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Introduction

- Insurance is designed to protect from a large financial loss
- Individual purpose
 - Rather than save for the loss, and require the full amount, pay a small amount for protection
- Societal purpose
 - If someone suffers a loss and is unable to pay for it, society must carry the burden, additionally people are less likely to spend if their interests are not protected
 - Insurance spreads the risk of a loss
- **Auto Insurance**
 - **Section A. Liability (\$200k minimum required)**
 - Government has an interest in ensuring that people injured in accidents are compensated
 - This is third party coverage going to the party in the other car
 - Technically you pay the other party and the insurer pays you; practically the insurer pays straight to third party
 - **Section B. No Fault or First Party Benefits**
 - You're injured, and plan to sue the other driver, can get money upfront from your insurer to compensate
 - Disability, pay a portion of lost wages for a certain period of time
 - Medical, up to \$50,000 in medical costs
 - Funeral, insurer will pay part of funeral costs and death benefits (but only in small amounts)
 - **Section C. Collision Coverage**
 - Covers damage to your vehicle
 - C can be limited by the insurer
 - Can't be drunk, cannot be intentional
 - Because A and B are about safety and protecting society, they cannot be limited the same way as C

Topic #1: Insurable interest

- What is Insurable Interest?

- Generally (Auto/Property)
 - Common law
 - **Factual expectancy test:** Insurable interest is when the insured stands in relation to the insurance subject such that they would suffer a loss or detriment on the happening of the insured against the event
 - *Constitution Insurance v Kosmopolous*
 - Expressly adopts the factual expectancy test over legal title test
 - Emotional interest is not enough, must be 1) **pecuniary** + 2) **legally enforceable**
 - Promises to give or promises to be put into a will are not legally enforceable
 - A complete contract for sale (event if you don't yet have title) is legally enforceable
 - Loan in general is not, but may be if it is tied to property
 - If you have title, but no financial interest (but car in dad's name), then don't have insurable interest
 - Onus is on the insured to prove they have insurable interest
 - Insurable interest either exists in its entirety, or not at all

- If there is no insurable interest, there was never a valid contract, don't have to pay for the loss but must return the consideration (the premiums)
 - Life Insurance
 - Governed by statute, not common-law factual expectancy test
 - However the test is indirectly incorporated into who has an insurable interest
 - *Section 647* provides a list of people who have an insurable interest in the context of life insurance
 - Self, child, grandchild, spouse, anyone you were wholly or partly dependent on, employees, person you have a pecuniary interest in
 - **Insurable interest does not run with the property**
 - The insurance risk assessment goes to the relationship between the insured and the subject matter, therefore cannot attach to the subject matter on its own
 - *Rayner v Preston*
 - Insurance contract is a personal contract between the insured and the insurer and will not run with the land
 - Assigning an insurance policy requires the insurer's consent
- Interests of Others**
- General rule: If proper steps are taken, some insurable interest entitles the insured to insure the entire amount
 - This is relevant in situations where there are multiple insurable interests on a single entity (eg. Seller/Purchaser of a home)
 - Requirements
 - 1) Policy must note that it covers another's interest
 - 2) Policy doesn't particularize the owner
 - 3) The relationship to the other requires you to ensure the entire amount
 - To benefit people who are not named
 - 1) Policy must indicate that it does more than indemnify the purchaser
 - 2) The person benefiting has to be ascertainable at the time
 - 3) Named insured must have the intention to benefit others
 - 3) Benefited, party must authorize or ratify
 - Case Law
 - *Keefer and Quebec Bank v Phoenix*
 - **If someone has a partial interest, they can insure the item for the full amount** (unless the policy specifically limits it)
 - While you can insure the interests of others, you can't keep all the benefits for yourself (need to distribute)
 - *Spencer v Continental Insurance Co*
 - Court is generally prone to find that there was an insurable interest
 - Here they found an insurable interest in any subject matter that has common enjoyment, since there would have been a moral obligation to replace the property, and therefore suffers detriment or loss
 - Not really legally enforceable or pecuniary; Court is stretching
 - *St. Paul Fire v Chaleur*
 - **The "owner" per SC #2 is anyone with an insurable interest**
 - SC #2 deals with the property of others; generally an insurer is not liable for property not owned by the insured, unless specifically stated in the contract or the specific item is mentioned in the contract
 - *Dudelzak v Landry & Madill* applies *Chaleur* interpretation of SC #2 in Alberta

- When must there be interest?

- Auto/Property: there must be insurable interest **at the time of the loss**
 - Some authorities state you need an interest when entering into a contract, but less certain however you can have it, lose it, and then get it back again no problem
 - If there is no interest at the date of the loss, the contract is void
- Life: Do not require insurable interest at the time of loss, **only when entering into the contract**

Topic #2 Principle of Indemnity

- Overview

- *Section 638*: Insurance is intended to be compensatory
 - Entitled
 - Is there contract formation? (insurable interest, contract requirements, statutory requirements) (onus is on the insured)
 - Is the loss within coverage? (onus is on the insured)
 - Has the insured done (or not done) something that denies coverage (onus on insurer)
 - Value
 - Open Policy
 - Sets out limits; pay any amount of loss, up to the limits. Can't tell just by looking at the policy how much will be paid out, insured needs to prove loss of amount.
 - True indemnity policy because the insurer pays the entire loss (up to the policy limits)
 - Valued Policy
 - Agree on the amount to be paid on the loss, without the need to prove loss amount
 - Note: For life insurance, value based on premiums, not the loss
 - Not true indemnity because it doesn't compensate based on the actual loss
 - Pre-valued Policy
 - Used in specialized property. Assign a value to a piece of art, can't authenticate/valuation after. If total loss, get the full amount of policy
 - Related to the actual value (valued policies aren't) but determined at outset, whereas open is determined at the time of the loss. Setting pre-determined value for full loss, rather than creating an open policy

- Entitlement: Public Policy Considerations

- General rule: The insured isn't entitled to recover for their loss if their conduct was unconscionable or morally repugnant because it would run counter to public policy interests
- Common law (altered by statute)
 - Intentional losses are unrecoverable
 - Cannot recover if loss occurred during an illegal activity, even if it was unintentional
- Statute
 - *Section 533 (general)*: Breach of a criminal law does not prohibit recovery, unless the breach was intended to bring about the loss, and unless the contract provides otherwise
 - e.g. Section C Auto policy specifically states that impairment (crime) prohibits recovery
 - *Section 541*: Exclusion of coverage for a criminal act only applies to the insured who caused the loss
 - e.g. Joint owners, one burns the house down (crime), criminal can't recover but the innocent party can
 - *Section 647*: Insurance can cover suicide if the policy expressly states

- Case Law
 - *Dominion Fires Insurance v Nakata*
 - Property insured was a brothel, insurer knew it was a brothel; Can't have an insurance contract because the contract is designed to promote illegal activity
 - *Co-operative Fire & Casualty v Saindon*
 - Don't need to intend to cause the particular loss that occurred, just need to have intended to cause some loss
 - Intention is measured whether the insured generally intended to cause a loss
 - *Dhingra v Dhingra Estate*
 - Public policy bars the morally responsible from recovering; If NCR then not morally responsible and therefore public policy does not apply
 - H + W have mutual life insurance policies, H kills W; H found NCR
 - *Oldfield v Transamerica Life Insurance*
 - Public policy is aimed at not encouraging criminal acts by allowing coverage, when the beneficiary is innocent they will be able to recover
 - Insurer could have specifically excluded coverage for criminal acts
 - *Wong Estate v Liberty Mutual Insurance*
 - Contract had a provision denying coverage for "criminal acts", argument is whether it means intentional or all criminal acts
 - Criminal acts means all criminal acts, not just intentional one
 - Jurisprudence differs, some say means all, some say just intentional ones with unintended consequences

- Valuation

- Three factors determine the amount that should be paid from the insurer to the insured
 - 1) Type of policy (open, valued, pre-valued)
 - 2) Valuation method in contract
 - 3) Extent of loss or interest
- Important concepts
 - Pre-valued: The policy/parties decide the value of the subject matter at the outset
 - Replacement cost endorsement: Replacement policies disregard depreciation, value not determined on the days of the loss, may end up with more than was lost
 - Constructive total loss: Cost of repairing exceeds the total value (totalled)
 - Salvage: Car is written off, but the car wreckage/parts may still be worth something. If the insured gets both the value of the car and the value of the salvage they will be over indemnified
 - *Section 556 SC#4(8)*: Insurer gets salvage for auto insurance contracts
 - Other contracts it would have to be written in
 - Abandonment: Opposite of salvage, prevents the insured from making a decision on whether there was a constructive total loss. Cannot abandon without the insurer's consent
 - General: *Section 540 SC#10* and Auto: *Section 556 SC#4(7)*
 - Optional repair: The insurer can choose to repair themselves, or give you the value of the loss
 - General: *Section 540 SC#13* and Auto: *Section 556 SC#6*
 - If the insurer chooses to repair, they need to finish, even if the cost is more than the value or the policy limits
 - Co-insurance clause: Insurer wants you to insure the total value of the loss, and writes in a clause that requires you insure a certain percentage of the value. In such a scenario if

you fail to get extra insurance, you become the co-insurer and the insurer doesn't have to pay fully

- *Section 519*
 - ADR provisions for dispute in valuation
- General: *Section 543* and Auto: *Section 584*
 - Insurer is obligated to notify the insured of a deductible or co-insurer clause (must bring to their attention)

