

[8th Circuit Affirms 'Your Work' Exclusion Bars Coverage](#)

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Body

The Eighth Circuit U.S. Court of Appeals on Aug. 1 affirmed that a commercial general liability's "your work" exclusion precludes coverage for damage caused by a rag allegedly left in a compressor by a contractor (Tonicstar Limited v. Lovegreen Turbine Services Inc., et al., No. 06-3503, 8th Cir.; [2008 U.S. App. LEXIS 16286](#); See 9/12/06, Page 16).

(Opinion available 03-080807-104Z)

In a 2-1 decision, Judges Kermit E. Bye and Lavenski R. Smith upheld a Minnesota judge's ruling that the insurer of a service company has no duty to defend and indemnify Lovegreen Turbine Services Inc., which provided cleaning, inspecting and repair services to Flint Hills Resources LP's crude oil refinery. Senior Judge C. Arlen Beam dissented, concluding that coverage is owed.

Overhaul

Flint Hills hired Lovegreen to perform an overhaul of a gas compressor at its plant. The overhaul required Lovegreen to dismantle, inspect, service and rebuild the compressor. Lovegreen brought a 50-pound container of cloth rags to use on the job site. The overhaul was completed in September 2003, and a Lovegreen employee allegedly removed all supplies from the job site. FHR turned on the compressor on Oct. 2, 2003, and it operated normally for a week until it had to be shut down.

Upon inspection, FHR found a cloth rag stuck inside the unit. FHR alleged that the rag was one of Lovegreen's. FHR claimed that it incurred business interruption losses of more than \$6.5 million as a result of the compressor failure and its shutdown for repair.

Lovegreen's primary insurer and six subscribing London syndicates paid FHR almost \$5 million of the \$6.5 million in damages. Lovegreen's remaining insuring syndicate, Tonicstar Ltd., refused to pay; FHR sued Lovegreen for negligence and breach of contract. Tonicstar filed a declaratory judgment action, seeking a ruling that it has no duty to defend Lovegreen. Tonicstar moved for summary judgment.

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'Your Work' Exclusion

U.S. Judge John R. Tunheim of the District of Minnesota ruled that coverage is barred under the "property damage to your work" exclusion, finding that Tonicstar has no duty to defend or indemnify. He said that "your work" refers to the "overhaul" of the compressor and that Lovegreen had a duty to inspect and remove any foreign material.

He ruled that the exclusion states that the insurance does not apply to "property damage" to the compressor that must be "restored, repaired or replaced" because Lovegreen's overhaul was incorrectly performed on it when it failed to inspect for and remove the cloth rag. He also found that the completed operations hazard does not apply, finding that the cloth rag qualifies as "abandoned or unused materials" under the policy, barring coverage.

Lovegreen appealed, asserting that keeping a rag out of the compressor was not part of its "work" within the meaning of the policy; the lower court erred in finding that the rag constitutes "abandoned or unused materials"; and Flint Hills' loss of business damages should have been covered under the products-completed operations hazard provision, which is not subject to the "your work" exclusion.

Part Of Work

But the appellate majority agreed with the lower court that the rags were part of the materials Lovegreen furnished in connection with the overhaul of the compressor and using the rag to wipe the compressor during the overhaul was part of the work or operations performed by Lovegreen.

"Such conduct triggers [the exclusion] because it indicates Lovegreen's work was incorrectly performed, and the compressor required repair as a result. Furthermore, the \$6.5 million in business interruption damages Flint Hill suffered while the compressor was being repaired is excluded from coverage because the policy's definition of property damage encompassed not only physical injury to the property affected by the defective work, i.e., the cost of the compressor repairs, but also the resulting loss of use of the property," Judge Bye wrote for the majority.

The majority affirmed the lower court's conclusion that the products-completed operations coverage did not extend to property damage arising out of the existence of tools, uninstalled equipment or abandoned or unused materials and that the rag constituted abandoned or unused materials.

Dissent

Judge Beam opined that the property damage resulting from leaving the rag inside the compressor was a loss of use of the compressor, which is a covered loss. He said the cloth was not abandoned or unused material and though it gradually caused the compressor to malfunction, it did not cause a later premises accident.

"One strains to understand how an exotic item such as this piece of cloth can possibly be defined as 'materials, parts or equipment furnished [to Flint Hills] in connection with such [contract-specific] work or operations,'" he said.

Tonicstar is represented by Bradley J. Ayers and Sonia L. Miller-Van Oort of Flynn, Gaskins & Bennett in Minneapolis and Kelly L. Stoltz, Robert J. Franco and Richard M. Kuntz of Bollinger, Ruberry & Garvey in Chicago. Lovegreen is represented by Chad A. Snyder and James S. Reece of Zelle, Hofmann, Voelbel, Mason & Gette in Minneapolis. FHR is represented by Charles F. Webber, Rikke A. Dierssen-Morice and Michael M. Krauss of Faegre & Benson in Minneapolis.

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