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### Recent Case Developments

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# RECENT CASE DEVELOPMENTS

*Jeffrey W. Stempel*<sup>1</sup>

CONSTRUING FORTUITY REQUIREMENT IN COVERAGE FOR  
“ACCIDENT,” THIRD CIRCUIT BORROWS APPROACH OF “EXPECTED OR  
INTENDED” EXCLUSION AND APPLIES “STANDPOINT OF THE INSURED”  
ANALYSIS TO FIND COVERAGE

*Nationwide Mutual Fire Insurance Co. v. Pipher*, 140 F.3d 222, 1998  
(3d Cir. 1998) (applying Pennsylvania law).

Insurance policies are designed to provide coverage only for losses that occur by chance. Paying and defending policyholders for damage wrought by their conscious design would run counter to this basic principle and raise significant concerns of moral hazard (insured entities would be less careful in curbing venal or mean-spirited impulses) and adverse selection (persons with a predisposition toward intentional misconduct would exhibit a disproportionate demand for insurance). Although many courts and commentators argue that this “fortuity” requirement is an implicit condition precedent in any insurance policy, most liability insurers expressly codify the requirement in part by providing that the policy will not provide coverage where the damage underlying the claim was “expected or intended from the standpoint of the insured.”

Similarly, most liability policies define a covered occurrence as an “accident” or other fortuitous event. But what if the insured is sued because its negligence contributed to the harm caused by the intentional acts of a noninsured? In facing this issue, the United States Court of Appeals for the Third Circuit, applying Pennsylvania law, resolved the textual and structural conflict of these common policy provisions by holding that a claim alleging negligence by the policyholder is covered even if the actual cause of the harm was not “accidental” as such.

Policyholder Linda Pipher, who held a “Tenant’s Policy,” leased a second floor apartment in her home to Francis and Bernine McFadden. In

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1. Fonvielle & Hinkle Professor of Litigation, Florida State University College of Law. Professor Stempel is the author of *INTERPRETATION OF INSURANCE CONTRACTS: LAW AND STRATEGY FOR INSURERS AND POLICYHOLDERS* (1994 and 1998 Supp.) published by Aspen Law & Business. Portions of the case summaries were originally authored in substantially this format for the <<http://www.aria.org/jri/>> *Journal of Risk and Insurance*, <<http://www.aria.org/jri/>> of the <<http://www.aria.org/>> American Risk and Insurance Association, Box 9001, Mount Vernon, NY 10552-9001.

undertaking to install new carpeting in the apartment, Pipher or the prior tenants had removed the doors to the apartment, which were never reinstalled and hired a painter with an allegedly troubled past to repaint the unit. The painter assaulted and killed Bernine McFadden. Her widower husband filed a wrongful death action not only against the perpetrator but also against Pipher as landlord, alleging that Pipher had been negligent in hiring the painter and in failing to have the apartment doors reinstalled.

Nationwide defended Pipher with a reservation of rights and argued that there was no coverage because the claim did not arise out of an "accident" but from an intentional murder, albeit not one committed by the insured. The Policy provided liability coverage for "damages [the insured] is legally obligated to pay due to an occurrence," with an "occurrence" defined as bodily injury resulting from an "accident." The policy also contained the common express "intentional act" exclusion barring coverage for losses that were "expected or intended from the standpoint of the insured."

Nationwide cited a relatively recent Pennsylvania Supreme Court precedent (*Gene's Restaurant, Inc. v. Nationwide Ins. Co.*, 548 A.2d 246 (Pa. 1988)) and progeny holding that "to constitute an accident, and thus a covered occurrence, the court must focus on the nature of the act which inflicted the injury or directly caused the death, and that act must be unintentional, even when an insured is sued for negligently failing to prevent or for contributing to the harmful intentional acts of the person who directly inflicted the injury or cause the death." 140 F.3d at 224 (footnote omitted). The Third Circuit in *Pipher* distinguished *Gene's Restaurant* as inapposite because the complaint in that case "contained no allegations of negligence on the part of the insured" but instead "merely alleged that while she was a patron in the defendant insured's restaurant, the defendant [not an insured] assaulted and violently beat her, causing injuries and damages." 140 F. 3d at 224. *See also* *Britamco Underwriters, Inc. v. Weiner*, 636 A.2d 649 (Pa. Super. Ct. 1994)(Pennsylvania court distinguishes *Gene's Restaurant* on basis that instant complaint alleges alternative theories of liability, one alleging intentional conduct and the other alleging negligent conduct).

