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NEW BOUNDARIES FOR THE HOUSEHOLD RESIDENT EXCLUSION IN BRITISH COLUMBIA?

Insurers are undoubtedly aware of the need to look at the policy as a whole when interpreting an insurance contract. A recent case from the British Columbia Supreme Court, *Gill v. Ivanhoe Cambridge I Inc./Ivanhoe Cambridge I Inc.,* 2016 BCSC 252, has underscored the importance of this guiding tenet of contractual interpretation and should serve as a reminder to insurers to thoroughly consider the language of the whole of the policy when making decisions on coverage.

THE FACTS

In *Gill*, at issue was an exclusion clause in a homeowner's policy, often referred to as the household resident exclusion and referred to by the court as the "Family Exclusion". In the policy at issue, the Family Exclusion specifically barred claims "arising from… bodily injury to the Insured or any person residing in the Insured's household other than a Residence Employee."

The insured, Mr. Gill, had commenced an action on behalf of his 2-year old son as a result of injuries the boy sustained falling through a missing glass partition on the second floor in a shopping mall. In the action, three of the defendants filed third party claims against Mr. Gill alleging that he was negligent for failing to properly supervise his son. Mr. Gill reported the third party claims to his insurer and the insurer denied coverage relying on the Family Exclusion. Mr. Gill claimed for a declaration of coverage and the insurer applied to have that claim dismissed.

At the hearing it was agreed by all that Mr. Gill and his son would be entitled to personal liability coverage under the policy unless the Family Exclusion applied. The insurer argued that the language of the Family Exclusion was clear and unambiguous and ought to apply to claims by insureds directly and indirectly against one another as in this case. As there was no BC jurisprudence directly on point, the insurer relied heavily on a decision from the Ontario Court of Appeal, *Quick v. MacKenzie* (1997), 33 O.R. (3d) 362 (C.A.).

In *Quick*, the Court upheld an insurer's denial of coverage under a similarly worded exclusion clause. In that case, the infant plaintiff was attacked by a dog and brought a suit against the dog-owner. The dog-owner claimed against the plaintiff's parents for failing to supervise the infant and the parents sought coverage under their homeowner's policy. Deciding in favour of the insurer, the Court in *Quick* found that the

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exclusion was unambiguous, noting that the language of the clause was "precisely focused" and the claim by the dog-owner against the parents could be considered one "arising from" bodily injury to their daughter. Notably, the decision in *Quick* was recently reaffirmed in *Allstate Insurance Company of Canada v. Aftab,* 2015 ONCA 349. In both *Quick* and *Aftab*, only limited portions of the coverage and exclusion provisions in the policies in question were referred to in the reported decisions.

THE RULING

Despite the strength and recency of *Quick* and *Aftab* respectively, the Court in *Gill* refused to follow these decisions. Rather, the Court distinguished the Ontario precedents by focusing on the wording of other exclusion clauses in the policy at issue. In *Gill,* the phrase "arising from" was found in various other exclusion clauses in the policy, but the language used in those other clauses specifically demonstrated an intention to exclude coverage for both direct and indirect claims. For example, there was a clause in the policy which excluded loss or damage arising from drug activity, "whether or not the insured has knowledge of such activity." Further, the clauses in the policy excluding claims arising from terrorism and mould both contained language that left no doubt that the exclusions applied to both direct and indirect claims. In the Court's view, the absence of similar language in the Family Exclusion rendered that clause ambiguous.

To resolve the ambiguity the Court examined the historic purpose of the Family Exclusion in order to find an interpretation consistent with the reasonable expectation of the parties. The Court noted that the jurisprudence made clear the purpose of the Family Exclusion was to prevent collusive claims by residents of the same household against one another. In other words, the purpose of the exclusion was to preclude coverage for direct claims by household residents as opposed to indirect claims such as those in *Gill*. As there was no allegation of a collusive claim being raised by Mr. Gill or his son the Court found that reading the Family Exclusion as the insurer proposed would strip Mr. Gill of coverage the policy was intended to provide.

PRACTICAL CONSIDERATIONS FOR INSURERS

Gill is of practical import to insurers for a number of reasons. Firstly, the case demonstrates both the need to look to the language of the policy as a whole to determine if ambiguity exists as well as the utility of considering the purpose or object of an exclusion clause to resolve that ambiguity. Secondly, the decision serves as a caution to insurers to be weary of relying too heavily on seemingly persuasive judicial authority when making coverage decisions. A careful consideration of the wording of the policy as a whole may negate or at least temper reliance on judicial authority that otherwise seems to be on all fours with a position. Finally, as a result of *Gill*, insurers should reconsider the wording of the household resident

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exclusion in their homeowner policies. Insurers that want to exclude claims made by third parties arising from injuries to household residents should add the following wording suggested by the Court to the end of the exclusion: "... *whether such claims are brought by the insured, a person residing in the same household, or any other person*."

It is notable that the insurer has appealed the decision so it is likely the BC Court of Appeal will have the final say on whether the aforementioned interpretation is correct.

Detailing the Policy by Ryan Shaw published in The Lawyers Weekly

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