Michaud LeBel

S.E.N.C.R.L.

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The Legal Brief

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Why a legal column?

- Because law is constantly evolving;
- Because the team of Michaud LeBel, s.e.n.c.r.l. is always up to date on recent legal developments;
- Because we want to keep our clients and partners posted on the latest legal developments about matters which concern them;
- Because we hope this will help you in properly conducting your own files.

This is why we hope that you will appreciate our bulletins and that you will give us your impressions, ask us any questions you may have and let us know what your needs are.

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RESERVE LETTER

In the current context in which insurers are increasingly requested to assume the defence of their insured, in comparison with past practice, it is essential that their position be rapidly disclosed to their insured and be clearly stated, thereby allowing insurers to establish the limits of its obligation to indemnify and/or establish a rule to share defence costs. This is what the Superior Court recently reiterated in *Touchette* v. *Oppenheim*, 2014 QCCS 6039.

An insurer's obligation to rapidly make its position known results from its general obligation of good faith. In *Lapointe Boucher* v. *La Mutuelle-Vie des fonctionnaires*[1], Justice Michel Robert, with a bit of humour in citing a proverb: "you made your bed, now you have to lie in it," explained the basic obligation an insurer has to invoke as soon as possible any grounds for refusing coverage and/or for an exclusion in countering its insured's claim.

An insurer's negligence in invoking a ground for refusing coverage and/or an exclusion may entail various consequences. If an insurer does not notify its insured of a reason for refusing coverage and/or invoking an exclusion, it may be considered that the insurer has irrevocably waived its right to do so, even if it took the trouble to reserve its rights to invoke any other ground for refusing coverage and/or invoking an exclusion later on. This rule especially applies to facts which the insurer knew or should have known. If during the processing of a claim, the insurer learns about a new fact, it may without any problem invoke a new ground for refusing coverage and/or invoking an exclusion, even if it was not specifically invoked initially.

As far as direct damage is concerned, an insurer which does not notify its position within a reasonable time limit may nevertheless be required to indemnify its insured.[2] In addition, if an insured is required to indemnify its insured for damage which is not covered, its subrogatory recourse will be irrevocably affected because legal subrogation does not take place when an insurer pays an indemnity which is not covered. Moreover, if an insurer is directly sued for civil liability without its insured also being sued, it cannot invoke in defence against the third party's recourse any grounds for non-coverage and/or exclusion which it did not invoke against its insured.[3]

Insurers have developed various ways of structuring their practice to avoid waiving grounds of non-coverage and/or exclusion. The signing of a non-waiver agreement during an investigation may be useful to some extent, to counter an insured's allegations to the effect that an insurer apparently acknowledged an insured's right to an indemnity, because it conducted an insurance investigation.

However, the best means of disclosing an insurer's position to an insured and of protecting its interests still is a reserve letter.

A reserve letter must:

- Be given rapidly following an insurance investigation (ideally by respecting the time limit of 60 days specified in article 2473 of the *Civil Code of Québec*);
- Be precise and describe in detail the reasons for non-coverage and/or exclusion, as well as all relevant facts, while being very short. An insured must always be able to identify the means invoked without the insurer being required to disclose the facts and conclusions of its investigation;
- In the case of an *ab initio* cancellation of an insurance policy, it must contain a mention of the sending of a cheque for the reimbursement of premiums or include this cheque, or in the few and rare cases in which an insurer is not required to reimburse any premiums, appropriate explanations must be given;
- Be part of a overall strategy in connection with the file, thereby determining the extent of the details regarding the facts which must be included in the explanations;
- Be complete but avoid uselessly invoking too many exclusions which have no chance of succeeding, thereby affecting the insurer's credibility, leading to doubts regarding its good faith;
- Contain subsidiary means, for example, a ground of *ab initio* nullity to which may be added exclusions and/or grounds to pay a proportional indemnity.

Lastly, a reserve letter must always be drafted with care and diligently: an insurer must be careful when processing its file and invoke as rapidly as possible any ground for non-coverage and/or an exclusion, failing which the insurer may end up having to pay for losses which it could have avoided. An insurer must accordingly be especially attentive and process every claim diligently, failing which it may have to "sleep in a bed which isn't right for it."

References

1 96 CanLII 5921 (C.A.);

2 *Touchette* v. *Oppenheim*, 2014 QCCS 6039;

3 *Di Capua* v. *Fonds d'assurance responsabilité professionnelle du Barreau du Québec*, 2003 CanLII 1347 (C.A.), par. 86.

Mission

Competency

Efficiency

Simplicity

Our professionals strive to come up with efficient and innovative solutions to quickly settle numerous disputes and litigation in the fields of construction, civil and professional liability as well as in the fields of business and insurance.

To do so, our team does not hesitate to work in close cooperation with clients to establish a litigation settlement strategy which is efficient and realistic.

The Michaud LeBel law firm has rapidly become outstanding and has ensured the confidence of its clientele by insisting on the accessibility and competency of its professionals.

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