DOUBLE INSURANCE AND FRAUD

Chenglin Li*
Victoria University of Wellington, New Zealand

Research Methodology

This paper analyses the issues and arguments of double insurance under The People's Republic of China (PRC) Criminal Law 2006, Insurance Law 2002 and 2009, using articles in journals and books. The unique approach for the paper is to develop arguments with relevant opinions and case analysis.

The Purpose and Importance of the Paper

Economic recession may lead to a rise in crime rates. Reports in Newspapers have shown that crime rates typically rise in New Zealand. There are similar situations in China and other countries. The slowing economy has increased the risks or issues of the insurance industry. In order to help the insurance industry to avoid these risks, the paper will discuss a fraud and a double insurance fraud from the perspective of Common law such as in New Zealand and Continental law such as in The People's Republic of China.

To decide whether a claim is a fraud in New Zealand, a court would examine what a statute states. If it does not state clearly, Parliament's purpose for the Act will be examined and Common Law rules also help to fill in the gaps. However, there is no case law in the Chinese Civil Law System; even a judgement made by the People's Supreme Court is not binding on the lower courts. The only source of application of law is to interpret what a legislation states. The People's Congress and People's Supreme Court have authority to interpret legislation in the People's Republic of China (PRC), but it is not common for the People's Congress to explain legislation. The interpretation of legislation is mostly from the People's Supreme Court. Consequently both parties' arguments are focused on interpretations of relevant Statutes. The difficulty for a court or disputed parties is that there has been no interpretation of insurance law and relevant law since the first insurance law was passed in 1995. Accordingly there are more difficulties for a court to distinguish a fraud in double insurance situations and other issues.

The paper's purpose is to provide an analysis for legislators to amend the law on double insurance by analysing sections 198 and 266 of PRC Criminal Law 2006 and section 56 of

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*Chenglin Li, LLB, LLM, is a Professor at Qingdao University, Shandon Province, China. He is currently in a PhD course at the University of Wellington.

PRC Insurance Law 2009. The paper also compares and contrasts the relevant sections in legislation in Britain, Taiwan, Australia and New Zealand.

The paper will discuss the following issues:

- whether a double insurance amounts to a fraud;
- what amounts to double insurance;
- what are the consequences of non-notice of double insurance,
- whether an insurer can limit or exclude its liabilities in its contract;
- if insurers are liable for loss, then in what order should an insured or applicant claim for compensation against insurers, and what amount does an insurer have to pay.

The paper is divided into three sections: insurance fraud, double insurance, and contribution.

Section 1: Insurance Fraud

This section discusses whether a claim of double insurance is an insurance fraud under section 198 of PRC Criminal Law 2006. If such a claim is not an insurance fraud, the next question is whether it is a fraud under section 266 of the Law.

What amounts to an insurance Fraud?

An insurance fraud is defined in section 198 of PRC Criminal Law 2006. There are two requirements under the section. One is the criminal act, which is described by the methods below. The other is whether the amount involved in the crime is relatively large. If the amount is small or not large, the Act does not deem it a crime. Article 198 states that

> Any of the following persons ... commit insurance fraud in any of the following methods, if the amount involved is relatively large:
>
> (1) an applicant defrauds insurance money by deliberately falsifying the subject matter of the insurance;
>
> (2) an applicant, an insured or a beneficiary defrauds insurance money by making up the cause of an insured accident or overstates the extent of loss;
>
> (3) an applicant, an insured or a beneficiary defrauds insurance money by inventing stories of an insured accident that has not occurred;
>
> (4) an applicant or an insured defrauds insurance money by deliberately causing the occurrence of an insured accident that leads to property damage;
>
> (5) an applicant or a beneficiary defrauds insurance money by deliberately causing the death, disability or illness of the insured.

Generally there are four elements to establish a crime under PRC Criminal Law. They are intention, subject (which refers to the persons who offend society), subject matter (which includes a person or any property or social system), and the methods of a criminal act. The Table below shows the four elements required under section 198 of the PRC Criminal Law of 2006.

