Pursuing the "Other Insurer": The Doctrine of Equitable Contribution

Sometimes, an insured has liability coverage for a given risk under more than one insurance policy. The insured then makes a claim under one of those policies. Can the selected insurer turn around and claim contribution from the other insurer(s)? If so, what is the legal basis? The answer to these questions seems to lie in the doctrine of equitable contribution.

A precedent case on equitable contribution is the Supreme Court of Canada decision of *Family Insurance Corp. v. Lombard Canada Ltd.*[1]. In *Family Insurance,* the Supreme Court noted that, as a general principle, the insured may never recover more than the amount of the full loss but is entitled to select the policy under which to claim indemnity, subject to any conditions to the contrary. The selected insurer, in turn, is entitled to contribution from all other insurers who have covered the same risk.

The Court stated that the general principles concerning the right of contribution among insurers are as follows:

1. All the policies concerned must comprise the same subject-matter.
2. All the policies must be effected against the same peril.
3. All the policies must be effected by or on behalf of the same assured.
4. All the policies must be in force at the time of the loss.
5. All the policies must be legal contracts of insurance.
6. No policy must contain any stipulation by which it is excluded from contribution.

Where liability is shared among insurers covering the same risk, the issue becomes the method by which the extent of each insurer's obligation to contribute is calculated. The Supreme Court held:

> The overwhelming view in Canada is that…the loss is borne equally by each insurer until the lower policy limit is exhausted, with the policy with the higher limit contributing any remaining amounts…

In *Family Insurance*, the Family policy was silent with respect to the method of sharing, while the Lombard policy contained a sharing formula. The Court specifically rejected the proposition that the Lombard sharing formula should be followed and applied to both insurers. Pursuant to Lombard's formula, the insurers would contribute by policy limits. According to the Lombard policy, "Under this method, each Insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all Insurers." The Court noted that the Lombard policy limit was $5 million whereas the Family policy limit was $1 million. As a result,

[1] [2002] SCC 48

pursuant to the sharing formula, Family would be liable to contribute 1/5 of the loss and Lombard would contribute 4/5[2].

In rejecting the sharing formula approach set out in the policy, the Supreme Court, among other things, pointed out the absence of privity of contract between the insurers, adding that, “In the absence of privity between the two insurers, there is simply no basis for allowing Family to benefit from Lombard's provision on sharing by limits.”

Once an insurer elects to pursue equitable contribution, the insurer will need to consider other issues, including whether to pursue contribution via action or application. An insurer will also need to consider whether to pursue the action or application in the insurer’s own name or in the name of its insured. These issues are beyond the scope of this article, but are important considerations.

[2] The Westlaw Annotation to *Family Insurance* appears to correctly point out that the Court’s math was incorrect. It seems that Family would be obliged to bear 1/6 of the loss and Lombard would be responsible for 5/6.