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News Story

Tenant can recover for lead dust caused by other unit

Despite presence of pollution exclusion clause



Toxic particles leaked out during renovations at 165 Friend St. in Boston (building at center).

By David E. Frank

A commercial tenant could recover for property damage caused by lead-paint dust that migrated from another unit during renovations, even where its insurance policy contained a pollution exclusion clause, a Superior Court judge has decided.

The defendant insurance company argued that the insurance agreement specified that the damage caused by the dust was a pollutant as defined in its policy and that the pollution exclusion clause barred the plaintiff tenants' recovery.

But Judge Isaac Borenstein disagreed and granted the plaintiffs' summary judgment motion, holding that an ambiguity between two provisions of the policy concerning the definition of pollution necessitated a ruling in their favor.

"When presented with the ... ambiguities in the [policy], a policyholder could reasonably believe that (and justifiably rely on) property damage caused by a cloud of fine particulate matter, i.e. dust or smoke, containing lead qualifies as a [loss] for which coverage is allowed under the pollution exclusion clause," he wrote.

He added: "In light of the well established rule that ambiguities in insurance contracts are to be construed against the insurer, ... this court finds that the plaintiffs' property damage ... is covered under the Spectrum Policy issued by the defendant."

The 19-page decision is *Andrew Robinson International, Inc., et al. v. The Hartford Fire Insurance Company*, Lawyers Weekly No. 12-137-06.

Lack of appellate precedent

Jack A. Milgram of Boston, who represented the tenant, said he was not aware of any appellate court decisions addressing the question of whether first-party claims were excluded under the pollution exclusion clause.

Despite receiving coverage on the third-party claim, he noted that first-party claims — where a party seeks recovery under its own policy — involve a measure of damages that is more favorable than third-party claims, where the policy of a negligent third party is at issue.

Milgram said that he relied heavily on the 1992 Supreme Judicial Court decision of *Atlantic Mutual Insurance Company v. McFadden*, which held that the pollution exclusion clause did not apply to third-party liability claims

involving lead.

"The *McFadden* case clearly held that lead was not a pollutant and was not excluded under the policy. So we contended that if lead wasn't a pollutant in that case, then it shouldn't be here," Milgram said. "The fact that this was a first-party claim as opposed to a third-party claim really shouldn't make any difference, and the judge obviously agreed."

Although both claims involved the same set of underlying facts and used the same definition of pollution, Milgram stated that the insurance company's decision to affirm coverage on the third-party liability claim but deny it on the first-party property claim defied logic.

William A. Schneider of Boston, who represented the insurance company, could not be reached for comment prior to deadline.

Risk management

The plaintiffs, Andrew Robinson International, a risk management company that advises corporate insurance buyers, were tenants in Unit Three of a building located on Friend Street in Boston.

From June 2003 through June 2004, they were insured by the defendant, Hartford Fire Insurance Co., who also insured the law office in Unit Two, which abutted the plaintiffs.

For an annual premium, the plaintiffs purchased a Hartford Spectrum business insurance policy called a Spectrum Policy.

Subject to a series of exclusions, the policy contained a form specifying that the insurance company would pay for direct physical loss or damage at the property.

One exclusion, dealing with pollution, stated that "we will not pay for loss or damage caused by or resulting from the discharge, dispersal, seepage, migration, release or escape of 'pollutants' unless ... caused by any of the 'specified causes of loss.'"

Those specified losses included fire, lightning, explosion and water damage.

The policy also said that the insurance company would not pay for loss caused by negligent, faulty, inadequate or defective work.

In April 2003, when the law office was conducting renovations in Unit Two, contractors sandblasted the interior walls, causing the release of dust into the air.

The contractors failed to take any safety precautions to prevent the dust from leaving the unit and also failed to test for the presence of lead in the walls before starting the work.

As a result, dust containing lead migrated to the plaintiffs' unit.

The Boston Public Health Commission then ordered an immediate cleanup, suggesting that all building occupants relocate to another location "because they can't be around during the clean-up process."

The plaintiffs then sought recovery for damage done to the property, filing a third-party liability claim against the insurance company and a subsequent suit against the lawyer in Unit Two.

Under its Spectrum Policy, the plaintiffs also filed a first-party property claim.

A few months later, the plaintiffs filed suit against the insurance company seeking a declaratory judgment that the pollution exclusion clause did not bar recovery for the damage.

Spectrum Policy

In granting the plaintiffs' summary judgment motion, Borenstein said that the case turned on whether the Spectrum Policy covered damage to the property caused by the negligence of a third party.

He stated that there were several provisions in the policy that were ambiguous, all of which necessitated a finding against the insurance company.

"First, the Coverage Form does not indicate whether damage caused by smoke containing a pollutant is excluded under the pollution exclusion clause," he said.

The judge referred to one portion of the form that stated that damage caused by pollution was excluded from coverage.

That provision used a definition for pollution that included any "solid, liquid, gaseous or thermal irritant or contaminant, including smoke."

However, he noted that another seemingly contradictory section stated that pollution-related damage would be covered under the policy if caused by fire, lightening or smoke.

"Thus, under the Spectrum Policy, property damage caused by smoke is excluded as a 'Pollutant' but covered as a 'Specified Cause[] of Loss' under the pollution exclusion clause," he said.

Bornstein also pointed out that the policy did not make clear whether damage caused by smoke composed of fine particular matter or dust containing a pollutant was covered.

"[P]roperty damage caused by a cloud of fine particular matter that contains lead may be limited or excluded under [one] ... provision but covered as an exception to the pollution exclusion clause," he said.

Even though courts in other jurisdictions may have been persuaded that paint dust containing lead was a pollutant for the purposes of the pollution exclusion clause, the judge wrote that he was not compelled to follow those decisions.

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