Van Osselaer and Scanlon in ABA Insurance Journal: A Battle over the Pollution Exclusion That You Didn't Know Existed

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Haynes Boone Associate Andrew Van Osselaer, Counsel Michael Scanlon and former Haynes Boone associate Erin McGuire authored an article for *ABA Insurance Journal* describing a third option for interpreting the scope of pollution exclusions.

Read an excerpt below.

It is generally accepted in the insurance field that there are two jurisdictional camps for interpreting the scope of pollution exclusions. The first camp interprets pollution exclusions only to exclude what is often described as "traditional environmental pollution"—e.g., contamination of the air, water, or land. The second camp interprets pollution exclusions broadly to exclude potentially any injury arising out of the release of pollutants, contaminants, or irritants—not just those arising from traditionally understood pollution events.

Jurisdictions following the first approach base their reasoning on exclusions' clear and unambiguous language, in exclusions' inherent ambiguity, or in the reasonable expectations of the insured. Advocates of the second approach, on the other hand, tend to base their interpretation solely on the exclusion's supposedly clear and unambiguous meaning—at least where it does not expressly limit itself to environmental harm (as some do). Advocates of this approach often tout it as being less variable in its application (and therefore supposedly more predicable), but it often leads to unusual results contrary to policyholder expectations. In one case, for example, coverage of damage to furs from the aroma of curry from a nearby restaurant was excluded because the aroma was considered a contaminant. As another example, the Seventh Circuit explained that under such a broad interpretation, a pollution exclusion may exclude a slip-and-fall caused by spilled Drano because the accident was supposedly caused by the release of a pollutant.

Indiana's Third Option

Unbeknownst to many, however, Indiana law provides a third option. The Indiana Supreme Court has rejected both of the above camps, instead finding the pollution exclusion to be per se ambiguous as to what it excludes when it refers merely to "pollutants," "contaminants," and "irritants" (and similarly less-than-descriptive terms. As a result, in Indiana, insurers must specifically identify the substances that are excluded if their pollution exclusion is to have any effect at all. That is to say, prototypical qualified, absolute, and total pollution exclusions are simply inoperative as written.

While critics of Indiana's rule have complained of it rendering pollution exclusions unworkable due to the level of specificity required, courts interpreting the Indiana rule have not taken the Indiana rule so far. While something more specific than "pollutant" is required, it need not be so specific as to require the identification of singular chemicals. A sufficiently specific classification or even incorporation by reference (for example, of "Hazardous Substances" under the Comprehensive Environmental Response, Compensation, and Liability Act) is likely sufficient. The Seventh Circuit,

for example, concluded that “petroleum or petroleum based substances” was sufficient to exclude gasoline. Further, the Indiana approach is not inconsistent with those jurisdictions that understand pollution exclusions to apply only to traditional environmental contamination. They are guided by inherent ambiguity within standard pollution exclusions or policyholder expectations (or both), and both seek to resolve those issues in favor of coverage. The only difference is they take issue with different components of the exclusion, which make its scope unclear.

To read the full article from *ABA Insurance Journal*, click here.