

EXAM 6 – CANADA, FALL 2018

8. (2 points)

In each of the following scenarios, explain a likely outcome for the insurance company and cite any relevant precedent used to support the conclusion drawn.

a. (1 point)

A journalist is insured by a \$500,000 limit professional liability policy with a primary insurer and a \$5.5 million excess professional liability policy from an excess insurer. The journalist is being sued for \$4 million for defamation after an article he wrote. The excess insurer is denying the payment of defense costs. The primary insurer sues the excess insurer claiming it has a duty to defend.

b. (1 point)

An insurer received notice of a third party claim resulting from pollutants arising out of an insured fire that occurred at its British Columbia premises where the insured conducted its business. The insurer is denying the duty to defend, since pollutants are excluded from the policy. The insured sues the insurer for denying its duty to defend.

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SAMPLE ANSWERS AND EXAMINER'S REPORT

QUESTION 8	
TOTAL POINT VALUE: 2	LEARNING OBJECTIVE(S): A3
SAMPLE ANSWERS	
Part a: 1 point	
<p><u>Sample 1</u> Alie v. Bertrand Frere Excess insurer will have to pay defense costs provided their policy follows the form of the lower limits policy, which it appears to be, and the excess insurer doesn't specifically exclude defense costs. Excess insurer has duty to defend.</p> <p><u>Sample 2</u> Similar to the case Broadhurst & Ball vs. American Home Assurance, where the excess insurer Guardian was found to have to pay part of defense costs. Since the possible judgment is well into the excess coverage limits as in Broadhurst, the excess insurer may be involved in payment for this suit. Thus, it is likely that the primary insurer wins and the excess insurer will have to cover some defense costs (possibly half as in Broadhurst).</p>	
Part b: 1 point	
<p><u>Sample 1</u> Case: Precision Plating v. Axa Insurer does not have duty to defend. 3rd party is claiming for pollutants, not fire, which is excluded from policy. No duty to indemnify and thus, no duty to defend.</p> <p><u>Sample 2</u> Precision Plating v. Axa Pacific The insurer doesn't have duty to defend. Because the third party claim was for pollutants, not for fire, indemnification is beyond the scope of the policy. Since pollutants are excluded from the policy, there is no duty to defend since duty to defend is triggered by duty to indemnify.</p>	
EXAMINER'S REPORT	
Candidates were expected to identify a case specifically applicable to the facts and circumstances provided and apply the same reasoning to arrive at the appropriate outcome.	
Part a	
Candidates were expected to understand the circumstances under which the excess insurer has a duty to defend based on relevant precedent cases.	
Common errors included:	
<ul style="list-style-type: none">• Stating a case that did not specifically reference the duty to defend for excess insurers.• Stating that there is no duty to defend by assuming defamation is excluded from the policy.	

SAMPLE ANSWERS AND EXAMINER'S REPORT

Part b

Candidates were expected to understand that although the fire is a covered peril, the third party liability claims are for pollution, which is excluded under the policy. As such, only the Precision Plating v. Axa Pacific Insurance Co. case applies. Candidates were expected to understand that the duty to defend is triggered by the duty to indemnify.

Common errors included:

- Stating that there is no duty to defend because pollution is an excluded peril without making the link between the duty to indemnify and the duty to defend (i.e. the duty to defend is triggered by the duty to indemnify).
- Stating that “there is no duty to defend because fire is a covered peril”, which is a contradicting statement.