PLUS

Professional Liability Underwriting Society
Canadian Chapter

WHAT BOARDS WANT TO KNOW: Director and Liability Issues

Speakers:

- Keith Morrison – Liberty International Underwriters
- David Pick – Scott Venturo LLP
- Jacqueline Toering – Translink

Moderator:

- Catherine Richmond – Aon Reed Stenhouse

Introduction

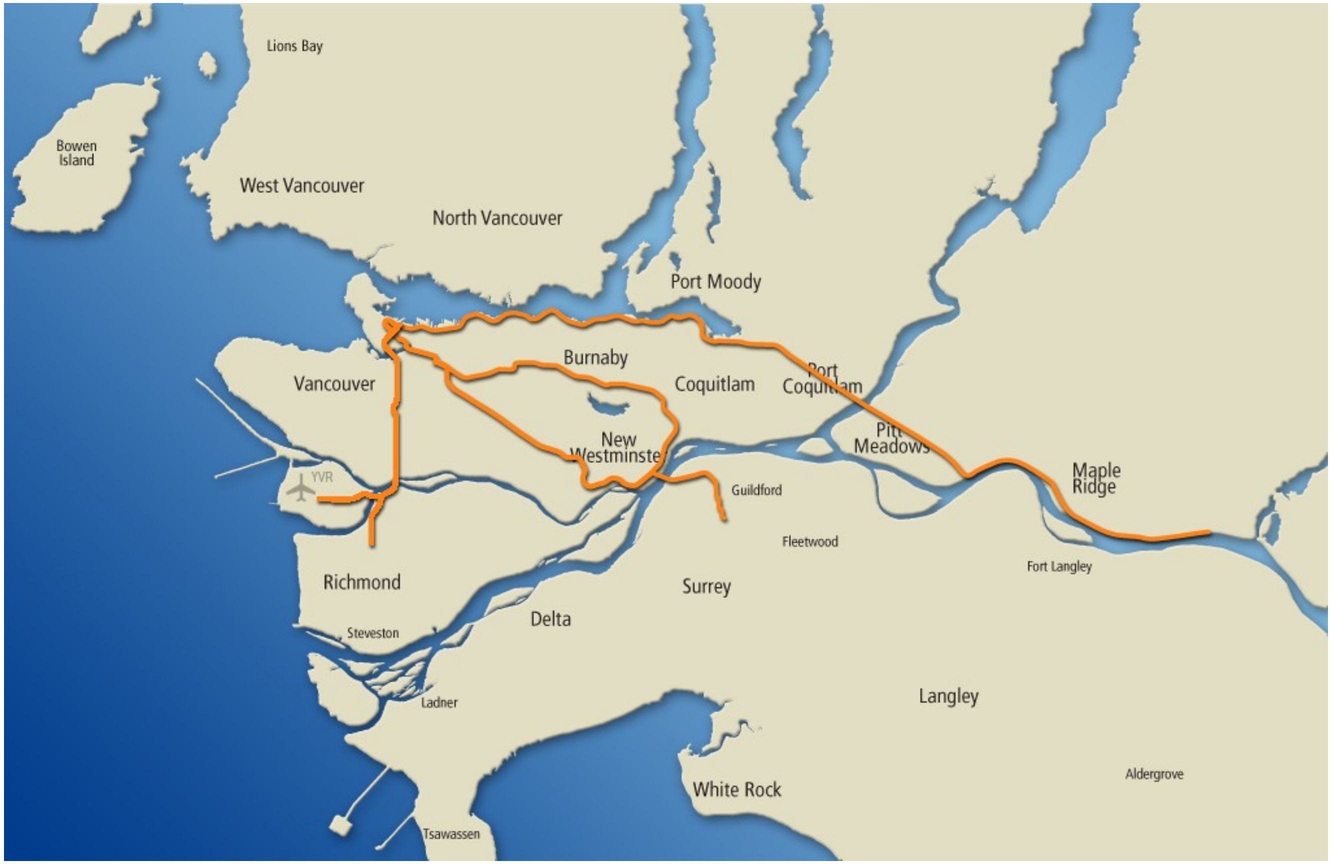
Catherine Richmond
Aon Reed Stenhouse Inc.

