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Insurance

Off-coverage positions and timing of a breach of policy defence

By **Stevan Manojlovic**

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(December 11, 2019, 10:38 AM EST) -- Once notified of an accident, an insurer will have a laundry list of tasks to complete while preparing for litigation. Although it is prudent practice to pause and consider whether there is a coverage issue at the outset of a dispute, this may be easier said than done. As such, the question of when an insurance company is allowed to declare that a policy will not cover a particular accident has, and will certainly continue, to arise in litigation.

On Oct. 7, 2019, the Ontario Court of Appeal released its decision in *Bradfield v. Royal Sun Alliance Insurance Company of Canada* 2019 ONCA 800. The Court of Appeal's decision is noteworthy as it may have the effect of decreasing an insurer's burden to promptly investigate an incident to determine coverage. It also suggests that, under some circumstances, insurers will be permitted to alter their position on coverage deep into the litigation proceedings.

Facts

Royal Sun Alliance Insurance Company of Canada (RSA) was the motorcycle insurance provider of Steven Devecseri. In May 2006, Devecseri was driving his motorcycle with Jeffrey Bradfield and Paul Latanski. Devecseri guided the group onto the wrong side of the road where they collided with Jeremy Caton's automobile. Devecseri was killed in the accident and Caton was injured.

Caton brought an action in which Devecseri and Bradfield were found liable for damages resulting from the accident. During discoveries on June 24, 2009, RSA learned for the first time that Devecseri had consumed alcohol prior to the accident. Alcohol consumption was not permitted under the terms of his policy with RSA.

Subsequently, RSA took an off-coverage position. RSA argued that Devecseri breached his policy by having a blood alcohol level above zero while driving his motorcycle. The problem was that this fact was discovered, and RSA advanced this defence, over three years after the accident occurred, and over a year after the action was commenced. At the initial trial, the issue of whether RSA was required to provide insurance coverage to Devecseri was deferred to a second trial.

In the second trial, the judge considered whether RSA waived the right to rely upon Devecseri's policy breach but determined that RSA took its off-coverage position too late. As such, Bradfield was entitled to recover $800,000 from RSA. The judge reasoned that:

- RSA did not take steps to acquire the coroner's report in 2006, when it was initially available;
- Knowledge of the policy breach was imputed at the time the report was available; and
- RSA's failure to take an off-coverage position after the report was available in 2006, and prior to defending the claim in 2008, amounted to waiver by conduct of Devecseri's breach (see *Bradfield v. Royal and Sun Alliance Insurance Company of Canada* 2018 ONSC 4477).

RSA appealed the finding that it waived the right to deny coverage. RSA asserted that the waiver

requires actual knowledge of the breach and that the doctrine of estoppel should not apply where there was a lack of knowledge on its part.

Appellate court's decision

The Ontario Court of Appeal allowed the appeal and found that RSA did not waive its right to, and was not estopped from, denying coverage.

RSA engaged an adjuster to investigate the accident in 2006. At the time, the adjuster obtained a police report that concluded that excessive speed was a major factor in the collision. The report made no mention of alcohol. Further, the adjuster interviewed the other drivers, Bradfield and Latanski, and neither indicated that Devecseri was drinking prior to the accident. None of the parties involved in the litigation obtained the coroner's report.

RSA's position was that it had no knowledge of the breach until 2009. When it was given reason to believe that there was a breach, it investigated and promptly denied coverage.

The central issue for the Court of Appeal was determining what constituted "knowledge" under the circumstances. The trial judge imputed knowledge to RSA on the basis that the evidence was available earlier.

The Court of Appeal considered, but ultimately distinguished, the decision in *Logel Estate v. Wawanesa Mutual Insurance Company* 2009 ONCA 252. In *Logel*, the insurer was prevented from taking an off-coverage position after it initially agreed to defend the claim.

Contrarily, in this case, RSA had no actual knowledge that Devecseri breached the policy by consuming alcohol until 2009. Therefore, knowledge should not have been imputed as this was not a case where RSA failed to appreciate the significance of the information acquired.

Further, there was no legal authority to support an insurer's obligation to obtain a coroner's report. RSA was not aware of the information contained in the coroner's report. There was no evidence, or reasonable possibility, that RSA knew of this information but chose not to obtain the report anyway.

The Court of Appeal also found that RSA was not estopped from asserting a breach of policy as, again, it did not have knowledge of the breach.

Conclusion

The central legal issues in this case dealt with the doctrines of waiver and estoppel. For both doctrines, the knowledge requirement is vital to their application.

Ultimately, this decision suggests that an insurer's knowledge requirement is not whether it can theoretically obtain material information but whether it actually obtains the material information necessary to become aware of a policy breach.

Moving forward, it will be interesting to consider whether there will be a statutory or common law requirement that a coroner's report be obtained when dealing with fatal motor vehicle accidents. Moreover, this decision could have the indirect effect of decreasing the diligence with which insurers are required to investigate incidents to determine coverage. It is also possible that the reasoning will be applicable to insurance claims beyond motor vehicle accidents.

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