not on their source but on their intrinsic nature". The essential nature of MIG is that it is to provide the lender with extra security so that it will advance the borrower more money than the lender would normally do without that policy. It is not a policy to absolve the borrower from the covenants to pay the mortgage debt.

The second passage refers to considerations of justice, reasonableness and public policy ...... (page 484, para. j). The legacy of negative equity and sales of repossessed properties for less than the accrued debt is a recent phenomenon regrettable though it is. But it should not cloud the issues. Is it just reasonable, or in accordance with public policy that the "not that I can't pay, old boy, just that I won't pay" brigade should be allowed to renege on their proper and freely entered into obligations? I hope that this "alternative view" may show why there is no need for the Courts nor the Ombudsman to do so.

POLICY WORDING DISPUTES IN DOUBLE INSURNACE AND CONTRIBUTION CLAIMS
by Roger Doulton, Winward Fearon & Co.

I Introduction

The common law permits an assured to insure any subject matter in which he has an insurable interest as many times, and under as many policies, as he wishes.[1] When he does so he is said to have taken out double insurance although in the context of that renowned anti-hero of the recession, Johnny Fraud, seeking to recover indemnity from as many insurers as possible in respect of the same loss, 'multiple insurance' may often, perhaps, be a better description.

At first sight the law's apparent leniency in this respect might well encourage further propagation of what we lawyers choose to call the myth (but which the public knows to be the reality) that the law is an ass were it not for that equally uncomfortable other phenomenon of the recession, the insolvent insurance company! The law has always taken the view that an assured should be entitled to hedge against the risk of one of his insurers becoming insolvent – a risk which recent times have sadly only served to show to be very real indeed.

All the law can do in these circumstances is seek to strike a balance between assured and insurer/s on the one hand and, for reasons which appear later in this talk, insurers inter se on the other. Insurers can do better: with proper systems and policy wordings they may decisively tilt the balance in their own favour always assuming, of course, that they know they are faced with double insurance – often, in reality, the real problem when John Fraud's around and about.

The fact that there is double insurance doesn't mean that the law will permit an insured to recover more than his actual loss. The common law principle of indemnity provides that an assured can recover at most only an amount representing his actual – or, in the case of a valued policy, his agreed – loss so that in the case of over insurance by way of double insurance part of the total of the sums insured by the various policies will not be recoverable.

This is the good news. The bad news is that there is no restriction in the general law as to the order in which an assured may proceed against individual insurers: he may thus seek to claim his entire loss from one insurer leaving the others free from liability to him. (2) Nor is there any common law obligation on an assured to disclose that he has already taken out a policy covering the same risk – a point which I have seen qualified in one of our leading text books by the phrase "unless the degree of over insurance is such as to give rise to the prospect of fraud" but one which, on closer inspection of the case cited in support of this proposition would not appear a point well made, save and only to the extent that an assured should not, of course, exaggerate the value of that which it is he is insuring.

To an extent the problem created by the law's permissive attitude both as to the number of insurers with whom an assured can place his risk and as to the order in respect of which he may proceed against individual insurers is alleviated by the equitable principle of contribution which permits an insurer which has paid more than its fair share of the loss to recover contribution from other insurers. But it is only 'to an extent' for the rule does not shift the initial burden on an individual insurer of making the initial disproportinate (given the principle of contribution) payment. Nor, as much of the most hard fought litigation of recent years has shown, does the principle always operate in the manner expected or even, perhaps, particularly fairly.

Faced by these difficulties insurers have adopted a number of defensive measures. These include: a requirement on the assured to disclose in pre-contractual negotiations the existence of any other insurance covering the same subject matter; an obligation on the assured not to take out any further insurance on the insured subject matter during the currency of the policy, either absolutely or in the absence of the insurer's permission; and a provision to the effect that in the event of the existence of a number of concurrent insurances, the insurer is to bear only its own proportion of the loss (a rateable proportion clause). But, as we shall see, these defensive walls have only served to create their own difficulties. In particular, and in this article, I propose to attempt to answer the following questions:-

(i) What constitutes double insurance for the purposes of clauses prohibiting further insurance or rateable proportion provisions and for the purpose, also, of the insurer's right of contribution?

(ii) What are the rights of an assured where his loss falls within a number of policies?

