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COURT OF APPEALS
DIVISION II

10 JUN -1 AM 10:22

STATE OF WASHINGTON

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NO. 38945-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ADRIAN TEPEI, ANGELICA TELESCU (nee TEPEI),
BENJAMIN TEPEI, CAMELIA COLCER (nee TEPEI),
DAN TEPEI and DINA TEPEI,

Appellants/Plaintiffs,

v.

INSURANCE CORPORATION OF BRITISH COLUMBIA,

Appellee/Defendant.

**STRICT REPLY OF APPELLEE/DEFENDANT
INSURANCE COMPANY OF BRITISH COLUMBIA**

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I. INTRODUCTION

COMES NOW Appellee Insurance Corporation of British Columbia ("ICBC") in strict reply to points and authorities made by the Tepei Appellants/Plaintiffs¹ regarding subject matter jurisdiction under the Foreign Sovereign Immunity Act ("FSIA"). The claim of lack of subject matter jurisdiction under the FSIA was raised by ICBC in its Response Brief. Plaintiffs responded asserting that while ICBC would be considered a "sovereign" under the FSIA, ICBC's conduct related to UMP issues fit within a "commercial activity" exception under the FSIA. ICBC provides the following strict reply brief to address that discrete issue.

II. FACTS RELATED TO FSIA

1. Factual Background of Claims by Plaintiffs

An auto accident occurred on October 27, 1996, in Lewis County Washington, involving Plaintiffs who were passengers in a vehicle driven by their husband and father Petru Tepei. Plaintiffs were injured as a result.² Petru Tepei was insured by ICBC, a Crown Corporation whose shares are owned by the government of British Columbia ("B.C.") ICBC is charged with administering B.C.'s compulsory basic auto insurance program (known as "AutoPlan").³ ICBC does business exclusively in B.C. with its principal offices in North Vancouver.⁴ ICBC provided

¹ (hereinafter "Plaintiffs" pursuant to RAP 10.4(e)).

² Complaint at ¶¶ 2.1-2.44. (CP 1439).

³ Decl. of Dan Burnett in Support of Defendant ICBC's Opposition to Plaintiffs' Motion for Leave to Amend ("Burnett Decl."), p.1; §A. (CP 821).

⁴ Complaint ¶¶ 1.2, 2.5. (CP 1438-1439).

liability coverage to Mr. Petru Tepei and paid for his defense in an action filed by Plaintiffs in Lewis County.

Plaintiffs pursued claims against both Mr. Tepei and Michelin of North America and Uniroyal Tire (collectively “MNA”), the manufacturer of the blown out tire on Mr. Tepei’s vehicle.⁵ The claims against MNA, however, proved to be unsuccessful and the jury found Mr. Petru Tepei 100% at fault for the accident. ICBC paid the full extent of the liability coverage limits to Plaintiffs following the verdict in Lewis County.

In addition to liability coverage—and as a completely separate aspect of the universal insurance coverage in B.C.—ICBC provided Underinsured Motorist Protection (“UMP”) to Plaintiffs.⁶ Under the applicable B.C. regulations, UMP coverage is available to Plaintiffs because they were residents in the household of Petru Tepei (in B.C.) and Mr. Tepei was the owner of the ICBC insured vehicle (registered in B.C.).⁷ UMP coverage is not triggered until after resolution of liability insurance claims⁸ UMP benefits are determined pursuant to a B.C. arbitration procedure and are only available to B.C. residents in B.C. The liability coverage and the UMP coverage are related only in that they are both provisions which are offered under AutoPlan to B.C. citizens.

⁵ Burnett Decl. at p.2, §D. (CP 822).

⁶ Burnett Decl. at p.2, §B. (CP 822).

⁷ Farrell Decl. at ¶4. (CP 1363).

⁸ Farrell Decl. at ¶5. (CP 1363).

Again, following the August 2004 verdict in Lewis County, ICBC paid the \$200,000 (CND) of liability coverage to Plaintiffs.⁹ After this, Plaintiffs sought to negotiate a settlement with ICBC of their claimed UMP benefits.¹⁰ Plaintiffs filed a formal claim with ICBC, in B.C., for these benefits.¹¹

Because Plaintiffs and ICBC were unable to reach agreement regarding the amount of UMP benefits, a mandatory B.C. arbitration proceeding was commenced by Plaintiffs in B.C. on September, 9, 2004, pursuant to the UMP provisions of the Revised Regulations (1984) of the Insurance (Motor Vehicle) Act, I.S.B.C. 1996 c 231.¹²

While this separate UMP benefits determination was being pursued by Plaintiffs in B.C., Plaintiffs filed their Complaint for Declaratory Judgment in Lewis County seeking to have the Lewis County court issue a declaration and/or an injunction prohibiting the UMP tribunal from making its independent evaluations of damages as required under B.C. UMP laws and regulations.¹³ ICBC subsequently moved to dismiss.¹⁴

⁹ *Id.* at ¶9. (CP1363).

