New Jersey Law Journal

VOL. CLXXIV – NO. 7 – INDEX 572 NOVEMBER 17, 2003 ESTABLISHED 1878

IN PRACTICE

ENVIRONMENTAL LAW

By ROBERT D. CHESLER AND KRISTINA D. PASKO

Absolute Pollution Confusion

Other jurisdictions can provide guidance for interpreting the absolute pollution exclusion clause in New Jersey

New Jersey courts have applied the absolute pollution exclusion most often in the context of traditional environmental harms — harms that require the containment and remediation of pollutants that have permeated the land, water or air, typically involving large-scale environmental damage or industrial polluters, or both. But as insurers use the exclusion to deny coverage in a growing number of nontraditional contexts, it is important to determine its scope.

In New Jersey, this determination is a difficult one because of conflicting decisions within the Appellate Division. New guidance, however, has appeared in the form of three recent decisions from the California Supreme Court, the District of Columbia Court of Appeals, and the New York Court of Appeals, all of which have limited the scope of the APEC and provide clearer, common sense guidance to policyholders and insurers.

New Jersey's Conflicted Approach

The exclusion typically excludes insurance coverage for most pollution-type claims. While the absolute pollution exclusion may appear in many different forms or names, for example the "total pollution exclusion," the conclusions drawn herein are meant to encompass all of these types of exclusions. A typical clause will bar coverage for:

> Bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
>
> Pollutants means a 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.

New Jersey courts, like most courts around the country, usually address the exclusion in the context of insurance coverage for traditional environmental pollution. More often, however, insurers attempt to use it to bar coverage for events not typically considered within the realm of traditional pollution, such as: carbon monoxide poisoning caused by a faulty furnace in a building; lead poisoning caused by flaking paint chips in a home; an ammonia spill or pesticide usage in an office or apartment building; or toxic fumes from chemicals used in roofing, carpeting or construction.

In these types of cases, courts all over the country have come to different conclusions. Some courts have ruled, for instance, that the exclusion applies only to traditional environmental harms or that: it extends beyond traditional environmental harms; the substances at issue are, or are not, to be considered pollutants within the definition of the exclusion; the substances can or cannot be considered to have "discharged, dispersed, released or escaped" within the definition of the exclusion; because the pollution is confined within an indoor space, the exclusion does not apply.

Often, it is some combination of the above factors, or other factors not enumerated above, that prompts the court to bar or allow coverage.

The few New Jersey cases on the topic fail to provide much guidance, either. Three cases from the Appellate Division that involved "nontraditional environmental harm" contain contradictory rulings and appear to steer away from New Jersey's usual pro-policyholder jurisprudence.

The earliest decision, *S.N. Golden Estates, Inc. v. Continental Cas. Co.*, 293 N.J. Super. 395 (App. Div. 1996), addressed a suit by homeowners against their developer after septic systems at their homes failed. Continental denied the developer's request for a defense, relying on the exclusion. The court cited other jurisdictions that had held that the exclusion was intended to apply only to environmental claims, and then turned to New Jersey decisions interpreting the exclusion, which had all involved claims for traditional environmental type dam-

---

Chesler is a director at Lowenstein Sandler of Roseland and chairs the insurance law practice group. Pasko is an associate and a member of the firm's environmental department.

This article is reprinted with permission from the NOVEMBER 17, 2003 issue of the *New Jersey Law Journal*. ©2003 ALM Properties, Inc. Further duplication without permission is prohibited. All rights reserved.

ages.

The court contrasted the damages in the underlying action, which "are not dependent on the substance that flowed onto their properties being classified as a pollutant." Essentially, the court found that the exclusion did not apply because the septic was waste and not a pollutant. But the decision arguably hints at the possibility that the court believed that nontraditional environmental harms should fall outside the reach of the exclusion.

The Appellate Division subsequently turned away from the nontraditional environmental harms approach in *Byrd v. Blumenreich*, 317 N.J. Super. 496 (App. Div. 1999). There, a plaintiff claimed injuries from being exposed to lead chips and dust flaking off the lead paint in his parents' apartment. The court addressed whether injury caused by the ingestion of the flaking and peeling lead paint chips arose "out of the actual … discharge, dispersal, seepage, migration, release or escape of pollutants" within the meaning of the exclusion.

