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BRIEFING NOTE

THE TIDES ARE TURNING ON SPECIAL COSTS IN INSURANCE COVERAGE CASE

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Recently in ***West Van Holdings Ltd. v. Economical Mutual Insurance Company*** 2019 BCCA 110, our Court of Appeal found that there was no principled legal basis to automatically award special costs to insureds that were successful in a coverage dispute. Although the comment was made in *obiter*, given the full analysis of the issue and the clear position by the appellate court that special costs ought not to be awarded absent misconduct, we will likely start to see the tides turning in special cost awards sought against insurers in these circumstances.

In ***West Van Holdings,*** the plaintiffs West Van and Lions Gate had been sued for damages arising out of contaminants alleged to have migrated from the insureds' property to adjacent lands.

West Van and Lions Gate sought a defence under a CGL policy from Intact (their insurer from 1998 to 2002) and Economical (their insurer from 2002 to 2012). Both insurers denied coverage on the basis of exclusion clauses. Intact relied on its "Environmental Liability" exclusion and Economical denied coverage relying on its "Pollution Liability" exclusion.

West Van and Lions Gate filed a claim against Economical and Intact (2017 BCSC 2397) and in a summary judgment application successfully argued that the duty to defend had been triggered and a defence was owed to them. The insureds were further successful in being awarded special costs (solicitor and own client costs) as per the recent trend of cases that have held that "any expenditure by the insured in enforcing a policy for full indemnity in relation to defence costs, should also get its costs in trying to enforce that policy".

The insurers successfully appealed the decision that they owed a duty to defend and also appealed the special cost award, arguing that there was no principled basis to award solicitor-and-own-client costs against the insurers, despite the number of cases at our Supreme Court that have held otherwise. The insurers successfully argued that there was no legal basis to imply a term into the insurance contract that obliges insurers to fully indemnify an insured for expenditures arising from a proceeding enforcing coverage.

The appellate court found the chambers judge had erred in finding a duty to defend, and accordingly did not need to deal with the appeal of the cost award; however, Goepel, JA continued, in *obiter*, with a thorough discussion on the purpose of special costs (i.e. to deter misconduct) and the circumstances in which special costs may be awarded.

Ultimately, Goepel JA stated that the lower courts decisions to award special costs in coverage disputes **were wrong in principle in that special costs awards were not authorized by the Rules. Given that determination, those decisions should no longer be followed.**

Some highlights of Goepel JA's analysis of special costs are as follows:

- The wording of the policy governs indemnity. Where the insurance contract is limited to the cost of defending an underlying action against an insured, the language in the policy cannot be extended to cover legal fees and expenses the insured may incur in attempting to enforce its contractual right to coverage (para. 99);

- There is no basis to imply a term that the insurer will pay special costs if it unsuccessfully resists a claim under the policy (para. 100);

- There is no custom in the insurance industry by which insurers are expected to pay the full indemnity costs of a claimant enforcing coverage (para. 101);

- The main purpose of special costs is to deter misconduct. If a losing party faces full indemnity costs irrespective of their litigation conduct, the incentive for good conduct is correspondingly diminished. (para. 108);

- There is no principled reason to award costs in a duty to defend case in a manner different than other litigation (para. 109); and

- The Supreme Court decisions in which special costs were awarded in coverage dispute and there was an absence of misconduct were all wrongly decided on the cost issue and should not be followed (para. 110)

WHAT DOES THIS MEAN?

A victory for insurers!

Despite the costs decision in ***WestVan Holdings*** being in *obiter*, it is expected that lower courts in B.C. will treat it as binding. Given the comments by the Court of Appeal, so long as an insurer facing a duty to defend claim does not breach its duty of good faith or does not conduct itself in a manner that is worthy of rebuke, it will no longer have to worry about incurring the additional costs of paying for a successful insureds legal fees and expenses in a coverage dispute.

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