ONTARIO COURT REFUSES TO APPLY "STONEWALL PRINCIPLE"

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The Ontario Superior Court of Justice recently declined to adopt the American "Stonewall Principle" as part of the law of Ontario.

The "Stonewall Principle" asserts that in cases involving multiple insurance policies, the insured should not be held responsible for years during which it could not purchase insurance due to the unavailability of the insurance in question.

In Goodyear Canada Inc. v. American International Companies, [2011] O.N.S.C. 5422, Goodyear Canada Inc. sued its property and casualty insurers on risk between 1969 and 1986. Goodyear sought a declaration that it was covered by insurance for numerous lawsuits in the United States (the U.S. Claims). In the U.S. Claims, individuals sought compensation from Goodyear for damages sustained from exposure to certain asbestos-containing products manufactured by Goodyear Canada and sold into the US market between 1969 and 1973.

Claims that engage "long tail" liability present an array of complex questions that require courts to balance competing interests between the insurer, insured and claimant. Past courts have tended to treat asbestos exposure claims as "continuous" claims – engaging coverage from each of the policies on risk over the period of asbestos exposure. In cases of this nature, each of the responding insurers would be required to contribute to defence costs (and ultimately, indemnity) pro rata according to the period of time each was on risk.

Goodyear was unable to purchase insurance against asbestos related claims after 1985, because no such insurance was commercially available. Accordingly, the question Goodyear sought to have determined was whether it would be considered "self-insured" from 1985 onward for the purpose of allocating defence costs. This question was of particular importance given Goodyear's large deductible on each of its policies. Spreading the claim amounts over many years (and particularly, beyond 1985) would result in Goodyear having no coverage for many of the years in question.

The central issue to be decided in the case was whether to apply the American “Stonewall Principle” in Canada. The “Stonewall Principle” represents the high water mark of courts shunning logic and fairness to the insurer in favour of a positive result for the insured. According to the “Stonewall Principle” the insured should not be held responsible for years when it could not obtain coverage because no coverage was commercially available. As a result, the loss is spread over the other insurers on risk during the other years during the applicable period.

The first issue before the court in Goodyear was whether insurance was available for asbestos related claims after 1985. The court concluded that insurance coverage for asbestos related liability in the United States was not available to Goodyear after 1985.

The court was then required to determine whether the “Stonewall Principle” should be adopted as part of the law of Ontario. At the hearing, Goodyear argued that the “Stonewall Principle” has been applied in numerous American jurisdictions. Goodyear argued that the principle does not apply because of logic, but out of a concern for fairness and good public policy. The purpose of the principle was to maximize fairness and coverage to the insured. Goodyear argued that it would be against good public policy for it to have purchased insurance coverage for earlier years, but then be denied the benefit of that coverage simply because it could not have foreseen an extremely large number of claims, each falling within its per claim deductible.

The insurers argued that there was no logical basis underlying the “Stonewall Principle”. Each insurer negotiated policy terms, calculated premiums, issued their respective policies and was guided by the prevailing market conditions. The insurers argued that the “Stonewall Principle” should be rejected because it offends the fundamental tenets of contract law.

Justice Stinson found that while the “Stonewall Principle” had indeed been adopted by a number of courts throughout the United States, there were many cases in which U.S. courts refused to apply it. His Lordship noted that the decision from which the “Stonewall Principle” originated lacks internal logic and does not support unavailability of insurance as a relevant consideration to how loss should be allocated between the insured and the insurers.

Finally, His Lordship noted that there is no “right to insurance”. When a manufacturer brings a product to market, that manufacturer is responsible for the attendant risks. Insurers may choose

or decline to provide coverage for that risk. There was no compelling reason why an insurer who has made a business decision not to provide coverage (as insurers had done for asbestos claims after 1985) should be forced to do so under earlier policies.

The Ontario Court's decision to decline to adopt the "Stonewall Principle" in Goodyear Canada Inc. v. American Insurance Companies is a welcome recognition that insurance coverage should reflect the intentions of the parties at the time the policies were obtained, and should also accord with basic contract law. The Court's decision should be seen as an affirmation that fairness and public policy cannot alone be used to justify a departure from logic and the intentions of the parties.