

## Clause allows insurer to avoid paying \$7M legal bill

By: Phillip Bantz May 27, 2015

A federal judge's interpretation of a broadly written pollution exclusion clause has allowed an insurer to avoid picking up a \$7 million tab for legal costs incurred by the Charlotte-based National Gypsum Company.

But another insurer could be left holding the bag.

"This [order] surprised us and a lot of other people around the country who do insurance defense work," said an attorney for NGC, Steve DeGeorge of Robinson, Bradshaw & Hinson in Charlotte.

His client ran up the multimillion-dollar legal bill in defending itself against a flurry of class-action lawsuits over allegedly defective drywall imported from China in the wake of Hurricane Katrina in 2005, which triggered a construction boom that depleted the domestic wallboard supply.



Two insurers, ACE and National Union, provided general liability insurance policies for NGC at the time of the litigation, but refused to pay for the company's legal defense.

NGC paid its own costs and successfully fended off the suits, proving that its drywall was safe. The plaintiffs had alleged that the Chinese drywall emitted high levels of sulfur, which not only smelled unpleasant but also wrecked home electronics and caused health problems.

While NGC was dealing with the underlying class actions, it filed suit in U.S. District Court in Charlotte against ACE and National Union. The suit contended that both insurers had a duty to defend NGC.

But Judge Richard Voorhees found that ACE was off the hook based on a pollution exclusion in NGC's insurance policy. The clause stated, in part, that the policy "does not apply to any injury, damage, expense, cost, loss, liability or legal obligation arising out of or in any way related to pollution, however caused."

The clause defined pollution as the "actual, alleged or potential presence in or introduction into the environment of any substance if such substance has, or is alleged to have, the effect of making the environment impure, harmful, or dangerous."

### Courts are divided

Some courts have refused to enforce these types of clauses, especially in cases that are centered on indoor pollution, such as carbon monoxide poisoning, according to DeGeorge. He said courts in this camp have found that the pollution exclusions are overly broad and "produce absurd results."

But Vorhees' ruling on May 12 for ACE brings North Carolina's Western District in line with other camp of courts, which have taken a hard-line stance on exclusion clauses.

"These courts have said to the insured, 'Too bad. It's your policy. You accepted it. And we're going to enforce it literally,'" DeGeorge said. He added that courts around the country are "pretty evenly split" when it comes to enforcing or rejecting exclusion clauses.

Vorhees granted summary judgment to ACE after concluding that the sulfur at the center of the class actions against NGC qualified as pollution under the insurer's exclusion clause.

"Construing this exclusion in a manner to afford coverage would effectively rewrite the contract to favor one sophisticated commercial entity over another," he wrote. "It would also significantly expand the scope of the risk undertaken by ACE."

### 'You can't file suit here'

While all pollution exclusion clauses cast a wide net, DeGeorge said ACE's clause is among the broadest versions he has ever seen.

"All of these are typically written in a manner in which if they were enforced literally they would cover all types of situations that have nothing to do with what most people think of as pollution," he added.

NGC will not challenge Voorhees' order because he went on to determine that the other insurer, National Union, had a duty to defend the company. That means it will now be difficult, if not impossible, for litigants to overcome exclusion policies in the state's Western District.

"If a client came to me today in this district and said, 'A space heater in our house malfunctioned and emitted toxic levels of carbon monoxide that killed my parents in their sleep and I want insurance coverage.' I'd have to tell them that if their policy had a pollution exclusion you're going to lose," DeGeorge said. "You can't file suit here."

An attorney for ACE, Tracy Eggleston of Cozen & O'Conner in Charlotte, declined comment.

Matthew Lee, a partner at Whitfield, Bryson & Mason in Raleigh who represents plaintiffs in construction defect and product liability cases, agreed with Vorhees' ruling, saying the judge simply applied the plain language in the contract.

But Lee, who was not involved in the case at hand, added that pollution exclusion clauses, and commercial general liability policies as a whole, can be frustrating because they contain so many limitations.

"It leaves you wondering what is covered," he said.

### Still getting paid

While broad language helped ACE it hurt National Union, which was found to have a duty to defend NGC based on the open-ended definition of the class of plaintiffs in the underlying drywall litigation.

National Union argued that it did not have to provide coverage because the policies it wrote for NGC expired before the plaintiffs bought the drywall at the heart of the class actions.

But the members of the class were defined as anyone who had purchased drywall at any time, which led Vorhees to determine that National Union had a duty to defend NGC.

"The duty [under North Carolina law] is broader than any obligation an insurer might have to pay a judgment," DeGeorge said. "If a lawsuit could be covered the insurer has to step in and provide a defense."

"At the end of the day National Gypsum is going to get its defense costs reimbursed," he added.

Susan Burkhart of Cranfill, Sumner & Hartzog in Raleigh represented National Union. She declined comment.

Voorhees' decision against National Union should give policyholders leverage in spurring insurers to provide coverage, according to Lee.

"This is the trend of broadly interpreting the duty to defend," he added. "It also puts insurers on notice that they take a big risk when they decline to defend their insured."

The 31-page decision is *New NGC Inc. v. ACE American Insurance Co.* (Lawyers Weekly No. 15-04-0529). The full decision can be found at [nclawyersweekly.com](http://nclawyersweekly.com).

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