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IN THIS MONTH'S EDITION

UNITED STATES CIRCUIT COURT DECISIONS

Eleventh Circuit Denies Coverage for Drywall Claims Based on Pollution Exclusions

Granite State Ins. Co. v. American Building Materials, Inc.
(11th Cir., January 3, 2013)

An policyholder alleged that American Building, supplied it with defective gypsum drywall manufactured in China for installation in residential homes in Florida. The drywall was emitting unusual amounts of sulfide gases.

The Court of Appeals held that the damages associated with the drywall fell within the scope of the pollution exclusions. However, the court declined to decide a choice-of-law dispute because damages would be excluded under either Massachusetts or Florida law. Under Florida law, nearly identical pollution exclusions had been found to apply to claims arising from the release of sulfide and other noxious gases from defective drywall relying on the Florida Supreme Court decision in *State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135 (Fla. 1998) (holding language of the pollution exclusions included damage from Chinese Drywall as sulfide gas released constituted a gaseous irritant or contaminant).

Massachusetts law excludes coverage for injuries resulting from everyday activities gone slightly awry. This approach does not limit pollution exclusions to the improper handling of hazardous waste, or other pollution occurring in an industrial setting. It limits exclusions to harm caused by the kind of release that an ordinary policyholder would understand as pollution.

Gas released by the drywall is the kind of release that a reasonable policyholder would understand as pollution, it anticpated that, Massachusetts state courts would find the defect more analogous to an oil spill than an unusually harmful emission of carbon monoxide from an appliance. The court held coverage was excluded by the pollution exclusion under either Florida or Massachusetts law.

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Federal Circuit Reverses Federal Claims Court's Denial Of Insurer's Action Under National Defense Authorization Act for Environmental Clean-up Claims

Indian Harbor Ins. Co. v. United States (Fed. Cir., January 11, 2013)

An insurer sued the United States in U.S. Court of Federal Claims seeking reimbursement for environmental clean-up costs under §330 of the National Defense Authorization Act of 1993 (NDAA) for amounts paid to develop a military base after the base was closed.

The U.S. Department of Defense closed the Marine Corps Air Station in Tustin, California, and transferred the base to the City of Tustin, who, in turn, hired a developer. The developer discovered petroleum hydrocarbon contamination in the soil and was ordered by the California Regional Water Quality Control Board (RWQCB) and the California Environmental Protection Agency Department of Toxic Substances Control to clean up the site. The developer complied with the RWQCB's order and submitted a claim for costs it incurred to its insurer, and the developer's insurance company paid the claim and filed a claim against the U.S. Navy. The Navy denied the claim and the insurer filed suit.

The Court of Appeals found that the Court of Federal Claims erred when it dismissed the insurer's complaint. The deed the government gave the city included specific recognition of the government's indemnification duties under NDAA §330, and directions the developer received from state regulators constituted a "claim for personal injury." Based on the foregoing, the Court of Appeals reversed the Court of Federal Claims decision dismissing the insurer's complaint and remanded the case.

First Circuit Affirms Time on the Risk Allocation for Determining Environmental Claims in the Absence of Facts Supporting a Pro-Rata Assessment

Boston Gas Co. v. Century Indemnity Co. (1st Cir., January 18, 2013)

The district court declared Century had to pay future costs associated with the cleanup at the Everett site. The issue on appeal involved the proper method under Massachusetts law for allocating liability for long-term environmental contamination where the CGL insurer provided coverage for only a portion of the time during which the contamination occurred.

The Supreme Judicial Court rejected an "all sums" approach in favor of pro rata allocation, pursuant to which each insurer is obligated to pay only those costs associated with damage occurring during its policy period. The court stated in the event that the evidence does not permit such an allocation, losses should be allocated based on the insurer's "time on the risk." It would defer to trial judges in the first instance to determine whether losses can be allocated based on the amount of property damage that in fact occurred during each policy period, or must instead be allocated on the basis of each insurer's time on the risk.

