IN FACT AND IN LAW

Life and Disability
Insurance Law

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Insurability Report for Credit Insurance: the Obligation is primarily Incumbent upon Applicant

By Catherine Dumas

On September 6, 2002, the Superior Court rendered a judgment dismissing the action of Mrs. Norma Gobeil claiming the balance of two loans covered by life insurance policies issued by Desjardins-Laurentian Life Assurance (hereinafter "DLLA") following the death of her spouse[1].

The Facts

In March 1993, Plaintiff's spouse, Raynald Pednault, obtains a mortgage with the Defendant, Caisse Populaire Desjardins de Chicoutimi (hereinafter the "Caisse"), at which time he completed an application for life insurance coverage offered by DLLA.

When completing the form, Mr. Pednault had to answer certain questions about his insurability, in particular questions 5 A-2 and 5 C-1, to which he answered affirmatively:

[Translation]

[3] [...]

5 A-2: Have you ever had an application for insurance declined, approved with an additional premium or modified by an insurer, including Desjardins Life Insurance?

5 C-1: During the last two years, have you consulted a health professional, received treatments or undergone tests for heart or lung problems, high blood pressure, diabetes, back problems, tumours, cancer, immune system deficiencies including acquired immunodeficiency syndrome (AIDS), alcoholism, drug abuse or other serious disease?

In view of the positive answers to these two questions, Mr. Pednault was asked to provide DLLA with an insurability report, which he is required to complete and return to the Caisse. Despite the absence of an insurability report, the file is nonetheless sent to the data processing center and the loan is approved. The Caisse then collects the life insurance premiums and remits such premiums to DLLA as though Mr. Pednault had automatically been accepted for insurance.

In July 1993, Mr. Pednault takes out a personal loan from the Caisse. On this occasion, his answers to the two questions set out above are negative and is therefore not required to provide an insurability report. He is granted the loan and the life insurance premiums are once again collected by the Caisse out of the monthly instalments and remitted to DLLA.

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[1] *Gobeil* v. *Caisse Populaire Desjardins de Chicoutimi* et *Assurance-Vie Desjardins Laurentienne*, S.C. Chicoutimi, No. 150-05-000371-957, September 6, 2002, Gosselin, J., J.E. 2002-1688, REJB 2002-33959.

On February 24, 1995, Mr. Pednault commits suicide and in April 1995, DLLA confirms to the Caisse that it refuses to pay the balance of the two loans after noticing both the absence of an insurability report relating to the hypothecary loan and a refusal of loan insurance prior to 1993 based on medical history.

Indeed, had Mr. Pednault sent the insurability reports at the appropriate time, he would have then received the same answer as in prior years, that is, he would not have been eligible for the loan insurance since his health status was not considered acceptable.

The Plaintiff claims from the Defendants solidarily an amount of $61,556.65 representing the balance of the mortgage and personal loan covered by the life insurance as well as a sum of $25,000 as punitive damages.

Issues in Dispute

The Superior Court considers the following three questions:

> **[21] [...]**
>
> **1. For each of the two loans, did Raynald Pednault take out a valid life insurance policy?**
>
> **2. If not, may the Caisse and DLLA be held extracontractually liable?**
>
> **3. Is there cause for granting exemplary damages as claimed by the Plaintiff?**

Did Mr. Pednault Take Out a Valid Life Insurance Policy?

The Superior Court held that Mr. Pednault was not insurable at the time of the two loans. With respect to the personal loan taken out in July 1993, there is no doubt that the contract with DLLA was void *ab initio* in view of the false representations made by Mr. Pednault.

With respect to the lack of insurability issue, the Court bases its decision on the elements found in Mr. Pednault's file with DLLA, which caused the latter to refuse to pay the balance of the loans in 1995, as well as on additional elements discovered since the refusal when DLLA became aware of the Mr. Pednault's hospital file.

By allowing the introduction of additional evidence that had not been considered by DLLA when it carried out a "retroactive selection" in 1995, the Superior Court allows a retrospective analysis of the applicant's insurability, which is not simply limited to information available to the insurer when determining his insurability but covers *all* relevant information that the insurer may or may not have been aware of at the time of selection.

Extracontractual Liability of the Caisse and DLLA

On the basis of its conclusion that the Caisse was not acting as DLLA's agent in the processing of Mr. Pednault's application, the Superior Court found that only the liability of the Caisse is at issue, and then only with respect to the mortgage for which the credit agent would have failed to follow up on the insurability report.

It is useful to reproduce the instructions that accompany the Desjardins life insurance application form.

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[Translation]

[64] [...]

(...) If a person does not meet the insurability requirements set out in section 5 of the insurance application:

- he or she must complete an insurability report (15-083) available at the caisse or the financial institution;

- he or she must return this document to the caisse or the financial institution immediately, to avoid any delay in the consideration of his or her file;

- he or she must follow-up on this document.

The Superior Court found that the Caisse cannot be held liable since the obligation to complete the insurability report and to send it to the insurer is primarily that of the applicant. It is true that by collecting the insurance premiums the Caisse gave the false impression that the mortgage was covered by a life insurance policy. This mistake did not, however, cause damage to the Plaintiff since any application for insurance by Mr. Pednault would have been declined under the circumstances.

Exemplary Damages

The Plaintiff finds fault with the Defendants, alleging that they set up a deficient and inadequate insurance product that did not meet the requirements of good faith. The main reproach is that the insurer was allowed to collect premiums even though the applicant was ineligible. This however does not allow the Court to conclude that the insurer and the lender were of bad faith. The Court adds that exemplary damages, which are intended to be preventive and not compensatory, can only be granted in Quebec where expressly provided for by a provision of law. Such is not the situation in the present case.

Conclusion

This judgment reminds us that when an insurer must carry out a "retroactive selection", a retrospective analysis of the applicant's insurability based on *all* relevant elements of proof is possible. The insurer is not limited to information available at the time it made its decision—any element subsequently discovered is admissible as evidence to the extent that it is relevant to the applicant's insurability.

It should also be noted that the requirement that a duly completed insurability report be provided is incumbent upon the applicant and not upon the credit agent of a financial institution.

Finally, unless a statutory provision so provides, an insurer alleged to have set up a deficient insurance product cannot be held liable for exemplary damages on this sole basis.

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