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Court Finds that Pollution Exclusion Applies to Smelter Lead Particulate Emissions

Nicole Weinstein – November 27, 2017

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Recently, the Missouri Supreme Court held that lead particulates emitted into the air outside a smelting facility qualify as “pollutants” under a pollution exclusion, and that insurance coverage was not available. [*Doe Run Res. Corp. v. Am. Guar. & Liab. Ins.*](#), No. SC96106 (Mo. Oct. 31, 2017).

The underlying class action involved a lead smelting facility in Peru. Residents in the vicinity of the facility alleged bodily injury from exposure to the facility’s emission of a dust composed of lead, arsenic, cadmium, and sulfur dioxide. The policyholder sought insurance coverage under a commercial general liability policy with periods of coverage spanning 2005 to 2007. The policy included a pollution exclusion for injury stemming from pollution at the insured’s premises, defining “pollutant” to mean “any solid, liquid, gaseous, or thermal irritant or contaminant.”

The court distinguished a Missouri appellate level decision, *Hocker Oil Co. v. Barker-Phillips-Jackson, Inc.*, 997 S.W.2d 510 (Mo. App. 1999), in which gasoline was found not to be a pollutant when spilled by a gasoline company because the contaminant was also the company’s product. Although the policyholder’s product in *Doe Run* was lead, and it faced allegations of exposure to lead contamination, the court reasoned that the lead particulate matter at issue was not the company’s product, but rather a toxic byproduct being released into the environment. Because the materials at issue otherwise met the definition, the court held that they were “pollutants” within the meaning of the policy.

The court, however, left open the question of whether a pollution exclusion might be found ambiguous and therefore inapplicable in other circumstances. Allegations of indoor air contamination or injury stemming from non-particulate lead, for example, might produce a different result. Although pollution exclusion issues are not new to the coverage field, case law continues to develop on a situational basis, and practitioners should consult the law in their jurisdictions.

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