Coverage ABCs

Policy Exclusions May Block Pollution Claims

By Chinye Uwechue-Akpati

Under an occurrence-based commercial general liability policy, policyholders, until relatively recently, had dutifully made their pollution claims under Coverage A, which provides for "bodily injury and property damage liability." The Coverage A choice is logical in light of the nature of pollution and environmental claims, which involve allegations of physical harm to a claimant's body or property.

Coverage B, on the other hand, was created to cover "personal and advertising injury liability." Traditionally, the scope of Coverage B had been limited to claims affecting possessory rights. *Nichols v. Great American Ins. Co.*, 169 Cal.App.3d 766 (1985). However, in recent years policyholders have tried to ignore the personal injury provision's traditional limits in an attempt to by-pass the adverse effects pollution exclusion clauses have on their environmental claims.

Policyholders' attempts at expanding the scope of coverage claims have involved a two-pronged attack. They argue that all pollution exclusion clauses — whether absolute or limited by sudden and accidental provisions — apply solely and exclusively to Coverage A and have no effect on Coverage B, and that the generic and broad language used in the personal injury clause found in Coverage B allows for coverage of claims that are based on inadvertent contamination of third-party property.

The first argument is illustrated in *Pipefitters Welfare Educational Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir. 1992). The second argument is based primarily on the pre-1986 CGL policy wording of the personal injury clause, which provides coverage for "all sums for which the insured shall become legally obligated to pay as damages because of personal injury." Covered personal injury is then defined to include "wrongful entry or eviction or other invasion of the right of private occupancy." Policyholders have argued that the words "other invasion of the right of private occupancy" is broad enough to cover pollution claims, and that the provision is at best ambiguous and therefore ought to be construed in the insured's favor as providing coverage.

In *Pipefitters*, two policies were involved, the Westchester policy and an International Insurance Co. policy. The Westchester policy defined personal injury as including "wrongful entry or eviction or other invasion of the right of private occupancy." The policyholder argued that its pollution claim fell within this provision. The insurer argued that its personal injury provision only covered conduct "undertaken by one claiming an interest in property, and [who also] intended to deprive the injured party of its right to privately occupy that property."

The court agreed with Westchester that the term "eviction" referred to "actions taken by landlords with the intent to deprive tenants of their right to occupy or enjoy leased premises." However, the court stated that the "catch-all phrase 'other invasion of the right to private occupancy' ... has a less precise meaning. ... Nothing in the phrase seems to require that the 'invader' bear any intent to deprive the occupant of possession. Viewed in this light, the term clearly encompasses the tortious conduct alleged in [the underlying] complaint."

As to wrongful entry, the court concluded that unlike eviction, a wrongful entry can be committed "without intending to deprive the occupant of his right of occupancy."

By applying the ejusdem generis rule, the court concluded that the catch-all phrase "other invasion of the right of private occupancy" was not limited to conduct that required an intent to dispossess; therefore, Pipefitters' pollution claim potentially fell within the scope of the Westchester policy under Coverage B.

Following this reasoning, the court then considered Pipefitters' argument that the pollution-exclusion clause contained in the Westchester policy was limited to Coverage A, and therefore did not apply to Coverage B. After examining the clause's plain language, the court concluded that it was limited in its application to Coverage A so that Pipefitters claim under Coverage B was unaffected. Consequently, Westchester had a duty to defend Pipefitters.

By contrast, the International policy contained a pollution exclusion that, unlike the Westchester clause, expressly stated that it denied "coverage for bodily injury, property damage or personal injury arising out of the actual, alleged or threatened discharge ... of pollutants." The court ruled: "[T]he district court correctly concluded that the pollution exclusion clause bars coverage under International's policy for any property damage or personal injury liability Pipefitters might incur as a result of the [underlying] litigation."

California courts have reasoned differently. In *Titan Corp. v. Aetna Casualty*, 22 Cal.App.4th 457 (1994), the CGL policy contained an absolute pollution exclusion. Titan brought a pollution claim under the personal injury clause. The court, after noting that the insurance contract was to be interpreted "as a whole, with each clause lending meaning to the others," stated: The "policy here unambiguously declares it will not pay for either bodily injury or property damage when the cause of such ... is pollution. ... [T]he coverage afforded by the personal injury portion of the policy [is] limited to damages other than the injury to realty which an occupier of land may suffer when his quiet enjoyment of occupancy is disturbed."