	Who	Intention	Methods of criminal activity	Subject matter	Accident	Loss
(1)	applicant	Yes	Falsifying subject matter	No	No	No
(2)	Appiicant Insured beneficiary	Yes	Making up the cause of accident or overstate the extent of loss	Yes	No or Yes	No or Yes
(3)	Applicant Insured beneficiary	Yes	Inventing stories of an accident	Yes	No	No
(4)	Applicant Insured	Yes	Deliberately causing the accident	Yes	Yes	Yes
(5)	Applicant beneficiary	Yes	Deliberately causing death or illness	Yes	Yes	Yes

An applicant, insured, and beneficiary can be the subject who commits an insurance fraud. The methods of a criminal act are as follows: falsifying subjective matter, making up the cause of accident or overstating the extent of loss, inventing stories of an accident, and deliberately causing the accident or death or illness. Intention is necessary for the subsection (1)-(5). Intention may be assumed if there was no accident or no loss but an applicant or an insured made up a story or overstated a loss or caused an accident. If a claim was not within the methods of a criminal act under section 198 of PRC Criminal Law 2006, it would not be an insurance fraud. The amount involved will not be discussed in this paper because the issue is of no concern.

An issue is whether a claim is a fraud under section 266 of PRC Criminal Law 2006 if the claim is not an insurance fraud under section 198 of that law. An example situation is if an applicant or an insured did not make up a story or cause an accident or overstated a loss, but he did obtain a payment which exceeded the insurable value without giving notice of his double insurance.

Article 266 states

> Whoever takes public or private money or property dishonestly, if the amount is relatively large, shall be sentenced to fixed-term imprisonment of not more than three years, --- except as otherwise specifically provided in this Law.

There are four requirements to establish a fraud in Article 266: intention, criminal act, subject matter and relatively large amount. However, this Article is subject to other Articles which are specified in the law. If other Articles were not applied, this Article would apply. The section only discusses the two elements which are essential for a fraud, which are intention and act. *Actus Reus* or act refers to conduct or methods of criminal act which swindle public or private money or property or subject matter. Intention or *Mens Rea* is a guilty mind and it has to be proved beyond reasonable doubt in common law. However, Chinese criminal law as a Continental Law is not required to do so, because there is no jury in the court hearing, the prosecutor's job being to convince judges by proving the intention of a fraud.

What is a fraud?

A fraud is not categorized under section 266 of PRC Criminal Law 2006, but it is clearly defined in the Fraud Act 2006 (UK) as three classes: fraud by false representation, fraud by failing to disclose information, and fraud by abuse of position. Fraud by false representation is any person who makes any representation as to fact or law whether express or implied which they know to be untrue or misleading (Section 2 of the Act). Fraud by failing to disclose information is persons who fail to disclose any information to a third party when they are under a legal duty to disclose such information (Section 3 of the Act). Fraud by abuse of position refers to a person who occupies a position where they are expected to safeguard the financial interests of another person and abuses that position (Section 4 of the Act). In all three classes of fraud, three elements are required for an offence to have occurred: the person must have acted dishonestly, and they had to have acted with the intent of making a gain for themselves or anyone else, or have inflicted a loss (or a risk of loss) on another (Wikipedia, 2009).

Fraud by failing to disclose information, and fraud by false representation, are closely linked to the situation which is related to double insurance. Section 56 of PRC Insurance Law 2009 requires that an applicant shall notify relevant information to the insurers with double insurance. If an applicant knew about the double insurance but failed to notify intentionally or negligently, or made false representation, he may commit a fraud by failing to disclose information or by false representation if the Section 266 of PRC Criminal Law 2006 classified fraud as does the British Fraud Act 2006. But until there are any legislation amendments, there are no such categories in PRC Criminal Law; if misrepresentation and non disclosure are to be deemed as fraud, there are no legal grounds for this unless the law is amended.

