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S.E.N.C.R.L.

Memo

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FROM: Benjamin Poirier

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An In-depth Investigation is Required Before Denying Coverage!

All contracts are governed by a requirement of good faith. An insurance policy is particular as its content and implementation must be based on increased mutual confidence between an insurer and the insured. Because of its particular nature, case law has imposed an additional rule on the parties, that is, the requirement of performing their obligations with the "utmost good faith" when declaring a risk and when processing a claim for an insurance indemnity. When processing such a claim, case law specifies that an insurer must do so "seriously, objectively and with the required diligence,[1]" from the time the loss is reported until a settlement is completed, or coverage is refused.

Claims adjusters must be conscientious and thorough in processing claims. Sometimes, however, in rare cases, an insurer may lose sight of a claim. This occurred in this case which concerned damage caused to a swimming pool and to a backyard by soil movements.

The Decision in *Lacoursière* v. *Promutuel des Bois-Francs*: Background

In April 2013, the plaintiffs noted cracks in the concrete around their swimming pool and the slumping of their hedge. The plaintiffs went to their insurer's office to report the situation. According to them, the damage was caused by landscaping on the neighbouring lot. The insurer retained the services of a claims adjuster to examine the premises. After a fifteen (15) minute visit, the claims adjuster reached the conclusion that based on his experience, the soil movements which caused the damage were due to a natural cause linked to a thaw-freeze cycle, which was a risk that was excluded from the home insurance policy. Nevertheless, the claims adjuster recommended to the insured to send a demand letter to their neighbour. He did not open a file for the claim and did not take a statement from the plaintiffs.

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[1] *Lacoursière* v. *Promutuel des Bois-Francs*, 2021 QCCQ 7655, para. 113.

The plaintiffs' insurer also insured the neighbour for civil liability and the general contractor who sold and landscaped the neighbour's lot. Accordingly, the plaintiffs' insurer retained the services of a second claims adjuster to represent the neighbour and a third claims adjuster to represent the general contractor. A few weeks later, the claims adjuster representing the plaintiffs sent an email to the two (2) other claims adjusters to advise them of the possibility that the general contractor may be liable and of the risk of a conflict of interest, considering that the same insurer was involved for the three (3) parties. The plaintiffs' claims adjuster was retiring, and a replacement colleague was copied on this email. It was also mentioned that the plaintiffs would be informed that their claim was excluded based on the "natural soil movements" clause in their insurance policy. This was done the same day. In answer to the refusal of coverage, the plaintiffs' attorney sent a demand letter to the neighbour. The two (2) other claims adjusters visited the site.

Accordingly, the claims adjuster who was retained by the plaintiffs reached the conclusion that the damage was caused by the neighbour's landscaping work. On this basis, a demand letter was sent to the plaintiffs' insurer, criticizing its refusal to indemnify, by erroneously invoking the exclusion for "natural soil movements." The insurer maintained its refusal to indemnify and also refused to renew the insurance policy, invoking an aggravation of the risk noted during the site visit.

The plaintiffs undertook a civil recourse before the Superior Court against their neighbour for the damages sustained, as well as a recourse for the insurance indemnity against their insurer before the Court of Quebec. The plaintiffs also filed a complaint against the claims adjuster with the *Autorité des marchés financiers* (Financial Markets Authority) (hereinafter "AMF" and with the *Chambre de l'assurance de dommages* (General Insurance Board) *(hereinafter* "ChAD"). The claims adjuster pleaded guilty to this complaint on the three (3) counts, that is: lack of professional conduct during the investigation, negligence in file keeping and a lack of professional conduct when announcing the refusal of coverage.

On July 15, 2015, the joint expert acting in the Superior Court case, reached the conclusion that the damage was caused by natural soil movements.

In March 2018, Honorable Clément Samson, S.C.J., allowed the plaintiffs' claim, dismissed the joint expert's theory, and ruled that the landscaping of the neighbour's lot had caused the damage to the plaintiffs.[2] The court order was paid by the neighbour's insurer, whom we underline, was the plaintiffs' insurer.

The Insurer's Conduct: Applicable Rules

According to the Superior Court judgment, the recourse before the Court of Quebec was amended to take this judgment into consideration. The plaintiffs then claimed from their insurer the damages, namely for the mishandling of their claim and for invoking an abusive defence, that is, their refusal to indemnify. They also claimed other damages which are not commented on.

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[2] *Lacoursière* v. *Lachance*, 2018 QCCS 1035.

