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DUTY TO DEFEND: ONCE AGAIN, PLEADINGS ARE PARAMOUNT

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In the recent case of *Surrey (City) v. Co-Operators General Insurance Company,* 2023 BCSC 955, the Supreme Court of British Columbia found that an insurer had a duty to defend an additional named insured after ruling that extrinsic evidence tendered by the insurer could not be used to trigger an exclusion clause.

Factual Background:

In the underlying action, Mr. Lanki claimed that, among other things, the City of Surrey had improperly maintained a leg press machine (the "Machine") at the Surrey Recreation and Leisure Centre causing an injury to Mr. Lanki (the "Underlying Action"). In particular, Mr. Lanki alleged that an incorrect pin was placed in the Machine which had fallen out and led to his injury.

In regards to the Machine, Surrey had contracted with Roland Cerf, Dorothy Cerf, and Elk Fitness Repair (collectively, "Elk") to provide the maintenance and repair of its fitness machines and, as part of the agreement, for Elk to obtain general commercial liability insurance that included Surrey as an additional insured.

Elk took out an insurance policy with the insurer (the "Policy") which contained an Additional Insured Endorsement noting that the additional insured, i.e. Surrey, would not be covered by the Policy where there was

> "Bodily Injury" or "Property Damage" arising out of any act or omission of [Surrey] or any of its employees (the "Exclusion Clause").

Surrey brought an action to compel the insurer to defend it with respect to the allegations made by Mr. Lanki. In particular, Surrey alleged that the pleadings in the Underlying Action allege negligence in the maintenance and condition of the Machine, for which Elk was at least partly responsible.

In response, the insurer brought a separate action to summarily dismiss the claims made against it in the Underlying Action on the basis that Elk was not negligent with respect to Mr. Lanki's injury. The insurer then opposed Surrey's action by claiming its summary dismissal application should be heard first, as a finding that Elk was not negligent will allow it to rely on the Exclusion Clause and thereby oust its duty to defend

Surrey under the Policy. The insurer also sought to tender extrinsic evidence that would indicate Elk had not placed the problematic pin.

The Ruling:

The court started its analysis with the test for triggering a duty to defend, otherwise known as the "pleadings rule", as described in the Supreme Court of Canada decision *Monenco Ltd. v. Commonwealth Insurance Co.,* 2001 SCC 49 [*Monenco*]. First, the court had to determine whether the pleadings alleged facts which, if true, would require the insurer to defend Surrey in the Underlying Action. The court clarified by stating that this principle will apply even when the actual facts may differ from the allegations pleaded.

Based on the allegations contained in the pleadings of the Underlying Action, the court found that the insurer would be obligated to defend Surrey.

In addressing the Exclusion Clause, and whether it would oust the insurer's duty to defend, the court relied on the ruling in *Co-operators General Insurance Company v. Kane*, 2017 BCSC 1720 stating that unless all occurrences which potentially caused or contributed to the loss or damage are clearly and unambiguously excluded in the Policy, coverage for the duty to defend will not be ousted. Here, the court found that:

> …based on the pleadings, it cannot be said that all claims against Surrey are divisible from those which are covered within the insurance policy thus the exclusion clause does not oust the [insurer's] duty to defend.

Of important note, and in reference to the extrinsic evidence submitted by the insurer, the court stated that to review and make findings on said evidence would amount to a trial within a trial. At this stage of the Underlying Action, it did not matter whether Elk would ultimately be found liable in their placement of the pin, as the analysis related to the duty to defend is based primarily on the pleadings alleged. Furthermore, in referencing *Monenco*, the court stated that only extrinsic evidence which has been expressly referred to in the pleadings and which may assist in determining the substance and true nature of the allegations may be considered.

Ultimately, the court refused to consider the extrinsic evidence submitted by the insurer in support of its claim and held that the insurer had a duty to defend Surrey based on the allegations in the pleadings alone.

Practical Implications for Insurers and Insured:

This case is a good reminder of the fact that an insurer's duty to defend is triggered by the allegations contained in the pleadings of an underlying action which, if true, could establish liability on the part of the

insured. While extrinsic evidence *may* be considered, this is limited only to its effect on the courts' ability to determine the substance and nature of the allegations in the pleadings. Furthermore, any extrinsic evidence will only be considered where it is expressly referred to in the pleadings of the Underlying Action.

Practically speaking, it is important to remember that an insurer may have a duty to defend an insured regardless of whether the insured is ultimately liable. Further, it will indeed be a rarity where an insurer can take steps to trigger an exclusion clause by advancing a parallel procedure to obtain a supportive factual determination; courts are unlikely to accede to such procedural endeavours, particularly when prejudice to an insured's coverage position may be the natural outcome of the procedure.

For more information about this article, contact the author, Alexander Bogdan here.