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RELIEF FROM FORFEITURE FOR BREACH OF STATUTORY CONDITION

Richards Buell Sutton Insurance Law Newsletter

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A recent decision of the Supreme Court of Nova Scotia concerning a fire loss is of broad interest to property insurers because of the common wording of the relief from forfeiture provision found in the *Insurance Acts* of every common law province, except Saskatchewan, including the 3 Territories. The case is also an important reminder to insurance brokers about the risk of liability arising from a failure to place proper coverage. In *Keizer v. Portage LaPrairie Mutual Insurance Company*, 2013 NSSC 118, the insured homeowners sought relief from forfeiture for breach of a statutory condition in a homeowner's insurance policy. In addition to the claim against their insurer the homeowners pursued a claim against the insurance broker in negligence for failing to obtain the proper insurance coverage.

The Issues

The Supreme Court of Nova Scotia had to decide three issues:

1. Was there a material change in risk in breach of Statutory Condition No. 4 of the homeowner's insurance policy?
2. If so, were the insureds entitled to the equitable remedy of relief from forfeiture against the insurer, pursuant to the provision in the *Insurance Act* of Nova Scotia?
3. Was there actionable negligence on the part of the insurance broker by failing to place the proper insurance coverages needed by the homeowners?

The Background

The insureds were homeowners who operated two businesses out of the garage attached to their home. The first business was doing contract work for Home Depot installing kitchen cabinets and countertops in its customers' homes. The second business was a home-based woodworking shop doing carpentry and furniture repair work.

The homeowners contacted their insurance broker and informed the agent of both business activities, relying on the broker to obtain the necessary coverages. The agent informed the insurer about the first

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business (cabinet installations for Home Depot) but not the second (the operation of a woodworking shop in the garage). The failure to inform the insurer about the woodworking shop in the garage was material to the risk because the sole source of heat in the garage was a wood stove. Although the insurer knew of the presence of the wood stove in the garage, it was never advised about the operation of a woodworking shop in the garage.

A fire broke out in the area of the wood stove resulting in property damage of $81,000. During its investigation into the loss, the insurer learned that the garage was being used as woodworking shop while being heated by a wood stove and denied coverage on the basis that there had been a material change in risk under the homeowner's policy.

The Ruling

On the first issue, the court accepted the insurer's evidence that it was beyond its risk tolerance to insure premises with a combination of a woodworking shop in an area heated by a wood stove. Since the insurer had never been informed of the risk raised by that combination of factors, the insurer was entitled to treat the situation as a material change in risk in breach of the statutory condition under the fire insurance provisions of the *Insurance Act*.

On the second issue, the court relied on a "useful summary" of the factors that courts have considered in determining whether to grant relief from forfeiture in fire insurance cases:

(a) the custom in the insurance industry;

(b) the rational nature of the contractual provision;

(c) the causal connection between any breach and the risk that materialized;

(d) the degree of the breach;

(e) the ease with which the insured could have respected the provision;

(f) the relationship between the contested provision and the premiums paid by the insured; and

(g) the prejudice to the insurer.

Regardless of the fact that there was no basis upon which the conduct of the insured homeowners could be impugned the court concluded there were compelling factors that weighed heavily against the granting of relief from forfeiture and dismissed the claim against the insurer. In doing so, the court noted that:

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- the breach of the statutory condition had not been rectified prior to the date of the fire;
- there was a direct connection between the fire loss and the increased risk of fire presented by the use of a wood stove in a woodworking shop because the source of ignition of the fire was the wood stove itself; and
- to grant relief from forfeiture would work significant prejudice to the insurer because it would force the insurer to pay a fire damage claim for a risk that it never would have accepted had it been made aware of the intended operation of the home-based woodworking shop in the garage that was heated by the wood stove.

On the third issue, the court found the insurance broker was negligent because it failed to inform the insurer of the home-based woodworking business to be operated in the garage, which would have alerted the insurer to the material change in risk. The broker was also found negligent because it failed to confirm with the homeowners the currency and accuracy of the information about their home business activities when replying to the insurer's questionnaire at the time of the policy renewal. In the circumstances, the broker was found liable for the full extent of the insureds' loss.

Practical Considerations for Insurers

In this case, the insurer was able to establish that the combination of the use of the garage as a woodworking shop for carpentry and furniture repair work, while heated by a wood stove, constituted a material change in risk, and rendered the coverage void, by leading clear evidence of its underwriting guidelines. Although the insureds had made full disclosure to the broker, and there was no basis on which the conduct of the insureds could be impugned, the sympathy for the insureds' position could not overcome the clear evidence of the insurer that it would never have accepted the risk had it been made aware of all factors material to the risk. Having clear, written underwriting guidelines in place will protect an insurer from claims arising from risks which do not fall within those guidelines.

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