Claim No: 323620

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Landry v. Auto Motion/Auto Protector of Canada, 2010 NSSM 25

BETWEEN:

ROBERT LANDRY

Claimant

- and -

AUTO MOTION/AUTO PROTECTOR OF CANADA

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on March 23, 2010

Decision rendered on March 30, 2010

APPEARANCES

For the Claimant	self-represented
For the Defendant	Ellen Sampson Counsel

BY THE COURT:

Introduction

[1] The Claimant seeks recovery on a rust-proofing warranty which he arranged when he purchased his vehicle some eleven years ago. The frame on the vehicle rusted out requiring a fairly costly replacement and repair, totalling almost $7,800.00.

[2] Prior to considering whether the repair cost or any part thereof is covered, there is a threshold question: whether or not the named Defendant is liable to respond to the warranty claim, or whether the Claimant is limited to his redress (if any) against an American company (ECP[1] Inc.) which appears to have been the intended actual issuer of the warranty.

Who is liable?

[3] The vehicle, a 1999 Chevrolet Silverado pick-up, was bought new by the Claimant from what was then called Forbes Chev-Olds (now Forbes Chevrolet) in Dartmouth, Nova Scotia. The Claimant was offered (by the Forbes sales staff) additional rust protection (undercoating) which as a term thereof also provided an extended warranty against rust damage. The Claimant said he was interested. He was then asked to sign a one-page (two-sided) document called an "Application Form" which started the process in motion. That document was short on details. Apart from the customer's name and vehicle information, several notable details on the form were:

---

[1]ECP is apparently short for "Entire Car Protection"

a. The name on the top was “Auto Protector of Canada” with an address in Truro, Nova Scotia.

b. It had an apparently trademarked drawing of a knight’s helmet (shown below) carrying the name “The Protector.”

c. A section called “Warranty Validation” states that “the Authorized Dealer must mail a copy of this registration form to Auto Protector of Canada within 45 days of this application. All appropriate fees must be enclosed. This registration must be completed in full and eligibility[2] is noted on the reverse of this application.”

d. A section called “Buyers Protection” states that “confirmation of coverage, exceptions, limitations, exclusions and claims procedure will be sent to the above address [the customer’s address] within 90 days. If for any reason you do not receive confirmation call Auto Protector of Canada at [a toll-free number].”

[4] The public records reveal (and I do not believe this would be disputed) that Auto Protector of Canada is a business name (since revoked) of a company called AML Communications Inc. That company was formerly known as Auto

---

[2] I gather that “eligibility” would not have been a concern in the case of a new vehicle, although it might be in cases where the rust proofing was being applied to a used vehicle.

Motion Limited, which is named as a Defendant in this matter (although the word "Ltd." has been omitted).

[5] The evidence put forth by the Defendant is to the effect that it was in the business of selling third party warranties on behalf of an American company known as ECP Inc., based in Oak Brook, Illinois, just outside of Chicago. That company is said to be the largest provider of such warranties in North America. The product known as "The Protector" is that company's proprietary rust inhibitor, and it is they who warrant vehicles treated with their product.

[6] The Defendant's evidence also was that upon receiving and accepting an application for warranty, further documentation consisting of two pages, would be sent out confirming the terms of the warranty and providing information on how to make a claim. Although the application form suggests that the information will be sent to the purchaser, the practice was more often than not to send the documentation to the dealer.

[7] The Defendant appears no longer to be in the business of selling warranties.

[8] The Claimant testified, and I have no trouble accepting, that he never received any further documentation after he signed the application. He paid his money at the time of purchasing the vehicle (he thinks about $800 or $900), signed the application form, and then faithfully brought the vehicle back for its required annual inspection and re-application of the rust-proofing product. He never thought about whether he had all of the required documentation. He also testified, and I accept, that he believed that he was purchasing a Canadian product and dealing with a Canadian company, based on the application form

that he signed. He also stated that he would have been very reluctant to purchase a warranty from an American company because of what he called “cross-border issues” which I take to mean that he would have been concerned that he might have a much more difficult time getting redress in the event of a dispute.

[9] I do note that the company ECP Inc. is not registered to do business in Nova Scotia.

[10] The two-page document that the Claimant never received was placed in evidence. This is clearly just a sample of a standard document, as it bears no names. Had one been sent to the Claimant, it would have alerted him to the fact that the warranty was being extended by ECP Inc. and that its warranty department was in Illinois. He would also have learned of the various requirements for a claim, such as the fact that it needed to be reported within 60 days of the rust damage being discovered.