The *Titan* court stated the test as being what the insured could objectively reasonably expect, and that there were three alternative grounds for ruling that there was no duty to defend or indemnify under the policy. The court explained: "The term 'other invasion of the right of private occupancy' draws meaning and content from the preceding language: 'wrongful entry or eviction.' Such language connotes disruptions of the ability of a landowner to actually occupy his property, not mere injuries to property. ...[W]e do not believe it is objectively reasonable for an insured to expect 'personal injury' to mean 'property damage,' or to expect contamination of ground water to harm either a 'private' right or an 'occupancy' right, or to expect that a blanket pollution exclusion will never operate."

In *Legarra v. Federated Mutual Ins. Co.*, 35 Cal.App.4th 1472 (1995), the court followed *Titan*. The policy contained an absolute pollution exclusion and a definition of personal injury that encompassed injury resulting from "wrongful entry or eviction or other invasion of the right to private occupancy." The court reasoned that the issue was whether Federated had a duty to defend the Legarras against a pollution claim, and concluded that there was no coverage. "To interpret ground water pollution as a wrongful entry or other invasion of the right to private occupancy would nullify the pollution exclusion since all property damage caused by pollution would simply be recast as per-

Please turn to Page 8

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Exclusions May Block Claims

Continued from Page 7

sonal injury," explained the court.

Union Oil Co. v. International Ins. Co., 37 Cal.App.4th 930 (1995) also followed *Titan*. A gas station lessor brought a lawsuit against its liability insurer to recover cleanup costs incurred in remediating leaks from an underground gasoline tank. International was the excess carrier, and its policy adopted the terms of the underlying policy, which had a sudden and accidental pollution exclusion clause. The personal injury clause was defined as including, inter alia, "violation of personal rights ... wrongful entry." Union Oil argued that its claim was covered under the policy's personal injury provision, to which the exclusion did not apply.

The court concluded that there was no coverage: "In construing insurance policies, courts generally interpret coverage clauses broadly and exclusions narrowly. ... This does not mean, however, that we may strain to find coverage where none was reasonably intended."

One California case holding that there was coverage for a pollution claim under Coverage B is *Martin Marietta Corp. v. Insurance Co. of North America*, 40 Cal.App.4th 1113 (1995). Martin Marietta had both automobile and personal injury coverage, and made a claim under the latter. After noting that several earlier judicial decisions had concluded that the personal injury clause could not reasonably provide coverage for pollution claims when the policy also incorporated a pollution exclusion, the *Marietta* court pointed out that since the policy had no pollution exclusion, the personal injury clause — by incorporating the phrase "other invasion of the right of private occupancy" — was susceptible to more than one interpretation and was therefore ambiguous. The court, by following the rule that ambiguities are construed in favor of the insured, found coverage to exist.

The *Marietta* court's reasoning does not entirely contradict *Titan*. The key is the scope given to the definition of wrongful entry. A conflict in the courts' interpretation of this provision was explicitly recognized in *Marietta*, where the court stated that of the two cases (*Fibreboard Corp. v. Hartford Accident*, 16 Cal.App.4th 492 (1993), and *Titan*), "*Fibreboard* is correct."

In *Fibreboard* the court ruled: "Although wrongful entry can describe a trespass committed for the specific purpose of dispossessing the owner or occupant of land ... it can also describe a more general, 'simple trespass' involving no intent to dispossess." By contrast, as pointed out in *Marietta*: "Titan Corporation seems to depart from California law. First, to the extent that the case, by requiring 'disruption of the ability of a landowner to actually occupy his property,' would find no coverage for trespass or similar claims."

California courts have been quick to use the CGL policy's pollution exclusion to prevent plaintiffs from unilaterally extending coverage for pollution claims by using personal injury provisions. The reasoning has been that an insured, in the face of such a clear and unambiguous pollution exclusion, cannot reasonably have expected to have coverage for environmental claims. Despite this approach, which favors the insurer by applying pollution exclusions to Coverage B, the insurance industry has responded by modifying the personal injury provisions found in CGL policies.

The modifications are twofold. First, the post-1986 CGL policies do not have the words "other invasion of the right of private occupancy." Second, in the 1990's, the scope of the exclusions in Coverage B has been expressly and unambiguously extended by the words "this insurance does not apply to 'personal injury' ... arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time." These more recent CGL policies clearly and expressly prevent an insured from bringing a pollution claim under the personal injury provisions of Coverage B.