

Noteworthy

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Monk v. Farmers' Mutual Insurance Co. (Lindsay): Further Lessons in Policy Language and Interpretation

In *Monk v. Farmers' Mutual Insurance Co.* (Lindsay), [2015] ONCA 911, the Court of Appeal reversed the motion judge's decision that the "faulty workmanship" exclusion applied to both direct and indirect damages. The Court ruled that the motion judge's interpretation of the exclusion was overly broad and that the damage to the insured's property was covered by the policy whether or not the damage constituted resulting damage from faulty workmanship.

Facts:

The action arose when the insured retained a contractor, Pleasantview Restoration Systems ("Pleasantview"), to perform restoration work on the exterior of her home. At the conclusion of the work, the insured discovered deficiencies in the work done by Pleasantview; namely, stains on the windows, light fixtures, and the carpeting, scratches and marks on the windows, and damage to the wooden window frames.

The home was insured by Farmers' Mutual Insurance Company ("Farmers' Mutual") with the insured purchasing a homeowner's insurance policy through Muskoka Insurance Brokers ("Muskoka Insurance").

The policy covered perils subject to the specified exclusions, two of which are relevant to the case at hand. The first, under the heading "Losses Excluded", provided:

We do not insure:

...

2. the cost of making good faulty material or workmanship;

The second exclusion, under the heading "Property Excluded", stated:

We do not insure loss or damage to:

...

4. property

...

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(ii) while being worked on, where the damage results from such process or work (but resulting damage to other insured property is covered);

The insured allegedly went to Muskoka Insurance when she discovered the aforesaid damage, and was informed that her policy did not cover work done by an independent contractor, and that the contractor hired would be responsible for the damage. Muskoka Insurance denied this.

The insured subsequently sued Farmers' Mutual under her policy and Muskoka Insurance based on an alleged breach of Muskoka Insurance's contractual and fiduciary duty to her by failing to advise her in a timely way that she had a valid claim against Farmers' Mutual.

Parties Position:

Farmers' Mutual and Muskoka Insurance brought motions for summary judgment for dismissal based on the argument that the insured's claim constituted costs of repairing faulty workmanship caused by Pleasantview, and thus was specifically excluded by the policy. They argued the "faulty workmanship" exclusion is an unqualified exclusion, and does not contain an

exception for "resulting damage".

The insured argued that the "faulty workmanship" exclusion should apply only to restoration work Pleasantview was contracted to perform and that the incidental or corollary damage from that workmanship should not be excluded. In addition, the insured argued that her damages constituted damage to "property while being worked on" and that the "resulting damage" exception in the exclusion ought to extend coverage regardless of the wording in the "faulty workmanship" exclusion.

Decision of the Motion Judge:

The motion judge disagreed with the insured's arguments. The motion judge applied a plain and simple reading of the policy's "faulty workmanship" exclusion and ruled that coverage for direct and indirect damage arising from faulty workmanship was excluded. Furthermore, the motion judge found that coverage afforded by an exception to the "property being worked on" exclusion did not provide coverage because the faulty workmanship exclusion trumped the exception. The insured appealed the decision.

Issue on Appeal:

The main issue on appeal was whether the motion judge erred in concluding that the "faulty workmanship" exclusion also excluded resulting damage.

The Appeal Decision:

The Court ruled that the "faulty workmanship" exclusion should not be interpreted so broadly as to deny coverage for damages that an "all-risks" policy would otherwise provide. The Court noted that if an insurer wanted to exclude particular coverage, such as resulting damage, it should do so specifically.

The Court held that an interpretation of the "faulty workmanship" exclusion that denies coverage for resulting damage is an overly broad interpretation of the exclusion clause. The Court interpreted the exclusion narrowly as excluding coverage from direct damage only and not the resulting damage from faulty workmanship. This was not a matter of reading an exception into that exclusion, but interpreting it narrowly in accordance with established principle.

The Court observed that if the "faulty workmanship" exclusion was interpreted as excluding resulting damage in the case at bar, the two ex-

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clusion clauses at issue would be in conflict. The "faulty workmanship" exclusion would exclude damage to property caused by faulty workmanship including resulting damage. On the other hand, the "property being worked on" exclusion would specifically preserve coverage for resulting damage to "other insured property."

The Court found that the motion judge erred in saying the "faulty workmanship" exclusion trumped the "property being worked on" exclusion because the exception to that exclusion only preserved resulting damage coverage for a narrow range of events unrelated to faulty workmanship, such as damage caused by accident. This was an overly narrow interpretation of the resulting damage exception. In effect, the Court indicated that the exception to the "property being worked on" exclusion, which is to be construed broadly, should not be interpreted narrowly, so that the "faulty workmanship" exclusion can be interpreted broadly, when the principle is it should be interpreted narrowly.

The Court noted that the motion judge considered it significant that "faulty workmanship" exclusions in insurance

policies typically include an exception for resulting damage, which is not the case in the insured's policy. However, the Court found that this consideration was irrelevant to the interpretation of the policy at hand. The Court went on to find that the motion judge's suggestion that the absence of an exception for resulting damage from the "faulty workmanship" exclusion is reflective of the insurer's intention not to provide coverage for such damage is misplaced. The Court stated that an insurer's unilateral intention is irrelevant to the interpretation of the insurance contract. And, it is not appropriate to interpret the "property being worked on" exclusion in a manner that narrows the coverage it preserves by its exception in order to interpret the "faulty workmanship" exclusion as broadly as possible.

The Court held that an interpretation of the "faulty workmanship" exclusion that denies coverage for resulting damage is an overly broad interpretation of the exclusion clause.

The Court therefore concluded that resulting damage to insured property is covered by the policy whether or not

that damage is the result of faulty workmanship.

The Court also indicated that following its recent decision of *MacDonald v. Chicago Title Insurance Co.*, 2015 ONCA 842, the standard of review to be applied was "correctness" because this was a standard form insurance contract. Although the "faulty workmanship" exclusion was not standard across the insurance industry, it is standard to Farmers' Mutual's customers, and should be interpreted consistently.

The action was remitted to the motion judge to decide the question of whether the action is limitation-barred which was not previously addressed because of his decision there was no coverage.

Commentary

The Court addressed the conundrum posed by the "faulty workmanship" exclusion being worded differently from other homeowners' policies by saying that this does not matter, what matters is what this policy provides.

And, then, reading the policy as a whole, the Court found that to give the subject exclusions meaning, the fact the faulty workmanship exclusion has no exception means it

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should be read without one, and interpreted narrowly.

It is arguable that by doing so the Court gave a similar meaning to the two exclusions by holding that both do not exclude resulting damage, one dealing with property being worked on, and the other for faulty workmanship

generally. Can it be said this was the intention of the parties? The Court's reasoning suggests it was not; rather, it was only the insurer's intention. Ultimately, the Court indicated that Farmers' Mutual's attempt to exclude resulting damage by not including an exception in the "faulty workmanship" exclusion was insufficient. The wording used must specifically state there

is no coverage for resulting damage in that context.

Thus, the Court of Appeal in Monk has indicated the importance of insurers clearly identifying and articulating areas of excluded coverage so as to ensure that they are providing the type of coverage they wish to provide.

Firm News

For the third year in a row Laura Dickson helped put together the program for the Hamilton Advocacy Seminar, which was held on January 28, 2016. This year Laura also spoke about Advocacy in Small Claims Court.

At the same conference Jack Fitch gave a presentation entitled Top Ten Tips on Running an Effective Trial.

Aleksandra Zivanovic spoke about the Top Cases from 2015 at the Tricks of the Trade conference held on January 29, 2016.

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