

February 9, 2007



CONCURRENT CAUSE: *DERKSEN* REVISITED



FACTS & BACKGROUND

Of interest to CGL insurers will be the recent decision of the Ontario Supreme Court in *CUMIS v. 1319273 Ontario Ltd.* A motorcyclist suffered personal injury as a result of being struck by a ladder that flew off a roofing repair company truck. The applicant liability insurer for the roofing repair company argued that it had no obligation to defend its insured under a CGL as the CGL contained an exclusion for bodily injury that arose out of the "ownership, maintenance, use or operation by or on behalf of the insured of any automobile... or from bodily injury ...with respect to which any motor vehicle liability policy is in effect". The court held that the nature of the Plaintiff's claim involved the negligent loading and storing of the ladder on the truck and that that constituted the direct or indirect use or operation of an automobile under the terms of a motor vehicle liability policy. The exclusion under the CGL therefor applied, and there was no obligation on the CGL insurer to defend the claim.

ANALYSIS

For those of you familiar with the SCC case of *Derksen v. 539938 Ontario* you will note that the *CUMIS* decision is in contrast to the *Derksen* decision wherein the court found a duty to defend under a CGL on the basis that there were concurrent causes of the loss. The trial judge in the *CUMIS* decision distinguished *Derksen* on the basis that *Derksen* was an admitted "failure to load" case whereas *CUMIS* involved allegations of a failure to secure the ladder. Further given that loading and unloading are ordinary and well known activities to which motor vehicles are put the "automobile" exclusion would apply. Finally, the Court found that where the activity in question is captured by one exclusion clause in a policy (i.e. the automobile exclusion) an insured cannot look to language in another exclusion clause in its attempt to require the insurer to provide a defence.

IMPACT ON INSURERS

The result of the *CUMIS* case is that the decision as to whether a CGL insurer owes a duty to defend will continue to be very fact specific. *CUMIS* underscores the need for insurers to pay particular attention to pleadings before agreeing to provide coverage pursuant to alleged concurrent causes of the loss.

In addition, insurers should no longer be swayed by arguments that exclusionary language in an unrelated clause can influence their duty to defend.

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