K&LNG Alert

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Insurance Coverage

Is Application of the so-called "Absolute Pollution Exclusion Clause" Limited to Traditional Environmental Pollution? Absolutely, says the Supreme Court of New Jersey in Nav-Its v. Selective.

INTRODUCTION

On April 7, 2005, the Supreme Court of New Jersey rejected the insurance industry's interpretation of the so-called "absolute pollution exclusion" as "overly broad, unfair, and contrary to the objectively reasonable expectations of New Jersey and other state regulatory authorities," not to mention policyholders, in its very important decision in Nav-Its, Inc. v. Selective Insurance Company of America.[1] In so holding, the Court paid particular attention to the representations made by the insurance industry to the various state insurance regulators who, in turn, relied upon those representations nearly twenty years ago to approve the absolute pollution exclusion. The Court also settled conflicting New Jersey Appellate Division decisions, broadly holding that "[b]ecause we conclude that the [absolute] pollution exclusion clause as presently approved should be limited to traditional environmental pollution, we disapprove of any contrary view expressed in our case law."[2] The decision in Nav-Its is a great victory for policyholders with potential liability for "non-traditional" environmental pollution, including what has been described as "indoor pollution."

BACKGROUND

Nearly thirteen years ago, in Morton International, Inc. v. General Accident Insurance Co. of America,[3] the Supreme Court of New Jersey began its tradition of analyzing the regulatory history of disputed insurance policy provisions to ensure that such provisions are interpreted in accord with the objectively reasonable expectations of state insurance regulators and policyholders. The Nav-Its court relied heavily upon Morton and its refusal to enforce the earlier "standard pollution exclusion clause" as written because "[t]o do so would contravene [New Jersey]'s public policy requiring regulatory approval of standard industry-wide policy forms to assure fairness in rates and in policy content, and would condone the industry's misrepresentation to regulators in New Jersey and other states concerning the effect of the clause."[4] New Jersey courts, as set forth in Morton and further illustrated in Nav-Its, will not literally enforce pollution exclusions in the face of contrary regulatory history.

THE SUPREME COURT DECISION

In Nav-Its, the policyholder, Nav-Its, Inc., was sued for personal injuries incurred by a physician who allegedly was exposed to fumes inside his office while a sub-contractor of Nav-Its performed floor coating/sealant work in the same office complex.[5] Nav-Its sought defense and indemnity for these claims under a commercial general liability insurance policy it had purchased from Selective Insurance Company of America. Selective denied insurance coverage based on the absolute pollution exclusion contained in

[1] 2005 WL 770749 (N.J.), —N.J.— (2005).
[2] Id. at *10.
[3] 134 N.J. 1 (1993).
[4] Id. at 30.
[5] Id. at *1.

Nav-Its' insurance policy and Nav-Its sued. Nav-Its and Selective then filed cross-motions for summary judgment on the applicability of the absolute pollution exclusion to the injuries at issue. Nav-Its prevailed in the trial court and Selective successfully appealed. The Appellate Division's holding that the absolute pollution exclusion clause is "not necessarily limited to the clean up of traditional environmental damage" added confusion to New Jersey law on the issue.[6] The Supreme Court of New Jersey granted certification to settle the issue and, following Morton's example, looked to the regulatory history of the absolute pollution exclusion.

The Court noted that it "had not been presented with any compelling evidence" that the absolute pollution exclusion clause, "when approved by the [New Jersey] Department of Insurance, was intended to be read as broadly as Selective urge[d]."[7] On the contrary, the record reflected that New Jersey insurance regulators held hearings in 1985 to determine whether to approve the absolute pollution exclusion clause:

> The regulators were concerned that the then-proposed exclusion sought to sweep too many potential non-environmental liabilities within its reach. The insurance industry sought to allay those fears and, thus, secure the needed approval of the of this exclusion…[by representing that] the insurance industry did not intend to use the revised pollution exclusion as a bar to coverage…[and that it is not an absolute exclusion.][8]

Based on its review of the development of the absolute pollution exclusion clause, the Nav-Its Court stated that "we are confident that the history of the pollution-exclusion clause in its various forms demonstrates that its purpose was to have a broad exclusion for traditional environmentally related damages."[9] The Court also followed a line of state high court opinions including California,[10] Illinois,[11] Massachusetts,[12] Ohio,[13] New York[14] and Washington.[15]

The Court does not define what "traditional environmental pollution" includes. As a result, insurance companies may continue to deny insurance coverage in borderline cases. Nav-Its provides policyholders with another weapon to assist in establishing insurance coverage for non-traditional pollution claims, and particularly personal injury claims for exposure to hazardous fumes. Policyholders should look to the "touchstone" of the Supreme Court of New Jersey's decisions in Morton and Nav-Its:

> [t]he insurance industry may not seek approval of a clause restricting coverage for the asserted reason of avoiding catastrophic environmental pollution claims and then use that same clause to exclude coverage for claims that a reasonable policyholder would believe were covered by the insurance policy.[16]

IMPLICATIONS OF THE NAV-ITS DECISION

First, the decision of the Supreme Court of New Jersey in Nav-Its unanimously confirms that the insurance industry's continued denial of insurance coverage for "indoor pollution" and other types of non-traditional environmental pollution claims should be rejected under New Jersey law. Second, it enforces the

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[6] Id. at *2. The Supreme Court of New Jersey noted that the prior New Jersey Appellate Division decisions could be "read as in conflict." Id. at *10 (citing S.N. Golden Estates, Inc. v. Continental Casualty Co. 293 N.J. Super. 395, 402 (App. Div. 1996) (the "absolute pollution exclusion was intended to apply only to environmental claims, and not to claims of personal injury or property damage which can be separated from the substance's environmental toxicity"); Byrd ex rel. Byrd v. Blumenreich, 317 N.J. Super. 496, 504 (App. Div. 1999) (the absolute pollution exclusion is "ambiguous in the absence of specific language excluding from coverage injury or damage caused by the indoor residential exposure to lead paint"); and Leo Haus, Inc. v. Selective Insurance Co., 353 N.J. Super. 67 (App. Div. 2002) (the absolute pollution exclusion is not limited to traditional environmental pollution)).

[7] Id. at *8.

[8] Id. at *7.

[9] Id.

[10] MacKinnon v. Truck Insurance Exchange, 73 P.3d 1205 (Cal. 2003).

[11] Am. States Insurance Co. v. Koloms, 687 N.E.2d 72 (Ill. 1997).

[12] MacKinnon v. Truck Insurance Exchange, 73 P.3d 1205 (Cal. 2003).

[13] Am. States Insurance Co. v. Koloms, 687 N.E.2d 72 (Ill. 1997).

[14] Belt Painting Corp. v. TIG Insurance Co., 795 N.E.2d 15 (N.Y. 2003).

[15] Kent Farms v. Zurich Insurance Co., 998 P.2d 292 (Wash. 2000).

[16] Id. at *8.

safeguard that revisions to the pollution exclusion to further restrict coverage of risks "must be fully and unambiguously disclosed to regulators and the public."[17] Finally, policyholders should carefully scrutinize, in light of the Nav-Its decision, prior and future denials of insurance coverage based on the absolute pollution exclusion clause and fight for any claims they reasonably expected would be covered when they purchased the insurance coverage to begin with.

[17] Id. at *10.

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