

Québec government adopts new legislation amending insurers' duty to defend

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In Québec, insurers may now in some circumstances depart from the once rigid rules of Article 2503 of the Civil Code of Québec (C.C.Q.).

On 5 May, the “Regulation respecting categories of insurance contracts and insured parties that may depart from the rules of articles 2500 and 2503 of the Civil Code” (the Regulation) came into force and allows some insureds to be exempt from Article 2503.

Article 2503 legally requires insurers to take up and cover the entire defence costs of their insureds in addition to the policy limits. This had been a non-negotiable principle of public policy and unique to Québec – in other common law provinces in Canada, the duty to defend is contractual and could be part of the limit of liability, reducing the limit accordingly.

Articles 2500 and 2503 read as follows:

“2500. The proceeds of the insurance are applied exclusively to the payment of injured third persons.

2503. The insurer is bound to take up the interest of any person entitled to the benefit of the insurance and assume his defence in any action brought against him.

Costs and expenses resulting from actions against the insured, including those of the defence, and interest on the proceeds of the insurance are borne by the insurer over and above the proceeds of the insurance.”

These principles had meant that certain types of insureds struggled to find reasonably priced insurance because the cost to defend certain types of cases, such as class actions, could be extremely high for insurers. The amendments aim to allow insureds to find premiums that are priced more similarly to the rest of Canada and tackle the issue of rising defence costs.

Now, insureds who fit a certain criteria may be exempt, so long as their contracts do not exceed one-year. These criteria are:

- The insured is a manufacturer of prescription drugs;
- The insured is a legal person established under the following Acts – Act constituting Capital régional et coopératif Desjardins, Act to establish Fondation, le Fonds de développement de la Confédération des syndicats nationaux pour la coopération et l'emploi and the Act to establish the Fonds de solidarité des travailleurs du Québec; or
- The insured is a director, officer or trustee of any entity referred to in the two bullet points above, even one not insured under such a contract.

An insured may also be exempt if the total coverage of all their liability insurance contracts is a minimum of \$5,000,000 and the insured is:

- a large business within the meaning of the Act respecting the Québec sales tax or is a person related to a large business within the meaning of the Taxation Act;
- a reporting issuer or a subsidiary of such a reporting issuer within the meaning of the Securities Act;
- a foreign business corporation within the meaning of the Taxation Act or the Income Tax Act; or
- a director, officer or trustee of any entity referred to in any of the three preceding items, even one not insured under such a contract.

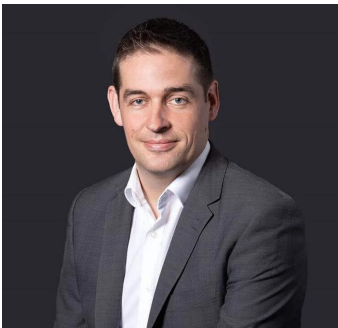
Key considerations for insurers

Insurers whose insureds fall into these categories will need to adjust their policies accordingly to make good use of the Regulation, though it is worth noting that the categories exempt from the requirement to be defended are limited, meaning few companies will benefit from it. In future, other categories may be added to or removed from the Regulation. This change starts to bring the Québec civil liability insurance market in line with the rest of Canada.

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