

MASSACHUSETTS LAWYERS WEEKLY

'Deleading' House Was Not Covered By Policy

By: david.l.yas September 2, 1996

Property owners could not collect under their homeowners' insurance policy for costs they incurred removing lead paint from their house, a Superior Court judge has held.

The plaintiffs argued that the lead paint constituted a "physical loss" to the house as defined by the policy when they "delead" the house after minor tenants tested positive for lead poisoning.

But Judge Charles M. Grabau disagreed.

Since the lead paint in the home did not damage the property itself, the policy did not cover the plaintiffs' expenses, Grabau said.

"The presence of lead paint in the plaintiffs' rental property did not damage or destroy the rental property, but instead poisoned the [tenants'] children," wrote Grabau in granting the insurance company's motion for summary judgment. "Therefore, absent damage or destruction of the rental property, lead paint cannot be considered to be a physical loss that is insured against under the plaintiffs' homeowner's insurance policy."

The case is *Pirie, et al. v. Great Northern Insurance Co.*, Lawyers Weekly No. 12-262-96.

Boston lawyer James S. Harrington, who represented the defendant, said that "it's an important decision, because other than in the asbestos area there hadn't been a decision as to whether [such a] condition in a building could be construed as a physical loss. ... It was a challenging task for Judge Grabau. There were no cases applying property insurance to lead paint."

The decision is helpful to insurance lawyers, said Harrington, in that plaintiffs are regularly "trying to expand what is a 'physical loss.' ... Every time people discover something defective, or something hazardous, there's an incentive to get it covered."

According to Harrington, the ruling "draws a line, so that 'physical loss' cannot be stretched to the point where it means anything."

Philip Y. Brown, counsel for the plaintiffs, noted that he had urged the court to look at what the parties perceived as the risk anticipated by the policy.

The plaintiffs "thought they had purchased the policy that would include everything — that's why they purchased the deluxe homeowners' policy," explained Brown.

As to the building suffering a "physical loss," Brown reasoned that "clearly there was a loss here; the plaintiffs never anticipated that they'd have to delead the property. There was a monetary loss due to a change in the building."

Deluxe Accommodations

Plaintiffs Robert and Deirdre Pirie were owners of rental property located in Hamilton. The home, which was built in 1840, was purchased by the plaintiffs in 1980.

The plaintiffs insured the home through defendant Great Northern Insurance under a "Deluxe Coverage" homeowners' insurance policy for the period of July 18, 1994 through July 18, 1995.

On Sept. 1, 1994, the plaintiffs leased the property to a couple and their two young children.

About a month later, the plaintiffs were informed that the minor tenants had tested positive for high levels of lead poisoning. There was no peeling or chipping paint or paint dust during the tenancy.

At approximately the same time, the property was inspected by the Massachusetts Department of Public Health Childhood Lead Poisoning Prevention Program. The inspector found levels of lead paint that were higher than the legal limit in every room of the house.

The plaintiffs were ordered to eliminate all lead violations by hiring a licensed deleading contractor within ninety days. The plaintiffs paid \$27,225 to install new windows and delead the house.

Thereafter, the plaintiffs then filed a claim under their homeowners' policy seeking the reimbursement of approximately \$44,000 for testing, deleading, loss of rent, and legal and other expenses.

The defendant denied coverage and the plaintiffs filed suit in Superior Court.

Language Lessons

When an insurance policy is at issue the court must consider "what an objectively reasonable insured, reading the relevant policy language, would expect to be covered," Grabau said.

Common sense, explained the judge, "is not a stranger to the interpretation of insurance policies. Absent ambiguity, I must give policy language its plain and ordinary meaning."

Grabau noted that ambiguities are resolved against the insurance company, which drafted the policy, and in favor of the insured.

"The insurer bears the initial burden of proving that a claim falls within the grant of coverage, which once established, shifts the burden onto the insurer to show the applicability of any exclusion," stated the judge.

Loss Is More

The defendant alleged that lead paint was not a physical loss which is recoverable under a homeowners' insurance policy, Grabau said.

The plaintiffs' argument, noted the judge, was that lead paint was a physical loss which is fortuitous, and therefore, covered under the provisions of their policy.

The policy stated that: "Your policy provides coverage against physical loss if your home or its contents are damaged, destroyed or lost. The kinds of losses are covered, and any special limits that apply, are explained in detail in the policy."

The policy further provided that: "In Deluxe House Coverage, a `covered loss' includes all risk of physical loss to your house or other property covered under this part of your Masterpiece Policy, unless stated otherwise or an exclusion applies."

Grabau affirmed that the presence of lead paint in the plaintiffs' rental property did not damage the rental property, but poisoned the child tenants who had tested positive for high levels of lead.

"Therefore, absent damage or destruction of the rental property, lead paint cannot be considered to be a physical loss that is insured against under the plaintiffs' homeowner's insurance policy," concluded the judge. "Moreover, the plaintiffs are not entitled to be reimbursed for loss of rent and other losses associated with the deleading of the rental property because such losses are not covered under the homeowner's insurance policy."



Boston, MA 02108

(800) 451-9998

