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"FIRST PAST THE POST" ALLOCATION OF POLICY LIMITS AFFIRMED FOR NON-AUTOMOBILE CLAIMS IN BRITISH COLUMBIA



Insurers occasionally face the problem of multiple claims arising out of the same incident that, collectively, exceed policy limits. The British Columbia courts recently confirmed that the allocation of insurance proceeds in the non-automobile context is to judgment creditors in the order in which the creditors obtain judgment. This is known as the "first past the post" approach. This is contrary to the approach prescribed by motor vehicle legislation mandating that the policy limits be allocated to all claimants on a "pro rata" basis.

FACTS AND BACKGROUND

Aviva Canada Inc. issued a homeowner's policy to the Dewhirsts. During a social event hosted by their daughter the Dewhirsts' deck collapsed. Seven of the 45 people on the deck at the time of its collapse commenced actions against the Dewhirsts.

Aviva wanted to enter into settlement negotiations with the seven existing claimants. However, it wished to avoid any adverse repercussions should the negotiations result in a depletion of policy limits. As many of the attendees at the social event were minors the limitation period had not expired and the possibility remained for future claimants to seek payment under the policy.

As such, in *Re: Aviva Canada Inc.*, 2006 BCSC 1578, Aviva petitioned the court for declarations that it was entitled to pay settlements and judgments to the various present and future claimants in the order in which such settlements and judgments were negotiated or obtained and that such payments would deplete the policy limits with no recourse under the policy to future claimants for amounts in excess of the policy limits.

THE RULING

The allocation of policy limits in the non-automobile context had, prior to this ruling, never been addressed in British Columbia. The court held that British Columbia should follow Alberta and Ontario's lead in applying the "first past the post" approach.

In the automobile context the British Columbia courts have applied various provisions of the British Columbia *Insurance Act* and *Insurance (Motor Vehicle) Act* to find that policy limits, where exceeded, must be distributed on a pro rata basis as between all those having a claim under the policy. Within the highly regulated sphere of motor vehicle insurance it is a valid public policy objective to ensure that all non-culpable persons injured in a car accident are at least partially compensated.

There are no similar “pro rata” sharing provisions in the *Insurance Act* relating to non-automobile policies. As such, it was open to the court to look beyond the pro rata approach mandated within the “unique” sphere of automobile insurance. The court held here that it should follow prior Alberta and Ontario rulings and apply the “first past the post” approach to non-automobile insurance. The court considered that this approach “*is the fairer option as it encourages early settlement ...; it rewards those claimants who diligently move their claims forward; and it affords judgment creditors the opportunity to realize the fruits of their judgments as soon as possible.*”

IMPLICATIONS TO THE INDUSTRY

Whether the payment of policy limits is governed by a “first past the post” approach or “pro rata” approach is dependent on the type of policy and must be considered before policy limits are eroded. Where “first past the post” applies an insurer must be cautious not to show favouritism by affecting the order in which settlements are reached or judgments are entered. Rather, prior to any judgment the insurer should pursue a global settlement of all known claims on terms acceptable to all claimants. This approach will benefit both the insured by reducing or eliminating its exposure to claims in excess of limits and the insurer by avoiding any challenge to the distribution.

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