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## New Developments in Insurance - Duty to Defend

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October 1, 2001

The leaky condo crisis in British Columbia has prompted a fresh look by the British Columbia courts at the CGL insurers' duty to defend contractors and subcontractors for claims arising from defective work made by strata corporations.

The decisions in *AXA Pacific Insurance Co. v. Gilford Marquis Towers Ltd.* (2000), 74 B.C.L.R. (3d) 194 S.C. and *F.W. Hearn/Actes v. Commonwealth Insurance Company* (2000), B.C.S.C. 764, 75 B.C.L.R. (3d) 272 have made it clear that there is a duty to defend a claim involving consequential damage to a building notwithstanding that the damage occurred as a result of defective workmanship. Liability insurers have attempted to avoid liability for defending by arguing that a building is a completed work product and as such the entirety of the building, including the consequential damage, is within the work product exclusion.

In assessing whether or not a duty to defend arises, courts have historically reviewed allegations in the pleadings to determine whether there is a duty to defend. If the pleadings disclosed a claim which might fall within coverage, then the courts have held that there was a duty to defend. This presented some difficulties in leaky condo cases as plaintiffs rarely particularized the damages suffered and tend to only make general allegations of defective workmanship in the pleadings. CGL policies generally exclude loss arising from defective workmanship.

The typical pleadings by a strata corporation rarely, if ever, break down the damages between damages for repairing defective work and consequential damages. To overcome this difficulty, reference was made by insureds to other allegations made by the strata corporation, outside of the pleadings, to buttress the argument that a claim was being made for consequential loss and as such there was a duty to defend.



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It was unknown whether the reference to material outside of the statement of claim was appropriate to resolve the issue of the duty to defend. This issue was dealt with by the Supreme Court of Canada in *Monenco Limited v. Commonwealth Insurance Company* (2001), S.C.C. 49 (September 13, 2001) where the court addressed the issue of whether or not Commonwealth had a duty to defend Monenco, an engineering/construction company, in respect of a claim advanced against it by Suncor arising from a fire at the Tar Sands Plant in Alberta.

The Court concluded that there was no duty to defend as the claim advanced fell within the turnkey exclusion of the project. The Court however slightly expanded the extent to which an insured could reference matters not within the pleadings. The Court held that where the pleadings are not framed with sufficient precision to determine whether the claims are covered by the policy, the insurer's obligation to defend will be triggered where on reasonable reading of the pleadings, a claim for coverage can be "inferred". The widest latitude should be given to the allegations in the pleadings in determining whether or not they raise a question within the policy. The Court refused to decide whether or not extrinsic evidence beyond the pleadings could be considered but concluded that evidence (such as contracts and documents) referred to in the pleadings may be considered to determine the substance and true nature of the allegations and assess whether there is a duty to defend. The Court left open to another day the question of whether or not extrinsic evidence not covered by the pleadings could be assessed.

This case will be of assistance to insureds in obtaining a defence to leaky condo claims. Even though the strata corporations usually fail to provide particulars of the type of damages suffered, it can be reasonably inferred from the standard leaky condo claim that water ingress causes damage not only to the defective part through which the water entered the building, but also causes consequential damage to other parts of the building. This authority should expand those instances where CGL insurers will be required to provide a defence to contractors and subcontractors.