



# **“THE POLICY GIVETH AND THE POLICY TAKETH AWAY”**

## **EXCLUSIONS 2010/ 2011 SUMMARY OF THE LAW AND RECENT DEVELOPMENTS**

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## “THE POLICY GIVETH AND THE POLICY TAKETH AWAY”

### EXCLUSIONS 2010/2011 SUMMARY OF THE LAW AND RECENT DEVELOPMENTS

There have been some significant recent developments in the law relating to interpretation and application of exclusions. This paper focuses on interpretation and application of exclusions generally, and does not deal with individual exclusions. Some of the more commonly encountered exclusions, and the issues they raise, are dealt with separately.<sup>1</sup>

#### I. GENERAL INTERPRETATION RULES AND ISSUES

The general principles that apply to interpretation of exclusions are easy to state. They include the following:

1. coverage provisions are to be interpreted broadly and exclusions narrowly;<sup>2</sup>
2. exclusions, like all policy terms, are to be given an interpretation which best promotes the reasonable expectations of the parties;<sup>3</sup> and
3. the insured has the onus of bringing itself within the basic coverage agreement; the onus then shifts to the insurer to bring itself within the scope of any exclusion; and the onus then shifts back to the insured to bring itself within the scope of any exception to an exclusion.<sup>4</sup>

While these principles are easy to state, they are not always easy to apply. Some of the issues that more commonly arise in interpreting exclusions are considered.

#### A. The Front End: Multiple Causes and “No Causes”

The opening words of the exclusion are key to defining its scope. This was not always the case. There was a time when an exclusion referring to loss “caused by” one excluded peril would permit the exclusion to operate, irrespective of the number of perils or causes.<sup>5</sup> It is now clear that, in the absence of express

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<sup>1</sup> By Krista Prockiw, Oliver C Hanson and Alexandre Maltas.

<sup>2</sup> For example, *Reid Crowther partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252, *Buchanan v. Wawanesa Mutual Insurance Co.*, 2010 BCCA 333 at para. 8.

<sup>3</sup> For example, *Progressive Homes, infra*, at para. 23, *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at 900 – 902.

<sup>4</sup> *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164 at 167, *Strata Plan NW2580 v. Canadian Northern Shield Insurance Co.*, 2006 BCSC 330 at para. 15, *Supreme Steel Ltd. v. American Home Insurance Company*, B.C.S.C. Vancouver Registry No. S023382 at para. 10.

<sup>5</sup> See *Wayne Tank v. Employers' Liability Insurance Corp.*, [1973] 3 All. E.R. 825 (C.A.); *Ford Motor Co. of Canada Ltd. v. Prudential Insurance Co.*, [1959] S.C.R. 539.

language, exclusions referring to one cause do not operate in multiple cause situations.<sup>6</sup> If an exclusion is to apply in a situation involving multiple concurrent causes (two causes operating at the same time) or multiple consecutive cause (one cause preceding the other), the words of the exclusion must be clear in terms of requiring this result. Otherwise, the exclusion will apply only if all contributing causes are excluded. An example of operation of this approach is *B&B Optical Management v. Bast*, 2003 SKQB 242. There, an exclusion for damage caused by artificially generated electric currents was held not to apply to a claim for damage to certain electrical equipment. There was no doubt that the equipment had been damaged by excessive electrical current. But the cause of the excess of electrical current was negligence of a contractor. This was an external cause. Existence of multiple causes meant that the exclusion, in the absence of appropriate opening words, could not apply. The opening words which permit the exclusion to apply notwithstanding multiple causes include reference to loss caused “directly or indirectly” by an excluded peril, or refer to loss “caused, or in any way contributed to” by the excluded peril.

Of course, this principle cannot be taken too far. The cases make it clear that it is not permissible to divide what would, on a common sense basis, be seen as a single peril to find multiple causes. An example of this approach is *Chandra v. Canadian Northern Shield Insurance Co.*, 2006 BCSC 715. The loss was caused by faulty installation of drain tiles which lead to ongoing continuous leaks. The policy excluded both faulty design/workmanship and was caused by continuous seepage or leakage of water. The insured argued that the loss should be divided so as to find additional causes. The Court rejected this argument and found that there was at most two causes, both excluded.