Century argued that Boston Gas represented at trial that property damage occurred continuously from the beginning of plant operations until the date of remediation. It requested an allocation of damages evenly from 1886 through 2007 based on the time-on-the-risk method announced by the Supreme Judicial Court.

Boston Gas argued that the jury verdict already reflected a fact-based allocation and that judgment should be entered that all covered damages at the site occurred during Century's policy periods.

The circuit court held that the district court properly vacated the jury's verdict. The time on the risk method was the most appropriate means of allocation. The court agreed that judicial estoppel applied since the policyholder advanced and prevailed at trial on a theory of continuous contamination. The entry of judgment allocating damages evenly across the 121-year span from the time of plant operations to trial was affirmed. A new trial was ordered on the limited issue of which of the costs were subject to the owned property.

Fourth Circuit Affirms Judgment Of Single Occurrence Under Policy For Multiple Environmental Claims

Mitsui Sumitomo Ins. Co. of Am. v. Automatic Elevator Co. (4th Cir., February 11, 2013)

The defendant performed two elevator repair projects over two sequential insurance policies. The defendant improperly labeled and stored used hydraulic fuel in plastic barrels labeled with the name of a common cleaning agent used by the policyholder hospital in cleaning surgical instruments. The hospital mistakenly used the hydraulic fluid to clean surgical instruments leading to a 127 patients asserting claims against the hospital and related defendants which were settled for over $6 million. The hospital then sued the contractor and its insurer brought this action seeking a declaratory judgment that it owed no further obligation to its policyholder contractor.

The two policies in question each included a $1 million per occurrence limit and a $3 million aggregate limit. The insurer argued that the hydraulic fluid mistake constituted only one occurrence which resulted in bodily injury during the latter of the two policies and made available $1 million for the settlement of the claims. The court agreed and found that because only one elevator was serviced during the second policy period in which bodily injuries were claimed, coverage under that policy was all that was available. The hospital argued that the elevator company's negligence lead to over 100 surgeries constituting multiple occurrences.

The court found that under North Carolina law, the "cause approach" dictated only a single occurrence of negligence for the purposes of the policy's liability limits. The court noted that the only action that the policyholder took in the case was placing the barrels of hydraulic fluid in its designated storage area at the hospital. Under the proximate cause theory that event constituted one occurrence when there was but one proximate, uninterrupted, and continuing cause that resulted in all of the injuries and damages. Under this test, the number of occurrences is determined by the cause of causes of the resulting injury.

Fifth Circuit Reverses District Court and Holds BP Was Entitled to Additional Policyholder Coverage Under Insurer's Policy for Environmental Claims

In Re: Deep Water Horizon; Ranger Ins. Ltd. v. TransOcean Offshore Deepwater Drilling, Inc. et al.
(5th Cir., March 1, 2013)

The excess insurers and Ranger each filed declaratory actions against BP seeking a declaration that the insurers have no additional policyholder obligation to BP with respect to pollution claims against BP. All parties conceded that the drilling contract is an "policyholder contract" and that BP qualified as an additional policyholder. At issue was the scope of BP's insurance coverage under the subject policies as an additional policyholder. BP argued that the insurance policies alone, and not the indemnities detailed in the drilling contract, governed the scope of BP's coverage rights as an additional policyholder. The district court ruled in favor of the insurers and BP appealed.

The insurers argued that that the additional policyholder provision in the drilling contract specifically limits BP's status as an additional policyholder to circumstances involving those liabilities Transocean specifically assumed under the contract. The circuit court dismissed this argument, noting that Texas law "makes clear … that only the umbrella policy itself may establish limits upon the extent to which an additional policyholder is covered in situations such as the one now before us." The court ruled that Texas law establishes that "where an additional policyholder provision is separate from and additional to an indemnity provision, the scope of the insurance requirement is not limited by the indemnity claims." Where the umbrella policies between the insurers and Transocean did not impose any relevant limitation upon the extent to which BP is an additional policyholder, and because the additional policyholder provision in the drilling contract was separate from and additional to the indemnity provisions therein, BP was entitled to coverage under each of Transocean's policies as an additional policyholder, as a matter of law.

