

LAWPRO goes to bat for lawyers – in many different ways

It's a fact of life that lawyers get sued. If these suits arise from the practice of law, LAWPRO defends these practitioners pursuant to the defence obligations in the insurance policy. However, LAWPRO also helps lawyers in ways which go beyond its strict contractual obligations. LAWPRO has taken a variety of proactive measures to prevent claims against its insureds.

Going to bat in the courts

PREVENTING TWO LAWSUITS, WHILE RESTORING AN INSURED'S REPUTATION

LAWPRO is especially proud of *Butty v. Butty*,¹ where we not only prevented what might have been a very nasty claim against the insured, but also helped to restore the lawyer's reputation and prevented a possible claim against a second lawyer.

Our insured acted for the husband in matrimonial litigation. One of the issues was whether the wife was bound by their marriage contract. A second solicitor had acted for the husband with respect to that contract. The contract purported to exclude from equalization one parcel of land, consisting of 151 acres.

The insured arranged for an appraisal of the property. The appraiser discovered that in fact there were two parcels separated by a strip of land owned by Ontario Hydro. The insured provided the wife's counsel with a copy of the appraisal. Neither the insured nor the wife's counsel believed that the existence of two parcels, as opposed to one parcel, made any real difference to the parties.

The trial judge found that the insured misled the court as well as counsel for the wife about the fact that the parcel was actually two parcels. The marriage contract was set aside, based on the alleged non-disclosure concerning the parcel(s). The trial judge made very disparaging remarks about the insured, the husband, and the husband's previous solicitor. The court invited the wife to seek an order that costs be awarded against the insured personally.

At this point, the insured put LAWPRO on notice. LAWPRO successfully sought intervenor status on the husband's appeal. His appeal was successful. The Court of Appeal stated that the insured had done nothing wrong and expressed regret for the trial judge's unwarranted criticism. Not only was the possibility of a claim against our insured eliminated, a separate claim against the solicitor who prepared the husband's marriage contract was precluded as well.

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TAKING ADVANTAGE OF CHANGES IN THE LAW

In *Zwaigenbaum v. Scher*,² LAWPRO took advantage of the "new" summary judgment rule to have the action against our insured summarily dismissed as statute-barred.

Our insured acted for the plaintiff in an unsuccessful appeal of a family matter. That appeal was dismissed on November 6, 2006. The insured's retainer was terminated one week later. The claim against him was issued on January 5, 2009.

Justice Pitt observed that throughout 2006, the plaintiff sent many letters to our insured, voicing complaints identical to those made in her statement of claim: that the insured was late filing material, failed to file relevant material, failed to keep her informed, provided her with misleading information, failed to follow her instructions, and failed to properly prepare for the appeal.

The plaintiff alleged that she did not discover her claims until she received a copy of the Law Society of Upper Canada's review of our insured's professional conduct, in May 2008. Justice Pitt held that no new material facts arose from the Law Society's review.

The plaintiff knew or ought to have known all of the material facts giving rise to her claims when she terminated our insured's retainer on November 13, 2006, or at the latest, when he notified her that he had stopped acting for her, on or about November 29, 2006.

Going to bat via repair – and preventing a claim from happening

LAWPRO "repair" work is less high profile – and not always as well known except among those who benefit from it.

Usually these efforts involve correcting errors made in the course of civil litigation. For instance, in *Clements v. Greenlaw*,³ LAWPRO's counsel persuaded the Divisional Court to set aside a master's

order dismissing the plaintiff's action at a status hearing. This spring, LAWPRO counsel will argue on appeal from the Divisional Court in *Vearella v. Khan*,⁴ which will further clarify "misnomer" in the context of the *Limitations Act, 2002*.

But repair work is not limited to civil litigation. LAWPRO counsel was able to salvage a construction lien action in *Sunrise Greenhouse Manufacturing v. J.C. Fresh Farms*.⁵

Rule 2 of the *Rules of Civil Procedure* was used to cure the irregular way in which the plaintiff set its action down for trial under s. 37 of the *Construction Lien Act*. The difficulty was that in addition to suing the defendants moving to dismiss the action, the plaintiff had sued two additional defendants, but had never noted them in default. The plaintiff set its action down for trial without serving the "extra" defendants with a trial record, thereby failing to comply with rule 48.03 of the *Rules of Civil Procedure*. The moving defendants argued that the plaintiff had failed to properly set the construction lien action down for trial within two years of the commencement of the action, as required by s. 37, and the lien action must therefore be dismissed

The court refused to dismiss the action. The plaintiff never intended to proceed to judgment against the two "extra" defendants. The court waived strict compliance with rule 48.03.

In 2009, LAWPRO was able to rectify two wills. In *Nugent v. Lang*,⁶ Harris J. granted rectification of a will, deleting the words "Twenty-five thousand dollars", and moving commas and decimal points so that "\$25,000" read as "\$2,500." These typographical errors were only discovered on the death of the client, and the lawyer had failed to notice these errors.

In rectifying the will, Justice Harris relied on *Balaz v. Balaz*.⁷ In that case, Justice D. M. Brown granted rectification of the will by deleting powers granted to the estate trustees which could have tainted the spousal trust which Balaz wished to establish in favour of her husband.

The solicitor who prepared the will gave uncontradicted evidence that the client had intended that her will create a spousal trust that would meet the requirements of the *Income Tax Act*. Through inadvertence, the solicitor included language in the section of the will dealing with the trustees' powers that could taint the spousal trust. This language was included without the knowledge or approval of the client. The language was a mistake, and was deleted so that the will conformed to the testatrix's wishes. The beneficiaries under the will, and the minister of National Revenue, consented to the order that the will be rectified.

Conclusion

While most LAWPRO files relate to the defence of actions brought against our insureds, LAWPRO has been proactive in matters which did not fall squarely within the defence provisions of the LAWPRO policy. LAWPRO launched strategic interventions in third-party litigation, has taken advantage of changes in the law, and has involved itself extensively in "repair" applications on behalf of insureds who have committed errors.

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¹ 2009 ONCA 852

² 2010 ONSC 559 (ON.S.C.)

³ 2009 CanLII 33028 (ON S.C.D.C.)

⁴ 2009 CarswellOnt 5658 (Div.Ct.)

⁵ Unreported judgment, Court File No.: Os-Cv-S010 (Windsor), Released June 17, 2009

⁶ 2009 CanLII 22604 (ON.S.C.)

⁷ 2009 CanLII 17973 (ON.S.C.)