LEGAL UPDATES

PUBLISHED: JUNE 24, 2013

Chinks in the Armor of the Absolute Pollution Exclusion Clause Continue to Develop

Services

Construction & Design

Environmental

Industry

Manufacturing

Professional

MEGAN P. CALDWELL
DENVER:
303.749.7204
MEGAN.CALDWELL@
HUSCHBLACKWELL.COM

On the heels of the recent *Wyatt* decision in Missouri, a federal appeals court has carved out another exception that requires insurers to defend their policy holders against allegations that are not explicitly excluded by the language of the absolute pollution exclusion clause. Specifically, the federal court decided that the absolute pollution exclusion clause does not relieve insurers of their defense obligations for claims premised upon the "distribution" of hazardous or toxic substances.

No Defense Owed for Pollutant Releases

In a pair of related cases, the U.S. Court of Appeals, Eighth Circuit, recently clarified what types of claims trigger absolute pollution exclusion clauses contained in certain comprehensive and commercial general liability insurance policies. Doe Run Resources Corp., a metals mining company and a global lead producer headquartered in Missouri, was faced with three separate lawsuits alleging bodily injury and/or property damage arising out of its operations: the "Nadist" lawsuit, the "Briley" lawsuit, and the "McSpadden" lawsuit.

Lexington Insurance Co. insured Doe Run's operations under commercial general liability policies that covered liability to third parties for bodily injury or property damage. When sued, Doe Run notified Lexington and requested the insurer to defend it against the three underlying suits. Lexington denied it had a duty to defend based upon exclusionary language in the policies, and Doe Run filed two declaratory judgment actions in order to enforce Lexington's duty to defend under the policies.

The district court, applying Missouri law, granted summary judgment to Lexington in both declaratory judgment actions based on a finding that

absolute pollution exclusion clauses contained in the policies – barring coverage for "releases" of pollutants – precluded insurance coverage for the underlying lawsuits. Doe Run appealed the two district court orders to the federal appeals court, which issued decisions on June 13 (*Doe Run Resources Corp. v. Lexington Insurance Co.*, No. 12-3498, 2013 WL 2631161; *Doe Run Resources Corp. v. Lexington Insurance Co.*, No. 12-2215, 2013 WL 2631145).

Two of the underlying lawsuits – Nadist and Briley – were premised on allegations that Doe Run was liable for causing the "release" of hazardous and toxic substances. The court found that these constituted classic claims for damages caused by environmental pollution and, thus, fell squarely within the absolute pollution exclusions' language that barred coverage.

Defense Required for Distribution of Materials

The third lawsuit – McSpadden – was different. Although the complaint also alleged liability based on Doe Run's "release" of hazardous or toxic substances, it also alleged liability based on the company's "distribution" of materials for use throughout the community – *e.g.*, for use as fill on roads and driveways, in building foundations, and in children's sandboxes. The Court of Appeals found that the word "distribute" is not among the verbs that trigger pollution exclusion clauses and that the distribution of a material for use as a product is markedly different than the inadvertent release of a pollutant. Thus, the court found, the McSpadden claims did not fall within the absolute pollution exclusion.

As a result, the court found that Lexington was obligated to defend Doe Run in the McSpadden lawsuit that claimed "distribution" of certain substances but found that Lexington had no duty to defend Doe Run in the Nadist and Briley lawsuits that only claimed the "release" of substances. The Eighth Circuit's finding that the language was ambiguous as far as the term "distribution" in the absolute pollution exclusion clause comports with the ruling in *American National Property & Casualty Co. v. Wyatt*, No. WD 75226, 2013 WL 1197508 (Missouri Court of Appeals, March 26, 2013), which held that the exclusionary language relating to "pollutants" in the same exclusion was ambiguous and that an "ordinary" policyholder could reasonably read the policy in a manner that would not exclude coverage for injuries caused by the accidental accumulation of carbon monoxide (which is not harmful unless, or until, it accumulates to certain levels) within a building or residence (http://www.huschblackwell.com/barriers-to-insurance-coverage-for-personal-injury-claims-lowered-in-illinois-and-missouri).

The takeaway from the *Doe Run* and *Wyatt* decisions is that the absolute pollution exclusion may not always be absolute. The allegations of the complaint and the type of materials at issue control whether or not coverage exists.

What This Means to You

Manufacturers and other businesses regularly face lawsuits for personal injury and property damage arising out of the companies' operations and environmental releases, both recent and historical. An understanding of environmental and insurance law – particularly the law on exclusions such as absolute pollution exclusion clauses – is key to a company's ability to successfully obtain insurance coverage for claims. The recent *Doe Run* and *Wyatt* decisions provide further support for interpreting insurance policies in a way that extends coverage to claims where a hazardous or toxic substance leaves the company's premises in the form of a product that is useful instead of as a waste material. As a result, at least where Missouri law governs the interpretation of the insurance policy, more companies may be able to receive insurance coverage for claims that would otherwise severely deplete the companies' litigation reserves and damage market share.

Contact Information

If you have questions concerning this or other environmental and/or insurance coverage issues, please contact your Husch Blackwell attorney or Megan Caldwell at 314.480.1648.

Husch Blackwell regularly publishes updates on industry trends and new developments in the law for our clients and friends. Please contact us if you would like to receive updates and newsletters or request a printed copy.