

Are We Seeing A Revival In Michigan Environmental Insurance Coverage?

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The U.S. District Court for the Western District of Michigan, on Feb. 3, 2015, ruled in favor of a policyholder seeking insurance coverage for “Superfund” cleanup costs: *Decker Manufacturing Corp. v. Travelers Indemnity*, No. 1:13-CV-820. The court rejected the insurer’s pollution exclusion defense:

“Under this approach, the relevant discharge is the discharge from the Landfill into the environment rather than the placement of waste into the Landfill. Travelers has not met its burden of showing that the pollution exclusion applies. Accordingly, Travelers’ Motion for Summary Judgment on the pollution exclusion will be denied. Moreover, because there is no evidence to suggest that Decker was on notice of any problems at the Landfill or that Decker ‘intended or expected’ that its wastes would be discharged from the Landfill into the environment, the Court will enter a declaratory judgment that the pollution exclusion does not bar coverage regarding the Landfill.”

The court also rejected Travelers’ defense that it was prejudiced by late notice which therefore would preclude coverage. Based on “vagueness” of pleading this affirmative defense based on EPA Information Requests, the issue of untimely notice was excluded from trial evidence. The court applied the “injury-in-fact” trigger of coverage: “the Travelers Policies . . . obligate Travelers only to provide coverage for property damage that occurs during the policy period, not for damages arising before or after the policy period.” The court deferred any ruling on the extent of damages, but agreed with Travelers that defense and indemnity coverage would be limited to a *pro rata*, time-on-the-risk allocation despite “all sums” language in the policies. The court’s subsequent Opinion of May 5, 2015, entered Declaratory Judgment that Travelers’ coverage obligations for defense and indemnity costs are limited to 12.4 percent of such costs. Expert testimony supported the groundwater impact from waste disposal in the landfill until the landfill cap was installed. The policyholder’s legal arguments did not persuade the court to reject or modify that time period during which the groundwater was likely impacted by contaminants from the landfill waste. After many years of policyholders assuming that the pollution exclusion was the death knell to environmental insurance coverage claims under Michigan law, *Decker Manufacturing* may breathe new life into such claims if analogous to the underlying facts as characterized by the court. Of course, there is the mitigating factor of the time-on-the-risk allocation of coverage spanning the

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period of property damage to be evaluated on a cost-benefit basis – but at least insurers will feel some pressure to defend similar environmental claims for Michigan sites.