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• JUGGLING ETHICS: JOINT RETAINERS AND THE PROFESSIONAL OBLIGATIONS OF INSURANCE DEFENCE COUNSEL •

Nigel Kent, Clark Wilson LLP

Introduction

Much legal literature has addressed the liability insurers' "duty" to defend law suits against their insureds. The material tends to focus on the rights and obligations of the insurer and the insured respectively. The terms of the contract (the policy) between the parties drive much of the analyses. When is the duty to defend triggered? Who appoints and instructs defence counsel? How do the conflicts of interest between insurer and insured get addressed? Invariably, the policy is silent about such conflicts. Occasionally the Court will be called upon to fashion a remedy but more often than not the parties will themselves devise a handling protocol to muddle through, hoping for some compromise outcome in

the underlying suit that will avoid the conflict coming to the fore.¹

This article is not focused on the insurer-insured relationship, but rather on the professional and ethical obligations of the third player in the "tripartite" relationship, namely, defence counsel. More specifically, this article will focus on the professional conduct rules and directions of the Law Societies, particularly the Law Society of British Columbia ("LSBC"). As we will see, defence counsel is obliged to walk an ethical tightrope and confront significant professional discipline exposure.

Joint retainers

Most liability policies impose a requirement upon the liability insurer to defend law suits brought against the insured for claims and liabilities of a sort insured under the policy. The policy usually grants the insurer the right to appoint and instruct defence counsel.

The IBC form 2100 Commercial General Liability ("CGL") policy defines the word "action" to mean a civil proceeding seeking compensatory damages on account of injury or damage "to which this insurance applies". The insuring agreement in the policy then stipulates, "[the insurer] will have the right and duty to defend any 'action' seeking those compensatory damages ... [and the insurer] may investigate and settle any claim or 'action' at its discretion".

Homeowners policies extend liability coverage. One form of policy in use in B.C. provides:

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Defence of lawsuits: [the insurer] will defend any action against [the insured] claiming compensatory damages on account of legal liability insured by this policy. [The insurer] will defend any such action even if it is completely groundless. [The insurer] reserves the exclusive right to appoint and instruct legal counsel in the defence and settlement of any such action as [the insurer] in [its] absolute discretion considers appropriate.

In British Columbia, that Province's plan of universal compulsory vehicle insurance is operated by I.C.B.C. pursuant to the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, as amended and the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83. Sections 74 and 74.1 of the *Regulation* address the defence of claims arising out of motor vehicle accidents:

74 ... the Corporation, at its expense, shall

(a) assist the insured by investigating and negotiating a settlement where, in the Corporation's opinion its assistance is necessary, and

(b) ... defend in the name of the insured any action for damages brought against the insured

74.1 ... on assuming the defence of an action for damages brought against an insured, the Corporation shall have exclusive conduct and control of the defence of the action and, without limiting the generality of the foregoing, the Corporation shall be entitled to

(a) appoint and instruct counsel to defend the action,

(b) admit liability, in whole or in part, on behalf of the insured ...

...

(d) compromise or settle the action.

These insurance policy provisions contemplate that the insurer will appoint a lawyer to defend the insured and also, to varying degrees, purport to vest the insurer with the authority to instruct that lawyer to handle the claim as the insurer wishes. So clearly, the insured, the very person whom the lawyer is representing in the law suit, becomes a client of that lawyer. Is the insurance company, the one that appoints, pays and instructs the lawyer, also a client?

There is one Canadian case, widely considered by the insurance bar to be wrongly decided on this point, which has held that insurer-appointed defence counsel has only one client, namely, the insured. In *Hopkins v. Wellington*, [1999] B.C.J. No. 1164 (S.C.), the Court declared "the only client is the insured even though the insured has, by virtue of the contract of insurance, delegated the choice of his or her counsel to the insurer".² The Court expressed disapproval of the no-

tion that “defence counsel is also acting on behalf of the insurer and has a duty to protect the insurers’ interests” and went on, to observe:

- ordinarily information in the possession of defence counsel would have to be shared with the client (the insured);
- this would include any opinion which those lawyers may have issued to the insurers regarding coverage;
- any such coverage analysis “should not have been undertaken” by defence counsel, but rather “the insurers should have obtained separate counsel for that purpose”;
- if defence counsel did provide coverage information/analyses to the insurer “as a result of a separate retainer”, then “the [lawyer’s] obligation of confidentiality owed to their clients, the insurers, comes in conflict with the obligations they owe to their clients, the defendant-insured ... and in those circumstances the lawyers must withdraw from further acting for the defendants-insured”;
- however, if they can continue to act, defence counsel “are not in a position to pass to the insurers any confidential communications received from the defendant-insured or confidential information while acting for the defendant-insured if that information would or might prejudice coverage or if that information is otherwise protected by solicitor-client privilege”.