(iii) To what extent may the rights of an assured be varied by the express wording of the policy?

(iv) What are the rights of insurers as regards the allocation of liability between themselves in respect of a claim by the assured i.e. what is the proper calculation of contribution?

II The Meaning of Double Insurance

The precise definition of double insurance is important for two reasons:-

(i) A policy may prohibit double insurance or, alternatively, restrict the assured's rights in the event of double insurance;

(ii) The insurer's right of contribution will only arise where there is double insurance.

At first sight, matters seem quite simple. Section 32(1) M.I.A. 1906 provides:-

"Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums exceed the indemnity allowed by this Act, the assured is said to be over insured by double insurance."

As you will know, it is one of the prime functions of Her Majesty's Judges to make money for the boys and true to form, therefore, the Courts have managed to develop two different interpretations of this apparently simple sub-section depending on which of the two situations one faces. Where the dispute concerns the interpretation of a policy wording, double insurance will often be held to exist where there is a mere accidental overlap. Where, however, the dispute concerns the existence or otherwise of a right on the part of a paying insurer to secure compensation from another the Courts have tended to adopt a much more restrictive attitude such that, unless the policies are more or less identical, contribution will not be available.

In light of these and other difficulties it is appropriate to consider the sub-section in greater detail.

(a) **Same Subject Matter**

Trite as this statement would appear I should perhaps draw your attention to the obvious point that double insurance arises only where both policies cover the property which has been the subject of the loss.

Sometimes it is suprisingly difficult to decide if they do. In *Boag v Economic Insurance Co Limited*[3] for example, the question arose as to whether a lorry load of cigarettes insured under an all risks transit policy did or did not form part of the assured's stock in trade at a factory where the goods had been temporarily stored in circumstances that that factory and load, whilst in the factory, were destroyed by fire.

It was held that the cigarettes were not part of the assured's stock in trade. Please note, however, that it is not a pre-requisite of double insurance for the policies to be identical in scope or in their financial limits. Nor does the fact that it is not possible to apportion any specific part of the premium paid under the wider policy to the subject matter in question prevent a finding of double insurance.

(b) Same Form of Cover

A strict reading of Section 32(1) M.I.A. 1906 would not, at first sight, lead one to deduce the absence of double insurance where there was merely a temporary or partial overlap under policies covering entirely different classes of business so long as the insured subject matter itself happened to fall within each of them. As already indicated, however, the English Courts have always been reluctant to accept this proposition and this is particularly so where rights of contribution are at stake. It follows that you are at risk of making your lawyer rich for no good purpose if you instruct him to seek contribution from another insurer unless the peril which causes the loss is common to both policies.

Three cases nearly illustrate the point. I say "nearly" because the first may better be considered authority on the specific question of fraudulent double insurance, in the second the relevant remarks are obiter and the third is Irish. Nonetheless, it is the best we can do unless or until some brave insurer takes the risk of taking a case on this point to the House of Lords.

Australian Agricultural Co v Saunders (4) was a case where the assured obtained a fire policy protecting its wool while in transit or warehoused in Sydney prior to shipment. Subsequently, the assured effected a marine policy against the loss of wool during its transportation to London. The fire policy contained a clause preventing any recovery by the assured in the event of the wool being "insured elsewhere" without the insurer's consent and, following a fire at the Sydney warehouse at which the wool had been stored, the fire insurer denied liability on its policy on the basis that loss pending loading was insured by the marine policy. The Court held that the marine policy did not in fact extend to cover the loss in question so that the fire insurer had no defence but there are indiciations in the Judgment to the effect that "insurance elsewhere" was not to be taken to apply to insurances of a different nature which overlapped in part and that the phrase should be confined to policies covering the same class of business and the same subject matter. As stated, however, *Saunders* may better be regarded as an authority on the question of fraudulent double insurance because the Court put particular emphasis on the fact that the object of the clause in the fire policy was to protect the fire insurer against fraudulent double insurance, a danger which did not arise from accidental overlapping.

