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New Jersey Appellate Division: Pollution Exclusion Not Applicable to a D&O Claim

The Pollution Exclusion is the *Law & Order* of coverage issues. One of the spin-offs in this long-running coverage drama is its applicability to D&O claims. The latest episode came yesterday from the New Jersey Appellate Division.

In *Sealed Air Corporation v. Royal Indemnity Company*, the court addressed the applicability of a pollution exclusion contained in a D&O policy to shareholder claims brought against Sealed Air Corp. for allegedly misrepresenting the amount of its contingent liabilities for W.R. Grace's asbestos liabilities.

Following a head-spinningly complex corporate transaction, Sealed Air Corp. was in the position of having to make representations in SEC filings and press releases that it would not incur any liability for W.R. Grace's asbestos liabilities. It was ultimately determined that Sealed Air's assets were potentially threatened by the asbestos liabilities and its stock dropped like a stone. Shareholders of publicly-traded Sealed Air securities filed a class action against the company, alleging misrepresentations by its directors and officers, and seeking compensation for the decline in stock value.

Sealed Air sought coverage from Royal under a D&O policy (specifically, advancement of defense costs was at issue before the court). Royal acknowledged that the nature of the complaint was covered, but that the pollution exclusion precluded coverage.

Royal urged that the pollution exclusion be given a literal reading, and, thus, that it "preclud[ed] coverage for the claims alleged in the Securities Litigation because those claims are for financial losses to security holders based on, arising out of or in any way involving the actual, alleged or threatened discharge, release, escape, seepage, migration, or disposal of asbestos products." *Sealed Air* at 15. Sealed Air took a different view: "[T]he alleged loss to the shareholders 'arises out of allegedly misleading financial statements, not from air-borne asbestos.'" *Sealed Air* at 16.

Notwithstanding that the pollution exclusion at issue contained terms that are ordinarily afforded a broad meaning under New Jersey law ("based on," "arising out of" and "in any way involving"), the Appellate Division held that the exclusion did not apply to preclude coverage: "Examining the history of the multi-step transaction, Sealed Air's subsequent securities disclosures, and the explicitly stated cause of action that triggered Sealed Air's claim under its D&O policy, we find that the pollution exclusion relied on by Royal to

exclude coverage is too attenuated from the damages sought and the legal grounds supporting such alleged damages claimed in the complaint in the underlying action.”

A copy of *Sealed Air Corporation v. Royal Indemnity Company* can be accessed here:

<http://www.judiciary.state.nj.us/opinions/a5951-06.pdf>

Please let me know if you have any comments or questions.

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