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April 3, 2009

APPEAL COURT UPHOLDS DENIAL OF COVERAGE TO GENERAL CONTRACTOR: *PROGRESSIVE HOMES LTD. v. LOMBARD GENERAL INS. CO.*, 2009 BCCA 439



BACKGROUND

A recent "trilogy" of British Columbia cases have denied general contractors coverage under CGL policies for property damage arising from faulty or defective workmanship.¹ However, the divided opinions of the Court of Appeal in *Progressive Homes Ltd. v. Lombard General Insurance Co.*, [2009 BCCA 439](#), the only one of the "trilogy" to reach that Court, leave certain questions open.

The "trilogy" all involved suits against general contractors relating to "leaky condos". They established that CGL insurers do not owe general contractors a "duty to defend" when the only damage alleged is to the very work that the insureds were contracted to perform. The courts reasoned that faulty construction is not "property damage" under a CGL policy; nor is it an "occurrence" unless a third party's property is damaged.

In *Progressive Homes*, the general contractor had argued that, because the claim included the cost of repairing parts of the building damaged by subcontractors' defective work *elsewhere* in the building, it was a claim for "property damage" and also an "occurrence", and so should be covered. This distinction between parts of a building has become known as the "complex structure theory".

The trial Court rejected the theory, holding that a building is an "integrated whole", and that where the whole structure is allegedly defective, it is artificial to segregate the general contractor's work from that of its subcontractors, unless that approach was clearly intended by the policy. The Court also confirmed that defective construction is not an "occurrence", and does not trigger CGL coverage

¹ *Swagger Construction Ltd. v. ING Insurance Company of Canada et al.*, [2005 BCSC 1269](#); *GCAN Insurance Company v. Concord Pacific Group Inc. et al.*, [2007 BCSC 241](#); and *Progressive Homes Ltd. v. Lombard General Insurance Co.*, [2007 BCSC 439](#).



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unless property other than the building itself is damaged. Finally, the Court rejected the contractor's argument that certain of the policy's exclusions and exceptions could create coverage where none existed in the first place.

THE APPEAL

The general contractor appealed. On March 26, 2009, a majority of the B.C. Court of Appeal upheld the trial decision and confirmed that the claim was not covered.

- The majority first observed that the "complex structure" theory could not be rejected out of hand; other policy wording might be interpreted to define the scope of coverage by portions of a building, rather than the whole. However, the policy wording in this case did not permit such distinctions. Insurance only protects against fortuitous risk, and the predictable consequences of poor workmanship are not fortuitous. Nothing in the policy language contradicted that principle and gave rise to coverage.
- Second, because the pleadings alleged that the building's integral parts (*i.e.*, its roof and walls) were defectively built, there was no "property damage" caused by an "occurrence" and coverage for the general contractor under the CGL policy was not triggered.
- Lastly, although the policy's faulty workmanship exclusion did have an exception providing coverage for subcontractors' work, that exception only applied to accidental property damage that occurred *after* the work was completed; it could not create coverage for the faulty construction itself.

In dissenting reasons, the minority held that the policy's definition of "property damage" was not limited to physical injury to property *other than* the insured's work. Therefore, the claims against the general contractor did allege "property damage" and "loss of use" caused by an "occurrence". The minority thus held that the insurer owed a duty to defend.



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PRACTICAL IMPLICATIONS FOR INSURERS

The majority's decision in the Court of Appeal means that the "trilogy" of cases denying coverage to general contractors in these circumstances continue to stand in B.C. However, those principles are still subject to the particular policy wording in any given case. A Court might still distinguish the "trilogy" where the policy wording is different, given the minority's dissent. Courts in other jurisdictions have also reached conclusions inconsistent with the majority reasons in *Progressive Homes*.² It is likely that we have not seen the final chapter in this debate, which may be left for the Supreme Court of Canada to write.

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² See for example *Bridgewood Building Corp. (Roverfield) v. Lombard General Insurance Company of Canada* (2006), [266 D.L.R. \(4th\) 182 \(C.A.\)](#); *American Family Mutual Insurance Company v. American Girl Inc.*, 673 N.W.2d 65 at 74 (Wis.Sup.Ct.)