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Non-waiver agreement, emergency measures and renunciation by the insurer

At the onset of an investigation, whenever the insurer has reasons to suspect that coverage may be an issue, it usually requires the insured to sign a non-waiver agreement that will allow the insurer to investigate the situation without jeopardizing its rights. However, could some of the insurer's subsequent actions amount to renunciation of these rights? This was the question in Haddou c. Alpha (L') compagnie d'assurances inc., 2016 QCCS 6184, a decision from the Superior Court, district of Québec.

On August 25, 2014, the insureds' residence was damaged by fire. The next day, the insurer appointed an adjuster who immediately made arrangements for the relocation of the insureds and for emergency repairs. On August 27 and 28, the insureds signed a non-waiver agreement and a consent to the insurer's investigation. On September 2, the adjuster met with the insureds and repeated that the insurer's investigation was ongoing, without prejudice to its rights. She later had the insureds' furniture and personal belongings removed and arranged for the flooring and walls to be stripped to avoid moisture damage.

On September 18, the adjuster was informed by a police investigator that a complaint had been filed with youth protection services in May 2014 alleging that the insureds had been negligent towards a child who was under their care. Subsequent research revealed that the insureds had posted messages on a website announcing daycare services at their home. As those facts were in contradiction with the insured's previous versions, the insurer decided to deny coverage for several reasons: the insureds had failed to disclose their plan to operate a daycare when the policy was issued; they misrepresented the fact that they were operating a daycare when the fire occurred; and they had committed arson. The insureds claimed that the insurer's actions, after the fire, implicitly constituted a waiver of its right to raise those arguments.

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They also claimed that they had not been informed of the possibility that coverage could be denied and that, since the insurer had undertaken repairs while still within the 60-day limit of art. 2473 CCQ, when it was not required to do so, it had implicitly renounced to raise these arguments. The insureds argued that relocating them, authorizing the cleanup of their clothing, getting rid of irreparable goods and planning the repair work was tantamount to the insurer's waiving its rights.

The insurer argued that it could not waive rights when it was not yet unaware of the reasons to deny coverage. It also maintained that the insureds had repeatedly been informed that the investigation was ongoing and that the insurer had not waived its rights. It added that the repairs had been undertaken to avoid moisture damage, and that these repairs should have been done by the insureds in any event.

The Court held that the insurer had not waived its rights. The emergency repairs that it authorized were necessary and, in these circumstances, relocating the insureds was reasonable. Undertaking the repairs to avoid moisture damage was also reasonable, although the investigation was under way. Furthermore, the insurer was only informed on September 18 of certain facts that influenced the investigation and eventually led to a denial of coverage.

Having set aside the waiver argument, the Court discussed the insurer's remaining arguments. On the increase of risk, the Court held that the evidence made by the insurer, including the insurer's internal policy not to insure domestic daycare facilities was not decisive. However, the Court agreed that the insureds' misrepresentation on the operation of such a daycare facility at the time of the fire was a cause for denial of coverage. Consequently, it did not have to consider the possibility that the damage could have been caused by arson. The insureds' claim was dismissed, whereas the insurer's claim for the refund of expenditures incurred was allowed in part.