

Case Summary: Malcolm Silver & Co. Ltd, et al. v State Farm Fire and Casualty Company

Defence + Indemnity

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The Court held that a fraudster's unauthorized use of the insured's online banking system to make payments against her own credit card debts did not qualify as forgery or alteration under the terms of the policy in question.

Malcolm Silver & Co. Ltd., et al., v State Farm Fire and Casualty Company, 2019 ONSC 4264, per Sossin, J.

Facts + Issues

The Plaintiff insured Malcolm Silver & Co. Ltd. was the victim of sophisticated fraud perpetrated by Martinez and suffered losses in excess of \$1,000,000. The fraud included forgery of cheques and also Martinez's use of Malcolm Silver's online banking services without authorization to pay her personal credit card debts.

Malcolm Silver obtained default judgment against Martinez but nothing was collected.

Malcolm Silver claimed for the losses from State Farm under the "forgery or Alteration" endorsement, which provided as follows:

We will pay for loss resulting directly from forgery or alteration of any cheque, draft, promissory note, bill of exchange or similar promises payment in 'money' that you or your agent has issued, or that was issued by someone who impersonates you or your agent.

The policy defined the term "money" as "currency, coins, and bank notes in current use and having a face value, travelers' cheques, registered cheques and money orders held for sale to the public."

State Farm indemnified the insured regarding losses due to cheques forged by Martinez but refused to cover the losses due to online banking activity (which totalled \$101,474.15), taking the position that they were not covered by the "Forgery or Alteration" endorsement.

The insured applied for a declaration that the online banking transaction losses were covered.

HELD: For the insurer; application dismissed.

The Court summarized the general principles regarding the interpretation of insurance policies:

12 The general principles applicable to the interpretation of an insurance policy are not in dispute. In *Sabean v. Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7, [2017] 1 S.C.R. 121 (S.C.C.), Justice Karakatsanis summarized these principles as follows (at paras. 12-13):

[12] In *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, this Court confirmed the principles of contract interpretation applicable to standard form insurance contracts. The overriding principle is that where the language of the disputed clause is unambiguous, reading the contract as a whole, effect should be given to

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that clear language: *Ledcor*, at para. 49; *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, at para. 22; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at para. 71. Only where the disputed language in the policy is found to be ambiguous, should general rules of contract construction be employed to resolve that ambiguity: *Ledcor*, at para. 50. Finally, if these general rules of construction fail to resolve the ambiguity, courts will construe the contract *contra proferentem*, and interpret coverage provisions broadly and exclusion clauses narrowly: *Ledcor*, at para. 51.

[13] At the first step of the analysis for standard form contracts of insurance, the words used must be given their ordinary meaning, “as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law”: *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605, at para. 21; see also *Ledcor*, at para. 27.

The Court held that the endorsement’s coverage regarding “forgery or alteration of any cheque, draft, promissory note, bill of exchange or similar promises payment in ‘money’” did not cover online transfer of funds. Such transfers amount to payment of money not promises to pay money as required by the endorsement:

14 The term “money” is further defined in the policy as “currency, coins, and bank notes in current use and having a face value, travelers’ cheques, registered cheques and money orders held for sale to the public.”

15 Online banking is not mentioned as one of the instruments to which forgery or alternation applies. Therefore, if online banking is analogous to these instruments in that it “similarly promises payment in ‘money’,” within the meaning of this clause, then the losses relating to these credit card payments falls within the “Forgery or Alteration” coverage, and Martinez’s unauthorized use of online banking to make these credit card payments may be covered by the policy in the same way the cheques forged by Martinez were covered.

...

19 Where someone impersonates another party and accesses their online banking account without authorization for purposes of removing funds (whether by transfer to another account, or as here, payment of credit cards or other bills online), this action is a sophisticated fraud. Forging cheques is similarly a species of fraud. Criminal prosecutions for fraud may arise both from forging cheques and unauthorized online banking transfers; see *R. v. Trotter*, 2012 CarswellOnt 17149 (Ont. S.C.J.).

20 Interpreting this clause in the policy with its ordinary meaning, however, I find online banking is not a form of “Forgery and Alteration”.

21 The analogy between online banking and the definition of ‘money’ in the policy is a close fit. When an online payment is made on a credit card account, or as a transfer between accounts, the funds have been moved by that action. These payments are not a promise to pay but rather payment itself. There is no signature or other indicator of a promise by one party to pay another, but rather a password or P.I.N. that enables a party to access to the account from which the transfer of funds has been authorized. If one wishes to cancel or alter the transaction, there is no cheque or other evidence of a promise to pay which can be ripped up or reversed; rather, an additional transaction must be undertaken specifically to affect a new transfer.

22 I do not find enough ambiguity respecting online banking to bring it within the *contra proferentem* principle, which would favour the broad interpretation of an unclear coverage provision.

23 Therefore, I find that losses which flow from accessing online banking without authorization are not included within the “Forgery or Alteration” endorsement in State Farm’s insurance policy for the relevant applicant (1532383 Ontario Ltd.).