

THE CONSTRUCTION LAW BRIEFING PAPER

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NEW CGL POLLUTION ENDORSEMENTS DON'T LEAVE HOME WITHOUT THEM

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THE STANDARD POLLUTION EXCLUSION

A standard form Commercial General Liability ("CGL") Policy contains a "Pollution" exclusion which excludes coverage for bodily injury or property damage arising out of a "discharge, . . . release or escape" of an "irritant or contaminant." Most contractors understand that the Pollution exclusion excludes coverage for environmental damage caused by industrial pollutants. Thankfully, industrial pollution accidents are rare. Thus, the Pollution exclusion has little day-to-day relevance to contractors. . . right? Wrong!

THE PROBLEM: THE EXCLUSION IS APPLIED TOO BROADLY

Increasingly, courts have held that the Pollution exclusion excludes coverage of accidents involving common construction materials which do not cause environmental damage. For example, the following list of common construction materials have been held to constitute an "irritant or contaminant," as defined by the Pollution exclusion: paint; paint fumes; carbon monoxide; glue fumes; ammonia gas; dust; demolition debris; smoke; and concrete curing agent fumes. Similarly, the phrase "discharge, . . . release or escape" has

been interpreted broadly. Some courts have held that there was a "discharge, . . . release, or escape" simply because the substance was outside of its original container.

Cook v. Evanson, 83 Wash. App. 149, 920 P2d 1223 (1996) is illustrative of the approach taken by many courts. In Cook, the insured contractor was applying a sealant to the exterior of a building. Fumes from the sealant injured two people in the building. The Court held that the fumes were an "irritant" and had been "released." Thus, the injured people's claim was not covered by the contractor's CGL policy. The contractor was required to defend itself and pay any damages awarded the injured people.

A SOLUTION: TWO NEW ENDORSEMENTS

To narrow this type of exposure, all contractors should have the Pollution Limitation Coverage Extension Endorsement (ISO Form CG 0422 11 85) added to their policy. This endorsement narrows the pollution exclusion to exclude environmental damage only.

The Insurance Services Office, Inc. has also filed a new endorsement, called The Limited Exception for Designated Pollutants (Form CG 04 03), for regulatory approval. This

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endorsement will further narrow the Pollution exclusion so that the insured will have coverage with respect to “pollutants” which the insured regularly uses in its business and specifically identifies in the endorsement. Copies of these two endorsements are attached to this briefing paper.

PROVING COVERAGE WITHOUT THE NEW ENDORSEMENTS

If a contractor is already facing a “pollution” type claim and lacks the broader coverage provided by the new endorsements, all is not lost. To exclude a claim, the insurer must clear two hurdles – the “irritant or contaminant” hurdle and the “discharge, . . . release or escape” hurdle. If the insurer stumbles over either hurdle, then the claim is not excluded. In addition, the hurdles should be viewed as “high hurdles” because the insurer bears the burden of proof on both issues. Finally, strong arguments can be made that the Pollution exclusion should be tempered by the Reasonable Expectation Doctrine. Under this doctrine, exclusions are interpreted according to an insured’s reasonable, common sense expectations. Courts adopting this view are far less likely to view accidents involving common construction materials as being excluded from coverage by the Pollution exclusion.

CONCLUSION

Check with your insurance representative to determine whether you have the broader coverage provided by the new pollution endorsements. If not, get it. If you are already faced with a “pollution” type claim and lack the broader coverage, then seek competent legal counsel. Provided the proper legal arguments are made, all is not lost.