

PLUPS, CLUPS AND THE WORLD THEY LIVE IN

By Robin B. Cumine Q.C.

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What are they and what are they not

PLUPS, Personal Liability Umbrella Policies, and CLUPS, Commercial Liability Umbrella Policies, are policies of insurance that have been issued by liability insurers to provide increased coverage to an insured in connection with liabilities which might arise from a variety of sources. Probably the most frequently found combination of coverage are motor vehicle liability coverage and general liability coverage either of the nature found under a Homeowners policy or under a Commercial General Liability coverage. Many of these policies, however, provide coverage that is significantly broader than these two categories and often provide coverage in connection with liability risks not usually covered under the standard form of primary policies.

While the Courts have not always made the distinction, umbrella policies are really something that provide a different form of coverage than a simple second or third layer of coverage which effectively increases the limit of an underlying coverage with respect to essentially the same risks. The excess policies we all carry over our LPIC cover are an example of that form of policy. Umbrellas are certainly not, as was suggested by the plaintiff insured in one case, a form of blanket property coverage which was asserted to provide coverage against all risks of loss with respect to a herd of buffalo¹.

To see an umbrella policy in proper operation look at the *Derksen* Case - trial and Ontario Court of Appeal decisions². That case involved a finding that both a motor vehicle policy and a contractors liability policy could be called on the respond to a claim where a metal plate left on a tow bar between a truck and piece of equipment fell off while the vehicle was in motion and went through a school bus window. A commercial liability umbrella policy was held to add to the coverage limits of both underlying policies.

Why you should be interested in these policies

There has been a substantial increase in the marketing of these policies over the last few years and your chances of having one available to someone in the action are good. Certain companies have been selling umbrella policies on the basis that by buying a primary policy with a low limit and an umbrella policy taking the limit up to the desired amount you will get the same coverage at a substantially lower premium. If this is the case, be careful to find out since the coverages may not completely overlap. In that case it is likely that unless any differences in the coverages have been fully explained by the agent to the insured, a Court may very well hold that the umbrella policy provides all of the coverages contained in the underlying policy even if those coverages are in fact specifically limited or excluded in the umbrella policy.

For example, where the purchaser of a PLUP policy did not take increased uninsured/underinsured cover under the PLUP he successfully persuaded the company that since initially he told the agent that he really wanted full automobile cover with higher limits, which would have given him uninsured cover to that limit with the auto policy, he should get the benefit anyway.

These policies are also of interest because in many policies there can be a 'drop-down' feature. This means that if the liability is not one required to be covered under the underlying policies but one that is covered by the umbrella, the umbrella policy will cover from the first dollar of liability.

For example, a number of these policies contain coverage and an obligation to defend in connection with claims which are specifically excluded under the 'underlying' policies. This can include claims arising from false arrest, malicious prosecution, libel, slander, defamation of character, invasion of privacy and even assault and battery. In some cases even certain claims as a result of intended personal injury or property damage are covered. Unless there is a specific 'retained limit' under the umbrella policy, coverage would 'drop down' in those case to the first dollar of liability.

If you are acting for a defendant in an action, you should be interested in the existence of any umbrella policy as a potential source of additional protection for your client whether it is your client who has the umbrella policy or another defendant who may share in the liability. In fact you should ascertain if the plaintiff has such a policy since the plaintiff's umbrella liability coverage could contain benefits that might reduce the exposure of your client.

Obviously, if you are acting for an insurer who has issued the umbrella policy, you will have a real interest in it.

I have preached for years that in every case involving insurance it is essential to read the policy, and this is certainly true in the case of umbrella policies since, at least to this point in time, there is very little in the way of standard language contained in them and a variety of different results can be arrived at by reason of the wording of a specific policy.

Some specific issues our Courts have considered:

1. Where an underlying insurer becomes insolvent does the umbrella policy “drop down” to make up the shortfall?

This was specifically considered by the Ontario Court of Appeal in the *Plaza Fiberglass* case³ as a result of the insolvency of Cardinal Insurance Company. In that case the insolvency of Cardinal meant that there were not enough funds to pay the policy limit under the primary policy in connection with a claim well in excess of these limits. The umbrella cover was to start after the primary limit had been reached and there was, therefore, a gap.

