DLA CLIFFE DEKKER HOFMEYR

INSURANCE

ALERT

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IN THIS ISSUE

LIMITATION OR EXCLUSION OF LIABILITY: POTENTIAL ANOMALIES

It is self-evident that any contract should clearly and accurately reflect the intentions of both parties, and an insurance contract is no different. This is especially important when recording any limitation on the obligation of the insurer to indemnify the insured for a loss. Although any ambiguity in an insurance contract will generally be interpreted to the benefit of the insured, the time to check if the policy says what you want it to mean is before it is signed, not when it is time to claim.

In the 2007 case of *Hollard Life Assurance Company Ltd vs Van Der Merwe N.O.* the insurance policy provided that in the event of the insured dying before discharging his liability to WesBank in terms of an Instalment Sale Agreement, Hollard would pay the outstanding liability. The policy excluded liability in the event of "…suicide, self-inflicted injury or self-inflicted illness, whether intended or not, or voluntary exposure to danger or obvious risk of injury" (our emphasis). The insured accidentally shot himself with his own firearm whilst still indebted to WesBank. Although it was accepted that the deceased's death was accidental, Hollard repudiated liability, arguing that the death resulted from a self-inflicted injury.

The trial court ruled that on a strict interpretation of the words in the contract, all of the other acts mentioned in the exclusion clause, namely suicide, self-inflicted illness and voluntary exposure to harm, presuppose the common element of deliberate intent. From that conclusion the trial court found that the phrase 'whether intended or not' did not apply to the words 'self-inflicted injury', but only applied to the words 'self-inflicted illness'. The trial judge accordingly held that the exclusion did not apply and that Hollard was liable in terms of the policy to settle the indebtedness to WesBank.

The Supreme Court of Appeal disagreed with the trial court and held that "the ordinary rules of grammar dictate that the comma before and after the phrase 'self-inflicted injury or self-inflicted disease' in the exclusion clause makes the qualification 'whether intended or not' (appearing immediately after such phrase) applicable to both instances and not only to 'self-inflicted disease'".

In coming to this conclusion the appeal court referred to its own judgement in the 1995 case of *Fedgen Insurance Ltd vs Leyds* in which it had held that the ordinary rules relating to the interpretation of contracts apply equally to the interpretation of a policy of insurance. In the event of ambiguity, a limitation of liability must be restrictively interpreted for it is the insurer's duty to make clear what specific risks it wishes to exclude.

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The respondent argued that the appeal court's interpretation would lead to absurd results and in this regard the trial court had listed some examples, such as falling into an uncovered manhole, eating contaminated sardines and driving into an invisible stationary object at night. The appeal court found no absurdity and interpreted the words "self-inflicted injury" and "self-inflicted disease" restrictively, finding that "only injuries or diseases which are entirely inflicted upon himself or herself by the insured will be covered. An injury or disease which is caused partly by the actions or omissions of the insured, but in conjunction with the action or omission of some other party or some other contributory factor, will fall outside the ambit of the exclusion clause".

The appeal court found that in the examples listed by the trial court there was in each case intervention by someone else or some other contributory factor "(the removal and non-replacement of the manhole cover, the manufacture and/or sale of contaminated sardines, the leaving of the offending object in the path of traffic)" without which the injury or disease would not have occurred. The court found on the ordinary meaning of the words used that the exclusion applied in this case as the insured died of a self-inflicted injury and liability was excluded whether this injury was intended or not.

One has to wonder what the insured would have thought of that outcome.

Roy Barendse

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PLAYING WITH FIRE: REPUDIATION AND THE INSURED'S DUTY TO PREVENT LOSS

A common clause in insurance agreements stipulates that the insured is obliged "to take all reasonable precautions to prevent or minimise loss or damage, bodily injury, death, liability and accidents". In view of an interesting factual scenario which has presented itself to us, let us examine the implications of such a 'reasonable precautions' clause, and whether a court will be inclined to rule in favour of an insurer in the case of a repudiation based on such a policy condition.

The scenario

We represent an insurer in a claim wherein a motor vehicle accident occurred in which the insured's representative (who was the driver at the time) drove at more than 100km/h above the speed limit of 120km/h and lost control of the luxury vehicle. The vehicle left the road and rolled, resulting in the vehicle being written off (yes, the wheels literally fell off) and one of the passengers in the vehicle was killed.

The insurer repudiated the claim in respect of the vehicle relying on the policy's 'reasonable precautions' clause, and the insured subsequently laid a complaint with the Ombudsman for Short-Term Insurance (OSTI). After investigation into the factual matrix, the OSTI ruled in favour of the insurer and the insured has since instituted an action for damages against its insurer.

The South African legal position

Despite conflicting historic decisions, the most recent jurisprudence demonstrates that it would undermine the very purpose of a policy of insurance to interpret the policy condition of 'reasonable precautions' as an exclusion of liability for the insured's negligence. As such, our courts favour a restrictive interpretation of 'reasonable precautions' clauses (including use of the *contra proferentem* rule). An insurer must show that an insured acted recklessly – and not merely negligently – to be justified in its repudiation of a claim arising from damages caused by the insured's own actions.

Importantly, as regards the scope and interpretation of 'reasonable precautions' clauses, the evidentiary burden lies with the insurer, 'to make clear what particular risks it wished to exclude' in a contract of insurance. This is a difficult *onus* to discharge and the wording of the particular exclusion against the backdrop of the contract of insurance as a whole will be decisive. Insurers should therefore err on the side of caution and take care to be specific in detailing the possible exclusions of liability for loss under a policy of insurance, rather than simply relying on a general condition for the right to repudiate in circumstances where it may be shown that an insured acted recklessly.

