

Proudly presents...

CGL 101 - Understanding Commercial General Liability Policy

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Agenda

1. Principles of interpretation applicable to all insurance policies
 - Structure Of Policy
 - Order Of Interpretation And How The Onus Shifts
 - Rules Of Interpretation

2. The Commercial General Liability Policy
 - Coverages Afforded
 - The Obligation To Defend And/Or Indemnify
 - Exclusions
 - Notable Conditions

Principles Of Insurance Policy Interpretation

Structure of Policy

An insurance policy typically consists of the following components:

- The Declarations Page
- The policy wording which consists of:
 - Insuring Agreements
 - Exclusions
 - Exceptions to exclusions
 - Definitions
 - Conditions
- Endorsements (if any) that restrict or enhance the coverage as set out in the policy wording

Order Of Interpretation And How The Onus Shifts

Although subject to specific rules of interpretation that may dictate a contrary approach (such as the nullification of coverage doctrine), it is generally accepted that a court should approach the interpretation of the policy in the following order:

- The Insuring Agreements
- Exclusions
- Exceptions to exclusions

Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada, [2010] 2 S.C.R. 245.

Order Of Interpretation And How The Onus Shifts (cont'd ...)

The logic behind this is simple: The Insuring Agreements set out the grant of coverage provided by the policy, the exclusions set out those particular circumstances or risk factors that are taken away from the grant of coverage, and the exceptions to the exclusions bring an otherwise excluded claim back within coverage where that claim fell within the initial grant of coverage in the first place. Therefore, the onus of proof changes as follows:

- The insured has the onus to bring the claim within the Insuring Agreements
- The insurer has the onus to prove the application of an exclusion
- The insured has the onus to prove the application of an exception to an exclusion
- In all cases, the onus is on the insurer to establish a breach of policy condition

Rules Of Interpretation

- The primary principle of interpretation is that when the language of the policy is unambiguous, the court should give effect to the clear language, reading the contract as a whole.

Non-Marine Underwriters, Lloyd's of London v. Scalera, [2000] 1 S.C.R. 551

- Where the language of the policy is ambiguous (this means that the language allows for two different and *reasonable* interpretations), the courts rely on general rules of contract construction.

Rules Of Interpretation (cont'd ...)

For example:

- Courts should prefer interpretations that are consistent with the reasonable expectations of the parties so long as such an interpretation can be supported by the text of the policy.
 - 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 strive to ensure that similar insurance policies are construed consistently.
- These rules of construction are applied to resolve ambiguity and not to create ambiguity where none exists in the first place.

Progressive Homes v. Lombard, supra.

Rules Of Interpretation (cont'd ...)

- Where these rules of construction fail to resolve the ambiguity, courts will interpret the policy *contra proferentem*, against the insurer.
- A corollary of this principle, but also a standalone rule of insurance policy interpretation, is that coverage provisions are to be interpreted broadly and exclusion clauses narrowly.

Progressive Homes v. Lombard, supra.

Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co., [1993]
1 S.C.R. 252.

Rules Of Interpretation (cont'd ...)

- As a gloss on all of these rules of construction, stands a principle of interpretation that although grounded in an earlier Supreme Court of Canada decision, has been pressed by the Ontario Court of Appeal in a number of recent cases, to extend coverage in circumstances where a literal interpretation of an exclusion (or other limiting provision) would nullify the purpose for which the insurance was sold.
- In *Cabell v. The Personal Insurance Company*, 2011 ONCA 105, the Ontario Court of Appeal dubbed this principle the nullification of coverage doctrine that applies even in the absence of an ambiguity. The court approved the following description of the doctrine from its earlier decision in *Zurich Insurance Co. v. 686234 Ontario Ltd.* (1992), 62 O.R. (3d) 447 (leave to appeal to the SCC refused):

Rules Of Interpretation (cont'd ...)

... It is clear that this court has concluded that even though an exclusion clause may be clear and unambiguous, it will not be applied where: (1) it is inconsistent with the main purpose of the insurance coverage and where the result would be to virtually nullify the coverage provided by the policy; and (2) where to apply it would be contrary to the reasonable expectations of the ordinary person as to the coverage purchased.

Rules Of Interpretation (cont'd ...)