A Risk Manager's Perspective

Jacqueline Toering
Translink

TransLink

- South Coast British Columbia Transportation Authority – known as TransLink
- Responsible for planning, financing and operating an integrated transportation system
- Legislatively mandated to provide public transit within Metro Vancouver



TransLink Operations & Mandate

Bus Services
More than 220 bus routes with a fleet of over 1,525 vehicles

Ferry Services
SeaBus, three passenger-only ferries linking Downtown Vancouver and North Vancouver

Cycling
Contributions to new bike paths and locker facilities

HandyDART
A custom transit service for people with disabilities, there are 338 vehicles in the fleet

Light Rail Services
Expo, Millennium and Canada SkyTrain Lines

Commuter Rail Services
West Coast Express

Roads
Operation and maintenance of the 2,400 km major road network

Bridges
Owns the Pattullo, Knight Street, Golden Ears and Westham Island Bridges

Transit Police Force
Own integrated transit system

AirCare
Vehicle emission testing and inspection

PLUS

So…What Do Boards Want To Know?

YOU got this covered!!

What do we have to do?

Executive Summary

- External / Internal environment assessment
- Changes from prior year(s)
- Broker / Insurer
- Value (gone to market?)

Coverage

- Summary (type, amounts, deductibles)
- Highlights (comparisons, changes)
- Specials (coverages, exclusions, inclusions)
- Legal Costs covered?
- Benchmarking

Directors & Officers Coverage

- Assurance
- Indemnities
- Details
- Comparisons (similar, standards, experts)

Cost

- Total and Policy $$
- Prior Year Comparisons
- Variance Explanations

Assertions

- In conjunction with our advisors….
- Policies in effect and in good standing
- Considered the assessment of risk
- Coverage is fair, reasonable and adequate
- Insurers have the specified minimum rating
- In compliance with Standards
- Not aware of any significant risks that have been omitted or excluded from program

PLUS

Claims Management

- Update
- Litigation
- Reserves

Questions?

- jacqueline.toering@translink.ca

Key Trends, Underwriting Concerns and Coverage Solutions

Keith Morrison
Liberty International Underwriters

Key Trends in D&O Claims

- Securities Class Actions in Canada (Bill 198 Claims)
- Regulatory Investigations and Enforcement Actions
- Employment Practice Claims
- Bankruptcy/Statutory Claims
- Competitor Claims

PLUS

Key Underwriting Concerns and Considerations – Securities Class Actions

- Share Performance/Volatility
- Financial Performance and Position
- Accounting & Disclosure Practices
- Accounting & Disclosure Controls/Oversight
- Effectiveness of D&O's in their Roles & Responsibilities
- Corporate Mission and Strategic Plan
- Corporate Track Record/Culture
- Performance Measurements and Rewards

PLUS

Key Concerns of D&O's and Coverage Solutions

- Corporate Mishap/Failure
- "Rogue" D&O's
- Fraud/Criminal Allegations
- Regulatory "Head-Hunting"
- Shareholder Activism

Insurer's Duty of Good Faith

David M. Pick
Scott Venturo LLP

SCOTT VENTURO LLP
BARRISTERS + SOLICITORS

“Good Faith” Defined

The phrase “good faith” used in the insurance context means **good faith performance or enforcement of a contract with an agreed common purpose and faithfulness.**

In the insurance context the insurer is obligated to treat the insured with good faith.

PLUS

Types of "Bad Faith" Claims

1) **First-Party Bad Faith Claim:** An insured suffers a loss and makes a claim under the insurance policy. The insurer refuses or delays payment of the claim.

The insured then sues, seeking not only the amount of the loss payable under the policy, but additional amounts such as aggravated and punitive damages, alleging that the insurer has acted in bad faith.

PLUS

Types of "Bad Faith" Claims

2) **Third-Party Bad Faith Claim:** A claim is made against an insured in an amount which exceeds the limits available under the insurance policy. The claimant offers to settle for an amount which is refused by the insurer. The claimant proceeds to trial and judgment is given in an amount which exceeds the policy limits and the amount of the claimant's lowest offer.

   The insured then looks to the insurer for payment of the *entire* judgment on the basis that the insurer has acted in bad faith.

PLUS

The American Perspective

- A duty of good faith and fair dealing is implied in every insurance policy.

- The implied duty of good faith and fair dealing requires that the insurer do nothing to injure the insured's right to receive benefits due.

The American Perspective

- "Bad faith" is actionable as a tort only in the insurance context.

- Tort duty of good faith and fair dealing protects insured's from insurers' exploitation of their superior bargaining power and exclusive control over claims processing, and because the business of insurance affects the public interest.

The American Perspective

- To be guilty of bad faith an insurer must do more than breach its contract with its insured.

- Most Courts require intentional wrongdoing by an insurer to impose bad faith liability.

PLUS

The American Perspective

- The insurer's ability to control settlement provides an obligation to settle claims that should be settled.

- Insurers in the United States are required to settle cases within policy limits if that is the prudent course.

PLUS

The American Perspective

- Where the case clearly will be resolved within policy limits — whether it is settled or tried — the insurer is free to pursue settlement as it sees fit.

