

NJ Court Evaluates Enviro Insurance Exclusions Amidst Natural Resource Damages

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\$3 billion dollars annually. That's how much US businesses are paying for environmental insurance each year. While environmental insurance is an important risk management tool for a wide variety of industries, insurance is only as good as the terms of the policy, and this applies doubly to environmental insurance, which is written and negotiated on a custom basis to provide tailored coverage. To make things more interesting, there have been precious few decisions regarding the terms of environmental insurance policies. Now, in a recent decision, a New Jersey appellate court has interpreted the terms of an environmental insurance policy to deny coverage to the insured. See *Handy & Harman v. Beazley USA Services, Inc.*, Docket No. A-2068-20 (N.J. App. Div. Mar. 2, 2023).

Background

A metal etching business operated in New Jersey from March 1984 to November 1985, when it decided to sell the property it operated on. The businesses used hazardous substances and also fell within the industries subject to New Jersey's Environmental Cleanup Responsibility Act (ECRA), the predecessor of the Industrial Site Recovery Act (ISRA). As a result, the sale of the property triggered the obligation to investigate and remediate historical contamination pursuant to ECRA and subsequently ISRA. The business then entered into an Administrative Consent Order (ACO) to set forth its ECRA obligations and allow the sale to proceed. Thereafter, businesses completed much of the investigation and remediation of the subject property.

Many years later, in 2017, and for reasons not disclosed in the decision, the business obtained an environmental insurance policy. The policy contained two relevant exclusions: (1) a Prior or Pending Litigation Exclusion, which eliminated coverage for matters arising from prior claims, proceedings, and litigation; and (2) a Specified Coverage and Contamination Exclusion, which eliminated coverage for certain pollution conditions arising from known pollution conditions, and which the policy defined as all conditions associated with the "ECRA/ISRA investigation/remediation." The policy also decreed that New York law would govern its terms, which may have proved fatal to the insured's hopes of coverage.

A few years passed again, until 2021 when the New Jersey Department of Environmental Protection sued the business owner for natural resource damages and other environmental damages arising from the historical contamination. Natural resource damages (NRD) are damages damage to any natural resource (such as groundwater or other media) because of the discharge of hazardous substances and pollutants at the property. These damages can be distinct from the actual cost of remediating the natural resource and include loss of use and/or permanent damage to the resource. The business requested coverage for these damages under its environmental insurance policy, but the insurer refused coverage as a result of the above-referenced exclusions.

Interpreting the Exclusions

Both the trial court and the appellate court decided that the Prior or Pending Litigation Exclusion barred coverage because the NRD could be traced back to the business's obligations under the ACO, and the ACO qualified as a prior "claim" that was subject to the exclusion. Although it did not convince either court, the business argued that natural resource damages were different in nature from the investigation and remediation required by the ACE. Policyholders should be troubled by this result because there is a distinction between first-party cleanup costs and natural resource damages. Policyholders should evaluate existing coverage to see how this result would apply to them, and prospective policyholders should attempt to instill more clarity regarding coverage for NRD in future policies.

The courts did not need to address the Specified Coverage and Contamination Exclusion, which is unfortunate as there are so few cases interpreting this type of exclusion. However, the breadth of the exclusion is likely to have precluded coverage and is a reminder to businesses to more narrowly define known conditions where possible. At times, it is possible to define known conditions by contaminant or area of contamination so that newly discovered contamination and areas are covered.

As a final matter, the business should have pressed for New Jersey law to apply to the insurance policy during its negotiations. This is something that can be easily done, and New Jersey law is much more friendly to policyholders.

Conclusion

Businesses will continue to use environmental insurance to manage risks and should work with experienced counsel to obtain an environmental insurance policy that provides the expected coverage. This decision highlights a few points for businesses to consider as they pursue coverage, but there are many other important areas of focus as well, and these areas vary by industry and insurance carrier.