If there was no notice performed, whether the non-notice is a false statement or a failure to disclose information, depends on whether an applicant is in breach of good faith which is a principle of insurance law (British Marine Insurance Act, 1906). In some situations an insured or an applicant is ignorant of other insurance, for example, an insured has no knowledge of other insurance policy which is signed on his behalf such as the purchaser and his solicitor both take out an insurance immediately after a property is bought, Or a policy is taken out by

someone else. Or, in yet other cases, the insured may have a statutory right in respect of other insurance, either under the Fires Prevention (Metropolis) Act 1774, or its local equivalents, or under several provisions of the Insurance Contracts Act 1984 (Ball and Kelly, 1991). In one case, the plaintiff's motor vehicle policy contained an extension covering friends and relatives of the insured. A friend of the insured was involved in an accident while driving the insured vehicle. The friend also had motor vehicle insurance with an extension covering him while driving another vehicle 'provided that there is no other insurance in respect of such or whereby the insured may be indemnified', but the plaintiff did not know about the other insurance (*Gale v Motor Union*, 1928).

A difficult question is whether an insured acted in good faith when he had insurance and was not satisfied with it and later bought other insurance, then wanted to cancel the former insurance, but was not successful. The second insurer knew of the first insurance, but there were no notice in writing (*Deaves v CML*, 1979).

Accordingly, knowledge of double insurance is an essential requirement of obligation of notice. If an applicant had no knowledge of double insurance, he had no obligation of notice. Certainly he had not breached Sections 56 and 5 of PRC Insurance Law 2009 or section 41 of the Law of 2002 and he could not commit a fraud under Section 266 of PRC Criminal Law.

Another vital element for a crime is *Actus Reus* or a criminal act. A person cannot be punished for criminal thoughts (Wikipedia, 2009). A criminal act has to be proved under Section 266 of Criminal Law; for example, if a person commits a fraud, his swindling of public or private property has to be proved. However, if he did not obtain a payment which exceeded his insurable value even if he was dishonest to obtain it, he may not commit a fraud, because of his unsuccessful conduct. Or he could commit a fraud even if the applicant did not complete his act or not reach his purpose; his conduct had started if the law is broadly interpreted.

If an applicant negligently or carelessly obtained compensation which was more than his insurable value, without notice of double insurance, does that constitute a fraud? The applicant was not committing a fraud under Sections 198 and 266 because he had no intention. The applicant may hold the extra payment in trust for the insurers (NZ Marine Insurance Act, 1908) and has a responsibility to refund it to insurers by reason of unjust enrichment (Qing, 2006).

Accordingly, a suggestion for Section 198 of PRC Criminal Law is to amend it to read "any other ways to defraud insurance money" or in Section 266 of PRC Criminal Law to categorise fraud as the three classes in the British Fraud Act 2006. This may include double insurance fraud in some circumstances. Legislators may consider the suggestion to avoid some unexpected situations.

Section 2 double insurance

This section deals with several questions regarding what amounts to a double insurance. What is notice responsibility? What is the consequence of non-notice under Section 41 of PRC Insurance Law 2002 and Section 56 of the Law 2009? Can an insurer limit or exclude his liability in the contract? Can an insurer apply Article 16 of Insurance Law 2009 to avoid the contract? It also describes the history of limitation and exclusion of double insurance and legal intervention of the Australia Insurance Contract Act.

The statement of double insurance in the two versions of law, 2002 and 2009

Section 41 of PRC Insurance Law 2002 states:

> If the total amount of the sum insured by double insurance exceeds the insured value, unless specified otherwise in the contract, the insurers concerned shall undertake their obligation for indemnity based on the proportions their respective amounts of the sum insured bear to the total amount of the sum insured.

The section was amended in Section 56 of the Law 2009:

> The total insurance money paid by all insurers in overlapping insurance shall not exceed the insurable value. Unless it is otherwise provided for by the contract, each insurer shall be liable for paying insurance money according to the proportion between its insured amount and the total insured amount.
>
> The insurance applicant in overlapping insurance may require the insurers to refund pro rata the insurance premium for the excess of the total insured amount over the insurable value.

