Litigation - Canada

Lawyers beware – risks of giving investment advice to clients

Contributed by **Dentons**

March 11 2014

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Introduction

Lawyers who provide investment advice or services to their clients may find themselves unprotected against potential claims arising out of these services, as the claims may be excluded from coverage provided by professional liability insurance policies. The recent decision of the Ontario Superior Court of Justice in *Juroviesky v Lawyers Professional Indemnity Company*(1) serves as an important reminder to lawyers to review their insurance policies for coverage and exclusions carefully, or face potentially significant financial consequences if coverage is not extended. As the decision confirms, at least in Ontario, investment advice provided by a lawyer is not insured, unless it is provided as a direct consequence of the performance of legal services.

Facts

The Lawyers' Professional Indemnity Company (LAWPRO) is a wholly Canadian owned insurance company that provides professional liability insurance and title insurance to lawyers in jurisdictions across Canada. The applicant, Henry Juroviesky, is an Ontario lawyer who was insured under a standard LAWPRO policy. Robert Bell was an existing client of Juroviesky.

In 2007, Juroviesky learned from a friend that a business called Clear Vision Windows was looking for a business partner to provide investment capital and become involved in management. Juroviesky communicated with Bell about the potential investment, although there was no suggestion that Juroviesky's communication about the company was part of the existing legal retainer with Bell. Specifically, Juroviesky sent Bell an email which, on its face, appeared to be an investment recommendation, and on which LAWPRO relied to deny coverage.

The subject line of the email read, "Window Company Investment" and the investment email stated the following:

> *"Let us review where we are.*
>
> *We talked about the potential in investing in a window and door manufacturing company situated in Barrie.*
>
> *At the time we spoke, I expressed my intuition after interviewing my friend (an investor in the Company and responsible for Sales) which was as follows:*
>
> *1) Small company that has economic potential.*
>
> *2) Cash crunch due to long Accounts Receivable cycle (from time order in materials until order is filled and paid).*
>
> *3) Lack of executive management on the business vision side.*
>
> *4) Lack of expertise in financial affairs management.*
>
> *5) Good inside technical people.*

6) Opportunity to be white knight investor (come in and save company in return for healthy interest in company)."

In the email, Juroviesky also discussed a "detailed interview" that he had with the friend who recommended Clear Vision Windows (and who was a principal at Clear Vision Windows) and the founder of Clear Vision Windows. Based on that interview, Juroviesky indicated that he believed that his initial intuition – as set out in the six points above – was "on mark", although he qualified that his comments were subject to further due diligence and documentation, including financial and legal due diligence. Juroviesky also provided several suggestions to Bell on how to proceed, including both short-term and long-term lending and investment advice.

Bell eventually decided to pursue an equity investment in Clear Vision Windows, and retained Juroviesky and his firm in connection with the investment. Ultimately, the investment was unsuccessful. Juroviesky then received a letter from Bell's new lawyer, advancing a complaint against Juroviesky regarding his firm's advice and services in relation to the investment in the company and damages suffered by Bell, which were claimed in the amount of C$1.2 million.

Juroviesky reported the complaint to LAWPRO, which ultimately denied coverage, primarily on the basis of the exclusion for investment advice contained in the policy:

> *"This POLICY does not apply:…*
>
> *(d)* to any CLAIM in any way related to or arising out of an INSURED providing investment advice and/or services*, including without limitation, investment advice and/or services relating to or arising out of a business, commercial, or real property investment,* unless as a direct consequence of the performance of PROFESSIONAL SERVICES." [emphasis added]

In court, LAWPRO also relied on a 'notwithstanding clause' in the policy, which LAWPRO argued would allow it to deny that it had a duty to defend where it had reasonable grounds to conclude that an exclusion applied. The clause stated:

> *"Notwithstanding the INSURER'S… obligation to defend, investigate and pay certain expenses and costs,* the INSURER may decline to so defend*, investigate or pay the expenses or costs…* where it determines on reasonable grounds that the CLAIM *does not arise out of an error, omission or negligent act in the performance of or failure to perform PROFESSIONAL SERVICES… or is excluded pursuant to Part III of the POLICY.*
>
> *In the event that the INSURED shall disagree with the decision of the INSURER, the dispute or disagreement may be heard… upon application or action by either party to the Ontario Superior Court of Justice. The INSURER or the INSURED* may introduce evidence *relating to the issues of coverage and the activities of the INSURED… on the application or action,* which evidence shall be considered by the… judge in making his or her determination of the respective obligations *of the INSURED and INSURER."* [Emphasis in original]

In concluding that Juroviesky was not covered by the policy, the court engaged in a detailed interpretative analysis of the policy, against the backdrop of well-settled legal principles regarding the duty to defend and the proper approach to interpreting insurance policy contracts in Canada.

Duty to defend the insured

The overarching issue to be decided was whether there "existed a possibility" that there was coverage under the policy – if so, LAWPRO would have a duty to defend Juroviesky.(2)

The Supreme Court of Canada recently summarised the circumstances in which there will be a duty to defend in *Progressive Homes Ltd v Lombard General Insurance Co of Canada*(3):

> *"1. An insurer is required to defend a claim where the facts alleged in the pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim.*
>
> *2. It is irrelevant whether the allegations in the pleadings can be proven in evidence. That is to say, the duty to defend is not dependent on the insured actually being liable and the insurer actually being required to indemnify.* What is required is the mere possibility that a claim falls within the insurance policy.
>
> 3. Where it is clear that the claim falls outside the policy, either because it does not come within the initial grant of coverage or is excluded by an exclusion clause, there will be no duty to defend."(4) [emphasis added]

As the Ontario Court of Appeal noted in *Alie v Bertrand & Frere Construction Co*,(5) the court will decide whether there is a duty to defend based on the statement of claim

alone, unless the policy expressly indicates to the contrary. In this case, the policy's notwithstanding clause specifically allowed parties to adduce extrinsic evidence, including the email.

