IN FACT AND IN LAW

General and
Damage Insurance

March 2001

The **insurance policy** was not delivered to the insured: the insurer must compensate

By Odette Jobin-Laberge

The Court of Appeal recently dismissed the appeal in the case *of General Accident v. Genest*, J.E. 2001-206 and R.E.J.B. 2001-22026, and declared void against the insured a clause excluding damages caused by ground water, for the reason that at the time of the renewal of the policy, the broker had only given the insured a "summary" of the renewal (probably the special policy conditions page).

The insurer could not prove that the full text of the policy had been delivered to the insured by the broker and the broker's fault was attributed to the insurer. Indeed, the Civil Code makes communication of the policy a strict obligation of the insurer, even if the insurer satisfies this obligation by having it delivered through its insurance broker. Justice Rochette writes:

"In these cases, insurance brokers, in my opinion, are acting as agents of the insurer. They must then give each insured, as their agent (sic) should have done, documentation containing all conditions pertaining to each type of contract. Therefore, the insurance broker acts not only as the insurer's agent in the performance of his duties. Depending on the action he is taking, he may, in a given case, bind the insurer." (para. 29) (translation)

Quoting Professor Bergeron, Justice Rochette agrees with the following statements:

"(...) It is beyond belief that an insurer would be entitled to escape from any liability because an indermediary has the same responsibility as that of the insurer."

"(...) It is through him (the broker) that the insurer speaks to perform its obligations and to allow the insured to perform his. Establishing a reliable communication system with the insured is the responsibility of the insurer. It would be surprising if the insured had to bear the insurer's shortcomings and that the simple use of this communication system proposed by the insurer would render him an *agent of the insured*." (para. 31) (translation)

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Consequently, since the only document delivered to the insured did not include the exclusion clause, it would be unenforceable against him.

On the other hand, even if the document delivered did include a statement of reference to the "Applicable forms", failure to deliver them to the insured is in breach of Article 1435 C.C.Q. and renders null any "external clause" which was not brought to the attention of the insured.

Finally, Justice Rochette declares that in any case, the exclusion clause would have been inapplicable since the water which infiltrated through the windows and the foundation originated from the bursting of the city's watermain and could not be considered as "groundwater"; because the concept must be strictly construed, drinking water should not be deemed as such (para. 41 to 47).

It seems however that the insurer could seek the liability of the broker who omitted to deliver the policy to the insured, inasmuch as this insurer could demonstrate that he had given the necessary documents to the broker for the purpose of delivery.

Insurers and brokers should pay attention, otherwise the insured may seek damages which the contract would not entitle him to.

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