GOLDBERG SEGALLA

Environmental Coverage Report

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IN THIS EDITION

UNITED STATES CIRCUIT COURT DECISIONS

Carbon Monoxide Poisoning Deemed Traditional Pollution Precluding Coverage Under Policy's Pollution Exclusion

Church Mut. Ins. Co. v. Clay Center Christian Church, et al.
(8th Cir.; March 25, 2014)

An insurer commenced a declaratory action seeking a determination that the policies' pollution exclusions precluded any duty to defend or indemnify a church with respect to the pastors' estates' claims and issued a reservation of rights denying coverage on the basis of those exclusions.

The claimants disclosed their intent to have a chemist testify as an expert witness regarding whether carbon monoxide is an "irritant" or "contaminant." The insurer moved *in limine* to exclude the chemist's testimony and then later moved for summary judgment. The district court granted both motions, concluding that the pollution exclusions were unambiguous, that carbon monoxide was a "pollutant" as defined by the policies, and that the claimants' claims were not covered under the plain terms of the policies.

On appeal, the claimants argued that the pollution exclusions were ambiguous because the terms "irritant" and "contaminant" as used in the definition of "pollutant" were ambiguous. In affirming the district court, the appellate court relied on the Nebraska Supreme Court ruling in *Cincinnati Ins. Co. v. Becker Warehouse, Inc*. 262 Neb. 746 (2001) which interpreted a standard pollution exclusion. The Nebraska Supreme Court concluded that although the pollution exclusion was "quite broad" it was unambiguous and was not limited to traditional environmental damage. The holding further noted that it recognized that the "majority of state and federal jurisdictions have held that absolute pollution exclusions are unambiguous, as a matter of law, and thus, exclude coverage for all claim alleging damage caused by pollutants."

The claimants attempted to distinguish *Cincinnati* and contested the denial of the motion *in limine* granting the insurer's motion to exclude the testimony of their expert witness regarding whether carbon monoxide is an "irritant" or "contaminant." The court held that the district court did not abuse its discretion in excluding the testimony of the claimant's expert and affirmed the ruling on the applicability of the exclusion to preclude coverage under the terms of the policy. Thus, the release of carbon monoxide was deemed to fit within the exclusion and constituted traditional environmental contamination consistent with the majority of jurisdictions.

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Policy's Total Pollution Exclusion Precluded Coverage for Manufacturer Involved in Suit Based on Use of Spray Foam Insulation

Lapolla Industries, Inc. v. Aspen Specialty Ins. Co. (2nd Cir.; May 19, 2014)

Lapolla, a Delaware corporation with its principal place of business in Houston, Texas, brought a class action seeking coverage under two insurance policies issued by Aspen — a primary commercial general liability policy and an excess liability policy. Lapolla sought a declaration that the policies obligate the insurer to defend and indemnify it in a product liability class action suit brought by individuals alleging property and bodily injuries from spray polyurethane foam (SPF) manufactured by the company. The claimants alleged that the SPF installed in their home "off-gasses" toxic fumes.

The insurer declined to defend or indemnify Lapolla in the underlying action based on the total pollution exclusion (TPE) clause contained in the policies. The TPE clause excluded claims for "[b]odily injury" or "property damage" that "would not have occurred in whole or part but for the actual, alleged, or threatened discharge, dispersal, seepage, migration, release, or escape of pollutants at any time." The excess liability policy provided coverage subject to the exclusions of the commercial general liability policy, and contained its own (similar) pollution exclusion.

The court held that New York and Texas law are in conflict regarding the treatment of total pollution exclusion clauses, and, under the circumstances presented here, Texas law governs the interpretation of the TPE. Under Texas law, the TPE clause was unambiguous and excluded coverage of the underlying claims, warranting dismissal of Lapolla's complaint for failure to state a claim on which relief can be granted.

UNITED STATES DISTRICT COURT DECISIONS

Policyholder's Recovery Limited Policy Sublimit for Gasoline Spill

Two Farms, Inc. v. Greenwich Ins. Co. (S.D.N.Y.; January 6, 2014)

This environmental coverage action arises out of the release of gasoline at the policyholder's underground tank farm and the interpretation of the scope of an exclusion sublimit clause covering the loss. The issue was the amount of coverage to which the policyholder was entitled under the policy for losses it incurred as a result of the discharge at its facility. Specifically, the policyholder asserted that the $1 million coverage limitation was inapplicable to the over $5 million in damages caused by the gasoline discharge, and thus sought judgment for the $4 million difference in what was paid by the insurer under the policy.

