

Wisconsin Court of Appeals Holds that Total Pollution Exclusion Applies Where Insured Did Not Disperse the Pollutant

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In *Advanced Waste Services, Inc. v. United Milwaukee Scrap, LLC*, 2014-AP-1169, the Wisconsin Court of Appeals held that the "total pollution exclusion" bars insurance coverage for occurrences caused by pollutants regardless of what entity dispersed the pollutants. In that case, United Milwaukee Scrap ("UMS") contracted with Advanced Waste Services ("AWS") to remove wastewater from its facilities after which AWS would take the wastewater to its facility for processing. AWS sued UMS after wastewater provided by UMS was found to contain PCBs, which contaminated the AWS facility during the recycling process.

UMS' insurer, Illinois National Insurance Company ("Illinois National"), refused to defend UMS citing to the "total pollution exclusion" in its policy. The exclusion prohibited coverage for "'property damage' which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." UMS filed a third-party complaint against Illinois National arguing it had breached its duty to defend. The trial court granted summary judgment to Illinois National.

On appeal, UMS argued there was no "pollutant" and no "dispersal" as defined by the policy because the PCBs were not released until after UMS had relinquished possession of the wastewater to AWS. UMS also argued it was AWS' duty to ensure the wastewater was not contaminated. UMS acknowledged PCBs are pollutants, as defined by the policy, but contended the exclusion should not apply because it did not disperse the pollutants. UMS urged the appellate court to adopt a limiting principle whereby the pollution exclusion would only apply if the insured intentionally discharges a known pollutant.

The court looked to the precedent of *Hirschhorn* and *Ace Baking* as guidance and found no such limiting principle under Wisconsin law. The court held that, based on the plain, unambiguous terms of the policy, the exclusion applies to any loss involving the dispersal of pollutants, even where the insured took no action that could be said to have caused the dispersal of the pollutant. In other words, when interpreting a "total pollution exclusion" it does not matter who dispersed the pollutant, only that a pollutant was dispersed.

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