

ALASKA SUPREME COURT FINDS GASOLINE RELEASED FROM UNDERGROUND STORAGE TANK IS A "POLLUTANT" WITHIN THE SCOPE OF AN ABSOLUTE POLLUTION EXCLUSION IN A CGL POLICY

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In *Whittier Properties, Inc. v. Alaska National Insurance Company*, No. S-12538, Alaska Supreme Court ___ P.2d ___ (June, 2008) the Alaska Supreme Court addressed the question of whether gasoline stored in an underground storage tank constituted a "pollutant" within the meaning of the Absolute Pollution Exclusion contained in the general liability policy at issue in the case.

In *Whittier Properties*, the insured owned and operated a gas station and convenience store. In the course of a tank upgrade project, soil contamination in the vicinity of the older tanks was discovered. The contamination was reported to the Alaska Department of Environmental Conservation ("ADEC"), which advised the insured that it should undertake appropriate investigation and cleanup efforts at the site. Apparently, the insured did not investigate or remediate the release.

The insured ceased operations and closed the facility several years later. Subsequent investigation at the site revealed petroleum product contamination apparently associated with piping for the new tank installed in 1995. Further investigation indicated that approximately 50,000 gallons of gasoline was released over a several year period.

Neighboring property owners filed suit against the insured seeking damages for contamination of their property from the gasoline release. In addition, the State of Alaska filed suit against the insured to recover response costs. The insured tendered the defense of both suits to the insurer, Alaska National, which denied coverage based upon the Absolute Pollution Exclusion contained in the policy. Thereafter, the insured sued the insurer for breach of contract and bad faith.

The trial court, the Superior Court for the Third Judicial District, in Anchorage, granted summary judgment to the insurer based upon the terms of the Pollution Exclusion. The insured appealed to the Alaska Supreme Court. The insured argued

that on the facts of this case, the gasoline released from the underground storage tank at the site was not a "pollutant." The insured argued the gasoline was a useful product held for sale to third parties for use as vehicle fuel. In support of its arguments, the insured cited to the *American States v. Kiger* case from Indiana and the *Hocker Oil v. Barker-Phillips-Jackson* case from Missouri, which found the pollution exclusion ambiguous as to a release of gasoline.

The Alaska Supreme Court rejected the insured's arguments and declined to follow *Kiger* and *Hocker Oil*. The court found the pollution exclusion was unambiguous and effectively precluded coverage for claims alleging damage caused by the release of a variety of different pollutants, including gasoline. The court found there was:

...no ambiguity because, even though gasoline that is in the underground storage tank is a 'product' for purposes of other parts of the insurance policy, when the gasoline escapes or reaches a location where it is no longer a useful product, it is fairly considered a pollutant.

The Court followed what it viewed as a "majority" of courts that have rejected the argument that the absence of the term "gasoline" in the definition of "pollutant" in the policy demonstrated that the insurer did not intend gasoline held for sale in a tank, if released, to be a "pollutant" under the policy.

It is interesting to note the Court's decision in *Whittier Properties* was based, at least in part, on the insurer's argument that the insured was aware that the policy did not apply to pollution resulting from leaks from the underground storage tanks given that the insured had applied for, and obtained, a third party liability and corrective action policy from another insurer which specifically applied to claims arising from releases of fuel from the storage tank system. The Court also found

persuasive the fact that the insured had stated in its application for the storage tank policy that it did not have current pollution coverage for its tank system under its general liability coverage with Alaska National. Given this, the Court found the insured could not have reasonably expected that Alaska National's policy would have applied to pollution damage resulting from a leak of gasoline from the storage tank.

The *Whittier Properties* decision is significant in a number of respects. First, it clarifies that the Absolute Pollution Exclusion will be enforced by the Alaska courts. Second, it is clear that in Alaska, claims arising from releases of gasoline from storage tanks fall within the scope of the pollution exclusion. The *Whittier Properties* decision is also significant because it adds

to the weight of the majority of decisions around the country which have addressed these issues, and have held that gasoline released from an underground storage tank falls within the scope of claims excluded by the Absolute Pollution Exclusion.

To discuss any questions you may have regarding the decision discussed in this Alert, or how it may apply to your particular circumstances, please contact Peter Mintzer in Seattle at 206.373.7243 or pmintzer@cozen.com. Peter is admitted to practice in Alaska, as well as the states of Washington, Oregon, Idaho and Hawaii. Peter is a Member in the firm's Global Insurance Group ("GIG") based in the Seattle office and co-chairs the GIG's Environmental Practice.