INSURANCE COVERAGE
SECTION OF LITIGATION

Vol. 32 No. 4

Key Developments in Environmental Insurance Coverage: Case Law Update

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Recent years have seen developments in areas of environmental insurance litigation, including the COVID-19 pandemic, per- and polyfluoroalkyl substances (PFAS), and climate change actions. Courts have applied established principles of insurance law to these contexts in matters of first impression or nascent bodies of case law. Courts also continue to refine familiar insurance litigation issues, such as the scope of total pollution exclusions with respect to conventional pollutants and industry operations, timely notice of claims, and allocation of long-tail environmental claim liability among insurers. This update provides an overview of selected recent cases involving coverage for environmental issues.

COVID-19 Coverage Litigation

The COVID-19 pandemic resulted in a large volume of coverage litigation arising out of COVID-related losses.[1] Most of these cases have involved coverage for business interruption losses under commercial property insurance policies, where the primary coverage issue is whether COVID-19 constitutes a physical loss or damage to property. This update focuses on the smaller number of lawsuits seeking coverage for business interruption under pollution legal liability policies, often turning on whether a virus qualifies as a covered pollution event under the particular insurance policy wording.

Policies specifically including "viruses" in coverage. Policyholders with pandemic-related losses have had the most success when the pollution liability policy at issue explicitly includes coverage for "viruses." Although litigation under such policies is rare, two recent decisions resulted in favorable outcomes for policyholders with this type of environmental coverage.

In *Sunstone Hotel Investors, Inc. v. Endurance American Specialty Insurance Co.*,[2] the plaintiff sought coverage for pandemic-related losses after it temporarily had to close one of its Boston hotels due to a COVID-19 "superspreader" incident in early March 2020. The plaintiff's Site Environmental Impairment Liability Coverage policy provided coverage for business interruption losses that "directly result from . . . Biological Agent Condition(s)" at a covered location. Significantly, the policy definition of "Biological Agent Condition" encompassed

viruses and other pathogens. The insurer argued that the government's shutdown orders were an intervening circumstance that broke the chain of causation, precluding coverage.

The Central District of California rejected the insurer's arguments and resolved the parties' cross-motions for summary judgment in the policyholder's favor. The court held that the insurer failed to show that the virus was not itself the origin of the hotel's business losses, particularly because the government's shutdown orders occurred after the superspreader event and the policyholder's response. The court noted that the orders were at least in part a response to the superspreader event and that deeming the orders an intervening circumstance would be contrary to the reasonable expectations of the insured.[3]

In *New York Botanical Garden v. Allied World Assurance Co. (U.S.) Inc.*,[4] the New York Appellate Division (First Department) affirmed the denial of the insurer's motion to dismiss where the policyholder sought contingent business interruption coverage for losses resulting from COVID-19 shutdown orders under a pollution liability policy with virus coverage. The New York Botanical Garden was required to close in March 2020 pursuant to New York's pandemic-related government orders, incurring business losses. Its pollution legal liability policy defined "contingent business interruption" as "the necessary suspension of your business operations . . . as a result of an order by a government body or authority denying access to the location," provided that the suspension and order were "caused solely and directly by a pollution incident on, at or under an independent location."

The insurer did not dispute that the policy's definition of "pollution incident" applied to viruses, including COVID-19, and instead argued that there must have been a complete access denial to trigger coverage. The appellate court disagreed, holding that the policy provisions contemplated temporary access to the insured's property during the coverage period and did not require complete access denial. The court further concluded that the insurer failed to show that the government's executive orders, which the insurer relied on as extrinsic evidence, were not "solely and directly" the result of COVID-19 at an independent location.[5]

COVID-19 and "pollution conditions." Two recent COVID-19 coverage decisions narrowly interpreted the term "pollution condition" under pollution liability policies in the context of traditional environmental liability in the Eastern District of Virginia and Southern District of New York. In *Central Laundry, LLC v. Illinois Union Insurance Co.*,[6] the owners and operators of related hospitality, hotel, and restaurant businesses sought coverage for loss of income and other costs relating to governmental COVID-19 shutdown orders. The pollution liability policy at issue defined a covered "pollution condition" as "the discharge, dispersal, release, escape, migration, or seepage of any solid, liquid, gaseous or thermal irritant, contaminant, or pollutant[.]"[7] In a decision recently affirmed by the Fourth Circuit Court of Appeals, the court granted summary judgment in favor of the insurer on the basis that a "pollution condition" under the policy applied only to "traditional environmental liability," which it held did not include COVID-19.

