

# Client Alert

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## **General Liability Policy's Absolute Pollution Exclusion and Indoor Air Quality Exclusion Are Ambiguous as to Indoor Carbon Monoxide Leak**

On May 29, 2014, the Supreme Court of Nevada held in *Century Surety Company v. Casino West, Inc.*, No. 60622 (Nev. May 29, 2014), that a general liability policy's absolute pollution exclusion and an indoor air quality exclusion are ambiguous and do not bar coverage for claims arising out of an indoor carbon monoxide leak.

### **Background**

The underlying litigation involved claims arising from the death of four hotel guests after carbon monoxide leaked from a pool heater located directly below the victims' hotel room. Casino West, the hotel operator, sought coverage for the deaths from its liability insurer, Century Surety Company ("Century"). Century denied the claims, alleging that two policy exclusions – the absolute pollution exclusion and indoor air quality exclusion – barred coverage.

After denying coverage, Century brought a declaratory judgment action in federal court. Casino West counterclaimed and Century moved for summary judgment. Finding the exclusions ambiguous, the district court denied Century's summary judgment motion. On appeal, the Ninth Circuit Court of Appeals certified to the Supreme Court of Nevada questions of whether the so-called absolute pollution exclusion or the indoor air quality exclusion preclude coverage for claims arising from indoor exposure to carbon monoxide.

### **Holding**

The Supreme Court of Nevada held that neither the absolute pollution exclusion nor the indoor air quality exclusion precluded coverage for the carbon monoxide claims because both were ambiguous and thus would be interpreted in favor of Casino West.

Century argued that carbon monoxide was a "pollutant" within the policy's broad definition of that term, which included "any solid, liquid, gaseous or thermal irritant or contaminant." Century further contended that a building-heater exception contained in the exclusion, which carved out from the exclusion coverage for bodily injury resulting from equipment used to heat the building, demonstrates an intent that the pollution exclusion apply to both indoor and outdoor pollution. As Century argued, if the exclusion applied only to traditional environmental pollution, the building-heater exception would be unnecessary, as harm from a building's heating system would not fall within the absolute pollution exclusion at all. Casino West argued, on the other hand, that the plain language of the pollution exclusion, which contains environmental terms of art that do not encompass substances like indoor carbon monoxide, makes clear that the exclusion was designed to apply only to traditional environmental pollution.

The court agreed with Casino West, finding that the broad construction urged by Century was not consistent with the insured's reasonable expectations, as set based on the plain language of the policy. As the court explained, if "pollutant" was intended to encompass more than traditional environmental pollution, the term could be applied to include ordinary items like soap, shampoo, rubbing alcohol and

bleach, since each can be considered to be a contaminant or irritant. The court also looked to the exclusion's original intent and its drafting history before reaching the conclusion that more than one reasonable interpretation applied.

The court also found the policy's indoor air quality exclusion to be ambiguous. Century argued that the exclusion applied to any bodily injury resulting from exposure to hazardous air quality. Century argued that the parties intended for the exclusion to have broad application, as illustrated by the parties' use of language stating that the exclusion would apply to bodily injury from exposure to hazardous air "regardless of cause." Casino West argued, in contrast, that such an unlimited application could stretch far beyond any policyholder's reasonable expectations and lead to absurd results. The court agreed with Casino West and held that the exclusion applies only to inherent and continuous air quality issues. The court therefore found the indoor air quality exclusion also to be ambiguous.

### **Implications**

*Casino West* confirms that policy exclusions must be narrowly tailored to achieve their particular purpose. Where they are overly broad, or drafted in a manner that permits application beyond reasonable limits or the policyholder's reasonable expectations, courts will find the exclusion to be ambiguous. Pollution exclusions were developed to limit insurers' exposure from large-scale environmental pollution. Insurers now often seek to apply these targeted exclusions broadly to events well beyond the scope of traditional pollution events. *Casino West* illustrates such an attempt. As in *Casino West*, policyholders therefore must remain vigilant of insurers' attempts to over-apply policy exclusions and, where appropriate, challenge insurers based on the exclusion's plain language, original intent and their own reasonable expectations of coverage.

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