

CLAIMS DENIED

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New York Governor Proposes to Broaden Civil Authority Coverage

By: *Alexander J. Anglim, Esq.*

The terrorist attacks on the World Trade Center and Pentagon on September 11, 2001

were unique and unprecedented; they affected the country in ways few could have imagined only a few days earlier. In addition to the loss of life, the financial consequences of the attacks were severe and far-ranging. The combination of unique facts and devastating financial losses has shone new light on what is and is not covered under commercial first-party property insurance policies.

One notable example of the unique factual issues raised by the disaster was the FAA's decision to ground all domestic air traffic in the wake of the disaster. The air traffic shutdown cost businesses all over the country millions of dollars of revenue. Many of these businesses sought coverage under the civil authority or ingress-egress coverage extensions in their busi-

ness interruption policies, only to realize that these coverages can be surprisingly narrow.

Most civil authority provisions require that the following elements be present in order to trigger coverage: (i) a suspension of the insured's operations, (ii) which results from an order of civil authority that prevents access to the insured's premises and (iii) which order results from physical damage to property (even if it is not the insured's property). The ingress/egress coverage extension is similar in scope, but omits the "civil authority" requirement.

These coverages present some tricky issues for policyholders. For example, where a variety of factors leads an agency to issue an order prohibiting access to a particular area, what is the "cause" of that

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order? Likewise, what does it mean to “prevent” access to a facility — must all access be prohibited, or is it enough that the most expedient, practical, or important means of access is unavailable? There is pending litigation involving both of these questions. Notably, as to

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the first issue, some insurers have taken the position that civil authority coverage does not apply to the FAA’s grounding order. They argue that the FAA grounded air traffic because it feared additional hijackings, not because of the property damage at the World Trade Center and Pentagon. By contrast, policyholders have argued that the fact that the FAA has never before responded to a hijacking by grounding all air traffic establishes that the unique feature of these hijackings — property damage — was in fact the cause the FAA’s order. It is not clear how these cases will be

resolved, as there is little, if any, controlling case law on point.

Moreover, some policies contain wording even narrower than that which is highlighted above. For example, while some policies require that the order be a “result” of property damage, other policies require that it be a “direct result.” Note how much more difficult it might be for a policyholder to establish that the FAA’s order was a *direct* result or property damage, rather than simply having to prove that it was a result of such damage.

In response to the problems caused by the narrow wording of these policies, New York’s Governor Pataki has proposed legislation that would eliminate the “physical damage” requirement in the civil authority coverage extension. This would eliminate the need to determine the cause — direct or otherwise — of the particular order at issue. It will be interesting to see if the industry follows Governor Pataki’s lead and responds by introducing new policy forms for use outside New York.

One key lesson to draw from the 9/11 airport cases is that risk managers and brokers must recognize that policy language is paramount. What may seem like minor differences in language could have enormous impact on the breadth of their coverage. As such, they must

negotiate aggressively to get their insurers to put the broadest possible language in their policies. The insertion of a minor change by an insurer — such as requiring that something be a *direct* result rather than simply a result, can have major impact when a claim arises.

SUPREME COURT DECISIONS MAY LEAVE CLAIMS BY WORKERS WITHOUT INSURANCE COVERAGE

By: Jennifer A. Lopez, Esq.

The New Jersey Supreme Court has recently decided three workers’ compensation cases that addressed the issue of whether intentional wrongdoing by the employer allowed the injured worker directly to sue the employer. Generally, under the New Jersey Workers’ Compensation Act (the “Act”), an employee who suffers a workplace injury is required to apply for workers’ compensation benefits as the exclusive remedy against the employer for that injury. However, the Act *does* permit an employee to pursue alternative or additional remedies when a workplace injury is caused by “intentional” employer misconduct. The new decisions provide a roadmap on how to plead intentional wrongdoing in order to avoid dismissal on summary judgment. This means that employers who are sued will face substantial

transaction costs, along with additional pressure to settle rather than risk a runaway jury. Moreover, the employer may not have any insurance coverage. Since the predicate for these actions is an allegation of intentional wrongdoing, the complaint may not trigger any coverage.

The determination of whether an employee's workplace injury is caused by intentional employer misconduct will be based on "all the facts and circumstances." However, in three recent cases, the Supreme Court of New Jersey set forth the key factors in making the determination.

