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Insurance

Pizza delivery bars claim for indemnity under insurance policy

By **James Cook**

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(June 1, 2021, 12:50 PM EDT) -- Over the course of the pandemic people may have started to use their homes or vehicles for business purposes to supplement their income. In such cases they would be well advised to review the terms of their automobile and/or property insurance policies to assess the potential ramifications on coverage.

Insurance policies may have terms requiring notice to the insurer of the change in use. Failing to advise the insurer of material facts relating to a change in use of the insured property may result in a loss of coverage at a time when it is needed most.

In *Euler v. Economical Insurance* 2021 ONSC 3018, the applicant owned an automobile which was insured under a motor vehicle policy issued by the respondent insurer in 2014, which was renewed annually thereafter. At the time of the application for the policy, the applicant left an area of the written form concerning business use of the vehicle blank, which meant that no business use was contemplated.

The annual premium for the policy 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 terms and conditions for the policy, the applicant agreed to promptly notify his 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 after the policy was issued, the applicant started to use his automobile for a business purpose, namely delivering pizza for a well-known chain, Domino's. It does not appear from the decision that Domino's provided any insurance coverage for delivery drivers using their own personal vehicles.

On Oct. 28, 2017, the applicant was involved in an accident with another vehicle. He reported the accident to his insurer and subsequently confirmed with a claims adjuster that he was employed by Domino's on the date of the accident and was returning from a delivery when the accident occurred.

After the applicant reported the accident, his policy was cancelled effective Oct. 29, 2017. His vehicle was scrapped and the insurer refunded $92.56 in unearned premiums. The applicant obtained a new policy for another vehicle, this time with a guarantee that he would no longer be doing deliveries.

In 2019, the applicant was notified of a claim against him arising out of the accident. He reported the claim to his insurer and sought indemnity and defence costs under his former policy. The insurer denied the claim, taking the position that the applicant had breached the policy by failing to disclose on his application for insurance or 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 commenced proceedings to determine coverage, and argued that the intended use of the vehicle was not a term or requirement of the insurance policy. 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 started using his vehicle to deliver pizzas.

In a decision released in April 2021, Justice Douglas C. Shaw found that the insurer did not have a duty to defend or indemnify and dismissed the application.

Justice Shaw affirmed that 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; see *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, met the test, as it was a change in risk material to the insurance contract and within the applicant's knowledge.

The applicant was therefore required to promptly notify his insurer of the change in risk. He did not do so promptly or at any time prior to the accident.

As to the argument that the insurer had failed to rescind the policy, a misrepresentation or a failure to notify of a material change in risk does not render a policy voidable nor is the policy automatically terminated from the date of breach.

The consequence of the breach is governed by s. 233 (1) of the Ontario *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 make a claim under the policy, but not the policy itself.

As a result, Justice Shaw concluded that 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 relating to a change in use of the insured property. The initial application process is an integral part of the formation of an insurance policy and many policies have a term requiring that the insurer be notified of any material changes to the information. 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.

It is important for an applicant not to intentionally withhold or misrepresent any material facts during the written or telephone application process, and to update an insurer if there are any changes to the use of property insured under the policy. Part-time delivery persons, ghost hotel operators, drivers and people undertaking similar business activities would be well advised to review their insurance policies to avoid being left to defend themselves without coverage if incidents occur.

James Cook is a partner at Gardiner Roberts LLP*. As a litigator in the firm's dispute resolution group, Cook has experience in a broad range of commercial, real estate and professional liability litigation.*

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