

2016 ONSC 5619  
Ontario Superior Court of Justice

Paine v. Intact Insurance

2016 CarswellOnt 14747, 2016 ONSC 5619, [2016] I.L.R. I-5913,  
133 O.R. (3d) 781, 271 A.C.W.S. (3d) 163, 60 C.C.L.I. (5th) 304

**JEFFREY PAINE and 4053265 CANADA INC.**  
**(Applicants) and INTACT INSURANCE (Respondent)**

Vallee J.

Heard: September 2, 2016  
Judgment: September 14, 2016  
Docket: 14-1202

Counsel: Ashley McInnis, for Applicant  
Christopher Cheung, for Respondent

***Vallee J.:***

1 The applicants request a declaration that the respondent, as the insurer of the applicants, pursuant to policy number [# omitted] has a duty to defend the applicants regarding any claims arising from an accident that occurred on January 28, 2010. The applicants also request a declaration that the respondent has a duty to indemnify the applicants with respect to this accident. Furthermore, the applicants request declaration that the OPCF 28A endorsement is invalid and ineffective to render the applicant, Mr. Paine, as excluded driver under the policy. The respondent contends that the endorsement is valid and that it has no obligation to defend the applicants or indemnify them.

**Issues**

- (1) Did Intact comply with section 232 (3) of the Insurance Act, R.S.O. 1990, C. 18 which requires it to deliver or mail to the insured a copy of the endorsement
- (2) Did the endorsement apply to the 2002 Ford Explorer, which the applicant, Mr. Paine, was driving at the time of the accident?
- (3) Has Intact shown that the endorsement applies?

## **Applicable Law**

2 Section 232 (3) of the Insurance Act states, "subject to subsection (5), the insurer shall deliver or mail to the insured named in the policy, or to the agent for delivery or mailing to the insured, the policy or a true copy thereof and every endorsement or other amendment to the contract.

3 The onus of showing that the exclusion applies lies squarely on the insurer that relies on the exclusion. (See *General Accident Assurance Co. of Canada v. Singh*, [2000] O.F.S.C.I.D. No. 141 (F.S.C.O. App.), paragraph 17.

4 Anyone signing the excluded driver endorsement should be able to determine that if the excluded driver drives a vehicle described in the endorsement, there would be no coverage for that individual. (See *Tompros v. Ravitharan*, 2015 ONSC 3998 (Ont. S.C.J.) para 41)

### ***1. Did Intact comply with section 232 (3) of the Insurance Act which requires it to deliver or mail to the insured a copy of the endorsement?***

5 The applicant had insurance coverage which was arranged through Orangeville Insurance Services. Mr. Paine was the principal of 4053265 Canada Inc. The insurance covered vehicles owned by 405.

6 Nicky Hoogendoorn-deGroot (Nicky) of Orangeville Insurance Services contacted Mr. Paine in April, 2007, prior to the renewal of 405's policy. Mr. Paine's driver's licence had been suspended as a result of a conviction for impaired driving.

7 Mr. Paine went to Nicky's office on May the 8<sup>th</sup>, 2007 and signed an Excluded Driver Endorsement (EDE). The endorsement provided that Mr. Paine was excluded from driving a 2004 Pontiac Montana, a 1993 Chevrolet and a 1998 Ford Ranger. The EDE contained a warning. It stated, "By signing this form you agree that if the excluded driver drives any automobile described below, this policy will not provide the insurance required by law; this policy will not provide coverage for damage or injuries caused by the excluded driver; and both the automobile owner and the excluded driver may be personally responsible for damage or injuries caused by the excluded driver."

8 Mr. Paine states that Nicky told him that he would be an excluded driver until his driver's licence was re-instated. Nicky denies telling him this.

9 When the insurance application was made, it listed a 2002 Pontiac Montana, a 1993 Chevrolet and a 1998 Ford Ranger as noted above. The 2002 Ford Explorer was owned by 405 at the time; however, it was not on the road. Therefore, it only required comprehensive insurance coverage, not third party liability. Oddly, the policy purports to have four pages, but there are actually two

page twos. The 2002 Ford Explorer is listed on the second page two of the application form. It was not a newly acquired automobile.

10 According to Nicky, Mr. Paine told her that the 2004 Pontiac Montana would be replaced by the 2002 Ford Explorer within a few months. Accordingly, the Pontiac Montana would be deleted from the policy.