- Sue & Labour clause

- Insured: If there's a loss, the insured must take all reasonable steps to prevent future loss
- Insurer: If there's a loss, and the insured takes reasonable steps, the insurer must compensate, even if the steps were unsuccessful (may result in paying more than policy limits)
 - Expenses incurred to protect property from some covered risk
 - Expenses have to relate to a materialized risk and must be an attempt to limit further loss
- General: *Section 540 SC#9*
 - Pro rata share of the costs
- Auto: *Section 556 SC#4(1)*
 - Insurer pays full sue and labour costs, if insured fails to take reasonable steps, insurer can refuse to cover second loss
- Case law
 - *Leger v Royal Insurance*
 - For an open policy, the insured gets the lower of 1) the policy limits 2) actual cash value 3) interest of the insured
 - *Martin v Travellers Indemnity Company of Canada*
 - Future contingencies are not taken into account when determining the value on the date of the loss (whether or not the building was going to be demolished)
 - *Raymond v US Fire*
 - When its ambiguous in the contract, the type of contract (open, valued, pre-valued) will be inferred from the insurer's conduct
 - If you give the impression that it's valued, court will hold you to that
 - *Re Art Gallery of Toronto*
 - When there is a partial loss to an underinsured item and there is a pre-valued or valued policy, the insurer is only responsible for a percentage of the loss
 - $((\text{Loss})/(\text{Actual Value at Date of Loss})) \times \text{Value in Policy}$
 - *Hartford Fire Insurance v Benson & Hedges*
 - Sue and labour clauses cover costs incurred in mitigating future damage from a loss that has already occurred
 - In this case, one of many bottling tank exploded, so the insured paid to fix all the other tanks to pre-emptively address the problem. However because the other tanks hadn't yet exploded (no loss), their repair cannot be covered by sue and labour clauses
 - Note: Sue and labour clauses deal with materialized risks, difficulty is characterizing a materialized or an un-materialized risk

Topic #3 The Insurer's rights of Subrogation and Contribution

- Subrogation

- Subrogation allows the insurer to step into the shoes of the insured and sue the wrongdoer
 - It is an equitable remedy that can be altered if expressly contemplated in the policy
 - Subrogation involves the insurer suing in the name of the insured and they are vulnerable to any defences that would be available against the insured and may only recover what the insured would have gotten
 - Subrogation takes effect once the insured has been indemnified
 - Note: Subrogation is related to indemnity. Life insurance is not an indemnity policy and therefore one cannot subrogate under a life insurance policy
- **1) No subrogation until the insured has been fully indemnified for their loss**
 - Common law
 - Have to waive deductible, must pay total loss, even if its over the policy limits
 - If there are multiple loses but only one is covered, only have to indemnify for the covered loss
 - Statute
 - *Section 546*:
 - Get subrogation once any amount is paid, if less than the full amount is recovered than the insured and the insurer will share pro rata based on the amount contributed
 - *Section 570(4) and (6)*
 - Can't subrogate for section B auto coverage
 - Section C has provisions waiving subrogation against people driving with permission
- **2) Upon the right of subrogation arising, control of the action rests entirely with the insurance company**
 - Insurer can choose the settle, decide not to pursue, etc. regardless of what the insured wants
 - Common law
 - Insurer is always in control
 - Statute
 - *Section 546*
 - If there is partial indemnity, and the insured's contribution is more than the deductible, insurer and the insured must work together against the tortfeasor; Court will provide a mechanism to decide who gets to control the action if they cannot agree
 - If partial indemnity, can't settle unless both the insured and the insurer agree
- **3) The subrogated claim or subrogated right of an insurance company is completely derivative**
 - The insurer gets rights from the insured's rights
- **4) Insured has a duty to cooperate throughout a subrogation claim**
 - Insured has all the evidence so their cooperation is imperative
 - This is partially codified and can be expressly changed in the contract
- **5) Insurer cannot subrogate against their own insured**
- Case law
 - *Confederation Life Insurance Company v Causton*

- Contract does not need to expressly mention a right to subrogation, it is prima facie available
- Full compensation means complete compensation for the losses incurred (including legal costs)
- *Mutual Life Assurance Company of Canada v Marance*
 - Subrogation clauses can alter the common law requirement of full indemnity but they must be crystal clear in doing so
 - Saying “share in recovery” is not specific enough to dispose of the full indemnity requirement
- *Sommersall v Friedman*
 - The duty to cooperate is limited, it requires the insured to pass on what they have but does not require them to preserve a cause of action. The insured must have acted in bad faith to breach the duty
- *Zurich Insurance Company v Ison TH Auto Sales Inc*
 - The court will strictly interpret contractual clauses that alter the common law subrogation rule requiring full indemnity
 - Here the contract specified that upon making any payment the insurer could obtain a subrogation claim, however it was silent on control, and in order to change the rule that you get control in exchange for full indemnity, the provision must be completely clear

- Contribution

- General rule: When there are two (or more) policies covering the same risk, the insurers will share in indemnifying the insured
- **How do you know whether two policies are covering the same risk?**
 - Requirements of contribution
 - 1) Address the same subject matter
 - 2) Same insured
 - 3) Cover same interest in the subject matter (e.g. owners interest in a building compared to a tenants interest)
 - 4) Cover same risk, the cause of loss and must provide the same degree of coverage
 - Primary policy
 - Designed to pay first, as soon as the loss occurs. Statute deems certain types of insurance as primary
 - Excess policy: Layered on top of primary, only comes into play after primary loss/ coverage (not a part of contribution)
 - e.g. SEF 44 family endorsement

• **How do insurance companies share the loss?**

Policy Limits & Loss Amounts	Pro Rata (Maximum Liability Formula)	Equal Sharing to Policy Limits	Independent Liability
Equal Limits / Loss within Limits: Policy A \$10,000 Policy B \$10,000 Loss \$6,000	$10000/20000 \times 6000 = \3000 for each A & B **same result	A pays \$3000 B pays \$3000 **same result	$6000/12000 \times 6000 = \3000 for each A & B **same result
Unequal Limits / Loss within Limits: Policy A \$10,000 Policy B \$20,000 Loss \$6000	$10000/30000 \times 6000 = \2000 for A $20000/30000 \times 6000 = \4000 for B	A pays \$3000 B pays \$3000 **same as independent liability	$6000/12000 \times 6000 = \3000 for each A & B **same as equal sharing
Unequal Limits / Loss Over Limits of <u>One</u> Policy: Policy A \$10,000 Policy B \$20,000 Loss \$15,000	$10000/30000 \times 15000 = \5000 for A $20000/30000 \times 15000 = \10000 for B	A pays \$7500 B pays \$7500	$10000/25000 \times 15000 = \6000 for A $15000/25000 \times 15000 = \9000 for B
Equal Limits / Loss Over Limits of <u>Each</u> Policy: Policy A \$10,000 Policy B \$10,000 Loss \$15,000	$10000/20000 \times 15000 = \7500 for each A & B **same result	A pays \$7500 B pays \$7500 **same result	$10000/20000 \times 15000 = \7500 for each A & B **same result
Unequal Limits / Loss Over Limits of <u>Each</u> Policy: Policy A \$10000 Policy B \$20000 Loss \$21,000	$10000/30000 \times 21000 = \7000 for Policy A $20000/30000 \times 21000 = \14000 for Policy B **same result as independent liability	A pays \$10000 B pays \$11000	$10000/30000 \times 21000 = \7000 for Policy A $20000/30000 \times 21000 = \14000 for Policy B **same result as pro rata

- **Common law default is the Pro Rata formula**

- Pro Rata = (policy limits of insurer / combined policy limits of all insurers) x value of the loss
- Courts will sometimes apply equal sharing up to the policy limits
 - Equal Sharing = each insurer contributes dollar for dollar up to the value of the loss or to policy limits
- Independent liability is rarely used
 - Independent Liability = (amount the insurer would pay toward the loss as the ONLY insurer / total amount all available insurers would pay toward the loss if each was the ONLY insurer) x actual amount of the loss
- Note: The different methods of contribution only make a difference if there are unequal policy limits
- General: *Section 544* insurer pays “rata-able” portion unless the insurers agree otherwise

- Auto: *Section 596* each pays rata-ably
 - If equally policies, share equally
 - If unequal, match dollar for dollar until reach limits
 - **How does the insured get their payment?**
 - Common law
 - The insured can claim the entire amount from one insurer, who can claim against the others
 - Statute
 - Insurers only have to pay their contribution to the claim, not the whole amount
 - Case Law
 - *Continental Insurance v Prudential*
 - The common law doctrine of contribution is an equitable doctrine, and the rules of equity will apply (clean hands doctrine)
 - Statute changes common law by saying that each contributing insurer needs only to pay their ratable portion
 - *Clark v Fidelity-Phoenix*
 - Contribution principles will only apply when there is duplicate coverage
 - Not enough to cover the same property, must have the same owners and interest in that property
 - *Musca v Wawanesa Mutual Insurance*
 - To determine whether there was duplicate coverage, look to whether both insurance companies thought their coverage was in place at the time of the loss
 - Policy limits cap contribution but don't determine it, rather contribution is determined by the actual amount of the loss
 - Each pays as much as necessary to indemnify the loss, up to their own limits
 - *Family Insurance v Lombard Canada Ltd*
 - It is possible to draft contractual clauses that make a particular policy excess
 - However when there are multiple "other insurance"/excess clauses that are irreconcilable, both insurers will still have to contribute
 - Note: *Section 444(2)* Limits an insurance company's ability to insert excess clauses
- **Difference Between Contribution & Subrogation**
 - Both preserve the obligation to indemnify the insured, but give insurance companies a way to limit their loss
 - *Cameco Corp v Insurance Company of Pennsylvania*
 - Where there is more than one policy in place and one insurer fully indemnifies the insured, that insurer cannot subrogate another insurer
 - The right of subrogation excludes the right of one insurer to subrogate against another
 - Contribution allows insurers to claim from other insurers also liable for the same loss, subrogation does not

