INSURANCE LAW UPDATE:
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COVERAGE FOR POLLUTANTS:
THE EFFICIENT PROXIMATE CAUSE RULE INVALIDATES THE
ABSOLUTE POLLUTION EXCLUSION

Zhaoyun Xia, et al. v. ProBuilders Specialty Ins. Co., 188 Wash.2d 171, 393
P.3d 748 (2017)

> Pollution damage caused by a covered event, such as negligence
> of the insured, is a covered loss notwithstanding an absolute
> pollution exclusion or anti-concurrent causation provision. The
> court will examine and apply the efficient proximate cause rule to
> determine if the initiating event is a covered cause of loss.

Plaintiff bought a new house from a builder who was insured under the CGL policy
issued by defendant. The builder failed to properly vent the water heater, causing carbon
monoxide to be released into the house, injuring plaintiff. The insurer denied coverage based
upon the CGL policy's pollution exclusion.

The trial court had ruled the pollution exclusion was enforceable. The Court of Appeals
agreed. The Supreme Court reversed, holding that if the negligent event causing dispersal of
pollutants is a covered peril, the efficient proximate cause rule would defeat the pollution
exclusion in its entirety.

The Washington Supreme Court ruled that because a covered loss – negligence of the
builder – caused the subsequent release of pollutants, the "absolute pollution exclusion" is
unenforceable and insurer cannot deny coverage based upon either the pollution exclusion or an
anti-concurrent causation provision.

The insurer argued this ruling makes the pollution exclusion ineffective because, as a
practical matter, all acts of unintentional pollution begin with negligence. The Supreme Court
disagreed, noting that if the peril that set the causal chain into motion was the polluting event
itself – presumably absent negligence – the exclusion remains intact. The Supreme Court also
advised that the insurer could avoid liability for pollution clean-up by simply writing a more
specific exclusion for the initiating event, such as excluding negligence in the installation of
water heaters.

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The typical pollution exclusion reads something like this:

> We do not insure for "loss" caused directly or indirectly by any of
> the following:
>
> **Pollutants:** Noise or any solid, liquid, gaseous … contaminant
> including odor … fumes … chemicals, and waste. "Pollutants"
> includes all grown or manufactured illegal substances, residues,
> materials, by-products, solids, liquids, gases, odors and chemicals
> arising from the illegal substances.

The typical anti-concurrent causation clause reads something like this:

> "We do not insure for such loss regardless of: a) the cause of the
> excluded event; or b) other causes of the loss; or c) whether other
> causes acted concurrently or in any sequence with the excluded
> event to produce the loss."

The rule of efficient proximate cause requires coverage where a covered peril sets into motion a causal chain, the last link of which is excluded. The efficient proximate cause rule applies only when two or more perils combine in sequence to cause a loss and a *covered peril* is the predominant or efficient cause of the loss.

Anti-concurrent causation provisions such as the one cited above are rejected as attempts to circumvent efficient proximate cause. An exclusionary clause drafted to circumvent the rule will not defeat recovery for a covered occurrence merely because an uncovered peril appeared later in the causal chain.

The Court will enforce clear policy exclusions for specifically named perils. What the Court will not allow is the use of broad policy language which eliminates the efficient proximate cause rule under *all possible circumstances*. The Xia Court found, however, that because the pollution was triggered by the negligence of the insured, and the policy provides broad coverage for all forms of negligence *except those acts specifically excluded,* a covered act of negligence was the efficient proximate cause of Xia's loss.