

Court Rules on Application of Pollution Exclusion to Contamination Caused by a Fire



Many commercial insurance policies specifically exclude pollution-related claims from coverage. It may appear that this exclusion applies anytime a company is sued for, say, damages caused by the release of a pollutant or reimbursement of the costs of remediating contamination it created. But the application of the pollution exclusion isn't always that simple. For example, an insurance policy may cover fire damage but exclude damage caused by the release of pollutants. So what if a fire results in the release of a contaminant that causes damage? A court in BC considered exactly that scenario. Here's a look at how it ruled.

THE CASE

What Happened: An electroplating company had a fire at its premises, which activated the sprinkler system. The water released from the sprinklers caused vats containing chemicals to overflow. The partially diluted chemical solutions contaminated the surrounding property used by neighbouring businesses. Several of these businesses sued the company for the damage caused by the release of the chemicals. The company asked its insurer to 'indemnify' or defend it in these lawsuits as required by its insurance policy. But the insurer refused, claiming that the policy specifically excluded property damage caused by the release of pollutants from property owned or used by the company. The trial court ruled for the company. So the insurer appealed.

What the Court Decided: The BC Court of Appeal ruled that the pollution exclusion did apply and so the insurer didn't have to defend the company in the lawsuits.

The Court's Reasoning: The company's insurance policy generally provided coverage for potential liability because of property damage due to an accident or occurrence, such as a fire. It also excluded certain kinds of liability, including liability for property damage 'caused by, contributed to by or arising out of' the release of pollutants. So the appeals court explained that the issue was whether the pollution exclusion covered damages caused by a release of pollutants that was partly caused by a fire. The appeals court found that

although the company reasonably expected that it would be indemnified against any liability for damage to neighbouring properties from a fire on its property, it couldn't have a reasonable expectation that it would be indemnified against liability for the escape of chemicals from its vats. Thus, whether you apply the literal wording of the policy or use a contextual approach, the appeals court said you get the same result: the policy excludes coverage for the risk of being found liable for the escape of chemicals from vats. In short, the appeals court found that it's not the 'true cause' of the damage that was relevant but the cause of the *liability*. And because the lawsuits claimed the company was liable 'for the accidental release of pollutants and the contamination caused by leaking toxic chemicals,' the insurance policy pollution exclusion applied and thus, the insurer had no duty to defend the company in these lawsuits, concluded the appeals court [*Precision Plating Ltd. v. Axa Pacific Insurance Company*, [2015] BCCA 277 (CanLII), June 18, 2015].

ANALYSIS

Industrial fires can cause damage in a variety of ways. For example, the flames can destroy property and the smoke can ruin it. One reason companies buy insurance is to protect them from liability for exactly those kinds of damage. But in the *Precision Plating* case, the businesses that sued the company didn't allege liability for fire or smoke damage. Instead, they claimed liability for the release of toxic chemicals from the company's vats. And such liability was explicitly excluded from coverage under the insurance policy. So the lesson from this case is that when it comes to the application of an insurance policy's pollution exclusion, the cause of the release or discharge of pollutants may not matter'just the simple fact that there was a release of a pollutant may be sufficient to exclude related liability from coverage under the policy.