Consumer & Commercial Law State Bar of Texas

Pollution Exclusion Coverage Update

Plunkett Cooney PC

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Pollution Exclusion - Eighth Circuit (North Dakota Law)

XTO Energy, Inc. v. Commerce and Industry Ins. Co. No. 24-3101, 2026 WL 2607472 (8th Cir. Sept. 3, 2026)

The U.S. Court of Appeals for the Eighth Circuit reversed the federal district court's grant of summary judgment in favor of XTO Energy, Inc. (XTO) and against Commerce and Industry Insurance Company (Commerce). The issue in the case was whether a pollution exclusion in Commerce's second-layer umbrella policy precluded coverage for an oil well explosion. The district court held that a "time element" exception to the pollution exclusion applied, rendering the exclusion inapplicable. The appellate court disagreed and held that the pollution exclusion precluded coverage under the umbrella policy.

XTO was the owner and lease operator of the Ryan 14X-09E oil and gas well near Watford City, North Dakota. XTO retained a contractor, Missouri Basin, to perform services at the well. The agreement required Missouri Basin to secure and maintain commercial general liability insurance. Missouri Basin obtained primary coverage from Berkley National Insurance and the umbrella policy from Commerce with a $25 million limit. The umbrella policy contained a pollution exclusion that excluded from coverage any claim arising out of the "release or escape of Pollutants anywhere at any time." The exclusion also contained a "time element" exception that would render the exclusion inapplicable if five elements were satisfied, including a requirement that the insured report the incident to Commerce in writing within 21 calendar days.

On June 18, 2016, an explosion and fire occurred at the well, killing one contractor and severely injuring several workers. Commerce was not notified of the incident within 21 calendar days. Berkley filed a coverage lawsuit, and XTO filed a third-party complaint against Commerce seeking coverage under the umbrella policy. Commerce asserted that the pollution exclusion precluded coverage. The district court determined that the insurance demand fell within the scope of the exclusion and that XTO did not satisfy the notice element of the exception. However, the district court granted summary judgment in favor of XTO, concluding that Commerce had waived the right to disclaim coverage because its denial letter did not mention the lack of timely notice as a basis for denying coverage.

The appellate court first concluded that the pollution exclusion applied to the facts of the claim. The claim involved bodily injury caused by the release of pollutants (i.e., oil and gas that caught fire and exploded). The appellate court then concluded that the "time-element" exception to the exclusion did not restore coverage. There was no dispute that XTO failed to timely notify Commerce within 21 days of the incident. However, the appellate court held that because XTO had the burden to prove an exception to the pollution exclusion, Commerce did not waive the right to assert that XTO failed to satisfy the elements of the exception. In so holding, the appellate court rejected the argument that North Dakota law required an insurer to demonstrate prejudice before denying coverage for untimely notice.

Lastly, the appellate court denied XTO's argument that the primary policy's "hostile fire" and "additional insured" exceptions to its pollution exclusion were incorporated into the umbrella policy, effectively restoring coverage. The appellate court held that the primary policy's exclusion conflicted with the umbrella policy's exclusion, and therefore, the two additional exceptions were not incorporated into the umbrella policy's pollution exclusion. Thus, the appellate court concluded that the pollution exclusion precluded coverage and reversed the district court's decision.

Plunkett Cooney PC - Joshua LaBar