

Premises Pollution Liability Policy: Missouri Appellate Court Addresses Insurance Coverage Issue



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01/16/2018

The Missouri Court of Appeals (Eastern District) addressed in a December 19th opinion a coverage issue involving a Premises Pollution Liability Policy (“PPL policy”). See *Hazelwood Logistics Center, LLC v. Illinois Union Insurance Company*, 2017 WL 6460094.

The coverage question involved whether a PPL policy applied to methane gas discharging from a landfill caused by contractors’ allegedly improperly designed engineering cell.

Hazelwood Logistics Center, LLC (“Hazelwood”) is stated to have remediated an “old illegal landfill site” known as the Edwards Avenue Landfill (“EAL”) in Hazelwood, Missouri, for development.

Hazelwood hired certain contractors to remediate the property which included:

- Environmental Operations, Inc. (“EOI”) (providing environmental engineering and remediation services)
- Geotechnology, Inc. (“Geotech”) (providing engineering and consulting services)
- Clayton Engineering Company, Inc. (“Clayton”) (to provide engineering services)
- Budrovich Excavating, Inc. (“Budrovich”)(a subcontractor to EOI, to provide clearing, excavation, and screening of trash from the EAL)

The contractors are stated to have completed the work. However, the Missouri Department of Natural Resources stated several areas of the engineered cell’s cap were observed to be “bubbling” during a site visit on April 16, 2008. The agency ordered Hazelwood to perform testing for methane gas.

Hazardous methane conditions were identified.

By correspondence of February 11, 2010, Hazelwood demanded insurance coverage from Illinois Union Insurance Company (“Union”). The coverage demanded was for remediation of the pollution condition of methane gas on the property to satisfy the Missouri Department of Natural Resources. Union denied coverage stating the pollution condition occurred after June 7, 2006.

The PPL policy provided in relevant part that Union’s agreement was to pay for “remediation costs” arising out of “pollution conditions” where such costs resulted from a “claim” or “government” action. Further, coverage explicitly “only applies to pollution conditions that first commence on or prior to June 7, 2006.” This was due to a reverse retroactive date provision contained in an endorsement to the PPL policy.

In a related matter, Hazelwood was sued in federal court for breach of contract and breach of guaranty. The company alleged, pursuant to the commercial frustration doctrine, it was relieved of its obligations

under a loan agreement because the unforeseen methane gas contamination due to the contractors' negligent remediation of the landfill made redevelopment (i.e., the purpose of the loan) impossible. That litigation settled.

Litigation was filed in the Missouri trial court between Hazelwood and Union as to whether there was coverage for the previously reference pollution. Both parties filed competing Motions for Summary Judgment.

Union argued that it was not liable for the 2008 pollution condition caused by negligent contractors. Hazelwood responded that the 2008 methane gas emissions were coming from the trash that was in the landfill site prior to June 7, 2006. It, therefore, contended that under the term of the policy as written by the parties, Union should be liable for any claims for remediation of the emissions.

The trial court determined that the undisputed facts provided that the 2008 pollution condition was caused by the contractors' improperly designed engineering cell used to remediate the trash after June 7, 2006 (resulting in Missouri Department of Natural Resources action). It stated that Hazelwood admitted this in the federal litigation by alleging "the contractors negligently caused methane gas to spread across portions of the property previously uncontaminated by same. The trial court therefore held that Union was entitled to judgment as a matter of law."

Hazelwood argued on appeal that Union was not entitled to judgment as a matter of law because the record established that the pollution condition of methane existed on the property prior to June 7, 2006 (or a genuine issue of material fact existed regarding such.) It argued that coverage should have been provided because the record showed that the pollution condition of methane existed on the property prior to June 7, 2006 and all requirements for coverage under the PPL policy were satisfied.

Hazelwood argued on appeal Union's correspondence denying the coverage claim asserted "the methane condition falls within the pollution conditions described in documents identified in Paragraph III of the Re-Opener Endorsement" and that the methane gas resulted from:

. . . "the decomposition of the trash" Respondent admits was present on the site prior to June 7, 2006.

The Court notes that while there was trash on the property prior to June 7, 2006, methane gas emissions that were the subject of the Missouri Department of Natural Resources 2009 action was not. The Appellate Court further notes:

. . . the old trash on the property is not the pollution condition subject to the MDNR's action. Rather, it was the method of containment of the trash in the engineered cell that generated the methane emissions, which did not exist prior to June 7, 2006, as admitted to by all the experts.

Hazelwood also references alleged admissions by Union admitting methane gas is a pollution condition under the PPL policy in a June 10, 2010 communication. The communication is deemed by the Appellate Court as statements of denial of coverage and generated early in the claims process. Statements in preliminary claim evaluations that addressed possible situations were characterized as not being admissions of fact stopping an insurer from later making alternative analysis of claims based on the generation of fact.

The Appellate Court references what it characterizes as extensive expert testimony and scientific evidence regarding whether methane gas pollution existed prior to June 7, 2006 that is found in the related federal litigation record. The prior allegations against the contractors by Hazelwood are noted. They include a claim that they caused the high methane levels that were previously uncontaminated by the substance. The Appellate Court further noted, in part:

In summary, the MDNR approved a Remedial Action Plan (RAP) that called for screened EAL waste to be placed into a clay-walled engineered cell to be constructed on the western part of the property. That work was completed in 2007. In 2009, methane was detected on the western part of the property. All of the experts in this case agree the engineered cell was generating the methane. Thus, the summary

judgment record is clear that the methane condition did not exist on Appellant's property prior to June 7, 2006.

The trial court's judgment is affirmed and the denial of coverage under the PPL policy is upheld.

[A copy of the opinion can be downloaded here.](#)