Total Pollution Exclusion/Crude Oil Leak: Federal Appellate Court Addresses Insurance Coverage Question



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") addressed in an October 26th Opinion a company's Commercial General Liability ("CGL") policy Total Pollution Exclusion ("TPE"). See *Central Crude, Inc. v. Liberty Mutual Insurance Company, et al.*, No. 21-30707.

The issue involved whether a crude oil leak of unknown origin is encompassed by the TPE.

Central Crude, Inc. ("CCI") discovered in 2007 a crude oil leak on its property and a neighboring tract of land owned by Chevron in Paradis, Louisiana. CCI reported the leak to the Louisiana Department of Environmental Quality and retained an environmental contractor ("EC") to undertake remediation. Approximately $1 million was paid to the EC to perform remediation.

The remediation efforts are apparently still ongoing at the time of the issuance of the Opinion. Further, the source of the leak is stated to be undetermined. In other words, there has been no determination as to whether the spill occurred from CCI's pipelines or a Chevron well. An additional possible source was stated to be oil seeping from the ground.

CCI has coverage from Liberty Mutual Insurance Company ("Liberty") under its CGL policy. The policy contains a TPE endorsement which limits coverage as follows:

This insurance does not apply to: . . .

f. Pollution

(1) "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement 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"; or

. . . .

Costs incurred by CCI included the previously referenced remediation expenses and a lawsuit filed by Columbia Gulf Transmission Company alleging that the crude oil threatened its natural gas pipeline.

CCI filed a lawsuit which was removed to federal district court (Western District of Louisiana) seeking:

1. Coverage for past and future expenses that occurred in cleaning up the spill
2. Coverage for defense costs in connection with the Columbia Gulf Transmission lawsuit
3. Damages, penalties, and attorneys' fees for Liberty's alleged bad faith denial of coverage

The federal district court determined that the TPE barred coverage for CCI's claims and granted summary judgment in favor of Liberty Mutual.

The Fifth Circuit in addressing CCI's appeal of the coverage issue referenced Louisiana law which provides that an insurance policy is a contract:

. . . between the parties and is construed under the same general rules for interpreting contracts.

These include:

- The party's intent, as reflected by words of the policy, determines coverage
- A policy that is clear and expresses the intent of the parties must be enforced as written
- An insurance policy should not be interpreted to achieve an absurd result
- Because the purpose of liability insurance is to afford protection from damage claims, policies should be construed to effect, and not to deny coverage
- An insurer has the right to limit coverage in any manner it desires, unless the limitations conflict with law/public policy
- CCI, as the party seeking coverage, has the burden of proving the event falls within the policy terms
- Liberty has the burden of proving applicability of the TPE

The Fifth Circuit cites *Doerr v. Mobil Oil Corp*, 774 So. 2d 119, 124 (La. 2000) as the key Louisiana case interpreting the TPE. This decision provided an extensive discussion regarding the text, history, and purpose of the TPE. The decision is stated to have made clear that courts should:

. . . construe a pollution exclusion in light of its general purpose, which is to exclude coverage for environmental pollution, and under such interpretation, the clause will not be applied to all contact with substances that may be classified as pollutants.

The *Doerr* identified three factors to be considered:

1. Whether the insured is a "polluter" within the meaning of the exclusion;
2. Whether the injury-causing substance is a "pollutant" within the meaning of the exclusion; and
3. Whether there was a "discharge, dispersal, seepage, migration, release or escape" of a pollutant by the insured within the meaning of the policy.

The Fifth Circuit in applying the *Doerr* factors to CCI's claims states that:

1. CCI is a pipeline company transporting large volumes of oil that present a risk of pollution and therefore is a polluter within the meaning of the TPE
2. Crude oil is a pollutant
3. A dispersal of release of crude oil occurred that impacted four or five acres of property resulting in the removal of more than 25,000 gallons of liquid

The Fifth Circuit rejects CCI's argument that the TPE is only applicable if the insured is found responsible for the release or discharge of the pollutant. It cites *Doerr* language instructing courts to look at the actions of the alleged polluter. CCI was deemed to clearly be an alleged polluter.

The Fifth Circuit holds that the TPE unambiguously excludes coverage for CCI's costs related to cleanup or removal of crude oil as well for any property damage which would not have occurred in whole or part but for the release or escape of the crude oil. Further, it holds that Liberty does not owe CCI a duty to defend.

A copy of the Opinion can be downloaded here.