

FOCUS ON INSURANCE LAW



An oddity in
Insurance Law

U.S. gender rating looks good on Canada

Three cheers for Canada's health care system! It prevents gender rating (charging women higher health insurance rates than men for the same services), which is a rampant practice in the U.S.

A California law recently banned gender rating, and the U.S. National Women's Law Center wants to see the ban extended across the country. In a 2008 study, the center found that women in the U.S. are charged as much as 48 percent more than men for health insurance, according to *The National Law Journal*. And insurers in eight states may use a woman's status as a survivor of domestic violence to deny her health insurance.

Now there's a ringing endorsement for Obama's health care reforms. — *Natalie Fraser*

ISTOCKPHOTO.COM

Is Mary Carter dead — or just wounded?

The Ontario Court of Appeal dealt a body blow to Mary Carter agreements (MCAs) last spring. It is unclear whether they will survive in their present form. The court has taken away what it calls the plaintiff's "double recovery" and reallocated it to the least co-operative defendant.

For the past 15 years in Ontario, MCAs have been used infrequently but effectively in complex litigation as a risk management tool. For the plaintiff, they represent an opportunity to insure against an unfavourable result at trial through an alliance with a "settling defendant" who participates in the trial in hope of reducing the amount that he has contributed to the settlement. For the settling defendant, the agreement caps exposure in damages (often a significant consideration where policy limits are at risk) and provides an opportunity to reduce the ultimate payout in the litigation. MCAs are not very different from hedge contracts used by Canadian businesses to manage their risk.

In addition to managing risk, MCAs have a proven track record of promoting global settlement by realigning the forces at play in the litigation through the creation of an alliance between the plaintiff and one defendant. Ontario courts, beginning with Justice Lee Ferrier in *Petty v. Avis Car Inc.*, [1993] O.J. No. 1454, have accepted the useful role of these unconventional settlement agreements.

In *Laudon v. Roberts*, [2009] O.J. No. 1824, (leave to appeal to



CRAIG BROWN

“
The court has taken away what it calls the plaintiff's 'double recovery'...

the Supreme Court of Canada being sought), the Ontario Court of Appeal laid down some principles on double recovery of damages that may have an effect on MCAs and other partial settlement agreements in the future — notwithstanding the fact that the agreement considered by the court in *Laudon* was not a true MCA. Justice Jean MacFarland noted that the agreement lacked an essential ingredient of an MCA, namely, that the settling defendant shares in the plaintiff's recovery from the non-settling defendant on a basis determined by the terms of the agreement.

Justice MacFarland began her analysis in *Laudon* by examining the Supreme Court of Canada's decision in *Ratych v. Bloomer*, [1990] 1 S.C.R. 940. She identified the key issue in the double recovery debate as being whether the plaintiff "had established a loss

or compensable damages."

Ratych narrowed a century-old exception to the rule against double recovery. Where a plaintiff had the foresight to insure against future wage loss, the courts have refused to give the benefit of that foresight to the tortfeasor who caused the loss. The majority in *Ratych* limited that exception to private insurance schemes for which plaintiffs could prove they had paid a premium or to which they have made some contribution.

Justice MacFarland applied a number of other Canadian decisions in which settlements with one tortfeasor were credited to the liability of the remaining tortfeasor. In each, the desire to avoid a double recovery or windfall to the plaintiff was given as a reason for permitting a tortfeasor to pay less than its assessed share of the plaintiff's damages, effectively transferring any windfall from the victim to the tortfeasor.

The potential effect of *Laudon* is that MCAs between the parties may not qualify as an exception to the rule against double recovery — even when the result is to reward a recalcitrant defendant.

In the future, plaintiffs will attempt to distinguish *Laudon*, saying that there is a critical difference between it and cases involving a true MCA. Under the terms of an MCA, when plaintiffs contract to limit their right of recovery against one defendant, they do "give up something." They are securing the settling defendant's co-operation and contribution to their damages in return for a

commitment to restrict their potential for recovery against that defendant and an agreement to indemnify that defendant from the cross-claims of the non-settling defendant.

This feature of MCAs is analogous to the premium paid for wage replacement insurance. Applying the analogy would bring MCAs within the exception to the double recovery rule, allowing plaintiffs to retain the benefit of their foresight and acceptance of the risk of under-compensation.

Until *Laudon*, MCAs were seen as an opportunity for a plaintiff and a co-operative defendant to increase the risk of the litigation to an uncooperative defendant and share the proceeds of a successful prosecution of the plaintiff's claim against that defendant. It is likely that MCAs in the future will emphasize procedural co-operation between the contracting parties in order to bring pressure to bear on the recalcitrant party. They will be most valuable to the contracting parties where co-operation with one defendant will result in a substantial increase in the damages likely to be awarded at trial.

The potential for reimbursement to the settling defendant will still be an appealing feature of MCAs, but plaintiffs may have lost the possibility of compensation beyond their global provable damages. ■

Craig Brown is a partner at Thomson, Rogers in Toronto and acts for plaintiffs in personal injury litigation. He frequently uses MCAs in multi-party litigation.