

CITATION: Lyons v. TD Home and Auto Insurance Co., 2021 ONSC 6877
COURT FILE NO.: CV-20-64678900CP
DATE: 20211015

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KEVIN LYONS, Plaintiff

– **AND** –

THE TORONTO-DOMINION BANK and TD HOME AND AUTO
INSURANCE COMPANY, Defendants

BEFORE: E.M. Morgan J.

COUNSEL: *Jordan Goldblatt, Alex Fidler-Wener, Sivan Tumarkin and Michael Gerhard*, for
the Plaintiff

Jeff Galway and Ann Christiansen, for the Defendants

HEARD: October 15, 2021

CERTIFICATION OF THRESHOLD ISSUE

[1] The parties have agreed to certify a single threshold common issue.

[2] This claim alleges that the Plaintiff and other similarly situated insureds under a travel insurance policy issued by the Defendant, TD Home and Auto Insurance Co. (“TD Insurance”) were wrongfully deprived of trip cancellation benefits.

[3] As a preliminary matter, counsel for the Defendants has confirmed to the Plaintiff’s satisfaction that it is TD Insurance, and not its parent company, The Toronto-Dominion Bank (“TD Bank”), that issued the insurance in question and that is the only proper Defendant. The Plaintiff and the Defendant have agreed to a dismissal the claim against TD Bank.

[4] Given that the insurance policy is issued by TD Insurance and that TD Bank appears to have no contractual obligations thereunder, this consent dismissal is legally appropriate. It does not prejudice the putative class members in any discernable way.

[5] The parties have also agreed to define the class in this matter as follows:

Any person in Canada insured under the terms of Policy TGV006 and the applicable Certificate of Insurance who, between March 16, 2018 and the date of certification had their claim for a Trip Cancellation Benefit under the Policy fully or partially denied based, wholly or in part, on the availability of non-monetary compensation such as credits, coupons, or vouchers.

[6] In his Statement of Claim, the Plaintiff defined the putative class as slightly broader terms than this. The original definition included not only persons who submitted claims for travel benefits to TD Insurance and were denied, but also those insureds who had never asserted any claim but were “entitled to assert a claim”.

[7] Plaintiff’s counsel submit that limiting the class to only those who have asserted a claim is appropriate under the circumstances. As they point out, those who have not actually had their claims denied have suffered no breach of their insurance policies, which would mean that a class that included persons “entitled to assert a claim” is unnecessarily broad and potentially legal untenable.

[8] I would further note that it has been well over a year since the first wave of the COVID pandemic necessitated the cancellation of travel for anyone insured under the policy in question. One can reasonably assume that those who could have made a claim have done so. If not, they are still able to make one or to bring an individual action if they so desire.

[9] The threshold common issue which the parties have agreed to have certified is:

Does TD travel insurance policy bearing Group Policy No. TGV006 (the “Policy”) and the applicable Certificate of Insurance, as contained within the class member’s Cardholder Agreement permit the denial, in whole or in part, of claims for Trip Cancellation Benefits for reimbursement of Eligible Trip Cancellation Expenses forfeited as a result of Non-Medical Covered Causes for Cancellation on account of the availability of non-monetary compensation, such as credits, coupons, or vouchers which the class member has received or which the class member was entitled to receive from a travel service provider?

[10] As framed, this proposed common issue is essentially a question of contract interpretation. By its nature it requires a minimal evidentiary base in order for it to be put squarely before the court.

[11] Counsel for both parties have described this single common issue as a threshold question for the claim. If the answer is that TD Insurance was permitted under the travel insurance policy in issue to deny claims for trip cancellation benefits as a result of non-medical covered causes for cancellation as set out in the stated question, then the class’ claim will be at an end. On the other hand, if the answer is that TD Insurance was not permitted to deny such claims, there will be follow-up questions, potentially in the form of another series of common issues.

[12] The agreed-upon procedure therefore envisions the possibility of more than one common issues trial or common issues summary judgment motion. I commented to counsel at the hearing that this strikes me as unusual; indeed, neither counsel nor I could think of another class action that has proceeded in that way (although there may be some that do not come immediately to mind). My instinctive concern with the proposed procedure is that it seems cumbersome, at least at first blush. A common issues trial is supposed to streamline the action, and not be an opening to even more common issues trials.

[13] On further reflection, however, I see the logic and appeal of proceeding in the way that the parties have proposed. There is nothing to be gained by requiring the parties to compile the evidentiary record that would be needed to answer the follow-up questions if the answer to the threshold question puts an end to the claim. Under the circumstances, the threshold common issue is more akin to a Rule 21 motion than it is to a common issues trial.

[14] In addressing the agreed-upon threshold common issue, the Court will be required to interpret the contract without considering the circumstances of any claim. While this procedure, unlike a Rule 21 motion, will allow the parties to submit some evidence if they and their counsel deem it necessary, they will not have to do so. The matter can potentially be addressed through legal argument and reference to documents that are mentioned in, and effectively form part of, the Statement of Claim.

[15] Accordingly, although certifying a single common issue with the prospect of further common issues down the road is unusual, it is a helpful way to proceed in this case.

[16] The class is hereby defined as set out in paragraph 5 above, and the common issue is hereby certified as set out in paragraph 9 above. The Plaintiff is the representative plaintiff and Plaintiff's counsel is appointed as class counsel.

[17] The claim against TD Bank is dismissed without costs and with prejudice.

[18] There will be an Order to go as submitted by counsel.



Morgan J.

Date: October 15, 2021