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TRIGGERING THE DOCTRINE OF EQUITABLE CONTRIBUTION

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Oftentimes an individual or business may have more than one insurance policy cover the same issue that could potentially arise. A recent decision from the Ontario Court of Appeal provided guidance when both policies cover the same loss and include language claiming to be excess insurance over the other.

In *Northbridge General Insurance Company v. Aviva Insurance Company*, 2022 ONCA 519 the court re-affirmed that if two insurance policies apply to an insured's loss and are irreconcilable, then both insurers are expected to share equally the costs of defence and indemnity.

The court outlined that the doctrine of equitable contribution between insurers applies when two insurance policies are irreconcilable to the extent that they both cover the loss at issue and neither is clearly in excess to the other. When these circumstances occur both insurers will be required to equally contribute to the insured's defence and indemnification.

Background

In *Northbridge* the plaintiff sought a declaration that the defendant be required to contribute equally to the defence and indemnification of an insured party that was sued in the underlying action.

The underlying action involved a pharmacist who was sued for professional misconduct. The pharmacist's employer, a pharmacy, was also named as a defendant in the action. The plaintiff had issued a professional liability insurance policy to members of the Ontario Pharmacists Association (the "Association Policy") that included the pharmacist. The defendant had issued a commercial general liability policy to the pharmacy (the "CGL Policy"). The CGL Policy included a Pharmacists Professional Liability Endorsement that extended liability coverage to the pharmacy's employed pharmacists. As such, the pharmacist was an insured covered by two policies.

The plaintiff settled the underlying action without contribution from the defendant and thereafter sought a declaration from the court that the defendant must contribute equally to the defence and indemnification of the pharmacist.

The Association Policy contained as a general condition an "other insurance" clause that stated "This

insurance is excess over any other valid and collectible insurance…[and] does not apply to insurance which is purchased by the insured to apply in excess of the Policy". The CGL policy contained an Additional Condition that stated "The insurance provided under this endorsement is excess over any other valid and collectible insurance available to individual pharmacists…".

At trial the court found that the two policies were irreconcilable because they covered the same loss and had equivalent "other" insurance clauses wherein each policy claimed to be excess to the other. These two findings led the court to apply the doctrine of equitable contribution and grant the application that both insurers equally split the cost of the defence and indemnification.

The defendant appealed the trial judge's decision arguing that he erred in his conclusion that the two policies were irreconcilable.

Ruling

The Court of Appeal upheld the decision and found it was not in error, whether reviewed on the standard of palpable and overriding error or the standard of correctness.

In the context of the standard of appellate review, the court affirmed that matters of contractual interpretation are questions of mixed fact and law unless those questions involve the interpretation of standard form contracts or contracts with precedential value and there is no meaningful factual matrix relevant to the interpretation. In this case, the court concluded that the "other insurance" and other relevant provisions of the policies at issue are not "standard form contracts' or contracts with significant precedential value. This conclusion meant that the deferential standard of palpable and overriding error applied.[1]

The court cited *Family Insurance Corp. v. Lombard Canada Ltd*, 2002 SCC 48 and noted In this case the Association Policy and the CGL Policy both had the intention of achieving the same goal; rendering them excess if other insurance was available. This goal made them irreconcilable. Further, since the pharmacist was not the one that purchased the CGL Policy it did not fit within the Association Policy's other insurance exception. Finally, the "individual pharmacists" language in the CGL Policy, though intended to require pharmacists to have a separate professional liability policy, did not alter the CGL Policy's scope or context to one of a true excess insurance policy.

Consequently, the court dismissed the appeal.

Practical Considerations

This decision flags for insurers that when it comes to other insurance clauses and clauses aimed at limiting insurer obligations, specificity of language and the intention of specific clauses, though clearly important, may not be determinative. Perhaps more determinative is the "contextual analysis" the court referred to from *McKenzie v. Dominion of Canada General Insurance*, 2007 ONCA 480 at para 39. That analysis requires that an insurance policy be considered as a whole and that the availability of primary coverage, including a duty to defend obligation, cannot operate to change the nature of a policy to an excess or umbrella policy. This contextual analysis, if applied in a pre-eminent fashion, will render much of the competing "other insurance" clause litigation largely moot as most policies in these disputes can readily be found as primary insurance thus triggering the equitable contribution doctrine.

Finally, evidentiary care must be taken when advancing these types of applications in order to ensure, as much as possible, that any appellate review can proceed on the correctness, as opposed to palpable and overriding error, standard.

[1] *Northbridge General Insurance Company v. Aviva Insurance Company*, 2022 ONCA 519 at paras 15-16.