COURT OF APPEAL FOR ONTARIO

CITATION: Royal & Sun Alliance Insurance Company of Canada v. Intact Insurance Company, 2017 ONCA 381
DATE: 20170510
DOCKET: C62842

Juriansz, Brown and Miller JJ.A.

BETWEEN

Royal & Sun Alliance Insurance Company of Canada

Applicant (Appellant)

and

Intact Insurance Company,
Diane Wilson, Rita MacLeod and Cathy MacLeod

Respondents (Respondent)

Christopher P. Klinowski, for the appellant

Jason P. Mangano and Jennifer A. O'Dell, for the respondent

Heard: March 2, 2017

On appeal from the order of Justice Harrison S. Arrell of the Superior Court of Justice, dated September 20, 2016.

Juriansz J.A.:

A. OVERVIEW

[1] The main question in this appeal is whether an endorsement of an automobile insurance policy that excludes coverage for a named driver is valid

even though its form is not that pre-approved by the Superintendent of Financial Services, as required by s. 227(1) of the *Insurance Act*, R.S.O. 1990, c. 1.8.

[2] For the reasons that follow, I conclude that the use of an unapproved form, as is alleged here, does not necessarily invalidate an agreement between the parties about exclusion from insurance coverage. I also reject the appellant's other arguments, and would dismiss the appeal.

B. BACKGROUND

[3] Diane Wilson and her husband met with her insurance broker on February 29, 2012 because her driver's licence had been suspended for unpaid fines and the insurance on the 2004 Impala she owned was being cancelled. She wished to maintain insurance coverage on the car so her husband could drive it. Insurance was arranged with the respondent, Intact Insurance Company, on the basis that Wilson would be an excluded driver. Wilson executed an Excluded Driver Endorsement.

[4] The trial judge found that when Wilson completed the form the broker explained to her and she clearly understood that, even if the licence were to be reinstated, Intact still would not insure her and the Excluded Driver Endorsement would continue to apply.

[5] Wilson's licence was reinstated, she drove the vehicle, and had an accident in which Rita and Cathy MacLeod were injured. The MacLeods commenced a personal injury action against Wilson.

[6] The MacLeods' uninsured motor vehicle carrier, Royal & Sun Alliance Insurance Company of Canada, is the appellant. Royal brought an application for a declaration Wilson was fully insured by Intact. Intact, relying on the Excluded Driver Endorsement, took the position there was no coverage and Wilson was uninsured.

[7] The application judge found the Excluded Driver Endorsement was in full force and effect at the time of the accident and that Intact had no duty to defend or indemnify Wilson in respect of the accident. Royal appeals from that decision.

C. ANALYSIS

(1) The use of an unapproved form does not necessarily invalidate an excluded driver endorsement

[8] Royal's main argument on appeal is that the Excluded Driver Endorsement that Wilson executed is not in the form pre-approved by the Superintendent and is void because it did not strictly comply with s. 227(1) of the *Insurance Act*.

[9] Section 227(1) provides:

> 227.(1) An insurer shall not use a form of any of the following documents in respect of automobile insurance unless the form has been approved by the Superintendent:

1. An application for insurance.
2. A policy, endorsement or renewal.
3. A claims form.
4. A continuation certificate. [Emphasis added.]

[10] FSCO's Bulletin No. A-03/05 circulated FSCO pre-approved standard forms. Paragraph 2 of the pre-approved Excluded Driver Endorsement form and the boxes that follow it are reproduced below:

2. **Exclusions from Coverage** - Except for certain Accident Benefits under Section 4 of the policy, we will not provide coverage while the Excluded Driver is driving the automobile(s) listed below, as well as any temporary substitute automobile and any newly acquired automobile as defined in the policy.

Automobile #	Model Year	Trade Name (Make)	Serial # /VIN

[11] On the form that Wilson executed these boxes were not filled out. Rather, the words "See your Certificate of Automobile Insurance for which automobile(s) this change applies to." are written in across these boxes. The Certificate of Insurance set out these identifying details of the vehicle.

[12] Assuming for the sake of argument that the Excluded Driver Endorsement was not in the pre-approved form, the question is whether s. 227(1) renders void an unapproved form. The section, itself, is silent on the effect of using a form that has not been pre-approved. The question is one this court has never squarely addressed.

[13] It is necessary to interpret s. 227 in the context of the Act, its purposes and the regulatory scheme as a whole to determine the legislative intent. Doing so leads me to conclude the legislature intended that a lack of compliance with s. 227(1) is a matter for the Superintendent. It is not the role of the courts, while applying the law of contract, to read into s. 227 that a non-compliant form is necessarily void as a matter of contract law.

(a) The objectives of the regulatory automobile insurance regime

[14] No doubt one of the main objectives of the regulatory automobile insurance regime in Ontario is consumer protection and guaranteed compensation of victims: *Smith v. Co-Operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129, at para. 11; *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at paras. 22-24. This court in *Abarca v. Vargas*, 2015 ONCA 4, 123 O.R. (3d) 561, at paras. 36-37, recognized that automobile insurance policies are more than commercial contracts and form part of "an integral social safety net".

