Storage Tank Liability Insurance Policy/Petroleum Release: Federal District Court Addresses Notification Issue

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10/20/2021

A United States District Court (D. New Hampshire)("Court") addressed in an October 13th Memorandum and Order ("Order") an issue arising out of a storage tank liability insurance policy. See *TRT Development Company, Inc., et al. v. ACE American Insurance Company*, 2021 WL 4777240.

The question considered was whether the insured's failure to report a petroleum release to the insurance company within the required time period provided a basis for denying coverage.

The Omni Mount Washington Hotel ("Hotel") in Bretton Woods, New Hampshire (TRT Development Company, Inc. and Omni Mount Washington, LLC [collectively "TRT"]), procured a Storage Tank Liability Insurance Policy ("Policy") from the ACE American Insurance Company ("ACE") in 2017. The Policy covered the Hotel's 25,000 gallon aboveground fuel storage tank ("Tank"). Coverage was in effect from December 7, 2017, until December 7, 2018.

Staff at the Hotel are stated to have identified on May 26, 2018:

. . . oil on the side of an embankment in a wooded area near the hotel's boiler house, where the hotel's aboveground fuel storage tank was located.

Hotel staff were stated to have promptly reported the discovery to the Hotel's environmental consultant. The consultant's preliminary investigation determined that contamination was caused by a release of fuel oil in the Tank located in the Hotel's boiler house. Same day notification of the release was given to various governmental authorities. Further, a regional emergency cleanup contractor was retained to immediately commence cleanup and remediation.

On June 20, 2018, TRT notified ACE of the storage tank incident. The Policy was written on a claims-made basis. Nevertheless, both the insured and the insurance company agreed that this notification was within the policy period. Further ACE denied coverage for remediation costs because of TRT's failure to notify ACE within seven days of discovering the incident. The Policy contained language which stated:

The insured must see to it that the insurer receives written notice of any claim or storage tank incident, as soon as possible, but in no event more than seven (7) days after a responsible insured first became aware of, or should have been aware of, such claim or storage tank incident.

The Court notes that the parties agree that the storage tank incident was otherwise eligible for coverage under the Policy. Further, the parties are stated to have agreed that ACE was not prejudiced by TRT's two-week delay in reporting the incident.

The Court stated that the question to be considered was whether New Hampshire law requires an insurer to show prejudice resulting from late notice in order to deny coverage in the previously described circumstances. It noted that the New Hampshire Supreme Court had not squarely addressed this issue. However, it determined that what it described as "closely analogous cases and persuasive authorities from other jurisdictions" persuaded it to apply what is denominated the "notice-prejudice" rule.

In analyzing the issue, the Court first distinguishes an occurrence insurance policy from one that is written on a claims-made basis. Occurrence policies provide coverage for claims:

. . . based on an event occurring during the policy period, regardless of whether the claim or occurrence itself is brought to the attention of the insured or made known to the insurer during the policy period.

The noted purpose of requiring prompt notice of the claim with such policies is characterized as affording:

. . . the insurer an adequate opportunity to investigate, to prevent fraud and imposition upon it, and to form an intelligent estimate of its rights and liabilities before it is obliged to pay.

Contrasted is a claims-made policy in which the insured event is stated to include a combination of two requirements:

1. the claim must be made against the insured by a third party, or a covered loss must be discovered by the insured, during the policy period; and
2. the claim or loss must be reported to the insurer during that same policy period.

Further, the incident that gives rise to a claim:

- can occur before the start of the policy period
- the trigger for coverage is the discovery and reporting of a claim within that period

Consequently, the Court states that the notice to the insurer within the policy period "is of the essence in determining whether coverage exists" under a claims-made policy.

Cited in the Order is the observation that claims-made policies are typically less expensive than occurrence policies because the insurer may "close its books" on a policy at its expiration. As a result, the insurer can attain a level of predictability that may be unattainable under standard occurrence policies.

The Court references Decisions by the New Hampshire Supreme Court and notes that in the case of an occurrence policy it has been held that prejudice must be shown to deny coverage in the case of the untimely notice of a claim. In contrast, a showing of prejudice is not required to deny coverage under a claims-made policy. However, the Court determines that despite the fact that the ACE Policy is written on a claims-made basis, the facts in this instance are distinguishable from the cited New Hampshire Supreme Court case. It is distinguished by the fact that while the Tank incident was not reported within the seven days, notice was provided during the policy period. As a result, the Court opines that:

. . . requiring a showing of prejudice would defeat the purpose of a claims-made policy by allowing claims reported outside of the policy period – does not exist here.

In other words, ACE was deemed to have not yet "closed the books" on the Policy because it was still in effect when reported to the insurance company. As a result, the Court held that excusing late notice would not rewrite a fundamental term of the insurance contract and expand coverage.

Decisions in other jurisdictions are cited in support of this conclusion.

The Court determines that the New Hampshire Supreme Court would hold in accordance with Decisions from other jurisdictions that the notice-prejudice rule applies when an insured reports a claim under a

claims-made policy during the policy period but fails to provide notice within the time period specified in a notice-of-claim provision. TRT reported the Tank incident during the policy period. Therefore, ACE was deemed not prejudiced by the two-week reporting delay and ACE was held unable to deny coverage.

A copy of the Opinion can be downloaded here.