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Insurance Law Update

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CAUTION TO PRIMARY RISK INSURERS IN CASES WHERE AN EXCESS INSURER *MAY* BE AT RISK

A recent Ontario Court of Appeal case sounds a note of caution for primary insurers who have conduct of a defence where an excess insurance policy *may* be triggered. The ruling effectively places an onus on primary insurers to give prompt notice of a potential claim to excess insurers in order to preserve the right to recover a portion of defence costs from an excess insurer.

FACTS

In *ING Insurance Co. of Canada* v. *Federated Insurance Co. of Canada,* the court considered which insurer ought to bear which percentage of the defence costs arising out of a serious motor vehicle accident. ING issued the insured's automobile policy, which had a limit of $2 million. Federated had issued two other policies to the insured, each with limits of $1 million. It was not disputed that the ING policy was primary and that the two Federated policies were excess.

ING assumed conduct of the insured's defence and appointed counsel. Federated did not have notice of the tort claim until seven months before the scheduled trial. Several days before the mediation, defence counsel advised Federated for the first time that his assessment of the damages exceeded the ING policy limits by approximately $1 million. Previously, defence counsel had always been of the view that the claim for damages would not exceed the ING policy limits. Shortly after so advising Federated, defence counsel offered the ING policy limits and an assignment of the insured's rights under the Federated policy, in exchange for a promise from the plaintiff not to sue the insured personally.

Following the mediation, Federated became directly involved in the negotiations among counsel and the matter settled. After the matter settled, ING brought suit against Federated, seeking a declaration that it was entitled to an equitable contribution from Federated for 50% of incurred defence costs. The lower court ordered Federated to pay 31% of incurred defence costs to ING. Federated appealed.

DOLDEN WALLACE FOLICK
Tenth Floor - 888 Dunsmuir Street | Vancouver. British Columbia. Canada. V6C 3K4 | TELEPHONE 604-689-3222 FAX 604-689-3777

RULING

The Court of Appeal confirmed that an excess insurer only has to contribute to defence costs where it has a duty to defend *and* it is put at risk by the claim. There is no obligation on the part of an excess insurer to contribute to defence costs in the absence of a duty to defend. The Court of Appeal confirmed that the duty to defend only arises on being given notice of the claim – absent which, there is no obligation to contribute to defence costs. Whether an excess insurer is "plainly at risk" to indemnify the insured is also a "crucial consideration" when determining whether it must contribute to defence costs.

Further, the Court of Appeal confirmed that the obligation of the excess insurer to contribute to defence costs was a matter of "equity" or "fairness", rather than contract. In the circumstances of this case, where it only became evident that Federated was "at risk" one month before the scheduled trial and where ING acted in manner adverse in interest, it would not be fair or equitable to require Federated to pay any portion of ING's defence costs.

PRACTICAL IMPACT FOR THE INSURANCE INDUSTRY

An issuer of a primary insurance policy ought to take early steps to identify the existence of excess insurance and provide prompt notice to an excess insurer of a potential claim, even if it is not thought at the time that the claim will exceed the limits of the primary policy.

Further, in order to preserve the primary insurer's right to receive a portion of defence costs from the excess insurer, care must be taken not to act in a manner adverse in interest to the excess insurer during the conduct of the defence. If the primary insurer offers up its policy limits on conditions the excess insurer will have a strong argument that because of this adverse position, it ought not be compelled to fund a portion of the defence costs incurred by the primary insurer.

AUTHOR Cynthia Hartling-McLean
Direct Line: 604-891-0365 *E-mail:* chartlingmclean@dolden.com

EDITOR Alex L. Eged
Direct Line: 604-891-0357 *E-mail:* aeged@dolden.com