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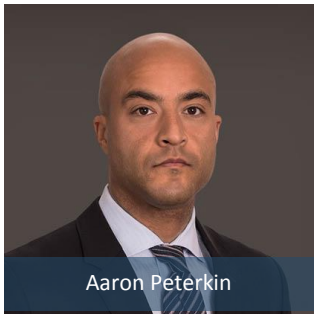
A PLUG NICKEL'S WORTH OF COVERAGE FOR INTENTIONAL ACTS:

URBANMINE INC. V. ST PAUL FIRE AND MARINE INSURANCE CO., 2017 MBCA42


Aaron Peterkin

As so many of the coverage opinions I write concern construction defects and building deficiencies, it can be refreshing to review decisions that consider unusual or 'nefarious' allegations against an insured. Add the intentional act exclusion into the mix, and we've got an interesting read…

One such decision arises most recently from the Manitoba Court of Appeal in *Urbanmine Inc. v. St Paul Fire and Marine Insurance Co*., 2017 MBCA 42, which concerned the insurers' duty to defend claims relating to the alleged theft of a half-million pounds of nickel from a Vale Canada Ltd. ("Vale") mine in Thompson, Manitoba.

In the underlying action, Vale sued one of its subcontractors, alleging the theft and misappropriation of 494,050 pounds of nickel. According to Vale's Statement of Claim, the subcontractor then sold the stolen nickel (at a *very* deep discount) to Urbanmine Inc. ("Urbanmine"), who, in turn, resold the stolen nickel to someone else (again, for "*less than fair market value*"). Suffice it to say, everyone involved in the alleged conspiracy was sued.

Vale's pleadings against Urbanmine are fascinating. To paraphrase, Vale alleged that Urbanmine had the skill, experience and industry knowledge to determine the nickel was actually owned by Vale. As such, Urbanmine knew or ought to have known that the nickel was stolen or obtained by the subcontractor through an unlawful or fraudulent scheme. Vale's pleading further alleged that Urbanmine was a knowing and willing participant in the scheme and, intending to cause loss to Vale, wrongfully converted the nickel for its own use and profit. Upon receipt of the claim, Urbanmine sought coverage from its liability insurers, who, of course, denied coverage.
Interestingly, the Manitoba Court of Appeal didn't describe or categorize the liability policy at issue and only a few of its terms are reproduced in the decision. To summarize the policy's insuring agreement, Urbanmine was entitled to be defended and indemnified from claims for "*property damage*" arising Urbanmine's "*work, products or completed work.*" The property damage must have been caused by an "*event*", which the policy later more narrowly defined as "*an accident …*" The policy contained a typical intentional act exclusion, withdrawing coverage for "*damage that is intended or expected from the standpoint of the [insured]*."

In the Queen's Bench, the learned Chambers Justice found a duty to defend, applying a "*reasonable expectations*" analysis that was ultimately rejected by the Court of Appeal. Considering Urbanmine's business as a metal broker, the learned Chambers Justice opined that "*reasonable expectation would be that in the course of its operations, when it bought or sold metal, it would be offered liability coverage for* decisions *that were negligent during the course of those operations*." At the same time, the insurers should have reasonably understood their policy would provide coverage for instances when Urbanmine "*bought or sold metal in a negligent manner*." The learned Chambers Justice reasoned that, to the extent that the allegations pertained to unintended consequences of Urbanmine's routine business operations, the policy's intentional act exclusion should not be triggered. Urbanmine's insurers appealed (obviously). On appeal, the most compelling argument in favour of coverage (in my view) concerned Vale's "*ought to have known*" allegations, which Urbanmine argued *inferred* a claim for negligence. As Urbanmine reasoned, these allegations raised issues of "*constructive intent as opposed to actual intent*" and, while it was entirely possible that Urbanmine's representatives should have known better, Urbanmine argued "*the pleadings*

clearly allow for the prospect that it unknowingly purchased and resold the stolen product." (While I too might have confidently advanced this argument, the Court of Appeal was wholly unimpressed).

Finding there was "*no ambiguity in the policy wording*," Justice Burnett (speaking for the Appellate Court) was understandably apprehensive of the lower court's reasonable expectations analysis, which "*focussed on the possibility of negligence by [Urbanmine], notwithstanding the absence of any express claim for negligence in the statement of claim*." Indeed, examining the true nature and substance of the claim, he found it "*difficult to envision any claim for negligence that could be advanced by Vale against the applicants on the present facts*."
To summarize the Court of Appeal's reasoning, Urbanmine's insurers agreed to provide liability coverage for property damage caused by an "*accident*," which is a fortuitous or unexpected happening. Where the damage or injury was an intended or reasonably expected result of the insured's alleged acts there can simply be no coverage (i.e. under "occurrence-type" policies written in this manner). By their very nature, allegations of theft or fraud cannot attract coverage because they involve the intentional and wrongful taking of someone else's property. Justice Burnett then explained: "*It follows that the [intentional act] exclusion applies, and the respondents have no duty to defend such claims in the present case*."

Next, Justice Burnett observed that the only cause of action that could *possibly* attract coverage was the wrongful conversion claim. Wrongful conversion involves a wrongful interference with the goods of another (e.g. taking, using or destroying these goods in a manner inconsistent with the owner's right of possession), which the Court of Appeal acknowledged could conceivably be done inadvertently or innocently. That said, looking that the true nature and substance of the pleadings, the Statement of Claim could not be interpreted as alleging conversion resulting from ignorance, innocent mistake or negligence. Clearly, Vale alleged that Urbanmine was a willing and knowledgeable participant in an unlawful and fraudulent scheme. In the Court's view, "*the claim for wrongful conversion is entirely based on the wrongful and intentional actions of the applicants in buying and selling the stolen product for less than fair market value*." Indeed, it was specifically alleged that Urbanmine's representatives knew the nickel was stolen and, notwithstanding, participated in the conspiracy. The claim's true essence had nothing to do with unintentional conduct, which simply could not be inferred from the reasonably egregious facts as plead by Vale.

Of course, I agree with Justice Burnett's conclusion. This is the correct result. Notwithstanding, I find some of the Court's reasoning a little unclear. Was the Court of Appeal saying that theft or fraud cannot be an "*accident*" and, therefore, there was no coverage under the policy's insuring agreement? If so, a Court need not even consider the intentional act exclusion (i.e. exclusions serve only to withdraw coverage for claims that otherwise within the insuring agreement). If coverage turned upon the intentional act exclusion, how did the Court get past the fortuity requirement? This question's answer may have very practical consequences, given the insured bears the initial burden of proving that a claim falls within coverage under the insuring agreement, which then shifts to the insurer when an exclusion might apply. One way or another, in absence of very specific terms of coverage, fraud or theft allegations should not often trigger a duty to defend under general occurrence-type liability policies… unless the factual pleadings *actually* suggest an element of unintentional conduct or imply that the taking of another's property was (somehow) unintended consequence reasonable or normal conduct. Vague "ought to have knowns" aren't enough.

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