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Lex Mundi Global Insurance Guide Manitoba, Canada

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OVERVIEW

1. The Manitoba Department of Finance, Financial Institutions Regulation Branch (FIRB), Superintendent of Financial Institutions- Insurance regulates insurers and reinsurers in Manitoba. The FIRB was established in 2010, but the predecessor Office of the Superintendent of Insurance was first established in 1906.
2. The following classes of insurance presently exist in Manitoba:
 - (a) Accident;
 - (b) Aircraft;
 - (c) Automobile;
 - (d) Boiler and machinery;
 - (e) Credit;
 - (f) Employers' liability;
 - (g) Endowment;
 - (h) Fidelity;
 - (i) Fire;
 - (s) Plate glass;
 - (t) Property Damage;
 - (u) Public liability;
 - (v) Sickness;
 - (w) Sprinkler leakage;
 - (j) Guarantee;
 - (k) Hail;
 - (l) Inland transportation;
 - (m) Legal expense;
 - (n) Life;
 - (o) Livestock;
 - (p) Marine;
 - (q) Mortgage;
 - (r) Personal property;
 - (x) Surety insurance;
 - (y) Theft;
 - (z) Title;
 - (aa) Weather;
 - (bb) Workers compensation;

3. Insurance companies in Manitoba are subject to the same general taxes as all other businesses in Manitoba, but in addition pursuant to the provisions of *The Insurance Corporations Tax Act* S.M. 1992, c.52 as amended must pay a tax of 2% of the net amount of the premiums payable under contracts of accident insurance, life insurance and sickness insurance, and 3% of the net amount of the premiums payable under any other contract of insurance.
4. The presently approved distribution channels in Manitoba are as follows:
 - a. independent brokers and agents;
 - b. captive agents; and
 - c. direct writing.
5. Automobile insurance is compulsory in Manitoba, and is provided by a Crown Corporation (i.e. Government owned), The Manitoba Public Insurance Corporation (MPI). As well, various professional groups in Manitoba must compulsorily carry errors and omissions liability insurance, including for example, lawyers, engineers, architects, insurance agents, brokers, medical doctors and several other professions.
6. Several amendments have been proposed for *The Insurance Act*, R.S.M. 1987, c. 140 which were to have been proclaimed into existence on July 1, 2014, though now delayed indefinitely. They principally involve the following:

a. Property Insurance

- i. Permitting recovery by innocent multiple insureds;
- ii. Limiting recovery to proportionate interest of multiple insureds;
- iii. Prohibiting certain exclusions in property policies;
- iv. Limitation period revised to delete Statutory Condition No. 14 and providing for a period of two years after the date the insured knew or ought to have known that loss or damage occurred;
- v. Significant changes to the appraisal process including providing that umpires will now be bound by the rules of procedural fairness in carrying out their function;
- vi. Provisions for agreeing in writing to a joint survey, examination, estimate or appraisal;
- vii. Expansion of the basis for statutory estoppel against property insurers; and

- viii. Subrogation provisions altered to provide a mechanism to apply to the Court for conduct and control of any subrogated action, and a provision that settlements and Releases will not bar the rights of the insured or the insurer unless they have concurred in the settlement.

b. Life Insurance

- i. Expanding the duty to disclose to apply to applications for additional coverage, but in such instances limiting relief to disclosure/misrepresentations rendering contracts voidable only in relation to the addition, increase or change of insurance;
 - ii. Extending the grace period after policy lapse due to non-payment of premiums for a period of a further 30 days, for effectively a total of 60 days (i.e. 30 days before lapse, 30 days after);
 - iii. Proof of insurability not required within the incremental 30 days after policy lapse;
 - iv. Limitation period under life policies will be increased from the existing one year to two years, and specifically stated to arise not later than the earlier of 2 years after the date evidence is provided to the insurer, or 6 years after the date of death;
 - v. Limitation period for disability benefits changed to 2 years after the date the claimant knew or ought to have known of the first instance of the loss or occurrence giving rise to the claim;
- 7. Insurance brokers and agents will be permitted to offer reasonable customer inducements, such as loyalty reward programs;
 - 8. A Broker or agent will no longer be prohibited from charging a fee on commercial insurance transactions in which a commission is also earned;
 - 9. Amendments to facilitate and regulate electronic transactions under *The Insurance Act*;
 - 10. Authorization for regulations to be enacted directing how insurers may use information about the credit status of policy holders and applicants for property insurance relating to a residence;
 - 11. Provide legislative authority for licensing of incidental sellers of insurance;
 - 12. Provide legislative authority to introduce regulations on the use of credit scores;
 - 13. Provide for recognition of electronic means of communicating in insurance transactions including its use for termination of contracts, subject to a consumer's prior consent;