Compare and contrast the two articles and relevant sections in other countries' Acts

The similar meaning of double insurance between two Sections (41 and 56) is that an insurance applicant enters into insurance contracts with two or more insurers respectively for the same subject matter insured, the same insurance interest or the same insured incident. There are two more meanings in Section 56. One is that double insurance is an insurance in which the sum insured exceeds the insurable value. Another is that an insurant can require an insurer to refund the excess of premium which is more than the insurable value. A similar statement is in Section 33 (1) of the New Zealand Marine Insurance Act 1908 and Section 32 (1) of the British Marine Insurance Act 1906. They all state:

> Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed

the indemnity allowed by this, the assured is said to be overinsured by double insurance.
(Marine insurance 1908 Act NZ is the same as the definition in Marine insurance 1906 UK).

The difference between Chinese and British and New Zealand Marine Insurance Acts is that the former requires an applicant to arrange a double insurance contract, the latter demands the assured (or someone on behalf of the assured) as a party to the contract.

Taiwan Insurance Law has the same prescription as Section 41 of PRC Insurance Law 2002. Section 35 of the Law states that double insurance is when an applicant reaches agreements with two or more insurers for the same insurable interest and insurable event. They both require an applicant to reach an agreement with insurers but not an insured.

What amounts to a double insurance?

A double insurance refers to insurance policies which have the same subject matter, same insurable interest and same event or risk. The same subject matter of insurance refers to the same property, liability, or person (for example a vehicle which is covered by two insurance policies is the same property in the two insurance policies). But in some circumstance an issue is whether there is the same property in the two insurance polices. In one case, an applicant insured his truck with an insurer but his trailer was with another insurer. The trailer was damaged in an accident. The question is whether the truck and trailer are the same property in the two insurance policies. Both policies said the truck and trailer are deemed as an entirety when being used. The court confirmed that they were the same property (*Chinese Property v Guanzhou Fancun*, 2008).

The same insurable interest refers to the same person with the same property. If a property in the two insurance policies is the same insured property but for different persons, the persons do not have the same interest in the property (for example, a vendor and a purchaser have each separately insured a house; because they do not have the same interest in the property, the two insurance policies are not double insurance (*Re State Government*, 1984). The same insured event or risk refers to risk or event in which two policies cover the same risk, such as fire or burglary. But the issue is whether the same risk needs two or more insurance policies covering exactly the same or identical risks. An Argument is that it is not necessary that the other insurance covers identical risks to attract the operation of another insurance provision. Other insurance provisions would have virtually no operation at all if minor differences in the risks covered made them ineffective. However, it is possible that the risks covered must be similar in substance (Ball and Kelly, 1991).

Notice obligation

Notice obligation includes questions such as who is responsible for notice of double insurance, and when, what has to be notified, and what are the consequences if no notice is given.

Section 41 of Insurance Law 2002 and Article 56 (2009) state:

> "In the event of double insurance, the applicant shall notify all the insurers concerned of relevant information with respect to such double insurance.

It is an applicant's responsibility to notify insurers about double insurance, but not an insured. Taiwan insurance law has a similar statement, Section 36 of Insurance Law 1997 states that an applicant shall notify an insurer about another insurer's name and sum insured unless agreement is specified. By contrast, in common law it is an insured's responsibility to notify double insurance under Section 18 of the British Marine Insurance Act 1906.

As for when the notice has to be given, Section 56 of PRC Insurance Law and Section 36 of Taiwan Insurance Law do not say. But it could be assumed that the time of notice is when an applicant enters into a contract with an insurer. In contrast, British law requires the time of notice to be before the contract is concluded, in Section 18 of the British Marine insurance Act. And it also could be when an accident occurred (Ball and Kelly, 1991).

What has to be notified?

