

Client Alert

April 2016

UPDATE: Pollution Exclusion Applies to Lead Poisoning Claim Under CGL Policy

In April 2015, we issued a Client Alert analyzing the Court of Appeals of Georgia's opinion in *Smith v. Ga. Farm Bureau Mut. Ins. Co.*, 331 Ga. App. 780, 771 S.E. 2d 452 (2015), which held that lead-based paint is not a pollutant in the context of a commercial general liability (CGL) policy's pollution exclusion. The Supreme Court of Georgia has now reversed that decision and held that the pollution exclusion does indeed exclude coverage for a personal injury claim related to ingestion of lead-based paint. [Georgia Farm Bureau Mut. Ins. Co. v. Smith, No. S15G1177](#) (Ga. March 21, 2016). The Supreme Court of Georgia's decision provides virtually no analysis to support the court's conclusion that household lead constitutes a "pollutant." The decision, therefore, does little to illustrate how policyholders should interpret other injurious substances that do not fit the contours of a traditional environmental "pollutant."

Background

Smith sued her landlord, alleging that her daughter suffered severe injuries from ingesting lead-based paint chips or dust at the landlord's rental property. Based on the relevant pollution exclusion, Georgia Farm Bureau ("GFB"), the landlord's insurer, filed a declaratory judgment action seeking a ruling that its policy did not require GFB to defend or indemnify the landlord for Smith's lawsuit.

The GFB policy's pollution exclusion clause excluded coverage for bodily injury claims "arising out of the actual, alleged or threatened discharge, dispersal, ... release or escape of 'pollutants.'" The principal issue was whether lead-based paint qualified as a "pollutant," which the policy defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste."

In the 2015 decision, the Court of Appeals of Georgia analyzed the applicability of the pollution exclusion against the background principle of Georgia law that "[e]xclusions from coverage in insurance policies require narrow construction on the theory that the insurer, having affirmatively expressed coverage through broad promises, assumes a duty to define any limitation on the coverage in clear and explicit terms." Applying these principles, the court held that, because "lead-based paint is not clearly a 'pollutant' as defined by the policy," Smith's claims were not excluded by the pollution exclusion.

The Georgia Supreme Court granted GFB's certiorari petition to consider the holding in the 2015 decision.

Analysis and Holding

The Supreme Court of Georgia's opinion included a historical discussion of the pollution exclusion, noting their original development in response to the substantial liabilities that followed the enacting of environmental regulations in the 1960s and 1970s. Although the first pollution exclusions were directed specifically at environmental exposures, the language of the exclusions in many CGL policies was expanded to encompass non-environmental pollution claims under so-called "absolute" pollution exclusions.

The Supreme Court of Georgia acknowledged that there is a split of authority in other states about whether “absolute” pollution exclusions such as the one in the GFB policy applied to all injuries caused by pollutants or only to industrial and environmental claims. It ultimately determined that Georgia law follows the more expansive application of the exclusion and held that the pollution exclusion precludes recovery for exposure to **any** pollutant. Because the Supreme Court concluded that “lead present in paint unambiguously qualifies as a pollutant,” it held that Georgia Farm Bureau had no liability and no duty to defend the landlord because the alleged injuries clearly resulted from exposure to a pollutant under the policy.

Implications

Rather than explaining that basis for its determination why lead in lead-based paint “unambiguously qualifies” as a “pollutant” for purposes of the GFB policy’s pollution exclusion, the Georgia Supreme Court’s opinion simply deemed it a pollutant without analysis. This, despite the disagreement of three judges on the Georgia Court of Appeals just one year earlier. The decision will provide litigants with little guidance in the future about how to analyze whether a substance clearly or unambiguously qualifies as a pollutant. Nor was the Georgia Supreme Court’s formulation of the pollution exclusion in the GFB policy specifically limited to lead in lead-based paint, which raises questions about the logical limits of the opinion’s interpretation.

The Supreme Court of Georgia’s opinion also confirmed that, contrary to indications in the Court of Appeals opinion, Georgia law does not require a substance to be among those itemized in the definition of “pollutant” to be considered a “pollutant.” Although nothing in the Supreme Court opinion softens traditional rules requiring strict construction of ambiguous policy terms against insurers, it arguably narrows the field of what qualifies as “ambiguous.” This may embolden insurers in future coverage cases to litigate more policy interpretation issues than they would otherwise, especially under pollution exclusions.

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