

Newsletter



Robinson Sheppard Shapiro
Avocats • Lawyers

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More on the Duty to Defend

It is fair to say that not a week goes by that one does not see a new judgement on the insurer's duty to defend. One can easily say that it has been the trendy subject matter of recent years. Another judgement from the Quebec Court of Appeal (***Northbridge General Insurance Company v. Cirvek Fund I***) has been added to the already long list of judgements. This time, the Court of Appeal dealt with the issue of the payment of legal fees when the claim is only partly covered.

In that judgement, the insured owned a mixed residential/commercial complex in Toronto. The buildings had an underground parking that was divided between the commercial and residential tenants. Having rented commercial space to a major tenant, the insured tried to reduce the number of spaces reserved for residential tenants to increase the spaces for commercial tenants. The residential tenants' association sued the insured. In its action, the

association was claiming the payment of damages and injunction orders to force the insured to maintain the status quo. The claim was reported to the insured's liability insurer who denied coverage on the basis of an exclusion that applied to "*wrongful eviction from or invasion of the right of private occupancy of premises...committed by its owner, landlord or lessor.*"

The insured did not attempt to force its liability insurer to defend the Ontario action. Instead, the insured defended the action itself. Some \$2,347,817 in legal fees later, the residential tenants' action was dismissed. The insured sued its liability insurer to be reimbursed the legal fees incurred in the defense of the action.

The trial judge had maintained the insured's action and forced the insurer to pay \$964,811. That figure had been arrived at by reducing the amount of

(See next page)



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fees by 40% on the basis that the amounts charged by the Ontario lawyers were “unreasonable”. From that amount, the trial judge had condemned the insurer to pay 2/3 of the fees. The insurer appealed the judgement raising amongst other things that the trial judge should have split the fees further to take into account the fact that the claim for the injunction orders were clearly not covered and that only the claim for damages was covered. On that specific issue, the trial judge and, subsequently, the Court of Appeal decided that the insurer (translation) “had to demonstrate that the claim for injunction necessitated work that was distinct and separate from the

work relating to the defense of the claim for damages.” In the absence of such evidence, fees remained entirely the responsibility of the insurer. The Court of Appeal dismissed the appeal and the judgement of the trial judge was confirmed.

In cases where the duty to defend is uncertain, a liability insurer would be well advised to arrive at an agreement with its insured on the division of legal fees and disbursements right from inception rather than wait for the insured to sue after judgement is rendered on the liability claim.

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