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California Court Applies MacKinnon In Property Insurance Dispute, Finds Pollution Exclusion Applies

By Samuel H. Ruby

A California Court of Appeal has held that the release of asbestos in and about a condominium complex during the scraping of acoustical "popcorn" ceiling falls within a property insurance policy's pollution exclusion. *Villa Los Alamos Homeowners Assn. v. State Farm General Ins. Co.*, 2011 WL 3586475, --- Cal. App. 4th --- (2011).

The exclusion at issue pertained to "the presence, release, discharge or dispersal of pollutants, meaning any solid, liquid, gaseous or thermal irritant or contaminant, including vapor, soot, fumes, acids, alkalis, chemicals and waste." In *MacKinnon v. Truck Insurance Exchange*, 31 Cal. 4th 635 (2003), the California Supreme Court interpreted a comparable *liability* insurance exclusion as applying only to "conventional environmental pollution," which the court distinguished from "ordinary acts of negligence involving harmful substances." In *Villa Los Alamos*, the parties disagreed on whether that interpretation should govern in the property insurance context; and if so, whether the facts of the claim met the *MacKinnon* test.

On the interpretation issue, the Court of Appeal rejected State Farm's position that a broader test should apply to first-party pollution exclusions. Though "mindful that there are analytical differences between first party property and third party liability policies," the court decided that "the general principles announced in *MacKinnon* . . . also pertain in the context of a dispute over first party property insurance claims."

However, on the ultimate issue of coverage, the court sided with State Farm. Applying the *MacKinnon* test, the court determined that the release of asbestos during ceiling renovations constituted "pollution." The court found that asbestos is a "pollutant" and that the loss (which included remediation of the complex and its grounds) resulted from the "release" of asbestos. The court further found that because removal of asbestos-containing material is highly regulated, an improper removal effort cannot be deemed an "ordinary act of negligence."

The court rejected the insured's argument that *MacKinnon* requires repeated releases leading to widespread damage. The court held that a single release of a pollutant resulting in only localized harm can still qualify as "conventional environmental pollution." The court also rejected the insured's argument that because State Farm had not endorsed the policy with a specific exclusion for asbestos, the general pollution exclusion could not be read to encompass that substance.

We have long expected that California courts would look to *MacKinnon* to interpret a pollution exclusion in a property insurance policy. Though *Villa Los Alamos* makes it official, the holding comes as no surprise. Of greater interest is the fact that once again, under circumstances falling well short of a massive environmental catastrophe, a court applying *MacKinnon's* so-called narrow test has found that test met.

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