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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

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Colin is a partner in Blaney's Insurance Coverage Counsel Group. As coverage counsel, Colin provides advice and litigates in relation to liability policies of every description, including commercial general liability, automobile, homeowner and directors' and officers' policies. He also provides advice in relation to first party property policies.

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BLANEY MCMURTRY PARTICIPATES IN IMPORTANT ALLOCATION CASE

W. Colin Empke

Introduction: A Test Drive of the Stonewall Decision

In 1995 the United States Court of Appeal (for the Second Circuit) released its decision in *Stonewall Insurance Company v. Asbestos Claims Management Corporation*, 73 F.3d 1178. That case ignited an insurance coverage debate about whether or not a policyholder must contribute to pay defence costs to reflect years during which it had no insurance coverage. This debate has been raging in many US jurisdictions ever since.

In *Goodyear Canada v. American International Companies et al*, 2011 ONSC 5422, this debate has been addressed by a Canadian court for the first time, at the request of Goodyear Canada. Colin Empke of Blaney McMurtry LLP represented Intact Insurance (formerly ING Canada) alongside six other Canadian insurance companies and their coverage counsel.

Some Background

Hundreds of thousands of asbestos bodily injury cases have been brought and are ongoing in the United States and Canada. Exposure to asbestos can cause a person to develop devastating diseases such as mesothelioma or asbestosis. It is very difficult to pinpoint the time at which these diseases fully develop and become "bodily injury" within the meaning of the insuring agreements of commercial general liability policies. It is therefore a tricky insurance coverage question to determine how many policies must respond to an injury that may have been developing from the very first day of exposure to asbestos and silently working its evil until the day the disease is discovered by medical testing.

Goodyear Canada manufactured asbestos containing gaskets between 1969 and 1973 and sold these products into the US marketplace. Beginning in the 1980s and accelerating through the 1990s and 2000s, Goodyear Canada became the target of thousands of asbestos bodily injury lawsuits. Naturally, Goodyear Canada turned to its insurance policies for assistance. This case involved those policies in place between 1969 and 1980.

In Canada, most courts have unreservedly adopted the continuous trigger approach to allocating insurance coverage for property damage claims involving long term exposure to substantially the same harmful conditions. The "continuous trigger" or "triple trigger" was developed to create a mechanism to determine when "property damage" occurred, in circumstances when it is largely impossible to pinpoint the exact date of loss. The Ontario Court of Appeal described this process in *Alie v. Bertrand & Frere* (2002), 62 OR (3rd) 345 (CA):

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> Under the triple trigger theory, where damage is continuous and progressive, is caused by exposure to a harmful or defective substance, and in some cases by further exposure to exacerbating conditions, then only manifests itself while the damage is progressing or after it has fully developed, the damage is said to occur from the first exposure to the date of discovery of the extent of the damage (or the date when it could reasonably have been discovered). Because all of the relevant policies are called upon to respond to the loss, by applying the triple trigger or continuous trigger theory, the court can apportion the liability equitably among the insurers. To the extent that the amount of deterioration during each policy period cannot be determined, the court is in this case using a "theory" to fill an evidentiary gap.

In some US jurisdictions the continuous trigger has still not been adopted. But in Canada this debate has been, in large measure, put to rest. Most cases involving insurance coverage for long tail injury or damage where proof of timing is difficult to demonstrate will ultimately be resolved by reference to the continuous trigger of coverage.

A difficulty arises when the existence of insurance cannot be proven for the whole of the long-tail period or if the policyholder did not have insurance for some of the years. Insurance may be absent for a number of reasons: policy exhaustion; a decision to self-insure; or because insurance could not be purchased in the marketplace. Insurers argue, as did the insurers in the *Goodyear Canada* case, that the policyholder must be responsible for its pro-rata share of defence costs and indemnity for those years in which no insurance coverage exists or can be proven to exist. This allocation to the insured issue was the subject matter of the *Stonewall* decision.

The *Stonewall* Principle

In *Goodyear Canada* Justice Stinson summarized the "Stonewall Principle" as follows:

> The principle that an insured, here Goodyear, should not be held responsible for the years during which it could not purchase insurance due to the unavailability of such insurance is referred to as the "Stonewall Principle" because that scenario was addressed in a U.S. case called Stonewall Insurance Company v. Asbestos Management Corporation, 73 F.3rd 1178 (2d Cir. 1995) ("Stonewall"). The court in Stonewall held that, when allocating an asbestos-based claim for insurance purposes over a number of years of injury, the insured should not be deemed to self-insure for those years when the insured could not voluntarily insure itself because of the existence of an asbestos exclusion. The insured is therefore not required to bear pro rata allocation for the period during which insurance was unavailable.

The Stonewall Principle is one approach to dealing with the question of when policyholders like Goodyear Canada should have to contribute to their own defence costs. As Justice Stinson noted, this question is important to Goodyear Canada because the asbestos related injury claims span such long periods of time. If Goodyear Canada is required to contribute to defence costs allocated pro-rata to those years in which it had no asbestos coverage in Canada, it will be paying a very significant portion of the

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costs itself. The insurers on risk from 1969 to 1980 would pay a significantly lower amount.

