Change in occupancy can void policy

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A recent court decision in British Columbia serves as an important reminder that statutory conditions can void coverage even when a policy's exclusion clauses do not exclude coverage and false statements made by the insured are insufficient to preclude a claim.

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Background

In 2006, two insureds purchased and insured a house in Surrey, B.C. One of the insureds, Tor Quinn, began living full-time at the property with only a few furnishings. After a while, he met a woman and began spending a great deal of time at her home. Between staying at his girlfriend's home and his work out of province, Quinn's occupancy of the Surrey property was limited to about one weekend a month for the next four to five months.

The co-insured, Scott Peebles, who never lived at the property, was aware of Quinn's living circumstances and inspected the property about three times a week to check on the mail, heat, and other items. Quinn's romantic relationship was described as "on-and-off" and because of this, and the swimming pool at the Surrey property, he was of the view that he could move back there if it had not been sold by the insureds before the upcoming summer.

The homeowner's policy written to insure the property excluded from coverage "loss or damage occurring after your dwelling has, to your knowledge been vacant for more than 30 consecutive days." 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."

In April, 2008, the house was destroyed by explosion and fire.

Wawanesa Mutual Insurance denied coverage based on 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 premiums but treated the policy as providing continuing liability coverage.

At trial, the insurer produced evidence that can be key to "material change" cases. The underwriting manager testified that, had the insurer known of the infrequent occupancy of the house, it would have changed the form of the policy, eliminated the guaranteed replacement cost endorsement, added further exclusions and charged a further 36 per cent premium. Independent underwriting evidence on materiality was also tendered by the insurer.

Ruling and commentary

In *Peebles v. The Wawanesa Mutual Insurance Co.*, the court considered numerous cases interpreting "vacancy" exclusions and reviewed the principles of construction for insurance policies. The cases considered had varying exclusionary language. The importance of interpreting the policy on the Surrey house instead of imposing judicial interpretations applied to different policies was noted by the court. 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 house was "vacant." The B.C. Court of Appeal has concluded this phrase means "no intention of returning to live" and does not apply to returning for matters such as cleaning. The court had to determine whether Quinn had moved out "with no intention of returning." It concluded that was not the case: There was a possibility Quinn would return. Therefore, "vacancy," and the exclusion, was not established. The court focused on the "primary" or likely intention of the insured and not all remote possibilities that could occur.

The three key elements required to establish a material change were considered. The court concluded:

- There was a material change to the risk created by the change from regular to sporadic occupancy.
- The change was within the control of the insured.
- 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 insurance policy.

The court also addressed the insurer's decision not to refund premiums. It determined that inactivity by an insurer in the return of a premium or cancellation of a policy does not amount to an express waiver of a policy's statutory conditions. Further, the portion of the statutory condition that allows for avoidance applies "to the part affected by the change." This is particularly so where the insurer acknowledges there is some continuing coverage that is not affected by the "material change."

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

This case is a good reminder for lawyers assessing coverage to not limit the review of the basis for denial solely to exclusionary language in a policy. ■

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Reasons: *Peebles v. The Wawanesa Mutual Insurance Co.* [2012] B.C.J. No. 803

Separate mandates help minimize ethical dilemmas

Tripartite

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independent counsel. As Justice Beverley McLachlin (as she then was) notes: "An insurer would be understandably reluctant to sign a 'blank cheque', and cover whatever costs are borne by whatever lawyer is retained, no matter how expensive" (*Nichols v American Home Assurance* [1990] 1 SCR 801, para 20). A lawyer's professional obligation to charge fair or reasonable fees regardless of the payer is not sufficient to alleviate concerns about high defence costs. What constitutes fair and reasonable fees is a case-specific determination based on factors such as counsel's experience and agreement with the client.

The potential for an insured to be entitled to independent representation at the insurer's expense can lead to an insurer abandoning coverage disputes rather than risk losing control over liability claims and incurring uncertain costs. This creates the possibility of an insured not being accountable for a breach of their duty, or gaining the benefit of, and indemnification for, uncovered claims. This is detrimental to the insurance system and policyholders who have to pay higher premiums.

The potential for conflicts in liability claims against the insured is inherent in the tripartite relationship. The solution to minimizing the damage caused by these conflicts may be a strict demarcation between lawyers defending liability claims and those acting on coverage disputes, as well as separate reporting structures for the different files. Separate mandates promote full and frank communication in joint representations consistent with the parties' reciprocal duty of utmost good faith. Separate mandates may also minimize the likelihood of ethical dilemmas for defence counsel, reduce the need for insured-appointed independent counsel, and reassure both parties that their interests will be equally protected. ■

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