

## Focus INSURANCE LAW

# Duty to defend decision ‘will change the landscape’

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The Ontario Court of Appeal has shone a new light on an old decision.

In *Papapetrou v. 1054422 Ontario Limited* [2012] O.J. No. 3373, the court found that a duty to defend was not triggered in the face of independent allegations that were outside the scope of the contract.

In reaching this conclusion, the court reviewed *RioCan Real Estate Investment Trust v. Lombard General Insurance Co.* [2008] 91 O.R. (3d) 63. In that decision, Ontario Superior Court Justice Patricia Hennessy stated: “I am of the view that in most situations where there is a duty on an insurer to defend some, or only one, of the claims made against an insured and that claim embodies the true nature of the claim, a duty to defend the entire claim arises. This is so even where the pleadings include claims that may be outside the policy coverage.”

The province’s appeal court does not concur. “The court expressly disagreed with *RioCan*,” said Andrew Evangelista, a Toronto lawyer who represented Collingwood Landscape Inc., one of the two defendants in *Papapetrou*.

“This decision will change the landscape,” he added. “Over the last three to four years there have been more motions based on *RioCan*. There may now be fewer.”

The case looked at two issues. First, the court addressed when a duty to defend is triggered in situations where there are allegations outside the scope of the contract. Second, the court looked at what stage the need to indemnify arises.

“The big question is how do you deal with a conflict of interest if in theory there is one,” said Nancy Crespo, a Toronto lawyer who represented Cora Group Inc., the second defendant.

The plaintiff in this case claimed she slipped and fell on black ice that had accumulated on stairs of

a building managed by Cora. That company had, in turn, contracted Collingwood to provide winter maintenance and snow removal services for the building. In its service contract, Collingwood promised to name Cora Group as an additional insured on its commercial general liability policy; however, Collingwood breached that obligation.

On a motion for summary judgment, the judge ordered Collingwood to assume Cora’s defence in the personal injury action and to indemnify Cora for any damages awarded. The motion judge relied on *RioCan* to determine that the defendants were negligent.

The appeal court concluded that Collingwood was liable to Cora Group in damages for failing to satisfy its duty to have that company named as an additional insured. However, the issue came with a legal wrinkle.

“Ordinarily, the scope of this obligation would be determined by the terms of the insurance

contract (in particular, the additional insured endorsement). The difficulty in this case is that the terms of coverage for The Cora Group as an additional insured were not included in the insurance contract. Accordingly, the terms of the intended insurance coverage must be discerned from the insurance obligation and the indemnity provision in the service contract,” Justice Janet Simmons wrote.

The court concluded that Collingwood’s breach of its contractual obligation did not create a duty to defend; rather, it gives rise to a remedy in damages. For landlords, said Crespo, that means “you can’t rely on that breach” for future coverage.

Prior to the appeal being heard, Cora Group conceded that the order to indemnify was premature. Still, the court addressed the issue. “To make an order that Collingwood must indemnify The Cora Group, a court will first have to determine

whether Collingwood’s contractual obligation to indemnify has been triggered. As no evidence concerning the issues of liability or damages was led on the motion, this cannot yet be determined,” said Justice Simmons.

The appeal court’s decision has national implications, Crespo said. There are standard contract clauses used to routinely address the situations that surfaced in *Papapetrou*. “These clauses are pretty common. [Now] what kind of protection do people have?”

Evangelista is optimistic about the implications of the appeal court’s decision. “I’m hopeful that coverage and indemnity obligations will be more definable.”

The Ontario appeal court has returned to the first principles of a duty to defend, he added. “We started to confuse things. This is a refocusing.”

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