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BC COURT GRANTS SOLICITOR-AND CLIENT COSTS AWARD FOR WRONGFUL COVERAGE DENIAL

Richards Buell Sutton Insurance Newsletter

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A successful challenge by an insured to a coverage denial is now likely to entitle the insured to solicitor-and-client costs in British Columbia regardless of the insurer's conduct. Williams v. Canales, 2016 BCSC 1811 has decided this specific issue for the first time in this province and BC law is now consistent with that in Ontario, Manitoba, New Brunswick and Newfoundland and Labrador. Additionally, other parties involved in coverage litigation, such as a broker, may also be awarded costs payable by an insurer despite being those parties being added to the litigation by the insured.

The Facts

A woman injured at a gym while exercising with her personal trainer commenced an action seeking damages from her trainer, the gym, the gym's principal and the landlord. The gym, its principal and the landlord (the "Insureds") were all insured under one policy. The insurer refused to provide a defence for the Insureds and a summary trial on the duty to defend ensued. The insurance broker and its agent (the "Brokers") were named as parties by the Insureds in the duty to defend proceeding. A declaration that the insurer was obligated to defend the Insureds was granted by the court along with an order that the Insureds be reimbursed for defence costs incurred. Subsequently the Insureds sought special or solicitor-and-client costs from the insurer. They did this while acknowledging there had been no reprehensible conduct by the Insurer which was the usual or predominant standard in British Columbia for establishing an entitlement to special costs. The Brokers sought party and party (i.e. ordinary costs) from the insurer.

The Ruling

The court began its deliberations with a review of the Ontario jurisprudence on the availability of full indemnity or solicitor-and-client costs for successful insureds in coverage disputes. That jurisprudence, as well as case law from other jurisdictions, has reasoned that an insured should be saved harmless from the cost of litigation required to enforce an insurer's duty to defend because of the unique nature of the insurance contract. In particular, since insurance contracts entail a duty to defend at no expense to the

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insured, any steps necessary to enforce this entitlement should also be at no expense to the insured. After reviewing this jurisprudence and determining that this particular issue was before a BC court for the first time, the court exercised its discretion and awarded the Insureds solicitor-and-client or special costs. In doing so, the court affirmed an exception to the usual rule that solicitor-and-client or special costs will only be awarded in extraordinary circumstances. No longer will it be necessary for an insured to show that an insurer exhibited reprehensible conduct before it can obtain solicitor-and-client or full indemnity for its costs associated with coverage proceedings.

Regarding the Brokers' entitlement to costs the Insureds were prepared to discontinue their claims against the Brokers following the declaration obliging the insurer to defend, however, under court rules the discontinuance would have entitled the Brokers to recover their costs from the Insureds. Rather than attempt to get their costs from the Insureds the Brokers relied on a rule that enables the court to order that the costs of one defendant be paid by another defendant instead of by the plaintiff. This was opposed by the insurer on the basis that the proposed discontinuance was a settlement and not a result of "success" by the Brokers in the litigation. The court interpreted the relevant rule as giving the trial judge discretion on costs regardless of a party's "success", however, the trial judge also considered the Brokers to be substantively "successful" in the action because the claim against them was determined by the success of the Insureds against the insurer. Accordingly, the Brokers were awarded their party and party or ordinary costs payable by the insurer.

Practical Considerations for Insurers

The successful challenge of a denied duty to defend is now likely to require an insurer to pay the full legal costs incurred by its insured, its own legal costs and potentially a portion of the legal costs of other parties drawn into the coverage dispute. Such significant cost consequences undeniably raise the stakes for denying a duty to defend. The increased risk associated with litigation costs should cause insurers to further consider, when possible, defence cost sharing arrangements and other coverage settlement mechanisms before issuing a firm duty to defend denial.

Given the court's decision in *Williams*, insurers can expect to see insureds advance claims to solicitor-and-client costs in the context of successful challenges to first party indemnity denials and, potentially, other types of successfully overturned decisions made by insurers.

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