

# In the Provincial Court of Alberta

**Citation: Peace Hills General Insurance v. Terrigno, 2009 ABPC 203**

**Date: 20090810**

**Docket: P0590106501**

**Registry: Calgary**

Between:

**Peace Hills General Insurance Company**

Plaintiff

- and -

**Antonietta Terrigno, Rocco Terrigno and Michael Terrigno**

Defendants

**Reasons for Judgment of the Honourable Judge B.K. O’Ferrall**

## **Introduction:**

[1] This is a case involving an endorsement to a motor vehicle liability policy which required the named insureds to reimburse their insurer amounts paid out by the insurer to third parties for property damage caused by persons prohibited from driving the insureds’ vehicle. It is also a case of an insurer seeking to be reimbursed by an unnamed insured (i.e. a person insured by, but not named in, the policy) amounts it paid to settle third party personal injury claims in circumstances where no judgment had been obtained by the third parties against the unnamed insured.

[2] The Plaintiff-insurer sought reimbursement from its named insureds pursuant to the endorsement; and it sought reimbursement from the named insureds’s son, who was also a person insured under the policy, on the basis that he drove the insured vehicle while his licence to drive was suspended in contravention of one of the statutory conditions of the policy.

[3] The endorsement upon which the insurer relies for reimbursement of the amount it paid to settle a third party property damage claim is in the form of a standard endorsement form (S.E.F.) approved by the Superintendent of Insurance in December of 1993 pursuant to Section 610 of the

*Alberta Insurance Act*, RSA 2000, c.I-3. It is known as S.E.F. 8a and is entitled “Property Damage Reimbursement for Operating by Named Person Endorsement”.

[4] The endorsement contains an undertaking by the named insured that certain persons will not drive the vehicle. However, if the undertaking is breached and those persons do drive and an accident occurs and the insurer is required to compensate a third party for property damage arising from that accident, then the insurer is entitled to reimbursement from its insured up to an agreed-upon limit. The endorsement is offered to insureds who have the high-risk drivers who might have access to their vehicles.

**The Plaintiffs’ Claims:**

[5] The Plaintiff-insurer seeks reimbursement, pursuant to the terms of the endorsement, from its named insureds for what it had to pay a third party for the property damage she suffered in an accident caused by the insureds’ son. The insureds’ son was one of two persons named in the endorsement as being persons prohibited from driving the insured vehicle. The other was their other son.

[6] The Plaintiff-insurer also seeks a judgment against the insureds’ son for amounts it paid out to the third parties to compensate them for the personal injuries they claimed to have sustained in the accident on the basis that the son breached a statutory condition of the policy. The accident occurred when the son driving while suspended; and the accident appeared to have occurred as a result of the son’s negligence. Furthermore, at the time of the accident, the son’s licence was under suspension for an unpaid fine in Ontario where was attending university. Reimbursement was sought by the insurer on the basis that it had a right to claim reimbursement from any person insured by the policy, whether named or not, for any amount it was compelled by the *Insurance Act* to compensate third party claimants, but which amount, because of a breach of the policy by the insured, the insurer wouldn’t otherwise have had to indemnify the insured.

[7] In seeking reimbursement from the insureds’ son, the insurer relies on the fact that the insureds’ son was driving while his licence was suspended in breach of the policy when the accident occurred. That is, the insurer seeks a judgment against the son for amounts in excess of what the named insureds agreed to reimburse their insurer in the property damage reimbursement endorsement. And, again, the basis upon which the reimbursement was sought was that the son’s driving constituted a breach of a statutory condition in the policy, namely that which prohibits any person who drives the insured vehicle with the consent of the named insured from driving it while his or her licence is suspended.

**The Defendants’ Defences:**

[8] With respect to the insurer’s claim to reimbursement for the amount it paid for third party property damage, the named insureds, represented by Dennis McDermott, Q.C., a very experienced

insurance counsel, took the position that the property damage reimbursement endorsement was invalid because the named insureds never signed the endorsement. The form of endorsement approved by the Superintendent of Insurance required the “*Signature of the Insured*”, to quote the form. The reference to the “*Insured*” on the form appeared to be to the named insured. However, in this case the endorsement was signed by one of the named insureds’ son who was also a person insured by the policy.

[9] Section 608(e) of the *Insurance Act* defines the “insured” as a person insured by a contract of automobile insurance, whether named or not. Section 620 states that any person insured but not named in a contract is deemed to be a party to the contract for the purpose of recovering indemnity to the same extent as if named in the contract as the insured. Also, in the insuring agreement, the insurer’s undertaking is to indemnify not only the named insureds but also every other person who drives the insured vehicles with their consent. Section 616(i) of the *Insurance Act* also requires as much. So, subject to the obligation to reimburse and the limitation on public liability coverage contained in the two endorsements, the son signing the endorsement was an insured under the policy or contract of insurance.

[10] With respect to the insurer’s claim to reimbursement for the amounts it paid out to compensate the third party claimants for their personal injuries, the position taken by Mr. McDermott, who also acted as counsel for the insured’s son, was that a statutory precondition to reimbursement had not been met. That precondition, said to be found in section 635(1) of the Alberta *Insurance Act*, was that a judgment had to be obtained by the injured third parties against the insured before the insurer could seek reimbursement from its insured. Since there had been no judicial determination that the insureds’ son was liable to the third parties (i.e., that he was negligent), it was argued that the insurer had no right to reimbursement from him. Alternatively, counsel for the son argued that there ought to be relief against forfeiture of insurance coverage because, although the policy has been breached, the breach constituted, at worst, imperfect compliance with the policy, but not complete non-compliance. The licence suspension in Ontario was for unpaid fines which the son claimed he did not know were even levied. Within days of the accident, he paid the fines and the suspension was immediately lifted.

**The Insured’s Covenant to Reimburse and the Insurer’s Statutory Right to Reimbursement:**

[11] One of the “Agreements of Insured” in the standard form of automobile insurance is that any person insured by the policy agrees to reimburse the insurer any amounts which the insurer was required by the *Insurance Act* to pay third parties, but which the insurer would not otherwise be liable to pay under the policy (because of a breach). An almost identical right to seek reimbursement is provided for in the Section 635 of the Alberta *Insurance Act*. With respect to both the covenant to reimburse and the statutory requirement to reimburse, the insured took the position that the payments made by the insurer to the third party claimants were made voluntarily. That is, the payments made by the insurer were not required to be paid as there had been no judicial determination of the insured’s liability to the third parties. Alternatively, the insured sought relief

from the requirement to reimburse, relying on those provisions of the *Insurance Act* which provide relief from forfeiture of insurance coverage.

**The Facts:**

[12] The facts of this case are interesting. The Plaintiff is an insurance company. The named insureds are mother and father, Antonietta and Rocco Terrigno, who run a very successful and well-known restaurant here in Calgary, known as Osteria de Medici. At the time of the accident, their son, Michael, was a student taking the combined M.B.A/LL.B. program at the University of Western Ontario in London. Another son, Maurizio, who is not a Defendant, also played a role in this piece. Maurizio assisted Mom and Dad in running the restaurant and was the signatory to the property damage reimbursement endorsement, as well as the reduction of coverage endorsement.

[13] Mr. and Mrs. Terrigno owned a fleet of vehicles, including a Jaguar and a Mercedes, which needed insuring. Sons, Michael and Maurizio, had driving records which left something to be desired from an insurer's perspective. The fact that the two boys were members of the family and might be given access to their parents' vehicles from time to time added significantly to the insurer's assessment of the risk of insuring Mom and Dad.

