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Client Alert

Court Rules “Function in Your Business” Modification of Pollution Exclusion Does Not Bar Coverage

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In *State Auto. Ins. Co. v. Flexdar* (Jan. 11, 2010), an Indiana trial court ruled in favor of our client as to the meaning of the “function in your business” endorsement modifying the absolute pollution exclusion. This endorsement was introduced by the Insurance Services Office (ISO) and used widely by insurers in Indiana following the Indiana Supreme Court’s ruling finding the pollution exclusion ambiguous, overbroad and unenforceable in *Am. States. Ins. Co. v. Kiger* in 1996. The endorsement states: “The Pollution Exclusion applies whether or not the irritant or contaminant has any function in your business, operations, premises, site or location.” The insurer argued that *Kiger* stands only for the proposition that a policy cannot exclude the major source of liability for the policyholder—in *Kiger*, gasoline at a gas station—unless the policy clearly says so. The *Flexdar* court rejected that contention, ruling that the modification did not cure the ambiguity in the definition of “pollutants” found in *Kiger* and a series of Indiana appellate decisions which followed it. The policies in *Flexdar* contained the same definition of “pollutants” that was examined in those cases. It found that the policies did not define the substance at issue as a “pollutant” any more than the industrial wastes were a “pollutant” in *Seymour*, or the electroplating chemicals were a “pollutant” in *Summit*, or carpet glue fumes were a “pollutant” in *Friedline*, or perchlorate was a “pollutant” in *Standard Fusee*.