

Failure to disclose material facts to insurer voids coverage for delivering pizza

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Failing to advise an insurance company of material facts relating to the policy may result in a loss of coverage at a time when it is needed most.

In *Euler v. Economical Insurance*, 2021 ONSC 3018 (CanLII), the applicant had an automobile insurance policy with the respondent insurer which was issued in 2014, and renewed annually thereafter. The application form required the applicant to indicate any business use of the insured vehicle. The applicant left that area of the form blank, indicating no business use. The annual premium for the policy (\$733) was rated on the basis that the vehicle was used primarily for “pleasure” with a stated two-kilometre commute to work. This information was endorsed on the Certificate for Automobile Insurance for each successive term.

Pursuant to the standard policy terms and conditions, the applicant agreed to promptly notify the insurer of any changes in the “risk material to the contract” or to “a change in the way the automobile is used.”

At some point, the applicant started to deliver pizza for Domino’s Pizza. On 28 October 2017, he was involved in an accident with another vehicle. The applicant reported the accident to his insurer and subsequently confirmed with a claims adjuster that he was employed by Domino’s Pizza on the date of the accident and was returning from a delivery when the accident occurred.

It does not appear from the decision that Domino’s Pizza provided any insurance coverage for delivery people using their own vehicles.

On 28 November 2017, five days after reporting the accident, the applicant cancelled the policy, signing a Cancellation Agreement, effective 29 October 2017. His vehicle had been scrapped following the accident. The insurer refunded \$92.56 in unearned premium.

In 2019, the applicant was notified of a claim against him arising out of the accident. He reported this claim to his insurer. However, the insurer denied the claim for indemnity and payment of defence costs arising out of the accident, stating that the applicant had breached the policy by failing to disclose on his application for insurance and at any point in the duration of the policy that he used his vehicle for business – delivering pizza – which was a change in risk material to the policy.

The applicant argued that the intended use of the vehicle, to deliver pizzas, was not a term or requirement of the contract of insurance. Alternatively, he argued that the insurer waived its right to deny coverage by treating the policy as valid and subsisting, by failing to rescind the policy, *ab initio*, and by failing to refund the premiums that it had received, dating back to when he began using his vehicle to deliver pizzas.

In a decision released in April 2021, the Honourable Mr. Justice D. C. Shaw found that the insurer did not have a duty to defend or indemnity and dismissed the application. The test for materiality in an insurance contract is whether a reasonable insurer, if properly informed of the fact, would have acted differently by refusing to accept the risk or by imposing special conditions: *Lavoie v. T.A. McGill Mortgage Services Inc.*, 2014 ONCA 257, at para. 29. The fact that the applicant used his vehicle for the business of delivering pizzas and not for the declared purpose of pleasure and commuting to and from his work, was a change in the risk material to the insurance contract and within the applicant’s knowledge. As such, the applicant was required to promptly notify the insurer of the change in risk. He did not do so promptly or at any time prior to the accident.

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As to the argument that the insurer had failed to rescind the policy, pursuant to the Ontario *Insurance Act*, a misrepresentation or a failure to notify of a material change in risk, does not render the policy voidable nor is the policy automatically terminated from the date of breach. The consequence of the breach is governed by subsection 233 (1) of the *Insurance Act*, namely “a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited.” The consequence of the breach of the policy affects the right to claim under the policy, not the policy itself.

As a result, the insurer had no obligation to defend or indemnify the applicant in the action arising from the accident.

The decision illustrates the consequences of failing to disclose material facts to an insurer which may result in a policy being void or the lack of any obligation to respond to claims made against the insured by a third party. It is a well-established principle that an applicant for insurance has an obligation to reveal to the insurer any information that is material to the application: *Vrbancic v. London Life Insurance Co.*, 1995 CanLII 1055 (ON CA).

The obligation to advise of material facts may relate to changes to the policy, such as the use of an automobile or a home being used partially for commercial purposes (e.g. Airbnb), or to the disclosure of pre-existing facts relating to the insured person at the time the policy is issued.

As an example of personal facts, in *Estate of Donald Farb v. Manulife*, 2020 ONSC 3037 (CanLII), the applicant telephoned the respondent insurer to renew his travel insurance policy before travelling to Florida. During a 27-minute telephone call with the insurance representative, the 84-year old applicant answered “no” to various questions about prescribed medications and pre-existing health conditions. While in Florida, the applicant was unexpectedly hospitalized and incurred \$134,479 (US) in hospital expenses. His subsequent claim for reimbursement was denied by the insurer on grounds of misrepresentations made during the telephone call. He passed away before the matter was adjudicated.

In response to a claim by the applicant's estate, the insurer took the position that the travel insurance policy was voided because the answers provided during the telephone interview – about whether in the last four months he had been prescribed or was taking six or more medications and whether he was being treated for a kidney disorder – were not correct. The estate argued that the insurer could not rely on the telephone answers to void the policy, as the applicable condition in the *Insurance Act* provides that no statement made by a person at the time of an application shall be used to void the policy “unless it is contained in the application or any other written statements or answers furnished as evidence of insurability.”

Justice Edward P. Belobaba determined that while the answers provided by the applicant were not part of the written application form, the insurance representative took the information by phone, filled out the application form on his computer as the information was being provided, and then emailed and mailed the (now written) application to the applicant for his review and correction. He had two months thereafter to review his answers as set out in the written version of his application and to advise the insurer of any corrections or clarifications before the policy took effect and he travelled to Florida. He never contacted the insurer to make any corrections to his answers.

As a result, the insurer was able to rely on the telephone interview questions and answers as being part of the application. It has yet to be determined whether, as a matter of fact, the impugned “no” answers were correct - that the applicant had not been prescribed six or more medications and was not being treated for kidney disease – as the merit-based issues were not part of the application.

In a more extreme example, *Mohammad v. The Manufacturers Life Insurance Company*, 2020 ONCA 57 (CanLII), the failure of an applicant for a life insurance policy to disclose his prior convictions of various offences, including manslaughter, and membership with a terrorist organization, amounted to fraudulent misrepresentation and voided the policy.

The applicant had obtained the life insurance policy in 1987, shortly after his arrival in Canada. He was ultimately deported to Lebanon in 2013, after an immigration adjudicator found that he had misrepresented material facts in his application for permanent residency. He died of lung cancer in Lebanon in 2015.

In overturning the lower court's decision upholding the policy, the Court of Appeal found: “The past actions of the deceased were material to the risk that he posed for the purpose of having his life insured.” As the deceased's failure to disclose his past actions was determined to be intentional, based on evidence that he knew his past activities were relevant to his application for life insurance and an affidavit in his immigration proceedings in which he said that his life would be in danger if he were to be deported, this was sufficient to establish fraud, thereby rendering the policy voidable.

There is a commonly held perception – rightly or wrongly – that an insurer's initial response to a claim will be to look for ways to avoid coverage. The initial application process is an integral part of the formation of an insurance policy and any misrepresentations of material facts in the written or associated telephone interview process (if any) may provide grounds for an insurer to deny coverage. It is important for an applicant not to intentionally withhold or misrepresent any material facts, and to update an insurer if there are any changes to the use of property insured under the policy, even if it is to deliver the occasional pizza. Part-



time Uber and other delivery persons would be well advised to review their automobile policies to avoid being left to defend themselves in an accident without any insurance coverage. A PDF version is available to download [here](#).

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