[14] So, in May of 2001, when the Terrignos were having difficulty obtaining insurance on reasonable terms, an experienced insurance broker, Armin Wushke, attended at the Terrigno restaurant to advise and take instructions with respect to the Terrigno's vehicle insurance needs. It was Mr. Wushke who suggested the endorsements in question as a means of lowering the Terrignos' insurance premiums. The circumstances surrounding the execution of these endorsements is critical to assessing the validity of the property damage reimbursement endorsement in particular. When Mr. Wushke met with Rocco and Antonietta Terrigno, together with their son, Maurizio, he was the bearer of bad news about how much the premiums were going to be. According to Mr. Wushke's nearly contemporaneous notes of this meeting, the family patriarch, Rocco Terrigno, "*flipped out*" at the amount of the premiums quoted and instructed Mr. Wushke to cancel all insurance. Mr. Terrigno then left the meeting in a huff, leaving mother and son to deal with the issue. Mother was upset. She knew that notwithstanding her husband's instructions she and he needed insurance for their vehicles. So the meeting with the broker continued, albeit without her husband.

[15] The result of that meeting was that collision coverage on the Jaguar, the Mercedes, and the Jeep Cherokee was deleted. The public liability and property damage coverage was reduced to a million dollar and even that coverage was qualified by an endorsement which reduced the amount of the insurer's liability, in the event of an accident while either of the two sons were driving, to the statutory minimum of \$200,000.00. Also, the property damage reimbursement endorsement was added to the policy.

[16] Three years later, while the policy, with the endorsements, was still in place, Michael Terrigno, one of the “prohibited” drivers, got into an accident. He was driving his mother’s Mercedes, surprisingly, with her permission. He was changing lanes on a one-way west-bound avenue in order to park on the left hand side of the avenue when he collided with a 1993 Pontiac Sunbird, which had been driven in the same direction in the far left lane. The Sunbird itself sustained minor body and other damage, but the occupants of the Sunbird advanced fairly substantial personal injury claims.

[17] The negligence alleged was that Michael Terrigno made an unsafe lane change. Michael’s version of events was that the Sunbird was speeding and failed to overtake in safety. His parents’ insurer, armed with all this information, settled the third parties’ claims by paying the third party claimants a total of \$16,000.00, \$1,600.00 of which was for property damage to the Sunbird. The balance, \$14,400.00, was to settle the their personal injury claims. Significantly, there was no action commenced by the third parties and no judgment obtained. Their claims were simply settled by the Plaintiff-insurer, although not entirely without involving the insureds’ son.

[18] The Plaintiff-insurer now seeks to recover from the named insureds, Rocco and Antoinetta Terrigno, the \$1,600.00 it paid to settle the Sunbird owner’s property damage claim pursuant to the property damage reimbursement endorsement. The insurer also seeks to recover from the insureds’ son, Michael, the \$14,400.00 it paid to satisfy the third parties’ injury claims, on the basis that it was entitled to do so because of his breach of the statutory condition in the policy. The statutory condition alleged to have been breached was that which prohibited any person insured by the policy from driving while his or her licence was suspended. Because of the breach of the statutory condition, the insurer claimed it had both a “contractual” and a statutory right to claim reimbursement of amounts paid to third parties. Counsel for the Michael argued that the right to reimbursement of the personal injury payments was contingent upon the third parties recovering a judgment against his client.

**The Property Damage Reimbursement Endorsement:**

[19] With respect to the claim against the named insureds under the property damage reimbursement endorsement, the endorsement is interesting, to say the least. On the one hand, there was the insureds’ undertaking not to permit their sons to drive any of the insured vehicles. On the other hand, the endorsement, and the companion endorsement limiting indemnity to the statutory minimum, provided for what would happen if they did drive. So, at one and the same time, Michael Terrigno was an excluded or prohibited driver under the policy and an unnamed insured, at least to the extent of the statutory minimum of \$200,000 in personal injury and property damage liability.

[20] The relevant portions of the property damage reimbursement endorsement have been reproduced below:

“S.E.F. 8a

**PROPERTY DAMAGE REIMBURSEMENT FOR OPERATION BY NAMED PERSON  
ENDORSEMENT  
(Section A Only)**

*In consideration of the premium charged, and in consideration of my undertaking that **Terrigno, Maurizio and Terrigno, Mike** will not drive or operate this automobile, I agree to reimburse the insurer in the sum of **\$10,000.00** or the actual amount of the loss or damage, whichever is the lesser, in respect of loss or damage to property arising out of each and every accident while **Terrigno, Maurizio and Terrigno, Mike** who is not the named insured, is personally driving or operating the automobile with respect to which indemnity is provided under Section A of this policy.*

*I understand and agree that upon the occurrence of an accident involving loss or damage to property of others:*

*a) notice shall be given to the insurer in accordance with Statutory Condition 3 of this policy;*

*b) the insurer shall investigate such accidents and negotiate and pay resulting claims or judgments arising therefrom and I shall reimburse the insurer the amount agreed to in this endorsement;*

*c) the limit of my liability for repayment shall be the amount stated in this endorsement for each accident regardless of the number of claims arising therefrom.*

*If more than one automobile is insured under this policy, this endorsement shall apply only to the automobile(s) described under item(s) number all of the schedule of automobiles attached to and forming part of this policy.*

***Please read before signing because this endorsement requires you to repay to the insurance company certain claims paid under this policy.”***

Then there was a place for the “*Signatures of the Insured*”.

[21] The endorsement maybe puzzling to the uninitiated; but it worked slick as a whistle. The insureds, Mr. and Mrs. Terrigno, were charged an acceptable (lower) premium. In return, the insurer received an undertaking that the two sons would not drive their parents’ vehicles. And in the event of a breach of that undertaking, the insurer also received a covenant from its insureds to reimburse it any amounts paid out to satisfy property damage claims up to a maximum of \$10,000.00. What is curious, though, is that the insureds’ liability to reimburse their insurer in the event of a breach was limited to property damage, and then only to the agreed-upon limit of

\$10,000.00. There was no obligation on the named insureds under the endorsement to reimburse their insurer any amounts it had to pay out for loss or damage resulting from bodily injury.

**The Reduction of Coverage Endorsement:**

[22] There was also a companion endorsement, Standard Endorsement Form, S.E.F. 28, entitled “Reduction of Coverage as Respects Operation by Named Person(s) Endorsement”. This endorsement limited the insurer’s liability to the statutory minimum of \$200,000 set forth in section 627 of the *Insurance Act* for loss or damage resulting from bodily injury or death or loss of or damage to property in the event of an accident occurring while either Mike or Maurizio was driving. There was no provision in this endorsement for any reimbursement whatsoever.

[23] The approved forms of both of these endorsements required the signatures of the insureds. However, the named insureds, Rocco and Antoinetta Terrigno, did not sign the endorsements. Instead, their son, Maurizio, who, like Michael, was both an excluded driver and an insured person under the policy, signed the property damage reimbursement endorsement and the reduction of coverage endorsement. Maurizio signed these endorsements in May of 2001 in the presence of his mother, after his father had left the room in a huff. The broker, Wushke, was also present when Maurizio signed the endorsements.

