Canadian Insurance Law Newsletter

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EDITOR'S INTRODUCTION

Borden Ladner Gervais LLP is pleased to present this twenty- fifth edition of the *Canadian Insurance Law Newsletter* for the benefit of our clients and others interested in this constantly evolving area of law. Our objective is to keep you abreast of recent trends and developments of significance on a wide variety of insurance law related topics.

This edition includes articles and case comments on such varied topics as the use of extrinsic evidence in policy interpretation cases, the new rights of the Ontario insurance regulator to impose administrative monetary penalties, an update on the circumstances when Canadian courts will assume jurisdiction over a dispute, the recent release of the largest punitive damages award against an insurer in Canadian history, as well as a survey of recent Ontario insurance coverage cases. Finally, this edition includes an article that reviews procedural differences between Canadian and U.S. class actions that could impact management of multi-jurisdiction class actions.

We invite your comments and suggestions with respect to questions, topics or concerns of special interest that you would like to see addressed in future editions.

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RECORD PUNITIVE DAMAGES AWARD AGAINST INSURERS

You know things haven't gone well for the insurers when the judge describes them as 'two major worldwide insurance companies who were determined to apply sufficient pressure to [the plaintiff] to force him into acceptance of a ridiculously low settlement of this otherwise justifiable claim.' Or, indeed, when the judge makes the highest punitive

damages award so far in Canada, a total of $4.5 million: *Branco v. American Home Assurance Co.* (March 21, 2013).

Branco, a 62 year old welder, was injured while working for Kumtor, a Saskatchewan mining company, in Kyrgyzstan in 1999. He was permanently disabled. AIG, his workers compensation insurer, made a cash settlement offer of US$22,500 which Branco rejected. He provided medical reports confirming the extent of his injuries but at first received no benefits, and then only intermittent payments. AIG insisted on rehabilitation in Portugal (where Branco had resettled) and retraining in a job that was unsuitable in light of Branco's injuries. Branco's disability payments were then terminated because he refused to travel three hours from his home
to the rehabilitation facility in Lisbon. The Saskatchewan Workers Compensation Board informed the insurer that Branco was too old for retraining and that they wouldn't have advised accepting a lump sum payment. AIG ignored this and stopped paying disability for four years, up to the eve of the trial of Branco's action against the insurer and his former employer. Branco fared little better with Zurich, his long term disability (LTD) provider (also a defendant in the Saskatchewan action), which approved his claim in 2002 but made no disability payments until 2009. Branco and his family were essentially without income for many years, and he was forced to survive on loans from his family and through remortgaging his house. His marriage broke down for almost a year. Once the Saskatchewan action was initiated, there were 'numerous and constant court delays' which the judge attributed to the two insurers.

Justice Acton held that AIG had clearly breached its contract to provide benefits and had acted in bad faith in doing so. Zurich was also in breach of its obligations and didn't just drop the ball in failing to make the payments required under its policy. The judge, concluding that AIG's workers compensation coverage and Zurich's LTD policy were 'peace of mind' contracts, awarded aggravated damages against both insurers for the mental distress which breach of them had caused and which was within the reasonable expectation of the parties. The judge didn't stop there: this was also a case for punitive damages and, after a review of the leading cases and the seven factors enumerated in *Whiten v. Pilot Insurance* (2002), assessed $3 million against Zurich and $1.5 million against AIG. The $1 million punitive damages award in *Whiten* (decided at a time when AIG and Zurich were dealing with Branco's claim) was not, in the judge's view, enough to 'catch the attention of the insurance industry'.

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DEFENDING CLASS ACTIONS IN CANADA

In-house counsel or external counsel are regularly required to direct or otherwise oversee the defence of class actions in Canada. Canadian class proceedings can take place as an extension of worldwide or United States litigation or as single disputes, made in Canada. This article highlights some of the major differences in Canadian procedural practice that can impact the overall defence strategy of United States counsel.

