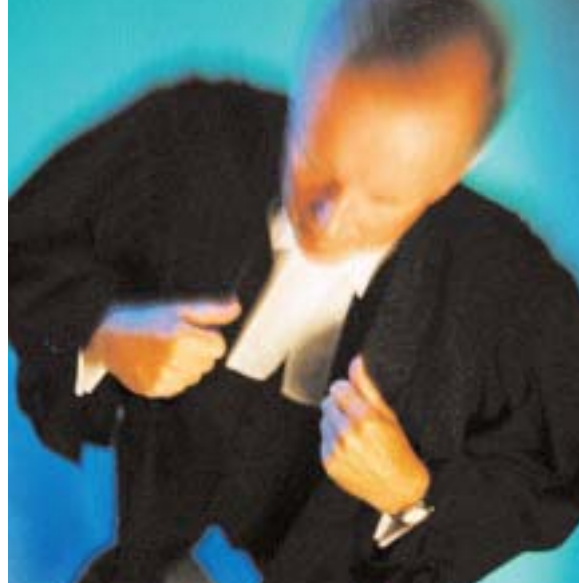


## ACTION AGAINST ALBERTA INSURERS DISMISSED



LITIGATION & INSURANCE LEGAL ALERT

FEB, 2003

### \$200,000,000 REPRESENTATIVE ACTION AGAINST ALBERTA INSURERS DISMISSED

On February 7, 2003, the Honourable Justice John D. Rooke rendered a decision in *Pauli et al. v. ACE INA Insurance et al.* 2003 ABQB 107, which has the effect of dismissing a representative claim against all Alberta insurers. The case involved the general insurance industry practice of paying insureds the actual cash value of their vehicle, less their deductible, in exchange for which the salvage rights in the vehicle vest in the insurer.

*Pauli* has its origins in an apparent conflict between the provisions of the Statutory Conditions that form a part of every policy of Automobile Insurance issued in the Province of Alberta, the section of the *Insurance Act*, R.S.A. 2000, c. I-3 that permits a deductible, and the Deductible Clause that is found in the Alberta Standard Automobile Policy. Specifically, although section 638(2)(b) of the *Act*, and the Standard Automobile Policy, expressly allow and contemplate the routine discounting of claims by the amount of the insured's deductible, if any, Statutory Condition 4(7) states that "if the insurer exercises the option to replace the automobile, or pays the actual cash value of the automobile, the salvage, if any, shall vest in the insurer". Counsel for *Pauli* relied on the terms of this Statutory Condition to support the proposition that insurers have wrongly subtracted the deductible from pay-outs in cases of "written-off" vehicles where the salvage vested in the insurer. As compensation, *Pauli* sought a return of these deductibles, and punitive damages, on behalf of all Albertans who have paid a deductible in such cases.

The issues in *Pauli* were before the Alberta Courts a quarter-century ago in *Mueller v. Western Union Insurance Company*, [1974] 5 W.W.R. 530, at which time it was held if an insurer elected to take the salvage rights to a written-off vehicle, they were required to pay the insured the actual cash value of the vehicle, without subtracting a deductible. Although leave to appeal *Mueller* was granted, the appeal was not pursued, and for some time insurance texts have commented that, as routine practice, insurers continued to retain the deductible in such cases.

*Pauli* is the inevitable response to the Supreme Court of Canada's 2001 refusal to hear an appeal from the Ontario Court of Appeal's decision in *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*, [2001] O.J. No. 2312 – a case that examined the same issues as *Pauli* and *Mueller*, only under the prevailing Ontario legislation. The Ontario Court held that the terms of the Statutory Condition that require payment of the "actual cash value" could not reasonably be read as meaning the "actual cash value minus any deductible", and allowed the action to proceed. *McNaughton* set the stage for *Pauli*, as it included a review of *Mueller*, and agreed with the support for *Mueller* that is found in standard insurance texts.

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Notwithstanding these precedents, the Alberta Court in *Pauli* agreed with the accepted insurance industry practice, and held that principles of statutory interpretation support the contention that Statutory Condition 4(7) is *subject* to the deductible provisions in section 638(2)(b) of the *Insurance Act*. This finding is in accordance with the introduction to the Statutory Conditions, which states:

614(1) *Subject to* sections 610(3), 615 and 638(2),

(a) the conditions set out in this section are statutory conditions and are deemed to be part of every contract and must be printed in every policy with the heading “Statutory Conditions”, and

(b) no variation or omission of or addition to a statutory condition is binding on the insured.

Although there is potential for an appeal of this decision, for the time being the *Pauli* claim has been dismissed, with costs, and the inconsistencies between *Mueller, McNaughton*, and generally accepted insurance industry practices, have been resolved. Parlee McLaws LLP is continuing to monitor developments in this case, and future updates will be published as required.

#### **THE FINE PRINT**

This legal alert is intended to provide general information concerning developments in the law and is not intended to provide legal advice in respect of any particular situation.