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Insurance

Rights, remedies between primary and excess insurers: Introduction, guiding principles

By **Stephen Ross and Erin Crochetière**

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(May 1, 2020, 9:35 AM EDT) -- This article examines the nature and scope of the duties owed between primary and excess insurers from a Canadian perspective, including a consideration of common issues that arise when multiple layers of insurance are potentially applicable to a claim.

The article is divided into three parts. Part one provides an introduction to the issues arising in the context of disputes between primary and excess insurers and considers the Agreement of Guiding Principles drafted by the Insurance Bureau of Canada. This part also examines the common law doctrine of equitable contribution and the application of this doctrine in the context of disputes regarding the allocation of defence costs.

Introduction

With the rise in the value and number of insurance claims, instances where the exposure reaches into excess layers of insurance will be more common. As such, it is anticipated that the number and nature of disputes between primary and excess carriers will increase.

In the U.S. context, the law regarding duties owed between primary and excess insurers is well developed. Conversely, there are very few reported Canadian decisions on the topic.

As elaborated below, it is the authors' view that, regardless of the context in which the remedy arises (equitable contribution, equitable subrogation or a duty of care in tort), the law requires that, where an excess insurer is harmed by the unreasonable conduct or actions of a primary insurer, the primary insurer be held accountable to the excess insurer for the financial losses caused.

Similarly, where there is a concurrent duty to defend and an excess insurer is put at risk by a claim, then the excess insurer should be involved in the investigation and adjusting of the claim and to contribute to defence costs accordingly.

In short, there is a relationship of proximity between primary and excess insurers such that the parties know, or ought to know, that a failure on its part could result in financial loss to the other. It is the writers' view that these losses should be recoverable, so long as they are reasonably foreseeable.

We will begin our analysis with a review of the key authorities and publications on the issue, starting with an agreement that has been reached with several insurance companies regarding guiding principles for primary and excess liability insurers.

Agreement of Guiding Principles

The Insurance Bureau of Canada has implemented the "Agreement of Guiding Principles Between

Primary and Excess Liability Insurers Respecting Claims, 1996."

The agreement outlines various duties owed between primary and excess insurers such as: the duty to act prudently in negotiating towards settlement; the duty to make reasonable efforts to investigate all facts relevant to the evaluation of the claim; and the duty to provide relevant information to assist in an insurer's assessment of exposure.

The agreement also outlines various duties owed by the excess insurer to the primary insurer where the excess insurer elects, or is required, to become involved in the defence and investigation of a claim.

These duties include a duty to share all information and to contribute to the proportionate costs of adjusting the claim, regardless of the ultimate value of a settlement or judgment.

The agreement has received little judicial attention and has been cited by only two reported Canadian decisions, including *Hollinger International Inc. v. American Home Assurance Co.* [2006] O.J. No. 140.

In both cases, although the court seemed to accept that the agreement had application to disputes between certain insurers, it did not engage in a meaningful analysis of the agreement as the disputes in question involved insurers that were not signatories to the agreement.

Notably, some large insurers operating in Canada are not signatories to the agreement and, as such, it will be of limited assistance in resolving disputes involving these insurers.

Nevertheless, whether applicable or not in any given case, the principles outlined in the document provide a useful analytical framework for any dispute between insurers.

At the very least, the agreement can serve as a base understanding of the nature of the primary and excess insurer relationship and the rights and remedies each might expect or intend had the parties actually sat down to negotiate a defence handling agreement as between them.

Indeed, the core duties, such as the duty to negotiate prudently in settlement, the duty to investigate all relevant facts, and the duty to share all relevant information, seem quite sensible and are likely what the parties would have agreed to had they turned their minds to the issue.

Equitable contribution: Allocation of defence costs

In the context of disputes regarding the allocation of defence costs, given that there is usually no actual contractual relationship between primary and excess insurers, Canadian courts have applied the principle of equitable contribution in order to resolve disputes between insurers.

In *Broadhurst & Ball v. American Home Insurance Co*., [1990] O.J. No. 2317, the Court of Appeal for Ontario held: "Since these insurers have no agreement between themselves with respect to the defence, their respective obligations cannot be a matter of contract. Nonetheless, their obligations should be subject to and governed by principles of equity and good conscience, which, in my opinion, dictate that the costs of litigation should be equitably distributed between them."

This principle was followed by the Ontario Court of Appeal in *Alie v. Bertrand & Frère Construction Co.* [2002] O.J. No. 4697, wherein the court held that, where there is a concurrent duty to defend between primary and excess insurers, and the excess insurer is put at risk by the claim, then the excess insurer should contribute to defence costs. The court stated that the nature of the contribution will depend on the equities of each case.

In other decisions, the court has made clear that, where there is no concurrent duty, such as when the primary limits have been exhausted, (see *Boreal Insurance Inc. v. Lafarge Canada Inc.*, 70 O.R. (3d) 502) or when the excess policy expressly excludes a duty to defend, there may be no liability for contribution to defence costs.

For example, in *ACE INA Insurance v. Associates Electric & Gas Services Ltd*. 2013 ONCA 685, the primary insurer, ACE INA, sought contribution for defence costs from the excess insurer, AEGIS. The

claim arose out of an explosion and fire, following which damages were claimed in excess of $50 million. The limits of the (primary) ACE INA policy, were $1 million and the AEGIS (excess) policy provided for $45 million in coverage.

ACE INA argued that, since AEGIS would bear the majority of liability, it should share in defence costs. AEGIS argued that, as stipulated in the AEGIS policy, it would only become liable for defence costs once the limits of the primary policy had been exhausted.

The AEGIS policy expressly stated that there was no duty to defend unless defence costs were not covered by other insurance. Specifically, the policy stipulated: "the company shall not be liable for expenses as aforesaid when such expenses are included in other valid and collectible insurance[…]."

The Court of Appeal held that "in insurance contracts not governed by statute, the obligation of an excess insurer to contribute to defence costs must either flow from a duty to defend or from the express language of the policy."

The court concluded that, as the policies question did not insure the same risk, the doctrine of equitable contribution did not apply and AEGIS was not obligated to contribute to defence costs.

The Court of Appeal in the recent decision of *Markham (City) v. AIG Insurance Company of Canada* 2020 ONCA 239 applied the principle of equitable contribution and held that two insurers were required to share equally in defence costs. In this case, the insurers owed duties to defend with respect to different claims advanced against the insureds in the action. The Court of Appeal held: "as there is no contract between [the insurers] with respect to the defence, their respective obligations should be governed by the principles of equity."

The court stated that, although each insurer bore some risk, the level of risk could not yet be determined given the early stage of the proceedings and the nature of the claim did not allow for a precise allocation of defence costs. Ultimately, the Court of Appeal held that the insurers were required to pay an equal share of defence costs pending final disposition of the action and the determination of the allocation of defence costs.

This is part one of a three-part series.

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