¹⁰ *Id.* at ¶10. (CP 1363).

¹¹ *Id.* (CP 1363).

¹² *See also* Farrell Decl. at ¶6. (CP 1363).

¹³ Complaint for Declaratory Relief, pp. 9-10. (CP 1446-1447).

¹⁴ *See generally* Defendant ICBC's Motion for Summary Judgment of Dismissal. (CP 1312-1343).

III. ISSUES PRESENTED IN STRICT REPLY

1. Is ICBC an agent and/or instrument of a sovereign state (B.C.) under §1603 of the FSIA? Yes (this point is conceded by Plaintiffs in their Reply at p.2).

2. Is ICBC entitled to sovereign immunity to suit, if no exception applies, under the FSIA? Yes (this point is conceded by Plaintiffs in their Reply at p.2).

3. Does ICBC's conduct regarding the UMP claims presented by Plaintiffs in B.C., amount to direct "commercial activity" as defined by the FSIA, sufficient to defeat ICBC's sovereign immunity? No.

IV. DISCUSSION

Plaintiffs concede that ICBC is a sovereign agency/instrumentality of B.C. and that it should be afforded the immunity set forth under the FSIA, unless an exception thereto applies. Here, Plaintiffs claim that the direct "commercial activity" exception of the FSIA is satisfied by ICBC's conduct related to the UMP benefits claimed by Plaintiffs.

Plaintiffs rely upon a footnote in the case of *Dumont v. Saskatchewan Government Ins. ("SGI")*, 258 F.3d 880 (8th Cir. 2001), and *Dumont's* applications in *Western Protectors Ins. Co. v. ICBC*, 2009 US. Dist. LEXIS 4568 (W.D. WA 2009) and *State Farm Mut. Automobile Ins. Co. v. ICBC*, 2009 U.S. Dist LEXIS 124233 (D.Or. 2009). However, these cases do not support Plaintiffs' assertion that the FSIA direct commercial activity exception applies. Rather, they support ICBC's

contention that subject matter jurisdiction is lacking in this matter and that ICBC is immune from suit pursuant to the FSIA.

1. Dumont is not dispositive to the issues in this case

Plaintiffs' reliance upon *Dumont* is misplaced. The liability coverage at issue in *Dumont* was unique and is distinct from the UMP coverage at issue here.¹⁵ That issue aside, the *Dumont* court made clear that the sole reason that the FSIA's "commercial activity" exception applied in that case was because SGI intentionally included direct liability insurance coverage to SGI's named insureds while they traveled in the United States. This was the only fact the *Dumont* Court pointed to—in footnote 6 of that opinion—which justified the application of the direct "commercial activity" exception to the FSIA under the unique facts of that case.¹⁶

Here, ICBC never denied Mr. Petru Tepei (its named insured) any rights under his ICBC liability coverage. ICBC afforded him all the rights and obligations it owed to him under the policy, even though the accident took place in Washington State. ICBC paid for his defense and when he

¹⁵ See *Dumont*, 258 F.3d at 882-83 (detailing the first party coverage provided by SIG to each decedent under the applicable policies, including third-party beneficiary "Family Security" coverage (however, this remained a first-party insurance benefit to the named insured)).

¹⁶ *Id.* at p. 884 fn. 6. Despite this finding of jurisdiction, the *Dumont* Court nevertheless held that the plaintiffs in that matter were bound by an arbitration decision which took place in Saskatchewan pursuant to the policy terms and applicable Saskatchewan law and regulations. *Id.* at 888.

was found at fault, paid the limits of the available liability insurance to Plaintiffs. These facts are undisputed.

The Facts in the *Dumont* case are very different from those in the present case.¹⁷ Unlike the benefits provided in *Dumont*, the UMP benefits from ICBC do not extend to the named insured across the border. Rather, UMP benefits were (and are) provided to members of the household of the named insured living in B.C. (Mr. Tepei). Moreover, the UMP benefits can only be triggered after resolution of all liability issues associated with ICBC's named insured. The distinctions between the SGI policy coverage at issue in *Dumont* and the UMP coverage provided to Plaintiffs by ICBC are critical and the two cannot be analogized.

