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Loblaw Companies Limited et al v Royal & Sun Alliance Insurance Company of Canada et al

In Canada, numerous class proceedings have launched on behalf of governments and individuals against entities involved in the manufacture and distribution of opioids. These actions claim wrongful acts and damages that extend over 23 years, raising important legal questions for the insurers of these entities as to the extent of their obligation to defend the proceedings on behalf of their insureds.

In *Loblaw Companies Limited et al v Royal & Sun Alliance Insurance Company of Canada*, the Court of Appeal for Ontario provided clarity on key coverage issues related to the payment of defence costs, relief from forfeiture of pre-tender defence costs, and an insurer's entitlement to defence information.

Background

Among many others, Loblaw Companies, Shoppers Drug Mart, and Sanis Health (the "**Insureds**") were sued in multiple class actions alleging, among other things, negligence in the manufacture and/or distribution and sale of opiates commencing in 1996. The Insureds were insured by multiple insurers over the Class Period under consecutive policies with substantial deductibles or retentions.

The Insureds brought an Application seeking a declaration that they could select a single insurance policy to defend all the claims against them, regardless of if the insurer might only have a policy that covered nine months of the 23 year class period. They also sought reimbursement for defence costs incurred prior to notice having been provided to insurers.

The Application Judge ruled, on the key issues, that:

- The Insureds were entitled to select a single primary insurer to bear the costs of the defence, including those that related to claims outside the insurer's coverage period. She rejected the *pro rata* allocation based on each insurer's time-on-risk that the different primary insurers had proposed;

- While a self-insured retention had to be exhausted before there could be a duty to defend, this could be paid by the

defence costs incurred by another insurer paying for the defence; and

- Loblaw was entitled to relief from forfeiture for its pre-tender defence costs (i.e., those defence costs incurred prior to notifying its insurers).

The Appeal Decision

On appeal, in a careful and substantive decision, the Court of Appeal overturned the Application Judge's findings on the above, and found in favour of the insurers on allocation and duty to defend issues.

Regarding payment of defence costs, the Court of Appeal held that a *pro rata* allocation of defence costs, based on the insurers' time-on-risk, was appropriate. Each policy's coverage was limited to occurrences "during the policy period," there were consecutive rather than concurrent coverage periods, and the insurers had agreed only to cover risks within defined time parameters. The duty to defend was restricted to claims for damages that fell within this scope. The Court of Appeal held that it was an error to hold that a single insurer could be obliged to defend the claims that extended over 23 years and beyond the temporal scope of their policies. To conclude that an insurer who was only on risk for approximately 6% of the class period should defend all allegations could rise to conflicts of interest, was contrary to reasonable expectations, and would apply an "all sums" approach, contrary to Canadian law.

Regarding how self-insured retentions should be applied across the Class Period, the Court of Appeal affirmed that such obligations under each policy had to be satisfied by the insured and could not be paid by defence costs covered under another policy. The insured would have to contribute the *pro rata* share of that insurer's allocation of defence costs until the relevant self-insured retention was exhausted.

Finally, with respect to pre-tender costs, the Court of Appeal held that defence costs incurred by the insured before notice to the insurer was contrary to the voluntary payments provision found in the policies. As the insurer had no notice of the claim, its duty to defend had not been triggered. And as coverage had not been denied, the doctrine of relief from forfeiture did not apply. The insurer was simply seeking to apply the policy terms. There was no forfeiture.

Takeaways

This decision brings important clarity to the extent of defence obligations for long-tail claims, and on the duties of insureds to

satisfy self-insured retentions. Key takeaways include:

- For long-tail claims involving multiple insurers and consecutive coverage periods, a *pro rata* allocation of defence costs among primary insurers based on their time-on-risk, subject to the exhaustion of applicable self-insured retentions and deductibles is appropriate;
- Retentions reflect self-insured obligations that must be satisfied by the insured before an insurer's obligations are triggered; and
- Relief from forfeiture is not engaged to allow an insured to recoup pre-tender defence costs where there is no denial of coverage.

The decision also addresses other important coverage principles around conflicts of interest in the insurance relationship. It represents an important decision for insurance law in Ontario.

Lenczner Slaght litigators, Nina Bombier, Sean Lewis, and Mari Galloway, represented the appellant, AIG Insurance Company Canada.