Michigan Court Of Appeals Denies Insurance Coverage Based On Pollution Exclusion

In a recent unpublished opinion, the Michigan Court of Appeals held that the absolute pollution exclusions contained in two commercial general liability ("CGL") insurance policies precluded coverage for personal injuries to two individuals who were insured by fumes through carpet adhesives.

The Court of Appeals decision involved two different, but very similar, cases. In the first case, Carpet Workroom had purchased a CGL policy from Auto Owners Insurance Company ("Auto Owners"). That policy protected Carpet Workroom against claims by third parties for bodily injury, but it included what the court described as a "standard pollution exclusion provision." Carpet Workroom was hired to install new carpeting in an enclosed common stairway joining two floors of an office building. Carpet Workroom used an industrial grade contact cement that contained toluene, acetone and n-hexane. Soon after it applied the contact cement, a woman who worked on the second floor was overcome by fumes and hospitalized. After she sued Carpet Workroom for her injuries, Carpet Workroom asked Auto Owners to defend it. When Auto Owners refused to do so, Carpet Workroom sued Auto Owners, asking the court to require Auto Owners to provide a defense and insurance coverage. The trial court held that Auto Owners had no duty to provide a defense or to provide insurance coverage because of the pollution exclusion in the policy, and granted judgment to Auto Owners before trial.

In the second case, Professional Floor Covering, Inc. ("PFCI") had used an adhesive that contained potassium hydroxide to install new carpeting, tile, and molding in a commercial building. Just as in the first case, a person who worked in the building was overcome by fumes from the adhesive, and sued PFCI for her injuries. PFCI asked its insurer, Meridian Mutual

Insurance Company ("Meridian"), to defend and provide coverage, but Meridian refused to do so because its policy contained a "absolute pollution exclusion." Meridian then sued both its customer PFCI, and the injured party, asking the court to rule that Meridian was not liable under the insurance policy to either of them. The trial court held that the pollution exclusion in Meridian's policy was ambiguous and had to be construed in favor of the insured. It therefore granted judgment before trial against Meridian.

The Michigan Court of Appeals considered both cases in a single opinion. Both insurance policies contained identical pollution exclusions that precluded coverage for "bodily injury . . . arising out of the . . . escape of pollutants . . . from any . . . site . . . on which any insured . . . [is] performing operations . . . if the pollutants are brought on or to the . . . site . . . in connection with such operations by such insured . . . ." The court noted that under Michigan law exclusions in insurance policies are strictly construed against the insurer and in favor of the insured, although "clear and specific exclusions must be given effect." Both insureds argued that the pollution exclusions in their policies were ambiguous because the insurance industry intended them to apply only to traditional environmental contamination, not personal injuries. The Court of Appeals rejected that argument based on its previous decision in *McKusick v. Travelers Indemnity Co.,* 246 Mich. App. 329 (2001). The court held that the pollution exclusions are unambiguous, and that the release of a pollutant need not necessarily result in widespread contamination for the pollution exclusion to apply. The court concluded that the personal injuries in these two cases arose out of the discharge of pollutants, and were, therefore, excluded from coverage.

The court also considered and rejected an argument that the Meridian policy provided coverage under the "products/completed operations" section of the policy, which the injured

person argued was "separate and apart from the general coverage" for bodily injury. The court rejected this argument because the policy described the amount of coverage available for "products/completed operations" coverage as the same amount that was available for "bodily injury" coverage. The court did not fully explain the rationale for its decision on this point.

Several statements in the opinion may provide some comfort to insureds, if they have favorably written policies. First, the court noted that "an insurance contract must be enforced in accordance with its specific terms." Therefore, if a pollution exclusion is drafted differently than the pollution exclusions considered in this case, such a policy may very well provide coverage. Second, the court specifically noted that "there are no exceptions to the applicable exclusions contained in the respective insurance policies and no language otherwise limiting the scope of their applicability." Therefore, if an insured can point to exceptions in the pollution exclusion in its policy, or to other language that limits the scope of such pollution exclusion, the insured may be able to obtain coverage.

The lesson of this case is that a person who wants insurance protection against events that could conceivably be described as a "discharge of pollutants" should carefully compare the wordings of pollution exclusions in available insurance policies, and purchase a policy that contains the most favorable provisions, rather than accepting a so-called "standard pollution exclusion."

Carpet Workroom v. Auto Owners Ins. Co., Mich. Ct. of App. No. 223646 (Unpublished Opinion, May 10, 2002).

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