

Protect Your Insured From Being Added to Litigation

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When an opposing party brings a motion to add an insured to existing litigation, the courts usually allows the party to be added, unless there are clear reasons not to do so, such as an expired limitation period. Consent is usually provided, as the threshold to add a party is low. Yet, recent developments show that a court may look deeper and assess the strength of the claim and evidence in support, to determine whether the addition of a party is improper, from the outset.

In [*Tacoma Engineers Inc. ats TNS Landco Inc.*](#) 2019 ONSC 1296, we successfully opposed a motion for Tacoma, a structural engineer, to be added as a Third Party on the basis that there was no merit to the claim against it, and that the claim was statute-barred. In dismissing the motion, the court awarded Tacoma \$20,000 in costs.

The matter arose out of a failed septic system on a commercial property, which failed partly due to improper coordination of consultants. Without their knowledge or consent, Tacoma was listed as the consultant responsible for coordination, on a contract between the Claimant owner and the Design-Builder. In fact, as the structural engineer on the project, Tacoma was never responsible for coordinating others.

Instead of simply adding Tacoma, and requiring it to subsequently bring a summary judgment motion to strike the action against it, the court considered the evidence to ascertain Tacoma's involvement. Justice Fowler Byrne dismissed the motion on the basis of the missed limitation period, and the fact that there was no basis to the claim.

The court noted that Tacoma's invoices all dealt with structural issues, and not coordination. She also found that at no time did the Claimant notify Tacoma about a septic issue, nor ask for their assistance to fix things. The court also drew an adverse inference from the fact that the Claimant did not even mention Tacoma when they retained an expert to opine on the cause of the septic issues.

The key take-away is that while the threshold may be low to add a party, there is a threshold. The court can assess the evidence to determine whether a party is improper or a limitation period is expired, and make a determination to not add them at a very early stage.

The case has important implications for insurers. Before simply consenting to a motion to add an insured to litigation, take a look at the facts. Is there clear evidence that the insured is an improper party? Is there clear evidence that the limitation period has expired? If so, it may be worth opposing the motion. If successful, it will prevent the insured from being added to the litigation, saving significant costs. If it is not successful, it may help to set up the evidentiary record needed to bring a summary judgment motion at a later stage.

Insurers should give careful consideration as to whether to consent or oppose a motion for an insured to be added as a party to existing litigation. Doing so may help reduce legal costs, and assist in potentially getting an insured out of litigation at an early stage.

Ian Epstein has a general insurance practice covering a wide array of insurance issues including E&O, general liability and product liability claims as well as coverage assessments. He has been recognized by Lexpert® Canadian Legal Directory as a leading practitioner consistently recommended in Professional Liability matters and ranked by Best Lawyers® in Canada for his expertise as a practitioner in insurance law.

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