The policy provided coverage for pollution conditions and remediation expenses for such releases. However, that coverage was limited by the underground storage tank (UST) exclusion, which precluded coverage for all claims "based upon or arising out of the existence of any underground storage tank(s) and associated piping." Notably, the UST exclusion contained an exception that restored coverage for the "underground storage tank(s) or associated piping … listed in the Underground Storage Tank(s) and Associated Piping Schedule" (Endorsement 10).

There was no dispute that the underground storage tanks and associated piping at the facility were on the attached schedule. Under the policy, coverage was also limited by the UST sublimit, which applied "to all Underground Storage Tanks and Associated Piping scheduled to [the] Policy" and capped the coverage amount for "each loss or remediation expense" at $1 million (2008 Policy at Endorsement 7).

The insurer argued that the broad language of the UST exclusion was applicable to the discharge, and that coverage for the discharge could be restored under the exception to the exclusion only if the term "underground storage tanks and associated piping" was construed to include the equipment that malfunctioned at the facility. It further maintained that the term "underground storage tanks and associated piping" must have the same meaning when used in the UST sublimit, and thus that the sublimit unambiguously limits the insurer's liability to $1 million for the losses incurred as a result of the discharge.

Conversely, the policyholder argued that the UST sublimit should be interpreted independently of the exclusion and its exception such that the sublimit is an ambiguous limiting provision that must be construed against the insurer.

In discrediting the policyholder's argument as unpersuasive, the court noted that the insurer correctly argued that the broad UST exclusion applied to the discharge. This was so because it was clear that the discharge could not have occurred but for the "existence" of an underground storage tank and associated piping, given that the sole function of the containment sump was to contain the equipment used to transfer the gasoline from the underground storage tank to the associated piping.

Because the UST exclusion applied to the losses, the policyholder was entitled to coverage for those losses only if coverage was restored by the exception to the exclusion. Coverage for the discharge could be restored under the exception to the UST exclusion only if the term "underground storage tanks and associated piping" was construed to include the equipment that malfunctioned at the facility.

The court then concluded that any coverage restored pursuant to the exception to the UST exclusion was subject to the UST sublimit. Consequently, it was held, because the losses incurred as a result

of the discharge were caused by defects in components of the UST system, and because the sublimit plainly limits the insurer's liability to $1 million from those components, the insurer was not liable for any damages beyond the $1 million it has already paid.

Insurer Prevails on Applicability of Pollution Exclusion — Release Not Sudden or Accidental

Travelers Indemnity Co. v. Northrup Grumman Corp., et al. (S.D.N.Y.; February 27, 2014)

Northrop acknowledged using a property, later known as Bethpage Community Park (BCP), for the disposal of sludge from an on-site industrial wastewater treatment plant and from waste oils that contained residual amounts of TCE, other solvents, and PCBs since 1948.

Later, in the 1960s, the company donated the property to the Town of Oyster Bay and the town undertook substantial excavation and building, including the construction of an ice rink in 1986. In 2002, Northrop provided correspondence to its broker from the New York State Department of Environmental Conservation (NYSDEC) requesting that it conduct corrective action at the site. Travelers denied coverage because the claims were not reported to it during the policy period and because the property damage was precluded by the policy's pollution exclusion.

Travelers argued that Northrop's claims for coverage at the site were barred for four reasons:

- The policies from 1972 to 1983 contained a statutory pollution exclusion unless the discharges were "sudden and accidental"
- The policies for 1983 and 1985 contained exclusions for pollution that is "expected or intended"
- Northrop gave late notice to Travelers
- Coverage for claims by the NYSDEC is barred by the six-year statute of limitations for breach-of-contract claims

The court concluded that its discharges of these contaminants were not "sudden" or "accidental." Its disposal practices in that area of the site were planned and spanned a number of years.

The court expressly discredited Grumman's argument that it did not intend to pollute, noting that "the law does not require that it 'intend' to cause property damage through contamination; the law requires that the act that eventuates in the property damage be sudden and that it be accidental." To find otherwise would be to read a requirement of "intent to pollute" into the New York insurance law that does not exist. The court held that it is responsibility, not state of mind, that the statutory exclusion addresses.

Insurer Prevails on Applicability of Pollution Exclusion — Central Business Activity Exception Does Not Apply to Traditional Pollution

Federal Ins. Co. v. Southern Lithoplate, Inc., et al. (E.D.N.C.; March 14, 2014)

This environmental coverage action arises out of environmental contamination resulting from industrial use of solvents at the policyholder's operations and the court's interpretation as to the application of the policy's pollution exclusion. Southern Lithoplate initiated a third-party complaint against its insurer for a declaratory judgment asserting that Travelers had a duty to defend and indemnify it in two separate West Virginia state court environmental lawsuits involving ground water contamination of neighboring property. Travelers denied Lithoplate's claim for a defense based on an absolute pollution exclusion in the policy.