Ninth Circuit Denies Insurer's CERCLA Subrogation Claims

Chubb Custom Ins. Co. v. Space Systems/ Loral, Inc.
(9th Cir., March 15, 2013)

Chubb issued an environmental insurance policy to its policyholder, Taube-Koret, covering remediation costs related to the former pollution releases at the property. Chubb paid its policyholder $2.4 million as reimbursement of the cleanup costs.

Chubb filed suit against the defendants and PRPs seeking to bring subrogated claims under both sections 107(a) and 112(c) of CERLCA. Specifically, Chubb alleged a section 107(a) claim as the equitable and contractual subrogee of Taube-Koret. Chubb also brought a claim for statutory subrogation under section 112(c). The district court dismissed Chubb's section 107(a) claim for lack of standing because it determined that an insurance payment is not included within the meaning of "costs of response" as required under the statute, and because permitting a subrogation action under that provision would render section 112(c) a nullity. The district court further dismissed Chubb's section 112(c) claim because Chubb did not allege that Taube-Koret was a "claimant" pursuant to 42 U.S.C. § 9612(c)(2). Chubb appealed, arguing that it may bring a section 107(a) claim in subrogation and that the policyholder need not be a claimant, as defined by CERCLA, for the insurer to bring a subrogated action under section 112(c).

Upon analyzing statutory language and extensive case precedent, the appellate court held the district court properly dismissed the insurer's § 112(c) claim because the insurer failed to allege that its policyholder made a written demand for payment for its response costs from potentially liable parties or the Superfund. Specifically, the appeals court found that a "claimant" under that section is an entity that demands compensation for damages or costs from the Superfund or a liable party resulting from a CERLCA violation, which here, claimant did not assert. Rather, "Chubb only alleges that Taube-Koret has made an insurance claim to Chubb. There is no indication that section 112(c) contemplates this meaning of claimant."

As to the impact of this holding, the appellate court stated, "[o]ur decision here does not mean that insurers cannot bring subrogation claims in environmental matters. On the contrary, insurers' subrogation rights remain intact under CERCLA section 112(c) and relevant state law provisions." The court further noted that the right to subrogation under CERLCA section 112(c), however, is not an unbridled right and it may be circumscribed by Congress through certain requirements, including the assertion of a claim by the subrogor-policyholder. Thus, after reviewing the statutory language, remedial scheme, and purpose of CERCLA, the court held that an policyholder must first make a claim to either the Superfund or a potentially liable party before an insurer can bring a subrogation action under section 112(c).

The court also held that the insurer lacked standing to sue under § 107(a) because

it had not itself become statutorily liable for response costs under CERCLA. Specifically, the court held that section 107(a) of CERCLA does not authorize an insurer to assert a subrogation claim under that provision to recover insurance payments when it did not directly incur environmental response costs. The plain statutory language of section 107(a) and its interaction with section 112(c), which directly speaks to the issue of subrogation, indicated that Congress did not contemplate equitable subrogation under section 107(a). The court noted that permitting subrogation suits through an expansive reading of section 107(a) and 112(c) would thwart, not promote, CERCLA's purpose and the interests of public, stating:

> CERCLA was not enacted to benefit insurance companies; rather, it was enacted to promote the timely cleanup of contaminated waste sites, impose liability on those responsible for polluting the environment, and to encourage settlement through a complex statutory scheme. An expansive application of subrogation to sections 107(a) and 112(c) is inconsonant with those overall goals.

Eleventh Circuit Sides With Insurer in Denying Coverage to Developer for Resident's Environmental Claims

Mt. Hawley Ins. Co. v. Dania Dist. Centre Ltd et al.
(11th Cir., March 20, 2013)

This environmental coverage action arises from residents' underlying claims of negligence, nuisance, trespass, and violations the Florida Pollutant Discharge Prevention and Control Action stemming from the discharge and release of contaminants associated with the development of parcel as a result of illicit dumping. The policyholders bought a piece of property long known to have contamination for the purposes of development. Neighboring residents, however, sued defendant developers for dispersing contaminants onto their property. The insurer sought a declaratory judgment that it had no duty to defend the developers under its pollution exclusion and continuous or progressive injury and damage exclusion clauses. The district court granted the insurer summary judgment and the developers appealed.