My second case is *American Surety Co of New York v Wrightson.*[5] This case concerned a bank which had effected a policy against loss through the dishonesty of its employees with a limit on recovery of $2,500 per employee and a further policy for $40,000 against loss caused by any of a number of risks to include theft, fire, dishonesty or negligence of any person including employees. An individual employee misappropriated the sumof $2,680 and, *it having been conceded* by both insurers that each policy covered the loss and that a right to contribution arose as a result of that double insurance, it fell to the Court to determine exactly how the loss was to be apportioned between them. In the course of his Judgment, Hamilton J expressed the view *obiter* that the concession relating to double insurance had not been correct and that the policies were sufficiently different in scope and nature to exclude the contribtion requirement:

Zurich Insurance Co v Shield Insurance Co.[6] is my third case. Zurich was the motor insurer of Q and any person driving Q's vehicles with his consent. Shield were Q's employers' liability insurer. S, an employee of Q, was injured by a fellow employee in a motor accident with the effect that both of the insurers were potentially liable. Q, in fact, made a claim against Zurich which company paid in full and sought 50% contribution from Shield. The Irish Supreme Court held that the policies were different in nature so that there was no double insurance and thus no right to contribution.

(c) Same Assured and Same Interest

It commonly occurs that a number of persons each have a different interest in one subject matter and that each person effects insurance to cover his own interest. Typical illustrations include concurrent interests in land held by landlord and tenant, or mortgagor and mortgagee, and concurrent interests in goods held by bailor and bailee. In these cases it is well established that no right of contribution arises between the various insurers.

(d) Valid and subsisting overlapping insurances

As a matter of principle, it is clear that there cannot be double insurance unless there is in existence more than one valid policy attaching to the same interest. There is, for example, no double insurance where one policy is substituted for another. But the Courts have got themselves into a terrible

tangle in recent years on the key issue as to how they should operate the principle of contribution between insurers where, at the time the insured sustains the loss, there is no dispute that there is more than one valid policy but where, also, as is usually the case, the assured chooses to make a claim against just one insurance policy leaving the other insurer or insurers in the dark as to the existence of the claim. By the time the paying insurer comes to seek contribution, it is usually the case that had the assured chosen this moment to bring his claim against the other insurer or insurers, that company or companies would have had a defence to the assured's claim by way, for example, of late notification. But should that defence be available aginst a paying insurer seeking contribution?

The authorities are split on this important issue and, to be fair, there are strong arguments to be made both ways. On the one hand, it is argued that it would be inequitable for either of the insurers to receive the benefit of premium without being liable for their share of loss.(7) On the other hand, it is argued that it would be inequitable to make an insurer contribute where it had no notice of the accident, had no say in the handling of the claim and had no opportunity "to investigate the rights or wrongs of it."(8) *Monksfield v Vehicle and General Insurance Co Limited*(8) was the first case in which this important issue came to be decided albeit at the comparatively lowly level of the Mayors of City of London Court. In his Judgment, Judge Graham Rodgers had this to say:-

"On consideration of these authorities I have come to the conclusion, not entirely without doubt, that the Registrar was right. In my view, it cannot be an equitable result that an insurance company which had no notice of an accident, had no say in the handling of the claim, and for whom, to quote the words of the Master of the Rolls in *Farrell's* case, there was no opportunity "to investigate the rights or wrongs of it", should be called upon to make a contribution in a case in which it would quite clearly have had the right to repudiate if the claim had been brought under the terms of its own policy. The Defendants are entitled to take advantage of the conditions in their policy and are, in my view, not liable for contribution."

The point was next up for grabs in the widely reported case of *Legal & General Assurance Society Limited v Drake Insurance Co Limited*(7). The case was heard in the Court of Appeal and, by a majority verdict, it was decided

that the right of contribution was not defeated by the fact that the assured party had failed to notify the co-insurer of a potential claim albeit that such failure was a breach of a condition under the policy requiring immediate written notice to be given of any such claim as a condition precedent to liability since the breach occurred after and not before the accrual of the right of contribution on the date of the relevant loss.

In reaching this decision, Lloyd L.J. brushed aside that passage from Judge Graham Rodgers' Judgment which I quote in that imperious style which Lord Justices of Appeal reserve especially for County Court Judges:-

"I do not find this reasoning convincing. The fact that a co-obligor has no 'say in the handling of the claim' had never been an answer to a claim for contribution, whether in the field of insurance or in any of the other fields in which the equitable doctrine prevails. As to the right to repudiate, this would, as I have said, have been a good defence to a claim for contribution if the assured had been in breach of condition *prior* to the loss. The failure to distinguish between breaches of condition prior to the loss and a breach of condition subsequent to the loss by failing to give notice in time vitiates, if I may respectfully say so, the learned Judge's conclusion."

