Insurance for Leaky Condos: A Plaintiff's Perspective

I. Introduction

All too often, plaintiff strata corporations find themselves at the mercy of their defendants and the illingness of those defendants to report claims to their insurers. Even where a claim is reported, a denial of coverage or non-committal by an insurer to defend a leaky condo claim often results in a defendant "going it alone", which loosely translates to "not going it at all".

Defendants who view their exposure to liability, as minimal to none, lack the incentive to take an aggressive stance with their insurers. This paper explores some options available to strata corporations in such situations.

II. The Duty to Defend

Because the duty to defend commences with a review of the pleadings, care must be taken by the plaintiff when drafting the statement of claim. The rule that the pleadings govern the insurer's obligation to defend was approved by the Supreme Court of Canada in *Nichols v. American Home Assurance Co.*[1]:

> The pleadings govern the duty to defend – not the insurer's view of the validity or nature of the claim or of the possible outcome of the litigation. If the claim alleges a state of facts which, if proven, would fall within the coverage of the policy, the insurer is obliged to defend the suit regardless of the truth of falsity of such allegations. If the allegations do not come within the policy coverage, the insurer has no such obligation...

A poorly drafted claim, that is one which does not go far enough to particularize damages, for example, could result in a denial of coverage. While our courts have, from time to time, gone beyond the pleadings to determine the Asubstance@ and Atrue nature@ of a claim (see for example *Monenco Ltd. v. Commonwealth Insurance Co.*[2]*),* in the author's view, pleadings which

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[1] (1990), 68 D.L.R. (4th) 321
[2] [2001] 2 S.C.R. 699 (S.C.C.)

are well thought out, and drafted with insurance policies in mind, will place the defendant in the best possible position respecting coverage issues.

III. Disclosing Policies of Insurance

Unlike other jurisdictions, there is no statutory requirement on a defendant to disclose its liability policy to the plaintiff. While the Notice to Mediate Regulations to the *Homeowner Protection Act*, SBC 1998,c.31, require the presence of a defendant's insurers at a mediation session, insurers continue to hold their cards close to their chest and reveal little about the underlying policy to the plaintiff.

To the extent possible, policies of insurance should be secured from defendants and intended defendants prior to litigation. This will not only allow you to review and consider exclusion clauses which may be relied upon by the insurer to deny coverage, but give you some insight into policy limits.

Once counsel is retained, your window of opportunity to communicate directly with the intended party is closed. Accordingly, you will want to secure whatever cooperation you can muster at an early stage, preferably before an action has commenced.

Disclosure Statements typically provide insight into the developer and/or general contractor's insurance requirements for the project. The disclosure statement may go so far as to set out the name of the insurer, the type of policy and policy limits. Where the developer's requirements include wrap-up liability coverage, plaintiff's counsel should advise all parties to the action of such coverage.

Once an action has commenced, plaintiff's counsel should review with each of the named defendants, the status of their insurance coverage. Where a party has not filed an appearance or a defence, is self-represented, or represented by counsel not generally known to be insurance defence counsel, every effort should be made to "encourage" those parties to hand over their insurance policies for review.

If coverage has been denied, the letter of denial together with the policy should be obtained from the defendant. In the writer=s experience, most defendants will be forthcoming with their policies

as they hope to demonstrate to the plaintiff that they are uninsured or alternatively, would like assistance in compelling coverage.

IV. Where the Insurer is not Defending

There are several options available to the plaintiff where a defendant is not represented through its insurer. First, the plaintiff may simply accept the fact and proceed against the insured itself. The disadvantage with this approach centers around collectability issues or more realistically, with leaky condo litigation, the likelihood that that party will make a "reasonable" contribution to the settlement pot.

Second, it is open to the plaintiff to fund, in whole or in part, an application on behalf of the insured to compel the insurer to defend.

