

The Tenth Annual Insurance Symposium

February 6, 2014

8:30am – 4:30 pm One King West Hotel, 1 King St. W., Toronto

Agenda

7:45–8:30 *Registration and Continental Breakfast*

8:30–8:45 **Welcoming Remarks**

8:45–9:30 **Bad Faith Issues in Over Limits Claims**

Ashley Richards, Thomas Gold Pettingill LLP, Toronto

Insurers often have to respond to a bad faith claim if the underlying litigation results in an over limits exposure. Coverage and defence counsel can play a pivotal role in properly assessing the underlying litigation and protecting the insurer from a finding of bad faith. This presentation will provide a current overview of bad faith law in Canada, as well as practical tips that coverage and defence lawyers should use to protect against bad faith judgments in over limits claims

9:30–10:15 **Coverage for Intellectual Infringement in Canada**

Heather Sanderson, Intact Insurance Company, Calgary
Eric Macramalla, Gowlings, Ottawa

Actions for trade-mark infringement, passing-off and depreciation of goodwill are on the rise. Coverage B of the GL offers a defence and indemnity to certain forms of intellectual property infringement in advertising however very few Canadian businesses know that it exists. How effective is it? As the coverage has imported American legal terms that have no precise equivalent in Canada, how will Canadian Courts interpret this coverage? Hear Eric Macramalla give a primer on Canadian trademark infringement actions and how the terms used in the coverage such as "slogan", "trade dress" are not used in the Canadian statutory scheme that protects intellectual property rights. Heather Sanderson will explain the coverage offered in light of this discussion and the potential ambiguities that may arise

10:15 - 10:30 *Morning Break*

10:30–11:45 **Auto Insurance Coverage Issues Across Canada**

Edwin (Ted) Ehrhardt QC, Bingham Law, Moncton
Marney Lutz, Scott Venturo LLP, Calgary
Lee Samis, Samis & Company, Toronto
Patricia Armstrong, Lindsay LLP, Vancouver

Hear from a national panel on auto insurance coverage issues across Canada. Ted will provide comparison of what the coverage is in the four Maritime Provinces, common problems, distinct problems and if a unified approach would make sense. Lee will review the state of Ontario's auto insurance including the Minor Injury Guideline, Catastrophic Impairment, and the ADR process. Marney and Pat will do an overview and comparison of the minor injury caps in Alberta and the Maritime provinces, and touch on recent hot topics including "serious and permanent impairment"; Certified Examinations, including expert selection and videotaping; and case law under the MIR. Pat will speak primarily on ICBC and on the government auto insurance schemes in Manitoba and Saskatchewan.

11:45-12:30 **Emerging Topics in CGL Coverage**

Mark Lichty, Blaney McMurtry LLP, Toronto
Nick Krnjevic, Robinson Sheppard Shapiro LLP, Montreal
Jennifer Biernaskie, McLennan Ross LLP, Calgary

Cyber Claims

Emerging cyber-liability claims now include lost laptops and USB Keys containing sensitive data; insufficient protection of data from hacking risks; e-defamation/ cyber-bullying /electronic aggression. What are the pertinent CGL policies coverage and exclusions and what about other potentially responsive cover to third party claims?

Privacy Claims

There is a new tort of intrusion on seclusion in Ontario. What are the related torts and how are other provinces handling these kinds of claims? Many cyber-privacy injuries are not yet accommodated such as personal electronic/online identities worthy of legal protection. What are the challenges to liability insurers to accommodate/exclude emerging cyber rights?

Perspectives from Quebec

Are defence costs always in addition to limits? There are some peculiarities arising from the third parties' right to bring a direct action against the CGL carrier. Other insurance: equitable subrogation v equitable contribution.

12:30-1:30 *Lunch*

1:30-2:30 **Ethical Issues in Third Party Coverage Cases**

Rod Winsor, Blaney McMurtry LLP, Toronto
Tom Donnelly, Thomas Gold Pettingill LLP, Toronto
Hon. Mark Edwards, Ontario Supreme Court, Toronto

Third party insurance coverage claims give rise to many ethical issues. The most common are conflicts arising out of partially covered claims, and claims in excess of policy limits. This programme explores the following scenarios:

Conflict between Defence Counsel's Duties to Insured and Defence Counsel's Close Economic Relationship with the Insurer

- Defence counsel is tempted to prefer the interests of the insurer over the interests of the insured, especially when insurer sends significant amounts of work to the firm.
- The insurer wants to appoint one counsel to defend multiple insured's with conflicting interests raising conflict of interest issues and the possible erosion of the policy limits.

Conflict between Insurer's Economic Interests and Insured's Business Relationship, and Reputational Interests

- The insurer wants to bring claims for contribution and indemnity against insured's clients or contractors, and the insured doesn't want to because of business interests.
- The insurer wants to settle the underlying litigation for economic reasons and the insured wants to fight the claim for reputational or business reasons. Or the insured wants to settle to preserve a business relationship, and the insurer wants to fight the case on liability.

Impact on Defence of Claim when Insurer doesn't have a Duty to Indemnify

- Sometimes an insurer has to defend a case even though it knows it is highly unlikely that there will be a duty to indemnify, raising potential conflict issues between the insurer and the insured.
- Defence counsel can be conflicted over settlement contributions. Can defence counsel tell (or ask) the insured to contribute to settlement?

2:30 - 2:45 *Afternoon Break*

2:45 – 4:15 **Flood Wind & Fire: Adapting Coverage to Respond to Climate Change**

Max Cohen, Lowe Stein LLP, New Orleans
Scott Urquhart, Lindsay LLP, Vancouver
Alister Campbell, CEO, The Guarantee Company of North America, Toronto

Hurricane Katrina, which struck the United States gulf coast on August 29, 2005, was one of the deadliest and costliest hurricanes to strike the United States. It led to unprecedented regulatory measures that affected the plethora of wind and flood damage claims and litigation that followed the disaster. Some of the issues addressed by the courts were:

- 1) what is a flood?
- 2) what triggers and what is covered by business interruption coverage?
- 3) how are concurrent causes of loss and the valued policy law addressed?
- 4) under what circumstances has the insurer acted in bad faith?

In Louisiana, Katrina also led to decisions significantly narrowing an insurance agent's duties to his client. Finally, because Katrina, and later Hurricanes Rita and Ike, helped render the National Flood Insurance Program unsustainable, significant changes to the program were implemented by the United States Congress in July 2012.

4:15 – 4:30 **Closing Remarks**

4:30 -6:00 *Reception*