A recent case considering a multiple cause scenario is *Minox Equities Ltd. v. Sovereign General Insurance Co.*, 2010 MBCA 63. The policy excluded loss “directly or indirectly” caused by seepage, rain or humidity. The building was damaged by mould which followed incursion of water. The trial judge found that the loss arising from the development of mould was not excluded. The Court reasoned that, as mould was not specifically referred to as an excluded peril and as development of mould was not the inevitable result of the underlying conditions, the exclusion could not apply. This decision was overturned on appeal. The Court of Appeal essentially found that the words of the policy were not ambiguous and could not support the “inevitability” finding made in the Court below. As at least one of the events referred to in the exclusion contributed to the loss, the exclusion applied.

It is also necessary to consider the effect of an exclusion makes no reference to cause whatsoever. Where the exclusion applies to a particular type of damage, without regard to how the damage arose, the question of cause becomes irrelevant. The exclusion applies to the relevant damage irrespective of cause. A commonly seen example is the exclusion for “settling, expansion, contraction ...” of buildings. This exclusion was considered in British Columbia in *Leahy v. Canadian Northern Shield Insurance Co.*, 2000 BCCA 408 and more recently in *Buchanan, supra*. In *Leahy* leaks from a sprinkler system on a neighbouring property led to subsidence and cracking in the insured’s home. The Court held that the exclusion would apply to damage consisting of the settling, cracking, etc., irrespective of cause or causes.

This decision has not always found favour and in subsequent decisions courts have avoided the result that would follow application of this approach. For example, in *Rivard v. General Accident Insurance Co. of Canada*, 2001 MBQB 293, upheld on different grounds 2002 MBCA 70 the Trial Court, in a similar situation (but where damage arose from a leaking pool) restricted application of the exclusion to “normal” settlement or cracking as opposed to settlement or cracking arising from an external or fortuitous cause.

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<sup>6</sup> See *Derksen v. 539938 Ontario Ltd.*, [2001] 3 S.C.R. 398; *Pavlovic v. Economical Mutual Insurance Co.*, [1994] B.C.J. No. 2494; *CCR Fishing Ltd. v. British Reserve Insurance Co.*, [1990] 1 S.C.R. 814.

The court did so relying in part on American authority. The Court of Appeal upheld the result, but disagreed with the trial judge's reasoning. The Court of Appeal found there was cover based on the wording of an exception to another exclusion (referred to below in the discussion on exceptions). The "normal settlement" restriction was also referred to by the Trial Court in *Engle Estate v. Aviva Insurance Co. of Canada*, 2008 ABQB 645, upheld 2010 ABCA 18 (where, however, the policy included "caused base" language in the exclusion). In *Buchanan v. Wawanesa Mutual Insurance Co.*, 2010 BCCA 333 the BC Court of Appeal followed the reasoning in *Rivard*, and distinguished *Leahy*, again relying on the wording of an exception to a separate exclusion (discussed below). The Court also left open the possibility that *Leahy*, and its approach might potentially be reconsidered in a future case.

## **B. The Back End: Exceptions, Ensuing Loss and Resultant Damage**

Just as important as the opening words of the exclusion are its closing words. Most exclusions are subject to some exception. The most common exceptions are for "resultant damage" or loss caused by an ensuing peril (or some variation of that language).

The "resultant damage" exception has most commonly been considered in connection with the faulty design and workmanship exclusion. For the resultant damage exception to apply, it is clear that there need be no new peril following the collapse or other loss due to faulty design or workmanship. There need simply be damage to property, other than that which was the subject to faulty design/workmanship. The cases make it clear that the loss or damage must be to entirely separate property, and it is not possible to divide the property which has been the subject of faulty design or workmanship into its component parts for purposes of applying the exception.<sup>7</sup>

