Michigan Court Of Appeals Construes Pollution Exclusion Narrowly

In a recent unpublished opinion, the Michigan Court of Appeals held that a pollution exclusion in a liability policy that excluded coverage for discharges of pollutants "which are at any time transported . . . as waste by or for the insured," precluded coverage for several municipalities that unknowingly sent PCB contaminated waste oil to an oil recycling plant.

The Village of Nashville and the Townships of Castleton and Maple Grove, located in Eaton County, Michigan, jointly operate a transfer station that receives and sorts waste products before sending them to recycling or disposal facilities. Someone delivered to the transfer station four (4) drums of waste oil that turned out to be PCB-contaminated. The transfer station sent the waste oil to an oil recycling plant, which, in turn, blended the waste oil with approximately 200,000 gallons of other waste oil that the oil recycler had intended to sell to others for use as fuel. When the oil recycler discovered the contamination, it could no longer sell the 200,000 gallons as fuel. It sued the Village and Townships under various environmental statutes, and also for breach of contract, fraud, trespass, and negligence. When the Village and the Townships asked their liability insurance carrier to defend the case, the insurer refused to do so because the liability insurance policy included an "absolute pollution exclusion."

The Village and the Townships successfully defended against the oil recycler's lawsuit, and then sued their insurer to recover their defense costs. The trial court ruled in favor of the Village and the Townships, and awarded them damages of $276,947, plus interest.

The insurer appealed to the Michigan Court of Appeals, arguing that it had no duty to provide a legal defense for the Village and the Townships because the pollution exclusion in the general liability policy excluded coverage for property damage "arising out of the . . . discharge . . . of pollutants which are at any time transported . . . or processed as waste by or for the insured . . . ." The Village and the Townships conceded that some of the legal claims in the oil recycler's complaint were indeed based on environmental laws, and that those claims were barred by the pollution exclusion. However, they argued that the oil recycler's claims for breach of contract, fraud, trespass, and negligence could not be considered "classic environmental claims," and therefore should not be barred by the pollution exclusion.

The Court of Appeals cited its June 8, 2001 decision in *McKusick v Travelers Indemnity Co.* for the proposition that "a pollutant need not cause traditional environmental pollution before triggering a pollution exclusion with regard to the 'discharge, dispersal, seepage, migration, release, or escape of pollutants.'" See, "Court Denies Coverage of Products Liability Claim Based on Pollution Exclusion," 12 *Michigan Environmental Compliance Update* (July 2001). The Court held that the *McKusick* decision required it to hold that a claim based on the contamination of a recycled fuel product by PCBs in waste oil is barred by the pollution exclusion.

The Court did not analyze or explain why the mixing of PCB-contaminated waste oil with other waste oil should be considered "an actual, alleged or threatened discharge, dispersal, release or escape of pollutants." The decision could be questioned on that basis, because all the contaminated fuel involved in this case was contained at all times in storage tanks, and there was never any actual, alleged, or even threatened release of the contaminated fuel into the environment.

The Court appears to have based its decision on the fact that the pollution exclusion involved in the case expressly excluded liability for damage to property owned by others arising from the release of pollutants "which are at any time transported, handled, stored, treated, disposed of or processed as waste by or for the insured . . . ." This particular sub-paragraph of the pollution exclusion appears to apply perfectly to the facts, because the waste oil from the transfer station obviously was "transported . . . as waste by or for the insured." The Court of Appeals concluded that the insurer had no duty to cover the loss, and therefore had no duty to defend the Village and the Townships in the lawsuit by the oil recycler.

The Court of Appeals also held that similar language in the "errors or omissions" extension to the liability policy precluded any coverage under that extension to the policy. Finally, the Court held that the pollution exclusion in the policy was not ambiguous, and therefore the Townships and the Village could not have had any "reasonable expectation of coverage" by the policy for the kind of loss that occurred.

Village of Nashville, Township of Castleton, and Township of Maple Grove v Michigan Township Participating Plan, Michigan Ct. of App., No. 224598 (August 3, 2001).

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