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## **Other Insurance clauses & overlapping coverage**

### ***Supreme Court of Canada tackles irreconcilable differences in coverage dispute***

In *Family Ins. Co. v. Lombard Canada Inc* (May 23, 2002), the SCC ordered an equal sharing of a loss where two policies covered the same risk, but each declared itself excess to the other.

In a contest between insurers only, there was no need to look for evidence of the insuring intent outside the policies themselves. Where that intent was irreconcilable, as here, the insurers remained under an equal obligation to indemnify the loss.

#### **Background**

The underlying tort claim involved a riding accident at a stable in British Columbia. The stable owner had a homeowner's insurance policy (with Family Insurance). She was also insured under a commercial general liability policy (with Lombard) as a member of the Horse Council of British Columbia.

The quantum of damages, settled before trial, was below Family's \$1M policy limit and the \$5M limit under the Lombard policy. At issue was the extent to which each insurer had to contribute to the loss.

#### **'Other insurance' clauses**

Each policy, standing alone, would have provided primary coverage to the claim and paid it in full. According to the 'other insurance' clauses found in both policies, however, each policy declared itself to be secondary, or "excess," to any other insurance held by the insured for the same risk.

The Lombard policy, in fact, purported to be excess even to "excess" insurance.

Both insurers attempted to avoid primary liability by relying on the 'other insurance' clauses. The clauses could not be reconciled, clearly, as the insured would be left without *any* coverage if both policies were given effect.

#### **At trial**

The trial judge commented that the policies created "a kind of drafting 'tag,'" dodging the question of which policy was primary. By ruling that the 'other insurance' clauses were inoperative, as they cancelled each other out, each policy was taken to provide primary coverage.

As for apportionment between the insurers, there was precedent for an equal contribution to the loss up to the insurers' respective limits or until the loss was compensated and the trial judge adopted this approach.

#### **Surrounding circumstances & insuring intent**

While the trial judge looked only to the policy wordings as evidence of the insurer's intent, the Court of Appeal also considered "surrounding circumstances." It considered important the fact that most Horse Council members had other coverage in place and inferred that the underwriters of Lombard's CGL policy had this in mind when coverage was secured.

The Court of Appeal therefore found the Lombard policy to be excess to the coverage provided by Family.

#### **SCC steps in**

A unanimous panel of the Supreme Court of Canada restored the trial decision and affirmed the approach taken there.

It ruled that the Court of Appeal should not have factored in possible underwriting considerations in an attempt to identify the true intent of the policies.

The SCC stated that an insurer's intent, on this type of evidence, may be relevant in disputes with an insured, but not in a contest between insurers.

In this situation,

*"...there is simply no basis for looking outside the policy. [T]he unilateral and subjective intentions of the insurers, unaware of one another at the time the contracts were made, are simply irrelevant."*

The insuring intent could be determined only by reference to the language the insurers chose to use in their policy.

In this case the two policies clearly set out the insurers' intentions, in that each offered primary coverage unless 'other insurance' was available.

### **Apportionment**

Looking to the policies only, it was clear that each insurer, at the very least, intended to provide primary coverage. Ruling that the irreconcilable 'other insurance' clauses were "mutually repugnant and inoperative," the Court found that each insurer was independently liable for the full loss, "as if the other insurer did not exist."

It was then left to determine each insurer's contribution to the loss.

The CGL insurer, Lombard, had policy limits of \$5 million while Family's limits were \$1 million. The Supreme Court rejected Family's argument that the insurers should split liability in proportion to their respective limits.

The Court instead endorsed the "independent liability" approach to apportionment: where liability is shared among insurers, each covering the same risk, each bears the loss equally until the lower policy limit is reached. The policy with the higher limit would then contribute any remaining amount.

The claim fell below the limits of either policy, so Family and Lombard shared liability on a 50/50 basis.

### **Comment**

This case may have more far-reaching effects than many insurers realize. Take an example: an insured has two properties with a separate policy for each. Liability attracted in connection with one property may trigger coverage for both policies. Unless the policy wordings are clear, it may not matter what each insurer intended to insure.