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USE CHEMICALS IN YOUR BUSINESS? READ YOUR INSURANCE POLICY: YOU MIGHT NOT BE COVERED.

A recent federal appeals court ruling underscores the need for businesses using potentially irritating chemicals to check their insurance policies for "absolute pollution exception" clauses. These increasingly common clauses exclude coverage indemnification for any bodily injuries resulting from exposure to environmental pollutants.

In its May 13, 2014 decision in *United Fire & Casualty Company v. Titan Contractors Service, Inc.*, the Eighth Circuit Court of Appeals vacated a district court's ruling that held an irritating chemical was not a pollutant under a company's commercial insurance policy. In doing so, the majority stated that it was holding the parties to the plain language of their insurance contract. Businesses in Missouri should review their policies to ascertain the extent of their coverage should they be sued for damages arising from environmental pollutants.

Titan Contractors Services, Inc., a clean-up and sealing company, held a general commercial insurance policy issued by United Fire & Casualty Company. The relevant absolute pollution exception excluded from coverage "'[b]odily injury' or 'property damage' which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." The policy defined "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

In March 2009, three women sued Titan for alleged injuries resulting from inhalation of TIAH, an acrylic concrete curing and sealing compound. Titan used TIAH to seal a floor in a building where the three women worked. The TIAH fumes allegedly caused the women to suffer physical injuries. Although United defended Titan against the women's negligence claims, it filed a separate suit against Titan seeking a ruling that the insurer had no duty to defend or indemnify Titan in the TIAH suits. Titan counterclaimed, seeking a declaration that United owes duties to defend and indemnify it against the state-court lawsuit. The district court held for Titan, reasoning that TIAH did not constitute

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a “pollutant” and, thus, that the absolute pollution exclusion did not apply.

The Eighth Circuit majority, looking to the text of the insurance policy, held that the contract’s definition of “pollutant” included any substance that was an “irritant.” On this basis, the court vacated the district court’s order and in doing so remanded the case to the district court for further proceedings, including a determination as to whether the negligence claims arose from a “discharge, dispersal, seepage, release or escape” of TIAH.

The 2-1 decision highlights the difficulty that both the insurance industry and the courts face in defining what “pollution” risks are encompassed within standard commercial general liability coverage. The interpretation and application of the absolute pollution exclusion and similar types of exclusions are far from uniform and have led to substantially different results in courts around the country. The Missouri Supreme Court has yet to weigh in on the issue and Missouri’s intermediate appellate courts have not resolved the questions definitively.