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WHEN A MATERIAL CHANGE IN RISK IS NOT "MATERIAL: *AVIVA v. THOMAS*, 2011 NBCA 96

A recent decision of the New Brunswick Court of Appeal will likely place constraints on insurers seeking to void an insurance policy based upon an insured's failure to inform the insurer of a material change in risk. The decision in *Aviva Insurance Company of Canada v. Thomas* 2011 NBCA 96 is significant in that the issue does not appear to have been previously addressed by any appellate court in the country.

Facts of the Case

In 2000, Mr. Thomas, who was elderly with a limited formal education, obtained a policy of fire insurance for his home. The policy contained a statutory condition allowing the insurer to void the policy where prompt written notice of a material change in risk is not provided by the insured.

When Mr. Thomas applied for his policy in 2000, the application indicated that his home's primary heating source was electrical. At that time, this was the sole heat source for the home, so that indication was entirely truthful. The application also contained a question asking about the existence of auxiliary sources of heat and/or solid fuel heating units. However, the broker taking the application left this question unanswered, and struck out the question by drawing a diagonal line through it.

In the fall of 2001, Mr. Thomas installed a woodstove in his home in an attempt to defray electrical heating costs. No mention of the woodstove was ever made to the insurer.

The policy was renewed annually. The insurer's annual renewal notices did not request that Mr. Thomas notify it of all changes material to the risk. Rather, the renewal notice simply stated:

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"*Enclosed is the renewal of your policy. Please ensure that all information is accurate as your coverage and premium are based upon the information you provided*." The information that Mr. Thomas had provided was summarized in an accompanying certificate. True to the initial application, the sole information pertaining to sources of heat in that certificate was that the home's *primary* source of heat was electric.

In 2007, Mr. Thomas' home was damaged by fire. A subsequent investigation revealed that the fire originated from the woodstove. Having learned of the presence of the woodstove, its apparent role in the fire, and pointing to the fact that it had not been notified of the woodstove, the insurer took the position that Mr. Thomas had failed to provide prompt notice of a material change in risk, and voided the policy.

The court noted that the application and renewal documents referred to the home's primary heating system as electrical, which implicitly allowed for auxiliary sources. Furthermore, the details of any such auxiliary heat source were neither requested nor provided at any time. In such circumstances, the court noted that where an insurer fails to ask about a matter, an inference may be drawn that the insurer does not consider that matter relevant. Where an insured answers truthfully according to a reasonable interpretation of a question which is ambiguous or inadequately worded, he will not likely forfeit a claim on the grounds of misrepresentation or nondisclosure. Further, the court commented that an insurer should not be allowed to benefit from a problem it has created through poor drafting of its application forms. In the right circumstances, the same approach may be taken with respect to poorly drafted renewal notices as well.

The court concluded that the nondisclosure of the material change in risk in this case resulted from the cumulative effect of: (1) the insurer's failure (through its broker) to ask about possible auxiliary heat sources; (2) the lack of importance given to that question (inferred from the fact that the broker crossed this question off the form); (3) the post-application failure to seek answers to that question, during the renewal process or otherwise; and (4) the insurer's advice to the insured at renewal time that coverage depended on the accuracy of the information <u>that he had previously provided</u>. Given those factors, the insured's installation of a woodstove was not considered to be a change material to the risk requiring disclosure under the policy. The Court of Appeal upheld the trial court's decision finding coverage for the insured.

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Significance to the Insurance Industry

This decision indicates that the courts will pay very careful attention to the steps taken by insurers (and their agents) in receiving applications for insurance and granting subsequent renewals in determining what changes in risk may be material, and whether those potential changes and the need to report them have been properly communicated to the insured. In the words of counsel for Mr. Thomas, insurers will be motivated to review their applications for insurance and renewal notices to ensure the questions or statements reflect their underwriting guidelines. If insurers consider changes such as the installation of a woodstove to be a material change in risk, then that fact should be clearly communicated to the insured.

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