This critical distinction was recognized in both the *Western Protectors* case and again in *State Farm* after each court analyzed the *Dumont* case.¹⁸ "[O]nly plaintiffs maintaining lawsuits upon the formation of the insurance contract, those that are named insureds, may

¹⁷ Again, the specific coverage offered by SGI differs substantially from that offered by ICBC under AutoPlan. Specifically, the Family Security coverage (which was a direct benefit to the named insured under the SGI policy) is completely different and distinct from the UMP coverage offered under ICBC's AutoPlan. SGI's Family Security coverage was triggered at the time of the accident in North Dakota involving SGI's named insureds; whereas ICBC's UMP coverage under AutoPlan was not triggered until after the full resolution of the liability issues in Lewis County and was triggered in B.C. when Plaintiffs' made their request for these benefits to ICBC at its Vancouver office through their B.C. counsel.

¹⁸ *State Farm*, 2009 U.S. Dist. LEXIS 124233 (D.Or. Nov. 19, 2009) at *25 (quoting *Western Protectors*, 2009 U.S. Dist. LEXIS 4568 at *4)

avail themselves of the commercial activity exception to the FSIA."¹⁹ As the the federal Judge in *State Farm* correctly observed:

In [*Dumont*] the plaintiffs were named insureds in the policies of insurance and were involved in the procurement of the policies outside the United States," whereas the parties [in *Western Protectors*] were "strangers to the procurement of the policy of insurance."²⁰

This distinction was the justification for both courts in *Western Protectors* and *State Farm* to uphold application of the FSIA to ICBC and deny an attempt to apply the direct "commercial activity" exception.

While both the claims in *Western Protectors* and in *State Farm* involved claims which were arguably "related" to ICBC's liability policy issued to its named insured; both courts correctly determined that this "relation" alone was "not sufficiently connected to the commercial activity of ICBC to warrant disregard of sovereign immunity."²¹

Here, UMP benefits—at most—could be seen as "related" to the liability benefits extended (and honored) by ICBC to Mr. Petru Tepei (ICBC's named insured) when operating his vehicle in the United States. However, like the courts in *Western Protectors* and *State Farm* found, this "relation" alone is insufficient to find a direct "commercial activity" exception to the FSIA.

¹⁹ *Id.* (emphasis added).

²⁰ *Id.* at *25-26 (citing *Western Protectors*, at *5.)

²¹ *Id.* at *26-29 (citations omitted).

2. Plaintiffs show no direct and/or sufficient connection between ICBC and Washington State

ICBC agrees with Plaintiffs that the analysis regarding specific personal jurisdiction is a similar analysis and can influence a finding of a commercial activity exception under the FSIA.²² However, Plaintiffs fail to realize that this correlation between personal jurisdiction analysis and FSIA commercial activity analysis further highlights the appropriateness of Judge Brosey's dismissal of the Complaint against ICBC for want of personal jurisdiction.

Plaintiffs simply cannot establish that ICBC conducted any direct and specific conduct in Washington State as it relates to the UMP benefits offered to Plaintiffs in B.C. Plaintiffs continue to confuse the issues related to this matter seeking jurisdiction (both subject matter and personal) over ICBC for unrelated, attenuated and insufficient contacts with Washington State related to the liability insurance coverage afforded to Mr. Petru Tepei. This contact with Washington State, as Judge Brosey correctly found, was a passive fulfillment of ICBC's obligations its policy provided to its named insured, Petru Tepei.

V. CONCLUSION

Plaintiffs have failed to fulfill their burden of establishing, with competent evidence, that this Court can exercise either personal jurisdiction or subject matter jurisdiction over ICBC in this matter.

²² See Reply at p. 6 (citing *Stairmaster Sport/Medical Prods. v. Pacific Fitness Center*, 916 F.Supp. 1049, 1052 (W.D. WA 1994)).

Without such a showing, any exercise of personal jurisdiction would violate the Washington Long Arm Statute and violate the Due Process Clause of the United States Constitution. In addition, this court lacks subject matter jurisdiction over ICBC under the FSIA. For the reasons stated herein, as well as in ICBC's Response Brief, the trial court's dismissal of the action against ICBC should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of this document to be delivered via United States mail, first-class postage prepaid, and via e-mail per agreement of the parties, to the following:

Greg Samuels, WSBA #19497
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Ste. 204 – 1730 W 2nd Ave
Vancouver, BC V6J 1H6
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Signed at Seattle, Washington, on May 28, 2010.



Marci L. Brandt, Legal Assistant