Whether a Homeowner's Policy Must Respond to a Third Party Claim for Contribution for Injury to a Family Member

A Commentary on
***Bawden v. Wawanesa Mutual Insurance Company*, 2013 ONCA 717**

Homeowner's insurance policies typically contain an exclusion for claims for damages brought by one family member against another. The purpose of this exclusion is to avoid the possibility of family members colluding to make a false claim.

However, what happens when a family member sues an unrelated third party who in turn third parties one of the other family members? Does the exclusion apply, or must the insurer respond? This situation often arises when the claimant is an infant. For instance, if an infant runs onto the road and is struck by a motorist, the motorist, if sued, will likely third party the infant's parent for failure to supervise their child. Until this Court of Appeal decision, the issue of whether the homeowner's policy had to respond was an open question.

The Bawden case was just such a case involving an infant struck by a motor vehicle. The motion court judge, Justice Sanderson, found that the exclusion clause was not applicable and the insurer appealed.

The Court of Appeal recited the pertinent clauses of the Wawanesa policy as follows, at paras. 4 and 5:

> [4] The critical coverage provision in the Wawanesa policy is as follows:
>
> > You are insured for claims made or actions brought against you for:
> >
> > > (1) Personal Liability: bodily injury or property damage *arising out of* your personal activities anywhere in the world. [Emphasis added.]
>
> [5] The critical exclusion provision is the following:

> Exclusions: you are not insured for claims made or actions brought against you *for*: ...
>
>> (3) bodily injury to you or to any person residing in your household other than a residence employee. [Emphasis added.]

The court noted the general rule that grants of coverage are to be construed broadly, but that exclusions are to be construed narrowly.

The Court also noted that, although the insurer chose to use the words "arising out of" in a number of other specific exclusion clauses, instead it used the word "for" in the exclusion clause in question. The implication is that the insurer intended a different meaning for "arising out of" and "for".

In the view of the Court of Appeal, the claim advanced against the third party parent was a claim "arising out of" an injury to the infant, but was not a claim "for" the injury to the infant. Instead, the third party claim was a claim "for" contribution and indemnity for negligent supervision. Therefore the exclusion was not applicable.

The Court went on to observe that this was consistent with the purpose of the exclusion, which was to exclude only claims in which there was a danger of collusion among family members.

This is a fair result as it would be in the reasonable expectation of the policyholder to be covered for liability claims from unrelated third parties.

Unfortunately, unlike auto, fire and life policy wordings, homeowner policy wordings are largely unregulated, and there is nothing preventing Wawanesa or any other insurer attempting to circumvent this decision by altering the wording of the exclusion clause by substituting "arising out of" for "for".

However, given the Court of Appeal's statement as to what it perceives to be the policy purpose of the exclusion and bearing in mind the maxim that exclusion clauses are to be construed narrowly, there is no guarantee that

the outcome would have been different even had the exclusion clause wording used “arising out of”.

by John D. Strung
Strung Mediations and Arbitrations Inc.

© Strung Mediations and Arbitrations Inc., November 2013