Liabilities of Marine Underwriters to Insureds and Co-insureds

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By:

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I. Introduction

In a policy of marine insurance, the word “insured” must be interpreted in its context. Depending upon the policy, the term “insured” can include one or more specifically named insureds as well as unnamed insureds and assignees. In addition, while loss payees may not be true insureds, under some policies they are able to claim many of the rights of an insured.

This article will review some of the duties and obligations owed by marine underwriters to these insureds and co-insureds.

II. Types of insureds

A. Named insureds

In its simplest form, a policy of marine insurance can be issued to a single insured who is specifically named. However, since more than one party can have an insurable interest in a vessel or cargo, it follows that more than one party can also be specifically named. A simple example would be a yacht policy, which is owned jointly by a husband and wife. In this example, a policy could be issued specifically naming both owners of the vessel. A more unusual example would be a joint policy over a vessel issued in the name of both a vessel owner and a Bank holding a mortgage over the vessel. [1] Another example would be a charterer who specifically requested that it be named in the policy. [2]

B. Un-named insureds

Other insureds may be named generically [3] such as members of households, employees, or charterers. For an example of a case involving a charterer as an unnamed insured see the *Sceptre Squamish*. [4] This case involved an additional insured clause covering “the Insured, associated and affiliated companies of the Insured, be they owners, subsidiaries or interrelated companies and as bareboat charterers and /or charterers and/or subcharterers and/or operators . . .”.

C. Assignees

Another insured to whom obligations can be owed under a policy of marine insurance are assignees. Assignment is specifically provided for under sections 17 and 51 of the Federal *Marine Insurance Act.* [5] An example of an assignee would be the purchaser of cargo aboard a ship who also took an assignment of the insurance over the cargo as part of the sale.

Even in the absence of a legal assignment pursuant to the provisions of the *Marine Insurance Act,* it would appear that an equitable assignment will be deemed to occur upon the placement of a policy of insurance by a borrower pursuant to a covenant to insure in a mortgage. This is in effect an assignment of the insured’s chose in action (right to sue) against the underwriter [6] .

D. Loss Payees

The obligations of underwriters to loss payees are aptly described in Appelman, *Insurance Law and Practise,* as adopted by the Nova Scotia Court of Appeal [7] and other courts [8] :

From the point of view of legal interpretation, it has been held that a mortgagee under an open [loss payee] *clause is an appointee only to receive the funds payable in the event of loss, it* *is not an assignment of the contract, but an appointment only. It does not create a new contract with the payee nor abrogate any condition of the policy. The rights of such appointee are, therefore, no greater than those of the insured, nor is an undertaking thereby imported to pay the mortgagee, independent of that to pay the insured or mortgagor. And in any event, such a policy is insurance on the property of the mortgagor as owner, rather than on the interest of the mortgagee. The sum for which the company is liable therefore, is not the loss of the mortgagee, but the loss of the insured, and the loss would extend only to the balance owing to the mortgage holder at the time the loss occurs.*

An open loss payable clause does not, therefore, operate as a separate contract between the mortgagee and the company; but the policy remains one between the company and the owner, with a right of collection vested in the mortgagee by appointment.

III. Bars to claims by co-insureds (including the named insured)

Since the rights of most co-insureds are derivative in nature, it follows that any act or failure to act by a named insured can prejudice the rights of other co-insureds. Conversely, there are also situations where the acts of an unnamed insured can prejudice the rights of a named insured. [9] These two different situations shall be examined separately.

A. Bars to claims by co-insureds

For discussion purposes, unnamed insureds, assignees and loss payees shall all be referred to generally as **"co-insureds."**

1. Privity of Contract as a bar to claims by co-assureds

a) Traditional doctrine

Privity involves being a party to a contractual arrangement. The common law distinguishes between those who are parties to a contract (as being signatories to a written contract or, if it is oral, those assenting to the contractual promises) and others. [10] As a general rule, a contract can neither confer rights nor impose obligations on persons who are not parties to the contract. Accordingly, since an unnamed insured is not generally privy to the insurance contract, it cannot obtain the benefit of that contract.

