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WHEN DOES AN INSURANCE POLICY NOT MEAN WHAT IT SAYS?

Richards Buell Sutton's Insurance Law Newsletter

By: H. Scott MacDonald

In *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada,* [2010] 2 SCR 245, the Supreme Court of Canada taught us to focus on policy wording, when reviewing coverage, but recent cases have reminded us that the answer will not always be found in the insurance policy. For a number of years, Canadian courts have been using the doctrine of reasonable expectations to interpret ambiguous policy wording. If the wording of an insurance policy is ambiguous, then the doctrine of reasonable expectations can be used to interpret the policy in a manner consistent with the reasonable expectations of the parties.

In cases where there is no ambiguity, however, the policy has to be interpreted according to its clear meaning unless doing so would lead to a nullification of all coverage. This rule of interpretation is described as the doctrine of nullification of coverage. Two recent cases have used that rule to interpret insurance policies and find coverage in a manner which appears to contradict clear wording of exclusion clauses.

The Doctrine of Reasonable Expectations

The Supreme Court of Canada has made clear that the rule of reasonable expectations can be used when policy wording is ambiguous: *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 SCR 252. Both the intent of the policy holder and the insurer must be considered. Proof of the reasonable expectations of the parties must be presented. For that purpose, evidence may be called from brokers, risk managers, underwriters or others to prove the intent of the parties at the time the policy was issued. The court then weighs that evidence to determine the actual expectation of the parties at the time the policy was issued, in an effort to resolve the ambiguity.

Nullification of Coverage

In cases, however, where there is no ambiguity in the policy wording, Canadian cases are resorting to the doctrine of nullification of coverage, to interpret insurance policies in a manner which finds coverage, even if it contradicts the clear wording of an exclusion clause. One such recent example is found in *Cabell v. Personal Insurance Co.*, 2011 ONCA 105. In that case the Ontario Court of Appeal was interpreting property

700 - 401 W GEORGIA ST.
VANCOUVER, BC V6B 5A1
CANADA
TELEPHONE 604 682 3664
FAX 604 688 3830
RBS.CA

coverage in a homeowners insurance policy to determine whether it provided coverage for damage sustained to an outdoor, in-ground swimming pool. A build up of ground water had created pressure which caused the pool to lift up out of the ground and, as a result, the pool cracked. The common exclusions to the property coverage excluded risks arising from "settling, expansion, contraction, moving, bulging, buckling or cracking of any insured property". The basic property coverage under this homeowners' policy did not cover swimming pools so the insured bought an endorsement to include the pool as covered property. The endorsement stipulated that "all other terms, conditions and exclusions of this policy remain unchanged".

Applying the common exclusion in the policy dealing with "cracking of any insured property", the Ontario Superior Court of Justice denied coverage for the property loss. On appeal, however, the Ontario Court of Appeal reversed that decision. Even though there was no ambiguity in the policy wording, the Ontario Court of Appeal found that the insurer's interpretation would virtually nullify the coverage. If the court concludes that the insurer's interpretation would nullify or render nugatory coverage for the most obvious risks for which certain coverage is issued, then a tactical burden shifts to the insurer. In that situation, it is up to the insurer to show that the effect of its interpretation would not virtually nullify the coverage. The Court of Appeal found that the insurer had not discharged that burden. In the circumstances, the Court of Appeal held that the common exclusion did not apply and the homeowners were covered for the property damage to the cracked pool.

Blurring the Lines to Find Coverage

A more recent B.C. case, *Turpin v. Manufacturers Life Insurance*, 2011 BCSC 1162, seems to blur the lines between these two doctrines. In *Turpin*, the B.C. Supreme Court found coverage under a travel insurance policy even though, under the court's interpretation of an exclusion clause for pre-existing conditions, the insured was not eligible for medical coverage because she suffered an irregularity in her health, three days before the policy was issued. In the court's view the effect of that interpretation, however, was to deny the medical coverage under the travel insurance policy and the court concluded that is not what the parties expected. The court stated:

> "Ms. Turpin applied to the defendants' agent for medical insurance, for a planned trip to Southern California. The defendants' agent presented a travel insurance policy, 'off the shelf' as it were, without inquiry. Ms. Turpin paid the policy premium and left the agent's office, without reading the policy, notwithstanding the caution on the policy cover that she 'PLEASE READ CAREFULLY'.

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CANADA
TELEPHONE
604 682 3664
FAX
604 688 3830
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> I find, however, that if she had read the policy, she would have found it difficult to understand, with its myriad of excluding conditions, variously applicable, or not applicable, to an infinite array of possible risks.
>
> This is a proper case to apply the reasonable expectations principle. Accordingly, the plaintiffs will recover their expenses for medical services in Southern California ..."

The decisions in *Cabell* and in *Turpin* are examples of cases where the Courts will refuse to apply clear policy wording when to do so would effectively nullify all coverage under the policy or defeat the reasonable expectations of the parties. The difficulty arises in trying to predict when the courts will override clear policy language.

In *Cabell,* the insured had a good argument that the enforcement of the exclusion would nullify virtually all the property coverage granted by the endorsement for the outdoor pool. In *Turpin,* however, even if the court had upheld the exclusion for the pre-existing condition there would still have been coverage available for other illnesses or conditions. Nevertheless the court in *Turpin* chose to ignore the clear policy language in favour of a result which it felt was more in keeping with the reasonable expectations of the parties.

Impact for Insurers

The risk of an adverse decision on coverage is always higher when there has not been adequate time spent by an agent explaining the type of coverage being purchased. The use of plain policy language in clear, easy to understand terms, will always help but it's not a bullet-proof solution as these cases demonstrate. Whenever specific endorsements or riders are added to the standard policy wording, the endorsement or rider should always stipulate that "all other terms, conditions and exclusions of this policy remain unchanged and apply to this endorsement" or rider as the case may be.

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VANCOUVER, BC V6B 5A1
CANADA
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FAX 604 688 3830
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