

Liability Insurance

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published 03/30/2011

Duty to Defend

Lawsuits are common in the construction industry. When embarking on any major construction project, companies will often obtain insurance to protect themselves in the event of an accident (an event which is neither expected nor intended). However, on occasion, a claim arises in relation to a construction project where a company may not have the protection it believed it had in place. As a result, the company finds itself being met by the insurance company saying that the claim falls outside the policy, and the insurer saying it has no duty to defend the company in the lawsuit. In such scenarios, what generally ensues is litigation between the company and the insurer on the issue of defence coverage. *Progressive Homes Ltd. v. Lombard General Insurance Company of Canada* was faced with this very question. The SCC concluded that the insurance company has to pay for defence costs if there is the mere possibility the policy exists to cover the alleged damages. The facts were that the insured, Progressive, had been hired as a general contractor to build several housing complexes. After completion, four actions were initiated against Progressive claiming breach of contract and negligence. It was alleged that significant water damage caused rot, infestation and deterioration in all four buildings. Progressive had secured several commercial general liability insurance policies with the insurer, Lombard. The policies required Lombard to defend and indemnify



Progressive when Progressive was legally obligated to pay damages because of property damage caused by an occurrence or accident. Lombard claimed that it did not have a duty to defend because the claims were not covered, and therefore excluded, under the insurance policies. Progressive brought a court application seeking a declaration that Lombard was under a duty to defend in the four actions. The application judge found that the claims did not fall within the initial grant of coverage under the policies and therefore Lombard did not owe a duty to defend. Progressive appealed, and a majority of the Court of Appeal dismissed the appeal. The SCC however disagreed and in resolving divergent lines of case law concluded that Lombard owed Progressive a duty to defend the four actions. *Progressive v. Lombard* can be summarized as follows:

- The initial onus is on the insured to show that the pleadings fall within the initial grant of coverage;
- The focus of insurance policy interpretation should be first and foremost on the language of the policy at issue;
- Provided the initial onus is met by the insured, the burden then shifts to the insurer to show that any potential coverage is ousted by an exclusion clause in the policy. The exclusion clause relied upon by the insurer must clearly and unambiguously apply to all of the claims made against the insured and there must be no possibility of coverage under the policy of insurance;
- Depending on which version of the comprehensive general liability policy applies, there is a possibility of coverage for damage to work completed by a subcontractor, for damage resulting from work performed by a subcontractor, or for damage resulting from the particular part of the insured's work that was defective;
- If it is clear that the claim falls outside the policy, either because it does not come within the initial grant of coverage or is excluded by an exclusion clause, there will be no duty to defend.

It is to be noted that the ruling pertains only to the duty to defend, and that determination of what damage was actually covered by the insurance policy, and what was excluded by the exclusions, had to wait until the evidence was established at trial.

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