Retailers beware: Pollution liability exclusions apply to deny coverage for claims against retailers

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The Ontario Court has once again confirmed that commercial general liability (CGL) policies containing the typical pollution liability exclusion will not respond to claims against insureds relating to allegations of damages caused by pollution. In *Mississauga Motors Mart Inc. v. Sovereign General Insurance Co.*, 2013 ONSC 6360, Mississauga Motors sought coverage from its liability insurer for a claim made against it by its former landlord. The landlord alleged that an oil spill had occurred during Mississauga Motors' tenancy when it operated a used car business on the property. The landlord alleged that it incurred significant costs to remediate the property following the discovery of the contamination and that it suffered significant losses as it was unable to re-lease the property during the cleanup. The insurer denied coverage to Mississauga Motors for the claim based on the pollution exclusion.

Mississauga Motors brought an application to the Court for a determination as to whether its insurer, Sovereign, had a duty to defend it with respect to the landlord's action. They argued that the pollution exclusion should not apply as it referenced non-coverage for "property damage"; thus, damages for the remediation to the land which is not tangible property would not be excluded. They also suggested that the landlord's claim for lost rental income could not be considered to be property damage.

The Court considered the reasonable expectations of the parties at the time the policy was issued and concluded that the only reasonable interpretation was that the insurer did not intend to obligate itself to indemnify the insured in relation to any liability arising out of the spill or pollutant which would include liability for damages to real property, as opposed to tangible property, and damages for pure economic loss. As such, there was no coverage and no duty to defend the action on the part of Sovereign.

For years, businesses that have been caught without pollution liability policies have tried to convince the courts that pollution liability exclusions contained in CGL policies should not apply to them unless they are involved in activities that would render them "active industrial polluters." This argument was rejected in 2011 by the Ontario Court of Appeal decision of *ING Insurance Company of Canada v. Miracle* in which the Court found that pollution liability exclusions in CGL policies applied to exclude coverage against insureds who conduct any activity that carries "a known risk of pollution and environmental harm." The Court in Mississauga Motors did not mention this issue, but by denying coverage to a used car sales business, implicitly found that the exclusion applies to a much broader range of companies. It may well be that the courts are expanding the category of insureds to which the pollution liability exclusion will apply to include any business that carries any risk whatsoever of a spill of or an exposure to contaminants.

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