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Eighth Circuit Holds That Carbon Monoxide Is a Pollutant

Courts are generally in two camps when determining whether the pollution exclusion applies. Some find the exclusion applies only to traditional environmental pollution. Others view it more broadly and apply the ordinary meaning of the words within the exclusion and definition of "pollutant." In finding that carbon monoxide emitted from a portable heater in a farm shop was a "pollutant," the Eighth Circuit, applying North Dakota law, aligned with those courts who view the exclusion broadly.

Larry Alber worked on a North Dakota farm that the Rodins operated. He claims to have sustained cardiovascular and neurological injuries from exposure to carbon monoxide emitted from a portable heater in the farm shop. Alber sued the Rodins, who tendered the suit to their liability insurer, North Star Mutual.

The policy had an exclusion for bodily injury or property damage that results from "the actual, alleged, or threatened discharge, dispersal, seepage, migration, spill, release, or escape of 'pollutants' into or upon land, water, or air." The term "pollutant" was defined as "any solid, liquid, gaseous, thermal, or radioactive irritant or contaminant, including acids, alkalis, chemicals, fumes, smoke, soot, vapor, and waste. Waste includes materials to be recycled, reclaimed, or reconditioned, as well as disposed of."

North Star filed a declaratory judgment action to establish that it owes no duty to defend. The district court awarded North Star summary judgment, and the Rodins appealed. They argued that the pollution exclusion was not meant to apply when carbon monoxide was emitted from a portable heater being used to heat a farm shop. As the Eight Circuit has interpreted the pollution exclusion differently depending on which state's law it was applying, the Rodins asked the Eighth Circuit to certify the question to the North Dakota Supreme Court.

The Eighth Circuit refused. Even though the North Dakota Supreme Court has not interpreted the pollution exclusion, the Eighth Circuit said there was ample guidance on how to interpret insurance policies under North Dakota law.

The court first looked to dictionaries for the ordinary meaning of "discharge" and concluded that it means "to give outlet or vent to: emit." Applying this meaning, the Eighth Circuit found that Alber's claim would be excluded if carbon monoxide is a "pollutant."

The court next looked to the ordinary meaning of the terms used in the policy's "pollutant" definition, and specifically, "contaminant." It determined that a "contaminant" is something that contaminates, and that to "contaminate" is "to make unfit for use by the introduction of unwholesome or undesirable elements." Because carbon monoxide is a gas that can render air unfit for use if introduced at high levels, carbon monoxide was a "pollutant" within the meaning of the pollution exclusion.

The Eighth Circuit was unpersuaded by the Rodins' argument that a broad interpretation of the pollution exclusion could lead to absurd results. The court noted that "the exclusion imposes limitations on its own scope separate from the definition of pollutant." The court explained that the pollution exclusion applies only when the injury resulted from the discharge, dispersal, seepage, migration, spill, release, or escape of a pollutant. If the pollutant causes an injury in a way that is not listed in the policy, the claim is not excluded.

The Eighth Circuit thus affirmed the district court's ruling awarding North Star summary judgment.

The case is *North Star Mut. Ins. Co. v. Rodin*, No. 24-1180 (8th Cir. Apr. 7, 2026).

Colorado Supreme Court Provides Instruction on Failure-to-Cooperate Defense and UIM Exhaustion

Anthony Wenzell suffered injuries in a 2017 rear-end collision. He previously had back surgery from a 2014 accident. Wenzell claimed $2.7 million in medical costs from the 2017 accident.

Three insurance policies potentially covered the claim: the tortfeasor's liability policy, a State Farm underinsured motorist policy (primary), and USAA underinsured motorists' policy purchased by Wenzell's

brother that covered family members (excess). State Farm and USAA requested comprehensive medical releases to apportion damages between accidents. Wenzell allegedly failed to provide adequate medical releases, and the insurers cited a lack of cooperation.

Wenzell sued USAA and State Farm for breach of contract and for bad-faith delay or denial of insurance benefits. The case made its way to the Colorado Supreme Court.