Topic #4 The Insurance Contract

- Insurance contracts are contracts of utmost good faith, with special requirements on both the insurer and the insured
 - Both parties are uniquely dependent on each other
 - Insured relying on the insurer when in need and the insurer relying on the insured to give accurate information
 - Always a breach of contract to act fraudulently
- **Duty to Disclose**
 - **Duty to Disclose (at common law)**
 - General rule: Insurer has a duty to disclose **1) material facts + 2) within their knowledge**, at common law the duty arises at the formation of the contract and there is no ongoing duty
 - Material facts
 - Materiality is assessed from the insurer's point of view, not the insured
 - **Would the information have caused a reasonable insurer to have increased their premiums or refused the risk had they known?**
 - Note: Arises even if the ultimate loss is unrelated to the material fact
 - Within their knowledge
 - No obligation to disclose information they did not know
 - Notes:
 - No obligation to disclose information in the insurer's possession
 - Do not have to disclose information that the insurer waive it's right to know
 - Do not have to disclose information the insurer would know as a matter of common sense
 - Requirements to prove breach
 - 1) Prove inaccurate information from the insured
 - 2) Must prove that the undisclosed fact was material on a reasonable insurer test
 - 3) Must prove that it was material to this particular insurer
 - Case Law
 - *Carter v Boehm*
 - The insurer does not have to show that the insured had a fraudulent intent when they failed to disclose some information
 - *Mutual Life v Ontario Metal Product*
 - Insurer has a duty to disclose all material facts within their knowledge; Materiality is assessed based on the reasonable insurer test: whether the reasonable insurer would have increased their premiums or refused coverage had they known about the information
 - When there is evidence that the coverage would be the same with or without the information it will be found to be immaterial
 - *Badenhurst v Great-West Life Assurance Co*
 - The intention of the insured or their view as to whether a fact is material or not is irrelevant, the test for materiality depends on the reasonable insurance company
 - *Henwood v The Prudential Insurance Co*
 - In the absence of evidence to the contrary, the evidence brought forward by one insurance company will be taken to be representative of the reasonable insurer
 - **Duty to Disclose (at statute)**
 - **Property Insurance**
 - *Section 540 SC#1 & 4*

- *SC#1 6-10* apply to property, describes the duty at the outset
 - Contract is voidable if the insured
 - **Gives false description of property to the prejudice of the insured**
 - **Gives a misrepresentation of material circumstances**
 - No obligation where insured innocently forgot, misrepresentation requires a positive action
 - **Fraudulently omits material circumstances**
 - Omissions require fraud, but its difficult to know whether it is an omission rather than a false description
- *SC#4* applies to liability and property, ongoing duty
 - Imposes disclosure requirements throughout the contract
 - **Insured must promptly disclose/report changes in writing that are within their knowledge and control**
 - Once reported, the insurer can raise the premiums or cancel the contract (so long as they meet the notice requirements)
 - Burden on the insurer to show a breach on a BOP (that it was material, etc.)
- *Section 545*
 - Regardless of a particular provision in the contract, if the court finds that the provision is unreasonable they can refuse to enforce it
 - Designed to benefit the insured
- Case Law
 - Duty at the outset
 - *Taylor v London Insurance*
 - *SC #1* requires the insured to prove actual fraud for an omission, that the insured knew they weren't disclosing and they did so for the purpose of misleading
 - *Bowes v Fire Insurance of Canada*
 - *SC#1* does not require the insurer to prove actual fraud for a misrepresentation, the information just needs to be within the knowledge of the insured and has to be material (based on the reasonable insurer test)
 - On going duty
 - *Nahayowski v Pearl Assurance*
 - There is an ongoing duty to disclose material information within the knowledge and control of the insured
 - *Watkins v Portage La Prairie Mutual Insurance Co*
 - Ability to start legal proceedings ≠ control
 - Must have physical control of the property, (here the tenant was violent and abusive so the insured didn't have control because going in would have put herself at risk)
 - *Marche v Halifax Insurance Co*
 - *Section 545* can apply to prevent the court from enforcing *SC#4* (on going duty to disclose) when it would be unreasonable to apply the statutory condition
 - Vacancy clauses are common, here the property was occupied, vacant, occupied; Since the unreported change had been rectified by the time of the loss it would be unreasonable to apply *SC#4* in these circumstances
- **Auto Insurance**
 - Duty to disclose at the outset
 - *Section 554*

- **Can't give inaccurate or false particulars to the prejudice of the insurer**
- **Can't knowingly misrepresent facts**
- **Can't fail to disclose if asked**
- Ongoing duty
 - *Section 546 SC#1*
 - **Ongoing duty to report material changes to risk within the knowledge of the insured**
 - No control requirement
 - Statute provides non-comprehensive list of material changes, the reasonable insurer test still applies
- Adverse contract action
 - *Section 555*
 - Limits when the insurer can refuse an application, cancel or alter a policy
 - Can refuse to pay a claim, but cannot void the policy
 - Can refuse to pay under *Section C* or to provide anything in excess of \$200k minimum
 - Practically, insurer can make it undesirable for the insured to stay with them
- Case Law
 - Duty at the outset
 - *Sleigh v Stevenson*
 - Knowing misrepresentation does not require an intent to mislead, the insured must just know certain facts to be true and fail to disclose them at the outset
 - Here the mom signed a contract without reading it, signatures authenticate a document as being read and understood
 - *Meritt v Meritt Insurance*
 - To the prejudice of the insurer means anything that would have caused them to increase premiums or deny coverage (synonymous with materiality)
 - When an inaccuracy is not to the prejudice of the insurer than the insurer cannot deny coverage
 - *Moxness v Co-operative Casualty Co*
 - Insured is not required to disclose information that the insurer waived their right to know
 - If the insurer represents that they will endeavour to discover some information, than the insured need to disclose that information
 - Ongoing duty
 - *Thompson v Allianz Insurance Co of Canada*
 - Reasonable insurer test still determines what the insured must disclose
 - Materiality is determined objectively, based on the enumerated list under *Section 546 SC#1* or the reasonable insurer test
 - Insured does not need to know whether the information was material
 - *Heon v Insurance Corporation of British Columbia*
 - Future contingencies to perform a material change do not count, must prove that a material change actually occurred and was not only contemplated
 - Here the insured hadn't yet used the vehicle for a commercial purpose (had she used it for a commercial purpose it would have been a material change)
 - Note: Court doesn't address physical changes to the vehicle
 - **Life Insurance**
 - Duty to disclose at the outset, **no ongoing duty to disclose**
 - *Section 649*

- Contract takes effect on delivery, so long as no material change since the application
 - Not typically a problem now, used to be when the policies were mailed out
- *Section 652*
 - Duty on applicant and insured to disclose material facts that have not been disclosed by the other
- *Section 653*
 - Cannot void the contract based on a misrepresentation on the application if the policy has been in place for more than two years unless there was fraud
 - Incontestability clause
- *Section 655*
 - If the misrepresentation goes to age, never allowed to void, need to recalculate the payout
 - If the insurance is limited by age, can void within 5 years of the misrepresentation
- Case law
 - *Murphy v Sun Life Assurance Co*
 - The insured is not required to intend to mislead
 - Insurer must show there was a misrepresentation on a balance of probabilities
 - *Bureau v Manufacturers Life*
 - Cannot deny coverage based on an innocent misrepresentation once the policy has been in place for more than 2 years
 - Have to prove fraud
 - Here the insured failed to disclose a material fact, but because he thought that it was only a passing injury he was not found to have intended to mislead the insurer, therefore insurer must extend coverage
 - *35445 Alberta Ltd v TransAmerica Life Insurance Company of Canada*
 - Court can look to extrinsic evidence to determine if the misrepresentation was fraudulent
 - Question is whether there was fraud, not whether the insurer actually relied on the fraudulent information

- **Formation of Contract**

- Like any other contract, still need offer, acceptance, consideration and mutually agreed terms
 - Typically filling out application is offer, issuing the policy is acceptance (wherein the premiums have been quoted)
 - Sending a reminder of renewal is offer to renew, paying premium is acceptance
- Essential terms of any insurance contract
 - Definition of risk
 - Duration of cover
 - Amount of coverage, limits
 - Premium amount
- **Property & Auto Insurance**
 - *Section 522*
 - Insurance contract is binding before the first premium is paid
- **Life Insurance**
 - *Section 649*
 - Life insurance not in effect until the application is complete, and policy is delivered without material change since the application

- Case Law
 - *Davidson v Global Insurance Company*
 - In order for an insurance contract to be in place, the parties must be *ad idem* on essential terms
 - Essential terms include risk to be covered, duration of risk, policy limit, and premium amounts
 - *McCunn Estate v CIBC*
 - Intention requires both parties to have turned their minds to the issue
 - Cannot presume intention based on administrative error
 - Here there was no evidence that the insured knew that the premiums continued to be deducted or that they intended to extend their policy with the insurer
 - *Khosah v Canada Life Assurance Co*
 - Both parties must have intended for their to be a contract and intention cannot be presumed, must look at the evidence to find whether there was sufficient intention. Where the parties did not intend to form a contract, the contract never existed.