Thus, although the federal appellate court is required under the *Erie* doctrine to follow controlling state law as enunciated by the highest court of the relevant state, the *Pipher* Court avoided the seeming command of the *Gene's Restaurant* decision in order to align itself with other precedents holding that "the fact that the event causing [injury] may be traceable to an intentional act of a third party does not preclude the occurrence from being

an 'accident.'", 140 F.3d at 225 (quoting *Mohn v. American Cas. Co. of Reading*, 326 A.2d 346, 348 (Pa. 1974)). In *Mohn*, an innocent insured father was able to obtain health insurance coverage for his son, who was injured when shot by the police during a foiled burglary.<sup>2</sup>

Against this backdrop, the Third Circuit in *Pipher* had no difficulty finding coverage since the McFadden wrongful death action alleged negligence conduct by Pipher that facilitated the intentional wrongdoing of a non-insured. "From the Pipher's standpoint, Bernadine McFadden's assault and death was unexpected, entirely fortuitous, and therefore, an accident." 140 F.3d at 226.

In other words, the *Pipher* Court read the definition of "accident" in the Nationwide Tenant's Policy in harmony with the intentional act exclusion, which requires that the question of intent and fortuity be determined from the standpoint of the insured rather than that of third parties. This approach is not only most consistent with the policy language and common sense but also best serves the purpose of liability insurance. Liability insurance is designed to protect the insured from the consequences of its negligence. So long as the insured is not indemnified for intentional wrongdoing, this objective is met.

Any other construction would, as a practical matter, begin to unravel a significant part the existing system of liability insurance. For example, policyholders are frequently sued – and covered – for incidents involving inadequate security. The *Pipher* Court noted that its approach was followed in other jurisdictions, citing cases from Florida, Louisiana, New York, and Ohio.

As the *Pipher* Court points out, the holding of a case like *Gene's Restaurant* is not at all inconsistent with the *Pipher* approach. In *Gene's Restaurant*, there was no coverage because the plaintiff simply failed to allege any negligence or other covered liability-creating conduct by the policyholder. Hence, in the absence of the allegation of a covered loss, there could be no coverage. The *Gene's Restaurant* Court almost certainly did not

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2. The *Pipher* Court also cited *Wetzel v. Westinghouse Elec. Corp.*, 392 A.2d 470, 472-73 (Pa. Super. Ct. 1978), a somewhat notorious case often noted in casebooks and treatises, arising out of a father-son altercation over the preparation of a tax return. Because both father and son were martial arts experts, the high tension often found around April 15 turned deadly. The father, enraged by something in the son's preparation of the return, attacked the son with a sword. The son, defending himself with nanchukas and sticks, accidentally killed his father rather than merely subduing him. The *Wetzel* Court deemed the killing a covered accident rather than an uncovered intended murder.

purport to change the “rule of the game” that the intentional act exclusion relates to the policyholder’s state of mind rather than that of other persons connected to the case. The quotation above about focusing on the event rather than the insured’s state of mind is just an unfortunate misstatement of insurance law by the Pennsylvania Supreme Court that the federal appeals court wisely sidestepped without violating its duty to follow state law in claims based on diversity jurisdiction.

