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INSURE UPDATES

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DWF Welcomes Morgan Martin to the Toronto Office

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Dolden Wallace Folick is pleased to announce that Morgan Martin has joined the Toronto Office.

Morgan has significant experience defending claims involving occupiers' liability, municipal liability, professional negligence, hospitality liability (commercial and social host), property insurance, product liability and civil claims involving police liability. He regularly defends multi-million dollar claims involving catastrophic injuries including traumatic brain injuries and quadriplegia. Morgan regularly appears as lead counsel in the Ontario Superior Court of Justice and has also appeared in the Court of Appeal.

Morgan's hospitality experience includes acting as preferred counsel to one of Toronto's largest entertainment lifestyle companies, defending claims arising from the service of alcohol, forcible ejection, interior/exterior maintenance, and occupiers' liability. Morgan has defended hundreds of claims against the largest clubs and the smallest pubs on behalf of both domestic insurers and the London Market Insurers.

In addition to his insurance defence practice, Morgan has a keen interest in sports law having clerked for the Court of Arbitration for Sport at the 2005 Commonwealth Games in Melbourne,

Australia, and the 2008 Summer Olympic Games in Beijing, China.

Recently, Morgan represented National and International level athletes before the International Rugby Board and the Sports Dispute Resolution Centre of Canada (SDRCC) in anti-doping, team selection and carding disputes. In November of 2013, Morgan sat on the first ever Fédération Internationale de Volleyball (FIVB) Appeals Panel hearing a transfer dispute in Lausanne, Switzerland. Since 2009, Morgan has been a pro bono legal adviser to Rugby Canada.

Morgan has also presented at numerous speaking engagements, and co-authored various articles.

The Consequences of Failing to Name Another Party as an Additional Insured

By: Michael Bellomo

The scenario is all too common: A property owner, or perhaps an event organizer, contracts with another party to provide building maintenance, security or some other related service. Under the terms of the contract, the service provider is required to obtain liability insurance with predefined limits and add the property owner as an additional insured on the policy. Invariably, both the property owner and the service provider are sued by a third party for negligence and personal injury under occupiers liability legislation. When the suit is commenced, the property owner turns to the service provider for coverage under the service provider's liability policy, only to realize that the service provider failed to name the owner as an additional insured.

Most insurers would be surprised to learn that a breach of a covenant to insure does not give rise to a duty to defend on the part of the breaching party. Instead, the courts have held that the breach gives rise to a remedy in damages, which can have serious consequences.

The Ontario Court of Appeal's decision in *Papapetrou v. 1054422 Ontario Ltd.*, 2012 ONCA 506 ("*Papapetrou*") illustrates the consequences of failing to name another party as an additional insured. This case involved liability for injuries caused by a "slip and fall" on ice located in a commercial property - stairs in a mall. The building was owned by a numbered company and managed by The Cora Group ("Cora"). Cora had retained Collingwood Landscape Inc. ("Collingwood") to provide winter maintenance and snow removal services at the building. The contract contained an insurance clause whereby Collingwood agreed to procure liability insurance covering the liability of Collingwood with limits of $2,000,000 and to include Cora as an additional insured on the policy. However, Collingwood mistakenly obtained insurance with $1,000,000 in limits and failed to name Cora as an additional insured.

On a motion for summary judgment, the motion judge ordered Collingwood to assume Cora's defence and indemnify it for any damages awarded in the personal injury action. Collingwood appealed. However, the Ontario Court of Appeal ultimately reversed the motion judge's decision, holding that:

> *[34] However, Collingwood's breach of this contractual obligation does not create a duty to defend; rather, it gives rise to a remedy in damages.*
>
> [...]
>
> *[36] The quantum of such damages is the amount The Cora Group will be required to pay for a defence of the claims Collingwood's insurer would have been obliged to defend on The Cora Group's behalf had Collingwood fulfilled its contractual obligations.*

In the result, the Court of Appeal held that the Collingwood must pay Cora's defence costs. What's more, Cora was entitled to retain its own separate counsel. On this latter point, the Court of Appeal recognized that an insurer has a right to control its own defence (and appoint its own defence counsel), which, though not absolute, can only be shifted where there is a reasonable apprehension of a conflict of interest on the part of counsel appointed by the insurer. However, the court noted that this case was not governed by this rule given that Cora was not,

in fact, insured under Collingwood's policy. Rather, Collingwood was simply being ordered to pay damages for the breach of a contractual obligation under the service contract. Thus, in considering whether Cora was entitled to choose its own counsel the court held that it was unnecessary to consider whether there was a potential conflict of interest.

Papapetrou makes clear that a failure to name a party as an additional insured can be a costly mistake. Had Collingwood lived up to its insurance obligations under the contract and added Cora as additional insured, it would not have had to pay Cora's separate defence.

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