- Interestingly, the court in the *Cabell* case noted that there is no case that has held that evidence is essential (although it would be desirable) to determine nullification of coverage and reasonable expectations of the parties, and that the court was in a good position to determine what are the most obvious risks for which an ordinary homeowner's policy is issued. If the court determines that the insurer's interpretation would render nugatory coverage for the most obvious risks for which the policy is issued, the onus shifts to the insurer to show that the effect of its interpretation would not virtually nullify the coverage and would not be contrary to the reasonable expectations of the ordinary person as to the coverage purchased.

The Commercial General Liability Policy

- The following CGL policy excerpts and references are taken from the current standard form of the Insurance Bureau of Canada (IBC), as this is the most commonly used form by Canadian insurers.
- However, variations on the IBC form do exist and, in particular, for larger corporate insureds, the larger insurance brokers will often negotiate manuscript policy forms specifically tailored to the needs of a particular insured.
- Insurers will also commonly add to the IBC form by Endorsements which set out risk specific exclusions and other terms.
- In all cases, a full review of the actual policy wording issued is essential.

The Commercial General Liability Policy (cont'd ...)

The Declarations Page(s)

- The Declarations Page(s) typically provides a summary of the coverages provided by the CGL policy and will always include the name of the insured and insurer, a brief description of the business operation insured, the policy period, the limits of liability (both on a per occurrence and/or aggregate basis), the applicable deductible, the amount of the premium and the identity of the insurance broker.
- In some instances, the Declarations Page(s) will also set out a detailed list of the specific coverages afforded and the different limits, if applicable, as well as the more significant exclusions and/or Endorsements.

The Commercial General Liability Policy (cont'd ...)

Overview Of Coverages Afforded

- The Insuring Agreements of the CGL policy provide that the insurer will pay those sums that the insured becomes legally obligated to pay as “compensatory damages” because of:
 - “bodily injury” or “property damage”
 - “personal and advertising injury”
 - “property damage” to premises of others rented to or occupied by the insured (i.e., tenant’s legal liability)
- The policy also covers medical expenses for “bodily injury” caused by an accident, paid by the insured on a voluntary basis in essentially a first aid context.
- In respect of claims covered by the CGL policy, the insurer has a right and duty to defend the insured and to indemnify against any damages awarded.

The Commercial General Liability Policy (cont'd ...)

The Duties To Defend And Indemnify

- In purchasing a CGL policy, an insured is buying two primary benefits: the right to a defence and the right to an indemnity in respect of covered claims under the policy. These two duties are distinct, however, and a duty to defend may be imposed where ultimately there may be no duty to indemnify under the policy.
- The general principles are well established by the trilogy of Supreme Court of Canada decisions in *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801, *Non Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551, and *Monenco v. Commonwealth Insurance Co.*, [2001] 1 S.C.R. 699, which have set out the following rules:

The Commercial General Liability Policy (cont'd ...)

1. The duty to defend is independent of and broader than the duty to indemnify.
2. The duty to defend arises where the Statement of Claim alleges acts or omissions which potentially fall within the policy coverage, while the duty to indemnify only arises where such obligations are proven at trial.
3. The duty to defend is governed by the allegations in the Statement of Claim (as well as documents expressly incorporated by reference therein) which, for that purpose, are to be read with the widest latitude.
4. It is not necessary to prove that the obligation to indemnify will, in fact, arise in order to trigger the duty to defend - the mere possibility that a claim within the policy may succeed, suffices. However, the court is not to engage in a fanciful reading of the Statement of Claim for the purpose of requiring the insurer to defend – it is only where there is a genuine ambiguity or doubt that the duty to defend must be resolved in favour of the insured.

The Commercial General Liability Policy (cont'd ...)

5. The bare assertions in the Statement of Claim are not necessarily determinative of the duty to defend. What matters is not the labels crafted by plaintiff's counsel (i.e., the literal terms of the pleading) but the true nature and substance of the claim. In this regard, the court is to assess the duty to defend based on the plaintiff's properly pleaded allegations.
6. If the damages claimed are not payable under the policy there is no duty to defend. In other words, the duty to defend, although broader than the duty to indemnify, is not so broad that it arises with respect to allegations that are clearly beyond the scope of the policy by reason of an exclusion clause or otherwise. If there is no duty to indemnify because an exclusion or other provision applies, there is no duty to defend.

The Ontario Court of Appeal has recently stated that “[a]lthough in most cases the ‘pleadings rule’ applies to a statement of claim or similar pleading, it can apply to a letter that asserts liability for damages against an insured.”

