

## Focus INSURANCE

# Efficacy exclusion won't work for property damage



Alex Eged

A Canadian court has for the first time considered an “efficacy exclusion” in *West Creek Farms Ltd. v. Lloyd’s Underwriters* [2016] BCSC 48. Based on the Court’s reasoning it appears that this exclusion, like similar exclusions considered in the United Kingdom and Australia, will have rare application.

West Creek Farms Ltd. produces and sells custom nursery and greenhouse soil mixes, landscape soils and bagged potting soil to horticultural and landscape industries in British Columbia. One of the products it produces and sells is press block soil, a mix of soils pressed into a small block. The press block is used during the early growth stages of plants, including flowers. Small plant cuttings are placed into the press blocks which are in turn incorporated into larger trays or beds of growing soil. The cuttings initially root in the press block then expand to take hold in the growing soil eventually producing marketable flowers or other plants.

West Creek produced and sold a press block mix to a commercial producer of chrysanthemums. This producer commenced suit alleging that the press block mix was, among other things, not fit for the purpose of growing chrysanthemums because of the mix’s high sodium content. This high sodium content was alleged to have caused delay and disruption to the usual growth cycle of the plaintiff’s chrysanthemums which rendered them unmerchantable or of inferior quality. The plaintiff’s claims were based on breach of contract, negligence and breach of warranties of fitness for purpose and merchantable quality that were pursuant to the B.C. *Sale of Goods Act*.

West Creek sought a defence and indemnity from its insurer which denied coverage on the basis of an efficacy exclusion that read: “EFFICACY EXCLUSION – LOSS OF YIELD. Endorsement attaching to and forming part of Policy Number NEWL0326 Notwithstanding anything contained herein this Policy shall not apply to liability arising out of the failure of any Product manufactured, sold supplied or distributed by



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the Insured to:

1. promote growth or enhance the yield of any crop/animal or other agricultural product
2. control or eradicate any weed disease insect or pest
3. germinate, pollinate or reach expected yield
4. perform its intended function

“Notwithstanding anything contained herein the Policy shall not apply to liability arising out of the failure of any product manufactured, sold supplied or distributed by the Insured which results in a loss of prize winnings, earnings, awards, competition fees or stud values or stud fees or the like [the Exclusion].”

It is notable that the subject policy contained occurrence based coverage for property damage as well as product liability coverage for property damage on a “claims made and notified basis.”

West Creek petitioned the Court for a ruling on the insurer’s duty to defend the plaintiff’s claim.

Though the insurer originally denied coverage on the basis of the exclusion, at the hearing of West Creek’s petition it argued that the claims in the underlying action did not fit within the policy definition of “property damage” and therefore did not fit within the grant of coverage provided by the two insuring agreements. This resulted in the Court having to undertake a characterization of the plaintiff’s claims in the underlying action. In this regard, the Court stated at paragraph 15: “The correct characterization of [the plaintiff’s] claim, certainly a reasonable one, is that the

Soil caused harm to [its] flowers, as opposed merely to not enhancing [them]. The problem was not lack of efficacy, or not only lack of efficacy, the problem was also damage. Someone may buy skin cream because of its advertised capacity to remove wrinkles. If using the cream simply fails to remove the wrinkles, the efficacy of the cream is questionable. However, if the cream not

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The text of the insurance policy, taken as a whole, supported the reasonable expectation of the parties that coverage for the claim in issue would not be excluded, the Court added.

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that is a different matter. West Creek’s Soil not only failed to enhance flower growth, it also, according to my view of the pleadings, harmed the plants. It not only lacked efficacy, it also caused harm. The flowers would have been better off if the Soil had not been used. That, at least, is a reasonable interpretation of the [plaintiff’s] claim.”

Turning to the exclusion, the Court found it to be patently ambiguous. The text of the insurance policy, taken as a whole, supported the reasonable expectation of the parties that coverage for the claim in issue would not be excluded, the Court added.

In summary, the Court concluded that the plaintiff’s claim was not one for the failure of the press block soil to perform its intended function but rather a claim for property damage to the plaintiff’s flowers due to high sodium levels in the press block mix. Based on this conclusion it appears that efficacy exclusions, even if unambiguous, will not operate where claims of property damage are alleged, concurrently or on their own.

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only fails to remove wrinkles, but also harms the user, by burning the skin, for example,



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## No tax deductions for hired dependents

It’s great to use your kids as tax writeoffs on your income tax, but only if they are actually yours. Raheem McClain, of Ozark Mo., was charged in a three-count indictment of filing false income tax returns after he named three children as dependents that were not in fact his, reports CBS News. The 37-year-old McClain made it relatively easy for the authorities by allegedly posting the following ad on Craigslist: “Wanted: Kids to claim on income taxes – \$750. If you have kids you aren’t claiming, I will pay you \$750 each to claim them on my income tax.” The ad was posted in 2015 and the indictment includes three tax filings from 2012 to 2014. He listed the three dependents by name and Social Security number, but on one return they are listed as two sons and one daughter while on the other two returns they are listed as one son and two daughters. Evidence supporting the charges against McClain will be presented to a federal trial jury at a later date. – STAFF