Section 56 of PRC Insurance Law 2009 only says that relevant information with respect to double insurance has to be notified. The relevant information could be insurer's name, sum insured, risks, property and contact details. The two parties can specify what is in the contract. But Taiwan insurance law states clearly that unless specified in the agreement, an applicant shall notify insurers' name and sum insured (Taiwan Insurance Law, 1997). Section 56 of the Law does not say whether the notice should be in writing or oral. It can be in writing, or oral, or any other way of communication such as a phone call or meeting.

Issue or problem

One issue is when an applicant or an insured has no knowledge of other insurance, and therefore cannot give notice of other insurance.

Issue 1 is an applicant who cannot give notice of other insurance when an applicant and an insured are different persons. For example, an employer buys family property insurance for employees; it is very popular in People's Republic of China. The employer as an insurance applicant does not know whether the employees as insurants have other insurance policies which cover the same property.

Issue 2 is an insured who has no knowledge of insurance. In some cases, an insured did not know of another insurance which was bought on the insured's behalf, such as the purchaser and his solicitor both signing insurance contracts immediately after the property was bought. Alternatively, an insured might have a right to claim damages against an insurer under a policy taken out by someone else (*Gale v Motor Union*, 1928). In that case, the plaintiff's motor vehicle policy contained an extension for friends and relatives of the insured and his friends also had a similar policy, but he had no knowledge of this before the accident occurred. Another example is that the insured may have a statutory right in respect of other insurance, either under the Fire Prevention (Metropolis) Act 1774, or its local equivalents, or under several provisions of the insurance Contracts Act 1984 (Ball and Kelly, 1991).

If an applicant or insured had no knowledge of insurance, but the Law requires him to perform obligation of notice, it would be absurd or ridiculous. So the law would say that an applicant or insured shall give notice or disclose information which is known to him, or ought to be known, or should be known (British Marine Insurance Act, 1906).

What is the consequence of non-notification?

Section 56 of PRC Insurance law 2009 or 41 of the law (2002) did not state the consequences of not giving notice of double insurance. Section 56 could imply that an insurer may avoid the insurance policy, if one party is in breach of good faith under Section 5 of PRC Insurance Law 2009. But the law does not say that expressly, and it could be argued that one party could not avoid the contract even if another party did not observe good faith. By contrast, British law clearly says it may be avoided if one party fails to observe good faith (British Marine Insurance Act, 1906). Taiwan insurance law expressly says that the insurance policy is void if an applicant intentionally does not perform his notice obligation or his purpose is to obtain unjust enrichment (Taiwan Insurance Law, 1997). Taiwan insurance law also classifies the faith of parties as good faith and bad faith. Only bad faith can cause an insurance policy to be voided.

Accordingly, an insurance policy may be void if an applicant or an insured intentionally does not perform his duty to notify double insurance. Since the applicant has been in breach of good faith, although the law does not state it expressly it may imply that the bad faith of an insured or an applicant may cause his contract to be voided.

Whether Section 16 would apply if there is no notice of double insurance

There is no comment from any authority or professional about this question. There may be two choices. One is that the Article may apply because Section 56 does not say what consequence of no notice is. The other is that Section 16 may be used as a reference to deal with a situation the law does not expect.

Section 16 states:

> Where the insurer makes any inquiry about the subject matter insured or about the insurant when entering into an insurance contract, the insurance applicant shall tell the truth.

To determine whether Section 16 may apply, a question is whether a double insurance is within matters concerned with the objects of an insurant or may inquiry be made about the subject matter of the insurance or person to be insured.

