

Wash. Justices Won't Rethink Pollution Exclusion Ruling

By Jeff Sistrunk

Law360, Los Angeles (August 18, 2017, 9:47 PM EDT) -- The Washington Supreme Court on Thursday refused to disturb its holding in April that a pollution exclusion doesn't negate coverage under a commercial general liability policy when negligence is the primary cause of a loss, a ruling that was hailed by policyholders and maligned by insurance companies.

Bolstered by a slew of insurance industry groups, including the Property Casualty Insurers Association of America, the Northwest Insurance Coverage Association and the Complex Insurance Claims Litigation Association, ProBuilders Specialty Insurance Co. had asked the Washington high court to rethink its ruling that the insurer refused in bad faith to defend a builder in homeowner Zhaoyun Xia's suit over injuries stemming from toxic levels of carbon monoxide released from a hot water heater.

In a pair of brief orders, though, the state justices rebuffed ProBuilders' bid for reconsideration, while also amending the April 27 decision to clarify that Xia is entitled to recover her attorneys' fees and court costs.

Six of the nine justices had concluded in the opinion that although carbon monoxide clearly falls within the absolute pollution exclusion in a liability policy that ProBuilders issued to builder Issaquah Highlands 48 LLC, coverage is still available for the underlying suit brought by Xia because the predominant cause of her injury was Issaquah's allegedly negligent installation of the water heater.

The majority applied Washington's "efficient proximate cause," or EPC, rule, which states that coverage exists if a covered risk sets in motion a chain of events leading to an injury, even if an excluded risk is part of the chain.

"Under these facts, ProBuilders Specialty Insurance Co. 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," Washington Justice Mary Yu wrote for the majority.

Moreover, the Washington justices found that ProBuilders' refusal to defend was in bad faith because it failed to recognize the possibility that a covered negligent act was the predominant cause of Xia's injuries.

Attorneys told Law360 at the time that the state high court's opinion is a game-changing ruling that

could render many pollution exclusions effectively toothless, given that many pollution incidents are arguably initiated by an act of negligence.

On Friday, Crowell & Moring LLP partner Laura Foggan, who represented CICLA as an amicus in support of ProBuilders, said the Washington justices' denial of the insurer's reconsideration motion leaves intact a pair of "disturbing" holdings detrimental to insurance carriers. The decision has the potential to apply not just to pollution exclusions, but other exclusions dependent on the cause of an event, she said.

"I think it is clear from the amount of attention the ruling received that it came as a surprise that the court would apply the efficient proximate cause doctrine in this way," Foggan said. "Many observers felt that this was a clearly incorrect application of the doctrine. With that level of uncertainty on whether the doctrine would apply in this context, the Washington Supreme Court shouldn't have held that ProBuilders acted in bad faith."

White & Williams LLP counsel Randy Maniloff, who publishes the insurance newsletter Coverage Opinions, told Law360 that the biggest question left open by the Washington Supreme Court's decision is "whether the other shoe drops — a court applies the rule from Xia as a basis to preclude applicability of another type of exclusion."

ProBuilders had refused to defend Issaquah against Xia's suit, arguing that the pollution exclusion barred coverage. After settling with Issaquah for \$2 million and receiving an assignment of the builder's rights under the ProBuilders policy, Xia sued the insurer in Washington state court for breach of contract, bad faith and violations of Washington's Consumer Protection Act and Insurance Fair Conduct Act.

The insurance company prevailed on summary judgment before the trial court, and a state appellate panel affirmed its win after finding that the pollution exclusion clearly encompassed Xia's claims.

In April's ruling, the majority of the state high court held that while a "polluting occurrence" obviously happened when the water heater spewed toxic levels of carbon monoxide into Xia's home, it is "equally clear" that the ProBuilders policy still provides coverage under the efficient proximate cause rule because the alleged negligent installation of the heater was the predominant cause of Xia's injuries.

Attorneys for Xia and ProBuilders did not immediately respond to requests for comment.

Xia is represented by Howard Mark Goodfriend and Catherine Wright Smith of Smith Goodfriend PS and by Richard B. Kilpatrick of Kilpatrick Law PC.

ProBuilders is represented by Stephen Gift Skinner of Andrews & Skinner PS.

The case is Xia et al. v. ProBuilders Specialty Insurance Co. RRG et al., case number 92436-8, in the Supreme Court of the State of Washington.

--Editing by Pamela Wilkinson.