CGL Policy – "Flooding Event" – Pollution Exclusion Clause

Where plaintiffs assert their business and land suffered damage from flooding from a nearby owner's property after he installed culverts in a stream, which overflowed during a flood, the carrier cannot rely on the "pollution exclusion" clause of a commercial general liability policy issued to defendant property owner's business to deny a defense.

The court considers the applicability of the policy's pollution exclusion clause to the facts at hand. The language of the clause specifies that it only applies to pollutants that cause damage at premises occupied by the insured or that cause damage elsewhere after physically originating from the insured's premises. It is undisputed that there are no allegations as to the former. As to the latter, plaintiffs allege that the negligent, illegal and prohibited restriction of water flow, caused by defendants, created flood conditions that were non-existent and non-occurring prior to installation of the culverts or after their removal. Although the plaintiffs charge that the culverts caused the water in the stream to physically invade their property, there are no claims that the water was actually dislodged from the owner's property and landed on plaintiffs' property, making flood waters alone as pollutants, and the pollution exclusion clause is inapplicable as a matter of law to the facts at hand.

Finally, the court considers whether the carrier has waived its right to rely on a breach-of-policy defense. Even if I were to assume that the owner failed to provide timely notice of the occurrence to the carrier, both the plain language and chronicled application of the provision preclude the carrier from asserting a breach-of-policy defense against the plaintiffs' claim. The evidence, viewed in the light most favorable to the carrier, indicates that a reservation of rights letter was issued to the owner on April 25, 2003. Upon issuing the letter, the carrier was required to notify the plaintiffs of this action by June 9, 2003, 45 days from the date of the letter. The evidence shows without dispute that plaintiffs learned of the letter sometime between April 12 and April 14, 2004, more than 10 months after the statutory deadline. Thus, the carrier failed to comply with the statutory notification requisites and is barred from asserting a breach-of-policy defense.

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