Distinctions between negligence and recklessness

In the 1999 case of *Santam Ltd v CC Designing CC* in the Cape High Court, Judge Comrie addressed the impact and scope of a 'reasonable precautions' clause in detail, together with the question of the interplay between negligence and recklessness. The learned judge's exposition of this topic took into consideration previous decisions of our courts as well as reasoning and precedents from English decisions on the subject. The judgement was given by a full bench and has widely been accepted as correct.

So what is the difference between 'negligent' and 'reckless' conduct, and what must an insured do to render his insurer able to repudiate a claim on the basis that he indeed played with fire (so to speak) and courted danger deliberately?

It is interesting to note that our courts frequently equate 'reckless conduct' with 'grossly negligent conduct'. However, these concepts are noted as differing (albeit by very little) in Neethling, Potgieter & Visser's *Law of Delict* 6th ed. at 127 (see also 134). Here, recklessness is referred to as a 'serious degree of negligence', for which the question is whether the wrongdoer actually subjectively foresaw the possibility of consequences and either did not care what the result might be or was indifferent to the possible result and nevertheless persisted in his conduct.

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In contrast, gross negligence, whilst falling short of *dolus eventualis*, involves "a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be a conscious risk-taking, a complete obtuseness of mind..."

There may, however, be an overlap between 'grossly negligent' and 'reckless' conduct in respect of the actions of an insured. This of course complicates matters further, creating difficulty for classification of conduct as being either 'negligent' or 'reckless'.

Whether an insured's conduct has 'crossed the line' into recklessness will obviously have to be determined with reference to the particular circumstances of the claim and to the specific policy (and wording thereof) in question. On the one hand, continuing to drive a vehicle which has been in an accident and which the driver knew had experienced radiator damage was considered by the OSTI in 2011 to have rendered the insured deliberately courting danger, and the insured was declared to be responsible for all serious engine damage suffered as a result of such conduct. What, on the other hand, of an insured driving well over the speed limit?

From the description of 'recklessness' above it is clear that subjective factors play a large role in determining the recklessness of an insured. Such subjective factors may be inferred from the facts and surrounding circumstances of the claim. In fact, Judge Comrie noted in his judgment in *CC Designing* that "the question [of recklessness] is predominantly one of fact". Considerations in regard to recklessness of an insured's conduct include previous deliberation and preparation coupled with failure to render assistance, absence of surprise at the outcome of an action or omission, regret or sympathy and, most importantly, the grave consequences which have flown or may still flow from such conduct.

It remains to be seen whether our courts will deem driving in excess of 100km/h above the speed limit of 120km/h to be 'reckless' in view of the prevailing case law and to reverse the OSTI's decision in favour of the insurer.

Watch this space for more developments as the case unfolds in regard to this pertinent question of SA insurance law.

WPS van Wyk and Philene Spargo

THE EFFECT OF CLIMATE CHANGE ON THE INSURANCE INDUSTRY

Climate change is altering weather patterns and causing an increase in the intensity and frequency of adverse weather conditions. Weather conditions such as flooding, hail and drought can affect a policy holder's insurable assets. Climate change therefore creates risks to both movable and immovable property and one of the issues for insurers is how to underwrite the additional risks that climate change brings. In November 2013, a hailstorm occurred in Gauteng with Santam reportedly receiving more than 2,000 claims with an estimated value of R60 million. Climate change can clearly lead to an increase in claims being submitted and needs to be addressed by the insurance industry.

Apart from the effects of climate change on policy holders, it can also impact on the sustainability of the insurance industry. The availability of insurance is premised upon two factors, being the "ability of the insurance industry to finance risk and the expectation that the insurance underwritten will be profitable". Climate change can therefore pose a financial threat to the insurance industry, and management and understanding of climate change and its effect on insurable assets are crucial in ensuring the future sustainability of the insurance industry.

Neither the Long-term Insurance Act, No. 52 1998 nor the Short-term Insurance Act, No. 53 of 1998 makes provision for addressing risks arising from the effects of climate change. Despite the lack of guidance there are various measures that insurers can adopt in order to mitigate or avoid the risks posed by climate change:

- Risk assessment will need to include climate change as a component in its management of future risk. When assessing risk, weather patterns and their potential effect on an insurable asset must be a component in an underwriter's estimation of future risks.

- Pricing will need to reflect the underlying weather-related risks. In this way, insurance companies can influence their customers to reduce their exposure to climatic risks through the differentiation in the pricing of insurance premiums. By way of example, a policy holder can receive a reduction in their premium if they take steps to protect their insured property against climatic risks such as flooding and hail. By the same token, a policy holder may face a higher premium if they choose to develop a project in an area prone to climatic risks such as floods and droughts.

- Insurers can draft their policies to limit their loss in the face of weather-related risks. This can be done by limiting the scope for claims which can be made or providing that measures aimed at protecting property against weather-related risks are a necessary requirement for a claim.

The insurance industry bases their premiums on statistics of past loss and probabilities. Climate change can create uncertainty in the pricing process but insurers can develop models to assess their possible loss for any climate change related risk. It will be necessary also to collect data on climate change related risks as well to develop the resources needed to anticipate and analyse climate risks and their impact.

Climate change should not be ignored or underestimated and will inevitably lead to change both for the insurer and the insured.

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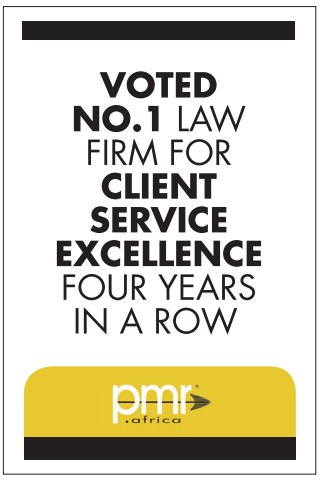

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