The case involved Colorado Revised Statute Section 10-3-1118 – a Colorado statute governing how insurers may assert a common-law failure-to-cooperate defense. Under the statute, an insurer must give the policyholder written notice of his or her failure to cooperate within 60 days of the alleged failure and the notice must provide the policyholder 60 days to cure. An insurer must inform the policyholder that it is seeking information that is unavailable without the help of the insured and may only seek information that a reasonable person would determine is needed to adjust the claim or to prevent fraud.

The issue was whether the common-law failure to cooperate defense included a defense based on the failure to satisfy conditions precedent in the policy. The difference is important because it goes to whether the insurer must show prejudice. A prejudice showing is required for general cooperation breaches but not for specific conditions spelled out in the policy. The reasoning behind the distinction is that a generic duty to cooperate could include a range of unspecified conduct that a policyholder might not realize the insurer expects them to perform.

But as the statute did not define the word “cooperate,” there was a question over when the statute was meant to apply.

The court held that Section 1118 only governed general failure-to-cooperate defenses. It did not abrogate the common law distinction between condition-precedent defenses and general failure-to-cooperate defenses. Thus, Section 1118 did not apply to Wenzell’s claim because his failure to provide the medical releases was a breach of the enumerated conditions in the policy. Because Wenzell failed to comply with the policies’ conditions precedent, coverage was barred.

The court also addressed USAA's argument that it wasn't obligated to pay UIM benefits until State Farm (as Wenzell's primary insurer) paid its policy limits. USAA's policy was excess to other UIM coverage because the named insured (Wenzell's brother) did not own the vehicle involved in the accident. USAA argued that because Wenzell had not collected the limits of State Farm's primary policy, USAA's policy did not attach.

The Colorado Supreme Court needed to determine what it means for underlying insurance to be "exhausted" in the context of excess UIM coverage (which is subject to additional statutory regulation). The court considered two approaches followed by other jurisdictions: (1) the undisputed-damages approach (exhaustion occurs when it is determined that damages will exceed the underlying limit) and (2) the payment-limit approach (the primary insurer has tendered payment up to its limit). USAA urged the court to apply the payment-limit approach.

The court chose the undisputed-damages approach. Under that approach, the excess insurer is responsible for damages exceeding the limit of the primary policy no matter what amount the primary insurer pays. The court reasoned that the primary determinant of coverage is the policyholder's damages, not the primary insurer's payment.

In the court's view, the payment-limit approach would limit coverage in a way contrary to Colorado law by conditioning an excess insurer's payment on the primary insurer's adjustment and payment of the claim. The undisputed damages approach, on the other hand, was consistent with the Colorado statutory UIM scheme, which prohibited insurers from using setoffs from underlying coverage to reduce their own coverage.

The court cautioned, however, that insureds must still demonstrate that their "undisputed" damages exceed the limits of all underlying policies to trigger an excess policy, and that insurers retained other tools – such as the failure-to-cooperate defense – to procure the necessary information. Because factual issues remained over whether Wenzell's costs arose from the 2017 accident or complications from the 2014 accident (Wenzell had not supplied the medical releases), Wenzell had not presented undisputed

evidence that his damages would necessarily exceed the tortfeasor's coverage and his primary UIM limit. USAA thus had no obligation to investigate, adjust, or pay Wenzell's claim until he made such a demonstration.

The case is *United Servs. Auto. Ass'n & State Farm Mut. Auto. Ins. Co. v. Wenzell*, No. 24SC372 (Colo. April 27, 2026). On May 11, 2026, the Colorado Supreme Court denied Wenzell's request for a rehearing.

Colorado Supreme Court Holds that Rental Car Companies Are Not Statutory or Common Law Insurers

On February 26, 2020, Roman Rakhimov rented a car from Hertz Corporation. As part of his rental agreement, Rakhimov purchased, for an additional $18.85 per day, supplemental insurance, which included uninsured/underinsured ("UM/UIM") coverage for all occupants of the rental car.

