

Total Pollution Exclusion

Are You Protected? | by GARY R. RIMLER

I don't know how many people stay up at night reading their Commercial General Liability (CGL) Insurance Policy to determine how well protected or how exposed their rink may be in the event of a liability claim. The CGL will defend and make claim payment for people getting hurt (Bodily Injury Liability) or Property Damage Liability either at your rink or any other place you conduct your business. While the coverage grant is generous, there are a bunch of exclusions added to the policy, and those exclusions go beyond the 26 letters of the alphabet in some policies.

I remember when a river was accidentally set afire in Cleveland and when a chemical spill in Philadelphia caused evacuations and closure of businesses. In the mid-1970s when the river burned, the CGL policy was called "Comprehensive" not "Commercial" and there was no pollution exclusion added to the policy. The liability from this event was insured, as was the chemical spill in the early 1980s. Today, there is a Total Pollution Exclusion included within virtually every Commercial General Liability.

If you read the exclusion, there is no protection against anyone getting hurt or their property damaged as a result of a pollution event broadly defined to eliminate almost any release into the atmosphere or on land. The policy excludes discharge, seepage, migration, release or escape of pollutants. Insurance companies define pollutants as solid, liquid, gaseous, thermal irritants or contaminants including vapor, soot, smoke, fumes, acids, alkalis, chemicals and waste. They go on to say waste includes materials to be recycled. As you can see, the insurance company is serious about the total pollution exclusion. You must agree that chemicals like glycol and

ammonia used every day in your business fall within the pollution exclusion.

Ice arenas have experienced problems relative to Carbon Monoxide releases and arena guest illnesses. Ice resurfacing machines regularly release contaminants within the ice arena. The Total Pollution Exclusion can eliminate protection under the Commercial General Liability policy for injuries to guests or participants. Operators should be guarded for subrogation claims relative to employment or injuries to third parties. A Pollution Liability Policy will insure this type of event.

"If there is a total exclusion does this mean there is no insurance available? Absolutely not!"

What's an ice arena to do to protect itself? There are chemicals in the ice that can gradually seep into the ground and there can be a sudden release of chemicals or a fuel spill that can cause damage and injure people. If there is a total exclusion, does this mean there is no insurance available? Absolutely not!

A number of insurance companies offer site specific or contractor's pollution liability insurance. The policies are broad in their scope and will defend liability claims and pay on your behalf. They cover pollution both on the site and pollution off the site that was generated from your arena. Insurance is also available relative to underground and above-ground storage tanks.

It is important to consider the breadth of the exclusions. Courts regularly interpret and define pollution events. An example of the broad definitions occurred in

Minnesota when the Minnesota Court of Appeals held that the pollution exclusion applied to composting, even though composting is natural. It's an interesting decision. *Larson v. Composting Concepts, Inc.*, 2008 Minn. App. Unpub. LEXIS 551.

Most CGL policies are "occurrence based." This means that your policy in effect on the day of the "occurrence" will respond to the claim. Most Pollution Liability policies are "claims-made" policies. The difference is that the "claims-made" policy in force on the day the claim is first made responds. This can be a positive and a negative. Some insurers offer "prior acts" protection, and your new pollution liability policy will cover events not just from the start of the policy but at anytime in the past, provided the claim is made during the "claims-made" policy term. If you buy a policy now and have prior acts protection, it will be as if you had always purchased policy insurance and events going back a number years will now be insured, provided you first become aware of the pollution event during the new policy term.

Pollution insurance premiums are considered reasonable by many businesses when you consider the scope of the insurance and the ability to cover prior acts. One drawback of the "claims-made" insurance is that you must continue to purchase the insurance or you will not be covered if the policy is not in force on the day of the claim. It is possible to purchase "tail" insurance should you sell your business or decide to stop purchasing this protection.

As you can see, pollution can be a problem or you can solve the problem through the right insurance. ★

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