The Stonewall Principle has limited application: it only operates in circumstances where the insured has been unable, for reasons unrelated to its own business operations, to place insurance for the asbestos risk. In *Stonewall* and as argued by Goodyear Canada, asbestos exclusions became prevalent in North America starting in 1985, making it impossible for companies to insure their asbestos related risks. Because the reason Goodyear Canada could not procure asbestos coverage was external to the company, it argued the Stonewall Principle should be imported into Canada and require the insurers from 1969 to 1980 to assume the whole burden of defence costs and indemnity.

The Goodyear Canada Decision

Justice Stinson was asked to address a number of coverage questions presented by the parties, assuming (without deciding) that the continuous trigger and pro-rata allocation of defence costs were the applicable theories for this case. On that basis Justice Stinson heard evidence concerning the nature of asbestos coverage in Canada. Justice Stinson concluded that Goodyear Canada was not able to purchase, on commercially reasonable terms, conventional insurance coverage for its asbestos related risks after 1985. As such, insurance was not available for reasons external to Goodyear Canada and the Stonewall Principle had potential application.

Justice Stinson declined to adopt the Stonewall Principle in Ontario. In doing so he recognized that in insurance coverage matters Canadian courts will frequently be referred to American jurisprudence. However, such jurisprudence cannot be adopted unthinkingly. The Ontario court must be persuaded on the merits of the jurisprudence. Justice Stinson was not persuaded by the merits of *Stonewall*. In rejecting *Stonewall*, Justice Stinson noted:

> With all due respect to the Second Circuit Court, as a decision that responds to a particular and idiosyncratic legal development, *Stonewall* itself lacks the internal logic necessary to support the proposition that the unavailability of insurance is a relevant consideration in the first place.
>
> …
>
> Why then, should an Ontario court adopt a principle of the Second Circuit whose logic is not evident and whose acceptance into American law has been far from unanimous. Goodyear argues that it is not a question of logic: fairness dictates that the continuous trigger theory and pro rata allocation, creatures of the courts, should be modified so that their application to our facts do not deny it coverage for the period during which it was insured. While I acknowledge that a *pro rata* arrangement may allocate to Goodyear payouts that are below the deductible for a given year, I do not agree that this would be an unfair result.

When giving further consideration to the "fairness" of applying the Stonewall Principle, Justice Stinson noted that the factual uncertainties about asbestos injuries is the very reason the continuous trigger and pro rata allocation are used:

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> They are a fair means to apportion liability across a number of parties where any one of them may have actually been liable in fact. Not only that, but they are equally to each party's benefit because a given injury might have actually occurred while any one of them was responsible.

Justice Stinson then made key comments on where the burden of periods of no insurance should lie, taking into consideration the commercial realities:

> Finally, it must be said that there is no right to insurance. When any manufacturer brings a product to market, it is responsible for the attendant risks. Insurers may choose or decline to provide coverage for that risk. While insurers may freely contract to indemnify the manufacturer, they are by no means required to do so. Further, where an insurer deems it no longer to be commercially viable to provide such indemnification, it has the freedom not to contract. *Stonewall* or no *Stonewall*, I see no compelling reason – and surely none grounded in fairness – why an insurer who has made a business decision not to provide coverage should be forced to do so because it was not available elsewhere. The facts of this case provide neither the reason nor impetus to adopt *Stonewall* at this time.

The very purpose of the Stonewall Principle is to compel insurers to provide coverage (including defence costs) for matters falling wholly outside the scope of the insuring agreement of a particular policy period. It is well-settled Canadian law that an insurer is not obliged to provide coverage for matters falling outside the scope of the policy (*Nichols v. American Home*, [1990] 1 SCR 801 is the usual case cited for this principle). It is comforting to see recognition that insurance policies are voluntary contracts and insurance companies should not be subjected to arbitrary extensions of coverage or redrafting of their policies.

Allocation of Deductibles

One additional argument was advanced by Goodyear Canada: that if allocation occurs over multiple policy years, then the deductible should be prorated over the covered years also. This was a question of first impression in Canada.

Allocating deductibles in this case would have reduced Goodyear Canada's obligation to pay $10,000 and $25,000 per claim deductibles for each of the policy periods between 1969 and 1980. Once again, Goodyear Canada relied on some American jurisprudence and arguments related to fairness. Justice Stinson rejected these arguments, noting that the deductible provisions in the policies were unambiguous: they provide that Goodyear Canada must "cover a certain, pre-determined, and bargained for amount for each policy period before the coverage is triggered." The Court found that Goodyear Canada will be responsible for the payment of the full deductible (which happens to include defence expenses) for each claim, as provided for in the contracts of insurance.

Impact of the Decision

The *Goodyear Canada* case represents the first time several contentious American insurance coverage concepts were given consideration by a Canadian court. American jurisprudence is frequently of great assistance to Canadian courts. But the many jurisdictions create a considerable patchwork of decisions in the United States and

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a corresponding hardship for Canadian courts in considering the merits of a question. The *Goodyear Canada* case demonstrates that U.S. insurance concepts need to be critically examined in light of Canadian coverage law and the Canadian business environment. The Stonewall Principle is very controversial law in the United States. By rejecting the Stonewall Principle and the allocation of deductibles, this decision takes steps to provide certainty for Ontario and Canadian insurance coverage cases involving long-tail damage and injury. ■

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