The number of class actions started in Canada continues to grow each year. Class proceeding legislation in some provinces of Canada is relatively young and not yet deeply litigated. Significant substantive and procedural issues are before appellate

courts in Canada in the areas of securities law, employment and overtime law, banking and anti-trust or competition law and consumer products.

Directing simultaneous defences in conventional litigation in different jurisdictions in the United States poses many challenges. Those challenges are magnified when actions are also brought in either the common law provinces of Canada or in the civil jurisdiction in the Province of Québec.

American counsel are initially surprised by the breadth of cases certified in Canada as compared to the United States. The test for certification of class actions in Canada is lower than in the United States. Canadian courts will often certify an action if there is one common material issue that will move the proceeding forward. Canadian law does not include some of the more important restrictions to certification found under United States Federal Rules of Civil Procedure. For example, in Ontario there is no requirement that common issues of fact or law predominate over individual issues nor does Canadian law rigorously apply the concept of typicality.

Canada as a Federal Jurisdiction — Non-Uniformity

Class action law in Canada is largely, but not exclusively, provincial. There is however great similarity between the substantive and procedural law among the nine common law provinces and three common law territories.

For example, the criteria for certification in Ontario under the *Class Proceedings Act* are: (a) the pleadings must disclose a cause of action;
(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant; (c) the claims or defences of the class members raise common issues; (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and (e) there is a representative plaintiff or defendant.

The substantive and procedural law is distinctly different in the civil law jurisdiction of the Province of Québec. The certification criteria under the *Québec Code of Civil Procedure* are: (a) the members of the group must present similar, identical or related questions of fact and law – i.e., there must be one or more common issue(s) to be tried; (b) the plaintiff must have asserted a prima facie case that is not frivolous; (c) the number of class members must be sufficient so that it would be impractical or impossible for each of them to join in the same action or to allow one of them to represent the others by proxy; and (d) the proposed representative plaintiff must be an adequate representative for the members of the group. Québec law does not include the “preferable procedure” criterion applicable in common law Canada.

National Classes – Work in Progress

The viability of national classes in Canadian law is still unsettled.

Canadian provinces have not enacted protocols permitting the certification of national class actions in Canada, the enforcement of class action judgments or the preclusion of claims of individual plaintiffs after a class action settlement or judgment in a different province.

This uncertainty promotes the proliferation of parallel class proceedings against the same defendant in Canada. Fortunately, for the sake of efficiency, one action in one jurisdiction often becomes the lead action.

Procedural Implications of Cross Border Litigation

Broadly speaking, most Canadian class action proceedings will be decided by a judge alone, and not by a jury. Trials are typically lengthier than in the United States. This is in part because in most provinces witnesses other than the plaintiff and one representative of the corporate defendant are not deposed prior to trial in Canada. A recent Canadian product liability class action established a high watermark of 138 days for trial.

The differences between production and disclosure obligations in the common law provinces, Québec, and the United States create significant tactical issues for defendants.

In the case of parallel actions brought in Canadian and American jurisdictions, the use of documentary production in one action for the benefit of the other is a developing trend. Protective orders issued in the courts of the United States do not necessarily bar Canadian plaintiff access to documents and discovery evidence in parallel actions in Canada. Plaintiffs in Canadian proceedings have sometimes obtained access to discovery in United States actions.

In a recent decision of the Ontario Court, the bid of a Canadian resident to oppose enforcement of a letter of request for deposition by United States class plaintiffs on the basis that the deposition would violate narrower Canadian discovery rules was rejected in the spirit of comity.

Further tactical implications are created by differences in litigation privilege and work product privilege between jurisdictions in the United States and Canada. For example, litigation privilege may cease to apply upon termination of litigation in Canada and not have perpetual protection. Differences in Canadian law mean that the creation of solicitor work product must be carefully considered.

Exposure to Significant Awards of Legal Fees

There are enormous differences in the rules of the provinces concerning the payment of legal costs by unsuccessful class action litigants. In some jurisdictions, such as Québec, unsuccessful defendants on certification hearings will be required to pay nominal awards towards plaintiff legal costs. In other provinces, unsuccessful defendants will face awards of legal costs of several hundred thousand dollars on certification.

