

Inter-Insurer Fights Sure To Emerge From Fatal Pa. Explosion

By **Shane Dilworth**

Law360 (May 19, 2023, 1:02 PM EDT) -- Battles between insurers over coverage for property damage and personal injuries are the only things certain for now as investigators continue to look into what caused a fatal factory explosion in Pennsylvania that left seven dead, experts say, with more issues to arise as questions are answered.

A preliminary report issued May 2 by the National Transportation Safety Board concluded that the explosion was fueled by natural gas but did not indicate what triggered the blast. The NTSB noted in its report that prior to the incident, employees at two company buildings recalled smelling rotten eggs, an odor characteristic of additives, such as methanethiol and mercaptan, that are mixed with natural gas to help identify leaks.

Insurance coverage attorney Michael Hamilton of Goldberg Segalla LLP's Philadelphia office told Law360 that the uncertainty over the explosion's exact cause could lead to disputes between carriers for natural gas provider UGI Corp., factory owner R.M. Palmer Co. LLC and their respective insurance carriers.

"It certainly ends up happening in a lot of these types of tragic events that cause personal injury and property damage," he said. "Ultimately, you're going to have different entities pointing fingers at each other as to what the ultimate cause was."

While claims for structural damage to adjacent properties will likely be covered by the individuals' homeowner's policies, experts say those carriers could then seek to recover those amounts from insurers for Palmer and/or UGI via the subrogation process. Subrogation allows an insurance company to "stand in the shoes" of its policyholder to recover proceeds it paid for damages from a third party.

"The insurers are going to be wondering who's at fault and if it's a third-party entity other than its insured, then they may look to that entity," explained policyholder attorney Matthew Schlesinger of Covington Burling LLP in Washington, D.C. "With any explosion, there could be some questions about who may be at fault."

Schlesinger stressed that it is important a policyholder not inadvertently forfeit subrogation rights when resolving a claim with a third party, noting that some policies require the carrier's consent before an insured settles with a third party.

"Typically, there are clauses in the various policies, which mandate that the policyholder can't jeopardize the rights that the insurer may have without the insurer's consent," he said. "So, that is one thing that

policyholders in this type of situation would want to keep in mind."

Suits Already Filed

Palmer, a family-owned novelty chocolate candy maker, and UGI already are facing a number of lawsuits over the March 24 blast at the West Reading, Pennsylvania, facility that left seven dead, 11 injured and three families displaced from an adjacent apartment building.

The first suit filed was a wrongful death action brought by the family of a worker who died in the explosion. Another suit was filed by a nearby resident, who seeks damages for personal injuries and property damage.

According to the lawsuits, Palmer and UGI acted negligently by failing to properly respond to reports of individuals smelling natural gas before the explosion that decimated the factory.

Goldberg Segalla's Hamilton said the NTSB's preliminary conclusion that there was a natural gas explosion raises a number of questions that could affect coverage. For example, he noted that the condition of the natural gas lines, records on the maintenance of the gas lines and any prior reports of natural gas leaks will likely be examined by investigators.

Michael Levine, a policyholder attorney with Hunton Andrews Kurth LLP, told Law360 that unlike an incident involving a liquid petroleum product, determining the duration of a natural gas leak is extremely difficult, if not impossible, to ascertain.

"There's no evidence of leakage over time," he explained. "If you have a gasoline pipeline explosion, you can examine the area and determine how long there's been gasoline in the soil, how far it's migrated, et cetera, which gives you almost immediate indication of how long the leak had been happening. You don't have anything like that when you're dealing with natural gas."

Open Causation Questions Affect Coverage

The uncertainty surrounding the exact cause of the explosion can also lead to coverage headaches, experts say, since the NTSB's ongoing investigation could go stride for stride with discovery in the underlying civil suits.

From a coverage standpoint, Hunton's Levine said an important question is whether there will be enough coverage for personal injuries and fatalities from the blast. Damage to Palmer's property, he explained, will likely be covered by its own policies.

Carrier-side counsel Hamilton said that though legal battles on coverage may follow as a result of the underlying suits, any disputes over the duty to defend will be resolved first.

Experts agree that the most prudent thing for Palmer and UGI to do is to provide prompt notice to their carriers to obtain a defense against underlying suits.

"Both the public utility [UGI] and Palmer are going to be submitting these lawsuits to their liability insurance carriers, which will then make a determination based on the allegations in the complaint on whether they have a duty to defend," Hamilton said. "To the extent the insurers determine there is a duty to defend, they're going to be appointing counsel and defending these defendants in the wrongful

death suit and other actions."

Michael John Miguel, a policyholder attorney with McKool Smith, told Law360 that providing notice in a timely manner is extremely important.

"As a policyholder, the best practice is always to give better and faster notice rather than waiting and deciding whether there should be notice or not," he said. "It's a lot easier to withdraw a claim later than it is to make a claim later."

He explained that notice issues in the past were dealt with differently and often litigated since determining when a claim arose in asbestos injury or long-tail environmental claim was more difficult. Regardless of the circumstances, however, Miguel said providing timely notice is imperative since failure to do so can essentially result in a "get out of jail free" card for carriers.

Covington's Schlesinger concluded that the best way of dealing with underlying suits and potential coverage battles is to have attentive policyholder counsel.

"You need a quarterback to manage all of this," he concluded. "Typically, we as policyholder counsel act as that quarterback because there are so many different moving parts. From the underlying counsel focused on an ongoing investigation to the insurers, someone's got to make sure that the policyholder understands the policies, communications with the insurers are done properly, that an insurer's rights are preserved and that the insurers get what information they say they need in order to provide the coverage they promised."

--Editing by Roy LeBlanc.