**Renewals and Reminders of the Excluded Drivers Covenant:**

[24] Subsequent policy renewals made repeated reference to the property damage reimbursement and reduction of coverage endorsements for Mike and Maurizio Terrigno, including the policy renewal which was in effect at the time of the accident (i.e. June 15, 2004). There were also a number of letters from the insurer’s broker to Rocco and Antoinetta Terrigno over the years between 2001 and 2004 reminding them, “Your sons Mike and Maurizio are ***not allowed to drive***” (emphasis in the original), including a letter dated June 6, 2004 to Rocco Terrigno, about a week before the accident took place. That letter read in part:

*“We currently have insurance on the following vehicles:*

<i>1999 Jaguar</i>	<i>driver Rocco</i>
<i>1999 Mercedes</i>	<i>driver Antoinetta</i>
<i>2003 Nissan</i>	<i>driver Rocco</i>

*these vehicles are under policy #H40088*

<i>2002 Dodge Dakota</i>	<i>driver Kirk Charyton</i>
<i>2002 Jeep</i>	<i>driver Jan Litnik</i>

*these vehicles are under policy #K44026*

*Mike and Maurizio are **EXCLUDED** as drivers.*

*I am concerned that you could get into some serious liability issues if in fact Mike and Maurizio are driving. We have been informed through a claim that Maurizio was driving the Jeep and more recently that Mike was driving the Mercedes.*

*As you know the policy is void and does not respond to any claims if we have any undisclosed drivers or drivers that are specifically excluded.”*

[25] These renewal policies and letters are relevant for a number of reasons, not the least of which is that both Mr. and Mrs. Terrigno testified at trial that they didn't know their son, Mike Terrigno, was a prohibited or excluded driver. They claimed that they were only aware of the prohibition on Maurizio. I found that difficult to believe and concluded that Mr. and Mrs. Terrigno must be taken to have known that both sons were excluded drivers. The insurer had done everything it could to remind them of what I found they had agreed to. The reasoning for that finding follows.

### **The Validity of the Property Damage Reimbursement Endorsement:**

[26] The argument that the property damage reimbursement endorsement was invalid for lack of a signature by either or both of the insureds was certainly problematic for the insurer. Counsel for the Terrignos pointed to Section 610(1) of the *Insurance Act* which states:

*“610(1) No insurer may use a form of application, policy, endorsement or renewal or continuation certificate in respect of automobile insurance other than a form approved by the Superintendent.”*

And, as indicated above, the Superintendent of Insurance had approved a form which appeared to require the “*Signature of the Insured*”. Furthermore, in a letter dated December 31, 1993 to all licensed automobile insurers, the Superintendent of Insurance had directed that the “*insured is required to sign the endorsement*”.

[27] Just above the spot where the signature of the insured is to be affixed, the approved form of endorsement also includes the following caution: “*Please read before signing because the endorsement requires you to repay the insurance company certain claims paid under this policy*”.

The caution appears to speak to the concern of the Superintendent of Insurance that the insured's obligation to reimburse his or her insurer would require a fully-informed consent by the insured.

[28] Section 610(1) of the *Insurance Act* does not prescribe the consequences of an insurer using a form of endorsement other than one approved by the Superintendent. Section 780(e)(iii) makes it an offence to contravene Section 610(1) and Section 786(1) states that a person convicted of an offence is liable to a fine. As an alternative to a fine, Section 789(1) provides for administrative penalties for contraventions of the Act. But nowhere in the *Insurance Act* does it state that the failure to use an approved form vitiates what would otherwise be considered to be an enforceable agreement or covenant by the insured.

[29] Now, Section 513(1) of the *Insurance Act* does state that all the terms and conditions of a contract of insurance must be set out in full in the policy or by writing securely attached to it when issued. Otherwise, such terms and conditions, where they purport to modify or impair the policy's effect, are invalid and even inadmissible in evidence to the prejudice of the insured. Section 513(2) goes on to state that the foregoing invalidity or inadmissibility does not apply to an alteration or modification of the contract of insurance (the policy) agreed on in writing by the insurer and the insured.

[30] My view is that the property damage reimbursement endorsement did not modify or impair the policy's effect and did not constitute an alteration or modification of the policy of insurance as contemplated by Section 513(2) of the *Insurance Act*. The property damage reimbursement endorsement was an agreement by the insureds to reimburse their insurer in certain circumstances. It didn't alter the policy. It didn't change the coverage, as perhaps the reduction of coverage endorsement did. It simply provided for reimbursement of certain payments made by the insurer.

[31] However, if I am wrong in failing to characterize the property damage reimbursement endorsement as an alteration or modification of the policy which required the named insureds' agreement in writing, I find that the named insureds did agree in writing to the so-called alteration or modification. They may not have signed endorsement; but they repeatedly ratified written reminders of its presence and of its effect by writing cheques for the reduced premiums year in and year out for a number of years prior to the accident.

[32] As indicated above, there can be no doubt that both named insureds were aware of the prohibition and the reimbursement obligation contained in the endorsement. It is true that Rocco Terrigno was not present when his son, Maurizio, signed the endorsement. It is possible, though highly unlikely, that either Maurizio or Mrs. Terrigno neglected to inform Rocco of the substance of the agreement. But it was Rocco who signed premium cheques and when he signed the premium cheque in 2001, after having instructed the cancellation of all insurance, he would have been made aware of the more acceptable premiums. Furthermore, Mrs. Terrigno, one of the named insureds and wife of Rocco, was present when the endorsement was explained by the insurance broker and signed by her son. The fact that it was the endorsement which enabled the placing of insurance at a premium level which was acceptable to Mr. Terrigno made any suggestion that Mr. Terrigno was

unaware of it not credible. And in the years following 2001, this endorsement continued to be attached to the policy. The insureds' broker sent letters annually to Rocco Terrigno with the emphatic reminder that "*your sons Mike and Maurizio are **not allowed to drive***". One such letter, just prior to the accident, contained the express admonition that the insurer suspected that the sons had been driving the insured vehicles and that the Terrignos were risking "*serious liability issues if in fact Mike and Maurizio are driving*". These repeated notices and warnings, left unanswered as they were, must be given effect.

[33] Mrs. Terrigno testified that she had never seen the letters because her husband handled all of the family's insurance matters; but she was present when the undertaking contained in endorsement and the covenant to reimburse were made. Mr. Terrigno testified that he had never seen the letters because his secretary handled all of his mail. Mr. Terrigno's testimony is neither credible or justifiable. It is not credible because the insured's broker testified he met personally with Mr. Terrigno on an annual basis to review his insurance needs and on more than one occasion communicated to him orally the admonition contained in his letters. It is not justifiable because those who employ a secretary cannot be absolved of responsibility for reading their correspondence.

[34] The insureds also claimed that they thought only Maurizio was prohibited from driving. Yet the evidence shows that every communication that they had with the insurer or their broker, from the initial endorsement to the reminder letters, made it clear that the driving prohibition and reimbursement obligation related to both sons. Michael's driving record, which was put before me, was such that it would be astounding if the named insureds did not know that the prohibition and reimbursement obligation applied to him as well as Maurizio.

[35] But, is mere awareness enough, given that neither insured signed the property damage reimbursement endorsement? I therefore considered whether the endorsement was invalid for lack of a signature by either or both of the named insureds. Though not determinative, but a consideration nevertheless, was that the *Insurance Act* does permit agents to sign certain documents on behalf of insureds. Section 612(1) of the *Insurance Act* provides that an agent of the insured may sign the application for insurance on the insured's behalf.

