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ALBERTA COURT OF APPEAL NARROWS EXCLUSION UNDER ALL RISK POLICY FOR LOSS CAUSED BY BUILDING SETTLEMENT

In *Engle Estate v. Aviva Insurance Company of Canada*, 2010 ABCA 18, ("*Engle*"), the Alberta Court of Appeal concluded that a building settlement exclusion in an all-risk policy did not exclude a claim for damage caused by construction on an adjacent property. The Court found that the exclusion applied only to settlement resulting from gradual, naturally-occurring events; it did not apply to sudden "man-made" events (also described as "fortuitous" events). As a result, the insured was entitled to be indemnified for settlement damage caused by construction on a neighbouring lot.

FACTS AND BACKGROUND

The insured, Engle, owned a commercial building in Calgary that was insured under an all risk policy. In June 2006, a developer began building a high-rise condominium project next door to Engle's building. After the condominium property was excavated, the walls, floors and ceilings of Engle's building began to crack. Engle's engineer concluded that the cracks were caused by vibrations and inadequate underpinnings and shoring in the excavation. The estimated cost of repairing Engle's building was $1 million.

Engle sought indemnity from its insurer, which the insurer denied on the basis that the policy did not insure against loss or damage "*caused directly or indirectly to "buildings" by settling, expansion, contraction, moving, shifting or cracking unless concurrently and directly caused by a peril not otherwise excluded in Clause 6.B thereof;...*".

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DECISION OF THE COURT OF QUEEN'S BENCH

The Chambers Judge concluded that the exclusion did not apply: the loss was fortuitous, not inevitable, and the exclusion clause applied only to settlement-type damage caused by natural forces.[1] The Chambers Judge followed American cases that limited settlement exclusions to natural settlement only; he declined to follow Canadian case law such as the Supreme Court of British Columbia's decision in *Strata Plan v. Canadian Northern Shield Insurance Co.*, 2006 BCSC 330, ("*Strata Plan*") which interpreted the exclusion more broadly and did not distinguish between damage *caused* by settlement and settlement as a *type* of damage.

The Chambers Judge also concluded in the alternative that the settlement exclusion clause was ambiguous and, applying the *contra proferentem* rule, that it should be interpreted as only excluding losses resulting from naturally-occurring events.

DECISION OF THE COURT OF APPEAL

The Court of Appeal dismissed the insurer's appeal. The Court declined again to follow the Supreme Court of British Columbia's decision in *Strata Plan*, focussing its decision on the parties' intentions and reasonable expectations. It noted that the exclusion used the term "*settling*" alongside "*expansion, contraction, moving, shifting or cracking*". This choice of wording suggested that the clause was intended to exclude damages for "*passive, gradual, naturally occurring events*."

The insurer argued that the words "*directly or indirectly*" broadened the exclusion clause to exclude both fortuitous and naturally-occurring settlement. The Court however cited other instances in the policy where these terms were used, such as an exclusion for loss or damage caused "*directly or indirectly ... by flood, including waves, tides, tidal waves, tsunamis or the rising of, the breaking out of or the overflow of, any body of water, whether natural or man-made...*". The Court found that the words "*directly or indirectly*" did not necessarily demonstrate an intent that the exclusion applied to both fortuitous and natural events; otherwise the final phrase "*natural or man-made*" would be superfluous. The

[1] 2008 ABQB 645

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Court concluded that the drafters "*... were able to reflect an intent to exclude both natural and fortuitous events by employing precise language such as 'whether natural or man made'. In contrast the settlement exclusion clause makes no attempt to specify that damage arising from settling, whether natural or man made, was intended to be excluded.*"

The Court also stated that its interpretation was consistent with the underlying purpose of all risk policies – to protect against *fortuitous* events. The Court noted that insurers would reasonably want to exclude naturally-occurring settlement because of its inevitability, and that an insured would not expect such settlement to be covered. Conversely, there would be no reason for the parties to exclude damage resulting from an unnatural or fortuitous event, particularly since an insurer may potentially recover any payment by right of subrogation.

IMPLICATIONS FOR INSURERS

The Court of Appeal's reasoning in *Engle* has already influenced other Courts interpreting settlement exclusion clauses. For example, the *Engle* trial decision had been distinguished by the Supreme Court of British Columbia in *Buchanan v. Wawanesa Mutual Insurance Company*, 2009 BCSC 470, on the basis that the settlement exclusion clause at issue in *Buchanan* did not contain the words "*caused by*", which were present in *Engle*. The trial judge in *Buchanan* thus found that all settlement, however caused, was excluded from coverage. However, the British Columbia Court of Appeal in *Buchanan* overturned that decision (2010 BCCA 333), relying in part on the Alberta Court of Appeal's reasoning in *Engle*. The majority of the British Columbia Court of Appeal concluded that there was a contradiction between the exclusion (relied upon by the trial judge) that excluded settlement as a *type* of damage, and other portions of the policy that appeared to cover water escapes from public mains as a *cause* of damage; this contradiction was resolved in favour of the insured.

Engle and *Buchanan* demonstrate that an exclusion for settlement or similar perils should use explicit language that either defines the scope of the exclusion by the *type* of damage, without reference to

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cause, or, if it refers to the *cause* of damage, makes clear whether the underwriters intend to exclude from coverage natural causes, man-made causes, or both.

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