

# Ethylene Oxide Emissions/Insurance Coverage: Illinois Appellate Court Addresses Duty to Indemnify/Defend Claims



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The Illinois Court of Appeals (Second District) (“Court”) addressed in a March 4th Opinion an insurance coverage question involving a medical instrument sterilization facility (“Medline”). See *Ill. Un. Ins. Co. v. Medline Indus., Inc.*, 2022 Ill. App. 2d 210175, -- N.E.3d -- (Ill. Ct. App. 2022).

The question addressed was whether the facility’s insurance policy provided coverage for injuries allegedly caused by ethylene oxide (“EtO”) emissions.

Illinois Union Insurance Company (“Illinois Union”) initiated an action in the Circuit Court of Lake County seeking a declaratory judgment that it did not owe a duty to indemnify or defend to Medline. The Circuit Court granted judgment on the pleadings in favor of Illinois Union.

Medline had purchased an insurance policy from Illinois Union for coverage of claims arising out of a “pollution condition” that occurs at its facility.

Illinois Union refused to indemnify or defend Medline in nineteen underlying lawsuits. The lawsuits alleged allegations that Medline caused the plaintiffs injuries due to its emission of EtO. EtO is a carcinogenic and mutagenic gas. The plaintiffs alleged that the emission of EtO had occurred from 1994 until 2019 or 2020 when the lawsuits were filed.

The retroactive date in the insurance policy was September 29, 2008—the same day that Medline acquired the facility. The significance of this date is that the earliest occurrence that may be covered under the policy must have occurred on or after that date.

The focus of the coverage question was the interpretation of the policy term “pollution condition.” Specifically did the EtO emissions constitute one continuous pollution condition that occurred prior to the retroactive date or several discrete pollution conditions that occurred both before and after the retroactive date.

Illinois Union contended that the plaintiffs alleged the emissions occurred prior to the retroactive date. Therefore, it was argued to be a single, continuous pollution event. As a result, it contended no duty was owed to indemnify or defend to Medline.

Medline contended that the underlying complaints alleged many discrete emissions over a span of years rather than one continuous emission. It argued that each emission of EtO constituted a separate and new

pollution condition under the policy. Therefore, those emissions were argued to have occurred after the retroactive date and were covered under the policy.

The policy provided coverage for pollution conditions that “first commence, in their entirety, on or after the retroactive date.” The Court deemed this fatal to Medline’s argument because whether a pollution condition is covered under the policy—regardless of it being intermittent or continuous—is determined by looking at when the totality of the emissions started. Because the plaintiffs alleged the emissions began as early as 1994, the pollution condition “first commenced” prior to the retroactive date, or, in other words, did not commence “in their entirety” after the retroactive date.

Medline also argued that “in their entirety” meant pollution conditions caused by Medline “in their entirety.” This argument was also rejected.

The Court held that preventing it from looking to events prior to the retroactive date would render the retroactive date meaningless.

The Court affirmed the Circuit Court’s decision.

A copy of the Opinion can be downloaded [here](#).