[36] While I am cognizant of the difference between the application for insurance and the policy itself, I find that the insureds' son, Maurizio, was the insureds' agent when he signed the endorsement. He was not only their son; but the circumstances surrounding the execution of the endorsement also suggest that Maurizio was signing the property damage reimbursement endorsement on his parents' behalf. The circumstances to which I refer include one of the named insureds, the head of the household, the owner of the restaurant, walking out of the meeting with his broker which was held to discuss, among other things, the problem he was having with escalating insurance premiums. They also included an upset mother who knew they needed coverage. They also included twenty or thirty-something, Maurizio, who his father testified "*works with me every day in the restaurant*", signing the endorsement. The endorsement was required to obtain the insurance coverage his mother knew they needed. The endorsement was also required to achieve the lower premiums his father wanted. What more need be said? Maurizio was his parents' agent.

He had both actual and apparent authority to sign on their behalf. The authority was express in the case of his mother, apparent in the case of his father.

[37] Mrs. Terrigno came to court aided by an interpreter and testified that all insurance matters were handled by her husband. Her husband came to court and professed very little knowledge of insurance matters. Rocco Terrigno claimed to never have seen the endorsements or the letters from his broker repeatedly reminding him that his two sons were excluded drivers. He testified that his bookkeeper/secretary opened and dealt with all such mail. Mr. Terrigno testified however that he was the one who signed all cheques, including those cheques for the premiums he was being charged on the basis that Maurizio and Michael would not drive the vehicles in question. He also conceded that he met with the broker, Armin Wushke, at least once a year at his restaurant. Mr. Wushke, whom I found to be a knowledgeable and professional insurance broker, testified that he reminded Rocco Terrigno annually of the exclusions which enabled the lower premiums. So even if there wasn't actual or ostensible authority in Maurizio in the first instance to sign the endorsement on his parents behalf, clearly Mr. Terrigno, who did sign the initial application for insurance, repeatedly ratified Maurizio's actions on his behalf.

[38] Therefore, I reject the argument that the endorsement is invalid because it wasn't signed by the insureds. In so doing, I would also point to Section 527 of the *Insurance Act* which states;

*“527 Any act or omission of the insurer resulting in imperfect compliance with any of the provisions of this Act does not render a contract invalid as against the insured.”*

This section, of course, does not speak to the validity of an insurance policy vis-a-vis the insurer where there has been imperfect compliance by the insurer. Yet Section 527 also does not state that imperfect compliance by the insurer renders the contract invalid against it. Furthermore, nowhere in the statute could I find a provision which states that imperfect compliance by the insurer renders the contract of insurance invalid as against the insurer. Indeed, as previously indicated, the *Act* does not appear to prescribe the consequences for the contract of insurance of a failure by the insurer to employ a form of endorsement prescribed by the Superintendent of Insurance. Certainly one could imagine circumstances where such a failure would vitiate the contract of insurance or a covenant in it. But one could equally imagine circumstances where it would not. I believe this to be a case of the latter.

[39] And although it may not be necessary for my decision, I find the insurer's failure to have the named insureds sign the endorsement to be a case of imperfect compliance by the insurer as opposed to complete non-compliance. The broker, Mr. Wushke, admitted he may have goofed by not getting the named insureds to sign the endorsement; but when pressed about his mistake, he not only testified as to the circumstances surrounding the adding of the endorsement (in respect of which he had kept contemporaneous or nearly contemporaneous notes which corroborated his version of events) but he also testified that he was not unhappy to see Maurizio sign the endorsement because it brought home to Maurizio, as one of the excluded drivers, that he was not to drive the vehicles being insured. I suppose imperfect compliance, like beauty, is in the eye of the beholder. But

despite the undertaking contained in the endorsement, the excluded driver remained an insured under the policy. To have him sign the endorsement instead of the named insureds in the circumstances of this case seems like imperfect compliance to me. And it is of no consequence that Michael, the other excluded driver, was not around when these arrangements were made. The undertaking was by the named insureds. It was up to them to abide by that undertaking.

[40] Even if the failure to have the named insureds sign the endorsement constituted complete non-compliance (as opposed to imperfect compliance), I am of the view that such non-compliance in the circumstances of this case does not mean that the named insureds' promise to reimburse is unenforceable. There was no ambiguity in the promise. Consideration for the promise was given. There was no doubt the promise was made. There was no doubt the named insurers knew and understood what the promise was. While it is true that contracting for insurance coverage is strictly regulated, I don't believe that such strict regulation totally supplants common sense principles of offer and acceptance and being bound by what you agree to.

### **The Breach of the Statutory Condition:**

[41] The property damage reimbursement, which I have now found to be effective, permits recovery only from the named insureds and then only that amount which the Plaintiff-insurer paid out to repair the third party's car. The issue I must now address is whether the insurer can recover from either the named insureds or Michael Terrigno the \$14,400.00 it paid to satisfy the third party personal injury claims. That recovery is dependent, firstly, on whether Mike Terrigno breached a statutory condition of the policy and, secondly, on whether that breach, if it be a breach, entitles the insurer to reimbursement by the insureds of what the insurer paid out to compensate the third parties for their personal injuries.

### **Was There A Breach of the Statutory Condition by the Named Insureds?**

[42] In the absence of a breach of a statutory condition by the named insureds, the insurer's claim to reimbursement from them was limited to the property damage because, although it was a term of the contract that the insureds undertook not to let Mike Terrigno drive under any circumstances, the parties expressly agreed what the consequences of a breach of that undertaking would be. Those agreed-upon consequences were that the insureds would reimburse the insurer amounts paid out for property damage only, to a maximum of \$10,000.00. Why the agreement to reimburse was limited to property damage was never explained; but that was what the approved form of endorsement stated and that is what the parties agreed to. So the only basis on which the insurer could seek further reimbursement would be if there was yet another breach justifying reimbursement. The only other breach that might provide a basis for reimbursement would be that of permitting Mike Terrigno to drive while his licence was suspended.

[43] The named insureds argued that there was no further breach by them of the policy. They claimed that they didn't know their son's license had been suspended. In support of their claim, they pointed to the fact that even their son claimed no knowledge of the suspension.

[44] The cases hold that while an insurer does not have to establish that its insured knew that the license of the person he or she permitted to drive was suspended, it nevertheless must show that there was a failure by its insured to exercise reasonable caution or prudence in investigating the qualifications of the person permitted to drive the insured vehicle: *Nichols v. Saskatchewan Government Insurance* [1984] 5 W.W.R. 349 (Sask. Q.B.) affirmed (1985) 31 M.V.R. xxxvi (Sask. C. of A.). Evidence of a failure to exercise reasonable caution or prudence on Mrs. Terrigno's part might be inferred from her knowledge of her son's questionable driving record and the possibility that that record might have resulted in a suspension. But I believe drawing that inference is a bit of a stretch. Knowing that her son, at one time, had a valid driver's licence, the only reasonable precaution she might conceivably have taken was to have asked her son if it had been suspended recently. But who asks their adult children that before tossing them the keys? And even if she had asked that question, the evidence disclosed that Mrs. Terrigno would have been advised by her son that his licence was valid because he didn't know that it had been suspended. Not even counsel for the insurer argued that Mrs. Terrigno, living in Calgary, ought to have made inquiries at the Office of the Register of Motor Vehicles in Ontario before lending her car to her son who was home from law school. So, my view is that there was no evidence of a failure by the named insured, Mrs. Terrigno, to exercise reasonable caution or prudence which is what the authorities hold must be shown. I am of the view that she had no reason to believe her son's licence was suspended. Presumably, the Supreme Court of Canada's decision in *Co-operative Fire & Casualty v. Ritchie* (1983) 2 S.C.R. 36 is sufficient authority for the proposition that there is no right of reimbursement from the insured owner where that insured owner, having consented to the driver's use of the insured vehicle, had no reason to expect that the driver would drive the vehicle in breach of the statutory condition.

