American Educational Institute, Inc.

CLAIMS LAW UPDATE

A SUPPLEMENT TO CLAIMS LAW COURSES IN CASUALTY, PROPERTY, WORKERS COMPENSATION, FRAUD INVESTIGATION AND AUTOMOBILE

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AEI CLAIMS LAW QUIZ

INTERPRETING THE ABSOLUTE POLLUTION EXCLUSION

[Ref. Law of Insurance: General Liability, Para. 4.12]

FACTS: Amy Smith sued her landlord, Bobby Chupp, on behalf of her daughter, Taysia Brown, alleging that Brown suffered injuries as a result of having ingested lead paint chips in the house Smith rented from Chupp. Smith claimed that she and her daughter were tenants of Chupp's for several years beginning in 2004 when her daughter was born. In 2007, a health department inspection of the premises revealed that lead paint was cracking, chipping, and peeling throughout the house. Medical tests revealed that Brown had lead in her bloodstream. Smith alleged that Chupp breached his duty to keep the property safe because he knew of the risk posed by the lead paint but failed to remove it or warn his tenants of the risk.

The rental property was insured under a commercial general liability (CGL) policy issued by Georgia Farm Bureau Mutual Insurance Company (GFB). The "Coverages" section of the policy provided: "We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies. We will have the right and duty to defend the insured against any suit seeking those damages. ... This insurance applies to bodily injury and property damage only if the bodily injury or property damage is caused by an occurrence that takes place in the coverage territory." The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy also included the following exclusion:

> This insurance does not apply to:
>
> ...
>
> (F) Pollution
>
> (1) Bodily injury or property damage arising out of the actual, alleged or threatened, discharge, dispersal, seepage, migration, release or escape of pollutants: (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured.

The policy defined "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant,

including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." The language of this exclusion along with the policy's definition of the term "pollutant" is commonly referred to as the absolute pollution exclusion.

After Chupp tendered Smith's lawsuit to GFB, the insurer filed a declaratory judgment action to determine coverage under the policy. The insurer argued that Smith was aware of the deteriorating paint throughout the house and, therefore, Brown's injuries were not accidental. In the absence of an accident, there was no occurrence and, therefore, no coverage under the policy. Since there were questions of fact yet to be determined on the occurrence issue, the key legal issue was whether the absolute pollution exclusion applied.

QUESTION: Does a CGL policy's absolute pollution exclusion bar a claim for bodily injury resulting from the ingestion of lead paint?

ANSWER: Yes, according to the Georgia Supreme Court in *Georgia Farm Bureau Mutual Insurance Company v. Smith*, 784 SE2d 422 (Ga. 2016).

THE TRIAL COURT: The trial court concluded that the exclusion was clear and unambiguous and applied to bar coverage. It cited *Reed v. Auto-Owners Ins. Co.*, 667 SE2d 90 (Ga. 2008), an earlier Georgia Supreme Court decision which, like the present case, involved the interpretation of an absolute pollution exclusion in a CGL policy insuring residential rental property. In that case, the tenant sued her landlord for carbon monoxide poisoning allegedly caused by the landlord's failure to keep the rental home's furnace in good repair. Although not specifically listed in the policy, the court in *Reed* held that carbon monoxide gas qualified as a pollutant for purposes of the exclusion.

In *Smith*, the trial court concluded that lead, like the carbon monoxide gas in *Reed*, was a contaminant within the policy's definition of pollutant and, therefore, granted summary judgment in favor of the insurer.

THE COURT OF APPEALS: The court of appeals reversed the trial court and held that the exclusion did not apply to the lead paint that was peeling off the apartment walls. The court cited *Sullins v. Allstate Ins. Co.*, 667 A2d 617 (Md. 1995), a case that also involved an absolute pollution exclusion. In *Sullins* the court said: "The terms in the exclusion, 'contaminants' and 'pollutants,' are susceptible of two interpretations by a reasonable prudent layperson. By one interpretation, these terms encompass lead paint; by another interpretation, they apply only to cases of environmental pollution or contamination, and not to products such as lead paint." In other words, a reasonable insured could have understood the pollution exclusion to exclude coverage for injuries caused by certain forms of industrial pollution, but not the presence of lead paint in a private residence. Agreeing with the *Sullins* court that the pollution exclusion was ambiguous, the court of appeals concluded that lead paint was not a pollutant as defined by the policy.