- **Cover Notes**

- Related to offer/acceptance, document to the insured that secures temporary coverage while the insurer is deciding if they want to give coverage
- The cover note is evidence of a contract, but not the contract itself
- General features
 - Basic coverage
 - Shorter time period
 - Lower cost
 - Specified term period, remains in place until agreed to terminate, the listed end date or replaced with a full policy. If no term specified, presume a reasonable period
 - Term is material, can only imply a reasonable period since temporary, won't do that for a full policy
- Once issued, a full policy will take precedent over a cover note
- Issuing a cover note does not obligate the insurer to issue the full policy
- Case Law
 - *Patterson v Gallant*
 - Pink cards are evidence of financial responsibility
 - Pink cards are not a policy or a cover note, they exist to make things easier for the insured. Intention in sending a pink card is isn't to bind self, but to make things easier for the insured
 - Pink cards can be contract, but there needs to have been sufficient intention for the pink card to be a contract on both sides
 - *Brochu v Vachon*
 - There was no mutual intention, therefore no mutual mistake
 - No evidence that they had thought about whether an accident had already occurred, therefore it wasn't certain at that time
 - Here the pink card didn't say what time the policy would begin, therefore the cover note adopt the wording on the policy and imitates coverage at 12:01am

- **Duration of Cover**

- When a policy starts/ends is a question of intention and is determined by the contract
- **Property & Auto Insurance**
 - *Section 522*
 - Coverage can being before premiums are paid

- *Section 522(3)*
 - If cheque bounces, insurer can terminate
 - Still have to give notice, important since premiums don't have to be paid to be in place, but non-payment can terminate
- *Section 555 (auto)*
 - Adverse contract action
 - Can't terminate for certain things
 - Can limit coverage to the statutory limits but can only cancel for specific, narrow reasons
- **Life Insurance**
 - *Section 649*
 - Coverage begins after the first premium is paid and the policy is issued
 - *Section 651*
 - Anyone can pay the premiums
 - Grace periods: coverage should be continued if premiums are paid within the 30 day grace period set out in the statute
- Termination
 - Three ways to end
 - Nature expiration
 - Generally indicated in the policy (life insurance is exception)
 - End by mutual agreement
 - Unilateral termination (unusual in contracts, this is explicitly provided for in statute)
 - Either party can end, without reason
 - *Section 540 SC#5*
 - Unilateral termination by insured at any time
 - *Section 540 SC#14 (general), Section 556 SC#9 (auto)*
 - Insured has to give notice to the insurer
 - *Section 556 SC#8*
 - Insurer must give 15 days' written notice by registered mail, or 5 days with personal delivery. Counts from the day of delivery, not the date sent
 - Insurer must also return unused premiums with the notice or within a reasonable amount of time
 - Bad faith termination
 - Can never terminate for a bad faith reason
 - e.g. Spreading wildfires, take premiums until almost at the house's doorstep, then cancels the policy
- **Case Law**
 - *Lumbermen's Mutual Casualty v Stone*
 - Obligation to deliver the letter, not that the insured actually read the letter
 - Statute only requires that the insurer delivers the letter, not that the letter is actually read or understood by the insured
 - *Ellis v London-Canada Insurance Co*
 - If you have mutually agreed to terminate the contract, you do not need to meet the statutory requirement
 - Mutually agreed termination is instant
 - *Krupich v Safeco Insurance Co*
 - In order to terminate unilaterally, the insurer must strictly comply with statutory requirements

- Unused premiums must be returned along with the notice, or as soon as practicable in order for the termination to take effect
- *Lafont v AMA*
 - Normally, unless a policy is actually renewed it will expire. However, the insurer can be held liable if they create a duty of care such as the duty to inform the insured that they would not renew the policy
 - Here since the insurer had been automatically renewing the contract and the insured was never required to do anything, they created a reasonable exception of automatic renewal, so they were bound to not be negligent towards this assumed duty of care
 - Similar to an estoppel argument

Topic #5 Interpretation of Terms

- Interpretation of terms (general principles)

- What was the intended scope of coverage (contractual interpretation) and was the loss contained within that scope (causal)
 - Goal of the court is to give effect to the intentions of the parties
 - Because insurance contracts are contracts of adhesion, it's difficult to ascertain intent
 - The insured didn't turn their mind to coverage, therefore ambiguities will be in favour of the insured
 - Look to promote the reasonable intentions of the parties at the time they entered into the contract
 - Give undefined words their plain, ordinary meaning, give defined words their defined meaning
 - If a word has two possible meanings, choose the definition that most reasonably reflects the intentions
 - Interpret the contract as a whole, remaining mindful not to give a windfall
 - If ambiguous use the following
 - Interpret the contract against the insurer (drafter)
 - Does not apply to statutory conditions because they are not written by the insurer
 - Broadly interpret coverage, narrowly interpret exclusions
 - Apply the reasonable expectations doctrine
 - Accepts that the parties may not have turned their minds to the issue, and asks if they had, what would they have reasonably expected
- Case Law
 - Generally
 - *Jesuit Fathers of Upper Canada*
 - Where terms of the contract are unambiguous, they must be given their ordinary meaning
 - Without ambiguity, regular principles of contractual interpretation apply
 - Here "claims made" is interpreted to cover claims brought (rather than those which occurred) during coverage
 - *Briquette Estate v Westbury Life Insurance*
 - Just because a contract fails to address a situation does not automatically mean there is an ambiguity
 - Principles to follow when interpreting
 - Promote the true intentions of parties

- If there are two meanings, use the one that promotes the intentions of the parties, ambiguity is construed against insurer
- Avoid an interpretation that would result in a windfall to one party
- Narrowly apply public policy exclusions
 - Here there was a clear intention that the surviving spouse should benefit, however this should be barred based on public policy (H killed W)
- Exclusion clauses
 - *Engle Estate v Aviva Insurance Co*
 - Exclusion clauses should be interpreted narrowly, and in light of the contract as a whole
 - Here the question was whether “settlement” included man made causes, there were other clauses that specified between natural or man made
 - *Scott v Wawanesa*
 - This case informed *Section 541*
 - An exclusion clause in a contract for loss caused by an intentional or a criminal act only applies to the interests of the person who committed the intentional act
 - *Lewis v Economical Insurance Group*
 - Courts will find ways to justify interpretation of the policy in favour of the insured when warranted (despite general principles)
 - Here the insured was claiming under an SEF 44 because the tortfeasor could not be identified
 - Court will liberally interpret coverage because of the remedial nature of the contract

- Interpretation of Terms (Use and Operation)

- Interpretation of “use and operation” per the standard auto policy
 - *Section A*
 - Person benefiting is not a party to the contract
 - Contract provides indemnity from loss or damage arising from the ownership, use, and operation of a motor vehicle
 - *Section B*
 - Benefits from injury/death the injury sustained directly and indecently from other causes, by accident arising from the use and operation of a motor vehicle
 - *Section C*
 - Direct and accidental loss to motor vehicle
 - Note: Section C has to be accidental whereas A and B can be intentional
 - SEF 44
 - Indemnity when inadequate insurance from accidents arising from the use and operation of a motor vehicle
- Case law
 - *Amos v ICBC*
 - Question is whether the injury was sustained in the use and operation of the vehicle?
 - **Test = Purpose + Causation**
 - Purpose
 - **Did the loss result from the ordinary, well known, use of the vehicle as a vehicle?**
 - Insured was driving, that’s the ordinary use
 - Non-ordinary use could be using the back of truck as a diving board
 - Causation

- **Is there some nexus or causal relationship between the loss and the use and operation of the vehicle?**
 - *Citadel General Assurance v Vytlingham*
 - When examining whether there was sufficient causation, the but for test is too broad
 - Auto insurance is not intended to cover anytime a vehicle drives to the scene of a tort
 - **Question is whether an intervening act broke the causal connection**
 - Here there was an intervening act between driving to the overpass and the tort (which was dropping the boulders on cars)
 - *Lumbermen's Mutual Casualty v Herbison*
 - Getting out of the vehicle, loading a gun, and shooting the gun is sufficient to break the causal chain
 - *ING v Manual*
 - Shooting was an intervening act and prevents coverage by not satisfying the causal requirement
 - *Arruda & Haekel v Allstate Insurance*
 - Wording of *Section B* is different in Alberta as compared to *Amos*, in Alberta there are the added words of "directly and indecently of all other causes"
 - **Compensate only where there is an unbroken chain of causation (cannot be an intervening act)**
 - *Derksen v 539938 Ontario Ltd*
 - General, insurance interpretive principles apply
 - Interpret exclusions narrowly
- **Interpretation of Terms (Accident)**
 - Spectrum of loss
 - Purely fortuitous: Independent of the insured's actions
 - Negligence: Risk is foreseeable but not foreseen
 - Gross negligence: Coming close to courting risk
 - Reckless: Realizing the potential for risk, but taking it anyway
 - Intention: Knowing the result of an action but taking it anyway
 - Case Law
 - *Martin v American International Assurance Life Co*
 - **Distinction between intentional act and intentional consequences**
 - Here the death was accidental but the act was intentional, risks were known but there was no expectation that insured would die
 - Two tests: **Can we determine what the insured subjectively thought? If not, what would a reasonable person in that position expect?**
 - *Co-operators Life Insurance Company v Gibbons*
 - **Insurance doesn't cover diseases contracted in their ordinary means because they are not accidents**
 - e.g. Guy gets bit by a mosquito, gets west Nile, not considered an accident because it is a disease contracted in its ordinary means
 - Here the insured was rendered paraplegic after complications from genital herpes, which he got as a result of having unprotected sex
 - *Nelson v Industrial-Alliance Pacific Life Insurance*
 - **If a normal activity triggered a pre-existing condition then it is not accidental**
 - In this case had a pre-existing heart arrhythmia which was triggered when he went swimming (normal activity), therefore not accidental
 - SCC categories of accident

- **1) If mishap is external and unexpected, then it was an accident**
 - Guy gets into car accident (mishap), results in infection, then dies
- **2) If antecedent mishap results from a miscalculation of risks then it is an accident**
 - It is a deliberate act by the insured but a miscalculation of the risk
 - *Martin case*
- **3) If a disease or illness arises in the ordinary way, then not accident**
 - If a disease or illness is caused by traumatic event, then accident