- Where the case threatens excess of policy limits, the insurer is not free to favour its own self-interest.

- An insured prejudiced by an insurer's failure to settle within the policy limits may assert both contract and tort claims.

Factors for determining whether an insurer acted in bad faith:

1. insured's liability;
2. amount of the policy limits;
3. extent of damages;
4. adequacy of the insurer's investigation;
5. adequacy of the defence;
6. whether the insurer followed lawyer's/adjusters' advice regarding settlement;
7. willingness to engage in settlement negotiations;
8. whether the insured made any misrepresentations that may have misled the insurer;
9. communication between the insurer and the insured (kept the insured informed of settlement negotiations); and
10. any other conduct to show that the insurer felt greater concern for its interests than it did for its insured

The American Perspective

Other claims against insurer may also be described as bad faith claims:

- claims against insurer for improper cancellation of coverage;
- improper setting of premiums; and
- failing to cooperate with the insured in a claim against another insured.

PLUS

The Canadian Perspective

- An insurers obligations to its insured are:
  1) those imposed by the express terms of its policy; and
  2) an implied obligation of good faith and fair dealing that includes certain elements of fiduciary duty.

- The **duty of good faith** is owed at every stage of the insurance process.

- Breach of duty of good faith is a breach of a contractual duty.

- This duty arises due to the special nature of the relationship which places each party in a position of vulnerability at different times throughout the contract.

PLUS

The Canadian Perspective

- Insurer's duty of good faith means insurer cannot act contrary to the interests of the insured during settlement negotiations.

- Insurers must attempt to minimize the amount of a possible judgment against the insured.

- Insurers have been held liable where they have refused a settlement offer within the policy limits, and an excess judgment has gone against the insured.

PLUS

Fredrikson v. I.C.B.C (1990)

- Action against an insurer for damages for negligence, breach of fiduciary duty and bad faith in refusing to settle.
- The insured had been found liable for the amount in excess of his coverage as a result of a motor vehicle accident.
- Insured claimed that the insurer had not investigated sufficiently and that the insurer ought to have settled prior to trial for an amount within the limit of his coverage.
- Action was dismissed.

PLUS

Fredrikson v. I.C.B.C (1990)

- Rejected the American view that insured/insurer relationship might be characterized as a fiduciary one.
- The insurer must conduct itself in accordance with a duty of good faith and fair dealing in relation to its customer.
- The test is, **did the insurer give at least equal consideration to the insured's interest as it did its own interest?**

Dillon v. Guardian Insurance Company (1983)

- The claimant made an offer to settle within the policy limits, but the insurer, without consulting the insured, instructed the insured's counsel to proceed to trial.
- The insured was personally held liable for an amount in excess of the policy limits and subsequently sued the insurer for bad faith failure to settle.
- The court held the insurer liable for the amount by which the judgment against the insured exceeded the policy limits.

PLUS

Shea v. M.P.I.C (1993)

- Insurer could have settled for a payment of policy limits and an agreement to litigate coverage issues at a later date.
- The insurer refused to do so, and a substantial excess judgment was awarded at trial.
- The court upheld the insured's claim of bad faith refusal to settle, and the insurer was liable to pay the shortfall between the policy limits and the award against the insured.

PLUS

Shea v. M.P.I.C (1993)

- Special duties may arise over and above the duty of honesty, which do not reach the fiduciary duty;
- The insurer's discretionary power to settle liability places the insured at the mercy of the insurer;
- The insured's position of vulnerability imposes on the insurer the duties:
  a) of good faith and fair dealing;
  b) to give at least as much consideration to the insured's interests as it does to its own interests; and
  c) to disclose to the insured material information in the settlement negotiations.

PLUS *Shea v. M.P.I.C* (1993)

Insurer must <u>use reasonable efforts on the insureds' behalf to settle within policy limits</u>.

Reasonable efforts include:

- affirmative attempts to settle, and
- where a finding of liability is highly probable, and where the judgment to be awarded will probably exceed the policy limits, include the duty to offer to pay the third party liability policy limits in exchange for a release of its insureds.

PLUS *Whiten v. Pilot Insurance Company* (2002)

- The benchmark case in Canada is the Supreme Court decision of *Whiten v. Pilot Insurance Co.* 2002 SCC 18.

- The Court held the insurer breached its obligation to act in good faith in dealing with its insured in the course of denying a claim for fire damage. The insurer denied payments on the grounds that it believed the insured had deliberately set the fire. The insurer did not have any evidence to substantiate the allegation.

- The trial court awarded punitive damages on the grounds that the insurer's conduct was malicious, oppressive and high-handed. There is a contractual duty to act in good faith.