The court of appeals distinguished the present case from *Reed* because that case dealt with carbon monoxide gas and the exclusion there specifically included "any ... gaseous or thermal irritant or contaminant." The court of appeals noted that in the present case "the definition of pollutant does not include the words lead, lead-based paint, or even paint. Whether lead-based paint is properly classifiable as one of the substances specifically enumerated in the policy's definition of pollutant is not clear." In reversing the decision of the trial court, the court of appeals said:

> We hold that if GFB had intended to exclude injuries caused by lead-based paint from coverage in the policy at issue in this case, it was required, as the insurer that drafted the policy, to specifically exclude lead-based paint injuries from coverage. Inasmuch as ambiguities in an insurance contract are strictly construed against the insurer as drafter of the document, and an exclusion from coverage sought to be

> invoked by the insurer is likewise strictly construed, as in this case, the trial court erred by holding that Smith's claims came within the policy's exclusions.

THE GEORGIA SUPREME COURT: The Georgia Supreme Court reversed the court of appeals and held that the absolute pollution exclusion applied to bar coverage. The court first addressed the fundamental rules that apply to the interpretation of insurance contracts.

> As with any contract, in construing the terms of an insurance policy, we look first to the text of the policy itself. Words used in the policy are given their usual and common meaning, and the policy should be read as a layman would read it and not as it might be analyzed by an insurance expert or attorney. Where contractual language is explicit and unambiguous, the court's job is simply to apply the terms of the contract as written, regardless of whether doing so benefits the carrier or the insured. This is so because Georgia law permits an insurance company to fix the terms of its policies as it sees fit, so long as they are not contrary to the law, thus companies are free to insure against certain risks while excluding others. However, when a policy provision is susceptible to more than one meaning, even if each meaning is logical and reasonable, the provision is ambiguous and, pursuant to statute will be construed strictly against the insurer/drafter and in favor of the insured.

Next, the court provided a historical perspective of the pollution exclusion. The original exclusion was developed to apply to claims arising from mass environmental contamination, that is, traditional environmental pollution, such as claims arising from the industrial release of hazardous substances into the atmosphere, water, or soil. The absolute pollution exclusion, however, extends beyond the natural environment to exclude claims arising from the release of any pollutants anywhere. According to the court, this includes claims arising from exposure to hazardous substances within a building. The court said that the absolute pollution exclusion extends "beyond the natural environment to premises owned, rented, or occupied by the insured."

After the absolute pollution exclusion was introduced, however, a split developed among the states over whether to apply the provision broadly to exclude all injuries caused by pollutants or, given the historical purpose behind the exclusion, to apply it narrowly to exclude only those injuries caused by traditional environmental pollution. In holding that the absolute pollution exclusion applied to bar coverage in this case the Georgia Supreme Court stated:

> As in *Reed*, we find that the contractual language of Chupp's CGL policy unambiguously governs the factual scenario in this case. Accordingly, the court of appeals was required to simply apply the terms of the contract as written. ... Here, Smith alleges that her daughter suffered lead poisoning and permanent injury from the ingestion of lead paint found on the premises of the house she rented from Chupp. Under the broad definition contained in Chupp's policy, we conclude that lead present in paint unambiguously qualifies as a pollutant and that the plain language of the policy's pollution exclusion clause thus excludes Smith's claims against Chupp from coverage. Accordingly, we reverse the decision of the court of appeals.

The court also said that for the exclusionary language to be considered clear and unambiguous it is not necessary for it to list every possible pollutant, contaminant, or irritant to which it applies.

