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Alaska Supreme Court Holds That Carbon Monoxide Is Not a Pollutant

Courts interpret the pollution exclusion differently. Some courts apply the exclusion based on a literal reading of the definition of "pollutant." But others apply it more narrowly and limit the exclusion to traditional environmental exposures.

The Ninth Circuit asked the Alaska Supreme Court to clarify Alaska law on the issue in a case involving carbon monoxide poisoning. Interpreting the exclusion from what it believes a reasonable insured would have expected, the court ruled that exposure to household pollutants falls outside the scope of the pollution exclusion.

The insureds rented a cabin to a teenager who died while taking a bath. The cause of death was carbon monoxide poisoning from an improperly installed propane water heater. Running the water heater with the bathroom door shut resulted in high levels of carbon monoxide accumulating inside the bathroom.

The insureds' homeowners policy had a pollution exclusion that applied to bodily injury "arising out of the actual, alleged, or threatened discharge, dispersal, release, escape, seepage or migration of 'pollutants' however caused and whenever occurring." The term "pollutants" was defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste."

The policy also separately excluded bodily injury arising out of exposure to lead paint and asbestos. After the homeowners insurer denied coverage under the pollution exclusion, the insureds entered into a confession of judgment with the teenager's estate, admitting negligence and assigning their rights under the insurance policy.

The estate filed a declaratory judgment action in federal court. The district court found that the pollution exclusion was unambiguous and ruled for the insurer. The estate appealed. The Ninth Circuit certified a question to the Alaska Supreme Court: "Does a total pollution exclusion in a homeowners insurance policy exclude coverage of claims from carbon monoxide exposure?"

The Alaska Supreme Court said the factual context is important in determining whether the pollution exclusion applies. In *Whittier Properties*, the Alaska Supreme Court held that the pollution exclusion in a commercial general liability policy unambiguously barred coverage for losses due to gasoline leaking from a gas station into the surrounding soil and water. But the court said *Whittier Properties* does not control here because it involved a different substance and did not address whether the pollution exclusion applies only to traditional industrial or outdoor environmental harms.

In considering whether the pollution exclusion applies to carbon monoxide poisoning, the court looked to the reasonable expectations of the insured. But as most insureds think every loss is covered, the court noted that there are limitations to this doctrine. To determine the parties' reasonable expectations, the court must consider "the language of the disputed policy provisions, the language of other provisions of the insurance policy, relevant extrinsic evidence, and case law interpreting similar provisions."

The Alaska Supreme Court acknowledged that the insurer offered a reasonable reading of the ordinary and customary terms used in the exclusion. It is reasonable to say that carbon monoxide contaminates air and irritates those who inhale it. And not only is the definition of "pollutants" broad, but so is the breadth of the exclusion itself, which applies to loss arising from the discharge of pollutants "however caused and whenever occurring."

But the court said that the exclusion is not to be read in isolation. An insured may reasonably draw inferences from other clauses in the policy. The court considered two other exclusions in the policy: lead and asbestos. Because these common household pollutants were called out in the policy, the court found that this supported a narrower view of the pollution exclusion. According to the court, a reasonable insured could infer from these specific exclusions that exposure to toxic substances commonly found within the

home falls outside the pollution exclusion. And because certain subsections of the pollution exclusion addressed suits by governmental authorities or others to test for, monitor, clean up, detoxify or neutralize the effects of pollutants, this suggested the exclusion applies only to the kind of pollution that harms the environment.

The court next assessed the case law around the country, finding that it fell within two camps. One camp applies a plain meaning interpretation, while the other considers a broader set of rationales. The court noted that the second camp generally applied the doctrine of the insured's reasonable expectations, which more closely aligned with how Alaska law interprets insurance contracts. For that reason, the court thought it was best to view the pollution exclusion through the lens of the insured's reasonable expectations.

When looking through that lens, the court concluded that an insured would reasonably expect coverage for liability for poisoning by carbon monoxide from a defectively installed water heater. The literal terms of the exclusion are broad. But the court reasoned that the clauses for monitoring and detoxification, along with specific exclusions for lead and asbestos (pollutants commonly found in a home), gave the term "pollutants" a narrower connotation.

