

BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow



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Update: Insurance Coverage License Plate Contest – The response to the *Binding Authority* license plate contest has been overwhelming. I am really excited to share the best ones with everyone. Gale and I haven't stopped laughing since the entries have been rolling in. I was thinking it would be impossible to select the three best out of the gazillion sent in. But then that problem was solved. Someone submitted BDG ATHY – wrapping up first, second and third place in one shot. Gee that was easy. Just kidding. I made that up. Please keep 'em coming. I am going to talk to Oxford University Press about getting more copies of "Key Issues" for prizes.

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Indiana Supreme Court Slams The Flexdar Shut On Any Chance To Change Kiger

***Hoosier State Remains The Toughest In The Country For Insurers And
The Pollution Exclusion***

The Most Eagerly Anticipated Coverage Decision In The Nation

This is the third issue in a row of *Binding Authority* to address the Pollution Exclusion. A three-peat is a first in all the years of these dispatches. I need to end this since I'm starting to look like a one-trick pony. But the *Binding Authority* Selection Committee had little choice in the matter. Yesterday the Indiana Supreme Court handed down its decision in *State Auto Mutual Insurance Company v. Flexdar* – the coverage case that I believe has been the most closely watched, and whose decision has been the most eagerly anticipated, in the country.

When it comes to Indiana and the Pollution Exclusion for insurers, the picture has resembled Lucy repeatedly pulling the football away just as Charlie Brown goes to kick it. Yesterday's holding in *Flexdar* did nothing to change that. The Supreme Court held that the Pollution Exclusion did not apply to preclude coverage to Flexdar, a

manufacturer of rubber stamps and printing plates, for its liability for clean-up costs for the presence of chemical solvent trichloroethylene (TCE) in soil and groundwater. What's more – the Pollution Exclusion at issue in *Flexdar* added that it applied “whether or not the irritant or contaminant has any function in your business, operations, premises, site or location.” It still was not enough.

Lots of states debate whether the Pollution Exclusion applies to things like carpet glue fumes and carbon monoxide – and hold that it does not because these substances are not so-called “traditional environmental pollution.” But that's not at all what *Flexdar* was about. It is hard to imagine a situation more appropriate for application of the Pollution Exclusion than one involving the presence of TCE in soil and groundwater.

A lengthy explanation of how Indiana has reached this point could be provided. But I really need to get to work. In general, the situation goes back to the Supreme Court's 1996 opinion in *Kiger*. In *Kiger*, the court held that the Pollution Exclusion did not preclude coverage to a gas station for contamination caused by the leakage of gasoline from its underground storage tanks. Since *Kiger*, Indiana's Pollution Exclusion jurisprudence has evolved such that, for it to apply, the exclusion must specifically state what the pollutant is that is sought to be excluded from coverage. It is not good enough – *even for TCE* -- to have the typically used exclusion that applies to any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.

Some saw *Flexdar* (me included) as an opportunity for the Indiana Supreme Court to back away from *Kiger*. But *Flexdar* did nothing to change this interpretation of the Pollution Exclusion. To the contrary, the court's opinion was a parade for *Kiger*.

Applying basic contract principles, our decisions have consistently held that the insurer can (and should) specify what falls within its pollution exclusion. . . . Where an insurer's failure to be more specific renders its policy ambiguous, we construe the policy in favor of coverage. Our cases avoid both the sometimes untenable results produced by the literal approach and the constant judicial substance-by-substance analysis necessitated by the situational approach. In Indiana, whether the TCE contamination in this case would “ordinarily be characterized as pollution,” Appellant's Pet. to Trans. at 11 (emphasis added), is, in our view, beside the point. The question is whether the language in State Auto's policy is sufficiently unambiguous to identify TCE as a pollutant. We are compelled to conclude that it is not.

Flexdar at 8-9.

The court also noted that State Auto did in fact change its Pollution Exclusion to specifically name excluded pollutants, such as diesel, kerosene, and other fuel oils . . . carbon monoxide, and other exhaust gases . . . mineral spirits, and other solvents . . . tetrachloroethylene, perchloroethylene (PERC), trichloroethylene (TCE), methylene chloroform, and other dry cleaning chemicals . . . chlorofluorocarbons, chlorinated hydrocarbons, adhesives, pesticides, insecticides . . . and all substances specifically listed, identified, or described by one or more of the following references: Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Priority List

Hazardous Substances (1997 and all subsequent editions), Agency for Toxic Substances And Disease Registry ToxFAQ, and/or U.S. Environmental Protection Agency EMCI Chemical References Complete Index. *Id.* at 9-10.

This version of the Pollution Exclusion, however, was not in play for the Flexdar claim. In fact, while the court did not say so specifically, that State Auto adopted this different version of the Pollution Exclusion probably did not help its cause when it came to interpreting the more generalized version of the Pollution Exclusion. This was a much bigger issue in the Court of Appeals's decision in the case.

Two Justices dissented. Coincidentally, the dissenting opinion addressed in some detail last week's 7th Circuit decision in *Scottsdale Indemnity Co. v. Village of Crestwood*, which was the subject to the March 16 issue of *Binding Authority*.

While the Indiana situation is difficult for insurers, the court has not hid the ball on what it takes to have an effective Pollution Exclusion. Like State Auto did, insurers insuring Indiana policyholders must use an exclusion that specifically lists the pollutants sought to be precluded from coverage. Of course, this presents underwriting challenges, but that's a whole other kettle of fish.

A copy of yesterday's Indiana Supreme Court decision in *State Auto Mutual Insurance Company v. Flexdar* can be accessed here:

<http://www.in.gov/judiciary/opinions/pdf/03221201rdr.pdf>

Please let me know if you have any questions.

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