American counsel are also often surprised by the existence of third party funds that can be available to pay for the costs of plaintiff experts and to indemnify unsuccessful plaintiffs against significant costs awards which can be made against them.

Impact of Trans-Border Class Actions in Canada

Few claims of Canadian claimants are tried or settled in class action proceedings in the United States or other jurisdictions outside of Canada.

A more common practice is for internationally negotiated settlements affecting Canadian claimants to be approved in a Canadian class action proceeding.

Settlement approval may be sought in several provincial jurisdictions in Canada, particularly in jurisdictions where large numbers of claimants reside in a foreign country. Defendants may be interested in seeking settlement approval in multiple provinces, and particularly Québec, for the purpose of precluding claims.

Canadian courts show a willingness to work collaboratively in defining classes to avoid the troublesome problem of overlapping cross- border classes.

Conclusion

The defence of Canadian class actions as part of global or North American litigation strategy is common in Canada. Recognition and appreciation of the significant differences in law and practice will greatly improve the result achieved and permit clients and counsel to manage the proceedings effectively.

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INTERPRETATION OF THE *VAN BREDA* TEST

Last year the Supreme Court of Canada created a legal test on whether or not a Canadian court can assume jurisdiction over a dispute. This test was developed from two separate court actions wherein two individuals were injured while vacationing in Cuba. Mr. Van Breda sued as a result of injuries sustained on a Cuban beach. Mr. Charron died while scuba diving in Cuba. Both Van Breda and Charron brought actions in Ontario against a number of parties. The Court heard these two cases, and released its decision in *Club Resorts Ltd. v. Van Breda* (2012). This decision provided guidance on where to bring court actions involving foreign defendants.

The two-step test is as follows:

Step One: The plaintiff has the onus of establishing a “presumptive connecting factor” which connects their litigation to the province. Presumptive connecting factors can include:

1. the defendant is domiciled or resident in the province;
2. the defendant carries on business in the province;
3. the tort was committed in the province; and
4. a contract connected with the dispute was made in the province.

Step Two: If a connecting factor is established, the defendant can rebut the presumption of jurisdiction on the grounds that the connection is weak, or does not point to any real relationship between the subject matter of the litigation and the forum.

Plaintiffs also have the ability to develop other presumptive factors not initially contemplated. Generally, a presumptive factor will point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum.

Almost one year since the release of the *Van Breda* decision, we have had an opportunity to reflect on how this test has been adopted and interpreted. Specifically, have plaintiffs been successful in creating new presumptive factors that allow for the courts to assume jurisdiction? A number of cases have since been adjudicated, and two recent Ontario cases discussed below provide insight on the hurdle of developing new factors.

On October 21, 2007 a major landslide at a gold mine in Costa Rica brought operations to a halt, closing the mine. In *Sun Mining v. Vector Engineering* (2013), the Toronto based plaintiff, and the indirect owner of the mine, commenced an Ontario action against a number of out-of- province defendants seeking damages for negligence and breach of contract with respect to the development, construction and operation of the mine. The defendants challenged the jurisdiction of the Ontario court. The plaintiff argued that there were two "new" presumptive connecting factors that should be assessed because: (a) the claim was in respect of property in Ontario; and (b) the claim was in respect of a breach of contract in Ontario.

Specifically, the plaintiff claimed that as a result of what happened to the mine in Costa Rica, the plaintiff's reputation and goodwill in Ontario were damaged. However, the court did not accept this argument and held that this was an attempt to reintroduce damages as a presumptive category, a concept rejected in the *Van Breda* decision. The plaintiff also attempted to develop a presumptive factor by categorizing the loss as a breach of contract occurring in Ontario. Not that the contract was made in Ontario (since the *locus* for performance of the mining contract occurred abroad in Costa Rica), but that the breach occurred in Ontario. The court held that a breach of a contract in Ontario was not a presumptive factor. Further, even if a presumptive factor was created it was rebutted, as the degree of the connection between the locus of the contract, the jurisdiction and the dispute was tenuous.