However, it is the almost universal view of the insurance bar that the appointment by a liability insurer of defence counsel to defend a lawsuit against an insured is in fact a “joint retainer” and that defence counsel has two clients, namely, insurer and insured:

It is well established that the relationship between defence counsel, the insurer and the insured constitutes a joint retainer (*Groom v. Crocker*, [1938] 2 All ER 394; *Chersinoff v. All State* (1968) 69 DLR (2d) 653 (BCSC), appeal allowed in part (1969), 3 DLR (3d) 560 (BCCA)). Defence counsel stands in a solicitor-client relationship with both the insurer and the insured, and owes professional duties to each.³

In the *Chersinoff* case the Court commented on the appointment of defence counsel in a fatal accident law suit:

The starting point must be that the solicitors were acting as solicitors for both insurer and insured in respect to the claims for damages brought against the latter. Although the insured did not select the solicitors himself but was represented by them and became their client because of the contractual right of the insurer to conduct the defence and select the solicitors, the insured agreed as a condition of being indemnified that the insurer should have the right to select solicitors, so I think the insured may properly be taken to be a party of the employment of the solicitors selected. While the employment of the same solicitors for both parties came about because of the condition, the position of the solicitors in my view is that they must be regarded as having been jointly retained to represent both parties on the issues of whether or not the insured was liable to pay damages in respect to the motor accident and the amount of the damages.⁴

While it is possible some debate may remain in the case law, there is no question that the Law Society of B.C. considers the appointment by a liability insurer of defence counsel to represent an insured to be a situation of joint retainer. All the Law Societies along with the Canadian Bar Association, have promulgated codes of professional conduct which include rules addressing conflicts of interest between clients. These rules, which are referred to in greater detail below, are drawn in general terms and are not specifically directed to the retainer by a liability insurer of defence counsel for an insured.

However, the Law Society of British Columbia, more so than any other Law Society in Canada, has chosen to specifically address the implications of the tripartite relationship in the context of liability insurance on several different occasions over the years, including insurer-imposed litigation and billing guidelines (1999), professional negligence in defending third party liability claims (2003), the I.C.B.C. “Strategic Alliance Agreement” with its defence law firms (2006) and “Third Party Liability Claims” (2008). From the outset the LSBC has very clearly stated that “Lawyers defending a claim for damages pursuant to a policy of insurance ... act for both the insured and the insurer”.⁵ In its October 2003 bulletin to the profession respecting professional negligence in defending third-party liability claims, the LSBC states,

A lawyer appointed by an insurer to defend a third-party liability claim has two clients: the insurer and the insured. The lawyer owes obligations to both clients ... care must be taken by the lawyer to identify and avoid conflicts of interest between the two clients and to ensure that they are both fully protected.

The LSBC also issued a bulletin to the profession in August 2006 circulating a “draft policy for discussion”. It was entitled “Joint Retainers in the Defence of Third-Party Liability Claims” and it went on to observe “it seems likely that not all lawyers who practice in this area are complying with their obligations [set out in] the Professional Conduct Handbook”.⁶ These statements, combined with a subsequent bulletin issued October 2008 entitled “Third-Party Liability Claims”, make it very clear that in so far as the LSBC is concerned, the appointment by a liability insurer of defence counsel to represent an insured is indeed a “joint retainer” and carries with it certain professional and ethical obligations the breach of which will put the defence counsel at risk of disciplinary proceedings.

Potential Conflicts of Interest between Insurer and Insured

In *Fredrikson v. I.C.B.C.*, [1990] B.C.J. No. 717, 44 BCLR (2d) 303 (S.C.), Esson C.J.S.C. observed the “element of conflict is a necessary incident of the contract [of insurance and] in the relationship between insurer and insured”. As one author has observed,

It is commonplace for there to be “conflicts” or adverse interests between the insurer and the insured in the course of defending a third party’s claim on such issues as tactics, whether or not to settle and for how much, and how much to spend on investigation and defence preparation. These are not unacceptable conflicts; as stated in *Fredrikson*, they are inherent in the relationship.⁷

It is not difficult to imagine numerous liability defence scenarios where the interest of insurer and insured may differ and ultimately conflict. A partial list might include the following:

- disagreement as to the selection and appointment of defence counsel;
- allegations of multiple or alternative claims (damages or causes of loss) some of which are covered by the policy and some of which are not;
- reservation of rights by the insurer to later deny coverage in the event that a policy breach or a mis-representation voiding coverage can later be substantiated;
- claims for damages which exceed the available policy limits and which, if not settled, may expose the insured for per-

sonal liability that is not covered by the policy;

- disagreement whether or not to settle the case.

