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Environmental Law

Exclusion Confusion

Does the Absolute Pollution Exclusion apply to nontraditional environmental claims in New Jersey?

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The "Absolute Pollution Exclusion," also known as the "Total Pollution Exclusion," excludes insurance coverage for losses arising out of any "discharge, dispersal, release or escape" of "pollutants." Since approximately 1985, Absolute Pollution exclusions have been written into most Commercial General Liability (CGL) policies. The inclusion of such provisions in CGL policies was in response to increasing liabilities from environmental claims that resulted, in part, from new environmental regulations enacted by federal and state governments.

Generally, the issues regarding the applicability of the exclusion focus on the meaning of the term "pollutant" and the interpretation of the phrase "discharge, dispersal, release or escape" as contained in the exclusion. In most jurisdictions, including New Jersey and New York, the Absolute Pollution exclusion has been found to be unambiguous and applicable to most scenarios concerning traditional environmental contamination involving the release of toxic pollutants into the outdoor environment or the disposal of hazardous wastes. There is some confusion, however, when the exclusion is applied to nontraditional or nonindustrial environmental claims.

The appellate courts in New Jersey have reached conflicting conclusions. First, in 1996, an appellate court found that the Absolute Pollution exclusion did not bar coverage for contamination resulting from a defectively installed residential septic system. The court reasoned that the Absolute Pollution exclusion was intended to apply to more traditional environmental claims. *S.N. Golden Estates, Inc. v. Continental Cas. Co.*, 293 N.J. Super. 395 (App. Div. 1996). In 1999, an Appellate court held that the Absolute Pollution exclusion did not apply to claims for bodily injury resulting from the ingestion of lead-based paint applied to a residence. The court, in coming to this conclusion, focused on language within the exclusion regarding the "discharge, dispersal, release or escape" of pollutants and found it to be ambiguous and, therefore, construed it against the insurer. The court found that chipping or flaking lead-based paint did not qualify as such a discharge or dispersal. The court also noted that lead was not specifically included in the definition of "pollutant." *Byrd v. Blumenrich*, 317 N.J. Super. 496, 505 (App. Div. 1999).

More recently in 2002, the Court in *Leo Haus, Inc. v. Selective Insurance Co.*, 353 N.J. Super. 67 (App. Div. 2002), reached a contrary conclusion and found that the Absolute Pollution exclusion did in fact apply to indoor air pollution provided that the contaminant qualifies as a "pollutant." In *Haus*, carbon monoxide was found to be such a pollutant. The court rejected the notion that the Absolute Pollution exclusion can only be applicable to typical industrial discharges and outdoor contamination.

In New York, the highest court reached a conclusion contrary to that reached by New Jersey in *Haus*. The New York Court of Appeals, in *Belt Painting Corp. v. TIG Ins. Co*., 100 N.Y. 2d 377 (2003) found the Absolute Pollution exclusion ambiguous when applied to a personal injury claim, which resulted from the inhalation of paint or solvent fumes in an office building. The New York court ruled that despite the inclusion of "fumes" in the definition of "pollutant," "reasonable minds can disagree as to whether the exclusion applies here." The court went further, questioning whether the injury was in

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fact caused by the "discharge, dispersal, seepage, migration, release or escape" of the fumes. More specifically, the court questioned whether such language would apply when the fumes "drifted a short distance from the area of the insured's intended use and allegedly caused inhalation injuries to a bystander." Coming to this conclusion, the court relied on *Westview Association v. Guaranty National Ins. Co.*, 95 N.Y.2d 334 (2000), where the court held that the Absolute Pollution exclusion was ambiguous when applied to lead based paint.

The New Jersey Supreme Court has addressed the applicability of the exclusion to a "non-traditional" environmental claim. In *Nav-Its v. Selective Insurance Co. of Am.*, 183 N.J. 110 (2005), the Court concluded that the Absolute Pollution exclusion "as presently approved" by the New Jersey State Insurance Department, should be limited to "traditional environmental pollution." Unfortunately, the Court provided little guidance as to exactly what "traditional environmental pollution" is. It is unclear how "traditional environmental pollution" will be defined in future court rulings.

In *Nav-Its*, the Supreme Court examined the applicability of the absolute pollution exclusion to a claim for bodily injury caused by exposure to fumes that were released during the application of a floor sealant in an office. The Court conceded that there were conflicting Appellate Division decisions in New Jersey regarding the applicability of the exclusion to nontraditional environmental pollution claims. As it did in *Morton International, Inc. v. General Accident Ins. Co. of America*, 134 N.J. 1 (1993), the *Nav-Its* Court examined the testimony presented by the insurance industry to regulators regarding the intended purposes of the exclusion and found that, as approved, the applicability of the exclusion should be limited to "traditional environmental pollution." The Court cited to a Kentucky Appellate Court decision where it was held that "traditional environmental pollution" means "environmental catastrophe related to intentional industrial pollution." (Quoting *Motorists Mutual Ins. Co. v. RSJ, Inc.*, 926 S.W. 2d 679, 681 (Ky. Ct. App. 1996)). The Court held that to enforce the exclusion more broadly, "as written," would be to "condone the industry's misrepresentation to regulators in New Jersey and other states concerning the effect of the clause."

In New Jersey, the Absolute Pollution exclusion will be applied broadly to traditional environmental claims typically associated with industrial discharges and landfill operations. It will not be applicable to nontraditional environmental claims, such as claims relating to indoor pollution, mold and possibly residential contamination claims. How the Courts will define "traditional environmental claims" remains to be seen. There are many contamination claims that do not fit neatly into the rubric of these two amorphously defined categories. For instance, it is unclear whether the exclusion will apply to claims resulting from leaking residential fuel oil tanks. Groundwater contamination with MTBE, a former gasoline additive, now plagues many residential neighborhoods in New Jersey. Claims relating to such contamination may or may not be considered "traditional." Even claims relating to pesticides or farm wastes may be difficult to classify.

Insurers and policyholders struggling with atypical or nontraditional contamination claims now have additional guidance in determining the availability of insurance coverage. However, both insurers and policyholders will be well advised to examine their risks and exposures carefully when assessing claims that do not fit neatly into a defined category. ■