

PUFFERY OR FRAUD

by

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Statutory conditions 6 and 7 are attached. Condition 7 represents a particular statutory confirmation of a more general obligation to act in good faith. A fraudulent statement not contained in a statutory declaration, e.g., in the schedule of loss, would also justify denial of a claim. *Anastasov v. Halifax Insurance Company* (1987), I.L.R. 1-2245 (B.C.C.A.).

A false representation is fraudulent if it was made knowingly, believing it to be false or made recklessly whether it be true or false. *Derry v. Peek* (1889), 14 App. Cas. 337 (H.L.).

The burden of proof is the insurer's and the standard is one of a balance of probabilities. The fraud must be proved with strong and convincing evidence. *Hanes v. Wawanesa Mutual Insurance Company*, [1963] S.C.R. 154; *Continental Insurance Co. v. Dalton Cartage Ltd.*, [1982] 1 S.C.R. 164.

The courts recognize a distinction between puffery or establishing a negotiating position and fraud. *National Development Corporation v. Halifax Insurance Company* [1985], I.L.R. 1-1909 (N.S.C.A.). The distinction is determined by the insured's state of mind. The factors chiefly to be considered in making this determination are motive, conduct,

documents and physical evidence.

MOTIVE

- marital difficulties, including recent separation or divorce;
- evidence of alcohol or drug abuse;
- change in financial circumstances, including loss of employment;
- gambling habit or addiction;
- general financial difficulties;
- heavy debt load;
- operating losses;
- cash flow problems, including pressure from creditors;
- high levels or slow movement of inventory;
- obsolescence of equipment or inventory;
- high overhead, including mortgage and/or lease obligations;
- many debts owed;
- business, premises or contents for sale at the time of loss;
- business or home recently purchased;
- disagreements between partners;
- age or illness of key personnel.

CONDUCT

- being overeager for a quick settlement;
- willingness to settle for an amount substantially less than that claimed at first;
- early complaints regarding delays in adjusting the claim;
- an aggressive posture, including quick assertions of "bad faith", or threatening of litigation;
- difficulties in contacting the insured by telephone or mail;
- insured handles all business in person;
- coincidental absence of insured, family members or pets at the time of the loss;
- previous and, particularly, similar loss history; and
- general credibility.

DOCUMENTS

- amounts claimed in round numbers;
- loss claim includes large amounts of cash;
- inability to provide credit card or bank records, especially for large or recent purchases;

- credit card receipts with incorrect or no approval code;
- lack of invoices or proofs of purchase, especially for recent purchases;
- unusual number of recent purchases;
- frequent claims with respect to cash purchases;
- over-documentation, with receipts for every purchase, and especially old ones;
- incomplete documentation for expensive items, particularly where minor items are over documented;
- blank receipts -- i.e., without store logo or letterhead;
- receipts from same supplier numbered in sequence, especially in wrong date order;
- one receipt with different handwriting or typefaces;
- invoices without appropriate or correct provincial and federal taxes;
- loss includes large number of family heirlooms;
- inconsistency between amounts of loss reported to police or fire department and that claimed in proofs of the loss;
- loss includes numerous scheduled or appraised goods;
- loss of primarily seasonal inventory after the selling season -- e.g., golf store which burns in the winter;
- questionable losses -- e.g., winter boots on trip to Palm Springs;
- disproportion between extent or type of items claimed and apparent means of insured.

PHYSICAL EVIDENCE

- fire department reports cause as incendiary, suspicious or unknown;
- lack of physical debris after the fire, especially non-combustible items such as jewellery;
- no signs of forcible entry (regarding theft claims);
- absence of expensive items, such as antiques or audio-visual equipment;
- absence of items usually found in a business or home, such as, kitchen: appliances or normal foodstuffs; living room: audio-visual equipment, record, tape or compact disc collections, furniture; bedroom: jewellery, toys; garage: garden or woodworking tools, bicycles, sporting goods; business or office: furniture or equipment, written records;
- absence of personal effects, such as family pictures or photo albums;
- damaged property discarded by the insured immediately after the loss;
- building in deteriorating condition or bad neighbourhood;
- fire occurred after hours or on weekend or holiday;
- alarms or sprinklers failed to work; and
- lack of security measures for business;
- photos;

- type of crime e.g. substantial or wholesale theft combined with negligence.

