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CASENOTE

**PAINTING A HISTORICAL PICTURE OF POLLUTION EXCLUSION CLAUSES:
COURTS SHOULD ENFORCE CLAUSES AS WRITTEN**

*Hartford Underwriter's Insurance Co. v. Estate of Turks*¹

I. INTRODUCTION

Whether a court will enforce a pollution exclusion clause in an insurance policy as written has not been an easy question to answer. During the past few years pollution exclusion clauses have been highly litigated. However, even in cases with seemingly similar facts, courts frequently have reached different results in their decisions. Some courts look to the plain meaning of the terms of the clause for guidance. Others speculate at the intent of the drafter by reading into the clause additional limiting terms and applying the clause only to 'traditional' environmental pollutants. Until recently, Missouri's courts had not had an opportunity to consider specifically whether an insurer is responsible to indemnify its insured for injury caused by exposure to lead paint. When the District Court for the Eastern District of Missouri had the occasion to confront this issue, it followed the plain meaning rule, by holding that injury resulting from exposure to lead paint fell within the scope of the pollution exclusion clause. Thus, the insurer was responsible neither for defending nor indemnifying its insured.

II. FACTS AND HOLDING

Through guardian Shanthia Swift, Tony Stewart filed suit for damages to compensate for physical injuries allegedly sustained while living in a building under defendant Bettie Lee Turks' immediate control.² Stewart asserted that he suffered from lead poisoning on due to Ms. Turks' failure to inspect the grounds for lead, failure to warn about the possible danger of lead paint, failure to eliminate or make the premises safe from lead paint, and also claimed that Ms. Turks did not exercise reasonable care in maintaining a premises safe for human habitation.³ Tony Stewart alleged that he suffered both cognitive and physical injuries because of his exposure to lead paint, for which he sought to hold Ms. Turks responsible.⁴

Hartford Underwriter's Insurance Co. ("Hartford") was the plaintiff in the instant decision.⁵ Hartford asked the court to declare that it was not required to defend or subsidize Turks for the lawsuit that Tony Stewart had filed against her.⁶ Relying on the insurance policy between Hartford and Turks that explicitly excused Hartford from responsibility for any injuries resulting from a "pollutant,"⁷ Hartford denied liability. The policy contained a clause excluding, in pertinent part,

¹ *Hartford Underwriter's Ins. Co. v. Turks*, 206 F. Supp. 2d 968 (E.D. Mo. 2002).

² *Id.* at 972.

³ *Id.* at 973.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

damages or personal injuries “[a]rising out of the discharge, dispersal, seepage, migration, release, or escape” of pollutants, and specifically designated lead paint as a pollutant.⁸

Hartford argued that its policy was clear and unambiguous, and that lead paint was specifically listed as a pollutant under its policy.⁹ Additionally, Hartford contended that the injuries complained of by Stewart arose from a means excluded from coverage by the policy.¹⁰ Tony Stewart’s suit suggested that he was injured by lead paint on the walls of the premises controlled by Ms. Turks.¹¹ Hartford argued that the lead paint had to have moved from its intended place on the walls in order to have come into contact with Mr. Stewart’s person and cause his ailments.¹²

In response, Ms. Turks’ estate (“defendant”) denied that the policy was unambiguous in providing an exclusion for injuries arising out of the insured’s negligence, and that a reasonable person would not interpret the policy to exclude liability for injuries caused by chippings of lead paint.¹³ Specifically, defendant contended that the average insured reading the policy would understand that the policy excluded for injuries caused by outside environmental pollutants, and not the chipping off of lead paint, as in the present situation.¹⁴ Finally, defendant argued that even if the pollution exclusion would have been relevant based on the facts, it would not apply in this case due to the exception for “falling objects.”¹⁵ This exception held Hartford liable for injuries resulting from “falling objects.”¹⁶ So the defendant contended that, for the purpose of this section, lead paint chips constituted “falling objects.”¹⁷

