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COVERAGE – DRIVEN SOLUTIONS IN MULTI-PARTY LITIGATION

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A. INTRODUCTION

Given the vast number of "leaky building" claims and, more recently, building mould claims in British Columbia, an E&O or general liability insurer in this province is likely to see multiple claims against construction-industry professionals, contractors and suppliers that exceed the insured's aggregate policy limits. Rather than incurring mounting defence costs and facing uncertain indemnity exposure, an insurer in such a situation would be well advised to explore creative, coverage-driven solutions to ascertain and limit its defence and indemnity exposure. Two successful strategies have been the payment of policy limits into court and the policy buy-back. This paper will present an outline of each of these two strategies.

B. PAYMENT OF POLICY LIMITS INTO COURT

1. INTRODUCTION

If a liability insurer is faced with likely exposure in excess of the insured's aggregate policy limits, continuing to defend the action will only drive up the insurer's total monetary exposure as defence costs continue unabated. From the insurer's perspective, it is preferable to be released from its defence and indemnity obligations in exchange for tendering the policy limits.

Section 23 of the *Insurance Act*[1] provides a procedural mechanism that allows the insurer to pay money into court and extinguish any further liability. The payment of policy limits into court affords the insurer protection from claims by other defendants for contribution and indemnity through third party proceedings or joint and several liability. The various claimants will then determine, through litigation or negotiated settlement, how the policy proceeds will be distributed.

Section 23 reads as follows:

> **Payment by insurer into court**
>
> **23** (1) If an insurer cannot obtain a sufficient discharge for insurance money for which it admits liability, the insurer may apply to the court without notice to any person for an order for the payment of it into court,

[1] RSBC 1996, c. 226

> and the court may order the payment into court to be made on terms as to costs and otherwise the court directs, and may provide to what fund or name the amount must be credited.
>
> (2) The receipt of the registrar or other proper officer of the court is a sufficient discharge to the insurer for the insurance money paid into court, and the insurance money must be dealt with according to the orders of the court.

Where such a strategy is appropriate, the insurer should attempt to secure a settlement with the various claimants, according to which the claimants will discontinue any actions against the insured and covenant to forego any damages for which the insured would, directly or indirectly, be held responsible. In exchange for this immunity for the insured, the insurer will pay the policy limits into court for the benefit of the settling claimants. Ideally, this will permit both the insurer and the insured to retire the claims at a cost, in terms of both time and money, significantly less than if the claims were litigated.

The effectiveness of this strategy will depend primarily upon the following factors:

- The willingness of the claimants to enter into a comprehensive settlement;
- The terms of the settlement;
- The nature of the policy ("occurrence" or "claims made"); and
- The policy wording with respect to the insurer's duty to defend.

The willingness of the claimants to settle, the terms of any settlement and the nature of the policy will determine whether and to what extent the insurer continues to face liability with respect to a given policy period. The policy wording in relation to the insurer's duty to defend will determine whether, and to what extent, the insurer has a continuing duty to defend with respect to any other liability the insured may face.

Why would the claimants agree to completely release the insured for the policy limits when that figure represents significantly less than the insured's likely exposure? For the claimants, the payment into court represents a certain recovery, without the need to prove liability against the insured. Accepting the policy limits eliminates the risk of non-recovery and reduces the claimants' legal costs. Even where the risk in litigating against the insured is low, there may be a high risk that the insured will be unable to pay any judgment in excess of the policy limits. Without a fund set aside for the benefit of the claimants, the claimants would be in a "race to judgment", with the first

claimants to have judgment in their favour exhausting the policy limits, leaving subsequent claimants with little or no monetary recovery. The payment into court also provides funds with which the claimants can pursue other defendants.

Typically, where such an agreement is possible, it will attract participation from all claimants. It makes little sense for a claimant to be on the outside of an agreement that provides for guaranteed settlement funds and probably represents the extent of the insured's ability to pay. It follows that such an agreement will be more difficult to enter into where the claimants sense that the insured has "deep pockets" or excess insurance coverage.

2. THE "BC FERRIES" AGREEMENT

In British Columbia, this type of arrangement is undertaken in conjunction with a "BC Ferries agreement". In many other jurisdictions, it is referred to as a "Pierringer" agreement.[2] Critical to this process is the requirement that the BC Ferries agreement be comprehensive enough to eliminate any further exposure on the part of the insured. It is not sufficient for the claimant to agree to release the insured from its share of liability. That is because the insured will likely be named as a third party by other defendants, who will seek contribution and indemnity from the insured. A claimant cannot, through entering into a settlement with the insured, prejudice the rights of other defendants to recover from the insured whatever amounts the court finds the insured liable to contribute. Only by agreeing to forego all amounts for which the insured would ultimately be responsible can a claimant provide the insured with full protection from any further liability in relation to the action. From the claimant's perspective, the BC Ferries agreement affords a mechanism by which it can settle with a joint tortfeasor without extinguishing the joint liability of the remaining tortfeasors.

The document which specifies the respective obligations of the claimant and the insurer under the BC Ferries agreement is called a "Covenant Not to Sue". Two examples of this document, one where an action has been commenced and another where an action has not yet been commenced, are attached as Appendices A and B, respectively.

In short, the effect of the BC Ferries agreement is that the amount the claimants receive on behalf of the insured will be in total satisfaction of all amounts for which the court may find the insured liable – whether directly to the claimant or indirectly to co-defendants – in relation to those claims. If a claimant obtains judgment against the non-settling defendants and the court finds that the insured would be responsible for a certain share of the damages, the claimant cannot recover the insured's share of

[2] Derived from *Pierringer v. Hoger et al*., 124 N.W. (2d) 106 (Wis. S.C. 1963), the Wisconsin case in which this type of agreement was first considered

damages from the non-settling defendants. That will be so whether that amount is greater or less than the amount paid on behalf of the insured in settlement of the claim.

If the claimant attempts to recover the insured's share of liability from the non-settling defendants, those defendants will raise the BC Ferries agreement between the insured and the claimants as a defence. Courts will enforce such an agreement, even though the non-settling parties seeking to rely upon it are not parties to the agreement.[3] Further, the insured will be able to use the BC Ferries agreement to have third party claims for contribution and indemnity against it dismissed. That is because the other parties will not, under the agreement, be called upon to pay any amounts for which the insured would be responsible. There is therefore nothing for those parties to recover from the insured. In the leading case, *British Columbia Ferry Corp. v. T&N plc*[4] the British Columbia Court of Appeal, affirming the dismissal of a claim for contribution and indemnity against the settling parties, stated the following:

> …if the defendants are saved harmless from any damages caused or contributed to by the fault of a concurrent tortfeasor … there is no basis upon which the right to contribution or indemnity, provided for in s. 4 of the *Negligence Act*, could be exercised.

The Court also stated that, to be certain what it is the plaintiff is foregoing, "the express waiver should properly form part of the pleadings … a further amendment should be made to the Statement of Claim, wherein the substance of that waiver is clearly set out".[5] A Statement of Claim amended in accordance with a BC Ferries agreement might read as follows:

> The Plaintiff expressly waives any right to recover from the Defendants, or any of them, any portion of the loss which the Plaintiff claims and which the Court may attribute to the fault, liability or responsibility of [Insureds], for which the Defendants , or any of them, might reasonably be entitled to claim contribution, indemnity or an apportionment against [Insureds], pursuant to section 1 or 4 of the *Negligence Act*, R.S.B.C. 1996, c. 333 and amendments thereto or any successor equivalent legislation.

The Court of Appeal further concluded that the non-settling parties can maintain against the insured an action for a declaration as to the insured's degree of fault. This will entitle the non-settling parties full access to the ordinary procedural mechanisms,

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[3] British Columbia Ferry Corp. v. T&N plc (1995), 16 B.C.L.R. (3d) 115 (C.A.)
[4] at para. 14
[5] at para. 15

including the discovery process, in order to determine their respective degrees of fault. The insured may therefore be called upon to (1) produce documents; (2) be examined for discovery; and (3) be a witness at trial. In some instances, claimants will require the insured to execute an agreement to "assist and co-operate" in further litigation proceedings in order to avoid the necessity of obtaining a court order in respect of the above. At the end of the process, there will be a declaration as to the insured's degree of fault. However, no monetary judgment will be entered against the insured.

It should be noted that there may remain two distinct avenues of liability for the insured, both premised on independent duties owed to a co-defendant. First, the insured may be liable in contract to indemnify a "non-setting" co-defendant. Secondly, the Alberta Court of Appeal in *Amoco Canada Petroleum Co. v. Propak Systems Ltd*.[6] left open the possibility that a settling defendant, under a BC Ferries agreement, may continue to face tort liability from a non-settling defendant based on an independent tort duty owed to the non-settling defendant. Because these potential liabilities are independent of the claimant's action, it may be that they are not foreclosed by the Covenant Not to Sue.

3. A PRACTICAL EXAMPLE IN THE E & O SETTING

Consider the following scenario which, unfortunately, is increasingly common in an era of mass tort litigation:

> Within a single policy period, an architectural firm gives notice to its E&O insurer that it has been – or will be – named as one of several defendants in 15 "leaky condo" claims. The insured has a "claims made and reported" E&O policy with a limit of $200,000 per occurrence and $1,000,000 aggregate. The estimated aggregate value of the claims is approximately $15,000,000. The insured's likely exposure in relation to the claims is estimated at between $3,750,000 and $7,500,000. There are no coverage issues and the insurer has a duty to defend until the policy limits are paid out towards settlement or judgment. The defence of all claims would likely cost approximately $500,000.

Satisfied that its total exposure will likely be in excess of the policy limits, the professional liability insurer seeks to settle all of the claims for the policy limits. Typically, the process might involve the following steps:

1. The insurer seeks the consent of the insured to such a settlement approach and advises the insured to seek independent legal advice;

[6] 2001 ABCA 110

2. At all times, the insured or their counsel are involved in the decision-making process;
3. The insurer contacts counsel for all of the tort claimants;
4. A meeting takes place, where the insurer's counsel explains the limits of the insured's policy and offers to settle all claims for the policy limits;
5. The claimants accept the settlement offer in principle, subject to disclosure of the terms of the insurance policy;
6. The insurance policy is disclosed on condition of confidentiality; thereafter, a final agreement is reached;
7. Each of the claimants sign a "Covenant Not to Sue", as set out in either Appendix "A" or "B". By means of the Covenant, each claimant agrees:
   (a) not to commence an action against the insured, or to discontinue any action already started;
   (b) not to make allegations against the insured in any statement of claim filed, or to amend the statement of claim to delete any such allegations; and
   (c) to include a provision in any statement of claim, foregoing recovery of any amounts for which the insured would be liable.
8. The insurer files a Petition under s. 23 of the *Insurance Act* to enable it to pay the policy limits into court and discharge its obligations;
9. Notices of Discontinuance are entered, discontinuing each of the actions that have been commenced, against the insured;
10. A Court Order is entered, permitting the insurer to pay into court the policy limits as settlement funds for the benefit of the various claimants and discharging the insurer's obligations; and
11. The claimants apply to amend the pleadings in accordance with the BC Ferries agreement;
12. The insurer pays into court, on behalf of the insured, the policy limits; and
13. The claimants are entitled to payment of the policy proceeds into court only after all claimants have implemented the amendments required by the B.C. Ferries agreement.

The Petition filed by the insurer must set out in detail the steps to be implemented under the BC Ferries agreement, as well as the relevant background. A sample Petition is attached as Appendix "C". The end result of this process is that all claims for the policy period are settled and the exposure of both the insured and the insurer has been conclusively determined.

4. CONTINUED EXPOSURE FOR THE INSURED AND THE DUTY TO DEFEND

In the above example, the insured will have ended its exposure in relation to the particular policy period. The insurer can therefore be confident that its obligations have also been extinguished. However, circumstances may exist where the insurer wishes to terminate its obligations in exchange for tendering the policy limits into court, but cannot ensure that the insured will be entirely free of potential liability.

This section will examine the circumstances in which such continued exposure may exist, and the ability of the insurer to extinguish its defence obligations in the face of such exposure.

(a) When might the insured continue to face liability?

For obvious reasons, an insured would be unlikely to consent to an incomplete settlement which continues to expose the insured to liability while terminating the insurer's defence obligations. However, even where a BC Ferries agreement is entered into, an insured with an occurrence-based policy may subsequently face new claims. Secondly, an insurer may seek to discharge its obligations by paying the policy limits into court without a settlement. Each of these potential scenarios will be examined below.

In the professional liability context, the vast majority of policies have for some time been "claims made" or "claims made and reported" policies. The "claims made" policy only requires that a claim be made against the insured during the policy period. A "claims made and reported" policy requires that a claim be made against the insured *and* that such claim be reported to the insurer, both within the policy period, as conditions precedent to coverage. With either type of policy, the insurer will know with some certainty the number and nature of claims the insured faces for a given policy period. It is therefore possible to deal with all of the claimants in a single comprehensive settlement. In this way, both the insurer and the insured will have closure with respect to the specific policy period.

However, insurers may continue to face claims on "occurrence-based" policies. For example, a cause of action may have a longer limitation period, or "discoverability" issues may delay the running of the limitation period. This may be the case in leaky building and building mould cases, where problems may not be "discovered" for several years. In such circumstances, finality will *not* exist, in that new claims may arise subsequent to a BC Ferries agreement being entered into with existing claimants.

A second scenario in which an insured would continue to be exposed is where an insurer who cannot secure a BC Ferries agreement seeks to pay the policy limits into

court without a settlement, and discharge its obligations under s. 23 of the *Insurance Act*. In such a case, the insured would be fully exposed for the entire aggregate value of the claims, save for the policy limits already paid in by the insurer.

(b) Scope of the Duty to Defend

The extent to which an insurer will have a continuing duty to defend in the face of exposure beyond the policy limits will be governed by the policy wording. Courts have stated that an insurer's defence and indemnity obligations are two separate obligations.[7] The exhaustion of one does not necessarily entail the exhaustion of the other. The wording of a policy must be clear to ensure that the insurer's defence obligations will be extinguished upon payment of the policy limits.

Example A

A BC Ferries agreement is entered into releasing the insured from all liability to current claimants in relation to an occurrence-based liability policy. Subsequently, a new claim arises for the same policy year. The insured asserts a right to be provided with a defence in relation to the new claim.

Whether the insurer has a continuing duty to defend notwithstanding the exhaustion of its indemnity limits for the policy will depend on the policy wording. Some policies will be ambiguous with respect to this issue. The following wording is reflective of a typical general liability "occurrence-based" defence obligation:

As respects insurance afforded by this Policy, the Insurer shall

1) defend in the name and on behalf of the Insured and at the cost of the Insurer any civil action which may at any time be brought against the insured on account of such bodily injury or property damage but the Insurer shall have the right to make such investigation, negotiation and settlement of any claim as may be deemed expedient by the Insurer;

Such a defence clause does not explicitly state that the defence obligation ends when the policy limits are reached. The defence costs are considered supplementary coverage under the policy and are therefore not included within the policy limits. The only suggestion that the defence obligations may end when the policy limits are reached comes from the opening phrase, "as respects insurance afforded by this Policy". The insurer might argue that, once the policy limits are reached, the defence would no

[7] Regency Plymouth Chrysler Inc. v. Insurance Corp. of British Columbia, [1999] B.C.J. No. 639 (Q.L.)(S.C.)

longer be in respect of insurance afforded by the policy. This view has prevailed in relation to slightly clearer policy wording, where the entire coverage afforded by the contract was stated to be "subject to the limits of liability".[8]

The insured, on the other hand, could argue that the defence obligation continues to exist – even in the event of settlement or judgment up to the policy limits – insofar as the claims in excess of the policy limits are the *type* of claims covered by the policy. This view prevailed in one U.S. case[9], where the phrase *"with respect to such insurance as is provided by this policy"* was found to be ambiguous, and the court concluded that the duty to defend continued after the policy limits were exhausted.