When these conflicts arise, it is not uncommon for the insured to attempt to seize control of the defence of the claim, albeit at the expense of the insurer. Depending on the nature of the conflict, in various cases the Courts have been prepared to make orders granting the insured the right to appoint and instruct defence counsel, restricting the nature and extent of reporting by defence counsel to the insurer, and so on.⁸

Caught in the middle of this coverage tug of war is the defence counsel who has professional duties of loyalty and confidentiality to both the insurer and the insured. What guidance can that hapless lawyer draw from the Rules of Professional Conduct promulgated by Law Societies or Bar Associations? That lawyer, who after all will usually have a special relationship with the insurer developed over many years of retainers, must tread very carefully indeed.

Law Society Rules and Mandates

Most Law Societies have issued a professional conduct rule respecting impartiality and conflict of interest between clients similar to Chapter V of the CBA Code of Professional Conduct. That Rule is stated to be:

The lawyer shall not advise or represent both sides of a dispute and, except after adequate disclosure to and with the consent of the clients or prospective clients concerned, shall not act or continue to act in a matter when there is or is likely to be a conflicting interest.

The related “guiding principle” set out in the Code commentary continues:

Before the lawyer accepts employment from more than one client in the same matter, the lawyer must advise the clients that the lawyer has been asked to act for both or all of them, that no information received in connection with the matter from one can be treated as confidential so far as any of the others is concerned and that, if a dispute develops that cannot be resolved, the lawyer cannot continue to act for both or all of them with respect to the matter and may have to withdraw completely. Where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer must advise the other client of the continuing rela-

tionship and recommend that the other client obtain independent legal advice about the joint retainer. If, following such disclosure, all parties are content that the lawyer act for them, the lawyer should obtain their consent, preferably in writing, or record their consent in a separate letter to each. The lawyer should, however guard against acting for more than one client where, despite the fact that all parties concerned consent, it is reasonably obvious that a contentious issue may arise between them or that their interests, rights or obligations will diverge as the matter progresses. ... If a contentious issue arises between clients on a joint retainer, the lawyer, although not necessarily precluded from advising them on other non-contentious matters, would be in breach of the Rule if the lawyer attempted to advise them on the contentious issue. In such circumstances the lawyer should ordinarily refer the clients to other lawyers.

Based on the above rule/principle, it would appear that in joint retainer situations, such as the insurers' appointment of defence counsel to represent an insured,

- so long as there is "adequate disclosure" and both insurer/insured consent, the defence lawyer is free to act even though there "is or is likely to be" a conflict of interest between the two clients;
- the lawyer must advise both clients that there is no confidentiality attached to any information received and that all such information can (and will) be released to both clients;
- the lawyer who has a long-standing relationship with the insurer, should advise the insured of that long-standing relationship (presumably as part of the adequate disclosure-consent "process" referred to above); and
- the lawyer must tell both clients that if a dispute develops between them which cannot be resolved, then he is not allowed to advise them on the dispute and may have to withdraw from the retainer.

We have already seen how The Law Society of British Columbia has expressly declared that the appointment of defence counsel by a liability insurer for the benefit of the insured is a joint retainer. This triggers certain general principles and mandatory procedures set out in Chapter 6 of that Law Society's Professional Conduct Handbook which provides as follows:

Chapter 6

Conflicts of Interest between Clients

General Principles

1. As a general principle, a lawyer has a duty to give undivided loyalty to every client ...
3. A lawyer may, with informed client consent, represent clients in circumstances that might, in the future, give rise to divided loyalties.

Acting for two or more clients

4. A lawyer may jointly represent two or more clients, if, at the commencement of the retainer, the lawyer:
 - (a) explains to each client the principle of undivided loyalty,
 - (b) advises each client that no information received from one of them as part of the joint representation can be treated as confidential as between them,
 - (c) receives from all clients the fully informed consent to one of the following courses of action to be followed in the event the lawyer receives from one client, in the lawyer's separate representation of that client, information relevant to the joint representation:
 - (i) the information must not be disclosed to the other jointly represented clients, and the lawyer must withdraw from the joint representation;
 - (ii) the information must be disclosed to all other joint represented clients, and the lawyer may continue to act for the clients jointly, and
 - (d) secures the informed consent of each client (with independent legal advice, if necessary) as to the course of action that will be followed if a conflict arises between them.
5. If a lawyer jointly represents two or more clients, and a conflict arises between any of them, the lawyer must cease representing all the clients, unless all the clients:
 - (a) consented, under paragraph 4(d) to the lawyer continuing to represent one of them or a group of clients that have an identity of interests, or
 - (b) give informed consent to the lawyer assisting all of them to resolve the conflict.