The case is *Estate of Wheeler v. Garrison Prop. & Cas. Ins. Co.*, No. S-18849 (Alaska Feb. 28, 2025).

Georgia Federal Court Holds Pollution Exclusion Bars Coverage for Freon Release

A Georgia arena owner hired Augusta Chiller Service, Inc. ("ACS") to design and install its chiller system.

The arena's maintenance manager, Rex Broadwater, heard a hissing noise coming from the chiller room and went in to inspect. Upon entering, he observed Freon escaping the chiller. He reported the issue to ACS.

An ACS employee told Broadwater to turn off the chillers and evacuate the building. The ACS employee did not warn Broadwater that Freon was harmful or that protective equipment must be worn when working with Freon. Broadwater first tried to plug the gas leak and then evacuated into an exterior

stairwell. Unfortunately, air from the chiller room was vented into the stairwell. Broadwater was later found unresponsive in the stairwell and died. Broadwater's surviving spouse and the administratrix of his estate sued ACS.

ACS tendered the claim to its primary and excess commercial general liability insurers. The policies contained pollution exclusions for "'[b]odily injury' or 'property damage' which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." "Pollutants" meant "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." The insurers sought a declaration that they had no duty to defend or indemnify ACS.

The U.S. District Court for the Southern District of Georgia held that the policies' pollution exclusion unambiguously excluded coverage. ACS argued that the injuries were not caused by a "pollutant" but rather by a lack of oxygen. The court rejected this argument. Under Georgia law, the pollutant need not be the sole cause of the injury, only a but-for cause. It was undisputed that Freon is a harmful chemical, and but for the Freon escape, there would not have been injury.

The court also rejected ACS's public policy argument – that because Freon is ACS's main product, excluding Freon-related injuries would render the policies illusory. The court acknowledged that the insured's reasonable expectations and the "main product" inquiry are relevant when the policy is ambiguous. But here, there was no ambiguity. Nor did interpreting the exclusion to include Freon-related injuries render the policies illusory because they still covered other injuries that might occur in providing on-site services. For these reasons, the court granted the insurers' motion for summary judgment that they had no duty to defend ACS.

The case is *Citizens Ins. Co. of Am. v. Augusta Chiller Serv.*, 123-CV-110 (S.D. Ga. Mar. 24, 2025).

NOTE: As these first two cases illustrate, courts approach exposure to indoor pollutants differently. The Alaska Supreme Court recognized that carbon monoxide poisoning fell within the literal terms of the pollution exclusion but still looked beyond the exclusion to see whether that coincided with the insured's

reasonable expectations. The Southern District of Georgia found that Freon exposure fell within the plain terms of the pollution exclusion and there was no need to consider the insured's reasonable expectations because the policy was unambiguous.

At Publix's Request, Florida Federal District Court Awards Final Judgment for Publix's Insurers in Opioid Litigation, Sets Up Appeal

It's not every day that a party moves to have judgment entered in favor of its adversary. But Publix found itself in this unusual situation to expedite its appeal of a decision finding that opioid lawsuits do not allege damages "because of bodily injury."

Publix is a supermarket chain that operates retail pharmacies. It is a defendant in more than 60 suits related to the opioid crisis. Publix sought coverage under excess policies it purchased from 19 insurers between 1995 and 2018. None defended, so Publix sued in Florida federal district court.

To streamline its motion practice, Publix moved for partial summary judgment against only its 2013 tower insurers. The issue was whether opioid lawsuits by governmental entities alleged damages "because of bodily injury." The court found that although the opioid suits referred to people injured by opioids, the government plaintiffs did not seek reimbursement for injury to any specific person and merely described societal harms caused by opioid addiction. The court ruled that the causal connection between the injuries alleged, and the damages sought was too attenuated to constitute damages "because of bodily injury."

Publix argued that the claims against it would not exist without the injuries suffered by those who abused opioid medication. Rejecting this argument, the court said that under Florida law, "because of" requires a direct causal connection, not a "but for" connection. The court also rejected Publix's argument that there was a meaningful difference between the phrase "for" bodily injury and "because of" bodily injury. The court thus sided with most courts that have found the opioid suits are not covered.

