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IN Court Enforces Pollution Exclusion, Applying MD Law

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The Court of Appeals of Indiana, applying Maryland law, recently held that contamination caused by the release of perchlorate constitutes traditional environmental pollution and is thus subject to the total pollution exclusion in a commercial general liability (CGL) policy. *Chubb Custom Insurance Co., et al. v. Standard Fusee Corp.*, No. 49A02-1301-PL-91 (Ind. Ct. App. Jan. 23, 2014). The court also held that such contamination does not trigger coverage under a personal injury coverage part that provides coverage for personal injury arising out of "wrongful entry into" the premises of another.

This decision is a reminder of the importance of choice of law determinations in environmental coverage litigation, a point not lost on Standard Fusee and its insurers. They battled all the way to the Indiana Supreme Court over the question of the law governing insurance policies covering multiple risks in multiple states, where the Indiana high court concluded that a "uniform-contract-interpretation" approach should be followed such that the law of a single state is applied to interpretation of the contract. *Nat'l Union Fire Insurance Co. of Pittsburgh, PA, et al. v. Standard Fusee Corp.*, No. 49S04-1006-CV-318 (Ind. Dec. 29, 2010). The Indiana Supreme Court further held that, under that approach, Maryland law governed whether various liability policies provided coverage for alleged or potential contamination at the policyholder's former California facility and at its Indiana facility.

The policyholder, a manufacturer of emergency signaling flares, was incorporated in Delaware and headquartered in Maryland. It previously owned or operated facilities in Maryland, Indiana, Pennsylvania, New Jersey, Ohio, and California, and, at the time of

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the court's decision, was conducting operations in Maryland, Indiana, and Pennsylvania. In 2002, a chemical used in the production of the policyholder's flares was discovered in groundwater samples at and around its former California facility. Lawsuits against the policyholder in California state court followed, but they were dismissed after it was determined that the policyholder had never discharged the chemical at that site. In 2004, the policyholder tested its Indiana facility and, when the test suggested potential contamination, participated in a voluntary remediation program with a state environmental management agency. The policyholder sought coverage for the California and Indiana proceedings under liability policies that the policyholder purchased through two brokers, one located in Maryland and the other in Massachusetts.

The insurers denied coverage based on the total pollution exclusion. In one of the policies, this provision excluded all coverage for "bodily injury, property damage, advertising injury, or personal injury arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release, or escape of pollutants." The policy defined pollutants as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acid, alkalis, chemical, and waste." Another insurer also denied coverage on the basis of a similar pollution exclusion that applied to bodily injury and property damage. This insurer also denied coverage under the personal injury coverage part of its policy, which did not contain a pollution exclusion, arguing that the contamination did not constitute personal injury under the policy language.

In the earlier appeal to the Indiana high court, it held that the "uniform-contract interpretation" approach should govern the applicable choice of law. That court explained that its choice-of-law rule in contracts cases contemplates contacts with multiple states (such as the California and Indiana sites involved in this case), but nonetheless requires application of the law of only a single state with the most intimate contacts. The court further noted that its rejection of dépeçage-analyzing different issues in the same case under different states' law-comports with the uniform approach.

Applying this test, the Indiana high court held that Maryland law should apply. As to the factor given the most weight in insurance contracts cases — the principal location of the insured risk — the court noted that Maryland and Indiana each contained one of the policyholder's insured sites. However, the Maryland site also served as the policyholder's headquarters, suggesting that it serves as the principal location of the risk, the court explained. As to the domicile and place of incorporation of the parties, the court noted that this factor favored application of Maryland law, as the policyholder was headquartered in Maryland and none of the insurers was incorporated or headquartered either in Maryland or Indiana.

As to the place of negotiation and contracting, the court explained that these factors favored application of Maryland law, as all of the policyholder's communications with its brokers originated from its Maryland headquarters; the policyholder's insurance procurement, review, and decision-making took place in Maryland; and the policies were retained in, and premiums paid from, Maryland. As to the place of performance, the court rejected the trial court's determination that this factor exclusively favored application of Indiana law, given that the policyholder acknowledged that insurance recoveries would be used not only to pay for remediation of the Indiana site but also to pay expenses incurred in defending itself in the California lawsuits. Because the overall number and quality of contacts favored Maryland over Indiana, the Indiana Supreme Court held that Maryland law should apply to the entire dispute.

On remand, the trial court again held in favor of the policyholder, holding that the pollution exclusion did not apply to the perchlorate contamination and that it fell within the personal injury coverage part of a GL policy. On appeal from the trial court decision after remand, the Indiana Court of Appeals now has held that the perchlorate contamination met the definition of "pollution" in both policies under Maryland law. Applying *Sullins v. Allstate Insurance Co.,* 667 A.2d 617 (Md. Ct. App. 1995) and *Clendenin Brothers, Inc. v. United States Fire Insurance Co.*, 889 A.2d 387 (Md. Ct. App. 2006), the court stated that, as a highly toxic chemical that spreads quickly in the environment and causes substantial health risks, perchlorate qualifies as a pollutant under Maryland's interpretation of the pollution exclusion clause.

Additionally, the Indiana Court of Appeals held that there was no duty to defend or indemnify the policyholder under the personal injury coverage part of the GL policy, because the perchlorate contamination did not fall within any of the enumerated personal injuries. The personal injury coverage part defined personal injury as any injury, other than bodily injury, arising out of, *inter alia*, "wrongful entry into" the property of another. The court rejected the policyholder's argument that the perchlorate contamination of nearby properties constituted an actionable trespass, holding that, under Maryland law, this provision applies only to landlord-tenant situations and not to environmental pollution. Accordingly, the intermediate appellate court held that neither insurer had a duty to defend or indemnify the policyholder in connection with the perchlorate contamination.

The *Standard Fusee* ruling reflects the importance that choice of law can play in environmental coverage disputes. After years of litigation, Maryland law has been applied to this case and the pollution exclusion clause has been enforced to bar coverage for the perchlorate contamination at issue. Further, also applying Maryland law, the court found there was no available coverage for the perchlorate contamination under the personal injury coverage of the GL policy.