Subrogated Actions: Who has the final say?

The decision of *Zurich Insurance Company Ltd. v. Ison T.H. Auto Sales Inc.*[1] arose out of a dispute between an insurer and its insured concerning the right to control litigation against the alleged wrongdoer. The insurer advanced a subrogated claim after paying the portion of the loss covered by the policy while the insured advanced a claim for its uninsured losses and the deductible. Although the insured commenced an action against the wrongdoer asserting its own claim and the insurer's claim the insurer wanted carriage of the action. The insurer's position was founded on its interpretation of the Subrogation Clause contained in the policy. The insured was of the view that until it had been fully indemnified for all its losses, both insured and uninsured, it was entitled to control any litigation against the tortfeasor.

The Lower Court Decision

Justice Strathy held that the insured maintained control of the litigation until it was fully indemnified for both its insured and uninsured losses. Justice Strathy noted there was nothing in the subrogation clause contained in the policy to alter the insured's right to control the litigation until it was fully indemnified. In addition, there was no reason to imply a provision giving the insurer the right of control litigation in order to give business efficacy to the contract. An insurer's right to control the litigation was not implied by its right to be subrogated to the rights of the insured or to bring an action in the name of the insured. The effect of the subrogation clause at issue, which included the right of the insurer to share proportionately in recoveries coupled with the duty of good faith, would require the insured to consider the insurer's interests, despite being in control of the litigation, and to keep the insurer informed concerning the status of the litigation.

Justice Strathy recommended that in the case of large losses, it would be prudent for an insurer to discuss subrogation with its insured at the time an insurance claim is paid so as to come to an agreement on matters such as choice of counsel, costs, and procedures for the resolution of any disagreements. Justice Strathy concluded that the insured remained in control of the litigation.

Court of Appeal Decision

The insurers appealed the decision of Justice Strathy, claiming they were entitled to have carriage and control of the action pursuant to the subrogation clause in the policy. In the alternative, they submitted *inter alia* that they were entitled to have meaningful participation in the action and full control of their subrogated claim, except on issues of liability common to both parties. The Court of Appeal rejected these submissions and adopted the analysis of Justice Strathy, in its entirety calling his conclusions "masterful". On appeal, the insurer attempted to focus on the monetary discrepancy between the competing claims (ie. the insurer's "hard" $1 million dollar claim versus the insured's "soft" $700,000 claim). The Court adopted on appeal the position that control might be

[1] 2011 ONSC 1870, aff'd 2011 ONCA 663

transferred to the insurer where its interest is "so vastly disproportionate to the insured's interest that it would be unreasonable to allow the latter to have control of the litigation". The issue of what constitutes "vastly disproportionate" remains unclear.

This decision can put insurers in a precarious situation – particularly in instances where an insured is determined to settle the claim. When considering subrogation, insurers should act diligently in assigning counsel at an early stage so that all parties are aware of the insurer's subrogated interest. In addition, underwriters should carefully consider the wording of subrogation clauses, drafting such clauses to provide the insurer with control over the litigation, irrespective of whether the insured has been fully indemnified or not.