Another recent decision is *Frank v. Farlie* (2013). The thrust of the plaintiff's argument against the foreign company was that the defendant beached a common law duty of care to its shareholders. The plaintiff argued that the defendant's participation in Ontario's capital markets, and its engagement of the province's regulatory regime, presumptively connected it to Ontario. Indeed, the foreign company indirectly communicated with Ontario-based investors and lenders. The plaintiff argued these activities were akin to "carrying on business" in Ontario. The court did not accept the plaintiff's novel argument and the action was stayed for want of jurisdiction. The plaintiff's claims were founded on a breach of a common law duty owed to shareholders and not for contravention of Ontario's securities legislation. In the court's opinion, the foreign company would not have reasonably expected that the long arm of the Ontario court's jurisdiction would reach out and grab it, especially when the

allegation against the company was not in and of itself a contravention of the *Securities Act.*

The recent case law that has followed the *Van Breda* decision may be the start of a trend, allowing for clarity to the assumption of jurisdiction. The cases post *Van Breda*, including those discussed above, illustrate the important nexus between the jurisdiction and the true subject-matter of the litigation that is required for a new presumptive factor to be created. These cases could have significant implications for insured businesses which are not resident in Canada but have a virtual global presence such as tourism, transportation, securities trading or internet-based activities.

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FIVE MILLION REASONS WHY EXTRINSIC EVIDENCE STILL MATTERS

It is well established that Ontario Courts will consider extrinsic evidence in their analysis of issues of coverage where there is ambiguity surrounding the intentions and expectations of the contracting parties. This stands in stark contrast to recent duty to defend applications where Ontario Courts have made clear that extrinsic evidence will generally not be considered in resolving those types of coverage disputes, unless expressly referred to in the Statement of Claim. As Lloyd's was recently reminded in unsuccessfully defending its denial of coverage in *Coventree Inc. v. Lloyds Syndicate 1221 (Millennium Syndicate)* (2012) (leave to appeal to the Supreme Court of Canada refused), compelling extrinsic evidence, such as documentary evidence, can work against even the clearest of policy wordings excluding the very coverage claimed.

The heart of the issue in the *Coventree* decision was whether a director's and officer's policy provided coverage for a claim when notice of the potential for that claim had been provided to a previous insurer. The Ontario Court of Appeal used extrinsic evidence generated in the negotiation and placement of the policy to resolve the interpretation of an endorsement providing prior acts coverage.

Coventree was a major participant in the asset- backed commercial paper market in Canada. Coventree's business was devastated by the collapse of this market in August, 2007, and was wound-up shortly thereafter. Over two years later, in 2009, Coventree and its directors and officers were the subject of an Ontario Securities Commission ("OSC") inquiry for which coverage was sought under its D&O policy with Lloyd's. More specifically, Coventree sought indemnification of its defence costs from Lloyds and from its prior insurer, Great American.

Soon after the business collapsed, Coventree suspected its directors and officers would be the subject of a potential OSC claim. On October 16, 2007, Coventree provided notice of a potential claim to its then insurer, Great American. This worked to meet the notice requirement for coverage under the Great American policy before it expired on October 17, 2007. Coventree then exercised a one year extension period under the Great American policy and also placed a replacement policy with Lloyd's effective

October 17, 2007 (the “2007 policy”). The Lloyd’s 2007 policy provided $10M limits and expressly excluded prior acts coverage for any claim based upon a wrongful act that occurred before October 17, 2007. Thereafter, in September, 2008, Coventree sought further coverage from Lloyd’s for the period effective October 17, 2008. Following a number of discussions, exchanges of documents and negotiations, Lloyd’s issued another policy to Coventree with limits of $10M, but subject to a sublimit of $5M for prior acts coverage (the “2008 policy”). The exclusion for prior acts coverage in the 2007 policy was accordingly removed from the 2008 policy.

