Case Alert

Louisiana District Court Declines to Apply Total Pollution Exclusion

The United States District Court for the Eastern District of Louisiana recently decided that a broad total pollution exclusion in a marine general liability policy did not bar coverage because the insurer could not unambiguously establish its application based on the facts of the case.

Based on the allegations of the underlying complaint, sandblasting at a shipyard resulted in the dispersal of by-products consisting of silica dust and toxic substances. Allegedly, those by-products led to a variety of bodily injury and property damage to neighboring persons and property, which resulted in a lawsuit against the shipyard and the contractors.

In *Hanover Ins. Co. v. Superior Labor Services, Inc.,*[1] the court considered whether the contractors' insurer, Arch, was obligated to provide coverage to either of the contractors as named insureds or to the shipyard as an additional insured with respect to the underlying complaint. The court first emphasized Louisiana's eight-corners rule, which confines the court's coverage analysis to the "four corners" of the pleading as well as the "four corners" of the policy. The essence of the rule is that "the factual allegations of the plaintiff's petition must be liberally interpreted to determine whether they set forth grounds which raise even the possibility of liability under the policy."

Arch argued that the policy's total pollution exclusion eliminated any possibility of coverage. The pollution exclusion stated:

> Such coverage as is afforded by this policy shall not apply to any claim arising out of the discharge, dispersal, release or escape of smoke, vapors, … or other irritants, contaminants or pollutants into or upon land, the atmosphere, or any watercourse or body of water.

In its analysis, the court explained Louisiana's position with respect to the application of pollution exclusions. There are two main approaches to interpretation of pollution exclusions: (1) to read the language literally and (2) to read the language in the context of the origin of pollution exclusions. According to the Louisiana Supreme Court,

> a literal application of a total pollution exclusion would lead to absurd results…. In light of the origin of pollution exclusions, as well as the ambiguous nature and absurd consequences which attend a strict reading of these provisions, a total pollution exclusion is neither designed nor intended to be read strictly to exclude coverage for all interaction with irritants or contaminants of any kind.[2]

When determining whether a pollution exclusion applies, Louisiana law requires consideration of three factors, called the *Doerr* factors. Namely, the insurer must show 1) that the insured is a "polluter", 2) that the injury-causing substance is a "pollutant," and 3) that there was a "discharge, dispersal, seepage, migration, release or escape" of the pollutant.

To determine whether the insured is a "polluter" within the meaning of the exclusion, the court considers several factors, including "the nature of the insured's business, whether that type of business presents a risk of pollution, whether the insured has a separate policy covering the disputed claim, whether the insured should have known from a read of the exclusion that a separate policy covering pollution damages would be necessary for the insured's business, who the insurer typically insured, any other claims made under the policy, and any other factor the trier of fact deems relevant." Here, the court held that Arch was unable to point to any information within the eight corners of the pleadings and the policy regarding

the nature of the insureds' businesses, the risk of pollution associated with those types of business, or whether the insureds had separate pollution insurance. Therefore, the court was unable to conclude that the insureds were "polluters" within the meaning of the policy.

The court then considered the factors for determining whether the substances which caused the injury, i.e., the silica dust and toxic substances, were "pollutants." It considered "the nature of the injury-causing substance, its typical usage, the quantity of the discharge, whether the substance was being used for its intended purpose when the injury took place, whether the substance is one that would be viewed as a pollutant as the term is generally understood, and any other factor the trier of fact deems relevant." Again, the court determined that Arch could not establish from the eight corners that the alleged substances were "pollutants" within the meaning of the policy.

Finally, the court looked at whether there was a "discharge, dispersal, seepage, migration, release or escape." For this question, the court considered "whether the pollutant was intentionally or negligently discharged, the amount of the injury-causing substance discharged, whether the actions of the alleged polluter were active or passive, and any other factor the trier of fact deems relevant." Once again, the court determined that Arch could not establish this element of the pollution exclusion within the eight corners rule.

Ultimately, the court held that because Arch failed to meet the required showing for all three *Doerr* factors, Arch could not establish that the total pollution exclusion unambiguously precluded coverage.

This is a very favorable decision for policyholders. Total pollution exclusions are extremely prohibitive for policyholders because they eliminate virtually all coverage for pollution incidents. However, this decision reinforces that policyholders may still have a path to coverage even if their policy contains a total pollution exclusion, depending on how the allegations of the underlying complaint are pled.

For more information about this case or simply to discuss pollution exclusions, contact William S. Bennett at wsb@sdvlaw.com or 203-287-2136. If you are interested in how various states interpret pollution exclusions, see our State by State Survey on CGL Pollution Exclusions.

1. Nos. 14-1930, 14-1933, 2016 WL 6892825 (E.D. La. Nov. 23, 2016).
2. Citing Doerr v. Mobil Oil Corp., 774 So. 2d 119 (La. 2000) (internal quotation marks omitted).

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