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EXCLUSION CLAUSE NOT OPERATING: CONSIDER A STATUTORY CONDITION

Richards Buell Sutton's Insurance Newsletter

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"Vacancy", as defined in the context of an exclusion clause, was not established however, a Material Change justified voiding certain portions of the policy in *Peebles* v. *The Wawanesa Mutual Insurance Company*, 2012 BCSC 590. The case is an important reminder that statutory conditions can operate to void coverage even when an exclusion clause is not available. It is also a reminder that the failure to return the unused portion of a paid premium in a policy voiding situation is not always a bar to voiding.

Factual Background

The insureds purchased and insured a house in Surrey, BC (the "Property"). One of the insureds, Mr. Quinn, began living full time at the Property with only a few furnishings and minimal personal effects. This continued for approximately 1.5 years. In late 2007 Quinn met a woman who lived in Maple Ridge and began spending a great deal of time at her home. Between staying at his girlfriend's home and the time he spent out of province for work, Quinn's occupancy of the Property was limited to approximately one weekend per month for the next four to five months. The co-insured Peebles, who never lived at the Property, was aware of Quinn's living circumstances and accordingly inspected the Property about three times per week to check on the mail, heat, and other items. It was notable that Quinn's romantic relationship was "on-and-off" and that because of this, and the swimming pool at the Property, he was of the view that he would move back into the Property if it had not been sold by the insureds before the upcoming summer.

At the time of purchasing the Property an application to insure was completed and a policy was written on a Homeowners Special Form (the "Policy"). The Policy excluded from coverage "loss or damage occurring after your dwelling has, to your knowledge been vacant for more than 30 consecutive days" (the "Vacancy Exclusion"). The Policy's definition of "vacant" included "circumstances where, regardless of the presence of furnishings: all occupants have moved out with no intention of returning and no new occupant has taken up residence".

The Property was destroyed by explosion and fire on April 26, 2008.

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The insurer denied coverage on the basis of the vacancy exclusion, a material change in risk and a misrepresentation on the proof of loss form whereon the insureds indicated "not applicable" in response to a question about whether there had been a change in use to the Property. The insurer did not refund unused premium but treated the Policy as subsisting in respect of the liability coverage it afforded.

At trial the insurer tendered underwriting evidence regarding the impact of the infrequent occupation of the Property. The underwriting manager testified that had the insurer known of the infrequent occupancy of the Property it would have changed the policy from an "all risk" form to a "fire and E.C.", eliminated the guaranteed replacement cost endorsement, added further exclusions and charged a further 36% premium. Independent underwriting evidence on materiality was also tendered by the insurer.

The Ruling

The court considered a vast number of cases in respect of the Vacancy Exclusion. Many of the cases considered had varying exclusionary language. While acknowledging that inspection does not amount to occupancy the court emphasized that given the definition of "vacancy" the intention of the insured to "occupy" was a key factor in deciding whether the Property was "vacant". Quinn had not moved out of the Property "with no intention of returning", therefore, "vacancy", and the exclusion, was not established.

The three key elements required to establish a material change were considered The court concluded that 1) there was a material change to the risk created by the change from regular to sporadic occupancy by the insured; 2) the change was within the control of the insured; and 3) the insured had knowledge of the change. Accordingly, the court concluded that there was a material change in the occupancy of the Property that voided the Policy.

The court also addressed the insurer's decision to not refund insurance premiums. It determined that the failure to refund an unearned premium does not equate with an election to treat the Policy as continuing by failing to cancel or collecting further premiums. It also determined that inactivity by an insurer in the return of a premium or cancelation of a policy does not amount to an express waiver of a policy's statutory conditions. Finally, the portion of the statutory condition that allows for avoidance applies "to the part affected by the change". The above is particularly so where the insurer acknowledges there is some continuing coverage which is not affected by the "material change".

No misrepresentation on the proof of loss was established since it was not an intentional statement made knowing it was material to the insurer.

Practical Considerations for Insurers and Claims Handlers

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- When considering coverage denials do not, if possible, limit the basis for denial solely to exclusionary language.
- In “material change” cases, investigate whether the “changed” circumstance would impact the policy terms or the premium charged in addition to whether the risk would have been underwritten.
- Returning unearned premiums is not necessarily required in voiding situations however a helpful determination as to whether the whole, or part of, coverage is affected is appropriate.
- Where the “intention” of an insured is relevant, courts will generally look for the “primary” intention of the insured – not all remote possibilities that could occur.

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