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INSURE UPDATES

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Insurer Can Commence Power of Sale Proceeding By Way of Subrogation on Behalf of Insured Mortgagee

By *Renata Antoniuk*, DWF Toronto, Email: rantoniuk@dolden.com

Mikel Pearce and Brett Stephenson of DWF's Toronto office were recently successful in the Ontario Court of Appeal in responding to an appeal in *Hanson v Totten Insurance Group Inc.*[1]

In Hansen, the Ontario Court of Appeal held that if a mortgagor fails to secure property insurance, a mortgagee can obtain insurance to protect its own interest. Further, where a loss occurs and an insurer provides payment under an insurance policy, the insurer is then subrogated to all rights of recovery of the insured and may bring an action to enforce such rights.

The appellants, Nicola Anne Hanson and Paul Hanson (the "Hansons") obtained a private mortgage from the Respondents, John Malac and Lynne Malac (the "Malacs"), in the sum of $250,000. In September 2010, the Hansons' property insurance was cancelled and they were unable to obtain property insurance.

The Malacs were concerned about their interest as mortgagees and obtained a policy of insurance in their own names on the

[1] 2018 ONCA 446

property owned by the Hansons (the "Policy"). The Policy only protected the interest of the Malacs as mortgagees.

Following a fire loss, the insurer paid the Malacs their mortgage loss and claimed, through subrogation, against the Hansons. The Hansons brought a motion for summary judgment in which they sought a determination as to whether the Policy covered their interest in the property so that the payment on the Policy extinguished the mortgage debt.

The main issues on appeal were:

1. whether the Policy also covered the Hansons' interest in the property; and
2. whether the insurer was entitled to exercise its right of subrogation having paid out the mortgagees' interest.

The Court of Appeal held that the Policy did not cover the Hansons' interest in the property.

The Court of Appeal held that Standard Charge Term 16 of the mortgage, which pertained to the obligation to insure, cannot be interpreted to require a mortgagee to obtain insurance that would cover the interests of both the mortgagor and mortgagee when a mortgagor does not, for whatever reason, insure the property. Although the Hansons were named as Insureds on the Policy, the Court of Appeal found that this was not determinative of the issue, as the Policy specifically stated that the sum insured was in the interest of the names insured "*in their capacity as Mortgagee*".

The Court of Appeal found that since the insurer paid out the Malacs' interest, it was entitled to exercise its right of subrogation. As the summary judgment was dismissed in its entirety, there was no impediment to the insurer proceeding with its power of sale proceeding.

Take Away

This decision highlights the rights of insurers to subrogate when a property insurance policy is issued to mortgagees. Following a loss, an insurer will be entitled to exercise its right of subrogation if it provides payment in accordance with the policy. Where the insured is a mortgagee, but not an owner, the right of subrogation

will include proceeding with a power of sale if the mortgage is in default.

Insurer Can Deny Landlord Coverage for Tenant's Marijuana Production

By *Renata Antoniuk*, DWF Toronto, Email: rantoniuk@dolden.com and by *Chet Wydrzynski*, DWF Toronto, Email: cwydrzynski@dolden.com

Can a landlord be denied coverage by an insurer due to a tenant's illegal marijuana production that the landlord had no knowledge of? In Saskatchewan, the Queen's Bench affirmatively answered the foregoing and upheld an insurer's drug exclusion.

In *Carteri v Saskatchewan Mutual Insurance Company*[1], ("*Carteri*"), a fire and explosion occurred at rental premises in 2009 due to the tenants' illegal efforts to produce a substance derived from marijuana resin.

The landlord plaintiffs purchased insurance for their rental properties in 2000, and renewed the policy annually thereafter. The November 2003 and November 2004 renewal forms contained wording that gave notice to the plaintiffs that the policy did not insure property used for the "*illegal cultivating, harvesting, processing, manufacturing…of marijuana…*". The policy also contained the following exclusion:

> *We do not insure:*
>
> *15. dwellings, outbuildings, or personal property…used…for the cultivation, harvesting, processing, manufacture, distribution or sale of marijuana…*

The landlords unsuccessfully argued that the above wording, or its operation, was unjust and unreasonable, and as a result, could not bind them.

