CA APPEALS COURT INTERPRETS POLLUTION EXCLUSION IN FAVOR OF TENANT

In an unpublished February, 2009 decision, a California Appellate Court affirmed a judgment in favor of the plaintiff. Their rationale was that the pollution exclusion does not plainly or clearly exclude mold related injuries from coverage therefore the policy must be interpreted narrowly against the insurer.

The primary legal question raised in the appeal was whether airborne toxic mold spores, in the context of this case, qualify as a pollutant or contaminate, and if so, whether injuries caused by exposure to the mold should be excluded from coverage under the landlord's insurance policies issued by Constitution Insurance Company (Constitution) and Clarendon National Insurance Company (Clarendon). Both policies contained essentially identical pollution exclusion clauses, denying coverage for any injuries arising from the introduction or "*discharge, dispersal, seepage, migration, release or escape of 'pollutants.'*"

In arriving at its decision, the appeals court looked to the California Supreme Court's analysis of similar pollution exclusions — *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635 (*MacKinnon*).

They wrote: "After considering the historical evolution of the pollutant clause, conflicting authority from other jurisdictions, and its own application of California contract law, the Supreme Court held the exclusion was intended to cover what is understood by the policyholder to be substances typically associated with pollution of the environment. It created a test for coverage as being dependent not only upon the type of pollutant, but also how it is released into the environment. (*Id.* at pp. 650-654.)

Applying the *MacKinnon* test here, we conclude neither the dispersal of clean water nor the negligent building maintenance resulting in an isolated incident of mold growth would necessarily qualify as the escape or introduction of a conventional environmental pollutant. Because the pollution exclusion does not plainly or clearly exclude mold related injuries from coverage, it must be interpreted narrowly against the insurer."

General overview of the case: This case originated with a landlord's negligence in maintaining the walls and roof of a condominium unit, and in overwatering the yard around the structure. The combination of these acts caused water to leak inside the structure, which in addition to the typically warm California climate, and the presence of naturally-occurring airborne mold spores, caused toxic mold to grow in and around Carol Johnson's home. For several years, Carol Johnson and her family suffered from various mold-related medical ailments and they sued the landlord to recover damages.

Facts of the case are as follows:

In 2002, Johnson, on behalf of herself and as guardian ad litem for her children, Taylor Godwin, Lexi Swearingen, and Nichole Swearingen (collectively referred to in the singular as Johnson), filed a complaint for damages arising from the exposure to mold in the condominium they leased from its owners, Jennifer and Joyce Gregg. Johnson sued the Greggs and Kellogg Terrace (Kellogg), which managed and controlled the condominium complex. They later added as defendants a landscaper, a general contractor, and a roofing contractor hired by Kellogg.

From 1998 to 2000, Clarendon insured Kellogg under two successive commercial policies (October 1998 to 1999, and October 1999 to 2000). From 2000 to 2002, Constitution insured Kellogg under two successive commercial polices (October 2000 to 2001, and October 2001 to 2002). The policies generally provided coverage for bodily injury and property damage that occurred during the policy periods. Kellogg tendered the Johnson lawsuit to Clarendon and Constitution for a defense and indemnity.

The insurance firms advised Kellogg they had no duty to defend because their policies contained pollution/contamination exclusions that eliminated any potential coverage for Johnson's claims. Constitution also alleged the "discovered injury" exclusion barred its coverage because Johnson was injured several years before inception of Constitution's policy in October 2000.

The Clarendon policy's pollution exclusion provided, in relevant part, "*This insurance does not apply to: "(1) The 'pollution' and/or 'contamination' of any 'environment' by 'pollutants' that are introduced at any time, anywhere, or in any way, or arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of*

Continued on page 29

CA Appeals Court ...

continued from page 28

'pollutants'; or (2) Any 'bodily injury,' 'property damage,' 'personal injury' or 'advertising injury' arising out of such 'pollution' and/or 'contamination'; or (3) Payment for the investigation or the defense of any loss, injury, or damage, or for any cost, fine or penalty, or for any expense, claim or 'suit,' related to any of the above . . . ."

