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## **BCCA UPHOLDS SUBROGATION BAR IN CLAIM AGAINST WAREHOUSE**

### **Richards Buell Sutton Insurance Law Newsletter**

By RBS Lawyers

#### **INTRODUCTION**

In the recent case of *Kruger Products Limited v. First Choice Logistics Inc.*, 2013 BCCA 3 the British Columbia Court of Appeal affirmed the “tort immunity” subrogation bar defence to entities that are the beneficiaries of covenants to insure. In particular, *Kruger* provides assistance in assessing whether there will be tort immunity in regard to claims made against a warehouse and other beneficiaries of covenants to insure.

#### **FACTUAL BACKGROUND**

On July 31, 2001 fire destroyed a warehouse operated by First Choice Logistics Inc. (“FCL”) containing the paper products of Kruger Products Limited (known by its prior business name of “Scott Paper”) stored pursuant to a warehousing agreement (the “Warehousing Agreement”).

Scott Paper commenced an action alleging FCL breached the express or implied terms of the Warehousing Agreement, its common law duty of care, its duty of care as a warehouse under the *Warehouse Receipt Act*, R.S.B.C. 1996, c. 481 and its duty of care as an occupier of the warehouse under the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337.

Among other defences, FCL asserted that the Warehousing Agreement required that Scott Paper obtain liability and property insurance naming FCL as an additional insured thereon and that such a term bars Scott Paper from claiming against FCL to the extent of the indemnity which would have been provided by such insurance if it had been placed.

The trial judge found that Scott Paper’s claim against FCL was not barred by tort immunity because, *inter alia*, FCL was not required by the Warehousing Agreement to pay and had not paid any of Scott Paper’s insurance costs. Additionally, there was no language in the Warehousing Agreement which suggested an intent that Scott Paper’s property insurance should benefit FCL. Finally, the trial judge determined there were broad policy considerations that avoided the application of the tort immunity doctrine.

#### **THE RULING**





The court of appeal overturned the trial judge's finding on tort immunity on the basis that the Warehousing Agreement contained a term that required Scott Paper to maintain "insurance of its property and inventory within the warehouse" and to name FCL as an additional insured under this "primary coverage".

The court stated that the insertion of such a covenant on the part of a bailor or landlord is generally intended for the benefit of the bailee or tenant and it will found a subrogation bar unless there is wording inconsistent with such a result in the agreement. In *Kruger* there was no inconsistent wording in the Warehousing Agreement. In fact, the acknowledgement that the said insurance would respond as primary coverage strengthened the case for tort immunity.

The court explained that the beneficiary of the covenant to insure, in this case FCL, negotiated for this benefit when entering into the Warehousing Agreement and that allowing subrogation to proceed would unfairly strip FCL of this bargained for benefit. There need not be evidence that FCL paid for the insurance directly or that the covenant to insure was explicitly for the benefit of FCL.

The court also found that FCL, as bailee, maintained an insurable interest in the property "because of their special relationship with the property entailing the possibility of liability." It is notable that the court also determined that an insurable interest in the property need not be established in order to invoke tort immunity. Finally, the court did not accept the subrogating insurer's policy argument that invoking tort immunity would impair a warehouse's standard of care as derived through tort, contract or statute.

#### **PRACTICAL CONSIDERATIONS FOR INSURERS**

*Kruger* provides us with a number of guiding principles for assessing at an early stage whether tort immunity will bar a subrogated claim:

1. The existence of tort immunity will be determined by looking at the contract between the parties. The contract between the parties may be as simple as a single written document or may include numerous pieces of correspondence and oral agreements;
2. In circumstances where a potential plaintiff (usually a landlord, chattel owner or lessor) covenants to obtain insurance, the defendant (the respective tenant, warehouse or lessee) will benefit from such insurance, in the absence of language to the contrary in the contract. This benefit results in subrogated proceedings against the defendant being barred;
3. Establishing that the defendant had an insurable interest in the property is not necessary; and
4. There is no conflict between a general covenant to indemnify or any requisite standard of care contractual or statutory language and the doctrine of tort immunity derived from covenants to insure.