The court stated that the issue in the current case was whether Tony Stewart’s injuries were the result of the lead paint harming him in one of the prescribed manners in which the insurance policy excluded Hartford from liability.¹⁸ Therefore, the court reasoned that it was necessary to define the terms, “discharge, dispersal, seepage, and migration,” in order to determine whether the lead in the paint had come into contact with Tony Stewart’s person through one of the described means, causing him cognitive and physical harm.¹⁹ Generally, the court decided that each of the four terms referred to a substance moving from a confined place to an unconfined place.²⁰

Missouri’s courts had never directly ruled on the issue involved in the instant case, so the court considered decisions from other jurisdictions.²¹ The majority of jurisdictions had held that “lead-based paint [was] covered by pollution exclusions in insurance policies similar to the present policy.”²² In examining these decisions, the court found that Hartford was not required to defend nor

⁸ *Id.* at 972.

⁹ *Id.* at 973.

¹⁰ *Id.* Hartford suggests that the terms discharge, dispersal, seepage, etc. should be given their normal meanings, which it claims means something moving from one location to another. *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 974.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 971.

¹⁷ *Id.* at 974.

¹⁸ *Id.* at 976.

¹⁹ *Id.* The court consulted standard English dictionaries to decipher the terms. It found that in the ordinary course of usage, discharge meant “to pour fourth contents;” dispersal meant “to break up and scatter in various” directions; escape meant “to get free;” and migration’ meant to “change location periodically.” *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 977.

indemnify the defendant for Mr. Stewart's injuries.²³ In addition, the court found that although the defendant had the burden of proving that flaking paint chips constituted a falling object, she had failed to do so.²⁴ Finally, the defendant's attempt to convince the court that the pollution exclusion should only be applicable to traditional environmental pollutants, and not lead-based paint, was denied.²⁵ Accordingly, the court held that the insurance policy was unambiguous, and that the chipping of lead-based paint occurred in one of the specified manners that would relieve Hartford from liability for Mr. Stewart's injuries under the pollution exception.²⁶

III. LEGAL BACKGROUND

Over the past few decades, there has been an almost exponential increase in cases in which insurers have sought indemnification from their insurers for damage or injury to a third party caused by pollution. Consequently, insurers have responded to this "new breed of lawsuit" by attempting to limit their personal liability in these often costly "pollution related losses."²⁷ These conditions set the stage for the advent of the pollution exclusion clause, which has become standard boilerplate in insurance policies since 1970.²⁸

While the pollution exclusion clause was intended to limit the types of damages insurers are responsible for indemnifying, the history of judicial interpretation of pollution exclusion clauses demonstrates that courts disagree as to what constitutes a pollutant. On one hand, some courts enforce pollution exclusion clauses exactly as they are written. However, other courts sometimes opt to forego the plain meaning of the terms provided in the clause and only apply the exclusion to "traditional" environmental pollutants. Missouri's courts, similar to courts in most other jurisdictions, have produced decisions that represent both approaches.

Although a Missouri court has never specifically considered whether lead paint is a pollutant for the purposes of a pollution exclusion clause, the Missouri Court of Appeals for the Eastern District has held that "pollutant" is not limited to traditional environmental pollutants.²⁹ In *Cincinnati Ins. Co. v. German St. Vincent Orphan Assn., Inc.*, the Court of Appeals interpreted an insurer's pollution exclusion clause to include friable asbestos as a pollutant, and refused to read 'environmental' into the exclusory clause.³⁰ Thus, in this instance the plain meaning of the exclusory clause prevailed over what the insured believed to be the intended result. Similarly, in *Boulevard Inv. Co. v. Capitol Indem. Corp.*, the same court held that grease and other kitchen waste, although not considered traditional, were pollutants under the insurance policy.³¹ In that case, the Court of Appeals described the issue as one of first impression.³² Ultimately, the Court of Appeals

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ E. Joshua Rosenkranz, *The Pollution Exclusion Clause Through the Looking Glass*, 74 Geo. L.J. 1237, 1239 (1986).

²⁸ *Id.*

²⁹ *Cincinnati Ins. Co. v. German St. Vincent Orphan Assn., Inc.*, 54 S.W.3d 661, 666 (Mo. App. E.D. 2001).

³⁰ *Id.* at 666.

