

First Circuit Holds Conflicting Policy Provisions Require Coverage for Petroleum Spill

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On December 18, 2020, the U.S. Court of Appeals for the First Circuit held that conflicting provisions in an excess policy required an insurer to cover the costs a transportation company incurred to clean up a fuel spill, despite the excess policy's total pollution exclusion.

Although the holding of *Performance Trans. Inc. v. General Star Indemnity Company*^[1] is relatively narrow, the court's interpretive approach is odd and troubling. In effect, the court treated an exception to a policy exclusion as if it were a grant of coverage, which was not subject to – and could in fact override – the effect of a separate exclusion located elsewhere in the policy.

The coverage dispute in *Performance* involved a tanker truck owned by Performance Trans., Inc. (PTI), which overturned and spilled approximately 4,300 gallons of fuel. PTI incurred clean-up costs in excess of \$3 million, which easily exhausted the \$1 million limits of its underlying primary coverage.

PTI tendered to its excess carrier (General Star) under an excess policy that provided coverage for:

Ultimate net loss in excess of the total of the limits of underlying insurance that is covered by both the controlling underlying policy and this policy.

The excess policy included a total pollution exclusion that provided:

This policy does not apply to any damages for which the insured is legally liable, or loss, costs or expenses arising out of, resulting from, caused by or contributed to by . . .

[t]he actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time . . .

[or any] [r]equest, demand, or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants. . . .

This policy does not apply to damages . . . caused by . . . pollutants regardless of whether the underlying insurance affords coverage for such damages

The District of Massachusetts court found this exclusion unambiguously barred coverage for PTI's claim. The First Circuit, however, disagreed, finding the "total pollution exclusion" was in conflict with another excess policy endorsement, titled "Special Hazards and Fluids Limitation Endorsement," that precluded coverage for certain accidents and spills, but contained an exception for fuel spilled as the result of "the upset or overturn" of a truck.

Specifically, the Special Hazards Endorsement stated:

This policy does not apply to ultimate net loss or costs from any event arising out of, contributed by or relating to any Special Hazard described in this endorsement and resulting from the ownership, maintenance or use of any auto ... [including] Drilling

Fluids Unloading Hazard.

However, this exclusion does not apply to an event arising out of the unloading of drilling fluid from an auto covered by this policy ... if the unloading of drilling fluids resulted directly from ...

[2] upset or overturn of such auto...; or

[4] a short term drilling fluid event, provided that coverage under this item 4 ... will be available to ... property damage, but not damage to real property or to a body of water or to any other natural resource.

PTI argued that the excess policy – in carving out vehicular “upset or overturn” from the exclusionary scope of the Special Hazards Endorsement – guaranteed that the insured would receive coverage in such a scenario, notwithstanding the exclusionary language that might appear elsewhere in the policy.

General Star argued, by contrast, that the Special Hazards Endorsement was exclusionary in nature and that an exception to an exclusion does not create coverage. In any event, General Star argued, even if the exception could (somehow) be viewed as a grant of coverage, any coverage grant should be subject to other applicable exclusions – such as the total pollution exclusion.

The First Circuit found both parties’ interpretations were reasonable and the excess policy was therefore ambiguous. Under Massachusetts law, such ambiguity is generally interpreted in favor of the insured. As a result – in a highly questionable ruling – the First Circuit found that the insured was entitled to coverage, notwithstanding the total pollution exclusion.

Because the First Circuit found that the purpose and effect of the Special Hazards Endorsement were ambiguous and rested its decision on that ground, it declined to address the lower court’s finding that Massachusetts has a *per se* rule against finding an affirmative coverage obligation in an exception to an exclusion when another provision unambiguously bars coverage.

If you have any questions or need more information, contact Eric B. Hermanson (hermansone@whiteandwilliams.com; 617.748.5226) or Austin D. Moody (moodya@whiteandwilliams.com; 617.748.5206).

[1] No. 20-1022, 2020 U.S. App. LEXIS 39815 (1st Cir. Dec. 18, 2020).

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