To me the decision seems fair. However, and in *Eagle Star Insurance Co v Provincial Insurance plc*[9] the Privy Council chucked the cat right back among the pigeons.

The case, in fact, concerned the statutory obligation of both insurers to meet a Judgment under the Bahamian equivalent of the Road Traffic Act 1988. It is, nonetheless, authority on the point at issue here, the question as to whether or not when a defence becomes available to an insurer vis-a-vis the assured after the date of the loss but before the claim for contribution then that defence should be available to the insurer in the contribution proceedings.

The Plaintiff was injured in the Bahamas as a result of the negligent driving of the Defendant who at the time was driving a car lent to him by a car repairer. The Plaintiff obtained judgment against the Defendant and when the Defendant failed to meet that judgment brought proceedings against both the Defendant's insurers (Eagle Star) and the repairer's insurers (Provincial).

Eagle Star had cancelled their policy prior to the date of the accident but, by reason of the fact that they had failed to follow the relevant procedures in the Bahamas, had failed to obtain its surrender. Accordingly, in the absence of any other relevant insurance, they were at risk of a statutory liability under Section 12 of the Bahamas Road Traffic Act.

Eagle Star, however, contended that there was another relevant insurance policy, namely the policy of Provincial and, at first instance, they were successful in this contention, thereby throwing onto Provincial 100% of the liability. Provincial appealed to the Court of Appeal of the Bahamas which allowed their appeal and held that they were entitled to 50% contribution. Eagle Star appealed to the Privy Council.

For Provincial it was argued that the relevant date for determining insurer's rights against each other was the date upon which the contribution proceedings had been issued, not the date of loss. Because, by that date, Provincial would have been able to reject any claim from the Defendant had he made it, by reason of his failure to bring the claim within the appropriate time limit, it was further argued that this put Provincial in an identical position to Eagle Star, namely that an insurer whose liability arose only by reason of statute.

Provincial were successful and retained their contribution from Eagle Star. Had a similar result obtained in the Legal & General case then, of course, Drake would have been able to rely upon its Notice of Loss clause because, when the claim for contribution was made against it, Drake had ceased to be liable under their policy.

Privy Council decisions are, of course, of only persuasive authority but Eagle Star was decided by a Privy Council consisting of five Lords of Appeal and Lloyd L.J.'s Judgment was itself brushed aside with the same kind of imperious majesty which he reserved for the Mayors and City of London County Court. In the words of Lord Woolf:-

“While this could have the result that the action of a person insured in relation to one insurer can affect the rights of contribution of the other insurer, this is an inevitable consequence of one insurer being able to take advantage of any limitation of his contractual liabilities on the question of contribution.

However, before suggesting this could be unfair it has to be remembered that it is unlikely that the existence of the other insurer would have been known at the time that the contract of insurance was made."

So where does this leave us?

Here, I do think it might be worth making your lawyer a little bit richer in the event that a contribution is sought against you and in the event, also, that, by the time the claim for contribution is made you would have had a defence under your own policy against the assured's claim. I don't predict the result with any certainty but if the sum claimed against you is large enough there has to be some point in spending the money to find out what their Lordships have to say about this issue within the context of the English jurisdiction.

(e) Obligatory payment

Contribution is available only where the paying insurer has made payment under a legal liability. It follows, that if an insurer makes an ex-gratia payment to the assured the rules of contribution do not permit that insurer to obain contribution from another. And now will they obtain contribution where they fail to take, say, a contributory negligence point.