The *Pipher* Court thus rightly rejected Nationwide’s attempt to argue that the term “accident” had a meaning separate and distinct from the intentional act exclusion contained elsewhere in the policy. Rather, *Pipher* read the insurance policy as a whole and construed the two provisions harmoniously and sensibly. Unfortunately, at the close of the opinion, the *Pipher* Court attempted to buttress its analysis by invoking the doctrine that ambiguity is to be construed against the contract-drafting insurer, finding the term “accident” ambiguous as applied to the McFadden claim. The *Pipher* Court’s gilding of the coverage lily is unfortunate in that it represents another overuse of the perfectly defensible ambiguity doctrine through unnecessary invocation. More logically, the term “accident” is not ambiguous at all -- it simply means a loss event fortuitous insofar as the insured is concerned. This logical assessment of the meaning of a liability insurance policy would seemingly hold even if the policy did not contain the “expected or intended from the standpoint of the insured” language as well as the “accident” language unless the insurer used clear language precluding coverage for claims arising out of murder or other criminal acts by third parties.

IN CASE INVOLVING SEXUAL MOLESTATION, SEVENTH CIRCUIT APPLIES BROAD INTERPRETATION OF COMPLAINT TO TRIGGER DUTY TO DEFEND AND IMPLIES TRIGGER ANALYSIS SIMILAR TO THAT FOUND IN ASBESTOS AND POLLUTION CASES

*Roman Catholic Diocese of Springfield, Ill. v. Maryland Casualty Co.*, 139 F.3d 561 (7th Cir. 1998) (applying Illinois law).

Analogies between sexual abuse of minors and product liability or pollution claims are not intuitively obvious but these disparate torts are related in that, for purposes of insurance coverage, all are subject to the general rule of liability insurance that there have been an injury during the

policy period caused by a covered occurrence if there is to be coverage for the claim.

Maryland Casualty provided general liability insurance to the Diocese from 1977 through 1981. From approximately 1978 through 1981, a former associate pastor at a Diocese parish allegedly had sexually abused several boys entrusted to his supervision. Five of the alleged victims filed suit in 1993, with the claims dismissed as untimely under that statute of limitations. In 1995, parents of two other victims filed another action, alleging particularized abuse and also attempting to establish grounds for tolling the statute of limitations on the ground that the priest had admonished the boys never to disclose the abuse, permitting the parents to be unaware of the abuse until mid-1993. The Diocese tendered the new suits to its insurers, but defense and coverage were denied, with the insurers taking the position that the parents were not injured during the 1977-1981 period in which the Maryland Casualty policy was in force since the parents had no knowledge of the abuse until 1993.

The trial court accepted the insurer's argument, expressly rejecting the Diocese's argument that the injury from child abuse was like the damage caused by asbestos or other contaminants that causes insidious injury for years prior to visible manifestation and discovery. The Seventh Circuit unanimously reversed, finding that

a judgment declaring that Maryland has no duty to defend the Diocese is appropriate only if we can say with confidence that no injuries comprehended by the complaint would potentially trigger coverage.

\* \* \*

Reading the complaint generously [as required by Illinois law, and most state law, regarding the duty to defend], it is easy to imagine that the parents of the abused children were in fact injured long before 1993, and within the period of Maryland's coverage, but that the parents simply remained in the dark as to the source of their injuries until then. As we have noted, the complaint identifies a variety of harms that the children suffered as a result of the abuse: "severe and medically diagnosable emotional distress, embarrassment, loss of self-esteem, disgrace, humiliation, psychological

injury, loss of enjoyment of life, wage loss and deprivation of earning capacity.” [citing to complaint]. Surely some of these injuries occurred during the period of Maryland’s coverage. Common sense suggests that these injuries could in turn have resulted in concrete, identifiable harm to the parents within the same period. If the children required medical and psychological treatment at that time, for example, the parents would have borne the costs of that care. If the children became withdrawn as a result of the abuse, their relationships with their parent almost certainly suffered. And so on. [citations omitted] . . . . Although the identified injuries are attributed in part to the 1993 revelations [and thus are not covered by the 1977-1981 Maryland Casualty policies since damage from “knowing” of the abuse occurred during 1993]. . . they are also attributed directly to the abuse by [priest] Havey [citing complaint] and that allegation leaves the door open to claims for injuries that pre-date the expiration of the Maryland policies.

