LITIGATION MATTERS

One element of Munich Re's claims services includes providing our clients with the most up-to-date industry trends in claims management. We are pleased to launch this newsletter, where we will bring you updates on Canadian litigation news, and announce activities and provide information related to litigated claims.

Self-inflicted injury exclusion in disability coverage: it's time to revisit!

With increasing societal awareness of mental health issues, our industry is faced with a new set of challenges. One of these challenges is the application of the self-inflicted injury exclusion clause in disability policies. In this climate, what purpose is being served by this exclusion? In Individual and Group Disability coverage, products are usually being priced to cover mental health conditions, to which a self-inflicted injury would likely be related. If the primary cause of claim was not because of the self-inflicted injury, rather, that injury occurred during the course of a claim for another cause (such as a mental health diagnosis), the self-inflicted exclusion would not apply. The inclusion of this exclusion in policies where it is not relevant may only serve to complicate policy wording and mislead consumers – and potentially claims professionals – into its needless application.

Having said this, the self-inflicted injury exclusion still serves a purpose under specific circumstances and should be reserved for any Individual Disability coverage with a mental health condition exclusion, and for Accidental Death policies in general. Its removal should be considered if mental health conditions are otherwise covered under the policy, which is the case for most disability products.

In a similar vein, our industry is also currently debating the removal of the mention of *Sane or Insane* that often appears in the suicide exclusion for Life and Accidental Death coverage. This wording was implemented as a safeguard for avoiding judicial debates on the degree or nature of the mental health disorder to determine if the insured person was in mental state to understand the nature of his or her actions causing death. Given that Life and AD&D coverage usually excludes suicide (its application in keeping with the laws on suicide limitations), we should make sure the policy wording excludes it to avoid any debate on mental state.

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Decriminalization of the physician assistance to end life: any impact on suicide exclusions?

On April 14, 2016, our Federal government presented BILL C-14 entitled *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*. This new Bill is the federal response to the Canadian Supreme Court's decision *Carter v. Canada (Attorney General)*, which unanimously overturned the Criminal Code of Canada prohibitions on physician assisted suicide. In Quebec, the legislature had adopted *the Act Respecting End-of-Life Care* (RSQ, c. S-32.0001) on December 10, 2015, recognizing the primacy of the patient's wishes in receiving care to end life and regulating certain types of care to end life, including receiving medical assistance to die.

As an industry, we must evaluate how this change will impact our longstanding policy exclusion related to suicide. As an example, Section 49 of the new Quebec Act states that "a person's decision to refuse to receive a treatment or withdraw consent to a treatment that is needed to keep it alive (...) cannot be used to refuse to pay benefits or any other amount due according to a contract." What this means for us is that the claim cannot be denied on the basis of a suicide exclusion if the medical record obtained at claim time demonstrates that insured life had consented to medical assistance to end life and that the medical assistance was provided in accordance with the Act.

Munich Re News

Introducing Julie St-Laurent

We are pleased to announce that Julie St-Laurent recently joined us as Director, Claims Litigation. Julie is a lawyer and brings her experience in litigated claims management to Munich Re along with several years of experience in the Life insurance industry. Julie will work closely with Charles Tremblay, AVP Claims and Litigation, and will be responsible for the management of litigated claims, helping our clients to minimize risk exposure, efficiently deploy legal costs and to implement optimal solutions. Julie looks forward to introducing herself to clients over the next few months.

Industry Litigated Claims Best Practices

Munich Re has been gathering and sharing industry claims management best practices in Disability, Life, Critical Illness and Long Term Care with clients for many years. Watch for the release Litigated Claims Best Practices coming soon!

The federal Parliament recently adopted Bill C-14 modifying the Criminal Code to decriminalize receiving medical assistance to die. It will be interesting to see if other Canadian provinces follow Quebec's lead in defining the medical process to obtain assistance to end life, including the legal restrictions on the application of suicide exclusions in insurance contracts.

In the courts: the pre-existing condition exclusion

A case was recently decided before an Alberta court *(Tyson v. Holloway, 2016 ABQB 284)* and has brought to the forefront the interpretation of Long-Term Disability and group Critical Illness policy wording related to the pre-existing condition exclusion. Since the Insurance laws do not clearly define what constitutes a pre-existing condition, this case confirmed once again that insurers must carefully consider the words used in their pre-ex definition in order to apply the clause as it is intended (and priced for). Here are our thoughts on the key takeaways and resulting case laws from this decision:

- Courts require a high standard of clarity in the drafting of the pre-existing clause and will not hesitate to apply the *Contra Proferentum* interpretation rule if any ambiguity is found in the policy wording, otherwise the decision will be resolved against the drafter (the insurer). It is important to have a clear understanding of your policy wording when applying the exclusion in cases where there was no definitive diagnosis prior to the effective date of coverage.
- When drafting the pre-existing clause for new policy wording, be sure to explicitly define the term "diagnosis" to include the words "diagnostic measures" if you mean to exclude conditions where investigations ultimately leading to the final diagnosis were undertaken prior to the effective date of coverage. It would also be prudent to include wording to exclude conditions where symptoms for which no medical advice was sought, but were present prior to the effective date of coverage.

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NOT IF, BUT HOW