Having denied Publix's motion, the court directed Publix to show cause as to why the court should not grant summary judgment to the 2013 insurers. Publix responded with a motion to enter final judgment because it could not show cause as to why the 2013 insurers should not be awarded summary judgment on

the duty to defend based on the court's October ruling. Publix sought to have that ruling apply to all remaining insurers, but the court found that it did not automatically extend to policies not put before the court.

Publix moved again for final judgment, this time with a joint policy stipulation showing that all remaining policies cover only claims seeking damages "because of" or "for" bodily injury. As none of the remaining policies cover the opioid suits, the court entered final judgment.

This allows Publix to file an appeal with the Eleventh Circuit.

The case is *Publix Super Markets, Inc. v. Ace Prop. & Cas. Ins. Co.*, No. 8-22-cv-2569-CEH-AEP (M.D. Fla. Mar. 12, 2025).

NOTE: In another opioid litigation case, *Opioid Master Disbursement Trust II v. ACE American Insurance Co.*, No. 22SL-CC02974 (Mo. Cir. Ct., St. Louis Cty. Mar. 10, 2025), a Missouri state court found that the products-completed operations hazard endorsement barred an opioid manufacturer's claim for coverage. The court interpreted the phrase "arising out of" and found that it was much broader than the phrase "caused by" or the concept of proximate causation. A bankruptcy trust that acquired the manufacturer's coverage rights argued that the exclusion did not apply to allegations concerning the promotion of opioid use generally rather than the manufacturer's specific opioid products. But the court was unpersuaded. It found that the "unbranded" representation arose out of the manufacturer's products because they were part of the manufacturer's efforts to boost its own sales and because representations about safety of opioids in general encompassed the manufacturer's products.

Fifth Circuit Affirms Ruling That Bad Faith Damages Were Foreclosed in Winter Storm Uri Suit

Plaintiffs sustained damage to their home caused by the February 2021 freeze event in Texas and elsewhere known as Winter Storm Uri. Plaintiffs and their insurer disputed the amount of the loss, and plaintiffs ultimately invoked the appraisal provision in their homeowners policy.

After the appraisal panel determined the value of loss, the insurer, GeoVera, paid the award (less the deductible and any prior payments). Plaintiffs then sued GeoVera in Texas federal court for violating Texas Insurance Code Chapters 541 (Unfair Settlement Practices) and 542 (Prompt Payment of Claims). Plaintiffs also asserted a breach of the common law duty of good faith and fair dealing.

After plaintiffs filed their suit, GeoVera paid plaintiffs interest under the Prompt Payment of Claims Act. GeoVera then moved for summary judgment on the grounds that all of plaintiffs' remaining causes of action were extinguished by GeoVera's payment of the appraisal award plus interest. The district court agree with GeoVera, and plaintiffs appealed.

On appeal, plaintiffs argued that they could recover both actual and treble damages in tort for an improperly withheld payment, even when the insurer has already paid the appraisal and any interest.

The Fifth Circuit disagreed. Texas Supreme Court authority states that payment of an appraisal award forecloses an insurer's liability for breach of contract and common-law and statutory bad faith unless the insured suffered an independent injury. Plaintiffs did not assert any independent injury beyond entitlement to the benefits that they have already been paid. The Fifth Circuit also cited three cases within the last year where it held that an insured cannot recover for bad faith under Chapter 541 or the common law where the only actual damages are the benefits already paid under the policy's appraisal provision.

Plaintiffs thus could not maintain common law or statutory bad faith claims against GeoVera.

The case is *Guiles v. GeoVera Advantage Ins. Servs.*, No. 24-40411 (5th Cir. Mar. 24, 2025).

Eighth Circuit Finds That Ensuing Loss Clause Does Not Restore Coverage for Faulty Workmanship Claim

Nabholz Construction Company hired Bob Robison Commercial Flooring, Inc. ("Robison") to install a vinyl gym floor with painted volleyball and basketball lines at a middle school in Arkansas. Robison installed the gym floor and subcontracted the painting portion of the project to Robert Liles Parking Lot Services. Liles's painting work was faulty. Issues included crooked lines, incorrect markings, and smudges. Nabholz

rejected the gym floor. The defective painting could not be removed from the vinyl flooring. To correct the project error, Robison had to remove and replace the floor and paint new lines.

