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Century Sur. Co. v. Casino W., Inc., 130 Adv. Nev. Op. 42 (May 29, 2014)¹
CERTIFIED QUESTION: INSURANCE LAW

Summary

The court determined whether two distinct provisions of an insurance policy regarding air pollution were subject to multiple reasonable interpretations.

Disposition

The Court found two clauses in an insurance policy were ambiguous and construed their meanings in favor of the insured.

Factual and Procedural History

Appellant, Century Surety Company, issued an insurance policy to respondent, Casino W, Inc., owner of a Casino West Motel. Four patrons of the Casino West Motel, respondent, died from carbon monoxide poisoning while sleeping in a room directly above a pool heater. Respondent sought coverage for the deaths but appellant denied the claims based on two provisions of the policy. The two provisions in question excluded coverage for “[b]odily injury’ or ‘property damage’ arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of ‘pollutants,’” and for “[b]odily injury,’ ‘property damage,’ or ‘personal and advertising injury’ arising out of, caused by, or alleging to be contributed to in any way by any toxic, hazardous, noxious, irritating, pathogenic or allergen qualities or characteristics of indoor air regardless of cause.”

After appellant denied coverage, it brought a declaratory relief claim in federal district court. In response, respondent filed a counterclaim. Appellant then moved for summary judgment on both its claim and respondent’s counterclaim. The federal district court denied both of appellant’s motions, determining the policy exclusions were ambiguous and thus should be interpreted in respondent’s favor. Appellant appealed the interlocutory decision to the United States Court of Appeals for the Ninth Circuit. Accordingly, the Ninth Circuit certified two questions of law regarding the interpretation of the two exclusionary provisions of the insurance policy: (1) does the pollution exclusion in Century’s insurance policy exclude coverage of claims arising from carbon monoxide exposure? (2) Does the indoor air quality exclusion in Century’s insurance policy exclude coverage of claims arising from carbon monoxide exposure?

Discussion

The Nevada Supreme Court first considered whether or not the insurance policy was ambiguous. An insurance policy is considered ambiguous if “it creates [multiple] reasonable expectations of coverage as drafted.”² The Court also noted it interprets ambiguities in an insurance contract against the drafter, in this case, the appellant/insurer.³ Furthermore, clauses in

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² *Powell v. Liberty Mitt. Fire Ins. Co.*, 252 P.3d 668, 672 (2011).

³ *Id.*

insurance policies are broadly interpreted to provide the greatest possible coverage to the insured.⁴

The absolute pollution exclusion

Respondent argued that the absolute pollution exclusion only applies to traditional environmental pollution because the exclusion contains environmental terms of art. Appellant, in contrast, contends the absolute pollution exclusion applies to this case to exclude coverage because carbon monoxide is a “pollutant” under the policy's terms.

The absolute pollution exclusion is a standard provision in general commercial liability policies.⁵ The scope of an absolute pollution exclusion is a matter of first impression in Nevada; accordingly, the Court looked to other jurisdictions for interpretation. The Court determined that the absolute pollution exclusion permits “multiple reasonable interpretations of coverage.” “Initially, it is reasonable to categorize carbon monoxide as a pollutant because it is a gaseous element that contaminates the air, making it dangerous and sometimes deadly to breathe.”⁶ Therefore, it is reasonable to conclude that the policy does not cover any carbon monoxide damage.

However, the Court also found the respondent’s interpretation as reasonable. “Taken at face value, the policy's definition of a pollutant is broad enough that it could be read to include items such as soap, shampoo, rubbing alcohol, and bleach insofar as these items are capable of reasonably being classified as contaminants or irritants.” Further, the absolute pollution exclusion's drafting history supports the interpretation that the exclusion was designed to apply only to outdoor, environmental pollution.⁷ In light of the exclusion's ambiguity, the Court determined it must interpret the provision to effectuate respondent's reasonable expectations.

The indoor air quality exclusion

Unlike the absolute pollution exclusion, the indoor air quality exclusion has not been heavily litigated. Appellant argued the exclusion was unambiguous and that the “regardless of cause” language precluded liability for any injury suffered from indoor air quality. Respondent argued appellant’s interpretation is overly broad.

The Court determined that both interpretations of the exclusion were reasonable. Similar to the Court’s explanation of the absolute pollution exclusion, here, it determined that although the language of the exclusion could be read in favor of the appellant, it could also be read so broadly as to preclude essentially any claim. As a result of the multiple reasonable interpretations, the Court found in favor of the insured, the non-drafting party.

Conclusion

Neither the absolute pollution exclusion nor the indoor air quality exclusion clearly excluded coverage for carbon monoxide exposure under this case's circumstances.

⁴ *Nat'l Union Fire Ins. Co. of the State of Pa., Inc. v. Reno's Exec. Air, Inc.*, 100 Nev. 360, 365, 682 P.2d 1380, 1383 (1984).

⁵ *See Apana v. TIG Ins. Co.*, 574 F.3d 679, 680 (9th Cir. 2009).

⁶ *See Midwest Family Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628, 637 (Minn. 2013).

⁷ *Cf. J.E. Dunn Nw., Inc. v. Corus Constr. Venture, L.L.C.*, 249 P.3d 501, 505 (2011) (providing that, when interpreting statutes, the Court looks to the statute's legislative history for guidance to determine the law's proper scope).