Lithoplate produces lithographic plates and other products for the graphics and photography industries. In July 2012, claimants filed suit in West Virginia state court against the company, alleging various tort claims related to groundwater contamination.

Travelers issued 10 separate policies to Lithoplate, all of which contained the identical pollution exclusion. The Court determined Travelers had no duty to defend. The court concluded that the policies defined the term "pollutant" broadly and that they covered any "hazardous waste" capable of contaminating the plaintiffs' properties.

Lithoplate relied extensively on *West Am. Ins. v. Tufco Flooring E., Inc.*, 104 N.C. App. 312 (1992) to argue that the "central business activities exception" precluded judgment on the pleadings and eliminated applicability of the pollution exclusion under the circumstances because the possibility existed that pollutants were used in the course of the insured's central business activity. The court discredited this argument, noting that the central business activity exception cannot be read so broadly and there is no blanket rule whereby every company that uses pollutants in the course of its central business activity is exempt from the pollution exclusion provisions of itsinsurance contracts. Instead, *Tufco* applies to the (much narrower) circumstance in which an ambiguity exists between application of the pollution exclusion to the particular facts alleged in the underlying actions and the insured's primary business activity itself.

The court noted that the exception applies where an insurer is attempting to apply the pollution exclusion to an injury that is not associated with traditional environmental pollution. This can be considered an attempt to "hide behind ambiguities in the policy and deny coverage for good faith claims that arise during the course of the insured's normal business activities."

Preemptive Power Shutdown From Hurricane Sandy Was Not a Covered Business Interruption Claim

Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co. (S.D.N.Y.; April 24, 2014)

This coverage action arises from the widespread power outages that occurred in and around New York City during and after Hurricane Sandy. On October 29, 2012, in anticipation of storm-related flooding, utility provider Consolidated Edison Co. of New York, Inc. preemptively shut off power to some of its service networks to preserve the integrity of the utility system. As a result, the plaintiff, a law firm, was without power at its lower Manhattan office for several days. The firm filed a claim under its property insurance policy for loss of business income and extra expenses due to its inability to access its office during the power outage. The insurer denied the claim.

The threshold question was whether the firm carried its burden of showing the policy provided coverage for its claimed losses under New York law, and as such, whether the insured premises experienced "direct physical loss or damage by a covered peril to property." The firm claimed coverage under two business loss provisions: the "Ingress And Egress" provision and the "Loss of Utilities" provision, each of which required a "direct physical loss or damage" as a condition precedent to the firm's recovery.

In holding for the insurer, the court discredited the firm's arguments that the preemptive closure of its building constituted a direct physical loss, where the property was rendered unusable or unsatisfactory for its intended purpose. The court noted that in each case, there was some compromise to the physical integrity of the workplace, including noxious fumes and water contamination. The court held that the firm did not meet its burden of showing that the policy covered the claimed losses, granting summary judgment to the insurer.

Insurers Denied Summary Judgment on Duty to Indemnify Where Questions of Fact Existed as to Whether Methane Gas Caused Asphyxiation

Acadia Insurance Co. v. Jacob and Martin, LTD, et al. (N.D. Texas; May 28, 2014)

The underlying plaintiffs contended that when a worker removed a sewer line plug "toxic fumes were released and the worker died from asphyxia due to methane gas inhalation." The policyholder did not dispute that methane is a pollutant or that the exclusions otherwise apply to the facts alleged in the underlying suit. The policyholder asked the court to consider extrinsic evidence that they claim demonstrated that the worker may have died from a lack of oxygen, as opposed to methane gas exposure. The court declined to consider any evidence outside the eight corners.

As to the duty to indemnify, the insurers submitted the autopsy report for the worker and the results of the Occupational Safety and Health Administration (OSHA) investigation for the incident. The autopsy report was amended to change the cause of death from "asphyxia due to methane gas inhalation" to "asphyxia due to oxygen displacement in a confined space." The OSHA investigation indicated that the worker died from asphyxiation due to the inhalation of toxic vapor.

While the court discredited the affidavit of the policyholder on the cause of the asphyxiation, the court concluded that the corrected autopsy report raised a genuine issue of material fact as to whether the worker's death fell outside the pollution exclusion of the policies. The court concluded the insurers failed to demonstrate that the substance which displaced the oxygen was in fact a pollutant as defined by the policies, noting, "[i]t is not sufficient for Plaintiffs to note that the oxygen must have been displaced by another substance."

