IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 94-20765

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KINARK CORPORATION, ET AL.,

Plaintiffs-Appellees,

v.

HOME INSURANCE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 93 1651)

August 30, 1995

Before KING and JONES, Circuit Judges, and LAKE*, District Judge.

PER CURIAM:**

Kinark Corporation appeals from a final summary judgment declaring that Home Insurance Company had no liability to Boyles Galvanizing Company, a Kinark subsidiary, under two comprehensive general liability insurance policies issued by Home to Kinark. We affirm.

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* District Judge for the Southern District of Texas, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Boyles operated a metal galvanizing facility in Denver, Colorado. From March of 1978 through October of 1980, while Boyles was insured under comprehensive general liability policies issued by Home to Kinark, Boyles contracted with Waste Transportation, a subsidiary of Waste Management Company, to transport and dispose of waste from its galvanizing facility at the Lowery Landfill near Denver. The landfill was owned by the City and County of Denver and operated by Waste Management of Colorado, Inc. Boyles knew that the waste it shipped for disposal at the Lowery Landfill contained chemicals that are now defined as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601(14) (e.g., arsenic, chromium, lead, and mercury). Boyles also knew that Waste Transport was depositing its waste at the Lowery Landfill.

The United States Environmental Protection Agency ("EPA") listed the Lowery Landfill on the National Priorities List in September of 1984, thereby slating it for cleanup pursuant to CERCLA. In May of 1988 EPA notified Boyles that it was a potentially responsible party and that as such it may be obligated to pay response costs incurred to investigate and correct environmental problems at the landfill. Boyles was also named as a defendant in two lawsuits seeking to impose liability under federal and Colorado law for response costs incurred in connection with the cleanup of the Lowery Landfill. Boyles' alleged liability in both the EPA proceeding and the private lawsuits was predicated upon its

shipments of hazardous waste to the landfill from March of 1978 through October of 1980 for disposal.[1]

Waste Management of Colorado, Inc. and its parent, Chemical Waste Management, Inc., offered to defend and hold Boyles harmless from all of the claims against it in return for Boyles' payment of $1,481,343. Boyles made demand on Home to indemnify and defend the claims against it and to fund the offer by Waste Management, but Home refused all of Boyles' requests. Boyles and Houston General Insurance Company, one of its excess carriers, paid Waste Management $1,481,343 in return for a release and indemnity of all claims by EPA and others in connection with Boyles' disposal of waste at the Lowery Landfill. Kinark, Boyles, and Houston General then brought this action against Home.

The insuring language of Home's policies states:

> The Company will pay on behalf of the insured all sums which the insured shall become legally liable to pay as damages because of . . .

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[1] Boyles acknowledges that both EPA's claim and the private lawsuits are predicated upon Boyles' alleged liability for "the shipment of waste materials by BOYLES to [the landfill]. . . ." (Plaintiffs' Second Amended Complaint, ¶ 3 at p. 3) EPA's May 1988 letter to Boyles stated that "EPA has reason to believe that you arranged, by contract, agreement, or otherwise, for the disposal, treatment, or transportation for the disposal or treatment of hazardous substances found at the [Lowery Landfill]. The private lawsuits also alleged that Boyles arranged for the disposal of hazardous substances at the Lowery Landfill. Plaintiffs' First Amended Complaint in The City and County of Denver, et al. v. Adolph Coors Co., et al., Civil Action No. 91-F-2233, in the United States District Court for the District of Colorado, at ¶ 48; answer and counterclaim and third-party complaint of the S.W. Shattuck Chemical Co. in Waste Management of Colorado, Inc., et al. v. The S.W. Shattuck Chemical Co., et al., Civil Action No. 92-Z-214, in the United States District Court for the District of Colorado, at ¶¶ 11 and 43 of the third-party complaint.

> B. Property damage to which this insurance applies, caused by an occurrence, . . .

The term "occurrence" is defined by the policy to mean "an accident, including continuous or repeated exposure to conditions, which results in . . . property damage, neither expected nor intended from the standpoint of the insured." The policies contain pollution exclusion clauses, which state:

> This insurance does not apply to . . . property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

The policies do not define "sudden and accidental."

Boyles, Kinark, and Houston General filed a motion for partial summary judgment, and Home filed a motion to dismiss, which the district court treated as a motion for summary judgment. Boyles argued that Colorado law governed the interpretation of Home's policies, that the term "sudden and accidental" was ambiguous, and that one reasonable interpretation of the term was pollution that was "unexpected or unintended" from the standpoint of the insured. Since Boyles did not expect or intend any leakage from the Lowery Landfill, it argued that the pollution exclusion did not apply and that Home was liable under its policies. Home argued that Oklahoma law applied, that regardless of which state's law applied the pollution exclusion clause was not ambiguous, and that the discharges of Boyles' waste into the Lowery Landfill were neither "sudden" nor

"accidental" since they were intended by Boyles. Persuaded by Home's arguments the district court granted its motion for summary judgment.

Aided by some additional case law appellants make the same arguments to this court that the district court found unpersuasive. They argue that under Colorado law the term "sudden and accidental" is ambiguous and that because Boyles did not intend or expect discharges or releases from the Lowery Landfill, the pollution exclusion in Home's policies does not apply. To support this argument appellants rely primarily on the Colorado Supreme Court's opinion in Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991), which construed policy provisions identical to those in the present case.

