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Indiana and Maryland:

Insurance Company Use of Pollution Exclusions 'Strange' and 'Absurd'

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Recently, the Indiana Supreme Court in *American States Ins. Co. v. Kiger,* (Mar. 27, 1996) held that a gas station owner is entitled to a defense, and possibly indemnification, against claims by neighbors alleging environmental property damage.

The court held that liability insurance coverage was available under both pre-1987 liability insurance policies containing the so-called "sudden and accidental" pollution exclusion and also under post-1987 liability insurance policies containing a version of the so-called "absolute" pollution exclusion.

The court did not accept the insurance industry's flip-flop regarding the scope of the sudden and accidental pollution exclusion. The court also attempted to meaningfully assess the meaning of the term "pollutant" in the case of a policyholder that owns a gasoline station.

Contamination First Detected

The case began when residents of Danville, Indiana complained to the Indiana Department of Environmental Management (DEM) regarding petroleum vapors in their homes. At about the same time, the town of Danville informed the DEM that petroleum had been detected in a portion of the town's sanitary sewer.

DEM investigated and determined that the source of the contamination was an underground storage tank at a gasoline station owned by the policyholders—the Kigers. DEM spent in excess of $400,000 attempting to clean up the gasoline. A major leak was discovered at the Kigers' gasoline station and a sump was installed to recover the petroleum that was being released into the environment.

The Kigers sought defense and indemnity coverage from their liability insurance company, American States Insurance Company. The trial court determined that American States owed Kiger coverage for both pre- and post-1987 liability, and had a duty to defend the Kigers from claims asserted regarding the petroleum.

The Ruling

The Indiana Supreme Court first addressed the "sudden and accidental" pollution exclusion in the Kiger's pre-1987 policies. The court stated:

> The ambiguous phrase "sudden and accidental" was first added to insurance policies in the early 1970's, in response to a plethora of claims for damage caused by polluting industries. The industry claimed that its addition was a mere clarification. The drafters said that:
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> > coverage for pollution may not be provided in most cases under present policies because the damages could be said to be expected and intended and thus would be excluded by the definition of occurrence, and, therefore, the adoption of an exclusion could be said to be a clarification, but a necessary one in order to avoid any question of intent.
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> Minutes of the Industrial Rating Board General Liability Governing Committee (March 17, 1970) (emphasis added) (quoted in Harwood et al., The "Frivolity" of Policyholder Gradual Pollution Discharge Claims, 5 Mealey's Ins. Lit. Rpts. No. 40 (August 1991)). In other words,

> the adding of the "sudden and accidental" language is nothing more than a "clarification" which made explicit the fact that the insurance did not cover those acts which are expected or intended.
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> Thus, the insurance industry's own understanding of this language indicates that "sudden" can be understood to mean "unexpected."

The court held that "the pre-1987 insurance policy is properly construed to provide coverage for damage done by discharges of gasoline."

The Indiana Supreme Court then addressed American States' argument concerning a post-1987 "pollution exclusion." The court observed:

> We begin by noting one oddity in American States' position. That an insurance company would sell a "garage policy" to a gas station when that policy specifically excluded the major source of potential liability is, to say the least, strange.

The court further observed that the clause could not be read literally:

> Clearly, this clause cannot be read literally as it would negate virtually all coverage. For example, if a visitor slips on a grease spill then, since grease is a "chemical," there would be no insurance coverage. Accordingly, this clause requires interpretation.

The court held that the term "pollutant" does not obviously include gasoline and thus is ambiguous.

The court held that "if a garage policy is intended to exclude coverage for damage caused by the leakage of gasoline, the language of the contract must be explicit." The court further held that there was coverage for the gasoline contamination under the post-1987 policies.

Similarly, Maryland's highest court unanimously held that insurance companies cannot avail themselves of "pollution exclusions" to deny their obligations to defend or indemnify their policyholders in actions alleging injury from exposure to lead paint. *Sullins v. Allstate Insurance Company* (Md. Nov. 6, 1995). The court held that a reasonable person could interpret the terms "pollution" and "contamination" as not encompassing products, such as lead paint, when used legally. As the court noted, "[s]ome courts have held that products, despite their toxic nature are not 'pollutants' or 'contaminants' when used intentionally and legally."

Discussing Policy Specifics

The court also discussed the drafting history of the policies, the language of the "pollution" exclusions and dictionary definitions of various terms in the policies. The court further stated that the terms "contaminants" and "pollutants" as contained in the "absolute" pollution exclusion are ambiguous when applied to products:

> Without some limiting principle, the pollution exclusion would extend far beyond its intended scope, and lead to some absurd results.

Interestingly, insurance companies themselves have represented that "pollution exclusions" do not preclude coverage for certain alleged liabilities. For example, the CIGNA Property and Casualty Companies represented to the New York State Department of Insurance that the 1985 "pollution exclusion" does not void coverage for many lead liability claims (1993). CIGNA stated:

> [T]he pollution exclusion may or may not exclude coverage for claims arising from the toxic properties of lead.
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> . . . . . .
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> The pollution exclusion typically would not rule out coverage for:
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> - A "bodily injury" claim against a paint manufacturer for a five year old child inhaling or ingesting lead paint in his home; . . . .
>
> - a "bodily injury" claim against a landlord for a visiting five year old child who picks and ingests pieces of paint from the wall of one of the apartments;

If one of the largest insurance companies in the United States believes that the 1985 pollution exclusion does not typically preclude coverage for claims involving liability from exposure to lead-pigmented paint, why should policyholders expect any less when they submit such claims to their insurance companies for coverage?

In Washington

In addition, the Insurance Environmental Litigation Association (IELA) and other insurance industry associations recently represented to the Commissioner of Insurance of the State of Washington that terms similar to the terms found in "pollution exclusions" should not be interpreted to include asbestos or lead liability claims.

In a position paper, the IELA stated:

> The focus of the Commissioner's concerns in promulgating the proposed regulations has been to expedite cleanup of hazardous waste sites. The definition of environmental claim is intended to encompass such environmental pollution problems. However, it is possible that the phrase "arising from a discharge of pollutants into land, air or water" could be misused in an effort to reach asbestos or lead claims, for example. Plainly, these were not intended to fall within the ambit of this regulation.

Several major insurance companies belong to these insurance industry associations.

Conclusion

When it is in their best interest to do so, insurance companies argue that certain claims are not environmental claims. Insurance companies should not be permitted to change their tune when claims are made by invoking various "pollution exclusions." The Kiger and Sullins decisions are part of a growing trend of cases nationwide that find coverage for policyholders by relying on public representations of insurance companies and holding insurance companies to their own words. ■

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