

Absolute Pollution Exclusion, Economic Loss Rule Coverage Update

May 1, 2025

Absolute Pollution Exclusion – New Mexico

Chisholm's Village Plaza LLC v The Cincinnati Ins. Co.

No. 23-2133, 2025 WL 1178099 (10th Cir. Apr. 23, 2025)

The U.S. Court of Appeals for the Tenth Circuit, in reversing the order of the U.S. District Court of New Mexico, determined that the unambiguous absolute pollution exclusions in the insurance policies issued by The Cincinnati Insurance Company (Cincinnati) and Fidelity and Guaranty Insurance Underwriters (Fidelity) to Chisholm's Village Plaza LLC (Chisholm) precluded coverage for Chisholm for an underlying suit alleging contamination under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).

The coverage dispute arose from a CERCLA action against Chisholm and others as part of an effort to respond to a two-mile-long chemical plume in the City of Las Cruces. The city and the County of Doña Ana filed an amended complaint against Chisholm alleging that a dry-cleaning business that occupied the Chisholm's property released hazardous substances that contaminated the soil and caused groundwater contamination of drinking water supplies in Las Cruces. The hazardous substances allegedly included tetrachloroethylene, commonly known as PCE, which is a known carcinogen. The government entities sought to hold Chisholm and others jointly and severally liable for the costs expended in cleaning up the site.

Chisholm sought coverage for the CERCLA lawsuit from Cincinnati and Fidelity, but both insurers denied coverage. Chisholm prevailed in the underlying action by establishing that it was not a potentially responsible party under CERCLA. After prevailing, Chisholm filed a declaratory judgment action against Cincinnati and Fidelity, alleging, among other things, that the insurers breached their respective policies when they failed to pay Chisholm's defense costs in the CERCLA lawsuit. The parties filed competing dispositive motions. The trial court granted Chisholm's motion, finding that the New Mexico Supreme Court would utilize an outlier approach to determine that the absolute pollution exclusions in the insurers policies were ambiguous. The insurers appealed.

The appellate court reversed the trial court's ruling, finding that the interpretative approach utilized by the trial court and Chisholm was inconsistent with New Mexico law and created an ambiguity that did not exist. The appellate court determined that neither insurer had a duty to investigate or defend

Chisholm in the CERCLA lawsuit.

With regard to the absolute pollution exclusion contained in the Fidelity policy, the appellate court disagreed with Chisholm's position that the term "pollutant" was ambiguous because it did not specifically identify PCE and the CERCLA complaint does not allege any other hazardous substance, noting that the New Mexico Supreme Court has held that it is "unreasonable to require [an insurer] to provide an exhaustive list of noncovered activities" under an exclusion "in order for the clause to be considered unambiguous" [and] "[i]t is sufficient that the [exclusion] includes [a term that encompasses noncovered activities] among the itemized list of [excluded things] for which coverage is excluded." The appellate court also disagreed with the trial court that the term "contaminant," as used in the Fidelity policy's definition of "pollutant," was unclear since it was not defined by the policy because, under New Mexico law, when a term is not defined it is given its common and ordinary meaning that may be ascertained from a dictionary. Finding the terms "pollutant" and "contaminant" unambiguous, the appellate court ruled that the trial court erred when it held otherwise and reversed the trial court's summary judgment ruling regarding Fidelity.

The pollution exclusion in the Cincinnati policy differed slightly from Fidelity's as it contained an exception to the exclusion, indicating that the exclusion does "not apply to liability for damages because of 'property damage' that the insured would have in the absence of such a request, demand, order or statutory or regulatory requirement, or such claim or 'suit' by or on behalf of a governmental authority." The appellate court determined that the trial court erred when it concluded that this liability exception applied to the CERCLA lawsuit since there was a possibility that common law claims could be alleged against Chisholm. The appellate court noted that the mere possibility of common law claims being alleged does not create a duty to defend. The court reasoned that to hold otherwise would always trigger an insurer's duty to defend. Since there were no common law claims alleged in the CERCLA lawsuit, the exception to the pollution exclusion did not apply. As with Fidelity, the appellate court reversed the trial court's summary judgment ruling in favor of Cincinnati.

By: Amy Diviney

Economic Loss Rule - Colorado

Mid-Century Ins. Co. v. HIVE Constr., Inc.

No. 23SC267, 2025 WL 1153463 (Colo. Apr. 21, 2025)

The Colorado Supreme Court held that an insurer that brings an action against a contractor, as subrogee of its insured, is required to bring that action in contract and not in tort due to the economic loss rule.

Mid-Century Insurance Company (Mid-Century) insured Masterpiece Kitchen, which hired HIVE Construction, Inc. (HIVE) as a general contractor for the construction of its restaurant. The contract between Masterpiece Kitchen and HIVE stated that HIVE would comply with the contract's construction specifications and if work is not authorized or approved, it may be deemed defective. One of the contract's construction specifications requested that a wall be constructed between Masterpiece Kitchen's kitchen and dining area, consisting of two layers of drywall for the purpose of increased fire resistance. However, without Masterpiece Kitchen's approval, HIVE made the wall with plywood, a combustible material, and only one layer of drywall. Eventually, the kitchen area caught fire because the plywood was located close to the kitchen broiler.

Pursuant to Masterpiece Kitchen's insurance policy with Mid-Century, Mid-Century made payments for damages then sued HIVE for negligence, alleging HIVE breached its "duty to perform its work as general contractor ... in a safe, careful, competent, and workmanlike manner." It also alleged HIVE's installation of the combustible plywood in the wall demonstrated willful and wanton conduct.

At trial, HIVE moved for a directed verdict, arguing that the economic loss rule barred Mid-Century's negligence claim. Under the economic loss rule, "a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law." The purpose of the rule was to maintain a distinction between contract and tort law, holding parties to the terms of their bargain, and encouraging parties to allocate risks and costs during bargaining.

The trial court denied HIVE's directed verdict motion, relying on *McWhinney Centerra Lifestyle Center LLC v. Poag & McEwen Lifestyle Centers-Centerra LLC*, 486 P.3d 439, 453, which ruled that the economic loss rule does not bar intentional tort claims. The jury then issued a special verdict, finding that HIVE's conduct was willful and wanton. The trial court entered judgment in Mid-Century's favor.

HIVE appealed, and the appellate court reversed the judgment and remanded the case to the trial court with instructions to direct a verdict in HIVE's favor on the basis that the duty of care that HIVE had allegedly breached was not independent of its contractual obligations.

The Colorado Supreme Court upheld the intermediate appellate court decision. In so doing, the Supreme Court analyzed the source of defendant's duty by considering whether: (1) the relief sought in negligence is the same as the contractual relief; (2) there exists a recognized common law duty of care in negligence; and (3) the negligence duty and contractual duty differ.

The Supreme Court concluded that "the economic loss rule required Mid-Century to pursue its claim in contract, rather than tort" because the parties "memorialized in their contract the same duty that Mid-Century contended HIVE breached by deviating from the plans and design, and thus, the alleged tort duty was not independent of the duty set forth in the parties' contract." The Supreme Court also stated that it has "never excepted willful and wanton tort claims from the economic loss rule." Instead, an

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exception might apply where there is an allegation of intentional conduct.

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