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IT'S DIFFERENT OUT HERE: THE $1 MILLION LESSOR'S LIABILITY CAP IN BRITISH COLUMBIA

Richards Buell Sutton Insurance Law Newsletter

By RBS Lawyers

In *Stroszyn v. Mitsui Sumitomo Insurance Company Limited*, 2013 BCSC 1639, the Supreme Court of British Columbia concluded that the $1 million cap on a lessor's liability under section 82.1 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the "Act") is not less any amounts paid by or on behalf of a lessee. The court also found that section 61 of the Act does not alter the express terms of a lessor's excess coverage policy such that an unnamed driver/lessee becomes an additional insured. This decision is particularly noteworthy with respect to its determination on the lessor liability cap issue because it means that the law in British Columbia is now exactly the opposite of the law in Ontario.

The Background and Issues

On May 15, 2008 a vehicle driven by the plaintiff petitioner was struck by a vehicle driven by Jason Chen and leased by Mary Chen from Honda Canada Finance Inc. ("Honda"). Ms. Chen's lease agreement with Honda Canada required her to carry $1 million of liability insurance and name Honda as an insured. Honda was also an insured under an excess insurance policy with Mitsui. (the "Policy"). It was agreed by all parties in the tort action that the plaintiff petitioner's damages were $1.6 million. One million of this was paid by the lessee's insurer and a determination as to the respondent Mitsui's responsibility for the excess $600,000 was sought.

The Lessor Cap Issue

The petitioner argued that the respondent was liable to the extent of $600,000 because s. 82.1 of the Act does not contain specific language which would make amounts recovered from a lessee deductible from the cap. The insurer argued that the fundamental common law principles of joint liability dictate that the payment by or on behalf of one jointly liable party discharges the liability of all other jointly liable parties to the extent of that payment. Therefore Honda's potential liability of $1 million had been completely discharged by the lessee.

In determining the applicability of section 82.1 the court noted that similar legislation had been introduced in Ontario and that in *Nguyet v. King*, 2010 ONSC 5506 it was declared that the $1 million cap was less any

amounts recovered from the lessee. The court also noted that the Ontario legislation contains specific language on this subject that is absent from the Act.

The court disagreed with the insurer's position that principles of joint liability rendered such language unnecessary. It found that those principles exist to prevent double recovery which was not at risk. Instead the proper interpretation of s. 86(1.2) of the *Motor Vehicle Act* (vicarious liability of a lessor) and s. 82.1 of the Act was for a lessor to be exposed to liability as a joint tortfeasor with a limit on that liability of $1 million. Therefore the insurer was liable for $600,000 as that result was consistent with the plain meaning of s. 82.1 and accorded with the legislative scheme.

The Excess Coverage Issue

The Policy contained an endorsement that only Honda was covered in respect of leased vehicles. The petitioner argued that the respondent must pay $600,000 to the petitioner on behalf of Mr. and Ms. Chen because despite the endorsement as they were entitled to coverage pursuant to section 61 of the Act. The respondent argued that the plain wording of the Policy provided insurance for only Honda and that the legislative scheme did not alter the result.

Section 61(1)(a) of the Act states that when an optional insurance contract extends the limit of coverage it must do so for every insured on the same terms and conditions. Subsection (1.1) does permit certain prohibitions and exclusions, however subsections (1.2) and (2) create limits on those prohibitions and exceptions and require the policy to contain the words "This policy contains prohibitions relating to persons or classes of persons, exclusions of risks or limits of coverage that are not in the insurance it extends". These words were not contained within the Policy.

When considering the effect of these legislative provisions the court found that because Mr. and Ms. Chen were not named insureds under the Policy section 61 had no application. The fact that the Policy did not contain the requisite subsection (2) wording did not make them insureds under the Policy. According to the court, to decide otherwise would allow a victim of an accident involving a leased vehicle to claim against a lessor's excess coverage, which could potentially be $9 million and thus far in excess of the cap. The court felt that such a result would not accord with the legislative scheme.

Practical Considerations for Lessors and Insurers

At the time of this publication notices of appeal and cross appeal have been filed by both the petitioner and the respondent. Whether this appeal in fact proceeds and its results, if any, will be seen in the future.

Presently however, lessors and insurers of vehicles licensed or operated in British Columbia must be aware

that, unlike Ontario, a lessor's potential liability of $1 million is not less amounts recovered from lessees or their insurers. Lessors and their insurers are exposed up to $1 million in excess of amounts recovered by plaintiffs. This state of law should be taken into consideration by lessors when setting lease terms and rates, creating their own excess reserves and/or obtaining their excess insurance. Lessors' primary and excess insurers are well advised to consider the ruling in *Stroszyn* when determining policy coverage terms and premium rates.