IN FACT AND IN LAW

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Life and Disability Insurance

THE COURT OF APPEAL CONFIRMS THAT THE POLICYHOLDER AND THE INSURER MAY AGREE TO MODIFY THE PROVISIONS OF A GROUP INSURANCE CONTRACT WITHOUT CONSULTING THE PARTICIPANTS[1]

JEAN SAINT-ONGE, Ad. E. and EVELYNE VERRIER

THE DECISION OF THE COURT OF APPEAL IN THE *LA CAPITALE* CASE HAS BEEN EXPECTED SINCE FEBRUARY 2012 WHEN THE SUPERIOR COURT DISMISSED THE CLASS ACTION TAKEN AGAINST AN INSURER WHO, WITH THE CONSENT OF THE POLICYHOLDER, HAD UNILATERALLY MODIFIED THE WAIVER OF PREMIUMS CLAUSE IN A GROUP INSURANCE CONTRACT[2].

TO BETTER UNDERSTAND THE CONTEXT, PLEASE REFER TO OUR NEWSLETTER IN JUNE 2012 FOLLOWING THE SUPERIOR COURT JUDGMENT.

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 represent class members covered by the group insurance contract who were or had been disabled since 1996 and from whom the waiver of premiums benefit had been withdrawn by a modification to the insurance contract. The group consisted of approximately 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bargaining unit became disaffiliated with the FTQ and in June 2006 the insurer notified him that insurance coverage was withdrawn because his union was no longer affiliated with the FTQ.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 it. His insurer notified him in November 2007 that under a new provision of the insurance contract, it could cease granting the waiver of premiums after 36 months of benefits. 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 claimed, on behalf of the members of the class, that their right to the waiver of premiums be restored.

[1] *Tremblay v. La Capitale*, 2013 QCCA 410.

[2] 2012 QCCS 746.

All the contracts entered into between the times of their respective disabilities and the modifications that deprived them of the waiver of premiums for sickness insurance and dental care, which came into force 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." [Translation] (Our underlining)

THE SUPERIOR COURT JUDGMENT

The Superior Court concluded that given the power granted to the contracting parties, i.e. the policyholders (a group of numerous associations representing the insureds) as well as the insurer, they could negotiate modifications to the contract because a specific clause authorized them to do so. Thus, the clause terminating the waiver of premiums was valid without the agreement of the individual insureds.

The Superior Court added that the waiver is not a benefit recognized in the insurance policy, but rather a provision found in the section on payment of premiums, which confirms 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 in dispute is whether the policyholder and the insurer had the right to unilaterally modify the group insurance contract.

THE COURT OF APPEAL DECISION

The Appellants repeated all of their arguments. They claimed that "disability" and the waiver of premiums attached to it at the beginning of their respective disabilities was an insured risk. This right to the waiver crystallized when their disabilities arose and the modification made to the group policy on January 1, 2001 was not valid. Lastly, they claimed that the insurer had committed a fault that engaged its liability.

The Court, in a decision written by Justice Thibault, first traced the history of the successive contracts and the provisions of the *Civil Code* that apply to them.

It noted that the contract in force on March 1, 1991 provided for not only a waiver of premiums in cases of disability, but also a clause authorizing modifications to the contract upon agreement between the insurer and the Committee (policyholder) and those modifications apply to all insureds, whether they are active, disabled or retired.

The contract in force since January 1, 1997 provided for a waiver of premiums in cases of disability, but it ceased at 65 years of age or when the insured no longer fulfilled the conditions of insurability. The clause giving the policyholder and the insurer the power to modify the contract was similar.

The contract in force since January 1, 2001 added as a cause of cessation of the waiver of premiums privilege the date on which the Committee confirms cessation of the employees group's membership in the union, which is the policyholder, or cessation of the member's membership in the employees group. The 65 years of age limit and the clause permitting modification of the contract remained similar.

On January 1, 2008, an endorsement was added to the contract from 2001 and it provided that, in addition to the causes described above, the sickness insurance and dental care plans ceased at the date of the end of the employment relationship or 36 months after the date of the commencement of the participant's disability.

The Court of Appeal confirmed that the benefits that the insurer must pay under the sickness and dental care coverages do not depend on the occurrence of a disability; they are not linked to disability.

As for the waiver of premiums that is tied to the occurrence of disability, it is not a coverage to which the insurer has committed itself because the insurer has not taken on responsibility for it, but instead it is shared between the participants. This benefit results from the policyholder's decision to transfer to the active participants the premiums that the disabled participants are not required to pay.

Then the Court considered the argument concerning the "crystallization" of the Appellants' rights at the times of their respective disabilities, because it is important for the insurers to know whether or not the successive contracts are distinct contracts, although the Court judged this issue to be secondary considering the fact that the contract from 1997 contains a preamble stating that it is a consolidation of the contract and endorsements in force since 1991.

The contract applicable at the time of the occurrence of the disability of each of the Appellants was the one from 1997. Although it was replaced by the contract from 2001 and modified by the endorsement of 2008, all the modifications were made at the request of the policyholder because the active employees expressed their dissatisfaction with the high cost of the premiums paid for the plan. At that time, the policyholder's insurance advisor had informed it that the waiver of premiums benefit until 65 years of age was very generous and that most plans limited the waiver period to three years.

Given that all of the contracts that had been in force since the Appellants' disabilities authorized the policyholder and the insurer to modify them by agreement and that they provided that the modifications applied to all the insureds irrespective of their status, no right could "crystallize" at the dates of disability. However, it was agreed that the Appellants continued to have the benefit of the life insurance with a waiver of premiums.

Lastly, the Appellants argued that article 2405 C.C.Q. required that the modification putting an end to the contract in the event of a change in the union's allegiance be brought to their attention. The Court rejected that argument; the group insurance contract is based on the definition of a given group for the benefit of which it is negotiated. The policyholder has authority from this group to negotiate and could agree on a modification concerning the categories of eligible persons. The Court accepted the views expressed by author Michel Gilbert stating that article 2405 C.C.Q. "can apply only to individual insurance because one cannot expect that participants come forward concerning a modification in which they are not involved." [Translation]

CONCLUSION

The modification clauses are valid and any change, addition or withdrawal of a coverage or privilege can be invoked against all of the active, disabled or retired insureds, without them having to be notified about it, if the bilateral agreement procedure is respected.

The Plaintiffs have 60 days to apply for leave to appeal to the Supreme Court.

JEAN SAINT-ONGE, Ad. E.
514 877-2938
jsaintonge@lavery.ca

EVELYNE VERRIER
514 877-3075
everrier@lavery.ca

YOU CAN CONTACT THE FOLLOWING MEMBERS OF THE LIFE AND DISABILITY INSURANCE GROUP WITH ANY QUESTIONS CONCERNING THIS NEWSLETTER.

DANIEL ALAIN DAGENAIS 514 877-2924 dadagenais@lavery.ca
MARY DELLI QUADRI 514 877-2953 mdquadri@lavery.ca
NATHALIE DUROCHER 514 877-3005 ndurocher@lavery.ca
MARIE-ANDRÉE GAGNON 514 877-3011 magagnon@lavery.ca
ODETTE JOBIN-LABERGE, AD. E. 514 877-2919 ojlaberge@lavery.ca
JEAN SAINT-ONGE, AD. E. 514 877-2938 jsaintonge@lavery.ca
VIRGINIE SIMARD 514 877-2931 vsimard@lavery.ca
EVELYNE VERRIER 514 877-3075 everrier@lavery.ca

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