14. Provide for allowing use of electronic signatures for designation of beneficiaries in life and accident and sickness insurance, subject to a consumer's prior consent;
15. Provide legislative authority to introduce regulations dealing with the market conduct of insurers who market or sell products electronically;
16. Provisions to clarify the appeal processes involving brokers and agents disciplined by The Insurance Council of Manitoba.

MARKET ENTRY

17. The requirements/procedures for establishing a new insurance or reinsurance company in Manitoba, as well as its continuing governance are set out in *The Insurance Act* Sections 22 through 87 inclusive. Copies of the cited Sections of *The Insurance Act* are appended as Appendix "A".

As it happens, however, almost no insurers choose to incorporate in Manitoba. In fact, at this point there remains only one Manitoba incorporated insurer. There are, however, several Manitoba-organized fraternal insurance societies and reciprocal insurance exchanges.

In Canada almost all insurers of any size are federally incorporated, but licensed by various provinces of their choosing to transact business in those provinces. As noted above, an exception in Manitoba lies with fraternal organizations, insurance reciprocals and the like, typically smaller affiliation insurance operations which do not have a scope beyond their province of incorporation, and by definition quite parochial in their operations.

18. It is not mandatory that a company be physically present in Manitoba, either by virtue of headquarters or a branch office, to write insurance/reinsurance policies. Rather, the company must simply be licensed to carry on business in Manitoba pursuant to the provisions of *The Insurance Act*.
19. Foreign insurers are able to write business directly if licensed in Manitoba.
20. The incorporation of local companies with foreign shareholders is permitted in Manitoba, though a minimum of one third of the directors must be Canadian residents.

REGULATORY

21. The main sources for insurance and reinsurance regulatory law in Manitoba are a combination of the (federal) *Insurance Companies Act*, S.C. 1991, c. 47 as well as *The Insurance Act*, and numerous Regulations enacted under both the federal and provincial statutes. A list of the Regulations enacted under *The Insurance Act* is appended as Appendix “B”.

22. The current insurance regulatory climate in Manitoba including pending or anticipated reform is as follows:

a. Solvency and Capital Requirements

The Solvency and capital requirements are as specified in Manitoba Regulation 174/97, a copy of which is appended as Appendix “B”. Essentially, they require capital stock of not less than \$4,000,000.00 subscribed for in good faith, allotted and fully paid, together with an unimpaired surplus of not less than \$1,000,000.00.

b. Confidentiality

At present there is minimal confidentiality for insurers under *the Manitoba Insurance Act*. To promote greater risk-based self-evaluation, however, the proposed amendments to the *Act* will provide that insurers who conduct their own compliance audits have a limited privilege in relation to the audit documentation.

c. Supervision

The supervisory function of the Superintendent of Insurance is more of an advisory and reactive supervision, than a proactive one. Under the proposed amendments to *The Insurance Act*, that situation does not change significantly.

d. Corporate Governance

As noted elsewhere, Sections 41.1 to 41.25 of *The Insurance Act* deal with governance matters, and are quite detailed. The regulatory climate toward governance in Manitoba, as elsewhere, is in the ascending phase, and *the Act* contains relatively stringent requirements in respect of Corporate Audit Committees, Conduct Committees, and so on.

e. Reporting Requirements

Detailed Annual Reports are required from each insurer in accordance with various provisions of *The Insurance Act* mandating such reports, including gross premium dollars written, and other statistical information required by the Office of the Superintendent of Insurance for evaluation and calculation of taxes and fees, among other things. Among other requirements, insurers must file copies of all Corporate By-laws enacted, an Annual Statement every year relating to the condition of affairs of the insurer as at December 31 of the preceding year, as well as a wealth of other statistical information.

