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HOW EFFECTIVE IS AN EFFICACY EXCLUSION?

A Canadian court has for the first time considered an “efficacy exclusion” in *West Creek Farms Ltd. v. Lloyd’s Underwriters*, 2016 BCSC 48. Based on the court’s reasoning it appears that this exclusion, like similar exclusions considered in the United Kingdom and Australia, will have rare application.

The Facts

West Creek Farms Ltd. (“West Creek”) produces and sells custom nursery and greenhouse soil mixes, landscape soils and bagged potting soil to horticultural and landscape industries in British Columbia. One of the products it produces and sells is press block soil, a mix of soils pressed into a small block. The press block is used during the early growth stages of plants including flowers. Small plant cuttings are placed into the press blocks which are in turn incorporated into larger trays or beds of growing soil. The plant cuttings initially root in the press block then expand to take hold in the growing soil eventually producing merchantable flowers or other plants.

West Creek produced and sold a press block mix to a commercial producer of chrysanthemums. This producer commenced suit alleging that the press block mix was, amongst other things, not fit for the purpose of growing chrysanthemums because of the mix’s high sodium content. This high sodium content was alleged to have caused delay and disruption to the usual growth cycle of the plaintiff’s chrysanthemums which rendered them unmerchantable or of inferior quality. The plaintiff’s claims were based on breach of contract, negligence and breach of warranties of fitness for purpose and merchantable quality pursuant to the *BC Sales of Goods Act*.

West Creek sought a defence and indemnity from its insurer which denied coverage on the basis of an efficacy exclusion which read:

EFFICACY EXCLUSION - LOSS OF YIELD

Endorsement attaching to and forming part of Policy Number NEWL0326

Notwithstanding anything contained herein this Policy shall not apply to liability arising out of the failure of any **Product** manufactured, sold supplied or distributed by the Insured to:

1. promote growth or enhance the yield of any crop/animal or other agricultural product



2. control or eradicate any weed disease insect or pest
3. germinate, pollinate or reach expected yield
4. perform its intended function

Notwithstanding anything contained herein the Policy shall not apply to liability arising out of the failure of any product manufactured, sold supplied or distributed by the **Insured** which results in a loss of prize winnings, earnings, awards, competition fees or stud values or stud fees or the like

(the "Exclusion")

It is notable that the subject policy contained occurrence based coverage for property damage as well as products liability coverage for property damage on a "claims made and notified basis".

West Creek petitioned the court for a ruling on the insurer's duty to defend the plaintiff's claim.

The Ruling

Though the insurer originally denied coverage on the basis of the Exclusion, at the hearing of West Creek's petition it argued that the claims in the underlying action did not fit within the policy definition of "property damage" and therefore did not fit within the grant of coverage provided by the two insuring agreements. This resulted in the court having to undertake a characterization of the plaintiff's claims in the underlying action. In this regard, the court stated at paragraph 15:

The correct characterization of [the plaintiff's] claim, certainly a reasonable one, is that the Soil caused harm to [its] flowers, as opposed merely to not enhancing [them]. The problem was not lack of efficacy, or not only lack of efficacy, the problem was also damage. Someone may buy skin cream because of its advertised capacity to remove wrinkles. If using the cream simply fails to remove the wrinkles, the efficacy of the cream is questionable. However, if the cream not only fails to remove wrinkles, but also harms the user, by burning the skin, for example, that is a different matter. West Creek's Soil not only failed to enhance flower growth, it also, according to my view of the pleadings, harmed the plants. It not only lacked efficacy, it also caused harm. The flowers would have been better off if the Soil had not been used. That, at least, is a reasonable interpretation of the [plaintiff's] claim.

Turning to the Exclusion the court found it to be patently ambiguous for its lack of punctuation and connective conjunction. Additionally, the court went on to find that providing coverage on the facts of the case against West Creek would have been a realistic result within the contemplation of the parties when the policy was concluded.



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Practical Considerations for Insurers, Brokers and Claims Examiners

In *West Creek* the court concluded that the plaintiff's claim was not one for the failure of the insured's product to perform its intended function but rather a claim for property damage caused by the insured's product. In determining the application of an efficacy exclusion one is well advised to consider comments from the United Kingdom wherein that court noted it was artificial to describe the function or purpose of a product as "not to cause injury"; to hold such would emasculate much of the cover.

Based on the various courts' rulings it appears that efficacy exclusions, even if unambiguous, will not operate where claims of property damage are alleged, concurrently with claims the product did not perform as promised, or on their own.

