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ONTARIO COURT OF APPEAL AFFIRMS NARROW APPLICATION OF "TOTAL POLLUTION EXCLUSION" AND ADDRESSES STANDARD OF APPELLATE REVIEW OF STANDARD FORM CONTRACTS

By: RBS

In *Hemlow Estate v. Co-operators General Insurance Company*, 2021 ONCA 908, the insurer relied on a "Total Pollution Exclusion" to deny a defence to an insured's estate under a CGL policy. The Court applied past, long-standing precedent in finding such exclusions apply primarily in the context of businesses engaged in activities carrying a well-known risk of pollution and environmental damage. Perhaps more importantly, the Court concluded that because the subject CGL was not a "take it or leave it" policy, it was not a standard form contract. Accordingly, the more stringent level of appellate review, namely palpable and overriding error, applied in the circumstances.

The Facts

The insured, Mr. Hemlow, was a mechanical contractor who provided mechanical and refrigeration system sampling and analysis services. In 2015, he was subcontracted to sample and analyze oil at a processing facility owned by Rich Products of Canada Limited ("Rich"). During the performance of this work, Hemlow opened a valve to a pipe containing pressurized ammonia, thus allowing it to escape and cause significant damage to the Rich facility. Hemlow died in the accident.

Rich brought an action against the insured's estate in negligence, nuisance and breach of contract for the property damage. The insurer denied its duty to defend on the basis of a Total Pollution Exclusion. This exclusion found its way into the policy through a series of emails between the insured and his agent, and was actually signed by the insured prior to its incorporation into the policy.

The Ruling

The trial court found the Total Pollution Exclusion inherently ambiguous. By attempting to exclude any act of emission of virtually any substance, without clearly stating that the exclusion is not limited to environmental claims, the insurer had misrepresented the exclusion—the exclusion was in effect a *Total Emissions Exclusion*, not a *Total Pollution Exclusion*. The trial court suggested two ways the exclusion could have been

clearer: 1) by using the word "emission" rather than "pollution"; and 2) by adding a statement that the exclusion is not limited to environmental claims. After finding this ambiguity, the trial court concluded that the reasonable expectations of the insured was not consonant with the wide application suggested by the insurer in the context of the underlying claim.

On appeal, the Court began its analysis by considering the applicable standard of review. The well-founded principle that contractual interpretation entails questions of mixed fact and law and thus draws a higher standard of review (namely, that of palpable and overriding error), was considered. The Court also considered whether the applicable standard of review for the interpretation of standard form contracts entails no question of fact and thus should garner a lower standard of review (correctness). Insurance contracts are often standard form contracts. In finding the higher standard of review in this case, the Court relied on facts indicating that the subject CGL was not a standard form contract. These facts included: correspondence between Hemlow and his insurance agent on the effect of the Total Pollution Exclusion, the risk of pollution events in his business, and the need for Hemlow's signature on the Total Pollution Exclusion. Such evidence indicated there were various options at play, which took the policy out of the standard form contract category. The higher palpable and overriding error standard of review would have to be met by the appellant insurer.

Following this determination, the Court considered that in other landmark pollution exclusion decisions (i.e., *Zurich Insurance Co. v. 686234 Ontario Ltd*. and *ING Insurance Co. v. Miracle*), the "historical purpose" of these exclusions had been found to preclude coverage only in the context of activities carrying a well-known risk of pollution and environmental damage. Both levels of court found it significant that the nature of Hemlow's business did not carry any obvious risk of pollution, as that term is commonly understood. They also found that Rich's claim was for property damage rather than the cost of mandated government clean up activities, and as such was not a claim arising out of "pollution".

Practical Considerations

This decision underscores the prior line of jurisprudence that pollution exclusions will operate only in the context of businesses bearing a well-known risk of pollution rather than businesses bearing only a remote or potential risk of pollution causing property damage. Insurers must thoroughly consider the insured's business activities and the type of damage alleged in determining the application of pollution exclusions.

Perhaps more importantly, when considering a court application to determine coverage, insurers are well-advised to keep an eye toward potential appeal should an adverse ruling ensue. This would entail marshalling evidence that shows the subject policy and its terms being scrutinized are part of a "standard

form contract". Insurers must be mindful that the window on what constitutes a standard form contract appears to be narrowing, thus limiting the potential for successful appeal of an adverse ruling.

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