139 F.3d at 566-67.

Although the Seventh Circuit did not specifically address the issue of the Diocese’s analogy to the asbestos trigger that was rejected by the district court, the appellate court’s analysis, although based expressly on a broad view of the liability insurer’s duty to defend, is very consistent with the more enlightened views of an “actual injury” or “injury-in-fact” trigger utilized by the courts ruling on insurance coverage disputes involving asbestos claims. *See, e.g., American Home Prod. Corp. v. Liberty Mut. Ins. Co.*, 748 F. 2d 760 (2d Cir. 1984)(finding injury-in-fact to have resulted from inhalation of asbestos fibers without requirement that injury be manifest or medically diagnosable at the time in order to trigger coverage).

In the asbestos coverage cases, courts adopted a variety of triggers of coverage: (1) exposure; (2) injury; (3) manifestation; and (4) continuous or multiple trigger. Of these, the dominant approach is the actual injury trigger, which also most comports with insurance policy language and the purpose of insurance, which is to provide coverage for “bodily injury” that took place during an occurrence policy period. *See generally* JEFFREY W. STEMPEL, INTERPRETATION OF INSURANCE CONTRACTS §T3.2 (1994 and 1998 Supp.). However, on closer examination in light of the allegations actually pleaded

or the facts actually shown or assumed by the courts, the four triggers tend to converge upon one another in that the courts adopting an “exposure” trigger were usually finding or assuming that the mere exposure to the asbestos was instantly injurious to some degree. The manifestation courts can be characterized as insisting upon what many regarded as too much blatant evidence of injury but were nonetheless concerned not with the date of negligence, discovery, or judgment but with the date of injury. Multiple or successive trigger approaches build on this commonality. See Alan I. Widiss with Jeffrey W. Stempel, *Pulling Triggers from Coverage Provisions of Liability Insurance Policies* (manuscript 1998) (on file with author).

The actual injury cases that do not require so much evidence of injury as to amount to manifestation are the best reasoned of the asbestos coverage cases (and their cousins the pollution coverage cases) in that these cases recognized that an injury can be taking place inside the human body (or in the water table or on land) well before it is consciously recognized or diagnosable. Newspapers and medical histories are, for example, filled with instances where a person suffers for perhaps years with an infection or other malady before it is detected, diagnosed, or treated. As the *Diocese* Court implicitly notes, psychological and social injury can resemble insidious physical injury. Just as the asbestos victims were suffering lung and other damage for years prior to becoming consciously short of breath, the families of the abused children in *Diocese* probably were injured in their intra-family relations and mental well-being long before the parents (and perhaps even the abused children) knew of or recognized the agent of disease.

Although the Seventh Circuit chose to rest its decision expressly upon broad construction of the complaints and the substantial requirements of the liability insurers’ duty to defend, the analogy to the long-tail trigger coverage cases of the 1980s and 1990s seems apt regarding the type of child abuse at issue in *Diocese* and could provide a useful tool for assessing the coverage questions concerning the date of psychological or emotional injury.



CHANGE IN APPLICABLE LAW CONSTITUTES EVENT SUBJECT TO  
PREMIUM ADJUSTMENT BASED ON LOSS EXPERIENCE FOR  
WASHINGTON REDSKINS' WORKERS COMPENSATION INSURER

*Hartford Accident & Indemnity Co. v. Pro-Football, Inc.*, 127 F.3d  
1111 (D.C. Cir. 1997) (applying District of Columbia law).

As one might expect, on-the-job injuries are rather frequent for professional football players such as the Washington Redskins. The team's ownership obtained workers compensation coverage through a risk pool arrangement operated by the State of Virginia, where the team maintains a practice facility.

