

Indemnity Coverage under a CGL Policy after *Progressive Homes*

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Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada

Seminal decision about the interpretation of CGL insurance policies.

1. What is an “accident”?
2. What is “property damage”?
3. What is excluded by “insured’s own work”?

Bulldog Bag Ltd. v. AXA Pacific Insurance Company

- BCCA decision interpreting *Progressive Homes*.
- Is the decision in *Progressive Homes* about the contents of a CGL policy:
 - part of the *ratio decidendi* ,
 - or only *obiter dicta*?

I. “Accident”

1. Some cases interpret “accident” to exclude “negligence

Andrews & George Co. v. Canadian Indemnity Co.

- “accident” does not include the “direct and unexpected damages from the daily risks which it was part of their business...to face and eliminate”.

- 2, More recent decisions include negligence within “accidents”.

Strait Towing Ltd. v. Washington Iron Works

- “..., a policy which wouldn’t cover liability due to negligence could not properly be called comprehensive”.

I. Accident (cont'd)

- *Progressive Homes*: Insurer argued that a defective building is not an “accident”.
- The SCC rejected this view:
 - ... “ there is no categorical bar to concluding in any particular case that defective workmanship is an accident...”.
- SCC also rejected the argument that a defective building is not “fortuitous contingent risk”:
 - “...Fortuity is built into the definition of “accident” This is a requirement of coverage; therefore it cannot be said that this offends any basic assumption of insurance law”.

I. Accident (cont'd)

- SCC also rejected argument that including faulty workmanship within “accident” converts a CGL policy into a performance bond:
 - “...: a performance bond ensures that the work is *brought to completion* ... whereas the CGL policies ... only cover damage to the insured’s own work *once completed* ... the CGL policy picks off where the performance bond leaves off.

II. Property Damage

- Insurer asserted that damage to one part of a building caused by another part of the same building amounted to economic loss, not “property damage”.

- The SCC disagreed:
 - “...I do not agree with Lombard that the damage must be to third-party property. There is no such restriction in the definition”.

- The exclusion for “work performed” supported this conclusion:
 - “...Qualifying the meaning of “property damage” to mean third-party property would leave little or no work for the “work performed” exclusion ... ”.

II. Property Damage (cont'd)

- The SCC held that “defective property” could constitute property damage”.

III. “Work Performed” Exclusion

- a) Exclusion to property damage to work “performed by” the insured

SCC: did not apply to damage caused by a subcontractor, or to the subcontractors work whether caused by the subcontractor, another subcontractor or another insured contractor.

Work Performed Exclusion (cont'd)

b) Exclusion of “that particular part of your work included in the “products – completed operations hazard”.

- SCC: this exclusion excludes repairing defective components in the excluded part of the work, but not for resulting damage to other parts of the work.

Bulldog Bag Ltd v. AXA Pacific Insurance Company

- Was *Progressive Homes* only a decision about the duty to defend?
- Or did *Progressive Homes* change the law with respect to the contents of a CGL Policy?
- The BCCA adopted the latter view:
 - “The Supreme Court of Canada reversed a line of insurance cases that had taken a narrow view of the scope of coverage under a commercial and general liability (“CGL”) policies...The Court determined that ...

Facts in *Bulldog Bag*

Bulldog manufactured plastic packaging and sold it to Sure-Gro

Sure-Gro used printed packaging to sell products to Canadian Tire
Ink came off the packaging,

Bulldog had to supply new packing and Sure-Gro had to retrieve, re-package and re-deliver.

Sure-Gro claimed against Bulldog for its cost in doing so.

Bulldog conceded that the cost of the initial defective bags was not covered.

The *Bulldog* Decision

- ↪ Insurer conceded that the claim fell within the policy, but argued that the exclusions applied (is the initial coverage issue still in doubt?)
- ↪ Exclusion for property damage to goods or products manufactured or sold by the insured.
- ↪ Insurer argued that the “costs associated with repairing or replacing the insured’s defective work and products” was still excluded after *Progressive Homes*.
- ↪ The Court of Appeal disagreed.

The *Bulldog* Decision (cont'd)

- “...the [exclusion]... cannot be extended to compensation for Sure-Gro’s costs separating those bags from its products, repackaging in different bag, and salvaging the “old” products some months later.
- “...here, the clause does not purport to exclude coverage for “claims that flow from” the plaintiff’s defective work or work product, and excludes only coverage for property damage to goods supplied by the insured.”
- The newer and soil products within the bags was “physically injured or destroyed” because it ceased to be useable for its intended purpose.

Conclusion

Unless the policy provides otherwise:

- a) A policy covering damage arising from an “accident” covers damage arising from an insured’s negligence, including a defective building.
- b) A policy excluding damage to the insured’s own work will cover damage to other property, even if arising from the insured’s own work.
- c) A policy excluding damage arising from work performed by the insured will not exclude damage arising from work performed by the sub-contractor or others.

Work Conclusion (cont'd)

- d) A policy excluding damage to a particular part of the work does not exclude damage to other parts of the work, even if caused by damage to the excluded portion.
- e) Damage arising from a defective product, or to a product if it is rendered unfit for its intended use, will be covered.

Quebec C.A. Case

- *Velan inc v. GCAN Insurance Company*,
2012 QCCA (Aug. 22, 2012)
- CGL policy held not to apply to claim arising from allegedly faulty connectors and seal rings for pipelines, manufactured and sold by the insureds.
- The connectors and rings were detached and replaced without damaged to any other property.

Velan v. GCAN (cont'd)

- Pipeline company's cost of inspecting and replacing the connectors was not "property damage"
- Claim against the insured was based entirely on a breach of a sale of goods contract
- Unlike *Bulldog*, the connectors could be removed without damage to other property