There are two reasons why the Article may not apply. One is the obligation to tell the truth is as a result of an inquiry by an insurer. If an applicant or insured does not receive an inquiry from an insurer, a double insurance is not within the extent of the subject matter of the insurance, and therefore the insured or applicant has no obligation to disclose it under Section 16. The obligation of an insured or applicant to tell the truth only in response to an inquiry by an insurer is supported by the draft of interpretation of the PRC Supreme Court's insurance law and Guidance of Insurance Law of the Beijing High Court and Guangdong High Court (Guide of Insurance Case, 2008). Another reason is if double insurance is within the extent of the subject matter, the issue is that there are conflicts between Section 16 and 56. Under Section 16 the disclosure is a responsibility if an inquiry is made by an insurer, which could be interpreted as an applicant only needing to answer questions when put to him. If an insurer did not inquire about double insurance, he would not need to volunteer information. If this is a correct interpretation, it is contrary to Section 56. Under that Section, an applicant has to notify double insurance but does not need answer an inquiry, and the Article states:

> The applicant shall notify all the insurers concerned of relevant information with respect to such double insurance

Accordingly non-disclosure and non-notice are different legal definitions for different situations. Section16 is most likely not to apply.

If Section 16 does not apply in the absence of any stated consequence of no notice of double insurance under the PRC Insurance Law 2009, 2002 and 1995, the next question is whether an insurer can exclude its indemnity as in the terms of exclusion in the insurance policy.

Whether an insurer can exclude or limit its liability in the event of other insurance

In common law it was very common for an insurer to exclude or limit his liability in the contract in the event of double insurance. There were two ways to do so. One is notice provision, which states an insurer's indemnity would be limited or excluded provided there were no notice of other insurance given. Another is a clause of exclusion which excludes the indemnity of an insurer in the event of other insurance. *Weddell v Road Transport and General insurance Co* was a leading case in 1928. In that case both insurers denied their liability. The court

demanded that the two insurers pay half and half (*Weddle v Road Transport*, 1928). The judge refused to allow the process to become circular in holding that it is covered anywhere but is nowhere (Allen's website, 2009).

In Australia, statute intervention is easing the problem. Section 45 of the Australia Contract Insurance Act (1984) states that the limiting or excluding clause in a contract of general insurance, unless the cover is specified in the contract, is void if it excludes insurers' liability for double insurance.

But there is no such similar statute intervention in the PRC's insurance law. In the absence of consequence of non-notice in Section 56, there are two possible explanations. One is an insurer can limit or exclude his liability because the law requires an applicant to notify double insurance and the applicant has breached that duty. Consequently if there were no notice given the contract can be void. This is supported by Guangdong High Court's Guidance of interpretation of Insurance Law. The guidance states that a claim is not supported by the courts in the event of double insurance, as no explanatory reason is given by an insurer about the standard clause in the contract (Guide of Insurance Cases, 2008). It could explain that the exclusion clause of double insurance is not within the obligation of explanation under Section 17 of PRC Insurance Law 2002 and an insurer has no duty to explain double insurance to an applicant. If no notice is given, insurers can exclude or limit their liability in the exclusion clauses of their contracts. But the reasoning in the guidance is unreasonable. The argument is that the law does not say what the consequence is if there is no notice of double insurance, and the authority does not interpret what a non-notice result is, and also Guangdong Hight Court as a high court has no authority to interpret law, because the only authority to interpret law is the Supreme Court but not a high court. And the explanation of Guangdong High court is not consistent with the purpose of the law which is to protect an insured's interest under Section 1 of PRC Insurance Law 2009 and 2002.

Therefore it is reasonable to interpret Section 56 as being that an insurer could not avoid or limit its liability in the agreement by using an exclusion clause of double insurance. This interpretation is more likely to protect an insured's interest under Article 1 of PRC Insurance Law 2002 and 2009.

Section 3 contribution in double insurance

Definition - what is contribution?

If two or more insurers under indemnity contracts are liable in respect of the same loss they are bound as between themselves to contribute rateably to the loss. If an insurer pays the full amount of the loss, he is entitled to recover contribution from the other insurers (Marine Insur-

ance Act, 1909). The explanation is prescribed in Section 225 of PRC Marine Insurance Law 1992.