The residents' lawsuit claimed bodily injury and property damage, resulting from the alleged discharge of pollutants from property that was both (1) owned by the policyholders and (2) once used for waste disposal. Because these claims fell squarely within subsections (a) and (b) of the pollution exclusion clause, the alleged injuries were not covered under the policy.

In reviewing the district court's decision de novo, the appeals court noted that the pollution exclusion was unambiguous. The court rejected the argument that the insurer had a duty to defend the policyholder based on allegations about sewage odors, excessive noise, and dust. The complaint failed to allege that the residents were injured as a result of the odors or noise — only that the residents were injured as a result of the pollutants. Because the residents' alleged injuries stemmed from contaminated dust, coverage for those injuries is also excluded by the pollution exclusion.

The residents argued on appeal that the contaminated soil at the site was completely replaced by clean soil by the end of 2001 and this was a superseding event that broke the continuous injury. The complaint alleged that the policyholders were aware of the presence of toxic and hazardous substances on the property prior to the policy coming into effect and that residents suffered personal injuries from being "exposed, over a period of years . . . to elevated levels of hazardous toxic chemicals and materials." The court noted that the complaint failed to allege injuries that fell outside of the continuous or progressive injury and damage exclusion clauses barred coverage for the claims.

The circuit court concluded that both the pollution exclusion and the continuous or progressive injury and damage exclusion clauses barred coverage for the claims.

Insurer Obligated to Defend Groundwater Contamination Suit

Olin Corp. v. Century Indemnity Co.
(2nd Cir., June 18, 2013)

This action arises from alleged careless disposal of potassium perchlorate resulting in the contamination of a community's drinking water supply. The insurer argued that it had no duty to reimburse Olin's costs in defending the lawsuits because the homes at issue were constructed after the policies expired. The complaints did not specify when injury to individual homes or wells occurred, but they did allege ongoing contamination of the groundwater plume beginning in 1956. Olin's policies were in effect from 1956 to 1970, during the alleged period of ongoing contamination.

The court held that the allegations in the complaints were sufficient to establish a reasonable possibility of coverage, and therefore, that the district court did not err in determining that defendant had a duty to defend based solely on the face of the complaints. Further, the court affirmed the district court's holding that the insurer was responsible for 100 percent of the defense costs because there was no reasonable means of prorating the costs between covered and non-covered items.

Pollution Policy's Late Notice Requirement In Buy-Back Provision Upheld Regardless of Prejudice

Starr Indemnity & Liability Co. v. SGS Petroleum Service Corp.
(5th Cir., June 18, 2013)

This environmental coverage action arises from a dispute as to the notice provision involving a pollution occurrence and whether the policyholder was required to show prejudice before denying coverage as required by a pollution buy-back provision in the policy.

Starr's excess coverage policy contained an absolute pollution exclusion clause. The parties negotiated a buy-back provision which deleted the original pollution exclusion and replaced it with a new provision providing coverage under certain specific conditions. One was that any discharge or escape of pollutants must have been reported within 30 days after having been known to the policyholder. The policyholder did not report the triggering incident to the insurer until 59 days after it learned of the chemical release. The court found that the insurer was justified in denying coverage under the specific terms of the buy-back provision which the parties had negotiated to replace the original pollution exclusion. The court noted that the notice requirement in the supplemental pollution endorsement was essential to the bargained-for coverage.

