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# When A "Pollutant By Any Other Name" Is Not A Pollutant

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In most jurisdictions, determining whether a pollution exclusion in a commercial general liability (CGL) policy precludes coverage for a particular claim can be a thorny issue. Under some historical policies, coverage may depend on factual arguments over whether the pollution was "sudden and accidental" or gradual. Under others containing so-called "absolute" pollution exclusions, coverage may depend on whether or not the claim arises out of "traditional" environmental pollution (for example, cleanup of groundwater in response to a governmental demand vs. toxic tort claims based on workplace exposure).

Indiana has traditionally taken a different approach to the pollution exclusion than most other jurisdictions. Rather than become entangled in factual thickets over whether pollution is sudden or gradual, or arises in a "traditional" environmental context, Indiana courts for two decades have taken an elegantly simple approach: Is the substance at issue included by name in the policy's definition of "pollutant?" If so, the exclusion applies.

This simple rule was first set forth by the Indiana Supreme Court in *American States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996). *Kiger* held that a pollution exclusion was inapplicable to a claim against a gas station for cleanup of a gasoline spill, because "the term 'pollutant' does not obviously include gasoline." *Id.* at 949.

Following *Kiger*, liability insurers attempted to "cure" their pollution exclusions by adding an Indiana-specific pollution endorsement. However, they did not take the Indiana Supreme Court's hint and identify by name the alleged "pollutants" subject to the exclusion. Rather, they tried to take a shortcut by stating that the exclusion "applies whether or not such irritant or contaminant has any function in your business," or words to that effect.

Interpreting this Indiana-specific endorsement in 2012, the Indiana Supreme Court confirmed that it meant what it said when it required substances to be identified by name if they are to be excluded by the pollution exclusion. In *State Auto Mutual Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845 (Ind. 2012), the court confirmed that the endorsement "takes effect only when the contaminant at issue has first been identified as a pollutant . . . ." *Id.* at 849. Because the pollution exclusion in *Flexdar* did not identify the alleged contaminant, TCE, by name in the definition of "pollutant," it did not preclude coverage. *Id.* at 851-52.

Even before *Flexdar*, and more so after, carriers have been going back to the drawing board, trying to formulate a definition of "pollutant" that passes

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muster under Indiana's simple test. A pair of recent Indiana federal court cases demonstrates that courts continue to rigorously enforce the Indiana requirement that contaminants must be identified by name to be excluded from coverage, even while giving effect to exclusions with the required specificity.

In *Continental Ins. Co. v. George J. Beemsterboer, Inc.*, No. 2:14-CV-00382, 2015 U.S. Dist. LEXIS 163949 (N.D. Ind. Dec. 8, 2015), the court considered whether an exclusion that identified "petroleum products" as being within the definition of "pollutants" was sufficiently specific and unambiguous to exclude coverage for petroleum coke, a byproduct of the crude oil refining process. *Id.* at *7. The court held that the exclusion "is ambiguous as to whether 'petroleum products' includes pet[roleum] coke," given "the vast number of products made from petroleum, including all types of plastic products." Accordingly, the exclusion did not preclude coverage. *Id.* at *46-47.

In *St. Paul Fire & Marine Ins. Co. v. City of Kokomo*, No. 1:13-cv-01573-JMS-DML, 2015 U.S. Dist. LEXIS 82465 (S.D. Ind. June 25, 2015), the court considered two types of endorsements intended to pass muster under *Flexdar*.

The first type contained a definition of pollutant that still did not identify contaminants by name, but rather attempted to categorically exclude all substances that are "regulated[] in any federal or Indiana environmental, health protection, or safety law," and then listed and cited to a number of federal and Indiana Acts. *Id.* at *24-25. The court determined that this endorsement does not pass muster: "This general incorporation of state and federal laws is insufficient to comply with Indiana's stringent standard that an insurance policy 'specify what falls within its pollution exclusion.'" *Id.* at *32-33 (quoting *Flexdar*, 964 N.E.2d at 851-52).

The second type of endorsement the court considered, by contrast, did list a number of contaminants by name, including the ones at issue – lead, chromium, arsenic, and mercury. Because they were specifically identified, the court enforced the pollution exclusion as to those substances. *Id.* at *36-37. Two other substances that were potentially at issue – silver and selenium – were not identified by name, so the court did not rule out potential coverage for those two substances, if they ultimately needed to be cleaned up. *Id.* at *40-41.

*Beemsterboer* and *City of Kokomo* illustrate that if a pollution exclusion identifies particular "pollutants" with sufficient specificity, Indiana courts will enforce the exclusion pursuant to Indiana's simple test. However, Indiana courts continue to reject carrier attempts at amending their pollution exclusions that are not specific enough, including exclusions that attempt to "identify" all pollutants merely by citing regulatory statutes.

The roadmap for a carrier to follow to exclude coverage for particular contaminants has been well-established in Indiana over the last 20 years. Policyholders who are based in Indiana, own or operate sites located in Indiana, or have other connections to Indiana, should consider carefully reviewing the definition of "pollutants" in their policies, and should not simply assume that the pollution exclusion precludes coverage for a particular claim. If a carrier has failed to meet Indiana's simple test for identifying what is a "pollutant," the policyholder is justified in pursuing coverage for its environmental liabilities from that carrier under Indiana law.