In denying coverage for the defence costs claim, Lloyd’s principally relied upon a “carve out” provision in the Application for Insurance which excluded claims arising from notices provided under any prior policy. Lloyd’s took the position that the prior acts coverage in the 2008 policy was not intended to apply to claims arising out of the matters disclosed in Coventree’s October 16, 2007 notice under the prior Great American policy.

However, Coventree’s position was that it was its intention that the 2008 policy provide full prior acts coverage including those matters falling within the October 16, 2007 notice to Great American.

In resolving this dispute, the Court of Appeal reviewed the general principles of policy interpretation and reconfirmed that the starting point is an examination of the text of the policy to determine the objective intentions of the parties from the words used. The Court also held that in appropriate circumstances, a court can have regard to extrinsic evidence of the surrounding circumstances or factual matrix at the time of the negotiation and execution of the contract, in order to determine that objective intention. The following passage summarizes the relevant principles:

> However, the words of the contract alone may not be determinative of the objective intention of the parties. Contracts are not to be looked at in a vacuum. Rather, it is “perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were really contracting about” … The court’s search for the intention of the parties may be aided by reference to the surrounding circumstances or factual matrix at the time of the negotiation and execution of the contract, as viewed objectively by a reasonable person …

As such, the Court examined the full documentary record between Coventree and Lloyd’s generated in the negotiation and placement of the 2008 policy. This included the Application, telephone conversations, email and other written exchanges between the parties, as well as a temporary “binder” or “quote” provided by Lloyd’s. Upon consideration of this extrinsic evidence, the Court concluded that Lloyd’s had waived the “carve out” provision in the Application, and that it was the objective intention of the parties that the 2008 policy provide full prior acts coverage to the limit of $5M, including for claims arising out of those matters covered in the October 16, 2007 notice. In this regard, the Court noted as follows:

> Had Lloyd’s intended to exclude coverage for the acts referred to in the October 16, 2007 notice [the notice to Great American], it would have been logical to have done so in the endorsement specifically addressing exclusions for prior acts. Instead, it worded the endorsement to implicitly provide $5 million prior acts coverage for acts committed before October 17, 2007.

Although it remains the general rule that extrinsic evidence generated in the placement and negotiation process for a policy will not be referred to in order to determine a policy interpretation issue, in the appropriate circumstances, the
Court of Appeal has confirmed that reference to such evidence is permitted.

In the circumstances of this case, and based on the evidence reviewed in the decision, it appeared clear that both Coventree and Lloyd's had a meeting of the minds prior to the policy being issued which reflected the intention that full prior acts coverage would be provided. Had the Court declined to look at the extrinsic evidence and simply taken a literal interpretation of the policy, the Court would have found against coverage. This would have ignored evidence that clearly spoke to the intention of the parties, a result which would have been unjust in the circumstances.

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A SURVEY OF SOME RECENT ONTARIO COVERAGE CASES

One recent Ontario insurance coverage decision of note has been reviewed in detail in this Newsletter, but the following provide some short notes on additional Ontario coverage cases of interest:

- In what is understood to be the first Canadian appellate consideration of the issue, the Ontario Court of Appeal in *Onex Corporation v. American Home Assurance Company* (February 25, 2013) reviewed the specificity requirement of a Notice of Potential Claim ("NOPC") provision in a directors and officers policy. The importance of the decision will not be confined to directors and officers policies but will apply to all claims made policies that contain NOPC provisions. In this case, a summary judgement motion was brought by excess insurers in later policy years for a declaration that coverage for the claim against Onex properly belonged in an earlier policy year due to a NOPC submitted by Onex under an earlier policy. Onex took the position that the prior policy was not applicable because the NOPC did not provide full particulars as to the dates, persons and entities involved in the potential claim, including a description of the transaction which could give rise to a claim. The NOPC provided by Onex consisted only of a notice letter which threatened litigation and did not provide these particulars. The court agreed with the excess insurers that the NOPC triggered the prior policy and noted as follows:

