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Overlapping Insurance Policies: The Court of Appeal of Ontario toes the line!

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On January 16 last, the Supreme Court of Canada refused to grant leave to appeal by Lombard following a judgment rendered on June 20, 2013 by the Ontario Court of Appeal.[1]

This decision deals with the issue of overlapping excess and umbrella policies.

THE FACTS
In January 1995, an apartment building was destroyed by fire. Six people died and many others were injured. Actions were then instituted by the victims for several millions of dollars against:

Axes Investment ("Axes") the owner of the building
Tandem Group Management ("Tandem", a building manager)

Lombard and Aviva insured Axes and Tandem's liability in the following way:

Lombard was the primary insurer of Axes and Tandem with a $1M policy limit
Lombard was the umbrella insurer of Axes and Tandem for a $9M policy limit
Aviva was the excess insurer of Tandem for a limit of $5M

Within the scope of the liability proceedings instituted by the victims against Axes and Tandem, Lombard assumed Axes and Tandem's defence by retaining one and the same counsel. The same defence was filed by Lombard, Aviva, Axes and Tandem and none of them ever requested that the liability between Axes and Tandem be apportioned. Axes and Tandem were found liable as if they were a single defendant.

Lombard took the position that Aviva's excess policy would be required to respond after Lombard's primary policy and that Lombard's umbrella policy was triggered only after Aviva's $5M policy was exhausted. Aviva took the position that Lombard's policy should be next to respond completely as it covered both Tandem and Axes.

Following this decision, a judgment of the Ontario Court of Appeal confirmed a priority proceeding that the Aviva's excess policy was triggered prior to Lombard's umbrella policy with respect to Tandem's liability only. This decision is known as the "Ranking Decision".

Faced with a threat of having to pay punitive damages and a refusal of Lombard to a joint contribution, Aviva "blinked" and paid the balance of the claims made both against Axes and Tandem in the amount of almost $2.5M as the two were held solidarily liable. Lombard had paid the first million dollars.

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Neither the Priority decision nor the Ranking Decision addressed whether, or to what extent, liability would be shared if Aviva's payment on behalf of Tandem exhausted the liability of both defendants, jointly.

Aviva then sued Lombard in order to claim the payments made on behalf of Axes, whom it did not insure. Lombard argued that its umbrella policy did not apply once Aviva's excess policy limits were exhausted. The Superior Court ordered Lombard to reimburse half of the damages by Aviva. Lombard appealed.

ONTARIO COURT OF APPEAL JUDGMENT

Relying on the Supreme Court of Canada's decision in *Family Insurance Corp*. v. *Lombard Canada*,[2] and on the theory of equitable contribution and the restitutionary principles of unjust enrichment, both notions imposed by equity, the Court of Appeal of Ontario confirmed the judgment holding Lombard responsible. The theory of equitable contribution between insurers was applied in this case to require Lombard to contribute to Aviva's payment of the loss. Payment of the loss by Aviva was, in reality, according to the Court of Appeal, payment on behalf of both Tandem and Axes. Lombard insured both Tandem and Axes. The Court held that while Lombard was not required to respond next to the loss on behalf of Tandem in light of the Ranking Decision, it was required to respond to the loss on behalf of Axes and should therefore contribute 50% of the total loss.

In fact, since the two insurers purposely decided to not request an apportionment of liability between Axes and Tandem, they rendered themselves liable towards the victims to indemnify them completely and equally. In other words, Lombard and Aviva were each equally obligated to respond to the plaintiffs' claim in full. The Court added that "*The fact that Aviva blinked first*" does not detract from Lombard's legal obligations to respond, had the tort plaintiffs pursued Aviva alone. "Blinking" cannot be the defining principle of insurance law upon which the respective responsibilities of Aviva and Lombard for responding to the losses are determined.

CONCLUSION

This decision is interesting notably with respect to the impact that the choice of the defence strategy can have on another insurer. Hence, if for strategic or economic reasons an insurer decides not to request the apportionment of liability between insureds and there is a judgment without the apportionment of liability, it may be ordered to pay its part of indemnity to the victims.

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1 *Aviva Insurance Company of Canada* v. *Lombard General Insurance Company of Canada*, 2013 ONCA 416.

2 [2002] 2 S.C.R. 695.

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