A well known example of the application of this rule is the case of *Vandepitte v. The Preferred Accident Insurance Corporation of New York*. In *Vandepitte*, a vehicle owned and insured by a father was being driven by his daughter with the father's permission. The insurance policy contained a provision that the insurance would extend to, amongst other things, any person operating the vehicle with the owner's permission. When the plaintiff in an automobile accident was unable to realize on its judgement against the daughter, it attempted to sue the insurers directly under the provisions of the *Insurance Act.* Both the Supreme Court of Canada and the Privy Council held that since the daughter was not an insured under the policy, the insurer had no obligation to make payment on her behalf. [11]

b) Sceptre Squamish

At first instance, the doctrine of privity of contract was successfully relied upon by an underwriter in the *"Sceptre Squamish* [12] to deny the benefit of an insurance contract to an unnamed insured. In this case, Fraser River Pile & Dredge Ltd. (the "Barge Owner") owned a barge which was insured under its fleet insurance policy. As previously discussed, this policy contained, amongst other things, the following:

1. an "Additional Insureds Clause" which purported to extend the benefit of the policy to charterers;

2. an amendment to the Canadian Hulls Pacific Clauses which extended coverage for negligence of charterers; and

3. a waiver of subrogation clause.

With respect to the waiver of subrogation clause, normally when an insurer pays out a claim on behalf of its insured vessel owner, it is subrogated or substituted into the place of the vessel owner and is given the legal right to sue in the vessel owner's name to recover the loss. By including a waiver of subrogation clause, the insurer appeared to have waived the right to sue any charterer pursuant to its general right of subrogation. [13]

Subsequent to the issuance of the insurance policy, the Barge Owner entered into a charter arrangement with Can-Dive Services Ltd. (the "Charterer") to charter the barge to lay concrete mats on an undersea pipeline in the Georgia Strait. After the commencement of the charter, the barge sunk in heavy weather while in the care of the Charterer. The Barge Owner then made a claim against its insurer for the damage to the barge and the claim was paid. However, the Barge Owner agreed to abandon any right which it had under the waiver of subrogation clause to prevent the insurer from suing the Charterer for its negligence in allowing the barge to sink.

The case proceeded to trial in the British Columbia Supreme Court with the insurer suing in the name of the Barge Owner. With respect to the issue of liability, Warren J. found that the Charterer was negligent for, amongst other things, leaving the barge unattended in heavy weather.

With respect to the waiver of subrogation clause contained in the original insurance policy, the court relied on *Vandepitte* to rule that since the Charterer was not a party to the original contract, it could not enforce it on the grounds that there was no "privity of contract" [14]

The Court's approach to the additional insured clause was similar. Mr. Justice Warren concluded that, since the Charterer was not a party to the contract of insurance, it could not rely upon the additional insured clause unless:

1. it fell into one of the exceptions to the privity of contract rule; and

2. it could show some consideration for the contract of additional insurance flowing from the Charterer to the insurer.

The Court reviewed the agency exception to the privity of contract rule in detail, and concluded that the Charterer could not rely on this exception to the rule because it failed to ratify or affirm the contract of additional insurance until after the Barge Owner and insurer had modified the contract by entering into their settlement agreement.

Unfortunately for marine underwriters, this strong affirmation of the privity of contract rule was not long lived.

Upon appeal to the British Columbia Court of Appeal, the court ruled that the privity of contract rule set out in *Vandepitte* had been impliedly over-ruled by the Supreme Court of Canada. It also would have created a new exception to the privity of contract rule based upon the case of *London Drugs Ltd. v. Kuehne & Nagel International* [15] and applied the agency exception to the privity rule as well.

Upon further appeal to the Supreme Court of Canada, the court upheld the decision of the British Columbia Court of Appeal, but confined its reasoning to the issue of whether or not a new exception to the doctrine of privity of contract should be created. In doing so, it applied the following test from *London Drugs Ltd. v. Kuehne & Nagel International:*

1. Did the parties to the contract intend to confer a benefit upon the third party seeking to rely upon the contractual provision;
2. Are the activities in question the very activities contemplated as coming within the scope of the agreement between the initial parties; and
3. Does the exception represent an incremental change to the common law rather than a wholesale abdication of the existing principles?

In creating this new exception to the doctrine of privity of contract, the Court was careful to limit its exception to "the limited situation of a third-party's seeking to rely on a benefit conferred by the contract to <u>defend</u> against an action initiated by one of the parties, and only then in circumstances where the inchoate contractual right has crystallized prior to any purported amendment" [emphasis added].

