Focus INSURANCE

Apportioning defence costs at start of litigation

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As the cost of complex litigation grows, the allocation of legal defence costs at the initial stages of litigation has become an increasingly important issue.

Issues arise as to whether an insurer must pay *all* of an insured's defence costs of "mixed" claims alleging both covered and non-covered liabilities. Similarly, disputes arise as to how to allocate defence costs among various insurers and insured parties for losses extending over lengthy periods of times or where there are periods of no coverage.

The "duty to defend" clause is governed by the "pleadings rule": an insurer will have a duty to defend an insured if a claim alleges a state of facts which could engage the insurance coverage. In mixed claims alleging both covered and non-covered liabilities, an insurer may seek prospective apportionment of some defence costs to the insured. However, the insurer must show that the uncovered claim is not inexorably connected to, or derivative of, the covered claim.

For example, in *Sommerfield v. Lombard Insurance Group* [2005] O.J. No. 1131, the court distinguished allegations of negligence from allegations of intentional torts. The underlying claim was of sexual assault against the defendant teachers and, secondarily, for negligence in failing to report the sexual assault. While the sexual assault claim was excluded under the policy, negligence was covered and triggered a duty to defend. The court held that, as the main claim dealt with non-covered intentional torts, it would be unfair to require the insurer to prospectively cover all defence costs. Instead, it was ordered to pay 20 per cent.

A similar issue has arisen regarding prospective apportionment of defence costs in "long-tail" claims, where losses are continuous and extend over a lengthy period of time — often implicating multiple insurance policies as well as periods of no insurance coverage. This often arises with ongoing environmental contamination, only discovered decades later.

The critical question becomes the basis upon which to preliminarily apportion defence costs among the different insurers and the insured. Ontario courts have been willing to attempt prospective apportionment, typically using equitable contribution by all parties, or pro-rata apportionment where the circumstances permit. For example, in the seminal case of *Broadhurst & Ball v. American Home Assurance Co.* [1990] O.J. No. 2317, the Ontario Court of Appeal held that defence costs should be shared equally among the primary and excess insurers, as the losses at trial would likely exceed primary coverage.

In *General Electric Canada Co. v. Aviva Canada, Inc.* 2010 ONSC 6806, the court provisionally allocated defence costs on an equal basis between two insurers and the insured, invoking the principles of equity and fairness and acknowledging that although each party was on risk for some portion of the relevant time period, the record before the court did not allow for a pro-rata allocation.

However, in *ACE INA Insurance v. Associated Electric & Gas Insurance Services Limited* 2013 ONCA 685, the Ontario Court of Appeal cautioned that equitable contribution among insurers cannot override express policy wording. In this case, although there was a duty to pay defence costs under both the primary and excess policies, the express terms of the excess policy excluded liability for defence costs to the extent they were covered by another policy. As there was no overlapping duty for defence costs, there was no basis for equitable contribution from the excess insurer.

Courts in British Columbia have been more reluctant to attempt prospective allocation of defence costs between insurers and insureds, whether on a pro-rata or equitable contribution basis. As observed in *Continental Insurance Co. v. Dia Met Minerals Ltd.* [1996] B.C.J. No. 1293, a retrospective assessment of defence costs is the best solution to the "almost insurmountable difficulty of apportioning defence costs, on the basis of pleadings alone."

These courts have also given a more robust interpretation to the duty to defend obligations of insurers. In *Lombard General Insurance Co. of Canada v. 328354 B.C. Ltd.* 2012 BCSC 431, the court declined to follow the approach reflected in the *GE Canada* case on the basis that the wording of the policy, rather than equity, must guide any apportionment. As the express wording of the policy provided that the insurer had a duty to defend any action seeking compensatory damages occurring within the policy period, it followed that the insurer must pay *all* reasonable costs of defending such claims, regardless of whether they also assist in the defence of claims for damage falling outside the policy period.

Ultimately, as legal claims grow in scope and complexity, and associated defence costs rise, these disputes over the scope of the duty to defend and seeking to allocate costs to the insured, have become increasingly important at early stages of litigation.

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Lawyer, lawyer pants on fire in arson case

A lawyer was defending an arson case when his pants caught fire and no, it was not a visual aid. It happened while Miami attorney Stephen Gutierrez was arguing that his client had not purposely set his car on fire but that it had spontaneously burst into flames, reports miamiherald.com. The court was amazed when at that exact moment smoke began pouring from his pocket. Gutierrez ran from the courtroom and the jurors were ushered out. The culprit, it turned out, was a malfunctioning e-cigarette. After returning with no more than a singed pocket, the lawyer insisted that it was an accident and not a staged stunt. "When I checked my pocket, I noticed that the heat was coming from a small e-cigarette battery," Gutierrez said. He was representing Claudy Charles, who was on trial for intentionally setting a car on fire in South Miami. Charles was eventually convicted of second-degree arson. Police have seized the dead e-cigarette batteries as evidence and prosecutors are investigating the incident. – **STAFF**