



Lumbermens Mutual Casualty Co. v. Commonwealth of Penn.

April 18, 2008 - Spotlights

In *Lumbermens Mutual Casualty Co. v. Commonwealth of Pennsylvania*, 2008 WL 223274 (Supreme Court of New York, New York Cty. 2008), the Defendants the Pennsylvania Department of Transportation (PDOT) and Commonwealth of Pennsylvania (Commonwealth) (collectively, the defendants) were faced with having to pay \$60 million dollars associated with the environmental cleanup of hazardous materials discharged during the excavation of an interstate highway. The plaintiff, Lumbermens Mutual Casualty Co. (Lumbermens) was the parent-company of Kemper Indemnity Insurance (Kemper), the insurance company, which issued a pollution liability insurance policy (Kemper policy) to the defendants in connection with the construction of the interstate highway. The plaintiff commenced the instant action in New York for a judgment declaring the rights and obligations of the parties under the Kemper policy. Simultaneously pending in a Pennsylvania court, was defendants' action seeking payment of its claims under the Kemper policy. In order to dismiss the New York action and preserve its action in Pennsylvania, the defendants asserted four different arguments under New York's Civil Practice Law and Rules. In the end, the defendants' argument resting on the theory of forum non conveniens (the forum most convenient to the parties and where substantial justice would be accomplished) carried the day in spite of a forum designation clause in the Kemper policy which clearly listed New York as the forum for any court action.

In the spring of 2000, the Pennsylvania Department of Transportation (PDOT) launched the construction of an interstate highway known as Interstate 99 (the project). The interstate highway would span a stretch of eighteen miles. The actual construction work of the project was quite involved. The project demanded the PDOT to use the "cut and fill" process. In other words, the soil would be excavated from one portion of the project and used as fill in other portions of the soon to be highway. Given the nature of the construction, the PDOT obtained liability insurance for the possible pollution and hazards associated with the cut and fill process. Kemper issued an insurance policy (the policy) to the PDOT and the Commonwealth of Pennsylvania.

Hazardous pyritic material was unearthed both during preliminary engineering and excavation of the project. Pyrite is a metal and sulfur-bearing material that when exposed to air and water, oxidizes, turning the sulfurous material to sulfuric acid. If left untreated, the sulfuric acid dissolves the metals in the rock and can potentially contaminate the nearby streams and groundwater. Despite numerous attempts, the defendants could not neutralize and contain the sulfuric acid. Nevertheless, defendants continued to excavate and unearth additional pyritic materials.

Defendants moved to dismiss the plaintiff's New York action on four grounds including forum non conveniens. The court quickly concluded that Lumbermens as a parent company had standing to

bring suit as it had established its pecuniary interests in the outcome of this case.

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