

MICHELIN v. ACE INA – INTERPRETING THE EMPLOYEE BENEFITS LIABILITY ENDORSEMENT

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By Michael Teitelbaum and Tyler Dellow

In *Michelin North America (Canada) Inc. v. ACE INA Insurance*, [2008] O.J. No. 2328, a judgment released on June 12, 2008, Justice Laurence A. Patillo of the Ontario Superior Court of Justice found that ACE INA was not required to defend an Application brought against Michelin in the Nova Scotia Supreme Court ("the Smith Application"). *Michelin v. ACE INA* is notable in that it is the first time that a Canadian court has considered an Employee Benefits Liability Endorsement in a Commercial General Liability (CGL) policy and the scope of coverage that it provides to an insured.

The Smith Application arose out of Michelin's handling of its pension plan for retired employees. In 1972, Michelin established a contributory pension plan for the employees of its two plants in Nova Scotia. The plan was registered in 1978 under the *Nova Scotia Pension Benefits Act*. The terms of the plan were amended from time to time. On May 1, 1987, it was made non-contributory. Effective December 31, 1990,

the plan was merged with another Michelin pension plan that was in effect for sales and head office employees. In 2001, Michelin acquired Uniroyal Goodrich. The pension plan was merged with the one in effect at Uniroyal Goodrich.

At various times, actuarial calculations showed the pension fund to be in a position of surplus. Between 1984 and 1988 and between 1996 and 2000, Michelin applied part of the surplus to fund its ongoing contribution obligations.

On June 20, 2005, Everett Smith, a retired Michelin employee and member of the pension plan brought an Application seeking certain relief including, amongst other things, a declaration that Michelin was not permitted to fund its contributions to the plan from surpluses generated by the plan, a declaration that Michelin was required to repay the benefits that it had derived from the contribution holidays to the plan, and an accounting of the original pension plan.

In November of 2005, Michelin made an Application to the

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court seeking an order that the Smith Application be continued as an action. The essence of Michelin's position was that the issues raised by the Smith Application were required by the *Civil Procedure Rules of Nova Scotia* to be determined by way of an action. During the course of argument of the issue, counsel for Smith indicated that he was willing to abandon his claim for a separate accounting of the various pension plans involved and to abandon the use of certain communications from Michelin in order to have the proceeding continue as an Application. MacAdam J. found that those concessions were sufficient to permit the continuation of the matter as an Application and dismissed Michelin's Application.

Michelin was insured by ACE INA pursuant to a CGL policy. The policy included an Employee Benefits Liability Endorsement ("EBL Endorsement"). This endorsement provided that ACE INA would pay on behalf of Michelin "...all sums which [Michelin] shall become legally obligated to pay as damages...caused by any negligent act, error or omission of [Michelin] in the administration of [Michelin's] Employee Benefit Programs". The word "administration" was defined in the Endorsement as consisting of a number of discrete activities, including "Interpreting the Employee Benefit Programs" and

"Handling of records in connection with the Employee Benefit Programs."

ACE INA declined Michelin's request to defend it in the Smith Application. Michelin brought an Application seeking a declaration of a duty to defend. The Application turned on the resolution of two issues: (a) whether the claims advanced by Smith came within the coverage provisions of the EBL Endorsement and, if so, (b) whether Michelin had knowledge of or could have reasonably foreseen circumstances which might have resulted in a claim prior to the effective date of the Policy. The second question was not determinative of the result reached by the Court, and we focus here on Pattillo J.'s conclusions with respect to the first issue.

Were Smith's claims within coverage?

The question of whether Smith's claims were within coverage turned on a number of sub-issues. Pattillo J. considered whether or not the Smith Application alleged a "...negligent act, error or omission" and, if it did, whether the negligence occurred in the "...administration of [Michelin's] Employee Benefit Programs".

"Negligent act, error or omission"

Pattillo J. began his analysis of this point by reviewing the nature and purpose of general liability insurance. He cited

the decision of the Ontario Court of Appeal in *Liberty Mutual Insurance Co. v. Hollinger Inc.*, [2004] O.J. No. 481 and referred to the Court's statement as to the necessity of reading and interpreting insurance policies in light of the general principle of insurance law that insurance is intended to cover only fortuitous or contingent losses.

His Honour then turned to the allegations contained in the Smith Application and concluded that the essence of Smith's claims was in contract rather than negligence. His conclusion on this point was based on his reasoning that the issues raised by the Smith Application involved a determination of the terms and conditions of the Michelin Pension Plan in order to assess whether or not Michelin was entitled to reduce or discontinue its contributions to the Michelin Pension Plan when the plan was in a surplus position.

