Snowden LLP
COVERAGE COUNSEL

Incorporating Statutory Conditions – Boyce v. Co-operators

Ontario commercial lines insurers can impose a shorter statutory limitation period for coverage suits, but only if drafted clearly to achieve this result. On October 17, 2013, our highest Court dismissed the policyholder's request for leave to appeal in the May 8, 2013 Ontario Court of Appeal's decision in *Boyce v. Co-operators General Insurance Co.* on review from the Ontario Superior Court. This decision is an important reminder to Ontario insurers attempting to incorporate the *Insurance Act*'s Statutory Conditions including the one-year limitation period in commercial property multi-peril policies. The panel confirmed that by using clear and unambiguous incorporating language an insurer can convert the Part IV Fire Insurance Statutory Conditions into contractual terms applicable to commercial property policies which extend coverage beyond the risk of fire.

Executive Summary

The Court of Appeal held:

1. An insurance policy's specific incorporation language can turn the Part IV Fire Insurance Statutory Conditions into contractual terms applying to all perils in a commercial multi-peril property policy;
2. The Statutory Conditions' one-year limitation period can override the general two-year limitation period in the *Limitations Act*; and
3. A commercial insurance policy falls within the *Limitations Act*'s definition of a "business agreement" permitting an opt out from that Act's longer limitation period.

Because the specific policy at issue in this appeal was a Commercial Lines policy, the panel's decision must be confined to this context. Whether or not a Personal Lines multi-peril policy (e.g. tenant, homeowner, condominium, etc.) is a "business agreement" remains an open question. Whether or not Ontario insurers can incorporate and effectively rely on the one-year limitation period into Personal Lines insurance policies, therefore remains at issue.

Background Facts

Portside Boutique is a women's fashion boutique and, at the time of loss, was insured under a multi-peril commercial property policy issued by the Co-operators General Insurance Co. The Co-operators' policy wording included a clause (set out below) deeming the Part IV Fire Insurance Statutory Conditions to apply to all perils insured under the policy.

On October 30, 2010 the store owner discovered a foul odour when she opened the store for the day. After an investigation, the policyholder concluded the smell was a result of vandalism and tendered a claim to the Co-operators.

On November 11, 2010 the Co-operators' investigation prompted it to deny coverage, asserting the smell came from a skunk, an uninsured peril.

On February 17, 2012 (a little more than 15 months after the loss) the policyholder sued the Co-operators for coverage under the policy. The Co-operators brought a Summary Judgment motion arguing the policyholder's claim was time barred by the Statutory Condition's one-year limitation period.

The Policy Wording – Incorporation of a Statutory Limitation Period

Statutory Condition No. 14 states:

> Every action or proceeding against the insurer for the recovery of any claim under or by virtue of this contract is absolutely barred unless commenced within the one year next after the loss or damage occurs.

The Co-operators' incorporation clause read as follows:

> The Statutory Conditions apply to the peril of fire and as modified or supplemented by forms or endorsements attached apply as Policy Conditions to all other perils insured by this policy.

The Lower Court Decision

Amongst other arguments, the Co-operators contended the policyholder's right of action was governed by the Statutory Conditions' one-year limitation period.

The policyholder argued:

(i) Statutory Conditions apply solely to "Fire Insurance" and not to multi-peril insurance policies; and

(ii) The action was not statute barred since it was issued within the two-year limitation period in the *Limitations Act*, 2002 (the "*Limitations Act*").

Following the Supreme Court of Canada decision in *KP Pacific Holdings Ltd. v. Guardian Insurance Company of Canada*, the motions court dismissed the Co-operators' motion stating:

> I find that the facts and the law with respect to this case fall squarely within the ambit of *KP Pacific Holdings*. As the legislation in Ontario uses substantially the same wording as the legislation in British Columbia referred to in *KP Pacific Holdings*, it appears clear that a multi-peril policy, such as the one issued to the Plaintiff, cannot be considered fire insurance. The peril of fire is an "incidental peril" to the coverage provided and therefore excluded from the application of Part IV (Fire Insurance) of the *Insurance Act* by virtue of S.143 (1)(c) of the *Insurance Act* (at para. 37).

The motions court concluded that the general statutory two-year limitation period applied unless parties to a "business agreement" varied it under subsections 22(2-6) of the *Limitations Act*.

The motions court (i) held the policy did not use contractual language sufficient to modify the statutory two-year limitation period; (ii) criticized the Co-operators for using misleading language; and (iii) questioned whether an insurance policy is a "business agreement" as required by the *Limitations Act*'s opt out exception.

The Appeal ruling

On appeal, the panel identified three issues:

1. Did the policy provide for a one-year limitation period?

2. If so, did it override the *Limitations Act*'s general two-year limitation period?

3. Was the policy a "business agreement" for this purpose?

The panel noted that in a previous decision, *International Movie Conversions Ltd. v. ITT Hartford Canada*, the Court held "clear and unambiguous" incorporation language can deem the Statutory Conditions' one-year limitation period to apply to multi-peril policies. In reviewing the Co-operators' policy, the panel concluded the incorporating language was "clear and unambiguous", similar to the *International Movie* decision.

The panel also concluded this satisfied the *Limitations Act*'s Section 22 opt out exception, stating:

> A court faced with a contractual term that purports to shorten a statutory limitation period must consider whether that provision in "clear language" describes a limitation period, identifies the scope of the application of that limitation period, and excludes the operation of other limitation periods. A term in a contract which meets those requirements will be sufficient for Section 22 purposes assuming, of course, it meets any of the other requirements specifically identified in Section 22 (para. 20.)

Finally, the panel held that an insurance contract of the type before it falls within the definition of a "business agreement".

In the result, the panel overturned the motions court ruling, held the action was time barred and dismissed the policyholder's action. Leave to appeal to the Supreme Court of Canada was denied.

Impact on Future Cases

Statutory Conditions incorporated into a commercial multi-peril property policy using clear and unambiguous language are enforceable assuming all other requirements are met. Co-operators was successful both because of the clear and unambiguous language used in its policy wording and because the panel agreed the commercial property policy at issue was a "business agreement".

Ontario insurers wishing to rely on some or all of the Part IV Fire Insurance Statutory Conditions in a commercial lines multi-peril policy should review their wording in conjunction with this decision.

Underwriters should also consider using clear and unambiguous incorporation language both in the relevant section of the policy and on the Declarations page(s), as well as on all renewal documents to ensure the policyholders have fair notice.

Finally, insurers should be careful not to read too much into this case. The panel's decision potentially leaves open the question of whether or not this outcome governs a personal lines policy. Is a condominium owner's, homeowner's or tenant's package a "business agreement"? Arguably not, since the purpose is usually confined in the main to a consumer's personal property.

Bradley J. Wells, a former insurance broker and founding partner of Snowden LLP, Coverage Counsel, provides coverage advice and representation to the insurance and risk management community for property and casualty insurance products. Brad's practice also includes advising clients on both broker-related business transactions and risk management related legal issues.

Contact Brad at brad@snowdenllp.com or by telephone at 416.363.3353.