The next day, as Rakhimov was driving the rental car accompanied by two passengers, Stanislav Babayev and Oleg Chikov ("plaintiffs"), another vehicle collided with the rental car and fled the scene. Plaintiffs sustained injuries and were transported by ambulance to an emergency room where they received extensive treatment.

As beneficiaries of the UM/UIM coverage in the supplemental insurance purchased by Rakhimov, plaintiffs submitted claims for medical expenses. The automobile insurance policy providing this coverage was issued by ACE American Insurance Company, a licensed and regulated third-party insurer. Under Chubb's policy, Chubb was the insurer, Hertz was the named insured, and Rakhimov and plaintiffs were additional insureds. The claim was handled by Chubb's third-party claims administrator, ESIS, Inc.

But because plaintiffs received payments that totaled less than the medical expenses claimed, they sued Hertz. The district court dismissed the suit against Hertz, holding that it was not a statutory insurer under Colorado law nor a common law de facto insurer. The Court of Appeals reversed. Hertz appealed.

The Colorado Supreme Court reversed. The court held that a car rental company may offer its customers supplemental insurance through its own insurer. But that arrangement does not impose on the

car rental company a statutory nondelegable duty to act as an insurer. Rather, that duty remains with the insurer named on the policy providing the supplemental insurance (that is, the car rental company's insurer). The court noted that Colorado statutory law had abrogated an older Colorado Supreme Court decision, *Passamano v. Travelers Indem. Co*., 882 P.2d 1312 (Colo. 1994), which held that car rental companies offering to sell their customers the option of purchasing insurance were effectively insurers and were required to offer UM/UIM coverage.

Nor did Hertz qualify as a de facto insurer under common law. The court distinguished prior case law extending the common-law duty of good faith and fair dealing to certain third-party administrators. Unlike third-party administrators, Hertz did not have primary responsibility for claims handling or a significant financial incentive in the resolution of the claim. That Hertz participated in the early investigation and adjustment of the underlying claims and offered input on potential settlement was "woefully short" of the showing needed for de facto insurer status.

For these reasons, the court concluded that Hertz was neither plaintiffs' statutory insurer nor their common-law de facto insurer and reversed the appellate court's judgment.

The case is *Hertz Corp. v. Respondents: Stanislav Babayev & Oleg Chikov*, 24SC183 (Colo. Apr. 27, 2026).

Georgia Federal Court Finds that Trade Secrets Claim Did Not Arise out of the Performance of Professional Services

Jeremy Cohen, an attorney, provided legal services to Xytec Cryo International. Jeremy's wife, Lorin, worked at Xytex. Xytex sued the Cohens for theft of trade secrets and other confidential information.

Jeremy had a professional liability insurance policy with ALPS Property & Casualty Insurance Company and tendered the Xytex suit to ALPS for defense and indemnity. The policy applied to the insured's wrongful acts – acts, errors, or omissions in the performance of professional services. "Professional services" was defined as, "services or activities . . . rendered solely to others as ... an attorney

in an attorney-client relationship on behalf of one or more clients applying the attorney's specialized education, knowledge, skill, labor, experience and/or training."

ALPS denied coverage and brought a declaratory judgment action in federal court in Georgia. The Cohens counterclaimed and both sides filed summary judgment motions. The issue was whether the claims against Jeremy arose out of an act in his performance of legal services for Xytex. The court found that the policy language was unambiguous. So, the court focused on whether Xytex's complaint contained facts that brought the claim within the coverage of the policy.

ALPS contended that the complaint did not refer to any legal matters that Jeremy completed for Xytex. It alleged only that Lorin sent emails to Jeremy and that Jeremy helped recruit another defendant to use his IT computer access and expertise to steal and convert Xytex's confidential information and trade secrets for improper use.

According to Jeremy, Xytex alleged that Jeremy and his wife conspired to steal trade secrets, but the "true facts" were that employees came to Jeremy as an attorney who worked for the company because the CEO was committing fraud.