11 Nicky could not recall providing a copy of the EDE to Mr. Paine after he signed it. In his examination for discovery in the tort action, Mr. Paine stated that he did not recall receiving a copy of the EDE from Nicky. In his cross-examination on his affidavit in this application, Mr. Paine stated that he definitely did not receive it.

12 Nicky stated that she would have followed her standard practice regarding the EDE. She would have given a copy of it to Mr. Paine after he signed it. According to Nicky's evidence, she did not follow her standard practice with respect to other aspects of completing the EDE. There is no VIN listed on the EDE for the Pontiac Montana. Mr. Paine's signature as an excluded driver is undated.

13 The applicant states that Nicky very likely did not provide Mr. Paine with a copy of the EDE, as was her standard practice, because she did not follow her standard practice with respect to two other aspects of completing the EDE.

14 The respondent, Intact, states that Nicky did send the policy of insurance to Mr. Paine and reminded him of the EDE. When the policy was up for renewal, another person from Orangeville Insurance Services sent a letter to 405, dated May 8, 2009, enclosing the renewal policy for a further term and stating, "Please note that the 28A endorsement is still on the policy, excluding Jeffrey Paine as a driver".

15 Intact states that Nicky clearly explained to Mr. Paine the effect of the EDE when he signed it. The point of section 232(3) of the Insurance Act, which requires delivery or mail is to ensure that insured is aware of the endorsement. Here, the insured was aware of it, because Nicky explained it to him. He was also aware of it as a result of the letter that he received, dated May 8, 2009, from Orangeville Insurance Services. According to his evidence, Mr. Paine was not in the habit of reading mail sent to him with respect to the automobile insurance policies. Rather, he would simply take out the pink binder slips. Given Mr. Paine's handling of the mail, it would not have mattered whether Intact had delivered or mailed him a copy of the EDE. He would not have read it anyway.

## **Analysis**

16 Section 232(3) of the Insurance Act states that the insurer *shall* deliver or mail to the insured a true copy of every endorsement or other amendment to the contract. It does not say the insurer shall deliver or mail, unless the insurer has explained the endorsement to the insured, in which case

delivery or mail is not required. The language of the section is mandatory. Nicky's only evidence on whether the EDE was delivered to Mr. Paine was based on her standard practice. She was sloppy in completing the EDE. As noted above, there was no VIN listed for one of the vehicles and Mr. Paine's signature was not dated. Mr. Paine, on the other hand, initially stated that he was not sure whether she gave him a copy of the EDE. More recently at cross-examinations, he stated that he was sure that he did not receive it.

17 Because Nicky did not comply with her standard practice in completing the EDE, I find, on a balance of probabilities, that she did not provide a copy of the EDE to Mr. Paine after he signed it. Accordingly, Intact did not comply with s. 232(3) of the Insurance Act.

18 Intact argues that this is a small technicality. Mr. Paine knew what the EDE meant. Therefore, Intact should not be prevented from relying on the EDE in the face of this small technicality. I disagree that this is a small technicality. Nevertheless, I will go on to consider whether the EDE applied to the 2002 Ford Explorer.

***2. Did the EDE apply to the 2002 Ford Explorer, which Mr. Paine was driving at the time of the accident?***

19 As noted above, the EDE listed three vehicles, which did not include the 2002 Ford Explorer. On approximately December 11<sup>th</sup>, 2007, another Certificate of Automobile Insurance was issued, because there was a policy change. The 2002 Ford Explorer was added to the policy. Mr. Paine did not sign another EDE to include the Explorer. The applicant asserts that the 2002 Explorer clearly does not fall under the EDE, which Mr. Paine signed in 2007. Mr. Paine would have been required to sign another EDE to include the Explorer in order for Intact to take a legitimate off-coverage position. Exclusions, such as the EDE, must be construed narrowly, because they impact significantly on the insured. In contrast, insurance policies must be construed widely, because the onus is on the insurer to prove that there was no coverage. The onus is on Intact to show that the EDE is valid.

20 Intact states that Mr. Paine was not required to sign a new EDE when the 2002 Ford Explorer was added to the policy. Intact relies on *Hunter v. Economical Insurance Group*, 2004 CarswellOnt 5380 (Ont. S.C.J.) at paragraph 12, in which the court stated, "There is no obligation in law on an insurer to remind an insured to execute a new Form 28A on each renewal. The absence of such a process gives rise to no triable issue."

