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LAWYER'S WEEKLY MAGAZINE: BCCA RULES ON GENERAL CONTRACTOR'S ENTITLEMENT TO COVERAGE UNDER CGL

Richards Buell Sutton Insurance Law Newsletter

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In the long awaited case of *Progressive Homes Ltd. v. Lombard General Insurance Co.*, 2009 BCCA 129, the British Columbia Court of Appeal has, in a split decision, ruled that claims in an underlying tort action against a general contractor do not warrant insurance coverage because of the breadth of defects alleged in the pleadings. The dissenting view was consistent with rulings of the Saskatchewan and Ontario Courts of Appeal, namely that the policy wordings do not exclude coverage for defective work of subcontractors. As it presently stands, this decision precludes coverage in British Columbia for general contractors under their CGL policies when the whole of the building is alleged to be defective.

Background

Progressive appealed a ruling that it was not entitled to coverage under various Lombard CGL policies covering a period from the early 1990's to the mid 2000's. Progressive's claim to coverage was in the context of "leaky building" litigation where the plaintiff in the underlying tort action alleged numerous types of building defects. The building defects alleged focused on components of the building related to the "building envelope" such as exterior walls, venting and drainage, windows and caulking. There were four sets of policy wordings over the alleged coverage period. Each set of wordings had widely used definitions for "property damage", "occurrence" and "completed operations hazard" and the "subcontractor exception" that has been held to extend coverage to property damage caused by subcontractors. At trial, Progressive's claim to coverage was denied. The denial was made in the face of evidence that the vast majority of work on the subject buildings was done by subcontractors on behalf of Progressive. The Court's ruling was based on previous rulings in the *Swagger* and *GCAN* cases and the finding that the allegations did not fall within the meaning of "property damage" or "occurrence" and thus did not fall within the ambit of coverage. The fact that the allegations did not fall within the ambit of coverage allowed the Court to find it improper to look to the subcontractor exception to find coverage as to do so would entail looking to an exclusion to find coverage where none existed in the first place.

The Ruling

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The majority in the Court of Appeal considered that the questions imposed on the appeal lie in whether the common law rules of interpretation with respect to implied exclusions or assumptions in insurance contracts ought to have prominence in an interpretation exercise or whether those assumptions have been overcome by the clear language of the policies. In undertaking this analysis the majority considered the underlying assumption that insurance is designed to provide for fortuitous contingent risk and that the expected consequence of poor workmanship can hardly be classified as fortuitous. To overcome this assumption the Court required Progressive to demonstrate

that the subject policies contained clear language designed to cover poor workmanship or faulty design. In attempting to do this Progressive relied upon the subcontractor exception to the "your work" exclusion and the recent Ontario Court of Appeal decision in *Bridgewood.* In that case the court undertook an analysis of the historical evolution of that exception and the reasonable expectation of the parties flowing from it. The court in *Bridgewood* found that the inclusion of the subcontractor exception in CGL policies was the response of the insurance industry to contractor unhappiness with the fact that coverage was not being afforded to them under older policy wordings when more and more of their projects were being completed by subcontractors.

The Court in *Progressive* refused to follow *Bridgewood* for two reasons. First, it had no admissible evidence before it of the historical evolution of the subcontractor exception and accordingly found *Bridgewood* of "limited value". Secondly, the Court found what it deemed to be a reasonable interpretation of the subcontractor exception in the context of the fortuity principle, namely that the exception was operational in respect of latent defects a general contractor cannot be expected to find that cause damage to the building after the work is complete. On this analysis, a general contractor would be entitled to coverage where an exploding boiler installed by a subcontractor caused damage to the entire building after the building was complete.

After interpreting the insuring agreement and the exclusions, including the subcontractor exception, the Court turned to the pleadings to determine coverage. In reviewing the pleadings the court found that:

> *"the pleader has not identified any interior components of the building such as boilers or electrical wiring that caused damage. Instead the case against Progressive alleges that the building components themselves were defective. In essence it is alleged that integral parts of the structure, the roofs and walls, have not functioned properly"* and that the *"damage alleged in this case does not fit within the "subcontractors exception" as I understand it."*

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The dissenting judge was persuaded by the insured that the policies in issue provide coverage for the contingent risk that the negligence of a subcontractor might give rise to an "occurrence" causing "property damage". In arriving at this conclusion it was found that such an interpretation did not offend the underlying assumption that insurance is designed to provide for fortuitous contingent risk. The dissenting view was taken on the basis of the interpretation of wording in the insuring agreement, the support of the exclusionary language to that interpretation and the acknowledgement of the *"commercial importance of a uniform Canadian interpretation of a general contractor's commercial general liability policy containing the completed operations hazard endorsement".*

Impact for Insurers, Contractors and Tort Claim Plaintiffs

It is our view that the BCCA ruling in *Progressive Homes* creates a dichotomy in Canadian jurisprudence on general contractors' entitlement to insurance coverage under CGL policies. While the majority decision distinguishes other Canadian appellate court rulings on the basis of available evidence and content of pleadings the relatively narrow interpretation of the subcontractor exception to the "your work" or "completed operations hazard" provisions cannot be ignored. This dichotomy as well as the importance of the ruling to the insurance and construction industry may lead to an appeal to the Supreme Court of Canada.

Irrespective of any appeals, it can be expected that insurers, particularly in the context of British Columbia cases, will trumpet the majority ruling. Insurers however will have to remain cognizant of two strategies that will be employed by litigants in the hope of triggering CGL coverage. First, it can be expected that general contractors, in the context of coverage disputes, will tender evidence on the historical development and insurance industry practice pertaining to the Broad Form Property Damage Endorsement implemented into the CGL in 1986 with a view to aligning their claims evidentially with those in *Bridgewood.* Secondly, third party tort claimants, their eyes trained on "deep pockets", can be expected to limit "shotgun" pleadings on building defects and instead allege fewer, more precise defects and thus avoid an interpretation that the whole of the building, or contractor's work, was defective.

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