

## Ninth Circuit to Address Application of Pollution Exclusion to Indoor Carbon Monoxide Exposure Claim under Oregon Law

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The Ninth Circuit is set to decide whether carbon monoxide falls within the absolute pollution exclusion of a general liability insurance policy. At issue in *Colony Insurance Company v. Victory Construction LLC, et al.*, No. 17-35357 is a ruling by an Oregon federal district court that a policy issued by Colony Insurance Company to Victory Construction LLC does not provide coverage for injury claims involving indoor carbon monoxide poisoning from a negligently installed pool heater.

The exclusion provides that the Colony policy does not apply to "[b]odily injury' . . . which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'hazardous materials' at any time." The policy defines "hazardous materials" to include "pollutants" which was further defined to include any "gaseous or thermal irritant or contaminant." As a matter of first impression under Oregon law, the district court concluded that the plain meaning of "pollutant" includes carbon monoxide and, therefore, Colony had no duty to defend or indemnify Victory.

Among other things, the district court rejected Victory's suggested interpretation that the pollution exclusion should only apply to "traditional environmental pollution," and stated that "[t]his Court does not even get to the point of considering the exclusion's drafting history, multiple reasonable interpretations of the policy, or the policyholder's reasonable expectations, because the plain meaning of the words 'irritant' and 'contaminant' resolve the case." It thus declined to "insert an analysis of the policyholder's reasonable expectations, in the absence of any such terms or substance within the Policy itself," and further noted that "[i]n Oregon, the Court is not tasked with considering alternative plausible interpretations of the pollution exclusion when the Policy terms' plain meaning resolves the case."

On appeal, Victory argues that the exclusion is ambiguous and that the district court improperly considered toxicity in determining that carbon monoxide is a "pollutant." In a brief filed with the Ninth Circuit on October 30, 2017, a policyholder advocacy group has since presented as an "alternative approach" the recent ruling in *Zhaoyun Xia, et al. v. ProBuilders Specialty Insurance Company RRG, et al.*, 393 P.3d 748 (Wash. 2017) (covered in the October 2017 issue of the *Complex Insurance Coverage Reporter*) that an absolute pollution exclusion did not negate liability coverage for a carbon monoxide exposure claim where the "efficient cause" of the loss was found to be a covered occurrence.

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