Denial Of Coverage Affirmed Due to Late Notice

In Re Setton Towing v. St. Paul Surplus Lines Ins. Co.
(5th Cir., June 18, 2013)

A vessel owned by the policyholder struck an oil well. The policyholder notified its insurers 37 days after the event. The insurers brought an action, seeking a declaratory judgment that they were not liable for the losses arising out of the incident. The district court held that the insurers were not liable on two of the policies because the policyholder did not comply with the 30-day notice requirements under a pollution buy-back endorsement. The trial court further held that an insurer was liable on one policy because it delayed delivery of the policy to the policyholder.

On appeal, the court affirmed the lower court holding finding that because the policyholder did not comply with the 30-day notice provision, which was a condition precedent to recovery, the insurers were not liable under two of the policies. However, due to the delayed delivery of the policy in violation of La. Rev. Stat. Ann. § 22:873(A) (2012), the insurer was prevented from relying on the exclusions in the remaining policy, whether or not the delay caused prejudice to the policyholder. The court also held that the insurer was liable for prejudgment interest from the date the policyholder paid third parties for the damage caused by the accident because that was when the insurer's obligation arose.

Transfer of PCB-Laden Oil From Tanker to Holding Tank Does Not Trigger a "Pollution Condition" Under the Policy

Colonial Oil Industries, Inc. v. Indian Harbor Ins. Co.
(2nd Cir., June 25, 2013)

Colonial is involved in the transportation, storage, and sale of fuel oil. Colonial received a large delivery of oil from a third-party distributor that unknowingly contained polychlorinated biphenyl (PCB's) and was unloaded into one of Colonial's aboveground storage tanks. A portion of the contaminated fuel oil from Colonial's tanks was delivered to one of Colonial's customers, resulting in harm to both Colonial and its customer.

Colonial sought coverage for these costs from its insurer under its "Pollution and Remediation Legal Liability Policy." The phrase "pollution condition" was defined as "the discharge, dispersal, release, seepage, migration, or escape of [p]ollutants into or upon land, structure, the atmosphere, or any watercourse or body of water."

The argument turned on whether oil which is transferred from a tanker truck into another containment vessel is "discharged" as that term is used in the policy even if no spill, leak, or other accidental release occurs. The Second Circuit held that under New York law, "'discharge' and 'dispersal' are terms of art in environmental law used with reference to damage or injury caused by disposal or containment of hazardous waste." The places for discharge contemplated by the policy exclusion (i.e., into or upon land, the atmosphere, or any water course) support the conclusion that the clause was meant to deal with broadly dispersed environmental pollution. The court noted these cases make clear that the reasonable expectations of a businessperson viewing the policy language would be that it is intended to provide coverage for environmental harm resulting from the disposal or containment of hazardous waste. However, this case merely involved the unwitting introduction and transfer of polluted oil into containers intended to hold oil and the events did not lead to a "pollution condition" as defined in the policy.

UNITED STATES DISTRICT COURT DECISIONS

Oregon District Court Determines Insurer Had No Further Defense Obligations After Exhausting Six Policies for Environmental Clean-up Claims

Siltronic Corp. v. Employers Ins. Co. Of Wausau
(U.S.D.C., Oregon, February 4, 2013)

At issue in this case was whether the insurer prematurely paid its indemnity obligation to avoid future defense costs.

In September 2009, Siltronic entered into an Administrative Settlement Agreement with respect to an area known as GASCO within the Portland Harbor Superfund Site. This agreement required that Siltronic perform "a response action" related to a GASCO site which was contaminated with various organic chemicals.

Siltronic purchased six consecutive CGC policies from Wausau for the years 1980–1986, with $1 million in liability limits each. The provision at issue is the same in each of the Wausau policies and provided that "the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements."

Wausau declared exhaustion and refused to pay any additional defense costs. Although it provided no accounting, Wausau contended that between 2003 and 2009, it not only paid the full $6 million in indemnity costs, but also paid $7,699,837.00 in defense costs.

Granite State, Siltronic's umbrella liability insurance provider, accepted Siltronic's tender for coverage subject to an express reservation of its right to contest Wausau's exhaustion claim. Siltronic sought a declaration that Wausau has a continuing duty to defend Siltronic in connection with its cleanup responsibilities. Wausau argued that by making $6 million in indemnity payments on behalf of Siltronic between 2003 and 2009, the liability limits of the six policies are exhausted, thus terminating any duty to defend.

