

Liability Insurance Policies Were Triggered When Groundwater Contamination Occurred

Many environmental insurance cases involve contamination that occurred over a long time period, and circumstances that make it difficult to determine precisely when the insurable occurrence took place. This can be a critical issue, especially when an insured needs to prove that old insurance policies apply to recently discovered contamination. A recent decision by a federal court in Detroit held that liability insurance policies were “triggered” at the time groundwater contamination took place, even though the municipal water systems affected by the contamination did not have to pay for special filtration equipment until after enforceable drinking water standards were adopted in 1988.

From the 1950’s through 1977, Dow Chemical Company (Dow) of Midland, Michigan manufactured two pesticides known as DBCP and EDB, which were widely used on crops grown in California. In the early 1970’s, certain studies suggested that DBCP and EDB might cause cancer in laboratory rats. A 1977 study identified the two pesticides as possible causes of infertility in human males. Dow stopped selling DBCP and EDB in 1977.

In 1979, DBCP and EDB were detected in groundwater at various locations in California’s San Joaquin Valley. The State of California issued non-enforceable advisories against drinking groundwater containing more than 1.0 part per billion (ppb) of either pesticide. In 1988, the State of California adopted mandatory maximum contaminant levels that prohibited the consumption of groundwater containing 0.2 ppb of DBCP or 0.05 ppb of EDB. As a result, numerous municipalities in the San Joaquin Valley had to purchase and install special filtration equipment to meet the new standards, or had to close and replace their groundwater production wells.

As early as 1981, some municipalities sued Dow to recover the costs of closing and replacing their wells or purchasing filtration equipment. Most of the municipalities sued Dow only after the state had adopted standards for EDB and DBCP in 1988, and sought to recover their costs of purchasing special filtration equipment. Dow settled many of the lawsuits by reimbursing the costs that the municipalities had incurred.

Fireman's Fund Insurance Company (Fireman's Fund) had sold six liability insurance policies to Dow covering the period from 1956 through 1976. The policies issued between 1956 and 1970 promised to reimburse Dow for any liability incurred "for occurrences during the policy period." The policies issued from 1971 through 1976 promised to reimburse Dow for liability resulting from "property damage which occurs during the policy period." Fireman's Fund paid Dow's legal costs of defending the lawsuits by the municipalities, but it refused to pay Dow for the cost of settling with the municipalities. Dow sued Fireman's Fund in 1996 to require Fireman's Fund to reimburse Dow's settlement costs. The parties agreed that the policies were governed by Michigan law, even though the alleged injuries had occurred in California.

Fireman's Fund asked the court to dismiss Dow's lawsuit before trial on the ground that its policies did not apply to the claims by the municipalities. Fireman's Fund argued that under Michigan law, a liability insurance policy applies only when an "injury-in-fact" occurred during the policy period. Fireman's Fund argued that none of the municipalities suffered any "injury-in-fact" between 1956 and 1976, even though they had been extracting and distributing contaminated groundwater during that time, because it was not until 1979 that the State of California adopted enforceable regulations that legally restricted their right to use the contaminated water.

In response, Dow argued that the application of the pesticides during the 1950's through 1970's was the event that ultimately caused the municipalities' losses, and that event occurred during the Fireman's Fund policy periods.

The court ruled that the language of the particular policies is critical in determining whether a liability policy is triggered by a certain event. It noted that each Fireman's Fund policy issued from 1956 through 1970 promised to reimburse Dow whenever there was an "occurrence" during the policy period, and did not specify that the property damage itself, or Dow's liability to the injured party, must occur during the policy period. In contrast, the 1971 to 1976 policies required that "property damage," not just an "occurrence," take place during the policy period.

The court relied on a decision by the Michigan Supreme Court in *Gelman v. Fidelity and Casualty Company of New York*, holding that a liability insurance policy is triggered when "injury-in-fact" occurs. The court decided that both the 1956 to 1970 policies, and the 1971 to 1976 policies, were triggered because the addition of dangerous chemicals into groundwater constitutes an "injury" to that water, and that such an injury is "property damage" even if under California law the municipalities did not own the groundwater, but simply had the right to extract and use it. Therefore, the court denied Fireman's Fund's motion and allowed the case to proceed to trial. The disputed facts to be tried are: (1) whether DBCP and EDP were injurious to water independent of the California regulation, (2) whether the groundwater was contaminated by injurious levels of the pesticides during the period of each policy in question.

Dow Chemical Company v. Fireman's Fund Insurance Company, (E.D. Mich., August 28, 2002 Case No. 96-75832).

Christopher J. Dunsky