Supreme Court of Canada: Spotlight on promissory estoppel in insurance

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In *Trial Lawyers Association of British Columbia v Royal & Sun Alliance*, 2021 SCC 47, the Supreme Court of Canada (the Court) considered, and subsequently rejected, the application of promissory estoppel against an insurer who denied coverage following the discovery of a policy breach. As put simply by the Court, the insurer must have knowledge of the facts demonstrating a breach in order to be bound by any promise to provide coverage.

What you need to know

- The insured (SD) died in a motorcycle accident.
- JB and another claimant were injured in this accident and started two lawsuits.
- Royal & Sun Alliance (RSA), defended SD's estate in the two lawsuits.
- In the insurance context, estoppel often arises when an insurer takes initial steps to be consistent with coverage and then denies coverage because of the insured's breach of a policy or ineligibility for insurance.
- The Court's decision emphasizes that actual knowledge of the facts is key with respect to policy breaches.

Background

Three years after the accident and over one year into the litigation, RSA learned that SD had consumed alcohol before the accident, putting him in breach of his insurance policy. RSA immediately ceased defending SD's estate and denied coverage. This reduced SD's policy from the limits of $1,000,000 to the statutory minimum coverage of $200,000. The actions proceeded to trial, resulting in a judgment against SD's estate and JB, and a judgment for JB on his cross-claim against SD's estate.

In enforcing his judgment against SD's estate, JB rejected RSA's position that its exposure was only $200,000. JB then sought a declaration of entitlement to recover judgment against RSA on the basis that RSA waived SD's breach or was estopped from denying coverage to his estate.

The trial judge granted the declaration and found that RSA had waived its right to deny full coverage by failing to take an off-coverage position earlier and by providing a defence to SD's estate. Given this finding, the trial judge did not consider the estoppel argument.

RSA appealed. In granting the appeal, the Court of Appeal found that at the applicable time, Ontario's *Insurance Act* precluded recognition of waiver by conduct. With respect to estoppel, RSA had lacked knowledge of SD's policy breach when it initially provided him with a defence. Furthermore, there was no prejudice to the insured in this case, as the only evidence at trial was that even if RSA had invoked the policy breach earlier, the defence would not have been any different.

JB sought to appeal the Court of Appeal's decision; however, JB subsequently settled with RSA and discontinued the appeal. The Trial Lawyers Association of British Columbia therefore asked and was permitted to be substituted as the appellant.

The decision

The Court dismissed the appeal.

The appellant conceded, and the Court agreed, that waiver by conduct was precluded by Ontario's *Insurance Act* at the relevant time. Accordingly, the issue was whether RSA was estopped from denying coverage because it responded to the claims against SD's estate after it discovered evidence of his policy breach.

The Court reiterated that the party relying on the doctrine of promissory estoppel must establish that the other party has made a promise or assurance, by words or conduct, which was intended to affect their legal relationship and to be acted on. Furthermore, the promisee must establish that, in reliance on the promise, he acted on it or in some way changed his position.

The defence therefore requires that:

1. The parties be in a legal relationship at the time of the promise or assurance;
2. The promise or assurance be intended to affect that relationship and to be acted on; and
3. The other party in fact relied on the promise or assurance.

In this case, the Court found that the estoppel argument must fail because RSA gave no promise or assurance intended to affect its legal relationship with JB. Additionally, and most importantly, RSA lacked knowledge at the time it provided a defence to SD's estate of SD having breached the policy by consuming alcohol. This, in the Court's view, was fatal to the appellant's position.

The Court went on to say RSA was under a duty to SD to investigate the claim against him "fairly", in a "balanced and reasonable manner". Indeed, the Court reiterated that it had previously sought to "temper" the incentives of insurers in order to protect the interest of insureds, who are vulnerable when insurers act with "wilful tunnel vision" to look for policy breaches. Additionally, the Court emphasized that RSA was under no

additional duty to JB to investigate policy breaches and the duty to investigate fairly, in a balanced and reasonable manner, is only owed to the insured, not to third parties.

Takeaways

The Court commented that if RSA had known of the fact that demonstrated SD's breach (specifically, that he had consumed alcohol prior to the accident), but had failed to appreciate the legal significance of that fact (specifically that this amounted to a breach of the policy), then perhaps knowledge of that legal significance could have been imputed to RSA. However, this was not the situation before the Court.

This decision therefore serves as a reminder that what the insurer knew at the time coverage was afforded will likely be one of, if not the most important, determinative factors if coverage is later denied.

For more information on the SCC's decision in *Trial Lawyers Association of British Columbia v Royal & Sun Alliance*, 2021 SCC 47, or promissory estoppel in the insurance context, please reach out to any of the authors or key contacts listed below.

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