Insurers should note, however, that the Courts have adopted a meaning of "ex-gratia/voluntary" which may not at first sight seem terribly obvious to anyone other than a Law Lord! In particular, it is well established that where an insurer in a double-insurance situation makes a payment in excess of its rateable proportion then its right of contribution against a co-insurer will be exclusded *possibly* even if that payment was made at a time when the paying insurer had no knowledge of the existence of the other insurance. The rule is draconian and in *Legal & General* was operated with astonishing effect for there, a 100% payment by *Legal & General* in accordance with its obligations under Section 149 of the Road Traffic Act 1972 was held to be "voluntary" to the extent that it was in excess of Legal & General's rateable proportion clause notwithstanding that Legal & General had no alternative but to make the payment in circumstances that by Section 149 (4) of the same Act the insurer was entitled to recover its excess over its net liability from the assured.

The mind boggles! Not too many insurers secure adequate recovery in these circumstances.

In reaching this decision, the Court appears to have looked not so much at the question as to whether the payment by the insurer was 'voluntary' in the sense that they had any opportunity not to make it, but, rather at the question as to whether they voluntarily or otherwise chose not to try to recover a proportion of that payment from the assured. Thus the interesting question arises as to whether an insurer making a payment in excess of a rateable proportion clause at a time when he does not know of the existence of other insurance is or is not making a voluntary payment.

On the one hand, it could be argued that the payment is not voluntary in the sense that the insurer has no intention to make a gift. On the other hand, so it seems to me, it could be argued that the paying insurer is in an analogous situation to that of *Legal & General* to the extent that he too would have a right to claim back from the assured any over-payment by reason of the fact that the payment was made by mistake of fact.

I would not wish to make a prediction as to the outcome of any action to recover contribution in these circumstances. It should not be forgotten that contribution is an equitable remedy and that, therefore, the Courts can do an extent fiddle around with the results to satisfy their own inclination as to what is just. The result might, at the end of the day, depend on the extent to which an insurer had, during the claims process, made attempts to find out whether or not there was double insurance. In any event, and as I see it *Legal & General* is a really dreadful decision on this point.

Footnote In 1991, the Motor Conference of the ABI produced a revised version of the Dual Indemnity Undertaking which revised version was, essentially, a response to the decision in *Legal & General v Drake*. The relevant undertaking provides as follows:-

"Where a motor vehicle is direcly insured by policies provided by two or more separate Insurers, they shall contribute in equal shares, notwithstanding that the driver or the Insured has not reported an occurrence, or is otherwise in breach of the policy conditions relating to requirements on the driver or the Insured following an occurrence under one or more of the policies. Any payment by the handling Insurer in excess of its equal proportion will not be treated as a voluntary settlement and shall be recoverable from the other Insurer or Insurers."

The undertaking also purports to apply irrespective of any limitation restricting indemnity, such as a rateable or nil contribution clause.

III THE RIGHTS OF THE ASSURED

(a) Rights of Recovery

As already stated, where an assured is over insured by double insurance he is limited to recovering no more than an indemnity. However, subject to that ceiling, he is free to satisfy his loss by claiming against his insurers in such order, and for such proportions of the total loss, as he thinks fit. The rights of the assured are codified in Section 32(2) of the M.I.A. 1906 as follows:-

"Where the assured is over-insured by double insurance:-

(a) The assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act;

(b) Where the policy under which the assured claims is a valued policy, the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject matter insured;

(c) Where the policy under which the assured claims is an unvalued policy he must give credit, as against the full insurable value, for any sum received by him under the policy;

(d) Where the assured receives any sum in excess of the indemnity allowed by this Act, he is deemed to hold such sum in trust for the insurers, according to their rights of contribution amongst themselves.

(b) Return of Premium

One question in respect of which there is no very clear answer is the question as to whether or not an assured is entitled to claim a rateable return of his premium from each insurer to reflect the amount by which he is over-insured by double insurance.

At common law the guiding principle was, and remains, that premiums are indivisible so that once the risk has attached, the assured is not entitled to a return of any part of the premium where the risk subsequently proves to be less than was originally believed to be the case. However, and in the Marine context, there are a number of exceptions to this rule. which exceptions are contained in Ss 82-84 of the M.I.A. 1906. It is unclear, however, whether that right of return extends to property and liability policies and will probably remain so in circumstances that most insurers avail themselves the opportunity to decide the issue in advance by means of their policy wording.

