

SUBROGATED CLAIM BARRED BY LEASE SAYS NB COURT OF APPEAL

Reported case: Robichaud et al. v. Pharmacie Acadienne de Beresford Ltee. et al

Citation: 2008 NBCA 12

At Issue: Can an insurer subrogate when its insured is a party to a lease requiring a waiver of subrogation but the corresponding insurance policy contains no waiver?

The Court: New Brunswick Court of Appeal

Judgment Rendered: February 15, 2008

Factual Summary: Pharmacie was a tenant in a shopping centre. Pharmacie sustained damages to leasehold improvements, inventory and office equipment when water escaped from a pipe in the shopping centre's sprinkler system. Pharmacie's insurer, Royal and SunAlliance, paid to settle the claims and then subrogated against the lessor, alleging nuisance and negligence. Royal's policy did not contain a waiver of subrogation. The lessor shopping centre pointed to their lease with Pharmacie, which contained a waiver of subrogation clause in favour of the lessor, as a complete defence to the action. Pharmacie countered, arguing the lease contained another clause that specifically left the door open to an action in negligence. The shopping centre brought a third party action against the law firm that created the lease.

Disposition by Lower Court: On a motion for a determination of a question of law, the motions judge decided that the waiver of subrogation clause in the lease foreclosed only Pharmacie's claims for damage to integrated leasehold improvements. The other aspects of the negligence claims were allowed to go forward.

Appellate Decision: The appeal was allowed and it was decided that both the waiver of subrogation and negligence clauses of the lease operated in tandem and effectuated a loss-bearing scheme that barred the underlying subrogated action in nuisance and negligence. The Court suggested this case was an important reminder for insurers underwriting commercial lessee's property to closely inspect the lease involved because the terms of the lease would invariably operate, whether individually or collectively, to limit a lessor's liability in a manner that curtails subrogation rights.

The motion was converted to a motion for judgment and the main action and the third party claim were dismissed.