The exact scope of this new exception is not entirely clear. It is noteworthy that the court went out if its way to "put to rest the unreasonable application of the doctrine of privity to contracts of insurance established by the Privy Council in *Vandepitte . . .* [16] As previously discussed, *Vandepitte* did not involve the defence of a subrogation action. It involved a plaintiff from a personal injury action trying to enforce a judgement it obtained against an unnamed insured directly against the insurer under statutory provisions very similar to section 24 of the British Columbia *Insurance Act.* [17] This section gives a claimant a direct action against the insurer of a judgement debtor, if the judgement debtor cannot pay its judgement. [18] In *Vandepitte*, the insurerused the privity of contract rule, to deny liability for the negligent conduct of a named insured, despite the existence of this legislation. Accordingly, to the extent that section 24 of the British Columbia *Insurance Act* [19] applies to marine insurance, the demise of *Vandepitte* in *Sceptre Squamish* could be used by a claimant, to directly sue the marine insurer, of an unnamed insured, if the unnamed insured is unable to pay a judgment.

Whether or not the British Columbia *Insurance Act* applies to marine insurance is not entirely clear. Based upon the recent Supreme Court of Canada decision in *Orden v. Grail,* [20] it is arguable that provincial acts of general application such as the *Insurance Act,* which effect matters going to the core of maritime law, are without jurisdiction.

Given the fact that *Vandepitte* decision dealt with a claim by a complete stranger to the contract, it likely that its demise in the *Sceptre* Squamish could also be used so as to prevent an underwriter from relying upon the doctrine of privity to avoid its obligations under a protection and indemnity [21] policy, to defend actions against unnamed insureds and pay out any judgements awarded against those insureds.

Since assignees of contracts are not affected by the doctrine of privity, [22] the *Sceptre Squamish* has no application to them.

c) Loss payees and standard mortgage clauses

As noted in the quote already referred to from Appleman, [23] the appointment of a Lender as a loss payee is not an assignment of the contract of insurance (other than the right to receive the policy moneys [24]) and does not create an independent contract with the underwriter. [25] Accordingly, the privity of contract rule operates to deny the loss payee an independent cause of action against an underwriter for payment. [26] However, in the non-marine fields of property insurance, this problem has been alleviated, for the most part, by the use of what are commonly referred to as "standard mortgage clauses." Although these clauses are primarily designed to protect lenders against breaches of warranty, they have also been interpreted so as to allow a direct cause of action against underwriters. [27]

While not issued as a matter of course in the marine field, these types of clauses are also available. Attached as **Schedules One** and **Two** are examples of two such mortgage clauses.

2. Breach of warranty and other misconduct of the named insured as a bar to claims by co-insureds

a) Derivative nature of claims by co-insureds

Since the right of co-insureds are derived from the rights of the named insured, the co-insured's claim is liable to be defeated by any act of the named insured which would entitle the underwriter to deny liability. Such acts would include non-disclosure, breach of warranties, fraudulent claims or even acts which would deprive the underwriter of its right of subrogation. [28] In the often quoted passage from Appleman previously referred to, [29] the derivative nature of the rights of a loss payee are described as follows:

This is the important distinction between the standard or union mortgage clause and the open loss payable clause in which the mortgagee could not recover where the insured was barred from recovery. In the open form, the indemnity of the mortgagee is subject to the risk of every act and neglect of the mortgagor which would avoid the original policy in the mortgagor's hands. The rights of the mortgagee in that type of contract are purely derivative, and if the mortgagor would have no right to recover, neither would the mortgagee. [30]

b) Standard mortgage clauses

As stated above, in non-marine policies, the bars to actions by loss payees as a result of misconduct of the insured have been largely circumvented through the use of standard mortgage clauses. Since there is a great deal of literature available dealing with these clauses, they will not be analyzed in any great detail in this paper. [31] The main points to consider are as follows:

1. Not all versions of this clause are the same;
2. Some versions of this clause do not protect against misrepresentations or omissions at the time the policy was placed or transfers of interest;
3. The clause approved by the Insurance Institute of Canada now protects against any act of "neglect, omission or misrepresentation attributed to the mortgagor" as well as transfers of interest;
4. Most versions contain a provision requiring notice to the mortgage holder prior to cancellation; [32]
5. The courts have recognized these clauses as separate contracts between the lender and the insurer giving the lender an independent right to sue; [33] and
6. Coverage is generally limited to the amount of principal and interest due and owing under the mortgage.