Third, the plaintiff may consider taking default judgment against the delinquent party. Once judgment has been secured, the plaintiff may then pursue the insurer under s.24 of the Insurance Act, R.S.B.C 1996, c. 226:

> **24** (1) If a judgment has been granted against a person in respect of a liability against which the person is insured and the judgment has not been satisfied, the judgment creditor may recover by action against the insurer the lesser of
> (a) the unpaid amount of the judgment, and
> (b) the amount that the insurer would have been liable under the policy to pay to the insured had the insured satisfied the judgment.[3]

Prior to taking default judgment, and to the extent possible, the plaintiff should ensure that the insurer for the delinquent defendant is placed on notice of the claim and that default judgment will be taken against the insured if a defence is not filed. Otherwise, it is open for the insurer to argue that the insured is in breach of its policy, has compromised the position of the insurer thus permitting the insurer to deny coverage.

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[3] A review of s. 24 of the *Insurance Act* is beyond the purview of this paper. This area will be canvassed more thoroughly by Mark Tweedy in his talk on "*The "Rights" of the Plaintiff Strata Corporation Vis-a-Vis the Insurers for Named Defendants*".

Finally, it may be open to the plaintiff to take an assignment of the defendant's rights and obligations, including its rights and obligations under its policy of insurance.

The Allocation of Defence Costs

I. Introduction

While it is true that an insurer need only defend claims which are covered under the policy of insurance, more often than not, the line between what is covered and what is not, is blurred.

While there is no theoretical impediment to having separate counsel defend the covered and uncovered claims, at least one court has discouraged the appointment of two counsel to defend one claim4. Accordingly, it will be left to the insurer to defend both covered and uncovered claims with the right to apportion defence costs along those lines.

It is not uncommon for an insurer to "propose" an allocation formula to its insured prior to assuming defence of an action. This paper will examine some of the factors which ought to be considered by the insured when faced with such a proposal.

II. The Allocation of Defence Costs

While it is open to the parties to an insurance contract to agree to an allocation formula prior to assumption of the defence, in the authors view, the practice is ripe for abuse.

The issue is often broached at the same time the insurer is considering whether or not it will defend the underlying claim. The insured, rightly or wrongly, may feel that he has no choice but to accept whatever proposal is being advanced by the insurer for fear that coverage could be denied.

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[4] Dominion of Canada General Insurance Co. v. MacColloch (1991), 78 D.L.R. (4th) 593 (N.S.C.A.)

Defence cost allocation should be made following resolution of the underlying action, with the insurer picking up all of those costs until a determination in the underlying action is made. Support for this approach is found in Continental Insurance Co. v. Dia Met Minerals Ltd5., where the Court noted at paragraph 18:

> In my view, the Court's suggestion that unlike the duty to defend, the obligation to indemnify in respect of defence costs should be "assessed retrospectively" offers the solution to the almost insurmountable difficulty of apportioning defence costs, on the basis of pleadings alone, before or even after trial.

The Court reached the same conclusion in Axa Pacific Insurance Co. v. Guildford Marquis Towers Ltd.6:

> [57] Axa acknowledges that a duty to defend arises under the policy in respect of claims "which may be argued to fall under the policy": Nichols v. American Home Assurance Co., [1990] 1 S.C.R. 801, 68 D.L.R. (4th) 321, 45 C.C.L.I. 153, at 812 of S.C.R.
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> [58] Here, as Axa has admitted in respect of resultant damage claims, and as I have explained in respect of the exception to exclusion 6(b), there are claims which fall under the policy.
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> [59] We do not now know their extent. The claims excepted from exclusion 6(b) will only be known with certainty after the difficult findings of fact are made by the trial judge after trial. The quantum of Axa's "resultant damage" category must similarly await trial. I agree with Mr. Peters that the Scott schedule prepared by the plaintiff in the underlying action cannot be taken as a definitive statement of the amount of these claims at this time.
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> 60] The claims, then, represent a mix of those within and those without coverage and there should be an apportionment of defence costs between the covered and non-covered claims: ***Surrey (District) v. General Accident Assurance Co. of Canada***

[5] [1996] B.C.J. No. 1293 (B.C.C.A.)
[6] 2000 BCSC 0197

(1994), 92 B.C.L.R. (2d) 115, [1994] 7 W.W.R. 226, 24 C.C.L.I. (2d) 34 (S.C.); (1996), 19 B.C.L.R. (3d) 186, [1996] 7 W.W.R. 48, 35 C.C.L.I. (2d) 154 (C.A[61] However, in my view, it is premature to consider a fair allocation of defence costs at this time. In the circumstances that should await trial and it should be undertaken retrospectively: Continental Insurance Co. v. Dia Met Minerals Ltd. (1996), 20 B.C.L.R. (3d) 331, [1996] 7 W.W.R. 408, 36 C.C.L.I. (2d) 72 (C.A.).

