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CASE SUMMARY: INSURED INDEMNIFIED AFTER BEING DEFRAUDED OF DEFIBRILLATORS

Insured succeeded on summary judgment application as the insured had not voluntarily surrendered defibrillator units as a result of the purchaser's fraudulent intent. The claim was not excluded as a conditional sale because there was no sale and no evidence of any agreement or intent to withhold title.

Insurance law – Commercial general liability insurance – All-risk – Fraud – Exclusion – Practice – Summary judgment

Heart Zap Services Inc. v. Lloyd's Underwriters, [2019] O.J. No. 3441, 2019 ONSC 3667, Ontario Superior Court of Justice, June 28, 2019, J.D. O'Flynn J.

The insured is in the business of selling defibrillator units. The insured received an order for 25 defibrillator units and accessories valued at \$37,120 by someone who presented as a doctor at Ottawa General Hospital. The defibrillators and equipment were shipped and invoices were sent to the purchaser. When the invoices went unpaid, the insured attempted to contact the purchaser, without success. The insured contacted the police and reported the theft, but neither perpetrator nor the shipped items were found.

The insured brought a claim under its all-risks commercial insurance policy; however the insurer denied coverage for the loss claiming the loss did not fall within coverage, or, alternatively, if it did, it was excluded pursuant to a clause in the policy for property sold under conditional sale. The policy insured "against all risks of direct physical loss or damage to the property insured". The insurer argued that the loss of the defibrillators and equipment was not a loss covered by the policy as the loss of goods "voluntarily surrendered to a fraudster" is not covered.

The court found that to constitute a sale of goods, there must be a *consensus ad item* between the buyer and seller to enter into a contract. In the case at bar, the court found that it was only in the belief that the doctor purchaser had capacity to pay that the insured was willing to deal with him; however, the evidence of fake names and contact information indicated that the purchaser's intent from the beginning was to obtain the defibrillators by fraud. Accordingly, the court found that there was no *consensus ad item* and therefore no contract of sale was formed. As such, the insured did not voluntarily convey the defibrillators.

The insurer also argued that the claim was excluded from coverage as a conditional sale. The insurer submitted that the purchase was conditional because the purchase order provided that payment "shall be net (30) days from date of delivery or invoice". The court rejected the insurer's argument, agreeing with the insured that the exclusion was intended to address situations where an insured retains title and risk to the insured property, where such property is out of their possession. In the instant case, the fraudulent sale was not a conditional sale, but rather a typical cash delivery contract and there was no evidence of any agreement or intent to withhold title. The court further held that the insurer's argument presupposes that there was a contract of sale. Where the vendor's consent to sell was obtained by fraud, there can be no sale.

The court granted summary judgment for the insured but refused to award punitive damages as the insurer's conduct could not be characterized as malicious.

This case was digested by [Tricia M Milne](#), and first published in the LexisNexis® Harper Grey Insurance Law Netletter and the Harper Grey Insurance Law Newsletter. If you would like to discuss this case further, please contact Tricia M. Milne at tmilne@harpergrey.com.