³¹ *Boulevard Inv. Co. v. Capitol Indem. Corp.*, 27 S.W.3d 856, 858 (Mo. App. E.D. 2000).

³² *Id.*

included the materials in question by relying on the definition of the term “waste” in Webster’s dictionary.³³

Missouri is not the only state to accept a broadened definition of pollutant that includes more than the traditional environmental pollutants. The Pennsylvania Supreme Court ruled that a pollution exclusion barred recovery for injury resulting from exposure to fumes from a concrete floor sealer.³⁴ Also, a Sixth Circuit Court applying Ohio law decided that recovery for injury due to exposure to liquid chlorine was barred by the pollution exclusion clause in issue.³⁵ Finally, the Louisiana Supreme Court refused to require an insurer to indemnify the insured for bodily injuries sustained by a third party resulting from exposure to anhydrous ammonia when a tractor blade hit a pipeline.³⁶ In so ruling, the court upheld the plain language of the exclusion clause, saying, “[a]s a court, we cannot place limitations on the plain language of a policy exclusion simply because we may think it should have been written that way.”³⁷

While the preceding examples demonstrate courts’ reluctance to read “environmental” into the plain meaning of pollution exclusion cases, on occasion, courts have held to the contrary. In one particular case, an insurer brought suit against the insured for a declaration that it did not have to indemnify the insured in a case brought by the insured’s tenant for bodily injuries arising from carbon monoxide fumes emitted from the tenant’s furnace.³⁸ The Illinois Supreme Court rejected the literal interpretation of the pollution exclusion at issue because it worried that accepting the interpretation would cause an unintended extension of the clause.³⁹ In looking at the history behind pollution exclusions, the Illinois Supreme Court determined that the underlying purpose of a pollution exclusion was to protect insurers from “enormous expense and exposure resulting from the ‘explosion’ of *environmental* litigation.”⁴⁰ Thus, because of the conflicting court decisions, the question of whether “pollutant” is strictly defined as to only include traditional environmental contaminants is seemingly unanswered.

As to the specific issue of whether lead paint constitutes a pollutant for the purpose of enforcing a pollution clause, the courts have also produced mixed decisions. Courts that have applied the absolute pollution exclusion to bar coverage for injury or damage arising from lead paint often emphasize the unambiguous nature of the pollution exclusion. In one case, a contractor contaminated the surrounding soil with paint chips containing lead⁴¹ in the process of stripping and painting two buildings. The First Circuit ruled that a reasonable person would necessarily understand that lead paint chips were a “solid contaminant” and “toxic waste,” which fell within the pollution exclusion clause.⁴² Thus, the court denied indemnification to the insured, holding that the

³³ *Id.*

³⁴ *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 107-09 (Pa. 1999).

³⁵ *United States Fidelity & Guar. Co. v. Jones Chem., Inc.*, 194 F.3d 1315 (Table), 1999 WL 801589 (6th Cir. Sept. 27, 1999).

³⁶ *Ducote v. Koch Pipeline Co.*, 730 So.2d 432, 436 (La. 1999), *overruled*, *Doerr v. Mobil Oil Corp.*, 774 So.2d 119 (La. 1999).

³⁷ *Id.*

³⁸ *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 74 (Ill. 1997).

³⁹ *Id.* at 79. “Like many courts, we are troubled by what we perceive to be an overbreadth in the language of the exclusion as well as the manifestation of an ambiguity which results when the exclusion is applied to cases which have nothing to do with ‘pollution’ in the conventional, or ordinary, sense of the word.” *Id.*

⁴⁰ *Weaver v. Royal Ins. Co. of Am.*, 140 N.H. 780, 783 (1996), quoting *Vantage Dev. Corp. v. Am. Envtl. Techs. Corp.*, 598 A.2d 948 (N.J. Super. L. Div. 1991).

⁴¹ *U.S. Liab. Ins. Co. v. Bourbeau*, 49 F.3d 786, 787 (1st Cir. 1995).