There are two main liabilities which insurers undertake in the circumstance of double insurance: joint liability, and *pro rata* or proportionality. Joint liability means that an insured can claim indemnity against any one of the insurers, and if an insurer pays the whole amount, it has right of contribution from other insurers. In common law there are two requirements for right of contribution (Ball and Kelly, 1991). One is that double insurance is established; another is that both insurers are seeking contribution and the contributing insurer must be liable. There are two ways to calculate contribution. One is maximum potential liability apportionment, which is suitable for cases where the amount of the cover bears some direct relationship to the amount of the loss, such as where each policy relates solely to the loss in question. Another is independent actual liability apportionment. It is reasonable and just for the method to apply to a case where each insurer indemnified against a wide range of events, with each amount of cover fixed by reference to what was being indemnified against, and both covering almost fortuitously, as it were, and indeed contrary to the assertions of both insurers, the particular loss occurred (*Government v Crowley*, 1910). Joint liabilities are convenient for an insured and can save him expense and are very popular in common law, such as in Britain, Australia and New Zealand.

Pro rata is that an insured has to claim for a proportion against every insurer. Every insurer only pays the part of indemnity he has undertaken and he has no right to contribution. Taiwan insurance law is a good example of *pro rata* (Taiwan Insurance law, 1997). The method is convenient for an insurer and saves costs. That insurer is not responsible for the proportion of other insurers and does not need to claim the proportion which exceeds its payment. But the method is not good for an insured because an insured has to claim from every insurer. The method is time consuming and expensive for him.

PRC's insurance law has two approaches to calculations. The Marine Law choose the first approach, joint liability, but the Insurance Law takes the pro rata approach. If an issue relates to a marine insurance policy, Section 225 of Marine commercial law would apply; otherwise Section 56 of Insurance Law would apply.

In what order does an insured claim indemnity from insurers?

Article 56 does not say in what order an insured claims his payment, it just says that the insurers concerned shall undertake their obligation for indemnity based on the proportions their respective amounts of the sum insured bear to the total amount of the sum insured. An insured could claim his payment from any insurer for the proportion the insurer has undertaken. However, an insurer may say it is not the first insurer to undertake indemnity; it could say it should be the last one to pay under a standard article in the policy in order to protect its

own interest (NZ Southern Cross, 2009). An argument would say that a commercial insurer should pay first; a compulsory insurer would pay the rest. The argument interprets the *pro rata* provision under Article 56 as this Article only applies to commercial insurers who shall share the payments, and it does not include compulsory insurers because of the different purposes of commercial insurance and compulsory insurance. The purpose of commercial insurance is to protect the insured in the event of accident. In contrast, the compulsory insurance is to make up for loss. Therefore it is more reasonable for the commercial insurer to pay first, then the compulsory insurer pay the rest (Sun, 2009).

The first opinion intends to protect an insurer's interest with standard clause but is not beneficial for an insured. If any of the insurers states it is the last to undertake its indemnity, an insured's interest will not be protected. Furthermore the statement is not consistent with the purpose of law to protect both parties' interest. Compared with the first opinion, the argument is more reasonable but the reasoning is not easy to understand.

It is more reasonable for an insured to claim for the full payment from any of the insurers, then the insurer who has paid extra has right of contribution from the other insurers. The PRC Marine Insurance Law 1992 and New Zealand Marine Insurance Act 1908 are good examples. Section 225 of PRC Law and Section 33 of the New Zealand Act state respectively that the assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he thinks fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act. This opinion is also consistent with the purpose of PRC Insurance law under Article 1 which states that the law is to protect the insured's interest and the courts are intended to protect insurants as a vulnerable group over dispute of insurance Sections (Miles, 2004).