Notably, the court found that the holdings of various other jurisdictions in the lead paint context fell into two camps: (1) those in which the "discharge, dispersal" language was construed as limited to environmental damage or injury caused by improper disposal or containment of hazardous wastes; and (2) those in which the language was construed more conservatively as "simply ambiguous" in the absence of specific language excluding from coverage the injury or damage.

The *Byrd* court agreed with the latter approach. Applying that approach to the facts before it, the court held that the words discharge, dispersal, release or escape "are not ordinarily understood to apply to the imperceptible chipping or flaking of lead paint which is attributable, not to an active or physical event, but rather to an involuntary effect occurring over a considerable period of years."

Byrd was distinguished in *Leo Haus, Inc. v. Selective Ins.*, 353 N.J. Super. 67 (App. Div. 2002), where homeowners had suffered personal injuries when the home's heating units discharged carbon monoxide for a year. The homeowners sued their builder, who sought a defense and indemnification from its insurer.

Coverage under the policy was excluded for injury to persons which "arises out of the 'pollution hazard,'" which "means an actual exposure … to the … toxic or other harmful properties of any 'pollutants' arising out of the discharge, dispersal, seepage, migration, release or escape of such 'pollutant.'"

Pollutants were defined to include any "gaseous … containment, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

The court first noted that the *Byrd* court did not base its decision on the premise that the exclusion applied only to discharges caused by improper disposal or containment of waste, but rather on the ambiguity of the exclusion as applied to the facts. The ambiguity did not exist in *Leo Haus*, because carbon monoxide was a "gaseous contaminant."

The conflict between the two cases arises from the test adopted by both: essentially, the discharge of the pollutant must be, as set forth by *Byrd*, an "active or physical event" that is not involuntary and does not happen intentionally. *Leo Haus* relied on this approach when it distinguished the carbon monoxide as actively discharged, dispersed, released or escaped. Furthermore, the carbon monoxide fell within the express definition of pollutant in that it was a "gaseous … contaminant" including "vapor, soot [and] fumes."

Unfortunately, neither court further illuminated the distinction between an active or voluntary discharge and an inactive or involuntary discharge.

The apparent rejection by the Appellate Division of the nontraditional environmental harm benchmark adopted by other courts, and the adoption of an unusual and murky active and/or voluntary test, leads to clouded guidance in those inevitable contexts in which the pollution exclusion's application will be less than absolute.

Common Sense Guidance

Recent well-reasoned and thorough opinions by the California Supreme Court, the District of Columbia Court of Appeals, and the New York Court of Appeals, however, provide an excellent basis for revisiting the question and for making the case for a common sense approach to interpreting and applying the exclusion.

These courts limited the scope of the exclusion and allowed policyholders to recover under their general liability policies. In *MacKinnon v. Truck Ins. Exchange*, No. S104543,2003 WL 21939779 (Cal. Aug. 14, 2003) [no pagination], *Belt Painting Corp. v. TIG Ins. Co.*, No. 2, 86, 2003 WL 21498685 (N.Y. July 1, 2003) [no pagination], and *Richardson v. Nationwide Mut. Ins. Co.*, No. 01-SP-1451, 2003 WL 21448372 (D.C. June 12, 2003), the courts carefully analyze the history and interpretation of the clause to decide that certain personal injury actions are, essentially, not the result of traditional forms of environmental harm and therefore not subject to the exclusion.

In *MacKinnon*, the policyholder was a landlord of an apartment building and had hired a pest control company to treat the building. One of the tenants died in the building, allegedly as a result of the dangerous chemicals sprayed in her apartment. In *Belt Painting*, the policyholder was hired to perform stripping and painting work in an office building. An employee in the building sued the policyholder, alleging that he was injured as a result of inhaling paint or solvent fumes. In *Richardson*, similar to New Jersey's *Leo Haus*, the policyholder owned an apartment building; the building's security guard alleged carbon monoxide poisoning caused by a malfunctioning furnace in the apartment building.

All three policyholders were denied coverage for the liability arising out of the events based on the pollution exclusion in their policies.

All three courts based their decisions in part on the history and purpose of the exclusion, and provided for that reason a detailed description of the exclusion's history. The exclusion's first incarnation in the 1970s was the qualified pollution exclusion, which typically excluded coverage for pollution liability unless the discharge or release was sudden and accidental. In about 1985, the insurance industry created the absolute exclusion in an effort to remove the uncertainties cre-

ated by the multiple interpretations of sudden and accidental, especially in cases where the pollution was gradual. The exclusion was also intended to protect the insurance industry from enormous liability caused by environmental disasters and for clean-up costs imposed by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

These background factors tended to demonstrate that the exclusion was intended to apply to deliberate or active polluters of the environment.

