SUPREME COURT OF SOUTH DAKOTA

Demaray v. De Smet Farm Mutual Insurance Co.

2011 S.D. 39 (2011) · No. #25757 · Decided July 20, 2011

SUMMARY

The South Dakota Supreme Court considered whether an insurer breached its duty to defend insureds in a pollution-related lawsuit. The court held that the policy's pollution exclusion was unambiguous and that the underlying complaint alleged repeated and continuing discharges, not a sudden and accidental discharge within the exception to the exclusion. The court reversed the circuit court's judgment and directed entry of summary judgment for the insurer, while denying appellate attorney's fees.

CASE DETAILS

COURT	Supreme Court of South Dakota
WRITING FOR THE COURT	Konenkamp, Justice; Gilbertson, Chief Justice; Zinter, Justice; Severson, Justice; Rusch, Retired Circuit Court Judge, sitting for Meierhenry, Retired Justice
JURISDICTION	South Dakota
DECIDED	July 20, 2011
DOCKET	#25757
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appeal from summary judgment for insureds in an action alleging that an insurer breached its duty to defend an underlying pollution lawsuit.
STANDARD OF REVIEW	Statutory construction and insurance contract interpretation are reviewed de novo. The existence of a duty to defend is determined from the complaint and other evidence of record.
PRECEDENTIAL VALUE	Published South Dakota Supreme Court opinion; precedential.
PARTIES	De Smet Farm Mutual Insurance Company v. Floyd Demaray, James Hagemann

TOPICS

duty to defend · insurance coverage · contract interpretation · standard of review · appellate procedure

PRACTICE AREAS

insurance coverage · insurance litigation · insurance contract interpretation · appellate procedure · environmental law

QUESTIONS PRESENTED

1. Whether the allegations in the underlying pollution complaint arguably asserted a claim for property damage arising from the sudden and accidental discharge of pollutants, thereby triggering De Smet's duty to defend.
2. Whether the circuit court could rely on evidence from the underlying trial, including testimony concerning a rainstorm and flooding, to find an arguable duty to defend.
3. Whether the insureds were entitled to appellate attorney's fees.

HOLDINGS

1. The allegations in the underlying complaint asserted property damage resulting from the discharge of pollutants onto land, so the policy's pollution exclusion applied and De Smet met its burden of showing that the alleged claims clearly fell outside basic policy coverage.
2. In the context of this policy, "sudden and accidental" is unambiguous and requires both a temporal component—an abrupt or immediate discharge—and an unexpected or unintended component.
3. The complaint did not arguably allege a sudden and accidental discharge of pollutants, so De Smet had no duty to defend and did not breach the insurance contract.
4. Evidence that a rainstorm may have caused sudden flooding and migration of manure did not create an arguable duty to defend where the underlying complaint alleged long-term, routine, repeated, and continuing discharges.
5. The insureds were not entitled to appellate attorney's fees because they identified no statute or rule authorizing an award in the appeal.

KEY QUOTATIONS

> *"If Demaray and Hagemann establish that the Alvine complaint arguably alleged property damage arising from the abrupt or immediate and unexpected or unintended discharge of pollutants, De Smet breached its duty to defend."* (¶ 14)

> *"Because nothing in the Alvine complaint stated an arguable claim for a sudden and accidental discharge of pollutants, De Smet did not breach its duty to defend Demaray and Hagemann, and the circuit court erred when it granted Demaray and Hagemann's motion for summary judgment."* (¶ 20)

FACTUAL BACKGROUND

Alvine Family Limited Partnership alleged that Demaray and Hagemann's cattle operation repeatedly and intermittently discharged animal waste and process wastewater into lakes and streams on Alvine's property. The underlying complaint asserted negligence, res ipsa loquitur, nuisance, and trespass, and sought injunctive relief, cleanup costs, and compensatory and punitive damages. Demaray and Hagemann tendered the lawsuit to De Smet, which declined to defend based on a pollution exclusion. The policies contained an exception for property damage arising from the sudden and accidental discharge of pollutants used in normal and usual farming activities.

PROCEDURAL HISTORY

Alvine Family Limited Partnership sued Demaray and Hagemann for alleged repeated and continuing discharges of pollutants. De Smet declined to defend under the policy's pollution exclusion, and the insureds defended themselves through trial. After prevailing in the underlying action, the insureds sued De Smet for defense costs; on stipulated facts, both sides moved for summary judgment. The circuit court granted summary judgment to the insureds, and De Smet appealed.

DISPOSITION

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reversed_and_remanded
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REMAND INSTRUCTIONS

The circuit court was directed to grant summary judgment for De Smet Farm Mutual Insurance Company.

