

Focus PERSONAL INJURY

Late accident report doesn't always forfeit coverage



Michael Lesage

Recently, the Ontario Court of Appeal affirmed that technical non-compliance with the reporting requirements of an insurance policy would not act as a bar to coverage. That issue arose in the context of an uninsured motorist claim, where the insured failed to report the accident to the insurer within the time frame specified by the policy.

The facts in *Dams v. TD Home and Auto Insurance Co.* 2016 ONCA 4 were relatively straightforward. In July 2009, Wolfgang Dams was injured when he dropped his motorcycle, which was partly caused by an unidentified driver. Pursuant to the terms of his (standard) Ontario automobile policy, Dams was required to report the accident to police within 24 hours or as soon as practicable thereafter and also to provide his insurer with a written statement within 30 days, or as soon as practicable thereafter. Additionally, a policy schedule (Section 8(1)) precluded an insured (such as Dams) from commencing a legal action where the requirements of the policy (including notice) had not been complied with.

Dams, conversely, did not report the accident to his insurer until several months later. Likewise, Dams did not attempt to report the accident to police until



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At trial, TD sought to deny coverage, asserting that Dams' failure to comply with the two reporting requirements set forth in his policy constituted non-compliance with the requirements of his policy, resulting in coverage being forfeit.

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sometime after February 2010, at about which time he first provided his insurer with a written statement. Thereafter, in May 2010, Dams brought suit against his insurer, seeking damages under the uninsured automobile coverage provisions of his policy.

At trial, TD sought to deny coverage, asserting that Dams' failure to comply with the two reporting requirements set forth in his policy constituted non-compliance with the requirements of his policy, resulting in coverage being forfeit. As he did not do so within those time frames, TD took the position that he had breached a condition of his policy that he had to comply with before he could bring the claim (a condition that comes before, or precedes), such that his coverage was forfeit.

In contrast, Dams argued that he had imperfectly complied with the policy terms, such that relief from forfeiture was available pursuant to s. 129 of the *Insurance Act* and s. 98 of the *Courts of Justice Act*.

The distinction between non-compliance and imperfect compliance was explored in *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co.* [1989] 2 SCR 778. Generally, a court can only award relief from forfeiture where the breach of a policy condition amounts to imperfect compliance rather than non-compliance with a condition precedent. The court in *Falk* further explained that relief from forfeiture provisions “are remedial in nature and... should be given a[n]...broad interpretation...to prevent hardship to beneficiaries where there has been a failure to comply with a condition for receipt of insurance proceeds and where leniency in respect of strict compliance... will not prejudice the insurer.”

Against that backdrop, the appellate court dismissed the insurer's arguments of non-compliance, noting that the purpose of the reporting requirements was to give an insurer timely notice of a loss so that it could investigate should it so choose. The court further noted that the interpretation suggested by the insurer was contrary to the Supreme Court's holding in *Falk Bros. Industries Ltd.*

The Court of Appeal additionally noted that the interpretation suggested by the insurer of the standard auto policy and schedules would bring same into conflict with the *Insurance Act*, in that the very relief from forfeiture

provided for by s. 129 of the *Insurance Act* would then be precluded. While not explicitly mentioned, it should be noted that the interpretation advanced by the insurer runs afoul of the rule of statutory construction that where separate statutes can be read harmoniously and apply without conflict, both will apply.

Despite the ruling in *Dams*, the state of the law in this regard remains somewhat nuanced. For instance, in some cases, driving with an expired licence has been held to be imperfect compliance, for which relief from forfeiture is available, while in other cases it has been held to be non-compliance with a policy term, resulting in coverage being forfeit. (See *McEnaney v. General Accident Assurance Co. of Canada* [2005] O.J. No. 717 and *Williams v. York Fire & Casualty Insurance Company* 2007 ONCA 479.) Likewise, while relief from forfeiture would seem readily available where a loss is reported in an untimely manner, that is usually not the case under “claims made and reported contracts,” where notice outside of the policy period has been held to be non-compliance which cannot be excused. (*Peel Law Assn. v. Royal & Sun Alliance Insurance Co. of Canada* 2013 ONSC 2312.) As with many insurance issues, the safest course of action is often to consult with an experienced insurance lawyer.

Michael Lesage is a lawyer at Michael's Law Firm, a litigation boutique that specializes in complex litigation involving legal malpractice, commercial litigation, insurance coverage and serious injury claims.

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