The marine mortgage clause attached as **Schedule One** does not provide protections for omissions or misrepresentations. Accordingly, this clause is only applicable to acts after the insurance policy is put in place. [34] The marine mortgage clause attached as **Schedule Two**, provides coverage for omissions (presumably this would be non-disclosure), but not misrepresentations.

The standard mortgage clause approved by the Insurance Bureau of Canada is attached as **Schedule Three**.

For unnamed insureds, assignees and loss payees without the benefit of mortgage clauses, the bars to recovery based on misconduct of the named insured remain.

Given their availability and relatively low cost, it is anticipated that the use of mortgage clauses in the field of marine insurance will increase in the future.

3. Obligations of co-insureds

While the focus of this article is primarily upon the bars to recovery or protection claimed by co-insureds under policies of marine insurance, other positive obligations of co-insureds will also be briefly reviewed.

a) Payment of premium

While the writer is not aware of any authority directly on point, on the basis of basic principles of contract law, it would appear that if a specifically named joint insured were privy [35] to a contract of insurance, it would be liable for all of the obligations undertaken by the insured, including payment of the premium. Conversely, if there is no privity of contract, it is unlikely that a co-insured would be liable for payment of premiums. Furthermore, as a general rule, one can only assign the benefits and not the burdens of a contract. [36] Accordingly, it follows that assignees have no obligations to pay premiums.

b) Notice of loss

Many insurance policies contain provisions imposing obligations upon the insured to give the insurer prompt notice of any losses. Since unnamed insureds fall under the definition of insureds in the policy, it follows that they must give notice of a loss if required to do so under the policy. Generally, this will only be necessary if the named insured fails to do so, or if the unnamed insured has a separate property interest, which is not covered by the proof of loss filed by the named insured. In the event that the contract of insurance is assigned, any obligation to give proof of loss will also be assigned to the assignee. [37]

In addition to contractual obligations to give notice of loss, it may also be necessary for a co-insured to file a proof of loss pursuant to the provincial *Insurance Act*, if it is applicable. [38] This Acthas general provisions which envision the filing of a proof of loss by the insured. [39]

In the Insurance Bureau of Canada standard mortgage clause (Schedule Three), there is a provision which specifically gives the loss payee the right to file a proof of loss in the absence of the named insured or in the event of the "inability, refusal, or neglect" of the insured to give notice. This is presumably designed to override the more onerous provisions contained in the statutory conditions applied to policies of fire insurance under the provincial *Insurance Act*. The sample marine standard mortgage clause does not contain such a provision. Presumably, this is because the more onerous provisions applicable to fire policies do not apply to marine policies.

c) Subrogation

As previously discussed, [40] when an insurer pays out a claim on behalf of its insured, it is subrogated or substituted into the place of the insured and is given the legal right to sue in the name of the insured to recover the loss. [41] This is based upon both the provisions of the federal *Marine Insurance Act* and common law. [42] It is also, in part, based upon the principle of equity that if anything which reduces or diminishes the loss comes into the hands of the insured, the insurer is entitled to be recouped by having that amount back. [43]

Based upon these principals, it follows that any unnamed insured or assignee [44] who receives an indemnity under a policy of insurance must co-operate fully with the underwriters with respect to subrogation.

Since loss payees under an open loss payee clause are not true insureds, it follows that they are not bound by the normal rules of subrogation. This problem is remedied by the Insurance Bureau of Canada's standard mortgage clause, which provides that in the event that a payment is made to the mortgagee where no liability existed to the insured, [45] then the insurer has a right of subrogation against the insured. This right of subrogation is deferred to the right of the mortgagee to collect any debts from the insured. The sample marine mortgage clauses attached as **Schedule One** and **Two**, have a similar rights by way of assignment of the debt note and mortgage. [46]

B. Bars to Claims by <u>named</u> insureds

1. Misconduct by co-insureds

While it is more common for unnamed insureds and assignees to find themselves prejudiced by the acts of a named insured, it is also possible for named insureds to be prejudiced by the acts of unnamed insureds. The most common example of this type of claim is the case of an automobile accident or house fire being caused by a member of an insured's family. [47]

Whether or not misconduct by an unnamed insured (or joint insured) will prejudice the claim of a named insured will depend to, large degree upon the wording of the insurance policy and to a lesser degree, upon the nature of property interest held by the co-insured.