(I am indebted to N.J. Tuytel, author of "Fraudulent Property Insurance Claims", C.J.I.L., January, 1995, v.13, No. 1, for this checklist, although I have altered and added to it somewhat).

STEPS TO TAKE:

1. Early delivery of blank proof of loss forms;
2. Investigate immediately (inspection included);
3. Videotape statement and questions;
4. ICPB;
5. What do police think;
6. Check with neighbours, business partners and other witnesses;
7. Consider checklist regarding motive, conduct, documents and physical evidence.

Objectively assess whether you have strong and convincing evidence that, on a balance of probabilities, insured's misstatement was made dishonestly. Puffery consists of things like over-estimations of the quantity or quality of items. Fraud may fairly be inferred from gross exaggerations. If a person claims his fridge and stove were only six years old, but they were nine years old, that likely is honestly believed or only puffery. But if he claims to have had three stoves and two fridges while only possessing one of each, that is fraud.

Examples of cases successfully defended are: *Dorosh v. Co-operators General Insurance Co.* (1991), 3 C.C.L.I. (2d) 211, 6 Sask. R.30 (Q.B.), *Mohammed v. Elite Insurance Co.* (1993), 16 C.C.L.I. (2d) 126 (B.C.S.C.), *Parasidis v. Wawanesa Mutual Insurance Co.* (1989), 33 C.C.L.I. 259, 53 Man. R. (2d) 194 (Q.B.); *affd* (1989), 38 C.C.L.I. 60, 59 Man. R. (2d) 159 (C.A.) and *Tumbers Video Ltd.v. INA Insurance Co. of Canada* (1989), 40 C.C.L.I. 262, [1989] I.L.R. 1-2511 (B.C.S.C.); *affd* (1991), 62 B.C.L.R. (2d) 58, 4 C.C.L.I. (2d) 200 (C.A.).

STATUTORY CONDITIONS

Requirements after loss.

6(1) Upon the occurrence of any loss of or damage to the insured property, the insured shall, if such loss or damage is covered by the contract, in addition to observing the requirements of Conditions 9, 10 and 11,

- (a) forthwith give notice thereof in writing to the insurer;
- (b) deliver as soon as practicable to the insurer a proof of loss verified by a statutory declaration
 - (i) giving a complete inventory of the destroyed and damaged property and showing in detail quantities, costs, actual cash value and particulars of amount of loss claimed,
 - (ii) stating when and how the loss occurred, and if caused by fire or explosion due to ignition, how the fire or explosion originated, so far as the insured knows or believes,
 - (iii) stating that the loss did not occur through any wilful act or neglect or the procurement, means or connivance of the insured,
 - (iv) showing the amount of other insurances and the names of other insurers,
 - (v) showing the interest of the insured and of all others in the property with particulars of all liens, encumbrances and other

charges upon the property,

(vi) showing any changes in title, use, occupation, location, possession or exposures of the property since the issue of the contract,

(vii) showing the place where the property insured, was at the time of loss;

(c) if required give a complete inventory of undamaged property and showing in detail quantities, cost, actual cash value;

(d) if required and if practicable, produce books of account, warehouse receipts and stock lists, and furnish invoices and other vouchers verified by statutory declaration, and furnish a copy of the written portion of any other contract.

6(2) The evidence furnished under clauses (1)(c) and (d) of this condition shall not be considered proofs of loss within the meaning of conditions 12 and 13.

Fraud.

7 Any fraud or wilfully false statement in a statutory declaration in relation to any of the above particulars, shall vitiate the claim of the person making the declaration.