In *Mull v. Zeta Consumer Products et al.*, 2003 N.J. LEXIS 561 (May 22, 2003), the Court held that the employee's workplace injury was attributable to the employer's alteration of the machine's safety devices and was, therefore, intentionally caused. In that case, an expert's report concluded that the employer had altered the machine in a manner that enhanced productivity, but created substantial risk of employee injury. Further, the employer did not place warnings to inform employees of the alterations. See also *Tomeo v. Thomas Whitesell Construction Company*, 2003 N.J. LEXIS 560 (May 22, 2003) (injuries caused by a snow blower were not intentionally caused because the snow blower is a

consumer product rather than an industrial machine).

In *Crippen v. Central Jersey Concrete Pipe Company*, 2003 N.J. LEXIS 562 (May 22, 2003), the court held that the employee's workplace injury was intentionally caused because it was related to the employer's deception of OSHA inspectors about the actual condition and operation of the machine. In that case, OSHA had ordered the employer to correct several viola-

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tions and in fact "[misled] OSHA into believing that the violations had been corrected." The expert in the case concluded that the employer's failure to correct the violations in a timely manner created a substantial certainty that an injury or death would result.

Insurance professionals should develop new products to alleviate the pressure on the employer of defending these suits. Brokers should investigate whether they can obtain a workers' compensation policy endorsement providing

that the insurer will defend until a court determines that the insured employer did act intentionally. Similar provisions exist in other types of policies, including employment practices liability insurance ("EPLI").

COURT FINDS INSURER MUST DEFEND CELL PHONE CASE

By: Priya R. Masilamani, Esq.

In *Northern Insurance Co. of New York v. Baltimore Business Communications, Inc.*, No. 02-1358, 2003 WL 21404703 (4th Cir. June 19, 2003), the United States Court of Appeals for the Fourth Circuit ordered an insurer to pay defense costs for a case in which the plaintiffs alleged they were exposed to dangerous levels of radiation emitted by cell phones. The Fourth Circuit rejected the insurance company's assertion that the requested relief - the cost of purchasing headsets - sought merely to prevent future injuries, placing the claim outside the scope of bodily injury coverage.

The plaintiffs sued several cell phone manufacturers and distributors for failure to warn, defective design, consumer protection law violations, implied warranty violations, negligence, fraud, and civil conspiracy. On each cause of

action, the plaintiffs requested relief in the form of “compensatory damages including but not limited to amounts necessary to purchase a [cell phone] headset. . . for each class member.” *Id.* at *1 (alterations in original).

In the insurer’s declaratory judgment action, the district court found that the insurer had no duty to defend, “because the Complaint merely sought cell phone headsets to prevent future injuries.” *Id.*

The Fourth Circuit reversed. First, it found that the plaintiffs identified present bodily injury at the cellular level, by alleging that radiation emitted by cell phones caused adverse cellular reactions and dysfunctions, and increased health risks. *See id.* at *4. Next, the court found that the request for headsets constituted “damages because of bodily injury,” explaining as follows:

On the face of the Complaint, the *Pinney* plaintiffs are seeking unspecified compensatory damages flowing from their bodily injuries, i.e., harm suffered from radiation. Baltimore Business could therefore be potentially liable to the *Pinney* plaintiffs for any and all compensatory damages recoverable under Maryland law, includ-

ing damages for already existing bodily injuries.

Id. Finally, the court found that extrinsic evidence offered by the insurer failed to demonstrate that the plaintiffs wanted headsets only to cure an allegedly defective product.

Northern Insurance is consistent with coverage cases dealing with environmental harm, asbestos and other mass tort exposures. It should be directly relevant to issues such as medical monitoring, and it demonstrates that, at least for purposes of the duty to defend, courts will interpret complaints broadly to find covered bodily injury or property damage.

**COMMON SENSE
INTERPRETATIONS
OF “ABSOLUTE
POLLUTION
EXCLUSION CLAUSE”
BROADEN CGL
COVERAGE FOR
POLICYHOLDER**

By: *Kristina D. Pasko, Esq.*

Two recent opinions interpreting the “absolute exclusion clause” have limited the scope of the clause and allowed policyholders to recover under their CGL policies. *Belt Painting Corp. v. TIG Ins. Co.*, 2003 WL 21498685 (N.Y. July 1, 2003) and *Richardson v. Nationwide Mut. Ins. Co.*, No. 01-SP-1451, 2003 WL 21448372 (D.C. June 12,

2003) carefully analyze the history and interpretation of the clause to decide that certain events leading to personal injury actions are, essentially, not traditional forms of environmental pollution and therefore not subject to the exclusion.

