The Bankruptcy and Insolvency Act Trumps The Subrogation Rights Of An Insurer

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The plaintiffs in the underlying action, Art and Wendy Douglas, owned property in Kingston where there was an oil leak in January of 2008. The defendants, who had supplied the oil, sent an environmental clean-up company to remediate the property after being alerted of the leak. The plaintiffs' insurer, State Farm Fire and Casualty Company (the "Insurer"), ultimately indemnified the plaintiffs in full and paid for repairs, remediation, additional living expenses of Mr. Douglas, personal property and related damages totaling more than $800,000. However, prior to the commencement of the action, both Mr. and Ms. Douglas had each made a separate assignment into bankruptcy. In any case, the Insurer issued a Statement of Claim against the defendants in January of 2010 naming Mr. and Ms. Douglas as the plaintiffs. After being unsuccessful on a motion for summary judgment and unsuccessful on a subsequent appeal to the Divisional Court, the defendants/appellants appealed to the Court of Appeal.

Writing for the majority, Associate Chief Justice Hoy found that the appeal raised three related issues:

1. Had the Insurer acquired a property interest in Mr. Douglas's cause of action at the time that he made his assignment, such that the cause of action did not vest in the Trustee?
2. If not, did the subrogation clause in the Homeowners' Policy permit the Insurer to commence an action in the name of Mr. Douglas, who is an undischarged bankrupt?
3. If the answer to the first two questions is "no", at this juncture, can the court make an order under ss. 38 or 40 of the BIA to remedy the procedural impediment to State Farm's subrogated action?

The Court of Appeal held in favour of the appellants on all three of these issues, thereby dismissing the subrogated claim of Insurer.

In her reasons, Justice Hoy found that any interest that the plaintiffs may have had in pursuing a cause of action against the defendants vested in the Trustee pursuant to section 71 of the *Bankruptcy and Insolvency Act* ("**BIA**"). Accordingly, the Insurer's interest in the cause of action became extinguished on the date of the insured's

assignment into bankruptcy. Additionally, the Court of Appeal found that it could not make a remedial order under either section 38 or section 40 of the BIA, primarily on the basis that the applicable limitations period had expired.

Writing in dissent, Justice Rouleau stated that the equitable result in this appeal should have been to remit the matter back to Superior Court for redetermination. In this respect, Justice Rouleau stated, "to foreclose State Farm in this appeal from having the misnomer issue determined would potentially grant a windfall to the appellants and be contrary to the well-established principle underlying subrogation…that the "loss falls on the person who is legally responsible for causing it"".

This decision should put insurers on notice that their rights of subrogation will be affected by an insured who has made an assignment into bankruptcy.

As Justice Hoy noted in her reasons, insurers may want to consider including an assignment in their insurance policies guaranteeing their right to pursue litigation against third parties in these kinds of circumstances.

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