

# BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow



White and Williams LLP

Randy J. Maniloff

maniloffr@whiteandwilliams.com

October 4, 2008

## **E.D. PA: Home Heating Oil is *Not* a “Pollutant”**

### ***Does This Week’s Decision Create Absolute Pollution Confusion?***

Most people familiar with Pennsylvania law concerning the Pollution Exclusion will probably be surprised by Tuesday’s decision from the Eastern District of Pennsylvania in *Whitmore v. Liberty Mutual Fire Insurance Company*, 07-5162 (September 30, 2008). Despite an abundance of Pennsylvania law interpreting the pollution exclusion broadly – even excluding coverage for non-traditional environmental pollution – earlier this week a Pennsylvania federal court concluded that home heating oil is not a pollutant (at least at the summary judgment stage). As they say, on any given Sunday....

In *Whitmore*, the court addressed first-party coverage for a 10 to 15 gallon spill of heating oil during delivery to an aboveground storage tank located in the basement of a home. The cause of the spill was in dispute (overfill versus cracked oil pipe) but that was not relevant to the court’s decision. While it is a first-party decision, nothing about the analysis or cases cited distinguish it from the third-party context.

Liberty Mutual disclaimed coverage to the *Whitmore*’s under their homeowners policy on the basis of the Pollution Exclusion, which provided: “We do not insure, however, for loss caused by any of the following: (5) Discharge, dispersal, seepage, migration, release or escape of pollutants unless the discharge, dispersal, seepage, migration, release or escape is itself caused by a Peril Insured Against under Coverage C of this policy. Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.; . . .” *Whitmore* at 5.

For various reasons, the *Whitmore* Court concluded that home heating oil is not a “pollutant,” and, thus, the Pollution Exclusion did not apply:

1. “There is no mention of home heating oil or, for that matter, any other petroleum product in the pollution exclusion. Unlike the fact patterns and insurers in *Madison [Construction]* and *Lititz [Mutual]*, Liberty Mutual has not provided any product report, expert opinion, or other source of information to show or even argue that home heating oil is a ‘pollutant’ within the policy’s pollution exclusion.” *Whitmore* at 7-8.
2. The case law that Liberty Mutual relied on is distinguishable because, in those cases, the parties did not contest that heating oil was a pollutant. In addition, the cases did not examine the “specific product at issue” as required by *Madison Construction*.

3. There was no evidence that the spilled oil contaminated the environment because it remained in the Whitmore's basement. "[U]nder state and federal statutes, a key element for determining if heating oil is a pollutant or contaminant is whether or not it has been released into the environment, i.e. into soil or water. Because the errant heating oil at issue here was not released into the environment, the Court finds no support for an assertion that it constitutes a pollutant under any state or federal regulation." *Whitmore* at 12-13.

In summary, the *Whitmore* court held as follows: "Liberty Mutual could have simply listed 'petroleum products' along with "smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste,' in the non-exclusive list of what constituted a 'contaminant' in order to avoid the ambiguity. Instead, the pollution exclusion clause in the Liberty Mutual policy is 'subject to more than one reasonable interpretation' in regard to spilled home heating oil that remains contained within a basement." *Whitmore* at 13 (citations omitted).

### Bad Faith Issue

The only win for Liberty Mutual was that the plaintiff's bad faith count was dismissed. The court concluded: "Liberty Mutual relied on various Pennsylvania cases that acknowledge heating oil as a pollutant. Although those cases did not follow the analytical framework established in *Madison*, neither did those cases deny the polluting aspects of heating oil. In fact, one case, *Jaskula*, acknowledged heating oil as a pollutant as late as 2006. Accordingly, although this Court cannot accept Liberty Mutual's 'interpretation given the various factors discussed above, [Liberty Mutual's] is not a wholly unreasonable or reckless interpretation.'" *Whitmore* at 14.

Looking ahead, the issue is whether Pennsylvania courts will follow *Whitmore's* lead and hold insurers to as high of a standard, such as the *Madison Construction* framework (and discount the weight of prior cases that did not follow the framework), to prove that a substance is a "pollutant" under the pollution exclusion.

A copy of *Whitmore v. Liberty Mutual* is attached.

Please let me know if you have any questions.

Randy

Randy J. Maniloff

**White and Williams LLP**

1800 One Liberty Place | Philadelphia, PA 19103-7395

Direct Dial: 215.864.6311 | Direct Fax: 215.789.7608

maniloffr@whiteandwilliams.com

The views expressed herein are solely those of the author and are not necessarily those of his firm or its clients. The information contained herein shall not be considered legal advice. You are advised to consult with an attorney concerning how any of the issues addressed herein may apply to your own situation. The term "Binding Authority" is used for literary purposes only and is not an admission that any case discussed herein is in fact binding authority on any court. If you do not wish to receive future emails addressing insurance coverage decisions, please send an email to the address listed above with "unsubscribe" in the subject line. No animals were harmed in the drafting of this e-mail.