

Iowa High Court Upholds Total Pollution Exclusion as Bar to Coverage

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In the case of *Bituminous Cas. Corp. v Sand Livestock Systems, Inc.*, 728 N.W.2d 216 (Iowa 2007), the Iowa Supreme Court addressed the issue of whether carbon monoxide constitutes a “pollutant” for purposes of an insurance policy’s total pollution exclusion. In response to a certified question from a federal court, the Iowa Supreme Court upheld the total pollution exclusion as unambiguous and applicable to carbon monoxide, thus barring coverage.

The facts of *Bituminous Casualty* are as follows. The insured had installed a propane power washer in a building’s washroom. The installation was allegedly defective and, while using the washroom, an employee was overcome by carbon monoxide fumes and died. The employee’s widow then filed a wrongful death lawsuit against the insured. The insured tendered the suit to its insurer under two insurance policies, a commercial lines policy and a commercial umbrella policy. *Bituminous Cas.*, 728 N.W.2d at 218-19.

In response, the insurer denied a defense and indemnity to its insured on the basis of the policies’ pollution exclusions. Both policies contained total pollution exclusions and defined “pollutants” as “any solid, liquid, gaseous, or thermal irritants or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.” *Id.* at 219-20. The insurer then filed a declaratory judgment action in federal court, seeking a declaration that coverage was not available. Because the application of the pollution exclusion had not been addressed by any Iowa court, the federal court certified the following issue to the Iowa Supreme Court: “[W]hether the pollution exclusions...exclude coverage for a death caused by the release of carbon monoxide fumes.” *Id.* at 220.

The court first addressed whether the total pollution exclusion was ambiguous. In order to be ambiguous, a term in an insurance policy must be susceptible to more than one interpretation. *Id.* at 220-21. Turning to the dictionary definition of carbon monoxide (“a colorless odorless very toxic gas”) the court reasoned that carbon monoxide is an irritant or contaminant under the very broad definition of “pollutants.” Accordingly, the court found that “[i]t is difficult to say the exclusions are ‘fairly susceptible to two interpretations,’ which is required for us to find the exclusions ambiguous.” *Id.* at 221.

The insured argued that the exclusions were ambiguous because it was unclear whether the exclusions extended beyond traditional environmental pollution. *Id.* The court responded that the plain language of the exclusions do not distinguish between traditional environmental pollution and injuries arising from normal business operations. Instead, the court held that “[t]he plain language in the exclusions encompasses the injury at issue here because carbon monoxide is a gaseous irritant or contaminant.”¹ *Id.*

Because the exclusion was not ambiguous, the court refused to construe it against the insurer. Accordingly, the court answered the certified question in the affirmative, allowing the application of the exclusion to deny coverage for injuries caused by carbon monoxide. *Id.* at 221-22.

Should you have any questions about *Bituminous Casualty*, or about the application of total pollution exclusions in general, please feel free to contact any member of Plunkett & Cooney’s Insurance Practice Group. A practice group directory can be found at www.plunkettcooney.com, or you can call [Ken Newa](#) at (313) 983-4848 or [Chuck Browning](#) at (248) 594-6247.

For a complete copy of the Iowa Supreme Court’s ruling in *Bituminous Cas. Corp. v Sand Livestock Systems, Inc.* 728 N.W.2d 216 (Iowa 2007), [click here](#).

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¹ The court refused to address the insured’s claim that Iowa’s “doctrine of reasonable expectations” applied to prohibit the application of the exclusion. The court stated that the application of the doctrine is a question of fact and outside the bounds of the certified question. *Bituminous Cas.*, 728 N.W.2d at 222.