February 6, 2008

American Casualty Co. of Reading, PA v Michael Miller

1/29/08

Insurance coverage; bodily injury; pollution exclusion

Miller owned a furniture stripping business which generated waste-waters containing solvents, including methylene chloride. The City of Santa Monica issued an Industrial Wastewater Permit that allowed the discharge of waste-water into the City's sewer. The permit prohibited the discharge of solvents, including methylene chloride, into the sewer.

American Casualty covered Miller with a comprehensive general liability policy which protected Miller and his company from claims for bodily injury caused by an occurrence. The CGL policy contained a pollution exclusion which provided that coverage did not apply to bodily injury arising out of "…the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of pollutants." The policy defined pollutants as "…any solid, liquid, …. irritant or contaminant, including ….acids, alkalis, chemicals, and waste."

On March 26, 2003, a private contractor hired by the City was working on the sewer lines downstream of Miller''s business. Mr. Valenzuela was repairing a 36 inch sewer line when he noticed wastewaters discharging from a drain outlet. The material soaked his clothing and caused him to lose consciousness. He sustained serious bodily injuries. Later that day, City inspectors investigated Miller''s business and discovered organic solvents discharging into the City''s sewer system. Testing confirmed the business' sump pump was tied into the sewer system.

Miller entered a plea agreement with the United States Attorney General''s Office stipulating he was guilty of negligent discharge of pollutants in violation of a permit. No evidence was presented as to how long the methylene chloride waste-waters had escaped into the sewer.

Zurich American Insurance sought reimbursement of worker's compensation benefits from Miller. He tendered defense of Zurich''s action to American Casualty. Miller's carrier denied the claim based on the pollution exclusion and refused to defend or indemnify Miller. Later, Valenzuela sued Miller for his injuries, and American Casualty refused to defend or indemnify that claim as well.

In June 2005, Miller settled the *Valenzuela* action and assigned his rights under the CGL policy to Valenzuela. Valenzuela demanded payment of the one million dollar CGL policy limit from American Casualty. It declined the demand. American Casualty then filed a complaint for declaratory relief against Miller and Valenzuela. Summary judgment was granted in favor of the carrier on the pollution exclusion, finding there was no coverage, and thus, no liability to Valenzuela. Miller appealed.

In an action seeking declaratory relief on the issue of a duty to defend, the insured must prove the existence of a *potential for coverage*, while the insurer must establish the *absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*.

In *MacKinnon v Truck Ins. Exchange* (2003) 31 Cal. 4th 635, the California Supreme Court addressed the meaning and scope of a pollution exclusion clause in a CGL policy. The Court found the pollution exclusion clause was intended to exclude coverage for ***injuries resulting from events commonly thought of as environmental pollution***, not all injuries arising from toxic substances. The word "dispersal" used in conjunction with "pollutant" is commonly used to describe the spreading of pollution widely enought to cause its dissipation and dilution. The term "discharge" is commonly used to describe runoff behaving as a traditional environmental pollutant.

The word "pollution" was also defined by the court. While a reasonable person of ordinary intelligence

might well understand carbon monoxide is a pollutant when it is emitted in an industrial or environmental settling, an ordinary policyholder would not reasonably characterize carbon monoxide emitted from a residential heater which malfunctioned as "pollution." It seems far more reasonable that a policy holder would understand it as being *limited to irritants and contaminants commonly thought of as pollution and not as applying to every possible irritant or contaminant imaginable.* (*MacKinnon*, at p. 652)

The Supreme Court noted that limiting the pollution exclusion clause to events commonly thought of as pollution was consistent with the use of the terms "discharge, dispersal, release or escape." The court stated that "..these terms, used in conjunction with 'pollutant' commonly refer to the sort of conventional environmental pollution at which the pollution exclusion was primarily targeted."

Here the court found methylene chloride is a "pollutant" under the policy definition. Miller pled guilty to negligently discharging pollutants into a public sewer system. Looking at the policy language, the release of methylene chloride into the sewer fits within the pollution exclusion clause because Miller, in his business, discharged, dispersed, released or allowed the escape of a pollutant from premises that were owned or occupied by the insured.

Miller and Valenzuela argued that the sewer was sealed and the methylene chloride was contained, thus resulting in no environmental pollution. The Second DCA stated that this fact was not determinative of whether the chemical release is an event commonly thought of as environmental pollution. The test in *MacKinnon* is not based upon the extent of injury, but upon the type of pollutant and how it is released into the environment. Miller should have known that the chemicals must be properly stored and their release into the environment could cause serious bodily injury.

Valenzuela's injuries arose from an event commonly thought of as environmental pollution. A reasonable insured would expect that the pollution exclusion clause in the CGL policy would exclude coverage for Valenzuela''s injuries. There is no potential for coverage and the trial court ruling on summary judgment for American Casualty is affirmed.

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