What is important here is that Onex, through Aon, provided American Home with the specifics of the threatened litigation as those specifics were provided to it. It was not necessary for the insured to speculate about the names of the individual directors or officers who might be named in the threatened litigation … when viewed objectively as a whole, the [notice] contains sufficient particulars to the dates, persons and entities involved …

- In *Lavoie v. T.A. McGill Mortgage Services* (March 15, 2013), the Ontario Superior Court of Justice considered the principles relating to rescission or voiding of a policy *ab initio* for non-disclosure of prior knowledge of claims in the context of a mortgage broker's professional liability policy. Although the case contains a useful discussion of these principles, the real significance of the case is the finding by the motion's judge that the existence of a FSCO undertaking or guideline signed by the insurer, which had the effect of providing coverage for claims in fraud against mortgage brokers as well as a direct right of action in favour of third parties against the insurer, did not preclude the insurer's right to rescind the policy for misrepresentation or non-disclosure. In doing so, the court stated that "To find otherwise would significantly erode a basic concept of insurance law that an insurance contract requires full disclosure. The undertaking/guideline does nothing to abrogate Echelon's right to rescind these contracts." The decision expressly referred to the RIBO Endorsement (which also provides coverage for claims in fraud), which is required by FSCO to be attached to policies of insurance broker professional liability insurance, and although always subject to the particular wording of the policy or endorsement, the decision should have broad application to all similar mandated endorsements.
- The issue of stacking of limits over multiple policy periods was recently considered by the Ontario Superior Court of Justice in *Gillespie v. Frank Cowan Co. Ltd. et al.* (August 30, 2012). In 2008, David and Heather Lyons were charged with a number of criminal offences and were immediately terminated as foster parents. In the context of a public entity liability policy, the foster parents sought coverage for legal costs incurred between 2008 and 2011 in successfully defending the criminal charges pursuant to a Legal Expense Rider to the policy. Although the policy contained an anti-stacking of limits provision, the Rider did not. The costs incurred were $750,000 and the per policy period aggregate limit for the Rider was $500,000. The court held that the aggregate limit in the Rider applied on a per policy period basis and was thus cumulative from year to year and could be stacked over multiple policy periods. The court noted that it would have been a relatively simple task for the insurer to have inserted words into the Rider, similar to those in the policy, which precluded stacking of limits, and any ambiguity was thus to be resolved against the insurer. Although stacking of limits was found to apply on the wording of the Rider, in the end result, the foster parents were entitled only to a single limit of $500,000 as they ceased to be insureds under the policy once they were terminated as foster parents in 2008.
- In *Oxford (County) v. Guarantee Company of North America* (July 13, 2012), the Ontario Superior Court of Justice reaffirmed the general principle that the determination of an insurer's duty to indemnify must await the trial of the underlying action and that it is premature to seek a determination of this issue at the duty to defend stage. Although the court recognized that exceptions (where there are no material facts in dispute, the facts are agreed or the issue is very narrow) may arise where it is appropriate to determine the coverage issue before trial, where the underlying action involves a significant dispute as to facts, the coverage issue should not be determined prior to trial.
- In what is reported to be the first judicial consideration of the issue, the Ontario Superior Court of Justice in *Boyce v. Cooperators General Insurance* (November 13, 2012), held that notwithstanding the preservation in the *Limitations Act, 2002* of the one year limitation period in the fire insurance Statutory Conditions of the *Insurance Act*, that one year limitation did not apply in the context of a multi-peril property policy even if the Statutory Conditions were expressly incorporated in the policy. In the result, the basic two year limitation under the *Limitations Act,*

2002 was held to apply in place of the one year limitation period in the Statutory Conditions. The court did so on two grounds: (1) the fire insurance Statutory Conditions do not apply to a multi-peril policy, and (2) the incorporation of the Statutory Conditions in the policy did not amount to a permitted agreement to vary the limitation period as the policy did not constitute a "business agreement" within the meaning of the *Limitations Act, 2002*. The decision is under appeal and if it is upheld, it is likely to effectively eliminate the application of the one year limitation period in the fire insurance Statutory Conditions as the existence of multi-peril policies are now the norm and strict fire insurance policies the exception..

