

# ALERT

DISPUTES / INSURANCE LITIGATION

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## New Developments on Whether the Absolute Pollution Exclusion Clause Bars Coverage for Non-environmental Pollution

A majority of state and federal courts have held that absolute pollution exclusions are unambiguous as a matter of law and, thus, exclude coverage for claims alleging damage caused by **all** pollutants. The Supreme Court of Nebraska recently joined the majority by holding that xylene fumes created from the application of a floor sealant was a pollutant and therefore the absolute pollution exclusion barred coverage for damage caused by the fumes. *Cincinnati Insurance Company v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (Neb. November 2, 2001).

### CASE BACKGROUND

In *Becker Warehouse*, the insured used a warehouse to store food products and ingredients owned by various food suppliers. In 1997, the insured contracted with a construction company to build an addition to the warehouse. During the renovation, the construction company applied a floor sealant which contained a hazardous substance known as xylene to the addition section of the warehouse.

Although the food products were stored in a separate section of the warehouse, the various food suppliers claimed that the xylene fumes that emanated from the addition section of the warehouse damaged their food

products. Two of the food suppliers filed suit against the insured. Subsequently, the insured filed insurance claims with Cincinnati Insurance, seeking indemnity and defense under the CGL policy issued by Cincinnati. Cincinnati denied the claims and refused to defend the insured against the pending lawsuits.

Cincinnati then filed a petition for declaratory judgment in district court seeking a declaration that the CGL policy that it had issued to the insured did not provide coverage for claims arising out of pollution due to the absolute pollution exclusion and that as there was no coverage, there was no duty to defend. The insured filed a counter/cross-claim and contended that the xylene fumes were not a pollutant within the meaning of the CGL policy issued by Cincinnati.

Both parties moved for summary judgment in the district court. The district court held:

- (1) that the insurance policy in question contained an absolute pollution exclusion which, as a matter of law, was not ambiguous and should be construed under its plain meaning;
- (2) that the xylene fumes constituted a pollutant within the meaning of the insurance policy at issue, creating damage arising out of the actual,

alleged, or threatened discharge, dispersal, seepage, migration, release, or escape of pollutants; and

- (3) that the damage to the food products that was in the care, custody, and control of the insured was excluded from coverage by the pollution exclusion clause in the policy.

Therefore, the district court concluded that the insured's damages were excluded from coverage under the policy and that Cincinnati had no duty to defend. The insured appealed and the Nebraska Supreme Court accepted the appeal.

## THE DECISION OF THE NEBRASKA SUPREME COURT

On appeal, the insured contended that the pollution exclusion contained in its policy was ambiguous and that it should only be applied to traditional environmental pollution claims. The insured further contended that application of the pollution exclusion to non-environmental claims would violate its reasonable expectations concerning the policy.

The Nebraska Supreme Court rejected both arguments. The Court decided to examine the "bare words of the exclusion" contained in the policy at issue and concluded as a matter of law, that the broad language of the pollution exclusion was unambiguous. Furthermore, the Court noted that the language of the policy did not specifically limit excluded claims to traditional environmental damage nor did the exclusion purport to limit materials that qualify as pollutants to those that cause traditional environmental damage. The Court concluded, "[a]n occurrence such as the

release of xylene fumes in Becker's warehouse clearly falls under Cincinnati's broad exclusion - to find otherwise would read meaning into the policy that is not plainly there." *Id.* Therefore, the Court determined that there was no indication that the pollution exclusion should be limited to traditional environmental pollution claims.

The Court rejected the insured's reasonable expectations argument because, under Nebraska law, the reasonable expectations of the insured are not taken into account unless the language of the insurance policy is found to be ambiguous.

Additionally, the Court reaffirmed the underlying holding of the district court that xylene fumes qualified as a pollutant and that the only logical explanation for the damage caused by the fumes was that the fumes "discharged, dispersed, released or escaped" from one part of the warehouse to the other, as defined by the terms of the policy.

## CONFLICTING CASE LAW

Although a majority of state and federal courts have held that the absolute pollution exclusion is unambiguous as a matter of law, there is a differing view which is developing in a minority of jurisdictions. The Supreme Court of Ohio, which previously upheld absolute pollution exclusions in a variety of non-environmental cases, recently joined Indiana and Illinois in restricting the application of the absolute pollution exclusion to cases of "traditional" environmental pollution. *Anderson v. Highland House Company, et al.*, 93 Ohio St.3d 547, 757 N.E.2d 329 (Ohio November 14, 2001).

The *Highland House* case began in 1997 when one tenant died and another was seriously injured from

inhalation of carbon monoxide fumes from a faulty heating unit located inside an apartment complex owned by Highland House Company and managed by Renaissance Management, Inc. or “RMI”. Both Highland and RMI were covered by commercial general liability policies issued by Indiana Insurance Company. All of the relevant policies contained absolute pollution exclusions.