⁴² *Id.* at 788.

discharge of lead paint onto property was a “classic” example of pollution against which the clause was designed to protect.⁴³

A Minnesota Court of Appeals, analyzing facts similar to the instant decision, also decided that a clause absolutely denying coverage for certain pollutants excluded coverage for injury caused by exposure to lead paint.⁴⁴ In that case an infant tenant was harmed while allegedly consuming lead-based paint chips that had flaked off a windowsill in the premises.⁴⁵ A clause in the insurance policy contained an exclusion for injuries resulting from “discharge, release, escape, seepage, migration or dispersal of pollutants,” and stated that for the purpose of exclusion, a pollutant was “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gases and waste.”⁴⁶ Because of its irritation effect on the human body, the Court of Appeals upheld the trial court’s decision.⁴⁷ In addition, it agreed that the bodily harm to the infant occurred when the paint chips flaked, and that flaking was a discharge, release, or migration.⁴⁸

In *Peace v. Northwestern Nat’l Ins. Co.*,⁴⁹ another tenant who had ingested lead paint from landlord’s premises brought suit for injuries sustained due to exposure to lead.⁵⁰ The Wisconsin Supreme Court upheld the decision that the plain meaning of the exclusion clause covered the release of lead from the paint in the ceiling and walls of the apartment building.⁵¹ It reasoned that because lead paint does not cause harm unless it moves from its original position, that is from walls or the ceiling, the paint must have flaked off for the lead to cause the tenant bodily harm.⁵² These are just two cases among many that deny insureds indemnification for injuries arising from contact with lead paint.⁵³

While the prior illustrative cases demonstrate how absolute exclusion clauses have been construed to bar recovery for damage caused by exposure or consumption of lead paint, a fair number of cases have held to the contrary. A common thread among these cases is that in most, the particular court regarded the pollution exclusion clause as ambiguous, and affirmed that lead paint was a pollutant contemplated under the exclusion. Recently, the New York Court of Appeals held that an insurer had no duty to indemnify insured when an insured’s tenant sustains bodily injury due to lead paint presence in the insured’s building.⁵⁴ In that case, the pollution exclusion clause did not *specifically* list lead paint as one of the excluded pollutants; consequently the court did not bar indemnification of the insured against the tenant.⁵⁵ Although the insurance contract’s exclusion

⁴³ *Id.* at 789.

⁴⁴ *Auto-Owners Ins. Co. v. Hanson*, 588 N.W.2d 777, 778 (Minn. App. 1999).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 596 N.W.2d 429 (Wis. 1999).

⁵⁰ *Id.* at 431.

⁵¹ *Id.* at 438.

⁵² *Id.* at 438-39 “Common sense tells us that lead paint that never leaves a wall or ceiling does not cause harm. Implicit in the Negligence Complaint . . . must be an allegation that the lead paint somehow separated from the wall or ceiling, and entered the air, or fell on the floor, furniture or fixtures in the apartment.” *Lefrak Org. Inc., v. Chubb Custom Ins. Co.*, 942 F. Supp 949, 954 (S.D.N.Y. 1996).

⁵³ See also *Shalimar Contractors, Inc. v. Am. States Ins. Co.*, 975 F. Supp. 1450, 1456-58 (M.D. Ala. 1997); *St. Leger v. Am. Fire & Cas. Ins. Co.*, 870 F. Supp. 641, 643-44 (E.D. Pa. 1994).

⁵⁴ *Westview Assoc. v. Guaranty Natl. Ins. Co.*, 740 N.E.2d 220, (N.Y. Ct. .App. 2000).

⁵⁵ *Id.* at 223.

clause barred recovery for injuries from “smoke, vapors, soot, fumes, acids, sound, alkalies, chemicals, liquids, solids, gases, thermal ‘Pollutants,’ and all other irritants and ‘Contaminants,’” the court declined to rule that lead paint fell into any of these categories.⁵⁶