[11] Based on the evidence, I find as fact that the Claimant was never provided with the documents that would have disclosed that the Defendant Auto Protector of Canada was acting as an agent for ECP Inc. While the Defendant or perhaps ECP may have sent documentation to Forbes Chev-Olds, and there is no specific evidence that they did, neither of them did anything independently to ensure that the Claimant received the information. If they relied on Forbes to pass along that information, that reliance was misplaced in these particular circumstances.

[12] On the surface, there is nothing whatsoever on the Application Form that would alert a reader to the fact that the warranty would be issued by a party other

than Auto Protector of Canada. Indeed, the document appears designed to conceal rather than reveal such a fact. It is a fair inference on reading the document that the Defendant, and not some third party, was the owner or at least an authorized user of the Auto Protector product and, as such, would be warranting its efficacy.

[13] As the process appears to work, the customer pays his money and has the vehicle rustproofed within days of purchase, with no documentation exchanged other than the Application referred to above. At best, the detailed warranty information would follow later. A customer, such as the Claimant, would have a hard time cancelling the contract on the basis that he was unwilling to contract with an American company. The money would have been paid and the product applied.

[14] In the case of the Claimant, if not as a matter of standard practice, the contract was made before the identity of ECP was revealed.

[15] The problems with rust on this vehicle became evident in November of 2008 when the vehicle was in for its annual inspection at Forbes. Forbes then initiated warranty action on the Claimant's behalf. Clearly Forbes knew to deal with ECP, and sometime later into the process the Claimant was put directly in touch with an ECP claims rep in Illinois, one Diane Smith. By then he knew that ECP was involved, although it was never made clear by anyone that Auto Protector of Canada was out of the picture.

[16] In my view, the emergence of ECP some years after the contract was formed did nothing to change the fundamental nature of the contract. The

question still remains: was the Claimant's contract with the Defendant, or was it acting as a mere agent without personal liability?

[17] The legal concept at play is that of an agent acting for an undisclosed principal. The following passage from the well-known text *Fridman's Law of Agency* (5th ed) states at page 233:

> Since the agent contracts personally where his principal is undisclosed, it is clear that, in accordance with the general rules considered above, the agent, as well as the undisclosed principal may sue and be sued upon the contract. Indeed, if the third party intended to contract with the agent, the latter may be precluded from setting up an undisclosed principal and thereby avoiding his personal liability.
>
> The liability of the agent to be sued, however, may depend upon the third party's election upon his discovery of the existence of a principal. It is clear that once the third party knows that there is a principal, he may choose between each of the two parties who are liable to him.

[18] The cases go on to make clear that the liability is alternate; i.e. the Claimant may elect to sue the agent or the principal, once he knows of its existence. This was well put in *Westmount Village Equities Inc. v. United Silvicultural Services Ltd.* 1998 CarswellAlta 405:

> 19 Fridman says that once the third party learns of the true facts he can choose who he will hold liable on the contract, the agent or the principal: pp. 270-71. *See Lang Transport Ltd. v. Plus Factor International Trucking Ltd.* (1997), 32 O.R. (3d) 1 (Ont. C.A.) for a recent discussion of the law. There may be a difference between an agent acting for a disclosed principal, in which case there may not be alternative liability and an agent acting for an undisclosed principal, in which case there may be alternative liability.
>
> 20 The case law holds that where there is an alternative liability by the agent and the undisclosed principal the third party must elect which one he will hold liable. The election does not normally arise until it comes time

> for judgment. The third party may sue both agent and principal and carry on the lawsuit against both to the point of judgment. Suit for payment is not of itself an election: *Lang Transport Ltd.* A judgment must be obtained. See also *Ed Flak Construction Ltd. v. Crow-Crest Industries* Ltd. (1982), 37 A.R. 70 (Alta. C.A.). There are of course other cases dealing with when an election is made. I need not belabour the point.

[19] The Defendant, however, says that it always intended to disclose that it was acting as an agent. In my view, supported by Fridman, this makes no difference. If the Defendant trusted others (i.e. the dealer or ECP) to make the disclosure on its behalf, then it assumed the risk that those others might fail in their task.

[20] Moreover, as observed, once money changed hands and the product was applied, it might have been too late for the agent to duck out of the chain of liability. The application form does not suggest in any way that Auto Protector of Canada is a mere agent. Indeed, it suggests precisely the opposite. So even had the Claimant been given documentation a few days later, it might not have sufficed to absolve the Defendant of liability unless the rust proofing had yet to be done and the money could have been refunded.

[21] In other words, I accept that the Claimant might have been deemed to have accepted the contract with ECP (and also released the Defendant) only if he had known that ECP was the warrantor and had agreed thereafter to have the rust-proofing work done.

