

HOMESOWNERS COVERAGE - COURT OF APPEAL'S DECISION IN DURHAM V. GRODESLEY V. ING

The Ontario Court of Appeal released an important insurance coverage decision in *Durham v. Grodesky v. ING*, released last Friday.

A child was accused of starting a fire which damaged a school owned by the plaintiff. The father was sued for failing to supervise the son. ING denied coverage, and the father third partied ING. ING's denial was upheld at the Superior Court level. This decision was overturned on appeal. The Court of Appeal held that there was a duty on ING to defend an innocent co-insured father under the liability coverage of his homeowner's policy where the father was alleged to have failed to prevent an intentional act by his son from taking place. The application exclusion read as follows:

We do not insure your claims arising from (6) Bodily injury or property damage caused by any intentional or criminal act or failure to act by: (a) any person insured by this policy; or (b) any other person at the direction of any person insured by this policy.

The Court of Appeal focused on the inclusion of the phrase "failure to act" in the exclusion, holding that such phrase was modified by the entire preamble "intentional or criminal." In the result, there may now be coverage for an innocent co-insured who is alleged to have failed to act to prevent an intentional act, as long as that failure to act is not, in and of itself, intentional or criminal (e.g. a parent who negligently failed to prevent their child from bullying or assaulting another child would be covered). If the innocent co-insured's actions are not proven at trial to be intentional or criminal, indemnity will follow as well.

There is some question as to the correctness of this decision as it appears to overturn a prior decision of the Ontario Court of Appeal in *Thompson v. Warriner* (2002) without explicitly indicating the intention to do so. That decision held that there is no coverage for an innocent co-insured under a policy's liability insurance coverage where there is an exclusion which precludes coverage to all insureds for an intentional act by "any insured." Many may remember the line of cases starting with *Godonoaga* and then *Snaak*, where intentional act exclusion clauses using the phrases "the insured" and "an insured" were held not to accomplish the result intended. However, insurers whose language denied coverage for all insureds where there was an "intentional act committed by any person insured under this policy" were comfortable that this language was sufficient. That may no longer be the case.

If you need more information on the impact of this decision, please do not hesitate to contact us.

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