[15] Only the "consumer protection" objective is at play in this case. The question is whether Wilson, as a consumer of insurance, should be protected from her insurer's use of an unapproved form. The victims requiring compensation in this case are the MacLeods. No matter the outcome of the case, they can claim compensation from one of the two insurers involved in the dispute.

[16] The *Smith* case provides additional guidance. It involved the validity of an insurer's notice under s. 71 of the *Statutory Accident Benefits Schedule* advising the insured of the termination of her statutory benefits. After noting the important consumer protection purpose of the insurance scheme, the court went on to caution, at para. 14,

> that it is not the role of this Court to set out the specific content of insurance refusal forms. This task is better left to the legislature. However, it is appropriate for this Court to interpret in general terms what the legislature intended the insurer to convey under s. 71.

Thus, in furthering the consumer purpose of the Act, courts should limit their role to implementing the insurance regime as designed by the legislature.

(b) The statutory setting of s. 227 of the *Insurance Act*

[17] Section 239(1) of the *Insurance Act* provides that "every contract evidenced by an owner's policy insures the person named therein". Section 240 creates an "excluded driver" exception as follows:

> If a contract evidenced by a motor vehicle liability policy names an excluded driver, the insurer is not liable to any person under the contract or under this Act or the regulations for any loss or damage that occurs while the excluded driver is driving an automobile insured under the contract, except as provided by the *Statutory Accident Benefits Schedule.*

[18] An excluded driver is defined at s. 224(1) of the Act as "a person named as an excluded driver in an endorsement under section 249." Section 249 provides

that an insured "may stipulate by endorsement to a contract evidenced by a motor vehicle liability policy that any person named in the endorsement is an excluded driver under the contract." In this context, s. 227(1) provides that an insurer shall not use a form for an endorsement unless the form is approved by the Superintendent.

[19] I note all of these provisions refer to the "contract" between the insured and the insurer.

(c) The Superintendent's regulatory powers

[20] The Superintendent appointed under the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28, has the general function of administering and enforcing the *Insurance Act*.

[21] Especially pertinent is the Superintendent's powers in relation to unfair acts and deceptive practices. Section 439 of the Act provides that "[n]o person shall engage in any unfair or deceptive act or practice." "Unfair or deceptive acts or practices" are prescribed by O. Reg. 7/00. Item 12 of O. Reg. 7/00 prescribes as an unfair or deceptive act or practice "[t]he use of a document in place of a form approved for use by the Superintendent, <u>unless none of the deviations in the document from the approved form affects the substance or is calculated to mislead</u>" (emphasis added).

[22] Ultimately, s. 441(2) of the Act gives the Superintendent the power to order a person to cease or refrain from an unfair or deceptive act, to perform acts to remedy the situation, and even to cease engaging in the business of insurance or any aspect of the business of insurance.

[23] The regulatory scheme focuses directly on the "use of a document in place of a form approved for use by the Superintendent" and gives the Superintendent the power to deal with the consequences of a deviation. I draw from reading s. 227(1) in this context that the legislature did not intend for the courts, while engaged in adjudicating a contractual dispute, to consider a contractual provision void merely because its form fails to strictly comply with s. 227(1) of the *Insurance Act*. The court's function is to determine the contractual dispute, and any alleged breach of s. 227(1) is a matter for the Superintendent. In fulfilling its function, the court may well consider an alleged deviation from a pre-approved form to the extent that is relevant to its enforceability in contract.

[24] In my view, s. 126 of the Act seems to confirm that this is the correct approach. Section 126 and its applicability was not put before the court by either counsel. However, on its own, it may be dispositive. 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 a beneficiary or other person to whom insurance money is payable under the contract, <u>by reason of a failure of the insurer to comply with a provision</u>

of this Act" (emphasis added). This seems to me to indicate that the role of the courts is to determine the validity of contracts of insurance 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.

[25] I reject Royal's argument that the court, in determining whether there was coverage in this case, must consider the Excluded Driver Endorsement necessarily voided by s. 227(1) because of its alleged deviation from the pre-approved form.

(2) Other arguments on appeal

[26] Royal pointed out that Intact bore the onus of proof that an exclusion applied and submitted that Intact could not meet that onus without explaining why it initially provided coverage to Wilson and only later took the position she was an excluded driver. In my view, Intact's subsequent coverage decisions have no bearing on the contractual validity of the Excluded Driver Endorsement when it was executed and the application judge did not err in failing to comment on them.

[27] There is no merit to Royal's additional arguments attacking the application judge's factual findings. Nor is there merit in Royal's argument that the conflicting evidence required a trial. There was little conflict as to the material facts and there was no good reason to order a trial. The application judge's findings that Wilson executed the Excluded Driver Endorsement, that it was unambiguous, that Wilson was given a pink slip certificate that clearly identified the vehicle, and that Wilson

understood, at the time, that she was excluded from driving the vehicle even if her licence were to be reinstated, were all supported by the record.

[28] The application judge was correct in finding that the Excluded Driver Endorsement on the Intact policy insuring Wilson's vehicle was in full force and effect on June 6, 2012 when Wilson was involved in an accident with the MacLeods.

D. DISPOSITION

[29] I would dismiss the appeal.

[30] Intact is entitled to costs of the appeal fixed at $15,000, inclusive of taxes and disbursements, as agreed by counsel.

Released: