Dolden Wallace Folick
INSURANCE LAWYERS

Insurance Law Update

MANAGING YOUR RISK www.dolden.com

May 5, 2006

IS *SWAGGER CONSTRUCTION* STILL GOOD LAW? A DISCUSSION OF THE IMPACT OF THE ONTARIO C.A. DECISION IN *BRIDGEWOOD BUILDING CORP.*

On April 6, 2006, the Ontario Court of Appeal upheld the trial decision in *Bridgewood Building Corp. (Riverfield) v. Lombard General Insurance Company*. On the surface, *Bridgewood* presents a significant obstacle for insurers seeking to rely on *Swagger Construction Ltd. v. ING Insurance Company of Canada* to deny coverage for poor workmanship related liability claims. However, as will be discussed below, a very strong argument can be made that *Swagger* remains good law where the policy wording in question requires that the loss arise from an "occurrence" and the alleged damage does not extend to third party property.

BRIDGEWOOD FACTS AND RULING

The Plaintiffs were Ontario builders that constructed a number of homes containing defective concrete supplied by a subtrade. Faced with warranty claims, the builders made the necessary repairs, provided alternate accommodations to occupants and then sought reimbursement from their liability insurer, which was denied.

At the trial level, the only issue adjudicated was whether the loss constituted an "obligation imposed by law" in view of the fact that the claim was being made under the Ontario New Home Warranty program. Having lost on that issue, *Bridgewood*'s liability insurer confined its appeal argument to the potential application of the policy's "your work" exclusion. Ultimately, the insurer lost in the Court of Appeal because the "your work" exclusion contained a "carve out" known as the Broad Form Property Endorsement ("BFPE") for work performed by the insured's subtrades.

RECONCILIATION OF *BRIDGEWOOD* AND *SWAGGER*

In *Swagger*, the B.C.S.C. concluded that if the damage being complained of related solely to the very building the general contractor was under obligation to complete, there could be no potential "duty to defend" unless the claim also asserted resultant damage to third party property.

DOLDEN WALLACE FOLICK LLP
Tenth Floor - 888 Dunsmuir Street | Vancouver. British Columbia. Canada. V6C 3K4 | TELEPHONE 604-689-3222 FAX 604-689-3777

Although the reasons in *Bridgewood* do not expressly refer to *Swagger*, at first blush the results appear to reach the opposite conclusion. However, a careful comparison of the two decisions and the involved policy wording suggests that the outcomes of *Bridgewood* and *Swagger* can be reconciled.

First, in *Swagger*, the grant of coverage obliged the insurer to indemnify for compensatory damages as a result of "physical injury to tangible property" caused by an "occurrence" (i.e. accident). However, in *Bridgewood*, the policy wording did not require that the loss entail an "occurrence", nor was there a requirement that the pleadings allege an "accident".

Second, the insurer in *Bridgewood* did not argue that (a) the loss did not arise from an "occurrence"; or that (b) the allegations did not constitute "property damage" as that term was defined, by virtue of the absence of any resultant third party damage.

Third, in *Swagger*, the exclusions and BFPE were of no import since the fundamental triggers for coverage, including the requirements of an "occurrence" and "property damage" were not satisfied in the first place, thus avoiding any need for the court to examine the exclusions.

PRACTICAL IMPLICATIONS FOR CGL INSURERS

It appears that CGL insurers will be able to rely upon *Swagger* to deny coverage for poor workmanship where the policy wording in question requires the traditional triggers such as an "occurrence" and "property damage".

AUTHOR Katherine S. Fast
Direct Line: 604-891-0364 *E-mail:* kfast@dolden.com

EDITOR Alex L. Eged
Direct Line: 604-891-0357 *E-mail:* aeged@dolden.com