

# Pollution Exclusions

Commercial General Liability Policies BY JENNIFER DAVIS AND KATHLEEN GARBUTT



A recent ruling from the British Columbia Court of Appeal has clarified pollution exclusion clauses by focusing on causation and liability. In *Precision Plating v. AXA Pacific Insurance Co.* (Precision), the Court of Appeal considered the effectiveness of a pollution exclusion contained in a Commercial General Liability (CGL) policy. Businesses need to ensure that policy exclusions are understood to avoid any surprise exclusions.

## Background

Precision Plating, who was insured by AXA, operated out of a multi-tenanted commercial building. A fire broke out, which triggered the sprinkler system, filling chemical vats and causing them to overflow. The overflowing vats seeped diluted chemicals into neighbouring businesses, contaminating the surrounding property. Alleging property damage due to contamination, the neighbouring property owners commenced an action against Precision Plating.

## The Policy

As with all Commercial General Liability Policies, the CGL policy in question was a third party indemnity policy: there was no coverage for the insured's property, but the insurer indemnified the policy holder for damage that occurs to a third party's property. Within the CGL policy there was a pollution exclusion which provided that coverage would not apply where damage was caused or contributed to by the "discharge, emission, dispersal, seepage, leakage, migration,

release or escape at any time of Pollutants." Pollutants was defined within the CGL policy and included chemicals of the sort that had escaped during the fire.

The British Columbia Supreme Court determined that the damage to the claimants' property was caused by the fire, the insurer was obligated to defend and the pollution exclusion did not exclude coverage. The Supreme Court's decision was primarily based on the imaged cause of the damage being the fire.

## The Decision

AXA appealed. The British Columbia Court of Appeal concluded that the trial judge erred by framing his analysis with reference to the cause of the damage claimed, rather than the liability which gave rise to the damage. The Court of Appeal changed the focus from the cause of the damage, the fire, to the source of the liability, the release of pollutants. In reaching this conclusion, the court considered the specific language in the CGL policy and concluded that "the language provides coverage for potential liability because of property damage due to an accident or occurrence, not the potential damage itself."

In other words, liability, or potential liability, for the release of pollutants was not covered by the CGL policy. As the escape of the pollutants (the source of liability) caused the damages complained of, not the fire, AXA was not required to provide coverage to Precision Plating for damages caused by the release of the pollutants.

The Court of Appeal accepted that Precision Plating had a reasonable expectation of coverage for damage caused by fire. That expectation, however, did not extend to circumstances where liability existed for the release of pollutants and no coverage was required in respect of these claims.

The court found that in circumstances where liability was caused by an excluded loss, such as the escape of pollutants, the insurer has no duty to defend. This remains true even in circumstances where the liability is concurrently caused by events that would be covered. However, an insurer is required to provide coverage, and therefore defend any claim for covered losses. Therefore, claims in relation to fire damage, were still covered.

## A Cautionary Tale

The Court of Appeal confirmed the longstanding principles applicable to the interpretation of insurance policies. An insurer's obligation to provide coverage, including the duty to defend, will generally be broadly interpreted in favour of the insured. Where a policy exclusion is unclear or ambiguous, such uncertainties are generally resolved in favour of the insured. Further, insurers have a duty to defend their insureds against any claim "that could possibly fall within the policy language."

That being said, a policy exclusion, such as the pollution exclusion in the AXA CGL policy, will be enforced where the exclusion is clear. In those circumstances, the insured has no duty to defend or indemnify the insured against claims.

In Precision, the fact that the release of the pollutants was caused by fire, a covered peril, did not matter. The actual cause of the potential liability will be examined in order to determine if there is an applicable coverage exclusion.

Taking a risk management approach, construction firms can take steps to mitigate losses by assessing operating risks and determining where potential liability may occur. General coverage policies do not always provide the broad coverage that you hope it provides. Coverage needs should be fully considered and carefully explained to insurers or insurance agents to ensure the broker or agent fully understands your risk management needs. Policies and exclusion clauses should be reviewed to ensure coverage is appropriate and risks are being appropriately addressed. A project with known pollution risks may warrant purchase of a pollution policy. **CB**

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