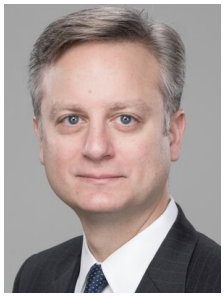
Emissions Permits May Not Override Pollution Exclusions

By **Bryce Friedman and Matthew Penny** (March 20, 2026)



Bryce Friedman

Matthew Penny

In a pair of recent decisions, the Illinois Supreme Court and the U.S. Court of Appeals for the Third Circuit each ruled that a pollution exclusion clause in a commercial liability insurance policy precluded coverage for claims alleging harm caused by emissions of ethylene oxide gas, or EtO. In each opinion, the court rejected the policyholder's argument that the exclusion should not apply because its emissions of EtO were purportedly authorized by government permits.

In Griffith Foods International Inc. v. National Union Fire Insurance Co., the Illinois Supreme Court declined, in its Jan. 23 opinion, to read into the pollution exclusion an implicit exception for pollution allowed by a government permit.[1]

In its Dec. 30 opinion in Noetic Specialty Insurance Co. v. B. Braun Medical Inc., the Third Circuit addressed a policy that contained an express exception for certain government-authorized emissions. The court nevertheless held that the pollution exclusion applied and barred coverage because the permits the policyholder cited did not authorize the EtO emissions at issue.[2]

Taken together, these rulings suggest a recent trend among appellate courts not to imply an exception to the pollution exclusion for government-authorized pollution or to expand an explicit but narrowly worded exception that the parties wrote into the insurance contract.

Griffith Foods

This coverage dispute arose from underlying tort litigation alleging that the insureds' emissions of EtO from a medical equipment sterilization facility had harmed residents of a nearby town in Illinois. The insured companies brought a declaratory judgment action against liability insurer National Union, seeking a ruling that the insurer had a duty to defend under certain commercial liability policies.

The policies contained a pollution exclusion that barred coverage for "bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water."

Applying Illinois law, the U.S. District Court for the Northern District of Illinois held that National Union had a duty to defend. It determined that the pollution exclusion did not apply because the EtO was emitted pursuant to a permit issued by the Illinois Environmental Protection Agency.

On appeal, the U.S. Court of Appeals for the Seventh Circuit certified the following question to the Illinois Supreme Court: "[W]hat relevance, if any, does a permit or regulation authorizing emissions (generally or at any particular levels) play in assessing the application of a pollution exclusion within a standard-form commercial general liability policy?"

National Union argued that the permit was irrelevant because the pollution exclusion at issue did not contain an exception for government-authorized pollution. By contrast, the insureds contended that the permit created an ambiguity as to whether permitted emissions constituted "pollution" for purposes of the exclusion in the first place.

Addressing the certified question, the Illinois Supreme Court ruled that whether the emissions were allowed under a permit was irrelevant to application of the pollution exclusion, holding: "a permit or regulation authorizing emissions (generally or at any particular levels) has no relevance in assessing the application of a pollution exclusion within a standard-form commercial general liability policy."

The Illinois Supreme Court reasoned that the discharge of EtO emissions into the atmosphere "fits squarely within [the] plain language" of the pollution exclusion. The court noted that the exclusion says "nothing about permitted or authorized pollution," and that a court "must not inject terms and conditions different from those agreed upon by the parties." The court concluded that the fact that a permit had been issued "did not change the character or substance of the EtO emissions as pollution."

Quoting the Seventh Circuit's 2012 decision in Scottsdale Indemnity Co. v. Village of Crestwood, the Illinois Supreme Court stated that "[a]ll that counts is that the suits are premised on a claim that the [emissions] caused injuries for which the plaintiffs are seeking damages, and that claim triggers the pollution exclusion."[3]

After receiving the Illinois Supreme Court's answer to its certified question, on March 13, the Seventh Circuit reversed the district court's entry of judgment for the insureds and remanded with instructions to enter judgment for the insurance carrier based on the pollution exclusion.

In its opinion, the Illinois Supreme Court observed that other types of policies with different language could potentially cover such pollution-related liabilities. It noted that "insurance companies have developed entirely separate pollution liability policies for purchase."

