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BRITISH COLUMBIA COURT OF APPEAL CLARIFIES RIGHTS AND OBLIGATIONS OF OUT-OF-PROVINCE AUTO LIABILITY INSURERS

Richards Buell Sutton's Insurance Law Newsletter

By RBS Lawyers

In the recent decision of *Moldovan v. Republic Western Insurance Company,* 2011 BCCA 418, the British Columbia Court of Appeal determined whether an out-of-province auto liability insurer can rely on the two year statutory limitation period in the *Insurance (Vehicle) Regulation* to preclude a plaintiff from suing for no-fault benefits due under British Columbia's universal, compulsory automobile insurance scheme. Also considered was whether the plaintiff's claim could be saved by the postponement provisions in the *Limitation Act*.

Factual Background

The plaintiff was injured as a passenger of a U-Haul vehicle that was insured by Republic Western Insurance Company (RWIC), an insurer located in Arizona. The plaintiff commenced an action against ICBC for the denial of no-fault benefits but through inadvertence did not commence an action against RWIC before the expiry of the two year limitation period in the *Insurance (Vehicle) Regulation*. The plaintiff applied to add the RWIC as a defendant despite the expiry of the limitation date.

U-Haul and RWIC had, prior to the accident, filed a Power of Attorney and Undertaking (PAU) with the BC Superintendent of Insurance. The PAU system is an inter provincial (and interstate) web of interlocking arrangements for substitutional service and undertakings by insurers designed to ensure that travelling motorists are financially responsible for their actions in other provinces and participating states. The subject PAU included an undertaking that RWIC would not "*set up any defence…which might not be set up if the contract had been entered into … in the Province or Territory of Canada in which such action is instituted*". The coverages and limits of motor vehicle liability insurance in British Columbia are statutorily prescribed in the *Insurance (Vehicle) Act* and *Regulations*.

In *Moldovan*, the Master found that the out-of-province insurer was entitled to rely on the two year statutory limitation period provided in the *Insurance (Vehicle) Regulation* and that the postponement provisions in the *Limitation Act* did not apply. As such, the Plaintiff was not entitled to add the out-of-province insurer as a

defendant in the action. The Plaintiff appealed and the Chambers Judge overturned the Master's decision. The Chambers Judge found that the limitation period in the *Insurance (Vehicle) Regulation* did not apply to out-of-province insurers as it would give the BC legislation an "impermissible extraterritorial effect". The Chambers Judge essentially determined that the PAU was nothing more than a promise by the insurer to not rely on the limits of insurance contained in its policy that are lower than the limits prescribed by the relevant statutes. The insurer did not incorporate into its policy all the terms contained in the *Regulation*, including the subject limitation provision.

The Ruling

In assessing the issue of whether a statutory provision that is applicable on its face to all plaintiffs is nevertheless inapplicable to an out-of-province insurer, the Court of Appeal reverted to a simple reading of the statutory provision and determined that the limitation period set out in the *Regulation* applies to any person who commences an action for no-fault benefits irrespective of whom that action is commenced against. The Court stated that the limitation provision in the *Regulation* "is not framed as an obligation of the insurer, nor as a contractual term that must be incorporated by agreement before it may operate." As such, the Chambers Judge erred in declining to apply the limitation on the basis that the PAU does not constitute an agreement to incorporate into an insurance policy all the terms that are prescribed in the applicable legislation.

However, despite determining that the out-of-province insurer could rely on the limitation defence, the Court applied the postponement provisions in the *Limitation Act* by finding that the balance of prejudice was in the plaintiff's favour and that it was just and convenient that the out-of-province insurer be added as a defendant.

Practical Considerations for Insurers

Moldovan affirms that a PAU requires out-of-province auto liability insurers to provide the kind or class of coverage and limits prescribed in a Province or Territory's legislative scheme. It also affirms that out-of-province insurers may rely on the defenses provided by the same legislation even if the insurer's policy does not have such a term.

Given the effect of a PAU, out-of-province insurers must be cognizant of any additional coverages and limits that may be imposed by statute in the particular province or territory where an accident occurs. By the same token, out-of-province insurers must also take advantage of other provisions of the local laws to determine their obligations, including time limitation, specific deduction and right of recovery provisions.

Out-of-province automobile liability insurers are well advised to establish relationships with local insurance adjusters or counsel for the purpose of ensuring their understanding of often complex statutory and regulatory local insurance schemes.