

Michigan Court of Appeals Denies Coverage Of Products Liability Claim Based On Pollution Exclusion

The Michigan Court of Appeals recently affirmed a trial court ruling which denied coverage for a products liability claim based on specific language in a pollution exclusion endorsement to a commercial general liability (CGL) policy.

Hi-Tech Engineering, Inc. (Hi-Tech) designs and manufactures systems which its customers use to deliver liquids through high-pressure hoses. A high-pressure hose manufactured by Hi-Tech burst while being used by Polaris Industries (Polaris) in Wisconsin, to deliver a chemical used to manufacture polyurethane foam. The chemical escaped from the broken hose. William McKusick, an employee of Polaris, and a co-worker were injured by exposure to the chemical while they were cleaning up the spill.

McKusick and his co-worker commenced a products liability lawsuit against Hi-Tech in Wisconsin state court. Hi-Tech asked Travelers Indemnity Company (Travelers), its CGL insurer, to defend the action, but Travelers refused, arguing that the claim was not covered because of the pollution exclusion in the policy. Hi-Tech sued Travelers in Michigan state court, asking the court to require Travelers to provide insurance coverage. While Hi-Tech's case against Travelers was pending, McKusick and Hi-Tech settled their litigation in Wisconsin by an agreement under which Hi-Tech admitted liability, consented to the entry of a judgment, agreed to pay a portion of the judgment, and gave McKusick the right to seek the balance of the judgment from Travelers. McKusick then commenced an action against Travelers in Michigan state court to collect the balance owed on the Wisconsin judgment against Hi-Tech.

Travelers then filed a motion asking the Michigan trial court to rule that the pollution exclusion in its policy meant that Travelers had no duty to provide coverage to Hi-Tech. After the trial court granted Travelers's motion, Travelers filed a similar motion in the action which McKusick brought against Travelers. The trial court in that case agreed with Travelers, and held that because the insurance policy did not cover Hi-Tech for McKusick's claim, McKusick had no right to recover anything from Travelers.

On appeal, McKusick argued that the pollution exclusion in the Travelers policy did not apply to McKusick's products liability claim against Hi-Tech, because the pollution exclusion applied only to claims arising from traditional forms of environmental pollution. The Michigan Court of Appeals rejected this argument, noting that the pollution exclusion in the Travelers policy expressly precluded coverage for

bodily injury arising out of the discharge of pollutants “which arises out of ‘your work’ . . . or . . . which arises out of ‘your product’”. The court also noted that the Travelers policy defined “your product” as “any goods or products . . . manufactured, sold, handled, distributed or disposed of by” the insured. The high-pressure hose manufactured by Hi-Tech clearly qualified as “your product” under the definition in the policy.

The Court of Appeals observed that neither the Michigan Supreme Court nor the Michigan Court of Appeals had ever considered this particular version of a pollution exclusion, nor had either court ever considered a claim under a CGL policy in a factual context in which the escape of pollutants did not result in the pollution of land, air, water, or other traditional environmental media. The Court of Appeals briefly discussed a 1999 decision by the United States Court of Appeals for the Sixth Circuit, applying Michigan law, in which the Sixth Circuit held that a differently-worded pollution exclusion in a CGL policy did not prevent coverage for personal injury resulting from the exposure to fumes from chemicals used by the insured while sealing a floor in a room immediately above where the insured was working. The Court of Appeals also briefly discussed several other cases cited by McKusick in which other courts had held that differently-worded pollution exclusions did not preclude coverage for personal injuries resulting from the release of fumes used by the insureds while working in a building, or for personal injuries incurred after years of exposure to toxic fumes and dust in a manufacturing facility.

The Court of Appeals did not disagree with the outcome of those decisions, but it held that those cases “are factually distinguishable” from McKusick’s case for several reasons. First, the Court of Appeals noted that “the pollution provision in this case is more broad” than the exclusions in the other cases, because the exclusion in the Travelers policy expressly applies when the release of pollutants arises from the insured’s work or products. Second, the Court of Appeals noted that in McKusick’s case, his injuries were caused by exposure to a chemical that was released when a high-pressure hose burst and spewed the chemical throughout the manufacturing plant; in contrast, the chemicals in the other cases were placed where they were supposed to be placed and were used as they were intended to be used, even though such use resulted in the migration of fumes within a confined area.

McKusick argued that the pollution exclusion in the Travelers policy shall apply only if the release of pollutants was “widespread,” or if the release resulted in pollution of land, air, or water, or affected

natural resources. The court rejected that argument, because the pollution exclusion in the Travelers policy unambiguously excluded coverage for releases arising out of Hi-Tech's products, with no requirement that the release must be widespread. The Court of Appeals recognized that other courts had ruled that the terms "discharge," "release," and other terms in the pollution exclusion are environmental terms of art, and that the pollution exclusion therefore applies only when the incident results in contamination of traditional environmental media. The Court of Appeals neither agreed nor disagreed with that reasoning, but held that that reasoning does not apply to a release of pollutants resulting from the failure of the insured's product, where the pollution exclusion at issue expressly excludes coverage for releases "arising from" the insured's product.

McKusick v. Travelers Indemnity Co., Mich. Ct. of App. No. 221171 (June, 8, 2001)

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