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NEW RIGHTS OF ONTARIO INSURANCE REGULATOR TO IMPOSE ADMINISTRATIVE MONETARY PENALTIES

As of January 1, 2013, the Financial Services Commission of Ontario ("FSCO") has the right to impose financial penalties that formerly could only be imposed by a court. FSCO now has the power to assess administrative monetary penalties ("AMPs") for contraventions of certain provisions of the *Insurance Act*¸ the *Automobile Insurance Rate Stabilization Act,* 2003 and the *Compulsory Automobile Insurance Act*. FSCO can also impose AMPs for breaching orders, undertakings and licence conditions.

There are two types of administrative penalties that FSCO may impose: general administrative penalties, which are the more serious of the penalties, and summary administrative penalties. In addition to the ability to impose such penalties, the Superintendent of Financial Institutions (Ontario) (the "Superintendent") has the right to suspend or cancel the licence of an insurer, agent or adjuster if it fails to pay the AMP.

General Administrative Penalties

The maximum AMP for a general administrative penalty is $100,000 for an individual and $200,000 for an entity. In determining the amount of the penalty, the Superintendent is required to consider only the following criteria: the degree to which the action was intentional, reckless or negligent; the extent of the resulting harm or potential harm to others; the extent to which the person attempted to mitigate or remedy the loss; any economic benefit the person realized as a result of the contravention or breach; and any previous breaches of the financial services legislation in Ontario or anywhere else in the preceding five years.

Administrative penalties to which the maximum AMP apply include carrying on business as an insurer without a licence; representing an unlicensed insurer; acting as an insurance agent without a licence; failure of an insurer to establish a compliance system to ensure its agents comply with their required legislative obligations; offering

inducements or making false or misleading statements by life insurance agents; and charging an unauthorized rate for automobile insurance.

There are a number of general administrative penalties for which the maximum AMP is $50,000 for an individual and $100,000 for an entity. These include publishing statements showing an insurer's financial condition that differ from financial statements filed with the Superintendent; using automobile insurance forms not approved by the Superintendent; acting as an insurance adjuster without a licence; failure of a life insurance agent to hold the required errors and omissions insurance; and failure of an automobile insurer to issue an insurance card to an insured.

The Superintendent must give advance written notice of a proposed general administrative penalty, and the person receiving the notice has the right to request a hearing from the Financial Services Tribunal (the "Tribunal"). The Tribunal has the power to direct the Superintendent to carry out the proposal, with or without changes, or to substitute its own opinion for that of the Superintendent. If no hearing is requested, the Superintendent may carry out the proposed general administrative penalty.

Summary Administrative Penalties

The maximum AMP for a summary administrative penalty is $25,000, although lesser amounts may be prescribed. A person is entitled to make written submissions before the Superintendent imposes a summary administrative penalty, but does not have the right to a hearing. However, the person may appeal the Superintendent's order to the Tribunal within 15 days after the Order is given.

The Regulations currently only provide for summary administrative penalties for which the maximum AMP is $1,000. These summary administrative penalties include failure to notify the Superintendent of the appointment or revocation of appointment of an actuary; failure to provide a life insured or claimant with a copy of the insurance application on request; failure to deliver notice of intention of non-renewal of an automobile insurance policy; failure of an insurer to notify the Superintendent of termination of an agent within 30 days; and failure of an automobile insurance agent to provide an application for automobile insurance and submit the application to an insurer on the request of a motor vehicle owner or lessee.

The Superintendent also has the power to assess penalties in the amount of $250 a day for late filing of certain documents required to be filed with the Superintendent, including interim and annual financial statements, to a maximum of $25,000.

Time Period In Which Amps May Be Imposed

Notice of a proposal to impose a general administrative penalty, and an order of a summary administrative penalty by the Superintendent, must in each case be issued within two years after the Superintendent becomes aware of the contravention or failure to comply with the legislation. The right to impose AMPs only applies to contraventions or breaches of legislation that occur after January 1, 2013.

By

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Expertise

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