



Posted on: September 4, 2019

INCLUDE MANDATORY POLICY LANGUAGE OR FACE SEVERE CONSEQUENCES

By: RBS

The British Columbia Supreme Court in *PCL Constructors Westcoast Inc. v. Royal & Sun Alliance Insurance Company of Canada*, 2019 BCSC 822, addressed whether an insured's claim to coverage was subject to a \$250,000 deductible. Although the insured builder had agreed to the deductible in its contract with the property owner and the subject insurance policy referenced the same deductible, the insurer did not include in the policy wording required by section 31 of the British Columbia *Insurance Act*. Based on this omission the court concluded that the claim was not subject to a deductible.

The Facts

In 2012, PCL entered into a contract with the City of Victoria to build a bridge (the "Construction Contract"). The Construction Contract included terms that the City would obtain builder's risk insurance that would require a \$250,000 deductible and that PCL would be responsible for payment of the deductible in the event of a claim on the policy.

The City obtained the builder's risk insurance policy (the "Policy") but the Policy omitted a statement on the first page that "This policy contains a clause which may limit the amount payable" as required by s. 31 of the *Insurance Act* (the "Mandated Alert")

During construction in 2015, water damage occurred to the concrete foundations of the new bridge. PCL provided notice of the occurrence and requested coverage for its loss of about \$544,000.

Following a court determination that PCL was an insured under the Policy the insurer adjusted the claim at \$520,000 and reduced the amount payable to PCL to \$270,000 based on PCL's obligation to pay the \$250,000 deductible. PCL challenged the insurer's decision to withhold payment of the deductible amount from the claim.

The Ruling

PCL argued that its claim was not subject to a deductible because the Policy was missing the Mandated Alert. The insurer countered that it would be inequitable to refuse to enforce the deductible given that the





Construction Contract included a term requiring PCL to pay it. PCL knew of and accepted this Construction Contract term and the Policy, with PCL's knowledge, was consistent with the Construction Contract. The insurer argued that acceding to PCL's position on the missing Mandated Alert would give it a windfall at the insurer's expense.

In considering the effect of the missing Mandated Alert the court examined cases dating back to 1977 that dealt with similar legislative provisions in both British Columbia and Ontario. The court concluded that provisions such as section 31 are to be "strictly construed against the insurer whether or not" the insured was aware of the deductible. If the Mandated Alert does not appear on the front page of the policy the deductible is not in effect. Underlying this conclusion is a determination that this statutory requirement is for the benefit of the insured.

The court went on to consider the insurer's equitable arguments and rejected each of them. It concluded the law is settled that section 31 is to be strictly construed even when an insured is aware of a deductible and agreed to it and that equitable remedies are not available against statutory duties. The latter conclusion precluded the insurer's attempt to rectify its "drafting" or "clerical" error.

We pause to note that although the court does not make any findings regarding the insurer's conduct in response to PCL's claim, there is a flavour of disapproval. This comes through in the otherwise irrelevant review of the insurer's ill-conceived initial denial of coverage, its subsequent failure to take a position on PCL's coverage hearing and its subsequent delay in adjusting PCL's claim.

Practical Considerations for Insurers

This case stands as a stark reminder that compliance with technical legislative requirements in the context of insurance policy contents is absolutely imperative. These technical requirements extend to exact wording, location of that wording and in some cases the colour of ink with which that wording must be impressed. Failure to comply with any single of these technical requirements can render insurance policy provisions that limit the amount payable under a policy meaningless not only with respect to deductibles, but, in British Columbia, co-insurance or similar clauses and conditional or unconditional specified percentage of value clauses.

We strongly recommend that insurers review their policy forms in order to ensure strict compliance with the legislative provisions in the various jurisdictions in which they provide insurance.

At a more general level, this case highlights the importance of complying with statutory requirements in policy drafting. Even if an insured has otherwise agreed to a term or there are other documents proving that





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the insured intended a term to be included, if the policy does not meet the statutory requirements, that term will not be enforceable.

Finally, this case demonstrates the potential effects of taking steps which a court considers to be objectionable such as unfounded initial coverage denials, delays in adjusting claims, and the taking of inconsistent legal positions. Even if these steps do not rise to the level of punitive cost awards or claims in bad faith they can lead to court criticism or worse.

This decision has not been appealed.



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