



WILL YOUR INSURANCE COVER DAMAGES FROM BUILDING SETTLEMENT?

By Dave Risling, Partner and Anthony Espejo, Student-at-Law



In the world of commercial real estate, it is not at all unusual to see damage caused to a property as a result of construction or demolition of an adjoining property. In *Engle Estate v. Aviva Insurance Company of Canada*, 2010, the Applicant owned a commercial property. Construction was taking place on the neighbouring property, part of which included excavation. Shortly after the construction commenced, the Applicant noticed cracks in the floors, ceilings and walls of his property, resulting in a significant impact on the structural stability, safety and integrity of the building, resulting in an estimated \$1,000,000.00 in repair costs. The Applicant sought indemnity under its property insurance policy, but was denied as a result of an exclusion clause relating to damages arising from “settlement”. The Applicant sought a declaration from the Court that it was entitled to coverage and indemnity under the policy of insurance.



The Applicant argued that the Settlement Exclusion did not exclude coverage as the exclusion was limited to damage from settlement due to natural causes. The Applicant relied on the *contra proferentum* doctrine (which essentially means that where ambiguity exists in a contract, the wording should be strictly interpreted against the party who drafted the agreement, and in favor of the other party).

The Respondent insurer argued that the Settlement Exclusion clearly and unambiguously excludes losses due to settlement, irrespective of whether the settlement is natural or non-natural (fortuitous).

The Alberta Court of Queen’s Bench reviewed both American and Canadian judicial authority to assist in interpreting the Settlement Exclusion. The American case law suggested that the proper meaning of “settlement” is generally taken to mean a “gradual, natural process”. The policy language did not refer to settling which happens “abruptly and unexpectedly”.

Canadian courts, on the other hand, have been consistent in finding that when the exclusion clause excludes settling as a type of damage, the damage is excluded irrespective of the cause (i.e., natural vs. non-natural). Some Canadian cases have expanded the interpretation of “settling” to clauses that exclude damages caused by settling.

The Alberta Court of Queen’s Bench ultimately held that it was proper to distinguish between clauses that exclude specific types of damages and those that exclude causes of damage. Hence, in the case at bar, in order for the exclusion clause to apply, the damage caused by settlement must be due to settlement that occurred from natural causes. In other words, the Court chose to follow the American case law in limiting the above exclusion to damages resulting from natural settlement only.

On appeal, the Alberta Court of Appeal unanimously upheld the Court of Queen’s Bench decision. The Alberta Court of Appeal stated that “exclusion clauses are to be interpreted narrowly, not awkwardly”. Further, the insurer was free to write into its contract that the Settlement Exclusion



applied to damage caused by settling whether it was natural or non-natural, but in this clause the phrase “directly or indirectly” did not operate to encompass natural or non-natural settlement.

This case has several important implications. Firstly, it reminds us that our Courts are open to the persuasion of American case law, despite contrary Canadian jurisprudence.

Secondly, this case underlines differing legal views in different jurisdictions within Canada (notably Alberta and B.C.) in respect of interpreting exclusion clauses relating to settlement.

Thirdly, an insurer is free to choose the terminology used in the exclusion. The words “directly or indirectly” do not operate to cause the exclusion to apply both to natural and non-natural events. If the common intention was that the exclusion was to apply to non-natural events, then it should have been expressly stated.

Lastly, this case emphasizes again the critical importance in any coverage dispute of the actual policy wording. The Courts will find the intention of the parties only in the language of the policy itself, interpreted in a plain and common sense manner. While cases such as this provide us with general interpretive principles, at the end of the day the outcome of the dispute will turn on that actual wording. Hence the importance of careful review of the policy and, from the insurer’s perspective, careful drafting, to ensure that the policy as worded truly says what the parties intend it to say.