

that action could not be a defense to the insurance company's liability if and when a subsequent suit was filed. Under *White*, the dismissal of a suit constituted a wiping of the slate—the duty of the insured to give notice of a suit is essentially reset. Yet, if the insured failed to timely notify the insurance company of a subsequent suit, and notice was a condition precedent to recovery, the insurance company did not need to show prejudice to be relieved of liability. // Holt

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## Liability Insurance/Pollution

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**CGL Policy's Pollution Exclusion Bars Coverage for Injurious Gasoline Leak from Service Station, and Additional Coverage for Products-Completed Operation Hazards in Umbrella Policy Does Not Cover Leak**

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### *Indiana Law Applied*

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*West Bend Mutual Insurance Company v. United States Fidelity and Guaranty Company, et al*, 598 F.3d 918 (7th Cir. 2010)

#### Case at a Glance

The Indiana Supreme Court's decision in *American States Insurance Company v. Kiger*, 662 N.E.2d. 945 (Ind. 1996), holding that the standard form pollution exclusion in a CGL policy does not preclude coverage for gasoline leaks from a gas station, did not control when a gas station's policy's pollution exclusion clearly applied to motor fuels, which were defined to include gasoline, and an "Indiana Changes Endorsement" made the pollution exclusion applicable whether or not the contaminant at issue had any function in the insured's business. Although the policy's broad pollution exclusion did not apply to an umbrella policy's products-completed operations (PCOH) coverage, no duty to defend arose under that coverage. PCOH coverage applies only to injury or damage arising from knowingly completed market transactions and abandoned product, and thus did not cover accidental leakage of gasoline from insured's storage tanks.

#### Summary of Decision

MDK owned a gasoline station in Indiana. It owned the business from 1980, or before, until 1998, when it sold the business. MDK discovered and reported gas leaking from its underground storage tank in 1996, and over the next 12 years it did various things to monitor and retard or prevent leakage.

In 2002, some families that lived near the station initiated a class action. They alleged that the gasoline MDK's station had leaked into the groundwater and migrated beneath a nearby neighborhood, causing personal injuries and property damage.

Between 1990 and 2003, MDK purchased liability insurance from, among others, West Bend Mutual Insurance Company and Federated Mutual Insurance Company. West Bend agreed to defend, subject to a reservation of rights, but Federated refused. Eventually, West Bend paid \$4 million to settle the class action.

West Bend then sued Federated, which had insured MDK under a CGL policy and under an umbrella policy. In addition to excess coverage, the umbrella policy provided PCOH coverage that was not provided in the CGL policy and which, significantly, was not subject to the pollution exclusion in the CGL policy. The dispute centered on whether the CGL policy's pollution exclusion relieved Federated of a duty to defend and indemnify in the underlying litigation and whether the umbrella policy's PCOH coverage gave rise to such a duty. The district court, applying Indiana law, granted summary judgment to the defendant insurers, but did not take up the PCOH matter, and West Bend appealed. The court of appeals affirmed, took up the PCOH matter, and decided it in favor of the defendant-appellee insurers. There was a dissent as to the PCOH clause decision and reasoning.

*The Federated CGL Policy.* The Federated CGL policy's pollution exclusion did not, itself, contain the word "gasoline," or the word "gas." However, it did include "motor fuels" in its list of pollution perils, and that phrase is defined elsewhere in the policy to be "a petroleum substance that is typically used in the operation of a motor or engine, including but not restricted to gasoline. . . ." The Indiana Supreme Court had addressed the applicability of pollution exclusions in garage policies issued to service stations directly in *American States Insurance Company v. Kiger*, 662 N.E.2d. 945, 949 (Ind. 1996). There, the

Indiana high court observed, "If a garage policy is intended to exclude coverage for damages by the leakage of gasoline, the language of the contract must be explicit." The reasoning in *Kiger* was that gasoline was not always a pollutant, and that it became a pollutant only when it leaked off the service station itself. This, reasoned the court, rendered the term ambiguous as to whether it was a pollutant, and so it was in need of classification (say, by definition) within the policy.

The question thus became this: Is *Kiger's* explicitness requirement met if the term "motor fuels" is included within a list of pollutants, and that term is defined elsewhere in the policy, e.g., in a definition section. West Bend, of course, said "No!" while Federated said "Yes!" In agreeing with Federated, the court observed that two rules of interpretation are particularly relevant: (1) in order to understand an insurance policy, it is necessary to interpret the whole thing, all at once, and not just one part of the policy, and (2) an insured is presumed to know the entirety of what is contained within its policy. Once these two principles were accepted, the answer "Yes" was obvious, and the district court decision was affirmed.

*The Federated Umbrella Policy.* The court then turned to the PCOH coverage clauses in the umbrella policy. The version of the PCOH coverage clause at issue worked like this. The terms "you" and "your" refer to the insured, and PCOH clause covers all "bodily injury" and "property damage" occurring away from premises you own, rent or occupy arising out of "your product" or "your work" subject to two exceptions. First, the products must not still be in the possession of the insured, or second, the work must not be incomplete or abandoned. The Umbrella policy defines "your product" to mean, among other things, "any goods or products, other than real property, manufactured, sold, handled, distributed, or disposed of by you[.]"

