

## Absolute And Qualified Pollution Exclusions Bar Coverage For All Claims, Says New York Appellate Court (Insurance Law Alert)

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New York's Third Department ruled that pollution exclusions barred coverage for all underlying claims against a manufacturing company, rejecting the policyholder's assertion that some discharges were "sudden and accidental." *Tonoga, Inc. v. New Hampshire Ins. Co.*, 2022 WL 52903 (N.Y. App. Div. Jan. 6, 2022).

After the policyholder's manufacturing site was declared a Superfund site, the policyholder entered into a consent agreement with the government to take certain remedial measures. Thereafter, numerous lawsuits were brought against the policyholder, alleging bodily injury and property damage stemming from pollution of water, soil and air at the site. The insurers refused to defend or indemnify the claims based on pollution exclusions in the relevant policies. A New York trial court ruled that the exclusions applied as a matter of law and that there was no duty to defend. The appellate court affirmed.

The appellate court ruled that an absolute pollution exclusion squarely applied. The court deemed it irrelevant that at the time the policy was issued, the harmful substances at issue were not known to have a detrimental effect on the environment. As to a qualified pollution exclusion in a different policy, the court ruled that the policyholder failed to allege that the discharges at issue were "sudden and accidental" so as to fall within the exception to the exclusion. In particular, the court explained that underlying allegations of "improper dumping" and "spilling" of harmful solutions did not sufficiently allege conduct that was "abrupt" or "unintentional." Rather, the court explained, the gravamen of the underlying complaints was that the policyholder dumped toxic substances over a period of many years as part of its routine practices. The court also rejected the policyholder's assertion that the "sudden and accidental" exception was met by underlying allegations that there were "likely" "other ways" in which the toxins were discharged into the environment.

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