### **Was There a Breach of the Statutory Condition by the Unnamed Insured?**

[45] With respect to the issue of whether there was a breach of a statutory condition of the policy by Michael Terrigno, the first point to be made is that statutory conditions apply not only to named insureds but also to persons insured by the policy, whether named or not. So, Michael Terrigno was bound by the statutory condition. The relevant statutory condition was Statutory Condition 2(1)(b):

#### ***Prohibited Use by Insured***

“2.

1. *The insured shall not drive or operate the automobile,*

(a) ...

(b) *while his licence to drive or operate an automobile is suspended ....”*

The question then is whether Mike Terrigno breached the condition.

[46] The Statement of Driving Record issued by the Ontario Ministry of Transportation indicated that Mike Terrigno had had his licence suspended on May 21, 2003 for failure to pay a fine related to a default judgment in a traffic court matter. That is, Michael was charged with a traffic violation while attending law school in Ontario. A date was set for entering a plea or the trial of the matter. Michael failed to appear and a fine was levied in his absence. Not knowing of the fine's imposition and not having kept the Ontario authorities informed of his current address, Michael failed to pay the fine until it was brought to his attention following the accident in Calgary. When he paid the fine, his licence was immediately reinstated, June 24, 2004, nine days following the accident.

[47] Michael may not have had actual knowledge of the fine or the suspension; but there was no evidence that he was unaware of the alleged traffic violation. As a law student, he ought to have known that if he didn't contest the charge, he would be fined, and that if he didn't pay the fine, his licence would be suspended. It is the law in Ontario. And it's also the law in Alberta.

[48] To give effect to the claim that he was unaware of the suspension, one would have to import a knowledge requirement into Statutory Condition 2(1)(b), as in "*while he knows his licence to drive or operate an automobile is suspended*". Authority for the proposition that the prohibition is strict and doesn't require knowledge of the licence suspension is found in *Prentice v. Co-operators General Insurance Company*, [1986] I.L.R. 1-2022. In that case, the Ontario Court of Appeal upheld a lower court's assertion that the Legislature could easily have inserted the word "*knowingly*" into the statutory condition, but didn't. In affirming the trial judgment, the Ontario Court of Appeal stated simply that, "*the appellant ought to have known that his driver's licence would be suspended for non-payment of a fine for speeding.*"

[49] In *Ratajczak v. Hemstra*, [1985] O.J. No. 1784, McDonald D.C.J. opined, in very similar circumstances, as follows:

*It is unfortunate that the word "knowingly" is not contained in this prohibition but I cannot rewrite the policy or the statutory condition to insert that word. It is clear on the evidence before me that neither the father nor the son were aware that he licence had been suspended, but this knowledge was available to them had they made appropriate inquiries with the Ministry of Transportation and Communications. It seems that there is no onus upon the Ministry to notify persons like the defendant, Michael Hemstra, when their licence is being suspended for non-payment of fines."*

[50] Now it might be argued that *Ratajczak* can be distinguished from the case at bar in that in *Ratajczak* the insured had known of the suspension, but did not know that it had continued in force without payment. However, Michael Terrigno knew that he had been charged with an infraction and that the matter had been set for trial. As a law student at the time, he would have almost certainly known that he would likely be convicted in his absence and that, at the very least, a fine might be levied. And, he must also be taken to have known that Section 46(2) of the *Ontario Highway Traffic Act* provided as follows:

*“46(2) If the payment of a fine imposed on conviction for an offence is in default, an order or direction may be made under section 69 of the Provincial Offences Act directing that the convicted person’s driver’s licence be suspended and that no driver’s licence issued to him or her until the fine is paid.”*

Although suspension is discretionary, it is a possible outcome of a failure to pay a fine. Furthermore, the phrase, “*until the fine is paid*” does not appear to brook any argument that the suspension is somehow retrospectively invalidated by payment. The suspension is deemed to be in force until payment is received. Mike was, therefore, a suspended driver.

[51] It also goes without saying that Michael’s suspension in Ontario meant he was also suspended in Alberta. The Alberta Traffic Safety Act expressly prohibits driving where the licence has been suspended elsewhere in the Dominion:

*94(1) For the purposes of this section, a person is an unauthorized driver if that person’s licence or permit to operate a motor vehicle in a jurisdiction outside Alberta is suspended or cancelled”*

[52] In conclusion, I find that the contract of insurance was breached by Michael. His licence to drive was suspended. And, whether or not he had knowledge of the suspension, the statutory condition was breached.

### **Relief from Forfeiture**

[53] Counsel for Michael argued that if his client’s driving while suspended was found to be a breach of the statutory condition, then, given the nature of the breach, relief from forfeiture of insurance coverage ought to be granted by the court. He cited Section 515 and 521 of the Insurance Act:

*“515 When there has been imperfect compliance with statutory condition as to the proof of loss to be given by the insured or another matter or thing required to be done or omitted to be done by the insured with respect to the loss and the consequent forfeiture or avoidance of the insurance in whole or in part and the Court considers it inequitable that the insurance should be forfeited or avoided on that ground, the Court may relieve against the forfeiture or avoidance on any terms it considers just....*

*“521 When there has been imperfect compliance with a condition or term of the contract as to proof of loss to be given by the claimant and a consequent forfeiture*

*or avoidance of the insurance, in whole or in part, and the Court considers it inequitable that the insurance be forfeited or avoided on that ground, the Court may relieve against the forfeiture or avoidance on any terms it considers just....*

[54] On the face of it, these provisions appear to be inapplicable in that they appear to relate only to the proof of loss requirements (Statutory Conditions 3 through 7) where one might expect some leeway to be given to the insured with respect to compliance with conditions requiring the provision of information, etc., after a loss. However, it appears these types of sections have been given a much broader interpretation: *Falk Brothers Industries Ltd. V. Elance Steel Fabricating Co.* (1989) 39 C.C.L.I. 161 (S.C.C.). Three Ontario cases have held that a similar provision could apply in cases involving breaches of conditions committed before the loss, such as driving without a licence: *Quarrie v. State Farm Mutual Insurance Co.* (1997) 42 C.C.L.I. (2d) 21 (Ont.Gen. Div.); *Clark v. Cooperators General Insurance Co.* (1997) 50 C.C.L.I. (2d) 111 (Ont.Div.Ct.); and *Pilot Insurance Company v. Clayton* [1998] I.L.R. I-3570 (Ont. C. Of A.).

[55] The Ontario Court of Appeal apparently took the opposite view in *McEnaney v. General Accidental Assurance Co. of Canada* [2005] O.J. 717, a case which also involves an expired driver's licence. Leave to appeal to the Supreme Court of Canada was refused; 2005 Carswell Ont. 5327.

[56] However, I believe the answer in this case lies not in the debate about whether relief can be granted for pre-loss, as opposed to post-loss, breaches. It lies in holding that the insured's breach in this case did not constitute imperfect compliance but rather constituted complete non-compliance with the statutory condition which required the insured to refrain from driving the insured vehicle while his or her licence was suspended. Perhaps the failure of the named insured, Mrs. Terrigno, to refrain from permitting the use of the insured vehicle by a person who is a member of her household while his licence to drive was suspended might have constituted imperfect compliance when she had no reason to believe that person's licence was suspended. But, in my view it was complete non-compliance when the unnamed insured, Michael Terrigno, drove the insured vehicle while his licence was suspended and while he had every reason to believe that it was suspended.