To avoid such uncertainty, the policy wording should make explicit that the defence obligation is exhausted when the policy limits are reached. Typically, such a result is achieved by wording similar to the following:

> We will have the right and duty to defend any action seeking those compensatory damages but:
> …
> 2) We may investigate or settle any claim or action at our discretion; and
>
> 3) *Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under [the various coverages].*

Possessed with such explicit policy wording, a general liability insurer can be confident that its defence obligations will terminate in the event of a comprehensive settlement for the policy limits on an occurrence-based policy, notwithstanding the insured's continued exposure to new claims.

> **Example B**
>
> *Clearly exposed for at least the policy limits but unable to secure a BC Ferries agreement, the liability insurer applies to pay into court the full extent of its indemnity obligations and leave the insured to handle its own defence.*

[8] Les Mines d'Amiante Bell Limitee v. Federal Insurance Company, [1986] I.L.R. 1-1995 (Que. S.C.); Keene Corp. v. Insurance Co. of North America, 597 F.Supp. 946 (D.C. 1984)
[9] Commercial Union Insurance Co. v. Pittsburgh Corning Corp., 553 F.Supp. 425 (E.D.Pa. 1981)

As a general principle, the insurer will not be relieved of its duty to defend simply by tendering the policy limits, absent any legal obligation to do so.[10] It will take strong policy wording for this result to be achieved. Even the explicit policy wording set out above – stating that the duty to defend ends when the policy limits are exhausted – is clearly not strong enough to relieve the insurer of its defence obligations in such circumstances. Because this clause requires that the policy limits have been paid pursuant to judgment or settlement, payment of policy limits into court would not, by itself, trigger the exhaustion of the insurer's defence obligations. Payment of the policy limits into court would be of little use if the insurer were still obligated to defend the insured against all of the claims.

The above policy wording could be improved by instead stating something similar to the following:

> Our right and duty to defend end when we have exhausted the applicable limits of insurance in the payment of funds on behalf of the insured toward settlement or judgment, whether or not any judgment or settlement is in effect at the time such payments are made.

This wording makes clear that the liability insurer is no longer obligated to defend once it has contributed to the extent of its indemnity obligations, whether or not judgment or settlement is obtained. This will most effectively limit the insurer's defence obligations and provide the greatest flexibility when confronted with multiple claims likely to exceed the policy limits.

5. SUMMARY

If an insured faces likely exposure in excess of the policy limits, there is an incentive for the insured, the insurer and the claimants to enter into a comprehensive settlement for the policy limits. Such a settlement, if it is made in relation to a "claims made" or "claims made and reported" policy, and includes a term preventing the claimants from recovering any amounts for which the insured would be liable, provides finality for the insured and the insurer, while limiting the insurer's defence costs. Where such finality is not possible, it will be difficult for the insurer to terminate its defence obligations for the policy limits. However, with a properly worded policy, the insurer may be able to pay the policy limits into court without a full release and terminate its defence obligations.

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[10] *Co-operators General Insurance v. Johnson* (1992), 7 C.C.L.I. (2d) 183 (Alta. C.A.); *Aerojet-General Corporation v. Transcontinental Insurance Company*, 2002 Cal. App. Unpub. LEXIS 1965

C. LIABILITY POLICY "BUY-BACKS"

1. INTRODUCTION

From the insurer's perspective, an alternative to settling with the claimants is to settle directly with the insured. By terminating its obligations under the policy with the consent of the insured – either generally or with respect to particular claims – the insurer seeks to bring finality to its obligations, notwithstanding the insured's continued exposure.

A policy buy-back agreement will take one of two forms – either a "Claim Release" or a "Policy Release". A Claim Release extinguishes coverage only for the particular claim set out in the Release. The policy continues in effect in relation to any claims not specified in the Claim Release. In contrast, a Policy Release involves a repurchase of all of the insurer's obligations under the policy. The result of a Policy Release is that there is no longer a contract of insurance in effect between the insurer and the insured. When either a Claim Release or a Policy Release is implemented, there is no longer coverage for the claims covered by the agreement. In relation to the claim or policy covered by the agreement, the insurer is released from its defence and indemnity obligations and the insured is released from its duty to cooperate with the insurer. A sample Claim Release is attached as Appendix "D" and a sample Policy Release is attached as Appendix "E".

The monetary payment to the insured can be nominal or substantial, depending on the circumstances. The key factors determining the size of the payment will be the strength and likely value of the claims against the insured and the cogency of any coverage issues that may exist. The greater the liability insurer's potential exposure, determined through an analysis of the claim and the coverage obligations, the more the insurer will be willing to pay for a Release.

A policy buy-back is an attractive option for the insurer whenever there is a claim or a risk of future claims which might trigger the insurer's obligations under the policy. There are, of course, practical limits on when such an agreement will be feasible. The insured needs a compelling reason to give up its defence and indemnity coverage when faced with possible or actual litigation.

There are many reasons for an insured to enter into a policy buy-back. The insured may believe it can resolve the claim for less than it would receive through the policy buy-back, thereby profiting from the difference. Policy buy-backs may also be appropriate in the event of a coverage dispute between the insurer and the insured. There may be such doubts as to the outcome of a coverage dispute that both parties choose to settle, as between the insurer and the insured, for less than the expected total exposure in the

litigation. The insured would then be compelled to carry its own defence. Similarly, where only some of the claims against the insured are covered, the insured may prefer to take a cash sum from the insurer and carry its own defence.

In many cases, the rationale for a policy buy-back from the insured's perspective is that the insured has no assets to protect and therefore no need for liability insurance. This will be the case where the insured is either inactive or insolvent.

In the following sections, the use of policy buy-backs will be examined, with an emphasis on the insolvency context and the risks to the insurer.

2. THE INSOLVENT INSURED

Frequently, the policy buy-back is used in the context of an insured with no assets to protect. This may occur either where the commercial insured is no longer carrying on business, or where the insured is involved in formal insolvency proceedings. This section will focus on the latter situation.

From the perspective of the trustee in bankruptcy, it will be desirable to avoid the time and cost of a lawsuit if possible. A legal action which is permitted to continue during the course of the bankruptcy may also draw out the bankruptcy process. The protection afforded by the insolvency legislation will make it difficult for a claimant to pursue an insolvent defendant. Without insurance, a claimant will ordinarily have little incentive to do so.

It is important to examine the various insolvency regimes in Canada, as the ability of the claimant to continue an action against an insolvent defendant is central to the use of policy buy-backs in the insolvency context.

(a) Differing Insolvency Regimes

In Canada, there are two statutes that govern corporate reorganizations and bankruptcy. One is the *Bankruptcy and Insolvency Act*,[11] (the "BIA"), and the other is the *Companies' Creditors Arrangements Act*,[12] (the "CCAA"). The BIA is available to corporate and personal debtors, while the CCAA applies only to corporations. Under the BIA, a debtor can either make an assignment in bankruptcy or file a "proposal". A debtor will file a proposal when it wishes to rehabilitate its finances rather than make an assignment in bankruptcy. A "plan of arrangement" under the CCAA performs a similar function and is preferred by larger corporations wishing to undertake more complex reorganizations.

Under a proposal or a plan of arrangement, the debtor will seek to compromise its debts with the approval of its creditors. The two statutes put in place mechanisms that permit the debtor to reorganize its affairs and put forward a proposal for acceptance – or rejection – by its creditors. Integral to this process are two parallel protections for the debtor: (1) a stay of legal proceedings is automatically in force during the reorganization process; and (2) once the proposal or plan of arrangement is accepted, claims against the debtor will be compromised, except to the extent they are dealt with in the proposal or plan of arrangement.

Where a debtor makes an assignment in bankruptcy, a stay of proceedings is also automatically in effect. Everyone claiming against the bankrupt must ordinarily prove their claims within the insolvency process. There is a mechanism for dealing with "contingent" or "unliquidated" claims, such as an action for damages. The bankruptcy trustee will attempt, so far as is possible, to quantify a claim put forward for proof, considering the likelihood of success in the action and the likely damage award. Similarly, a proposal or plan of arrangement can set aside funds for claimants who put forward claims during the reorganization process.

In short, with few exceptions,[13] actions against an insured which is availing itself of insolvency legislation are (1) stayed pending finality of the insolvency process and (2) extinguished except to the extent recognized within that process. For a plaintiff bringing an action against an insolvent defendant, all of this presents difficulties commensurate with the protections afforded the debtor. The plaintiff must either participate in the insolvency process, accepting a substantial compromise of the claim like other unsecured creditors – including the possibility of receiving nothing – or seek leave to continue an action outside of the insolvency proceeding.

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[11] R.S.C. 1985, c. B-3

[12] R.S.C. 1985, c. C-36

[13] The exceptions include claims for fraud and intentional bodily injury.

There is a key difference between an insured making an assignment in bankruptcy and an insured reorganizing under the protection of the BIA or CCAA. When a corporate insured makes an assignment in bankruptcy, it ceases to conduct business, its assets are liquidated and the corporation is wound-up. In contrast, a reorganizing insured continues to have assets to protect. While a stay of proceedings is in effect during the reorganization process, that stay is lifted once the proposal or plan of arrangement is accepted. Ideally, the proposal or plan of arrangement will have extinguished any claims against the insured. However, the insured cannot be certain that this will be the case until the proposal or plan of arrangement is accepted by creditors. For this reason, it will be more difficult to secure the insured's agreement to a policy buy-back where the insured is reorganizing under the BIA or CCAA.

(b) Actions Against the Insolvent Insured

It follows that an insolvent insured may continue to face claims brought by plaintiffs who have succeeded in having the stay of proceedings lifted. The question is whether such claims can realistically succeed and, if so, whether the insurer is exposed.

The statutory test for lifting a stay of proceedings under the BIA is (a) whether the creditor or third party is likely to be materially prejudiced by the stay; and (b) whether there are other equitable grounds for granting relief from the stay. Courts have held that there must be "compelling reasons" to lift the stay of proceedings against an insolvent defendant. One of the things considered is whether the action would survive the insolvency proceeding.[14] On this question, the courts have arrived at different conclusions.

Since the compromise or extinguishment of claims does not occur until a proposal or plan of arrangement is accepted, or the bankrupt discharged, the only impediment to obtaining judgment during the currency of the insolvency process is the stay of proceedings. Once that is lifted, judgment can be taken. However, it may well be that that the insolvency process will have concluded before judgment is reached. The question then becomes whether judgment can be obtained, or enforced, at that point. The lifting of the stay is a procedural step only – it does not create rights where none exist.

The more fundamental reason why a claimant would choose not to pursue a bankrupt defendant is, of course, that there is not enough money to satisfy any judgment. The existence of insurance can therefore be an important factor. Some courts have held that

[14] Maple Homes Canada Ltd. (Re), 2000 BCSC 1443

a claimant should be permitted to proceed against an insolvent defendant where there is a liability insurance policy that would afford coverage for the claims.[15]

In *Miller (Re)*, the policy contained the standard general liability policy provision which required the insurer to pay the claimant in the event of the insured's "*legal obligation to pay*." The Court concluded that the insured's discharge from bankruptcy did not affect the insured's "legal obligation to pay." It followed that, though the bankrupt insured could not be called upon to pay the judgment, the insurer could. It should be noted that the liability policy contained a clause – standard in commercial liability policies – that the bankruptcy or insolvency of the insured or of the insured's estate "shall not relieve the insurer of any of its obligations hereunder." Other courts have come to the same conclusion without any reference to such a provision.[16]

However, in *Woodworth v. J.S. McMillan Fisheries Ltd.*,[17] the court concluded that the effect of the completion of the insolvency process – and the consequent extinguishment of claims against the insured – was that no judgment could be entered against the insured, so no liability insurance policy could be triggered. Once the event occurred that would extinguish all claims – acceptance of a proposal or plan of arrangement or discharge from bankruptcy – the insured would automatically have an effective defence to the action. The court refused to allow the action to proceed for this reason.

There was a distinguishing factor in *Woodworth*, namely that the defendant in that case had come through a BIA proposal process, as opposed to being discharged from bankruptcy. The proposal had expressly extinguished all claims against the defendant. However, as the Court in *Woodworth* points out, the Court's analysis applies as well to a defendant who has been discharged from bankruptcy. In either case, the claims against the insured are extinguished – either by statute or by the terms of the proposal.

Arguably, where a cause of action is extinguished, the existence of insurance is irrelevant. The liability policy will provide either for the payment on the insured's behalf of amounts for which the insured is liable, or the reimbursement of the insured after the insured has paid such amounts. Either way, the insurer is not obligated to pay until the insured incurs a legal obligation to pay. If a cause of action is extinguished, it would seem to follow that no such legal obligation will exist and the insurance policy is

[15] *Duvall (Re)* (1992), 63 B.C.L.R. (2d) 97 (S.C.); *Miller (Re)* (2001), 27 C.B.R. (4th) 107 (Ont. S.C.J.)
[16] See for example *Duvall (Re)*, *supra*; *Major (Re)* (1984), 54 C.B.R. 28 (B.C.S.C.)
[17] 2000 BCSC 1783; see also *Moore (Re)* (1986), 64 C.B.R. 152 (B.C.S.C.)

not triggered. That is particularly so where the insurer's obligation is to indemnify the insured, as opposed to paying on the insured's behalf.[18]

However, while the insolvency proceeding is still ongoing, a claimant wishing to pursue an action could seek to delay the completion of the insolvency proceedings in order to obtain judgment and in turn recover from the insurer. This could be achieved through an objection to the discharge of the bankrupt, or participation in the proposal/plan of arrangement process that would either exempt the claim from extinguishment or delay the acceptance of the plan/proposal.

It follows that, on either view of the law, an insurer may face continued exposure in relation to an insolvent insured where a persistent plaintiff (a) obtains an order lifting the stay of proceedings; (b) participates in the insolvency proceeding to maintain its position; (c) obtains judgment; and (d) seeks to recover directly, under statute, from the insurer.[19]

Given the risk that an action could proceed against the insolvent insured, exposing the liability insurer to defence and indemnity costs, it may be desirable from the insurer's perspective to buy back the policy and extinguish its obligations. Since the exposure of the insolvent insured – without insurance – is much less than the potential exposure of the insurer under the policy, the release of the policy has the effect of reducing the total exposure.

