

Insurance & Reinsurance - Canada

Visited but vacant: the importance of ensuring appropriate insurance coverage

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A recent case demonstrates the importance of carefully reading an insurance policy to ensure that it remains in force. Failure to do so cost Paul and Wendy Wu dearly.

Background

The Wus purchased a house in Windsor, Ontario to serve as an investment for their future and to produce rental income. In 2002 they rented the house to a tenant. The tenancy was uneventful until the tenant began to date a certain man. At this point, rubbish, including junk cars and tyres, began to accumulate in the yard and neighbours complained of blight and rats. The Wus were given repeated notices by the City of Windsor to clean up their property. Eventually, the Wus gave their tenant notice to vacate the property. The tenant agreed to move out on August 1 2006; however, she and her boyfriend failed to leave that day. The Wus permitted them to stay until August 5, with the tenant agreeing to clean up the property before leaving. On August 4 the tenant and her boyfriend moved out of the house and gave Mrs Wu keys to the property. As it turned out, these keys were for the front door only.

The property was in a serious state of disrepair and the house had a foul odour. The Wus, along with some friends, spent considerable time cleaning up the house and the property, and six weeks later made the property available for renting. During this time, and in advance of a new tenancy that was to begin on November 1, the Wus visited the property nearly every day to clean it and to empty the mailbox.

In October a fire caused major damage to the property. On October 11 Mr Wu visited the house and discovered that the interior was burnt and that the water pipes had burst, resulting in significant damage. There was no sign of forced entry and the presence of petrol cans suggested that the fire had been lit deliberately. A representative of the Windsor Fire Department opined that the fire had been intentional. There were also beer cans inside the house that had not been there the last time Mr Wu had visited.

Claim

The Wus sought to claim under their insurance policy which they believed covered fire damage and loss of rental income. Gore Mutual Insurance Company denied coverage under two grounds: (i) that the Wus had knowledge that the house was vacant for more than 30 consecutive days, which was in violation of the policy; and (ii) that there was a material change in risk of which the Wus were aware, but to which they did not alert Gore.

While Mr Wu agreed that the insurance policy had a 30-day vacancy clause, he claimed that he did not know about this clause and it was never pointed out to him. In addition, he claimed that either he or his wife had visited the house nearly every day and so, in his mind, the house was never truly vacant.

Unfortunately for the Wus, the term 'vacant' was explicitly defined in the insurance policy, as the policy was specific to rental property. The definition provided for in the policy stated that a property is to be considered vacant when, regardless of the presence or absence of furnishings, (i) all occupants of the dwelling have moved out with no intention to return and no new occupant has yet to take up residence, or (ii) no occupant has taken up residence in a newly constructed dwelling.

This definition makes clear that vacancy is established when there is no resident in a property. Under the terms of the insurance policy, maintaining property such as furniture in the home or frequent visitations to the home do not qualify to make the property no longer vacant. To demonstrate that their property was not vacant, the Wus would have had to show that someone slept or cooked at the property and that it was someone's "habitual abode".

Court's reasoning

The court noted that case law relating to non-rental property, or to seasonal property such as summer homes which are not expected to be occupied during the winter months, provides for a different result. These divergent outcomes are based largely on the difference in wording in rental property insurance policies as compared with non-rental property insurance policies. Insurance policies relating to rental properties tend to define expressly the term 'vacant', as the occupancy status of the property relates directly to the risk of the property.

The court also found that there was a "material change in risk" under the insurance policy, and that this material change began in February 2006, upon the initial neighbour and city complaints about the property. The court found that at this point the Wus should have told their insurer about the situation and their proposal to address the matter. The three elements of material change requiring notification to the insurer (ie, a material change in risk that is within the control of the insured and of which the insured had knowledge) were all present. The Wus' failure to disclose a change in material risk had the effect of terminating their insurance policy. An additional material change in risk was created when the Wus determined that the previous tenant had kept a copy of the keys to the property, but neglected to change the locks on the doors. The Wus had decided not to change the locks upon realizing that not all prior keys had been returned, as they wanted to change the locks only immediately in advance of future tenants taking up residence.

Decision

While expressing sympathy for the Wus, the court found that the property lacked insurance coverage, and that the fire damage to the property was therefore not an insured risk. The Wus would need to spend nearly C\$130,000 to repair the house - or approximately C\$9,000 to demolish it.

Comment

Insureds are advised to:

- consider their needs when entering into insurance contracts, including the type of insurance coverage required and the use of the property to be insured;
- review carefully their insurance policies and discuss their current or prospective needs with their insurance brokers;
- notify their insurance broker of material changes in risk, including such things as property vacancies or major disputes with tenants; and
- discuss their insurance needs with a lawyer or if in doubt about their rights.

For further information on this topic please contact [Hartley Lefton](#) at Lang Michener LLP by telephone (+1 416 360 8600), fax (+1 416 365 1719) or email (hlefton@langmichener.ca).

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