IV MODIFICATION OF THE ASSURED'S RIGHTS BY EXPRESS WORDING

(a) Prohibition on unauthorised concurrent insurances

As already indicated, it is common for policies to contain a clause prohibiting the assured's entry into insurances covering the same risk without the consent of the existing insurer. It should be noted, however, that such prohibition only affects subsequent insurances which are valid and under which the risk is attached.(9)

(b) "Rateable Proportion" Clauses

I have already touched upon this subject within the context of 'voluntary payments'.

Rateable proportion clauses are now, of course, ubiquitous as a protector for insurers. From an assured's point of view, they are dangerous indeed if the true reason for him purchasing multiple insurance is to hedge against the risk that one or more of his insurers may become insolvent because, of course, the impact of such clause is to remove that risk from the insurer in whose favour the clause is drafted and to put it onto any other insurer, or in their absence, the assured himself.

From an insurer's point of view it is *possible* (I put it no higher than this) that they should now be perceived as something of a mixed blessing. While in *Legal & General* the insurer knew of the other insurance when settling the claim, in reality is is very often the case that an insurer only discovers the

existence of other insurance after making his payment to the assured. If the Courts do not make a distinction between these two scenarios and, following *Legal & General* deem the payment in the second scenario to be 'voluntary', insurers unaware of other insurance will be disentitled to make any claim for contribution.

(c) Prohibition of double insurance

Where the assured has effected concurrent insurances, one of which prohibits double insurance or withdraws its coverage in the event of double insurance, the insurer is exempted from liability and the assured must turn to the remaining insurers for an indemnity.

As with those clauses which prohibit unauthorised concurrent insurance, these clauses are now very common indeed and it is far from uncommon to find oneself in the position of having two or more policies, all of which would apply in the absence of such clause but all of which contain one. In such circumstances, it isn't always particularly easy to determine which of the policies is to bear the loss, although all but insurers perhaps will be relieved to know that the Courts have avoided the Doomsday scenario of holding each such policy to be self-cancelling, thereby creating Nirvana for insurers – masses of premium no risk!

Indeed, and in *Weddel v. Road Traffic and General Insurance Co Ltd*(10) Rowlatt J was faced with exactly this possibility. He rejected it in clear terms:-

"The reasonable construction is to exclude from the category of co-existing cover, any cover, which is expressed to be itself cancelled by such co-existence and to hold in such cases that both companies are liable ... [otherwise] one would reach the absurd result that whichever policy one looks at, it is always the other one which is effected."

This principle received the unanimous approval of the Court of Appeal in *National Employers Mutual General Insurance Association Limited v Haydon*(11).

V THE RIGHTS OF INSURERS INTER SE

I come now to the last of the questions which I posed at the beginning of this talk. Assuming that double insurance exists, and assuming also either that two or more insures are liable to an assured, or that one insurer is liable to another insurer in respect of payments made by that other to the assured, how does one determine the proportionate liability of each insurer?

This is a difficult area and one which would, perhaps, merit a lecture in its own right were the time available. For the purposes of this afternoon's lecture, therefore, I can do no more than give a general overview.

Step 1 is to determine whether or not the policies are concurrent (i.e. policies which provide cover for the same subject matter only) or non-concurrent (i.e. policies which are different in scope but which happen to cover the particular loss).

Step 2 is to analyse whether or not one or more of the policies contains a rateable proportion clause.

One can then apply the following rules:-

(a) In relation to concurrent policies free of any rateable proportion clause, proportions are usually determined by applying the 'maximum liability' rule;

(b) In relation to concurrent policies both containing rateable proportion clauses (or if a rateable proportion clause exists only in the policy of higher value), proportions are determined by applying the 'independent liability' rule;

(c) In relation to non-concurrent policies where the entire loss falls within both policies proportions are normally determined by applying "the maximum liability" rule although there is some authority (see *American Surety Co of New York v Wrightson)*[5] to suggest that the Courts might apply the "independent liability" rule or at any rate a bastardisation or it were the matter to come before them.

In relation to non-concurrent policies where part of the loss falls within both policy A and B but policy A alone covers the remainder of the loss different

forms of apportionment are made and the mean of the two is then takent to determine the final contribution ratio.

(d) The following case illustrates the practice to mean apportionment.