What this means is that it is mandatory for all defence counsel, upon their appointment as such, to advise both insurer and insured at the outset,

- an explanation of the concept of undivided loyalty and his duties to each client in that regard;⁹
- advise (a warning?) that none of the information received by the lawyer will be confidential as between the two clients and will be made available to each of them; and
- that an agreement is required as to what is to happen should a conflict arise between insurer and insured (which agreement must amount to “informed consent”, which in certain circumstances may even require the obtaining of independent legal advice).

In this writer’s experience, spanning almost 30 years, the above requirement (a “Chapter 6 letter”) has been almost universally ignored by the insurance bar in British Columbia. For sure, some of the concepts may have been incorporated into a sophisticated “Non-Waiver Agreement” which the insurer may have presented to the insured in certain situations.¹⁰ However, such a Non-Waiver Agreement does not meet all of the requirements of Chapter 6 including the most obvious requirement that the statements/explanations in question must come from the defence lawyer not the insurer.

In early 1999 the LSBC became aware that insurers were increasingly imposing upon their defence lawyers formal litigation handling and billing guidelines. Those guidelines, which are now quite common-place in the insurance industry, required defence lawyers to obtain the permission of the insurer before carrying out certain tasks in the litigation or before incurring certain expenses. They imposed caps or restrictions on rates for certain tasks and refused payment for other tasks. In addition, some insurers required the defence lawyer’s fee accounts to be submitted to external auditors for review and approval prior to payment.

The Law Society was very concerned that the guidelines had the potential to interfere with counsels’ professional judgment in the conduct of litigation and that the submission of an account to a third party auditor might, in the absence of informed consent from the insured, breach solicitor-client privilege and contravene the lawyer’s duty of loyalty and confidentiality to the insured. Ultimately, the Law Society issued opinions condoning the practices in question but urging defence lawyers to exercise caution.

In October 2003 the Law Society again ventured into the field of the appointment by insurers of lawyers to defend third party liability claims. This time the Law Society’s concern related to the increasing frequency of “bad faith” claims against liability insurers for failing to settle claims within policy limits and to the related potential exposure of defence lawyers to professional negligence claims. The resulting “Alert!” bulletin issued to the profession included, among other things, the following suggestions:

- Write to insured at the outset to advise of the [joint] retainer, its scope and its limitations. Be sure that the insurer is also aware of the scope and limitations of the retainer;
- Once appointed to defend, do not advise either party on insurance coverage issues. Do not act on behalf of the insurer in any action relating to insurance coverage issues (including Part 7 actions). Be aware of what the coverage issues are, so that you can identify conflicts and avoid them;
- Be alive to the possibility of conflicts at all times.

In 2006 the Law Society became concerned about the implications of the so called “Strategic Alliance Agreement” which I.C.B.C. required of the law firms that represented insureds in the defence of motor vehicle claims. While the resulting Benchers’ Bulletin did not expressly address professional conduct implications of the joint retainer, it did declare that the existence of the agreement required the law firm to withdraw from cases in certain circumstances and also made it mandatory for the lawyer to “advise clients of the lawyer’s relationship with I.C.B.C. and the implications of the restrictions the lawyer is under”.

Also in 2006, the Law Society decided to directly address “Joint Retainers in the Defence of Third-Party Liability Claims” and, in particular, “What Should be a Lawyer’s Obligations?”. A Benchers’ Bulletin was issued to the profession setting out a draft policy for discussion purposes. It noted no clear agreement existed between insurance practitioners on “several key issues”, notably,

- what advice should a lawyer give clients about a joint retainer?
- what circumstances require a lawyer to withdraw from a joint retainer?

- what information can the lawyer give to the parties when the lawyer is required to withdraw?

It is in this Benchers' Bulletin respecting joint retainers that the Law Society made the potentially ominous statement "it seems likely that not all lawyers who practice in this area [insurance defence] are complying with their obligations in Chapter 6, Rules 4 and 5 of the Professional Conduct Handbook".

It was not until October 2008 that the Ethics Committee of the Law Society finalised and issued to the profession its formal opinion respecting a lawyer's obligations in joint retainer situations. The opinion essentially mirrored the original draft except,

- it did not repeat the observation that insurance defence practitioners were breaching the PCH obligations, and
- it deleted the evidently controversial suggestion that "if a lawyer for an insured knows that the insured objects to a settlement, the lawyer may not settle the claim against the insured at the direction of the insurer, without giving the insured an opportunity to reject the defence offered by the insurer and to assume responsibility for the defence at the insureds' own expense".