The first decision handed down on the issue in New Jersey held that a pollution exclusion clause was ambiguous, thus allowing an insured indemnity in a suit brought by a child tenant for injury from ingesting lead paint chips at insured’s building.⁵⁷ The New Jersey Court of Appeals reasoned that the verdict hinged on “whether injury caused by the ingestion of the flaking and peeling of lead paint chips arises ‘out of the actual ... discharge, dispersal, seepage, migration, release, or escape of pollutants.’”⁵⁸ Unfortunately for the insurer, the court held that flaking paint chips did not qualify as one of these excluded-for actions. Similarly, in *Sullins v. Allstate Ins. Co.*⁵⁹ the Maryland Supreme Court ruled in favor of the insured, holding that a reasonable insured interpreting the exclusion clause would not think that lead paint would be a pollutant under the clause.⁶⁰ Thus, because the court believed that the terms were ambiguous, it construed them against their drafter; the insurer.⁶¹

IV. INSTANT DECISION

The case was heard in the District Court for the Eastern District of Missouri based upon diversity jurisdiction, and Missouri law was applied to the facts.⁶² Because insurance policies have been held to be contracts under Missouri law, the District Court treated the insurance policy as such and applied the principles of contract law in its interpretation.⁶³ Given that the District Court found that the issue was one of contract interpretation, it first looked to see if the insurance policy was unambiguous, reasoning that “where a term is defined in a policy and it is unambiguous. Missouri courts give effect to the definition in the policy and enforce it as written.”⁶⁴

In examining the language of the pollution exclusion clause in the insurance policy, the District Court determined that the term “lead paint” was not ambiguous because it was explicitly defined in the policy as a pollutant.⁶⁵ Because it found that lead paint was a pollutant under the policy, the District Court next examined how the lead paint injured Stewart, framing the issue as whether Stewart’s injuries arose out of the “discharge, dispersal, release, or escape” of pollutants.⁶⁶ Because the terms at issue were not defined specifically in the clause, the court, relying on Missouri case law, decided that the terms should be given their everyday dictionary meaning.⁶⁷ The court

⁵⁶ *Id.* “There is no language that demonstrates the drafter’s intent to incorporate lead paint into the pollution exclusion clauses. The insurer has not established that lead paint, in ‘clear and unmistakable language,’ is included in the pollution exclusion clause.” *Id.*

⁵⁷ *Byrd v. Blumenreich*, 722 A.2d 598, 602 (N.J. App. Div. 1999).

⁵⁸ *Id.* at 600.

⁵⁹ 667 A.2d 617 (Md. 1995).

⁶⁰ *Id.* at 620.

⁶¹ *Id.* at 624.

⁶² *Hartford*, 206 F. Supp. 2d at 974.

⁶³ *Id.*

⁶⁴ *Id.*, citing *State Farm Fire & Cas. Co. v. Berra*, 891 S.W.2d 150 (Mo. App. E.D. 1995).

⁶⁵ *Hartford*, 206 F. Supp. 2d at 975.

⁶⁶ *Id.* at 976.

⁶⁷ *Id.*

consulted a standard English dictionary and found that each word meant “some type of movement from one place to another, from a contained place to a free one.”⁶⁸

The court then determined whether there existed past Missouri decisions regarding whether an insurer was required to defend and or indemnify an insured if a third party was injured by lead paint on the premises.⁶⁹ The court stated that although generally a federal district court is bound by the decisions of the highest court in Missouri when interpreting Missouri law, the federal court can consult outside sources if the Supreme Court of Missouri has not ruled on the particular issue.⁷⁰ Because other Missouri courts had not considered this issue, the *Hartford* Court found persuasive the majority trend in other jurisdictions that have held that lead-based paint is covered under pollution exclusion clauses.⁷¹

While the defendant argued that pollution exclusion clauses should only be applied to ‘traditional’ pollutants, the court found this argument unconvincing, because past Missouri decisions have refused to read the word ‘environment’ into pollution exclusion clauses to limit the pollutants they contain.⁷² In addition, the court found similarly unpersuasive the defendant’s argument that the lead paint chips were ‘falling objects,’ and thus were covered in an exception to the pollution exclusion because the defendant did not support this position with any authority.⁷³ Ultimately, the court found that the chipping or flaking of the lead paint constituted a discharge, dispersal, release, or escape of a pollutant, and consequently granted the plaintiff’s motion for summary judgment, holding that plaintiff’s insurance policy excluded coverage for injuries arising out of exposure to lead paint.⁷⁴