3. A PRACTICAL EXAMPLE IN THE INSOLVENCY CONTEXT

Consider the following scenario:

> *The insured is one of several defendants in a complex, multi-party "leaky condo" action. The insurer has a duty to defend the action and it is reasonable to expect that defence costs will be high. The insured has entered an appearance to the action through its corporate solicitors. The insurer has not yet appointed counsel to defend the action or otherwise made its presence known to the other parties. The insured then makes an assignment in bankruptcy.*

The insurer senses an opportunity to do a policy buy-back with the trustee in bankruptcy and wishes to explore this possibility. Typically, the process might involve the following steps:

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[18] The cases that have held that the ability to recover from the insurer survives insolvency have typically involved policies requiring the insurer to pay the claimant on the insured's behalf. However, if the legal obligation to pay is not extinguished, as these cases suggest, the statutory cause of action, discussed below, could apply to the more typical policy, where the insurer's obligation is to indemnify the insured.

[19] See discussion below on statutory causes of action against the insurer.

1. The insurer contacts the trustee in bankruptcy to discuss the possibility of a policy buy-back;
2. The insurer and the insured, acting through the trustee in bankruptcy, enter into a "Claim Release" or "Policy Release" releasing the liability insurer's obligations under the policy in relation to the claim;
3. The insured's corporate counsel file a Notice of Withdrawal and direct all future inquiries and correspondence to the trustee in bankruptcy;
4. All parties agree that, if inquiries are made respecting insurance, the response should be simply, and accurately, that "there is no policy of insurance that would provide coverage for the claim";
5. As a term of the Release, the insurer agrees to indemnify the trustee in bankruptcy for reasonable professional fees and expenses in relation to any steps that may need to be taken in defence of the action, including production of documents; and
6. If the strategy has the desired effect, the plaintiff – and potential third party claimants – will not bother pursuing the insolvent insured, and will focus their efforts on other defendants.

4. RISK TO THE INSURER – THE STATUTORY CAUSE OF ACTION

The Insurance Acts of the various Canadian provinces contain provisions allowing a plaintiff who is unable to enforce a judgment against the insured to recover directly from the insurer to the extent of the insurer's indemnity obligations in relation to the claim. For the insurer, this poses a risk in the policy buy-back context. If the policy buy-back agreement does not have the desired effect, the insurer may continue to be liable – directly to the claimant – for its indemnity obligations.

This section will examine the sparse judicial treatment of policy buy-backs in an effort to determine if and when a court would recognize a policy buy-back agreement as a defence to a statutory cause of action brought by a claimant against an insurer.

(a) Section 24 of the *Insurance Act*

Section 24 of the *Insurance Act*, variations of which are found in other provincial legislation, is the provision which allows a judgment creditor to claim directly from the insurer where recovery from the insured is not possible. Section 24 reads as follows:

> **When third person has right of action against insurer**
> **24** (1) If a judgment has been granted against a person in respect of a liability against which the person is insured and the judgment has not

been satisfied, the judgment creditor may recover by action against the insurer the lesser of

(a) the unpaid amount of the judgment, and
(b) the amount that the insurer would have been liable under the policy to pay to the insured had the insured satisfied the judgment.

(2) The claim of a judgment creditor against an insurer under subsection (1) is subject to the same equities as would apply in favour of the insurer had the judgment been satisfied by the insured.

(3) This section does not apply in the case of a contract of automobile insurance.

Section 24 allows a claimant to recover directly from the insurer in circumstances where (1) the claimant has obtained judgment against a defendant; (2) the defendant is insured in relation to that liability; and (3) the judgment has not been satisfied. The claimant's action against the insurer is subject to "the same equities" as would arise in a coverage dispute between the insurer and the insured. If, for example, the insured had failed to disclose material information that would have affected the insurer's assessment of the risk, the insurer would have grounds to void the policy and would have a good defence to the action brought by the claimant.

As in most jurisdictions in North America, the claimant's right of action does not accrue until after judgment is entered against the insured. As the analysis below will make clear, this point is critical to the ability to enter into a policy buy-back. The scope for entering into a policy buy-back is extremely limited in circumstances where a claimant's right of action against the insurer accrues prior to judgment.

An example of the latter type of legislative scheme is found in the Civil Code of Quebec. The following provisions of Chapter XV, Section III of the Code are relevant in this regard:

§3. – Liability insurance
…
2501. An injured third person may bring an action directly against the insured or against the insurer, or against both.

The option chosen in this respect by the third person injured does not deprive him of his other recourses.

> 2502. The insurer may set up against the injured third person any grounds he could have invoked against the insured at the time of the loss, but not grounds pertaining to facts that occurred after the loss; the insurer has a right of action against the insured in respect of facts that occurred after the loss.

Paragraph 2501 grants the third party claimant the right to name the insurer jointly with the insured defendant, while paragraph 2502 makes explicit that the insurer cannot rely on post-loss events in defence of the injured third party's claim. Such post-loss events would, presumably, include a post-loss buy-back of the insurer's obligations in respect of either the claim or the entire policy.

Another important provision is found in Chapter XV, Section I of the Code:

> §4. – Special provision
> 2414. Any clause in a non-marine insurance contract which grants the client, the insured, the participant, the beneficiary or the policyholder fewer rights than are granted by the provisions of this chapter is null.
>
> Any stipulation which derogates from the rules on insurable interest or, in liability insurance, from those protecting the rights of injured third persons is also null.

The effect of the above provisions is that the rights afforded to injured third parties by the Civil Code of Quebec cannot be derogated from by agreement between the parties. The above provisions would appear to leave little or no room for policy buy-backs in the province of Quebec. Similar limitations will apply in the few U.S. states with similar statutory provisions.

In circumstances where a policy buy-back is entered into, the insurer will plead the existence of a Claim Release or Policy Release, in addition to any coverage issues, in defence of a statutory cause of action by a claimant.

(b) Recognition and Enforcement of Policy Buy-backs in the U.S.

In certain circumstances, U.S. courts have determined that policy buy-back agreements between a liability insurer and an insured should be recognized and enforced. However, there are important exceptions, most notably where:

1. the insurance is required by statute;[20]

[20] See for example: *Rauch v. American Family Insurance Company*, 340 N.W.2d 478 (Wisc. 1983); *Richard v. Fliflet*, 370 N.W.2d 528 (N.D. 1985)

2. the claimant is a third party beneficiary by the terms of the policy;[21] or
3. the claimant's right to recover against the insurer has accrued prior to the policy buy-back.

In *Cowley v. Texas Snubbing Control Inc*.[22] the insured defendant entered into a Policy Release with its liability insurer, in exchange for a significant cash payment which was used to settle one of several claims against the insured. The Policy Release was entered into after the accident occurred but before any claimant obtained judgment against the insured. A non-settling claimant sought to recover directly against the insurer and the insurer brought a motion to dismiss the claims.

The District Court considered a line of authority standing for the proposition that the rights of a third party claimant accrue upon the occurrence of the injury and cannot be affected by an agreement between the insurer and the insured. The Court distinguished these authorities, principally on the basis that, in that case, the insured was not required by law to maintain liability insurance and the third party claimants did not acquire any rights under the policy until judgment was entered against the insured. In the circumstances, the Policy Release was upheld and the claims against the insurer were dismissed. The U.S. Court of Appeals for the 5th Circuit affirmed the decision without reasons.

The Court's analysis of this area of the law is well summarized in the following passage:[23]

> …the question whether an insured and insurer may enter into a compromise settlement without the consent of an injured third party after the accident has occurred depends upon the status accorded under applicable state law to that injured third person. If the third party is considered a third-party beneficiary by virtue of the nature and/or terms of the contract itself, by virtue of a statute granting him that status, or by public policy flowing from the nature of the insurance contract, then it is fair to say that in those circumstances, the insured and insurer cannot defeat his right to recover under the policy by post-accident cancellation, rescission or settlement. In other cases, such as where the injured third party is not an intended beneficiary or becomes a policy beneficiary only upon securing a judgment against the insured, then a settlement between

[21] See for example *Harper v. Wausau Insurance Company*, 66 Cal. Rptr. 2d 64 (Cal. C.A.)
[22] 812 F.Supp. 1437 (S.D. Miss. 1992), aff'd 15 F.3d 180 (5th Cir. 1994), cert. denied 513 U.S. 820
[23] At pp. 1458-59

> the insured and his insurer prior to such time as the third party acquires the status of a policy beneficiary or judgment creditor would not affect the third party's "rights" in the policy as he has no "rights".[24]

The District Court also considered relevant certain factors which pointed to the legitimacy of the Policy Release. In particular, there were arguments that at least some of the claims against the insured were excluded by the terms of the liability policy and there were multiple claims, the total value of which exceeded the primary and umbrella policy limits. In such circumstances, the Court concluded that there were "a variety of legitimate reasons for the parties' effecting this settlement". Notably, the Court stated that its decision might have been different "if there were proof that the reason for the parties' entering into the settlement agreement was to deprive [the claimant] of any potential for recovery."

Similar reasoning was applied in the context of a bankrupt insured in *In Re Dow Corning Corp.*[25] In that case, the bankrupt insured faced multiple product liability claims and settled coverage disputes with its various insurers. Some of the settlements were "coverage in place" settlements which involved a discount off the policy limits, while others were "buy-out" settlements, which involved cash payments by the insurers, coupled with a release of certain claims under the respective policies. A provision of the buy-out settlements was that the insured would obtain an order from the bankruptcy court releasing the insurers from claims by other insurers and by the underlying tort claimants. The tort claimants opposed the "buy-out" settlements.

The Court approved the settlements, in part because the tort claimants, prior to obtaining judgment, were not "third party beneficiaries" of the policy according to Michigan law. The insurance policies were not mandated by statute and Michigan's garnishee legislation was of no assistance to the claimants until judgment was entered in their favour. In addition, the Court noted it is the policy of Michigan law to encourage settlements. If the parties to an insurance contract were required to obtain the consent of all potential third party claimants before settling a coverage dispute, such settlements would rarely occur.

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[24] Not all U.S. courts have accepted this reasoning. In *Sapp v. Grief*, 1998 U.S. App. LEXIS 6668 at pp. 21-22 (10th Cir. 1998), the Court, while affirming the dismissal of claims against the insurer on other grounds, questioned the correctness of the District Court's enforcement of the Policy Release, even though the policy was not required by statute. The Court reasoned that, with a "claims made" policy, the claimant's rights arise upon receipt by the insured of timely notice of the claim, and cannot thereafter be defeated by agreement between the insurer and the insured. However, the Court did not decide the issue and in any case appeared to rely on cases where the liability insurance was required by statute.

[25] 198 B.R. 214 (Bankr. E.D. Mich. 1996)

(c) Azevedo v. Markel Insurance Co. of Canada

In *Azevedo v. Markel Insurance Co. of Canada*[26], a third party loss occurred and the insurer and the insured agreed in writing to waive coverage for the claim. The claimants obtained judgment against the insured, who had since disappeared, and that judgment could not be executed. The claimants brought an action against the insurer under s. 219 of the Alberta *Insurance Act*,[27] which serves a purpose similar to s. 24 of the British Columbia *Insurance Act*. The trial court held that, because the insurer was entitled to the same "equities" as it would enjoy in an action brought by the insured, the claimants could not succeed. The waiver of coverage was as good a defence against the claimants as it would have been against the insured, had he paid the judgment and sought indemnity.

The Court of Appeal reversed that decision, finding in favour of the claimants. The Court of Appeal's reasons for judgment begin as follows:

> This appeal raises the issue of whether a mutual agreement that is entered into post-loss between the insured and the insurer to waive insurance coverage can defeat the right of the insured's judgment creditor to look to the insurer for payment of an unsatisfied judgment.

The "equities" defence was the only issue on the appeal, as the parties conceded that the threshold requirements of the section were met. In light of this concession by the insurer, the Court did not have to examine whether the waiver meant the defendant was not "a person insured against liability" for the purposes of section 219. The Court simply noted that "the policy was in effect and covered the loss suffered" (para. 3). This concession was likely actuated by the fact that, notwithstanding the waiver of coverage for the specific claim, the liability policy remained in force, such that the judgment debtor continued to be an "insured".

Section 219 of the Alberta *Insurance Act*, which differs from the B.C. provision, reads as follows:

> 219_*In any case* in which a person insured against liability for injury or damage to persons or property of others has failed to satisfy a judgment obtained by a claimant for the injury or damage and an execution against the insured in respect thereof is returned unsatisfied, the execution creditor has a right of action against the insurer to recover an amount not

[26] (1999), 180 D.L.R. (4th) 193, 14 C.C.L.I. (3d) 137 (Alta. C.A.), reversing (1998), 14 C.C.L.I. (3d) 113 (Alta. Q.B.), leave to appeal to Supreme Court of Canada denied, [1999] S.C.C.A. No. 605

[27] R.S.A. 1980, c. I-5 [now R.S.A. 2000, c. I-3, s. 530].

> exceeding the face amount of the policy or the amount of the judgment in the same manner and subject to the same equities as the insured would have if the judgment had been satisfied.

The question for the Court was whether any defence the insurer could raise against the insured was an "equity" which the insurer could raise in defence of the statutory cause of action by the plaintiff. The Court determined that "equities" as used in the statute had a narrower meaning. The Court cited with approval the following definition from Hay, *Words and Phrases Legally Defined*[28]:

> …any entitlement or obligation ("the equities") of which a court of equity will take cognisance. In that sense, the phrase can be used to refer to a "defensive equity" such as "laches, acquiescence or delay"…

The Court agreed with this definition's emphasis on the traditional jurisdiction of the courts of equity and "the implication, from the chosen examples, that *an equity is not something that two parties can deliberately create*" (emphasis added). The Court of Appeal concluded that there are significant differences between a unilateral act on the part of the insured that will affect coverage and a bilateral agreement between the insured and the insurer waiving coverage, after the loss and contrary to a legislative requirement to maintain insurance.

A key fact driving the Court's conclusion was the legislative requirement, under the *Motor Transport Act*[29] and the *Freight Truck Operation Regulation*,[30] that the insured carry a minimum amount of liability insurance. The intention of these legislative provisions was to protect third party claimants, who were effectively third party beneficiaries of the liability policy. Though a plain reading of the *Insurance Act* itself suggested that the insurer should be permitted to use the waiver as a defence to the claimants' action, reading that Act in conjunction with the motor transport legislation led the Court to a different result. The Court reasoned that it would make little sense to require insurance for the protection of injured parties, yet allow the insurer to avoid liability by agreeing with the insured to waive coverage. The overall legislative purpose was best achieved by adopting a narrower interpretation of the term "equities".

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[28] Supplement 1998 (London: Butterworths, 1998) at p. 115 (para. 16)
[29] R.S.A. 1980, c. M-20
[30] A.R. 429/86

Strictly speaking, *Markel* may be confined to its particular facts. However, the question remains whether the decision has broader implications. In particular, the following passage from the Court of Appeal's reasons raises concerns:[31]

> From the perspective of public policy, a legal regime that allows an insurer and its insured to agree post-loss to waive insurance coverage and hence defeat third party rights clearly has potential for abuse. We are by no means suggesting that the present case involved collusion. We simply note that any result that leaves open the possibility of collusion between the insurer and the insured offends public policy.

Notably, this passage does not mention the statutory requirement to maintain insurance. The majority of the Court seems to have expressed the view that the insurer and the insured should not be permitted to agree to waive coverage, after a loss has occurred, thereby eliminating the claimant's statutory cause of action against the insurer. The Court's definition of "equities" as excluding something deliberately created between the insurer and the insured may permit an extension of the court's decision beyond the context of a statutory requirement to maintain insurance.

