Who is the rightful owner of the car? About the criticism of a Supreme Court judgment on insurable interest

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The doctrine of insurable interest is reflected in the Insurance Contracts Act, according to which indemnification may be paid to the insured for every potential loss covered by the insurance policy. The concept of insurable interest is of material importance when determining who has the right to obtain insurance coverage. In this context, an analysis of the ownership of the car may – as a recent Supreme Court case illustrates – be essential.

Car insurance can cover many sources of potential loss. Insurance against third party loss is a compulsory statutory minimum in Sweden ("traffic insurance").[1] The main purpose of traffic insurance is to cover the owner's potential liability against other road-users.

Traffic insurance covers loss other than damage caused to the insured vehicle itself. If the owner of the vehicle wants insurance against loss resulting from damage which he may cause to his own vehicle he must take out an additional vehicle insurance for this purpose.

If a car is bought pursuant to a credit arrangement whereby the seller remains the legal owner of the car (Sw. *återtagandeförbehåll* or *äganderättsförbehåll*), Section 2 of the Motor Traffic Damage Act (Sw. *Trafikskadelagen, SFS 1975:1410*) provides that it is the purchaser/user rather than the seller/owner of the car that must take out traffic insurance. As regards traffic insurance, it is irrelevant who has taken out the insurance since it covers damage which the vehicle has caused other road-users.

Supplementary vehicle insurance is however structured differently, since it insures against loss to property of the insured. Such insurance only covers the insurable interest.

As in all property damage insurance, the insurance company calculates the risk and determines the premium on the basis of various different factors such as the car brand, year's model, the age of the insured, mileage per year and the place where the car is used. However, a frequent problem for insurance companies is that the car is owned and driven by someone other than the person for which the risk premium is calculated.

In fact, it is not unusual that a person in a certain (low) category of risk takes out the insurance, while the car is owned and principally driven by a person belonging to a higher risk category. This is of course the reason why the insurance companies are trying to narrow the terms of policy.

Insurance companies revise the definition of insurable interest in the policy conditions

In an appeal court case from 2002[2] a man had purchased a car from a dealer and agreed to pay in installments. His sister had lent him the down payment. Both the man and his sister had paid some of the installments. The man then claimed that the car had been stolen and sought compensation from his insurer.

The insurer denied compensation on the basis that the man was not the real owner of the car (Sw. *verklig ägare*) or its principal user (Sw. *huvudsaklig brukare*). In the policy under the heading "Who does the insurance cover" it was stated that the insurance "covers the policyholder's interest".

The District Court found that there was no support in the policy to the effect that 'insured interest' required that the insured was the real owner and principal user of the car. The District Court further noted that any legal interest which can be estimated in money may be insured and that the insurable interest is essentially an economic concept.

The term implies that the person suffering financial loss due to damage on insured property is entitled to compensation, irrespective of his right to the property. Since the man alone had signed the installment contract for the car and thus alone had to meet the obligations under the contract, the District Court found that the man had an economic interest covered by the insurance. In this case, however, the District Court concluded that the man was not entitled to any compensation because he had not been able to prove that the car had indeed been stolen. The Court of Appeal shared the District Court's view and also concluded that the man had a financial, insurable interest. However, as in the District Court, the man was not able to show that an insured event had occurred.

Perhaps it was this ruling that prompted the Swedish insurance companies, almost without

exception, to revise their conditions of vehicle insurance. Today they only cover the policyholder's interest as "real owner" and "user" of the vehicle. However, it is not evident from the policy conditions what is actually meant by these concepts.

The concept of ownership in Swedish law

In Swedish law there is no definition of the concept of "owner" or "ownership". These terms are instead used with a functionalistic approach, meaning that the identification of the owner will be decided on a case by case basis depending on the situation.[3] Ownership is not an independent concept but a question of what rights exist between people with different relationships to a certain object. While in Central Europe, it is common that ownership is transferred in every respect from a seller to a purchaser at a certain time, the Nordic countries have ever since the turn of the previous century perceived ownership as something determined by the relationship to other parties. Ownership is seen as an expression of who should be considered to have the best right to a certain object in relation to a certain third party.