Two recent opinions interpreting the “absolute exclusion clause” have limited the scope of the clause and allowed policyholders to recover under their CGL policies.

The cases involved somewhat similar circumstances. In *Belt Painting*, the policyholder was hired to perform stripping and painting work in an office building. An employee in the building sued the policyholder, alleging that he was injured as a result of inhaling paint or solvent fumes. In *Richardson*, the policyholder owned an apartment building; the building’s security guard alleged carbon monoxide poisoning caused by a malfunctioning furnace in the apartment building. Both policyholders were denied coverage by their insurers for the liability arising out of the events based on the absolute pollution exclusions clause.

Both courts began by describing the history and purpose of the exclu-

sion. The exclusion's first incarnation in the 1970s was the "qualified pollution exclusion," which typically excluded coverage for pollution liability unless the discharge or release was "sudden and accidental." In about 1985, the insurance industry created the "absolute" exclusion in an effort to remove the uncertainties created by the multiple interpretations of "sudden and accidental," especially in cases where the pollution was gradual. The exclusion was also intended to protect the insurance industry from enormous liability caused by environmental disasters and for clean-up costs imposed by the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") of 1980. These background factors (considered largely undisputed by the *Richardson* court) tended to demonstrate that the exclusion was intended to apply to deliberate or active polluters of the environment.

Next, the very terminology of the exclusion also indicated to these courts that it was never meant to apply to the factual scenarios presented in the cases before them. For instance, the absolute pollution exclusion at issue in *Richardson* excluded coverage for:

- (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threat-

ened discharge, dispersal, seepage, migration, release or escape of pollutants.

[Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.]

The courts considered the terms within the exclusion "terms of art" in environmental law which suggest industrial pollution and environmental contamination. The *Richardson* court wrote:

[W]hen one reads the entire clause ... one cannot reasonably avoid the impression that the revised exclusion has to do with the by-products of the manufacturing process and with massive environmental cleanup costs, the very concerns that, as a matter of undisputed history, led to the adoption of the new language.

Id. at *10. In addition, the terms bore a striking similarity to the terminology of environmental statutes, regulations, and judicial decisions, indicating again that the exclusion was meant to apply to traditional environmental pollution.

Further, application of the exclusion outside of those industrial or

traditional environmental contexts (such as to an ammonia spill in an office building, a carbon monoxide leak in a hotel, or hazardous fumes from a roofing chemical) would lead to absurd results. The *Belt Painting* court explained, "[I]t strains the plain meaning, and obvious intent, of the language to suggest that these fumes, as they went from the container to [the injured party's] lungs, had somehow been discharged, dispersed, released or escaped." 2003 WL 21498685 [quoting *Meridian Mut. Ins. Co. v. Kellman*, 197 F.3d 1178, 1184 (6th Cir. 1999) (internal quotations omitted)].

Nationally, courts are sharply divided over the reach of the absolute pollution exclusion, with courts in different states reaching opposite conclusions on similar facts. Even in New Jersey, there are conflicting appellate decisions. *Belt Painting* and *Richardson* hopefully point to a more rigorous analysis by courts of this exclusion, limiting its impact to true environmental pollution cases.

For more information regarding these or any other insurance coverage issues, please contact Robert D. Chesler, Chair of the Insurance Law Practice Group, at 973.597.2328 or at rchesler@lowenstein.com. Or visit the Insurance Outpost website at www.insurance-lowenstein.com.

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Insurance should provide security and peace of mind. In exchange for a premium payment, the policyholder externalizes risk. However, the relationship of trust between policyholder and insurer that once existed has vanished. The cavalry has turned and run, the umbrella lies in tatters and the good hands are a fist. All too frequently, the insurer's response to a valid request for coverage is 'claim denied.' We, in the Lowenstein Sandler Insurance Law Practice Group, still believe that insurance policies provide coverage. We will advise our clients of their rights, guide our clients down the tortuous paths of claims-handling, and partner with our clients to pursue coverage through litigation when necessary. We stand prepared to be your insurance advocate.

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