The policy itself, like many policies in high-risk or limited market areas provides something of a bet-hedging device for both insurer and insured – a provision for having premiums adjusted based on the actual loss experience of the policyholder. For example, if the team had enjoyed an injury-free season, the premium would be retroactively adjusted downward. However, if the season brought more injuries than expected at the time of underwriting, the insurer would be entitled to a retroactive premium increase. Such retroactive premium adjustment provisions are found fairly frequently for coverages in which the risk assumed is difficult to calculate at the inception of the policy period.

The *Washington Redskins* case itself presents an interesting question regarding what counts as a premium rating factor other than actual injury experience, missed work, and the severity and cost of the injuries. Because the team has facilities in Virginia and workers compensation rates are noticeably lower in Virginia than in the District of Columbia, the team understandably (and successfully at first) sought to have the policy priced as though the applicable rates of compensation to injured workers would be based on the Virginia schedule of benefits. However, several of the Redskins players successfully argued to District of Columbia authorities that the District's benefits schedule should control because the players' real locus of work was RFK Stadium in D.C., where the Redskins played NFL games even though gametime pales in comparison to practice time (although no team ever grabs the title by winning practices). Subsequently, the team's games have moved to the new Jack Kent Cooke Stadium in Landover, Maryland, perhaps serving the needs of a new premium adjustment dispute.

Consequently, the workers compensation policy originally written as

though benefits were to be calculated according the lower Virginia schedule became subject to the higher D.C. schedule, making the policy considerably more expensive. The insurer sought a retroactive premium adjustment of more than \$5 million (for a three-year policy period) based on the change in applicable law by which benefits were calculated. The trial court rejected this retroactive premium adjustment by the insurer but the Circuit Court of Appeals reversed, finding that a change in the legal yardstick for determining benefits was similar to the team's actual injury rate in terms of affecting the cost and value of the policy and the premium that the insurer should be allowed to charge in view of the clear and broad retrospective premium adjustment language contained in the policy at issue.

FLORIDA SUPREME COURT REQUIRES EXCESS JUDGMENT AGAINST  
INSURED BEFORE BAD FAITH ACTION MAY LIE, LIMITING THIRD-  
PARTY CLAIMANT'S ABILITY TO BRING BAD FAITH CLAIM AGAINST  
INSURER

*State Farm Fire & Casualty Co.v. Zebrowski*, 706 So. 2d 275 (Fla.  
Nov. 26, 1997).

Florida's bad faith statute permits "any person" to bring an action against an insurer for unfair claims practices and also provides "any person" with a right of action against an insurer for bad faith failure to attempt settlement. See FLA. STAT. § 624.155(1)(b)(1) (1997). However, this broad statutory language does not permit a third-party claimant to sue an insurer for bad faith refusal to settle during the course of the claimant's action against the insured tortfeasor. In order to sue the insurer for bad faith in refusing to attempt settlement, there must first be a judgment against the insured that exceeds the insured's liability policy limits.

In so ruling, the Florida Supreme Court noted that the statutory "cause of action is predicated on the failure of the insurer to act 'fairly and honestly toward its insured and with due regard for his interests.' The duty runs only to the insured. Therefore, in the absence of an excess judgment, a third-party plaintiff cannot demonstrate that the insurer breached a duty toward its insured." *State Farm Fire & Casualty Co.v. Zebrowski*, 706 So.2d at 276-77, (1997) (quoting FLA. STAT. § 624.155(1)(B)(1)).

According to the Florida high court, permitting the third party to

simultaneously sue the insured and its insurer would create an intractable conflict of interest for the insurer and raise the costs of providing liability insurance. *See* 706 So.2d at 277. Although the liability insurer is not permitted to gamble with the financial future of its insured, the insurer is permitted to defend claims against the insured with vigor, which is more easily accomplished if the insured (and not a third-party claimant as well) is the only entity toward whom the insurer owes a duty. If the insurer breaches this duty by making inadequate attempts to settle a claim against the insured, there is nonetheless no harm to the insured (at least not in the form of personal liability faced by the insured) absent an excess judgment. Hence, the excess judgment is a prerequisite for this type of bad faith claim by a third party.

