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The insurer's obligation to defend and indemnify: A subject revisited, yet still current

The 2010 decision in Progressive Homes has had significant impact on the property and casualty insurance industry, particularly with respect to holders and issuers of commercial general liability [CGL] insurance policies (Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada, [2010] 2 SCR 245, 2010 SCC 33). The Supreme Court had extended the scope of the concepts of accident (claim) and property damage tied to the insurer's obligation to defend and indemnify its insured, under art 2503 of the Civil Code of Québec.

And now, the recent judgment of the Court of Appeal in *Développement les Terrasses de l'Île inc. c. Intact, compagnie d'assurances*, 2019 QCCA 1440, reiterates the Supreme Court's teachings that unintended and unplanned construction and design defects that may have caused property damage to a building could trigger the insurer's obligation to defend. It is necessary to distinguish the malfunction and the accident that it caused.

Although this principle was established several years ago by the Supreme Court, it seems not to have been consistently applied by our Quebec courts. The Court of Appeal could have paved the way for future decisions.

Context of the decision

Développement les Terrasses de l'Île inc. and Darcon inc., as builders, had been sued by the syndicate of co-owners of the building for a series of construction defects. They were now appealing the March 18, 2018, decision of Superior Court Judge Brian Riordan dismissing their Wellington action.

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The Court of Appeal ruled that the trial judge had made a palpable and decisive error in finding that the alleged defects in construction or design were not an accident and, therefore, not a claim within the meaning of the insurance policy, and in concluding that the compensation claimed by the syndicate could not be covered by the policy.

The Court emphasized that a broad interpretation of the notion of claims and accident is necessary and concluded that there was coverage insofar as the construction and design flaws, that were neither wanted nor foreseen by the insured, may have caused damage to the building. The mere possibility that there be such damage is enough to cause coverage to apply, subject to possible exclusions and exceptions. The Court also states that a broad interpretation of the notions of claim and accident will not transform the builders' CGL-type liability insurance into a warranty of the correct execution of the work requested by the insured, since the CGL policy applies from the moment the warranty ceases to exist, and provides protection after the work has been done.

The Court also ruled that, although most of the material damages claimed in the lawsuit could be excluded from coverage, the fact that some would not is enough to conclude that Intact must defend the appellants, at least for the part of the claim that could subsist.

The Court therefore ruled that the insurer could have an obligation to compensate the appellants for some of the damages claimed by the syndicate, namely damages other than the repair of the alleged defects and some problems with the roofing. However, since the portion of the damage that could be covered by the insurance policy is divisible and identifiable, the duty to defend must be limited to these claims. It will therefore be interesting to see how this aspect of the judgment will be applied in practice by the parties since it is sometimes difficult to separate the costs related to litigating over the existence of the defect versus the consequences of the defect.

Feel free to contact members of our Insurance Law Practice Group to discuss insurance-related matters.

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