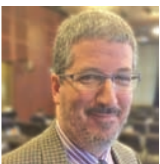
Focus INSURANCE

GUVENDEMIR / ISTOCKPHOTO.COM

Surviving the coming storm

Insurers using mitigation, adaptation tools to deal with climate change



Glenn McGillivray

Since the time of the Industrial Revolution, the Earth has warmed by approximately .8 (point eight) to 1 degrees Celsius (NASA Earth Observatory). In line with scientific projections that Northern Hemisphere countries will feel the effects of climate change more than equatorial nations, the rate of warming in Canada is roughly twice the global figure and, in the Arctic, closer to three times.

A warmer (and consequently wetter) world essentially translates into more — and more complex — weather-related claims for property and casualty insurance companies. Witness the 2013 floods in Alberta and the recent Fort McMurray wildfire to name just two examples. While such events can't be pinned specifically on climate change, they are consistent with the science, which says that such extremes will be become more and more common going forward.

So what are insurers doing right now to address this perceived bleak future of more and larger losses due to extreme weather?

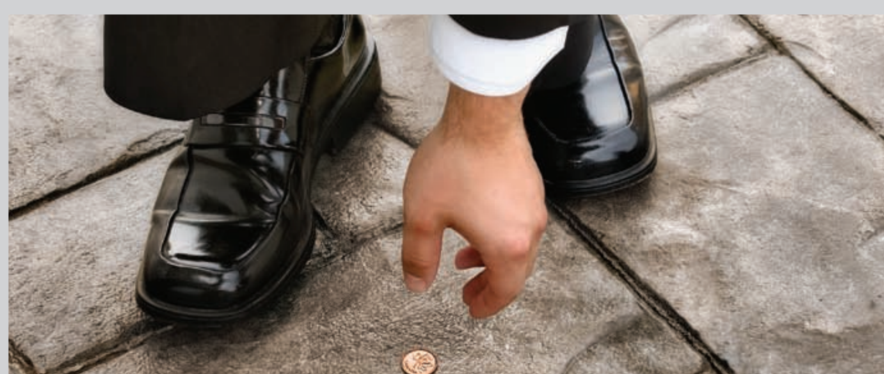
When insurers are faced with certain challenges, like steady upward pressure on claims costs due to increasing severe weather events, they can make adjustments to their products using various "tools." These may include increasing premiums, raising deductibles; imposing caps, limits and/or exclusions on coverages; assigning different deductible levels according to the hazard (like having a standard deductible for wind damage but a higher deductible for hail); and, amending replacement schedules for things like roofs (i.e. moving from covering the full cost of replacement to offering pro rata payment levels based on the age of the roof).

With a future that will see continued upward pressure on claims costs due to severe weather, it is expected that more and more insurers will turn to these tools to adjust how their products are structured. The challenge, however, is that in an ultracompetitive market like Canada, insurers must be careful not to lean on these tools too much or too often, or else they risk losing market share.

Though climate change means more threats to the insurance industry, it also means more opportunity, including the chance to develop and market new products to address current trends.

New product offerings by Canadian property and casualty insurers in recent

Actions, Page 13



McKellar STRUCTURED SETTLEMENTS
Now you're sure.
BILLIONS OF DOLLARS INVESTED, NOT A PENNY LOST.
1.800.265.8381 | www.mckellar.com

Focus INSURANCE

Court clarifies proportionate liability of lessor, lessee

Jennifer Biernaskie

As vehicle leasing has become increasingly popular, it has also become the norm for lessors to be named as defendants in tort claims arising from motor vehicle accidents. In most cases, the insurer for the negligent driver responds and pays or fights the claim on behalf of the direct tortfeasor. In the recent case of *Dempsey v. Bagley* [2016] ABQB 124, however, the claim against the driver (and his employer) was statute-barred, requiring Justice C.S. Phillips of the Alberta Court of Queen's Bench to consider the issue of vicarious liability of a vehicle lessor for the actions of a driver of the leased vehicle.

Dempsey involved two actions, both of which arose from single-vehicle accidents involving Brinks armoured vehicles. The passengers of the Brinks vehicles were injured in the accidents and sued the drivers, the drivers' employer, Brinks Canada Limited (Brinks), and PHH Vehicle Management Services Inc. (PHH), which had leased the vehicles to Brinks. One of the terms of the lease between PHH and Brinks was that Brinks would indemnify PHH for any claims relating to the leased vehicles. It was agreed by the parties that by virtue of the *Traffic Safety Act*, both PHH and Brinks were

RIVERNORTHPHOTOGRAPHY / ISTOCKPHOTO.COM

"owners" of the vehicles.

Liability was admitted in respect of the accidents, and the amount of damages for each passenger had been agreed upon by the parties. Because it was determined that the passengers and drivers were in the course of their employment with Brinks at the time of the accidents, the parties also agreed the claims could not proceed against the drivers or Brinks by virtue of s. 23 of Alberta's *Workers' Compensation Act* (WCA), which bars claims against workers and employers who are subject to the WCA. Thus, the sole issue at play in this trial was the liability of PHH.

The parties agreed that the claims could proceed against PHH, even though PHH was also a registered employer under the WCA, as PHH was not the employer of the passengers or the drivers. However, because of the indemnity clause between Brinks and PHH, the practical result was that Brinks would be paying any damages assessed against PHH, even though Brinks is a "protected" employer under the WCA scheme.

