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"PLAIN LANGUAGE" POLICY WORDING FRUSTRATES COVERAGE DENIAL

Richards Buell Sutton Insurance Law Newsletter

By RBS Lawyers

While the modern day movement to "plain language" contracts has been helpful in levelling the playing field between commercially sophisticated and unsophisticated parties its usage does allow for ambiguity. The effect of plain language ambiguity was recently felt in the British Columbia Supreme Court case of *Royal & Sun Alliance Insurance Company of Canada v. Araujo* 2012 BCSC 1203 where an insurer's application to uphold its coverage denial in the context of a personal lines policy exclusion was dismissed.

The Facts

Fifteen year old Matthew was sleeping on a sofa in his grandparents' house when the house was fire bombed by third party arsonists. After suffering serious burns Matthew commenced an action in negligence and occupiers liability against his grandparents, father and uncle for failing to keep him safe given another arson incident that occurred the previous day at the house. At the time of the incident the defendant relatives lived together in the house while Matthew primarily resided with his mother at her townhouse. Matthew stayed with his father at the house two or three nights per month.

The defendants sought coverage under the grandparents' homeowners insurance policy. The policy provided Personal Liability Protection subject to the following exclusion clause:

We do not insure claims made against you arising from...

5. bodily injury to you or to any person residing in your household other than a residence employee;

The words "you" and "your" were given the following definition in the policy:

You or Your means the person(s) named as Insured on the Coverage Summary page and, while living in the same household:

- *his or her spouse;*
- *the relatives of either;*

- *any person under 21 in their care.*

The insured denied the defendants coverage and sought a declaration as to the propriety of its denial.

The Ruling

The court found there are two parts to the exclusion clause: the exclusion of claims for bodily injury to "you" and the exclusion of claims arising from bodily injury to "any person residing in your household".

The first issue canvassed in respect of the exclusion clause was whether Matthew fell within the definition of "you" and "your". To avoid an absurdity created by the repetitive use of "you" in the exclusion clause (ex. a claim against the grandparents for bodily injury to the grandparents) the insurer argued that "you" in the exclusion clause must be given different meanings depending on the context (ex. a claim against the grandparents for bodily injury to Matthew). The court accepted the need to give context to the interpretation of the exclusion clause but, while appreciating the objective of "plain language contracts", found the very definition of "you" itself to be inherently ambiguous because it brings in all of the named and unnamed insureds. As is usual the ambiguity in the exclusion clause was resolved in favour of the insured.

Irrespective of how the court interpreted the terms "you" and "your" the insurer, to fit within both the definition and the second part of the exclusion, needed to establish that Matthew was "residing" in his grandparents' household (all parties agreed the terms "living in the same household" and "residing in your household" were synonymous) and that he was part of the "household". Given the familial relationships involved the court had no difficulty in concluding that when Matthew stayed at the house he was part of the "household". He was distinguished from a renter or house-sitter in this regard. Accordingly, the key question became whether Matthew was "residing" in the household.

The court accepted it is possible for a person to have more than one residence for insurance purposes and referenced several cases where children of separated parents were found to have dual residences. The court however found that this case was different for two reasons. Firstly, as this case involved the interpretation of an exclusion clause, the court needed to narrowly construe the term "residing". Secondly, in all the cases where dual residency was found, both parents had set up their own separate households of which the child was a part. Here Matthew was found not to be "residing" at the house primarily because he did not maintain a physical presence in the house. He did not have his own exclusive room, he did not have the subjective intent to reside at the house since he considered his mother's townhouse to be his home and his access to the house was dependent upon those who lived there as he had no key.

The determination that Matthew was not residing or living in the household, in addition to negating the application of the second part of the exclusion, lead to the finding that he did not fit within the definition of "you" irrespective of the inherent ambiguity in the definition.

Practical Consideration for Insurers

We are again reminded that ambiguity in an insurance policy will work in favour of insureds. In this case, the use of pronouns in policy definitions and language lead to the application of the *contra proferentum* doctrine. Even though the objective of using plain language is primarily for the benefit insureds courts will resolve any ambiguity arising from that language in their favour.

Insurers and claims examiners are well advised to note the use of pronouns in their policies, particularly in the definitions contained therein, when making coverage determinations. Such policy terms may be inherently ambiguous and thus favour coverage. Consideration may be had to greater usage of defined terms such as "Named Insured" and "Unnamed Insured" in policy language.

Additionally, insurers may consider including specific language in their policies as to what the term "residing" means. While here the court agreed it was possible that a person could have dual residency for insurance purposes it would have been helpful had the policy contained a specific definition as to what that term means.