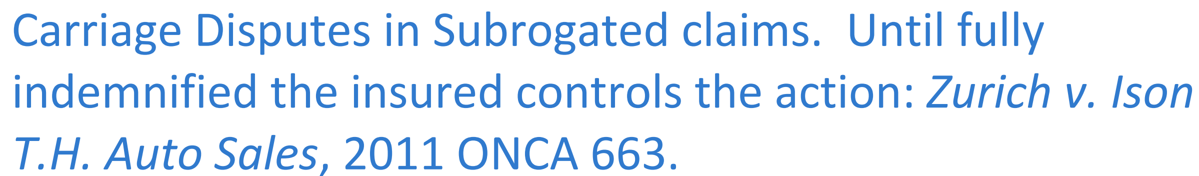

Carriage Disputes in Subrogated claims. Until fully indemnified the insured controls the action: *Zurich v. Ison T.H. Auto Sales*, 2011 ONCA 663.

In *Zurich v. Ison T.H. Auto Sales*, following a large loss event, the insurer paid out $1.1 million to its insured. The insured claimed that it had an additional uninsured loss of $700,000 and commenced an action against the alleged wrongdoer, including in its action both its claim for its uninsured loss and the insurer's subrogated claim. A dispute arose between the insured and the insurer over who should have carriage and control of the action. The insurer brought an application for carriage of the action. The application was dismissed by the application judge.

The Court of Appeal adopted the analysis and conclusions of the application judge in their entirety, characterizing them as "masterful." The application judge first set out the common law position that an insured is in control of litigation until it has been fully indemnified for its insured and uninsured losses. He then noted that there was nothing in the language of the subrogation clause of the insurance contract to alter the insured's right under the common law. He rejected the insurer's argument that the court should exercise residual discretion to give carriage to the insurer because the insurer had a larger claim for property damage ($1 million) than the insured's uninsured claim ($700,000) for business losses. He found that it was unnecessary to consider whether the court had this discretion because, among other factors, "the insurer's interest was not so vastly disproportionate to the insured's interest" and counsel for the insured had been diligently pursuing the claims on behalf of both the insured and insurer.

The Court left open the possibility that, even in the absence of a contractual provision, a court might exercise discretion to allow an insurer to have carriage over litigation in an appropriate case. Neither the application judge nor the Court of Appeal defined what an appropriate case might be, *i.e*. in what circumstances is the insurer's interest "vastly disproportionate" to the insured's interest"?

Note that it is open to insurers to amend policy language to change the common law position. Per the application judge: "it would be a simple matter for the insurers to amend the Subrogation Clause to alter the common law position and to give carriage to the insurers, if they wished to do so."

Barrie, Ontario

Tel: (705) 722-4400

www.chcbarristers.com