

Can Your Environmental Permit Save Your Insurance Coverage? One Court Says "Yes"

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Over the years, insurance carriers have refined the pollution exclusions found in most comprehensive general liability (CGL) policies. Prior to the mid-1980s, such policies rarely contained any exclusions for environmental contamination or pollution. Since then, insurers have gone from limited, "sudden and accidental" exclusions to more comprehensive, "absolute" pollution exclusions. Today, a CGL policy may also contain a "total pollution exclusion" or a "named peril and timed element pollution exclusion." These and other pollution exclusions are designed to strictly limit insurance coverage for environmental claims and contamination.

Courts Take Varying Positions

Over the years, the courts have taken varying approaches in addressing arguments concerning whether these pollution exclusions prevent coverage for underlying environmental claims. Some courts take a liberal approach and define "pollutant" and other policy terms broadly, such that coverage is barred by the pollution exclusion. An example of this liberal approach is the Eleventh Circuit's 2011 ruling in *Maxine Furs, Inc. v. Auto-Owners Ins. Co.* Applying Alabama law, the court held that curry aroma was a pollutant under a fur shop's insurance policy. When furs began to smell like curry due to shared air-conditioning ducts with a neighboring restaurant, the costs of cleaning the furs were excluded from coverage.

Other courts take a strict approach to the definition of "pollutant" and limit the application of the pollution exclusion to more traditional environmental contamination. Under this approach, in *Barney Greengrass, Inc. v. Lumberman's Mutual Casualty Co.*, a New York court held that odor from a deli leaking into an adjacent apartment was not a pollutant.

Illinois Appellate Court Weighs In

In its September 2011 opinion in *Erie Insurance Exchange v. Imperial Marble Corp.*, the Illinois Appellate Court has joined the judicial debate about what constitutes a "pollutant." The issue considered was whether allowable air emission, in compliance with Imperial's permit, constituted "pollution," thus triggering the pollution exclusion and providing sufficient cause for denying Imperial of insurance coverage.

The plaintiffs in the underlying class action, filed in 2007 against Imperial by residents living within one mile of its plant, alleged that their persons and properties were "physically invaded by noxious odors, volatile organic materials and hazardous air pollutants" in the emissions generated as part of Imperial's normal business operations. However, these emissions were authorized by an air permit issued by the Illinois EPA and were in compliance with the federal Clean Air Act. Erie Insurance denied coverage and sought a declaratory action that it owed no duty to defend and indemnify Imperial against the underlying suit. Imperial counterclaimed for a declaration that coverage was owed. Both Erie and Imperial brought summary judgment motions on the issue of whether Imperial's emissions constituted traditional environmental pollution and that coverage was thus precluded under the policy's absolute pollution exclusion. The trial court found in favor of Erie Insurance, rejecting Imperial's argument that, under the Clean Air Act and its air permit, the emissions were neither pollution nor hazardous. In reaching this decision, the trial court held that since Imperial's emissions migrated beyond its property, they constituted traditional environmental pollution, which was excluded from coverage. Imperial appealed.

The Illinois Appellate Court joined the strict constructionists, finding in favor of Imperial and holding that claims arising out of Imperial's emission of chemicals did not trigger the pollution exclusion, since the emissions were part of regular business operations and in compliance with the facility's air permit. The Appellate Court also found that because Imperial operated pursuant to an air emissions permit, it could not have expected or intended to injure the underlying plaintiffs. Thus, the "expected and intended injury" exclusion also was not triggered.

This is an important ruling for manufacturers that have allowable air emissions, water discharges or other releases of chemicals pursuant to permits and in compliance with applicable laws. The existence of a valid permit may act as a shield against a determination that such discharges, allegedly causing injury to neighboring persons and the environment, are "pollution" such that a policy's pollution exclusion is triggered. This is clearly contrary to the liberal approach to the definition of "pollutant" used by many courts.

Examine Your Coverage in Context

The lesson in the Illinois Appellate Court's decision is that businesses should not assume that the "absolute" pollution exclusions in their policies will always result in exclusion of coverage for environmental claims. It is important to consider the policy's terms in the context of the company's business operations—especially its environmental permits.

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