New Jersey Supreme Court Limits Reach of “Absolute Pollution Exclusion”

by Lorelie S. Masters

On April 7, 2005, the New Jersey Supreme Court joined the ranks of other state high courts that, in recent years, have limited the reach of the insurance industry’s “absolute pollution exclusion” to “traditional environmental pollution claims.” In *Nav-Its, Inc. v. Selective Insurance Co. of America*, No. A-20/21-04, 2005 N.J. Lexis 302, at *8 (N.J. Apr. 7, 2005), the New Jersey Supreme Court overruled conflicting New Jersey appellate court decisions, finding that the purpose of the exclusion “in its various forms was to have a broad exclusion for traditional environmentally-related damages,” such as those arising from remediation of hazardous waste sites under the Comprehensive Environmental Response, Compensation & Liability Act (“CERCLA”). *Id.* at *30.

In *Nav-Its*, the insurance company used the “absolute” pollution exclusion to deny coverage for personal injuries from exposure to fumes by floor coatings and sealants. On appeal, the New Jersey Supreme Court framed the “central question” in the case as “whether we should limit the applicability of the pollution exclusion clause to traditional environmental pollution claims.” The court answered that question in the affirmative.

In reaching that conclusion, the court relied on its earlier decision in *Morton International, Inc. v. General Accident Insurance Co.*, 134 N.J. 1 (1993), where the court rejected the insurance industry’s position that the “sudden and accidental” pollution exclusion precluded coverage for any pollution liability that was not “abrupt” or “instantaneous.” The court there imposed regulatory estoppel to prevent the insurance industry from rejecting coverage when it had made representations to insurance regulators that the “sudden and accidental” exclusion was merely a “clarification,” not a reduction, of coverage. The court in *Nav-Its* in part relied on an article written by Jenner & Block Partner Lorelie S. Masters, which discussed representations that insurance industry representatives made to insurance regulators in New Jersey with regard to the absolute pollution exclusion in the 1980s. *Id.* at *28-29. Based on a review of the development of the absolute pollution exclusion, the court was “confident” that the history of the exclusion “demonstrates that its purpose was to have a broad exclusion [only] for traditional environmentally-related damages.” *Id.* at *30. The court further concluded that, “[i]f we were to accept Selective’s interpretation of its pollution exclusion, we would exclude essentially all pollution hazards . . . .” The court rejected that interpretation as “overly broad, unfair, and contrary to the objectively reasonable expectations of the New Jersey and other state regulatory authorities that were presented with an opportunity to disprove the clause.” *Id.* (citing *Morton*, 134 N.J. at 30).

The court relied heavily on decisions by state supreme courts in California, Illinois, Massachusetts, Ohio, New York and Washington State limiting the reach of the absolute pollution exclusions to those hazards traditionally associated with environmental pollution. The court also recognized that the insurance industry periodically revises standard-form policy provisions to exclude certain exposures from coverage. Consistent with its earlier findings in *Morton*, the court made clear that application of approved policy terms must accord with representations that the insurance industry makes to insurance regulators: “We emphasize that industry-wide determinations to restrict coverage of risks, particularly those that affect the public interest, such as the risk of damage from
pollution, environmental or otherwise, must be fully and unambiguously disclosed to regulators and
the public." *Id.* at *37.

For policyholders the decision is a significant addition to the body of law confirming that insurers
may not properly invoke so-called "absolute" pollution exclusions as the basis for denying
coverage for "non-traditional” pollution claims. The *Nav-Its* case itself involved a claim alleging
bodily injury stemming from exposure to toxic fumes emanating from application of a floor coating.
Other examples of "non-traditional" pollution claims cited in the court’s opinion include claims
arising from the release of carbon monoxide from a broken furnace, release of paint solvent fumes,
and exposure to a policyholder’s products (like lead paint and pesticides). The decision makes
clear that general liability insurance should respond to cover such claims. Policyholders should
resist the overbroad application of these environmental pollution exclusions.