Topic #6 Claims on the Policy

- Duties of the Insured

- **Notice of Loss**
 - Must provide the insurer with notice of loss as soon as possible, while evidence is fresh
 - Makes notice a condition precedent of coverage
 - Insurer has to prove on a BOP that they filed to give notice
 - If the insured doesn't know about the loss, looked to whether they acted reasonably in giving notice
- **Property & Auto Insurance**
 - *Section 530*
 - Give notice by delivering it to the chief agency of the insurance company, sending it by registered mail, or giving it to an agent
 - Note:
 - This is the default, and can be changed by contract
 - Seems to imply written notice, but practically insured just calls the insurer
 - *Section 540 SC#6(1)(a)*
 - On the happening of a loss, where the damage is covered, must immediately give notice in writing
 - *Section 556 SC#3(1)(c)*
 - Insured to promptly give written notice giving rise to loss/damage to person on property
 - *Section 556 SC#4*
 - If loss/damage to vehicle, promptly give notice
 - *Section 556 SC#9*
 - Content not materially different from *Section 540*
- **Life Insurance**
 - Life insurance has no statutory requirements, contract typically requires as soon as practicable, notice requires the particulars, but don't have to prove
- **Proof of Loss**
 - Requires evidence, statutory declaration about the cause, nature and the claim
- **Property and Auto Insurance**
 - *Section 523*
 - Obligation on the insured
 - Within 60 days of notice or immediately on request, must provide insurer with a proof of loss form
 - This tells the insured what information the insurer needs with a declaration at the bottom
 - *Section 540*
 - *SC#6(1)(b)*

- After covered loss, insured provides the statutory declaration/proof of loss form as soon as practicable
 - Includes items claimed, values, how loss occurred, declaration that didn't cause the loss, information on other insurance, advice of change in title/location/interest
 - *SC#7*
 - Any fraud or POL vitiates claim
 - *Section 556*
 - *SC#3(1)(b)*
 - Section A/B: if required must statutorily declare that the loss occurred from the use and operation if the driver was insured
 - *SC#4*
 - Section C: Statutory declaration within 90 days of accident
 - **Life Insurance**
 - Notice must be given as soon as practicable
 - Case Law
 - *Swan Hills Emporium & Lumber Co v Royal General Insurance Co of Canada*
 - **Any proof of fraud vitiates the entire claim**
 - Does not have to relate to a material issue, any fraud will vitiate everything, even that which is completely unrelated to fraud
- **Duty to Cooperate (Liability Insurance)**
 - Insured has two main objectives under liability insurance: to defend and indemnify for any judgement or settlement within their limits
 - This reduces the incentive for the insured to care about the outcome of the case
 - Positive duty
 - *Section 556*
 - *SC#3(3)*
 - Insured has to lend all assistance to defend the loss under section A, other than pecuniary assistance
 - *SC#4(4)*
 - If the insurer asks, have to attend questions under oath (rare)
 - Negative duty
 - *Section 556*
 - *SC#3(2)*
 - Insured cannot admit liability or interfere with settlement unless it is at their own expense
 - Under tort law, insured is allowed to settle/admit liability
 - Case Law
 - *Thorsen v Meritt Insurance*
 - **Breaching the duty to cooperate requires proof of malice or bad faith and would include avoiding the required duties**
 - Ethical Issue with Liability Insurance
 - Insurer hires a lawyer to defend insured, lawyer is paid by insurer but they represent the insured; Their interests are not necessarily inline
 - Generally not a problem, but where there is a problem with the insurance contract (misrepresentation on the form) lawyer can't tell the insurer because that's contrary to the interests of the insured but they are required to since they are working for the insurer
 - Practically, to avoid this dilemma, they just disclose everything

- Limitations Relating to Suing for Denial of Coverage
 - **General limitation period of 2 years**
 - Starting point of limitation period is variable
 - Generally from the date the cause of action arises (i.e. when the coverage is denied)
 - Note: Can't sue insurer immediately, must provide time for them to consider the claim (Generally 60 days)
 - **Moratoriums**
 - *Section 524* (General)
 - No action lies until 60 days after proof of loss has been submitted or the happening of the event on which the insurance money is payable (or any shorter time fixed by contract)
 - **Property Insurance**
 - *Section 540 SC#12* (General)
 - Loss is payable within 60 days of proof of loss
 - Note:
 - Together these mean insurer is not obligated to pay until 60 days after proof of loss is made unless agreement makes that time shorter
 - Cannot sue until all requirements of *SC#3 & 4* are satisfied (re: proof of loss)
 - **Auto Insurance**
 - *Section 556 SC#6*
 - 60 days after proof of loss or 15 days after dispute resolution process
 - **Life Insurance**
 - *Section 674* (Life Insurance)
 - An insurance company is liable to pay within 30 days of the insured's company receiving the listed information about the loss (proof of death)
 - **Outer limitation**
 - **General Insurance**
 - *Section 525*
 - Limitation for commencing an action is 2 years from the time that the insurance company knew or ought to have known about the damage (may or may not have been the actual date of loss) or for a non-property damage claim, two years from the date the cause of action arose (essentially when they have made the decision to deny coverage)
 - **Auto Insurance**
 - *Section 558*
 - *Section C*: Two years from the date the accident occurred (date of the loss)
 - *Section A*: Two years from the date the cause of action arose
 - **Life Insurance**
 - *Section 677*
 - Must be commenced within 2 years after evidence of loss provided or a maximum of 6 years from the date of death
 - Note:
 - Fair practices regulation, s. 5.3 requires insurer to give written notice to a claimant to the applicable limitation period unless the claimant is represented by legal counsel
 - Case Law
 - *Smith v Cooperators General Insurance Co*

- Limitation period can be extended, but a letter that terminates benefits must advise the insured that some “mediation process” does not extend the limitation period

- Relief From Forfeiture

- Failure to fulfill a duty can typically empower the insurer to deny coverage, however exceptions (like relief from forfeiture may intervene to preserve coverage)
- Relief from forfeiture deals with the insured's conduct
- Requirements
 - **1) Does the court have jurisdiction to grant relief**
 - *Section 520*
 - Limited in scope, court can grant relief where there has been imperfect compliance with a statutory condition or a condition of the contract relating to proof of loss, or some other matter the insured failed to do with respect to the loss
 - Applies to post lost obligations, things the insured didn't do properly after the loss
 - *Judicature Act Section 10*
 - Broad scope, court has power to relieve against all forfeitures they see fit
 - Generally used concurrently with *Section 520*
 - **2) Do the facts justify granting the relief**
 - **i) Imperfect compliance**
 - Asses the gravity of the breach
 - e.g. Late notice vs no notice
 - **ii) Good reason for imperfect compliance (conduct of the insured)**
 - Is the insured acting in good faith or are they intentionally trying to stand in the insurer's way
 - **iii) Limited prejudice to insurer (comparison of value of insured's loss vs damage to insurer)**
 - What is the cost/harm to the insurer because of the breach?
 - Did the lack of notice mean that the insurance company is completely unable to investigate, or does it mean they must work harder
- Case Law
 - *Falk Bros Industries Ltd v Elance Steel Fabricating*
 - Can apply relief of forfeiture when there is imperfect compliance, good reason for the imperfect compliance, and limited prejudice to the insurer
 - **Relief of forfeiture is applied to contractual conditions not conditions precedent** (e.g. Limitation periods)
 - *Williams v York Fire & Casualty Insurance Company*
 - **Relief from forfeiture is only available (under the insurance act) to post lost obligations**
 - Cannot provide relief for any pre-loss obligations
 - *Kozel v Personal Insurance*
 - Where the IA cannot apply relief of forfeiture (pre-loss obligation), **the JA can provide relief so long as the conduct was a condition of the policy rather than a condition precedent to coverage**
 - Still requires imperfect compliance, good reason for the imperfect compliance, and only a limited prejudice to the insurer
 - *Sawyer v Canadian Lawyers Insurance*
 - **Relief from forfeiture cannot be used to get around a coverage issue**
 - *Northbridge General Insurance v 943240*

- Failure to list an item counts as a coverage issue (cannot be covered for that which you had not listed), therefore this isn't just an obligation it is a coverage issue
- **Waiver & Estoppel**
 - Waiver and estoppel deal with the insurer's conduct
 - **Waiver**
 - **Insured intentionally consents to give up the ability to rely on rights**
 - Can be done expressly or implicitly
 - **Estoppel**
 - **When the insurer makes representation that the insured relies upon to their detriment, it becomes unfair to act inconsistently with the representation**
 - Measured based on a reasonable insured standard
 - Insurer's may be estopped from denying coverage, etc.
 - **Reservation of Rights**
 - Letter insurer sends to the insured saying it will do the following, but doesn't mean there is coverage
 - Evidence they aren't waiving right (but not definitive)
 - Generally it is just telling the insured not to rely on it
 - It is foisted on the insured, so it cannot give the insurer additional rights
 - **Non-waiver agreement**
 - **Have the insured sign an agreement agreeing not to hold the insurer to cover their loss**
 - May also give the insurer more rights (settle, recover from insured)
 - Insurer thinks there might be a breach of contract, but not sure, so want to be involved in the defence, but don't want to be bound to pay if there is a breach
 - Note: Court will strictly construe both reservation of rights and non-waiver agreements
 - **Section 521** (Applies to all types of insurance contracts)
 - An obligation to comply with a term under the contract is excused if the insurance company has given notice in writing that the insured can be excused from the requirement to comply with a condition or if the insurer's conduct causes the insured to believe they don't need to comply and they rely on it
 - Conduct that will not be consider a waiver or estoppel: participating in a DR process, delivery of a proof of loss to the insured, an investigation or adjustment of the claim
 - **Case Law**
 - *Saskatchewan River Bungalows v Maritime Life*
 - **Waiver requires 1) full knowledge + 2) unequivocal intent to relinquish**
 - **Waiver can be withdrawn, but there must be reasonable notice to do so**
 - Here since the waiver and the retraction were received at the same time, the insured never relied on the waiver, so the retraction was considered to have been sent within reasonable notice
 - *Paul v Cumis Life Insurance Co*
 - **Estoppel requires detrimental reliance by the insured on the representation made by the insurance company**
 - None here, since the insured could have just applied for coverage from another company
 - **Waiver requires full knowledge and release of rights**
 - Did not apply here because insurer did not know that the insured had died
 - *Gilewich v 3812511 Manitoba*
 - Where an insurer's course of conduct would lead the reasonable person to believe that coverage was in place they will be estopped from denying coverage