21 The applicant states that this case can be distinguished because the EDE form was different from the form here. The *Hunter* form stated that the excluded driver would be excluded from operating any vehicles under the policy *or those added*. This is a catchall phrase. Here, the EDE does not contain this catchall phrase. There are only three vehicles listed, which do not include the 2002 Ford Explorer. The Explorer was not a newly acquired vehicle, nor was it a temporary

substitute vehicle to which the EDE would have applied. There was a positive obligation on the insured to have Mr. Paine sign another EDE, including the 2002 Ford Explorer, if it wished to exclude Mr. Paine from driving that vehicle. When the 2002 Ford Explorer was added to the insurance policy, no further EDE was signed.

### **Analysis**

22 According to *Tompros*, anyone who signs an EDE should be able to tell from that document the identity of the excluded drivers and the vehicles that are excluded from coverage. An exclusion, such as the EDE must be construed narrowly.

23 Mr. Paine did not execute a further EDE when the 2002 Ford Explorer was added to the policy in 2011. In these circumstances, a new EDE should have been executed, listing the 2002 Ford Explorer, in order for the insurer to take an off-coverage position. I accept the applicant's argument that the court in *Hunter* came to a different conclusion because it was considering an EDE that contained a substantially different paragraph, in contrast to the EDE here. The catchall phrase in the *Hunter* EDE meant that a new EDE was not required if vehicles were added to the policy. The EDE here contains no such paragraph. The executed EDE states that only the 2004 Pontiac Montana, the 1993 Chevrolet and the 1998 Ford Ranger are excluded. No one who viewed this form, including Mr. Paine, would know that the 2002 Ford Explorer was excluded from coverage.

### ***3. Does Mr. Paine's application for an Echelon insurance policy for the 1998 Ford Ranger show that Mr. Paine was aware that he did not have coverage for that vehicle?***

24 On July 23, 2009, Mr. Paine made an application to Echelon General Insurance Company for coverage for the 1998 Ford Ranger. This vehicle had been insured all along by Intact. Intact states that Nicky told Mr. Paine that Intact was unwilling to insure him and this was why he needed coverage through Echelon. He could not have believed that he could drive all the vehicles on the Intact policy when he applied for further insurance. Nobody would want to pay for an additional insurance policy when coverage has already been provided.

25 Mr. Paine stated that he did not know why the additional Echelon policy was required. He did not ask Nicky why he needed this. The applicant states that Mr. Paine did not have any expertise regarding insurance. He placed his trust in the broker. She said he needed the Echelon policy and therefore, he followed her advice and applied for it. The applicant states that it is unseemly for Intact to suggest that Mr. Paine had to ask questions in 2009 as to why he needed this Echelon Insurance while at the same time, taking the position that it did not have to comply with s. 232(3) of the Insurance Act.

### **Analysis**

26 The Echelon policy applied to the 1998 Ford Ranger. It did not apply to the 2002 Ford Explorer. Mr. Paine took Nicky's advice that he needed the Echelon policy for the Ford Ranger. This does not suggest that he knew that he did not have coverage for the 2002 Ford Explorer. I reject the respondent's argument that the fact that Mr. Paine applied for the Echelon policy meant that he knew he did not have coverage for the vehicles under the Impact policy. The Ford Explorer was added to the policy on or about December 11<sup>th</sup>, 2007. The application for the Echelon policy was made on July 24<sup>th</sup>, 2009.

### **Conclusion**

27 For the above noted reasons, I find that Intact did not comply with its obligation under s. 232(3) of the Insurance Act, because it did not deliver or mail to the insured a copy of the EDE. I find that the EDE did not apply to the 2002 Ford Explorer, because it was not listed in the EDE. A further EDE would have been required, including the 2002 Ford Explorer, in order for the insurer to take an off-coverage position. I find that Intact has not shown that the EDE applies here. Accordingly, the applicant shall have the declarations requested in paragraph 1(a), (b) and (c) listed in its Notice of Application, dated October 10<sup>th</sup>, 2014.

### **Costs**

28 If the parties cannot agree on the amount of costs or who should pay them, they may provide written submissions. *The text of the submissions shall be a maximum of 3 pages with 1.5 spacing, regular margins and 12 point font.* A bill of costs should be attached. The applicant shall serve and file written submissions within 20 days of the date of this endorsement. The respondent shall file responding submissions, if they wish, within a further 10 days. The applicant may file reply submissions within a further 10 days.

*Application granted.*