Mine Subsidence Claims Denied Based on Policy Exclusions

B.S.C. Holding, Inc. v. Lexington Ins. Co. (District of Kansas; May 28, 2014)

The policyholder owns and operates the Lyons Salt Mine, which mines salt at a depth of approximately 1,000 feet below the surface. From 2002 to 2010, Lexington issued eight consecutive policies of commercial property insurance to the plaintiff mine. When the policyholder made claims against the policies due to impending catastrophic property damage to the mine, the insurer denied coverage based on late notice and applicable exclusions.

The insurer moved for summary judgment on the basis that the plaintiffs' claimed loss did not fall within any of the policy periods, the sue-and-labor provision was inapplicable, and the plaintiffs' claims were precluded by the policies' exclusions. The insurer also argued that the plaintiffs' claims were untimely under the policies' notice conditions and contractual suit-limitation provision and that the plaintiffs' claims were barred under the doctrines of fortuity, known-loss, and loss-in-progress. In 2013, the court granted summary judgment in favor of the insurer based on late notice but declined to address the remaining bases for judgment.

The plaintiffs appealed the order, and the Tenth Circuit reversed and remanded with instructions to vacate the summary judgment award. The defendant then moved for a ruling on the remaining claims it asserted in its original summary judgment motion.

In holding in favor of the insurer, the court ruled that the policyholders' claims were time-barred pursuant to the suit-limitation provision, as Kansas law does not prohibit parties from contractually limiting the timely filing of suits. Specifically, the court rejected the policyholder's argument that it

did not violate the suit-limitation provision because it did not discover the cause of the water inflow until April 2010. However, the plaintiffs' discovery on January 18, 2008, triggered the policies' suit-limitation provision and because the plaintiffs did not file suit before January 18, 2009, their claims were time-barred.

The court also held that the mine claims were excluded from coverage. The court held that the Lyons mine was both "land" and "property situated underground" whereby it is excluded from coverage.

UNITED STATES — STATE COURT DECISIONS

Release of Perchlorate Deemed "Traditional Environmental Contamination" Subject to Total Pollution Exclusion

Chubb Custom Ins. Co. v. Standard Fusee Corp.
(Court of Appeals of Indiana; January 23, 2014)

This environmental coverage action arises out of the clean-up of perchlorate contamination involving a marine signal and flare manufacturing operation. The policyholder manufactured marine signal and safety flares, of which, perchlorate is an essential ingredient. The manufacturer discovered that perchlorate was found in water samples and was notified by the city that it would seek to recover its damages from the resultant contamination.

The insurer denied coverage for the contamination claims. It asserted that the trial court erred in granting judgment to the policyholder, holding that under Maryland law the total pollution exclusion provision was not applicable to the release of perchlorate, thereby triggering the insurer's duty to defend.

The issue before the court was whether the release of perchlorate by the policyholder manufacturer constituted traditional environmental contamination such that the subject pollution exclusion applied to the circumstances to preclude coverage.

In holding for the insurer, the court cited to key Maryland precedent involving lead paint and manganese welding fumes to conclude that the subject exclusion only applies to traditional environmental contamination circumstances. Further, after concluding that perchlorate was a "pollutant," the court noted that unlike the localized, workplace-limited effect of fumes and lead paint, in this instance a known hazardous substance was released into the soil and dispersed to an adjacent farm. Although perchlorate was used during the policyholder's standard business operations, the prolonged release of the contaminants into the environment cannot be categorized as a normal course of business when it results in an agency remediation program. As the court noted, "the continuous discharge of perchlorate over multiple years went beyond the routine commercial hazard of an occasional spill."

Consequently, the court held the policyholder's perchlorate claim was based on hazardous pollutant contamination that amounts to traditional environmental pollution, which falls within the province of the policy's pollution exclusion clause.

Multiple Carbon Monoxide Injuries Deemed a Single Occurrence

Kosnoski v. Erie Ins. Property and Casualty, et al.
(Supreme Court of Appeals of West Virginia; February 18, 2014)

A declaratory suit was initiated against the owner of a complex and the insurer seeking a declaration that the claimants were entitled to a separate occurrence limit and that the damages sustained by each group of tenant plaintiffs constituted separate occurrences under the policy. The subject policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The claimants contended that since the injuries to the two families, occupying separate apartments, took place over the course of an evening, and each apartment was exposed to different levels of carbon monoxide, there was more than one occurrence. The insurer argued that there was one occurrence.

