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Strata Plan LMS 3904 v. Commonwealth Insurance

Heard: January 28-29, 2009; Judgment: May 5, 2009

British Columbia Court Rules That Plaintiff Has Burden To Prove Multiple Marijuana Grow Ops Were Single Occurrence As Defined In Policy And That Question Of Cause Requires More Than Type Classification To Apply Aggregate.

The Plaintiffs owned a 90 unit residential rental complex, one third of which were found to have been infested with illegal marijuana growing operations in March 2005. The owners, having been put to considerable expense to clean up the illegal operations and the resulting loss of rental income during that process, applied for coverage under their All Risks Property Damage and Business Interruption Insurance policy with the Defendant.

The policy provided a (CDN) \$50,000.00 deductible for each occurrence of "illegal drug activity." Were a single deductible to be applied to all, as the Plaintiffs argued, the losses of over half a million dollars would be largely covered, but if individual deductibles were to apply to each unit where illegal activity was discovered, as the Defendant had argued, the deductibles would exceed the losses. The policy defined "occurrence" as "a loss and/or a series of losses which are attributable to one cause..." The Defendant cited a number of US cases, including: *U.S. Liability Insurance Company v. Bove*, 347 So. 2d 678 (1977) (Fla. C.A.) and *Appalachian Insurance Company v. United Postal Savings Association*, 422 So. 2d 332 (1982) (Fla. a.A.) to support its argument that the deductible provision in an insurance policy is a basic part of the policy and not an affirmative defence to be proven by an insurer.

The Plaintiffs argued that the deductible clause acts as a limitation on liability for the insurer and should therefore be treated similarly to an exclusion clause, which the insurer is obliged to establish. The Plaintiffs further argued that the burden should shift to the insured in cases involving limits and to the insurer in cases involving deductibles. The Court disagreed with the Plaintiffs approach, concluding that it would make no sense to construe certain provisions of a policy against the insurer if such related to deductibles, but not if they related to limits, potentially leading to two different interpretations of wording within the same policy; nor should the onus shift, depending on which of the two issues (deductibles or limits) are being decided.

Here, the Court concluded that, as is ordinarily the case in civil litigation, the burden of proof rests with the party seeking to establish the point; in this case, it was the Plaintiffs. On this point, the Plaintiffs argued that illegal drug activity was the "one cause" that linked the various marijuana growing operations together, such that they should be construed as a single occurrence as defined in the policy. Once again, the

Court rejected the Plaintiffs interpretation, saying that the losses from the 29 units could not be attributed to one cause, simply because similar activities were conducted in them.

The type of activity is irrelevant to the question of cause, absent some other factor/s that are common to the series of losses. In the end, it was concluded that only a handful of the units could be lumped together and treated as a single occurrence, there being evidence of an organized effort as far as the illegal activities therein were concerned, the balance being treated as separate losses.