The Court of Appeal in considering the particular policy wording and in looking at some of the American authorities came to the conclusion that the umbrella policy in that case would not be required to drop down to fill the gap. This decision was primarily based upon the specific provision in the umbrella policy that it would only meet amounts in excess of those amounts, “not covered by such underlying policies or insurance”.

The Court adopted the statement in an American authority that:

“When an excess insurer uses the term ‘collectible’ or ‘recoverable’ it is agreeing to drop down in the event the primary coverage becomes uncollectible or unrecoverable; on the other hand when an excess insurer uses the term ‘covered’ or ‘not covered’ it is agreeing to drop down only in the event that the terms of the underlying policy do not provide coverage for the occurrence or occurrences in question”.

From this you can see that it depends upon the wording of the policy as to whether the umbrella coverage will drop down where there is a shortfall.

2. Are there circumstances in which the umbrella policy does “drop down”?

The coverage will drop down in the event that the liability is one not covered by the terms of the underlying policies but which is covered by the terms of the umbrella policy unless there are specific provisions in the policy providing otherwise.

For example, in the *Symes & Brissenden* case⁴ the Court held that there was no drop-down coverage in connection with liability specifically excluded from an underlying policy because the umbrella policy contained the following language:

“This policy is subject to all terms, agreements, limitations and endorsements of and shall follow the Underlying Insurance in all respects except for the limits of liability and any provisions to the contrary contained in this policy.”

and further:

“All exclusions contained in the policies declared in the Schedule of Underlying Insurance are incorporated into this policy with the same force and effect, unless otherwise specified in this policy, and are in addition to the following exclusions.”

Obviously, that insurer was much more protective of its position in drawing its policy and clearly had better legal advice than was the case in the policy considered in the *Trenton Cold Storage* case⁵.

In the *Trenton* case, the policy provided that it would apply as excess insurance where, “the limits of liability of the underlying insurance listed in Schedule A are exhausted by an occurrence.” The underlying insurance available to the insured in that case which responded to the claim was not listed in Schedule A of the umbrella policy and the Court, relying on that fact, held that under those circumstances the umbrella policy was simply “other insurance” and not excess insurance and should, therefore, share equally with the primary insurer in connection with the claim. I understand, however, that this case is on its way to the Ontario Court of Appeal.

3. What class of insurance is an umbrella liability policy particularly where it provides coverage with respect to motor vehicle liability?

There are a great many American authorities dealing with this question and as is not unusual, you can find one or more decisions supporting just about any position you wish to take. In the main, the issue has arisen in the United States where attempts have been made to categorize umbrella policies as motor vehicle liability policies and as a result write into them the mandatory coverages required by legislation to be included in motor vehicle policies by State legislation. The results have varied from State to State and seem to depend on the legislation involved⁶.

To date in Ontario the result is not entirely certain. The Ontario Court of Appeal when it was confronted with this question in the *Joe and Guardian* case⁷ quite succinctly stated that:

“The Guardian policy was never intended to be anything other than an umbrella policy providing for excess coverage. This is wholly consistent with the purpose of the scheme of automobile insurance in Ontario. It would be contrary to the language of an umbrella policy if it had to share *pro rata* with the standard coverage . . . we see no conflict between the Guardian policy and Section 18 of the OEF 44.”

On the other hand, Mr. Justice Mercier in the *Keelty and Bernique* case⁸, without dealing with the categorization of the umbrella policy but recognizing that in that particular policy there was umbrella coverage afforded to a passenger for uninsured underinsured benefits, has held that the umbrella policy must respond to the claims of a passenger arising out of the actions of an uninsured motorist before the passenger is required to call upon his own SEF 44 coverage under an automobile policy on his own motor vehicle. This result too is on its way to the Ontario Court of Appeal but if it stands could mean that a plaintiff may have access to substantial uninsured auto benefits under someone else's PLUP.

Conclusion:

Make sure you don't miss the possible fun and benefits that might arise by discovering that someone in your cast of characters has an umbrella liability policy. By the way if you are buying one (and they are probably the best buy in the insurance market), make sure you get the agent to describe to you the very broad brush and general terms of the benefits that you will obtain by buying one.

If you act for an insurer that issues umbrella policies, make sure you very carefully analyse the policy, get clear instructions as to how your client intends it to be applied and ask to see the sales material used. Perhaps you can help make the insurer aware of some of the coverages it is affording even if it doesn't intend to do so.

LIST OF CASES

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Court of Appeal (1999), 123 O.A.C. 232

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