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ILLINOIS LAW MANUAL
CHAPTER XII
EXCLUSIONS TO COVERAGE

G. POLLUTION EXCLUSION

The standard comprehensive general liability insurance policy contains an exclusion for any bodily injury, property damage, personal injury, or advertising injury arising out of the actual, alleged, or threatened discharge, seepage, migration, dispersal, spill, release, or escape of pollutants:

(1) at or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured;

(2) at or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(3) which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom you may be legally responsible; or

(4) at or from any premises, site or location on which any insured or any contractor or subcontractor working directly or indirectly on behalf of any insured is performing operations;
   (a) if the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor; or
   (b) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize or in any way respond to or assess the effects of pollutants.

Pollutant is defined in the policy as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste." Waste includes materials to be recycled, reconditioned, or reclaimed.

The policy also excludes coverage of loss, cost, or expense arising out of any:

(1) request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize or in any way respond to or assess the effects of pollutants; or

(2) claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to or assessing the effects of pollutants.

How Illinois will treat this "pollution exclusion" is unknown as no Illinois court has yet construed its language. Thus far, Illinois courts have construed the version of the pollution exclusion that contained the exception for "sudden and accidental" releases. See Outboard Marine Corp. v. Liberty Mut. Ins. Co., 154 Ill. 2d 90 (1992). An insurance policy's exclusion provision may bar coverage under a comprehensive general liability policy for the underlying liability for environmental property damage from a continuous, long-term release of

pollutants. Id. The court in Outboard Marine was principally concerned with construction of the terms "sudden and accidental," and therefore, their rulings are not instructive on the current version of policies that do not contain that language. In Outboard Marine, "sudden and accidental" meant "expected and intended" to discharge the particular toxin for which coverage is sought. Id.

Also, in order for the pollution exclusion to apply, there must be "traditional environmental" pollution. American States Ins. Co. v. Koloms, 177 Ill.2d 473, 493 (1997). Illinois courts have held that, for there to be traditional environmental pollution, the pollutant must actually spill or discharge beyond the insured's premises and into the environment. Connecticut Specialty Ins. Co. v. Loop Paper Recycling, Inc. 356 Ill.App.3d 67, 80 (2005). A problem for insurers is that courts have narrowly construed what can constitute a traditional environmental pollutant. Insurance Co. of Illinois v. Stringfield, 292 Ill.App.3d 471, 476, (1997) held that ingestion of lead-based paint chips did not arise from the "discharge," "dispersal," "release," or "escape" of a pollutant within the meaning of the pollution exclusion, and, thus, the exclusion did not bar coverage for injuries. Further, lead was not a "contaminant" in the paint and, therefore, was not a traditional environmental pollutant, because it was intentionally applied to the premises when it was legal and it was not considered impure or unwanted. Id.

Other courts in the country have addressed similar exclusions and the trend seems to be inapplicability of the pollution exclusion because of ambiguity in the contract language or absence of hazardous waste or environmental pollution. In Atlantic Mut. Ins. Co. v. McFadden, 595 N.E.2d 762 (Mass. 1992), the insurer brought a declaratory judgment action arguing it had no duty under its comprehensive general liability policy to defend the insured against damages arising out of lead poisoning in property owned by the insured. The insurer relied on the pollution exclusion in its policy, which provided that coverage did not apply to "bodily injury or property damage arising out of the actual, alleged or threatened discharge, [dispersal], release or escape of pollutants . . . (a) at or from premises owned, rented or occupied by the named insured." The policy defined the term pollutant as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste."

The Supreme Judicial Court of Massachusetts held that an insured could reasonably have understood the policy provision to exclude coverage for injury caused by certain forms of industrial pollution, but not coverage for injury caused by the presence of leaded materials in a private residence. Atlantic, 595 N.E.2d at 764. The court further held that the definition of "pollutant" did not indicate that leaded materials fell within the scope of the definition, because the defining terms were terms of art in environmental law generally used with reference to damage or injury caused by improper disposal or containment of hazardous waste. Id.; see also Generali v. Caribe Realty Corp., 612 N.Y.S. 2d 296 (1994) (definition of "pollutant" not intended to include leaded materials); Schumann v. State of New York, 610 N.Y.S. 2d 987 (1994) (lead poisoning from prolonged direct exposure to toxic fumes did not fall within pollution exclusion); Karroll v. Atomergic Chemmetals Corp., 600 N.Y.S. 2d 101 (1993) (pollution exclusion inapplicable to injuries sustained by a plaintiff who was splashed with sulfuric acid from a broken bottle).

In Oates v. State of New York v. U.S. Fid. and Guaranty Co., 597 N.Y.S. 2d 550 (1993), the exclusion was effective in precluding coverage. There, a mother filed suit on behalf of her infant against City University of New York. She claimed that the child was born with lead poisoning due to the defendant's failure to remove lead paint from the apartment where the mother lived, and also the office where she worked. Both units were in the same building. In commenting on the pollution exclusion, the Court of Claims of New York noted that it is referred to as an "absolute" exclusion and that the only reasonable interpretation of it is "just

what it purports to be – absolute." The court further commented that it could not imagine a more unambiguous statement.

The court held that the policy language excluded coverage if, but only if, personal injury resulted from a poisoning, internal or external, caused by a chemical or chemical-like substance contained in the definition of pollutant or similar to those listed. Oates, 597 N.Y.S. 2d at 553. The court then determined that lead paint was a pollutant, stating that lead paint is a chemical and contaminant that can irritate or poison, thereby falling within the general tenor of the specifically listed pollutants. In further reviewing the claimants' allegations that they were damaged by lead poisoning resulting from lead paint in the premises, the court stated that the allegations necessarily implied that the claimants were damaged by the release of lead, a pollutant, on, in or from the defendant's premises, which the court stated was exactly the excluded event. Oates, 597 N.Y.S. 2d at 554.

However, this was rejected in Belt Painting Corp. v. TIG Ins. Co., 100 N.Y.2d 377, 386 (2003), holding that the pollution exclusion clause did not unambiguously exclude coverage for injuries caused by inhalation of paint or solvent fumes. In Oates, the court noted a New York decision that held the pollution exclusion to be ambiguous with respect to asbestos fibers discharged indoors. This finding resulted, however, from the insurance policy's reference to the excluded discharge being into or upon the land, the atmosphere or any water course or body of water. 597 N.Y.S.2d 550, 553–54. However, in Oates, not only did the policy not have the sudden and accidental language, it also removed the reference to land, atmosphere, and body of water, substituting instead at or from the premises you own, rent or occupy. Id. at 551. Thus, injuries sustained from a pollutant discharged into the premises, not the environment, could be excluded from coverage. As pollution exclusions have dropped the language "into or upon land, the atmosphere or any water course or body of water", some courts have held that the omission expands the scope of the exclusion beyond traditional environmental pollution, which was the case in Oates.