In his judgment, Honorable Pierre Allen, J.C.Q., reviewed the relevant articles of the *Civil Code of Quebec*[3], case law and doctrine to summarize the extent of the parties' obligations in an insurance policy. The obligation of good faith in the performance of the insurance contract was naturally at the heart of the analysis, but there was more. This is an obligation of the "utmost good faith." Because an insurer must answer a claim, it must consider all the facts, complete its investigation and take into consideration all of the additional evidence.

As a penalty for the insurer's bad faith, in addition to his right to an indemnity, the insured was entitled to damages for "humiliation, suffering, inconvenience and damaged reputation"[4], to the reimbursement of extrajudicial fees and even to punitive damages.

Regarding the handling of the plaintiffs' claim, the Court queried the insurer's submission to the effect that the plaintiffs did not make a claim, but merely sought clarification about the insurance coverage. In this seminal case, the rules governing an appreciation of an insurer's conduct in processing a claim were inapplicable.

The Court ruled that in April 2013, the plaintiffs notified their insurer about a loss within the meaning of article 2470 C.C.Q. The insurer retained the services of a claims adjuster to visit the site, which shows that it intended to consider the notification of damage as a claim. In addition, the email sent by the claims adjuster to the two (2) other claims adjusters and the refusal letter sent to the plaintiffs mentioned a "claim." Accordingly, the Court analyzed the insurer's conduct based on the parties' obligations and the rules applicable to processing a claim for an insurance indemnity.

> (TRANSLATION) *[105] Regarding indemnification, the duty to act according to the utmost good faith means that an insured who makes a claim to his insurer is entitled to expect that the insurer will make a decision, especially if it refuses to indemnify on the basis of an exclusion, after a diligent, thorough and objective investigation was conducted to obtain sufficient information to make that decision.*

The Decision

The Court dismissed the insurer's submission to the effect that based on his experience, the claims adjuster was warranted in reaching the conclusion that the soil movement was a natural cause. This was especially true considering that the cause of the damage was due to the neighbour's landscaping of her lot. The Court reached the conclusion that the claims adjuster whose services were retained by the insurer botched his investigation and that subsequently the insurer did not consider new facts which would have obliged it to reverse its decision to refuse coverage. In fact, the evidence showed that the insurer's file was practically empty and did not contain any objective or technical facts that would warrant the refusal of coverage. The photographs which were apparently taken by the claims adjuster, which was contested by the plaintiffs, were never found. At the beginning of the trial, the claims adjuster's contradictory evidence led the Court to doubt his credibility.

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[3] Articles 6, 7, 1375, 1433, 1434, 1458, 1607, 1611 and 1613.
[4] Para. 23.

Having reached the conclusion that the insurer infringed its obligation of good faith in processing the claim, the Court queried the abuse of procedures in the recourse undertaken before the Court of Quebec. The Court underlined the fact that a refusal of coverage, even if mistaken, is not necessarily abusive or unfounded to the extent that it can be justified. According to the Court, this is what happened on July 15, 2015, on which date the joint expert in the Superior Court case filed his report, reaching the conclusion that the soil movements were natural. Even if this opinion was not accepted by the Superior Court trial judge, from that point the insurer could justify its refusal to cover and the fact that its defence was well founded in the case before the Court of Quebec.

The Court acknowledged that extrajudicial fees of $2,500 were due to the plaintiffs from the date the procedures were undertaken before the Court of Quebec until July 15, 2015, by subtracting the fees in connection with the recourse before the Superior Court, in which the insurer was not a party, and the fees incurred to file the administrative complaints for professional liability before the AMF and the ChAD. The Court awarded an amount of $6,500 to the plaintiffs instead of the $15,000 claimed as moral damages.

The Lesson Learned

Completing and performing the obligations under an insurance policy can only be efficient when there is extensive reciprocal confidence, which requires reinforced good faith. The processing of an insurance claim is a point in the contract relationship where the insured is vulnerable. In this context, the conduct of the insurer and of any person assigned to investigate a loss, will be minutely analyzed.

Lacoursière is an exceptional case, in which unfortunately shortcomings were noted in the conduct of the investigation and the processing of the claim. This decision is a reminder to the insurance industry that even when a claim initially appears to be excluded, a prudent and diligent investigation is required to support the decision made to show the utmost good faith regarding the insured. This obligation to investigate is continuous and may even be reactivated following a trial on the merits confirming a refusal to cover, if the insurer was notified about new and determining facts.[5]

[5] *Bédard Martin* c. *Intact compagnie d'assurance*, 2021 QCCS 3964, par. 328, 358, 364, 366, 388 et 394.