Case Alert

Alabama District Court Rules That Sewage is Not a Pollutant Under a CGL Policy

An Alabama federal judge recently held that sewage was not a pollutant within the meaning of a pollution exclusion in a commercial general liability policy.

Evanston Insurance Co. v. J&J Cable Construction LLC et al. involved the installation of an underground electrical conduit by J&J Cable for Dixie Electric. During the course of the work, J&J Cable struck and broke sewer pipes that ran from the sewer main to two neighboring houses. Sewage backed up into the houses causing property damage. The homeowners brought suit, and J&J Cable sought coverage under its commercial general liability ("CGL") policy provided by Evanston Insurance. Evanston denied coverage, claiming that the pollution exclusion barred the claim.

A pollution exclusion prohibits coverage for property damage arising out of the discharge or release of "pollutants." There are generally two schools of thought as to what constitutes a "pollutant," and the states are relatively evenly split on the issue. One interpretation, favorable to policyholders, limits the pollution exclusion to "traditional environmental pollutants" like oil and toxic waste. The other approach considers a "pollutant" to be anything that could fit the plain meaning of the words in the definition of the policy. Like most CGL policies, the Evanston policy defined "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

The *Evanston* Court referred to two Alabama Supreme Court decisions for guidance. In *United States Fidelity and Guar. Co. v. Armstrong,* 479 SO. 2d 1164 (Ala. 1985), the Alabama Supreme Court found that residential sewage was not a pollutant under the older "qualified" pollution exclusion. The court held that the pollution exclusion was ambiguous and was intended to only cover industrial pollution and contamination.

The *Evanston* Court then referred to *Porterfield v. Audobon Indem. Co.,* 856 So. 2d 789 (2002) for the interpretation of an "absolute pollution" exclusion, the same exclusion as in *Evanston*. The substance in *Porterfield* was lead paint chips, and the Alabama Supreme Court held that although they could be considered a "pollutant," the terms "discharge" and "release" were reasonably susceptible to two or more meanings, and were therefore ambiguous. Due to those terms being ambiguous, the *Porterfield* Court found that an insurer using those terms must have intended to follow the prior construction given to those terms by the Alabama Supreme Court.

Extending that logic, the *Evanston* Court noted that *Porterfield* directs courts to look to previous Alabama Supreme Court cases for policy interpretation. The *Evanston* Court, following *Armstrong*, found that a reasonable insured would have understood that residential sewage is not a "pollutant", and held that the pollution exclusion does not preclude coverage for the residential sewage claim.

This is a positive result for policyholders and is part of what we hope is a positive trend towards courts limiting the pollution exclusion and what is considered a "pollutant." For more information, please contact Philip Brown-Wilusz at pbw@sdvlaw.com or 203-287-2107 or David G. Jordan at dgj@sdvlaw.com or 203-287-2111. Also, check out SDV's State by State Survey on the CGL Pollution Exclusion.

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