

HARPER GREY LLP
3200 – 650 West Georgia Street
Vancouver, British Columbia, V6B
4P7
Canada

Tel: 604 687 0411
Fax: 604 669 9385

CASE SUMMARY: COVERAGE EXCLUDED DUE TO RETROACTIVE DATE IN A CLAIMS-MADE POLICY

Insurance law – Commercial general liability insurance – Professional negligence – Exclusions – Occurrence vs. claims based policy – Interpretation of policy

First Condo Group Ltd. v. Lloyd's Underwriters, [2020] O.J. No. 122, 2020 ONSC 146, Ontario Superior Court of Justice, January 8, 2020, P.M. Perell J.

The insured was an engineering firm who prepared a reserve fund study, completed November 11, 2013, for a condominium corporation (“DCC”) regarding the remaining lifespan of lampposts on DCC’s property. The insurer provided coverage for four years under a claims-made policy from March 2010 to March 2014. A different insurer provided coverage between March 2014 and September 2015. The insurer issued a new claims-made policy beginning in September 2015 that was renewed annually up to and including the September 2018 to September 2019 period. This policy provided coverage for claims made during the policy period for, among others things, claims for negligent acts, errors, omissions and misrepresentations. The policy included a retroactive date which excluded coverage for claims arising out of an actual or alleged incident occurring on or before the retroactive date of September 11, 2015.

On October 30, 2015, Jason Cash was injured, suffering a traumatic brain injury, while working on a lamppost on DCC’s property. Mr. Cash sued DCC and later added the insured as a defendant. DCC also sought contribution and indemnity from the insured. It was alleged that the insured was negligent in preparing the reserve fund study, that they ought to have been aware the lampposts were prone to corrosion and at risk of collapse, and that they misrepresented the state of the lampposts. The insured reported the claim to the insurer on September 12, 2018, during the policy period. The insurer denied coverage on the basis that negligence was alleged to have occurred on or before the retroactive date. The insured brought an application to determine coverage.

The insurer took the position that “incident” in the retroactive exclusion referred to the insured’s alleged misconduct in 2013, rather than claims arising from it. The insured argued that “incident” referred to the date of injury in 2015, after the retroactive date. The insured also argued that, contrary to the intention of the parties, the insurer’s interpretation would effectively transform the policy from a claims-made to an occurrence-based policy. The Court determined the intention of the parties in the circumstances was that some claims-based incidents would be excluded, notwithstanding that the claims were made during the policy period. In this context, “incident” referred to the date of the 2013 reserve fund study and not the date of injury. The Court agreed that the policy remained in effect a claims-made policy, subject to some exclusions based on the retroactive date, and that was what the parties bargained for. As a result, the alleged incident occurred before the retroactive date and the claim was excluded.

This case was digested by [Michael J. Robinson](#), and first published in the LexisNexis® Harper Grey Insurance Law Netletter and the Harper Grey Insurance Law Newsletter. If you would like to discuss this case further, please contact Michael J. Robinson at mrobinson@harpergrey.com.