Not all courts agree with the Georgia Supreme Court's interpretation of the absolute pollution exclusion. Some courts interpret the exclusion more narrowly to apply only to injury or damage caused by traditional environmental pollution. These courts have supported their position by

considering the history of the exclusion and the reasonable expectations of the insured.

Courts that, like Georgia, have held the absolute pollution exclusion is clear and unambiguous include:

Iowa	*Bituminous Casualty v. Sand Livestock Systems, Inc*., 728 NW2d 216 (Iowa 2007) (absolute pollution exclusion applied to release of carbon monoxide gas)
Minnesota	*Midwest Family Mutual v. Wolters,* 831 NW2d 628 (Minn. 2013) (absolute pollution exclusion applied to release of carbon monoxide from negligently installed boiler in private residence)
Mississippi	*American States Ins. Co. v. Nethery*, 79 F3d 473 (5th Cir. 1996) (absolute pollution exclusion applied to hypersensitive materials in standard house paint)
Nebraska	*State Farm v. Dantzler*, 852 NW2d 918 (Neb. 2014) (absolute pollution exclusion applied to lead paint in residential rental property)
Oklahoma	*Bituminous Casualty v. Cowen Construction, Inc.*, 55 P3d 1030 (Okla. 2002) (absolute pollution exclusion clear and unambiguous and not limited to environmental pollution)
Virginia	*PBM Nutritionals, LLC v. Lexington Ins. Co.*, 724 SE2d 707 (Va. 2012) (absolute pollution exclusion not limited to traditional environmental pollution)
Washington	*The Quadrant Corporation v. American States Ins. Co.*, 110 P3d 733 (Wash. 2005) (absolute pollution exclusion applied to deck sealant fumes that drifted into claimant's apartment)

Courts on the following list are among those that have held the absolute pollution exclusion should only apply to traditional environmental pollution at least in part because, based on the reasonable expectations of an insured, the exclusion is ambiguous.

Arizona	*Keggi v. Northbrook Property and Casualty,* 13 P3d 785 (Ariz. App. 2000) (absolute pollution exclusion limited to traditional environmental pollution and did not apply to bacteria in drinking water)
California	*MacKinnon v. Truck Insurance Exchange*, 73 P3d 1205 (Cal. 2003) (absolute pollution exclusion did not apply to release of pesticides around apartment building)
Illinois	*American States Ins. Co. v. Koloms*, 687 NE2d 72 (Ill. 1997) (absolute pollution exclusion limited to traditional environmental pollution and did not apply to accidental release of carbon monoxide gas from broken furnace)
Kentucky	*Motorists Mutual Ins. Co. v. RSJ, Inc.,* 926 SW2d 679 (Ky. 1996) (absolute pollution exclusion did not apply to accidental release of carbon monoxide gas)
Maine	*Nautilus Ins. Co. v. Jabar,*188 F3d 27 (1st Cir. 1999) (absolute pollution exclusion ambiguous because insured could have reasonably interpreted it to bar coverage only for injuries caused by traditional environmental pollution and not for injury allegedly caused by inhalation of hazardous fumes discharged by roofing products)
Massachusetts	*Western Alliance Ins. Co. v. Jarnail Singh Gill,* 686 NE2d 997 (Mass. 1997) (pollution exclusion did not apply to release of carbon monoxide from a restaurant oven)
Nevada	*Century Surety Co. v. Casino West, Inc.*, 329 P3d 614 (Nev. 2014), (absolute pollution exclusion did not apply to release of carbon monoxide gas from motel pool heater)

New Jersey	*Nav-Its, Inc. v. Selective Ins. Co.*, 869 A2d 929 (N.J. 2005) (absolute pollution exclusion did not apply to fumes from floor coating sealant)
Ohio	*Andersen v. Highland House Co.,* 757 NE2d 329 (Ohio 2001) (absolute pollution exclusion did not apply to carbon monoxide leaks in residential apartment complex since it was reasonable for insured to believe exclusion wouldn't apply)