

Case Law Update: The Sovereign General Insurance Company v Walker

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2011 ONCA 597 (Released September 19, 2011)

Insurance liability coverage Notice of action Who may give notice s 129 of the *Insurance Act* Relief from forfeiture

The respondent Marie Walker slipped and fell at the Power Centre in Burlington, Ontario, and sustained serious and permanent injuries. The Walkers sued Emshih Developments Inc. ("**Emshih**"), the owner, and Sun Shelters, the maintenance company retained to clear the property of snow and ice. Sun Shelters was bankrupt and did not defend the action but Emshih notified its insurer, The Sovereign General Insurance Company ("**Sovereign**"), of the claim. Sovereign declined to participate.

The Walkers settled the action with Emshih and obtained a judgment against Sun Shelters for \$100,000 in damages and related relief. The Walkers then brought an action against Sovereign under s. 132 of the *Insurance Act*, which allows a third party to recover against an insurer where the insured has failed to satisfy a judgment for damages. Alternatively, they relied on s. 129 of the Act, which gives a court jurisdiction to grant relief from forfeiture where there has been imperfect compliance with a condition in an insurance policy. The Walkers moved for summary judgment on their claim. Sovereign brought a cross-motion to dismiss the action, claiming that Sun Shelters did not give effective notice of the action as required by the policy, thereby breaching the policy and relieving Sovereign from liability coverage.

On appeal from the motion judge's decision granting summary judgment to the Walkers, the Court upheld the motion judge's decision that the notice given by Emshih was effective under s. 3(a) of the policy. Notice was required "by or for the insured". On a plain reading of the provision, notice may be given by a person other than the insured. Section 3(a) must be interpreted in light of its purpose, which is to make Sovereign aware of a claim against its insured so that it has the opportunity to deal with it. The Court held that if the notice is to be given on an insured's behalf, the party giving it should have sufficient proximity to the claim to have knowledge of the information required by s. 3(a). The Court held that Emshih was such a party and its notice to Sovereign constituted effective notice under the policy. Sovereign was aware of the action but made no effort to contact its insured or seek its assistance. It cannot now complain that Sun Shelters breached its duty to cooperate.

The Court also upheld the motion judge's decision that the Walkers would be entitled to relief from forfeiture under s. 129 of the Act. The law has treated the failure to give timely notice of a claim as imperfect compliance rather than non-compliance. Even if this was not the state of the law, Sovereign had actual notice of the claim and it made a conscious decision not to participate in it. This was clearly a case of imperfect compliance. The only remaining question under s. 129 is whether forfeiture of the insurance proceeds would be inequitable. The motion judge made two key findings of fact: first, there was no bad faith by Sun Shelters, Emshih or the Walkers; and second, although Emshih gave Sovereign notice of the Walkers' claim over five years after the accident occurred, Sovereign suffered no prejudice from the late delivery of the notice. The Court upheld these findings of fact.

The appeal was dismissed. Sovereign was given effective notice in accordance with the policy conditions for liability coverage, and the Walkers were entitled to relief from forfeiture.

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