The court considered the policy as a whole and determined that a pollution condition under the policy language was limited to environmental pollution. The court determined that the policy provisions at issue and other defined terms contextualized the phrase in terms of distinctively environmental pollution. The court found a liberal reading of "pollution condition" was therefore untenable under that policy.

The Southern District of New York reached a similar conclusion in *Northwell Health, Inc. v. Illinois Union Insurance Co.*[8] New York's largest health care provider sought reimbursement for costs and losses associated with the COVID-19 pandemic. Its policy provided coverage for costs incurred in the event of either a "pollution condition" or a "facility-borne illness event." The court dismissed claims dependent on the pollution condition clause under New York law, concluding that "pollution condition," given the full context of the policy at issue, referred to traditional environmental pollution and not COVID-19.

Instead, any coverage would arise under the policy's facility-borne illness event coverage. The court held that the policy was ambiguous under this separate coverage part and denied the insurer's motion to dismiss. Although "facility-borne illness" under the policy excluded viruses that were "solely or exclusively the result of communicability through human-to-human contact," evidence suggested that COVID-19 may be transmitted on a surface. The court reasoned that COVID-19 could therefore plausibly constitute a "facility-borne illness event," even if human-to-human contact was the main form of transmission.

Emerging Issues: PFAS and Climate Change Litigation

Per- and polyfluorinated substances (PFAS) are the subject of a small but growing class of insurance coverage litigation. PFAS, which have been used for decades, encompass thousands of synthetic chemicals, including those commonly known as PFOA (perfluorooctanoic acid) and PFOS (perfluorooctane sulfonate). Found in a wide variety of consumer and industry products, PFAS have recently drawn regulatory scrutiny. As public attention on PFAS has intensified, courts are beginning to face coverage questions regarding these chemicals.

Three recent cases addressed whether insurers had a duty to defend or indemnify PFAS lawsuits. A New York state case, *Tonoga, Inc. v. New Hampshire Insurance Co.*,[9] involved multiple lawsuits filed against the policyholder manufacturing company in connection with decades of PFOA and PFOS releases from the company's routine business operations. The New York Appellate Division (Third Department) affirmed a grant of summary judgment in favor of the commercial general liability (CGL) insurers, finding the pollution exclusions relieved the insurers from the duty to defend PFAS suits against a manufacturer.

The CGL insurance policies at issue in *Tonoga* covered certain bodily injury and property damage claims and had policy periods of July 12, 1979, through July 12, 1982, and July 12, 1986, through July 12, 1987. The earlier policy contained a qualified pollution exclusion excepting "sudden and accidental" discharge, dispersal, release, or escape. The later policy contained an absolute pollution exclusion. The court held that the absolute pollution exclusion applied because the "sort of broadly dispersed environmental harm" alleged in the underlying

PFAS suits "[fell] squarely within pollution exclusions" like the one in the insured's policy. The court held that the qualified pollution exclusion applied, reasoning the "sudden and accidental" exception was not triggered because the alleged dumping and dispersal of the chemicals over many years "was neither abrupt nor unintentional" under New York law.

The Northern District of Georgia issued two declaratory judgment rulings that reached different conclusions as to whether the insurer had a duty to defend with respect to an underlying PFAS action. In *Grange Insurance Co. v. Cycle-Tex, Inc.*,[10] the court held that the insurer was entitled to a declaratory judgment that it had no duty to defend or indemnify a thermoplastics recycling facility in underlying pollution litigation because the policy's total pollution exclusion unambiguously barred coverage. The total pollution exclusion excluded bodily injury or property damage from discharges or releases of "pollutants" and losses arising from requests or requirements to test or clean up "pollutants." Because the policy defined "pollutants" as irritants or contaminants including chemicals, the underlying allegations—that the facility discharged PFAS-contaminated industrial wastewater into the local publicly owned treatment works—did not trigger the insurer's duty to defend or indemnify.[11]

In *James River Insurance Co. v. Dalton-Whitfield Regional Solid Waste Management Authority*,[12] the court considered a different defendant's policy in the same underlying action as in *Cycle-Tex* and concluded it did not unambiguously exclude coverage. The policyholder in *James River* was a public solid waste authority alleged to have operated landfills that discharged PFAS-contaminated leachate into a local publicly owned treatment works. Here, the policy exclusion at issue was not a pollution exclusion but an exclusion for bodily injury or property damage that was "expected or intended from the standpoint of the insured." The court held that because one or more claims in the underlying complaint sounded in unintentional torts including negligence and nuisance, the policy did not unambiguously exclude coverage. The court dismissed with prejudice the insurer's declaratory relief action with respect to the duty to defend and dismissed without prejudice the insurer's unripe declaratory relief action with respect to the duty to indemnify, pending judgment in the underlying action.