General Electric Canada Company v. Aviva Canada, Inc., 2012 ONCA 525 at para. 20.

The Commercial General Liability Policy (cont'd ...)

- Therefore, the general rule, referred to as the “pleadings rule”, is that the duty to defend is determined only on the basis of the allegations in the Statement of Claim or other originating process, or in some cases, a letter asserting liability. The primary exception to this rule from the Supreme Court of Canada’s decision in the *Monenco* case is that reference can also be made to documents that are expressly referenced in the Statement of Claim. Apart from that (there are some other very limited exceptions in the cases), reference to extrinsic evidence to determine the defence obligation is not permitted. The reason behind this restriction is to prevent a duty to defend hearing turning into a “mini trial” that may make findings prejudicial to the insured in the underlying action.
- Although it does not necessarily follow that the obligation to defend will ultimately also result in an obligation to indemnify, the practical result is that many coverage cases are essentially decided at the duty to defend stage. In many cases, therefore, once a defence is provided, even subject to reservations on the indemnity obligation, indemnity in whole or part will generally follow.

The Commercial General Liability Policy (cont'd ...)

The Specific Coverages

(a) “bodily injury” or “property damage”

- This coverage is confined to “compensatory damages” (defined to exclude punitive or exemplary damages or the multiple portion of any multiplied damage award) because of “bodily injury” or “property damage” that occurs during the policy period caused by an “occurrence”.
- These terms are defined as follows:

“Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

The Commercial General Liability Policy (cont'd ...)

“Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property ... or
- b. Loss of use of tangible property that is not physically injured ...

“Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

- The term “accident” is undefined in the IBC policy form but is generally accepted to mean an “unlooked for mishap or occurrence”.

The Commercial General Liability Policy (cont'd ...)

(b) “Personal and advertising injury”

- This coverage is confined to “compensatory damages” because of “personal and advertising injury” caused by an offense, arising out of the insured’s business, committed during the policy period.
- “Personal and advertising injury” is defined to mean injury, including consequential “bodily injury”, arising out of one or more of the following offenses:
 - a. False arrest, detention or imprisonment;
 - b. Malicious prosecution;
 - c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of the room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

The Commercial General Liability Policy (cont'd ...)

- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
 - e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
 - f. The use of another's advertising idea in "your advertisement"; or
 - g. Infringing upon another's copyright, trade dress or slogan in "your advertisement".
- This coverage accordingly provides some limited protection for certain forms of intentional tort committed in the course of the insured's business, and for breach of intellectual property rights provided such are committed in an "advertisement" in the insured's business.

The Commercial General Liability Policy (cont'd ...)

Exclusions

(a) “Bodily injury” or “property damage”

- This type of coverage is subject to numerous exclusions that can essentially be grouped into four categories:
 1. Risks insured under other specific forms of policy – injury to employees, worker’s compensation, automobile, aircraft, watercraft, damage to own property, professional liability.
 2. Intended injury – injury or damage expected or intended from the standpoint of the insured.
 3. “Business risk” exclusions – liability assumed in contract, damage to the insured’s own product or work, product recall.
 4. “Common” exclusions (or risks the insurer wants no part of) – nuclear liability, pollution, abuse or molestation, fungi and fungal derivatives, asbestos.

The Commercial General Liability Policy (cont'd ...)

- Additional exclusions can always be added by way of Endorsement to the policy for such matters as terrorism, data, hazardous products and the like.

(b) “Personal and advertising injury”

- The exclusions under this coverage are more limited and include such matters as publication of material with knowledge of its falsity, publication of material whose first publication took place before the beginning of the policy period, wilful violation of a penal statute or ordinance, and assumption of liability in contract.

The Commercial General Liability Policy (cont'd ...)

Notable Policy Conditions

- Notice of claim or occurrence:
 - This sets out the insured's obligation to give notice of claim or "occurrence" to the insurer. Delay in reporting is a common complaint from insurers and, depending on the circumstances, can result in a denial of coverage.
- Other insurance:
 - This condition speaks to those limited circumstances where in addition to the CGL policy there may be other applicable insurance that provides some concurrent coverage and, in that instance, sets out a formula for the sharing of defence and indemnity obligations.
- Subrogation:
 - The transfer to the insurer of the insured's rights to recover from a third party amounts which the insurer has paid out on the insured's behalf.

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