The court held that the insurer had exhausted its indemnity liability by payment of "judgments and settlements" such that it had no continuing duty to defend. Nothing supported a conclusion that Wausau tendered the full amount of the indemnity liability in an attempt to avoid having to pay defense costs.

Arsenic Contamination Covered by Exception to Pollution Exclusion

Assoc. Of Apartment Owners Of Imperial Plaza v. Fireman's Fund Ins. Co.
(U.S.D.C. Hawaii, April 9, 2013)

A three-story warehouse in Honolulu, Hawaii, had a roof consisting of cement slab and insulation layer. The roof consisted of a thick layer of insulation on top of the cement slab the contained cork, a layer of canec, and another layer of cork. Canec is a fiberboard made out of sugar cane bagasse and treated with inorganic arsenic compounds as an anti-termite agent.

During construction of a fourth floor, the policyholder discovered arsenic in the concrete slab poured over the insulation layer. Moisture had infiltrated and carried the arsenic into the cement topping slab over the insulation layer, therein posing a health risk to building occupants that required abatement.

The plaintiff contended that the moisture came from either a broken water line or waste line, or a large air handler located beneath the slab. The insurer argued that the moisture came from either leakage in the roof assembly prior to construction of the upper floor or exposure at the roof perimeter.

The insurer denied coverage, asserting the policy's pollution exclusion applied and argued the water infiltration itself was caused by gradual deterioration, latent defect, mold, wet rot, faulty, inadequate, or defective design specification or construction. The insurer also argued there would be no coverage because arsenic is a pollutant and there is anti-concurrent causation clause in the policy with respect to the pollution exclusion.

The court held that even assuming the arsenic is a pollutant, the policyholder still prevails because the arsenic was caused by a covered cause of loss, and therefore, fell within the exception to the pollution exclusion. The insurer failed to address the specific exception contained in the exclusion — i.e., "But if the same is the direct result of a covered cause of loss, we do insure direct physical loss or damage to covered property." The court held that this language contradicted the anti-concurrent clause barring coverage "regardless of 'any other cause or event'" by identifying an policyholder clause that restores coverage.

The court noted that moisture was a separate and independent event from the insurer's identified cause of a design defect. The moisture was a separate agent the caused damage, even though the design defect may have allowed the agent to enter.

Pollution and Health Hazard Exclusions Found to be Inapplicable to Chinese Drywall Claims Where Subject Policy Limited the Application to Outdoor Exposures

American Home Assurance Co. v. Arrow Terminals, Inc.
(U.S.D.C., Middle District of Florida, May 8, 2013)

The underlying claims sought recovery from the policyholder for damages caused by defective drywall used in townhome units causing physical injury and destruction to tangible property with the units, including damages to HVAC units, wiring, and appliances. The complaints alleged property damage from the release of pollutants to the interior of the townhomes.

The insurer brought a coverage action seeking a declaration that there is no coverage. The insurer argued the applicability of the pollution and health hazard exclusions.

The pollution exclusion precluded any claim arising out of the "discharge, dispersal, release or escape of . . . irritants, contaminants or pollutants into or upon land, the atmosphere, or any watercourse or body of water." The policyholder countered the underlying complaints do not allege that the drywall caused property damage from the release of pollutants into the outside environment, i.e., into land, the atmosphere, or any watercourse or body of water. Rather, the underlying complaints alleged property damage only from the drywall confined to the interior of the townhomes and residences.

The court agreed with the policyholder, noting that the insurer relied on cases that are inapplicable under the circumstances, as most of the cases interpreted materially different pollution exclusions, which did not contain the express "into or upon land, the atmosphere, or any watercourse or body of water" language, present in the subject insurance policies. Further, the court

noted that other jurisdictions interpreting this language limit the pollution exclusion to outdoor environmental contamination. Accordingly, the pollution exclusion did not apply to bar coverage as a matter of law.

