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Thomas Heintzman specializes in alternative dispute resolution. He has acted in trials, appeals and arbitrations in Ontario, Newfoundland, Manitoba, British Columbia, Nova Scotia and New Brunswick and has made numerous appearances before the Supreme Court of Canada.

Mr. Heintzman practiced with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, insurance, broadcasting and telecommunications, construction and environmental law. He was an elected bencher of the Law Society of Canada for 8 years and is an elected Fellow of the American College of Trial Lawyers and of the International Academy of Trial Lawyers.

Thomas Heintzman is the author of ***Heintzman & Goldsmith on Canadian Building Contracts,*** 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Is Loss Due To An Inevitable Event Covered By Property Damage Insurance?

A continuing issue relating to property damage insurance is whether loss which is bound to occur due to an unknown fault or defect in the structure is covered by the insurance policy. The policy may be a builders' risk insurance policy maintained during a building project or an all-risk insurance policy maintained by a business. Insurers maintain that this sort of loss is not covered because the insurance covers fortuitous events, not inevitable events. Owners and contractors maintain that this loss is covered because the insured does not know of the circumstances giving rise to the loss and does not intend or expect the loss to occur. So they argue that, from their standpoint, the loss is fortuitous.

In ***1422253 Ontario Ltd. v. Coachman Insurance Co***., (2014), the Ontario Divisional Court recently adopted the second view and held that the loss fell within an all-risk policy even though the circumstances, which were unknown to the insured, inevitably caused the loss. While the loss did not arise during a construction project, the decision in this case is important for the development of the law relating to risk-based property damage insurance policies, including those used by the construction industry.

The facts

The plaintiff owned and operated a gas bar. The plaintiff had an insurance policy providing coverage for "all risks of direct physical loss or damage from any external cause." Several automobiles broke down after filling up at the station. These events caused the plaintiff to hire a contractor to examine the underground gasoline storage tank. It was discovered that the fill-in pipe to the tank had developed cracks, allowing water to seep into the tank and contaminate the gasoline.

The plaintiff brought an action in which it asserted that it had coverage under its property damage insurance policy. The insurer defended, saying that the loss was an inevitable result of the circumstances, that the policy only covered fortuitous loss and that the loss was not fortuitous and therefore was not covered by the policy. The plaintiff said that the loss was covered because the plaintiff did not cause or contribute to the fault in the pipe and was not aware of and did not expect the fault or loss. The defendant brought a motion to dismiss the action by way of summary judgment. The motion judge agreed with the defendant that the loss was not fortuitous and not covered by the policy because it was the inevitable result of the circumstances.

The Decision

The Divisional Court reversed the decision of the motion judge. The court held that the proper test for coverage in an all-risk property damage policy is not whether the loss was inevitable due to the physical circumstances, but rather whether the loss was caused by the insurer or was expected to arise in the normal course of business of the insured, such as ordinary wear and tear and depreciation. In this case the pipe had been regularly inspected. The contractor who repaired the pipe said he had never seen such a broken fill-in pipe, and the owner of the gas station had never seen one as well. The court held that "although the cause remains unknown, that the fill-pipe cracked allowing water into the storage tank is exactly the type of fortuitous event that triggers coverage in the all-risk policy." The court rejected the defendant's "flood gates" assertion that allowing the claim would extend coverage to the normal risks or day-to-day events in the operation of a gasoline station.

Discussion

The focus of this decision is on the nature of fortuity. The court held that the policy must be interpreted from a common sense business standpoint, and in this context, fortuity means not

caused by the insured or not an expected result of the insured's business activities. Interestingly, the word "fortuity" is not contained in these sorts of property damage insurance policies. Rather, the concept of fortuity is read into the policy as a necessary ingredient of insurance. The policy could not have been intended to cover loss caused by the insured. Nor could it have been intended to cover loss arising from the normal business activities of the insured.

The word "fortuity" has been coined to capture the unintended and unexpected nature of the insurance. But the nature and extent of "fortuity" still remains somewhat of a mystery, and a battleground between insureds seeking to recover their unexpected business losses and insurers seeking to minimize claims arising from normal business activities. This decision tells us that the concept of fortuity will be determined from a business standpoint, not from the standpoint of physics.

See Heintzman and Goldsmith on Canadian Building Contracts (4th ed.), chapter, part

***1422253 Ontario Ltd. v. Coachman Insurance Co.*, (2014), 117 O.R. (3d) 635 (Div. Ct.)**

Insurance - Builders' Risk Property Insurance – Fortuity - Coverage

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