Why Does The Pollution Exclusion in California Insurance Policies Exclude Asbestos Building Contamination But Not Pesticide Building Contamination?

According to a recent California appellate court decision, a contractor's negligent release of asbestos fibers during the removal of asbestos-containing acoustical spray in a condominium complex is excluded by the pollution exclusion in a homeowner association's property and liability policy, despite a 2003 California Supreme Court ruling that a contractor's negligent spraying of pesticide in an apartment complex is not excluded by a similar pollution exclusion in an apartment owner's policy. *The Villa Los Alamos Homeowners Association v. State Farm General Insurance Company*, __ Cal. App. 4th __, 2011 WL 3586475 (August 17, 2011). How can that be?

Facts

In 2006 the Villa Los Alamos Homeowners Association (HOA) contracted to have spray-applied acoustical ("popcorn") ceiling texture in common area ceilings and stairways scraped and removed. During the removal, asbestos fibers were released into the air, common areas, individual units and public areas outside the building. The Bay Area Air Quality Management District (District) cited the contractor and ordered the HOA to clean up the asbestos fibers. The HOA submitted a first party claim to State Farm, its insurance carrier, for approximately $650,000 in cleanup costs. The HOA also sued the contractor. The contractor then cross-complained against the HOA and its management company. The HOA tendered its defense to State Farm.

A pollution exclusion in the first party coverage section of the policy excluded coverage for any loss caused by the "presence, release, discharge or dispersal of pollutants," while the exclusion pertinent to third party claims removes coverage for injuries arising out of "discharge, seepage, migration, dispersal, spill, release or escape of pollutants." State Farm denied coverage for both the first party and third party claims, citing the pollution exclusion and faulty workmanship exclusions in the policy.

The HOA sued State Farm for breach of contract, bad faith and declaratory relief. The trial court granted summary adjudication in favor of State Farm on the first party claims based on the pollution exclusion. The HOA dismissed its third party claims, and appealed.

Discussion

In *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635 (2003), the California Supreme Court found that the standard pollution exclusion clause in a comprehensive general liability policy was intended to exclude coverage for injuries resulting from events commonly regarded as "environmental pollution." The Court rejected a broader, literal interpretation of the clause that would foreclose coverage for any and all injuries arising from harmful substances. So, the Court held that it was unlikely that a reasonable policyholder would think that the activity in question there—namely, the ordinary but negligent spraying of pesticides around an apartment building in order to kill yellow jackets—was an act of pollution.

The HOA argued that *MacKinnon* applied here, and that the pollution exclusion in the State Farm policy did not cover a single, negligent, localized asbestos release. After reviewing *MacKinnon* and its progeny, the *Villa Los Alamos* court agreed that the general principles announced in *MacKinnon* concerning the pollution exclusion

also pertain in the context of a coverage dispute over first party property insurance claims based on analogous pollution exclusion—despite the well-recognized analytical differences between first party property and third party liability policies. But the *Villa Los Alamos* court otherwise rejected the HOA's application of *MacKinnon* to the facts at hand.

Reading the State Farm pollution exclusion in accord with *MacKinnon* as pertaining to environmental pollution, the *Villa Los Alamos* court asked this question: Did the accidental release and airborne dissemination of asbestos fibers in this case amount to what is commonly regarded as "environmental" pollution? The court concluded that asbestos is a pollutant as a matter of law, and that it was "released" into the air and areas around the popcorn ceiling texture during the contractor's scraping and removal. Emphasizing factual differences between a homeowner being able to buy and apply pesticides in a residential setting, and the removal of asbestos containing building materials being highly regulated by a myriad county, state and federal laws, the court rejected the HOA's analogy of the asbestos removal to a single, ordinary act of negligence. In short, the *Villa Los Alamos* court concluded that the ordinary layperson would understand the release of asbestos fibers under these circumstances to be "environmental pollution." Citing *American Casualty Co. of Reading, PA. v. Miller*, 159 Cal. App. 4th 501, 515-516 (2008), the court explained that

> the key point under a *MacKinnon* analysis is whether the act in question is commonly thought of as environmental pollution. Thus, even if the accident consisted of a one-time negligent release of methylene chloride [as in *Miller*], the pollution exclusion would preclude coverage because permitting the chemical to be released into a public sewer was an act of environmental pollution. (*Ibid.*) *Miller* is persuasive. To establish bright-line rules as to what constitutes "environmental pollution" makes no sense: A one-time event can be a polluting event if it creates "'impurity, something objectionable and unwanted.'" (*MacKinnon, supra*, 31 Cal. 4th at p. 654.) To reiterate: The release of asbestos from a product into the air people breathe constitutes a health hazard for which no level of exposure is safe. The work here apparently occurred over several days and resulted in the sufficient release of asbestos fibers into the air to contaminate the building complex and the adjacent outside areas, constituting environmental pollution.

Lesson Learned

There is no "bright-line" rule for when an ordinary layperson will consider a "release" of harmful substances in or around a residential structure to be "environmental pollution" rather than an "ordinary act of negligence." One can imagine the *Villa Los Alamos* court just as easily analogizing the release of asbestos fibers from asbestos-containing building materials in a residential building to be an "ordinary act of negligence" on par with pesticide contamination *a la MacKinnon* rather than "environmental pollution" *a la Miller*. The clever insurance coverage attorney will start framing and controlling the analogy early on.

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