

Blaneys Wins Appeal on the Duty to Defend Allegations of Fraud

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In July 2012 someone stole 494,050 pounds of nickel from Vale Canada in Manitoba. In 2013 Vale sued those parties it thought responsible, including one of its subcontractors and a company named Urbanmine Inc., which is involved in the metal industry in Manitoba. The statement of claim alleged the defendants were liable for damages of more than \$2.5 million for fraud, theft, misappropriation and wrongful conversion of the stolen nickel. Negligence was not pleaded. On April 20, 2017, the Manitoba Court of Appeal answered the question: is there a duty to defend Urbanmine against those allegations. The answer was no. The case is *Urbanmine Inc et al v. St Paul Fire and Marine Insurance Company et al* (2017 MBCA 42).

Urbanmine was insured by St. Paul Fire and Marine Insurance Company pursuant to a commercial general liability policy. Urbanmine sought a paid defence and St. Paul denied the claim. St. Paul argued that the true nature and substance of the lawsuit was not an accident and that Vale's losses were alleged to be intended or expected by Urbanmine and therefore excluded from coverage. Urbanmine brought a coverage application in the Manitoba Court of Queen's Bench and the application judge ordered St. Paul to defend the lawsuit. St. Paul appealed that decision and the Manitoba Court of Appeal overturned it and declared that St. Paul does not have a duty to defend Urbanmine. [Colin Empke](#) of Blaney McMurtry LLP successfully brought the appeal.

Vale is the only producer and distributor of nickel in Manitoba. Urbanmine had purchased the nickel from a co-defendant, Schwartz Bros., which is not a nickel manufacturer and which is alleged to have stolen the nickel. Vale alleged that Urbanmine, knew or ought to have known that the nickel was obtained through unlawful means and was actually owned by Vale. There were also allegations Urbanmine was aware of a conspiracy or fraud, that it intended to cause loss and damage to Vale and that it wrongfully and unlawfully converted the nickel for its own use and profit.

The application judge reasoned that Urbanmine was in the business of buying and selling metal and because this case involved allegations of the buying and selling of nickel the allegations were within the normal scope of its business. The judge concluded that Urbanmine's reasonable expectations were to be covered for claims relating to its ordinary course of business. He reasoned that if there was no duty to defend these allegations the purchase of the insurance policy would be nugatory and against Urbanmine's reasonable expectations of coverage. A duty to defend was ordered.

On appeal St. Paul argued the claim was clearly and unequivocally pleaded as a claim in which Urbanmine was sued for its deliberate choice to purchase and sell the stolen product. It argued there was no accident; that the exclusion applied and that no claim for negligence could be inferred from the pleading. The Manitoba Court of Appeal agreed, noting that if Vale proved fraud, theft or misappropriation by Urbanmine, it must be said that the damage was intended or expected and no indemnity would be possible under the policy.

The Court of Appeal noted that where there are allegations of fraud, theft and misappropriation the courts "will conclude as a matter of legal inference that such claims contemplate that the defendant intended harm for the purpose of construing exemptions of insurance coverage for intended injury". It followed that the intended and expected injury exclusion applied.

The statement of claim included an allegation that Urbanmine wrongfully converted the nickel. The Court of Appeal recognized that it is possible to commit the tort of conversion innocently and Urbanmine argued that a claim of innocent conversion had to be inferred from the pleading. The Court of Appeal was not persuaded that such a claim could be inferred. The Court of Appeal held that the true nature and substance of the claims made is that Urbanmine was a willing and knowledgeable participant in an unlawful scheme to cause loss to Vale. The claim for conversion was based entirely on allegations of wrongful and intentional actions by Urbanmine.

It was specifically alleged Urbanmine had to have known the nickel was obtained by unlawful means and that the company was a willing and knowledgeable participant in the conspiracy. The Manitoba Court of Appeal was simply not able to envision a claim by Vale against Urbanmine for negligence based on the facts as pleaded. It held it would require an unreasonable or fanciful reading of the statement of claim to infer a claim based on negligence. The Court of Appeal was satisfied that even if a claim for negligence could be inferred, it would have been derivative in nature based on the pleadings. It noted that a derivative claim does not trigger a duty to defend.

In the result the Manitoba Court of Appeal granted the appeal and held that St. Paul did not have a duty to defend Urbanmine.