[22] The revelation ten years later that ECP was the intended warrantor cannot absolve the Defendant of its contractual responsibility. I note the evidence of the Defendant's witness to the effect that it has never been sued on a warranty, and

has never involved itself in claims, despite having sold thousands of such warranties. If that is true, then there is a first time for everything.

The contents of the warranty

[23] Given that the application form is the only document that the Claimant ever received, and it sets out few details of the warranty, the question then arises as to what terms should be included in the warranty coverage. There is an argument that the ECP warranty should be imported into the contract. Another point of view would say that the Claimant should not be saddled with terms or limitations of which he was unaware.

[24] Where a contract is short on details, the law implies reasonable terms. In this case, the ECP contract - which does not appear overly onerous - would provide a good example of what was common in the industry and I would not deviate far from those terms, although I do not believe that I am bound to apply them to the letter. The critical feature of the warranty must be, however, that the Claimant is entitled to have rust damage repaired. Otherwise the concept of a lifetime warranty would be meaningless.

The merits of the claim

[25] When the rust was first located by Forbes and the claim opened, it was noted that the cost of a brand new frame was fairly high, but the possibility was raised that there might be a much less costly repair available for less than $800.00, using used parts. The challenge was to find a scrapped vehicle with a part in good condition that could be salvaged and used. Forbes made the

warranty claim to ECP and reported to the Claimant that this type of repair was authorized. It indicated that it would keep a look out for an available part.

[26] Every few months the Claimant contacted Forbes to ascertain whether the repair could be made, and each time the Claimant was told that the part had not yet been sourced.

[27] Eventually the rust problem became more serious and the Claimant was faced with having to have the repair done or risk having the vehicle be deemed unsafe. He ordered a new part through Forbes's associate dealer McPhee Pontiac, and obtained three quotes for installation. These were submitted to ECP, with whom he was then directly in touch. The total cost for parts and labour ranged between $7,000 and $10,000.

[28] It was then that ECP balked. It took the position that it would not pay any more than the originally authorized amount, some $795.00. It rejected any additional amounts on the basis that the Claimant had unreasonably delayed in getting the work done, and that ECP was not responsible for the consequence of that delay. It relied on a clause in the warranty that requires the claim to be made within 60 days after the alleged damage due to rust. Essentially, it sought to hold the Claimant responsible for the fact that a used part was not available and treated his claim for the larger amount as a new claim rather than a continuation of the earlier claim for a repair which had been authorized but not carried out.

[29] The Claimant lost patience and simply had the repair done, taking the lowest of the repair estimates. He then initiated this claim.

[30] The Defendant in this case adopts the position taken by ECP and also takes the further position that the Claimant should not be able to recover more than the book value of his vehicle, which it says is only in the range of about $1,872 to $3,072. This figure was generated by the Defendant or its counsel using a searchable database available over the internet, and is inaccurate at least to the extent that the Defendant assumed that the vehicle had been driven 200,000 kilometres when, in fact, it has been driven about half that. There is a far cry between a vehicle with 100,000 km on the odometer and one with 200,000.

[31] The Claimant insists that his vehicle is worth significantly more than this so-called black book value, and filed in evidence an appraisal to that effect. The Claimant also filed photographs of the vehicle showing it to be in immaculate condition.

[32] I agree in principle that a repair that exceeds the value of a vehicle is not a financially viable course of action. This is the principle that applies to write-offs after accidents. The assumption is that, in the case of a complete write-off, the insured or warranted party could take the money and buy a comparable used vehicle. The consumer is still theoretically left with a viable vehicle.

[33] In the case here, I do not trust the black book value presented by the Defendant. It purported to appraise a vehicle that had twice as many kilometres driven than is actually the case. The Claimant's appraisal supports a value that is at least equal to, if not more than, the cost of the repair that was undertaken.

[34] As for the defence which suggests that the Claimant is out of time, I reject this interpretation of what has occurred. The Claimant made his claim in a timely

manner. Unfortunately, the initially proposed cause of action could not be carried out. What occurred a year later was, in my view, simply a continuation of the same claim which had yet to be resolved. The Claimant did all that he could reasonably have done, under the circumstances.

[35] In the result, I believe that the Claimant should recover the full cost of his repair and allow the claim at $7,778.00, plus costs of $179.35.

[36] The Defendant may consider this a harsh result given that it sold this warranty many years ago with no expectation that it would ever have to answer for it, and likely earned a relatively minor commission on the sale (relative to the cost of the repair ultimately needed). Nevertheless, it created a document - the Application - which placed it squarely in the contractual picture and failed to take any reasonable steps to make clear its intended role as agent.

[37] In order to avoid any possible confusion about the identity of the Defendant, my order in this matter will recite that the Defendant Auto Motion is now known as AML Communications Inc.

Eric K. Slone, Adjudicator