

05/07/2019 - By Lance Meyer & Dale Thornsjo

Eighth Circuit Applies Total Pollution Exclusion in Contaminated Livestock Feed Case

In a short six-page decision, the Eighth Circuit recently applied a total pollution exclusion to bar coverage in a contaminated livestock feed case. *Restaurant Recycling, LLC v. Employer Mut. Cas. Co.*, 2019 WL 1890022 (8th Cir. Apr. 29, 2019).

Restaurant Recycling purchases used fat products, like waste cooking oil from restaurants, and then processes and resells the substances to livestock producers for blending with other ingredients in their animal feed. New Fashion Pork, a swine producer, sued Restaurant Recycling for delivering recycled fat that was contaminated with two substances that are not safe for animal consumption—lasalocid and lascadoil. New Fashion Pork blended the contaminated fats into its swine feed and alleged that the contaminated feed caused serious health issues for its swine. Restaurant Recycling, in turn, sued its insurer, seeking coverage under its CGL Policy. The district court granted the insurer's motion for judgment on the pleadings based on the total pollution exclusion in Restaurant Recycling's CGL Policy, and the Eighth Circuit Affirmed.

The total pollution exclusion at issue provided that the insurer had no duty to defend or indemnify in cases of "[b]odily injury' or 'property damage' which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." While conceding that the contaminant at issue constituted a "pollutant" under Minnesota law, which follows "a non-technical, plain-meaning approach to interpreting pollution exclusions," see *Midwest Family Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628, 637 (Minn. 2013) (applying the total pollution exclusion to the release of carbon monoxide indoors), the insured argued that the accidental blending of the contaminant into livestock feed did not constitute "dispersal" so as to trigger application of the exclusion. The Eighth Circuit disagreed.

The court reasoned that Restaurant Recycling's collection and processing of waste cooking oil into fat products for use in animal feed and New Fashion Pork's blending of the contaminated fat into its feed and transportation of the feed to its swine facilities qualify as "dispersing" because "they involve the breaking up and distributing of the [pollutants] throughout the processed fat product and New Fashion Pork's swine feed." In so holding, the court rejected Restaurant Recycling's argument that dispersal must be an intentional act to trigger application of the exclusion. Pointing to the plain meaning of dispersal, Minnesota case law, and the fact that the CGL Policy only provides coverage for "occurrences" or accidents in the first instance, the court held that the exclusion is not limited to intentional acts.

If you have questions regarding the Restaurant Recycling decision, Minnesota's broad application of total pollution

exclusions, or any other insurance-coverage issues, please contact Dale O. Thornsjo , Lance D. Meyer , or one of the other members of our Firm's Insurance Coverage Practice Group at (952) 831-6544.