V. COMMENT

Whether or not a court will consider a “nontraditional pollutant” as being covered under an insurer’s pollution exclusion is tantamount to a crapshoot. Courts in Missouri and in other jurisdictions still continue to reach seemingly conflicting decisions on the matter of whether an insurer’s pollution exclusion applies to various “non-traditional” pollutants, including, but not limited to, lead paint. Case law is mixed in almost all jurisdictions that have considered the issue, thus making it difficult for advocates to have confidence in the authority to support their positions, and making them leery of authority in opposition to their respective positions.

Lead paint is one classic example of a nontraditional pollutant, and cases arising over injuries sustained by exposure to lead paint are common. Therefore, a highly litigated issue currently is whether lead paint is considered a pollutant under an insurance contract’s pollution exclusion clause. If considered a pollutant, an insurer would have to indemnify or defend an insured for an action for bodily injury and property damage. If not, an insurer would be relieved from liability via the exclusion clause. Therefore, the meaning of ‘pollutant’ is of great interest and concern to insurers and insureds alike.

Courts regularly, and rightfully so, hold that a contract’s terms are given the same meaning as in their ordinary and everyday usage. Any first year law student could easily understand the

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 977.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

principle of using a word's 'plain meaning' when interpreting a contract. However, this is not always the case with insurance policies. For reasons unknown, when courts have an opportunity to interpret pollution exclusion clauses in insurance contracts, they forego the basic rules of contract interpretation and speculate as to the drafter's intent by introducing new terms into the contract. As a result, courts oftentimes produce mixed decisions even in cases with strikingly similar facts. Although the conflicting decisions are nevertheless unresolved, the main indicator of whether a court will find that an insurer is responsible to its insured is "whether the court recognizes and applies the plain meaning rule or, rather, adopts a technical meaning of words in the exclusion and reads into the policy an intent that is not expressly stated in its language."⁷⁵ Thus, it is usually in the cases where courts attempt to 'read into' insurance contracts terms that were never intended by their drafters that produce the most obscure results that baffle scholars and lawyers alike. Unfortunately, it often seems as if laymen using only common sense would be better suited for the interpretation task than our learned judges.

For example, lengthy decisions exist over *seemingly* obvious matters, such as, what it means for something to "discharge, disperse, release or escape."⁷⁶ When a court encounters a situation in which the terms are not defined in the contract, the correct and common sense approach is to define the words in accordance with their ordinary and popular meanings.⁷⁷ This position is supported by policy justifications, because it would pervert the intention of both the insurer and the insured if the terms of the contract to which they both had agreed were given meanings not in accord with the intent of the parties. If the parties signed a contract containing terms that would upon later consideration be construed differently than their expectations, could the parties have really assented to the contract terms at all?

In addition to not construing terms to have meanings different than their ordinary and plain meanings, it is both improper and outside a court's discretion to invent terms of a contract. For example, in the current case the defendant argued that the exclusion clause should be applied to only "traditional" types of environmental pollution.⁷⁸ However, the pollution exclusion clause made no mention that this was the meaning intended by the clause's drafter. If the court had accepted the defendant's argument, it would have created a term of the contract. It is not the court's role to rewrite a contract, but rather to interpret it as written. Thus, the court was correct in rejecting the defendant's argument, because a reasonable insured would not have read "environmental" into the clause, but understood the terms of the contract to be those as written.

In the current situation, the court's decision hinged on how Mr. Stewart's injuries arose, and whether they were the result of a 'discharge, dispersal, release, or escape' of lead paint. Unfortunately, it was unclear exactly how Mr. Stewart was injured by the lead paint.⁷⁹ Because lead paint is not harmful if it remains intact with the painted surface, such as a wall or ceiling, it follows necessarily that if Mr. Stewart was injured from lead paint in his apartment, then it would have had

⁷⁵ George C. Rockas et. al., *Recent Developments in Insurance Coverage Litigation*, 36 Tort & Ins. L. J. 411, 421 (2001). Most courts use the plain meaning rule and hold that the insurer is liable to indemnify its insured against property damage and bodily injury resulting from a pollutant. *Id.*

⁷⁶ *Hartford*, 206 F. Supp. 2d at 976.