- Enforcement Mechanisms

- Punitive damages can be awarded against an insured where the insured breaches its obligation of utmost good faith
 - Trying to dis-incentivize fraud
 - Punitive, so there has to have been malice on the part of the insured, must prove fraudulent intent
- Case Law
 - *Andrusiw v Aetna Life Insurance Co of Canada*
 - The court can award punitive damage against the insured when there is a breach of the duty of utmost good faith
 - *Hasidic v AMA Insurance*
 - The duty of utmost good faith places a high standard on the insured to act truthfully

Topic #7 Duty of the Insurer

- Duty to respond

- The duty to respond is both contractual (i.e. pay a claim which falls within coverage) and part of the insurer's duty of utmost good faith (i.e. act reasonably in addressing an insured's claim)
 - The duty of utmost good faith requires the insurer to act reasonably when responding to a claim, including:
 - Treating the insured fairly when investigating the claim
 - Paying the claim within a reasonable period of time at a fair value
 - Examples of unreasonable conduct include
 - Denying coverage without adequate reasons
 - Making insured take unnecessarily onerous steps to prove the loss
 - Being belligerent towards the insured
- Remedies for insurer breach
 - Ordinary damages (general/specific): Compensatory in relation to the damage caused by the contractual breach, may include damages for emotional/mental suffering if within reasonable contemplation of the parties as a possible consequence of contractual breach (e.g. "peace of mind" contracts)
 - Have to prove they are related to some loss suffered
 - Aggravated damages: Compensatory in relation to emotional or mental suffering (eg. distress or humiliation) resulting from an "actionable wrong" in addition to the breach of contract (e.g. breach of utmost good faith)
 - Have to prove they are related to some loss suffered
 - Punitive damages: Non-compensatory, awarded where there has been an actionable wrong in addition to the breach of contract (eg. breach of utmost good faith; They are exemplary, designed to punish the party committing the breach and to deter others from committing similar breaches
 - Do not have to relate to some loss suffered
- Case law
 - *Volvos v ICBC*
 - Punitive damages are awardable for a breach of contract where the breach constitutes an independent actionable wrong
 - *Whiten v Pilot Insurance Co*
 - **Insurer's breach of duty of utmost good faith can be an independent actionable wrong**

- In order to award punitive damages for such a breach, the court has to be satisfied that the breach is sufficiently egregious, look to various considerations including blameworthiness, vulnerability of the insured, level of deterrence etc.
- *Fidler v Sun Life Assurance Co of Canada*
 - Insurer can be wrong about coverage denial without being in breach of its duty of utmost good faith
 - Damages for mental distress
 - Available for “peace of mind” contracts
 - Must demonstrate that
 - 1) The object of the contract was to secure a psychological benefit so as to bring mental distress upon a breach within the reasonable contemplation of the parties
 - 2) That the degree of mental suffering caused was sufficient to warrant compensation
 - Aggravated damages are available if mental distress came from an “independent actionable wrong” (i.e. breach of utmost good faith)
- Summary
 - If a court determines that an insurer wrongly denied coverage the insurer:
 - Will be liable to pay the coverage amount owed under the contract
 - May be liable to pay compensation for mental distress if contract is a “peace of mind contract” and distress is significant
 - If the insurer breached its duty of utmost good faith in responding to the claim (i.e. committed an independent actionable wrong), the insurer:
 - May be liable for aggravated damages if the breach of utmost good faith caused significant mental distress to the insured
 - May be liable for punitive damages if the breach of utmost good faith was sufficiently egregious to warrant punitive damages
- **Duty to Defend**
 - Relevant to liability insurance contracts (e.g. *Section A* of the *Standard Auto Policy*)
 - *Section 564(b)*
 - Insurer must defend in the name of and on behalf of the insured and at the cost of the insurer any civil action
 - **The duty to defend is triggered by the allegation that some loss was caused by the insured**
 - Case Law
 - *Progressive Homes Ltd v Lombard*
 - Duty to defend is broader than duty to indemnify
 - Apply test from *Nichols v American Homes*:
 - **If the facts set out in the pleadings are true, would coverage exist under the policy?**
 - If yes, must defend
 - If no, no duty to defend
 - Need to examine the substance of the claims to identify the true nature of the claim(s)
 - *Non-Marine Underwriters v Scalera*
 - When looking at the pleadings, court has to decide if they’re different allegations or drafted to look alike to gain access to insurance money
 - Pleadings trigger coverage based on this test:
 - Are the allegations properly plead?
 - Are any of the claims/allegations derivative?

- Are the non-derivative claims, if true, covered?
- **Duty to Settle Within Policy Limits**
 - Dealing with liability insurance coverage and applies to non-waiver agreements, when the insurer settles with a third party
 - *Dillon v Guardian Insurance*
 - **Insurer has a duty to make best efforts to settle within limits of the policy (so as to avoid exposing the insured to an uninsured loss) if reasonable to do so**
 - Insurer can be liable for failing to settle within policy limits if it was reasonable to do so, may be liable for more than their policy limits if they breach their duty of utmost good faith by failing to settle within policy limits
 - Could avoid breaching this duty by telling the insured that they have to get their own lawyer to protect them against any value exceeding the policy limit
 - Also need to document all settlement offers to show that it was an unreasonable settlement offer
 - Note: The lawyer working for the insurer cannot put either the insured or the insurer before the other, they must simply report all the information, it then becomes the insurer's responsibility to sift through the documents to find if there is some issue (or change material to the risk)

Topic #8 Third Party Claims

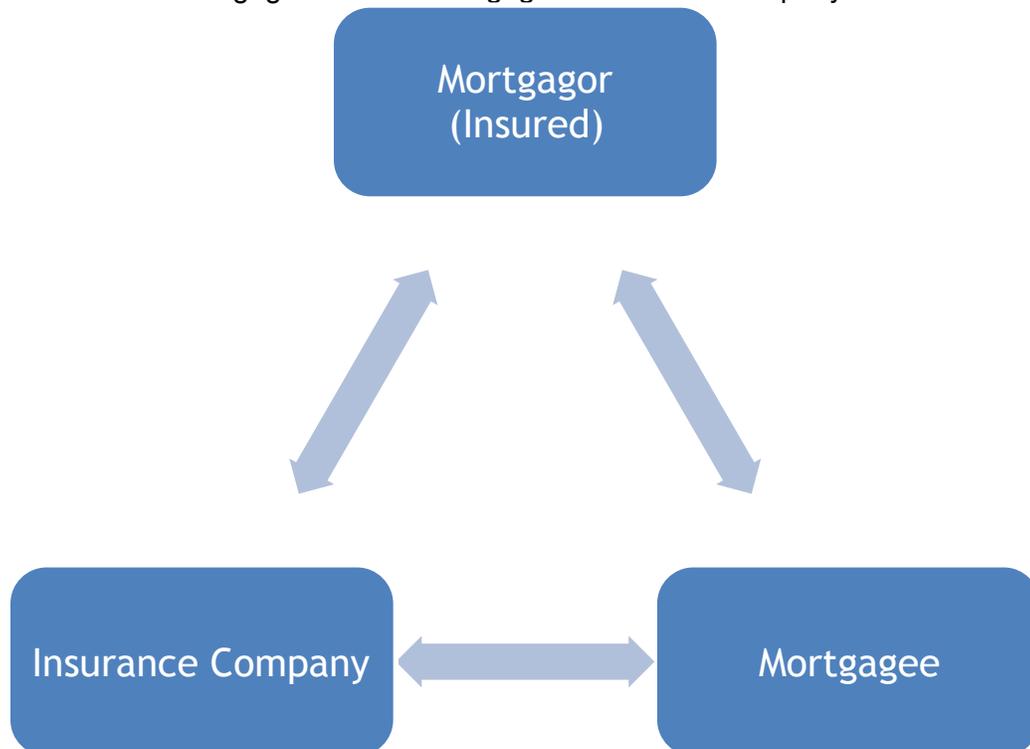
- Assignees

- Insurance is a personal contract that does not “run” with the transfer of the insured property or the subject-matter of insurance
- **Assignment of Proceeds:** (assigns post-loss, pay-out only)
 - Assigns payment only to a third party (no change in the identity of the insured)
 - Does not require insurer's consent because personal nature of the contract is not affected
 - Is subject to any defences insurer can raise against the insured, including policy breaches by the insured
- **Assignment of the Contract:** (assigns the entire contract)
 - Transfers the contract itself to a new insured
 - Requires insurer's consent because the insured person changes
 - Is a contract *de novo*: not subject to defences the insurer might have other raised regarding breaches by the original insured
 - If the original insured had made an error or failed on some obligation and it was unknown to the insured before the contract was assigned but the insured later finds out after some loss, as soon as the contract takes place they cannot rely on that prior error
 - An assignment of the contract is a substitution for the purchaser of the property obtaining its own insurance contract
 - Assignment may be easier/faster
 - A properly assigned insurance contract is a “novation” (a new contract) between the insurer and the assignee
 - Since the assignment must have an insurable interest in the assigned contract for the assignment to take effect, the assignment must take place contemporaneously with the property transfer
- Case Law
 - *Peters v General Accident Corp*

