IN FACT AND IN LAW

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THE POLICYHOLDER AND THE INSURER MAY AGREE TO UNILATERALLY MODIFY THE PROVISIONS OF A GROUP INSURANCE POLICY

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THE *LA CAPITALE* RULING HAD BEEN EXPECTED SINCE 2009, WHEN THE SUPERIOR COURT AUTHORIZED A CLASS ACTION AGAINST AN INSURER WHO HAD UNILATERALLY MODIFIED THE WAIVER OF PREMIUMS CLAUSE IN A GROUP INSURANCE CONTRACT IN 2001.[1]

THE FACTS

Two suits were brought against *La Capitale* by Plaintiffs Tremblay and Beaver, both public sector employees; they were authorized to institute a class action and to represent class members covered by the group insurance policy who were or had been disabled since 1996 and from whom the waiver of premiums benefit was withdrawn by a modification to the insurance contract. This group consisted of about 1,200 members.

The Plaintiffs became disabled in 1996 and 1997 respectively and are still disabled. They claim the right to have their premiums waived under their group insurance contract until the age of 65, as long as they remain disabled.

When he became disabled in 1996, Mr. Tremblay belonged to a bargaining unit covered by the collective agreements signed with the FTQ. The long-term care centre for which he worked terminated his employment in 2000 due to his disability. In 2005, his bargaining unit became disaffiliated from the FTQ which prompted the insurer to notify him in June 2006 that it was withdrawing the waiver of premiums because his union was no longer affiliated with the FTQ.

Mr. Beaver's situation is somewhat different. He was employed by a school board when he became disabled in 1997 and he still retains an employment relationship with the employer. His insurer notified him in November 2007 that under a new provision of the insurance contract, it could cease the waiver of premiums after 36 months. Because he had benefited from the waiver since 1997, the insurer claimed it was justified in ending it.

Plaintiffs Tremblay and Beaver's claims were joined together for hearing, and they requested, on behalf of the class, that their right to the waiver of premiums be restored.

The master policy which came into effect in 2001 contained a clause entitled *Modifications to the Policy* [Translation], which reads as follows:

> "The policyholder may, at all times, after agreement with the Insurer, make changes to the contract regarding the categories of eligible persons, the extent of protection and the sharing of costs between the categories of insured persons. Such changes shall then apply to all insured parties, whether active, disabled or retired".

Given the power granted to the contracting parties — namely the policyholders (a group of numerous associations representing the insureds) as well as the insurer — under this clause, the Superior Court concluded that they could negotiate modifications to the contract. Thus, the clause terminating the waiver of premiums was valid although it was modified without the agreement of the individual insureds.

[1] *Tremblay* v. *Capitale (La), assureur de l'administration publique inc.*, AZ-50836399.

The Superior Court added that the waiver of premiums is not a benefit recognized in the insurance policy, but rather a provision found in the section on payment of premiums, hence confirming that the waiver of premiums is not one of the insured benefits.

Although the facts in dispute and the number of parties involved make this a complex case, the real question is whether the insurer had the right to unilaterally modify a group insurance contract, and the Superior Court has confirmed that it did.

The class action was therefore dismissed.

APPEAL

Plaintiffs have inscribed the file in appeal giving the Quebec Court of Appeal the opportunity to rule on the validity of the Superior Court's decision. First of all, they are asking the Court of Appeal to declare that disability is a risk insured by the insurance policy, since they consider that the first judge concluded that it was not.

They also argue that the class members' rights crystallized when they became disabled. This argument entails that the right to disability benefits guarantees the waiver of premiums up until the insured is 65 years old.

Finally, although the Superior Court ruled that the master policy applicable in this case is the one that came into effect in 2001, the Plaintiffs have resubmitted this question to the Court of Appeal. They argue that the various versions of master policies are not new contracts but rather one that was renewed several times. Therefore, the applicable policy is the one that came into effect in 1991, which contained no clause authorizing modification and which was still in effect when the plaintiffs became disabled.

CONCLUSION

Although Plaintiffs were authorized to institute a class action, the Superior Court in its decision expressed the view that the class action was unfounded since the insurance contract stipulated that the policyholder and the insurer could make modifications, including the withdrawal of the waiver of premiums.

This case will be followed with interest by many, including the Plaintiffs in the *Vivendi* case,[2] who have recently obtained authorization from the Court of Appeal to institute a class action following modifications made unilaterally by the policyholder to a group insurance plan for retirees.

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[2] *Dell'Aniello v. Vivendi Canada inc.*, 2012 QCCA 384.

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