2. Joint/several property interests

The original test for deciding whether or not to bar a co-insured for misconduct of a named insured was derived from the 1924 English case of *P. Samual & Co. v. Dumas.* [48] This case involved a claim against an underwriter by the mortgagee of a ship which was scuttled by her master and crew. Despite the fact that the ship was scuttled, the House of Lords allowed the claim to the proceeds of a policy of marine insurance by the mortgagee on the grounds that the interest of the mortgagee was original and not an assignment. [49] However, in *obiter* it expressed the following opinion:

It may well be that, when two persons are jointly insureds and their interests are inseparably connected so – that a loss or gain necessarily affects them both, the misconduct of one is sufficient to contaminate the whole insurance.

P. Samual & Co. v. Dumas was followed by a line of Canadian authorities which denied liability where property was held jointly by co-insureds [50] until the Ontario Court of Appeal rejected this approach in 1985. In rejecting this approach, the Ontario Court of Appeal adopted a new approach being taken by some U.S. courts based upon what it viewed as the reasonable expectations of the parties to the contract of insurance. Effectively, the court presumed that a party owning an undivided interest in property, would expect that such interest would be protected by insurance. [51] This approach gained favour with other Canadian courts until the decision of the British Columbia Court of Appeal in Scott v. Wawaneesa Mutual Insurance Co. as affirmed by the Supreme Court of Canada in 1989. [52] This Scott approach placed much more emphasis on wording of the policy.

3. Wording of the policy

Craig Brown has done an admirable job of reducing the majority decision of the Court in *Scott v. Wawaneesa Mutual Insurance Co*. to a three stage test. [53]

Firstly, the court must examine the insurance policy to determine if the words clearly exclude the insurers' liability even on an innocent insured's claim when another insured has been guilty of specified wrongdoing. If so, the claim is barred.

Secondly, if the words do not clearly exclude liability, the court must examine the policy to determine if the words clearly provide that an innocent insured's claim survives the wrongdoing of another person insured under the same contract. If so, the claim is not barred.

If neither the first nor the second step produces a clear indication of the parties' intent, then it is necessary to go to step three. At this stage, one goes back to the *P. Samual & Co. v. Dumas* type analysis to determine the question based upon the nature of the property interest. That is, if the property interests of both insureds are inseparably connected, then the claim is barred.

IV. Assuming no bars to recovery, obligations to make direct payments?

Assuming that there are no bars to payment out under a policy of marine insurance, the underwriter can be faced with the problem of ascertaining exactly to whom to advance the funds. The extent of that obligation will depend upon the type of co-insured.

A. Assignments

Since a valid assignment places the assignee in the shoes of the insured, it follows that an absolute assignment of an insurance policy, of which the underwriter has notice, entitles the assignee to direct payment from the underwriter. In fact, in a Continuing Legal Education article on the creation of debt security instruments, David Zacks recommended that lenders be added as assignees in addition to loss payees, as "[a]n assignment provides the added benefit that any proceeds of the policy will be payable solely to the bank and not jointly to the bank and its customer." [54]

An underwriter who pays out to someone other than the assignee, does so at its peril. [55]

B. Loss payee clauses

1. Open

As previously noted in the quote from Applemen, a loss payee clause is an appointment to receive the funds payable in the event of a loss. According to Craig Brown, when the policy expressly makes a loss payable to the mortgagee, then the underwriter can obtain an absolute discharge of its obligation by making a payment to the mortgagee. [56] However, given Appleman's contention that the right of the mortgagee to payment out only extends to the balance owing to the mortgage holder, it would be prudent for the underwriter to ascertain the balance due and owing under the loan before paying out.

2. As their interests may appear

It is more usual, for a loss payee clause to be made payable to a mortgagee "as his interest may appear." In this case, it is clearly the duty of the underwriter to satisfy itself that the mortgagee does in fact have an interest and what that interest is. [57] In the event that payment out is made contrary to the interest of the mortgagee, the insurer may find itself paying out twice. [58]

3. Brokers & Adjusters

As a practical matter the underwriter's problem of ascertaining whom to pay is often solved by simply forwarding the funds to the broker or adjuster and imposing upon them the responsibility of doing so. [59] See for example *F.B.D.B. v. Canadian Indemnity Company et al.* *[60]* where an independent adjuster was held liable to both an insurer and a bank when it failed to pay a bank pursuant to a loss payee clause. This problem is often resolved by brokers by simply paying out by way of a cheque payable to all the parties involved [61]