As mentioned above, when cars are purchased on credit in Sweden, the seller as a rule remains the legal owner according to the sales contract (retention of title). Retention of title is a security right (Sw. *säkerhetsrätt*) which means that the seller is entitled to repossess the goods if the purchaser fails to pay the price, and further that the purchaser is not entitled to sell until the purchase price is fully paid.

Consequently, determining who is the "owner" or, in the context of vehicle insurance, the "real owner", should be a matter of analysing what rights obtain between the seller/owner, the purchaser/user and third parties.

As discussed above, the concept of "insurable interest" does not mean that the policyholder must necessarily be the real owner of the car. But what would the consequences be if a car, sold with a retention of title clause, is damaged and the purchaser/user claims compensation from his insurance company, and where the policy only covers the policyholder's interest as "real owner" and "user" of the vehicle?

The Supreme Court

The Supreme Court granted leave to appeal in a case involving the question asked above. The judgment[4] was rendered in April 2010.

In summary, the facts were the following. In March 2003 the claimant bought a car which had previously been acquired by the seller on credit from BMW with a right for BMW to terminate the loan and demand immediate payment of the full balance of the debt, or repossess the car in case of lack of payment. When the seller sold the car to the claimant, it had not been fully paid for to BMW. The seller warranted, however, that she would immediately after the receipt of the purchase price from the claimant pay the remaining debt to BMW. Contrary to the seller's promise to the claimant and her agreement with BMW, the seller however failed to pay the remaining installments. In December 2003, BMW terminated the credit and brought an action against the claimant for the car. The claimant objected to the claim and argued, *inter alia*, that the acquisition had been made in good faith. In January 2005, the District Court ordered the claimant to hand over the car to BMW without ransom payment or, if the car was not intact, an amount of SKr171,000. The Court of Appeal confirmed the ruling of the District Court, which became final on November 29, 2005 when the Supreme Court denied leave to appeal.

The car was destroyed in a fire on August 15, 2005. At the time of the fire, the car was insured against property damage including fire. The claimant's claim on the policy was declined by the insurer. In its defence, the insurer argued that the claimant was not the real owner of the car pursuant to the terms of insurance, and that the loss was not recoverable. The policy which the insurer relied upon provided that "the insurance concerns the insured's interest". However, the policy went on to state that the insurance was valid only "if the insured is the real owner of the car and principal user. If you bought the car on hire purchase or credit, we may provide compensation to the seller up to his remaining claim."

At the request of the insurer, who offered to refund the insurance premium, the District Court decided to address only the question whether the claimant at the time of fire was the beneficial owner within the meaning of the terms of insurance. Both the District Court and the Court of Appeal concluded that the claimant had not acquired the car in good faith. The Court of Appeal further found that the claimant could not be considered as the real owner of the car within the meaning of the policy. It reached this conclusion because the car, due to the retention of title clause in the contract with BMW, was owned by BMW at the time of the fire. Similar to the District Court, the Court of Appeal considered that neither the fact that the claimant was registered as the owner in the Swedish Vehicle Registry, nor that it was the insurer that drafted the (as alleged by the claimant) uncertain or unfair policy, gave the claimant a right to coverage.

The Supreme Court granted leave to appeal on the question whether the claimant, provided that he

had not acted in good faith when he bought the car, should nevertheless be considered to be the owner of the car within the meaning of the policy. The Supreme Court acknowledged that the fact that the claimant was the registered owner of the car in the Swedish Vehicle Registry at the time of loss was undisputed in the case. As registered owner, he should also be presumed to have been the vehicle's real owner. In the case it was further uncontested that he was the primary user of the car and that he had paid the correct premium in relation to the insured risk. The Supreme Court noted that "[t]hese facts indicate that the purchaser shall be deemed to be the real owner of the car within the meaning of the policy."[5]

The Supreme Court then proceeded to address the question of whether the claimant had such an interest in the car at the time of the loss that he should be regarded as the real owner of the car. Given that the claimant was aware of the liability *vis-à-vis* BMW, but had failed to assure himself that the seller had paid the debt to BMW, the Supreme Court concluded that the claimant did not have such an insurable interest in the car that he, within the meaning of the policy, should be deemed to be the real owner at the time of the loss.