[57] So, I am not inclined to grant relief from forfeiture of the insurance coverage by reason of the insured's breach of the statutory condition.

**Does the Breach of the Statutory Condition by the Insured Entitle the Insurer to Reimbursement?**

[58] Counsel for the insured went on to argue that even if there were a breach of the statutory condition and I wasn't inclined to relieve against forfeiture, the Plaintiff-insurer was still precluded from claiming reimbursement because no judgment had been obtained by the third parties against him as required by Section 635 of the *Insurance Act*.

[59] Section 635 of the *Insurance Act* is a lengthy section of the *Act* with sixteen subsections. Nevertheless, I propose to reproduce much of the section because I believe that only in considering the section as a whole can one assess the argument which has been based upon it.

*“635(1) Any person who has claim against an insured for which indemnity is provided by a contract evidenced by a motor vehicle liability policy, even though that person is not a party to the contract, may, on recovering a judgment in respect of the claim in any province or territory against the insured, have the insurance money payable under the contract applied in or toward satisfaction of the judgment and of any other judgments or claims against the insured covered by the contract and may, on the person’s own behalf and on behalf of all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.*

(2) ...

(3) ...

*(4) The right of a person who is entitled under subsection (1) to have insurance money applied on the person’s judgment or claim is not prejudiced by*

*(a) an assignment, waiver, surrender, cancellation or discharge of the contract, or of any interest in or of the proceeds of the contract, made by the insured after the happening of the event giving rise to a claim under the contract,*

*(b) any act or default of the insured before or after that event in contravention of this Subpart or of the terms of the contract, or*

*(c) any contravention of the Criminal Code (Canada) or a statute of any province or territory or of any state or the District of Columbia of the United States of America by the owner or driver of the automobile,*

*and nothing mentioned in clause (a), (b) or (c) is available to the insurer as a defence in an action brought under subsection (1).*

(5) ...

(6) ...

*(7) When a person has recovered a judgment against the insured and is entitled to bring action under subsection (1) and the insurer admits liability to pay the insurance money under the contract, and the insurer considers that*

*(a) there are or may be other claimants, or*

- (b) *there is no person capable or giving and authorized to give a valid discharge for payment who is willing to do so,*

*the insurer may apply to the Court ex parte for an order for payment of the money into Court, and the Court may, on the notice, if any, it thinks necessary, make an order accordingly.*

(8) ...

(9) ...

(10) ...

(11) ...

(12) ...

(13) *The insured must reimburse the insurer on demand in the amount that the insurer has paid by reason of this section and that it would not otherwise be liable to pay.*

(14) *When an insurer denies liability under a contract evidenced by a motor vehicle liability policy, it must, on application to the Court, be made a third party in any action to which the insured is a party and in which a claim is made against the insured by any party to the action in which it is or might be asserted that indemnity is provided by the contract, whether or not the insured enters an appearance or defence in the action.*

(15) *On being made a third party, the insurer may*

- (a) *contest the liability of the insured to any party claiming against the insured,*
- (b) *contest the amount of any claim made against the insured,*
- (c) *deliver any pleadings in respect of the claim of any party claiming against the insured,*
- (d) *have production and discovery from any party adverse in interest, and*
- (e) *examine and cross-examine witnesses at the trial,*

*to the same extent as if it were a defendant in the action.*

(16) ....”

[60] Subsequent sections in the *Insurance Act* provide for regulations requiring counsel for third party claimants, in actions against insureds, to give notice to the defendant’s insurer (Section 635.1 of the *Insurance Act*). There is also a requirement that the insured give notice to his or her insurer of any actions commenced or steps taken against him or her for damages occasioned by the use of the insured vehicle (Section 637 of the *Insurance Act*).

[61] Section 635 seems to be intended to achieve the following objectives:

(i) to give third parties a right of recourse against the tortfeasor’s insurer, i.e. the right to have the insurance money payable under the motor vehicle liability policy applied in satisfaction of their claims against the insured, so long as such third parties have recovered a judgment against the insured;

(ii) to give the insurer the right to contest the liability of its insured to such third parties; and

(iii) to give the insurer the right to demand reimbursement from its insured for amounts it might have had to pay to third parties by reason of the third parties’ rights, under Section 635(1), to have the insurance monies applied in satisfaction of their judgments in circumstances where, but for the section ( i.e., but for the right of recourse), the insurer would not be liable to pay such insurance monies.

The question before me was whether these provisions prevented that the insurer from demanding reimbursement because no judgment was recovered by the third parties against the insured?

[62] The answer to that question turns, in part, on whether the insurers’ rights to reimbursement are limited either to the statutory right contained in Section 635(13) of the *Insurance Act* or to the contractual right contained in the “Agreements of Insured” in the policy. If so, subject to what I have to say below, it appears at least that a judgment against the insured may be a necessary prerequisite to reimbursement. However, if there is a right, apart from the *Insurance Act* or the policy, for an insurer to seek reimbursement, then the so-called requirement of a judgment against the insured by the third party claimant may not exist.

[63] The problem is identifying what cause of action the insured might have (apart from the statute or the contract) against the insured person? Is there an action in tort? Is there an action in restitution or unjust enrichment? Is there a right of subrogation? Torts which come to mind include an action for breach of a statutory duty (for example, the statutory duty to be licenced to drive) or inducing a breach of contract. Neither were argued. Nor was unjust enrichment seriously advanced. And the insurer did not argue that Mrs. Terrigno, who after all gave her son permission to drive the car, had a cause of action against her son to which the insurer might be subrogated.

[64] So, I proceeded on the basis that the insurer's right to reimbursement in this case lay solely in the statutory right to reimbursement contained in Section 635(13) of the *Insurance Act* or the contractual right to reimbursement contained in the policy which itself is limited to amounts which the insurer paid by reason of the provisions of any statute relating to automobile insurance (viz., the *Insurance Act*).

[65] Counsel for the insureds argued that in these circumstances a judgment is necessary and cited His Honour Judge Ingram's decision in *Lombard Canada Ltd. v. Kostash* [2006] A.J. No. 612 (Alberta Provincial Court) and Ontario County Court Judge Zalev's decision in *Perri v. Allstate Insurance Co. of Canada* [1984] I.L.R. 1-1804. Both cases seem to suggest that in order for the insurer to seek reimbursement from the insured, the third party must have obtained a judgment against the insured unless the insured has somehow agreed that the insurer can settle and pay the third party claims without the requirement of a judgment.

[66] In *Lombard Canada Ltd. v. Kostash*, Judge Ingram of our court held that in order for there to be recovery by the insurer from the insured of payments made to third parties, there must have been a judgment obtained by the third parties or some admission of the validity of their claims by the insured. Counsel for the Plaintiff insurance company argued that Judge Ingram's comments appeared to be in conflict with what the Supreme Court of Canada said and did in *Co-operative Fire & Casualty Co. v. Ritchie* (1983) 2 S.C.R. 36, where the court appeared to say that the fact that no judgment was recovered by the third parties did not preclude the insurer from obtaining reimbursement from an unnamed insured in circumstances where that unnamed insured drove while intoxicated in breach of one of the statutory conditions of the policy. But, as counsel for the insureds responded, the validity and the amount of the third parties' claims against the insured in the *Co-operative Fire & Casualty Co. v. Ritchie* case were acknowledged and agreed to by the insured and it was for that reason that the Supreme Court of Canada allowed the insurer to obtain reimbursement from the named insured's wife who drove the vehicle in question while intoxicated in breach of the policy of insurance, even though no judgment against the insured had been obtained.

