

Kentucky Court Rules That Pollution Exclusion Bars Coverage For Criminal Claims Against Company And Executives Alleging Submission Of Fraudulent Dust Samples

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A Kentucky federal district court ruled that a pollution exclusion barred coverage for a criminal investigation and charges against a company and its executives relating to an allegedly fraudulent submission of dust samples to a federal agency. *Barber v. Arch Ins. Co.*, 2020 WL 6087951 (W.D. Ky. Oct. 15, 2020).

Armstrong, a coal company, was obligated to submit dust samples to the Mine Safety and Health Administration. A federal criminal investigation and subsequent criminal actions alleged that Armstrong and its employees had submitted fraudulent dust samples. Arch denied coverage, arguing that a pollution exclusion applied, among other things. The court agreed and granted the insurer's summary judgment motion.

Armstrong argued that the mere presence of coal dust in the mine does not trigger the exclusion unless there is "actual or threatened discharge" of coal dust. Further, Armstrong claimed that the exclusion was inapplicable because the criminal charges were limited to fraudulent reporting of dust monitoring and samples and did not speak to the actual release of dust into the environment. The court rejected these assertions, stating that the exclusion not only excludes losses from the threatened or actual release of pollutants, but also for any claim "arising from, based upon, or attributable to any" direction or request "to test for" or "monitor" pollutants. In addition, the court rejected Armstrong's contention that coal dust is not a pollutant where, as here, it is confined inside the mine rather than dispersed into the environment.

Authors and Contacts

[Bryce Friedman](#)
Partner

bfriedman@stblaw.com

+1-212-455-2235

