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"ANTI-SUBROGATION RULE" REAFFIRMED

BACKGROUND

The decision of the Alberta Court of Appeal in *Condominium Corp. No. 9813678 v. Statesman Corp.*, 2007 ABCA 216, serves to highlight the common law underlying the waiver of subrogation clause that is commonly found in all-risk insurance policies. It also emphasizes the reluctance of the courts to restrict or limit the scope of such waivers.

Here, the insurer for the Condominium Corporation brought a subrogated claim against the condominium's developer, after two of the four condominium buildings were destroyed by a fire allegedly caused by the negligence of the developer's contractor during the course of construction. The developer was also the owner of two condominium units in the buildings that had been destroyed, and was thereby a named insured in an all-risk insurance policy taken out by the Condominium Corporation. That policy contained an express waiver of subrogation for losses caused by the negligence of individual unit owners.

The Alberta Court of Queen's Bench determined that the developer was not entitled to the benefit of the waiver of subrogation contained in the insurance policy because the subrogation clause applied to the developer in its capacity as a unit owner, but not in its capacity as a developer/contractor engaged in the construction of the condominium buildings.

The developer appealed. The Alberta Court of Appeal allowed the appeal, finding that the developer was entitled to the benefit of the waiver.

THE RULING

The Court of Appeal began its consideration of the issue by acknowledging the well settled law that an insurer is not permitted to sue any of its insureds for losses paid out under the same policy no matter how negligent the insureds were in causing the loss. The insurer argued that the Court should find a controversial exception to that well settled law.

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The essence of the insurer's submission was that the all-risk insurance in place was taken out for the benefit of the condominium residents and not taken out as construction risk insurance by the developer. Because the developer was not acting in its capacity as a resident when it allegedly caused the loss, the insurer should be allowed to subrogate. The insurer also argued that it was more or less a coincidence that the developer happened to be both a named insured as well as the person who was building the adjacent condominium where the fire started

The Court noted that the traditional rule barring an insurer from suing its own insured occasionally yielded unpredictable results (such as the one in this case) but also recognized that insurers are free to negotiate exceptions to coverage or subrogation waiver clauses before they issue policies. The insurer was found to have no right to subrogate against its insured for several reasons:

1) while there may be individual fact situations where the anti-subrogation rule would be unfair, as a whole, insurers and insureds would be better off without the exception to the rule;

2) potential for bad faith against an insured during the claims handling process;

3) an insurer gets no right of subrogation until it has fully indemnified its insured. The Court wryly asked, "How can a cheque stapled to a bigger statement of claim *ever* be full indemnity?"; and

4) to allow an insurer to sue a co-insured by way of subrogation would likely be futile and circular and would fly in the face of the fact that the insurer has contracted to take the risk in question onto itself and from the insureds.

PRACTICAL IMPLICATIONS FOR INSURERS

This decision demonstrates that courts will be very reluctant to allow exceptions to waivers of subrogation unless such exceptions are entirely in keeping with the principles behind subrogation. It also highlights the real constraints on the ability of a property insurer to subrogate against any named insured even where that insured's liability arises in an entirely different context than the basis on which the insurance was placed.

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