

Byline

April 28, 2015

Wis. High Court Clarifies Contours of Pollution Coverage

by Michael S. Levine and Matthew T. McLellan

Published in Law360



The Supreme Court of Wisconsin recently held in *Acuity v. Chartis Specialty Insurance Co.*, No. 2013AP1303 (Wisc. March 17, 2015), that property damage and bodily injury caused by a natural gas explosion triggered defense and indemnity obligations under a contractors' pollution liability policy, and that the CPL insurer was obligated to share equally with a general liability insurer in the policyholder's defense and indemnity exposure.

Background

Dorner Inc., a construction company, contracted with the Wisconsin Department of Transportation to perform road construction, including underground excavation. While Dorner's employees were excavating a portion of a street, they moved a natural gas pipe, believing it was no longer in use. The pipe released natural gas, which resulted in an explosion. The explosion damaged several buildings in the vicinity and caused injuries to people nearby. Four lawsuits ensued as a consequence of the property damage and bodily injury.

Dorner was insured under a CPL policy issued by Chartis and a commercial general liability policy issued by Acuity. Chartis denied coverage for the lawsuits. Acuity defended and indemnified Dorner and sought contribution from Chartis. The Chartis CPL policy provided coverage for Dorner's liability for "Bodily Injury [or] Property Damage ... caused by Pollution Conditions ..." Pollution conditions were defined, in relevant part, as the "release or escape of any solid, liquid, gaseous, or thermal irritant or contaminant ... into or upon land, or any structure on land, [or] the atmosphere ... provided such conditions are not naturally present in the environment in the concentration or amounts discovered." Chartis contended that: (1) the natural gas leak was not a pollution condition under the CPL policy; and (2) even if it was a pollution condition, the gas did not cause the bodily injury and property damage, the fire and explosion caused the harm. The circuit court rejected Chartis' arguments and ordered that it contribute with Acuity on a 50-50 basis to the defense and indemnity of Dorner. The court of appeals reversed, finding that the bodily injury and property damage resulted from the explosion and fire, not the escaped natural gas. Dorner appealed.

Wis. High Court Clarifies Contours of Pollution Coverage
by Michael S. Levine and Matthew T. McLellan
Law360 | April 28, 2015

Holding

The Supreme Court of Wisconsin reversed the court of appeals, holding the natural gas leak was a pollution condition under Chartis' CPL policy and that the pollution condition caused the bodily injury and property damage alleged in the four lawsuits. According to the court, the question of whether the natural gas leak was a pollution condition turned on whether the natural gas was an "irritant" or "contaminant" — terms undefined in the policy.

The court found the undefined terms to be ambiguous. Ambiguities, the court explained, are construed in favor of coverage, whether contained in exclusionary provisions or elsewhere in the policy. The court rejected the insurer's argument that case law interpreting pollution exclusions controlled the outcome in this case, but acknowledged that such case law may be informative. In particular, the court looked to two cases, which found lead paint chips and bat guano were "contaminants" in the context of policy-based pollution exclusions. In those cases, the respective pollution exclusions barred coverage. The courts applied the dictionary definition of "contaminate" — to "make impure or unclean." Consistent with that authority, the Acuity court concluded that natural gas released into the air from a damaged natural gas pipeline constitutes a "contaminant" because it renders the surrounding ground and air "impure or unclean" due to gas's flammable and explosive properties.

The court also found its analysis to be consistent with the expectations of a reasonable insured. The court found that a construction company involved in excavation, such as Dorner, could reasonably expect a CPL policy to cover damages from the accidental release of contaminants during excavation.

The court next determined that the bodily injury and property damage were "caused by Pollution Conditions" and, therefore, came within the scope of the CPL policy coverage. Chartis argued it was not enough that there would be no injury or damage "but for" the contamination; rather, according to Chartis, the damage and injury had to be directly caused by the "contaminating nature of the substance at issue." The court distinguished Chartis' argument and supporting authority, finding them more suitable for an analysis under a pollution exclusion and not a pollution liability policy. Nevertheless, the court found it was indeed the "contaminating nature" of the natural gas that caused the harm, since the contaminating nature of natural gas includes its ability to cause explosions and fire. Thus, the necessary causal nexus was satisfied.

Finally, the court rejected Chartis' argument that there can be no coverage under both a CGL and a CPL policy because such policies are intended to provide nonoverlapping, complementary coverage. The court rejected that argument, finding the availability of coverage under Acuity's policy was not before the court. Further, the court explained that the policy language in the CGL and CPL policies does not mirror one another and contains nothing to suggest that the scope of coverage under one policy is mutually exclusive to the other. The court ordered, therefore, that Chartis contribute a 50-50 share of Dorner's defense and indemnity.

Implications

The Acuity decision illustrates the breadth of coverage available to policyholders under standard pollution liability policies. The decision also illustrates that while courts must strive to maintain consistency with respect to the construction of common terms like "pollutant" and "contaminant,"

Wis. High Court Clarifies Contours of Pollution Coverage
by Michael S. Levine and Matthew T. McLellan
Law360 | April 28, 2015

where an ambiguity exists, a term that might receive a narrow construction in the context of a policy exclusion will receive a considerably broader construction when viewed in the context of a coverage provision. Policyholders, therefore, should not be dissuaded from pursuing pollution liability coverage based on the narrow constructions of “pollutant” and “contaminant” found in case law arising in the context of general liability pollution exclusions.

Acuity also illustrates that general liability and pollution liability coverages are not mutually exclusive. Rather, where a claim fits the contours of coverage under one policy, the existence of another policy should be of no relevance. It is critical, therefore, that policyholders closely examine the terms and scope of coverage available under all of their policies of insurance and understand that more than one policy may apply to a particular claim or loss.

Wis. High Court Clarifies Contours of Pollution Coverage
by Michael S. Levine and Matthew T. McLellan
Law360 | April 28, 2015