Where the exception is for loss caused by an "ensuing peril", it is not sufficient that there be damage to property other than that which is subject of the exclusion. There must be a new peril following the excluded peril to permit the exception to apply. A recent case considering this situation is *Versacold Corp. v. Zurich Insurance Co.*, 2010 BCSC 23. A refrigerant valve failed at the insured's cold storage facility. As a result stock was contaminated by ammonia leaking from the refrigeration system. The cause of the valve failure was wear and tear. The policy excluded wear and tear and excluded contamination, with an exception for stock damage caused by an ammonia leak, "directly resulting from the occurrence of an insured peril". The insured argued that the consequential loss and damage to stored stock was sufficient to trigger the exception. The Court rejected that argument, and found that, in the absence of a new insured (or non-excluded) peril following the wear and tear which resulted in failure of the valve, the exception could not apply (para. 76). The Court was assisted in this finding by extrinsic evidence to the effect that the parties both fully understood that this result was consistent with the intended scope of the exclusion and exception.<sup>8</sup>

Another significant issue concerning exceptions is their potential application beyond the specific exclusion to which they are attached. It has been said in numerous cases that exceptions to exclusions do

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<sup>7</sup> See, for example, *B.C. Rail Ltd. v. American Home Assurance Co.* (1991), 54 B.C.L.R. (2d) 228 (C.A.); *British Columbia v. Royal Insurance Co. of Canada* (1991), 60 B.C.L.R. (2d) 109 (C.A.); *Algonquin Power (Long Sault) Partnership v. Chubb Insurance Co. of Canada* (2003), 50 C.C.L.I. (3d) 107 (Ont. S.C.J.).

<sup>8</sup> Other BC cases considering the necessity of a separate peril, either "directly" (i.e., immediately in time) or "directly and concurrently" (i.e., immediately and at the same time) to trigger the exception are *Canevada Country Communications Inc. v. GCAN Canada Insurance Co.*, 1999 BCCA 339 and *Strata Plan NW 2580 v. Canadian Northern Shield Insurance Co.* 2006 BCSC 330.

not grant cover.<sup>9</sup> However, this principle has to be carefully considered. Courts have been prepared to interpret exceptions in some cases in a way that could be said to come close to granting cover. A recent example of this approach is *Buchanan v. Wawanesa Mutual Insurance Co.*, *supra*. That case involved the interaction between a “cause based” exclusion, for damage caused by seepage or leakage of water, unless resulting from escape of water from a public water main or swimming pool, and a “damage based” exclusion for settling, expansion, cracking, etc. The facts were similar to those in *Leahy*, *supra*, except that in *Buchanan* the loss was due to leaks from a faulty water main (thus within the leak exception) while in *Leahy* the leaks were from a sprinkler system (thus outside the leak exception). Newbury J.A., (K.A. Neilson J.A. concurring, Groberman J.A. dissenting) held that, considering the policy as a whole, including the parties’ reasonable expectations, the settlement exclusion could not “trump” the cause based exclusion, including the exception. In other words, where there was damage caused by leakage from a water main, that damage was covered, notwithstanding that the damage was settlement, cracking, etc. Groberman J.A. disagreed with this analysis, Groberman J.A. held that the settlement exclusion should apply separately and independently from the leakage exclusion, and had to apply, on the basis of *Leahy*, irrespective of cause. The majority’s reference to considering all of the policy terms, including exceptions, together (paras. 31 -33) is similar to the approach taken by Rothstein J. for the SCC in *Progressive*, handed down a few months later, and referred to below.

### **C. What Can be Considered? Admissibility of Extrinsic Evidence**

It is clear that, in an appropriate case, the Court may consider extrinsic evidence to resolve an ambiguity in an exclusion. The Court may consider, within limits, evidence of statements made during the course of application for and/or negotiation of the policy to properly interpret the exclusion. A recent example of this approach is *Versacold*, *supra*. There the Court referred to detailed correspondence that took place between the broker and underwriter, on the specific subject of the scope of the “ammonia leak” exception to the wear and tear exclusion in interpreting the policy.

