Case Alert

Minnesota District Court Broadly Interprets Pollution Exclusion

The Minnesota Federal District Court recently decided against coverage for the release of carbon monoxide from an engine compartment into the open air due to a general liability policy's pollution exclusion.

In *Travelers Prop. Cas. Co. of Am. V. Klick*, Civil No. 15-2403 (DWF/LIB) (D. Minn. 2016), the plaintiff was on a fishing trip on a boat purchased by a companion when the group noticed that the engine was not functioning properly. When the the engine compartment was opened, carbon monoxide, which had built up inside the compartment, was released. It escaped into the ambient air as well as into the three-walled, open-backed wheel house, killing two of the fishermen and injuring the plaintiff.

The plaintiff sued the marina that had serviced and stored the boat. The marina agreed to judgment in the plaintiff's favor, provided that the plaintiff pursue recovery only from the marina's insurer.

The marina was the named insured on a marine general liability insurance policy issued by Travelers, which contained the following pertinent language in its pollution exclusion:

> This insurance does not apply to: … Any liability for loss, injury, damage, or expense arising out of the actual, alleged or threatened seepage, discharge, dispersal, disposal or dumping, release, migration, emission, spillage, escape, or leakage of "pollutants" into or upon land, atmosphere, environment, or any watercourse or body of water.

The policy also defined "pollutant" as:

> any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, petroleum products or derivatives, chemicals, sewerage, spoils, and waste materials or substances.

Travelers argued that when the engine compartment was opened, the carbon monoxide was released into the atmosphere, thereby fulfilling the exclusionary language. The plaintiff, on the other hand, contended that the carbon monoxide was actually first released into the engine compartment from the engine itself and the opening of the engine compartment constituted a secondary release.

To determine when the "release" occurred, the court looked to three precedential Minnesota cases. In *Board of Regents of the Univ. of Minn. v. Royal Ins. Co. of Am.,* 517 N.W.2d 888 (Minn. 1994), the court determined that a pollutant is only deemed to be released into the atmosphere, and therefore subject to the exclusion, if it is released into ambient air. If the pollutant was first released into an enclosed structure, then the exclusion would not apply.

In *Wakefield Pork, Inc. v. Ram Mut. Ins. Co.,* 731 N.W. 2d 154 (Minn. Ct. App. 2007), the court clarified the decision in *Board of Regents*, distinguishing between pollutants that are released directly into ambient air and pollutants that are released into an enclosed structure and then migrate into the ambient air outside of that structure. According to the court, those released directly into ambient air are excluded, while those that are released into an enclosed structure first are not excluded.

Finally, in Midwest Fam. Mut. Ins. Co. v. Wolters, 831 N.W.2d 628 (Minn. 2013), the Minnesota Supreme Court held that carbon monoxide is a pollutant within the meaning of the exclusion and that if a pollution exclusion does not have language specifically distinguishing between release of a pollutant into indoor air versus outdoor air then the exclusion applies to both situations.

Relying on these three cases, the district court determined that the carbon monoxide was initially released when the engine compartment was opened, therefore the initial release was into the atmosphere, as in *Board of Regents*. The pollution exclusion applied and Travelers did not have to indemnify the marina for the loss.

The court also addressed the policyholder's argument that the carbon monoxide's release into the wheelhouse constituted release into an enclosed structure, as explained in *Board of Regents*. The court determined, however, that this case was more like *Wakefield Pork*, where the pollutants were released into the ambient air and then migrated into an enclosed structure. Regardless, the court found that the wheelhouse was not an enclosed structure, given its open back.

Although Travelers was not obligated to indemnify the marina, the court held that it did have a duty to defend the marina. As the court correctly identified in its opinion, the duty to defend is broader than the duty to indemnify. Therefore, while the court had to consider the entire factual record in the case to determine if the duty to indemnify existed, it only had to look at the allegations of the complaint to determine if there was a duty to defend. Because the complaint did not specifically say that the carbon monoxide was released into the ambient air, the court determined that there was at least a possibility of coverage and, therefore, Travelers had a duty to defend the marina.

This case demonstrates the importance of having a robust pollution insurance program. Most standard general liability insurance policies contain a pollution exclusion similar to this case. If your business, however tangentially, implicates anything that could be considered a pollutant, you must carefully review your policies to ensure that you are covered in the event of an accident like this one. There are many considerations that go into such an evaluation, which vary dramatically from one state to the next, underscoring the need for close scrutiny of your insurance.

For more information about this case, please contact William S. Bennett at wsb@sdvlaw.com or 203-287-2136. For more information about how each jurisdiction approaches the meaning of "pollutant," review SDV's State by State Survey on the CGL Pollution Exclusion.

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