⁷⁷ *Chenoweth-Chapman Corp. v. Am. Ins. Co.*, 553 S.W.2d 872, 876 (Mo. App. E.D. 1977).

⁷⁸ *Hartford*, 206 F. Supp. 2d at 977.

⁷⁹ *Id.* at 975.

to separate from its original location.⁸⁰ Thus, the more narrow issue in the case was whether the movement or separation of the paint from the walls constituted a “discharge, dispersal, release, or escape.” For this reason, it became necessary to determine the definitions of the essential terms.

In answering the question of whether the injury complained of arose from a “discharge, dispersal, release, or escape” of a pollutant, the court wisely looked to the dictionary definitions of the terms in dispute, and found that each term involved the movement of something from a place of containment to an uncontained place.⁸¹ As previously stated, lead paint is not hazardous if it remains unseparated from the painted surface. If Mr. Stewart’s injury was the result of exposure to the lead paint in his apartment, the lead paint must have moved from its original place on the walls to injure him. Therefore, the court held that Mr. Stewart’s claim was within the group of excludable injuries, not requiring Hartford to indemnify Ms. Turks against his claim.⁸²

Given the history of decisions interpreting pollution exclusion clauses, the best advice for insurers now is to, “say what you mean!” If an insurer wishes to exclude injury from lead paint, it should explicitly include it in the pollution exclusion clause. When all else fails, the insurer should *define* the term *in the policy*. Insurers can save an enormous amount of time and money in litigation by using clearer language in their insurance contract terms.

Although this proposal seems like a simple remedy, the present case illustrates that even by expressly providing for lead paint as an intended exclusion may nonetheless lead to litigation over whether or not injury arising from lead paint was excludable as provided for in the contract. However, by using unambiguous language, insurers can lessen the probability that a court will read terms into the contract that the drafter did not intend. For example, the court in this case could easily discern that lead paint was intended as a pollutant because it was specifically listed in the definition of pollutant.⁸³

Overall, whether or not a pollution exclusion will be found to hold an insurer liable for indemnification is at times similar in probability to the flip of a coin. However, insurers can protect themselves and better their odds at trial by using clearer language. Still, there are no guarantees when it comes to predicting whether a court will enforce an insurer’s pollution exclusion clause as the clause was written and intended upon its drafting. More often in pollution exclusion cases than other situations of contract interpretation, courts abandon the plain meaning interpretation and ‘read into’ the clauses material terms that were never intended nor anticipated by their drafters. Thus, the lesson is “caveat insurer.”

VI. CONCLUSION

As a result of this decision, insurers and insureds in Missouri can now better predict how a court will interpret pollution exclusion clauses in their insurance policies. Consequently, drafters of future exclusion clauses should also define more terms within the contract itself, which would result in a decrease in ambiguity. Although this current decision undoubtedly gives Missouri courts precedent

⁸⁰ *Id.* at 975-96. “Lead paint is not hazardous when it remains embedded in a wall; it becomes so only when it is somehow released from the wall and ingested by humans.” *Dorchester Mut. Fire. Ins. Co. v. First Kostas Corp., Inc.*, 1998 WL 90742 at *5 (Mass. Super. 1998).

⁸¹ *Hartford*, 206 F. Supp. 2d at 968. The court used Webster’s II New Riverside Dictionary (1994) to determine the terms’ normal usage definitions. *Id.*

⁸² *Id.* at 977.

⁸³ *Id.* at 972. “There is no question that the term lead paint is defined in the policy as a pollutant, therefore, no ambiguity exists concerning that point.” *Id.* at 975.

to consult when considering future pollution exclusion clause cases, given the past interpretations of pollution exclusion clauses, it is still not a certainty that a court applying Missouri law will determine injury from lead-based paint falls within the exclusion. So, subsequent interpretations are

needed before it can be established with confidence how Missouri courts will interpret pollution exclusion clauses.

KELLY SHAMEL