[67] With respect to the *Lombard Canada Ltd.* case decided by Judge Ingram of this court, two points must be made. Firstly, in that case there was no breach of policy by the insured. So Judge Ingram's comments with respect to the need for a judgment in order for the insurer to demand reimbursement were *obiter*. But, more importantly for the purpose of my decision, the insurer in *Lombard* acted unilaterally; and no one would question a decision denying reimbursement in circumstances where the insurer simply settled a third party claim without input from the insured. The following statement by Judge Ingram I believe provides valuable insight into the rationale for the rule which holds there must be a judgment against the insured or an admission of liability by the insured in order for the insurer to be in position to demand reimbursement:

*“ An insurer has very broad powers in dealing with third party claims and may protect its interests even where they conflict with those of the insured. When the insurer seeks to recover from the insured for a claim paid to a third party, the good faith obligation of the insurer requires some consultation, or at least communication with the insured before the claim was paid. I do not have to decide of what such consultation or communication must*

*consist, but here there was none, which is clearly insufficient. An insurer may not act in bad faith and then sue its insured, particularly where its actions consist of admissions and payments, on behalf of the insured, which could affect the insurability or rating of the insured for future insurance purposes, as in this case.”*

[68] The question I must address in light of what appear to be the objectives of Section 635 of the *Insurance Act* and in light of what the decided cases referred to above have held, is whether in this case the absence of a judgment against the insured or the absence of his admission of liability or his agreement on the quantum of the third party claimants’ damages constitutes an absolute bar to the insurer demanding reimbursement.

[69] The author of the chapter on automobile insurance in *Insurance Law in Canada* (2002 Thomson Canada Limited, Toronto), Randall J. Bundus, is clearly of the view that reimbursement of the insurer by the insured is contingent upon a judgment having been obtained against the insured by the third party claimant or upon there being an agreement by the insured that the insurer may settle claims without the requirement of a judgment. In dealing with the Ontario equivalent of Section 635 of the Alberta *Insurance Act*, Mr. Bundus had this to say at p. 17-89 of vol 2 of the looseleaf text:

**“(e) Reimbursement of Insurer by Insured**

*By subsection 13, the insurer is entitled to seek reimbursement from the insured for any amount paid to a third party for which the insurer would not have been liable except for the operation of subsection 4 and 5. However, for the insurer to take advantage of subsection 13, the payment for which reimbursement is sought must have been made pursuant to the direct recourse section. Subject to one exception discussed below, the third party must have obtained a judgment against the insured. A settlement affected either by the insured himself or the insurer on his behalf is not sufficient ....*

*The exception to this requirement of a judgment against the insured arises where the insured and insurer, prior to settlement with the third party, have entered into an appropriate form of non-waiver agreement. In London Assurance co. v. Jonassen, the insured, before settlement by the insurer, agreed that ‘the insurer may settle and pay any or all claims arising from the said occurrences without the requirement of a judgment against the undersigned’. It was held that the requirement of a judgment against the insured merely states that the evidence on which the liability of the insured to reimburse the insurer is based and that it is open to the insurer and insured to waive proof on this form and to accept a settlement in its place.”*

[70] The uninitiated might not be faulted to questioning how the courts have repeatedly inferred that a judgment against the insured is a necessary prerequisite to reimbursement from statutory provisions similar to Section 635 of the Alberta *Insurance Act*. Indeed, even the decided cases are not unanimous in inferring it to be a necessary prerequisite; although it appears that the prevailing

view is that a judgment against the insured or an admission of liability by the insured is a pre-condition to reimbursement. Cases suggesting otherwise, i.e., that a judgment might not be a necessary prerequisite to demanding reimbursement, include Economical Mutual Insurance Co. v. Geldart [1984] N.B.J. No 35 (N.B.Q.B), London Assurance v. Jonassen [1968] 10.R. 487 (Ont. C.A.) and some of the comments of the Supreme Court of Canada in the Ritchie case cited about. There are however many more cases holding that a judgment is required.

[71] I believe resolution may lie in examining what Section 635 of the Alberta Insurance Act and similar provisions in other Insurance Acts were intended to achieve. Clearly, the main objective of Section 635 of the Alberta Insurance Act is to give third parties a right of recourse against the tortfeasor's insurer with whom the third parties would have no privity. That is, it was intended to give third parties the right to have the insurance monies payable under motor vehicle liability policies applied in satisfaction of their claims. The insurer's right to reimbursement was secondary to that objective. And the only way, under the statute, that a person who had a claim against an insured for which indemnity was provided could, as a matter of right, "demand" that the insurance monies be applied in satisfaction of his or her claim is if he or she had a judgment against the insured.

[72] The reason behind the requirement of a judgment is to definitively establish the insured's liability to the third party claimant before the right of recourse arises. Only then does the third party claimant have the right to demand that the insurance monies payable under the policy be applied in satisfaction of his or her claim. And while Section 635(15) confers upon the insurer the right to contest the insured's liability to the third party claimant or the amount of any third party's claim against the insured, there is no obligation to do so. Section 635(15) is permissive. The insurer is free to settle third party claims. Indeed, its primary obligation to its insured under the policy of insurance is "*to indemnify the insured ... against the liability imposed by law upon the insured ...*" And when one had reference to the insurance policy provisions dealing with the "*Time and Manner of Payment of Insurance Money*", it is the proof of loss which triggers the requirement to pay the insurance money for which the insurer is liable and proofs of loss may be given by any person to whom any part of the insurance money is payable.

[73] But while an insurer may voluntarily pay the insurance money for which it is liable under the contract to a third party claimant, can it insist upon reimbursement from its insured for what it paid third party claimants in the absence of a judgment? As indicated above, it has been repeatedly held that Section 635 of the Alberta Insurance Act and like provisions in other provincial insurance legislation prevent insurers from insisting upon such reimbursement where there has been no judgment against their insureds. The basis for that holding lies in the wording of subsection 635(13) of the Alberta Insurance Act, which wording, slightly altered, is also found in the policy:

*"The insured must reimburse the insurer on demand in the amount that the insurer has paid by reason of the section and that it would not otherwise be liable to pay."*

The argument is that any amount the insurer voluntarily pays to settle a claim pursuant to the provisions of the policy is not an amount the insurer has had to pay "*by reason of this section*"

because the only amount that an insurer would have had to pay by reason of Section 635 is an amount recovered by way of judgment by a person who had a claim against an insured.

