**Case Law Update For Insurance Clients:**
**Special Costs On Duty To Defend Cases**

Insurers will be interested in two recent decisions of the British Columbia Court of Appeal that address whether an insured plaintiff is entitled to special costs when litigating the insurer's duty to defend, and a third case that limits the overall application of this development in the law.

The first, *West Van Holdings Ltd. v. Economical Mutual Insurance Company*, 2019 BCCA 110 ("*West Van*"), was encouraging to the insurance industry, as the court held that there was "no principled reason to award costs in a duty to defend case in a manner different than other litigation." That decision was followed in *Blue Mountain Log Sales Ltd. v. Lloyd's Underwriters,* 2019 BCCA 240 ("*Blue Mountain*"), where the Court of Appeal upheld a decision about the insurer's a duty to defend, but overturned the special costs award.

A subsequent decision, *Tanious v. The Empire Life Insurance Company,* 2019 BCCA 329 ("*Tanious*"), went in the opposite direction, but in a limited way. In *Tanious*, the Court of Appeal upheld the decision of a trial judge to award special costs to a disabled plaintiff in a claim for coverage. The court based their decision to uphold special costs on the injustice inherent for disadvantaged plaintiffs seeking to enforce their entitlement to disability insurance.

The fallout of *West Van* and *Blue Mountain*, generally, is that special costs will no longer be automatically awarded to plaintiffs in duty to defend cases. The *Tanious* case is in a different context (a disability coverage claim, not a duty to defend case), and makes it abundantly clear that courts will carve out principled exceptions where circumstances warrant it.

The culmination of the court's analysis in the *West Van* case is at paragraph 109 where the court found: "no principled reason to award costs in a duty to defend case in a manner different than other litigation. There already exist other suitable mechanisms to censure an insurer's wrongful conduct… If the insurer has breached its duty of good faith, or conducts itself in a manner that is worthy of rebuke, it will be sanctioned. If not, an insurer facing a duty to defend claim should be treated no differently than any other litigant who may breach a contract."

The *West Van* reasons are forthright in addressing prior case law. Mr. Justice Goepel explicitly states (at paragraph 110) that prior Supreme Court decisions awarding special costs in similar scenarios should <u>not</u> be followed.

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For obvious reasons, this is a good development for the insurance industry. Plaintiffs can no longer take a dubious run at insurance companies with the expectation that they will be made whole for legal costs if they win their case. Similarly, insurers no longer face a harsh costs exposure when denying a duty to defend. An insurer can deny the duty to defend, and even if they are wrong (as was the case in *Blue Mountain*), the insurer will not automatically face the consequences of special costs. That said, any insurer will still be censured for bad faith, and needs to remain alive to their positive obligation of good faith throughout the life of a claim.

The *Tanious* case was argued and decided after *West Van* and *Blue Mountain*. In *Tanious*, the Court of Appeal decision cites *West Van,* but not *Blue Mountain*, and the citation is for the purpose of drawing a distinction. The *Tanious* decision reviews the policy of special costs in disability claims, and then assesses whether the trial judge erred in awarding special costs. The Court of Appeal said this about the trial judge (at para. 79): "the "driving consideration" for the judge was the injustice he saw in permitting the unique challenges, complexities and costs inherent in disability insurance litigation to render an impoverished and disabled litigant's pursuit of subsistence-level insurance benefits wholly impractical." The subsequent paragraph cites access to justice and after that, it is revealed that the insured's lawyer was acting "low bono", leaving a financial burden for advancing the claim on the party and the lawyer alike.

The *Tanious* judgment concludes with Madam Justice Dickson referring to "the unique nature of the particular contractual relationship in question…". On the one hand, this is limiting commentary, suggesting disability insurance should have a different judicial treatment than other types of insurance where the insureds are not at an inherent disadvantage. On the other hand, the take away for insurers is that they should carefully scrutinize claims, and engage reasonably in the settlement process rather than hedging their bets that disadvantaged claimants will be unable to afford litigation. Dickson J. writes at paragraph 83, "if on close and continuous examination, a defence appears strong and meritorious, the possible price of losing seems unlikely to keep a well-resourced disability insurer from the courtroom door."

In summary, the new state of the law as a result of these three 2019 judgments is that automatic special costs for duty to defend cases are gone, but good faith and the broader interests of justice for disadvantaged parties should remain central to an insurer's claims handling decisions.

*Authored by Christopher Schuld and Gina Addario-Berry on 18 December 2019*