Method of payment

If there is an item for method of payment in the agreement, then parties would follow the agreement, for example, the insurer would pay by proportion of sum insured under Article 20 of Vehicle Insurance section of Ancheng Property Insurance Co Ltd (PRAP, 2007). If there is no agreement for method of payment, an insurer would pay pro rata according to the sum insured. However, if the article in the policy is a standard article, the court is reluctant to grant it. In one case, the insurer argued that it would pay the proportion according to the amount of premium received between insurers under an article of the policy, but this argument was dismissed by the court. The court said the vehicle insurance article and explanation has no legal effect because it had been abolished by the PRC Insurance Committee. The court ruled that the two insurers must pay half and half according to the sum insured (*Tianan Insurance v Pan Weibo*, 2007). In another similar case, the court gave the same judgement but with different reasons. The court said the article related to double insurance of compensation was a standard article and the standard article was made by the insurer who was stronger than the other

party. The article limited the insurer's liability and it was not fair for an insured, compared to the method of payment by sum insured (Chinese *Property v Guangzhou Fanchun*, 2008). Courts try hard to protect insurants as a vulnerable group and are reluctant to approve a standard article because insurers are more powerful than insurants. If there are two choices, courts would prefer the one which favours insurants.

Conclusion

Economic recession may cause problems of increasing crime rates. The difficulty for insurers is to distinguish whether a claim is a fraud. If a fraudulent claim was paid, that would increase the risk for the insurance industry. If an honest insurance claim was refused, both parties, the insurer and the insured, could be involved in legal issues and litigation. In order to win a case both parties try to find a favourable explanation of the law. In common law, if there was no legislation or the meaning of it was not clear, judges would make a precedent or follow a precedent. However, in the People's Republic of China, there is no case law. Therefore most of the legal argument focuses on insurance law and the interpretation issued by the People's Supreme Court. The Supreme Court has striven to reach a compromise, but it is not successful because of many unsettled issues.

The first issue is whether a double insurance claim constitutes a fraud. It is not easy to find an answer in Sections 198 and 266, if an applicant of double insurance did not make up a story or overstate a loss, but in fact the applicant or an insured had obtained payment which exceeded the insurable value. The issue for Section 198 is that it only includes the specific situations which are listed, but it does not declare any other types of act. As a result, if an act is not specified in the section, that act could not be regarded as an insurance fraud. If the law wants to include some unexpected situations, it can say it includes any other situations. The issue is that Section 266 does not classify fraud and does not define what constitutes a fraud. If it categorised fraud as three categories, as in the British Fraud Act 2006, then if an insured did not disclose, or made false statement about, double insurance, a double insurance applicant may commit a fraud.

The next issue is what amounts to a double insurance. Section 41 of Insurance Law 2002 was amended by 56 of the Law 2009. The difference between the two Sections is that Section 56 has added that a sum insured which is more than the insurable value is related to double insurance. This seems more reasonable for double insurance. But both Sections do not define the consequence of non-notice of double insurance, they only state that an insurant applicant shall give notice of double insurance. The issue for the Sections is that an insurer may or may not avoid the contract. It is wise for the law to be amended that an insurer can avoid the contract in some circumstances or an insurer may not limit exclude its liability by reason of double insurance. For such an amendment, Section 45 of Australia Insurance Contracts Act

1984 is a good example.

The next issue, about claiming payment, is that both Sections 41 and 56 state that insurers must undertake indemnity in proportion. However, this is not convenient for an insured. He has to apply for payment to every insurer. The law should be amended so that an insured can apply for full payment from any insurer. This is consistent with Section 225 of PRC Marine Insurance Law 1992 and Section 4 of PRC Insurance Law 2009 which is to protect an insurant's interest, and is in accordance with the spirit of amendment of the Insurance Law 2009.

Therefore, if these amendments were to be made, the PRC insurance law and criminal law would reduce the fraud risks of the insurance industry.

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NZ Southern Cross Healthcare policy (2009) article 4 claims on other insurers or third parties:

4.1 before a claim will be accepted under this policy, claims must first be made on other insurers or third parties for any expense recoverable from a third party or under any contract of indemnity or insurance. For the purpose of this policy, the ACC is defined as another insurer.

New Zealand Marine Insurance Act 1908 s33 (2).

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Chenglin Li

P.O. Box 13854 Johnsonville Wellington, New Zealand.

Email: frankli59@yahoo.co.nz