Supreme Court Justice criticises his colleagues

It did not take long before the Supreme Court's ruling was criticised. Later the same year, Supreme Court Justice Håstad[6] heavily criticised the ruling by his Supreme Court Justice colleagues. Justice Håstad participated in the decision to grant leave to appeal in the Supreme Court and made no secret of the fact that he had a different outcome in mind.

The District Court and the Court of Appeal also received their fair share of criticism. Justice Håstad stated the following: "When the lower courts concluded that [the claimant] was not the owner because BMW had a proprietary right (Sw. *separationsrätt*) to the car in relation to [the claimant] and [the claimant] was not allowed to dispose of the car and therefore [the claimant] did not make an acquisition in good faith of the car, it was a one-sided and incomplete judgment."[7] Justice Håstad further pointed out that a seller who, pursuant to a credit purchase agreement, has retained title to the sold goods not only has a better claim to the goods than the purchaser, but also a better claim to the goods than the other creditors in the purchaser's bankruptcy. Nevertheless, if the goods are worth more than the remaining debt, the surplus value will remain with the purchaser. Further, the seller only has a right to take back the goods if he compensates the purchaser for the surplus value.

In view of this, Justice Håstad concluded that a seller in fact only has a security interest (Sw. *säkerhetsrätt*) in the goods, while the purchaser has a conditional unrestricted right (i.e., ownership). Hence, the claimant should be considered as the "real owner" of the car for insurance purposes.

Concluding remarks

The referenced Supreme Court case has hardly clarified the Swedish law on insurable interest. It remains difficult for the holder of an insurance policy to determine whether the insurance will cover loss relating to property in which the insured has an interest other than full ownership. The problem is widespread. Not only does it affect all those who bought their car on credit with a retention of title clause. It also affects every kind of moveable property bought on credit and where the sold property secures the purchaser's obligation to pay by way of a retention of title clause.

In the case discussed above, the claimant was no doubt under a duty to return the car to BMW. Nevertheless, if the value of the car was higher than the secured debt to BMW, he had a right to that surplus. Should not such an interest qualify as an insurable interest? It is quite possible that the suspicion of insurance fraud – that the claimant had set fire to the car himself – influenced the decision of the Supreme Court. Justice Håstad concludes his critique with a hefty swipe at his peers, rarely seen in Swedish legal debate:

"One can only hope that [the insurer] refrains from invoking the Supreme Court ruling against [the claimant] and compensates [the claimant] for his costs of the case and let [the claimant's] right to compensation be dependent on judicial review of whether insurance fraud is at hand or not. Otherwise, the Swedish Financial Supervisory Authority (Sw. *Finansinspektionen*) should intervene."[8]

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Notes:

1 More information on traffic insurance at the Swedish Transport Agency (Swe. *Transportstyrelsen*) website: http://www.transportstyrelsen.se/en/road/Vehicles/Compulsory-road-traffic-insurance/

2 The Svea Court of Appeal, case T 533-01.

3 Hessler, Henrik, Allmän sakrätt, 1973, p. 17.

4 The Supreme Court of Sweden, case reported in NJA 2010 p. 227.

5 The Supreme Court of Sweden, case reported in NJA 2010 p. 227, p. 7.

6 Torgny Håstad retired from the Supreme Court in January 2011.

7 Håstad, Torgny, Festskrift till Torkel Gregow, 2010, p. 130.

8 *Ibid*. p. 133.

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