Plaintiffs Cannot Bargain Away Their Insurers' Rights and Still Hope to Recover From Their Insurer

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During multiparty motor vehicle accident litigation, plaintiff's counsel often claims tactical advantage against one defendant by threatening to settle with other defendant. If the plaintiff is not careful, this type of settlement can prove improvident and will frustrate the plaintiff's efforts at further recovery.

In *Maccaroni v. Kelly*, 2010 ONSC 4447 (CanLII), the plaintiff settled with the underinsured motorist for the policy limits in an effort to force the hand of their own insurer, ING. ING brought a motion for summary dismissal of the plaintiffs claim against it on the basis there was no genuine issue requiring trial as the plaintiff has settled with the uninsured motorist and in effect bargained away ING's right to claim against them. The Court granted this motion.

The Action

The action concerned a motor vehicle collision that occurred on February 16, 2003. The plaintiff was rear ended by a vehicle operated by the defendant Kelly and owned by the defendant Ainsworth. The Ainsworth vehicle was insured by the Co-operators General Insurance Company ("Co-operators"), with third party liability insurance in the amount of $1,000,000. The plaintiff was insured by ING.

A Statement of Claim was issued October 1, 2003, against the tortfesors Kelly, Ainsworth and the plaintiffs own insurer, ING under its family protection endorsement (OPCF 44R), which also carried a $1,000,000 policy limit unless the insurer's liability was reduced by "operation of law" to the statutory minimum limits of $200,000 because of breach of the policy. The Co-operators obtained an order adding itself as statutory third party pursuant to section 258 in the *Insurance Act* with the admission that the Ainsworth vehicle was insured by it.

At the time of the accident Ainsworth permitted Kelly to operate her vehicle when she knew or ought to have known that Kelly did not have a valid driver's licence. Both Kelly and Ainsworth refused to co-operate with the Co-operators during their investigation of the action. Kelly and Ainsworth were noted in default. The Co-operators denied liability under the insurance contract due the alleged breaches of statutory conditions. The Co-operators also took the position that its liability was limited to $200,000 pursuant to section 258(11) of the *Insurance Act.*

Settlement by the Plaintiff

The plaintiff settled her action with Kelly, Ainsworth and the Co-operators in exchange for the statutory minimum limits of $200,000. On the basis of that settlement, the claim

against Kelly, Ainsworth and the Co-operators was dismissed. The plaintiff planned to continue their litigation against ING.

Prior to the dismissal order, plaintiffs counsel advised ING that the Co-operators had offered to settle for the statutory limits of $200,000 and requested that ING pay additional $295,000 plus costs under its underinsured coverage. ING took the position that the plaintiffs claim would not exceed the statutory minimum limits and for the plaintiffs to settle with the Co-operators and execute a release in favour of Ainsworth would prejudice ING's rights because the issue of whether Ainsworth had more then $200,000 available coverage had not been resolved.

ING never consented to the settlement or the dismissal.

The plaintiffs policy with ING set out that ING would not pay any amount in respect of a claim involving an uninsured or underinsured party if she or another insured could make a valid claim under a motor vehicle policy.

Counsel for ING put the plaintiffs on notice and wrote the plaintiffs "you cannot bargain away the rights of ING to a claim over against a tortfeasor or it's insurer".

Plaintiffs Position

The plaintiff claimed that the position taken by ING put her in a difficult place: (1) she could accede to ING's view, decline to settle with Co-operators and proceed to trial against all defendants, if judgment exceeded Co-operators statutory limits of $200,000, she would then be required to start another action against Co-operators and if Co-operators failed to prove that its insured had breached the policy, Co-operators would be liable for the proven damages in excess of $200,000; (2) but of Co-operators were able to prove that its insured's had breached the policy, this action would be dismissed and only then would the be able to claim from ING the amount of the judgment in excess of $200,000, pursuant to the underinsured coverage; (3) this would require the plaintiff to peruse two actions to judgment and bare the full expense of both of those actions and the costs risk of the second action against the Co-operators should it be unsuccessful.

The plaintiff was of the view that it was not in her best interest to refuse the settlement with the Co-operators.

Decision

The court held there was no genuine issue requiring a trial and that the defendant ING should have summary judgment.

ING had protested loudly to the plaintiff that she could not settle with Co-operators and bargain away ING's rights, which would include contesting the denial by the Co-operators, as well as quantum of damages.

The plaintiffs did not enter into a limits agreement with the tortfeasors or the Co-operators. Instead, they simply settled the claim with the defendant and were paid out the statutory limits – essentially, the claim was satisfied in the amount that the plaintiff had decided to settle.

There had never been a legal determination with respect to the off coverage position taken by the Co-operators and therefore the Co-operators limit of liability was never reduced by operation of law from the certificate amount of $1,000,000 to the statutory minimum of $200,000.

No such determination could be made at the time of the motion as the plaintiff had already released the tortfeasors and the Co-operators from the action.

The Court concluded that because there was no reduction by "operation of law", it follows that the plaintiff still had notionally available to her the third party limits of $1,000,000, the same limits as the ING family protection endorsement set out.

The Court therefore concluded that plaintiffs not yet proven loss in excess of $200,000 did not fall within the ambit of her ING policy as it does not involve an inadequately insured vehicle.

The Court rejected the plaintiffs' complaint that ING stance put her in a difficult position and refused to put the Co-operators in the difficult position of having to contest a case they had already settled. The Court concluded that the plaintiff had "made this soup, when she chose to ignore the risk occasioned by ING's stance" and that "she must now eat it". The court concluded that the plaintiff's case was finished.

Conclusion

This decision clearly illustrates that before a plaintiff settles with one party, they should consider the effect this may have on their claim against remaining parties and that the desired effect of leaving the remaining defendant exposed may backfire.

Also, this case suggests that Defendants should resist plaintiffs trying to pressure them by settling with other defendants as this may ultimately prove to be an improvident settlement that prejudices the plaintiff and frustrates their ability to continue the litigation.