In doing so the Court relied on one insurance case, *Supreme Steel Ltd. v. American Home Insurance Company*, B.C.S.C. Vancouver Registry No. S023382 and two non-insurance cases, *Delisle v. Bulman Group Ltd.* (1991), 54 B.C.L.R. (2d) 343 (S.C.) and *Elk Valley Coal Partnership Ltd. v. Westshore Terminals Ltd.*, 2008 BCCA 154. In *Supreme* the issue was proper interpretation of the faulty design and workmanship exclusion and an exception to the exclusion which was not on an entirely standard wording. As in *Versacold*, the Court admitted evidence of specific negotiation and correspondence between the broker and underwriter concerning the clause. The approach in *Delisle* and *Elk Valley* was the same, in a non-insurance context. In both cases the Court admitted evidence of statements made or correspondence during negotiations, to make it clear that the parties had a common intention and understanding, at the time the contract was concluded, as to proper interpretation of the clause in issue.

A very recent decision considering admission of extrinsic evidence on a policy interpretation issue (albeit although not specifically an exclusion) is *McGarry v. Co-operators Life Insurance Co.*, 2011 BCCA 214.

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<sup>9</sup> See, for example, *Krempulec, Property Damage Claims Under Commercial Insurance Policies*, Canada Law Book p. 4-8.

## II. SOME CURRENT ISSUES

### D. The End of Unwritten Exclusions; *Progressive Homes* and the “Underlying Policy”

The key recent case on exclusions is obviously the decision of the Supreme Court of Canada in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, [2010] 2 S.C.R. 245. *Progressive* is the most recent in a series of cases, most of which arose in BC, involving scope of cover for a general contractor or developer under a commercial general liability policy or a wrap-up liability policy. The application of *Progressive* to the “own work” exclusion is considered in a separate presentation by Oliver Hansen. The focus here is on significance of *Progressive* as marking the death of what could be termed as the “unwritten exclusion” based on the underlying philosophy of CGL cover, and the requirement for “third party property damage” as always necessary to trigger cover. *Progressive* appears to mark the end, at least in some circumstances, of the ability to interpret the underlying intent of a CGL so as to oust cover for a claim for cost of repair of the insured’s own work, irrespective of the policy’s specific “own work” exclusions. The recent history of the cases on this issue is well known, but is worth repeating, in light of the SCC decision in *Progressive*.

The first of the recent series of cases was *Swagger Construction Ltd. v. ING Insurance Co. of Canada*, 2005 BCSC 1269. *Swagger* involved typical “leaky building” allegations; defects in design or construction of certain building components, causing “resultant damage” to other parts of the building, and allegation that the defects had created resultant damage and would eventually result in a building dangerous to persons or property if not repaired. The Court relied on a number of authorities referring to the underlying principles and philosophy behind CGL cover, to the effect that the purpose of such insurance is not to cover cost of repair of the insured’s own faulty work. On the basis of those authorities the Court found that coverage could not be triggered. There was no need to turn to the exclusions (although the Court found that the same result would be reached on the basis of the exclusions). There could be no “occurrence” giving rise to “property damage” where the defect and damage was restricted to the insured’s own work or product. In a defective building claim against a general contractor or developer, cover could not be triggered where the claim is restricted to damage to the building itself. Damage to some other third party property would be necessary.

*Swagger*, and the underlying policy approach, was followed in *GCAN Insurance Co. v. Concord Pacific Group Inc.*, 2007 BCSC 241, and in the trial and Court of Appeal decisions in *Progressive*, 2007 BCSC 439 and 2009 BCCA 129, respectively.

In the meantime the Ontario Courts had reached the opposite conclusion in *Bridgewood Building Corp. v. Lombard General Insurance Co. of Canada*, [2005] O.J. No. 2083 (S.C.J.), [2006] O.J. No. 1846 (C.A.) (leave to appeal to the SCC refused) in a case involving similar facts. The Ontario Court of Appeal found that it was not appropriate to decide cover on the basis of the ‘general principle’ of no cover for cost of repair of the insured’s own work, but only on the specific policy wording. The Court found that, on the plain meaning of the policy, the conclusion that there could be no cover for cost of repair of the insured’s own faulty work was not sustainable. Such a finding, if it was to be made, would have to be made on the basis of the exclusions, and specifically, the “own work” exclusion.

