Carbon Monoxide Suits Not Excluded, Nonprofit Tells 9th Circ.

Law360

Nonprofit policyholder advocacy group United Policyholders urged the Ninth Circuit on Monday to reverse an Oregon federal court's decision that a pollution exclusion in a pool contractor's policy negates coverage for underlying suits over carbon monoxide poisoning, arguing the lower court's reading of the exclusion was overbroad.

Victory Construction LLC is challenging an Oregon district court's conclusion that a hazardous materials exclusion in its policy with Colony Insurance Co. encompasses the claims in two underlying actions, saying in an opening appellate brief filed last week that the exclusion defines "pollutant" as an "irritant" or "contaminant," while carbon monoxide is odorless and naturally occurring.

In a proposed amicus brief, UP threw its support behind Victory, calling the lower court's decision another example of a pollution exclusion being applied to a category of risks it was not designed to exclude. Oregon law mandates that exclusions be construed narrowly, the nonprofit contended.

"The over-breadth of the pollution exclusion results in a lack of certainty about what losses will be covered, which can be devastating to small business, particular with regard to the duty to defend," UP's attorneys wrote.

Counsel for Victory and Colony did not immediately respond to requests for comment on Tuesday.

The two underlying state suits alleged that Victory negligently failed to install a natural gas pool heater in a well-ventilated area, causing several residents of a home in Clackamas County, Oregon, to be sickened by carbon monoxide emanating from the unit.

Colony had issued a liability policy to the Artisan Contractors Association of America, of which Victory was

a member, for a term spanning June 2013 to June 2014. But the insurer declined to defend the pool company in the two suits, citing the hazardous materials exclusion, which precluded coverage for claims relating to the "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of hazardous materials at any time," according to court papers.

Colony filed suit against Victory in Oregon federal court in March 2016, seeking a declaration that it owes no coverage for the underlying actions. The parties then filed competing motions for summary judgment on the meaning of the hazardous materials exclusion.

Victory had asserted that the exclusion should only apply to "traditional" environmental pollution and further argued that carbon monoxide is not an irritant or contaminant included in the exclusion's definition of a hazardous material. At the very least, the pool contractor said, the exclusion is ambiguous and must therefore be interpreted in its favor.

U.S. District Judge Marco A. Hernandez disagreed and granted Colony's summary judgment motion in March, pointing out that while no Oregon court has ever weighed in on whether carbon monoxide falls under a pollution exclusion in a liability policy, the gas clearly fits the dictionary definition of a pollutant. And the foundation of the underlying complaints is the allegation that excessive carbon monoxide from the pool heater flooded the home and caused the occupants to become ill, the judge found.

On appeal, Victory has said Judge Hernandez inappropriately expanded the policy's definition of "pollution" to include toxicity when the express wording of the policy only uses the words "irritant" and "contaminant." Neither of those words apply to carbon monoxide, which does not cause inflammation and is produced by natural processes, it argued.

UP said in its amicus filing that the Ninth Circuit should side with Victory, pointing out that the pool contractor was accused of releasing carbon monoxide through "negligent, but ordinary, business operations."

"That is exactly the scenario in which Oregon law compels a narrow interpretation and application of the exclusion," UP's attorneys wrote.

UP also suggested that the Ninth Circuit could follow the rationale of the Washington Supreme Court's high-profile May ruling in the case of Xia v. Probuilders, which it said offers an "alternative way to

reconcile" the pollution exclusion with the "breadth of the duty to defend." In Xia, the Washington justices held that a pollution exclusion doesn't negate coverage under a commercial general liability policy when the policyholder's negligence is the primary cause of a loss.

However, UP argued, the Ninth Circuit could reverse the lower court without considering whether the principles of Xia apply to Victory's case.

"This court should, instead, interpret the definition of pollution narrowly, consistent with Oregon law, and find that it does not apply outside of the traditional environmental contamination context, based on the wording of the exclusion and the 'ordinary purchaser of insurance' interpretive principle," UP's attorneys wrote.

UP is represented by Seth H. Row and Christopher A. Rycewicz of Miller Nash Graham & Dunn LLP and by its own Amy Bach and Dan Wade.

Victory Construction is represented by Christopher B. Rounds of Rounds Law Office PC.

Colony is represented by Andrew C. Lauersdorf of Maloney Lauersdorf Reiner PC.

The case is Colony Insurance Co. v. Victory Construction LLC et al., case number 17-35357, in the U.S. Court of Appeals for the Ninth Circuit.

–Editing by Kelly Duncan.