The October 2008 Bulletin expressed the Ethics Committee's opinion that among other things,

- if the lawyer is not appointed to represent the insured alone (which is rarely the case in most situations), then joint representation of both the insurer and insured is permissible "with appropriate disclosure in accordance with Chapter 6 of the Professional Conduct Handbook";
- in any such joint retainer, "the lawyer has duties to both the insured and the insurer", and must take care to identify and avoid conflicts of interests between the two clients;
- "so long as the insured is a client, the Rules of professional conduct-and not the insurance contract-govern the lawyer's obligations to the insured";
- "if, after commencing to act on a joint retainer, the lawyer receives information that evidences a conflict between the in-

sured and the insurer, the lawyer must withdraw from the joint representation without disclosing the information giving rise to the conflict";¹¹

- "where the policy of insurance authorises the insurer to control the defence and to settle within policy limits in its sole discretion, the lawyer must inform the clients of those limitations on the representation". After the lawyer has communicated the necessary information respecting these limitation to the insured, "the lawyer may settle at the direction of the insurer" (presumably even though the insured may object).

It will be noted that the October 2008 Bulletin did not address the situation where the liability insurer is defending, and the defence counsel is appointed, pursuant to a "reservation of rights" or non-waiver-agreement scenario (for example, where claims may or may not be covered depending on the outcome of the case). The staff ethics lawyer for the LSBC takes the view that "independent legal advice is necessary for the joint clients in these situations". If so, it is presumably incumbent upon the defence lawyer to ensure this issue is addressed when the "Chapter 6 letter" is issued to the insured at the outset of the retainer.

***Mara v. Blake:* Does Contract Trump Professional Conduct Codes?**

In *Mara v. Blake*, [1996] B.C.J. No. 903, 23 BCLR (3d) 225 (C.A.), the hapless plaintiffs were involved in four different motor vehicle accidents over a span of four years. They issued four separate lawsuits against the various motor vehicle defendants, all of whom were insured by I.C.B.C. The insurer appointed the same lawyer to act as defence counsel for the various owners/operators who had been named as defendants. Liability was admitted in three of the law suits, although contributory negligence was alleged. In one of the actions, liability was denied.

All four actions were ordered to be tried together but at the commencement of the trial, the Judge raised concern about defence counsel being in a position of conflict in acting for all four groups of defendants. The Judge felt it would be necessary for four different counsel to appear for each group of

defendants unless the insurer, I.C.B.C., was prepared to abandon the contributory negligence allegations and appoint separate counsel in the one action where liability was denied. I.C.B.C. refused and the trial Judge ordered that the trials be adjourned because of the joint representation “by the same counsel despite having divergent interests”.

I.C.B.C. appealed. Given the issues involved, the Court of Appeal invited The Law Society of British Columbia to make representations.

The Court of Appeal acknowledged that there may be numerous circumstances of conflict in insurance defence cases including,

- where coverage under the policy is in dispute;
- where the claim against the insured is likely to result in recovery in excess of the policy limits;
- where the defendant wishes to be vigorously defended to protect his reputation contrary to the insurers’ wish to settle the action;
- where, as in the case at bar, it would be in the interest of each defendant in multiple actions to persuade the Court to allocate fault and damages to the other defendants;
- where multiple defendants seek to argue that the injuries were caused by the other accidents; or,
- where the rates of future insurance premiums payable by each defendant may be adversely affected by the degree of liability ascribed to them.

After citing the above examples, the Court of Appeal commented,

The real question, however, is whether this conflict, if indeed it is one, is such as to override the insurer’s right to appoint and instruct counsel as it deems best, and to disqualify counsel of its choice from acting. No case has been cited to us, and we have not located in our research, any case that suggests counsel should be disqualified. Indeed, the Courts have on many occasions recognized the unique nature of the insured-insurer relationship, in which the insurer, although bound to deal with the insured in good faith, is ultimately entitled as a matter of contract to decide upon what course is to be taken the conduct of an action, notwithstanding that the insured may vigorously object.

The Court went on to acknowledge the “inherent conflict” in the relationship of insurer and insured as recognized in the *Fredrikson v. I.C.B.C.* case¹² and also to Insurance (Motor Vehicle) Regulation granting I.C.B.C. the exclusive conduct and control of the defence¹³ and continued:

Each defendant in this case has granted to the insurer the exclusive right to control and conduct the defence to the action against him. Subject to the duty of good faith, the insurer alone is entitled to appoint and instruct counsel, to settle within the limits of the policy notwithstanding that the “insured” may object, or to defend the claim notwithstanding that the “insured” may wish to settle. Essentially, by taking up the policy of insurance, the insured has agreed that, subject to “good faith” remedies, his interest (at least in non-financial terms) and his wishes will be subordinated to those of the insurer in relation for the latter’s obligation to indemnify him for damages arising from the final award or settlement made against him. This reality would appear to have been accepted by the defendants in this case, none of whom have objected to I.C.B.C.’s appointment of one counsel to defend the four actions.