f. Consumer Protection

Consumer protection initiatives are in the ascending phase presently under *the Manitoba Insurance Act* and Regulations enacted thereunder. Under the proposed pending amendments to *The Insurance Act* and Regulations are the following:

- i. Life and Accident and Sickness Insurance provisions to be amended to allow consumers to have greater access to documents they may need from an insurer at the time of claim;
- ii. Restrictive prohibitions to be eliminated so that insurers and agents/brokers may offer consumer inducements such as common loyalty award programs;
- iii. Provisions to improve the dispute resolution process between insurers and policyholders;
- iv. Provisions to protect innocent persons from loss of property coverage due to the intentional acts of co-insureds or other persons;
- v. Provisions requiring long term disability plan sponsors to disclose to members if a plan is uninsured.

g. Broker Remuneration

Presently brokers and agents are restricted to solely earning commission income in Manitoba. The proposed amendments to *The Insurance Act* will eliminate the restrictive prohibitions on agents and brokers so that they may charge a fee on commercial insurance policies on which a commission will also be paid. As well, as earlier noted, restrictive prohibitions prohibiting agents and brokers from offering consumer inducements such as common loyalty reward programs will be abolished.

CLAIMS

23. The main sources for contract law in Manitoba are the Anglo-Canadian common law of contract, as supplanted or displaced by various provisions contained in *The Manitoba Insurance Act*.
24. In general, the substantive law relating to insurance does not favour insurers or insureds with the possible exception of the recent decision of the Ontario Court of Appeal extending (Judicature Act) relief from forfeiture for pre-loss breach of Policy conditions, in circumstances where prior thereto only post-loss events causing loss of coverage could be relieved against. The Courts of Manitoba are more likely than not to follow the Ontario Court of Appeal in that regard.
25. Subject to the pending limitation period revisions discussed above, the relevant limitation periods presently governing claims in Manitoba are as follows:

a. Fire and Property Insurance

Within two years next after the loss or damage occurs (Statutory Condition No. 14 located in Section 142 of *The Insurance Act*);

b. Life Insurance

Not more than one year after the furnishing of the evidence required by the proof of claim provisions of *the Act*, being the customary statistical information about date of death, name of beneficiary and so on, or more than six years after the happening of the event upon the insurance money becomes payable, whichever period first expires;

c. Accident and Sickness Insurance

Not more than one year after the date the insurance money becomes payable or would have become payable if there had been a valid claim. By way of explanatory note, all monies become payable under sickness and accident policies in Manitoba within 60 days after an insurer has received proof of claim. Notice of claim is required within 30 days of the date upon which the claim had arose, and proof of claim is required within 90 days from the date of claim. (accident and sickness insurance Statutory Conditions 12 and 7 contained in Section 211 of *The Insurance Act*);

- d. Breach of insurer's contractual obligations e.g. the duty to defend in liability coverage-six (6) years;

As noted above, the limitation provisions affecting certain insurance claims were to be amended effective July 1, 2014, now postponed indefinitely.

26. Third parties suffering injury to the person or property who obtain judgment against an insured which goes unsatisfied may sue the defendant judgment debtor's insurer directly on the judgment up to the face value of the policy, but subject to the equities as between the insurer and the insured.

Non-judgment creditor third parties can also bring direct action against an insurer on an assignment basis; that is, it is not uncommon for a plaintiff to take judgment by consent against a defendant whose insurer has denied coverage, undertake not to execute judgment, take an assignment of the insured's rights against the insurer, and thereafter pursue the insurer directly in an action commenced in the third party's own name, again subject to the equities existing as between the insurer and the insured.

27. An insured cannot maintain a direct action against a reinsurer in Manitoba.

DISPUTE RESOLUTION

28. The Manitoba Court of Queen's Bench is the Superior Trial Court in which insurance claims are typically heard in Manitoba. The Small Claims division deals with claims up to but not beyond \$10,000.00. The regular division of the Court of Queen's Bench has an expedited process under Rule 20A under the Queen's Bench Rules to deal with claims under \$100,000.00 with truncated rights of documentary production, discovery, and so on. Otherwise, claims in excess of \$100,000.00 proceed under the ordinary provisions of the Court of Queen's Bench Rules.