- **Cannot assign a contract without the consent of the insurer**
 - Assignment may change the risk factors, so the insurer needs to know about an assignment
- *Springfield Fire and Marine v Maxim*
 - **After the insurer agrees to assign they give up their right to refuse payment on the basis of a breach by the original insured**
 - Once it agrees it is bound by the agreement and anything that happened before the transfer cannot be relied on to refuse payment
 - Here the initial misrepresentation at the outset (which normally could have grounded a valid refusal of coverage) could not be relied upon because it was before the assignment

- Mortgages

- Mortgagee: a party who, in exchange for providing a loan, takes a security interest in property owned by the borrower (the mortgagor)
 - Problem: If the property is damaged/destroyed such that its value is affected, the mortgagee loses its security
 - Options for solving this problem
 - a) Mortgagee obtains its own insurance contract on the mortgaged property
 - b) Mortgagee obtains an assignment of proceeds from the mortgagor
 - c) Mortgagee is protected under a standard mortgage clause
- **Standard Mortgage Clause:**
 - Features
 - Is added to the mortgagor's insurance contract and creates a collateral contract between the mortgagee and the mortgagor's insurance company



- Costs additional premium
- The insurer's obligation to pay the mortgagee lasts only as long as the mortgagee retains an insurable interest in the property
- Contribution principles apply in relation to the insurer's obligation to pay the mortgagee and that of any other insurer obligated to pay the mortgagee
- Insurer is obligated to pay the mortgagee notwithstanding a breach of the contract by the insured but:
 - The insurer is entitled to recover amounts so paid by subrogating against its own insured (i.e. the insurer stands in the position of the mortgagee to recover from the insured)
- Mortgagee is obligated to tell the insurer of changes that increase the hazard if the mortgagee is aware of same
- Statutory Treatment of the Standard Mortgage Clause
 - *Section 539*
 - Insurer must give the mortgagee notice of cancellation or alteration of the contract to the prejudice of the mortgagee. For termination, the mortgagee is entitled to the same notice that the insurer is required to give to the insured under the statutory conditions
- Case Law
 - *Cooperators General Insurance Co v National Bank of Canada*
 - A standard mortgage clause can arise as an oral term subject to the same requirements for any contract (offer, acceptance, consideration)
 - The breach of an insured is irrelevant to a standard mortgage clause because it creates a separate, collateral contract which is independent of the conduct of the insured
 - *Royal Bank of Canada v State Farm Fire and Casualty Co*
 - A court cannot read terms of the main contract into the collateral contract. Any obligation on the parties must arise from the collateral contract/standard mortgage clause itself
 - In this case the mortgagee knew about the vacancy but failed to report it to the insurer, there was a vacancy clause that voided the contract if the insured failed to report a vacancy, however this was part of the main contract and could not be read into the collateral contract between the insurer and the mortgagee
 - *Hum v Grain Insurance and Guarantee Co*
 - **Standard mortgage clause states that the insurer will have to pay despite any act by the insured that entitles the insurer to deny coverage**
 - If the exclusion relates to an act of the tenant (setting the fire), still have to pay
 - If the exclusion went to the extent of the coverage (then do not have to pay)
 - *Kelowna Realty v Canadian Indemnity Company*
 - Distinction between a loss paid (assignment of proceeds) clause and a standard mortgage clause
 - **If a mortgagee is only a loss payee, there is no protection for the lender against breaches by the insured**
 - Here the insured's fraud meant that the mortgagee could not recover
 - Under a standard mortgage claim the mortgagee will get paid notwithstanding the actions of the insured
 - *Pinder v Farmer's Mutual Insurance Co*
 - In order to award damages against the insured in favour of the insurance company the insurer must prove that

- 1) The payment was made to the mortgage company because of an obligation under the contract
- 2) That the insurance company would not have had to pay its insured because there was a breach
 - They must prove the breach by showing evidence of an actual breach by the insured
- *Bonser v London & Midland General Insurance Co*
 - If notice of termination of the main policy is not given then the standard mortgage clause must still be honoured
 - *Section 539* requires the insurer give notice to the mortgagee if they decide to terminate the contract
 - Note: The standard mortgage contract is between insured and the insurer so without the statute there would be no obligation to the 3rd party mortgagee, the statute is designed to protect lenders

- Automobile Liability Claims

- Facts
 - Kermit is driving in a car insured under a standard automobile policy issued by the Muppet Insurance Company
 - *Section A* limits of \$1,000,000
 - *Section C* limits of \$20,000
 - SEF 44 Family Protection Endorsement with limits of \$1,000,000
 - Fonzie is driving a car insured under a standard automobile policy issued by Henson Insurance Co. providing:
 - *Section A* limits of \$1,000,000
 - *Section C* limits of \$40,000
 - Kermit and Fonzie are involved in a car accident, the accident is 100% Fozzie's fault, Fozzie's vehicle is damaged but Fozzie is not injured, Kermit's vehicle is damaged and Kermit is injured
- Assuming that there are no problems with the insurance contracts
 - Kermit will recover from Muppet Insurance Company for the damage to his vehicle for *Section B* benefits
 - Fozzie will recover from Henson Insurance for the damage to his vehicle
 - Kermit will sue Fonzie for personal injury and property damage
 - Kermit v Fonzie
 - Note:
 - This is a tort action
 - Kermit's personal injury claim will include general damages and special damages, less any special damage amounts already paid under his *Section B* coverage
 - The property damage is a subrogated claim by the Muppet Insurance Company for \$ paid to Kermit under his *Section C* coverage
 - Assuming no problems with Fozzie's insurance coverage
 - Under *Section A* of Fozzie's standard auto policy, Henson Insurance will:
 - Defend Fonzie against Kermit's lawsuit and indemnify Fozzie for any judgment Kermit obtains against him, up to the policy limits
- But, what if all is not well with Fozzie's insurance contract?
 - For example, what if:
 - Fozzie made a misrepresentation or non-disclosure on the application form?

- Fozzie failed to report a change material to the risk?
- Fozzie was driving in violation of *Section 556 SC#2*
 - If at the time of the accident, Fozzie was driving: 1) while not qualified 2) while his license was suspended 3) while under the age of 16 4) for an illicit or prohibited trade/transportation or 5) in a race or speed test
- Fozzie failed to notify the insurer of his accident
- Then Henson Insurance can deny coverage to Fozzie (for both *Section A* and *Section C*) because Fozzie breached the contract
 - But, if Henson insurance denies *Section A* coverage to Fozzie, and if Kermit obtains a judgment against Fozzie in the tort action, Kermit will not have access to private insurance funds to pay the judgment
 - Note: The Motor Vehicle Accident Claims Fund could be used as a source of funds but the government does not want to pay every time an insured breaches their insurance contract
- **Judgement creditor action**
 - In order to protect the innocent third party (Kermit) *Section 579(1)* gives **Kermit a direct cause of action against the tortfeasor's insurer** (Henson Insurance) once the third party has obtained a judgement against the tortfeasor (Note: This is a judgement creditor action and is only allowed by statute)
 - *Kermit v Henson*
 - The judgment creditor action must be commenced within **1 year** of Kermit obtaining judgment against Fozzie in the tort action (*Section 579(2)*)
 - The judgement must be one for which indemnity is provided under Fozzie's *Section A* coverage (*Section 579(3)*)
 - eg. Fozzie's liability must relate to the "use and operation" of the vehicle
 - In the judgement creditor action (*Section 579(11)*):
 - **The tortfeasor's insurer (Henson Insurance) cannot raise as a defence, the insured's 1) Failure to report a material change or 2) Failure to notify the insurer of the loss, in respect to the first \$200,000**
 - **The tortfeasor's insurer (Henson Insurance) cannot raise Fozzie's breach of *Section 556 SC#2* for any portion of the claim**
 - If, the tortfeasor's *Section A* insurer (Henson Insurance) has to pay the 3rd party claimant (Kermit) because it is prohibited from raising defences as a result of *Section 579*, the insurer is entitled to recover from its own insured (Fozzie) the amount paid to the 3rd party claimant (Kermit) (*Section 579(13)*)
 - Henson Insurance v Fozzie
 - This is a statutory recovery action
- Special note regarding the *Section A* insurer's denial of coverage:
 - 1) If the denial is based on coverage issues [eg. if the insurer takes the position that the loss doesn't fall within policy coverage ("use and operation of vehicle")]
 - The insurer can deny defence/indemnity on this basis, but it is not a breach by the insured
 - If the insurer can prove no coverage to the insured, then the insurer **will not be liable** to the 3rd party judgement creditor action
 - 2) If the insurer argues that the insured had no insurable interest in the motor vehicle
 - The insurer **cannot** use this as a defence in the judgement creditor action (*Section 579(5)*)

