

Sixth Circuit Rules That Pollution Exclusion Bars Coverage For Criminal Claims Alleging Submission Of Fraudulent Dust Samples

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Our [November 2020 Alert](#) reported on a Kentucky district court decision holding that a pollution exclusion barred coverage for a criminal investigation and charges against a company and its executives stemming from the fraudulent submission of dust samples to a federal agency. *Barber v. Arch Ins. Co.*, 2020 WL 6087951 (W.D. Ky. Oct. 15, 2020). This month, the Sixth Circuit affirmed. *Barber v. Arch Ins. Co.*, 2021 WL 2828021 (6th Cir. July 7, 2021).

A criminal action alleged that Armstrong and its employees submitted fraudulent dust samples to the Mine Safety and Health Administration. Arch denied coverage, arguing that a pollution exclusion barred coverage. The district court agreed and ruled in the insurer's favor and the Sixth Circuit affirmed.

The Sixth Circuit rejected Armstrong's assertion that coal dust is not a "contaminant or irritant" where, as here, it is confined inside a mine "where it is supposed to be," rather than dispersed into the environment. In so ruling, the court noted that coal dust levels in mines are strictly monitored by regulatory agencies and that coal dust inhalation can result in bodily harm.

In addition, the court rejected Armstrong's contention that the exclusion was inapplicable because the criminal charges did not "arise from" and were not "based on" or "attributable to any direction, request, or voluntary decision to test for, abate, monitor, clean up, remove, contain, treat, detoxify or neutralize Pollutants," as required by the exclusion. More specifically, Armstrong argued that "arising from" requires causality and that the criminal charges were caused by an alleged conspiracy rather than Armstrong's duty to regulate coal dust. The court stated:

Absent the . . . regulations, the employees would not have had to monitor or submit samples at all, and therefore would not have conspired to commit fraud Accordingly, the criminal proceedings arose from a direction to test for or monitor a pollutant, and the pollution exclusion bars coverage for the criminal proceedings.

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