The health hazard exclusion had no application to the property damage claims. Because of the exclusion made it clear that it had potential application only to claims arising out of the human ingestion of hazardous substances.

Mine Subsidence Claims Denied Due to Late Notice and Actual Prejudice to Insurer

B.S.C. Holding, Inc. v. Lexington Ins. Co. (U.S.D.C., District of Kansas, May 22, 2013)

The policyholder owns and operates the Lyons Salt Mine and Plant. From 2002 to 2010, Lexington issued eight consecutive policies of commercial property insurance. When the policyholder made claims for impending catastrophic property damage to the mine, the insurer denied coverage based on late notice and applicable exclusions.

In October 2004, a mine consultant identified higher than expected closure rates, indicating subsidence of the mine ceiling. Six months later, in April 2005, the consultant again identified abnormally high closure measurements in the same area. The closure rates were nearly 10 times higher than expected and was unrelated to Lyons Salt, who began and intensive investigation.

Thereafter, in 2008, Lyons Salt personnel detected an inflow of water into the mine in the same area where they observed high closure rates. When they discovered the water intrusion, the plaintiffs were not yet certain of its specific cause, duration, or the ultimate damage it may cause. The policyholder retained mining experts and engineers to investigate the problem and to devise a solution. In July 2008, Lyons Salt attempted a method of grouting to stop or control the water inflow, but this measure ultimately failed to stop the water inflow. By August 2009, Lyons Mine were considering additional grouting, bulkhead installation, brine injection, de-watering, and freezing.

In 2009, the plaintiffs were aware this was a significant problem that could result in a total loss of the mine due to catastrophic flooding. In July 2010, after nearly two years of research, the plaintiffs sent a letter and Notice of Loss to Lexington. The Notice of Loss informed Lexington for the first time that a water inflow issue was detected in January 2008, that an imminent catastrophic flooding event was going to occur at the mine, and that BSC had already spent $2,500,000 to investigate and remedy the water inflow problem. On October 22, 2010, Lexington sent the plaintiffs a Reservation of Rights letter, which expressed Lexington's expectation that the plaintiffs minimize the loss, and to prevent further damage.

In holding in favor of the insurer on its notice defense, the court held that the policy language was ambiguous. The terms which trigger notification provisions were listed in a disjunctive posture such that the duty to notify occurred upon "either loss, damage disaster, or casualty."

The insurer suffered actual prejudice by the late notice of the mine damage. In 2010, Lexington learned for the first time that the plaintiffs had observed structural problems since 2004. Two-and-a-half years earlier, the plaintiffs discovered water inflow in the same area where they had observed structural problems, and that this water inflow threatened catastrophic loss of the entire mine. Lexington also learned that the plaintiffs unilaterally engaged consultants and geotechnical experts who had already spent years completing an independent investigation.

UNITED STATES — STATE COURT DECISIONS

Court Rules Policyholder Arguments Against Applicability of Surface Water Interference Exclusion Does Not Hold Water

Grinnell Mut. Reinsurance Co. v. Hubbs (Appellate Court of Illinois, Third District, April 24, 2013)

The plaintiff-insurer brought a declaratory judgment action against landowners who alleged damages to crop land caused by alteration of the flow and level of surface and groundwater following the policyholder's construction of a holding pond on the property.

The insurer maintained that the damage to the cropland was caused by the policyholder's construction of a weir (dam) to create a holding pond on their property. The increased elevation of the groundwater table caused flooding of a 21-acre tract of farmland.

The policyholder maintained there was no proof that the construction of the weir resulted in damage to that adjacent property and the term "drainage" in the exclusion was ambiguous since it could be read so as to apply only to surface drainage and not subsurface drainage. The court dismissed these arguments noting the term "drainage" applies to both surface and subsurface drainage patterns.

The court noted that the applicable exclusion in the instant matter was clear and unambiguous.
The record established that construction of the weir and retention pond interfered with the natural drainage on Mercer's land and resulted in damage to the property.

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