This set the stage for the decision of the Supreme Court of Canada in *Progressive Homes*. The Court’s unanimous decision involved a rejection of the “underlying principle” approach to interpretation. There is nothing in the definitions of “occurrence” or “property damage” which would support a conclusion that damage to the insured’s work or product could not trigger coverage.

In reaching this conclusion the Court relied on the exclusions themselves. While neither an exclusion nor an exception to an exclusion can grant cover, the Court looked to the whole of the policy, including the exclusions and exceptions in deciding whether cover is triggered (see paras. 35 to 37). On the relevance of the exclusions to scope of cover the facts of *Progressive* are particularly interesting, as the five triggered policy years involved the three common limitations on the scope of the “own work” exclusion. It is common, in both CGLs and wrap-up liability policies, to see a restriction on the scope of the “own work” exclusion, particularly in connection with the product/completed operations hazard. It is very common to see wording added to the version of the exclusion that applies during the completed operations period, so as to narrow the scope of the exclusion. One of the *Progressive* wordings limited the scope of the exclusion to the “particular part” of property. The second restricted the completed operations version of the exclusion to work “by” the insured (as opposed to the version of the wording that applied during the operations cover, which applied to work “by or on behalf of the insured”). The third version provided that, during the completed operations period, the “own work” exclusion would not apply to work performed on behalf of the insured by a subcontractor (see paras. 52 to 70). If a claim for cost of repair of the insured’s own work could never be covered under the basic insuring agreement, or must always be excluded, the narrower wordings applying during the completed operations period that would be irrelevant. The limitation on the exclusions during the completed operations period suggests, absent the broader exclusion, such a claim was covered.

The influence of the rejection of the “underlying policy” approach in *Progressive* can already be seen. The relevant passages from the decision have been referred to many times and were, in large part, the basis for the recent decision of the Court of Appeal in *Bull Dog Bag Ltd. v. AXA Pacific Insurance Company*, 2011 BCCA 178. In that case the Court of Appeal overturned the finding of the summary trial judge that there was no cover for a claim against the insured or loss arising out of its supply of defective packaging. The packaged material (manure) had to be removed and repackaged. Only a small part of that material was actually lost in the repackaging process. Pearlman J. found there was no cover for the claim against the packaging manufacturer, relying in part, on the underlying policy and a number of the cases referred to above. The insurer accepted on appeal that this finding was not sustainable in light of the intervening decision of the SCC in *Progressive*, and restricted its case on appeal to application of the “own product” and “breach of warranty/representation” exclusions. The Court held that these exclusions did not apply in the circumstances.

Where we go from here remains to be seen. In most cases in which the “underlying policy” has been applied the claim has involved an allegation of a pure defect, without an allegation of resultant physical damage.<sup>10</sup> It is only where the underlying policy is applied to preclude cover where there is physical damage to the property (as in the defective building cases) that the result of application of the policy is questionable. Of course, it is also necessary to consider the possibility that an allegation of a pure defect, without resulting damage, may constitute property damage where the result of the defect is to render the property totally useless.<sup>11</sup>

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<sup>10</sup> See for example *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.* (1991), 57 B.C.L.R. (2d) 88 (S.C.) and *Celestica Inc. v. ACE INA Insurance* (2003), 229 D.L.R. (4<sup>th</sup>) 392 (Ont. C.A.).

<sup>11</sup> See the obiter comment of Rothstein J. in *Progressive* at para. 39 and prior decisions such as *Hironaka v. Co-operators General Insurance Co.* (2005), 30 C.C.L.I. (4<sup>th</sup>) 135 (Alta Q.B.).

It is also worth noting that the debate over the application and scope of the “underlying principle” continues in the U.S. Cases continue to come down on both sides, and consider many of the same issues that informed the decision in *Progressive*.<sup>12</sup>

### **E. “Great Expectations”: Reasonable Expectations and Nullification of Cover**

Arguably, 2011 marks the first acceptance of the “broad version” of the reasonable expectations doctrine and the first instance of the related “nullification of coverage” doctrine to overcome clear policy wording.