CASES CITED

- Alvine Family Limited Partnership v. Hagemann, 2010 S.D. 28, 780 N.W.2d 507
- Auto-Owners Ins. Co. v. Hansen Housing, Inc., 2000 S.D. 13, ¶ 10, 604 N.W.2d 504, 509
- State Farm Fire & Cas. Co. v. Harbert, 2007 S.D. 107, ¶ 18, 741 N.W.2d 228, 234
- North Star Mut. Ins. Co. v. Kneen, 484 N.W.2d 908, 912 (S.D. 1992)
- S.D. State Cement Plant Comm’n v. Wausau Underwriters Ins. Co., 2000 S.D. 116, ¶ 15, 616 N.W.2d 397, 402
- Hawkeye-Sec. Ins. Co. v. Clifford, 366 N.W.2d 489, 491 (S.D. 1985)
- State Farm Mut. Auto Ins. Co. v. Wertz, 540 N.W.2d 636, 638 (S.D. 1995)
- Fireman’s Fund Ins. Cos. v. Ex-Cell-O Corp., 702 F. Supp. 1317, 1328-29 (E.D. Mich. 1988)
- St. Paul Fire and Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195, 1200 (1st Cir. 1994)
- Aydin Corp. v. First State Ins. Co., 959 P.2d 1213, 1216-17 (Cal. 1998)
- Hecla Mining Co. v. N. H. Ins. Co., 811 P.2d 1083, 1092 (Colo. 1991)
- Claussen v. Aetna Cas. & Sur. Co., 380 S.E.2d 686, 688 (Ga. 1989)
- Outboard Marine Co. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1218 (Ill. 1992)
- Morton Int’l, Inc. v. Gen. Accident Ins. Co., 629 A.2d 831, 871-72 (N.J. 1993)
- Queen City Farms, Inc. v. Cent. Nat’l Ins. Co., 882 P.2d 703, 720-21 (Wash. 1994)
- Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 573 (Wis. 1990)
- Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc., 40 F.3d 146, 152-54 (7th Cir. 1994)
- Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co., 480 N.W.2d 368, 375 (Minn. Ct. App. 1992)

- Smith v. Hughes Aircraft Co., 22 F.3d 1432, 1437-38 (9th Cir. 1994)
- Anaconda Minerals Co. v. Stoller Chem. Co., 990 F.2d 1175, 1178-79 (10th Cir. 1993)
- Bureau of Engraving, Inc. v. Federal Ins. Co., 5 F.3d 1175, 1177 (8th Cir. 1993)
- N. Ins. Co. v. Aardvark Assocs., Inc., 942 F.2d 189, 193-94 (3d Cir. 1991)
- A. Johnson & Co. v. Aetna Cas. & Sur. Co., 933 F.2d 66, 72-73 (1st Cir. 1991)
- New York v. AMRO Realty Corp., 936 F.2d 1420, 1428 (2d Cir. 1991)
- U.S. Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31, 34-35 (6th Cir. 1988)
- Headley v. St. Paul Fire & Marine Ins. Co., 712 F. Supp. 745, 748 (D.S.D. 1989)
- Dimmitt Chevrolet, Inc. v. Se. Fidelity Ins. Corp., 636 So. 2d 700, 704 (Fla. 1993)
- Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc., 555 N.E.2d 568, 572 (Mass. 1990)
- Upjohn Co. v. N. H. Ins. Co., 476 N.W.2d 392, 397 (Mich. 1991)
- Bd. of Regents of the Univ. of Minn. v. Royal Ins. Co., 517 N.W.2d 888, 892 (Minn. 1994)
- Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd., 597 N.E.2d 1096, 1102-03 (Ohio 1992)
- Travelers Cas. & Sur. Co. v. Superior Court, 75 Cal. Rptr. 2d 54, 66 (Cal. Ct. App. 1998)
- LaFarge Corp. v. Travelers Indem. Co., 118 F.3d 1511, 1516-17 (11th Cir. 1997)
- St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195, 1200 (1st Cir. 1994)
- Hyde Athletic Indus., Inc. v. Cont’l Cas. Co., 969 F. Supp. 289 (E.D. Pa. 1997)
- Upjohn Co. v. Aetna Cas. & Sur. Co., 850 F. Supp. 1342 (W.D. Mich. 1993)
- Travelers Cas. & Sur. Co. v. Superior Court, 75 Cal. Rptr. 2d 54 (Cal. Ct. App. 1998)
- Standun, Inc. v. Fireman’s Fund Ins. Co., 73 Cal. Rptr. 2d 116 (Cal. Ct. App. 1998)