The district court observed that in determining what types of action constitute professional services, Georgia law looks to the nature of the act the insured performed, not the title or status of the insured. Applying this standard, the court found that the Xytex suit asserted claims that are, at most, incidental to Jeremy's performance of legal services for Xytex.

It did not matter that Xytex identified Jeremy as an attorney or detailed an attorney-client relationship because the claims brought against Jeremy did not clearly "arise from" an act in his performance of professional services for Xytex. The court found that Xytex's assertion that Jeremy knew he did not have a right to receive certain confidential business information and attorney-client privileged information weighed against Jeremy's account of his close legal representation of Xytex. The court reasoned that it is common for a company's retained counsel to have access to confidential business files and communications as they pertain to legal matters.

Nor were the other allegations – conspiracy to steal trade secrets, wrongful receipt of emails, and recruiting an IT employee to access protected files – actions taken by Jeremy as part of his legal services performed for Xytex. Receiving confidential documents and allegedly conspiring to steal trade secrets do not involve "specialized skill or training."

The court also found that Jeremy's "true facts" were immaterial to the coverage issues and merely provided explanations for his conduct. There was no showing that any internal investigation that he might have performed was requested or permitted by Xytex, such that it would qualify as part of his performance of legal services for the company. "It cannot be said," the court explained, "that a secret internal investigation, of which the corporate client is seemingly unaware, falls under the scope of professional services performed for the client."

The court ruled that the allegations in the complaint were unrelated to the work Jeremy performed for Xytex in his capacity as its attorney. As the suit did not arise out of Jeremy's performance of legal services for Xytex, ALPS had no duty to defend or indemnify Jeremy.

The case is *ALPS Prop. & Cas. Ins. Co. v. Cohen*, No. CV-125-105 (N.D. Ga. Mar. 25, 2026).

Georgia Federal Court Finds That Insurance Agent's Creation of a Competing Business Is Not a Professional Service

Matthew Queen and Gabriel Mayer were directors of Sherbrooke Corporate, Ltd. After Queen and Mayer set up the Grand Hook Agency, a competing business, Sherbrooke filed a lawsuit alleging that Queen and Mayer engaged in self-dealing and misused Sherbrooke's proprietary software technology. Queen and Mayer were also accused of stealing trade secrets and luring employees away from Sherbrooke.

Queen and Mayer sought coverage under Grand Hook's professional liability policy issued by Berkeley Assurance. The policy covered "those sums any insured becomes legally obligated to pay as 'damages' because of an act, error or omission arising from your 'professional services' rendered or that

should have been rendered." The Declarations page describes professional services as those provided solely as a managing general agency and insurance agent/broker.

After Berkeley denied coverage, Queen and Mayer sued in Georgia federal court seeking a declaration that Berkeley owed a defense. Berkeley moved to dismiss.

To determine what is a professional service under Georgia law, the court, like in the case above, looked to the nature of the act performed, not the title or status of the insured. The court explained that professional services within the meaning of a professional liability policy entail an application of special learning unique to the insured's profession.

Queen and Mayer argued that the creation of a competing business inherently included the professional activity of an insurance agent, broker, or consultant. The court disagreed. It found that Queen's and Mayer's conduct leading up to the creation of a competing business entity is not a "professional service" of an insurance agent, even if the entity was created to provide the professional services of an insurance agency. Also, Queen and Mayer were not sued for rendering professional services on behalf of Grand Hook, as is needed to qualify as insureds under the policy. Instead, they were sued for allegedly breaching their fiduciary duties owed to Sherbrooke in creating a competing company and other nefarious conduct while employed at Sherbrooke.

The court found it implausible that such conduct could be considered part and parcel of an insurance agent's professional services. The court sided with Berkeley and dismissed Queen's and Mayer's complaint.

The case is *Queen v. Berkeley Assur. Co.*, No. 4:25-cv-00002-WMR (N.D. Ga. Mar. 3, 2026).

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