From 1938 to 1953 Hecla was part owner of Resurrection Mining Company. Two of the company's mine shafts drained into the Yak Tunnel, which "was designed as a portal for the transportation of ore out of adjacent mines and to allow for drainage of the mine shafts into the California Gulch."[2] Years after Hecla last discharged mining waste into the Yak Tunnel employees of another mining company, Asarco, removed shoring timbers and accumulated debris from the tunnel and in so doing caused a sudden surge of contaminated water to be released from the Yak Tunnel into California Gulch and the Arkansas River.

[2] Hecla, 811 P.2d at 1085, n.2.

Various defendants in a CERCLA action instituted by the state of Colorado filed a third-party action against Hecla seeking contribution for the discharges it made into the Yak Tunnel from 1938 to 1953. Hecla's comprehensive general liability insurers denied coverage and brought a declaratory judgment action against Hecla. The district court held that the insurers had a duty to defend Hecla but that the issue of the insurers' duty to indemnify was not ripe for resolution. The court of appeals reversed, holding that because Hecla knew or should have known that its mining activities would result in environmental damage, the resulting damage was expected and, therefore, not an occurrence under Hecla's policies. The Colorado Supreme Court reversed the court of appeals. The Supreme Court held that because there were no allegations in either the CERCLA action or the third-party action that Hecla had expected or intended environmental damage to result from its mining operations, for purposes of determining the insurers' duty to defend, Hecla's discharges of waste into the Yak Tunnel were occurrences under the policies.[3]

In the alternative, Hecla's insurers argued that even if its discharges into the Yak Tunnel were occurrences under the policies, the pollution exclusion clauses applied because the discharges were not "sudden and accidental," but instead occurred continuously over a number of years. In response Hecla argued that the "sudden and accidental" language in the pollution exclusion clauses was

[3] 811 P.2d at 1088.

ambiguous and that it therefore had to be construed against the insurers to mean "unexpected and unintended." The Colorado Supreme Court agreed. After first explaining that "the pollution exclusion clause focuses on whether the discharge of pollution [as contrasted to the resulting damage] was unexpected and unintended . . . ,"[4] the Supreme Court held that the insurers had failed to establish that the pollution exclusion clause excused a duty to defend because they had failed to allege that the discharges of mining waste by Hecla were either expected or intended. Because, unlike the instant case, the insurers' duty to defend in Hecla was based solely on the absence of allegations that Hecla's activities were expected or intended, Hecla is not dispositive of the issues in this case.

The facts of this case are similar to those in Broderick Investment Co. v. Hartford Accident & Indemnity Co., 954 F.2d 601 (10th Cir. 1992), cert. denied, 113 S.Ct. 189 (1992). Broderick Wood Products, Inc. (BWP) treated wood products with creosote and pentachlorophenol and then disposed of its waste products in unlined pits on its plant property. The property was added to the National Priorities List after EPA determined that contaminants from the pits were seeping into the soil and groundwater. EPA sued Broderick Investment Company (BIC), a successor-in-interest to BWP, to recover response costs incurred and to be incurred in connection with the cleanup of the BWP facility. Hartford sued BIC seeking a

[4] 811 P.2d at 1088, n.7.

declaratory judgment that its comprehensive general liability policies provided no coverage for the response costs sought by EPA. On appeal from the district court's judgment in favor of BIC the Tenth Circuit was faced with construing a pollution exclusion clause identical to the one in Home's policies to Boyles under Colorado law.

Citing Hecla for its definition of "sudden and accidental" as meaning "unexpected and unintended," the Broderick court stated that

> [a]lthough the Hecla decision resolved some issues before this court, it left unresolved two critical issues that we must address -- namely, whether the placement of waste materials into containment ponds constituted a "discharge, dispersal, release or escape" and, if so, whether property damage could be said to arise out of this "discharge, dispersal, release or escape."[5]

The Broderick court certified these questions to the Colorado Supreme Court. When the Colorado Supreme Court refused to answer them the Tenth Circuit resolved the issues as it believed the Colorado Supreme Court would have resolved them.

The Broderick court held that the language in the exclusion clause denying coverage for property damage "arising out of the discharge, dispersal, release, or escape . . . of waste materials . . . into or upon the land" described BIC's placement of waste into the pits, not the later damage from seepage of the waste into soil and groundwater.[6] The Court then held that because

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[5] 954 F.2d at 604-605.

[6] 954 F.2d at 607.

contamination of soil and groundwater by seepage from the waste "arose out of" the discharges into the pits, the pollution exclusion clause applied, and BIC's discharges were not covered under Hartford's policy.

As in Broderick, we conclude that the language in Home's exclusion clause denying coverage for "property damage arising out of the discharge, dispersal, release, or escape of . . . waste materials . . . into or upon the land" describes Boyles' discharges of its waste at the Lowery Landfill and not the later damage from leakage of the waste into soil and groundwater. Consequently, even if the definition of "sudden and accidental" in the pollution exclusion clause is ambiguous and, as appellants argue, susceptible to the meaning of "unexpected and unintended," the clause still excludes coverage because Boyles intended and expected the disposal of its waste at the Lowery Landfill. Because under Colorado law Boyles' disposal of hazardous waste at the Lowery Landfill was a discharge that was neither sudden nor accidental under any reasonable interpretation of the pollution exclusion clause in Home's policies, the judgment of the district court is **AFFIRMED**.[7]

[7] Since appellants argue that Colorado law applies, we need not decide whether the district court's choice-of-law analysis was correct. However, like the district court we note that the result would be the same under Oklahoma law. See Oklahoma Publishing Co. v. Kansas City Fire & Marine Ins. Co., 805 F. Supp. 905, 910 (W.D. Okla. 1992).