> "The court held that the commercial arrangement between Brinks and PHH could not be used to circumvent the intention of the Traffic Safety Act, which states that an owner of a vehicle is vicariously liable for a driver operating the vehicle with consent.
>
> **Jennifer Biernaskie**
> McLennan Ross LLP

Brinks and PHH argued that the claim against PHH should be estopped on the basis that the indemnity clause creates a result that is contrary to the spirit of the WCA. The court held that the commercial arrangement between Brinks and PHH could not be used to circumvent the intention of the *Traffic Safety Act*, which states that an owner of a vehicle is vicariously liable for a driver operating the vehicle with consent. The fact that the practical result is something unintended by the WCA was not persuasive to the court, given that it would allow the parties to extend a statutory bar by contract. As such, the claim was allowed to proceed against PHH.

The court was therefore asked to apportion vicarious liability as between Brinks and PHH, in accordance with s. 23(2) of the WCA. In assessing this issue, the court agreed that these parties should be severally liable — in other words, each party should only be liable for their own degree of fault. The court confirmed Brinks and PHH were only vicariously liable as a result of their status as employer of the drivers (in the case of Brinks) and as owners of the vehicles (in the case of Brinks and PHH).

The court considered the control each party exercised over the vehicles and drivers involved in the accidents. In describing PHH's control over the vehicle, the court noted that, while Brinks had day-to-day use of the vehicles, PHH was the legal owner, retained the ability to encumber the vehicles; controlled how the vehicles could be used and prohibited certain uses, required Brinks to maintain insurance; and banned Brinks from assigning the lease. In light of these factors (which would be present in virtually every vehicle lease on today's market), the court apportioned liability at 75 per cent to Brinks and 25 per cent to PHH. Thus, the plaintiffs were entitled to judgment against PHH for 25 per cent of their agreed-upon damages.

This case will no doubt encourage lessors to continue the use of indemnity clauses in motor vehicle leases and should serve as a warning to employers who expect to be immune from liability as a result of the protections contained in provincial workers' compensation schemes. In circumstances where they have entered into lease agreements with a comprehensive indemnity clause, the employer may wind up paying both WCB premiums and compensation for injured employees.

This case also signals a turning point for insurers who issue policies for vehicles in industries covered by worker's compensation schemes. To the extent the premiums for those policies had been reduced as a result of the decrease in claims brought about by participation in those schemes, insurers may have to rethink their risks in the context of leased vehicles.

Jennifer Biernaskie is a partner in the insurance and commercial litigation practice groups at McLennan Ross LLP.

Actions: Changing building codes to make new, existing homes more resilient

Continued from page 12

months include:

- Home maintenance/repair coverage that gives clients access to home service programs;
- Water and sewer line coverage;
- Off-grid power to cover solar panels and wind turbines;
- Green insurance that would see damaged items replaced with greener options;
- Insurance that would see damaged items replaced with more weather-resilient options;
- Bylaw insurance coverage that indemnifies for additional costs associated with bylaw compliance.

Now, and very largely as a result of the massive flooding in Alberta and Toronto in 2013, several Canadian insurers have begun offering coverage for overland flood — a first for the country. However, with the lack of any kind of national flood insurance program or co-ordinating force, consumers will be faced with a dog's breakfast of flood insurance products, each with different coverage offerings, different exclusions, deductibles and pricing.

The two main actions most commonly described to address climate change are *mitigation* and *adaptation*. Mitigation in the climate change context refers to efforts to reduce the emission of greenhouse gases into the atmosphere. Adaptation is described as actions taken to help societies cope with a changing climate, such as fostering resilience by improving building codes for new construction or informing homeowners of actions they can take to make existing homes more robust.

Insurers are not experts in mitigation, but certainly are in the area of adaptation which, when using insurance lingo, essentially equates to loss control.

Most (re)insurers have their own internal staff to develop new products to, among other things, insure previously uninsurable or uninsured risks. Many larger companies also have their own staff to do things like forecast weather, conduct research into severe weather and resiliency, and build/run analytical models that help them better understand and price risk.

Medium to small companies, however, usually do not have the resources to sustain such specialized areas within their companies.

Many companies of all sizes belong to such groups as the Institute for Business and Home Safety (IBHS) in the U.S. and the Institute for Catastrophic Loss Reduction (ICLR) in Canada. Both organizations were formed by the property and casualty insurance industry to address trends of more and larger losses due to severe weather and earthquakes.

ICLR is a multi-disciplinary disaster prevention research and communication organization established by the industry almost 20 years ago and affiliated with Western University in London, Ont. Institute staff and research associates conduct multidisciplinary research in wind and seismic engineering, atmospheric science, risk perception, hydrology, economics, geography, health sciences, public policy and a number of other disciplines.

At present, the institute is concentrating much of its focus on better understanding the problem of urban flooding to reduce the instance of basement flooding in Canadian homes; working to change building codes, land use planning regimes and local bylaws in order to build new homes that are more resilient to natural disasters; and addressing the need to make existing homes more resilient to severe weather.

Just as climate change has been described as "weather on steroids," the impact of the phenomenon on insurers could be described as "claims on steroids": More claims, more complex claims, more challenges to coverages and, thus, more possible disputes for insurance company ombudsmen and the courts to settle.

As climate change leads to more uncertain weather, it will also lead to more uncertainty in the business of insurance.

So stay tuned, we ain't seen nothin' yet.

Glenn McGillivray is the managing director of the Institute for Catastrophic Loss Reduction.