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Amendments to the categories of contracts covered by the exemptions to the obligation of an insurer to assume an insured's defence—the Regulation to come into force

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On April 20, 2022, the government issued Order in Council 656-2022, which makes significant amendments to the *Regulation respecting categories of insurance contracts and classes of insureds that may derogate from the rules of articles 2500 and 2503* (the "**Regulation**"). The original version of the draft regulation with the same title (the "**Draft Regulation**") was the subject of one of our publications last September. The Regulation as amended will come into force on the 15th day following the date of its publication in the *Gazette officielle du Québec*; that is, on May 5, 2022.

Background

In its articles 2500 and 2503, the *Civil Code of Québec* (the "**C.C.Q.**") provides that the costs resulting from actions against an insured over and above the proceeds of insurance provided for in civil liability insurance contracts, including those of the defence, are borne by the insurer. In June 2021, the government amended article 2503 of the C.C.Q. to make it possible for some "categories of insurance contracts" and "classes of insureds" to be determined by regulation to depart from these rules.

It is in this context that the Draft Regulation came about. It was was significantly modified following the numerous comments and observations received from various industry stakeholders.

Amendments

First, sections 1 and 2 were amended to specify when the insured must meet the conditions referred to in these sections, i.e., "at the time of subscription".

The duration of the contracts covered by the first two sections of the Regulation is limited to one year pursuant to the new section 3. It also specified that in the case of contract renewal, the insured must meet the conditions set out in these sections.

The provisions of the former section 5 remain, with the necessary adaptations, and are now found in section 4.

Finally, sections 6, 7 and 8 were simply removed.

Categories of insured covered

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Below are the categories of insureds who may subscribe to policies that depart from the rules set out in articles 2500 and 2503 of the C.C.Q.:

Section 1
Drug manufacturers under the *Act respecting prescription drug insurance*;[1] Certain **corporations incorporated under a private bill**;[2] and Directors, officers and trustees of such businesses, except for their activities as members of a pension committee.

Section 2
Companies that are not referred to in section 1, but that meet one of the following conditions "where the total coverage under all the civil liability insurance contracts subscribed by that insured is at least $5,000,000": **Large businesses** for the purposes of the *Act respecting the Québec sales tax*,[3] that is, businesses that have total taxable sales in a given fiscal year in excess of $10 million; A **reporting issuer** or subsidiary of such a reporting issuer within the meaning of the *Securities Act*;[4] A **foreign business corporation** within the meaning of the *Taxation Act*[5] or the *Income Tax Act*,[6] that is, a company that is not resident in Canada; and Directors, officers and trustees of such businesses, except for their activities as members of a pension committee.

What to expect

The amendments to the Draft Regulation reflect a willingness to simplify its application. In this regard, the removal of section 8 will no doubt be well received. Nevertheless, Quebec continues to be an exception to the principle of full freedom of contract. As a result, small and medium-sized enterprises in certain industries may continue to be affected by the tightening of the insurance market in Quebec, including the manufacturing sector that exports to the United States. It remains to be seen whether the Regulation will change over time.

If you have any questions on the subject matter of this article or any other questions, feel free to contact a member of Lavery's insurance team.

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[1] A-29.01.

[2] *Act constituting Capital régional et coopératif Desjardins* (C-6.1), *Act to establish Fondaction*, *le Fonds de développement de la Confédération des Syndicats Nationaux pour la coopération et l'emploi* (F-3.1.2) and *Act to establish the Fonds de solidarité des travailleurs du Québec (F.T.Q.)* (F-3.2.1).

[3] T-0.1.

[4] V-1.1.

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[5] I-3.

[6] R.S.C. 1985, c. 1 (5th Supp.).

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