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The insurer's duty to defend and indemnify: a new judgment of the Quebec Court of Appeal

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Author

Jonathan Lacoste-Jobin

Partner, Lawyer

On March 1, 2013, the Court of Appeal rendered a judgment on the insurer's duty to defend and indemnify the insured in the area of commercial general liability insurance.[1] It confirmed the decision of the trial judge which had held that the insurer has the duty to defend and indemnify,[2] and ordered it to reimburse its insured for the amounts paid to settle the claim of a third party and the amounts incurred by the insured in defending itself against the action.

On the one hand, the Court found that the general coverage of the policy was occurrence-based. However, an extension to the policy also gave the insured, a manufacturer, claims-based coverage for its errors and omissions. The Court therefore found that there was an ambiguity which enabled it to apply the *contra proferentem* rule set out in article 1432 of the *Civil Code of Québec*. The trial judge's interpretation of the contract in favour of the insured was therefore without error.

On the other hand, the Court found that the insurer did not show that the allegations that were not covered by reason of exclusions in the policy itself could give rise to separate and quantifiable defence costs from those incurred in defending the allegations that were covered under the policy. Therefore, there was no reason to apply a percentage to distinguish between the amounts claimed that were covered and those that were not covered. The insurer was therefore bound to pay all of the amounts incurred by its insured for its defence.

Finally, the Court noted that the insurer's duty to defend starts as soon as it is served with a formal demand and not upon the service of the originating process. It reiterated what was originaly decided by the Supreme Court of Canada in the case of *Nichols* v. *American Home Assurance Co*.,[3] namely that the insurer must take up the insured's defence in a "*timely manner*".

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[1] *Zurich, compagnie d'assurances* v. *Gestion Guy Lamarre inc.*, 2013 QCCA 367 (Justices Jacques A. Léger, Jacques J. Lévesque and Dominique Bélanger).

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[2] *Laboratoires Confab Inc.* v. *Zurich, compagnie d'assurances*, 2011 QCCS 3282 (Justice Yves Poirier).

[3] *Nichols* c. *American Home Assurance Co.* [1990] 1 S.C.R 801.

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