

Derivative Pleadings and Duty to Defend

The decisions of the Supreme Court of Canada released in *SANSALONE* and *SCALERA* reinforce the view that in Canada, liability insurers are obliged to defend only those claims which, based on a reasonable interpretation of the circumstances alleged, could potentially fall within the indemnity available under the relevant contract of insurance. Where it is suspected that a plaintiff's lawyer has tailored pleadings by alleging "negligence" as a means of triggering coverage when the factual circumstances for the claim would otherwise be construed to fall outside coverage, the Supreme Court has endorsed use by insurers of "derivative claim" analysis to look behind the legal terminology in a pleading, when evaluating whether they are obliged to defend an action brought against an insured. If the pleading in "negligence" is merely derivative of the true legal character of the facts alleged, insurers are not obliged to defend if by its true legal character, the claim would fall outside coverage.

text [SANSALONE](#) decision, courtesy of LexUM

text of [SCALERA](#) decision, courtesy of LexUM

May 3, 2000