[Emphasis added]

The Court of Appeal then examined the jurisdiction to remove counsel from a case where the administration of justice is threatened. Here, both the Court and the Law Society in its submissions acknowledged that there may be a concern about one counsel jointly representing parties with divergent interests, namely, that “counsel might act with divided loyalties and therefore fail to exercise full diligence in protecting each client’s interest”. However, it was not appropriate for the Court to “inquire into the private arrangements among jointly represented parties to determine whether counsel has met the applicable professional standards” in as much such inquiry may impinge upon matters properly the subject of solicitor-client privilege. Rather, “it is, after all, the Law Society rather than the Court, that has primary responsibility for the regulation and supervision of the professional conduct of lawyers”.

Mara v. Blake is a fascinating example of a joint retainer of defence counsel notwithstanding clear and obvious conflicts of interest between the clients going to fundamental issues in the litigation. Equally fascinating is how the very Law Society charged with policing professional conduct code compliance effectively argued in support of the joint retainer even though it appeared to run afoul of the Court’s

“undivided loyalty” principle mandated by Chapter 6 of the Professional Conduct Handbook.

In *Mara v. Blake* the Court commented on the “reality” of the insurers’ contractual right to control the defence noting that such reality “appears to have been accepted by the defendants, none of whom have objected to I.C.B.C.’s appointment of one counsel to defend the four actions”. This commentary begs several questions: were the insureds even asked? Were the insureds issued a Chapter 6 letter mandated by the Professional Conduct Handbook? Did the Law Society make those inquiries even though the Court chose not to? The answer to all these questions is “probably not”.

Mara v. Blake emphasized the insurers’ contractual right to appoint/instruct counsel and conduct the defence of the litigation, but in its October 2008 *Benchers’ Bulletin* the Law Society of B.C. has seen fit to remind the profession:

So long as the insured is a client, the Rules of Professional Conduct—and not the insurance contract—govern the lawyer’s obligations to the insured.

Whether this means the Law Society will now be more diligent in actively policing Professional Conduct Handbook compliance by the Insurance Bar remains to be seen.

The Real World: Practical Solutions or Ethical Compromise?

Insurance defence counsel are confronting a delicate task. They have spent much time and effort cultivating long-term client relationships with the insurers who send them work. Those insurers will not be enthusiastic about their lawyers causing file-handling problems and potentially extra expense through compliance with technical Law Society requirements when, in the real world, most insureds couldn’t care less. All the more so when, as the *Mara v. Blake* case amply demonstrates, the Courts are generally prepared to acknowledge the insurers’ supremacy of control and will decline inquiry into whether counsel has complied with professional conduct standards respecting joint retainers.

And yet, under risk of professional discipline for non-compliance, it is clear insurance defence counsel has a long list of professional obligations *vis-à-vis* his other client, the insured, including the following (drawn from the various LSBC directives):

- being aware of whatever coverage issues might exist so that conflicts can be identified and avoided;

- not advising either insurer or insured on the coverage issues;
- securing from the insurer the written confirmation required by the 1999 Ethics Committee opinion before submitting accounts to the insurers’ external auditors;
- monitoring the litigation handling guidelines by insurers to ensure they do not impair the proper defence of the claim (failing which withdrawal is mandatory);
- writing to the insured at the outset of the defense retainer to advise of its scope and limitations;
- informing the insured of any rights granted by the policy to the insurer to control the defence and settle within policy limits;
- informing the insured of the long-term relationship with the insurer and the implications of any restrictions the lawyer may be under as a result of any retainer contract with that insurer;
- making the disclosure required by Chapter 6 of the Professional Conduct Handbook respecting (1) undivided loyalty, (2) non-confidentiality of information received and (3) informed consent being required as to the course of action to be followed should a conflict arise between insurer and insured, failing which withdrawal is necessary;
- in the event information is received that would prejudice the insureds’ right to coverage, withdrawing from the retainer without disclosing the information in question;
- where there is the possibility of exposure in excess of available insurance limits, assiduously following the Law Society’s recommended file handling procedures for avoiding allegations of bad faith and professional negligence (as set out in the October 2003 publication); and
- ceasing representation of all clients if an unresolvable conflict arises between them respecting defence of the claim.

Of course, while the insurance defence assignment involves a joint retainer of counsel by both in-

suror and insured, so too does the assignment involving the defence of multiple insureds. Whether it be — employer/employee, owner/operator, or simply multiple defendants with common interests — these are multiple clients being jointly represented by the one lawyer and all of the above restrictions apply with equal force.