Next, the very terminology of the exclusion also indicated to these courts that it was never meant to apply to the factual scenarios presented in the cases before them. For instance, the absolute pollution exclusion at issue in *Richardson* excluded coverage for:

> (1) Bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
> (a) 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[.]
> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.

The courts considered the terms within the exclusion "terms of art" in environmental law that suggest industrial pollution and environmental contamination. The *Richardson* court wrote:

> [W]hen one reads the entire clause … one cannot reasonably avoid the impression that the revised exclusion has to do with the byproducts of the manufacturing process and with massive environmental cleanup costs, the very concerns that, as a matter of undisputed history, led to the adoption of the new language.

In addition, the terms bore a striking similarity to the terminology of environmental statutes, regulations and judicial decisions, indicating again that the exclusion was meant to apply to traditional environmental pollution. The *MacKinnon* court similarly pointed out that the insurer's reading of the exclusion was based on a "basic fallacy" that the meaning of the policy language can be based on the dictionary meanings of the key words. "[S]uch an examination does not necessarily yield the 'ordinary and popular' sense of the word if it disregards the policy's context."

Further, application of the exclusion outside of those industrial or traditional environmental contexts (such as to an ammonia spill in an office building, a carbon monoxide leak in a hotel or hazardous fumes from a roofing chemical) would lead to absurd results. The *Belt Painting* court explained, "[I]t strains the plain meaning, and obvious intent, of the language to suggest that these fumes, as they went from the container to [the injured party's] lungs, had somehow been discharged, dispersed, released or escaped."

The *MacKinnon* court hypothesized the unreasonableness of this approach: the introduction of chlorine, which contains irritating properties, into a pool, the application of iodine onto a cut, and a child's accidental ingestion of a toxic substance negligently left in a soft drink bottle, could all be described as a dispersal or discharge but "few if any would think of these injuries as arising from 'pollution' in any recognizable sense of that term."

The insurers in *Richardson* and *Belt Painting* also set forth an argument based on the phrase "into or upon the land, the atmosphere or any water course or body of water," which existed in the pollution exclusion until 1985. Neither court was convinced. As stated in *Belt Painting*, "[b]ecause any pollution will necessarily involve discharge or release into land, atmosphere or water, the omission of such language … simply removes a redundancy in the exclusion."

A policyholder hoping avoid the exclusion by pursuing the nontraditional environmental harm approach should focus on distinguishing his case from industrial pollution cases where the exclusion would typically apply. *Richardson* shows that particular phrases appear repeatedly when courts describe the traditional environmental polluter or pollutant in interpreting the exclusion: "active polluter of the environment;" "costs of environmental cleanup;" "deliberate polluters;" "environmental degradation;" "major environmental disasters;" "byproducts of the manufacturing process;" "byproducts of industrial production."

This language helps put distance between the exclusion and, for instance, the contractor whose painting or other work creates fumes in an office building, or the building owner whose tenants or occupants are overcome by carbon monoxide or pesticides.

A similar rationale led to a sort of test in *MacKinnon*: whether the acts resulting in injuries would be "commonly thought of as pollution" or as "environmental pollution." The court's particularly phrased conclusion shows how important the analysis and presentation of the facts can be: "While pesticides may be pollutants under some circumstances, it is unlikely a reasonable policyholder would think of the act of spraying pesticides under these circumstances as an act of pollution."

MacKinnon, *Belt Painting* and *Richardson* are valuable to policyholders not only because of their pro-policyholder interpretations of the absolute pollution exclusion, but also because of the opinions' methodical and thorough discussion of the exclusion. The cases hopefully will encourage a more rigorous analysis by courts of the exclusion, limiting its impact to true environmental pollution cases or those circumstances commonly thought of as pollution.

Many policyholders who do not have traditional environmental exposures may still have pollution exposures that in many states, including potentially in New Jersey, may be subject to the absolute pollution exclusion. Until the law becomes more settled, such policyholders should determine whether they should purchase some form of environmental insurance coverage on an ongoing basis.

A variety of such coverage, ranging from specific endorsements to general liability policies to broad-based standalone policies, is now widely available. Indeed, a policyholder facing pollution liability who finds itself without such coverage may question whether its insurance broker had a duty to inform it of its need for such coverage. ■