

## CORPORATE INSURANCE LAW

# Prior or Pending Litigation Exclusion Bars Coverage for Natural Resource Damages Claim

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**T**he vast majority of courts construe insurance policy exclusions narrowly, placing the burden on the insurer to demonstrate that the exclusion applies and that there is no other reasonable interpretation of the relevant policy language. In the case of prior or pending litigation exclusions, the policyholder-insurer dispute is typically over whether a later filed claim arises out of the same subject matter or alleged activities as a prior or pending litigation.

Faced with this issue in the environmental insurance context, a New Jersey appeals court, applying New York law (based on the policy's choice of law provision), recently upheld a trial court ruling finding that the prior or pending litigation exclusion barred coverage. The policyholder had sought coverage with respect to a New Jersey Department of Environmental Protection (NJDEP) lawsuit alleging liability for natural resource damages resulting from historic metals operations at a site in Montvale, New Jersey. The Appellate Division agreed with the trial court that the NJDEP lawsuit arose out of the same pollutants



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and pollution-causing activities that had been the subject of a prior administrative consent order that required the policyholder to perform certain remedial activities at the site. See *Handy & Harman v. Beazley USA Services*, No. A-2068-20 (N.J. Super Ct. App. Div. March 2, 2023).

## Site Background

The policyholder owned and operated a metal etching business at the Montvale site in the early 1980s. When the policyholder decided to sell the property, the transaction triggered New Jersey's Environmental Cleanup Responsibility Act (ECRA), which would later be replaced by the Industrial Site Recovery Act (ISRA). In 1987, in order to satisfy its obligations under ECRA so that the contemplated transaction could proceed, the policyholder entered into an administrative consent order (ACO) with the NJDEP. The ACO required the policyholder to undertake

certain sampling activities and to remove contaminated soils, conduct surveys and install monitoring wells to delineate the scope of contaminated groundwater associated with the site.

Over a decade after the ACO was executed, NJDEP filed suit against the policyholder alleging statutory and common law causes of action and seeking reimbursement of cleanup costs as well as natural resource damages arising from the policyholder's discharge of pollutants at the Montvale site. The focus of the lawsuit was on the historic use of trichloroethylene (TCE) as a degreaser in connection with metal etching operations. The NJDEP alleged that TCE had leaked from large storage drums at the site and then migrated into subsurface groundwater, contaminating the Brunswick Aquifer. NJDEP claimed that the contamination caused the closure of municipal drinking wells and required installation of filtration systems necessary to supply clean drinking water to the public.

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### **The Insurance Policy**

In 2017, the policyholder purchased an environmental insurance policy from defendant insurer Beazley, which provided coverage for claims made during the period Dec. 13, 2017 to Dec. 13, 2020. The policyholder notified Beazley of the NJDEP lawsuit and sought defense and indemnification. Beazley reserved its rights citing to the Prior or Pending Litigation Exclusion as well as other policy provisions.

The prior or pending litigation exclusion in the policy provided as follows: " ... coverage under this insurance does not apply to cleanup costs, damages and claims expenses arising out of or resulting from any arbitration, cause of action, claim, decree, demand, judgment, legal proceeding or litigation against the underwriters or any insured or involving any covered location;

- which took place prior to or is pending as of the effective date that the covered location was endorsed onto the policy and of which ... any insured had received notice or otherwise had knowledge of as of such date; or
- based on substantially the same matters as alleged in the pleadings of such prior or pending litigation against ... any insured or involving any covered location; or
- based upon or arising out of any act of any insured that gave rise to such prior or pending litigation against ... any insured or involving any covered location.

The policy sets forth the following definition of "claim":

- a written demand received by an insured for money or services or alleging liability or responsibility, including, but not limited to service of suit or institution of arbitration proceedings; or
- a court or government agency order or government or regulatory action filed against the insured.

### **The Coverage Litigation**

The policyholder filed a coverage action against Beazley asserting a breach of contract claim and seeking a declaration that the NJDEP claims were covered under the policy. Beazley moved to dismiss the action and the trial court converted the motion to dismiss to a motion for summary judgment. In connection with the motion, the policyholder conceded that the claims for cleanup costs were excluded by a

specified coverage and contamination exclusion, so the remaining dispute concerned only the natural resource damages claim. Applying New York law, the trial court granted Beazley's motion for summary judgment and held that coverage for the natural resource damages claim was barred by the prior or pending litigation exclusion.

On appeal, the Appellate Division, after de novo review, affirmed the trial court's ruling. The Appellate Division first noted that, under New York law, an insurer who seeks to rely on an exclusion has the burden of proof and must demonstrate that the "exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation" and applies to the claim at issue. (citing *Tonoga v. N.H. Insurance*, 201 A.D.3d 1091, (N.Y. App. Div. 2022) (quoting *Broome County v. Travelers Indemnity*, 125 A.D.3d 1241, 1241-42 (N.Y. App. Div. 2015).

Next, in order to determine whether the prior or pending litigation exclusion barred coverage, the court addressed two key issues: was the ACO a prior or pending "claim"; and did the NJDEP lawsuit arise out of the ACO such that it was based on substantially the same matters or acts of the policyholder that gave rise to the ACO.

The court determined that the ACO was a claim as defined in the policy because it was undeniably a "government agency order" that had the force of law behind it. The ACO constituted a written demand to perform remedial activities to address pollution arising from the policyholder's industrial activities at the site. Further, the policyholder faced significant penalties if it refused to comply with the ACO.

The Appellate Division also agreed with the trial court's ruling that the NJDEP lawsuit was based on substantially the same matters as the ACO. The court determined that the pollutants

that allegedly caused natural resource damages were the same pollutants, and allegedly arose from the same policyholder activities, that were at issue in the ACO. Further, the court held that it made no difference that the NJDEP lawsuit sought natural resource damages not sought in connection with the ACO.

Consequently, the Appellate Division affirmed the ruling of the trial court holding that coverage was barred by the Prior or Pending Litigation Exclusion and granting summary judgment to Beazley.

### Looking Forward

In addition to barring coverage for lawsuits that are pending prior to inception of an insurance policy, prior or pending litigation exclusions typically bar coverage for new claims arising out of the same subject matter or alleged activities at issue in a prior or pending action. Disputes over these exclusions usually turn on the facts at issue and whether the subject matter of the two actions can reasonably be described as substantially the same. As a result of the fact-based nature of these disputes, a ruling in one case may have limited applicability as precedent in an unrelated case.

In this instance, the New Jersey courts had little trouble concluding that the pollution and pollutant activities that formed the basis of the NJDEP lawsuit were substantially the same as the issues and activities that had led to the ACO. Consequently, the Appellate Division upheld the trial court's ruling in favor of the insurer. While a ruling like this is unlikely to be broadly applicable to other cases involving prior or pending litigation exclusions, it may very well serve as relevant precedent in the context of environmental insurance cases.