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Insurance Law Update

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December 2, 2005

CGL POLICIES MAY BE REQUIRED TO PROVIDE COVERAGE FOR LIABILITY IMPOSED BY NEW HOME WARRANTY LEGISLATION

An unresolved issue in British Columbia to date is whether or not the standard I.B.C. approved general liability policy wording provides coverage for water ingress claims in new buildings covered by the British Columbia *Homeowner Protection Act*, S.B.C. 1998, c. 31 (the "*Act*"). The recent decision of the Ontario Superior Court in *Bridgewood Building Corp. (Riverfield) v. Lombard General Insurance Co. of Canada* suggests that coverage is available.

FACTS

In *Bridgewood*, two general contractors were required by Ontario's *New Home Warranty Plan Act* to repair damage caused to homes built in 2002. The damage arose as a result of the use of defective concrete supplied by a presently bankrupt concrete subcontractor. The contractors, after effecting repairs, brought proceedings against their insurer seeking coverage under their CGL policies for the cost of repairs and extra living expenses incurred by the home owners who had to relocate during the repair period. There was no evidence that the damage was caused by any fault or negligence of the contractors and the insurer agreed that it was not relying upon the "*own work product*" exclusion for the purposes of the coverage proceedings.

RULING

The insurer argued that coverage was excluded because the contractors were not "*legally obligated to pay*" costs to repair the damage caused by the faulty concrete. The Court rejected this argument, deciding that the policies did not require some element of fault on the part of the insured for coverage to be available, nor did the policies require a determination by a court that the insureds were legally liable to pay for the damages. Drawing on decisions in the United States that have found coverage under CGL policies for statutory liability imposed by environmental protection legislation, the Court concluded that coverage was available for liability arising from the obligations imposed on builders by the Ontario new home warranty legislation.

The Court also concluded that the statutorily imposed liability was not excluded by either the "*liability assumed by contract*" exclusion or by the "*voluntary payments*" exclusion in the policies.

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The decision is under appeal.

PRACTICAL IMPACT FOR THE INSURANCE INDUSTRY

British Columbia's *Homeowner Protection Act* came into effect in mid-1999 and is similar to the Ontario legislation. It requires builders to be registered and imposes a mandatory warranty of at least five years for defects in the building envelope, including defects resulting in water ingress, for new homes and strata complexes. The minimum limits required for strata complexes involve two components, a limit for each unit and a limit for the common property. The minimum limit for each unit is the lesser of the price paid by the owner for the unit or $100,000 per unit while the minimum limit for the common property is the least of the total original purchase price for all components of the multi-unit building, $100,000 times the number of units in the building or $2.5 million.

Bridgewood provides another potential avenue for indemnity to developers and general contractors for statutory liability imposed by the *Act*. Should the costs to repair a newly constructed "leaky building" exceed the limits of the new home warranty insurance carried by a builder, the builder's CGL insurer may be required to cover the difference. Additionally, CGL insurers may find themselves confronting claims for equitable contribution by new home warranty insurers as a result of *Bridgewood*.

Insurers are well advised to consider explicitly excluding coverage for claims arising from liability imposed by new home warranty legislation.

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