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CASE SUMMARY: ONCA DECLINES TO RULE ON MERITS OF AN APPEAL IN LIGHT OF APPARENT CONFLICT OF INTEREST BETWEEN INSURED'S COUNSEL AND INSURED

Ontario Court of Appeal declines to rule on merits of an appeal in light of an apparent conflict of interest between the insured's counsel and the insured, given the insured's counsel had brought an appeal of a decision finding there was no coverage under two additional policies of insurance which, if upheld, would likely result in there being no coverage to the insured under the policy pursuant to which the insured's counsel had been appointed.

Insurance law – Property insurance – Exclusions; Conflict of interest – Appointment and instruction of counsel – Third party action

Reeb v. Guarantee Co. of North America, [2017] O.J. No. 5270, 2017 ONCA 771, Ontario Court of Appeal, October 5, 2017, R.J. Sharpe, P.D. Lauwers and L.B. Roberts JJ.A.

The insured appealed from the dismissal of his application for a declaration that he was an insured under two policies issued by the insurers.

The question for the Court of Appeal was whether to rule on the merits of the appeal or to allow the appeal in view of an apparent conflict of interest between the insured and another insurer who appointed, paid, and instructed the insured's counsel.

In the underlying action, the insured was a defendant in a lawsuit brought by James Riley. When they were 14 years of age, James Riley and the insured were playing with pellet guns at Mr. Riley's home. The insured shot Riley who lost an eye. The insured's mother and father were also defendants. The insured's mother had a homeowner's insurance policy with Royal & Sun Alliance. Royal & Sun Alliance appointed counsel to defend the insured under a non-waiver and reservation of rights agreement. On behalf of the insured, counsel brought the application for a declaration that the insured was insured under two additional policies issued by the respondent insurers.

The respondent insurers conceded the insured was an insured under both policies but asserted the intentional act exclusion in both policies applied to exclude the injuries suffered by Mr. Riley. The application judge dismissed the application based on the intentional act exclusion in both of the policies, leading to the appeal. If the Court were to uphold the application judge's decision, then the intentional act exclusion would apply, the insured would not be entitled to coverage under the additional policies, and the insured would likely lose coverage under the Royal & Sun Alliance policy. As a result of this constellation of interests, the Court raised with the parties whether the insured's counsel was in an apparent conflict of interest. On the one hand he was being paid by Royal & Sun Alliance to defend the insured and pursue the appeal but on the other, if the appeal failed, the insured would have no coverage which would be to Royal & Sun Alliance's financial advantage.

The Court ultimately concluded there was a reasonable apprehension of a conflict between the interests of the insured and Royal & Sun Alliance. This apprehension of a conflict precluded the Court from ruling on the merits of the appeal. In order to protect his interest in these proceedings in light of the conflict, the insured ought to have independent counsel who did not report or take instructions from Royal & Sun Alliance to advise him on the on the advisability of bringing the underlying application. The Court set aside the decision of the application judge but did not make the declaration sought by the insured in the original application.

This case was digested by Cameron B. Elder, and first posted on Quicklaw and published in the Harper Grey Insurance Law Newsletter. If you would like to discuss this case further, please contact Cameron B. Elder at celder@harpergrey.com.

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