The court set out a two-step process in analysing the coverage provided by the policy:

- first, it should consider the issue of possible coverage based on the amended statement of claim alone; and
- second, it could also consider the extrinsic evidence in order to decide whether LAWPRO was entitled to deny coverage under the notwithstanding clause.

Interpretation of insurance policies

The Supreme Court of Canada has also recently summarised the interpretive principles for insurance policies in *Progressive Homes*:

> *"1. when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole;*
>
> *2. when the language is ambiguous, the court should rely on general rules of contract construction; and*
>
> *3. when the rules of construction fail to resolve the ambiguity, the court will construe the policy contra proferentem against the insurer – coverage provisions are interpreted broadly and exclusion provisions narrowly."*(6)

Further, the Supreme Court held that insurance policies should be read in light of the initial grant of coverage, and should be interpreted in the following order: coverage, exclusions and then exceptions.(7)The court in *Juroviesky* adopted this order in its analysis.

Policy coverage and investment advice exclusion

The court noted that the statement of claim against Juroviesky was short, with little detail, and that the claim was not "obviously a claim for negligent investment advice that has been cloaked as allegations about legal advice".(8) In the context of the duty to defend, the statement of claim must be construed generously,(9) and in this case, the allegations were sufficient to give rise to the possibility of coverage.

Having determined that the pleadings fell within the initial grant of coverage, the onus shifted to LAWPRO to show that the investment advice exclusion "clearly and unambiguously"(10) precluded coverage. On this basis, the court concluded that there was "no question, based on the pleadings, that the claims 'relate to' investment advice given by Mr. Juroviesky about a business investment".(11)

Significantly, the court rejected Juroviesky's argument that if allegations in the statement of claim were mixed (ie, involved both investment and legal advice), the investment advice exclusion should exclude only coverage for the negligent investment advice. The court held that if there was a mix of investment advice and legal advice related to the investment advice, the investment advice exclusion operated to exclude coverage altogether.(12)This interpretation was consistent in light of the policy's initial grant of coverage (which did not provide coverage for investment advice).

Exception to investment advice exclusion

The investment advice exclusion of the policy contained an important exception: if the investment advice alleged in a claim was a "direct consequence" of providing legal services, the insured would be provided with coverage. The court agreed with LAWPRO that the exception would not apply if the investment advice preceded the legal advice, and that the word "consequence" introduced a timing requirement. However, because the statement of claim did not expressly allege whether contact about Clear Vision Windows was a consequence of prior professional legal services, and consistent with giving wide latitude to the pleadings in favour of Juroviesky, the court held that there was a possibility that the exception applied. As a result, the court had to turn to extrinsic evidence.

Tie-breaker – notwithstanding clause

The court ultimately determined that coverage in this case was properly denied on the basis of extrinsic evidence, and specifically, Juroviesky's email. On its face, the email showed that the first step in the dealings between Juroviesky and Bell about Clear Vision Windows was advice relating to a potential investment, and that the due diligence and other legal services only came after the fact. Although Juroviesky attested that he provided legal services to Bell before the events described in the action, he did not suggest that any prior retainer called for or gave rise to his decision to contact the plaintiff about Clear Vision Windows. Perhaps most significantly, Juroviesky never referred to his email in his affidavit, and did not attempt to explain it or contextualise it. LAWPRO therefore had the necessary "reasonable grounds" to conclude that the claim

was excluded and deny a defence.

Comment

The key practical significance of this case is the potential for significant personal exposure if a lawyer does not render legal services in accordance with his or her professional liability insurance policy.

The practice of law may involve incidental investment advice, especially for lawyers involved in establishing trusts for clients and in estates law, where the lawyer may have limited investment or banking authority concerning trust or estate funds which is incidental and related to the lawyer's legal services mandate. The investment advice provided in this context would be covered in the ordinary course of providing professional legal services. However, providing investment advice that is not "a direct consequence" of legal services requires an enhanced level of investment expertise, which lawyers may not be in a position to provide. This risk simply creates inordinate and unacceptable exposure for a lawyer's liability insurance company.

For further information on this topic please contact Amer Pasalic or Norm Emblem at Dentons Canada LLP by telephone (+1 416 863 4511), fax (+1 416 863 4592) or email (amer.pasalic@dentons.com or norm.emblem@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) *Juroviesky v Lawyers Professional Indemnity Company*, 2014 ONSC 43.

(2) *Ibid* at para 14.

(3) *Progressive Homes Ltd v Lombard General Insurance Co of Canada*, [2010] 2 SCR 245 (SCC).

(4) *Ibid* at para 19.

(5) *Alie v Bertrand & Frere Construction Co* (2002) 62 OR (3d) 345 at para 182 (Ont CA).

(6) *Progressive Homes*, *supra* note 3 at paras 22-24.

(7) *Ibid* at paras 26-28.

(8) *Jurovieskу, supra* note 1 at para 28.

(9) *Ibid.*

(10) *Ibid* at para 30.

(11) *Ibid* at para 33.

(12) *Ibid* at para 40.