The Noetic case, discussed below, involved a differently worded policy that contained a limited exception to the pollution exclusion for certain of the insured's products and work that were authorized by government permit. The Noetic court therefore had occasion to evaluate a question that Griffith did not reach — whether specific government permits cited by the policyholder fit within an explicit exception to a pollution exclusion. We turn to that decision next.

Noetic Specialty

B. Braun Medical, a medical device manufacturer, faced lawsuits from Pennsylvania residents who alleged that they were harmed by EtO emissions from the company's manufacturing facility. B. Braun sought defense coverage from its liability insurer, Noetic Specialty Insurance Co. Noetic declined coverage and sought a declaratory judgment that it had no duty to defend or indemnify.

Noetic argued that a pollution exclusion in the policies barred coverage. The pollution exclusion stated that it precluded coverage for bodily injury caused by "pollutants," defined as "any solid, liquid, gaseous, or thermal irritant or contaminant." B. Braun contended that coverage was not barred because the exclusion's regulatory-clearance exception applied.

The regulatory-clearance exception provided that the pollution exclusion did not apply when either the insured's product or work "was cleared by any government health authority or regulatory body for marketing with a specific indication for medical, diagnostic, or therapeutic use." B. Braun argued that the exception was implicated because the company had obtained permits for its operations from the Pennsylvania Department of Environmental Protection and the U.S. Food and Drug Administration.

In October 2024, the U.S. District Court for the Eastern District of Pennsylvania granted Noetic's motion for judgment on the pleadings, concluding that the pollution exclusion unambiguously applied under Pennsylvania law and barred coverage.

On appeal, the Third Circuit affirmed. As an initial matter, it reasoned that EtO, described in the underlying complaints as a "powerful cancer-causing gas" that is "dangerous, toxic, carcinogenic and mutagenic," was at least an "irritant" as that term was defined in the policy and used in the pollution exclusion.

Moreover, the Third Circuit rejected B. Braun's argument that the regulatory-clearance exception to the pollution exclusion applied.

The court cited two reasons.

First, the term "product," as used in the exception, was defined as something "designed, developed, manufactured, sold, handled, or distributed by" B. Braun. However, the court determined that B. Braun used EtO only to sterilize the medical devices that it manufactured; the EtO itself was not B. Braun's product.

Second, the Third Circuit held that the two regulatory permits B. Braun had cited did not satisfy the requirements of the regulatory-clearance exception. The court reasoned that "the FDA's clearance of B. Braun's medical device for marketing makes no mention of the company's EtO emissions."

As for the Pennsylvania permit, it made "no mention of marketing" and therefore, it, too, fell outside the regulatory-clearance exception, which applied only when B. Braun's "product" or "work" was cleared by a regulatory authority "for marketing with a specific indication for medical, diagnostic, or therapeutic use." Based on this reasoning, the Third Circuit held that neither permit met the requirements of the regulatory-clearance exception, the pollution exclusion applied and coverage was barred.

Implications

These recent appellate opinions, read together, should provide insurers, policyholders and their respective legal counsel valuable guidance concerning application of pollution exclusions and exceptions to such clauses — not only in the context of EtO emissions but also other forms of pollution.

However, as the Illinois Supreme Court noted in Griffith, a wide variety of insurance policies are available in the marketplace, some of which could in theory extend coverage to certain government-authorized "pollution" that would otherwise be precluded under a different policy's pollution exclusion. That was not the case in either Griffith or Noetic.

That said, given the numerous ways that parties might write an insurance contract and the continually evolving landscape of environmental regulations, new disputes regarding

application of pollution exclusion clauses and "government permit" exceptions will certainly arise in the future.

Bryce L. Friedman is a partner and head of the insurance litigation practice at Simpson Thacher & Bartlett LLP.

Matthew C. Penny is counsel at the firm.

[1] Griffith Foods Int'l, Inc. v. Nat'l Union Fire Ins. Co., 2026 Ill. LEXIS 3 (Ill. Jan. 23, 2026).

[2] Noetic Specialty Ins. Co. v. B. Braun Med., Inc., 2025 U.S. App. LEXIS 33911 (3d Cir. Dec. 30, 2025).

[3] Scottsdale Indem. Co. v. Village of Crestwood, 673 F.3d 715 (7th Cir. 2012).