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CASE SUMMARY: DEFENCE COSTS OF A CLASS ACTION WERE EXCLUDED UNDER A CLAIMS MADE POLICY

Insurance law – Class actions – defence costs; Liability insurance – Errors and omissions policies – Policies and insurance contracts – Claims made policy – Exclusions – Service charges – Loss or damage – definition

Coast Capital Savings Credit Union v. Liberty International Underwriters

Insured's petition for indemnity for defence costs under a claims made policy was dismissed as it was plain and obvious that an exclusion applied, despite the fact that it was premature to determine if coverage was triggered under the policy.

[2016] B.C.J. No. 736

2016 BCSC 655

British Columbia Supreme Court

April 14, 2016

N.P. Kent J.

This decision concerned a petition brought by the insured for indemnity for defence costs incurred in relation to a class action. The insured was a credit union. In the reasons certifying the class action, the court held that the essence of the proceeding was that the insured charged undisclosed surcharges to its members who made foreign-currency withdrawals from their personal account from automated teller machines.

The policy was a claims made policy which extended coverage for a "loss" as a result of a claim made against the insured for a "wrongful act" arising out of the performance of "professional services". The definition of "loss" expressly excluded any claim for return of fees or charges. The policy contained exclusions for dishonest acts and for:

3(r) any Claim based upon or arising from charges or services, including commissions and fees.

The insurer argued the class action was not insured under the policy because: It was based on an intentional act and therefore not fortuitous; coverage was not triggered because the definition of "loss" was not met; and, if the claim fell within coverage, it was excluded by the dishonest act or charges/fee exclusion.

The court held that the fortuity argument was premature given the class action might reveal that the insured's liability was based on a mistaken interpretation of the relevant contract and therefore fortuitous. With respect to whether coverage was triggered, the court noted that while a claim for the return of fees or charges was excluded from the definition of "loss", the definition also included damages and punitive damages, which were being sought in the class action. This was sufficient to meet the definition of "loss". Like the fortuity question, the court held that it was premature to determine if the dishonest act exclusion applied. However, the court was satisfied that, even if there was coverage, it was plain and obvious that the coverage was excluded by the charge/fee provision, given that the essence of the action was for the charging of undisclosed surcharges by the insured, and the insured's petition for indemnity was dismissed.

This case was digested by [Michael J. Robinson](#) and edited by [David W. Pilley](#) of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact them directly at mrobinson@harpergrey.com or dpilley@harpergrey.com or review their biographies at <http://www.harpergrey.com>.