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USING THE WRONG POLICY WORDING TO DENY COVERAGE DOES NOT EXTEND THE LIMITATION PERIOD

By: RBS

A recent ruling from the Alberta Queen's Bench confirmed a lower court's decision that an inadvertent mistake by an insurer in using the incorrect policy wording to deny coverage to its insured did not extend the running of the limitation period.

In *Condominium Corporation No 0427067 v Aviva Canada Inc*, 2021 ABQB 43 a condominium corporation commenced an action against six subscription policy insurers (the "Insurers") after the Insurers denied coverage for its \$4.4 million claim for water damage causing construction deficiencies. The plaintiff unsuccessfully argued that the Insurers and their adjuster, unusually acting for both the plaintiff and the Insurers, had engaged in fraudulent concealment after the plaintiff realized years later that the denial letter issued in 2012 had been based on the wrong policy wording.

The Facts

On June 29, 2011, the plaintiff discovered water damage to the condominium building and on December 8, 2011, its property manager asked an adjuster (the "Adjuster") employed by a large adjusting firm to assess the damage and whether it was covered by the subject property insurance policy (the "Policy") coverage.

At the time of the Adjuster's retainer by the plaintiff, the Adjuster's firm had already been contracted to provide adjusting services to one or more of the Insurers. Further to the second retainer the Adjuster advised the Insurers that coverage denial was possible and the next day, December 16, 2011, the Insurers authorized the denial on the basis that the damage being claimed was not the result of an insured peril.

In late January 2012, one of the subscribing insurers, contacted the Adjuster and requested a copy of the relevant policy wording. This Insurer raised the possibility that there may be coverage and that the lead Insurer may want to re-examine its position on denial.

The Adjuster responded by providing the subscribing Insurer with a copy of the Policy wording that became effective July 1, 2011. This wording was provided to the Adjuster by the plaintiff's own insurance broker. This wording was subsequent to a renewal of the Policy which was in effect at the time of the loss in June 2011. The subscribing Insurer had some concerns about the wording provided by the Adjuster as it was





different than the wording it had, however the subscriber decided to follow the lead subscriber's determination of coverage and await the Adjuster's final report.

A formal denial letter was issued by the Adjuster on March 23, 2012. The letter cited wording, exclusions, and a different policy number than the Policy in place as of the June 29, 2011 date of loss.

A few years later, in the context of a concurrent construction deficiency action, the plaintiff realized that that the denial letter of March 2012 was based on the wrong policy wording. The plaintiff filed a Statement of Claim in 2017 to challenge the denial of coverage.

The coverage action was dismissed on a summary basis in September 2019 as being statute-barred. The plaintiff appealed on the grounds that the references to the wrong policy in the context of denial along with the Adjuster's conflicted position and failure to disclose the one subscribing Insurer's concern about the applicable Policy language amounted to a fraudulent concealment that would postpone the commencement of the limitation period.

The Ruling

In rejecting the plaintiff's arguments the court found that the evidence did not categorically confirm that the plaintiff was unaware that the Adjuster was also acting for the Insurers. On the contrary, the facts supported the conclusion that the plaintiff, effectively through its property manager agent, was aware that the Adjuster was acting on behalf of both itself and the various Insurers. The court also noted that the plaintiff was being assisted by sophisticated parties all of whom were well versed in the insurance and claims industry.

On the issue of whether the Insurers and Adjuster's actions were unconscionable, the court held that when viewed in context of the entirety of the circumstances, the Adjuster's failure to disclose the lone subscribing Insurer's concerns about Policy wording was not an unconscionable act. This was notwithstanding the special relationship between the Adjuster and the plaintiff as well as the plaintiff vis-à-vis the Insurers.

Finally, the court noted that in order to suspend the limitation period on the basis of fraudulent concealment, an insured must prove it exercised reasonable or due diligence to discover the purported fraud. The court found that in the circumstances, it was reasonable to expect that the plaintiff and its team of advisors including its property manager, broker and counsel would have, through the exercise of due diligence, detected in a timely manner the references to the incorrect Policy wordings used by Insurers in their denial.

Practical Considerations for Insurance Professionals





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0427 v Aviva demonstrates for all parties involved in assessing coverage the importance of both identifying the relevant date or dates of loss and the correct or applicable policy declarations, wordings, and endorsements for such date(s).

This is not only true for an insured who may lose the opportunity to commence an action against an insurer, notwithstanding that the denial was based on the insurer's mistake, but also for insurance brokers and legal counsel representing the insured. Both courts based their decisions in part on the fact that the plaintiff had access to legal counsel, an insurance broker, and a property management company to assist in advancing its coverage claim. A failure on the part of insurance professionals to conduct due diligence on behalf of their clients could open the door for negligence claims.

Finally, while the court found the plaintiff was likely aware of the Adjuster's dual role even though he did not explicitly advise of this fact, adjusters are well advised to clearly disclose any dual agency roles at the onset or altogether avoid such potential conflicts. This can avoid future allegations of bias or "abuse of a confidential position, some intentional imposition, or some deliberate concealment of fact".



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