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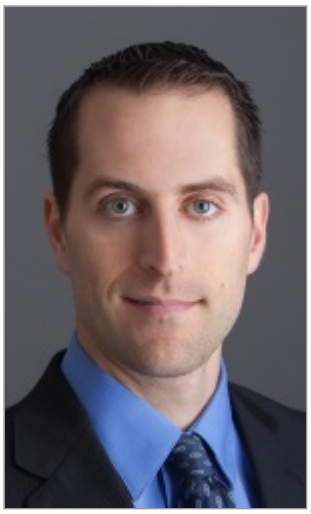
Insurance

Court of Appeal decision has bizarre implications for insurance law

By **Michael Lesage**



Michael Lesage

(September 17, 2018, 11:50 AM EDT) -- On Sept. 4, in an opinion likely to have significant implications to the field of insurance law, the Ontario Court of Appeal held that a policyholder's cause of action against its insurer began to run the day after the claim had been submitted. On that basis, in *Nasr Hospitality Services Inc. v. Intact Insurance* 2018 ONCA 725, the court allowed Intact's appeal, and granted summary judgment in its favour. If this decision stands, policyholders will be justified in filing suit immediately, with insurers obligated to pay resulting legal fees, even on claims the insurer intends to pay.

The underlying dispute in *Nasr* arose after its premises were flooded on Jan. 31, 2013. The loss was promptly reported to the insurer, who in turn assigned a company to report on it and perform emergency repairs. Two weeks later, Intact e-mailed Elsayed Nasr, the plaintiff's principal, and informed him that it was providing coverage, tendering him a $20,000 cheque toward foregone rent. Another $20,000 cheque was tendered in mid-April, while a final cheque of $2,000 for "hydro" was tendered on May 2, 2013.

Beginning in May 2013, the parties engaged in settlement discussions. Nasr then submitted a proof of loss form, which Intact rejected on June 25, 2013, stating that "its investigation remained incomplete, and that the insurer required additional time to investigate the loss." A subsequent proof of loss form was tendered on June 26, 2013, which Intact denied on July 22, 2013, along with "any further claims for damage as a result of this loss." Suit was filed for breach of contract on April 22, 2015.

In the trial court, Intact moved for summary judgment, alleging that the action was statute barred, having arisen on Feb. 1, 2013. Conversely, Nasr asserted that the limitations period did not begin to run until either May 2, 2013, the date of the last payment, or July 22, 2013, the date the insurer repudiated the insurance contract. Without deciding whether the cause of action was ripe on Feb. 1, 2013, Justice Paul Perell rejected Intact's argument, holding that Nasr's action for breach of contract would have been premature prior to Intact repudiating its obligation to indemnify on July 22, 2013.

Intact appealed, arguing that under the "appropriate means" element of the *Limitations Act*, Nasr's cause of action arose on Feb. 1, 2013. Inexplicably, Nasr agreed, while arguing that given Intact's subsequent payments, there was no reason to interfere with Justice Perell's ruling. In reliance upon that admission, and two cases construing statutory insurance provisions applicable to motor vehicle accidents, the appellate court allowed Intact's appeal, holding that Nasr's cause of action began to run the day after his claim was submitted, and it granted summary judgment in favour of Intact. That decision is all the more surprising given the absence of supporting policy language to that effect.

In her dissent, Justice Kathryn Feldman noted that the appellate court's analysis was problematic, for a number of reasons. Initially, Nasr's action was not against the party responsible for causing the flood, but against the insurer for breach of its obligations under the policy. Justice Feldman likewise noted that on a summary judgment motion, the burden was on the insurer to prove when its obligation to issue payments arose, which had not been met.

While the *Nasr* claim was ostensibly about whether one insurance claim was statute barred, its implications to insurance law are likely to be much further reaching. For instance, the reading in of adverse and unrelated insurance provisions upends the long-settled principle that coverage disputes are resolved within the four corners of the insurance contract and throws into doubt decades of settled North American jurisprudence on that issue.

Are insurance policies now subject to their own terms, plus any statutes or common law that the parties can find, that may, in their view, prove helpful in the circumstances?

Next, given that actions are now apparently appropriate one day after a claim has been made, will this not encourage (and seemingly oblige insurers to pay for) unnecessary litigation? Should that prove to be the case, will insurers respond by defending claims even more aggressively, further tying up scarce court resources? Given the potential consequences, it would appear that the court failed to consider the natural consequences of its actions.

Michael Lesage is a trial lawyer and the founder of Michael's Law Firm*, a litigation boutique that specializes in complex cases involving professional negligence, business litigation, insurance coverage disputes and cases of serious injury. When not representing clients, he can often be found playing competitive sports. You can e-mail him at michael@michaelsfirm.ca*

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