

A Sterling (Alaska) Result: The Alaska Supreme Court Denies Coverage for Leaked Gasoline under the Absolute Pollution Exclusion

Breaking Developments In London Market Law 06/16/08

On 13 June 2008, the Alaska Supreme Court issued its opinion in *Whittier Properties Inc. v. Alaska National Insurance Company*, concerning the interpretation of the “absolute pollution exclusion.” The Court held that leaked gasoline was unambiguously a pollutant, rejected the insured’s arguments for coverage under the “personal and advertising liability” section, and held that an insured cannot create coverage for an excluded risk by agreeing to indemnify a third party for the same. This case was successfully defended by a team of attorneys from Lane Powell’s Anchorage, Alaska office, including Brewster Jamieson, Andrea Girolamo-Welp, Brad Ambarian and Ben Roesch.

The Facts

Whittier Properties, Inc. (“Whittier”) owned and operated a gas station near [Sterling, Alaska](#). Alaska National Insurance Company (“ANIC”) issued five annual CGL policies to Whittier from 1996 through 2001. In late 2001, environmental specialists discovered nearly one foot (30 cm) of free gasoline floating on the groundwater. Subsequent investigation revealed that the vertical fill pipe for one of Whittier’s underground storage tanks (“USTs”) was broken and that some 50,800 gallons of gasoline had escaped between 1997 and 2000. Whittier’s neighbors brought suit for damage to their property.

When ANIC denied coverage and refused to defend these suits, Whittier sued for breach of contract, bad faith and a declaration of coverage. The trial court granted summary judgment to ANIC, and Whittier appealed to the Alaska Supreme Court.

The Court's Holding

The Alaska Supreme Court held that gasoline, once it escaped from its storage tank and began migrating through the environment, was a “pollutant,” as defined by the Policies. Whittier argued that gasoline was its “product,” and therefore not a pollutant, but the Court held that, “when gasoline escapes or reaches a location where it is no longer a useful product it is fairly considered a pollutant.” The Court thus held that Whittier’s proposed interpretation of “pollutant” was unreasonable. The Court also rejected Whittier’s argument that notations of the UST in ANIC’s underwriting and claims files created ambiguity in the policy language, and

noted that Whittier stated on an application for specific pollution insurance that it did not have pollution coverage for its leaky USTs.

The Court next rejected Whittier's multi-step argument that coverage existed because: (1) Whittier had agreed to indemnify the contractor who installed the leaky UST; (2) the leaked gasoline was the result of the contractor's "completed operations;" and (3) the absolute pollution exclusion did not apply to the "products-completed operations" hazard. The Court held that the absolute pollution exclusion applies to completed operations, and "in any event, an insured cannot create coverage under a policy containing a pollution exclusion by agreeing to indemnify a third party for the same risk."

Finally, the Court held there was no coverage for the leaked gasoline under Coverage B -- "personal and advertising injury." Whittier argued that the phrase "wrongful entry into ... premises that a person occupies by or on behalf of its owner, landlord or lessor" encompassed its neighbors' claims that the migrating pollution "trespassed" upon their property. The Court held that this provision applies only to landlord-tenant situations and declined to find coverage because, "accepting Whittier's interpretation of Coverage B would render the pollution exclusion in Coverage A meaningless."

What This Means for London Market Insurers

The Alaska Supreme Court's holding puts it among the majority of states holding coverage for claims arising from spilled gasoline and other petroleum products are barred by the absolute pollution exclusion. Given Alaska's history as the site of problematic oil spills – from the 1989 Exxon Valdez disaster to more recent pipeline spills in the oil fields of the state's North Slope – the *Whittier* Court's holding recognizes insurers' ability to protect themselves from unexpected pollution liability.

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