

Washington Ruling Highlights Importance of Tracking Case Law Changes

Court decisions can have a profound impact across the insurance value chain. They can affect everything from the types of exposures carriers are willing to insure to their reserve allocation strategies. In some cases, court decisions can influence an insurer's decision whether to write a particular class of business in a specific jurisdiction.

A 2017 ruling by Washington State's supreme court – and the decision's potential implications for insurance companies – illustrates how important it is for insurers to keep abreast of case law developments.

In *Xia vs. ProBuilders Specialty Insurance Co.* (189 Wash. App. 1041 [2017]), the insurer argued that the non-ISO pollution exclusion in its commercial general liability (GL) policy protected it from the insured's bodily injury claim related to carbon monoxide poisoning from a negligently installed water heater.

In rejecting the argument, the court applied the efficient proximate rule to third-party liability policies, stating that “[w]e have never before suggested that the rule of efficient proximate cause is limited to any one particular type of insurance policy. Instead, the rule has broad application whenever a covered occurrence under the policy—whatever that may be—is determined to be the efficient proximate cause of the loss.” The court reasoned that while the insurer “correctly identified the existence of an excluded polluting occurrence under the unambiguous language of its policy...it ignored the existence of a covered

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occurrence—negligent installation—that was the efficient proximate cause of the claimed loss.” The court went on to rule that coverage for the loss existed under the policy, and, in doing so, found that the insurer's “refusal to defend its insured was in bad faith”.

Since its release, the ruling has likely had implications for insurers currently writing or considering beginning to write GL coverage in Washington. Insurers may be questioning whether exclusions they have in place are



no longer applicable to certain claims and might have had to rewrite or develop policy language to address the ruling's impact (in fact, in July 2018, ISO filed new commercial lines forms in response to the *Xia* decision). Insurers might also have found themselves having to defend against or settle claims they perhaps could not have anticipated before the ruling.

The decision may have longer-term implications as insurers' in-house counsel consider new long term legal strategies in light of the decision and face so called "long-tail" claims arising from prior policies. Finally, insurers writing in Washington may want to evaluate, or perhaps have already evaluated, related business decisions with *Xia* in mind, including, for example, possibly adjusting class-specific pricing in the state.

1,000+ decisions a year

The implications—and potential associated costs—of this one case underscore the need for insurers to keep track of relevant case law developments for every jurisdiction. With respect to the issue of Efficient Proximate Cause in particular, important questions, such as whether any courts have issued similar rulings

(before or after the *Xia* decision), seem particularly important. Yet, with more than 1,000 new decisions relevant to the GL line of business alone released annually, and with more than 200 federal and state courts handing down new decisions daily, staying abreast of case law developments is obviously a tremendous undertaking for any insurer.

To help insurers distill that volume of case law into valuable information they can use, ISO recently launched CourtSide™, a case law analytics dashboard that tracks legal decisions and provides jurisdiction-by-jurisdiction analytics and scoring for cases related to a multitude of highly relevant topics. In addition to efficient proximate cause, these topics include trends followed by Verisk's Emerging Issues team—including opioids, electronic cigarettes and data breach—as well as legal topics around additional insured coverage, Restatement of the Law of Liability Insurance, construction defects, pollution, and dozens more.

With its initial focus on cases that are likely to have an impact on General Liability policies and claims, CourtSide is currently tracking over 150 topics/sub-topics (and adding new topics every week).

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