



It's now easier to sue you

Life just got a little easier for those looking to sue you.

Until recently, the existence, the amount and the coverage afforded by your insurer have always been non-compellable facts in litigation. An insurance policy was considered an asset, much like your home or your investments, and therefore not relevant to the issues in the lawsuit unless and until a judgment had been obtained against you.

A recent amendment to the rules governing the production of documents in court has changed that. While you are still not required to provide a plaintiff with an

inventory of your other assets, you are now required to disclose any insurance policy under which your insurer may be liable to satisfy or indemnify a judgment.

Moreover, the scope of examination for discovery has been expanded to specifically allow examination of you on the existence and contents of those producible insurance policies. In addition, examination of you is permitted on the amount of money available under a policy as well as any "communications" denying or limiting liability under the policy.

Strangely enough, information concerning insurance

policies is not to be disclosed at trial unless that information is relevant to the action. For the most part, therefore, the only purpose of the disclosure of policy information will be to assist a plaintiff's counsel in pre-trial settlement negotiations or in a determination of whether to proceed to trial at all. In other words, these amendments are not in any way designed to enhance the court's ability to justly resolve disputes.

This change in the rules is questionable on a number of grounds, not the least of which is that it is hard to imagine a pre-trial settlement by competent counsel that would not

involve a disclosure of policy information if the plaintiff was considering compromising its claim due to defence arguments of impecuniosity or lack of insurance.

Arguably, therefore, the amendments are unnecessary. Moreover, it is difficult to discern a principled basis for these amendments. Uninsured defendants are not required to disclose their ability to defend a claim or fund a judgment. Only defendants who have had the foresight to purchase insurance to assist in their own risk management are affected by these changes in the rules governing disclosure.

These amendments may introduce new problems for defence counsel and insurers in certain actions. For example, they foreclose defence counsel's ability to use policy information at a time and place most advantageous to the settlement or other resolution of a claim. Further, it is likely that the early disclosure of policy limits to plaintiffs

will affect the manner in which some plaintiffs' counsel will litigate claims that could exceed policy limits. In particular, insurers are likely to face more offers for policy limits as counsel attempt to induce insurers to settle claims, rather than face the prospect of a bad faith claim from their own insureds if there is any risk that a trial judgment could exceed those policy limits.

The new rules apply to all litigation currently underway, regardless of the stage to which the litigation has progressed. In fact, even for those actions currently in trial, the obligation to disclose this documentation likely arises.

This type of insurance disclosure provision is not unheard of in Canada. Ontario has had provisions similar to these in place since 1990. However, the Ontario provisions do not go as far as the recent B.C. amendments, in that Ontario's do not permit examinations for discovery on communications with

respect to denying or limiting liability under an insurance policy.

Ultimately, and assuming that disclosure of policy information will increase the average size of settlements in British Columbia, the net effect of this rule will simply be to drive up the cost of insurance. Somewhat perversely therefore, these amendments may result in decreasing the number of insured defendants, as increasing insurance premiums may encourage the use of other risk management strategies designed to protect assets such as uninsured shell companies. ■

Norm Streu and Chris Hirst are partners in the construction and engineering group of Vancouver law firm Alexander Holburn Beaudin & Lang LLP. Norm is a past chair of the Vancouver Regional Construction Association. If you have any questions about this decision, or any construction law related issue, please feel free to call Norm or Chris at 604-484-1700.