Insurers beware: Risks of ambiguous exclusion clauses

April 23, 2021

The Ontario Superior Court's recent decision in *Backyard Media Inc. v. HDI Global Specialty SE* reinforces the importance of clear and unambiguous exclusion clauses in insurance policies.

Background

The applicant, Backyard Media Inc., had purchased a "duty to defend" insurance policy from the respondent, HDI Global Specialty SE. The policy was a "claims-made" policy, which covered claims against the insured provided it gave notice of the claim to the insurer within the same policy year that the insured became aware of the claim.

On March 4, 2020, the insured received a demand letter from a former business partner who asserted that the insured was liable on numerous grounds. The insured responded to the demand letter on March 25, 2020. On April 24, 2020, the insured received a statement of claim from its former business partner, and reported the claim to the respondent insurer a few weeks later. However, on April 18, 2020, the one-year term of the insurance policy that had been in effect when the insured received the demand letter expired, and the policy renewed for another year.

The exclusion provision at issue in the application

The insurer argued that the policy excluded claims where the insured was aware of the claim before the renewal date of the current policy year. The insurer relied on the following exclusion provision:

> This "**Policy**" does not apply to:
>
> ***
>
> 20. Any "**Claim**" of which any director, officer, member, partner, manager or supervisory employee of an "**Insured**" entity is aware, as of the inception date of this "**Policy**" or of any fact, circumstance or situation which could reasonably give rise to any "**Claim**" being brought against any "**Insured.**"

The court focused its analysis on the meaning of the phrase “inception date of this ‘Policy.’” The insurer argued the inception date was the date of renewal, April 18, 2020. The insured argued the inception date was the date coverage first began, April 18, 2017.

The court relied on the Supreme Court of Canada decision in *Progressive Homes Ltd. v. Lombard General Insurance Co.* and noted it was clear that in the context of duty to defend policies that

> …if a claim falls within the terms of coverage and is not clearly unambiguously excluded, then, by definition, there must be a ‘possibility of coverage.’

In order to determine the meaning of the phrase at issue, the court in this case considered the policy as a whole, and in particular, the definitions of “retroactive date,” “policy” and “policy period,” as well as other exclusion provisions. Although the court found the definition of “retroactive date” was not grammatically correct, it noted that the definition incorporated the phrase “inception of the Policy.” The court concluded that in the context of the “retroactive date” definition, the phrase “inception of the ‘Policy’” referred to April 18, 2017. The court also found that, although each policy renewal constituted a new contract at law, the contract expressly incorporated the original application for insurance and endorsements, and did not expressly limit the “inception of the ‘Policy’” to the annual renewal form. As such, the court found that “the policy is more than the annual renewal document.”

The court concluded that the unclear exclusion clause failed under the rule established by the Supreme Court in *Progressive Homes,* as the claim was not clearly unambiguously excluded. The court noted that the interpretation argued by the insurer limited much of the coverage the policy offered and concluded, “excluding all claims that take more than a year to mature from first complaint to demand or litigation or which happen to cross the magic April 18 date is a very major limitation on coverage.”

Concluding comments

Insurance providers should take care in drafting exclusion clauses in policies to ensure there is no ambiguity or lack of clarity with respect to what is excluded. As this case illustrates, there is a low threshold for courts to find a “possibility of coverage” when analyzing an exclusion clause.

By

Natalie D. Kolos, Heather Webster

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749