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GENERAL GUIDELINES: DUTY TO DEFEND

In determining whether an insurer is liable to defend the insured or to advance defence costs under a liability policy, the wording of that policy is of paramount importance. The policy should be examined as a whole, the wording given its plain and ordinary meaning, the insuring agreement should be construed broadly, exclusion clauses narrowly, and the conclusion arrived at should make commercial sense. It is also desirable to determine whether the insurer, in marketing the policy, has commented on the wording since those comments may be considered by a Court in assisting it in interpreting the wording in issue. It will also assist the Court in determining if the insurer is subject to any estoppel or waiver arguments by the insured.

Test for Determining the Duty to Defend

The decisions of the Supreme Court of Canada in *Nichols v. American Home Assurance Company* (1990), 68 D.L.R. (4th) 321 and *Scalera v. M.J. Oppenheim in his Quality as Attorney in Canada for the Non-Marine Underwriters, Members of Lloyds of London* [2000] I.L.R. 1-3810 hold that the pleadings govern the duty to defend. One looks at the allegations made by the plaintiff to decide whether the insured has discharged the onus of establishing that there is a mere possibility that the allegations trigger the insuring agreement under the policy. The onus then shifts to the insurer to prove any exclusion, and if there is an exception to an exclusion, the onus is on the insured to prove the exception. In *Scalera* the plaintiffs pleaded several causes of action, namely, assault, breach of fiduciary duties, and negligence. The Court scrutinized the facts pleaded in support of those causes of action and found that they all rested on the alleged sexual assault. Since the factual basis for the plaintiff's injury was that of a "wilful act," which claim was excluded under the policy, there was no duty to defend.

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NOTA BENE: RADICAL CHANGES TO LIMITATION LAW BEFORE THE LEGISLATURE

An extremely significant piece of legislation, Bill 163/2000, dealing with limitation periods is currently progressing through the legislature. The legislation, which will basically establish a two year limitation period for most causes of action, has received first reading. The second reading, where the Bill will be debated in principle and will probably be amended, is expected to take place in the near future.

Here are some highlights of the proposed new Limitations Act:

- a basic two year limitation period for most causes of action, subject to discoverability;
- an ultimate limitation period of fifteen years regardless of discoverability for most actions;
- the two year limitation period would not run against minors or incapable persons unless or until such persons have a litigation guardian;
- a potential defendant can move to appoint a litigation guardian against a potential plaintiff in order to commence the running of the limitation period; and
- there is a presumption of incapability with respect to sexual assault claims in that victims of sexual assault are presumed to be incapable, hence the limitation period will not run against them.

If and when this Bill is passed, a detailed analysis of its impact will be featured in our newsletter.

William R. McMurtry, Q.C.
416.593.3948
bmcmurtry@blaney.com

Giovanna Asaro
416.593.3956
gasaro@blaney.com

NEW FEDERAL PRIVACY ACT: PRIVACY OBLIGATIONS OF INSURANCE COMPANIES

The main thrust of the new *Federal Privacy Act* is the requirement to obtain the consent of individuals for the collection, use, and disclosure of their personal information for commercial purposes. However, it is important for insurance companies operating in Canada to recognize that the *Act* contains additional provisions and is more extensive in its application than merely requiring consent from consumers. In its practical application, the *Act* will require many insurers to revise or to update administrative practices in order to ensure compliance with the *Act*.

A company should consider implementing the following items in anticipation of the *Act* coming into effect for insurance companies on January 1, 2004:

1. Designate a privacy officer, being one person who is ultimately accountable for the organization's compliance with the *Act* and the organization's privacy policy.

2. Document and publish, both externally and internally, the identity of the privacy officer and any authorized delegates.

3. Draft, circulate, and implement a privacy policy that adopts the principles of the *Act* and consider whether the policy should be adopted by the Board of Directors.

4. Draft, circulate, and implement information handling standards and data security and access protocol, so that the security of personal information is addressed.

5. Adopt a procedure whereby new employees sign-off on the privacy policy, information handling standards and data security procedures when they come on-board and ensure that existing employees, at the least, receive a copy.

6. Track complaints and inquiries regarding privacy. Employees should also know who to go to if they have received a request from a customer to obtain certain information and they are not sure if they should be disclosing the information to the customer.

7. Make the privacy officer accountable for receiving and reviewing the complaint and inquiry report from operational departments and addressing issues revealed by the report.

8. Track requests by customers who do not wish their personal information used for certain purposes, such as, for example, e-mail marketing campaigns or direct mail promotions.

Lastly, compliance with privacy obligations should be tested from time to time. Organizations should consider having their internal audit departments conduct periodic audits with respect to compliance with its own privacy code and the *Act* or privacy compliance could be scrutinized as part of routine internal audits of operational departments.