V. Obligations of Underwriters to give notice of termination to co-insureds

An issue of interest to most underwriters is the extent to which they owe a duty to give notice of termination in the event that a policy of insurance is to be terminated for non payment of premiums. Under the fire Insurance section 125 of the British Columbia *Insurance Act,* *[62]* underwriters are required to give advance notice of termination to loss payees. However, policies of marine insurance are specifically exempted from this part of the Act. There also do not appear to be any similar provision in the, the Federal *Marine Insurance Act.* [63]

Although the standard text books on marine insurance offer no guidance on this issue, [64] in *Insurance Law in Canada*, Craig Brown suggests that notice of cancellation is only necessary if there has been an assignment of the policy as a whole and the underwriter has received notice of the assignment, as opposed to merely an assignment of the proceeds. [65] As discussed above, the situation is different in the event that there is a mortgage clause in favour of a loss payee, as these clauses normally specifically provide for notice to the mortgagee before cancellation.

VI. Conclusion

The rights of named insureds and co-insureds [66] are co-dependant. The rights of all co-insureds, except loss payees with broadly drafted standard mortgage clauses, are dependant upon the good conduct of the named insureds. Similarly, the rights of named insureds can be dependant upon the good conduct of unnamed insureds. The exception, being either policy wording, which clearly exempts liability for the acts of co-insureds, [67] or the existence of clearly separate insurable interests coupled with policy wording which is silent on the issue.

The recent decision of the Supreme Court of Canada in the *Sceptre Squamish* has confirmed that the doctrine of privity of contract, no longer protects underwriters from certain liabilities to unnamed insureds. It is now clear that underwriters cannot ignore waiver of subrogation clauses in favour of unnamed insureds. It is also likely that the *Sceptre Squamish* will be interpreted so as to require underwriters to defend and payout third party claims made against unnamed insureds. It has also been well established that privity of contract will not bar a claim by a loss payee with a standard mortgage clause.

Assuming that co-insureds have established a valid claim, then underwriters can be under a strict duty to ascertain the extent of each co-insured's interest and ensure that they are paid appropriately. As a practical matter, this duty is often passed along to brokers and adjusters, who issue cheques jointly to all of the co-insureds involved. [68]

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[1] A well known example of this type of policy is the case of English case of *P. Samuel & Co v. Dumas* [1924] AC 431 (U.K. H.L.) where both the owner and mortgagees were named as original insureds under the policy. A mortgagee of a ship can insure to the full value of ship, however, its ability to recover will depend on whether it intended to only insure for its own benefit (the amount of the outstanding debt) or whether it intended to insure for the benefit of others as well. See: *Arnold's Law of Marine Insurance and Average* (London: Stevens & Sons 1981) p. 380; see also: *Colinvaux's Law of Insurance* (London: Sweet & Maxwell 1997) para. 14-29 (discusses issues of contribution), Arnold, *supra,* para. 380(discussion of insurable interest of

mortgagee), *Insurance (Marine) Act* R.S.B.C. 1996 c. 230, s. 15; Rui M. Fernandes, *Marine Insurance Law of Canada* (Toronto: Butterworths) p. 11.

[2] Arnold, *supra* note 1 at 344 for a discussion of the insurable interest of a charterer.

[3] See Craig Brown, *Insurance Law in Canada* (Carswell 1999 Release) p. 7-16.

[4] (1999) 176 D.L.R. (4th) 257 (S.C.C.).

[5] Many insurance policies also have specific requirements regarding assignment. See for example the discussion of the Institute Hull clauses in *Arnold, supra,*note 1 at page 257 note 9; see also sections 16 and 51 of the *Insurance (Marine) Act* R.S.B.C. 1996, c. 230. It is not clear whether or not s. 36 of the *Law and Equity Act,* R.S.B.C. 1996, c. 253 is applicable (requiring written notice to the debtor). This Act is based upon the English *Judicature Act.*

[6] Craig Brown, *supra*, note 3 part 15.6.; see also Arnold, *supra*, note 1 at paras. 259 & 38; E.R. Hardy Ivamy, *General Principles of Insurance Law* (London: Butterworths 1986) p. 453; Alternatively, it can be viewed as an equitable lien on the proceeds of any policy placed pursuant to a covenant to insure.

