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Freezing and settling, expansion exclusions under appeal in B.C.

The B.C. Supreme Court issued a ruling recently on the applicability of two exclusions in an all-risk property insurance policy. In *Wynward Insurance Group v. MS Developments Inc.,* 2015, the freezing and settling/expansion exclusions were applied in respect of commercial premises damaged by frost heave consequent upon a water leak. The court concluded the insurer was not obliged to cover the loss because of the exclusions.


Alex Eged

The Facts

The insureds owned and operated a restaurant and bar in Kelowna, B.C. The restaurant had a large walk-in freezer which created condensation through its operations. The condensation was drained from the freezer by a drainpipe to the outside of the building. To prevent freezing, the drainpipe was wrapped in tape containing electrical heating elements.


Scott MacDonald

In late 2013 the heat tape failed, causing the drainpipe to freeze and burst. Water migrated from the broken drainpipe through the freezer wall and onto and through the freezer floor slab. The water that had accumulated under the freezer floor slab and building walls froze. This freezing caused the ground around the freezer and building walls to heave, damaging floor tiles, walls, doors and even the ceiling in the vicinity of the freezer.

The insured sought indemnity for property damage and business losses under its all-risks property policy.

The Positions

The insurer denied coverage, petitioning the court for a declaration that the losses were caused, either directly or indirectly, by three excluded perils: freezing; earth movement and settling; and expansion, contraction, moving, shifting or cracking.

The insured argued that all of the exclusion clauses in issue were ambiguous and therefore ought to be construed narrowly against the insurer. In particular, the insured argued that the clauses did not distinguish between naturally occurring and man-made events.

The Ruling

The court ruled that two of the three exclusions applied and accordingly declared that the insurer was not obliged to indemnify for the loss. The court first considered the freezing exclusion. This clause provided that coverage would not be extended where the loss or damage was caused directly or indirectly by "changes in or extremes of temperature, heating or freezing."


Nicole Mangan

The court easily concluded that this exclusion was not ambiguous and that, since the damage flowed indirectly from the phenomenon of freezing, both at the drainpipe and ground, coverage for the loss was excluded.

The earth movement exclusion required greater consideration from the court due to a line of established case authority favouring the insured. In its consideration the court concluded there was ambiguity in the exclusion. The ambiguity arose from the fact that the exclusion could be interpreted as including both naturally occurring and man-made events. Therefore, because the earth movement at issue had a man-made cause, namely the failure of the heat tape, the ambiguity was resolved in favour of the insured and the exclusion was not applied.


Peter Lightbody

The third clause excluded loss and damage occurring by settling, expansion, contraction, moving, shifting or cracking. Here again, the notion of natural vs. man-made causes was the thrust of the insured's plea for ambiguity. Turning again to the jurisprudence in B.C., the court found that the exclusion encompassed natural and unnatural events, thereby avoiding the ambiguity that afflicted the earth movement exclusion.


Nick Safarik

In making this finding the court rejected case authority from the Alberta Court of Appeal that arguably favoured the insured on the basis that it was not binding in B.C.

Practical Considerations

This case is a useful reminder of certain policy interpretation fundamentals:

- There can be a significant difference in the interpretation of "causal-based" exclusions, such as those at issue in *Wynward*, as compared to "damage-based" exclusions.
- Causal-based exclusion clauses require evidence, usually expert, on the cause of loss. In *Wynward* the parties' experts agreed on the cause of loss, thus allowing the policy interpretation to be done by way of petition and without need of a trial. Insurers and insureds are well-advised to employ competent adjusters and obtain early expert opinion when addressing losses under policies containing causal-based exclusions.


Ryan Shaw

Courts in different jurisdictions may treat similar exclusions in an opposite manner. They must be aware of how the subject jurisdiction has treated the relevant exclusion(s) before making a coverage determination.

The insured in the *Wynward* case has appealed the decision and it is expected the B.C. Court of Appeal will rule on the application of the exclusions in mid-2016. IP