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British Columbia Limits Insurers' Liability for First Party Costs in Coverage Litigation

By Jonathan Weisman, DWF Vancouver, jweisman@dolden.com

The British Columbia Court of Appeal has veered sharply from the prevailing cost regimes in other Canadian provinces. In *West Van Holdings v. Economical & anor.*, 2019 BCCA 110, the court has held that insurers who unsuccessfully defend coverage claims are not required to fully indemnify their insureds for their legal costs. This decision will impact insurers' assessment of risk in challenging coverage scenarios.

In *West Van Holdings*, two insurers had issued a series of CGL policies with pollution and environmental exclusions. Their mutual insured was sued by an adjacent landowner for contamination alleged to have originated on the insured's land. Both insurers denied coverage on the strength of the exclusion clauses. The insured brought an action to compel its insurers to defend, and was successful in a summary trial. The chambers judge ordered that the insurers fully indemnify the insured for their costs of compelling the defence.

The insurers appealed both aspects of the judgment. In respect of the costs award, the insurers contended that there was no principled reason for distinguishing a CGL policy from any other commercial contract. Absent reprehensible conduct, parties who unsuccessfully defend a breach of contract are not required to pay special costs.

The insured submitted that the court should follow appellate authority in Ontario and Newfoundland as well as prior decisions in British Columbia which held that an insured successfully suing for a defence is entitled to full indemnification for its costs.

The Court of Appeal reversed the lower court's ruling on coverage, but it also proceeded to consider the question of costs to provide guidance in other cases.

The Court of Appeal concluded that there was nothing in the insurance policies that obligated the insurers to fully indemnify the insured for its costs of enforcing the policy. Additionally, it held that such a term could not be implied.

Prior cases had held that full indemnity for an insured's costs was required by the unique nature of insurance contracts. However, the Court of Appeal observed that this is already recognized by way of the contractual duty of good faith. Breaches of that duty are independently actionable, and punitive or aggravated damages are available as remedies. Costs are not intended as a substitute for damages, nor are they a remedy for breach of contract.

Accordingly, the Court of Appeal concluded that there is no principled reason to distinguish insurance policies from other contracts. Special costs and full indemnity costs may be available to an insured who successfully compels a defence, but only where the insurer has acted reprehensibly in the conduct of the litigation.

The Court of Appeal also held that when an insurer is faced with a difficult coverage question, it should be able to defend itself without automatically incurring exposure to severe cost consequences.

Take Away

This decision gives insurers some comfort in dealing with more difficult coverage decisions - defending a hard choice will not risk the same cost exposure as may be the case in other jurisdictions. At the same time, this emerging gap between the law in British Columbia and other Canadian jurisdictions is likely

to lead to a further appeal to the Supreme Court of Canada, if not in this case, then in another. The outcome of that further appeal may yet determine that full indemnity for an insured's costs is the order of the day throughout Canada.

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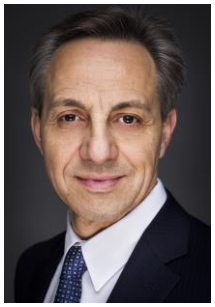

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