Finally, the Northern District of Ohio avoided ruling on an insurer's declaratory judgment action relating to underlying PFAS litigation, instead declining jurisdiction. In *Admiral Insurance Co. v. Fire-Dex, LLC*,[13] the insurer filed a declaratory judgment suit against a manufacturer of firefighting equipment facing several lawsuits by firefighters, their spouses, or both, who alleged that the manufactured clothing, gear, and fire suppression foam contained PFAS that caused their cancers. The subject general liability policies contained four policy exclusions: (1) a total pollution exclusion, (2) an occupational disease exclusion, (3) a preexisting damages exclusion, and (4) a punitive damages exclusion. The court agreed with the insured that the case belonged in state court in light of "novel questions of law" raised by the suit relating to the intersection of PFAS and insurance law that were "best reserved for the Ohio state courts to answer in the first instance."

In contrast to PFAS litigation, litigation related to climate change has not yet generated a body of coverage litigation decisions, but a small number of such actions have been filed,[14] and

substantive climate change cases are being monitored. As examples of the latter, the following recent decisions in non-coverage climate change cases reflect the jurisdictional tussles that have emerged, with federal courts in each case remanding cases that targeted fossil fuel companies: *City & County of Honolulu v. Sunoco LP*;[15] *Rhode Island v. Shell Oil Products Co., LLC*;[16] *County of San Mateo v. Chevron Corp.*;[17] *Mayor & City Council of Baltimore v. BP PLC*;[18] *Board of County Commissioners of Boulder County. v. Suncor Energy (U.S.A.) Inc*.[19] The coverage implications of cases such as these are likely to emerge in the near future.

Traditional Environmental Coverage Issue Cases

There have also been recent cases resolving familiar environmental coverage questions, including the scope of pollution exclusions, timely notice of claims, and allocation of liability among insurance carriers on the risk. Some notable decisions are described below.

Scope of absolute and total pollution exclusion. Issues involving the scope of absolute and total pollution exclusions in CGL policies continue to be litigated for more conventional contaminants and industrial operations. In *Central Crude, Inc. v. Liberty Mutual Insurance Co.*,[20] the Fifth Circuit affirmed a grant of summary judgment for the insurer where a pipeline company sought coverage for oil spill cleanup expenses and defense costs under its CGL policy. Although the parties agreed that crude oil constituted a "pollutant" under the policy, the policyholder argued that the pollution exclusion applied only where the policyholder is held responsible for the release of the pollutant. The court held that the pollution exclusion barred coverage, regardless of the insured's role in the release.

In *Crown Energy Co. v. Mid-Continent Casualty Co.*,[21] the Supreme Court of Oklahoma affirmed a grant of summary judgment in favor of the policyholder, finding that coverage for a lawsuit involving seismic activity allegedly resulting from the insured's oil and gas operations was not barred by the policies' pollution exclusions. The underlying lawsuit against the policyholder alleged that increased underground pressure resulting from wastewater disposal wells caused property-damaging seismic activity. The policies contained pollution exclusions providing that coverage did not apply to bodily injury or property damage arising out of "the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water course or body of water[.]"

The court held that the pollution exclusion was ambiguous as to whether the underground wastewater constituted an irritant or contaminant under the policies, and the court thus construed the exclusion in the insured's favor. Further, the property damage alleged was not caused by the wastewater's *polluting* nature and so did not arise from the release of pollutants and was not excluded.

Timely notice and accurate disclosure. Two very common issues for environmental policies are notice and accuracy in insurance applications. The Ninth Circuit recently considered both of these issues in the context of a policyholder seeking coverage from a state environmental agency enforcement action for solid waste management violations.[22] In *Admiral Insurance Co. v. Dual*

Trucking Inc., the two environmental impairment liability policies at issue had policy periods of October 1, 2012, to October 1, 2013, and October 1, 2013, to October 1, 2014, and provided coverage for certain pollution conditions. The insured canceled the latter policy as of July 1, 2014, triggering the policy's automatic 30-day extended reporting period. On July 2 and July 3, 2014, the insured provided notices of claims relating to the environmental agency enforcement action against it, identifying the date of occurrence as July 5, 2013.

