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STATUTORY CONDITION 1 - THE TRUTH, THE HALF-TRUTH AND THE OUTRIGHT LIE: WHY QUESTIONS INSURERS ASK ARE AS IMPORTANT AS ANSWERS INSURED'S PROVIDE

By: RBS

Pursuant to Statutory Condition 1, a misrepresentation made at the time of an application for insurance may void the policy. In contrast, an omission of a material circumstance will only void the policy if it is made "fraudulently". But when can non-disclosures (or partial disclosures) at the time an insurance policy is placed, be characterized as a misrepresentation as opposed to an omission? The recent British Columbia Court of Appeal decision of *Nagy v. BCAA Insurance Corporation*, 2020 BCCA 1270 provides important insight into the operation of Statutory Condition 1.

The Facts

The insureds sought coverage pursuant to a homeowner's Fire and E.C. policy after the total loss of their property due to a fire. The insurer resisted the claim, and brought a summary trial application seeking a declaration that the policy was void on the basis of: 1) an undisclosed material change in risk regarding occupancy; and 2) misrepresentations and omissions made at the time coverage was placed. Only the second ground for voiding was revisited on appeal.

On the issue of misrepresentations and omissions, the insurer took the position that there were two material non-disclosures (the "Non-Disclosures"). The first was that the insureds' prior insurer had lapsed its policy, and the second was the extent of the insureds' claims history.

On the day of binding, the insureds provided responses to various questions, both verbally on the telephone and in writing on the application form. In answer to the question "Has an insurer cancelled, declined, refused or imposed any special conditions on habitation insurance for the applicant in the last 10 years", the insureds answered "No". In fact, the insureds' application was urgent for the very reason that their existing policy was set to expire that same day due to their former insurer's unwillingness to renew. Furthermore, in answer to a request to provide a list of "all losses or claims" within the last 10 years, the insureds disclosed only one previous loss: a theft. In fact, there had been at least two other significant losses which the insureds failed to mention, including a previous fire loss.





The Ruling

At the lower court, the trial judge found that both Non-Disclosures were omissions, rather than misrepresentations. Thus, according to Statutory Condition 1, the omissions could only act to void the policy if they were made with fraudulent intent, and the trial judge accordingly put the insurer to this onus, which it failed to meet.

On appeal, this approach was found to be incorrect. The appeal court concluded that trial judge characterized the Non-Disclosures as omissions without examining the full context of the circumstances under which they were made.

By answering “no” to the question about whether there had been any prior cancelled or lapsed policies, the insureds did not make an omission. Rather, they answered with a positive statement that was untrue. The false answer “no” can be objectively compared against the truthful answer, which ought to have been “yes”. The trial judge therefore erred by characterizing this answer as an omission rather than a positive misrepresentation.

More problematic from a characterization perspective was the insureds’ disclosure of one, but not all, of their prior claims. While the disclosure of the one claim was literally true, by answering “no” to a request for *all* losses, the insureds made a statement that was misleading. The reason that it was misleading was *because of what was omitted*. This was considered to be a partial or incomplete statement, or a “half-truth”. The Court of Appeal held that such incomplete statements should be treated *presumptively* as omissions within the meaning of Statutory Condition 1. When analyzing omissions, the focus is on the intention of the applicant, not the knowledge of the insurer. If the words were spoken with the intention to mislead, then that would have satisfied the requirement of a fraudulent omission. However, there was no evidence of such intent given the summary nature of the trial and the lack of cross-examination on affidavits in that proceeding. The Court of Appeal therefore upheld the characterization of the non-disclosure of all prior losses as an omission.

Practical Considerations

Based on *Nagy*, we now know that a half-truth is presumptively an omission. An insurer arguing that the policy is void on the basis of insufficient disclosure will have the difficult onus of proving the fraudulent intent of the insured. On the other hand, an allegation of misrepresentation does not require any proof of intention because it is not relevant, for the purposes of Statutory Condition 1, whether the untruthful statement was calculated to mislead.





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According to the Court of Appeal in *Nagy*, the distinction between an omission and a misrepresentation lies, at least in part, in whether or not the untruth can be held up in direct contrast to the truth. In practice, this means that the characterization of the answer relies primarily on the way the question is asked.

Instead of asking the insured to state all losses, the question could have been “Have there been any prior claims related to fire?” Then the answer “no” or disclosure of the theft alone would have been a misrepresentation. While this may be practical in the context of an application for Fire and E.C. insurance, it may not be practical in the context of an all-risk policy. However, the characterization of the response as an omission may still be avoided by asking the insured to state the *number* of claims it had made in the relevant period and thereafter requiring a list of the nature and approximate time frame of each claim. Generally, insurers should consider asking yes/no questions, or a series of questions formulated to elicit one out of a finite number of possible responses. While there is no “fire-proof” method of asking questions to avoid the finding of innocent omission, more directed or pointed questions on applications will aid in ferreting out half-truth tellers from liars.

If you have any questions or would like further information, please contact RBS.



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