It will be useful to apply the reasoning in *Markel* to the British Columbia *Insurance Act*, outside of the factual context of that case.

(d) Implications of *Markel* in British Columbia

As noted, there are several unique features in the *Markel* case that may make it distinguishable from a typical policy buy-back scenario in British Columbia. The first is the application of the threshold requirements of the statutory provisions.

As noted above, the waiver of coverage in *Markel* did not terminate the contractual relationship between the insurer and the insured. It follows that the insured continued to be "a person insured against liability" for the purposes of Alberta's s. 219. While this would also be the case if the insurer and the insured entered into a "Claim Release," a different analysis would apply if a "Policy Release" were entered into. That is because, under the Policy Release, the contractual relationship between the insurer and the insured would be terminated. At the time of judgment, the judgment debtor would no longer be "a person insured against liability."

In this respect, there is a key difference in the wording of the British Columbia provision. Section 24 applies where judgment has been granted against a person "in respect of a liability against which the person is insured." The British Columbia

[31] At para. 17

provision clearly requires that the person be insured against the particular liability in relation to which the claimant is seeking recovery from the insurer. For that reason, it should make no difference in British Columbia whether the policy buy-back is done by way of a Claim Release or a Policy Release. In either case, the judgment debtor is not insured against the liability in question, *at the time judgment is granted in favour of the claimant*.

The key remaining issue, therefore, is whether the person has to be insured at the time judgment is granted. As noted above, the Court in *Markel* stated that it was sufficient that a valid liability policy was in effect *at the time of the loss*. If this is correct, then s. 219 will be applicable to either a Claim Release or a Policy Release, provided that the Release was entered into after the claimant suffered a loss. However, there are two factors which suggest such a conclusion may not be warranted, particularly in British Columbia.

The first point is that, in *Markel*, the parties did not argue, and the Court did not have to address, this temporal issue. That is because the judgment debtor was clearly "insured against liability" notwithstanding the waiver of coverage, for the reasons discussed above. There do not appear to be any other cases, in British Columbia or Alberta, where this issue has been decided.

Secondly, and more importantly in the British Columbia context, British Columbia's s. 24 and Alberta's s. 219 have different wording. The Alberta provision applies "in any case in which a person insured against liability… has failed to satisfy a judgment" while the British Columbia provision applies where "a judgment has been granted against a person in respect of a liability against which the person *is* insured and the judgment has not been satisfied" (emphasis added). The plain wording of the British Columbia provision suggests that the insurance must be in place when judgment is granted. The Alberta provision is much more ambiguous and it may be argued that s. 219 does not import such a temporal requirement. This may be why the Alberta Court of Appeal in *Markel* stated that s. 219 requires that "the insured had a valid liability policy in place at the time of the loss."[32]

It follows that the *Markel* case may be of limited precedential value in this respect, as it does not represent the considered opinion of the Court on this issue and because of the differing language of the respective provisions. A British Columbia court may well come to a different conclusion.

[32] At para. 6

The second important feature in *Markel*, already discussed above, is that the insured was required by statute to carry liability insurance to cover the plaintiff's claim. The agreement to waive coverage was therefore in violation of the statutory requirement. This was an important factor leading the Court to interpret the "equities" in the narrow manner in which it did. The U.S. cases discussed earlier[33] suggest that a different result might be reached absent such a statutory requirement. However, it is worth noting that many professionals, as well as businesses engaged in certain commercial activities, are required by statute or regulation to carry liability insurance. In such cases, the reasoning in *Markel* may be applicable.

A further risk might exist in the context of a statutory requirement to carry liability insurance, independent of whether the threshold requirements of s. 24 are met when the judgment debtor is insured at the time of the loss, but not at the time of judgment. The risk is that a court would find a policy buy-back in this context to be contrary to public policy, as articulated by the statutory insurance requirements. Having found the agreement to be contrary to public policy, the court would then consider the agreement to be void and refuse to recognize it.

This is similar to the approach taken by the British Columbia Court of Appeal in *International Paper Industries Ltd. v. Top Line Industries Inc*.[34] where the Court held that leases over part of an unsubdivided parcel of land were contrary to the public policy behind the British Columbia *Land Title Act* and were therefore invalid. Again, however, such policy considerations are unlikely to arise absent an overriding statutory imperative. In addition, the *Dow Corning* case suggests that such policy considerations must be balanced against the need to facilitate settlement of disputes between insurers and insureds.

It may also be relevant that in *Markel*, the insurer did not pay fair market value for the policy. There was no payment made, for the benefit of the claimants or otherwise. While the Court did not expressly deal with this issue in *Markel*, the existence of legitimate issues between the insurer and the insured, and the insurer's payment of monies towards settlement of certain claims, were key factors leading to the Court's approval of the Policy Release in *Cowle*y. A British Columbia court may well be more amenable to recognizing and enforcing an agreement where the insurer's payment (a) bears a relationship to the likely value of the claim and the insurer's coverage position and (b) is set aside in a segregated fund for the benefit of the claimants.

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[33] See in particular *Cowley v. Texas Snubbing Control Inc*., 812 F.Supp. 1437 (S.D. Miss. 1992) and *In Re: Dow Corning Corp.,* 198 B.R. 214 (Bankr. E.D. Mich. 1996)

[34] (1996), 20 B.C.L.R. (3d) 41, 135 D.L.R. (4th) 423

In short, a "typical" policy buy-back in British Columbia will differ from the circumstances in *Markel* in that a payment will be made by the insurer for the benefit of claimants, there may not be a statutory insurance requirement and it will be open to the insurer to argue that the threshold requirements of s. 24 of the *Insurance Act* are not met, in that there was no liability coverage in effect at the time of judgment. Nonetheless, the broad language used by the Court in *Markel* and the inherently uncertain nature of the "equities" warrants some caution in the approach taken to policy buy-backs, particularly where an insured is facing a claim at the time the buy-back agreement is made.

(e) Managing the Risk

Given the possibility of claimants seeking to recover from the insurer in the event that they obtain judgment and cannot recover from the insured, steps should be taken to minimize this risk.

The first step will be the requisite element of confidentiality. Fundamentally, the policy buy-back – like the policy of insurance itself – is a private agreement between the insurer and the insured. In the ordinary course, such dealings are of no concern to third parties. It may well be that, where a policy buy-back is entered into before the involvement of the insurer becomes known, no one will ever become aware that the claim was previously covered by a policy of insurance.

In the insolvency context, the advice of the trustee that "there is no policy of insurance which covers the claim" – coupled with the insolvency itself – may be sufficient to cause the claimants to lose interest, particularly where there are other defendants from whom to recover. Similarly, where the commercial insured has ceased carrying on business, and has no assets against which to recover, the absence of insurance will likely dissuade potential claimants.

Where the claimant proceeds against an insured, however, the situation will obviously be more difficult. The claimant cannot pursue the insurer until judgment is entered against the insured and steps in execution are unsuccessful. At this point, the only recourse is against the insurer, who will raise the policy buy-back as a defence.

If a policy buy-back agreement is successfully challenged, there is a risk that the insurer will end up paying twice – once to the insured as compensation for the policy buy-back, and again to the claimant under the statutory cause of action. In light of this risk, a second important step in protecting the insurer's interest is to stipulate, in the policy buy-back agreement, that any funds contributed by the insurer must be held in a segregated fund, for the purpose of retiring the claims covered by the agreement. This step will both increase the prospects for judicial recognition of the policy buy-back

agreement and also prevent the funds paid by the insurer from being diverted for the insured's own purposes.

In any action brought by a judgment creditor against the insurer, the insurer's defence will be two-fold. First, it will plead the policy buy-back, arguing that the judgment debtor is not, by virtue of the policy buy-back, insured in relation to the judgment. Secondly, the insurer will raise any coverage issues that would have been raised against the insured. To preserve its right to argue the latter defence, the insurer must obtain a non-waiver from the insured prior to entering into the policy buy-back.[35]

The insurer will want to maximize the potential for judicial recognition of the policy buy-back as its first line of defence. Ideally, the insurer would seek a summary dismissal of the judgment creditor's claim on the policy buy-back defence alone. This will save the time and expense of litigating potentially difficult coverage issues. In addition, the insurer will not want to be in a situation where the policy buy-back is not recognized as a defence, and the insurer is required to pay a judgment it played no part in defending. The insurer will not be able to reargue the merits of the claimant's case against the insured. It may be that the insurer could have successfully defended the claim against the insured – or settled it for a lower quantum – but lost the opportunity to do so. In such a scenario, even where the insurer has paid into a trust for the benefit of claimants, or has paid the insured a nominal sum, the insurer would end up paying more than it would have without the policy buy-back.

Given the risks identified above, the insurer – both inside and outside of the insolvency context – would do well to protect itself in order to minimize the total amount it is required to pay. The following guidelines will serve to minimize the risk associated with policy buy-backs:

- Obtain a non-waiver to preserve the right to deny coverage;
- Ensure, through a provision in the Claim Release or Policy Release, that the funds paid by the insurer are maintained in a segregated fund and used by the insured to retire the claims covered by the Release;
- Ensure the amount paid by the insurer is roughly representative of the strength and value of the claims against the insured and the strength of the coverage position;
- In the insolvency context, require the trustee to advise the insurer of any attempts to lift a stay of proceedings, to enable the insurer to

[35] Compare *Graham v. United States Fidelity & Guaranty Co.*, 162 A. 902 at 904 (Pa. 1932) and *Sapp v. Greif*, 1998 U.S. App. LEXIS 6668 (10th Cir. 1998)

participate in the hearing and argue that the insurer would have no obligation to pay the claimant if judgment were entered; and

- Where the insured undertakes a plan of arrangement under the CCAA or a proposal under the BIA, ensure that claims against the insured are extinguished by the proposal or plan of arrangement.

5. TRIGGERING OTHER INSURANCE – U.S. EXPERIENCE

In the United States, insureds have attempted to use policy buy-backs outside of the insolvency context to trigger other insurers' defence and indemnity obligations. Perhaps not surprisingly, those attempts have been – from the insured's perspective – largely unsuccessful.

In *Security Insurance Co. of Hartford v. Lumbermens Mutual Casualty Co.*,[36] the alleged injuries were related to "asbestosis" – a condition alleged to be caused by continuous exposure over time to asbestos. Because of this fact, the "continuous trigger" theory applied, causing several insurers with various policy periods to be exposed for both ongoing defence and indemnity obligations. The insured entered into a policy buy-back agreement with one of the insurers, Lumbermens. Another insurer, Security, sought a declaration that Lumbermens was responsible for an "equitable contribution" for defence costs, in spite of its prior agreement with the insured.

The Court concluded that the policy buy-back agreement was clear and unambiguous and had to be recognized.[37] Since Lumbermens no longer had any obligations under the policy, it could not be ordered to contribute to the costs of defending the insured. The Court also held that the remaining insurers could not subrogate against the insurer who reacquired its obligations. Subrogating insurers could only "step into the shoes" of the insured and enforce whatever rights the insured had. Since the insured had no right to claim defence costs from Lumbermens, by virtue of the policy buy-back agreement, neither did the other insurers have such a right.

However, in a subsequent decision,[38] the Court ruled that the *insured* was responsible for an equitable share of defence costs for the periods covered by the buy-back agreement with Lumbermens.[39] The insured was not responsible for its share of

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[36] 1998 Conn. Super. LEXIS 1327

[37] Notably, the Court did not look behind the agreement to determine whether the amount paid by the insurer was reasonable.

[38] 1999 Conn. Super. LEXIS 1902

[39] The Court followed the logic of *Stonewall Ins. Co. v. Asbestos Claims Management*, 73 F. 3d 1178 (2nd Cir. 1995), where the Court held that a liability insurer who opts to self-insure for certain periods is liable for an equitable share of any indemnity liability for those periods.

defence costs for later periods in which it was not insured because it could not obtain insurance.

In *Aerojet-General Corporation v. Transcontinental Insurance Company*,[40] the insured entered into a policy buy-back agreement with its primary insurer. It then applied for a declaration that the excess insurer had a duty to defend and indemnify, on the basis that the policy buy-back constituted an "exhaustion" of the primary coverage. The excess insurance policy contained the following wording:

> Liability to pay under this [excess] insurance shall not attach unless and until the Primary and Underlying Excess Insurers shall have admitted liability for the Primary and Underlying Excess Limits or unless and until [Aerojet] has by final judgment been adjudged to pay an amount which exceeds such Primary and Underlying Excess Limits and then only after the Primary and Underlying Excess Insurers have paid or have been held liable to pay the full amount of the Primary and Underlying Excess Limits.

The first difficulty for the insured was that there was no evidence that the amount paid by the primary insurer was in exhaustion of the policy limits. Secondly, the amount was not paid in for the benefit of claimants, but rather paid directly to the insured. The Court held that this did not constitute an exhaustion of primary coverage and the excess insurer's obligations were not triggered. This underscores the importance of ensuring that funds paid by the insurer are set aside for the benefit of the claimants. However, an alternative method of triggering coverage under the excess policy was for judgment to be granted against the insured for an amount in excess of the primary policy limits. In such circumstances, the Court left it open to the insured to eventually prove that excess coverage had been triggered.

These U.S. cases are broadly consistent with Canadian legal principles and a similar approach would likely be followed in Canada. It follows that an insured entering into a policy buy-back arrangement should be prepared to absorb the defence and indemnity obligations that would otherwise be borne by the insurer re-purchasing coverage (except to the extent that the buy-back agreement provides otherwise).

6. SUMMARY

Policy buy-backs may be useful in the following contexts: (a) where the commercial insured is no longer carrying on business and has no assets to protect; (b) where the insured is in a formal insolvency proceeding; (c) where the solvent commercial insured is confident it can obtain proceeds from the policy buy-back and retire the underlying

[40] 2002 Cal. App. Unpub. LEXIS 1965

claims for less than the funds received under the policy buy-back, thus profiting from the transaction; and (d) where there is a possibility that coverage will not ultimately be afforded, or where only some of the claims advanced are covered by the policy, and the insurer prefers to settle with the liability insurer and carry its own defence.

In the insolvency context, a claimant's ability to recover is impaired and the absence of insurance coverage will reduce – and often, practically eliminate – the claimant's prospects for recovery. In many cases, the insolvency coupled with the advice of the trustee that no insurance coverage is available, will be sufficient to make the claimants lose interest.

However, the risk to the insurer – both inside and outside of the insolvency context – is that it will ultimately be required to pay a judgment notwithstanding the policy buy-back. This risk is most acute outside of the context of formal insolvency proceedings, where a claimant has judgment against an insured which cannot be collected. To minimize this risk, caution should be used with respect to both the types of situations in which the policy buy-back is used and the manner in which any funds are paid out.

D. SUMMARY

A liability insurer faced with high exposure in multi-party litigation should explore creative solutions in order to ascertain and limit its indemnity and defence costs. Where an insured is a defendant in multiple claims for the same policy period and the total exposure exceeds the insured's policy limits, an attractive option for the insurer will be to pay the policy limits into court in exchange for a conclusive determination of the insured's liability and a discharge of the insurer's obligations.

