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CONTRACT GOVERNS ALLOCATION OF COSTS RELATING TO "MIXED" CLAIMS IN CGL POLICY: *HANIS V. TEEVAN*

BACKGROUND

On October 8, 2008, the Ontario Court of Appeal recently re-examined the allocation of defence costs in lawsuits that include claims that trigger the duty to defend as well as those that do not. In *Hanis v. Teevan*, 2008 ONCA 687, Dr. Hanis sued the University of Western Ontario and its employees over his dismissal from the University (the "Action"). Dr. Hanis pleaded multiple causes of action from a single set of complex facts, including wrongful dismissal and malicious prosecution.

The University was insured under a comprehensive general liability policy issued by Guardian Insurance Company ("Guardian"). The University sought coverage, which Guardian denied. The University defended the Action itself, and commenced third party proceedings seeking a declaration that Guardian had a duty to defend the Action. Guardian was held to owe a duty to defend, and was required to cover 95% of defence costs relating to claims fully or partially covered under the policy; the remaining 5% related solely to claims not covered under the policy.

RULING

The Court of Appeal confirmed the allocation of defence costs awarded below. It followed the strict "policy interpretation" approach taken by the British Columbia Court of Appeal in determining whether an insurer can allocate costs between covered and uncovered claims. The Court concluded that the nature and extent of the insurer's obligation to pay defence costs is not determined by judicial notions of fairness – it depends on what the insurer has agreed to do in the policy.

In the result, the Court of Appeal determined that the combination of the insuring agreement and the extended definition of "bodily injury", which included malicious prosecution, triggered coverage under the policy. Guardian was thus obliged to pay all costs associated with defending that claim. The Court stated that where the same defence costs are incurred in to defend both covered and uncovered claims, those costs should not be allocated, and the insurer must bear the costs of defending the entire claim. Nothing in the policies relieved Guardian from paying defence costs reasonably associated with the malicious prosecution claim, even though those costs also assisted the University in defending the uncovered claims, such as wrongful dismissal. The Court held that Guardian could have inserted wording into the policy that provided for an allocation of "mixed costs" or of costs related primarily to a covered claim, had it wanted that protection.

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It was likely only a small consolation to Guardian that the Court further concluded Guardian was not obliged to pay the 5% of defence costs solely related to defending uncovered claims.

The Court also stated that its contractual interpretation approach dictates the rejection of the argument that where an insurer fails to defend a covered claim it must assume the defence costs of all claims, both covered and uncovered. Finally, the Court stated that the burden of proof was on the insured to prove that the claims fell within the coverage provided by the policy, and that it is not up to the insurer to prove that a portion of the defence costs related to uncovered claims.

IMPACT ON INSURANCE INDUSTRY

Unless there is clear evidence that uncovered claims require a separate defence from the covered claims, an insurer will not likely be able to apportion defence costs between covered and uncovered claims. If insurers want to allocate costs in mixed claims, they must insert clear policy language allowing such allocation.

The full text of *Hanis v. Teevan*, 2008 ONCA 678, is available here: http://www.canlii.org/en/on/onca/doc/2008/2008onca678/2008onca678.html.

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