Robison submitted a claim to RLI Insurance Company ("RLI") for coverage for total loss under the Installation Floater Coverage Part of the builder's risk policy. After investigation, RLI rejected Robison's claim because an exclusion "for loss or damage caused by or resulting from inherent defects, errors, or omissions in covered property."

Robison then sued RLI in federal court, lost, and appealed. The Eighth Circuit, applying Arkansas law, affirmed.

The exclusion contained an "ensuing loss" clause which restored coverage if a defect, error, or omission resulted in a covered peril. Robison argued that the ensuing loss clause restored coverage because the underlying damage to the floor was a covered peril that resulted from Liles's workmanship. The court rejected this argument, holding that the ensuing loss clause requires a separate covered peril to restore coverage.

Here, the faulty workmanship did not result in a covered peril; the painting "was itself the peril." Faulty workmanship was the sole and exclusive cause of loss that occurred the moment the paint was applied. As all the loss was caused by an excluded peril (the faulty painting), applying the ensuing loss clause to restore some but not all of the loss would require RLI to pay for loss solely attributable to faulty construction. Any such reading would nullify the faulty workmanship exclusion.

Accordingly, the court ruled that the district court did not err in concluding the loss was excluded and affirmed the district court's judgment.

The case is *Bob Robison Commer. Flooring Inc. v. RLI Ins. Co.*, No. 23-3531 (8th Cir. Feb. 25, 2025).

Court Finds Products Liability Claims Involving Mattel Rock n' Play Sleeper Involve Single Occurrence and Damages Must Be Allocated Based on When Actual Bodily Injury Occurred

Mattel was sued in various products liability lawsuits across the country, which generally alleged that infants suffered bodily injury or death while using a Rock n' Play Sleeper (RNPS) product. In each of the RNPS claims, the claimants alleged that design defects in the product line made the products unsafe for periods of unsupervised sleep by infants.

Mattel made a claim under various excess and umbrella policies between 2011-2020. Mattel also had primary policies, which were fronting policies that Mattel self-insured.

Mattel sued its various insurers in Superior Court of Delaware for a declaratory judgment over whether the insurers had to defend and indemnify Mattel for the RNPS claims. Applying California law, the court resolved various coverage issues.

First, the court held that the RNPS claims were a single "occurrence." The primary policies had a batch clause that provided bodily injury arising out of the same or substantially similar goods or products was a single occurrence. The RNPS claims arose out of the same or substantially the same "hazard": the defective design of the RNPS products – specifically, an incline angle – that posed a hazard to infants. In reaching that conclusion, the court rejected Great American Assurance Company's argument that the proximate cause of the injuries needed to be determined before assessing the number of occurrences issue.

While the court disagreed with Great American on the number of occurrences, the court adopted Great American's proposed allocation approach. The court held that, regardless of the number of occurrences, the umbrella and excess policies only covered bodily injuries that happened during the policy period. The court emphasized that it was "bodily injury" during the policy period, not an occurrence, that triggered coverage. An occurrence was a precondition to bodily injury.

Mattel pushed for California's "all-sums-with-stacking" or "uber-policy" allocation law. Under that approach, insurance coverage from different policy periods is stacked to form a giant "uber-policy" with a coverage limit equal to the sum of all purchased insurance policies. The court rejected Mattel's argument because all-sums-with-stacking is only appropriate for long-tail injury cases where it is impossible for an insured to prove what specific damage occurred during multiple consecutive policy periods.

The court acknowledged that the parents of the injured children asserted claims of mental anguish that continued indefinitely. But it found that the cause of that anguish was attributable to a concrete time and cause. There was no California case law extending the "all-sums-with-stacking" approach to mental anguish claims.

The case is *Mattel, Inc. v. XL Ins. Am., Inc.*, No. N23C-01-042 (Del. Super. Ct. Mar. 28, 2025).

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