However, where a judgment in excess of policy limits is obtained, the third-party claimant may under Florida law then sue the insurer directly without obtaining an assignment from the insured defendant tortfeasor. Furthermore, the third-party claimant succeeding in this nonassigned bad faith claim against the insurer may recover counsel fees under the statute.

MASSACHUSETTS EXPRESSLY ADOPTS SUBJECTIVE APPROACH AND  
REQUIRES SPECIFIC INTENT TO INJURE BY INSURED BEFORE INSURER  
MAY VOID COVERAGE PURSUANT TO INTENTIONAL ACT EXCLUSION;  
COURT ALSO EXERCISES COMMON LAW POWER TO CREATE  
EXCEPTION TO "AMERICAN RULE" AND PERMITS INSUREDS  
PREVAILING IN COVERAGE DISPUTES TO RECOVER COUNSEL FEES  
FROM INSURER

*Preferred Mutual Insurance Co. v. Gamache*, 686 N.E.2d 989; (Mass. 1997).

Insured James Gamache was in an altercation with police officers, who subdued Gamache after considerable effort when called to the scene of a fight. Gamache was apparently under the influence of alcohol but fought fiercely, injuring the knee of one of the policemen, who brought suit against Gamache for "negligent, reckless and/or wanton conduct." Gamache was insured under his parent's homeowners policy.

The insurer denied coverage, citing the intentional act exclusion of the policy, which stated that the insurance "does not apply to bodily injury . . .

which results directly or indirectly from . . . an intentional act of the insured,” wording slightly different from the intentional act exclusions of most liability policies (which normally state that coverage is precluded when the loss is “expected or intended from the standpoint of the insured”).

The Court held that the policy’s limiting language precluded coverage where the injury in question was intentionally caused but did not bar coverage simply because the conduct at issue was volitional. For example, Gamache may have intended to lash out at the policemen in order to avoid being restrained or to continue fighting his nonpolice opponents. But this intentional behavior by Gamache may not have aimed to injure the policy officer. To avoid coverage, the insurer would be required to demonstrate at trial that the injury was subjectively intended by the insured, not merely that the insured voluntarily engaged in the conduct that caused the injury or that a reasonable person in the position of the insured would have expected the injury to result as a consequence of the insured’s voluntary conduct. *See* 686 N.E.2d at 990.

Although the Supreme Judicial Court is not clear on the burden of proof, its affirmance of the Appeals Court decision in *Gamache* shows that on remand, the insurer is required to prove the requisite degree of intent to injure in order to avoid coverage because the intentional act language is contained in a policy “Exclusion.” *See Preferred Mut. Ins. Co. v. Gamache*, 675 N.E. 2d 438 (Mass. App. Ct. 1997). Although the intended injury defense has come to be known by the shorthand reference of the “intentional act exclusion,” its limitations on coverage are often contained in the insuring agreement, which provides coverage for an “occurrence” and defines a covered “occurrence” as loss not expected or intended by the insured. Even where the intentional act limitation is not in the “Exclusions” section of the policy per se, many courts place the burden of persuasion on the insurer because the intentional injury limitation operates in the nature of an exclusion, wherever it is located in the policy.

In taking this position, the Massachusetts High Court aligned itself with the majority of jurisdictions, adopting the so-called “subjective” approach to construing the intentional act exclusion (focusing on what the insured in question intended) rather than using an objective approach (what a reasonable insured should have expected from its behavior). The majority approach adopted in Massachusetts of course tends to provide for broader coverage: insureds often act below the standard of a reasonable person in causing injury but seldom willfully cause injury. The *Gamache* Court reasoned that using

the objective standard would tend to undermine the purpose of the liability insurance provisions of a policy by eliminating coverage where the insured acted negligently, an improper result because coverage for negligence is the basic purpose of liability insurance.

