

## Up in Smoke – 5th Circuit Finds No Coverage for Hydrochloric Acid Spill Based on Pollution Exclusion

The Fifth Circuit Court of Appeals recently held that an insurer was not obligated to pay damages associated with a hydrochloric acid spill based on a pollution exclusion in the policy.

In Burroughs Diesel, Inc. v. Travelers Indemnity Co. of America,<sup>1</sup> a trucking company sued its property insurer, Travelers Indemnity Company of America ("Travelers") when it refused to pay a claim for a storage tank leak which resulted in over 5,000 gallons of hydrochloric acid entering the property and causing significant damage to buildings, vehicles, tools, and equipment. The acid was initially dispensed in liquid form, but quickly became a cloud that engulfed the property. Travelers denied coverage for the claim based on the pollution exclusion because "acids" fell within the policy's definition of "pollutants."

The trucking company sued Travelers in the United States District Court for the Southern District of Mississippi, alleging breach of contract and breach of good faith and fair dealing for refusing to pay the claim. The trucking company argued that coverage was warranted because there is an exception to the pollution exclusion if "the discharge, dispersal, seepage, migration, release or escape is itself caused by any of the 'specified causes of loss,'" and the hydrochloric acid cloud was a form of "smoke," which is a specified cause of loss covered by the policy. The District Court entered summary judgment in favor of Travelers, finding that the trucking company failed to demonstrate that an exception to the pollution exclusion applied. The trucking company appealed to the Fifth Circuit Court of Appeals.

On appeal, the issue came down to whether "smoke" as a specified cause of loss overcomes the inclusion of "acids" as an excluded pollutant. The trucking company argued that because "smoke" is not defined by the policy and there are several dictionary definitions of "smoke," the term is ambiguous and should be interpreted in its favor as the insured. Applying Mississippi law, the Court of Appeals found that the term "smoke" was not ambiguous simply because the trucking company pointed to a second definition, which defines it as "a suspension of particles in gas." Instead, Mississippi law requires that undefined policy terms be construed in accordance with their "ordinary and popular meaning," and the primary definition of smoke is "the gaseous products of burning materials." Accordingly, because the trucking company failed to prove that an exception to the pollution exclusion applied, the Court of Appeals upheld the judgment in favor of Travelers.

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<sup>1</sup>Burroughs Diesel, Inc. v. Travelers Indemnity Co. of America, No. 19-60875, 2020 WL 4430711 (5th Cir. Jul. 31, 2020).

<sup>2</sup>See American States Ins. Co. v. Nethery, 79 F.3d 473 (5th Cir. 1996) (Applying Mississippi law).

The Fifth Circuit Court of Appeals continues the trend in Mississippi of interpreting standard pollution exclusions very broadly. Mississippi courts apply the exclusion not just to traditional environmental contaminants such as oil or industrial waste, but to any substance that could be considered a "pollutant" (i.e., paint and glue fumes),<sup>2</sup> often to the detriment of policyholders. Moreover, not only is the exclusion itself broadly applied, but the exception to the exclusion (in this case for "smoke") is given a narrow application (rejecting the policyholder's proffered interpretation of the term "smoke" even though such interpretation actually fits within a dictionary definition of the term). The Burroughs Diesel decision is an important reminder for policyholders to carefully review all the terms of their policy and assess how certain exclusions or conditions may impact losses arising from a business's operations.

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