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THE $1 MILLION LESSOR'S LIABILITY CAP IN BRITISH COLUMBIA – REVISITED AND REVISED

Richards Buell Sutton's Insurance Newsletter

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In *Stroszyn v. Mitsui Sumitomo Insurance Company Limited*, 2014 BCCA 431, the British Columbia Court of Appeal reconsidered the liability cap for lessors of motor vehicles in British Columbia. The court concluded that under section 82.1 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the "Act") the amounts paid under a primary policy reduced any payment obligations owed by the lessor, therefore, in this case, the excess policy was not required to respond. The court also found that the insurer's failure to comply with section 61 of the Act, which requires express warning provisions if contractual terms in an optional insurance contract differ from the underlying policy, resulted in coverage for additional insureds despite express, contrary, policy terms to this effect.

This decision brings the law regarding lessor's liability in British Columbia more in line with that law in Ontario, however, each legislative scheme differs and may not always produce the same result.

The Facts

On May 15, 2008 a vehicle driven by Mr. Stroszyn 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 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 to a limit of $9 million (the "Excess Policy") with Mitsui Sumitomo Insurance Company Limited. It was agreed by all parties in the tort action that Mr. Stroszyn's damages were $1.6 million. One million was paid by Ms. Chen's primary insurer and a determination as to the excess insurer's responsibility for the remaining $600,000 was sought.

The Lessor Cap Issue

Mr. Stroszyn argued that the lessor was liable to the extent of $600,000 because s. 82.1 of the Act did not contain specific language which would make amounts recovered under the primary policy deductible from the cap where the primary policy was "issued to or obtained by lessees or drivers". The lessor argued that the fundamental common law principles of joint liability dictated that the payment by or on behalf of one

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jointly liable party discharged the liability of all other jointly liable parties to the extent of that payment – therefore Honda's liability of $1 million had been completely discharged. The lower court concluded that the lessor's liability was not reduced by the $1 million payment under the primary policy. On appeal, the court determined each insured could treat the entire primary policy payment as reducing their liability to the plaintiff to the extent of the amount paid. The statutory cap on the lessor's liability then resulted in all the lessor's obligations under the Act being discharged.

The Excess Coverage Issue

The Excess Policy contained an endorsement that only Honda was an insured in respect of leased vehicles. The plaintiff argued that the Excess Policy must pay $600,000 to him on behalf of the driver and the lessee because, despite the endorsement, the driver and lessee were entitled to coverage pursuant to section 61 of the Act. The excess insurer argued that the Excess Policy's plain wording provided insurance for only Honda and the legislative scheme did not alter the result.

Subsection 61(1) 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 61(1.1) permits certain prohibitions, exclusions and limits to coverage under optional insurance contracts however subsection (2) creates an immutable condition precedent to the availability of any prohibition, exclusion or limit. Importantly, subsection (2) requires the policy to contain, in a prominent place, in conspicuous letters, 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" for any such prohibition, exclusion or limit to be effective. These words were not contained in the Excess Policy. The effect of the lack of this wording, prominently displayed, was to extend coverage under the Excess Policy to both the driver and lessee. Honda's excess insurance was deemed to cover these two people beyond the limits available under their primary policy.

Excess Coverage in Ontario

In *Xu (Litigation guardian of) v. Mitsui Sumitomo Insurance Co.,* 2014 ONCA 805, the court concluded that section 267.12 of the Insurance Act, R.S.O. 1990, c. C.25, which expressly reduces the liability of a lessor to the extent of any payment under a primary policy, cannot be interpreted to extend coverage under the lessor's policy to the lessee. The section 61 issue from *Stroszyn* would not arise in Ontario as the O.E.F. 110 endorsement to the Standard Excess Policy Form expresses that drivers of leased vehicles are not covered by a lessor's insurance policy.

Practical Considerations for Lessors and Insurers

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All out of province insurers must remember that their license to issue insurance operative in British Columbia, and any deposited Power of Attorney or Undertaking (PAU), will limit their ability to raise defences that could not be raised if the policy was issued in British Columbia. The Act prevails over express policy terms that are contrary to its provisions.

Lessors and insurers of vehicles licensed or operated in British Columbia must be aware that, in British Columbia, a lessor's liability of $1 million is fully reduced by any payment made on behalf of all liable parties including drivers and lessees.

To avoid insuring anyone under an excess policy who is otherwise expressly excluded by a policy's terms, the language of s. 61 requires the following "conspicuous" wording to be included in a prominent place on any policy: "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". Lessors and insurers are well advised to take immediate steps to make certain that the mandatory language contained in subsection 61(2) of the Act is properly included in their policies.

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