Blaney McMurtry LLP

PUBLICATION

In a Class Action, Can the Insurer Choose to Opt Out? Or Does That Decision Belong to the Insured?

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In the just released decision of the Ontario Court of Appeal in *Zurich Insurance Co. v. Ison T.H. Auto Sales Inc.*, the Court reaffirmed the long established principle that the Insured is in control of the litigation until he or she has been fully indemnified for both the insured and uninsured losses.

While the *Zurich* case did not directly involve a class action, it can be expected that the reaffirmation of this principal will give Plaintiffs' Class Counsel comfort in any class action where there are both insured and uninsured losses. While an Insurer may prefer to have the subrogated claims dealt with by way of individual actions rather than by way of a class action, the Insurer may have no choice in the matter unless the Insured chooses to opt out of the class action or the Insurer fully indemnifies the Insured and then opts out of the class action.

In the *Zurich* case, the Insured brought an action seeking damages resulting from a fire and explosion that occurred in an apartment building. The Insurers sought an order giving them control of the litigation pursuant to the terms of a subrogation clause in the policy, and argued that this would be a "*fair and sensible result*" given the relative strength of the parties' claims. The Insurers pointed out that they had covered the insured losses of approximately $1.9 million and that these 'hard' losses were worth more than the 'soft' uninsured losses of approximately $700,000 claimed by the Insured for loss of goodwill.

It was the Insurers' position that they ought to have control of the litigation in these circumstances. The lower Court judge rejected the arguments put forth by the Insurers but did note that there may be circumstances where: "*…the insurer's 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…*", thus leaving the door open for Insurers with claims that are vastly in

excess of the uninsured claims with an argument that the Insurers ought to have control of the litigation.

In its decision released on October 11, 2011, the Ontario Court of Appeal affirmed both the decision and the "*masterful*" analysis of the lower Court judge. In so doing, the Court of Appeal appears to have accepted the notion that there may be claims where an Insurer's financial interest in the litigation is so much greater than the Insured's that allowing the Insurer to be in control of the litigation is warranted.

It is expected that this will not necessarily be the last word on who has control of the litigation, particularly in class actions, where subrogated claims often form a vast proportion of the potential claims, and Insurers may prefer to opt out and settle these claims rather than await a determination of a class proceeding with its attendant costs and delays.