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Michigan Supreme Court Splits in Reasoning, But Unanimously Decides City Sewage Is a Pollutant and Excluded From Coverage

By Jennifer L. Smith

The Michigan Supreme Court recently decided that sewage discharge was considered a pollutant under a city's insurance policy and, therefore, denial of coverage was proper. *City of Grosse Pointe Park v. Michigan Municipal Liability and Property Pool*, 473 Mich. 188, 702 N.W.2d 106 (2005). This was true despite the insurer's previous and ongoing payments for similar claims. Although the Court was unanimous in these two findings, the Justices were evenly divided (4-4) in their supporting analysis.

From 1940 to 1995 the city of Grosse Pointe Park pumped sewage and rainwater into Fox Creek, a tributary located in Detroit, in order to relieve overflow and prevent basement backups. Defendant Michigan Municipal Liability and Property Pool ("the Pool") is a group self-insurance pool created by certain local governments, and insured Grosse Pointe Park with successive one-year policies from 1985 through 1998. Throughout its years serving as the city's insurer, numerous claims were made against Grosse Pointe Park by its residents for sewage backups into their homes and businesses, based on the city's overflow into Fox Creek. The Pool covered these claims without invoking a policy exclusion regarding pollution.

A class action complaint was filed against Grosse Pointe Park and the City of Detroit in September 1995, alleging that their discharge of sewer overflow on July 24, 1995 caused homes to flood. Specifically, the plaintiffs claimed trespass, nuisance, gross negligence and taking. The City submitted the complaint to the Pool, and the Pool responded by reserving its rights under the insurance policy, specifically quoting the pollution exclusion clause. The Pool continued to cover basement backup claims during the duration of the class action lawsuit. A settlement was ultimately reached, whereby plaintiffs would receive \$1.9 million each from Grosse Pointe Park and Detroit, along with a promise to stop discharges into Fox Creek. Grosse Pointe Park finalized this settlement in light of the fact they had been notified that the Pool was denying their indemnification coverage. Shortly thereafter, the City filed a declaratory action.

SECRET WARDLE NOTES:

This case identifies the Michigan Supreme Court's current views on important insurance coverage issues. This case reveals that the Court is split on the type of burden a party is required to meet in proving whether or not a latent ambiguity exists, which would therefore allow a court to consider extrinsic evidence. The Court also disagrees on its interpretation of their 1999 decision in *Kirschner*, and whether or not estoppel may be used to extend coverage for risks not written within the policy.

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The trial court concluded that the Pool was equitably estopped from invoking the pollution exclusion clause to deny coverage because the Pool had previously paid basement backup claims without incident. It granted the City's motion for summary disposition and ordered the Pool to indemnify the City for the amount of the class action settlement. On appeal, the Court of Appeals decided 2-1 to reverse the trial court's decision, finding that a question of fact existed on whether or not the Pool was estopped from denying coverage. Due to the fact that the Pool had a practice of paying basement backup claims without invoking the pollution exclusion clause, the Court of Appeals held that extrinsic evidence could reveal an ambiguity in the insurance policy.

The Supreme Court granted the Pool's application for leave to appeal to decide whether: (1) sewage is a "pollutant" under the insurance policy's pollution exclusion clause; (2) extrinsic evidence may be used to establish an ambiguity in the policy's exclusion clause; and (3) the Pool may be estopped from asserting the exclusion clause based upon their past conduct. The Court separated into two groups in its analysis, with one opinion authored by Justice Michael Cavanagh and another authored by Justice Robert Young, Jr.

The Justices were unanimous in deciding that no latent ambiguity existed in the policy's pollution exclusion clause, and that consideration of extrinsic evidence could not be admitted to aid in the construction of the policy. Upon review of the plain meaning of the policy, the City's discharge constituted "pollutants." The Court was also unanimous in deciding that equitable estoppel did not apply. When the Pool reserved its rights under the policy, the City was put on notice that it might not be indemnified. The City's alleged reliance on the Pool's past conduct was unjustified, given this notice.

The Court did divide on how to properly analyze whether a "latent" ambiguity exists in an insurance policy, a finding of which would allow the court to admit extrinsic evidence. The Cavanagh contingent would not require the insured to present clear and convincing evidence of a latent ambiguity. Relying upon prior case law dealing with waiver and modification of contract, the Young contingent found that the party alleging the existence of the latent ambiguity must prove it through clear and convincing evidence.

The two contingents also disagreed on whether and when estoppel could be used to expand coverage beyond the terms of the policy. Both contingents based their analysis on the Michigan Supreme Court decision in *Kirschner v. Process Design Associates, Inc.*, 459 Mich. 587, 592 N.W.2d 707 (1999). The Young contingent found that estoppel could not be applied to expand coverage beyond the scope "originally contemplated by the parties in the insurance policy as written." For instance, by asking to invoke estoppel in this instance, Grosse Pointe Park was essentially asking the Court to ignore the policy's pollution exclusion clause. On the other hand, the Cavanagh contingent found that the rule announced in *Kirschner* was not absolute, and that in some instances it might be proper for the doctrine of estoppel to bring within coverage risks not covered by the policy.

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