



# Weekly Law Resume

A Newsletter published by Low, Ball & Lynch  
Edited by David Blinn and Mark Hazelwood



WEEKLY LAW RESUME™

Issue By: DAVID L. BLINN

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August 25, 2011

## Coverage: Pollution Exclusion - Asbestos

*Villa Los Alamos Homeowners Association v. State Farm General Insurance Company*  
Court of Appeal, First District (August 25, 2011)

In *MacKinnon v. Truck Insurance Exchange* (WLR September 4, 2003), the California Supreme Court previously held that a standard pollution exclusion clause in a CGL policy was intended to exclude coverage for injuries resulting from events commonly regarded as environmental pollution. This case determined whether the same standard applies in a first party property insurance policy.

The Villa Los Alamos Homeowners Association hired Cal Coast Construction to scrape the acoustical "popcorn" ceilings and stairways in one of its building. The Association was aware that there was some asbestos in the ceiling, and a resident was privy to a report that the material contained less than one percent asbestos. Cal Coast performed its work, and in the process disturbed asbestos contained in the ceilings, releasing asbestos fibers into the air, the common area hallways and stairwells as well as individual units and common areas and public spaces outside the building. The Bay Area Quality Management District cited Cal Coast and removed them from the project, and ordered the Association to perform comprehensive abatement of the building. Ultimately the Association paid \$650,000 to fully clean and abate the building.

The Association had a policy of insurance with State Farm General Insurance Company. This provided coverage for first party property losses, as well as third party business losses. It was an "open peril" form of policy, in which the insurer provided coverage for all losses not specifically excluded by the policy. Section I exclusions contained the following pollution exclusion: "2. We do not insure under any coverage for any loss caused by one or more of the items

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below...1. the presence, release, discharge or dispersal of pollutants, meaning any solid, liquid, gaseous or thermal irritant or contaminant, including vapor, soot fumes, acids, alkalis, chemicals and waste..."

The Association tendered its claim for repairs to the property to State Farm, which denied coverage based on the pollution exclusion. Subsequently, the Association sued Cal Coast, which cross-complained against the Association and its property manager. The property manager tendered its defense to the Association, which tendered both defenses to State Farm. It also asked State Farm to reevaluate its first party coverage for the damages. State Farm denied the tenders, based on the total pollution exclusion.

The Association sued State Farm, asserting causes of action for breach of contract, breach of the covenant of good faith and fair dealing and declaratory relief. State Farm moved for summary adjudication based on the pollution exclusion. The trial court granted the motion, ruling that "the test for whether the pollution exclusion excludes coverage is based upon the type of pollutant and whether it is released in a way that constitutes (environmental) pollution." The court held that it was "common knowledge" that asbestos was a pollutant. The Association appealed.

The Court of Appeals upheld the trial court's ruling. The Court analyzed this first party case in the context of the Supreme Court's decision in *MacKinnon*, which involved a third party claim over spraying of pesticides at an apartment complex which allegedly caused the death of a tenant. The *MacKinnon* court held that a reasonable policyholder would understand the policy to exclude "injuries arising from events commonly thought of as pollution, i.e., environmental pollution." On the other hand, despite the exclusion, the *MacKinnon* court felt an insured would still have a reasonable expectation that they would have coverage for "ordinary acts of negligence resulting in bodily injury." As applied in *MacKinnon*, this meant that the spraying of pesticides was an "ordinary act of negligence," and was not excluded.

The Court of Appeals noted here that *MacKinnon* involved third party liability claims, which are not analogous to first party property coverage claims. Nevertheless, when the language of the exclusion was the same under both coverages, as it was here, the court concluded that a reasonable insured would expect both exclusions to apply to environmental pollution.

The Court next determined that a reading of the exclusionary language led to the conclusion that asbestos is a "pollutant" within the policy exclusion, noting that courts have previously determined that silica is likewise a "pollutant," even if it is not one of the enumerated definitions of the same. Secondly, the asbestos was "released" as that term is used in the exclusion by the construction and related activities.

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The Court was not persuaded by the Association's assertion that a single, unintentional asbestos release was merely an ordinary act of negligence, as in *MacKinnon*, for which coverage was reasonably expected by the insured and not excluded. While there were legitimate and legal reasons for spraying with pesticides, in this case there were rules and regulations for how one dealt with asbestos that were ignored here, taking the Association's actions out of "ordinary negligence." Further, although the Association argued that this was a "one time" release, the court noted that the release of asbestos from a product into the air people breathed constituted a health hazard for which no level of exposure was safe. The Court held that the Association's actions constituted a "release" of a "pollutant" which was properly excluded under the policy. The trial court's decision was affirmed.

## COMMENT

This case applies the *MacKinnon* standard for determination of release of a pollutant to first party coverage, and holds that the release of asbestos from a property is excluded under the same. Businesses and property owners with this exclusion will have no protection of their own against the same if asbestos is mistakenly released through construction or repair efforts.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/A128443.PDF](http://www.courtinfo.ca.gov/opinions/documents/A128443.pdf)

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