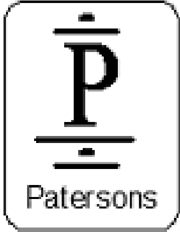

Insurance Claims and Litigation by Dennis M. Foerster

On Friday, August 1, 2008 my family and I took possession of our new home here in Brandon. There was a bad storm that Friday night. When I awoke Saturday morning, looking out our window, I noticed a tree on our property had been blown over and was sitting on my neighbour's garage and gazebo. I went outside to survey the damage and met my neighbour Ken for the first time who was also outside holding his cup of coffee and looking at the placement of our tree. I said, "Hi, I'm your new neighbour, Dennis. Don't worry we have insurance."

Incidents like the one described above form the basis of the majority of insurance claims and only a few ever result in litigation. Where an insured has to make a claim under their policy to its insured, the insurer will generally pay the claim, subject to the terms and limitations of the policy, and then seek recovery from the party responsible for the loss. When an insurer sues or tries to recover from a third party the amount it has paid out under a policy, this is called subrogation. The insurer "steps into the shoes" of its insured and sues in the name of the insured in order to exercise the legal rights of its insured against the third party. The insurer has the right to litigate, investigate, settle or simply pay out any claim on your insurance to the policy limits. The insurer generally has complete control of any settlement or conduct of litigation on your behalf.

Where both the insured and third party have insurance these matters are often settled by negotiations between the insurers or involve litigation on very narrow issues such as the interpretation of the policies or determining the amount of contribution by each of the insurers.

The right of subrogation is one of the most important rights an insurer has and, aside from the policy limit of any particular type of claim, it is one of the most important benefits of an insurance policy. It allows your claim to be honoured before any litigation or settlement discussion take place and leaves potentially expensive litigation or determining how and when to settle any claim with the insurer. Your home owner insurance policy will no doubt have several key sections dealing with this very issue. If you inadvertently breach any of these sections, either before or after advising your insurer of your claim, your insurer may not honour your claim. The two most important requirements, which are related, are that you advise your insurer at the earliest opportunity of a claim or a potential claim and that you do not do anything to "prejudice the position of the insurer" when it attempts investigate, settle or litigate any claim.

Most policies require you to report any claims or potential claims at the first opportunity. My policy states, "You must promptly give us notice when an accident or occurrence takes place." Such language has been relied upon by insurers to deny coverage when a claim has not been promptly reported. For the insurer, they want to know about an occurrence at the first opportunity in order to assess the situation at an early stage. By knowing about a situation relatively soon after an accident, the insurer can often minimize the amount to be paid

out to the third party or often rectify the damages at a point in time where the damage does not become worse.

In my situation, if either my neighbour or I did not report my tree sitting on his garage and gazebo for approximately one week, there is the very real possibility that any damage not dealt with as soon as possible could be worse. If there was a hole in his roof that was not repaired any rain that fell would cause more damage. It does not matter if the insurer takes steps to remedy the situation or not after receiving notice. What is important is that the insurer has notice and is therefore empowered to take steps if it so chooses.

The reporting requirement is one example of the broader concept of not doing anything to prejudice the position of the insurer. A delay in reporting is just one way in which the insurer could be prejudiced. Other examples include trying to fix the problem yourself, attempting to litigate or negotiate a settlement with a third party before or after advising your insurer of your claim or not cooperating with your insurer when you have given notice of a claim. All these examples have the potential to prejudice the rights of your insurer and may therefore serve as a basis for the insurer to deny coverage. The most important piece of advice I can give is if you think some type of event or accident may result in a claim on your insurance policy, before you do anything else tell your insurer and if necessary put it in writing so that you will have a record as to when and what you told them.

Luckily, it appears my neighbour and I and our respective insurers will work things out. My final article on the topic of insurance will deal with the most common situation that does result in litigation. Sometimes when an insured makes a claim under a policy, the insured denies the claim. An insured has three options; accept the denial, attempt to negotiate with the insurer or go to court to try to enforce the contract of insurance. For me, this is by far the most interesting aspect of insurance law.