

ALERT

DISPUTES / INSURANCE LITIGATION

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District of Columbia's Highest Court To Decide Whether Pollution Exclusion in General Liability Insurance Policy Precludes Coverage of Carbon Monoxide Contamination

The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has certified to the District of Columbia Court of Appeals (D.C. Court of Appeals) the question of whether under District of Columbia law an "absolute" or "total" pollution exclusion in a general liability policy applies to injuries allegedly arising from a residential carbon monoxide poisoning. *Nationwide Mut. Ins. Co. v. Richardson*, No. 00-7203 (D.C. Cir. November 2, 2001). The D.C. Circuit decided that certification of the question was appropriate because the court believed that D.C. law is "genuinely uncertain" on that issue and that the question is "one of extreme public importance."

CASE BACKGROUND

An insurer sought declaratory judgment in federal district court in D.C. that the insurer was not obligated to defend or indemnify the owner of an apartment complex who had been sued by a security guard at the complex. The security guard had alleged, in a separate

action, that she had been overcome and disabled in 1995 by carbon monoxide fumes released from a furnace in the apartment complex. The insurer moved for summary judgment based on the following pollution exclusion:

This insurance does not apply to: "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants.... Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.

The district court ruled in favor of the insurer and granted summary judgment, explaining that to find the pollution exclusion ambiguous as applied to an alleged carbon monoxide poisoning "would be to seek out ambiguities in the contract when none existed." The security guard, to whom the district court had granted limited permission to intervene, appealed the summary judgment to the D.C. Circuit Court.

THE D.C. CIRCUIT COURT DECISION TO CERTIFY

The question before the D.C. Circuit Court was whether the pollution exclusion, under D.C. law, unambiguously applied to an alleged residential carbon monoxide contamination. The D.C. Circuit Court acknowledged that the United States Court of Appeals for the Fourth Circuit has held that the pollution exclusion unambiguously barred coverage under D.C. law in a similar case involving injuries to welders caused by the release of manganese fumes. *National Elec. Mfrs. Ass'n v. Gulf Underwriters Ins. Co.*, 162 F.3d 821 (4th Cir. 1998). D.C. courts have not ruled on this issue. The district court had granted summary judgment to the insurer based at least in part on *National Electric*. However, the D.C. Circuit Court, without any explanation, stated in *Richardson* that its sister circuit's determination in *National Electric* was "not conclusive of D.C. law."

After reviewing the many decisions on the pollution exclusion in courts nationwide, the D.C. Circuit decided to certify the question to D.C. Court of Appeals. "With so many courts coming to diametrically opposed conclusions about the clause's clarity and meaning, it is difficult to know which line of cases the District of Columbia Court of Appeals would follow."

IMPLICATIONS

The *Richardson* certification presents the D.C. Court of Appeals with an opportunity to enforce the clear and unambiguous terms of the pollution exclusion. Other courts have ruled that the pollution exclusion unam-

biguously applies in cases involving environmental pollution as well as in cases involving the release of irritants and contaminants in non-environmental contexts. The D.C. Court of Appeals is not bound by the Fourth Circuit's interpretation of D.C. law in *National Electric*. Thus, the D.C. Court of Appeals will have an opportunity to enunciate new law on this significant issue affecting liability insurers. Accordingly, pro-policyholder counsel are likely to file *amicus curiae* briefs in this appeal to the District of Columbia's highest court, and insurers should consider filing *amicus* briefs to counter policyholders' attempts to weaken the pollution exclusion.

If you have any questions regarding this *Alert* or any insurance coverage-related matter, please contact:

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