

When Can an Insurance Policy Breach be Forgiven?

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Strict compliance with an insurance policy is not necessarily required for an insured to recover under the policy.

Two of the main considerations in determining whether an insured should be relieved of a breach of a policy are the seriousness of the breach and prejudice to the insurer.

These issues were addressed by the Ontario Court of Appeal in [*Monk v. Farmers' Mutual Insurance Company \(Lindsay\)*](#), 2019 ONCA 616.

Facts

The plaintiff owns a log house. In 2008, she hired Pleasantview Log Restoration Systems Inc. ("Pleasantview") to refinish the exterior of the logs.

The work was largely completed by the end of 2008. During and after the restoration work, the plaintiff noticed some damage to the interior and exterior of the house, which she attributed to the work of Pleasantview.

The plaintiff had home property insurance with Farmers' Mutual Insurance Company ("Farmers"). The policy required the plaintiff to notify Farmers forthwith of any loss or damage to the property if the loss or damage was covered by the policy, and to deliver as soon as practicable a proof of loss verified by a statutory declaration.

The trial judge found that the plaintiff first notified her insurance broker of the damage on September 2, 2011, close to three years after she first noticed damage.

The trial judge held that the plaintiff breached a statutory condition of the policy by failing to give Farmers notice "forthwith". He further found that the plaintiff was not entitled to relief from forfeiture. This was upheld by the Court of Appeal.

Test for Relief from Forfeiture

The Court of Appeal indicated that the purpose of allowing relief from forfeiture is to prevent hardship to insurance policy beneficiaries where there has been a failure to comply with a condition for receipt of insurance proceeds and where leniency in respect of strict compliance with the condition will not result in prejudice to the insurer.

Referring to other appellate authorities, the Court of Appeal outlined the following principles:

- Relief from forfeiture under section 129 of the *Insurance Act* is available where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss.
- Relief from forfeiture under section 98 of the *Courts of Justice Act* is available to contracts regulated by the *Insurance Act* and generally operates where the breach of the policy occurred before the loss took place.
- Relief from forfeiture under both of these statutes is not available where the breach consists of non-compliance with a condition precedent to coverage.
- That being said, a court should find that an insured's breach constitutes non-compliance with a condition precedent only in rare cases where the breach is substantial and prejudices the insurer. In all other instances, the breach will be deemed imperfect compliance, and relief from forfeiture will be available.
- Where relief from forfeiture is available, an insured must show three things: that his or her conduct was reasonable, that the breach was not grave, and that there is a disparity between the value of the property forfeited and the damage caused by the breach.
- However, an insured does not necessarily need to prove each of the three elements. A court is required to balance the three elements.

Conduct of the Insured

The Court of Appeal stated that an examination of the reasonableness of the breaching party's conduct lies at the heart of the relief from forfeiture analysis. A party whose conduct is not reasonable will face great difficulty in obtaining relief from forfeiture.

A court is required to consider the nature of the breach, what caused it, and what, if anything, the insured attempted to do about it.

The Court of Appeal found no error in the trial judge's conclusion that the plaintiff's delay in reporting the loss was not reasonable.

Although the plaintiff first noticed damage in late 2008, and then through 2009 and 2010, she failed to inform the insurer about any damage until September 2, 2011. The Court of Appeal indicated that the 2.75 year delay is "a considerable passage of time by any measure".

Further, the plaintiff did not speak with anyone at Pleasantview about the damage until late July 2011.

Moreover, after finding out that the insurer would deny coverage, the plaintiff attempted to mislead the insurer on when she first noticed the damage.

Overall, where there is a lengthy delay in reporting a loss, an insured must have a reasonable explanation for the delay.

Gravity of the Breach

In assessing the gravity of a breach, the court looks at both the nature of the breach and the impact of the breach on the contractual rights of the insurer.

The Court of Appeal did not agree with the trial judge's finding that the plaintiff's late notice impacted Farmers' ability to investigate the circumstances and value of the loss. There was evidence from an adjuster at Farmers that the delay in reporting the loss did not increase the cost of repair.

However, the Court of Appeal agreed with the trial judge that Farmers was prejudiced in its right to maintain a subrogated claim against the contractor, Pleasantview, as that action was likely barred by the limitation period by the time the plaintiff reported her loss.

Therefore, if an insurer is prevented from exercising its right of subrogation due to the conduct of the insured, the court will likely find that the insurer has been significantly prejudiced.

Disparity

The court is required to consider the disparity between the value of the property forfeited and the damage caused by the breach.

The trial judge acknowledged that the property forfeited by the plaintiff by reason of her breach was significant, in particular, approximately \$100,000 in insurance coverage.

However, in terms of the damage caused by the breach, the trial judge again referred to the plaintiff's late notice impacting Farmers' ability to pursue the contractor, Pleasantview.

The Court of Appeal found no error in the trial judge's analysis of the disparity issue.

Conclusion

Where there has been imperfect compliance with an insurance policy, a court has discretion to grant relief from forfeiture in order to prevent hardship to an insured.

The key consideration is the reasonableness of the insured's conduct. For example, was the insured's conduct willful? Does he or she have a reasonable explanation on why a condition of the insurance policy was not complied with?

Another important consideration is whether there has been prejudice to the insurer. For example, where the issue is late notice of a loss, was the insurer prevented from conducting appropriate investigations? Did the insurer lose its ability to subrogate?

The Court of Appeal's decision is an example of when late notice of a claim can be fatal to recovering under an insurance policy.