

MINNESOTA COURT OF APPEALS CONCLUDES THAT MOLD, BACTERIA AND BIOAEROSOLS DISPERSED FROM A COMPOSTING SITE ARE "POLLUTANTS"

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The Minnesota Court of Appeals recently concluded that mold, bacteria and bioaerosols dispersed from a composting site fall within a commercial general liability ("CGL") insurance policy's pollution exclusion. *Larson v. Composting Concepts, Inc.*, Nos. A07-976, A07-977, A07-976, available at 2008 Minn. App. Unpub. LEXIS 551 (Minn. Ct. App., May 13, 2008).

Composting Concepts, Inc. ("Composting Concepts") operated a soil composting site between June 1994 and September 1996. *Larson*, 2008 Minn. App. Unpub. LEXIS 551 at *2. In 2001, Robert Larson ("Larson"), who resided near the composting site, brought suit against Composting Concepts on "theories of nuisance, negligence, and intentional infliction of emotional distress, alleging . . . personal injuries and property damage [resulting] from living organisms, mold, bacteria, and bioaerosols generated by the composting materials." *Id.*

Farm Bureau Mutual Insurance Company ("Farm Bureau") insured Composting Concepts, and after Composting Concepts assigned its rights under the CGL policy to Larson in settlement of Larson's claims, Larson brought a garnishment action against Farm Bureau. *Id.* Farm Bureau denied coverage, relying in part on the policy's pollution exclusion. *Id.* The trial court agreed with Farm Bureau and discharged the garnishment proceeding. *Id.* at *2-3.

On appeal, the primary dispute was whether the "living organisms, mold, bacteria, and bioaerosols that . . . were dispersed from the composting site fall within the policy's definition of 'pollutants.'" *Id.* at *4. Larson argued that the term "pollutant" was ambiguous, and attempted to use extrinsic evidence in support of that argument. *Id.* at *6-8. The appellate court, however, reasoned that previous decisions had already determined the pollution exclusion to be unambiguous, and

as such, refused to consider any extrinsic evidence in construing "the plain language of the policy." *Id.* at *6-7.

Additionally, Larson argued that an ISO "Fungi or Bacteria Exclusion" created an ambiguity because the mere existence of the ISO form proved that the pollution exclusion encompassed only inorganic substances. *Id.* at *7. Because Farm Bureau had not adopted the ISO "Fungi or Bacteria Exclusion," and because it was not part of the Composting Concepts policy, the court also rejected this argument. *Id.* at *8.

Next, Larson argued that an exception to the pollution exclusion applied. *Id.* at *15. Because that exception did not become part of the Composting Concepts policy until 1999—after the relevant time period—the court held that there was no basis upon which the exception could apply. *Id.* Finally, Larson attempted to argue that an actual injury trigger rule should apply. *Id.* Larson, however, failed to raise the trigger issue at the trial court level, and as such, the appellate court declined to address the argument. *Id.* at *15-16.

In rejecting Larson's arguments, the court reasoned that the essence of his claim was that "living organisms dispersed from the composting site contaminated or irritated" his body and home. *Id.* at *10. The policy did not distinguish between organic and inorganic contaminants, and therefore, the court concluded that it would be difficult "to imagine a more clear-cut scenario where a substance could be classified as a contaminant." *Id.* Accordingly, the appellate court affirmed the trial court's application of the pollution exclusion to exclude coverage for Composting Concepts' settlement of Larson's claims. *See id.*

Following a general trend and the majority of jurisdictions that have ruled on the issue, the *Larson* decision affirms

application of a CGL pollution exclusion in the context of biological contamination claims. As bodily injury and property damage contamination claims continue to increase, the *Larson* decision provides additional authority for insurers to rely upon the pollution exclusion in issuing reservation of rights and disclaimer of coverage letters in such claims.

For a further analysis of the coverage issues raised in the context of food contamination and product recall claims, please contact Joe Bermudez, Jason Melichar or Suzanne Meintzer of Cozen O'Connor's Denver, Colorado office.

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