The policy defined pollution and contamination as "any unclean or unsafe or damaging or injurious or unhealthful conditions arising out of the presence of 'pollutants,' whether permanent or transient, in any 'environment.'" "Environment" was defined as "any man-made object or feature (including but not limited to buildings and other items of man-made property), and crop or vegetation, and land, any body of water or water course, any underground water or water table supply, any air, and any other feature of the earth or its atmosphere, whether or not altered, developed, cultivated, owned, rented, controlled, occupied or used by any 'insured[.]'" "Pollutants" was defined as meaning "any noise, solid, semi-solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fume, acid, alkali, chemical, biological and/or other etiological agent or material, electromagnetic and/or ionizing radiation and energy, genetically engineered agent or material, teratogenic, carcinogenic and/or mutagenic agent or material, and waste. Waste includes any material to be disposed of, recycled,
reconditioned or reclaimed."

Similarly, the Constitution policy contained an endorsement barring coverage for any bodily injury or property damage arising out of "pollution" and/or "contamination" of any "environment" by "pollutants." The terms were essentially identical to those defined in Clarendon's policy.

Johnson settled with all the defendants except Kellogg before trial.

With respect to Kellogg, the bench trial was held in November 2003. Kellogg did not present a defense and did not object to any of Johnson's evidence. The court entered judgment in Johnson's favor for $1,274,149.70, plus costs in the amount of $4,883. Kellogg assigned its claim for breach of contract against the insurance companies to Johnson in exchange for a covenant not to execute on the judgment.

In October 2005, Johnson filed a breach of contract action against Clarendon and Constitution. The insurance company answered the complaint asserting the underlying action was excluded by their policies' pollution/contamination exclusion provisions. The insurance companies filed motions for summary judgment raising the same legal defense. The court denied the motions.

The matter was heard in a bench trial based on stipulated facts by the parties. The court concluded the pollution/contamination exclusion provisions did not apply to preclude a defense in the underlying action, and it entered judgment in favor of Johnson. The court concluded it was undisputed there was "no direct language in the [subject pollution] exclusion that excludes mold. There are no cases cited . . . That directly hold that the langue of the polices exclude mold. The exclusion is vague and ambiguous." It reasoned, "The definition of contamination or pollution in the insurance policy is any unclean or unsafe or damaging or injurious or unhealthful condition arising out of the presence of pollutants . . . in any environment. This discretion is arguably broad enough to encompass just about anything that is considered harmful but it is also vague and ambiguous which is construed against the insurer. Exclusions are to be narrowly interpreted in favor of the insured and liberally against the insurer [citation].

An exclusion in an insurance policy must be clear, plain and conspicuous in order to be effective [citation]."

The stipulated facts were as follows: Johnson alleged in the underlying action that the family was exposed to toxic mold in late 1998 and early 1999 when they moved into the premises. The mold resulted from water intrusion into the condominium unit. This was caused by the negligent maintenance of the common areas of the property maintained by Kellogg and its property management company. The negligent maintenance led to water intrusion through the roofs, windows, walls, sub-floors, and other areas. Specifically, mold and fungi formed when Kellogg negligently: (1) failed to repair the rotted condition of the roof permitting water to leak into the structure; (2) placed rat poison in the walls; (3) overwatered the landscape permitting water to enter through inadequate moisture barriers; (4) failed to prevent water from entering through the vent piping at the roof sheafing; (5) failed to repair a significant leak adjoining the east wall of the utility room; and (6) installed roof, siding, and building paper.

In June 1998, Kellogg became aware of the mold on the external wall of Johnson's unit, but was not aware of the internal mold growth. In late 1998, Johnson and her family began experiencing various illnesses and heath problems. This continued to 2001, and the family experienced progressively severe illnesses, such as bronchitis, pharyngitis, asthma, acute upper respiratory infection (URI), sinusitis, shortness of breath, headaches, chest congestions, rashes, and coughs.

In February 2001, Johnson found extensive mold in one of the bedrooms
when the carpet was pulled up. The family moved out later that month.

Thereafter, Johnson obtained an evaluation by multiple environmental testing companies indicating the presence of elevated levels of molds and fungi in every area of the condominium except the front room. The molds discovered in the unit included aspergillus, penicillum, chaetomium, and stachybotrys. The fungi included aspergillus ochraceus, aspergillus restrictus, aspergillus pernicilli-noides, aspergillus sydowii, and aspergillus ustus.

CLICK HERE for document

A California Appeals Court rejected the insurers argument and interpreted the policy in favor of the tenant.