The plaintiffs contended that because the evidence demonstrated that the subject exposures and injuries were separated by time, place, and severity, they should have been considered separate occurrences

In holding for the insurer, the Supreme Court upheld the Circuit Court ruling of one occurrence under the facts of the case. Specifically, the Supreme Court held that the record established that there was a carbon monoxide leak from a single source, the gas boiler furnace. While the gas traveled to different rooms within the single building at different times over several hours, the injuries were from continuous or repeated exposure to substantially the same general harmful conditions.

Policy's Absolute Pollution Exclusion Did Not Apply to Carbon Monoxide Exposure

Century Surety Company v. Casino West, Inc.
(Supreme Court of Nevada; May 29, 2014)

In this action, the Ninth Circuit Court of Appeals certified questions of law to the Nevada Supreme Court regarding the interpretation of the absolute pollution exclusion and the indoor air quality exclusion contained in a motel's insurance policy after four motel guests died of carbon monoxide exposure.

The guests died from carbon monoxide poisoning while sleeping in a room directly above a pool heater in the Casino West Motel. The policyholder, Casino West, sought coverage, but the insurer denied the claims based on the absolute pollution exclusion and the indoor air quality exclusion. The federal district court denied the insurer's motion, determining that the policy exclusions were ambiguous.

In holding for the policyholder, the court concluded that the absolute pollution exclusion permitted multiple reasonable interpretations of coverage wherein a reasonable policyholder could have construed the pollution exclusion to only apply to traditional environmental pollution. Thus, the court held that in light of the exclusion's ambiguity, it must interpret the provision to effectuate the insured's reasonable expectations.

Further, when considering the significant amount of authority interpreting the absolute pollution exclusion to apply only to traditional environmental pollution, the court noted that one cannot rely on an exception to prove that the exclusion also applies to indoor pollution. Thus, to demonstrate that the absolute pollution exclusion applies to nontraditional indoor pollutants, an insurer must plainly state that the exclusion is not limited to traditional environmental pollution. Accordingly, the court determined that the absolute pollution exclusion did not bar coverage for the injuries caused by carbon monoxide in this case.

Lastly, the indoor air quality exclusion was also subject to multiple reasonable interpretations, and a policyholder could reasonably have expected that the policy allowed recovery for an unexpected condition that temporarily affected the air quality inside a building, and thus this exclusion did not bar coverage.

Insurers' Disclaimer Involving Environmental Damage Not Subject to Insurance Law §3420(d) Notice Requirements

KeySpan Gas East Corp. v. Munich Reinsurance America, Inc.
(New York Court of Appeals; June 10, 2014)

This environmental coverage action involved a dispute over whether the insurers had a duty to provide coverage for the remediation of environmental damage at several manufactured gas plant (MGP) sites formerly owned by Long Island Lighting Company (LILCO) and the timeliness of the excess insurers' late-notice defense asserted as an affirmative defense in its answer. The defendants issued excess insurance policies to LILCO that required, as a threshold condition for coverage, LILCO to provide prompt notice of any occurrence that potentially implicated defendants' duty of indemnification.

LILCO commenced a declaratory action and the insurer defendants moved for summary judgment based on late notice. The trial court denied the motion, holding that the reasonableness of LILCO's delay in notifying the defendant of environmental occurrences at its MGP sites presented a question of fact for the jury. The court further rejected LILCO's claim that the defendants waived their late notice defense by failing to disclaim coverage prior to interposing their answers.

On appeal, the Appellate Division held that "issues of fact remain as to whether defendant insurers waived their right to disclaim coverage based on late notice" by "fail[ing] to timely issue a disclaimer." Thus, the Appellate Division granted the defendants leave to appeal, certifying to the Court of Appeals the question of whether its order was proper.

On appeal to the Court of Appeals, the insurers argued that the Appellate Division wrongly applied the strict timeliness standard from Insurance Law §3420(d)(2) in considering whether the defendants waived their right to disclaim coverage of LILCO's environmental damage claims. The court held that by its plain terms, §3420(d)(2) applies only in a particular context: insurance cases involving death and bodily injury claims arising out of a New York accident and brought under a New York liability policy.

The court noted the insurer would not be barred from disclaiming coverage "simply as a result of the passage of time," and its delay in giving notice of disclaimer should be considered under common-law waiver and/or estoppel principles. As the environmental contamination claims at issue did not fall within the scope of §3420(d)(2), which the legislature chose to limit to accidental death and bodily injury claims, the matter was remanded.

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