III. The Time on Risk Approach

Another concern which frequency arises when dealing with the allocation question is: how should uninsured periods be dealt with? It is not uncommon for insurers to seek a contribution from the insured towards defence costs for that period of time in which there was no coverage.

This practice dovetails quite nicely with the convention among most CGL insurers to share defence costs on a "time on risk" basis. In the authors view, the approach is flawed as it relates to the insured.

CGL policies are triggered where damage occurs within the policy period. The difficulty, especially within the leaky condo context, lies with the question of when did the damage occur?

There are at least four trigger theories discussed and applied by the Courts:

a. The exposure theory: coverage is triggered on first exposure to the condition which causes bodily injury or property damage;

b. The injury-in-fact theory: coverage is triggered on the actual date that the injury or property damage occurs;

c. The continuous theory: bodily injury or property damage is said to occur throughout the period from initial exposure to the condition which causes the injury to when the exposure is removed; and

d. The manifestation theory: damage is said to occur when the plaintiff becomes aware of the damage.

There has been very little judicial treatment of the trigger theories in the construction or leaky condo context. In Privest Properties Ltd. v. Foundation Co. of Canada Ltd.7 the Court dealt with the issue in the following manner:

> I can see no benefit in embarking upon a detailed review of the American authorities or in attempting to decide, in the context of this application, whether or when an accident or an occurrence may have happened and which of the established theories should be adopted in this province. In my opinion that task should be left to the trial judge which will hear the evidence and have the benefit of expert opinion as a guide to the proper conclusion.

The concerns expressed by the Court in Privest are no less relevant to the issues surrounding the allocation question.

The "time on risk" approach is based on the "continuous trigger" theory. It assumes a certain state of facts which may or may not be proven at trial. By suggesting to the insured that it should bear a portion of the defence costs because it was uninsured for a period of time presupposes that the Court will conclude that the loss occurred, at least in part, during the uninsured period. For the same reasons articulated by the Court in Axa Pacific and Dia Met, any allocation of defence costs based on interrupted periods of coverage should be visited retrospectively, following a determination of the underlying action.

Surrey (District) v. General Accident Assurance Co. of Canada[8] is often advanced for the proposition that defence costs ought to be allocated based on a Atime on risk@ approach. In Surrey, a golf course flooded. The plaintiff golf club undertook repairs and then obtained a judgment against Surrey. General Accident insured the City for the latter part of a 20 year period. Surrey was unable to identify the liability carrier on risk during the early years. The Court concluded that 2/3rds of the damage occurred prior to the inception of the General Accident policy. Notwithstanding this finding, Surrey argued that General Accident should be responsible

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[7] [1991] B.C.J. No. 2213 (B.C.S.C.)

[8] [1994] 7 W.W.R. 226 (B.C.S.C.), affd 35 C.C.L.I. (2d) 154 (B.C.C.A.)

for all defence costs. The insurer objected. The trial judge sided with General Accident and apportioned Surrey 2/3rds of the costs. The Court of Appeal agreed, noting:

> Unless it is possible to apportion defence costs between an insured claim and an uninsured claim, the insurer is generally required to pay the full amount of the costs. However, in this case, I conclude that the Insurer is not liable for a greater portion of those costs than its liability for the damages.

In the authors view, Surrey is of limited assistance to the allocation question. First, the decision followed a judgment in the underlying claim. It was therefor appropriate for the Court to consider the issue.

And second, Surrey had refused General Accident=s offer to defend the underlying action under a reservation of rights agreement. The caselaw supports the view that the party defending the action bears the responsibility of setting up a system to capture and allocate costs between insured and uninsured claims. No such system was employed by Surrey.

In conclusion, there is nothing stopping an insurer and an insured from reaching an agreement respecting the apportionment of defence costs, providing however the parties are on a level playing field and the agreement follows informed dialogue between the parties. Otherwise, the insurer should defend the action, in whole, with the right of reapportionment following a determination of the underlying action.