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<p>PROPERTY DAMAGE CLAIMS UNDER COMMERCIAL INSURANCE POLICIES by Richard Krempulec, Q.C. Release No. 6, December 2024</p>

This is a concise, comprehensive, and practical guide to handling liability and first party claims under commercial insurance policies focusing on property damage claims. It’s an ideal resource for assisting lawyers, risk managers, claims adjusters, and others, in dealing with claims of a property nature, and providing a better understanding of property insurance claims in general.

What’s New in this Update:

This release features valuable updates to the case law and commentary in Chapters 2, 4 and 7.

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Case Law Highlights

- **Chapter 4—Duty to Defend—** In *Kerk-Courtney v. Security National Insurance Company (TD General Insurance Company)*, 2024 ONCA 676 (Ont. C.A.), the insureds appealed a decision of the Ontario Superior Court of Justice finding that their insurance company had no duty to defend and indemnify them in a lawsuit following the sale of their residential property. The insureds had sold their property in 2016. The buyers subsequently sued them in 2018 for, amongst other things, negligent misrepresentation after discovering various issues with the property. The insureds defended the claim for several years before providing a copy of the claim to their insurance company in 2021 and asking them to defend and indemnify them under the insurance policy they had when they sold their property. The insurance company declined to defend them in part because the insured had breached their obligation to give them prompt notice of the claim. The Court of Appeal determined the “prompt notice” breach for the first time on appeal. It found that the pleadings clearly contained an allegation of negligent misrepresentation, and that the insureds 2.5-year delay in giving notice to their insurer was a breach. The court did not grant relief from forfeiture under the Ontario Insurance Act, finding the delay was unreasonable and had prejudiced the insurer from successfully defending the claim.
- **Chapter 7—Perils Insured and Excluded—** In *Swaine et al. v. Intact Insurance Company*, 2024 MBKB 145 (Man. K.B.), the insured purchased their residential property in 1975. Several years later they discovered that a corner of the property had been dropping. They obtained an expert report and installed additional foundational supports for that portion of the property. Over 30 years later the insured discovered structural damage to their property which cost them \$124,000 to remediate. They brought an insurance claim alleging that the loss was caused by a sudden sinkhole that developed under their property. The insurer denied the claim based on an exclusion in the policy for damage caused by settlement. After reviewing the evidence, the court found that caused by the foundation diminishing over time resulting in settlement and movement. The court found that although the insured had established that the damage had arisen from a sudden and unexpected event, the cause of the loss was clearly excluded by the policy. The fact that the foundation had failed slowly over time, with a sudden drop in 2017, did not change the nature of the cause or bring it outside the exclusion in the policy.