



## Client Alert

June 2017

# Washington Supreme Court applies efficient proximate cause standard to pollution exclusion – rules for policyholder

By Will Eustace, Esquire, Head Casualty Coverage Officer, Willis Towers Watson

**Issue:** Pollution exclusion

**Policy type:** CGL

**Jurisdiction:** State of Washington

**Applicable to other jurisdictions:** Unlikely

**Coverage direction:** Expansion

*Xia v. ProBuilders Specialty Ins. Co.* (Wash. 2017)

Xia purchased a new townhouse from Issaquah Highlands LLC (IH), an insured under a CGL policy with ProBuilders. Shortly after she moved in, a negligently installed hot water heater vented carbon monoxide into her unit, causing bodily injury. ProBuilders relied on a broad pollution exclusion to deny coverage for the claim. Both the trial court and the appellate court ruled in favor of the insurer. The case then proceeded to the Washington Supreme Court.

Adopting a conventional approach, the court first held that the duty to defend hinged on whether the occurrence stemmed from traditional environmental harm: pollutants acting as contaminants or irritants. The court acknowledged that the facts in Xia — carbon monoxide seeping into a home — constituted the discharge of a pollutant. “Based on the plain language of the policy, it is clear that the exclusion

covers the release of carbon monoxide in this case.” Concentration of carbon monoxide gas in ambient air adversely affects human health. Ordinarily, that would have ended the inquiry.

However, borrowing a doctrine popularized in first-party property coverage litigation, the court expanded its analysis. Courts in Washington should also ask: is there an alleged prior act of negligence which could be the efficient proximate cause of a loss?

To understand this decision, a brief review of the doctrine of efficient proximate cause is in order. Under this doctrine, if the initial event in a causal chain, the “efficient proximate cause,” is a covered peril, then there is coverage, even if subsequent events within the chain of causation are excluded by the policy, as long as the covered peril is the predominant cause of the loss.

While ProBuilders correctly concluded that the plain language of the pollution exclusion applied to the release of carbon monoxide into Xia’s home, the court determined that the insurers “should have noted that a potential issue of efficient proximate cause existed. Xia alleged negligence in her original complaint related to ... failure to properly install venting for the hot water heater.

*“... A polluting occurrence happened when the hot water heater spewed forth toxic levels of carbon monoxide into Xia’s home. However, by applying the efficient proximate cause rule, it becomes equally clear that the ProBuilders policy provided coverage for this loss. The polluting occurrence here happened only after an initial covered occurrence, which was the negligent installation of a hot water heater that typically does not pollute when used as intended.”*

ProBuilders argued that the efficient proximate cause rule would completely swallow the pollution exclusion, since “all acts of unintentional pollution begin with negligence.” The court dismissed this line of reasoning: “The allegations of Xia’s complaint provided a reasonable and conceivable basis to believe that the negligent installation of the hot water heater, itself a covered occurrence under the policy provisions, set in motion a causal chain wherein the venting of exhaust lowered the oxygen content of the room such that a normally nonpolluting appliance began discharging toxic levels of carbon monoxide fumes.”

## Analysis

- The decision is unlikely to be followed outside Washington, since the efficient proximate cause rule is a creature of property coverage.
- The conclusion that the initial covered occurrence was the negligent installation of a hot water heater begs the question: where was the injury or damage?
- Courts across the country have held that there is no occurrence under a CGL policy absent injury or damage. The *Xia* court has artificially separated the occurrence and the BI or PD.
- ISO stated that it is in the process of reviewing the decision.

The observations, comments and suggestions we have made in this publication are advisory and are not intended nor should they be taken as legal advice. Please contact your own legal adviser for an analysis of your specific facts and circumstances.

## About Willis Towers Watson

Willis Towers Watson (NASDAQ: WLTW) is a leading global advisory, broking and solutions company that helps clients around the world turn risk into a path for growth. With roots dating to 1828, Willis Towers Watson has 40,000 employees serving more than 140 countries. We design and deliver solutions that manage risk, optimize benefits, cultivate talent, and expand the power of capital to protect and strengthen institutions and individuals. Our unique perspective allows us to see the critical intersections between talent, assets and ideas – the dynamic formula that drives business performance. Together, we unlock potential. Learn more at [willistowerswatson.com](http://willistowerswatson.com).

## Contact

### Will Eustace, Esq.

Executive Vice President  
Head Casualty Coverage Officer  
Brookfield Place  
200 Liberty Street  
New York, NY 10281  
D: 212-915-8679 C: 347-602-1932  
[Will.Eustace@willistowerswatson.com](mailto:Will.Eustace@willistowerswatson.com)