Value of property insured	**Insured by Insurer A**	**Insured by Insurer B**	**Loss**
Stock 2000	1000)		1500
	)	1500	
Fittings	1000)		500

Larger Loss First

	A	B
1. Stock		
A $\frac{1000}{2500} \times \frac{1500}{1} = 600$		
B $\frac{1500}{2500} \times \frac{1500}{1} = 900$	600	900
2. Fittings		
B 1500 – 900 = 600 Therefore B pays 500		500

Smaller Loss First

	A	B
2. Fittings B pays 500 of his total sum insured of 1500		500

1. Stock

A 1000

Total insurance

B

$$(1500 - 500) = \frac{1000}{2000}$$

$$A \quad \frac{1000}{2000} \times \frac{1500}{1} = 750$$

$$B \quad \frac{1000}{2000} \times \frac{1500}{1} = 750$$

	750	750
Aggregate	1350	2650
Mean	675	1325

Therefore A pays on Stock 675 (Half of 1350, i.e. 350 X $\frac{675}{1350}$)

B pays on Stock 825 (Half of 1650, i.e. 1650 X $\frac{1325}{2650}$)

B pays on Fittings 500 (Half of 1000, i.e. 1000 X $\frac{1325}{2650}$)

2000

(e) Even more complicated calulations where average is concerned. (See for example Chapter 25 MacGillivray.)

(f) Market practice where this differs from the above.

Which leaves me the task of explaining in brief the 'maximum liability' and 'independent liability' rules.

(1) **The 'maximum liability' rule**

Under this principle, the maximum possible liabilities of the insurers are added together and each insurer pays the proportion of the loss which accords with the proportion which its own maximum liability figure bears to the total maximum liability figure. For example, if insurer A has issued a property or marine policy, under which its maximum liability is to be £50,000 and insurer

B has issued a concurrent policy, under which its maximum liability is £100,000, losses would be apportioned in the following manner:-

Loss	Insurer A	Insurer B
(1) 25,000	$\frac{50{,}000}{150{,}000} \times 25{,}000 = 8{,}333$	$\frac{100{,}000}{150{,}000} \times 25{,}000 = 16{,}667$
(2) 75,000	$\frac{50{,}000}{150{,}000} \times 75{,}000 = 25{,}000$	$\frac{100{,}000}{150{,}000} \times 75{,}000 = 50{,}000$

(2) **The 'independent liability' rule**

The liability of each insurer is determined as if it stood alone and the ratios that those independent liability as determined bear to each other fix the proportion of each loss which the insurers have to bear. Thus, if one used the same figures as those set out in the example which I have just given, one would arrive at the following position:-

Loss	Insurer A	Insurer B
(1) 25,000	Liable for 25,000 thus pays: $\frac{25{,}000}{50{,}000} \times 25{,}000 = 12{,}500$	Liable for 25,000 thus pays: $\frac{25{,}000}{50{,}000} \times 25{,}000 = 25{,}000$
(2) 75,000	Liable for 50,000 thus pays: $\frac{50{,}000}{125{,}000} \times 75{,}000 = 30{,}000$	Liable for 75,000 thus pays: $\frac{75{,}000}{125{,}000} \times 75{,}000 = 45{,}000$

VI SOME FINAL TIPS AND OBSERVATIONS

I start from the assumption that in double insurance cases, as in all others, insurers are looking to spend the least possible consistent with their legal obligation, and where appropriate commercial expectation. But how does one achieve this objective against the background of that which has gone before?

In the first place, it is essential that all relevant staff should be alert to the possibility of separate cover. If they are not then, it goes without saying that insurers will not derive any benefit from the existence of double insurance. The point is so simple that I am alsmot embarrassed to make it but, in my experience, it is common for claims handlers at all levels to go to sleep on this one or even, I suspect, to pass their days in blissful ignorance of the fact that the discovery of double insurance in appropriate cases may improve their prospects of promotion within the department!

It is not just a question of individual claims handlers however. Pre-inception, for example, systems and/or wordings should be set-up that require the assured to address the matter of other insurances. Proposal forms should always include a direct question in this respect. There is a presumption of materiality where direct questions are asked.

Where the risk is broked other than by way of proposal form then, in my opinion, insurers should always ask the broker an appropriate question. If he cannot supply an appropriate answer, he should be asked to obtain one. They should then record the broker's answer in writing. Again, I apologise for making a simple point: you've no idea how many cases are lost because of the failure to make appropriate attendance notes.