Jill E. McCutcheon
416.593.2956
jmccutcheon@blaney.com

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'DUTY TO DEFEND' CONTINUED FROM PAGE 1

In *Randhawa v Da Rosa* [2000] O.J. No. 381, the plaintiffs purchased a house from the defendants who warranted that the house did not contain urea formaldehyde foam insulation ("UFFI"). The plaintiffs sued the defendants alleging: (i) breach of written warranty; (ii) innocent, negligent, or fraudulent misrepresentation that the property had not been insulated with UFFI; and (iii) that the plaintiffs had suffered bodily injury arising from the UFFI. An Ontario Motions Court judge applied the *Scalera* test and found that the factual basis for the harm suffered by the plaintiffs arose from the breach of the warranty, as set out in the agreement of purchase and sale (a contractual claim), and that the claims alleging misrepresentation were subsumed into the breach of warranty claim. The liability policies, which covered the Da Rosas between the time they sold the house to the plaintiffs and the institution of the proceedings, were held to only cover tort claims and not contractual claims, and since the bodily injury claim arose out of the breach of warranty, the insurers owed no duty to defend. In this case, there was no act on the part of the defendant which was found to form the basis of a tort claim as well as a contractual claim.

The *Scalera* test of looking at the factual basis for the harm was applied in a decision of the Albert Motions Court in *Erbe v Dominion of Canada General Insurance Co.* (2000) 20 C.C.L.I. (3d) 194. In that case, the insured owned property mortgaged to the bank and rented that property to a person who kept a large number of cats. The health authorities declared the premises unfit for human habitation and the bank by court order had the premises demolished. The bank then brought an action against the insured for breach of the covenants not to commit waste, to keep the premises in good repair, and for payment of the balance due under the mortgage. Despite the bank amending the claim to plead negligence on the part of the insured in maintaining the property, the insurer denied a duty to defend on the basis that the main action was a foreclosure or debt action. The Court accepted the insurer's argument, but also found that the bank's claim was not for property damage as defined in the policy as the damage suffered by the bank was not to property owned by it, but that of the insured's, which claim was excluded under the policy. The Court also held that property damage did not include the bank's claim for devaluation damages and demolition costs since those claims were held to be pure economic losses claims.

In *Godonoaga v. Khatamb Akhsh* (2000) 49 O.R. (3d) 22, a decision of the Ontario Court of Appeal, a mother sent her minor son to assist his brother and others in assaulting a young boy. The victim and the parents sued the two minor children and the parents. The plaintiffs alleged that the parents "failed to instil in their children reasonable accepted values and rules for living in society, including respect for life, person and property of others in the community," and that they failed in supervising their children in causing them to comply with these values. The Ontario Court of Appeal held that the assault was a consequence of the parents' negligence, and the action against the parents was not an attempt to dress up the assault in the guise of a negligent suit, and the duty to defend was triggered.

Summary

Subject always to the wording of the policy, in determining the duty to defend, one presumes the insured is guilty of the claims made by the plaintiff, and if those claims trigger the mere possibility of indemnity under the policy, absent exclusions, a defence is owed. The Court is not bound by the causes of action pleaded in the statement of claim and will determine the factual basis of the harm to decide whether more than one cause of action is supported by the facts pleaded. Only rarely is underlying evidence admitted in the initial stages to determine the duty to defend, as that duty is to be decided on the pleadings. The factual allegations in the pleadings are critical in determining whether the plaintiff has dressed up its claim to trigger an insurance policy or whether they support several causes of action which by happenstance trigger the policy.

Our next issue will feature "ALLOCATION OF DEFENCE COSTS."

Richard H. Krempulec, Q.C.
416.593.3942
rkrempulec@blaney.com

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dicta*

***_Dicta_ is a regular opinion column featuring personal views on broader legal issues of interest.**

The views expressed in _Dicta_ are the personal views of the author and they do not necessarily reflect the views of the members of the Insurance Law Group or of Blaney McMurtry LLP.

"THE RULE OF LAW"

The bizarre recount saga following the most recent U.S. Presidential election provides a useful and compelling paradigm for the strengths and weaknesses of a societal system governed by a so-called "Rule of Law."

On the one hand, one cannot help but be impressed that there could be a peaceful, even cordial and final result, in a bitterly partisan and disputed election where even to this day, significant doubts linger as to who actually won the vote. This achievement is even more remarkable when you consider that the result in question concerned no less than the most powerful and prestigious office in the world.

However, the suspect nature of the ultimate ruling of the U.S. Supreme Court graphically demonstrates how, in the final analysis, we are still subject to the individual predilections of the judges involved and how they choose to apply "the law" which is neither cast in stone nor open to only one interpretation.

Fortunately for the United States, and indeed all nations which would choose to be governed by a "Rule of Law," Al Gore, despite his strong disagreement with the slim majority decision of the U.S. Supreme Court, took the high road, and accepted the result, placing respect for the process, which provides the real basis of a stable society, ahead of personal ambition, notwithstanding the questionable basis for that final ruling.

Hopefully, the true value of the process will be that with the ultimate disclosure of all the facts, U.S. legislators will be able to provide amendments to the voting system which will prevent a future similar fiasco.

I am still convinced that despite its shortcomings and an element of human frailty, the extent to which a society is governed by a humane, objective and just "Rule of Law" provides the most significant and revealing measure of any nation.

William R. McMurtry, Q.C.
416.593.3948
bmcmurtry@blaney.com

EXPECT THE BEST

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

20 Queen St. West, Suite 1400
Toronto, Canada M5H 2V3
416.593.1221 TEL
416.593.5437 FAX
www.blaney.com

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