

# Silica Exclusions, Pollution Exclusion Coverage Update

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## Silica Exclusions – Eighth Circuit (Minnesota Law)

*Grinnell Mut. Reinsurance Co. v. Dingmann Bros. Constr. of Richmond, Inc.*

--- F.4th ---, 2022 WL 1559586 (8th Cir. May 18, 2022)

The U.S. Court of Appeals for the Eighth Circuit upheld the federal district court's grant of summary judgment in favor of Grinnell Mutual Reinsurance Company (Grinnell) and against MNDKK, LLC (MNDKK) and Great Lakes Insurance (Great Lakes). Specifically, the appellate court ruled that MNDKK and Great Lakes' subrogation claim against Grinnell was precluded because of the silica exclusions in Grinnell's insurance policy.

In the underlying matter, MNDKK hired Dingmann Brothers Construction (Dingmann) to install a garage door. Dingmann's subcontractor failed to use dust protection, which resulted in dust covering the inside of the building and its contents. The dust tested positive for silica – a well-known hazard to human health. MNDKK submitted a first-party claim to Great Lakes for the clean-up costs. Great Lakes paid the claim and subrogation demands were sent to Dingmann. In turn, Dingmann sought indemnity from its insurer, Grinnell. Grinnell refused to indemnify Dingmann, claiming that two exclusions in the policy applied due to the presence of silica. After Grinnell refused to indemnify Dingmann, Great Lakes filed a subrogation action. In response, Grinnell commenced a declaratory judgment action to determine coverage. The parties in the declaratory judgment action moved for summary judgment, and the district court granted summary judgment to Grinnell, holding that the exclusions unambiguously apply due to the presence of silica.

The appellate court held that there was no dispute that the dust contained silica and that the silica caused damage. The appellate court also held that the provision excluding the cleanup of silica applied. The exclusion barred “[a]ny loss, cost or expense arising, in whole or in part, out of the ... cleaning up, removing, ... or in any way responding to or assessing the effects of, silica or silica-related dust.” MNDKK and Great Lakes argued that the provision did not apply because the damage was due to silica or silica-related dust itself, not its “effects.” The appellate court disagreed and held that it would be difficult to separate losses due to silica from losses due to the effects of silica. Lastly, the appellate court held that the property-damage provision of the silica-related dust exclusion also applied despite MNDKK and Great Lakes' argument that only one of the two exclusions could apply because the cleanup provision was more specific. The appellate court held that overlapping provisions in a policy can both apply to preclude coverage.

By: Joshua LaBar

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## **Pollution Exclusion – Middle District of Georgia (Georgia Law)**

***Employers Mut. Cas. Co. v. Tiger Creek Dev., Inc.,***

No. 4:21-CV-65 (CDL), 2022 WL 1673425 (M.D. Ga. May 25, 2022)

The U.S. District Court for the Middle District of Georgia found that insurer Employers Mutual Casualty Company (Employers) had no duty to defend or indemnify its insured against a claim of property damage because it found the pollution exclusion applied to preclude coverage.

Employers issued a general liability policy to Tiger Creek Development, Inc. (Tiger Creek), a property developer. Tiger Creek began developing a piece of real property in 2018, which was adjacent to a parcel owned by Cherry Pease. Pease allegedly began noticing an increase in water, dirt and other particles encroaching on her property, allegedly stemming from Tiger Creek's removal of trees and bushes from the property it was developing. After efforts to resolve Pease's claim failed, she commenced a lawsuit against Tiger Creek. Tiger Creek sent a request for coverage for Pease's claim and the lawsuit to Employers. Employers agreed to defend Tiger Creek under a reservation of rights but commenced a declaratory judgment action to determine the parties' relative rights and responsibilities under the policy.

In ruling on Employers' motion for summary judgment, the district court first considered whether Pease's claim and lawsuit alleged an occurrence as defined in Employers' policy. The district court found that the underlying lawsuit alleged an occurrence because "an occurrence, as defined by the insurance policy, can include the unintended physical damage caused by intentional development activity." Therefore, while Tiger Creek intended to remove the vegetation on the neighboring property, it did not intend to cause runoff that affected Pease's property.

The district court ultimately found that there was no coverage under Employers' policy because the pollution exclusion precluded coverage. The pollution exclusion applied to the actual or threatened discharged of pollutants, including "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." Finding that the sediment runoff qualified as a pollutant, the court rejected Tiger Creek's argument that the pollution exclusion made coverage illusory under Georgia law. The district court concluded that "Employers Mutual's policy certainly covers other occurrences that could arise from its insureds' land development activities other than depositing sediment runoff into a neighboring pond. Further, the insureds here could not have reasonably expected that their policy would have covered sediment runoff when the policy contains a clear exclusion to the contrary."