Michelin advanced an argument that the allegations of "erroneous breach of contract" in the Smith Application were analogous to the allegations of breach of contract in *Cultus Lake Park Board v. Gestas Inc.* (1995), 33 C.C.L.I. (2d) 245, a decision of the British Columbia Court of Appeal in which claims for breach of contract were held to be covered under a policy of liability insurance. Pattillo J. distinguished the decision in *Cultus Lake* on the basis of the wording of the cover-

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age provision at issue in that case, which was considerably broader than the wording in the EBL Endorsement which only provided coverage for "negligent acts, errors and omissions".

Michelin argued that certain other allegations, which had been removed from the initial Application, constituted "negligent acts, errors or omissions" and therefore there was a duty to defend. Pattillo J. rejected this submission, noting that these allegations had been removed from the recast Michelin Application and, in any event, *per* the decision of the Supreme Court of Canada in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551, "...it is the true nature of the claim which must govern and the true nature of the claim in the Smith Application, as reconstituted, is one of breach of contract, not negligence."

Administration

Although his conclusion that the Smith Application did not allege any "negligent acts, errors or omissions" would have sufficed to dispose of the Application against ACE INA, Pattillo J. went on to consider whether the claims asserted by Smith occurred in the "administration" of the Michelin Pension Plan. He found that they did not and accordingly, even if the Smith Application had alleged any

"negligent acts, errors or omissions", it would not have triggered a duty to defend under the EBL Endorsement.

Prior to this decision, there were no Canadian decisions considering the meaning of "administration", as that term was defined in the EBL Endorsement. Pattillo J. turned to American authority and applied the meaning of "administration" adopted by Stern D.J. of the United States District Court for the District of New Jersey in *Maryland Casualty Company v. Economy Bookbinding Corporation Pension Plan and Trust*, 621 F. Supp. 410, a case involving the interpretation of an endorsement that contained virtually identical wording to that found in the EBL Endorsement.

Stern D.J. concluded that "administration" referred to routine, ministerial acts. Pattillo J. agreed with this conclusion, writing: "In my view, having regard to the entire wording of the definition, it is clear that 'administration' involves acts incurred in respect of relatively routine, ministerial or clerical acts performed in relation to Michelin's Employee Benefit Programs. The definition of 'administration' does not include discretionary management decisions concerning Michelin's obligations under the terms of the Michelin Pension Plan to contribute to it."

Michelin took the position that the allegations in the Smith

Application included both allegations relating to "Interpreting the Employee Benefit Programs" and "Handling of records in connection with Employee Benefit Programs." Pattillo J. rejected Michelin's suggestion that its decisions relating to the pension plan constituted "Interpreting the Employee Benefit Programs" on the ground that the decisions were discretionary management decisions. He also noted that the allegation in the Smith Application on which Michelin relied in support of its position that the Smith Application contained allegations relating to "Handling of records in connection with Employee Benefit Programs" had been dropped from the reconstituted Smith Application. Accordingly, he concluded that the allegations found in the Smith Application did not relate to Michelin's administration of the plan.

Pattillo J. concluded by again underlining the basic principle of insurance law that insurance responds to fortuitous and contingent events, and wrote: "Michelin's decision to take a contribution holiday in respect of the years in issue, whether right or wrong, was an intentional act on its part. It cannot be described as being in any way accidental or fortuitous. In my view, the wording of the EBL Endorsement does not nor was it ever intended to extend coverage under the Policy to Michelin's contractual obliga-

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tions to contribute to the Michelin Pension Plan".

Conclusion

The decision in *Michelin v. ACE INA*, which is under appeal, is a positive decision for insurers who afford coverage under identically or similarly worded Employee Benefit Liability Endorsements. In focusing on the rationale for insurance in considering whether or not the Smith Application alleged "negligent acts, errors and omissions", Pattillo J., in our view correctly, limited the Ap-

plication of these endorsements to true cases of negligence rather than situations in which an insured has made a deliberate choice and/or taken a calculated risk with respect to interpretation of the terms and conditions of its Employee Benefits Plans. His adoption of the ministerial definition of "administration" is similarly beneficial for insurers, as it provides insurers with a further strong defence to these types of claims.

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The authors were counsel for ACE INA on the Application before Justice Pattillo.

FIRM NEWS

CONGRATULATIONS!!! Jamie Trimble is now the President of the Ontario Bar Association. The OBA has a membership of approximately 17,000 lawyers; we are very proud to have Jamie leading this prestigious organization and are confident that he will make an excellent president.

Jamie Trimble will be speaking on Solicitor-Client and Litigation Privilege on October 16, 2008 at the 5th Annual Conference on Evidence Law for the Civil Litigator.

Mary Teal will be speaking on Requests to Admit and Pleadings at the same conference.

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