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DEFINING THE SCOPE OF THE DUTY TO DEFEND "ADDITIONAL INSURED" - *LIU V. CHU*, 2009 BCSC 753



In the recent case of *Liu v. Chu*, [2009 BCSC 753](#), the British Columbia Supreme Court considered the scope of an insurer's duty to defend an additional insured, where the wrongs alleged against the additional insured may be independent of those alleged against the named insured.

FACTS AND BACKGROUND

The Plaintiff alleged that she was struck by a delivery cart operated by an employee of Maxim Bakery. The collision allegedly occurred at Metrotown Centre, a large Vancouver-area shopping mall, where Maxim was a tenant. The mall was owned by Manufacturer's Life Insurance Company ("Manulife"). The Plaintiff's only basis for asserting liability against Manulife was that Manulife, as landlord, had breached the statutory duty imposed by the [Occupiers Liability Act](#) to keep the mall's common areas reasonably safe.

Manulife sought a declaration that Sovereign General, Maxim's comprehensive liability insurer, owed a duty to defend Manulife against the Plaintiff's claim. Manulife was listed as an "additional insured" in the Sovereign policy with respect to any liability "arising from the Legal Operations of the Named Insured [i.e., Maxim]". The policy also contained the following limits on coverage:

"Additional Insured Extension Endorsement

This Form includes the party or parties named in the Declarations as an Additional Insured but only with respect to the operations performed by or on behalf of the Named Insured. Such insurance as is afforded by this Extension does not insure liability arising out of the operations of the Additional Insured or its employees. [emphasis added]



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The insurer argued that it did not have to defend Manulife because the Plaintiff's claim against Manulife only related to Manulife's statutory duties as the "occupier" of Metrotown's common areas. The claim "stood alone", separate and apart from Maxim's activities, and did not constitute "...operations performed by or on behalf of the Named Insured". It thus fell outside the scope of the Endorsement cited above. Sovereign relied on *D'Cruz v. B.P. Landscaping Ltd.*, [\[2007\] O.J. No. 2704 \(S.C.J.\)](#), where the court distinguished between a plaintiff's claims against a landowner as *occupier* and against the landowner's contractor in *negligence*; the contractor's insurer did not owe a duty to defend the landowner for any breach of its statutory duties.

In response, Manulife argued that all of the Plaintiff's allegations ultimately arose from the actions of Maxim and its employee, and therefore coverage should be provided. Manulife relied on *Cowichan Valley School District No. 79 v. Lloyd's Underwriters, Lloyd's, London*, [2003 BCSC 1303](#), where the court decided that an insurer who had agreed to insure a tenant's baseball tournament also owed a duty to defend the owner of the land where the tournament was held, because the pleadings established a "clear nexus" between the tenant's activities, the alleged negligence and the alleged injury.

The Court agreed with Manulife, deciding that the insurer owed a duty to defend pursuant to the policy. It found that the Plaintiff's claim arose from an integral part of Maxim's operations, and not through any independent obligation on Manulife as occupier of the mall's common areas. More specifically, the court found that the pleadings, activity, and injuries which the insurer had agreed to cover were connected and inseparable; at paragraph 30:

"...the collision is clearly connected to the operation that Sovereign agreed to insure. The defendant employee injured the plaintiff while delivering goods in the course of his employment with Maxim's. The allegations contained within the statement of claim are predicated upon that act of the employee. Even a broad reading of the pleadings still discloses a nexus between the injury and Maxim's operations, which Sovereign agreed to insure."

The Court also concluded that there were no claims or facts alleged against Manulife that were "separate and distinct" from the Plaintiff's claim against Maxim, distinguishing *D'Cruz, supra*, and following *Cowichan Valley, supra*, on that basis.



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PRACTICAL IMPLICATIONS FOR INSURERS

Insurers faced with similar “duty to defend” claims by additional insureds should carefully review the scope of the applicable insuring agreement in light of the pleadings, the activities of the named insured, and the circumstances of the injuries alleged. If the alleged wrongdoing falls within the operations of the *original* named insured, and a separate and distinct cause of action cannot be articulated against the *additional* insured, coverage for the additional insured should likely be provided.

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