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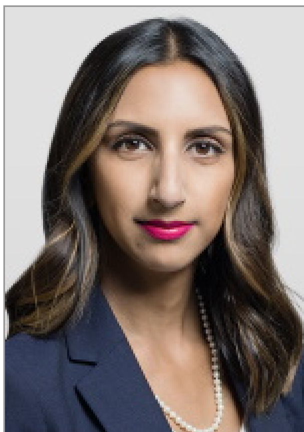
**Risk Management**

# What constitutes a material change in risk: A review of two recent decisions

By **Menka Sull**



Menka Sull

(October 28, 2019, 8:31 AM EDT) -- When does an insured's failure to disclose a material change in risk to its insurer entitle the insurer to void an insurance policy? Two recent B.C. Supreme Court cases considered this question in the context of home insurance policies. The insurer succeeded in defending against the insured's claim in one case, but the other was decided in favour of the insureds.

Insurance law principles stipulate that an insured has a duty to provide accurate particulars of all information material to the risks being insured, including the nature of the property and its use. A fact is material where, if it had been disclosed, it would have influenced a reasonable insurer to decline the risk, accept a different risk or charge a higher premium.

An insured fails to fulfil this duty if he or she fails to disclose a material change in risk. In these circumstances, the insurer will be entitled to treat the insurance policy as void *ab initio*, or from the outset, and decline coverage. Whether a change is material to the risk is a question of fact and must be assessed objectively.

In *Chase v. The Personal Insurance Company* 2019 BCSC 936, the defendant insurer had issued a standard "principal residence" home insurance policy to the plaintiff property owners in 2012. As part of the application process, the plaintiffs disclosed the following information to the insurer: a) the property was occupied as their principal residence and not occupied by others; b) no business or commercial activity occurred on the property; c) there were no detached structures on the property of 800 square feet or larger; and d) there were no pets or other animals on the property.

In fact, the plaintiffs had been generating income by leasing a portion of the property to graze cows and calves and they had obtained a legal farm classification for the property in 2010. The plaintiffs failed to disclose this information to the insurer. Nor did they disclose to the insurer, after the policy was issued, that farming operations were being carried out on the property or that they had constructed a large steel frame building used to store farm equipment.

When the steel frame building collapsed in February 2017 due to heavy snowfall, the plaintiffs made a claim under their policy to recover the resulting loss. Upon investigation, the insurer denied the claim on the basis of material misrepresentation. The plaintiffs subsequently sued their insurer for breach of contract and the insurer brought a summary trial application to dismiss the claim.

At the summary trial, the plaintiffs argued that the farming activities on the property were so limited that the property could not be considered a farm. The insurer provided evidence that it would have denied the application from the start if the plaintiffs had disclosed that a significant portion of the property was rented out to another party for farming purposes. The insurer also relied on expert evidence indicating that an insurer would not have agreed to insure the property under a standard residential home insurance policy.

In his reasons for judgment, Justice Kenneth Ball held that the plaintiffs misrepresented their use of the property and failed to disclose changes to the use of the property. The fact that income was being generated by leasing acreage to a cow/calf operation and that the property was operating as a

farm were material facts that ought to have been disclosed to the insurer. Therefore, the insurer was entitled to void the policy and was under no obligation to indemnify the plaintiffs.

In *Nagy v. BCAA Insurance Corporation* 2019 BCSC 930, the plaintiffs — Zoltan Nagy and Margaret Kuhn — sought coverage under a homeowner's insurance policy issued by the defendant insurer after the insureds' residence and all its contents were destroyed by fire.

The insurer denied their claim, citing the plaintiffs' failure to disclose a material change in risk related to the occupancy of the residence, among other grounds. The plaintiffs commenced an action against the insurer and, in turn, the insurer brought a summary trial application to dismiss the plaintiffs' claim. The insurer argued that the plaintiffs represented they would be living at the property at least 50 per cent of the time but this was not the case, as they only resided at the property on weekends.

In her reasons for judgment, Justice Veronica Jackson found that there was no change in occupancy after Nagy entered into the insurance policy with the insurer. His long-term intentions were to improve the residence, after which time he and Kuhn would live there on a full-time basis. However, the insurer was aware that his immediate plan was to live at the residence only on the weekends.

Moreover, Justice Jackson held that, even if she was wrong in finding that there was no change to the plaintiffs' occupancy of the property requiring disclosure, such change was not material to the risk.

The insurer's subjective view was that it would have refused to issue the policy if it had been aware that Kuhn never lived in the residence and that Nagy spent only weekends there. However, pre-application conversations indicated that the occupancy requirements could be fulfilled solely by Nagy's occupancy at the residence.

Furthermore, "principal residence" was not defined in the policy and no objective threshold of occupancy was in place. The only occupancy requirement according to the policy was that the property remain occupied. Therefore, the insurer could not say that the policy required the plaintiffs to live at the property more than 50 per cent of the time nor could the insurer say that "reduced occupancy" was material.

In addition, no expert evidence was tendered by the insurer to support its view that a reduced level of occupancy was considered a material change in risk by the broader insurance industry.

In dismissing the insurer's summary trial application, Justice Jackson held that the insurer had failed to prove that the policy was void by reason of a material change in the plaintiffs' occupancy of the property and the plaintiffs' loss was entitled to coverage under the policy.

The *Chase* and *Nagy* decisions illustrate a number of important considerations for both the insurer and the insured. First, while there is a duty on the insured to disclose material changes in risk, the policy wording must be unambiguous if the insurer intends to rely on it to deny coverage. Second, the determination of what constitutes a material change in risk will generally require expert evidence about standards in the insurance industry. Finally, the decisions demonstrate that such disputes may be effectively resolved by way of summary trial procedure.

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