The importance of good communication with one's insurer: a childcare center is sued

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Providers of educational childcare services, such as childcare centres and daycare centres, must hold various types of insurance coverage, including property and liability insurance.

Although some may think that the simple fact of taking out such insurance coverage is enough to protect them, you must be aware that other steps are necessary to benefit from full coverage.

OBLIGATION TO NOTIFY A LOSS TO YOUR INSURER

The law, as your insurance contract, requires you to notify your insurer of any loss or event which may trigger the application of your insurance policy:

> "The insured shall notify the insurer of any loss which may give rise to an indemnity, as soon as he becomes aware of it. Any interested person may give such notice."[1]

Such notification must be done quickly, that is, as soon as you become aware of the loss. Any failure to do so may bring you many headaches since the insurer may refuse to indemnify or defend you in whole or in part if it has not been notified quickly enough and thereby suffers injury:

> "An insurer who has not been so notified, and thereby suffers injury, may set up against the insured any clause of the policy providing for forfeiture of the right to indemnity in such a case."[2]

A premium increase or even a refusal to renew your insurance policy upon its expiry may follow.

It is therefore important to remain vigilant and notify your insurer of anything which may possibly involve your insurance coverage.

KEEPING ONE'S INSURER INFORMED OF SETTLEMENT NEGOTIATIONS

The law, as your insurance contract, provides that the insurer who pays you an indemnity to compensate an economic loss benefits from an automatic legal subrogation which will allow it to sue the person responsible for the loss to recover the amount it paid to you:

> "The insurer is subrogated to the rights of the insured against the person responsible for the loss, up to the amount of indemnity paid. The insurer may be fully or partly released from his obligation towards the insured where, owing to any act of the insured, he cannot be so subrogated."[3]

In legalese, this remedy is called "a subrogatory remedy", which results in the indemnified insured losing any and all rights he may have against the third party responsible for the loss in respect of the amount the insured received from the insurer.

It is therefore essential that you notify your insurer of any negotiation process you initiate with the opposing party, if the insurer has not yet adopted a position on coverage or paid an indemnity.

Indeed, a settlement entered into with the opposing party without the consent of the insurer may have a fatal impact on the insurer's subrogatory remedy, as was recently the case in the matter of *Société d'assurances générales Northbridge* v. *Maruca*[4] (hereinafter respectively referred to as "Northbridge" and "Maruca").

In this case, defendant Maruca had worked as an administrative assistant for a childcare centre (a "CC"). She was also responsible for payroll preparation and management.

Now, Maruca was using the CC credit card for purchasing items for personal use. In this way, she had embezzled several thousand dollars and had paid to herself unauthorized excess wages.

The CC had notified its insurer of these events and the insurer, after analysing the file, paid to the CC an amount of $19,108 pursuant to employee dishonesty coverage. However, concurrently to this claim, and unbeknownst to the insurer, the CC instituted legal proceedings against Maruca on March 29, 2012 to claim compensation from her for the faults she had committed.

These proceedings were settled in December 2013 through an agreement entitled *"Receipt, release, waiver, discharge and transaction",* the relevant excerpt of which reads as follows:

> "In consideration of all the foregoing, and under reserve of all the terms and conditions of the present Transaction, the parties hereby renounce immediately and definitely to all claims, rights, recourses, rights of action, sums and payments that they had, have or may have now or in the future, from or against her other, and hereby give one another a mutual, reciprocal, full, final, complete, definitive, unconditional and immediate release, discharge and exoneration of and from any and all past, present and future claims, that they had, have or may have, now or in the future, directly or indirectly relating to or arising from the litigation under Quebec Court number 500-22-191245-128."

After paying the indemnity, the insurer Northbridge, unaware of the existence of this lawsuit, introduced its own lawsuit against Maruca in August 2014, claiming, as is customary, the indemnity paid, and impleaded the CC in order for it to recover its $500 deductible.

Now, since the December 2013 transaction included a final release respecting any claim *"directly or indirectly relating to or arising from the litigation under Quebec court number 500-22-191245-128",* the judge ruled that Northbridge, as subrogated party, could not have more rights than its insured. In the case under review, in each of the lawsuits, namely, the first lawsuit of the CC, in 2012 and that of Northbridge in 2014, amounts were claimed to compensate the harm resulting from the same faults, that is, the illegal use of the credit card of the CC and the unauthorized payment of additional wages. The allegations as to the dates on which the faults were committed and discovered were also the same in each of the two files. The judge therefore ruled that the amounts claimed in Northbridge's file were identical or less that those claimed in the lawsuit of the CC, which had concluded in 2013. Accordingly, Northbridge's lawsuit was dismissed.

As shown by the above judgment of the Court of Québec, the failure to notify the filing of proceedings concerning the same events as those on which the claim for indemnity to the insurer and the fact that the case was settled without having informed the insurer resulted in the insurer losing its rights under legal subrogation and being unable to obtain compensation for the indemnity it paid pursuant to the insurance contract.

This time, the consequences were even more serious for the CC that the simple risk of premium increase or non-renewal of the insurance policy; indeed, Northbridge, having lost its rights due to the fault of the CC, instituted proceedings against the CC, claiming the repayment of the indemnity paid as well as the costs related to the proceedings.[5]

CONCLUSION

It is therefore essential to notify your insurer of the existence of any element which may give rise to a claim under your insurance coverage and of any step toward a settlement related to such event. In so doing, you will preserve your good relations with the insurer and limit your risk of legal and financial complications.

Better safe than sorry!

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[1] Art. 2470 par. 1 of the *Civil Code of Québec,* RLRQ c. C 1991 (hereinafter referred to as the "CCQ").
[2] Art. 2470 par. 2 CCQ.
[3] Art. 2474 par. 1 CCQ.
[4] *Société d'assurance générale Northbridge* v. *Maruca,* 2014 QCCQ 10083 (C.Q.).
[5] *Société d'assurance générale Northbridge* v. *Centre de la petite enfance St-Andrew's,* no. 500-22-219992-156 (C.Q.).