A policy buy-back may be an option where the insured has no assets to protect, believes it can pay less to retire the claims than the insurer is willing to pay under a policy buy-back agreement, or wishes to carry its own defence in light of incomplete or uncertain coverage. Where an insured is insolvent, the policy buy-back presents an opportunity to extinguish the obligations of both the insurer and the insured under the policy and eliminate the incentive for claimants to pursue actions against the insolvent insured. Each of these two strategies has a role to play in limiting the insurer's total exposure.

APPENDIX A

COVENANT NOT TO SUE WHERE LEGAL ACTION HAS BEEN COMMENCED

WHEREAS:

[Insureds] (hereafter collectively "[Insured]") is alleged to have provided architectural services, including field reviews, in respect of a Condominium Project in the City of ◆, British Columbia located at ◆ (the "Project") and known as ◆;

The Owners, Strata Plan No. VIS◆ (the "Covenantor") has alleged that the Project has sustained water ingress and other problems and has commenced action against [Insured] and others in the Supreme Court of British Columbia; ◆ Registry Action Number ◆, (the "Action");

[Insured] and the Covenantor have reached a settlement of the Action; and

The Covenantor intends to continue the Action with respect to water ingress and other problems against other persons or corporations named in the Action and possibly add other parties to the Action.

NOW WITNESSETH THAT IN CONSIDERATION of the payment into Court of the aggregate sum of $1,000,000.00 (the "Settlement Funds") on behalf of [Insured], the Covenantor's right to seek a share of the Settlement Funds as determined with reference to the various other claimants having a right to seek a share of the Settlement

Funds and the mutual covenants and agreements contained herein, [Insured] and the Covenantor (the "Parties") agree as follows:

1. **THE COVENANTOR HEREBY COVENANTS NOT TO SUE** [Insured] or any one or more of [Insured]'s officers, directors, servants, employees, agents, partners, successors, or assigns, in respect of any causes of action, claims or demands of any nature or kind whatsoever, which the Covenantor now has or at any time hereafter may have against [Insured] arising out of any cause, matter or thing whatsoever existing up to and inclusive of the date of this Covenant and, in particular, but without in any manner restricting the generality of the foregoing, **THE COVENANTOR HEREBY COVENANTS NOT TO SUE** [Insured] in respect of any and all causes of action, claims and demands arising out of, directly or indirectly, or in any way connected with the provision of architectural services, including field reviews, in relation to the Project or any damages which heretofore have been or hereafter may be sustained in consequence of or arising out of or in any way connected with any of the allegations made or which could be made in the Action or in relation to the Project;

2. **THE COVENANTOR HEREBY COVENANTS NOT TO COMMENCE OR MAINTAIN LEGAL ACTION AGAINST** [Insurer] or any one or more of its officers directors, servants, employees , agents, partners, successors, or assigns, in respect of any causes of action, claims or demands of any nature or kind whatsoever, which the Covenantor now has or at any time hereafter may have against [Insurer] arising out of any cause, matter or thing whatsoever existing up to and inclusive of the date of this Covenant and, in particular, but without in any manner restricting the generality of the foregoing, the **COVENANTOR HEREBY COVENANTS NOT TO COMMENCE OR MAINTAIN LEGAL ACTION AGAINST** [Insurer] in respect of any and all claims, demands and causes of action, statutory or otherwise, including but not limited to an

action pursuant to section 24 of the Insurance Act, R.S.B.C. 1996, c. 266, arising out of, directly or indirectly, or in any way connected with the architectural services, including field reviews, provided by [Insured] in relation to the Project, the payment into Court of the Settlement Funds or any damages which heretofore have been or hereafter may be sustained in consequence of or arising out of or in any way connected with any of the allegations made or which could be made in the Action or in relation to the Project;

3. This is a compromise settlement of a disputed claim and the provision of the Settlement Funds by and on behalf of [Insured] shall not be deemed to be an admission of liability by [Insured];

4. [Insured] shall not be liable to make any payment whatsoever with respect to the Action other than the payment of the Settlement Funds;

5. The Covenantor in continuing the Action against the other parties named therein, or which may be added to the Action, will limit its claim for recovery to the several extent of liability of those other parties and will not seek to recover from those other parties any amount attributable to or arising from the liability of [Insured];

6. The Covenantor acknowledges its entitlement to the Settlement Funds is not exclusive and is subject to the entitlement of various other claimants who may seek a portion of the Settlement Funds;

7. The Parties agree that this instrument is a Covenant Not to Sue and is not and shall not be construed as a Release;

8. The Covenantor warrants and represents that:

(a) it has the full and corporate power and capacity to execute and deliver this Covenant and to perform the obligations of the Covenantor under this covenant; and

(b) the execution, delivery and performance of the Covenantor's obligations under this Covenant have been validly authorized by all necessary proceedings which apply to the Covenantor under its bylaws and the Strata Property Act, S.B.C. 1998, c. 43.

7. As a condition precedent to the payment into Court of the Settlement Funds, the Covenantor covenants to:

(a) forthwith obtain a Court Order amending its Writ of Summons and Statement of Claim as follows:

i) deleting [Insured] as a Defendant from the style of cause;

ii) inserting the following paragraph in the Statement of Claim:

> *"The Plaintiff expressly waives any right to recover from the Defendants any portion of the loss which the Plaintiff claims and which the court may attribute to the fault, liability or responsibility of [Insureds] for which the Defendants might reasonably be entitled to claim contribution, indemnity or an apportionment against [Insureds] pursuant to section 1 or 4 of the Negligence Act, R.S.B.C. 1996, c. 333 or any successor equivalent legislation."*

iii) deleting any other reference to [Insured] within the body of the Writ of Summons and Statement of Claim.

(b) forthwith discontinue the Action against [Insured], without any costs, and file the said Discontinuance in the Court Registry.

9. The Covenantor acknowledges that the information contained in the Affidavit of [name], to be sealed with the Court pursuant to the relief sought in the related Petition, is confidential and will not be disclosed to any party. The Covenantor agrees and consents, to facilitate the payment of the policy proceeds, to:

(a) not disclose or otherwise release to any person not involved with this proceeding or any other person or entity any of the contents of the Affidavit of [name] (hereafter the "Affidavit") provided in unsigned form as an integral part of a "without prejudice" settlement offer, and intended to be filed, upon being sealed by the Court, as a filed affidavit in support of the related Petition;

(b) consent to a Court Order in the Matter of [Insured] and an Application pursuant to Section 23 of the Insurance Act, R.S.B.C. 1996, c. 226 (the "Proceeding") that:

i) No one shall disclose or otherwise release to persons not involved with the Proceeding, or, any other person or entity any of the contents of the Affidavit;

ii) the Registrar forthwith seal the Affidavit;

iii) all persons, other than counsel for the Petitioner in the Proceeding, Dolden Wallace Folick LLP, and those expressly authorized by the Petitioner, be restrained and enjoined from using or having access to the contents and information in the Affidavit.

IN WITNESS WHEREOF THE AUTHORIZED SIGNATORY(S) OF THE COVENANTOR sign this Covenant Not to Sue at the City of _____, in the Province of British Columbia, this _____ day of _____, 2001.

THE OWNERS, STRATA PLAN ◆

Per: _____
Authorized Signatory

Per: _____
Authorized Signatory

APPENDIX B

COVENANT NOT TO SUE WHERE LEGAL ACTION HAS NOT BEEN COMMENCED

WHEREAS:

[Insureds] (hereafter collectively "[Insured]") has or may be alleged to have provided architectural services, including field reviews, in respect of a Condominium Project located at ◆, in the City of ◆, in the Province of British Columbia, (the "Project") and known as ◆;

The Owners, Strata Plan ◆ (the "Covenantor") has alleged or may allege that the building envelope at the Project has failed and that the Project is suffering from water ingress and other problems;

[Insured] and the Covenantor have reached a mutually agreeable settlement of any and all claims or potential claims which the Covenantor has now or may have in the future against [Insured] arising out of the design or construction of the Project, the provision of architectural services, including field services, for the Project, or any alleged water ingress problems in relation to the Project; and

The Covenantor may commence legal proceedings against other persons and parties that were involved in the design and construction of the Project.

NOW WITNESSETH THAT IN CONSIDERATION of the payment into Court of the sum of $1,000,000.00 (the "Settlement Funds") on behalf of [Insured], the Covenantor's right to seek a share of the Settlement Funds as determined with reference to the various other claimants having a right to seek a share of the Settlement Funds and

the mutual covenants and agreements contained herein [Insured] and the Covenantor (collectively the "Parties") agree as follows:

1. **THE COVENANTOR HEREBY COVENANTS NOT TO SUE** [Insured] or any one or more of their partners, directors, successors, assigns, servants, employees, agents in respect of any causes of action, claims or demands of any nature or kind whatsoever, which the Covenantor now has or at any time hereafter may have against [Insured] arising out of any cause, matter or thing whatsoever existing up to and inclusive of the date of this Covenant and, in particular, but without in any manner restricting the generality of the foregoing, the **COVENANTOR HEREBY COVENANTS NOT TO SUE** [Insured] in respect of any and all causes of action, claims and demands arising out of, directly or indirectly, or in any way connected with the provision of architectural services, including field reviews, in relation to the Project or any damages which heretofore have been or hereafter may be sustained in consequence of or arising out of or in any way connected with the provision of architectural services, including field reviews, in relation to the Project;

2. **THE COVENANTOR HEREBY COVENANTS NOT TO COMMENCE OR MAINTAIN LEGAL ACTION AGAINST** [Insurer] or any one or more of its officers directors, servants, employees , agents, partners, successors, or assigns, in respect of any causes of action, claims or demands of any nature or kind whatsoever, which the Covenantor now has or at any time hereafter may have against [Insurer] arising out of any cause, matter or thing whatsoever existing up to and inclusive of the date of this Covenant and, in particular, but without in any manner restricting the generality of the foregoing, the **COVENANTOR HEREBY COVENANTS NOT TO COMMENCE OR MAINTAIN LEGAL ACTION AGAINST** [Insurer] in respect of any and all claims, demands and causes of action, statutory or otherwise, including but not limited to an action pursuant to section 24 of the Insurance Act, R.S.B.C. 1996, c. 266, arising out of,

directly or indirectly, or in any way connected with the architectural services, including field reviews, provided by [Insured] in relation to the Project, the payment into Court of the Settlement Funds or any damages which heretofore have been or hereafter may be sustained in consequence of or arising out of or in any way connected with any of the allegations made or which could be made in relation to the Project;

3. The Covenantor covenants and agrees that they will not commence any actions, suits or other legal proceedings of any kind whatsoever against [Insured] or any other present or future architectural firm of which [Insured] may be members;

4. The Covenantor covenants and agrees that in the event that the Covenantor commences legal proceedings against any other persons or corporations ("the Defendants") as a result of the design or construction of the Project, the provision of architectural services, including field reviews, for the Project, or the alleged water ingress problems in relation to the Project, that they will plead in any Statement of Claim or similar document issued in respect of such proceedings that they expressly waive any right to recover from the Defendants any portion of the loss which the Covenantor claims and which the court may attribute to the fault, liability or responsibility of [Insured] for which the Defendants might reasonably be entitled to claim contribution, indemnity or an apportionment against [Insured] pursuant to section 1 or 4 of the Negligence Act, R.S.B.C. 1996, c. 333 or any successor equivalent legislation;

5. The Covenantor covenants and agrees to insert in any Statement of Claim or similar document issued by or on its behalf the following paragraph:

> "*The Plaintiff expressly waives any right to recover from the Defendants, or any of them, any portion of the loss which the Plaintiff claims and which the Court may attribute to the fault, liability or responsibility of [Insured], for which the Defendants , or any of them, might reasonably be entitled to claim contribution,*

indemnity or an apportionment against [Insured], pursuant to section 1 or 4 of the Negligence Act, R.S.B.C. 1996, c. 333 and amendments thereto or any successor equivalent legislation."

6. The Covenantor further covenants and agrees that [Insured] shall not be liable to make any payment whatsoever with respect to any Action or legal proceeding which may be commenced other than the payment of the Settlement Funds;

7. The Covenantor acknowledges its entitlement to the Settlement Funds is not exclusive and is subject to the entitlement of various other claimants who may seek a portion of the Settlement Funds;

8. The Covenantor warrants and represents that:

(a) it has the full and corporate power and capacity to execute and deliver this Covenant and to perform the obligations of the Covenantor under this covenant; and

(b) the execution, delivery and performance of the Covenantor's obligations under this Covenant have been validly authorized by all necessary proceedings which apply to the Covenantor under its bylaws and the Strata Property Act, S.B.C. 1998, c. 43.

9. The Parties agree that the payment of the Settlement Funds is not to be deemed to be an admission of liability on the part of [Insured] or their Insurers;

10. The Parties agree that this instrument is a Covenant Not To Sue and is not and shall not be construed as a Release;

11. The Settlement Funds are the sole consideration for this Covenant Not To Sue, and that the Settlement Funds are accepted voluntarily for the purposes of making a full and final compromise, adjustment and settlement of all claims of the Covenantor, which they now have or may have against [Insured] by reason of the design or construction of

the Project, the provision of architectural services, including field reviews, for the Project, or the alleged water ingress problems in relation to the Project.

12. The Covenantor acknowledges that the information contained in the Affidavit of [Name], to be sealed with the Court pursuant to the relief sought in the related Petition, is confidential and will not be disclosed to any party. The Covenantor agrees and consents, to facilitate the payment of the policy proceeds, to:

(a) not disclose or otherwise release to any person not involved with this proceeding or any other person or entity any of the contents of the Affidavit of [Name] (hereafter the "Affidavit") provided in unsigned form as an integral part of a "without prejudice" settlement offer, and intended to be filed, upon being sealed by the Court, as a filed affidavit in support of the related Petition;

(b) consent to a Court Order in the Matter of [Insured] and an application pursuant to Section 23 of the Insurance Act R.S.B.C. 1996, c. 226 (the "Proceeding") that:

i) No one shall disclose or otherwise release to persons not involved with the Proceeding, or, any other person or entity any of the contents of the Affidavit;

ii) the Registrar forthwith seal the Affidavit;

iii) all persons, other than counsel for the Petitioner in the Proceeding, Dolden Wallace Folick LLP, and those expressly authorized by the Petitioner, be restrained and enjoined from using or having access to the contents and information in the Affidavit.

IN WITNESS WHEREOF THE AUTHORIZED SIGNATORY(S) OF THE COVENANTOR sign this Covenant Not To Sue at the City of _____, in the Province of British Columbia, this _____ day of _____, 2001.

THE OWNERS, STRATA PLAN ◆

Per: _____
Authorized Signatory

Per: _____
Authorized Signatory

APPENDIX C

No.
Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

[INSURER]

PETITIONER

IN THE MATTER OF [INSURED] AND AN APPLICATION PURSUANT TO SECTION 23 OF THE INSURANCE ACT R.S.B.C. 1996, c. 226

PETITION TO THE COURT

THIS IS THE PETITION OF:

Insurer

c/o Dolden Wallace Folick LLP
Litigation Counsel
Tenth Floor-888 Dunsmuir Street
Vancouver, B.C., V6C 3K4
Attention: Eric A. Dolden

ON NOTICE TO:	**AND TO:**
[All Plaintiffs and other interested parties]	

Let all persons whose interests may be affected by the order sought TAKE NOTICE that the Petitioner applies to the court for the relief set out in this Petition.