[7] *Trans Canada Credit v. Royal Insurance* (1983) 58 N.S.R. (2d) 280 at pp. 283-4.

[8] Co-operators General Insurance Co. v. Bank of Nova Scotia (1992) 117 N.S.R. (2d) and 324 A.P.R. 35; (N.S. County Ct.) at 37-8; C.I.B.C. v. Insurance Corp. of Ireland Ltd. (1990) 51 B.C.L.R. (2d) 341 (B.C.C.A.); see also Donald O'May, *Marine Insurance Law and Policy* (London: Sweet & Maxwell 1993) p. 54; Lance Fince, "Mortgage Clauses and Loss Payees" in Insurance Law (*C.L.E.: 1982);, Magilvray and Pakington on Insurance Law* (Ontario: Carswell 1988)at para. 1643; Alex L. Parks, *The Law and Practise of Marine Insurance and Average* (Cenerville: Cornell Maritime Press) at p. 199; David F. McEwen, "Hull and Machinery Insurance in Canada", prepared for the Seventeenth New Orleans Maritime Seminar January 1988 at pp. 29-39.

[9] See Brown, *supra,* note 3 at p. 15-34.

[10] Fridman, *The Law of Contract* (Scarborough, Ont.: 1994) (3rd) p. 175.

[11] Although the father could have contracted with the insurers as agent or trustee for his daughter, on the facts of the particular case, there was no evidence of his intention to do so.

[12] *Supra,* note 4.

[13] At trial, the President of Fraser River Pile Driving, the lead underwriter and the insurance broker all gave evidence that the manuscript wording containing additional insureds, trustee and waiver of subrogation clauses had been inserted into the policy as the Canadian Hulls Pacific Clauses would have prevented chartering altogether (See McEwen, *supra,* note 8 at page 3).

[14] The trial judge pointed out that if there had been a covenant to insure, the subrogation action would have been defeated, "for the insurer, as subrogee of the plaintiff's rights of action against the defendant, would have no greater rights than the plaintiff." The court also appeared to assume that Barger Owner could have enforced the subrogation clause on behalf of the Charterer, but failed to do so. Presumably, this would be on the basis of authorities such

as*Beswick v. Beswick* [1968] A.C. 58 and *Jackson v. Horizon Holidays Ltd.* [1975] 3 All E.R. 92. See generally Fridman, *supra,* note 10 at 176 and 188-90.

[15] [1992] 3 S.C.R. 299.

[16] This echoes similar language of the B.C. Court of Appeal which said, "I conclude that *Vandeppitte,* in its strict application of the rule of privity to prevent an unnamed insurer from taking a benefit conferred upon it by the language in the policy, must be regarded as a dead letter."

[17] R.S.B.C. 1996, c. 226.

[18] In B.C., it is not applicable to Motor vehicle accidents

[19] R.S.B.C. 1996, c. 226; In B.C., it is not applicable to Motor vehicle accidents.

[20] [1998] 3 S.C.R. 432.

[21] Policies insuring against third party claims.

[22] Fridman, *supra,* note 10 p. 670.

[23] *Supra,* note 7.

[24] See quote from MacGillivray & Parkington in *Trans Canada Credit v. Royal Insurance supra,* note 7 at p. 285.

[25] See Arnold, *supra,* note 1 at para. 259.

[26] But see the discussion under part IV B below with respect to the obligations to disburse funds once a claim is established.

[27] See Brown, *supra* note 3 at p. 15-21; *Trans Canada Credit v. Royal Insurance, supra,* note * p. 283.; But see Fridman, *supra,* note 10 at page 177 where he criticizes *Trans Canada Credit v. Royal Insurance* for stretching the notion of privity in order to do justice.

[28] See, for example, the discussion of loss payee clauses in MacGillivrary and Parkington, *supra,* note 8 at para. 1643.

[29] *Infra,* notes 7 & 8.

[30] *Trans Canada Credit v. Royal Insurance, supra,* note 7 p. 284.

[31] See: Brown, *supra,* note 3 pp. 15-19 to 15-27; McEwen, "Hull Machinery", *supra,* note 8 pp. 37-9; Rolf Weddigen, "Fraudulent Claims and the Innocent Co-insured" *Insurance Coverage Disputes,* Canadian Institute pp. 13-5; *Insurance on Property* Insurance Institute of Canada 1987 Study Four pp. 11-17; Finch, *supra,* note 8 pp. 1-7.

