Alberta court decision highlights insurance defence lawyer obligations to insureds

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Recently, the Alberta Court of Queen's Bench provided guidance to defence lawyers on their obligations to report to and take instructions from insurers and insureds in *Kostic v Thom,* 2020 ABQB 324. In addition, the Court identified potential conflicts of interest that may arise when a lawyer is retained by an insurer to act for an insured.

Facts

The Plaintiff and her employer were defendants in an action that made a number of allegations, including negligence and fraud (the Original Action). The Original Action triggered partial coverage for both the Plaintiff and her employer under the employer's Professional Liability policy (the Policy). The Policy set out that the insurer, in the insured's name and behalf, had the right and duty to investigate, defend and conduct settlement negotiations, but it agreed that it would not settle any claim without the consent of the insured.

The insurer appointed counsel to defend the Plaintiff and her employer in the Original Action. The Plaintiff alleged the lawyer retained by the insurer was negligent, thus giving rise to the litigation in question.

Early in the Original Action, the Plaintiff raised the possibility of seeking a summary dismissal with the lawyer. The lawyer held the opinion that there was no real chance of succeeding in a summary dismissal application at that stage of the litigation. The Plaintiff was aware of this opinion and did not push the matter further at that time.

Several years later, the Plaintiff instructed the lawyer to have the claims made against her dismissed. The lawyer advised the Plaintiff that he could not follow her instructions as the insurer had the sole right to instruct counsel and, even with the passage of time, he held his opinion that the summary dismissal application would likely not succeed.

Later, the claimant in the Original Action made an offer of discontinuance on a without costs basis (the Offer). The insurer and employer consented to the Offer, but the Plaintiff did not. The lawyer ultimately withdrew as counsel for the Plaintiff due to this disagreement.

Decision

The Court in *Kostic* found that the lawyer misunderstood the nature of his role as defence counsel. Although he was retained through the insurer, the lawyer's clients in the Original Action were the insureds, the Plaintiff's employer and the Plaintiff herself. The lawyer was obliged to take instructions from the Plaintiff, unless those instructions put him in a position of conflict between the Plaintiff, her employer and/or the insurer. The Court held that the lawyer's misunderstanding of the nature of his role as counsel for the Plaintiff resulted in her receiving poor communication. The reporting letters sent to the insurer as the Action proceeded should have been copied to the Plaintiff and the Plaintiff should have been made more aware of the defence strategy.

The Court ultimately dismissed the Plaintiff's claim against the lawyer and found there was no evidence of a conflict of interest until divergent instructions were given by the Plaintiff respecting the Offer. At that time, the lawyer properly withdrew as counsel for the Plaintiff. The Court held that the prior disagreement on bringing a summary dismissal application was a mere disagreement with respect to litigation strategy, which did not amount to a conflict of interest. If it did, the insurer's right to control the defence stipulated in the Policy would be effectively meaningless.

Implications

Kostic serves as a reminder of the obligations an insurance defence lawyer has to insureds. Defence counsel should be aware of their obligations to both the insurer and insured in these situations. In this sense, *Kostic* is not "ground-breaking". Where *Kostic* is of greater assistance is in its commentary respecting communication obligations. While insurers may have control of the defence of an action, it is clear that there must be communication with insureds to an extent that would permit the insured to understand strategic decisions. Whether this understanding is to be held to a subjective or objective standard is unclear from the ruling. We would assume it would have to be objective, albeit counsel would be well served to cater to her audience. At a minimum, it would seem prudent for defence counsel to report to the insured as frequently as her reports to the insurer. Finally, *Kostic* provides helpful clarification on when a conflict of interest might arise in these circumstances. It seems very reasonable to find, as the Court did, that counsel would need to remove herself where there is a material divergence of views on key strategic decisions such that there is a reasonable apprehension of a conflict between the interests of the insurer and the insured. Imposing such an obligation at an earlier stage would make it very difficult, if not impossible, for counsel to represent both the insured and insurer.

By

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