Sui Generis

Providing Insight into the Contours of Emerging Insurance Coverage and Environmental Issues

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"You say tomato, I say tomahto" – The New Jersey Appellate Division Holds that "finally delivered" under pollution exclusion actually means "delivered."

When people ask what I do, I'm sometimes inclined to say I'm a glorified Grammarian, attempting to divine the meaning of a passage by the placement or absence of a comma, or whether the word "sudden" means abrupt or unexpected.

Take the case of *Spartan Oil Co. v. New Jersey Property-Liability Ins. Guan. Ass'n*., No. A-5156-10T2 that was decided on June 8, 2012. The facts are relatively straightforward. Spartan delivered fuel oil to a customer for many years. Like most fuel oil deliveries, Spartan dispensed fuel from its vehicles into an external intake pipe outside of the premises. That pipe was attached to an internal line that led to an underground tank.

About a decade later, the property owner discovered that the fuel line was corroded. Fuel had seeped out over the years resulting in serious contamination, presumably during the course of delivery. Three years later, the owner sued Spartan. Spartan was ultimately dismissed by application of the statue of limitations. Spartan then sought reimbursement of defense costs from its insurer, Reliance Insurance Company.

Reliance's policies contained a pollution exclusion that precluded coverage for the release of pollutants "*after the pollutants* … are moved from the covered 'auto' to place [sic] where they *are finally delivered*…." (emphasis original). In interpreting this provision, the trial court reasoned that once the oil left the nozzle of Spartan's vehicle, the oil was finally delivered and therefore the exclusion applied (the Appellate Division sought to clarify this by stating the lower court had found that it was delivery into the fuel oil system that was the delivery).

Spartan contended that the trial court impressively looked beyond the four corners of the complaint to determine when the discharge occurred in determining if a duty to defend existed. The Appellate division, however, listed a litany of cases for the position that a court may look beyond facts pled in a complaint to determine a duty to defend. The problem with most of these cases is that they generally only permit reliance upon extrinsic facts to *trigger* a duty to defend, rather than to *preclude* that duty.

Thus far, only one other Appellate Division case has permitted an insurer to use extrinsic facts to preclude a duty to defend. *See Polarome Int'l., Inc. v. Greenwich Ins. Co.*, 404 N.J. Super. 241, (App. Div. 2008). The one thing in common with all of the cases that have looked to extrinsic fact is that they all involve a situation where facts critical to coverage were not relevant to the underlying litigation, and so are not pled. In that instance, the New Jersey Supreme Court has held that the insurer "is obligated to provide a defense until all potentially covered claims are resolved" either through litigation of the underlying action or in a separate coverage action. *See Flomerfelt v. Cardiello*, 202 N.J. 432, 447 (2010) (citing *Burd v. Sussex Mut. Ins. Co*., 56 N.J. 383, 390 (1970)).

In *Spartan*, the court explained that the complaint had not explicitly alleged that Spartan's negligence took place during or after delivery, although reference that the "fuel oil was delivered" implied that delivery had already taken place. The court found that the exclusion was unambiguous. Reasoning that the term "deliver" must be given its plain and ordinary meaning, and finding no case law on point, it relied upon the trail court's use of a dictionary to define "delivery" ("to have given into another's possession or keeping or surrender [sic] something") to support a finding that the contamination occurred *after* Spartan deposited the oil from its truck into the heating oil system.

Since the complaint did not contain the facts as to when delivery of the fuel oil to its final destination occurred, the court reasoned that it was permissible to look beyond the underlying complaint to understand claimant's allegations as to the basis for Spartan's liability.

The problem is though, the court doesn't seem to identify those "facts" in any meaningful way. The complaint alleged that the "fill and vent lines to the underground storage tank … were corroded … [a]s a result, the fuel oil delivered … was discharged…" It then quotes the trial court's understanding that the "discharge and the resulting contamination occurred while the fuel oil *was traveling through the fill pipes* towards the tank." (emphasis supplied). It's difficult to see how these were facts extrinsic to the complaint. The trial court, however, equated the introduction of the fuel into the "heating oil system" with the surrender of the fuel "in any rational [sic] meaningful and unambiguous way."

In addition to adopting this reasoning, the Appellate Division seems to have gone one-step further. It seems to have used the manner in which the term "deliver" was used in the complaint rather than any particular extrinsic fact to determine that the meaning of "finally delivered" in the pollution exclusion had the same meaning of "delivered" in the underlying compliant. Thus, by application of the judicial doctrine of Grammatical Alchemy, an adjective is found to be like a linguistic neutron – having mass but no electric charge.

This reasoning also seems to veer off course from *Burd's* example that a carrier would not be obligated to defend a third party complaint alleging that the auto involved was a Ford (covered auto) when in fact the car was a Chevy (not covered). *Burd*, 56 N.J. at 388. In that example, the facts are unequivocal and the brand of auto is not subject to interpretation.

Whether *Spartan* will continue to be a Greek Tragedy for the insured, or a EU bailout for carriers remains to be seen. But for now, insurers have at least two Appellate level opinions that support using extrinsic facts to deny a defense obligation in the Garden State.

A copy of the opinion can be found here.

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