



Current Articles 2008 – October

The Court Rules on CGL Exclusion

In July of this year the Superior Court made some interpretive decisions in respect of certain exclusionary clauses in a CGL Policy. The claim occurred in 2002 and the Ontario Court of Appeal overruled on a previous decision of the Ontario Superior Court of Justice.

The part of the claim that I was involved with was the result of a concrete forming contractor using defective concrete to install the foundations for several hundred new homes in the Greater Toronto area. He did not build the homes but was hired by the developers to install the foundations only. He would buy the concrete from the closest supplier and it would be delivered to the site by a ready-mix truck and then poured into the forms constructed by the contractor. Over time, the defective concrete that was used began to powder and crumble. It was apparent that these homes, some of which were occupied, will settle or collapse. To correct the problem, the homes had to be jacked up, the defective foundations and basement floors removed, new foundations installed and the home had to be reset on the new foundations. In some cases families had to be moved out while this work was being done.

The case revolved upon the application of three exclusions in the CGL: the “Your Work” exclusion, the “Your Product” exclusion, and an exclusion added by endorsement, namely, the “Rip and Tear” exclusion.

The “Your Work” exclusion provides that the insurance does not apply to *“Property damage” to that part of “your work” arising out of it or any part of it where the cause of the damage is a defect in “your work”*. It continues to state that *this exclusion only applies to: (ii) that part of “your work” which is defective. This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.”*

“Your Work” means: (a) Work or operations performed by you or on your behalf; and (b) materials, parts or equipment furnished in connection with such work or operations”.

Whether or not the “your work” exclusion applies depends on whether it is determined that the concrete supplier was a subcontractor or a mere supplier. The term “subcontractor” is NOT defined in the policy. The judge declined to accept American criteria to identify a subcontractor. The judge's comments included *“ I prefer to retain a degree of flexibility in the realm of insurance coverage, especially in cases like this, where coverage is acknowledged **but the insurer seeks to rely on exclusionary provisions to limit its scope.**” “if insurers want to lay down hard and fast criteria, they can do so by defining the word “subcontractor” to their choosing. Insured persons who pay substantial premiums would then know where they stand and would not be left guessing about the extent of coverage available to them. Unless and until it does so, I believe the word (subcontractor) should be construed broadly, lest it **become a trap for the unwary.**”*

The judge concluded that with regard to the “Your Work” exclusion, *the concrete contractor subcontracted to the concrete supplier its contractual obligation to supply concrete to the builders. In doing so, it triggered the “subcontractor” exception to the “Your Work” exclusion and the “Your Work” exclusion is ousted by the “subcontractor” exception.*

This decision meant that the CGL for the concrete formers would apply for the benefit of the defective concrete supplied by the now defined subcontractor. These case involved damages as a result of the defective concrete for approximately \$8,000,000. And yes you say, what about the insurance for the concrete supplier?? They declared bankruptcy!

This is a brief synopsis of the pages of deliberation. Next month, I will try and summarize the decisions in the other two exclusions.

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