Illinois Trump Tower Ruling Illuminates Insurance 'Occurrence'

By **Robert Tugander and Greg Mann** (November 14, 2023)

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Perhaps one of the most widely litigated issues under a general liability insurance policy is whether the insured's liability stems from an "occurrence."

Courts agree on the general legal principles, but the lines often become blurred when those principles are applied to a given set of facts.

A recent decision from an Illinois appellate court — Continental Casualty Co. v. 401 North Wabash Venture LLC — helps sharpen those lines, at least for certain claims involving compliance with statutory and regulatory obligations.[1]

The suit involved the Trump International Hotel & Tower in Chicago. The hotel's heating, ventilation and air conditioning systems withdrew over 19 million gallons of water each day from the Chicago River and returned it to the river as heated effluent.

Illinois environmental laws prohibit the discharge of heated effluent into state waters without a permit. The hotel had been operating under a permit for years, but its permit was set to expire.

It sought to renew its permit with the Illinois Environmental Protection Agency, but the agency did not issue a new permit before the old one expired. The hotel kept discharging heated effluent into the river despite its permit having expired.

The Claims Against the Hotel

This caught the ire of the Illinois EPA, and they slapped the hotel with a three-count complaint alleging violations of the Illinois Environmental Protection Act and regulations under the act.[2] The state sought injunctive relief — to stop the hotel from using the intake and discharge system — and civil penalties.

Environmental groups intervened in the suit, alleging the discharges violated the federal Clean Water Act and created a public nuisance. Among their Clean Water Act claims, the groups alleged the hotel failed to minimize the impact its water intake system had on fish and other wildlife. As for their nuisance claim, the groups alleged the water intake system unreasonably interfered with their right to fish and recreate in the river.

The Insurance Litigation

The hotel tendered the suit to its general liability insurers. The insurers filed a declaratory judgment action to get clear of any duty to defend or indemnify. The insurance litigation raised a host of coverage issues, but we focus here, as did the First District Court of Appeals, on just one — "occurrence."

Like in most policies, "occurrence" here was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The term "accident" was undefined, but the court found its meaning well settled under Illinois law. "Accident" means "an unforeseen occurrence, usually of an untoward or disastrous character or an undesigned sudden or unexpected event of an inflictive or unfortunate character."[3]

And that takes us to the heart of the dispute. What was the "occurrence"? We see a divergence in "occurrence" rulings not so much because the legal principles differ, but in how the conduct is viewed. Properly framing the issue is the most important determinant of outcome. The court's ruling usually depends on the angle from which it views the issue.

Courts recognize that the emphasis is not on whether the insured intended or expected to perform the act leading to liability, but whether the insured intended or expected that injury or damage would result from that act.

When the insured intends the act, but not the injury, courts will often find an "accident."[4] But this is kept in check by another well-developed principle: "that the natural and ordinary consequences of an act do not constitute an accident."[5]

So it was unsurprising that the hotel and its insurers disagreed about what constituted the "occurrence."

The hotel sought to shift the court's attention to the intervenors' claims, suggesting that it never meant to harm fish and other aquatic life when it withdrew river water through its intake system.

But the insurers urged the court to focus on the primary conduct for which the hotel was sued — operating a water intake and discharge system without a permit. Put differently, the hotel was in hot water because it did not comply with environmental laws and regulations, not because it endangered aquatic life.

The Court's Analysis

The court agreed with the insurers. It was the hotel's operation of its intake and discharge system, not the results of that operation, that drove the underlying complaints. And this makes perfect sense.

The state alleged three things: The hotel operated its intake and discharge system without a valid permit; its permit application was deficient; and the hotel violated Pollution Control Board regulations.

The environmental groups alleged the hotel violated the Clean Water Act by not complying with permit requirements. They also claimed the hotel's operation of its intake system in violation of its permit and federal regulations interfered with the groups' rights to use the river.