[1] 2018 SKQB 150

The Court relied on *Pietrangelo v Gore Mutual Insurance Company*[2], ("*Pietrangelo*"). In *Pietrangelo*, the insurer denied coverage to a landlord based on a drug exclusion after a fire was caused by a tenant illegally attempting to make marijuana resin. The landlord was unaware of the tenant's activities. The landlord was unsuccessful in arguing that innocent landlords should not be denied coverage because of the guilt of their tenants. The Court in *Pietrangelo* held that exclusionary clauses are by their very nature unfair and fairness cannot be the test for determining whether an exclusion should be binding on an insured.

Ultimately, the Court in *Carteri* found that the exclusion was binding on the landlords and dismissed the action against the insurer.

In other jurisdictions, such as British Columbia, the insurance legislation permits innocent insureds to maintain their entitlement to coverage under an insurance policy despite the criminal or intentional acts of a co-insured or another person. Similar legislative amendments have been proposed in Saskatchewan and Ontario.

Take Away

Carteri reinforces the position that insurers can rely upon exclusions to deny coverage for property losses in houses being used for illegal marijuana production.

Currently, individuals with the requisite licenses are permitted to grow medical marijuana in Canada. It is anticipated that later this year the adult public will be permitted to grow marijuana recreationally, subject to certain conditions. It is an open question as to whether courts will uphold exclusions denying coverage for losses involving legal marijuana-related activities. However, based on the reasoning in *Carteri* and *Pietrangelo*, we see no reason that exclusions with respect to legal marijuana production will not be upheld.

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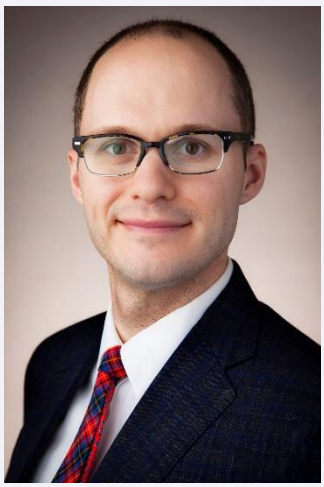
[2] 2010 ONSC 568, aff'd 2011 ONCA 162, leave to appeal ref'd [2011] SCCA No 185



Overlapping and Concurrent Policies of Insurance

By *Robert Smith*, DWF Toronto, Email: rsmith@dolden.com

The decision in *Aviva Insurance Company and Sanjay Patel v. Intact Insurance Company*[1], dealt with the situation where two insurance policies respond to some, but not all of the allegations made against the insured. This case reiterates the test to apply to determine if two insurance policies offer true concurrent coverage or overlapping coverage.

Sanjay Patel hosted a jam session for his musician friends at the office of Lakehead Engineering, a company that Patel owned. The office building was owned by 1062220 Ontario Inc., another corporation wholly owned by Mr. Patel. Royal & SunAlliance insured Lakehead, Aviva insured 1062220 and Intact insured Mr. Patel personally through his homeowners' insurance policy.

Unfortunately, one of Patel's guests, Stephen Novak, fell off a ladder during the jam session and sustained serious injuries. Mr. Novak commenced an action where he claimed against Lakehead and 1062220 as the occupiers of the premises and against Patel in his personal capacity.

Aviva and RSA defended Patel only in his corporate capacities and reserved their rights with respect to liability that was found against Patel personally. Intact did not defend Patel and relied on its "*other insurance*" clause. Aviva and RSA paid for separate defence counsel for Patel in both of his corporate capacities.

