

# Efficient Proximate Cause Rule, Asbestos Exclusion, Notice Requirements Coverage Update

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**Washington, Pennsylvania, Michigan Coverage Cases**

*The e-POST*

## Efficient Proximate Cause Rule – Washington

**Xiav. Probuilders Spec. ins. Co. RRG**

--- P.3d ---, 2017 WL 1532219 (Wash. Apr. 27, 2017)

The Washington Supreme Court held that an insurer acted in bad faith and breached its insurance contract by declining coverage to an insured builder for an underlying lawsuit relating to carbon monoxide poisoning, because although it fell within the pollution exclusion, the predominant cause of the injury was negligent installation. The underlying lawsuit was brought by a homeowner who alleged injuries from carbon monoxide released by an improperly installed water heater. The insurer declined coverage under a commercial general liability policy, relying on policy exclusions for pollution or any claims related to townhouses. The Supreme Court, however, held that the exclusions did not apply, citing to the “efficient proximate cause” rule that provides there is coverage “where a covered peril sets in motion a causal chain[,] the last link of which is an uncovered peril.” Applying that rule, the Supreme Court found that although the insurer correctly identified the existence of an excluded occurrence, “it ignored the existence of a covered occurrence – negligent installation – [t]hat was the efficient proximate cause of the claimed loss.” The Supreme Court reasoned that 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[;]” the exclusion could not “eviscerate a covered occurrence merely because an uncovered peril appeared later in the causal chain.”

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## Asbestos Exclusion – Third Circuit (Pennsylvania Law)

**Gen. Refractories Co. v. First State Ins. Co.**

--- F.3d ---, 2017 WL 1416364 (3d Cir. Apr. 21, 2017)

The U.S. Court of Appeals for the Third Circuit ruled that an asbestos exclusion in excess liability policies for asbestos-related losses was unambiguous and enforceable. The insured manufactured and supplied fire-resistant industrial products that allegedly exposed the underlying plaintiffs to asbestos. The policy at issue, however, precluded coverage for “EXCESS NET LOSS arising out of asbestos,

including but not limited to bodily injury arising out of asbestosis or related diseases or to property damage.” The insured contended that the exclusion only encompassed losses tied to exposure to asbestos in its raw, mineral form. The appellate court, however, found that the key language in the exclusion was the phrase “arising out of,” which has “unambiguous legal meaning that renders any uncertainty concerning the meaning of the word ‘asbestos’ immaterial.” The appellate court explained that the phrase “arising out of” was governed by the broad “but for” causation standard, which only requires a showing that harm would not have occurred in the absence of the defendant’s conduct. The appellate court ultimately held that as “the losses relating to the underlying asbestos suits would not have occurred but for asbestos, raw or within finished products,” the exclusion applied to preclude coverage.

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## Notice Requirements – Michigan

### **Perkovic v. Zurich Am. Ins. Co.**

--- N.W.2d ---, 2017 WL 1375273 (Mich. Apr. 14, 2017)

The Michigan Supreme Court ruled that notice requirements of the Michigan No-Fault Act do not require an intent to make a claim for Personal Protection Insurance (PIP) benefits. The insured was operating a semi-truck in Nebraska when he crashed into a wall and sustained injuries. The insured was treated at the Nebraska Medical Center, which subsequently mailed a bill for the services it provided, along with the insured’s medical records, to the insurance carrier of the insured’s employer. The insured filed suit under the No-Fault Act, seeking unpaid PIP benefits arising out of the accident. The insurer argued that the insured’s claim was barred because the medical records were insufficient to satisfy the notice requirement of the No-Fault Act, which requires that the written notice of injury “give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.” While the Michigan Supreme Court recognized that the notice provision’s purpose is “to provide time [to the insurer to] investigate and to appropriate funds for settlement purposes,” the Supreme Court stated that “reliance on the perceived purpose of the statute runs counter to the rule of statutory construction directing us to discern legislative intent from plain statutory language.” Ultimately, the Supreme Court concluded that the medical records and bills provided sufficient notice because they included all of the information required by the statute.

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## Trigger – Pennsylvania

### **Pennsylvania Mfrs. Ass’n Ins. Co. v. Johnson Matthey, Inc.**

--- A.3d ---, 2017 WL 1418401 (Pa. Commw. Ct. Apr. 21, 2017)

EFFICIENT PROXIMATE CAUSE RULE, ASBESTOS EXCLUSION, NOTICE REQUIREMENTS COVERAGE  
UPDATE Cont.

A Pennsylvania appellate court applied a continuous trigger theory to an environmental contamination claim, denying the insurer's motion for summary relief. In making this determination, the appellate court rejected the insurer's argument that, under Pennsylvania law, "insurance coverage for environmental property damage claims is triggered only at the time the property damage is first manifested[.]" Instead, the appellate court found that the undetected environmental contamination was similar to the latent nature of asbestos claims, and thus it applied the "continuous" or "multiple" trigger theory. Under that theory, coverage is triggered "under [all] policies in effect while environmental contamination is in progress and before any manifestation has occurred." The appellate court also noted that applying the continuous trigger theory comported with the plain language of the policies because "[c]ontamination of property is an injury to property. Therefore, if contamination occurs within a policy period, the coverage requirement of 'property damage which occurs during the policy period' is satisfied, regardless of whether the contamination is detected or known at the time." Finally, the appellate court found the continuous trigger theory was appropriate to apply to environmental contamination claims because "limiting coverage for environmental contamination claims to policies in effect at the time that contamination is first detected would present the 'problematic scenario' of permitting insurers 'to limit or terminate coverage, in anticipation of future claims that have not yet materialized but can be predicted with near certainty' that requires departure from the first manifestation rule."

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