MARSH

EMEA Environmental Practice

THE "BARTOLINE" CASE

This landmark case highlights the limitations of pollution coverage available under public liability insurance policies.

In a UK court judgement, it was held that offsite clean-up costs sought by public enforcing bodies were not covered by a claimant's public liability policy. The judgement in Bartoline Limited (Bartoline) v (1) Royal & Sun Alliance Insurance plc (RSA) (2) Heath Lambert Limited (2006) confirms that such costs did not constitute a "legal liability for damages" as required by the policy wording, and as such the insurer was within its rights to reject a claim for costs owed to the Environment Agency and costs incurred through complying with a statutory notice.

BACKGROUND TO THE CASE

Bartoline carries out the manufacturing and packaging of solvents and wood preservatives. A fire at Bartoline's premises led to fire-fighting foam and chemicals causing the pollution of two local watercourses. Acting under its statutory powers, the Environment Agency (the Agency) carried out emergency works to clean up the watercourses, including the construction of dams to enable dewatering, as well as the removal and disposal of contaminated silt and vegetation. The Agency subsequently invoiced Bartoline for the cost of the emergency clean-up works and Works Notices pursuant to the Water Resources Act 1991, requiring Bartoline to remove contaminated water and sediment.

Bartoline immediately sought to recover the invoiced sums from its public liability insurer RSA, as well as the cost of the clean-up it had carried out in accordance with the Agency's requirements. The total cost amounted to approximately £770,000. RSA rejected the claim, ultimately resulting in Bartoline commencing court proceedings against RSA for alleged breach of contract. An action was also brought against Heath Lambert, Bartoline's insurance broker, for its alleged breach of contract and/or negligence.

POLICY WORDING

At the crux of this case was the meaning of the term "damages" as set out in Bartoline's public liability insurance policy. The policy indemnified Bartoline against (amongst other things) "legal liability for damages in respect of.... damage to property....nuisance trespass to land or interference with any easement right of air, light, water or way". The preliminary issue considered was whether the costs incurred by Bartoline as a result of the Agency's statutory action fell within the meaning of "damages".

DECISION

The judge for this case considered that the Agency's statutory powers and the laws of tort seek to protect very different interests, commenting that 'any liability to repay the expenses incurred by the Agency…and any ability to pay damages in tort are… quite different animals. One arises out of the need to protect the public interest in the environment and the other to protect individual interests in property'.

The judge held that the core meaning of the policy term, 'damages' could be described as 'the pecuniary recompense given by a process of law to a person for the actionable wrong that another has done him.' It was held that the statutory debt and costs relating to the clean-up works would not fall within this meaning, although tortious claims brought by those with legal interests relating to the rivers may do so.

COMMENTS

The judgement draws a clear distinction between the statutory framework and the principles underpinning common law claims for 'damages'. The judgement is made all the more important as there is limited case law in this area. The case has been cited in subsequent insurance litigation cases.

Whilst excluding losses arising from gradual pollution, Bartoline's public liability policy, in common with many other such policies, covered pollution incidents of a 'sudden and accidental' nature. The fact that this pollution resulted from a 'sudden and accidental' event (i.e. the fire) was never disputed. Instead, the judgement goes to the root of policy coverage, by sending a clear message that the scope of 'damages' covered under a public liability policy should be limited to losses arising from a third party claim rather than from a statutory action by an enforcing authority. This is particularly important considering that regulatory authorities have only recently started to enforce their powers on a more frequent basis.

INSURER RESPONSE

The response of general liability insurers to date has been mixed.

- Most insurers have not amended their policy wording.
- A number currently exclude all clean-up costs.
- Certain insurers are now providing extensions to their public liability insurance policies. These extensions are often called 'Bartoline extensions'.
- Many of these extensions, however, do not change or expand the operative clause, and as such, these extensions may not actually respond to a similar 'Bartoline-type' incident.
- Some may respond when there is a simultaneous third party injury or property damage claim.

It is worth noting that the costs of onsite clean-up, which is understood to have far exceeded the costs of the offsite clean-up claimed by Bartoline, is unlikely to have been covered by the public liability insurance policy, irrespective of the judgement in this case. Coverage for both aspects could, however, have been provided by a specialist environmental insurance policy.

This case demonstrates the need for companies to seek appropriate advice from their broker on the extent of their insurance cover for pollution risks.

If you would like further information about any of the information featured in this publication, please contact your Marsh representative, or any member of the Environmental Practice on +44 (0)20 7357 1000.

Photograph overleaf – Source: Jason Gillyon (Photographer), May 23, 2003