IF YOU WISH TO BE HEARD at the hearing of the petition or wish to be notified of any further proceedings, YOU MUST GIVE NOTICE of your intention by filing a form entitled "Appearance" in the above Registry of this Court within the time for Appearance and YOU MUST ALSO DELIVER a copy of the "Appearance" to the Petitioner's address for delivery, which is set out in this Petition. YOU OR YOUR SOLICITOR may file the "Appearance". You may obtain a form of "Appearance" at the Registry. IF YOU FAIL to file the "Appearance" within the proper time for Appearance, the petitioner may continue this application without further notice.

Where this Petition is served on a person in British Columbia, the time for appearance by that person is 7 days from the service (not including the day of service).

Where this Petition is served on a person outside British Columbia, the time for appearance by that person after service, is 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

(1) ***The address of the Registry is:***

(2) ***The address for delivery is:***
Dolden Wallace Folick LLP
Tenth Floor - 888 Dunsmuir Street
Vancouver, B.C.
V6C 3K4
Attention: Eric A. Dolden
Fax number for delivery: (604) 689-3777

(3)	***The name and office address of Petitioner's solicitor is:*** as above

The Petitioner applies to this Court for:

A. firstly, an Order pursuant to the inherent jurisdiction of this Court, that:

1. No one shall disclose or otherwise release to any persons not involved with this proceeding, or, any other person or entity any of the contents or information in the Affidavit of [name] (the "Affidavit");

2. The Registrar forthwith seal the Affidavit and that all persons other than counsel for the Petitioner, Dolden Wallace Folick LLP, and those expressly authorized by the Petitioner, be restrained and enjoined from using or having access to the contents and information in the Affidavit; and

B. then, an Order pursuant to section 23 of the Insurance Act, R.S.B.C. 1996, c. 226, that:

1. The Petitioner, [Insurer], may pay into Court the proceeds of [policy details] (the "Policy"), which policy of professional liability insurance was in force from [policy period] in the sum of $1,000,000 ("the Policy Proceeds") pursuant to Section 23 of the Insurance Act, R.S.B.C. 1996, c. 226;

2. The payment into Court of the Policy Proceeds need not be made until the following conditions precedent have been satisfied:

(a) every Plaintiff and Claimant, as enumerated in Paragraphs 5 and 8 herein, has furnished a "Covenant Not To Sue" to the Petitioner's legal counsel;

(b) every Plaintiff in the Actions, as enumerated in Paragraph 5 herein, has obtained a Court Order amending its Writ of Summons and Statement of Claim in the following manner:

i) deleting [Insured] as Defendant(s) from the style of cause;

ii) inserting the following paragraph in the Statement of Claim:

> "*The Plaintiff expressly waives any right to recover from the Defendants, or any of them, any portion of the loss which the Plaintiff claims and which the Court may attribute to the fault, liability or responsibility of [Insureds], for which the Defendants , or any of them, might reasonably be entitled to claim contribution, indemnity or an apportionment against [Insureds], pursuant to section 1 or 4 of the Negligence Act, R.S.B.C. 1996, c. 333 and amendments thereto or any successor equivalent legislation.*"

iii) deleting any other reference to [Insureds] from the Writ of Summons or Statement of Claim; and

iv) every Plaintiff in the Actions has discontinued its Action against [Insureds] without any costs and filed the said Notice of Discontinuance in the Court Registry.

3. Upon payment into Court any one or more of the Plaintiffs or Claimants may make a claim on the Policy Proceeds as permitted by a Judge of this Honourable Court;

4. Upon receipt of the Policy Proceeds, the District Officer or other proper officer of this Court shall forthwith pay out the Policy Proceeds to an interest bearing trust account in favour of [Trustee name and address]; and

5. The receipt by the District Officer or other proper officer of this Court of the Policy Proceeds constitutes a full and complete discharge of the Petitioner in respect of any claim or demand either for costs or indemnity under the Policy.

At the hearing of this Petition will be read the Affidavit of [Insured] which is served herewith.

The facts upon which this Petition is based are as follows:

1. [Insurer] agreed to issue, *inter alia*, professional liability insurance upon the terms and conditions contained in the Policy.

2. The business of the Petitioner includes, *inter alia*, providing professional liability insurance to various classes of design professionals throughout Canada, including British Columbia.

3. The Petitioner issued a professional liability insurance policy that incepted effective [date], being Policy No. [X] (hereafter the "Policy"), to [Insured]. The Policy, by reason of its terms, provides that [named insureds] constitute the "insureds" for the purpose of coverage.

4. The Policy was a "claims made and reported" form for the period [policy period] (the "Policy Period"). The terms of the Policy provided limits of liability of $500,000 in respect of any one claim against [Insureds] with an aggregate policy limit of $1,000,000 in respect of all claims made against [Insureds] within the Policy Period (the "Policy Limits").

5. As at the date of this Petition five separate actions (collectively the "Actions") have been commenced against [Insureds] which, by reason of the terms of the Policy, fall within the grant of coverage. The Actions are as follows:

    [List of Actions]

6. In addition, and within the Policy Period, the Petitioner has been notified of a further six claims (collectively the "Claims") which have been or may be made against [Insureds]. While litigation proceedings have not yet been commenced

in respect of the Claims, they constitute a potential liability for damages against [Insureds] and thus, by reason of the terms of the Policy, fall within the grant of coverage afforded therein.

7. The Actions and Claims arise from architectural design services, including field reviews, provided by [Insureds] to facilitate the construction of various residential and commercial developments which have since been incorporated pursuant to the Condominium Act, R.S.B.C. 1996, c. 64, or the Condominium Act, R.S.B.C. 1979, c. 61.

8. The additional Claimants are as follows:

[List of claimants]

9. It is probable that the total liability of [Insureds] for the Actions and Claims will exceed the aggregate Policy Limits of $1,000,000 and there will not be sufficient insurance proceeds to satisfy fully all of the Actions and Claims against [Insureds].

10. The Petitioner admits liability for the Policy Proceeds conditional upon:

(a) all the Plaintiffs and Claimants furnishing a "Covenant Not To Sue" to the Petitioner's legal counsel; Dolden Wallace Folick LLP;

(b) each of the Plaintiffs in the Actions obtaining a Court Order amending its Writ of Summons and Statement of Claim in the following manner:

i) deleting [Insureds] as a Defendant(s) from the style of cause;

ii) inserting the following paragraph in the Statement of Claim:

> "*The Plaintiff expressly waives any right to recover from the Defendants, or any of them, any portion of the loss which the Plaintiff claims and which the Court may attribute to the fault, liability or responsibility of [Insureds], for which the Defendants , or any of them, might reasonably be entitled to claim contribution, indemnity or an apportionment against [Insureds], pursuant to section 1 or 4 of the Negligence Act, R.S.B.C. 1996, c. 333 and amendments thereto or any successor equivalent legislation.*"

iii) deleting any other reference to [Insureds] from the Writ of Summons or Statement of Claim; and

(c) each of the Plaintiffs discontinuing its Action against [Insureds] without any costs and filing the said Notice of Discontinuance in the Court Registry.

(d) every Plaintiff and Claimant covenanting to not disclose or otherwise release to persons not involved with this

proceeding, or, any other person or entity any of the contents of the Affidavit of [name] filed in this proceeding (the "Affidavit");

(e) every Plaintiff and Claimant consenting to a Court Order in this matter (the "Proceeding") requiring that:

iv) No one shall disclose or otherwise release to persons not involved with the Proceeding, or, any other person or entity any of the contents of the Affidavit;

v) the Registrar forthwith seal the Affidavit;

vi) all persons other than counsel for the Petitioner in the Proceeding, Dolden Wallace Folick LLP, and those expressly authorized by the Petitioner, be restrained and enjoined from using or having access to the contents and information in the Affidavit.

Dated: _____

_____
Solicitor for the Petitioner,
[Insurer]

This Petition to the Court is given by Eric A. Dolden of the law firm of Dolden Wallace Folick LLP, Litigation Counsel, whose place of business and address for delivery is

Tenth Floor - 888 Dunsmuir Street, Vancouver, British Columbia, V6C 3K4, Telephone (604) 689-3222

APPENDIX D

CLAIM RELEASE

This Claim Release dated and effective as of [date] is by and between [Insurer] and [Insured].

WHEREAS [Insurer] issued [policy] (the "Policy") to [Insured] for policy period [dates] (the "Policy Period");

WHEREAS the Policy, subject to all of its terms, conditions, exclusions, limitations, and Endorsements provided coverage to [Insured] for those sums that the insured becomes legally obligated to pay as compensatory damages because of bodily injury or property damage (as those terms are defined in the Policy);

WHEREAS the Policy granted to [Insurer] the right and duty to defend any action seeking compensatory damages against [Insured];

WHEREAS [Insured] has been named as a defendant and third party in British Columbia Supreme Court action [action number(s) and registry] (the "Action");

WHEREAS [Insured] is in bankruptcy, having made an assignment in bankruptcy on [date]; and

WHEREAS [trustee in bankruptcy] is the Trustee for [Insured].

NOW, THEREFORE, in consideration of the mutual covenants contained herein, it is agreed by and among [Insurer] and [Insured] as follows:

1. [Insurer[will pay to [Insured] Cdn. $X (the "Claim Release Funds") in satisfaction of any and all coverage which [Insured] had, may have had, have, may have or may be alleged to have had or have under the Policy with respect to the Action.

2. The execution and delivery of this Claim Release is a condition precedent to [Insurer's] payment of the Claim Release Funds contemplated in paragraph 1, above. [Insurer] will pay the Claim Release Funds upon its receipt of a fully executed copy of this Claim Release.

3(a) [Insured] and its agents, representatives, directors, officers, employees, executors, heirs, successors, predecessors, trustees, administrators and assigns (collectively, the "Insureds") hereby release and forever discharge [Insurer] and any of its present, former or future parent companies, subsidiaries, divisions, affiliates, agents, representatives, directors, officers, employees, executors, heirs, successors, trustees, administrators and assigns (collectively, "[Insurer]") from any and all actions, causes of action, suits, claims for sums of money, contracts, controversies, agreements, costs, lawyer fees, damages, judgments and demands whatsoever in law or in equity that the Insureds had, may have had, have, may have, or claim to have or have had against [Insurer] under the Policy arising out of the Action.

3(b) [Insurer] hereby releases and forever discharges the Insureds from any and all actions, causes of action, suits, claims for sums of money, contracts, controversies, agreements, costs, lawyer fees, damages, judgments and demands whatsoever in law or in equity that [Insurer] had, may have had, has, may have, or claims to have or have had against the Insureds under the Policy arising out of the Action.

4. [Insured] represents and warrants that it has not assigned any interest that it had, or may have had, or claim to have or have had by reason of the Policy.

5. [Insured] agrees to take no action or proceeding whatsoever against any person (legal or natural) not a party to this Claim Release that does or could result in a claim over against [Insured] for any form of contribution or indemnity.

6. [Insured] agrees and acknowledges that the agreement reflected in this Claim Release does not constitute a precedent and should not be relied upon by any person or entity as evidence of any obligation of any Insurer under the Policy, or any identical or similar policies.

7. Each and all of the terms and conditions of this Claim Release with respect to the Action are to be treated as strictly confidential, and all such terms shall remain privileged and private. Unless expressly compelled by court order, [Insured] shall not disclose, comment upon, or in any other way whatsoever publicize the fact of the agreement or any terms, conditions, aspects, or details of the agreement to any party other than

    i) its accountants;
    ii) a governmental taxing authority solely to the extent required to file or supplement a tax return;

iii) a governmental securities authority or the shareholders of [Insured] solely to the extent required to satisfy securities regulations or shareholder reporting requirements;
iv) its lawyer(s) solely to the extent required to enforce this Claim Release.

[Insured] acknowledges that this obligation of confidentiality is material to this agreement and that any breach of it will cause irreparable harm to [Insurer].

8. This Claim Release relates solely to the Action, the claims asserted in it, and the Policy coverage arising out of or related to it, and shall not affect any other rights or obligations of the Insureds or [Insurer] under the Policy.

9. By entering into this Claim Release [Insured] represents that it has relied on the advice of counsel, who is counsel of their choice, and that the terms of this Claim Release have been completely read by it and explained to it by counsel, and that these terms are fully understood and voluntarily accepted by it.

10. [Insured] represents that it has been represented by counsel in the negotiation, preparation, review and execution of this Claim Release. This Claim Release is the product of informed negotiations and [Insured] and [Insurer] agree that in the event of disagreement, dispute or controversy regarding this Claim Release, they shall be considered joint authors of this Claim Release and no provisions shall be interpreted against any party because of authorship.

11. This Claim Release shall be governed by and construed and enforced in accordance with the laws of the Province of British Columbia, and the Courts of British Columbia shall have exclusive jurisdiction with respect to any dispute, matter, or thing arising with respect to this Claim Release.

12. This Claim Release may be executed in counterpart, each of which shall be deemed to be an original, but all of which taken together shall constitute one and the same instrument.

13. The undersigned individuals executing this Claim Release on behalf of [Insured] and [Insurer] represent and warrant that they are authorized to enter into and execute this Claim Release on behalf of their respective party, and that the appropriate corporate resolutions and other consents, if any, have been passed or obtained and that this Claim Release shall be binding on the party on whose behalf they are executing it.

IN WITNESS WHEREOF, the parties have hereto set their hands as of the day first indicated above.

[INSURER]

Per:

_____

Name:
Title:

[Insured] per [trustee in bankruptcy], Trustee for [Insured]

Per:

_____

Name:
Title:

APPENDIX E

POLICY RELEASE

This Policy Release made and executed as of **[date]** by and between **[insurer]**, **[trustee]** in its capacity as the trustee in bankruptcy of **[insured]** and **[list names of directors and officers of insured]** (collectively the "**[insured]** Directors and Officers", and individually an "**[insured]** Director and Officer") (hereinafter, **[insured]** and the **[insured]** Directors and Officers shall be referred to collectively as the "**[insured]** Defendants").

RECITALS

WHEREAS, **[insurer]** issued **[insurer]** *for Directors and Officers* Policy No. ABC1234567890 (the "Policy") to **[insured]** for Policy Period 1 January, 2000 to 1 January, 2001 (the "Policy Period"), and the Policy expired in accordance with its terms at 12:01 a.m. (Mountain Time on 1 January, 2001;

WHEREAS, capitalized terms used in this Policy Release, including these recitals, have the meaning assigned to them in this Policy Release, unless otherwise defined in the Policy;

WHEREAS, on or about **[date of loss]**, **[here, outline the details and circumstances of the loss. e.g. leaky building claims, shareholders litigation, breach of contract, etc.]** (the "Loss").

WHEREAS, during the Policy Period, several actions, crossclaims, and third party claims arising from or out of or relating to the Loss were commenced in **[list Province]** or on behalf of the **[Plaintiff#1's name]** (the "Litigation").