29. *The Court of Queen's Bench Act* mandates and contains the power, if necessary, to order the disclosure/discovery and inspection of all relevant documents in the possession, power and control of the parties to an action. As well, the Court can order non-parties to attend on examination and to produce relevant documents on discovery. Queen's Bench Rule 30 governs the disclosure, discovery and inspection of documents in the possession of parties, as well as non-parties.

30. Mediation and arbitration are common methods used for resolving insurance disputes in Manitoba, but only consensually. There is no mandatory mediation in Manitoba either under *The Insurance Act* or the Queen's Bench Rules. In all likelihood more disputes are resolved out of Court than in Court. There are no particular factors affecting that dynamic in Manitoba other than mediated resolutions typically contain a confidentiality provision, and to that extent are viewed as advantageous by both insurers and insureds alike.

31. In Manitoba, Notice of Claim must be provided promptly to insurers regarding claims under all types of insurance. The relevant provisions are as follows:

a. Property Claims

- i. Notice to be given forthwith upon the occurrence of any loss or damage to property (Statutory Condition 6 contained in Section 142 of *The Insurance Act*);
- ii. There is no statutory provision relating to the consequence of failure to give timely notice for proof of loss in respect of property claims in Manitoba; however, any action is time-barred two (2) years after the date of loss or damage;

b. Life Claims

- i. No statutory notice period is prescribed. However, the latest an action may be commenced is six (6) years after the death of the insured, while benefits are payable 30 days after proof of the claim is submitted (Sections 180 and 184 of *The Insurance Act*);
- ii. There is no statutory provision relating to timely notice in Manitoba in respect of life claims. Rather, as noted in (i) above, the latest an action may be commenced is six (6) years after the death of the insured, while benefits are payable 30 days after proof of claim is submitted. Accordingly, notice of claim and proof of claim at any time during the 6 years referenced is deemed to be adequate in the circumstances.

c. Accident and Sickness Claims

- i. Notice to be given not later than 30 days from the date a claim arises under the contract (Statutory Condition 7(1) contained in Section 211 of *The Insurance Act*);
- ii. Failure to give notice of claim or furnish proof of claim within the times prescribed does not invalidate the claim if the notice or proof is given as soon as reasonably possible, and in no event later than one (1) year from the date of the accident or the date a claim arises under the contract on account of sickness or disability, if it is shown that it was not reasonably possible to give notice or furnish proof within the times prescribed (Statutory Condition 7(2) contained in Section 211 of *The Insurance Act*).

32. Under the liability coverage provisions of various types of insurance policies in Manitoba, including CGL policies, at common law the absence of timely notice can lead to forfeiture of coverage, particularly if an insurer can be said to have been actually prejudiced by the late notice; that is, by not having an adequate or any opportunity to investigate the circumstances giving rise to any particular claim, notably where witnesses or property go missing, or the physical evidence has been disturbed or destroyed. In appropriate cases, however, where no genuine breach of a condition precedent has occurred (i.e. there has been at the least substantial compliance), relief from forfeiture is likely available in respect of pre-loss forfeitures (undecided in Manitoba, but likely to follow Ontario's recent

judicial lead, *The Court of Queen's Bench Act*, Section 35), and is definitely available in respect of post-loss forfeitures (*The Insurance Act*, Section 130).

33. Bad faith claims in Manitoba are governed solely by common law, and are not statutory. In Manitoba, as established by the Supreme Court of Canada for all of Canada, aggravated damages and punitive damages can be awarded for bad faith in an appropriate case. The Supreme Court of Canada had several years ago suggested that an appropriate upper limit for punitive damages lies in the range of \$100,000.00, with most awards fetching substantially less, though the \$400,000.00 mark is not at all out of range per recent decided cases at the provincial appellate level throughout Canada. In a very recent exceptional Saskatchewan case presently under appeal, the Saskatchewan Court of Queen's Bench awarded punitive damages of \$4,000,000.00 against Zurich General Insurance Company.

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Paul Brett's practice is restricted to civil litigation and transportation matters arising in the Provinces of Ontario, Manitoba and Saskatchewan. Paul conducts a general civil litigation practice with an emphasis on insurance defence, coverage and regulatory matters, including general liability, errors and omissions, products liability, life and health, reciprocal exchanges and motor transportation law.