At the claims stage, all relevant personnel should be aware that it is not enough merely to be aware of the possibility of separate cover. They should also be aware that, if and when they discover double insurance, they should act as the Romans say quam celerimmae, i.e. bloody fast!! Otherwise, for reasons which I have already explained, the discovery maybe of archaeological interest only. The time to act when you discover double insurance is when you discover it, not at some later stage in the claims process.

Insurers should also arrange matters so that they maximise their prospect of discovering double insurance at the earliest possible stage following receipt of a claim. In particular, it should be standard for the issue of separate insurance to be raised on any claim form and standard practice, also, for any loss adjusters instructed to raise the issue once more during the course of their investigations. It's amazing how often a friendly chat with the loss adjuster will obtain information which is not obtained in answer to written questions on a proposal or claim form.

Insurer's wording of proposal forms and policy terms and conditions should be carefully considered following *Legal & General* and *Eagle Star,* to see how that wording addresses the issue of double insurance. In particular, in the absence of appropriate procedure in the claims process, rateable proportion clauses *may* now be seen as something of a mixed blessing, since payment in excess of a rateable proportion clause by reason of an insurer's ignorance of another policy *may* (as discussed above) be considered voluntary and irrecoverable from the other insurer in due course when, and if, you discover his existence. On the other hand, and of course they continue to protect insurers as to the quantum of any payment which they must make to the assured if the existence of the other insurance policy is known.

I said 'in the absence of appropriate procedure in the claims process' because it does seem to me that if, during the claims process, an assured is specifically asked whether or not there is in existence other coverage, a deliberately false statement in this respect should entitle an insurer to repudiate the claim for breach of the continuing duty of good faith set out in *The Litsion Pride* (12). He may, indeed, be able to repudiate the policy ab initio although which of the two, fortunately, is the subject matter of another lecture!

Insurers in a contribution situation should be careful to avoid making any payment which could later be characterised as 'voluntary' and thus irrecoverable, or, alternatively, if the boot is on the other foot, should be assiduous in checking the scope and wording of the other insurer's policy to see whether or not it can be argued that that company has made a voluntary payment.

Insurers who wish to make a contribution claim should also be careful to be seen to act reasonably with regard to other insurers. Any act by the insurer claiming contribution which may be held to prejudice the position of the other insurer from whom contribution is sought may undermine the equitable doctrine of contribution between insurers. Examples include (a) paying too much to the claimant or (b) failing to take or maintain an argument by way of defence which should reasonably have been taken, thus denying the benefit of that fence to the insurer against whom contribution is claimed.

Consideration should be given as to whether or not those matters which I have raised in this article as conditions precedent to double insurance, are or are not

satisfied. Very often they are not. Quite separately, attention should be paid to the question of possible breach by the assured of any condition of cover. In the event that there is a breach of a condition subsequent to the event which is the subject matter of the claim you should then discuss with your boss whether or not you wish to take the matter to the House of Lords!

Case Citator

(1) Godin v London Assurance Co (1758) 1 Burr 489

(2) Newby v Reed (1763) 1 Wm B1 416; Boulsfield v Barnes (1815) 4 Camp 228; Bruce v Jones (1863) 1 HC 769

(3) Boag v Economic Insurance Co Ltd (1954) 2 Lloyd's Rep 581

(4) Australian Agricultural Co v Saunders (1875) LR 10 CP 668

(5) American Surety Co of New York v Wrightson (1910) 103 LT 663

(6) Zurich International Co v Shield Insurance Co (1988) IR 174

(7) Legal & General Assurance Society Ltd v Drake Insurance Co Ltd (1992) 1 All ER 283

(8) Monksfield v Vehicle & General Insurance Co Ltd (1971) 1 Lloyd's Rep 139

(9) Eagle Star Insurance Co v Provincial Insurance Co (1993) 3 All ER 1 on appeal from the Bahamas

(10) Weddell v Road Traffic & General Insurance Co Ltd (1932) 2 KB 563

(11) National Employers Mutual General Insurance Association Ltd v Haydon (1980) 2 Lloyd's Rep 149

(12) The Litsion Pride (1985) 1 Lloyd's Rep 437