

INSURANCE  
COVERAGE &  
REGULATION

Anthony J. Piazza  
585.295.4420  
[apiazza@hblaw.com](mailto:apiazza@hblaw.com)

Gary H. Abelson  
David B. Cabaniss  
John R. Casey  
William C. Foster  
Alexandra Maloney  
Dennis R. McCoy  
Thomas J. O'Connor  
Judith M. Sayles  
Mark T. Whitford  
Joseph A. Wilson

## Appellate Court Finds Contamination Exclusion Ambiguous

Plaintiffs' home was allegedly damaged when approximately 75 gallons of a chemical mixture were released into the atmosphere from a nearby chemical plant. Plaintiffs, Francis Trupo and Anita Trupo, (the Trupos) brought suit seeking a determination that the defendant, Preferred Mutual Insurance Company (Preferred Mutual) was obligated to provide coverage for the damage to their home and personal property under a policy issued to them by defendant. Supreme Court denied defendant's motion for summary judgment dismissing the complaint, and granted, in part, plaintiffs' cross-motion for summary judgment determining that the insurance policy covered the damages caused by or arising from the loss.

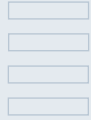
On appeal, the Appellate Division, Fourth Department, affirmed. *Trupo v Preferred Mutual Insurance Company*, 2009 N.Y. A.D. Lexis 942. The Court found that the policy covered "direct physical loss" caused by certain perils, including explosion. The Court further found that the incident at the chemical plant constituted an explosion under the policy, and resulted in the contamination of the plaintiffs' home. The Court held that the exclusion relied upon by defendant, entitled "Wear and Tear," did not apply to the loss. The exclusion provided that defendant would "not pay for loss which results from wear and tear, marring, deterioration, inherent vice, latent defect, mechanical breakdown, rust, wet or dry rot, corrosion, mold, contamination or smog\*\*\*."

The Appellate Court rejected Preferred Mutual's contention that the exclusion eliminated any coverage for damages arising from the explosion, finding that the "exclusion in question is ambiguous, and thus, should be construed in favor of plaintiffs, the insureds\*\*\*. The title 'Wear and Tear' would lead an average person to believe that the exclusion for 'contamination' therein included only contamination that occurred over time, rather than a sudden occurrence such as the incident here."

Two justices dissented. They agreed that the incident at the chemical plant did constitute an explosion under the policy, and that the contamination of plaintiffs' home was caused by that explosion. However, the dissenters argued that the plaintiffs suffered a loss from contamination, and the policy specifically excluded such loss. The dissenting justices noted that "[i]nasmuch as the language in the exclusion is unambiguous and does not limit the exclusion to contamination that occurs over time, we decline to add such limiting language."

This Court's interpretation severely restricts the application of the exclusion for contamination contained in the standard "Wear and Tear" exclusion, to damage which occurs over time as opposed to a sudden event.

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## Appellate Division Construes Liability Exclusions for “Spray Painting Operations” and “Work Product”

James and Joan Catlett hired Ryan Bennett and Robert Pesano to apply a protective sealant to the cedar wood siding of their home. The home was damaged by fire allegedly resulting from spontaneous combustion of chemicals in the sealant that had collected on drop cloths utilized by Bennett and Pesano.

Central Mutual Insurance Company, which insured the Catletts under a homeowner’s policy, made payment to the Catletts for the damage to their home and contents, and commenced a subrogation action against Bennett and Pesano to recover the monies paid to the Catletts.

Nova Casualty Company (Nova) had issued a commercial liability insurance policy to Bennett at the time of the fire. Nova agreed to defend Bennett in the subrogation action, but also disclaimed coverage based upon exclusions contained in its liability policy. Nova thereafter commenced an action against Central Mutual, the Catletts, Bennett and Pesano seeking a declaration that it was not obligated to defend or indemnify Bennett in the subrogation action based upon exclusions in its policy for spray painting and work product.

Supreme Court ruled that the exclusions in the policy did not apply, and granted a motion by Central Mutual for summary judgment dismissing the declaratory judgment complaint, and declared that Nova was obligated to defend and indemnify Bennett in the subrogation action. Nova appealed. On appeal, the Appellate Division affirmed the order of the lower court. *Nova Casualty Company v Central Mutual Insurance Company, et al.*, Third Department, 872 N.Y.S. 2d 603 (3rd Dep’t 2009).

Nova argued that the policy excluded any “bodily injury and property damage arising out of [s]pray [p]ainting [o]perations.” The Court rejected this argument, pointing out that the term “spray painting operations” was not defined in the policy, nor “is it specifically stated that such an operation includes the application of sealant or other nontraditional paint materials. Here, the uncontroverted testimony established that Bennett and Pesano were not using a paint; instead, they were applying a product called Cabot Clear Solution. Given that sealants, as opposed to paints, were not covered by the express wording of the exclusion, this clause, as it is applied to these facts, is, at best, ambiguous, and the existence of such an ambiguity serves to bar its application to the facts as presented by this claim\*\*\*.”

In addition, both Bennett and Pesano testified that they did not just spray the sealant onto the siding of the home but also used brushes as well. Thus, the Court refused to apply the exclusion since the record did not support a finding that the fire resulted from sealant that was sprayed onto the siding of the house as opposed to sealant that might have been applied with a brush. To accept Nova’s broad interpretation of the spray painting exclusion, would have resulted in there being no coverage under the policy, a result which would have been at odds with the insured’s “reasonable expectations as a business person seeking insurance coverage for injuries resulting from the operation of his [painting] business\*\*\*.”

Nova also argued that its policy exclusion for any damage “to that specific part of real property on which work is being performed... if the ‘property damage’ arises out of such work,” commonly referred to as a “work product exclusion” applied. The Court rejected this argument stating:

This exclusion is clearly not intended to exempt from coverage under a general commercial liability policy the physical damage caused by the negligence of an insured; instead, it was designed to apply to those situations where coverage is sought ‘for contractual liability of the insured for economic loss because the product or completed work is not what the damaged person bargained for’\*\*\*.

This case stands for the proposition that a spray painting operations exclusion will be strictly construed by the Court, and any ambiguity in its meaning as applied to the facts of a claim will result in the exclusion being rejected. Further, the work product exclusion will not apply to a claim that property damage was caused by negligence of the insured in the performance of operations on the property, but only to a claim for economic loss arising from the alleged failure of the contractor to perform work in accordance with the contract. ■

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