The *Progressive Homes* Decision: A New Era or More of the Same?

An analysis by Nigel Trevethan and Emily Williamson of

Harper Grey LLP

The Issue

Much judicial ink has been spilled on the question of whether a general contractor, alleged to have built a defective building, is entitled to a defence under its CGL policy. Since 2005, the judicial trend in British Columbia has to be find no coverage for such claims. The Supreme Court of Canada has now issued its reasons in *Progressive Homes Ltd. v. Lombard General Insurance 2010 SCC 33*. While coverage was found for Progressive Homes, it appears, at this early stage, that coverage will still require a case by case analysis.

The coverage difficulty that had existed over the last five years involved the following issues.

- Was the meaning of the phrase "property damage" in CGLs limited to third party damage? If it was and the whole of the building was considered the general contractor's "property" then there would likely be no coverage.

- Could defective workmanship ever be considered a fortuitous event capable of satisfying the concept of an "accident"? The trend had been to find defective workmanship would likely not ever be "fortuitous".

- Whether the exclusion for work performed includes work completed by subcontractors?

The Supreme Court of Canada considered each of these issues in *Progressive Homes*.

Background Facts

Progressive Homes Ltd. was a general contractor who built four buildings for a client. Progressive was subsequently sued by the client for breach of contract and negligence. The allegations were that the buildings leaked and, as a result, suffered significant water damage, rot, infestation, and deterioration.

Progressive had five years of CGL coverage with Lombard Insurance. The policies were fairly standard CGL wordings and did not materially change from year to year. Progressive made a claim for coverage under those policies.

The British Columbia Supreme Court and Court of Appeal upheld the denial of coverage.

The Supreme Court of Canada Decision

The Supreme Court of Canada began its analysis by setting out basic parameters of insurance coverage interpretation. The importance of these comments should not be overlooked by insurance professionals as they provide some new guidance on how to interpret insurance policies. On this issue, the Supreme Court of Canada reiterated that the facts alleged in the pleadings are to be considered true and added the following.

- The “mere possibility” that a claim falls within insurance coverage is sufficient to trigger coverage.
- The true nature of the claim must govern the determination of coverage rather than the labels selected by the Plaintiff in the pleadings.

It appears that the Court is suggesting that while the pleaded facts are assumed to be true, the legal labels ascribed to those facts in the pleadings do not need to be accepted by the Court as

accurate. For example, an intentional assault remains an intentional assault even if the Plaintiff calls it negligence.

The Court also noted that the interpretation of a policy should be done in the following order: coverage, exclusions, and then exceptions to exclusions. The burden of proving coverage is with the insured and the burden of exclusions remains on the insurer. The burden of proof returns to the insured to prove an exception to an exclusion.

The Court then directed its attention to the substantive issues raised by the appeal.

Issue A: Is the Alleged Damage Property Damage?

The first question answered by the Court was: Is the alleged damage considered "property damage" under the CGL? They stated that

> [36] I would construe the definition of "property damage", according to the plain language of the definition, to include damage to any tangible property. I do not agree with Lombard that the damage must be to third-party property. There is no such restriction in the definition.

As a result, even if the whole building was considered to be part of the insured's work product, there would be coverage because the plain and ordinary meaning of property damage is not limited to damage to another person's property and the definition of "property damage" in the policy did not specifically state that it was to be limited to third party property. This is an issue to be considered by underwriters in considering future wordings.

Issue B: Is Defective Workmanship an Accident?

The Court concluded that on the *Progressive Homes* facts, defective workmanship could be considered an "accident". However, in reaching this conclusion, the court noted that each case will have to be considered on its unique facts.

> [46] First, whether defective workmanship is an accident is necessarily a case-specific determination. It will depend both on the circumstances of the defective workmanship alleged in the pleadings and the way in which "accident" is defined in the policy. I, therefore, cannot agree with Lombard's view that faulty workmanship is *never* an accident.

The case by case analysis will continue to be a vexing issue for the insurance industry and will create uncertainty with regard to coverage.

Issue C: The Work Performed Exclusion

The issue of the work performed exclusion was complicated by the changes in the wording used in the CGL policies over the five years. The Court seemed to have no trouble in concluding that the insurer did not meet the onus of proving that the exclusion applied and that a "possibility" of coverage existed.

The Court did state, for the benefit of the insurance industry, that:

> [65] …If, as Lombard alleges, the buildings are wholly defective, then the exclusion will apply and Lombard will not have to indemnify Progressive. However, the pleadings allege that there was resulting damage: deterioration of the building components resulting from water ingress and infiltration. This is sufficient to trigger the duty to defend.

This statement may be useful for insurers in dealing with indemnity.

Conclusion

Much analysis remains to be done on the *Progressive Homes* decision. We expect that the impact of the decision will soon be shaped by the interpretation of the decision by lower courts, the unique facts of each case, and the working practices of insurers.

Underwriters would also be wise to review the decision in considering what, if any, changes should be made to CGL wordings.

If you have questions with regard to this case or any other insurance matter please feel free to contact Nigel Trevethan, Chair of the Harper Grey LLP, Insurance Group at 604 895 2821 ntrevethan@harpergrey.com.