

# BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow



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## Pollution Exclusion: Michigan Court of Appeals Will Leave Insurers Pistoned

A cornerstone of *Binding Authority* has always been that the coverage decisions being discussed were just-issued, as in, within the past couple of days. Today's issue strays from that principle and addresses a decision from November 24.

*I have let my readers down and I regret such transgression with all of my heart. I have not been true to the values of this publication and the behavior that its readers deserve. I am not without fault and I am far short of perfect. I am dealing with my behavior and personal failings behind closed office doors. I will strive to be the editor that the readers deserve. For all of those who have supported Binding Authority over the years, I offer my profound apology. -- Randy*

Last Tuesday the Court of Appeals of Michigan issued a pollution exclusion decision that I believe many will find surprising. Indeed, in holding that the pollution exclusion precluded coverage, the trial court stated that there could be "no dispute." But apparently there was a dispute, since the Court of Appeals reversed -- concluding that the issue was not so "basic" nor the answer so "obvious."

In *Hastings Mutual Insurance Company v. Safety King, Inc.*, the court addressed the applicability of a pollution exclusion in the context of claims (of some sort, more about that below) arising out of a sanitizing agent used by the insured in the course of its business -- providing air duct cleaning services. The active ingredient in the sanitizing agent was triclosan, which is an antimicrobial pesticide. *Safety King* at 4.

The insurer argued that, because triclosan is a pesticide, it is unquestionably a pollutant under the terms of the policy. *Id.*

The insured argued that triclosan is not a substance to which the pollution exclusion applies because it is not a "pollutant." Rather, the insured argued that triclosan is a "ubiquitous antimicrobial agent found in a variety of cosmetic and personal hygiene products. Triclosan targets bacteria and dental plaque and is used in various products including, for example, soaps, skin cleaning agents, deodorants, shaving gel, toothpaste, mouthwash, dental cement, surgical sutures, cosmetics, and air duct treatments. Because triclosan is commonly used in products that are applied directly to human skin and, in many cases, within the mouth, Safety King's use of a triclosan-containing product did not implicate the pollution exclusion. It simply is not a 'pollutant.'" *Id.*

Of course, under my test, triclosan is a "pollutant" because it satisfies the following criteria: It is a substance that: (A) (1) I can not pronounce; (2) I have never heard of; or (3) I do not know what it does; and (B) gives me a stomach ache just thinking about it because it brings back memories of high school chemistry.

Nonetheless, the Michigan Court of Appeals concluded that triclosan was not a "pollutant" because it was not an "irritant" or "contaminant," as required by the definition of pollutant:

[A]n “irritant” is a substance that, because of its nature and under the particular circumstances, is generally expected to cause injurious or harmful effects to people, property, or the environment. And, considered in context, a “contaminant” is a substance that, because of its nature and under the particular circumstances, is not generally supposed to be where it is located and causes injurious or harmful effects to people, property, or the environment. \* \* \*

Hastings did not prove that triclosan is an irritant or contaminant. Rather, the evidence set forth by Safety King showed that triclosan was supposed to be where it was located, i.e., in ductwork, and that it is *not* generally expected to cause injurious or harmful effects to people.

*Id.* at 5 (emphasis in original).

The court also rejected the insurer’s argument that all pesticides are necessarily “pollutants” since many homemade pesticides which use dishwashing detergent or pureed garlic as their active ingredient would not typically be considered “pollutants.” *Id.* at 5. Huh?

Curiously, the court’s opinion does not state what the nature of the underlying claims against Safety King were. But, obviously, because Safety King was sued by customers who used the company’s services to clean the ducts in their home, something must have gone wrong, causing bodily injury or property damage, notwithstanding that triclosan was supposed to be where it was located, i.e., in the ductwork.

In any event, *Safety King* is an interesting decision and one that certainly won’t do anything to settle the debate over the applicability of the pollution exclusion (nothing will, actually).

A copy of the Michigan Court of Appeals’s November 24<sup>th</sup> decision in *Hastings Mutual Insurance Company v. Safety King, Inc.* can be accessed here:

[http://coa.courts.mi.gov/documents/opinions/final/coa/20091124\\_c286392\\_35\\_286392.opn.pdf](http://coa.courts.mi.gov/documents/opinions/final/coa/20091124_c286392_35_286392.opn.pdf)

Please let me know if you have any questions.

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