The matter ultimately settled for an equal three-way liability split: 1/3 allocation to the engineering firm, 1/3 allocation to the building owner and 1/3 allocation to Mr. Patel personally. Aviva then brought an application to compel Intact to contribute one-third to the costs of defending and ultimately settling the liability claim against Mr. Patel, who was insured by both Aviva and Intact.

The Court addressed the issue of whether the Aviva and Intact policies were overlapping policies (which would trigger the

[1] 2018 ONSC 238

"*other insurance*" clause), or concurrent policies, meaning they cover different aspects of the same claim.

The Court referred to the Supreme Court of Canada's decision in *Family Insurance Corp. v. Lombard*, 2002 SCC 48, which established the test for determining when insurance policies are truly overlapping. Policies will overlap when they comprise the same subject matter, protect the same insured against the same perils, must be in force at the time of the loss, must be legal contracts of insurance, and must not contain stipulations that exclude them from contributing.

In applying the test in *Family Insurance* case, the Court held that the Intact policy and the Aviva policy insured different entities for different risks and therefore could not be stacked atop one another. Accordingly, both policies of insurance applied.

Take away

By denying coverage to an insured, the insurer loses control over the litigation and therefore cannot not control the amount of risk it ultimately has to bear. The lesson for claims handlers and defence lawyers is to make sure to apply the *Family Insurance* test to see if the competing policies are truly overlapping, which could turn into an excess policy, or if they are merely concurrent, which will not.

Property Owners Not "Occupiers" of Municipal Sidewalks

By *Amelia Staunton*, DWF Vancouver, Email: astaunton@dolden.com and *Cayleigh Handford* (Student), DWF Vancouver, Email: chandford@dolden.com

A recent British Columbia Supreme Court decision, *Scheck v. Parkdale Place Housing Society and The Corporation of the District of Summerland*, dismissed a law suit against a property owner, ruling it owed no duty, statutory or common law, to an injured plaintiff who allegedly slipped on snow and ice on a city sidewalk adjacent to its property.[1]

[1] 2018 BCSC 938

Parkdale Place Housing Society ("Parkdale"), brought an application wherein it argued that it was not an "occupier" per the definition in section 1 of the *Occupiers Liability Act* (the "*Act*").[2]

The *Act* defines an "occupier" as a person who (a) is in physical possession of the premises, or (b) has responsibility for, and control over, the condition of the premises, the activities conducted on those premises and the persons allowed to enter those premises.

The court agreed with Parkdale that it neither had physical control over the sidewalk in question, nor did it have responsibility for and control over the condition of the sidewalk, and is therefore not an "occupier" of the sidewalk as per the *Act.*

Ultimately, the court adopted the reasoning of an Ontario Court of Appeal decision, *Bongiardina v. York (Regional Municipality)* ("*Bongiardina*").[3] In *Bongiardina,* the court asserted that where a homeowner fulfills his or her duty to maintain their own property in a reasonable condition so that persons are not injured on it, "*he or she should be free from liability for injuries arising from failure to maintain municipally owned streets and sidewalks*."[4]

Thus, the *Bongiardina* court ruled that in Ontario, a municipal bylaw imposing an obligation on property owners to clear snow and ice from municipal sidewalks, such as the one in *Scheck*, does not make the property owners "occupiers" of the sidewalk, nor does it impose liability at common law for injuries sustained by pedestrians who fell because of inadequate snow clearing.

By following *Bongiardina*, the BC Supreme Court overturned a British Columbia precedent that, instead, would have imposed liability under the old common law.

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[2] R.S.B.C. 1996, c. 337.
[3] (2000), 189 D.L.R. (4TH) 658, 49 o.r. (3d) 641 (C.A.).
[4] *Scheck, supra,* note 1 at para 45, at para 19 in *Bongiardina, supra* note 3.

Take Away

Property owners can now rely on this case for the proposition that they are neither occupiers nor responsible in negligence for the maintenance of the sidewalk outside their premises. A property owner may now say that they are not liable for any injuries to passersby, or to invitees, as a result of an unmaintained municipal sidewalk.

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