- Note: If this is also characterized as a misrepresentation or failure to report a change material to the risk, the insurer is only liable to the judgement creditor for the statutory minimum amount (*Section 579(11)*)
- Review
 - Judgement Creditor Action
 - The insurance company is limited in the defences it can raise, both in respect of the statutory minimum coverage and the claim above the statutory minimum
 - It can raise defences relating to fact that contract does not cover the loss
 - The parties never entered into a contract because they were not *ad idem* on essential terms
 - The contract was terminated prior to the loss
 - The loss did not arise from the use and operation of the motor vehicle (the loss would not be covered)
 - Recovery Claim
 - The recovery claim allows the insurance company to recover from its own insured \$ it had to pay to the judgment creditor because it was statutorily prevented from raising certain defences against the judgment creditor that it could have raised against its own insured (misrepresentation, failure to disclose a change material to the risk, etc.)
 - To recover from its insured, the insurer has to successfully prove those defences
- Summary
 - Three possible consecutive actions arising from a party's claim against a tortfeasor in a motor vehicle accident
 - Tort action
 - Judgement creditor action (*Section 579(1)*)
 - Statutory Recovery Action (*Section 579(13)*)
- The tortfeasor's liability insurer (Henson Insurance) knows that, because of *Section 579(1)*, it will likely have to pay at least some of the judgement issued in the tort action, so the insurer has an interest in defending against the tort liability claim
 - **Question: How does the insurer involve itself in defending the tort action without triggering waiver or estoppel in regards to its right to deny coverage to the insured?**
 - **1) By having the insured sign a Non-Waiver Agreement**
 - Can be used if the insurer is undecided as to its coverage position.
 - The agreement should clearly provide insurer with right to defend and settle the tort claim on behalf of the insured
 - The insurer's right to recover defence costs and indemnity depends on the Non-Waiver Agreement clearly stating so
 - Assuming the insurer can prove a policy breach by the insured
 - **2) By having itself named as a "Third Party by Order" (*Section 579(14)-(16)*) in the tort action**
 - To be made a third party by order, the liability insurer (Henson) must deny coverage to the insured
 - Upon being made a third party by order, insurer participates as though it was a defendant in the tort action (*Section 579(15)*)
 - Insurer's right to recover defence costs and indemnity is statutory (*Section 579(13)*) (assuming the insurer can prove a policy breach by the insured); Judgment in judgment creditor action is needed first
 - Note:

- Requires a court application asking the court to have the insurer added to the tort action as a third party by order
 - The style of cause would be:
 - *Kermit (π) v Fozzie (Δ) and Henson Insurance (Third Party by Order)*
- Assume Kermit obtains a judgement of \$1,000,000 against Fozzie in the tort action
 - Scenario #1
 - If Henson Insurance has denied coverage to Fozzie because Fozzie made a misrepresentation on the application form or failed to report a material change or failed to give notice of the loss, then:
 - Assuming Henson can prove the policy breach by Fozzie, Henson will have to pay Kermit \$200,000
 - Kermit's SEF 44 Insurer will then pay \$800,000 to Kermit to satisfy the remaining amount of the judgment
 - Scenario #2
 - If Henson Insurance has denied coverage to Fozzie because on the date of loss Fozzie was operating the vehicle in violation of *Section 556 SC#2*, then:
 - Henson cannot rely on the breach by Fozzie to deny payment to Kermit, so Henson will have to pay Kermit \$1,000,000
 - Kermit's SEF 44 insurer will not have to pay at all
 - Scenario #3
 - If Henson Insurance has denied coverage to Fozzie on two grounds: (1) because Fozzie made a misrepresentation on the application form and (2) because on the date of loss Fozzie was operating the vehicle in violation of *Section 556 SC#2*, then:
 - Assuming Henson can prove breach (1), Henson will have to pay Kermit \$200,000
 - Kermit's SEF 44 insurer will then pay \$800,000
 - Note:
 - In each of the 3 scenarios Henson will be able to claim against Fozzie for recovery of the \$ paid to Kermit by relying on either i) a non-waiver agreement (if one was signed by Fozzie) or (ii) a statutory recovery action (*Section 579(13)*) so long as a judgment was obtained in a judgment creditor action; If Kermit's SEF 44 insurer has paid out, it too will seek recovery from Fozzie
 - In all 3 scenarios, Kermit collects from insurers in regard to a judgment obtained against Fozzie and Fozzie is legally responsible for reimbursing the insurers
- Final Note:
 - If there is no coverage under Fozzie *Section A* liability policy for Kermit's claim, then Henson Insurance doesn't have to pay Kermit anything. In this case, the Motor Vehicle Accident Claims Fund pays Kermit \$200,000, and Kermit's SEF 44 Insurer pays \$800,000
 - Drunk driving is an exclusion only under *Section C* so if Fozzie was impaired that is not a basis for Henson Insurance to deny coverage under Fozzie's *Section A* liability policy
 - Any breach of contract defence which Henson wants to rely on in the judgment creditor claim is subject to the same consideration of relief from forfeiture, waiver and estoppel as would apply between Fozzie and Henson Insurance
 - If Kermit's judgement against Fozzie exceeds the amount payable by Henson and Kermit's SEF 44 Insurer, then Kermit will also pursue Fozzie personally for any unrecovered portion of the judgement (i.e. Henson Insurance, Muppet Insurance and Kermit will all be unsecured judgement creditors pursuing Fozzie for recovery)
- Statutory provisions to note in addition to *Section 579*

- *Section 556 SC#2*: (1) Outlines prohibited uses by the insured; (2) says owner cannot permit prohibited uses by another driver
- *Section 559(1)*: Describes coverage provided under *Section A* of the SAP
- *Section 563*: Permits an unnamed insured (i.e. a party driving with the consent of the owner) to claim directly from the *Section A* SAP insurer
- *Section 571*: Establishes statutory minimum limit of \$200,000 in *Section A* SAP coverage
- *Section 576*: Enables insurer to enter into an agreement with the insured to have the insured repay the insurer (i.e. non-waiver)
- *Section 187* of the *Traffic Safety Act* makes a motor vehicle owner liable for loss or damage caused to a third party by anyone operating the motor vehicle with the owner's consent or by anyone who is living with and as a member of the owner's family
 - *Section A* of the SAP provides coverage to the named insured and anyone driving with the named insured's consent (required by *Section 559(1)* of the Insurance Act)
 - Note: *Section A* also provides coverage for loss caused while the insured was impaired
- **Non-Automobile Liability Insurance Contract**
 - Statutory judgement creditor claim is provided for in respect of non-automobile liability insurance contracts
 - *Section 534* of Alberta's Insurance Act provides that, where the insured under a liability insurance policy has failed to satisfy a judgement obtained by a claimant for loss or damage which falls within the policy coverage, the judgement creditor has a direct cause of action against the liability insurer
 - *Section 534* also says that, in this judgement creditor action, the insurer is entitled to rely on any defences it could have raised against its insured
- **Case Law**
 - **The Tort Action**
 - Claims for deductibles and premiums
 - *Lenkewich v Landry*
 - **Increased premiums can be claimed in a tort action, but causation must be proven**
 - To prove causation must bring evidence that the increase in premiums is actually the fact of the tortfeasor and not caused by some other reason
 - Non-waiver and reservation of rights
 - *Halifax Insurance Co v Williams*
 - If an insurer intends to rely on a non-waiver agreement they must ensure that the insured realized what rights they were giving away. The court will strictly construe a non-waiver and look at the conduct of the insurance company in getting it
 - **Here the insurer could not rely on the waiver because they had misrepresented the effect of the non-waiver agreement to the insured**
 - *Allstate Insurance Co v Foster*
 - **A reservation of rights letter only prevents an estoppel argument, it gives no right to claim against the insured (in the absence of a court order)**
 - The obligation must be created either by mutual agreement (non-waiver) or under statute. It's not fair to foist the settlement on the insured unless they were a party to it or authorized the insurance company to make the settlement for them.
 - This is what the non-waiver agreement does, it creates an additional contractual relationship between the parties
 - Third party by order
 - *Giese v Hunking*

- **Insurer must deny coverage to the insured to be granted a third party by order**
 - Unlike in a non-waiver, where it is unclear whether they can deny coverage
- *Re Perfaniuk*
 - **Can apply to be a third party by order any time before a judgment on the merits on the tort action, so long as you deny coverage to the insured**
 - Once the action is decided, you can only appeal it, you cannot reopen it
- **Judgement Creditor's Action**
 - Distinct from the tort action
 - *Bourbonnie v Union Insurance*
 - **Tort defences (volenti, contributory negligence etc.) cannot be raised in the judgement creditor action**
 - The judgement creditor action is predicated on a judgement being brought against the insured, if they can show no judgment they do not have to pay, if they can show that the person they have a judgment against isn't their insured, they don't have to pay, if they can show that the loss wouldn't be covered, they won't have to pay
 - Only applies to a judgment
 - *Bartkow and Walder v Merit Insurance*
 - **Anyone with a judgment creditor claim must pay the full value of the policy limits (with anything paid in other settlements) being extra**
 - Settled tort claims are not deducted from the minimum statutory limits. The policy limit is available to anyone that has obtained a judgment in the tort action
 - Limited Defences Available to the Insurer
 - Note: these are only in respect to the first \$200,000 of the policy limits
 - *Jivraj v Edwards*
 - **The insurer cannot raise a "no insurable interest defence" against a 3rd party claimant**
 - *Winch v Kedgh*
 - **The insurer can raise coverage defences (whether some risk/event is covered) against a 3rd party claimant**
 - *Ashton v Tu*
 - **In the context of judgment creditor actions, fraud is treated the same as any other breach on the contract and is unavailable as a defence**
 - Defences Available in Excess of Statutory Limits
 - *Markus v Western Union Insurance*
 - **In excess of the statutory limits, the insurer can rely on relief of forfeiture**
 - Rights determined on the same basis as they would be against the insured themselves, defences are determined on the same bases as if it were the insured
 - *McKinnon v Canadian General Insurance*
 - **Insurer can raise defences above statutory limits if they individually paid the limits, its per insurer not per all insurers**
 - In order to raise defences in excess they must have paid up to that limit themselves
 - *Schoff v Royal Insurance Co of Canada*
 - **Insurer can rely on intentional misrepresentation on the application to deny coverage in excess of the statutory minimum**
 - Straight forward case
- **Recovery by the insurer against the insured**
 - *Terrigno v Peace Hills General*

- **In order for a recovery action to be available, there must be an agreement that the insured is bound by the settlement made by the insurance company where there is no court order**
- *State Farm Mutual Automobile Insurance*
- If you want to recover against the insured there are three ways of doing it
 - 1) Non waiver agreement
 - 2) Judgment in a tort action giving a statutory right
 - 3) Assign the right to recover