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Nullity *ab initio* – misrepresentations during policy underwriting process

September 29, 2016

On August 18, 2016, the Honourable François Duprat, writing for the Superior Court of Québec, rendered judgment in the action brought by Jimmy Laporte (the "Plaintiff") against his property insurer, Intact Insurance Company.[1] The Court dismissed the Plaintiff's action and declared the insurance policy in issue void *ab initio* because of the Plaintiff's misrepresentations to his mortgage creditor.

The issue

On July 24, 2011, Plaintiff's home was seriously damaged by fire. Plaintiff claimed damages from Intact for the total loss of the building, loss of contents, and living expenses.

Intact refused to pay. The Court summarized the insurer's position as follows:

> The insurer refuses to pay the claim and offers a defence on all points: the fire was criminal and was caused with the complicity of the insured. The insurance policy is void ab initio given Jimmy Laporte's ties to organized crime. The insurer also submits that the policy must be declared void ab initio since Mr. Laporte cannot prove his income and, in fact, declares no income, and gave his mortgage creditor a false picture of his financial situation. In addition, Mr. Laporte kept cannabis for the purpose of trafficking in his residence and this triggers the exclusion for crimes committed by the insured or results in cancellation of the insurance policy given the uncertain moral hazard. Last, the amount of the claim for contents is exaggerated or false and provides grounds for rejecting the claim.
>
> [our translation]

After its analysis, the Court accepted only one mean of defence: the misrepresentations made by the Plaintiff to his mortgage creditor.

Reasons for judgment on the nullity *ab initio* based on the misrepresentations made to the mortgage creditor

Intact submitted that false documents were provided to the mortgage creditor by the Plaintiff to obtain a mortgage loan. According to Intact's underwriting department, knowledge of that situation would have resulted in refusal to insure, in that the Plaintiff's concealment of the truth from his mortgage creditor corrupted the moral hazard at the time the policy was issued.

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Intact explained that it had also refused to compensate the mortgage creditor, alleging, inter alia, that it had been negligent in its analysis of the documents on the basis of which the loan was granted.

It appears from the facts presented to the Court that the mortgage creditor received a certificate of employment signed by the Plaintiff, a statement of income and deductions showing an annual salary of $84,000, and tax returns from the Canada Revenue Agency and Revenu Québec.

Plaintiff admitted that the content of the employment certificate was false. However, he stated that he had never seen the statement of income and deductions and he did not recognize the tax returns introduced in evidence.

The Court did not accept Plaintiff's testimony; rather, it found that he lied in his loan application.

In its analysis, the Court pointed out that the insurer must prove that the undeclared information was material to its appraisal of the risk or its decision to cover it, within the meaning of article 2408 of the *Civil Code of Québec*. The insurer must also prove the existence of a connection between the circumstance in issue and the risk covered.

The Court concluded that Intact had met its burden and proved that the Plaintiff's misrepresentations to his mortgage creditor were material to the appraisal of the risk. The Court noted that it is not the existence of a loan that created a problem; it is the fact that Plaintiff obtained the loan as a result of his misrepresentations.

The Court wrote:

> ... The loan is closely connected with the purchase of the residence and the mortgage affects the insured property. There is nothing surprising or illogical about the insurer's assertion that if it had known, at the time the policy was issued, that the loan had been granted on the basis of false information, it would not have accepted the risk.

Three underwriters testified for Intact, stating that coverage would have been refused if Plaintiff's misrepresentations to his mortgage creditor had been disclosed. No contradictory evidence was presented on that point.

Conclusion

Based on this decision, it appears that misrepresentations made by an insured outside the context of the purchase of an insurance policy can constitute a material change in the moral hazard and may be relied on in support of an application to declare a policy void *ab initio*.

Very often, a mortgage creditor's interest in an insurance policy is recognized by the inclusion of a mortgage clause. However, insurers ordinarily have little information about how the loans were obtained, other than the identity of the creditor.

To some extent, this decision allows insurers to investigate more thoroughly, beyond the representations made by the insured during the policy underwriting process, to try to identify contradictions, reluctance to answer and misrepresentations made to other parties. The issue remains regarding how far they will be allowed to go in gathering information.

We however note that a notice of appeal was filed by plaintiff on or around September 20, 2016. To be continued.

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1. *Laporte* v. *Intact, Compagnie d'assurances (Axa Assurances inc.)*, 2016 QCCS 3922.

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