Case Alert

Washington Supreme Court Issues Groundbreaking Pro-Policyholder Pollution Decision

The Washington Supreme Court recently extended the efficient proximate cause doctrine – commonplace in first-party insurance – to a commercial general liability ("CGL") pollution claim. In doing so, the court determined that the negligent installation of a water heater, rather than the carbon monoxide emitted therefrom, was the proximate cause of injury and could not be excluded via a pollution exclusion.

In *Xia v. ProBuilders Specialty Ins. Co*., No. 92436-8 (Wash. April 27, 2017), the court considered whether coverage existed for injuries suffered by a new homeowner resulting from carbon monoxide exposure caused by the negligent installation of a water heater.

The court separated the pollution event and the negligent installation in its causation analysis. In doing so, the court explained that "ProBuilders … correctly identified the existence of an excluded polluting occurrence under the unambiguous language of its policy. However, it ignored the existence of a covered occurrence – negligent installation – that was the efficient proximate cause of the claimed loss." Going a step further, the court held that ProBuilders' assertion of the pollution exclusion as a basis to deny its defense obligation constituted bad faith.

Describing the rule of efficient proximate cause, the court explained that there is coverage "where a covered peril sets in motion a causal chain, the last link of which is an uncovered peril …. If the initial event … is a covered peril, then there is coverage under the policy regardless whether subsequent events within the chain, which may be causes-in-fact of the loss, are excluded by the policy."

This rule is commonplace in first-party property insurance losses. Although it is not typically utilized in third-party liability insurance cases, the court emphasized that it has "never before suggested that the rule of efficient proximate cause is limited to any one particular type of insurance policy. Instead, the rule has broad application whenever a covered occurrence under the policy – whatever that may be – is determined to be the efficient proximate cause of the loss."

The court specifically explained that insurers cannot draft insurance language to circumvent the doctrine of efficient proximate cause. Citing *Key Tronic Corp., Inc. v. Aetna (CIGNA) Fire Underwriters Ins. Co*., 124 Wn.2d 618 (1994), the court stated that "[t]he rule cannot be circumvented by an exclusionary clause; an exclusionary clause drafted to circumvent the rule will not defeat recovery."

The court also reiterated its position on general application of the pollution exclusion, which is characterized in most jurisdictions as whether it applies to traditional environmental pollution or is based on the plain meaning of the policy. Washington falls somewhere in the middle and applies the pollution exclusion when an occurrence "stems from either a traditional environmental harm or a pollutant acting as a pollutant."

This decision is a momentous win for policyholders. Following the court's analysis to its natural extension, this analysis calls into question many standard exclusions in a CGL policy. Insurers will need to think carefully before denying a defense under a CGL policy when there is a legitimate claim that the predominant cause of an injury or damage was something earlier in the chain of causation than the later excluded event.

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