Foster & Company's dynamic team providing clients with responsive, high quality services while maintaining the highest level of professional integrity and ethics.

Recent Caselaw

1st Case

Our first case this month concerns a defendant homeowner's claim for defence and indemnification from his insurer in an action against the defendant for misrepresentation in the sale of his home.

2nd Case

The second case this month deals with homeowner insureds' claims for indemnification for medicinal marijuana plants stolen from their property.

3rd Case

Our last case deals with the Ontario Standard Automobile Policy and whether its wording requires an insurer to continue to defend its insured even after policy limits are exhausted.

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Chrysanthis v. Shah, 2013 ONSC 1325 — 1st Case

In 2010, the plaintiffs were looking for a new home in the Brampton area. They retained a real estate agent who showed them the defendant's property. While walking through the property, the plaintiffs noticed possible evidence of fire damage. They instructed their agent to inquire whether a fire had ever occurred on the property. The agent reported back that according to the defendant's agent, there had never been a fire or smoke damage to the property.

The plaintiffs purchased the property. Shortly after they moved in, neighbours informed them and further investigation confirmed that a large grease fire had occurred on the property during the defendant's time in the home, for which the defendant had received a cash settlement. The plaintiffs sued the defendant for fraudulent misrepresentation and breach of contract.

The defendant wrote to his homeowner's insurer requesting it defend and indemnify him pursuant to his insurance policy. The insurer declined on the basis that its coverage related solely to unintentional bodily injury or property damage, and therefore a claim for fraudulent misrepresentation was not covered under the policy. Subsequently, the defendant launched a third party claim against the insurer. In turn, the insurer brought a motion for summary judgment.

At the hearing of the summary judgment motion, the sole issue was whether the plaintiffs' claim was covered under the wording of the policy. If it was, then the insurer had an obligation to defend the claim. If it was not, then the insurer was not obliged to defend or indemnify.

The Court granted summary judgment for the insurer. In doing so, it observed that the claim against the defendant was twofold, for misrepresentation and breach of contract. The Court was of the view that neither allegation attracted coverage under the policy, since both could be categorized as stemming from deceit via deliberate behaviour of the defendant.

Stewart v. TD General Insurance Company, 2013 ONSC 1412 — 2nd Case

The plaintiffs were insured homeowners with licences to possess and cultivate medicinal marijuana. In 2009, six marijuana plants growing in the plaintiffs' back yard were stolen. The plaintiffs made a claim under their homeowners' insurance policy.

The policy in question included personal property coverage, insuring dwelling contents and other personal property owned or used while on the premises. The policy also included a coverage extension entitled "Trees, shrubs and plants" which read as follows:

Trees, shrubs and plants being part of your landscaping on your premises. We will pay up to 5% of the limit of insurance applicable to your dwelling, subject to a maximum of $1,000 for any one tree, shrub or plant including debris removal. You are insured against loss cause [sic] by...vandalism or malicious acts, theft or attempted theft.

The plaintiffs' insurer issued payments of $6,000 pursuant to the wording of the "Trees, shrubs and plants" extension of the policy. The plaintiffs commenced an action against the insurer for $26,000 representing the value of the six plants, plus additional damages for breach of contract, pain and suffering, etc.

The plaintiffs argued that the marijuana plants were not part of the landscaping on their premises, because "landscaping" involved laying out plants for aesthetic purposes, not for the purpose of growing medicine. Instead, they argued that the marijuana plants constituted personal property owned or used while on the premises, and as such recovery would not be limited to $1,000 per plant.

Applying the principles of policy interpretation, the Court found that the personal property and contents provision of the policy dealt with property contained in the dwelling or which was usual to the owning or maintenance of the dwelling; however, the provision for trees, shrubs and plants was put into the part of the policy that provides coverage for items that were not contents of the dwelling. The Court held that to ignore a provision dealing specifically with the items in question and to follow instead a general provision of doubtful application would strain the meaning of the policy. In addition, the Court rejected the argument that the purpose of the plants were relevant to whether they were part of the landscaping, and stated that the definition of landscaping does not necessarily exclude plants laid out for reasons other than aesthetic.

The Court concluded that the maximum recovery for the stolen marijuana plants permitted by the policy was $1,000 per plant, the amount which had already been paid. As the plaintiffs' additional claims were based on the insurer's failure to pay more, the Court dismissed the actions.

Jevco Insurance Co. v. Malaviya, 2013 ONSC 675 — 3rd Case

An insured purchased an automobile insurance policy with minimum liability limits of $200,000. The insured was involved in an automobile accident and as a result was sued for substantially more than his liability limit.

The insurer offered to pay out its policy limits plus the plaintiffs' legal costs. After the insurer made the payment, the action against the insured continued. Having exhausted its policy limits, the insurer filed an application requesting a declaration that it was no longer required to indemnify or defend the insured as well as an order removing the solicitor it hired to defend the insured.

The insured conceded that the insurer was not obliged to cover any damages beyond the $200,000 already paid, but argued that the insurer was required under the policy of insurance to defend the action against him until it was tried on the merits or a final settlement was reached, even after the policy limits were exhausted.

The application judge stated that the drafting of the standard automobile policy "takes muddled and contradictory...to a rarified level," and found that in interpreting the policy it was necessary to consider the overall policy context in which it exists as a regulatory instrument produced under authority of the Insurance Act. According to the application judge, unlike the policy, the Act itself is clear and the requirement that an insurer bear its insured's defence costs is not limited or qualified in any fashion within the Act.

The judge stated that the policy wording had to be interpreted in such a way as to be consistent with the intention and wording of the Act, and agreed with the insured that the insurer was required to provide him with a defence to the action even after the policy limits were exhausted.

The insurer's application was dismissed.