

Atlantic Marine Underwriters Inc.

River Edge Plaza, 213 The Queensway South, 2nd Floor, Suite 400, Keswick, Ontario L4P 2A3
Phone: 905-989-0235 Fax: 905-989-9960 www.atlanticmarine.net

Bulletin

To: All our Brokers and Agents From: Peter J. Taylor, President
Subject: Additional Named Insureds Date: December 1st, 2005

Over the past while there has been increasing concerns on the part of insurance companies concerning the insertion of Additional Named Insureds into policies where there is no clear reason for such to occur.

Below please see a recent article written by Stephen Cavanaugh of Cavanaugh Williams in Ottawa.

Continuation of this practice by underwriters will certainly force premium and rating levels higher. We are sure you will find the article most interesting.

In [*Lacombe v. Phillips et al.*](#), Master Robert Beaudoin has ruled that an insurer cannot subrogate against an entity named as an "additional insured" in one of its policies, even when the payment sought to be recovered was made under a different policy than the one naming the "additional insured". The Master held that the "anti-subrogation" rule, preventing an insurer from suing its own insured, applied to bar the claim. Our firm acted for the successful party.

The Lacombes were homeowners, insured with Aviva. In 2003, fuel oil leaked at their property, resulting in damage of more than \$200,000. Aviva paid the Lacombes for the damage and then sued the contractor whom the Lacombes had hired to replace their furnace. The contractor had, in turn, hired a subcontractor and he was also named as a defendant in the subrogated action. The claim sought reimbursement of Aviva's payment to the Lacombes, on the basis of negligence by the contractor or subcontractor.

The subcontractor's liability insurance also happened to be with Aviva. Not only that, the contractor who had hired him to work at the Lacombe home had been made an "additional insured" in the subcontractor's policy with Aviva.

The motion before the Master sought dismissal of the subrogated claim. Relying on American caselaw (as there does not appear to have been any previous Canadian law on the application of the anti-subrogation rule across multiple policies), the Master ruled that Aviva could not sue its "additional insured", the contractor.

Comment

This whole issue of contractual risk transfer in an insurance context is one that we see more and more frequently in our practice. It is surprising (to us, at least) that insurers are more than happy to name, as additional insureds, businesses about whom they have no underwriting information at all and to whom no premium is charged. The insurance companies seem to think that the inclusion of "additional insureds" does not increase their risk appreciably, as their exposure to indemnify the additional insured is limited (or so they think), to the additional insured's liability for the negligence of the named insured. But that is often not so. Whether the additional insured is entitled to coverage for its own independent negligence is entirely dependent on the wording of the "additional insured" endorsement.

Depending on how that endorsement is drafted, the additional insured could end up with full liability coverage for his own negligence. In that event, the insurer has, in effect, issued a second policy, doubling its risk, with no corresponding premium dollars.

Of course, the "anti-subrogation" rule can also apply even in the absence of any additional insured endorsement. Common examples are landlord-tenant cases and claims among contractors and sub-contractors in builder's risk situations. In those kinds of cases, insurers need to give more thought, at the underwriting stage, to the limitations that they will face in attempting to subrogate.

Finally, we have found that liability insurers often fail to take advantage of contractual risk transfer opportunities (such as additional insured endorsements) that can reduce or even eliminate their defence costs and their indemnity exposure. In the *Lacombe* case, the contractor had its own liability insurance carrier. Master Beaudoin's application of the anti-subrogation rule has eliminated the indemnity risk that that carrier faced from the subrogated claim. Insurers should be alert for similar opportunities.

cavanagh williams is an Ottawa law firm practising in the fields of insurance defence, professional liability, employment law and commercial litigation.

This newsletter is provided for general information only and is not intended as professional legal advice. Further, it is not intended that a solicitor-client relationship arise from the sending of this Update. Should you wish to obtain further information about anything covered in our newsletters, we would be pleased to discuss your requirements with you.