By way of background, there are three variations on the reasonable expectations doctrine, as originally developed in the United States.<sup>13</sup> The three versions of the doctrine from the most narrow, to the most broad, are as follows:

1. Where there is a ambiguity in the policy, it should be resolved in favour of the insured in order to satisfy his or her “reasonable expectations”. This is not a controversial proposition and is probably no different than the principle, stated in many Canadian cases, that ambiguity which cannot be otherwise resolved is to be resolved in favour of the insured.
2. The second version of the principle provides the insured all cover that “might reasonably be expected to be provided” under the type of policy at issue. This is somewhat broader than the first version of the doctrine, but is still subject to the clear wording of the policy. Even on the second version, where there is an “unequivocal plain and clear manifestation of the company’s intent to exclude coverage” reasonable expectations cannot oust or overcome the wording.
3. On the third version of the doctrine the insured’s reasonable expectations are enforced, even where the policy provisions are clear and “would have negated those expectations”.<sup>14</sup>

A number of Canadian cases have embraced the first version of the principle and, arguably to some extent, the second version. Up to the time of the decision in *Smith v. Crown Life Insurance Co.*, [1999] O.J. No. 89 (C.J.) it appeared that the third version of the doctrine could not apply in Canada. In *Chilton v. Co-operators General Insurance Co.* (1997), 32 O.R. (3d) 161 (Ont. C.A.), the Court noted (para. 35) that no appellate court had embraced the broad application of the principle and that decisions on point, including *Wigle v. Allstate Insurance Co. of Canada* (1984), 49 O.R. (2d) 101 (C.A.), had made it clear that the doctrine could not apply beyond resolving an ambiguity.

*Smith v. Crown Life Insurance Co.*, [1999] O.J. No. 89 (C.J.) ostensibly applied the broad version of the doctrine. However, the facts of *Smith* were highly unusual and the case is arguably not about

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<sup>12</sup> See, for example, *Sheehan Construction Co. Ltd. v. Continental Casualty Co.* (2010), 935 N.E. 2d 160 (S.C. Ind.) considering, among other things, the exception to the “own work” exclusion in rejecting the underlying policy approach to interpretation, and *Group Builders Inc. v. Tradewind Ins. Co.* (2010), 231 P. 2d 67 (C.A. Haw.) reaching the opposite conclusion.

<sup>13</sup> The three versions of the doctrine are referred to by Cory, J. in his dissenting judgment in *Brissette Estate v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87, quoted in *Smith v. Crown Life Insurance Co.*, *infra*.

<sup>14</sup> R. Keaton “Insurance Law Rights at Variance with Policy Provisions” (1970) 83 Harv. L. Rev. 961 at 967, quoted in *Smith v. Crown Life Insurance Co.*, *infra*.

interpretation of an insurance policy at all. In *Smith* the plaintiff was an insured under both a personal disability policy and a group policy. The personal disability policy included an option permitting increase in cover without evidence of insurability, thus allowing the option to be exercised even during a period of existing disability. The insured exercised the option and the insurer denied the increased benefits, without stating any reason. The insured sued. The insurer then advised that the application for increased benefits had been denied due to the existence of the separate group policy, as a result of which the plaintiff was over-insured. The action was settled on the basis that the existing claim would be dropped and the insured would be permitted to reapply for the benefits increase option. The insured then cancelled his membership in the group policy and reapplied for the increase in individual benefits. The insurer then denied that application on the grounds that, by the time of the second application the insured (who had since ceased work), no longer had sufficient income to qualify for the increase. The policy provisions were not ambiguous, but their application would obviously have been highly unfair in the circumstances, not so much as a matter of policy interpretation, but given the facts with regard to the prior claim and settlement of the action.

This brings us to two very recent cases on the reasonable expectations doctrine, *Cabell v. Personal Insurance Co.*, 2011 ONCA 105 and *Turpin v. Manufacturers Life Insurance Co.*, 2011 BCSC 1162. In *Cabell* the insured purchased a rider to a homeowner's policy covering outdoor in-ground swimming pools. The rider contained its own set of exclusions, but also referred generally to incorporation of the exclusions in the main policy wording. The main policy wording included an exclusion for "settling, expansion, contraction, moving, bulging, buckling or cracking of any insured property, except resulting damage to building glass".

