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Relief from Forfeiture is not Automatic — Success for Economical Insurance

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On April 3rd Justice Leiper, of the Superior Court of Justice, released her reasons for decision in *Chavez v Economical Mutual Insurance Company*, 2020 ONSC 2005, dismissing the plaintiff's coverage application. Stephen Moore and Harrison Nemirov of our firm represented Economical.

Chavez was seeking coverage from Economical for an SUV/motorcycle accident which occurred in August of 2011. A mother and daughter riding the motorcycle sustained serious injuries. Both sued Chavez in separate actions. Additionally, both plaintiffs sued their OPCF 44R insurer and the passenger also sued the operator of the motorcycle (her mother). The motorcycle operator had, in turn, third partied Economical seeking a declaration that it insured Chavez. In 2018, almost 7 years after the accident, Chavez sued Economical for coverage. The two tort actions were settled for about $1.25 million with the question of who pays left to the coverage trial. The actions against Economical were tried together. If Economical lost, then it would pay the settlements. If it was successful, then the OPCF 44R insurer would pay them.

A key issue at the trial held in February 2020 was whether Chavez was entitled to relief from forfeiture. The 2014 Court of Appeal decision in Kozel had expanded the circumstances when relief from forfeiture is available under section 98 of the *Courts of Justice Act*. Chavez is one of a handful of post-Kozel cases which discusses when such relief is available. The second key issue was whether Chavez's claim was statute barred.

The first question at trial was whether Chavez had requested that his SUV be added to the policy within 14 days of it acquisition as required by the policy. If the answer was no, then Chavez sought relief from forfeiture for his failure to comply with the 14-day notification requirement.

In June of 2011 Chavez had two vehicles insured under his Economical policy. In late June he acquired a 3rd vehicle. It was this 3rd unlisted vehicle that was involved in the accident. He contended that one of the insured vehicles had broken down before he acquired the 3rd vehicle and was never driven again. He also alleged that shortly after acquiring the 3rd vehicle he faxed his former broker requesting that it be added to the policy. Chavez had not retained a copy of this fax. Everyone denied receiving a copy of this fax.

He contacted his broker the next day and told him that he had been involved in a "minor" accident. The broker told him he could not insure him for the accident but could add the 3rd vehicle to his policy as of that day.

Chavez was found to be an "equivocal" witness. The Court concluded that he had never attempted to send the fax. To succeed he needed to convince the Court to provide relief from forfeiture.

The relief from forfeiture argument was novel. At the time of the accident, Chavez only had two operating vehicles. He was paying for insurance on two vehicles, one of which was broken down. It was argued that Economical was not actually losing any money even if Chavez had failed to give notice regarding the new 3rd vehicle. Therefore, this failure should be relieved against. Her Honour only indirectly addressed this argument.

Justice Leiper approached the relief issue by first asking if this breach could be relieved against. She concluded that a Court could excuse imperfect compliance with the policy but not non-compliance. Since Her Honour had concluded that Chavez never attempted to insure the 3rd vehicle, **this was a case of non-compliance and relief from forfeiture was not available.**

Although not necessary, Her Honour went on to consider whether relief should be granted. Her Honour noted that there is a 3-part test for relief from forfeiture. The test requires the Court to examine the conduct of the insured, the gravity of the alleged breach and the disparity between the value of the property forfeited and the damage caused by the breach.

As previously noted, Her Honour concluded that Chavez never attempted to insure the vehicle. He knew that it required insurance and chose to put other members of the community at risk by failing to insure it. Accordingly, she found that Chavez failed the first branch of the test. She also considered the gravity of the breach to be serious. Her Honour discussed but made no specific finding on the third factor. Her Honour would not have exercised her discretion to grant relief from forfeiture.

Justice Leiper also found for Economical on the limitation issue. She concluded that Chavez knew or ought to have known on the day of the accident that he was not insured. Accordingly, his suit against Economical, launched in 2018, was out of time. Similarly, she found that as the plaintiffs' claims were served on Chavez in April of 2013, Chavez had also missed the two year limitation period for contribution and indemnity claims under section 18 of the *Limitations Act.*

She dismissed both claims against Economical. The OPCF 44R insurer is obliged to pay the settlements.

While this case is fact-specific, the broader implication is that, notwithstanding the Court of Appeal's expansion of the circumstances that may give rise to relief from forfeiture, there remain some criteria an insured must meet, and it remains worthwhile contesting these applications in the right cases.

If you have any questions about this decision please contact Stephen Moore at 416.594.3950 or smoore@blaney.com.

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