The Ninth Circuit held, with respect to the earlier policy, that the insured did not make a claim until after the claim reporting period ended, and thus the notice was untimely. With respect to the later policy, the insured did not meet the policy's requirement that the reported claim must have been learned about after the policy's cancellation. The court further agreed with the district court that the policyholder was not entitled to coverage under four other contractor pollution liability policies because it had materially misrepresented its knowledge of pollution conditions at the site of its operations in the policy applications and thereby rendered the policies void.

Allocation. Case law for long-tail environmental claims, often relating to decades-old pollution incidents, continues to develop as courts consider allocation of liability among insurance carriers and nuances that arise. In *Liberty Mutual Insurance Co. v. Jenkins Brothers*,[23] a policyholder company dissolved, and the trial court held that the insurer was the party in interest responsible for asbestos settlements. The New York Appellate Division (First Department) unanimously reversed, determining that the claimants had "failed to fulfill a condition precedent to filing a claim directly against" the insurer—obtainment of judgments against the policyholder. The court found that a prior court order directing substitute service on the insurer did not make the insurer a party to any settlement agreements or obligated to fund the whole settlement amounts under applicable law.

The court further stated that the claimants could not in any event be entitled to more relief than the now-dissolved insured company would have had in the applicable jurisdiction: a pro rata allocation for the loss occurring during active policy periods, rather than an all sums approach. The court granted the insurer's motion for summary judgment and declared that it was not responsible for funding the entire amount of the settlements between the insured's company and the individual claimants.

Takeaways

As in any coverage case, the jurisdiction and the policy language at issue are the most critical factors in recent environmental coverage litigation. The above decisions do highlight a few features of the current landscape:

- the coverage difficulties faced by policyholders who suffered pandemic-related business losses, outside those whose policies explicitly included "viruses" in their coverage provisions;

- the mixed bag of case law resulting from courts' policy-specific evaluations of pollution exclusions in the context of PFAS-related litigation;

- the incipient field of climate change actions and coverage implications; and
- the ongoing development of case law in familiar topic areas relevant to environmental coverage, such as absolute and total pollution exclusions, timely notice, and allocation.

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[1] The Covid Coverage Litigation Tracker, an insurance litigation database available on the University of Pennsylvania Carey School of Law's website, indicates that more than 2,300 pandemic-related coverage cases were filed in federal or state courts as of the end of March 2023. *See* Covid Coverage Litigation Tracker, Filings: Cumulative, https://cclt.law.upenn.edu/ (last accessed 6/12/2023).

[2] *Sunstone Hotel Inv'rs, Inc. v. Endurance Am. Specialty Ins. Co.*, 607 F. Supp. 3d 1006, 2022 U.S. Dist. LEXIS 111147 (C.D. Cal. June 15, 2022).

[3] The court deferred resolution of the parties' dispute about the length of the coverage period for further fact determination. *See Sunstone Hotel Investors*, 607 F. Supp. 3d at 1024–25.

[4] *N.Y. Botanical Garden v. Allied World Assurance Co. (U.S.) Inc.*, 206 A.D.3d 474, 168 N.Y.S.3d 305, 2022 N.Y. App. Div. LEXIS 3792 (N.Y. App. Div. 1st Dep't June 14, 2022).

[5] The court also found the insured stated a separate claim for breach of the covenant of good faith and fair dealing under the New York Court of Appeals' decision in *Bi-Economy Market, Inc. v. Harleysville Insurance Co. of New York* and its progeny. *See New York Botanical Garden*, 206 A.D.3d at 475–76.

[6] *Cent. Laundry, LLC v. Ill. Union Ins. Co.*, 578 F. Supp. 3d 781, 2022 U.S. Dist. LEXIS 2430 (E.D. Va. Jan. 5, 2022), *aff'd*, 2023 U.S. App. LEXIS 2440 (4th Cir. Jan. 31, 2023).

[7] The policy's full definition of "pollution condition" is "[t]he discharge, dispersal, release, escape, migration, or seepage of any solid, liquid, gaseous or thermal irritant, contaminant, or pollutant, including soil, silt, sedimentation, smoke, soot, vapors, fumes, acids, alkalis, chemicals, electromagnetic fields (EMFs), hazardous substances, hazardous materials, waste

materials, 'low-level radioactive waste', 'mixed waste' and medical, red bag, infectious or pathological wastes, on, in, into, or upon land and structures thereupon, the atmosphere, surface water, or groundwater." *See Central Laundry*, 578 F. Supp. 3d at 786.

