

Featured Case Comment, February 2015

Insurance Coverage for Unexpected and Unintended Events versus Exclusion of Faulty Workmanship and Design

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Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Company et al, 2014 BCSC 1568

This recent British Columbia case interprets a standard exclusion clause in a Course of Construction (COC) Policy for the first time: It also clarifies the requirement of an unexpected or unintended loss and the definition of 'damage' under a course of construction (COC) policy.

Background

In ***Acciona***, the Project was a \$250 million P3 hospital extension of the Royal Jubilee Hospital in Victoria, BC. The Project was an eight storey concrete structure, comprising four wings connected to a central core. The structural design was complex with each floor consisting of thin suspended slabs (250 mm thick) with large spans (over 9 m). During construction, the slabs "over deflected," which resulted in the slabs throughout the facility not being level as planned. The slabs required extensive remediation to meet the Project's serviceability requirements of level floors. The Design/Build Contractor of the Project commenced the action, after being denied coverage for its claim for all remedial costs under the Project's COC Policy.

The Court's Key Findings

The Court found that the contractors had established coverage under the insuring agreement. In particular, the Court determined that the over deflection and cracking of the concrete slabs constituted damage that was unexpected or unintended and as such fell under the Perils Insured clause in the Policy.

The key issue in ***Acciona*** was the interpretation of a standard exclusion clause developed by the London Engineering Group, referred to as "LEG2/96." Prior to ***Acciona***, LEG 2/96 had not been interpreted by any court in the world. As worded, the LEG2/96 clause excludes:

All costs rendered necessary by defects of material workmanship, design, plan, or specification, and should damage occur to any portion of the Insured Property containing any of the said defects the cost of replacement or rectification which is hereby excluded is that cost which would have been incurred if replacement or rectification of the Insured Property had been put in hand immediately prior to the said damage.

For the purpose of this policy and not merely this exclusion it is understood and agreed that any portion of the Insured Property shall not be regarded as damaged solely by virtue of the existence of any defect of material workmanship, design, plan or specification.

The Court found that the exclusion clause had two distinct components which must be read together in order to give meaning to the clause as a whole:

- a) "all costs rendered necessary by defects of material workmanship, design, plan, or specification"; and
- b) "should damage occur to any portion of the Insured Property containing any of the said defects the cost of replacement or rectification which is hereby excluded is that cost which would have been incurred if replacement or rectification of the Insured Property had been put in hand immediately prior to the said damage".

Further, the Court interpreted the exclusion as follows:

- the excluded costs are only those costs that would have remedied or rectified the defect immediately before any consequential or resulting damage occurred;
- but the exclusion does not extend to exclude the cost of rectifying or replacing the damaged property itself; and
- the excluded costs crystallize immediately prior to the damage occurring and are thus limited to those costs that would have prevented the damage from happening.

Conclusion

The Court found that the "damage" in this case was the cracking and over deflection of the concrete slabs. The failure to take steps or to address the complex design led to a finding that the formwork and shoring/reshoring procedures constituted a defect in workmanship within the meaning of the exclusion clause in the Policy. As there was no evidence on which to quantify the costs that would have remedied or rectified the defect except to say that they would have been minimal, all remedial costs to the concrete slabs, corresponding site General Conditions, and profit were covered, totaling \$8.5 million.

Take Away Points

I. The Interpretation of Insurance Policies

The Court in ***Acciona*** summarized the principles that apply to the interpretation of insurance policies generally, including that: the primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole; where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction; courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded; courts should also strive to ensure that similar insurance policies are construed consistently; and, ambiguity in the language of an insurance policy is generally resolved in the insured's favour.

II. Fortuity is Required

The Court confirmed that in order to trigger coverage, the loss or damage must be fortuitous in an all risk policy. This requirement is “built in” to the policy and is “the very essence of insurance”.

III. Insurers must use Language Available to Remove Ambiguity

Acciona reminds insurers that when they have language available to them that will remove an ambiguity from the meaning of an exclusion clause or will clearly specify the scope of an exclusion, they should incorporate such language. Otherwise, normal principles of interpretation will apply, including the principle that coverage provisions will be interpreted broadly and exclusion clauses narrowly. Had the insurers intended the defects exclusion in the COC Policy to be interpreted similarly to the more typical “resulting damage” clauses that appear in Canadian insurance policies, they should have incorporated such readily available language in the Policy.

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