As indicated earlier, it has been common practice within the insurance bar to simply ignore the Chapter 6 requirements of the Professional Conduct Handbook thus far with complete impunity from the Law Society which has been aware of the situation for many years. The October 2008 Benchers' Bulletin issued to the profession emphasizing the mandatory nature of that and other obligations arising from the joint retainer may now signal a changing of the guard. It would be wise for insurance defence counsel to "educate" their insurer clients about these developments and to walk the tightrope with care.

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¹ The most common mechanism for muddling through is the use of a non-waiver agreement or a reservation of rights letter which will allow the underlying liability claim to be defended and conflict issues to be determined later: see N.P. Kent "Preventative Paper Work: Non-Waiver Agreements, Reservation of Rights Letters and the Defence of Claims in Questionable Coverage Situations" (1995) 17 Adv. Q. 399.

² At para. 9.

³ J.S. Olsen, "The Tripartite Relationship", a paper prepared for the Continuing Legal Education Society of British Columbia, Insurance Law Conference, 2002. Mr. Olsen is in-house counsel with the Law Society of B.C. and advises on professional ethics.

⁴ [1968] B.C.J. No. 197, 69 DLR (2d) 653 at para. 27.

⁵ Law Society Ethics Committee Opinion re: Third Party Auditors, May 6, 1999.

⁶ *Supra* note 3. It was observed in Olsen "It is not common practice for counsel representing insurers and insureds to advise their clients in the terms required by CH. 6 of the PCH".

⁷ D.S. Ferguson, "Conflict Between Insured and Insurer: An Analysis of Recent Canadian Cases", (1990) 12 ADV. Q. 129. There are many other articles which have addressed this issue as the case law has developed including for example B. Billingsley, "Caught in the Middle: When Liability Insurance Defence Counsel Encounter Coverage Problems" (2000) 79 CBR 221, L. Anderson and P. Walker "The Duty to Defend Partially Covered Claims: Legal and Ethical Considerations" (2008) PBLI Insurance Coverage Symposium.

⁸ See the seminal Canadian case of *Laurencine v. Jardine*, [1988] O.J. No. 302, 30 CCLI 187 (Ont. H.C.J.), and the extensive judicial consideration in numerous subsequent cases as discussed in the articles referred to in footnote 7 above.

⁹ The LSBC in its sample Chapter 6 letter suggests: "We owe each of you a duty of undivided loyalty. This means that we must act in your best interests at all times and must not favor the interests of one of you over the interests of another, or allow anything to interfere with our loyalty to you or our judgment on your behalf. If we are unable to fulfill this duty of undivided loyalty, we will have to withdraw from this joint representation".

¹⁰ See the sample agreement attached to N.P. Kent "Preventative Paper Work: Non-Waiver Agreements, Reservation of Rights Letters and the Defence of Claims in Questionable Coverage Situations" (1995) 17 Adv. Q. 399.

¹¹ The most common example of this is where the insured discloses information to the lawyer which places or may place the insurance coverage in jeopardy ("I drank 8 beer before I got into the car to drive", "it wasn't an accident ... I meant to hurt him").

¹² [1990] B.C.J. No. 717, 44 BCLR (2d) 303 (S.C.).

¹³ *Supra*, P. 2.

• SUITS BETWEEN LIABILITY INSURERS NOW POSSIBLE IN QUÉBEC •

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The question of whether a liability insurer that had paid out an indemnity owing to the negligence of its insured could seek reimbursement of a portion of that indemnity from another insurer covering the same risk had in recent years been the subject of debate in Québec law. The question has just recently been settled by the Québec Court of Appeal, in a decision handed down on August 17, 2009 in *Promutuel Portneuf-Champlain, Société Mutuelle d'Assurance Générale c. Promutuel Lévisienne-Orléans, Société Mutuelle d'Assurance Générale*.¹

The Facts

Promutuel Portneuf-Champlain's insured, a 12-year-old boy, had, through his negligence, caused an accident involving a woman walking on a sidewalk. At the time of the accident, the boy was living with his mother at the home of his maternal grandfather, his parents having separated. During the school year, the boy spent one weekend out of two at his father's home. Custody was also shared between the parents in the summer months and on certain statutory holidays.

The woman who fell sued the boy and his mother for \$354,014.22. She later amended her proceedings to add as a co-defendant the liability insurer of the mother and child under a policy issued to the maternal grandfather, which insurer took up the defence of the mother and child, without reservation. The insurer then took a third party action against the father's home insurer on the grounds that the child's civil liability was also covered by that policy.