In addition, the *Gamache* Court determined that policyholders prevailing in coverage disputes with an insurer could recover the reasonable counsel fees incurred in obtaining coverage. Massachusetts, like most every American court, follows the "American Rule" that in litigation each party must pay for its own legal fees regardless of the results. By contrast, the "English Rule" prevailing in Great Britain and other countries provides that the losing party must pay a reasonable attorney's fee to the winner. The Court determined that a departure from the American Rule is required where an insurer incorrectly refuses to defend the insured because the insurer-insured relationship is the type of special relationship that warrants a departure from the American Rule because of the importance for insureds in having a ready defense against potentially bankrupting liability claims.

The American Rule has historically been subject to several well-established exceptions such as when a contract provides for fee-shifting or where fee-shifting is authorized by statute, where a litigant conveys a common benefit to others or creates a common fund available for others, where the victor vindicates an interest of the judicial system (such as enforcing contempt sanctions against the opponent) or when special circumstances warrant, such as when the losing party has acted with fraud, bad faith, or vexatiousness. The *Gamache* Court took the "special circumstances" exception a step further and determined that outright bad faith by the insurer should not be required for fees recovery by the prevailing insured in view of the importance of the duty to defend to the insured.

Although other jurisdictions have a similar policy regarding fees recovery in duty to defend cases, most of these exceptions to the American Rule are established by statute rather than a common law decision of the courts. See 686 N.E.2d at 991-92 (discussing rationale of American Rule and exceptions and indicating other states allowing insured to recover fees).

TWO ADDITIONAL COURTS LIMIT REACH OF ABSOLUTE POLLUTION  
EXCLUSION AND REJECT INSURERS' ATTEMPTS TO AVOID COVERAGE  
FOR CLAIMS ARISING OUT OF CARBON MONOXIDE POISONING

*Western Alliance Ins. Co. v. Gill*, 686 N.E. 2d 997 (Mass. 1997);  
*American States Ins. Co. v. Koloms*, 687 N.E.2d 72 (Ill. 1997).

The Supreme Courts of Massachusetts and Illinois both determined that the so-called absolute pollution exclusion in contemporary commercial general liability policies does not bar coverage for claims related to negligence resulting in carbon monoxide poisoning simply because carbon monoxide is a dangerous gas and as such falls within the literal reach of the pollution exclusion, which on its face states that it excludes liability claims related to any "actual, alleged or threatened discharge, dispersal, release or escape of pollutants," with pollutants defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

The Illinois Court faced a situation where the claim was against an insured landlord for failure to properly maintain a building furnace which emitted the CO fumes that caused the injuries resulting in the claim. Examining the background, history, and purpose of the exclusion, the *Koloms* Court determined that the exclusion -- despite its broad literal language -- was intended only to bar coverage for the traditional sort of waste discharge and diffuse contamination ordinarily thought of as pollution. Claims for the type of injuries traditionally arising from nonpolluting forms of insured negligence were not to be excluded. Hence, despite the linguistic breadth of the exclusion, the Illinois Court limited the reach of the exclusion in order to render a coverage determination the Court viewed as more consistent with the purpose of the Commercial General Liability (CGL) and the exclusion and the intent of the drafters. See *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 77.

Citing *Koloms*, the Massachusetts Court stated that the absolute pollution exclusion "should not be reflexively applied to accidents arising during the course of normal business activities simply because they involve a 'discharge, dispersal, release or escape' of an 'irritant or contaminant.'" *Western Alliance Insurance Co. v. Gill*, 686 N.E.2d 997, 999 (Mass. 1997). Following this analysis and confronted with a claim by a restaurant patron who suffered carbon monoxide poisoning as a result of poor ventilation at the restaurant,

the *Gill* Court found coverage not to be thwarted by the exclusion or the contaminant's role in bringing about the injury.