WHEREAS, all references herein to the Litigation include, but are not limited to, the following proceedings, suits and claims;

[numerically list all the actions]

include any and all disputes, demands, claims, statements of claim, complaints, crossclaims, counterclaims, third party claims, and/or other proceedings asserted in or that could have been asserted in the listed Litigation, or arising from or out of, based in whole or in part upon, in consequence of, derivative of, or related to, directly or indirectly, the Loss;

WHEREAS, on or about January 1, 2002, **[Plaintiff #2]** commenced Action No. 123456 in the Supreme Court of British Columbia, Vancouver Registry, styled as **[style of cause]**)the "**[Plaintiff #2]** Action") and the **[Plaintiff #2]** Action is not included in and does not constitute part of the Litigation;

WHEREAS, the Policy, subject to its terms, conditions, exclusions, limitations, and Endorsements, provided coverage for the Director(s)/Officer(s) (as defined in the Policy) of **[insured]** for Loss (as defined in the Policy) on account of Claims (as defined in the Policy) first made against them only during the Policy Period for alleged Wrongful Acts (as defined in the Policy), provided that such Claims were reported to **[insurer]** in accordance with the Policy during the same Policy Period in which such Claims were first made;

WHEREAS, in the Litigation allegations of Wrongful Acts were made against each of the **[insured]** Directors and Officers in their respective capacities as Directors(s)/Officer(s) of **[insured]**, and, subject always to all of its reservations of rights, **[insurer]** provided coverage under the Policy for some of these allegations;

WHEREAS, effective January 1, 2002, a full and final settlement (the "Settlement") of all of the Litigation was concluded for the all-inclusive sum of $_____ _____ (the "Settlement Funds");

WHEREAS, the Policy required that the **[insured]** Defendants obtain **[insurer]**'s consent to any settlement of the Litigation, and **[insurer]** consented to the Settlement, subject to express terms and conditions;

WHEREAS, to the extent that the Settlement applies to class action proceedings commenced by or on behalf of **[Plaintiff #1]** and included within and constituting part of the Litigation, Court approval of the Settlement was required ("Class Action Approval");

WHEREAS, the **[Plaintiff #2]** Action was not settled in the Settlement, none of the Defendants named in the Litigation were released with respect to the **[Plaintiff #2]** Action and **[Plaintiff #2]** is not bound by the terms of the Settlement;

WHEREAS, after the issuance of the Policy and the commencement of the Litigation or some of it, **[insured]** filed for bankruptcy under the *Bankruptcy and Insolvency Act* (Canada), as amended. **[Trustee's name]** was appointed as **[insured]**'s Trustee in Bankruptcy and by Court Order dated January 1, 2002 and currently acts in that capacity;

WHEREAS, the Settlement was of no force and effect, and the obligations imposed by the Settlement could not be implemented, unless and until both the Class Action Approval and the **[insured]** Dividend Approval were reflected in issued and entered Court Orders (respectively, the "Class Action Approval Order" and the "**[insured]** Dividend Approval") from which no successful appeal, rehearing, or reconsideration is taken;

WHEREAS, on June 1, 2002, the Class Action Approval Order and the **[insured]** Dividend Approval Order were granted;

WHEREAS, the Class Action Approval Order provides that the completion of the Settlement is conditioned upon the satisfaction of several conditions stipulated in the Class Action Approval Order (the "Settlement Conditions");

WHEREAS, the **[insured]** Dividend Approval Order gave the Trustee the full and lawful authority to release, remise and forever discharge each and every Release Matter (as defined in Paragraph (13) below) released by **[insured]** in this Policy Release, and authorized the Trustee to enter into and execute this Policy Release on behalf of **[insured]**;

WHEREAS, the **[insured]** Dividend Approval Order approved a net **[insured]** Dividend, after the imposition of the Superintendent's Levy, of $_____, which sum is _____% of the Litigation Directors' Estate Claim, and the **[insured]** Dividend Approval Order provides that **[insured]** Dividend may be revised and/or increased to reflect the final Litigation defence costs of the **[insured]** Directors and Officers (hereinafter, all references to the "**[insured]** Dividend" shall mean and be understood as the **[insured]** Dividend as revised and/or increased to reflect the final Litigation defence costs of the **[insured]** Directors and Officer);

NOW, THEREFORE, in consideration of the mutual covenants, promises, agreements, and conditions contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledge, **[insurer]**, the **[insured]** Defendants, and the Trustee, intending to be legally bound, agree as follows:

AGREEMENTS

1. **[insurer]**, the **[insured]** Defendants, and the Trustee each agree and acknowledge that to the best of their knowledge, information, and belief the recitals set forth above are true and accurate, and these parties each agree that such recitals are part of this agreement.

2. In addition to the Defence Costs (as defined in the Policy) incurred by and/or on behalf of the **[insured]** Directors and Officers with respect to the Litigation which have, to the date of the Policy Release, been allocated to and already paid under the Policy by **[insurer]** (the "Paid Defence Costs"), in consideration of **[insurer]** and **[insured]** Defendants' mutual execution of this Policy Release and their mutual agreement to be legally bound by its terms, and in full and final settlement of the Released Matters (as hereinafter defined in Paragraph (13) of the Policy Release), **[insurer]** will pay to or for the benefit of the Shareholders, on behalf of the **[insured]** Directors and Officers, the total all-inclusive sum of $_____.

3. In addition to the amounts paid or to be paid pursuant to Paragraph (2) above, upon the submission to **[insurer]** of further invoices in a form acceptable, **[insurer]** will pay __% of the further Defence Costs (the "Additional Defence Costs") incurred by and/or behalf of the **[insured]** Directors and Officers with respect to the Litigation until the time that all of the Settlement Funds are released to or for the benefit of the Shareholders in accordance with and as contemplated by the Class Action Approval Order, and/or, incurred as is reasonably necessary to complete the Settlement after the proper release of the Settlement Funds to or for the benefit of the Shareholders. The allocation of Defence Costs stipulated in this Paragraph (3) is in accordance with the express allocation provisions of the Policy.

4. Further, upon the full and final completion of the Settlement (including without limitation the release of the full amount of the Settlement Funds, including the **[insurer]** Funds, in accordance with the terms of the Class Action Approval Order), to the extent that any of the **[insured]** Directors and Officers have personally paid lawyer, expert, and/or mediation-related fees and costs and/or court reporting, transcript, and/or other litigation disbursements solely to defend the Litigation, for which they have not been indemnified, insured, or otherwise reimbursed in any manner or from any source. **[insurer]** will reimburse such **[insured]** Directors and Officers for ___% of the established defence fees and costs personally paid by them (The "Reimbursed Defence Costs").

5. The full and formal execution of this Policy Release by or on behalf of each and all of the **[insured]** Defendants, including as the case may be signed counterparts as provided for in Paragraph (28) below, and the delivery upon **[insurer]** at **[address]** of one (1) originally executed fully signed copy of this Policy Release by no later than 2 p.m. (Mountain Time) on July 1, 2002 are condition precedents to the making of any of the payments contemplated in Paragraphs (2), (3) and (4) above. This Policy Release shall only be considered delivered upon **[insurer]** when it is delivered in accordance with Paragraph (28) below. On or before September 1, 2002, only after the satisfaction of the two-(2) conditions precedent stipulated in this Paragraph (5), **[insurer]** will transfer the **[insurer]** Funds as directed jointly by all of the **[insured]** Defendants. Each and all of the **[insured]** Defendants, jointly and severally, irrevocably direct that the **[insurer]** Funds by paid by **[insurer]** in accordance with wire transfer details to be provided to **[insurer]** in writing by no later than 2 p.m. (Mountain Time on July 1, 2002).

6. Until and only upon the satisfaction of all of the Settlement Conditions stipulated in the Class Action Approval Order, the Settlement Funds are to be held in trust account(s), and invested in segregated interest bearing account(s) with a Canadian chartered bank in Vancouver. The Settlement Funds shall be disbursed in accordance with the Class Action Approval Order, and it is agreed that the **[insurer]** Funds must and shall be held with and released and/or disbursed in the same manner and on the same terms as the remainder of the Settlement Funds.

7. This Policy Release shall become effective, and may be relied upon and enforced by **[insurer]**, immediately upon release of the **[insurer]** Funds or any part thereof (the "Effective Time").

8. If **[insurer]** makes the wire transfer payment of the **[insurer]** Funds in accordance with Paragraphs (2) and (5) above, but the Settlement Conditions or one(1) or some of them are not satisfied such that the Settlement Funds cannot be disbursed in accordance the Class Action Approval Order, each and all of the **[insured]** Defendants, jointly and severally, hereby authorize counsel to take all reasonable and required steps, not prohibited by the Class Action Approval Order, to seek any and all Court Order(s) (collectively, the "Payment Return Order") required to permit the expedient return to **[insurer]** of the **[insurer]** Funds, plus all interest accrued thereon., If the Payment Return Order is obtained and not successfully appealed, the **[insured]** Defendants jointly and severally agree that the **[insurer]** Funds plus all interest accrued thereon shall be returned to **[insurer]** in accordance with the Payment Return Order, by wire transfer by no later than two (2) business days after the earliest of (a) the date upon which the Payment Return Order appeal period expires without an appeal, or (b) by the date upon which any appeal of the Payment Return Order is fully

and finally resolved. Any return of the **[insurer]** Funds required in accordance with this Paragraph (8) shall be affected in accordance with the same wire transfer detail provided by **[insurer]** pursuant to Paragraph (9) below, and on the basis that time is of the essence. Only in the event that **[insurer]** receives the returned **[insurer]** Funds is accordance with this Paragraph (8), this Policy Release shall be null and void and of no force and effect.

9. As a condition of the Settlement, and in consideration of the payments contemplated in Paragraphs (2), (3) and (4) above, each and all of the **[insured]** Directors and Officers, jointly and severally, irrevocably direct the Trustee to pay the whole of the **[insured]** Dividend to **[insurer]** and such payment will be made by the Trustee to **[insurer]** forthwith as soon as possible after both the issue and entry of the **[insured]** Dividend Approval Order and the calculation of the final Litigation costs of the **[insured]** Directors and Officers, but in no event later than 4 p.m. (Mountain Time) on September 1, 2002 unless the Trustee and **[insurer]** both agree in writing to a different date by which the **[insured]** Dividend must be paid by the Trustee to **[insurer]**. The Trustee shall pay the **[insured]** Dividend to **[insurer]** in accordance with wire transfer details to be provided by **[insurer]** to the Trustee in writing as soon as possible after the execution of this Policy Release.

10. The **[insured]** Directors and Officers and the Trustee hereby expressly agree that immediately upon **[insurer]**'s receipt of the **[insured]** Dividend payment in accordance with Paragraph (9) above, the whole of the **[insured]** Dividend shall be the sole property, legally and beneficially, of **[insurer]**, the **[insured]** Directors and Officers have no interest whatsoever, legal or beneficial in the **[insured]** Dividend, the **[insured]** Dividend is not impressed with any trust or alleged trust of any kind whatsoever in favour of the **[insured]** Directors and Officer,

[insured] or the Trustee or any of them or any representative, agent, or successor thereof, and **[insurer]** may deal with the **[insured]** Dividend solely as it sees fit in its sole and ultimate discretion for the sole benefit of **[insurer]**.

11. Only in the event that **[insurer]** receives the returned **[insurer]** Funds in accordance with and stipulated in Paragraph (8) above, **[insurer]** agrees to take all reasonable and appropriate steps necessary to ensure the immediate and expedient return to the Trustee of the full amount of the **[insured]** Dividend pay by the Trustee to **[insurer]** in accordance with Paragraph (9) above by no later than two (2) business days after **[insurer]** has received both the returned **[insurer]** Funds and the Trustee's written wire transfer details. Any return of the **[insured]** Dividend required in accordance with this Paragraph (11) shall be affected in accordance with written wire transfer details provided by the Trustee to **[insurer]**, and on the basis that time is of the essence.

12. In consideration of the payments contemplated in Paragraph (2), (3) and (4) above, and as required by the Policy, the **[insured]** Directors and Officer agree that **[insurer]** will be provided, time being of the essence, with copies of the fully and formally executed and/or issued Litigation settlement documentation, included without limitation the issued and entered Class Action Approval Order and the **[insured]** Dividend Approval Order, as soon as same is available.

    a) Save for their right to enforce the terms of this Policy Release, and in particular without limitation their rights expressly preserved and not released in Paragraphs (15) (16), and (17) below, the **[insured]** Directors and Officers, on behalf of themselves and their respective agents, representative, executor, heirs, successors, predecessors, trustees, administrators, lawyers, assigned, and all other persons or entities acting in concert with them, and the Trustee, on behalf of **[insured]**, (collectively,

including **[insured]**, hereinafter referred to as the "**[insured]** Defendants") hereby remise, release and forever discharge **[insured]** and any of its present, former or future parent companies, subsidiaries, divisions, affiliates, agents, representatives, Directors, Officers, employees, executors, heirs, successors, predecessors, trustees, shareholder, underwriters, lawyers, brokers, insurers, reinsurers, claims managers, administrators, assigns and all other persons or entities acting n concern with them (collectively, "**[insured]**") of and from any and all actions, rights of action, causes of action, suits, claims for sums of money, contracts, controversies, agreements, costs, lawyer, expert and other professional fees, damages, judgments and demands whatsoever in law or in equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, contingent or non-contingent, matured or inchoate, that the **[insured]** Defendants had, may have had, have, may have, or claim to have or have had against **[insurer]** under the Policy or otherwise now or in the future arising from or out of, based in whole or in part upon, in consequence of, derivative of, or in any manner related to, directly or indirectly, the Litigation, and/or conduct of **[insurer]** in connection with the Litigation and/or its Settlement, including without limitation all damages, loss or injury not now known or anticipated but which may arise in the future and all effects and consequences thereof.

b) Save for its rights to enforce the terms of this Policy Release and in particular without limitation its rights expressly preserved and not released in Paragraphs (15), (16) (17), and (19) below, **[insurer]** hereby remises, releases and forever discharges the **[insured]** Defendants of an from any and all actions, rights of action, causes of action, suits, claims for sums of money, contracts, controversies, agreements, costs, lawyer, expert

and other professional fees, damages, judgments and demands whatsoever in law or in equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, contingent or non-contingent, matured or inchoate, that **[insurer]** had, may have had, has, may have, or claims to have or have had against the **[insured]** Defendants under the Policy or otherwise now or in the future, arising from or out of, based in whole or in part upon, in consequence of, derivative of, or in any manner related to, directly or indirectly, the Litigation, and/or the conduct of the **[insured]** Defendant in connection with the Litigation and/or its Settlement, including without limitation any and all negotiations leading to this Policy Release, all including without limitation any and all negotiations leading to this Policy Release, all including without limitation all damages, loss or injury not now known or anticipated but which may arise in the future and all effects and consequences thereof.

c) The releases by each of the **[insured]** Defendants in Paragraph 12(a) and **[insured]** in Paragraph 12(b) are referred to herein collectively as the "Released Matters" and individually as a "Released Matter".

13. Each of the **[insured]** Defendants acknowledge and agree that, subject only to Paragraph (14) and (15) below, the Released Matters set out in Paragraph (12)(a) above shall include and/or extend to, among other things and without limitation, claims for "bad faith", unfair claims handling practices and any breach of any similar law, including any violation of any applicable statute, or any common law claims for "bad faith" insured practices or breach of the implied covenant of good faith and fair dealing or breach of contract. Save only for the rights, entitlements, and defences expressly preserved and not released in Paragraphs (14) and (15) below, each and all of the **[insured]** Defendants agree

never to file, directly or indirectly, any action, proceeding or claim against **[insurer]** arising from or out of, based in whole or in part upon, derivative of, in consequence of, or in any manner related to, directly or indirectly, the Released Matters, including but limited to any action, proceeding or claim arising from **[insurer]**'s investigation, evaluation, or handling of the Litigation, **[insurer]**'s involvement in the Settlement of the Litigation or alleging any "bad faith," breach of any covenant, promise or obligation (oral or written), or breach of any duty founded in law, equity or contract.

