Appellate Court rules on cyber breach class action coverage dispute

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On March 15, 2021, the Ontario Court of Appeal released its decision in *Family and Children's Services of Lanark, Leeds and Grenville v. Co-operators General Insurance Company*. This proceeding arose out of three separate applications dealing with the duty to defend, which were heard together.

Family and Children's Services of Lanark, Leeds and Grenville (FCS) claimed that it was hacked in April 2016, and confidential reports were allegedly leaked onto two Facebook pages. Prior to this incident, FCS had hired Laridae Communications (Laridae) to refresh and review the FCS website. FCS and Laridae were both insured by Co-operators General Insurance Company (Co-operators). Following these alleged unintended disclosure incidents, a class proceeding was commenced against FCS seeking damages of $75 million. FCS also brought a third-party claim against Laridae.

Co-operators denied coverage to both FCS and Laridae, based on exclusion clauses in the policies, which excluded claims arising from the distribution or display of data by means of an internet website. FCS and Laridae claimed Co-operators had a duty to defend their interests in the class action and began applications. Co-operators brought a separate application for an order that it had no duty to defend Laridae in the class action.

The application judge found that she could not interpret the exclusion clauses at the application because it was a novel interpretive issue and required a full record. However, she still concluded that the exclusion clauses did not exclude Co-operator's duty to defend either FCS or Laridae. She further held that neither FCS nor Laridae had any reporting obligations to Co-operators, due to a conflict of interest between the two insureds and the insurer.

There were three issues on appeal: (1) whether the duty to defend could be denied on application; (2) whether Co-operators had a duty to defend; and (3) whether, if Co-operators had a duty to defend, it would have the right to participate in the defence.

On the first issue, the Court of Appeal disagreed that the matter could not be dealt with by way of an application. According to the Appellate Court, there were no material facts in issue requiring a trial, as this was a simple matter of contract interpretation.

On the second issue, the Court of Appeal was critical of the application judge's analysis of the duty to defend. The Court of Appeal held that Co-operators owed no duty to defend either FCS or Laridae because the exclusion clauses at issue were unambiguous and the claims asserted by the applicants were covered by the clear language of the exclusion clauses. Further, the court found that the policies at issue were not intended to insure against all risks and clearly articulated what was covered and not covered.

While the third issue on appeal did not require review given the court's ruling, the court commented that the onus is always on the insured to establish a reasonable apprehension of conflict of interest on the part of the insurer.

While this decision affirms the importance of contract interpretation principles on a coverage dispute, the decision is a reminder that the principle of *contra proferentem* has no application where the language of the policy is found to be clear and unambiguous.

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