, 626 N.E.2d 24).

Under the terms of the policies, Selective had discretion to investigate and settle any claim or suit commenced against the County. The County, however, has failed to meet the high burden of demonstrating that Selective acted in bad faith in negotiating the underlying settlement here. There is no indication from the record that Selective's conduct constituted a gross disregard of the County's interests. Selective hired competent attorneys to defend the County in the underlying action and played an active role in the negotiation. Thus, the County's bad faith argument lacks merit.

[9] With respect to attorney's fees, Selective argues that the courts below erred in allocating the attorney's fees to the named plaintiff only, rather than allocating the fees ratably amongst the class, while the County contends that the lower courts' rulings were correct. We agree with the County.

*****97** ****463** **[10]** Based on the policies' definition of occurrence, the injuries sustained by the class members do not constitute one occurrence but multiple occurrences. Selective thus asserts that as a result of these multiple occurrences the attorney's fees should be allocated ratably among the deductibles. Equally reasonable is the County's assertion that given that there was one defense team for all class members, the fee should be attributed only to the named plaintiff, Bruce. It is undisputed that the policies are silent as to how attorney's fees would be allocated in class actions and therefore ambiguous on this point. Where the language of the policy at issue is ambiguous, and both parties' interpretation of the language is reasonable, the policy language should be interpreted in favor of the insured (*see Federal Ins. Co.,* 18 N.Y.3d at 646, 942 N.Y.S.2d 432, 965 N.E.2d 934; *see also Breed,* 46 N.Y.2d at 353, 413 N.Y.S.2d 352, 385 N.E.2d 1280). Here the policies' silence on how to allocate attorney's fees in a class action creates ambiguity as both Selective's and ***658** the County's contentions are reasonable. Consequently, the courts below correctly interpreted the policies in favor of the insured—the County—and the attorney's fees were properly charged to the named plaintiff, Bruce.

III.

We have considered the parties' remaining arguments and conclude that they raise no issue warranting modification of the Appellate Division order. Accordingly, the order of that Court should be affirmed, without costs.

Judges PIGOTT, RIVERA, STEIN and FAHEY concur; Chief Judge DiFIORE and Judge GARCIA taking no part.
Order affirmed, without costs.

All Citations

26 N.Y.3d 649, 47 N.E.3d 458, 27 N.Y.S.3d 92, 2016 N.Y. Slip Op. 01001

Footnotes

* While this Court has rejected the one-accident/occurrence-per-person approach in the absence of policy language dictating such an approach (*see Appalachian Ins. Co. v. General Elec. Co.,* 8 N.Y.3d 162, 173, 831 N.Y.S.2d 742, 863 N.E.2d 994 [2007]), we have also noted that the parties to an insurance contract remain free to define "occurrence" based on that approach if they so wish (*see id.* at 173, 831 N.Y.S.2d 742, 863 N.E.2d 994).