As a result of the accident, a wrongful death action was filed against Highland House and RMI. Both parties then filed a declaratory judgment action that Indiana Insurance had a duty to defend and indemnify them in the underlying action. In a third action, Indiana Insurance sought a declaratory judgment that it did not have a duty to defend or indemnify the insureds due to the absolute pollution exclusion. All three actions were consolidated by the trial court and the underlying tort claims were settled.

The trial court held that the language of the pollution exclusion was ambiguous as applied to a non-environmental claim and therefore the exclusion should only be applied to environmental pollution. Indiana Insurance appealed the decision of the trial court and the Eight District Court of Appeals held that the policies at issue clearly precluded coverage, consistent with prior Ohio decisions. See, e.g., *Longaberger v. U.S. Fidelity & Guaranty Co.*, (S.D. Ohio 1998), 31 F. Supp.2d 595; *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.*, (1992), 64 Ohio St.3d 657. The Supreme Court of Ohio allowed an appeal to be taken from the decision of the appellate court.

The issue on appeal before the Ohio Supreme Court was whether the pollution exclusion language in the policies at issue precluded coverage for death and

injuries stemming from residential carbon monoxide poisoning. The Court held that Indiana Insurance owed a duty of defense and indemnification to the insureds since the exclusion language at issue did not “clearly, specifically, and unambiguously state that coverage for residential carbon monoxide is excluded.” *Highland House*, 93 Ohio St.3d at 549.

Throughout the appeal, Indiana Insurance contended that carbon monoxide qualified as a pollutant because, under the language of the exclusion, it is a “gaseous irritant or contaminant.” Indiana Insurance also contended that Highland House and RMI should have known that coverage would not be provided for carbon monoxide poisoning based on the general definition of pollutants provided in the policies.

The Court rejected Indiana Insurance’s argument, relying on the Ohio principle that if an insurance policy does not plainly exclude a claim from coverage, then an insured may infer that the claim will be covered. *Id.* at 549 (citing *Home Indemn. Co. of New York v. Plymouth* (1945), 146 Ohio St. 96, 32 O.O. 30, 64 N.E.2d 248). The Court noted that the policies at issue never clearly excluded claims for deaths or injuries caused by residential carbon monoxide poisoning. This is in contrast with many cases from other jurisdictions that have held that the same language unambiguously bars all pollution claims. See, e.g., *Nat’l Elect. Mfrs. v. Underwriters Ins.*, 162 F.3d 821 (4th Cir. 1998) (applying DC law); *Technical Coating v. U.S. Fidelity & Guaranty*, 157 F.3d 843 (11th Cir. 1998) (applying Florida law); *Certain Underwriters at Lloyd’s v. C.A. Turner Const.*, 112 F.3d 184 (5th Cir. 1997) (applying Texas law); *Brown v. American Motorists Ins. Co.*, 930 F. Supp. 207 (E.D. Pa. 1996); *Truitt Oil & Gas Co. v. Ranger Ins. Co.*, 231 Ga.App. 89, 498 S.E.2d 572 (1998).

In an effort to determine whether the pollution exclusion intended to preclude coverage for carbon monoxide claims, the Court examined the history and original purpose for the pollution exclusion. The Court determined that the pollution exclusion at issue was created to bar coverage for gradual environmental degradation of any type and to preclude coverage responsibility for government-mandated cleanups. Therefore, based on this allegedly original purpose, the Court concluded that it was reasonable for RMI and Highland House to assume that their policies would not exclude coverage for carbon monoxide claims. As insurance policies are strictly construed against the insurer under Ohio law, the Court stated that it would not be sufficient for Indiana Insurance to demonstrate that its interpretation of the policy language was more reasonable than the policyholders.

The Court also examined similar cases in other jurisdictions, notably Illinois, and concluded that those cases provided persuasive support for the argument that the particular policy language at issue was indeed ambiguous and should be interpreted in favor of the insured. Therefore, the Court concluded, “we would be remiss if we were to simply look to the bare words of the exclusion, ignore its *raison d’être*, and apply it to situations which do not remotely resemble traditional environmental contamination.” *Highland House*, 93 Ohio St.3d at 552 (citing *Am. States Ins. Co. v. Koloms*, 177 Ill.2d 473, 492-493, 227 Ill.Dec. 149, 158, 687 N.E.2d 72, 81 (Ill. 1997)).

## IMPLICATIONS

The apparent split of authority among the courts as demonstrated by these recent cases highlights the principle that choice of law and forum selection are impor-

tant factors to be considered by an insurer in its efforts to enforce a pollution exclusion clause. Undoubtedly, an insured with any contacts in one of the minority states will file suit against its insurer in one of those states in an effort to obtain indemnity and defense for pollution claims. An insurer may successfully avoid this tactic by filing a declaratory judgment action in one of the majority states that has contacts with the pollution dispute. In the end, the application of the absolute pollution exclusion may depend on who files first and where.

However, the Ohio holding is significant in that it may signal a change among the courts who have previously upheld the pollution exclusion in a variety of non-environmental contexts. This is especially important given today’s climate when insurers may soon be faced with new claims, such as those for anthrax and mold exposures.

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