[8] *Northwell Health, Inc. v. Ill. Union Ins. Co.*, No. 20-CV-6893, 2022 U.S. Dist. LEXIS 57432 (S.D.N.Y. Mar. 29, 2022).

[9] *Tonoga, Inc. v. N.H. Ins. Co.*, 201 A.D.3d 1091, 159 N.Y.S.3d 252, 2022 N.Y. App. Div. LEXIS 105 (N.Y. App. Div. 3d Dep't Jan. 6, 2022).

[10] *Grange Ins. Co. v. Cycle-Tex, Inc.*, No. 4:21-cv-147, 2022 U.S. Dist. LEXIS 238863 (N.D. Ga. Dec. 5, 2022).

[11] The court issued its ruling on the insurer's summary judgment motion in its declaratory judgment action, although the court converted the motion into a default judgment motion because the defendant policyholder did not appear in the case. *See Cycle-Tex*, No. 4:21-cv-147, 2022 WL 18781187, at *3–4, *7–8.

[12] *James River Ins. Co. v. Dalton-Whitfield Reg'l Solid Waste Mgmt. Auth.*, No. 4:22-cv-41, 2022 U.S. Dist. LEXIS 238961 (N.D. Ga. Nov. 7, 2022).

[13] *Admiral Ins. Co. v. Fire-Dex, LLC*, No. 1:22-CV-1087, 2022 U.S. Dist. LEXIS 198034 (N.D. Ohio Oct. 31, 2022), *aff'd*, 2023 FED App. 275N, 2023 U.S. App. LEXIS 14822 (6th Cir. June 13, 2023).

[14] *See, e.g.*, *Aloha Petroleum Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. 1:22-cv-00372 (D. Haw. Aug. 10, 2022) (suit for defense and indemnity of underlying climate change case); *Everest Premier Ins. Co. v. Gulf Oil LP*, No. 2284CV01291 (Mass. Super. Ct. 2022) (insurer sought declaratory judgment that it was not obligated to defend or indemnify defendant in underlying climate change case; this action was voluntarily dismissed).

[15] *City & Cty. of Honolulu v. Sunoco LP*, 39 F.4th 1101, 2022 U.S. App. LEXIS 18640 (9th Cir. July 7, 2022), *cert. denied*, 2023 U.S. LEXIS 1722 (U.S. Apr. 24, 2023).

[16] *Rhode Island v. Shell Oil Prods. Co., LLC*, 35 F.4th 44, 2022 U.S. App. LEXIS 13838 (1st Cir. May 23, 2022), *cert. denied*, 2023 U.S. LEXIS 1744 (U.S. Apr. 24, 2023).

[17] *Cty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 2023 U.S. LEXIS 1719 (9th Cir. Apr. 19, 2022), *cert. denied*, 2023 U.S. LEXIS 1719 (U.S. Apr. 24, 2023).

[18] *Mayor & City Council of Baltimore v. BP PLC*, 31 F.4th 178, 2022 U.S. App. LEXIS 9409 (4th Cir. Apr. 7, 2022), *cert. denied*, 2023 U.S. LEXIS 1773 (U.S. Apr. 24, 2023).

[19] *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 2022 U.S. App. LEXIS 3458 (10th Cir. Feb. 8, 2022), *cert. denied*, 2023 U.S. LEXIS 1671 (U.S. Apr. 24, 2023).

[20] *Cent. Crude, Inc. v. Liberty Mut. Ins. Co.*, 51 F.4th 648, 2022 U.S. App. LEXIS 29848 (5th Cir. Oct. 22, 2022).

[21] *Crown Energy Co. v. Mid-Continent Cas. Co.*, 511 P.3d 1064, 2022 Okla. LEXIS 59 (Okla. June 14, 2022).

[22] *Admiral Ins. Co. v. Dual Trucking Inc.*, No. 21-35433, 2022 U.S. App. LEXIS 11550 (9th Cir. Apr. 28, 2022).

[23] *Liberty Mut. Ins. Co. v. Jenkins Bros.*, 203 A.D.3d 579, 162 N.Y.S.3d 706, 2022 N.Y. App. Div. LEXIS 1846 (N.Y. App. Div. 1st Dep't Mar. 22, 2022).