The only relevant Indiana authority interpreting a PCOH clause was the case of *B & R Farm Services Inc. v. Farm Bureau Mutual Insurance Company*, 483 N.E.2d 1076 (Ind. 1985). It focused on an exclusionary use of the PCOH clause, and it excluded coverage only for product which had been "relinquished" to others. Thus, the *B & R Farm Services* court said, "We deem the act of relinquishment to be one which necessarily involves volition, not something which occurs

accidentally or involuntarily." (Notice that completely finished goods, already sold, on the loading dock, ready to be shipped, which are stolen, and then sold, would not be covered, even if they were defective, and would be covered if they had been shipped pursuant to sale.)

The majority of the Tenth Circuit panel characterized the decision in *R & B Farm Services* as "informative," even though the word "relinquish" was not present in the Federated policy's version of the PCOH-coverage clause, nor was any other word obviously entailing or requiring an act of volition. Thus, it determined that "the Federated products-hazard clause covered only knowingly completed market transactions and abandoned product." Consequently, there was no coverage under the Federated policy in this case because the gasoline which leaked had not been sold or deliberately given away.

*Dissent.* The decision of the panel was 2 to 1. The dissenting circuit judge agreed with the majority regarding the pollution exclusion but rejected their decision regarding PCOH-coverage. Three avenues supporting the dissent are developed. First, the dissent reasoned from the plain meaning of the definition of "your product" and concluded that there was coverage. The crucial step is that the gasoline which leaked was MDK's "product." In addition, and second, she reasoned that the *R & B* case depended upon the presence of the word "relinquish," and that word was not present in the wording of the Federated policy anywhere. Consequently, she observed that the *R & B* case cannot be a "definitive statement of Indiana insurance law about the proper interpretation of product-hazard coverage in CGL policies as a general matter. The court's opinion was very brief and its holding was underreasoned." Third, and finally, there is a distinction between how to think about exclusions and grants of coverage. There is a good deal of case-controversy, as well as textbook-level writing about PCOH controversies, but almost all of it concerns PCOH as an exclusion. The doctrines developed there should not be automatically applied to the PCOH clause when it is used as a grant of coverage.

In short, says the dissenting judge, "because *R & B Farm Services* is distinguishable, I would not apply its 'placement in the stream in the stream of commerce' gloss here." At the same time, said the judge, there was conflicting evidence about what

MDK knew about the occurrence of the escape of the gasoline. These are triable issues. For this reason, she would have remanded for resolution of these questions.

### Comment

The circuit judge is essentially correct in her conclusion. There are more reasons to support her view. It may very well be true that the “already in the stream of commerce” requirement once made sense as a component of the PCOH-coverage clause and even the PCOH-exclusion clause. The main purpose of that clause, once upon a time, was to deal with products liability torts, especially when those independent torts first began to exist and to be extensively utilized. PCOH-coverage clauses, for example, were willingly added on to some policies by some insurers for an extra premium which was often quite hefty. What has to be remembered, however, is that PCOH-coverage clauses are used for many sorts of purposes now, so its original purposes should no longer be taken as binding as to meaning, especially since the wording of the clause has changed significantly, even by the elimination of a single word.

This is especially true since the fundamental rule of contract interpretation is that contracts are to be understood in terms of their own language understood in terms of its plain meaning. There is absolutely no reason to believe that a gas station has a product only once it is sold. Even if this were true, the term “your product” is defined to include the term “good,” so the gasoline not yet sold would be included in the definition of “your product,” even if that which falls within the word “product” just by itself did not. Thus the phrase “your product” is ambiguous, but the ambiguity is resolved within the policy itself—indeed, within a few lines. // Quinn

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## Procedure/Class Actions

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### Class Action Permitted Against Insurer That Denied Coverage of Services for Autism

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#### *Suit Alleged Violation of Unfair Competition Act and Mental Health Parity Act*

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*Arce v. Kaiser Foundation Health Plan, Inc.*, 181 Cal.App.4th 471, 104 Cal.Rptr.3d 545 (2010)

#### Case at a Glance

A class of autistic patients may proceed with a class action against a health insurer accused of improperly denying coverage for behavioral and speech therapy services.

#### Summary of Decision

Plaintiff brought a class action alleging that his health plan improperly denied coverage for behavioral and speech therapy for plan members suffering from autism. The suit alleged that the insurer breached its health insurance contract and violated the Unfair Competition Act [Bus. & Prof. Code §§ 72000 et seq.] by engaging in an unlawful and unfair business practice. The insurer was accused of violating the Mental Health Parity Act [Health & Safety Code § 1374.72], which requires health insurance plans to cover medically necessary treatment of severe mental illness under the same terms as other medical conditions. Plaintiff’s health insurance plan covered “health care services” and excluded “custodial care,” which was defined to include care that could be rendered by persons with no medical license or certificate. The insurer refused to cover behavioral and speech therapy for plaintiff on the grounds that these services were educational in nature and did not constitute “health care,” and that the services fell within the health plan’s exclusion for “custodial care” that could be provided without a medical license. The suit sought injunctive and declaratory relief on behalf of plaintiff and other members of the same health plan who had been