Blaney McMurtry LLP

PUBLICATION

Blaneys argues Ontario Court of Appeal Excluded Driver Endorsement case

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In *RSA v Intact Insurance*, Ms. Wilson and her husband met with their insurance broker on February 29, 2012. Her license had been suspended on account of unpaid fines. In order to maintain coverage on her Impala she had to purchase coverage from different insurance carrier. She decided to purchase a policy from Intact that insured the Impala but designated her as an excluded driver based on her driving history. Ms. Wilson executed an Excluded Driver Endorsement. The endorsement did not make express reference to the Impala. Rather, the endorsement contained the following all-encompassing language: “See Certificate of Automobile Insurance for which automobile(s) this change applies to”. A few months later, Ms. Wilson was involved in an automobile accident while driving the Impala.

Intact denied coverage based on the Excluded Driver Endorsement. As such, RSA, the plaintiff’s uninsured/underinsured motor vehicle carrier, was forced to respond. RSA challenged the Intact denial by way of application arguing in part that the Excluded Driver Endorsement was void because it did not allegedly conform with various provisions of the Insurance Act (the “Act”). Specifically it was argued the Intact endorsement was not a form pre-approved by the Superintendent contrary to section 227(1) of the Act.

Jason Mangano of Blaney McMurtry LLP successfully argued the case for Intact at first instance. Justice Arrell dismissed RSA’s application finding that the Intact Excluded Driver Endorsement was in fact a pre-approved form. Moreover, the form was filled out clearly and was not ambiguous. He also found that Ms. Wilson was fully aware of her prohibitions from driving the Impala at the time of the accident. RSA appealed and Jason (with the assistance of Jennifer O'Dell) also acted for Intact on the appeal.

The main issue in the appeal was whether Intact’s endorsement was still valid even though the form was not allegedly pre-approved. It was Intact’s position the form was in fact pre-approved.

The Court proceeded with its analysis on the assumption that "for the sake of argument" the Intact form was not pre-approved. The Court reviewed various sections of the Act, FSCO's Bulletin No. A-03.05, and cases emphasizing the main objective of the regulatory automobile insurance regime is consumer protection and guaranteed compensation for victims. The Court determined it is not the court's role to apply the law of contract to read into the Act that a non-compliant form is necessarily void.

The Court emphasized that automobile policies are far more than commercial contracts as they form an integral social safety net. Noting "consumer protection" objective of the automobile insurance regime at play, the Court held that no matter the outcome of this case the victim would receive money from one of two insurers. The Court then held that in furtherance of this "consumer protection" objective, "courts should limit their role to implementing the insurance regime as designed by the legislature." While acknowledging the court's function to determine contractual disputes, the Court noted that it is the Superintendent's function to determine the effect of breaches of the Act:

…Section 126(1) forbids an insurer from making a contract of insurance inconsistent with the Act. Significantly, s. 126(2) then provides that a contract is not "void or voidable as against an insured, or beneficiary or other person to whom insurance money is payable under contract, by reason of a failure of the insurer to comply with a provision of this Act." (emphasis added). This seems to me to indicate that the role of the courts is to determine the validity of contracts as a matter of contract law and the consequence of a failure to comply with a provision of the Act is to be determined as specifically set out by the Act and its regulations.

The Court ultimately rejected the argument that the Excluded Driver Endorsement was somehow voided by section 227(1) because of "its alleged deviation from the pre-approved form."

The Court summarily rejected the remaining arguments on appeal. Contrary to RSA's submissions, the Court held that Intact's subsequent coverage decisions have no bearing on the contractual validity of the Excluded Drivers Endorsement. It also held there was no merit to RSA's position that conflicting evidence necessitated a trial. The Court agreed with the lower court determination that the Excluded Driver Endorsement was unambiguous, the insured was given a pink slip which clearly identified the vehicle in question, and the insured understood at the time that she was excluded from driving the vehicle even if her license were to be reinstated. As such, Intact's Excluded Driver Endorsement was in full force and effect.