But as the court found, the underlying claims all arose from the same conduct — the hotel's noncompliance with environmental laws and regulations. True, the environmental groups claimed that the water intake system affected fish and other aquatic wildlife, but as the court explained, that was only relevant in the larger context of statutory and regulatory compliance.

Indeed, the hotel was not being sued for endangering the local fish population, but for not

studying the effect its intake system had on fish. The court rightfully was unwilling to equate such conduct with an "occurrence."

Even if the court had focused on the effects on fish and wildlife, that still would not have changed the result, because the natural and ordinary consequences of an act do not constitute an accident. The hotel knew that some aquatic life would be drawn into its water intake system, or entrained, and others trapped against the screens, or impinged.

The hotel's permit required it to submit data on entrainment and impingement. And its environmental consultant sought an extension to comply with this requirement. The hotel did not dispute that entrainment and impingement are concerns of any water intake structure.

This highlights another legal principle that many courts follow. In assessing intent and expectation, the insured need not be aware of the full degree of injury its actions may cause, only that its actions will cause some harm.

The hotel might not have known the extent of entrainment and impingement, but it knew that its intake system was having some impact on fish and wildlife in the river. That understanding negated any chance of there being an "occurrence."

Implications

This is not to say that there can never be an "occurrence" anytime a policyholder violates an environmental law or regulation. But the court was unwilling to find that a few allegations about fish impacts somehow changed the nature of the claim from a permit violation into an accident.

The complaints did not allege an accident. They alleged that the hotel operated its intake and discharge system in violation of environmental laws and regulations. The hotel allegedly discharged effluent into a river without permission, and failed to study what impacts its intake system would have on fish and other wildlife.

The hotel's liability stemmed from conduct fully within its control. The consequences of its conduct — its liability for discharging into the river without a permit — did not result in unforeseen harm. The hotel was facing liability for precisely what one would expect from such conduct — penalties for operating without a permit. That's outside the definition of "occurrence."

And this result follows whether the issue is the cost of complying with laws and regulations, or the costs a policyholder faces for its noncompliance. For example, a policyholder's costs to comply with air emissions regulations has been found not to stem from an "occurrence," but was considered a cost incurred to prevent an "occurrence."[6]

There may be other reasons why compliance or noncompliance with environmental laws and regulations are not covered, but as the 401 North Wabash Venture case illustrates, a court often may not have to look beyond the "occurrence" requirement.

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[1] 2023 IL App (1st) 221625, 2023 Ill. App. LEXIS 313 (Ill. App. Ct. Aug. 30, 2023).

[2] 415 ILCS 5/42 (West 2016).

[3] 2023 IL App (1st) 221625 at 27 (citing Korte & Luitjohan Contractors, Inc. v. Erie Ins. Exch., 202 N.E.3d 955 (Ill. Ct. App. 2022); Stoneridge Dev. Co. v. Essex Ins. Co., 382 Ill. App. 3d 731, 749, 888 N.E.2d 633 (2008) (collecting cases).

[4] For example, in Erie Ins. Exch. v. Imperial Marble Corp., 957 N.E.2d 1214, 1219-20 (Ill. App. Ct. 2011), residents near a manufacturing plant brought a class action for bodily injury and property damage caused by the plant's emissions. The plant operated in accordance with its permit. The court found that the alleged bodily injury and property damage were the unexpected result of the insured's intended emissions, and thus constituted an accident.

[5] The Appellate Court of Illinois recognized this as a bedrock principle of Illinois law, citing State Farm Fire & Cas. Co. v. Watters, 268 Ill. App. 3d 501, 506, 644 N.E.2d 492 (1994) (quoting Aetna Cas. & Sur. Co. v. Freyer, 89 Ill. App. 3d 617, 619, 411 N.E.2d 1157 (1980)) and Stoneridge Dev. Co., 382 Ill. App. 3d at 749-50 (collecting cases).

[6] Cinergy Corp. v Associated Elec. & Gas Ins. Services, Ltd., 865 N.E.2d 571, 582 (Ind. 2007).