

Client Alert

August 2012

Arkansas High Court Finds Pollution Exclusion Not A Bar To Coverage For Nuisance And Trespass Claims

In *Scottsdale Insurance Company v. Morrow Valley Land Valley Company*, No. 11-905, 2012 WL 1950247 (Ark. May 31, 2012), the Supreme Court of Arkansas held that a pollution exclusion in a commercial general liability insurance policy was ambiguous and, therefore, did not bar a defense for a lawsuit alleging nuisance and trespass claims arising out of the policyholder's conduct on a poultry farm.

Background

On September 11, 2009, sixty-six plaintiffs sued Morrow Valley Land Company ("Morrow Valley") and others, alleging that the defendants' concentrated animal-feeding operation constituted a public and private nuisance that amounted to a continuing trespass on the plaintiffs' rights.

Morrow Valley promptly notified its insurer, Scottsdale Insurance Company ("Scottsdale"), of the lawsuit, seeking a defense under its commercial general liability insurance policy. Scottsdale denied coverage, contending that the policy's pollution exclusion barred any defense obligations. The pollution exclusion in the policy provided that coverage does not apply to "bodily injury" or "property damage" arising out of the "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants." "Pollutants" were defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

Morrow Valley filed a declaratory judgment action in an Arkansas circuit court, seeking a declaration that Scottsdale was obligated to defend Morrow Valley in the underlying action. Morrow Valley also sought damages for breach of contract.

The circuit court granted partial summary judgment in favor of Morrow Valley, finding that Arkansas law governed the interpretation of the insurance contract, and that Scottsdale had a duty to defend Morrow Valley in the underlying nuisance action. The circuit court determined that the phrase "pollution exclusion" was "fairly susceptible to more than one reasonable interpretation" and, therefore, ambiguous under Arkansas law. Moreover, because there was ambiguity concerning whether the pollution exclusion covered the activities in the underlying lawsuit, there was a possibility of coverage that triggered a defense.

Scottsdale appealed, arguing two points of error: (1) that Tennessee law, not Arkansas law, governed the interpretation of the insurance policy; and (2) that the pollution exclusion unambiguously barred coverage and any defense obligations for the allegedly "persistent and widespread industrial pollution released from an industrial-poultry farm."

Holding

The Supreme Court of Arkansas affirmed the circuit court's holding in favor of Morrow Valley, finding that the pollution exclusion was indeed ambiguous and, thus, Scottsdale had an obligation to defend Morrow Valley in the underlying nuisance action.

First, the court considered the choice of law issue. The court explained that, even though the poultry farm was located in Tennessee, contracting occurred in Arkansas, negotiation of the contract occurred in Arkansas, performance of the contract was in Arkansas and the parties were domiciled in Arkansas. The court concluded, therefore, that Arkansas had the most significant relationship to the dispute and that Arkansas law should be applied.

The court next addressed the duty to defend. The court explained that in Arkansas, as elsewhere, the general rule is that an insurer must defend when there is a possibility that the alleged injury or damage falls within the policy coverage. The court found that, according to the complaint, the defendants operated their poultry farm “in such a manner that it generates noxious gases, smoke, dust, fumes, odors and particulate in great quantities which migrate off the property and are disseminated in great quantities through the surrounding environment.” The plaintiffs [further] claimed that these gases, smoke, dust, fumes, odors, and particulate caused them to suffer ‘grievous discomfort’ by effecting nausea and sleep disturbance and by forcing the plaintiffs to stay inside their homes with windows closed to diminish the stench,” which interfered with the plaintiffs’ use and enjoyment of their properties. The court analyzed these alleged facts against the “critical language” of the Scottsdale policy with emphasis on whether the policy’s pollution exclusion operated to bar coverage.

The court recognized that prior Arkansas appellate court decisions found similar pollution exclusions to be ambiguous. Consistent with those decisions, the court concluded that it was unclear from the language of the exclusion in the Scottsdale policy whether the gases, smoke, dust, fumes, odors and particulate from the poultry farm amounted to the “solid, liquid, gaseous or thermal irritant[s] or contaminant[s]” referenced in the Scottsdale policy’s definition of “pollutant.” Accordingly, the court concluded that the language was fairly susceptible to more than one reasonable interpretation and, thus, ambiguous.

And, since neither party submitted extrinsic evidence to otherwise clarify the meaning of the word “pollutant” as it was used in the Scottsdale policy, the court concluded that the trial court did not err in finding the pollution exclusion to be ambiguous. Indeed, under Arkansas law, if the court determines that ambiguity exists, parol evidence is admissible, and the meaning of the ambiguous term becomes a question for the fact finder. However, where parol evidence has not been admitted, then it is error under Arkansas law to submit the issue to the jury, and the ambiguity must be resolved as a matter of law. Therefore, since no parol evidence was admitted, the trial court correctly found that the exclusion did not bar coverage, thus entitling Morrow Valley to summary judgment on the duty to defend.

Implications

With environmental issues again at the forefront of politics, business activities and economics, policyholders must remain vigilant about potential insurance recovery for all environmental matters. Although there was no traditional contamination or pollution to adjoining land, *Morrow Valley* illustrates that coverage still may be available for claims arising out of an injury or offense that is allegedly caused by a “pollutant.”

Morrow Valley also serves as a reminder that, even though a court may properly resolve questions of policy construction and interpretation as a matter of law, where a potential ambiguity is at issue, policyholders should take appropriate discovery and be prepared to submit relevant extrinsic evidence at the trial court level in support of a finding that operative policy provisions are, in fact, ambiguous.

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