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The Québec Court of Appeal rules on the duty to defend and the exclusion of liability assumed by contract

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Last April 4, in the case of *Aldo Group Inc.* v. *Chubb Insurance Company of Canada*,[1] the Court of Appeal ruled on the insurer's duty to defend its insured and on the interpretation to be given to a clause excluding insurance coverage for liability contractually assumed by the insured. The decision highlights the difficulties of interpretation sometimes faced by the parties and the courts in situations involving complex contracts where the parties have adduced no evidence of what their respective intentions were at the time the contract was concluded. It also illustrates the importance of assessing each insurance policy on a case-by-case basis.

Facts

Aldo Group Inc. ("Aldo") had concluded various agreements including, in particular, with Moneris ("Moneris"), an agent of the Bank of Montreal ("BMO"), in order to facilitate purchases made by its clients with MasterCard credit cards. Pursuant to these agreements, Aldo agreed with Moneris to abide by certain IT security standards in order to protect the personal information of its clients. In particular, it undertook to pay penalties and other charges in the event of a breach of these standards. Moneris, in turn, entered into similar agreements with MasterCard.

Aldo's computing system was subsequently hacked, thereby jeopardizing its clients' data. Pursuant to the aforesaid agreements, MasterCard charged Moneris with more than $4.8M in penalties and other costs, which Moneris in turn charged against Aldo. No debate was held on this issue as these charges were automatically deducted, so that they could not be contested by Aldo. Instead, Aldo filed a claim in Ontario against Moneris and MasterCard, alleging that the amounts were deducted unfairly.

Aldo then applied to the Superior Court of Québec for an order against its liability insurer, Chubb Insurance Company of Canada ("Chubb"), to pay for its legal costs, i.e. its defence, in the action

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instituted in Ontario.

Trial judgment

The Superior Court dismissed the motion to force Chubb to pay for Aldo's legal costs[2] (its defence) in the action instituted in Ontario against Moneris and MasterCard. While the judge came to the conclusion, after interpreting the terms of the insurance contract between Aldo and Chubb, that the action instituted by Aldo was a valid claim within the meaning of the insurance policy, she found that the exclusion relating to liability assumed by contract applied. She also found that Aldo had contractually waived certain rights that it could have asserted against Moneris or MasterCard, thereby justifying the refusal by Chubb to assume its defence.

Court of Appeal judgment

Two preliminary comments by the Court of Appeal are important for parties and lawyers faced with resolving problems in the interpretation of insurance policies. Firstly, the Court of Appeal noted that this decision was not intended to "set a precedent" ("translation"), since it dealt with the analysis of contracts between the parties and an insurance policy specific to that case. In other words, each situation must be assessed in light of the particular insurance policy and the specific facts of each situation.

Secondly, the Court of Appeal stressed that there was no evidence of the circumstances surrounding the negotiation and conclusion of the insurance contract between Aldo and Chubb, including the specific exclusion at issue in this case. In the absence of evidence of the negotiations that led to the conclusion of the contract, or of the application of this exclusionary clause in the past, the court's analysis was limited to the text of the insurance policy alone, according to the applicable rules of interpretation.

On the merits, the Court of Appeal concluded, firstly, that the action instituted by Aldo against Moneris and MasterCard was a claim within the meaning of the insurance policy. Given the terms of the contract, the mere fact that Aldo itself had instituted the proceeding instead of being sued was not a sufficient reason, by itself, to conclude that Chubb's duty to defend had not been triggered.

Secondly, the Court of Appeal held, contrary to the trial judge, that Aldo had not contractually waived the ability to assert certain rights against MasterCard and Moneris, as Chubb had claimed. The mere fact that deductions had been made for the amount of the penalties did not constitute a waiver of the right of contestation. Furthermore, Aldo could not be accused of having failed to cooperate with Chubb.

Thirdly, the Court of Appeal confimed the trial judgment and concluded that Moneris' claim against Aldo was contractual in nature. The exclusion contained in the insurance policy for any liability assumed by contract therefore applied. In interpreting the policy, the Court held that this was a clause by which the insurer excluded claims from the liability insurance policy so as to avoid being held liable for any defaults by the insured in fulfilling its contractual obligations, such as unpaid accounts or other debts to third parties. In addition, the Court held that the exception to this exclusion relating to extra-contractual liability did not apply because Moneris could not have asserted its rights against Aldo in the absence of the contract. The fact that third parties, such as the victims of the leak of personal information, might potentially have been able to assert their rights against Aldo, was not a situation that enabled the exception to the exclusion to apply in this case.

The Court of Appeal therefore concluded that Chubb did not have the obligation to pay for Aldo's legal costs (its defence) in the claim brought in Ontario against Moneris and MasterCard.

Conclusions

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In summary, the Court of Appeal concluded as follows:

> while no legal action was brought against Aldo, Aldo's claim against Moneris and MasterCard was a valid claim within the meaning of the insurance policy and the duty to defend it would have been triggered, had it not been for the exclusion;
> Aldo had not waived the ability to assert any right whatsoever which prejudiced Chubb, and Chubb could therefore not claim on this basis that its duty to defend Aldo was not triggered;
> Chubb nevertheless had no duty to pay for the legal costs, i.e. the defence, of Aldo's claim against Moneris and MasterCard because this situation was covered by the clause excluding insurance coverage for any liability contractually assumed by Aldo.

As the Court of Appeal noted, this case in no way changes the principles governing the duty to defend. In this regard, Justice Bich wrote as follows:

> [Translation] [53] One cannot deny the atypical nature of this situation, which is certainly not an ordinary case. But, one must also see that the interpretation reached by the trial judge is not meant to be a general postulate that is intended to transform the duty to defend. It is a specific solution, based on the specific terms of a specific contract. The fact that we are outside the norm does not mean, by itself (subject to a palpable and overriding error), that we are justified in substituting the trial judge's interpretation of the text of the policy with a reading that would be consistent with Chubb's conception thereof.
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> [54] The defence contemplated in clause 16 is not therefore limited to contesting a legal action brought against the insured. This is, moreover, in no way incompatible with the meaning given by current dictionaries to the verb "to defend"/"défendre", which is not limited to a defence against a duly instituted court action, but more generally connotes such concepts as to protect, sustain, help, intercede and support.

The Court of Appeal also issued a warning to the parties to the insurance contract: if a contract such as an insurance policy must be interpreted with the help of other elements than the text, then evidence must be presented. Otherwise, only the text will guide the court, in light, of course, of the rules of interpretation as provided in the legislation and case law.

Finally, each insurance contract must be construed in accordance with its own wording and the facts of the case. Therefore, even in the presence of similar terms, insurers and insureds must nevertheless avoid speaking in generalities when the time comes for determining whether, for instance, the insurer has the duty to defend or indemnify.

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1. 2016 QCCA 554 (Justices Yves-Marie Morrissette, Marie-France Bich and Marie St-Pierre); reasons given by Justice Bich.
2. *Aldo Group.inc.* c. *Chubb Insurance Company of Canada* 2013 QCCS 2006 (Justice Marie-Anne Paquette).

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