

Pollution Damage – Liability Insurance and Third Party Interests

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Norwegian companies carry strict liability for pollution damage. This is different from the liability described in Directive 2004/35/CE on environmental liability which operates with the principle of liability for negligence. In 2006, the Norwegian Court of Appeal passed a judgement concerned with what is regarded a third party interest in connection with pollution damages. The result of the judgement was that the liability on the hand of the insurer was extended. Consequently, insurers may evaluate the risk of insuring Norwegian companies differently.

I. Introduction

Traditionally, liability insurance contracts covers the non-contractual liability of an insured party with respect to a third party as a consequence of injury or damage caused by the insured to the person or property of that third party. Damage or injury caused by the insured to the insured party's own person or property is not normally covered. In respect of such damage, indemnity must be sought under property insurance cover.

In pollution cases there will often be abstract nature conservation interests not directly related to injury or damage to third parties. Pollution damage to the insured's own land or property is an example of damage for which a third party may have an interest in seeking redress.

In 2006, Agder Court of Appeal in Norway (referred to in the following as the Court) rendered a judgment on the question of which third party interests enjoy protection under liability insurance cover. Although the findings of the judgment rest on an interpretation of the insurance contract in question, the judgment is also relevant in a wider context as it gives an indication as to what might constitute a third party interest covered under liability insurance in the case of pollution damage.

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2. The facts in the case and the submissions of the parties

The case concerned a claim by a cement producer, Norcem AS (referred to in the following as Norcem/the insured), against two insurance companies for indemnity under Norcem's liability insurance for costs incurred in mitigating pollution damage caused by a major oil spill.

The oil spill in question was caused by a leak from Norcem's waste oil tank. The tank was surrounded by a containment facility that was designed to prevent the spread of spillages. The containment facility did not function as intended, and as a result the oil spillage spread, not only within the confines of the containment facility, but also to the ground beyond and to the sea below the factory. The oil emission into the sea was the focus of interest in relation to the question of which third parties' interests are covered under the liability insurance contract.

Norcem's claim for recovery of costs associated with the oil spillage into the sea was primarily based directly under the insurance contract's pollution damage clause, even though Norcem had not paid compensation for damage caused to the property of any third parties. Contrary to the submissions of the insurance company, it was argued that no distinction could be made between damage to the insured's own property and damage to the property of third parties. Alternatively, Norcem argued that the costs were indemnifiable under the contract provisions regulating salvage costs. The insurer admitted liability for pollution damage insofar as the spillage had in fact caused damage outside Norcem's property on land or in the sea. Thus the disagreement between the parties was attributable to diverging views on what third party interests were covered under the liability policy, and accordingly what constituted pollution damage under the policy.

3. The findings of the Court

The Court first drew up the parameters of what the policy defines as third parties:

"... any individuals or legal entities as far as they are legally entitled to claim against the Insured who is responsible or legally liable for the loss." The Court held that this must mean that all outside parties with claims against the insured as a consequence of the insured event must in principle be covered as a third party, and that the wording does not provide grounds for a narrow interpretation. The Court held that the definition provided in the conditions of insurance of what constituted indemnifiable pollution damage was broad and permitted of a liberal interpretation in accordance with what the object of the insurance contract indicated.

The Court then considered the key issue of the area of cover afforded under liability insurance, viz. that it must provide cover for liability in law for compensation incurred by the insured with respect of third parties as a consequence of injury or damage to the property or person of that third party. The Court held that in the case of pollution damage this concept of third party is too restrictive and found that pollution in the form of oil spillage and emissions of harmful substances will, typically, cause damage to the external environment irrespective of whether the pollution results in physical encroachment of the person or property of specific third parties.

The Court went on to discuss the strict liability of the polluter under pollution legislation for the remediation of the pollution damage. The court concluded that the party responsible for the pollution may be ordered to pay restitution compensation to the general public for the costs of restoring the environment so that rights of common can as far as possible be exercised as before. In the assessment of the Court, it follows from the objects of the liability insurance and other policy

considerations that responsibility for pollution damage encompasses the responsibility of the insured in relation to interests that are protected under the Pollution Control Act. Accordingly, the court stated that the public environmental interests that are safeguarded and enforced on behalf of society by the pollution authorities will constitute a third party interest under the insurance contract.

The Court held that it was evident that the extent of the right of private ownership in the sea based on particular circumstances, such as the location of the sub-marine shelf was not an appropriate criterion for the purpose of delineating the scope of the liability insurance cover for oil spillage in the sea. Accordingly, it was not appropriate to apportion the costs of cleaning up the oil within and outside the boundaries of Norcem's property rights in the sea.

Nevertheless, the Court was in some doubt about whether Norcem's costs in mitigating the oil spillage in the sea should be covered as salvage costs or directly under the liability insurance cover. The Court emphasised that it could be argued that the basis for covering the insured party's own costs is regulated exhaustively by the rules on salvage costs. However, the Court concluded that the Pollution Control Act's special system of sanctions must lead to a different conclusion. It was noted that Norcem's costs in mitigating the spill in the

sea were not primarily costs incurred in fulfilling the duty of the insured under the insurance contract to prevent or reduce the scope of a recoverable loss, but rather measures that were performed in fulfilling a statutory duty sanctioned with an alternative liability for compensation for the costs of the public authorities in any measures performed pursuant to the Pollution Control Act. The Court held that the financial losses of the insured as a consequence of fulfilling this duty were a direct consequence of the pollution damage encompassed by the liability insurance cover.

Interestingly, the Court also found that the claim would have succeeded under the alternative claim for salvage costs. In other words, the Court did not "have" to decide the way they did to grant Norcem the right to recover its losses. In other words, the Court adopted a deliberate standpoint on whether third party interests covered under the liability insurance in the case of pollution damage also extends to damage to own property. As we have seen, this question was answered in the affirmative. In terms of Norwegian law, this represents a deviation from the traditional understanding of the cover afforded under liability insurance. It should be noted that the case was appealed to the Norwegian Supreme Court, but that leave for the appeal to proceed was not granted.