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THE RELENTLESS PURSUIT OF AMBIGUITY

Richards Buell Sutton Insurance Law Newsletter

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Insurers and their counsel are well aware of the risk that an ambiguous provision in an insurance policy will be construed *contra proferentum* if the ambiguity cannot be resolved through application of the general principles of insurance policy interpretation set out in the Supreme Court of Canada's decision in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33. In the recent Supreme Court of British Columbia decision in *The Owners, Strata Plan KAS3058 and 0739152 B.C. Ltd. v. St. Paul Fire and Marine Insurance Company dba Travellers*, 2013 BCSC 2197, the court upheld an insurer's denial of coverage for a loss of revenue claim for interruption by a civil authority, and found that the insureds were "simply searching for or creating ambiguity" where none existed.

The plaintiff, The Owners, Strata Plan KAS3058, is a strata corporation whose members are owners of strata lots and common property of a condominium complex known as Cove Lakeside Resort located in the Municipal District of West Kelowna, British Columbia. Certain units at Cove Lakeside Resort are available for rent through a rental pool, operated by the plaintiff, 0739152 B.C. Ltd. The plaintiffs were named insureds under an insurance policy issued by the defendant which provided property insurance for Cove Lakeside Resort.

On July 18, 2009, the Municipal District of West Kelowna issued an evacuation order for the area surrounding Cove Lakeside Resort as a result of wildfires in the area. The evacuation order was lifted on July 21, 2009 after the wildfires abated.

As a result of a significant number of cancelled rental bookings in the weeks after the evacuation order was lifted, the plaintiffs presented the insurer with a proof of loss in the amount of $463,287.50 for loss of rental income between July 19 and August 31, 2009. Although the defendant insurer agreed that the policy afforded coverage for the plaintiffs' loss of rental income during the time the evacuation order was in effect, it denied coverage for the plaintiffs' claims for the period after evacuation order was lifted.

The coverage for loss of revenue for interruption by a civil authority in the insurance policy provided as follows:

EXTENSION OF COVERAGE

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Interruption by Civil Authority

We will pay your actual loss of revenue when a civil authority denies access to an insured location as a direct result of physical loss or damage by a covered cause of loss to property not at an insured location. We will pay for loss of revenue for up to four consecutive weeks while access to an insured location is denied.

Arguing that the civil authority clause was ambiguous, the plaintiffs submitted that each of the sentences in the clause had a different meaning and provided a separate grant of coverage. The plaintiffs argued that the first sentence established an entitlement to coverage that started when a civil authority denied access, but did not restrict the covered losses to the period during which access was denied. According to the plaintiffs, when read as a whole, the coverage provided by the clause included reimbursement for revenue losses suffered while access was denied and due to the impact of denial of access, including consequential losses after the evacuation order was lifted.

As there appeared to be no Canadian authorities interpreting similar "interruptive by civil authority clauses", the defendant insurer relied upon American jurisdiction that considered the scope of coverage available under such clauses. The court noted that British Columbia and other Canadian jurisdictions have recognized US cases as persuasive authority in matter of insurance law and policy interpretation. Relying on the American cases and the language of the clause itself, the defendant insurer argued that the meaning of the clause was unambiguous. According to the insurer, when the clause was read as a whole, it was plain that the second sentence was directly related to and modified the first, and clearly contemplated the requirement that there be a denial of access for coverage to continue, and that such coverage was limited to a maximum of four weeks.

The court accepted the insurer's interpretation and found that the plaintiffs' proposed interpretation of the second sentence of the clause rendered most of it, including the very clear four week claims limit, meaningless. Noting that the drafters had attempted to use "plain language" throughout the policy, the court found that when the ordinary language of the clause was considered as a whole and in its context, coverage was only provided for loss of revenue that occurred when a civil authority denied access, and while it continued to do so, for a maximum period of four consecutive weeks.

Although the applicability of the court's decision in *The Owners, Strata Plan KAS3058*, is somewhat limited by the specific language of the insurance policy under consideration, insurers should take comfort in the court's simultaneous recognition of the insurance industry's efforts to use "plain language" and its refusal to find ambiguity where none exists.

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