Case Alert

District of Oregon Predicts Oregon's Place in "Plain Meaning" Pollution Camp

The Federal District Court for the District of Oregon recently decided that Carbon Monoxide constitutes a pollutant within the meaning of a pollution exclusion in a Commercial General Liability ("CGL") policy.

In *Colony Ins. Co. v. Victory Constr. LLC*, No. 3:16-cv-00457-HZ (Mar. 14, 2017), the District Court considered whether there was coverage for a pool company that allegedly failed to warn of the "risks of carbon monoxide poisoning associated with operating the heater in an insufficiently ventilated area," leading to carbon monoxide sickness.

The policy contained a pollution exclusion, which stated that the policy did not apply to:

> 'Bodily injury' … which would not have occurred in whole or part but for the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of 'hazardous materials' at any time.

The policy further defined "hazardous materials" as "pollutants, lead, asbestos, silica and materials containing them." "Pollutants" was defined as "any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

Courts have traditionally split over the proper method by which to apply the pollution exclusion. The court acknowledged this split and explained that:

> [s]ome courts apply the exclusion literally because they find the terms to be clear and unambiguous. Some have even found the exclusion clear and unambiguous when applied to carbon monoxide poisoning … Other courts have limited the exclusion to situations involving traditional environmental pollution, either because they find the terms of the exclusion to be ambiguous or because they find that the exclusion contradicts policyholders' reasonable expectations.

(Citing *Century Sur. Co. v. Casino W., Inc.*, 677 F.3d 903 (9th Cir. 2012)).

The court surveyed Oregon law and could not find "a case from any Oregon court providing guidance on how to determine the scope of the pollution exclusion or whether it applies to carbon monoxide."

The court considered four approaches to the interpretation of the exclusion. First, the plain meaning of the exclusion. Second, whether the intent of the exclusion was for it to apply solely to "traditional environmental pollution." Third, whether carbon monoxide as a pollutant comports with the reasonable expectations of the policyholder. Finally, the court considered whether the exclusion is ambiguous.

First, the court examined the plain meaning of the exclusion. The policyholder argued that carbon monoxide was not an irritant or contaminant because it is "odorless, colorless, tasteless, and harmful only in excessive amounts" and "it exists in the human body and in nature." Colony contended that, because the Clean Air Act defines carbon monoxide as a pollutant, it must be so. The court added that the EPA

and Oregon Department of Environmental Quality also define it as such. The court then considered numerous dictionaries, whose definitions of "irritant" and "contaminant" encompassed carbon monoxide. The court determined that the plain meaning of the exclusion encompassed carbon monoxide and barred coverage.

Although the court determined that the plain meaning of the exclusion alleviated the need to consider the policyholder's other three arguments, the court still discussed their merits. The court acknowledged that many other courts limit interpretation of the pollution exclusion to traditional environmental pollution, but characterized such decisions as taking an "analytical approach." The court determined that Oregon does not take the analytical approach, preferring the plain meaning approach, which necessitated the result reached here by not reaching the drafting history behind the exclusion.

The court again determined that the reasonable expectations of the policyholder are only relevant if the plain meaning does not resolve the dispute. Although the policyholder found some support for use of the doctrine in Oregon law, the court explained that

> the doctrine of reasonable expectations appears to be inconsistent with Oregon's statutes governing the construction of insurance contracts. O.R.S. 742.016 provides that "every contract of insurance shall be construed according to the terms and conditions of the policy."

Unless the policy supports such an analysis, the court explained that it would not consider as much.

Finally, the court considered the policyholder's argument that the exclusion was ambiguous. Despite the court acknowledging that "many courts have reached conflicting conclusions regarding the scope of the pollution exclusion," it was not persuaded to reach the same result. The court was not swayed by the policyholder's citation to *I-L Logging v. Mfgs. & Wholesalers Indem. Exch.*, 202 Or. 277 (1954), which held that "the very fact that a number of courts have reached conflicting conclusions as to the interpretation of a certain provision is frequently considered evidence of ambiguity."

This decision is not surprising. Courts consistently reach opposite decisions on this issue. As this is a district court case, which acknowledges that the Oregon Supreme Court has not decided the issue, Oregon should not be written off as a pro-insurer pollution exclusion state until further exists.

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