Furtado v. Lloyd's Underwriters: Relief from forfeiture not available for breach of condition precedent

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On March 27, 2025, the Supreme Court of Canada dismissed Mr. Furtado's application for leave to appeal the Ontario Court of Appeal's decision, where the Court of Appeal upheld the denial of coverage under a Directors and Officers liability policy as Mr. Furtado failed to meet a condition precedent under the claims-made and reported policy.

Key facts

Mr. Furtado, the directing mind of Go-To Developments ("Go-To"), sought coverage under a Directors and Officers liability insurance policy, effective from October 6, 2018 to October 25, 2019 (the "Policy"). The Policy was a claims-made and reported policy.

In March 2019, the Ontario Securities Commission ("OSC") launched an investigation into Go-To's business activities and subsequently sought production of documents under section 11 of the *Securities Act* (the "Act"). At that time, section 16(1) of the Act prohibited Mr. Furtado from disclosing the investigation to third parties, including his insurer. The Policy's Suspension Clause provided that Mr. Furtado was *not* required to notify the insurer of an investigation while he was legally prohibited from doing so. In December 2019, the Act was amended and section 16(1.1) permitted disclosure to the insurer; however, Mr. Furtado did not take steps to notify his insurer.

On December 6, 2021, the OSC commenced an application against Go-To and its affiliated entities, alleging that Mr. Furtado and the entities had breached the Act. In March 2022, the OSC filed a receivership application and enforcement proceeding against Mr. Furtado and the Go-To entities. Mr. Furtado thereafter reported the claims to the insurer in February and March 2022. On September 22, 2022, the insurer denied coverage, on the basis that Mr. Furtado did not provide notice of the claims during the policy period and that the insureds failed to satisfy a condition precedent under the Policy.

Superior Court decision

Mr. Furtado commenced an application in the Superior Court in 2023, seeking relief from forfeiture with respect to his "imperfect compliance" with the Policy.

The application judge found that the Suspension Clause only applied while Mr. Furtado was legally prohibited from notifying the insurer; his obligation to report resumed once disclosure was permitted under the revised Act. Mr. Furtado failed to report the investigation for nearly a year after receiving multiple summonses from the OSC, starting on February 16, 2021, which expressly drew his attention to his ability to disclose the investigation to the insurer. The Court found that this constituted a substantial breach of a condition precedent in a claims-made and reported policy. As such, relief from forfeiture under section 98 of the *Courts of Justice Act* was not available to Mr. Furtado.

Court of Appeal decision

On appeal, the Court of Appeal upheld the Superior Court's decision and reiterated several key principles relating to coverage under claims-made policies:

1. Difference between occurrence and claims-made and reported policies

Occurrence policies provide coverage for incidents that take place during the policy period, regardless of when the claim is brought.

Claims-made and reported policies focus on when the claim is made against the insured, rather than when the negligent act or injuries took place. Coverage is subject to two conditions precedent: (a) that the claim be made during the policy period; and (b) that the claim be reported to the insurer during the policy period.

2. Interpretation of the Suspension Clause

The Suspension Clause only suspended the duty to report while communication was legally prohibited. Once that prohibition was lifted, the insured must act promptly. In this case, the Court found that Mr. Furtado had a clear opportunity to disclose the circumstances by February 2021, when the OSC summons expressly drew his attention to his ability to disclose the investigation to the insurer.

3. Relief from forfeiture not available under the *Courts of Justice Act*

The Court found the delay of nearly a year in reporting the investigation after the updated legislation permitted disclosure to be substantial. Citing *Stuart v Hutchins*, the Court found that such delay in a claims-made and reported context causes prejudice to the insurer by increasing its risk exposure. Notably, relief from forfeiture only applies to imperfect compliance with the policy term, not failure to meet a condition precedent to coverage.

4. Distinction from Kozel v. The Personal Insurance Company

Mr. Furtado relied on *Kozel* to argue that relief from forfeiture is only categorically unavailable in rare cases when the breach is substantial and prejudices the insurer. The

Court rejected the insured's reliance on *Kozel,* on the basis that *Kozel* involved an occurrence-based policy. The Court noted that the core principle in *Stuart* remains applicable for claims-made policies, especially where policy language clearly sets out notice as a coverage trigger.

The Court of Appeal dismissed Mr. Furtado's appeal and Mr. Furtado subsequently made an application to the Supreme Court of Canada for leave to appeal, and the application was dismissed.

Takeaway

This decision reiterates that prompt reporting to the insurer is a condition precedent to coverage under claims-made and reported policies. Importantly, a delay in reporting – even if *initially* justifiable due to legal restrictions – may preclude coverage if the insured fails to report promptly once disclosure is permitted. Relief from forfeiture does not extend to remedy a breach of a condition precedent to coverage. While this could be viewed as a harsh result, claims-made policies involve a bargain struck between paying a lower premium and having more restricted coverage. Coverage depends on the claim being made and reported to the insurer within the policy period. Claims-made policies are essentially reporting policies, if courts were to allow an extension of reporting that would be tantamount to an extension of coverage for which the insurer had not bargained for.

For insurers, this decision provides some comfort that conditions precedent in claims-made and reported policies can be enforced, allowing for predictability in claims-made and reported policies.

By

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