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Insurer's Duty to Defend: Bill 82 Opens the Door to Possible Limitations

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On December 11, 2020, the Minister of Finance, Éric Girard, introduced and tabled Bill 82 entitled *An Act respecting mainly the implementation of certain provisions of the Budget Speech of 10 March 2020* (hereinafter the "**Bill**") before the National Assembly. The Bill opens the door to possible limitations on the duty to defend with respect to certain categories of liability insurance contracts to be determined by regulation.

Background

The *Civil Code of Quebec* ("**C.C.Q.**") provides in articles 2500 and 2503 C.C.Q. that the insurance limits provided for in liability insurance contracts and the costs resulting from actions against the insured, including those associated with the defence, are borne by the insurer in excess of these limits. Since these provisions are of public order, the parties to the contract cannot agree to the contrary and the insurer's obligation to pay these defence costs is practically unlimited.

The increase in the frequency and size of claims, as well as the explosion in costs associated with the defence of insureds, have contributed to a hardening of the market since 2019. In such a market, insurance companies are applying stricter pricing and demanding higher premiums. In some cases, some insurers are withdrawing completely from the market or from certain industries, creating real difficulties for many companies.

The absence of a possible limitation on the insurers' duty to defend, a principle specific to Quebec, was likely to make this market less attractive to national and international insurers.

Proposed legislative change

The Bill provides that the insurers' duty to defend under articles 2500 and 2503 C.C.Q. may be limited with respect to certain liability insurance contracts that will be determined by regulation. If the proposed amendment is accepted in its present form, the new article 2503 C.C.Q. will henceforth read as follows:

> *2503. The insurer is bound to take up the interest of any person entitled to the benefit of the insurance and assume his defence in any action brought against him.*
>
> *Legal costs and expenses resulting from actions against the insured, including those of the defence, and interest on the proceeds of the insurance are borne by the insurer over and above the proceeds of the insurance.*
>
> ***However, the Government may, by regulation, determine categories of insurance contracts that may depart from those rules and from the rule set out in article 2500, as***

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well as classes of insureds that may be covered by such contracts. The Government may also prescribe any standard applicable to those contracts

[Emphasis added]

This amendment has no practical impact in the short term since a regulation will have to be adopted to specify the contracts that may be subject to this limitation. We anticipate that the legislator will first target more special classes of liability insurance contracts, often purchased by more sophisticated insureds, such as Directors and Officers liability insurance contracts.

Nevertheless, this is a significant step forward that will undoubtedly stimulate the interest of certain specialized insurers for Quebec risks.

Upcoming steps

The Bill, although tabled, must go through several stages before the proposed amendment becomes law. Even if the Bill could be assented to in the coming months, a regulation giving effect to the new paragraph of article 2503 C.C.Q. will also have to be drafted and passed.

We will therefore continue to monitor the progress of this legislative matter.

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