The pool was damaged as a result of hydrostatic uplift. The Court found that this would fall within the wording of the exclusion, and found that the wording of the exclusion was not ambiguous. The Court, in finding cover referred to "reasonable expectations" and the "nullification of coverage" doctrine. The "nullification of coverage" doctrine is one that has previously been applied in certain specific categories to interpret an exclusion to conform to the presumed intention of the parties, where the insurer's interpretation would effectively "nullify coverage" under the policy. For example, in connection with the pollution exclusion the nullification of coverage doctrine has been applied to restrict the exclusion to claims that would traditionally be thought of as "pollution" claims. Thus, the exclusion has been held not to apply to carbon monoxide poisoning or contamination (see for example *Zurich Insurance Co. v. 686234 Ontario Ltd.* (2002), 62 O.R. (3d) 447 (C.A.)). In connection with the product recall or sistership exclusion the doctrine has been applied to restrict the exclusion to a situation in which the claim relates to products which have been recalled but are *undamaged*, so that the exclusion does not avoid cover where there has been property damage that might otherwise be covered under the policy (see for example *Food Pro National Inc. v. General Accident Insurance Co. of Canada et al* (1986), 57 O.R. (2d) 489 (Ont. H.C.J.)). In *Indemnity Insurance Co. of North America v. Excel Cleaning Service*, [1954] 1 S.C.R. 169 the doctrine was applied to giving a narrow meaning to the words "care, custody or control" in a liability policy. Assigning a broad meaning of that phrase, where liability was excluded for claims arising with respect to property in the care, custody or control of the insured, would nullify cover under the policy as claims against the insured could only arise in relation to property in its care, custody or control. All of those cases involved interpretation of ambiguous policy wording. *Cabell* probably stands as an instance, of application of the broad version of the "reasonable expectations" doctrine or as a significant expansion of the nullification of coverage doctrine. The Court essentially found that the effect of the exclusion would be to nullify coverage under the endorsement. As a result the Court did not read down or interpret the exclusion (as was done in all of the nullification of coverage cases referred to above). The Court simply declined to apply the exclusion, on the grounds that it would not be within the party's reasonable expectations.

The second significant recent case on the reasonable expectations doctrine is *Turpin v. Manufacturers Life Insurance Co.*, 2011 BCSC 1162. In *Turpin* the insured applied for a travel insurance policy in connection with a planned trip to be taken about a week later. In the few days prior to taking out the policy the insured had some medical issues. She had been to doctors and to the emergency ward. The condition recurred while on the planned vacation, and turned out to be appendicitis, requiring hospitalization and resulting in a claim under the policy of about \$30,000. The claim was denied on grounds of the insured's known medical issues.

The Court considered the insured's arguments on interpretation of the policy provisions carefully, and appears to have found that the policy provisions were not ambiguous. The Court then turned to the reasonable expectations doctrine. The Court referred to *Chilton* and *Cabell*, supra, in some detail and said this:

On the construction I have applied to the exclusion clause in this case, Ms. Turpin was not eligible for medical coverage because she suffered an irregularity in her health, three days before the policy issued. The medical coverage is nullified. That is not what the parties expected. I find they expected that Ms. Turpin would be so covered.

The Court then noted that, while the plaintiff never read the policy wording, had she read the wording she would have found it difficult to understand, and found that the reasonable expectations doctrine should apply.

*Turpin* may be a questionable case for application of the reasonable expectation doctrine. Obviously, were the policy wordings truly ambiguous it would legitimately be interpreted against the insurer. Complexity or difficulty of construction is not the same as ambiguity, and the relevant words of the policy (quoted in the decision), were drafted with an intent to use clear and understandable language and appear to have been found by the Court to be unambiguous. The Court's conclusion that the parties obviously would have intended the plaintiff to be covered, is certainly open to question in the case of the insurer. The insurer presumably would say that it fully intended to cover the insured for losses unrelated to any pre-existing condition, but had no intention of covering the insured for a condition for which the insured had sought medical treatment in the period immediately prior to taking out the policy.

Whether *Cabell* and *Turpin* are followed and result in broader application of the reasonable expectations doctrine remains to be seen.