[32] This is particularly important for marine policies as there does not appear to be any statutory requirement for notice.

[33] See *supra* note 27.

[34] Brown, *supra,* note 3 page 15-24.

[35] See discussion of traditional doctrine of privity on contract, *supra.*

[36] Fridman, *supra,* note 10 at p. 686.

[37] Brown, *supra,* note 3 p. 15-10; Under some situations, courts will allow substitue or vicarious performance of a task under a contract if the task is non personal in nature. See Fridman, *supra,* note 10 at p. 687.

[38] See previous discussion of Orden v. Grail with respect to the *Sceptre Squamish.*

[39] See s. 22(2) with respect to the filing of a proof of loss triggering the limitation period and s. 25(1)(a) with respect to the duty of the insurer to furnish a form to make a proof of loss; But see the article written by Gary Wharton where he advises that in practise, proof of losses are rarely filed for marine claims in British Columbia – Gary Wharton, "Limitation of Actions under Contracts of Marine Insurance and Doctrine of 'Clear Unequivocal Denial'" *Harbour and Shipping*August 1989

[40] See discussion of *Sceptre Squamish, supra.*

[41] See Arnold, *supra,* note 1 para. 1298-9.

[42] Section 81.

[43] Arnold, *supra,* note 1para. 1298.

[44] But see discussion of assignment at notes 36-7, *supra.*

[45] For example if there were grounds for denial for non-disclosure or breach of warranty.

[46] Both forms appear to have typos which purport the assign the mortgagees instead of mortgages.

[47] See for example: *Scott v. Wawanesa Mutual Ins. Co.*(1984) 13 D.L.R. (4th) 752 30 D.L.R. (4th) 414, aff'd (1989) 59 D.L.R. (4th) 660 (son of a named insured caused a house fire – liability denied); for an in-depth review of these cases see: McEwen, "Hull and Machinery" *supra,* note 8 pp. 29-39; Brown, *supra*note 3 pp. 7-16 to 7-18; Weddigen, *supra* note 31; the writer is not aware of any marine cases where a claim has been denied on this basis.

[48] *Supra,* note 1.

[49] See the discussion of the case in Parks, *supra* note 8 at p. 200.

[50] See Weddigen, *supra* note 31 for a summary of this line of authorities; see also McEwen "Hull Machinery" *supra* note 8.

[51] See *Higgins v. Orion Ins. Co.* [1985] I.L.R. 1-1886 as discussed in both McEwen "Hull Machinery" *supra,* note 8 p. 31 and Weddigen, *supra,* note 31 pp. 4-6.

[52] *Supra* note 47.

[53] *Supra* note 3 at 7-16 to 7-17.

[54] David Zacks, "Debt Security Instruments: Creation and Perfection – 1988" *C.L.E.* p. 7.5.01.

[55] See: *Swan and Cleland's Graving Dock and Shipping Co. v .Maritime Insurance Co. [1907] 1 K.B.116* where a insurer was held liable for paying funds directly to a shipyard without the consent of a mortgagee which had an assignment of the insurance policy.

[56] Brown, *supra,* note 3 p. 15-20.

[57] Brown, *supra,* note 3 p. 15-20;

[58] See: MacGillivrary & Parkington, *supra,* note 8 para. 1643; Arnold, *supra,* note 1 p. 260; Brown, *supra,* note 3 p. 15-20.

[59] See also Arnold, *supra* note 1 p. 260.

[60] As discussed in Michael D.Adlem, "Adjusters' Liability" *Insurance Issues 1993* C.L.E.

[61] See "Insurance on Property" *supra,* note 31.

[62] R.S.B.C. 1996, c. 226. s. 125.

[63] Or the more general provisions of the provincial *Insurance Act,* if it applies.

[64] Arnold, Ivamy, & O,may.

[65] Brown, *supra,* note 3 at p. 15-10.

[66] For the purpose of this article, co-insureds have been defined as unnamed insureds, assignees and loss payees.

[67] This type of policy wording appears to now be quite common.

[68] I acknowledge, with thanks, the assistance of **Rob Margolis**, **William McEwen** and **Chris Giaschi** for reviewing earlier drafts of this paper and providing me with their thoughtful comments. **An earlier version of this paper was presented to the Market Committee of the British Columbia Association of Marine Underwriters on January 13, 2000.**

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