14. It is agreed that the Released Matters do not include any or all actions, rights of action, causes or action, suits, claims for sums of money, controversies, costs, lawyer, expert or other professional fees, demands, judgments, and/or other proceedings asserted, made, or commenced by the Op-Out Shareholders or any Opt-Out Shareholder or some of them, whether now existing or may be asserted, made or commenced in the future, solely to the extent that such Opt-Out Shareholder(s) make allegations arising from or relating to the Loss. Each of the **[insured]** Defendants and **[insurer]** expressly reserve all of their rights, entitlements, and defences under or arising from our out of the Policy with respect to any Opt-Out Claim, an nothing in this Policy Release shall prejudice, waive, estoppe, diminish or in any other way affect such rights, entitlements, and defences.

15. It is agreed and acknowledged that this Policy Release does not apply to the **[Plaintiff #2]** Action or any third or other subsequent party claim brought solely within the **[Plaintiff #2]** Action against the **[insured]** Directors and Officers. Each of the **[insured]** Defendants and **[insurer]** expressly reserve all of their rights, entitlements, and defences under or arising from or out of the Policy with respect to the **[Plaintiff #2]** Action or any third or other subsequent party claim

brought solely within the **[Plaintiff #2]** Action, and nothing in this Policy Release shall prejudice, waive, estoppe, diminish or in any other way affect such rights, entitlements and defences.

16. The Trustee agrees that neither the terms and provisions of this Policy Release or the **[insured]** Dividend Approval Order nor the payment to **[insurer]** of the **[insured]** Dividend in accordance with this Policy Release preclude the **[insured]** Directors and Officers and/or **[insurer]** from making a claim for indemnification against **[insured]** bankrupt estate (the "Directors' Secondary Estate Claim") to the extent that fees and costs are incurred to defend the **[Plaintiff #2]** Action and/or any Opt-Out Claim on behalf of the **[insured]** Directors and Officers and/or to the extent that the **[insured]** Directors and Officers and/or **[insurer]** on their behalves pay an amount to settle or satisfy a Judgment obtained in **[Plaintiff #2]** and/or any Opt-Out Claim. Each of the **[insured]** Directors and Officers and **[insurer]** expressly preserve and do not release all of their rights under the law and/or in equity to make a Directors' Secondary Estate Claim, and nothing in this Policy Release shall prejudice, waive, estopped, diminish or in any other way affect such rights.

17. Save as expressly stipulated in Paragraphs (14) and (15) above, the **[insurer]** Funds, the Paid Defence Costs, the Additional Defence Costs, and the Reimbursed Defence Costs will be or have been paid by **[insurer]** in full and final satisfaction of any and all coverage rights and/or entitlements that the **[insured]** Defendants or any of them had, may have had, have, may have or may be alleged to have had or have under the Policy now or in the future arising from or out of or with respect to the Released Matters. Each of the **[insured]** Defendants agrees that, except for the rights and entitlements and defences expressly preserved in Paragraphs (14) and (15) above, they will not seek any other

reimbursement, contribution, indemnification, and/or payment from **[insurer]** under or arising from or out of the Policy with respect to the Released Matters. Each and all of the **[insured]** Defendants recognize and acknowledge that, at the Effective Time, **[insurer]** shall have no further obligation to the **[insured]** Defendant or any of them under or arising from or out of the Policy with respect to the Released Matters, save for the payments stipulated in Paragraphs (2), (3) and (4) above and the rights, entitlements, and defences express preserved in Paragraphs (14) and (15).

18. Each of the **[insured]** Defendants agree to take no action or proceedings whatsoever against any person (legal or natural) (hereinafter such action or proceeding shall be referred to as an "Ancillary Action") that does or could result in a claim over against **[insurer]** in any way whatsoever related to the Released Matters for any form of contribution, indemnity or other relief over whether arising at law, in equity, under or pursuant to the Policy or any contract, or under the provisions of any statue (collectively, such claim over shall be hereinafter referred to as a "Claim Over). This Paragraph (18) does not prohibit an **[insured]** Defendant from taking action or commencing a proceeding against any person (legal or natural) solely as part of its response to or in defence of the **[Plaintiff #2]** Action or an Op-Out Claim defined in Paragraph (14) above. The **[insured]** Defendants further hereby consent to an Order dismissing any Ancillary Action prohibited by this Paragraph (18) and authorize **[insurer]** to endorse a Consent of the **[insured]** Defendants or any of them to any such Order and, alternatively, at **[insurer]**'s sole election, each of the **[insured]** Directors and Officers agree to wholly indemnify, defend, and hold harmless **[insurer]** against, from, and with respect to any Claim Over against **[insurer]** resulting from Ancillary Action commenced or brought by him or her that is prohibited by this Paragraph (18).

19. Each and all of the **[insured]** Directors and Officers represent and warrant to **[insurer]** that they are the sole and absolute owners of each and every Released Matter released by them in this Policy Release, and that they have hall and lawful authority to release, remise, and forever discharge each and every such Released Matter in this Policy Release. The **[insured]** Directors and Officer each further represent and warrant to **[insured]** that they have not voluntarily or involuntarily assigned, transferred, or purported to assign or transfer to any person (legal or natural) whatsoever any Released Matter released by them in this Policy Release or part thereof, and/or any interest that the **[insured]** Directors and Officers or any of them had, may have had, have, may have, or claim to have or have had in, under, related to, or arising from the Policy. With respect only to **[insured]**, the Trustee represents or purported to assign or transfer to any person (legal or natural) whatsoever any Released Matter released by **[insured]** in this Policy Release or part thereof, and/or any interest **[insured]** had, may have had, has, may have, or claims to have or have had in, under, related to, or arising from this Policy.

20. Each of the **[insured]** Directors and Officers represent and warrant to **[insurer]** that:

    a) Except for the Litigation expressly enumerated in subparagraphs (1) to (19) of the last full recital on Page 1 of this Policy Release in which he or she is name as a Defendant, the **[Plaintiff #2]** Action as defined in the second full recital on Page 3 of this Policy Release (if he or she is named as a Defendant therein), he or she has not received, has not been served with, has not been told about, is not aware of, and/or has no knowledge or information whatsoever about any allegation, dispute, demand, complaint, claim, suit, action, crossclaim, counterclaim, third party claim

or other proceeding, or any other Claim made or commenced against him or her during Policy Period between 12:01 a.m. (Mountain Time) on 1 January, 2000 to 12:01 a.m. (Mountain Time) on 1 January, 2001, arising from or out of, based in whole or in part upon, in consequence of, derivative of, or related to, directly or indirectly, the Loss.

b) he or she has already reported to **[insurer]** any allegation, dispute, demand, complaint, claim, suit, action, crossclaim, counterclaim, third party claim or other proceeding, or any other Claim which, upon the execution of this Policy Release, he or she currently has any reason to believe is or may be covered under the Policy or with respect to which he or she currently has reason to believe he or she is or may be entitled to any reimbursement, indemnity, contribution, payment, defence, or hold harmless from **[insurer]**; and

c) for the purpose of making and confirming the accuracy of the representations and warranties set out in Subparagraphs 20(a) and (b) above, he or she has undertaken a thorough and diligent review of his or her own documents and files and has made inquiries of and had discussions with the counsel of his or her choice, his or insurance broker or agent, and/or his or her other representative or agent that he or she knows to have been involved in any way in addressing or responding to allegations, demand, or Claims made against him or her.

Each of the **[insured]** Directors and Officers acknowledge and understand that the representations and warranties made by him or her in this Paragraph (20) are material to this Policy Release and its Agreements, that such representations and warranties are provided as a term and condition of **[insurer]**'s consent to the Settlement, and that the provisions of this Policy Release, and in particular the

scope and breadth of the Released Matters, were agreed to by **[insurer]** in reliance upon such representations and warranties. In the event that after the execution of this Policy Release, **[insurer]** is notified for the first time of any allegation, dispute, demand, complaint, claim, suit, action, crossclaim, counterclaim, third party claim or other proceeding, or any other Claim made or commenced against any **[insured]** Director or Officer during the Policy Period between 12:01 a.m. (Mountain Time) on 1 January, 2000 to 12:01 a.m. (Mountain Time) on 1 January, 2001, or arising from or out of, based in whole or in part upon in consequence of, derivative of, or related to, directly or indirectly, the Loss of which any **[insured]** Director and Officer had any knowledge, awareness or information at the time of the execution of this Policy Release (the "Known Matter"), it is agreed and understood that **[insurer]** shall be entitled to assert and rely upon, as against each **[insured]** Director or Officer who had knowledge, awareness or information of or about the Known Matter, all of its rights, defences, and entitlements under the Policy, at law, and/or in equity with respect to the Known Matter, and all such rights, defences, and entitlements are expressly reserved by **[insurer]**. Additionally, it is agreed and understood that if a **[insured]** Directors and Officer breach any representation and warranty made by him or her in this Paragraph (20) because he or she had knowledge, awareness, or information of or about a Known Matter at the time that this Policy Release is executed, such breach will exclude reimbursement, indemnity, contribution, payment, defence or hold harmless, or any other coverage by or from **[insurer]** for that **[insured]** Director and Officer with respect to such Known Matter. It is agreed and understood that neither an Opt-Out Claim as defined in Paragraph (14) above nor the **[Plaintiff #2]** Action constitute a Known Matter.

21. Except for the Litigation or some of them expressly enumerated in subparagraphs (1) to (19) of the last full recital on Page 1 of this Policy Release, the **[Plaintiff #2]** Action as defined in the second full recital on Page 3 of this Policy Release, the Trustee represents and warrants to **[insurer]** that, to the best of its knowledge, information, and belief, it has not been made aware of any allegation, dispute, demand, complaint, claim, suit, action, crossclaim, counterclaim, third party claim or other proceeding, or any other Claim made or commenced against the **[insured]** Directors and Officers or one (1) or some of them during the Policy Period between 12:01 a.m. (Mountain Time) on 1 January, 2000 to 12:01 a.m. (Mountain Time) on 1 January, 2001, or arising from or out of, based in whole or in part upon in consequence of, derivative of, or related to, directly or indirectly, the Loss.

22. Each and all of the terms and conditions of the settlement between each and all of the **[insured]** Defendants and **[insurer]** (hereinafter, the "Coverage Settlement") are to be treated as strictly confidential, and all such terms and conditions shall remain privileged and private. Unless expressly compelled by Court Order or required by applicable legislation and/or regulation, including solely with respect to **[insured]** any legal requirement with respect to the approval of **[insured]**'s Inspectors in bankruptcy, neither the **[insured]** Defendants, or any of them, nor **[insurer]** shall disclose, comment upon, or in any other way whatsoever publicize the terms, conditions, aspects, details of the Coverage Settlement to any other party other their accountant(s) and/or auditor(s), their lawyers to the extent required to negotiate, prepare, review and/or enforce this Policy Release solely to the extent necessary to effect the Settlement and obtain, issue, entered, solely to the extent necessary to effect the Settlement and obtain, issue, enter, and/or enforce the Class Action Approval Order and the **[insured]** Dividend Approval Order, **[insured]**'s Inspectors solely

to the extent necessary for **[insured]** to obtain approval of and effect the **[insured]** Dividend payment, a governmental taxing authority solely to the extent require4d to file or supplement a tax return, **[insurer]**'s insurers and/or reinsurers, and any insurance regulator or auditor, a limited number of **[insurer]**'s and Trustee's respective Directors, Officers, and/or employees solely to the extent they need to know, and **[ABC Inc.]** solely in its capacity as **[insured]**'s former insurance broker, all of whom shall maintain the confidentiality thereof. To the extent that any disclosure, comment is permitted by this Paragraph (22), during or in the permitted disclosure, comment, or other publication, an express statement that the Coverage Settlement does not constitute and cannot be offered as an admission of any wrongdoing by or liability or obligation of **[insurer]** or any of the **[insured]** Defendants must be made.

23. The Settlement of the Litigation constitutes the compromises of a doubtful and disputed claim, and neither the payment of any sum of money nor the execution of this Policy Release shall constitute, be construed as, or offered or received into evidence as, an admission of any wrongdoing by, or liability of obligation of, **[insurer]** or any of the **[insured]** Defendants.

24. Each of the **[insured]** Defendants and **[insurer]** agree and acknowledge that the agreement reflected in this Policy Release does not create or establish any precedent and should not be relied upon by any person or entity as evidence of any obligation of any insurer under the Policy or any identical or similar policies.

25. By executing this Policy Release, each of the **[insured]** Defendants and **[insurer]** represent that they relied upon the advice of counsel, who is counsel of their choice, and that the terms of this Policy Release have been completely read by

them and explained to them by counsel, and that these terms are fully understood and voluntarily accepted by them.

26. Each of the **[insured]** Defendants and **[insurer]** acknowledge and agree that each has been given an opportunity to read this entire Policy Release and to review this Policy Release independently with legal counsel, and that they have been represented by counsel in the negotiation, preparation, review, and execution of this Policy Release and have agreed to the particular language of the provisions thereof. This Policy Release is the product of informed negotiations and the **[insured]** Defendants and **[insurer]** agree that in the event of disagreement, dispute or controversy regarding this Policy Release, they shall be considered joint authors of it and no provisions shall be interpreted against any party because of authorship.

27. This Policy Release, and any and all disputes arising under or related to it (whether it based upon common law, contract, tort, statute, rule, regulation, or otherwise) shall be governed by and construed and enforced in accordance with the laws of the Province of British Columbia, without giving effect to the choice of law rules of that jurisdiction, and the Court of British Columbia shall have exclusive and prevailing jurisdiction with respect to any dispute, matter, or thing arising with respect to the Policy Release.

28. This Policy Release may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which taken together shall constitute one and the same instrument. Signed copies or signature pages of this Policy Release may be delivered to the parties by facsimile transmission, which will constitute complete delivery and a binding agreement, provided however that appropriate proof of transmission and receipt are obtained and maintained,

and the originally signed copies of this Policy Release and/or all of its signature pages are thereafter immediately delivered to the parties by overnight courier.

29. The undersigned individual executing this Policy Release on behalf of **[insurer]** represents and warrants that he or she is authorized to enter into and execute this Policy Release on behalf of **[insurer]**, the appropriate corporate resolutions and other consents, if any, have been passed and/or obtained and that his Policy Release shall be binding on **[insurer]**. In accordance with the authority given to the Trustee in the **[insured]** Dividend Approval Order, this Policy Release shall be binding on **[insured]**.

IN WITNESS WHEREOF, the parties have hereto set their hands as of the date first indicated above.

[INSURED CO.]

_____
Name: John Doe

[ABC CO. IN ITS CAPACITY AS THE TRUSTEE IN BANKRUPTCY OF [INSURED CO.] AND NOT IN ITS PERSONAL CAPACITY

_____
Name: John Doe #2
Title: Vice President

_____
Witness

_____
John Doe #3