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Duty to Defend: Beyond the Pleadings

Court may look to extrinsic evidence

The traditional Canadian rule is that the duty to defend is governed by the pleadings. Where the statement of claim alleges facts which, if proven, would fall within the coverage provided by an insurance policy, the insurer is obliged to defend the suit regardless of the truth or falsity of the allegations.

In *Monenco v. Commonwealth Insurance* (September 13, 2001, SCC) the Supreme Court of Canada resolved conflicting lines of authority and held that this does not mean the insurer's obligations are to be interpreted in light of the pleadings alone. If that were the case, the Court noted, the parties to an insurance contract would always be at the mercy of a third party pleader.

What matters is the substance of the allegations. In determining whether or not a claim was covered, the court can look to extrinsic evidence.

No comprehensive definition was given as to the scope of the evidence which could be reviewed. The Court did find that extrinsic documentary evidence referred to within the pleadings could be considered.

Facts

In *Monenco*, Suncor contracted with ABM to design and build an expansion to Suncor's tar sands plant. ABM was a joint venture in which 67669 (a subsidiary of Monenco) participated.

The new construction was completed using PVC coated cables. A few years later, the plant was partially destroyed by fire.

Suncor alleged that 67669 was in breach of contract and negligent in failing to advise it of the inflammable characteristics of PVC, which was causative of the fire damage.

Suncor also claimed that Monenco controlled 67669, effectively acting as its alter ego and itself owed Suncor a duty to warn of the dangerous characteristics of the PVC cable.

Monenco carried liability insurance which excluded losses arising out of such design-build or turnkey projects, where the insured did the design, and construction work was carried out by an insured or a subsidiary. Seemingly, 67669 was treated as an unnamed insured.

Determining the duty to defend

The statement of claim referred to the contract between Suncor and ABM. Accordingly, in addressing the duty to defend, it was permissible to review that contract. This established that the Suncor plant expansion was a design-build project.

The statement of claim also referred to ABM as a joint venture between 67669 and others.

The joint venture agreement could thus also be referred to, to establish that 67669 was jointly and severally responsible to Suncor for the entire project, including design and construction.

By referring to this extrinsic documentation, the court was able to conclude that an insured was responsible for both the design and construction of the contract. The turnkey exclusion therefore applied, and 67669's claim was dismissed.

The case is also noteworthy in that it takes a robust interpretation of the application of the "turnkey exclusion."

The court confirmed that any general duty

of care, including a duty to warn, that might be owed by Monenco to a customer of its subsidiary, arose out of the design-build operations of that subsidiary, and therefore the resulting claim was excluded.

In the result, it has now been conclusively established that insurers can rely on documents referred to, even obliquely, in the third party statement of claim when rebuffing an application to compel provision of a defence.

The extent to which other collateral evidence, such as affidavits as to facts which would constitute a policy breach, can be relied upon remains unclear.

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