

HIN-119 What constitutes pollution.

Halsbury's Laws of Canada - Insurance (2023 Reissue)

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HIN-119

Halsbury's Laws of Canada - Insurance (2023 Reissue) (Knutsen) > VIII. Liability Insurance > 4. Common Issues with Commercial Liability Insurance > (1) Exclusion from Liability for Pollution

VIII. Liability Insurance

4. Common Issues with Commercial Liability Insurance

(1) Exclusion from Liability for Pollution

What constitutes pollution.

Most commercial general liability policies contain an exclusion barring coverage for losses from “pollution”. The exclusion is broadly worded, excluding bodily injury or property damage arising out of any “pollutant”: any “solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapour, soot, fumes, acids, alkalis, chemical and waste”.¹ The Ontario Court of Appeal has held that the historical context of the pollution liability exclusion in commercial general liability insurance policies suggests that the purpose of the exclusion “is to bar coverage for damages arising from environmental pollution”, not all injuries somehow involving a “pollutant”. The Court did not take a literal approach to interpreting the clause but instead took a more contextual one, holding that liability arising from the defective maintenance of a furnace that resulted in carbon monoxide poisoning was not captured by the exclusion.² Where the heading of an exclusion was “Total Pollution Exclusion” but the exclusion was actually a total emissions exclusion, the exclusion was construed against the insurer, since it had inherent ambiguity because the heading was misleading and confusing, the term “pollution” was not defined, and it was possible that the insured reasonably believed the exclusion applied to pollution in the natural environment.³

Historical purpose of exclusion. The historical purpose of absolute pollution liability exclusions was “to preclude coverage for the cost of government-mandated environmental cleanup under existing and emerging legislation making polluters responsible for damage to the natural environment”.⁴

Activities covered. Pollution exclusion clauses are not restricted “to situations where the insured is engaged in an activity that necessarily results in pollution ... the exclusion clearly extends to activities ... that carry a known risk of pollution and environmental harm”.⁵

Footnote(s)

¹ *Zurich Insurance Co. v. 686234 Ontario Ltd.*, [2002] O.J. No. 4496 at para. 39, 62 O.R. (3d) 447 (Ont. C.A.), leave to appeal refused [2003] S.C.C.A. No. 33 (S.C.C.).

² *Zurich Insurance Co. v. 686234 Ontario Ltd.*, [2002] O.J. No. 4496 at para. 39, 62 O.R. (3d) 447 (Ont. C.A.), leave to appeal refused [2003] S.C.C.A. No. 33 (S.C.C.). But see *Precision Plating Ltd. v. Axa Pacific Insurance Co.*, [2015] B.C.J. No. 1262, 2015 BCCA 277 (B.C.C.A.) (chemical fire resulted in chemical contamination of property and damage

HIN-119 What constitutes pollution.

was excluded); *O'Byrne v. Farmers' Mutual Insurance Co.*, [2014] O.J. No. 3303, 2014 ONCA 543 (Ont. C.A.) (oil leak from second-storey furnace was excluded); *ING Insurance Co. of Canada v. Miracle*, [2011] O.J. No. 1837, 2011 ONCA 321 (Ont. C.A.).

- 3 *Hemlow Estate v. Co-operators General Insurance Co.*, [2021] O.J. No. 419, 2021 ONSC 664 (Ont. S.C.J.), affd [2021] O.J. No. 7078, 2021 ONCA 908 (Ont. C.A.), leave to appeal refused [2022] S.C.C.A. No. 51 (S.C.C.).
- 4 *Zurich Insurance Co. v. 686234 Ontario Ltd.*, [2002] O.J. No. 4496 at para. 13, 62 O.R. (3d) 447 (Ont. C.A.), leave to appeal refused [2003] S.C.C.A. No. 33 (S.C.C.).
- 5 *ING Insurance Co. of Canada v. Miracle*, [2011] O.J. No. 1837 at para. 23, 2011 ONCA 321 (Ont. C.A.).

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