A few weeks before the trial, the insurer that had taken up the defence of the mother and child settled the victim's action for a total amount of \$150,000. Both the victim and the mother and child signed an agreement subrogating the insurer that had paid out the money to their respective rights against the father's insurer. In view of the settlement, the trial dealt solely with the third party action taken against the father's insurer by the insurer that had settled the victim's claim.

The Trial Judgment

The third party action heard by the trial judge raised two questions: i) was the child's civil liability also covered by his father's home insurance policy

and ii) if so, was the insurer that had settled the victim's action entitled to be reimbursed by the second insurer for half the indemnity paid out?

Both policies contained identical "Other Insurance" clauses as well as identical coverage limits. An admission was filed to the effect that if the Court were to allow the third party action, the loss would be apportioned equally between the two insurers.

Relying on the decision of the Court of Appeal in *Éclipse Bescom Ltd c. Soudures d'Auteuil inc.*,² the trial judge found the third party action of the first insurer against the second to be inadmissible on the basis there was no legal relationship between the two insurers. In other words, because the father's insurer had no liability toward the insurer of the grandfather in whose home the mother and child were living, the third party action could not be successful. Having ruled accordingly, the trial judge did not have to decide whether the child's civil liability was also covered by the father's policy.

The Appeal Court Reverses the Lower Court Ruling

Given the frequency of the child's visits to his father's home, the Court of Appeal found that the father's policy also covered his son's civil liability.

As to the admissibility of the first insurer's third party action against the second, the Court noted that article 2501 of the *Quebec Civil Code*, which provides that an injured third party may bring an action directly against an insured or against his insurer or against both of them, had allowed the victim to claim her damages in their entirety from the maternal grandfather's insurer irrespective of the "Other Insurance" clause contained in the policies of both insurers. Having found that the child's civil liability was covered by both the grandfather's policy and the father's policy, the Court of Appeal was of the view that this was a case where each of the two insurers was indebted toward the victim for the full amount of the damages. However, since their respective indebtedness arose from separate contracts of insurance, the Court of Appeal found that there existed between them a situation of imperfect solidary liability, known as obligation *in solidum*.

In the opinion of the Court of Appeal, it was precisely that imperfect solidary liability that authorized the first insurer to claim from the second, by way of

third party proceedings based on subrogation, reimbursement for half the indemnity paid to the victim.

It is noteworthy that in the course of its analysis, the Court of Appeal cited with approval an article written in 2003 by a partner of Ogilvy Renault, Jean-François Michaud, in which he proposed that the notion of imperfect solidary liability, or obligation *in solidum*, could serve as the basis for a recourse of this kind.

The Court also made reference to its recent decision in *Kingsway General Insurance Co. c. Duvernay Plomberie et chauffage inc.*,³ which had relaxed the conditions giving rise to third party actions.

Conclusion

This recent ruling by the Court of Appeal, handed down on August 17, 2009, puts an end to the controversy surrounding the nature of the right of one liability insurer to obtain from another reimbursement for a share of the indemnity paid to a third party victim, and the procedural vehicle that should be used to assert that right. It is now clear that such right is founded on the concept of imperfect solidary liability, or obligation *in solidum*, and that an action in warranty (third party action) based on subrogation is the appropriate procedural vehicle for exercising it.

However, the ruling by the Court of Appeal does not deal with the question of when the limitation period of the first insurer's subrogatory action against the second insurer begins to run. The answer to that question may well vary depending on what is being claimed. In this regard, it should be borne in mind that in such situations, an insurer that sues another exercises the rights of its insured against the second insurer via subrogation. In order to determine when the limitation period of the subrogatory action begins to run, it is therefore necessary to determine the point in time as of which the insured was in a position to take proceedings against the second insurer to compel it to discharge its duty to defend or indemnify. If the insured was sued by the victim more than three years before proceedings are taken against the second insurer, the subrogatory action of the first insurer against the second to recover the cost of defending the insured could already be prescribed. This question was not addressed by the Court of Appeal in its recent decision because the maternal grandfather's insurer had limited its claim to reimbursement for half the indemnity paid to the victim. In addition, an insurer that had initially denied coverage to an insured under a liability policy and then, more than three years after the insured had paid damages to the victim, decided

to cover and indemnify its insured accordingly, could find its subrogatory proceedings against a second insurer challenged on the basis of prescription (limitation period).

Although a number of questions regarding prescription still remain, a liability insurer who may want to take subrogatory proceedings against one or more other insurers should be mindful that prescription of such a recourse may already have begun to run without its knowledge. It is therefore imperative that the insurer identify any other insurers covering the same risk and analyse the issues influencing prescription as soon as possible.

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¹ [2009] J.Q. no 8305, 2009 QCCA 1554 (available in French only).

² [2002] R.J.Q. 855.

³ [2009] J.Q. no 4564.