Washington Supreme Court Applies Efficient Proximate Cause to General Liability Policy

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The Washington Supreme Court recently held—despite recognizing that a pollution exclusion on its face excluded coverage under a liability policy—that a duty to defend existed based upon the doctrine of "efficient proximate cause." *Xia v. ProBuilders Specialty Ins. Co*., No. 92436-8, 2017 Wash. LEXIS 443 (Apr. 27, 2017), held that the efficient proximate cause doctrine—which had previously only applied in the context of first-party policies—may apply to liability policies. The efficient proximate cause doctrine is a judicially-created doctrine designed to limit the scope of policy exclusions to claims in which a loss to covered property was set in motion by an enumerated peril and the excluded aspect of the loss arrived late in the chain of causation. The expansion of this doctrine by the Washington Supreme Court may have implications outside of Washington.

The case involved a personal injury claim and lawsuit by "Julia" Xia (a Washington townhouse owner) against Issaquah Highlands 48, LLC (the company that installed a natural gas water heater in Ms. Xia's home) in connection with an alleged carbon monoxide leak into Ms. Xia's home. Issaquah's general liability insurer, ProBuilders Specialty Insurance Company, disclaimed defense and indemnity coverage for Ms. Xia's claim and subsequent lawsuit against Issaquah pursuant to a pollution exclusion and townhouse exclusion contained in the general liability policy issued to Issaquah.

Issaquah settled the lawsuit by stipulating to a judgment in the amount of $2,000,000 and assigning the right to pursue claims against ProBuilders. Xia filed a declaratory judgment action against ProBuilders in Washington state court. On motions for summary judgment, the trial and appellate courts granted ProBuilders summary judgment. On review, the Supreme Court held that carbon monoxide qualified as a "pollutant" for purposes of the policy's pollution exclusion and that the pollution exclusion, on its face, applied. *Id*. at *19 ("ProBuilders did not err in determining that the plain language of its pollution exclusion applied to the release of carbon monoxide into Xia's home."). The court, however, went on to hold that a duty to defend existed because, pursuant to the efficient proximate cause doctrine, a jury could have concluded that the legal cause or origin of Ms. Xia's injury was faulty installation of the water heater such that the excluded loss—"bodily injury" based upon the release of carbon monoxide—should not preclude coverage for an event set in motion by a "covered" claim. The Supreme Court denied summary judgment in favor of ProBuilders, granted summary judgment on all claims in favor of Xia, and remanded for findings related to damages for bad faith denial of a duty to defend.

The Court's rationale for applying the efficient proximate cause doctrine was that (1) it had never held that the doctrine did not apply to liability policies and (2) the efficient proximate cause doctrine had been applied to pollution exclusions in first-party homeowners policies. Although many states recognize the efficient proximate cause doctrine in the first-party insurance context, e.g., homeowners insurance policies, we are unaware of any other court applying the doctrine in the context of a general liability policy. The Washington ruling is certain to be cited by insureds in support of their claims where a loss was "set in motion" by something other than an excluded loss.

The Court observed, “We have never before suggested that the rule of efficient proximate cause is limited to any one particular type of insurance policy.” *Id*. at *14. This rational seems at odds with the rule that the policy language itself should be the driver of policy interpretation. Indeed, the efficient proximate cause doctrine appears to have been developed in response to a particular problem created by the application of first-party policy language to certain factual scenarios. The Court’s rationale—disconnected from the policy language at issue—offers little guidance to lower or other courts.

It remains to be seen how *Xia* will be treated within Washington and elsewhere, and whether it will ultimately be overturned or abrogated by statute. The lack of analysis of the applicable policy language may lead courts in other states to identify the opinion as an anomaly of Washington law of limited utility elsewhere. Nevertheless, insurers should be cognizant of the manner in which the highest appellate court in Washington has broadened the duty to defend.