PLUS

Whiten Guidelines

Established important guidelines in the duty of an insurer to act in good faith:

1. Insurers are under a contractual duty of good faith and fair dealing.
2. The duty of good faith is mutual.
3. A breach of the contractual duty of good faith is independent of and in addition to the breach of contractual duty to pay the loss under the policy.
4. The power imbalance is a significant factor when assessing breach of good faith and punitive damages.
5. Insurers are entitled to thoroughly investigate a claim and exercise caution in evaluation of the circumstances of a loss.
6. An insurer is not entitled to deny a claim long after the requirements of due diligence or prudent practice have been exhausted.

PLUS

American vs. Canadian

American bad faith cases refer to at least four different legal bases for liability:

1) breach of contract;
2) tort;
3) breach of fiduciary obligation; and
4) breach of statutory duty.

Canadian cases have referred to all of these, although more recent decisions have focused on breach of contract.

PLUS

Indications of Bad Faith

1. Failure to fairly and competently investigate
2. Failure to fairly assess the claim
3. Failure to fairly defend the claim
4. Failure to fairly negotiate the claim
5. Failure to fairly inform the insured
6. Failure to be prompt
7. Failure to acquire and communicate information

PLUS

Failure to investigate

- Insurer must investigate thoroughly and promptly.
- Insurers often delegate the investigation to adjusters, investigators or experts (eg. doctors or engineers) - cannot avoid liability by delegating its responsibilities.
- Insurers must not to withhold any material evidence favourable to the insured.
- Failure to pursue evidence likely to support the insured's claim may be evidence of failure to investigate.

Failure to investigate "Limits Cases"

- Often insurers have a tendency to go through the motions of a defence when they know that they will be paying their limits.

- This is the very situation in which they should be most concerned about a possible bad faith claim and therefore investigate thoroughly.

Failure to Properly Assess

- Assessments must be made:
  - based on the proper information,
  - in a balanced or fair manner, and
  - with a competent person making the final assessment.
- Insurers are not to be held liable for being wrong in their assessment.
- However, if they are proven wrong they need to be able to show that this was the result of an honest attempt to be fair.

Failure to Properly Defend

- Covers both failure to defend and an improper or incompetent defence.
- Insurers must make the decision of coverage at the earliest possible time.
- Independent legal advice may provide some protection against bad faith claims, but does not allow the insurer to give up its responsibility to defend.

Failure to Negotiate Settlement

- If the claimant had little or nothing to gain by going to trial, then that claimant most likely would have accepted a limits offer had it been made properly and promptly.

- Where the claimant is related to the defendants it is also reasonable to conclude that a limits settlement would have been possible had the insurer actively sought to settle the claim.

- In USA: Some insurers ask insured to contribute to a settlement offer even though the settlement offer is not in excess of the policy limits.

  - The American courts have taken a dim view of this practice and have held that the request is, in itself, evidence of bad faith.

PLUS

Failure to Negotiate Settlement

- Where policy limits are inadequate to pay all of the claims outstanding, the insurer should not settle with one claimant in preference to another.
- However, insurers should not allow competing claims to paralyse settlement efforts.
- It is incorrect to assume that an insurer cannot settle with one claimant and not the others.

Failure to Negotiate Settlement

In those cases where there is an excess judgment, it is difficult for an insurer to prove that its failure to settle within the limits was justifiable.

<u>Exceptions</u>:

- where the insured has misled the insurer into believing the defence has merit, causing the insurer not to settle; or
- where it is clear that the plaintiff would not have accepted an offer for less than the amount of judgment.

Failure to Inform

- Failure to inform will bring the insurer's conduct of the action into question - suggests the insurer may not be giving the required attention to the insured's interests.

- There are limits to an obligation to inform. For example, may not be obliged to advise an insured of an approaching limitation period.

PLUS

Failure to be Prompt

- In third party claims, moving promptly to investigate, assess and negotiate the claim will enable insurer to defend and negotiate more effectively.

- No universally applicable principles, but insurer should be able to show proper consideration of the claim from the earliest possible time.

Failure to Communicate

- Insurer should be reporting to insured.
- Dangers arise where an insurer investigates in a manner that may harm its insured.

Other Allegations of "Bad Faith"

- Insurers refusal to insure or renew;
- Quote for high premiums;
- Inappropriately settling a claim against an insured with adverse consequences for their insured;
- Prefer one insured over another;
- Settle a claim against the insured which has a high uninsured retention;
- Subrogate against another insured; or
- Seek repayment of funds paid on behalf of an insured pursuant to strict liability obligations

PLUS

PROFESSIONAL LIABILITY UNDERWRITING SOCIETY

THANK YOU

QUESTIONS??