Settling Over the Limits Auto Claims

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On March 8, 2018, the Ontario Superior Court released its decision in *Foniciello et al. v. Bendall and Acculine et a*l, 2018 ONSC 1611. This ruling, in what was a long personal injury trial, stands as a stark warning to defendants and insurers wishing to extricate themselves early from a multi-party action involving a motor vehicle accident.

Facts

The case arose from injuries sustained by one of the plaintiffs, after he was struck by a vehicle owned and operated by the defendants, Sandra and James Bendall. The plaintiffs also alleged negligence against the corporate defendant, Acculine Pavement Markings, for the actions of its employees working at the intersection where the accident took place.

Settlement

The Bendalls had in place third party liability insurance in the amount of $1 million. Presumably in an effort to reduce ongoing defence costs and avoid a lengthy trial, counsel for the Bendalls entered into a settlement agreement with the plaintiffs. The agreement resulted in payment to the plaintiffs of the entirety of the Bendalls' third party liability limits, as well as $296,763.41 in costs. The settlement agreement was not signed by the co-defendant, and contained no provision that it disposed of the crossclaims in the action.

The settlement agreement was most noteworthy, however, by what it did not contain: neither an agreement by the plaintiffs to release the Bendalls from liability for any amount in excess of the Bendalls' several liability; nor an agreement that the plaintiffs would indemnify the Bendalls for any contribution sought by Acculine. Language to this effect would have rendered the settlement agreement a true Mary Carter or Pierringer agreement, respectively.

In fact, the agreement specifically noted that the payment of the policy limits "does not release James Bendall and/or Sandra Bendall from any claims for contribution and/or indemnity from any party defendant." The agreement was approved by order of a judge. The order specifically noted that it, "shall not be construed or interpreted to extinguish or limit any claims of joint and several liability, and that the cross-claims as between the defendants shall survive."

In light of the fact that the agreement made clear that payment of the Bendalls' policy limits did not shelter them from personal exposure, it is difficult to reconcile what followed: namely, that counsel for the Bendalls did not attend or contest liability or damages at trial. Given that the damages trial alone was 47 days long, one can assume that the rationale for having defence counsel not attend was motivated by a desire to limit defence fees, and limit any costs exposure visited on the Bendalls following the trials.

The actions of counsel and/or the insurer were all the more daring in light of several prior decisions, including Jevco Insurance Company v. Malaviya, 2013 ONSC 675, which outlined that an insurer's duty to defend under an automobile insurance policy continues even after the full policy limits are tendered.

The result for the Bendalls was that they were left undefended, while at the same time the settlement agreement left them unprotected from personal liability by way of the crossclaim.

Trial Outcome

A jury determined the issue of liability and found that the Bendalls were 60% at fault for the accident, while Acculine was 40% at fault. A judge sitting alone ordered total damages in favour of the plaintiffs in the amount of $3,863,661.18. Costs in favour of the plaintiffs were awarded in the amount of $1,100,000.

The plaintiffs sought from Acculine the entirety of the judgment, less the $1,000,000 already paid by the Bendalls. Acculine sought an order by way of the crossclaim for the difference between what it paid the plaintiffs, and 40% of the total damages. That difference amounted to $1,318,196.71 in damages.

Acculine also sought by way of the crossclaim the difference between what it paid the plaintiffs in costs, and 40% of the total costs award. That difference amounted to $541,294.64.

Acculine also sought costs for its crossclaim.

The court ruled that Acculine was entitled to contribution and indemnity for the damages it sought from the Bendalls, pursuant to section 1 of the Negligence Act. The court rejected the Bendalls' argument that this remedy is not available to defendants found to be vicariously liable.

On the costs issue, the court ordered that some additional costs be paid by the Bendall, specifically, the sum of $86,600. This amount was much less than that being sought by Acculine as the court acknowledged that the Bendalls did not oppose the plaintiffs at the trials and made an honest effort to settle. Costs of the crossclaim were also ordered in an amount to be agreed on or determined.

Consequences

So what will be the fallout?

The Bendalls themselves are personally liable for the contribution ordered to be paid to Acculine: over $1.3 million. This is unlikely to be the end of the issue, however, in light of the fact that the Bendalls' counsel did not continue to defend them after the settlement agreement. It is unknown under what circumstances the decision to stop the defence was made, or whether the Bendalls were fully advised of their right to a continued defence by counsel paid for by their insurer.

If not, and in the event a bad faith claim is brought by the Bendalls, it is quite possible a court will find that the duty to defend was breached and that the measure of damages is equivalent to the amount the Bendalls have been ordered to pay to Acculine (over $1.3 million plus costs), along with potential punitive damages.

Although the insurer saved defence costs in the short-term, it may have opened itself up to far greater exposure.

In auto claims, insurers and defence counsel should be very cautious when settling an over the limits lawsuit when the settlement does not fully protect the insured. Although there are some conflicting decisions on the issue, the duty to defend an insured in an auto claim does not end upon paying the policy limits.