[74] I must say I have had difficulty construing Section 635(13) as it has been construed. In my view, what Section 635 does is give the injured third party direct recourse against the insurer. In the absence of Section 635, there would be no such recourse. Any amount that an insurer pays a third party claimant is therefore paid by reason of this direct recourse provision. The provision for a judgment is there simply to give the insurer the opportunity to contest the liability of the insured to the third party claimant or the opportunity to contest the amount of the third party's claim. The insured, of course, as the alleged tortfeasor, also has the opportunity to contest his own liability by virtue of our system of civil claims. But, in my view, a judgment against the insured, as provided for in Section 635(1), is no more a necessary prerequisite to reimbursement than is a judgment against the insurer, as provided for in Section 635(2). Nor is the insured's agreement to waive the requirement of a judgment a necessary prerequisite to reimbursement. One could certainly imagine circumstances where an uncooperative insured who was clearly liable for the amounts being claimed by a third party might unreasonably refuse to agree to waive the requirement of a judgment. Does the third party, in that circumstance, have to sue the insured and recover a judgment before he or she can be compensated? The answer to that question is clearly no. But the answer to the next question is less clear. Does the third party have to obtain a judgment against the insured before the insurer can be reimbursed in the circumstance described above where the insured's liability is clear and the insurer would not otherwise be required to indemnify the insured?

[75] My view is that there is no hard and fast rule requiring a judgment and that is why there has been conflicting authority on this issue from the time these direct recourse provisions were first enacted. That is also why, in the absence of any express statutory authority (except perhaps in Ontario), courts have been made exceptions in circumstances where the insured was considered to have waived the requirement of a judgment.

[76] However, while it is clear is that the Legislature, in granting third party claimants recourse to the insurance monies, wished to provide the insurer with the opportunity to contest the liability of the insured to the third party claimant, it is equally clear that there was no intention on the Legislature's part to take away the insured's right to contest his or her liability, which right exists separate and apart from any insurance legislation. In the case at bar, the insured, Michael Terrigno, immediately denied liability and told his parents' insurer (whom he had reason to suspect would be denying coverage in any event) that he would be handling the claim himself. The problem is that he didn't handle the claim himself.

[77] Within one month of the accident, on July 12, 2004, the insurance company wrote Mr. and Mrs. Terrigno as follows:

*"This letter is to advise that you are in violation of your policy. Your driver, Michael, has refused to cooperate with us and will not provide us with a statement of the circumstances of this loss...."*

*“We have no choice but to deny the claim being presented by the other parties, Gwayzar and Haji Mosa through their solicitor, Saddullah Jan of Shory Law Offices. We have directed Mr. Jan to deal directly with you....”*

*“Copies of the letters received from Mr. Jan’s are attached for your reference.”*

About a month later, on August 10, 2004, the Plaintiff insurance company wrote the Terrigno’s a second letter as follows:

*“We have not heard from you in regards to our letter of July 12, 2004.*

*“We have advised the claimant’s solicitor to deal directly with you for the damages sustained to their vehicle, and the injuries reported. You will be responsible for any and all payments, judgments, and/or legal costs that may be generated by this claim.*

*“I am closing my file.”*

A week or so later, instead of taking control of the matter, Michael Terrigno simply provided the insurer with a brief exculpatory statement, which I took as an indication that he was prepared to have the insurer deal with the third party claimants.

[78] The insurer then advised Michael Terrigno to go to court to get the liability issue settled. Otherwise, the insurer advised, it would be settling the third parties’ claims as it saw fit. Michael did nothing except urge his insurer to investigate the third parties’ claims more thoroughly. The insurer did so and about a year later, it wrote Mr. and Mrs. Terrigno advising that it had settled the third party injury and property damage claims and was demanding reimbursement.

[79] Some evidence of the basis on which the insurance company settled with the third party claimants was put before me; but, as counsel for Michael Terrigno argued, there was no real trial of the issue of Michael’s liability for the accident or, more importantly, of the issue of whether the third parties actually suffered personal injuries in the accident. On the evidence before me, it appeared that Michael was at fault; but that same evidence also suggested that the third parties’ personal injury claims were exaggerated and the compensation they received was excessive. The third party claimants were not called to give evidence. Michael Terrigno did give evidence. He testified that there was no way anyone could have been hurt in the accident. And that evidence was supported by the initial police report which indicated no injuries to the third party claimants. Yet the third parties’ personal injury claims were settled for \$14,400.00. There may have been good reason for the settlement; but in the face of Michael’s evidence and in the absence of satisfactory evidence as to why the settlement was made, I had some doubts about whether Michael, the person from whom the insurer now seeks reimbursement, received an opportunity to contest his liability.

[80] On the other hand, there was evidence that the insurer twice urged Michael to get the liability issue decided and twice warned Michael that if he didn’t, it would be settling the claims as it saw fit. I find that Michael was the author of his own misfortune in that he was less than cooperative

with the insurer and, more importantly, failed to seize the initiative himself to get the issue of his liability determined. Michael had every opportunity to contest his liability. He or his parents could have sued for the damages to their car and the issue of liability would have been determined. Or, he could have contacted the third parties' lawyers to get them to commence an action. Or he could have sought some other form of judicial determination.

[81] Admittedly, muddying the waters in this case was the fact that the insurer mistakenly believed it need not involve Michael or his parents in its settlement discussions with the third parties because it thought it was entitled to reimbursement pursuant to the property damage reimbursement endorsement which it misunderstood as giving it a contractual right to reimbursement, up to a limit of \$10,000.00, for any and all damages (personal and/or property damage) arising out of the accident. That misunderstanding caused the insurer to settle the claim, confident in the knowledge that it could claim such reimbursement pursuant to the endorsement. That confidence, of course, was misplaced; but, worse, it led the insurer to act somewhat unilaterally. But that unilateral action only took place after Michael had been repeatedly invited to get a determination of liability. If he didn't, the insurer advised Michael that it would go it alone.

[82] My decision must turn on whether or not the insured was either afforded an opportunity to contest his liability to the third parties or whether he waived it. The opportunity to contest liability, of course, can present itself in many ways. It can present itself in an action commenced by the third parties. Or it can present itself in an action commenced by the insureds against the third party driver for the damage to their vehicle. It might also have presented itself in tri-partite discussions leading to a settlement between the insured, the third parties claimants and the insurer. Alternatively, the opportunity to contest liability can be waived by the insured. The latter is what I believe the evidence in this case supports.

[83] In my view, necessary prerequisites to reimbursement of the insurer by the insured may include any one of the following:

- (a) a judgment against the insured by the third party claimant,
- (b) an admission of liability by the insured and an agreement on quantum,
- (c) an express delegation of authority to the insurer to settle the third party claims,
- (d) an acquiescence by the insured in having the insurer settle the third party claims as it sees fit, or
- (e) a waiver by the insured of his or her right to contest the third party claim.

The evidence in this case did not support the presence of (a), (b), or (c). It did however support an acquiescence or acceptance by the insured to have the insurer handle the claims. And it also supported a finding of a waiver by the insured of his right to contest the claim. That waiver

is to be found in the insured's inaction. Michael Terrigno was content to return to law school and let the insurer deal with the claim. So the defence of no judgment against the insured fails.

[84] There will therefore be judgment in favour of the insurer against its named insureds for the amount it paid out to settle the third party property damage claims pursuant to their agreement to reimburse those amounts and a judgment in favour of the insurer against the insureds' son for the amount it paid out to settle the third party personal injury claims. That is, there will be a judgment against Antoinetta and Rocco Terrigno for \$1,600.00 and a judgment against Michael Terrigno for \$14,400.00.

[85] Costs may be spoken to if not agreed upon.

Heard on the 11<sup>th</sup> day of July, 2007 and the 28<sup>th</sup> day of May, 2008.  
Dated at the City of Calgary, Alberta this 10<sup>th</sup> day of August, 2009.

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B.K. O'Ferrall  
A Judge of the Provincial Court of Alberta

**Appearances:**

Dennis A. McDermott, Q.C.  
for the Defendant

Michael D. Aasen  
for the Plaintiff