

Alaska Justices Asked For Pollution Exclusion Input

By **Ganesh Setty**

Law360 (September 6, 2023, 8:09 PM EDT) -- The Ninth Circuit asked the Alaska Supreme Court on Wednesday to consider whether claims arising from carbon monoxide exposure fall within the scope of a homeowners policy's total pollution exclusion, noting courts applying the laws of various states have provided conflicting answers.

The **certified question** stems from a coverage dispute between USAA unit Garrison Property and Casualty Insurance Co. and the parents of Josiah Wheeler, 17, who died from acute carbon monoxide poisoning while renting a cabin owned by Garrison's insureds, Deborah Overly and Terry Summers.

"If the exclusion applies only to active industrial polluters or traditional environmental pollution, then there would be coverage in this case," Chief Circuit Judge Mary H. Murguia wrote for the appeals court Wednesday. "In contrast, if the plain language unambiguously encompasses carbon monoxide exhaust from a residential water heater, coverage might be precluded unless that result contravenes the reasonable expectations of the insured."

According to Wednesday's certification order and previous court filings, Wheeler had rented the cabin from Overly and Summers starting in October 2018, but was found dead in the cabin's bathtub in January 2019. A subsequent investigation revealed that the cabin's water heater, installed in 2002, was not properly connected to vent the carbon monoxide it emitted outside. The cabin had generally been unoccupied before Wheeler moved in.

Wheeler's parents, Keith and Rhetta Wheeler, asserted wrongful death and survivorship claims against Overly and Summers, who ultimately admitted liability for Josiah's death in August 2020 and further assigned insurance rights to the Wheelers under their homeowners policy with Garrison.

Rejecting coverage, the insurer pointed to the policy's pollution exclusion, which barred coverage for bodily injury arising out of the release of pollutants "however caused and whenever occurring." It defined pollutants as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes ... chemicals and waste."

U.S. District Judge Sharon L. Gleason sided with Garrison's bid for summary judgment in May 2022, finding the pollution exclusion was applicable. Alaska courts interpret insurance policies in the way a layperson would reasonably expect coverage under a given policy's terms, and Overly and Summers should have reasonably expected that the broad definition of pollutants "plainly encompasses exhaust from a water heater," she said.

Courts applying Massachusetts, Illinois and Ohio law, for example, have held that carbon monoxide emissions do not fall within such an exclusion, while courts applying Minnesota, Iowa and Georgia law found the opposite, Judge Murguia highlighted Wednesday.

The Alaska Supreme Court has only issued a published decision analyzing the scope of a pollution exclusion once before, in the 2008 case [Whittier Properties Inc. v. Alaska National Insurance Co.](#), which concerned gasoline leak claims and a commercial general liability. Judge Gleason found the case applicable to the carbon monoxide coverage question.

In Whittier, the Alaska justices considered whether gasoline that leaked from a broken pipe of an underground storage tank qualified as a "pollutant" within a pollution exclusion that defined the term in a nearly identical fashion to how it was defined in the Garrison policy. The court ultimately found that the exclusion unambiguously considered gasoline as a pollutant, though gasoline was considered

a "product" in other parts of Whittier's policy, "when the gasoline escapes or reaches a location where it is no longer a useful product it is fairly considered a pollutant."

"Likewise, when carbon monoxide escapes an appliance or reaches a location where it is harmful, such as accumulating inside a home, it is fairly considered a pollutant," Garrison argued in its opening appellate brief, filed in January.

For their part, the Wheelers countered that the "logical but unfathomable conclusion under Judge Gleason's ruling is that the insureds should expect not just carbon monoxide deaths, but all inhalation fire deaths to be excluded under the pollution exclusion."

"Pollution exclusion cases tend to set the rule for the specific pollutant at issue, and Alaska has not considered this exclusion in the residential context or in any case involving a nonindustrial pollutant that caused no environmental harm," Judge Murguia further noted Wednesday.

Kenneth Covell, an attorney for the Wheelers, told Law360, "We are very pleased [the court] certified the question, and look forward to further briefing with the Alaska Supreme Court."

Representatives of Garrison did not immediately respond to requests for comment."

The Wheelers are represented by Kenneth L. Covell of the Law Office of Ken Covell.

Garrison is represented by Cheryl L. Graves of Farley & Graves PC.

The case is *The Estate of Josiah Wheeler et al. v. Garrison Property and Casualty Insurance Co.*, case number 22-35484, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Leah Bennett.