IN FACT AND IN LAW

Damage Insurance

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Determining Who Is a Reasonable Insurer: Is Evidence By an Expert Witness Required? That Is the Question.

By Julie Cousineau

On March 18, 2005, the Quebec Court of Appeal handed down an important decision confirming that the evidence relating to the behaviour and practices of a "reasonable insurer" need not be provided by an expert witness. In *CGU Compagnie d'assurances du Canada* v. *Sylvain Paul et al.*, (J.E. 2005-705), Justices Louise Mailhot, René Dussault and Marie-France Bich dealt with this issue in connection with an objection to evidence made by the attorney representing the insured, Mr. Paul, who argued that this type of evidence required expertise, specifically regarding underwriting standards followed by reasonable insurers in the industry.

The objection was based on the witness' lack of qualifications and the fact that no expert's report had been filed beforehand.

The Court relied on its decisions in *H. & M. Diamond Ass. Inc.* vs. *Optimum, assurance générale agricole*, J.E. 99-2287 (C.A.) and *Scottish & York Insurance Co.* vs. *Victoriaville,* [1996] R.J.Q. 2908 (C.A.) to the effect that an insurer who wishes to avail itself of article 2408 of the C.C.Q. and seeks to demonstrate that it would not have accepted a particular risk had it known the circumstances involved, must show what the behaviour or practices of a "reasonable insurer" would have been by means of testimony of third party insurers familiar with the industry. The principle underlying these two Court of Appeal decisions is that [Translation], "a simple statement made *ex post facto* by the insurer is inadequate."[1]

The Court stated that evidence of this type is not, in itself, expert evidence. Although evidence by an expert witness may be submitted, it is not essential:

> **[Translation] "The usual customs, practices and behaviours in an area of activity may be established by ordinary witnesses because it is a matter of simple facts that a judge is able to understand and weigh without the assistance of an expert."**

Citing Professor Royer[2], the Court noted that the first condition for the admissibility of expert evidence is that it can help the Court understand the facts and weigh the evidence:

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[1] *H. & M. Diamond Ass. Inc.* v. *Optimum, assurance générale agricole*, J.E. 99-2287 (C.A.), page 5.

[2] Jean-Claude ROYER, *La preuve civile*, 3rd ed., Cowansville, Les Éditions Yvon Blais Inc., 2003, par. 466 (p. 297 in fine and 298).

[Translation] “Evidence related to the practices of other insurers has no scientific or technical features that make it essential to hear the testimony of an expert witness.”

Of course, it is up to the trial judge to assess the evidentiary weight of the testimony of representatives of other reasonable insurers.

In summary, this decision confirms that evidence of “facts” may be provided by other underwriters without them submitting an expert’s report. However, the reasonableness of insurers’ practices does not bind the Court, which must weigh the evidence and determine the facts in each case. In more nuanced or difficult cases, expert’s evidence may be advisable because the Court did not set aside the possibility of hearing such evidence in these types of cases.

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