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Supreme Court of Rhode Island Rules For Policyholders on Pollution Exclusion and "Trigger of Coverage"


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Policyholders recently won a major victory against the insurance industry. In *Textron Inc. v. Aetna Casualty & Surety Company (Texton-Wheatfield)* the Supreme Court of Rhode Island severely limited the pollution exclusion as a basis for the insurance industry to deny liability insurance coverage for a policyholder's environmental liabilities from long-term contamination. The Rhode Island Supreme Court also reaffirmed its earlier decision in Textron's favor that coverage is "triggered" under occurrence-based liability insurance policies in any year in which environmental property damage (1) manifests itself, (2) is discovered, or (3) in the exercise of reasonable diligence is discoverable (*Textron-Gastonia).* The *Textron-Wheatfield* decision unanimously re-affirmed that latent injury or latent environmental contamination is covered even if it is not immediately discernible.

Unanimous Decision on Pollution Exclusion

In a unanimous decision, the Rhode Island Court held in *Textron-Wheatfield* that gradually-occurring property damage (including eventual contamination of groundwater as a result of chemical seepage) was not excluded by pollution exclusion clauses put in liability insurance policies from 1973 through 1985. These are the standard-form qualified pollution exclusions with exceptions for "sudden and accidental" or "sudden, unintended and unexpected" releases which were common in United States and London market insurance policies, respectively.

The case arises from the placement into a holding pond of chemicals used at Textron's former Bell Aerospace operation in Wheatfield, New York, that unbeknownst to Textron gradually seeped from the holding pond intended to capture, contain, treat and neutralize those wastes. Some courts have accepted the insurance industry's post-underwriting interpretation of the "sudden" exception to the pollution exclusions as requiring temporally abrupt or instantaneous release of pollutants.

The Rhode Island Court in *Textron-Wheatfield,* however, correctly held that the term "sudden" is so ambiguous that policyholders are entitled to liability insurance coverage for their environmental liabilities unless they intentionally or recklessly pollute. Policyholders that make a good faith effort to contain and to neutralize toxic waste, but nonetheless still experience unexpected and unintended releases of toxic chemicals that cause damage, have liability insurance coverage under Rhode Island law for their environmental liabilities. The court held that *"coverage will be provided when the contamination was unexpected from the insured's standpoint: that is, when the insured reasonably believed that the waste–disposal methods in question were safe."* (Emphasis added.) Thus, the very reason policyholders purchase insurance coverage has been honored.

In other words, under the *Textron-Wheatfield* decision, no temporally abrupt contaminating event is needed for a policyholder to be covered for liability from environmental property damage under its general liability insurance policies. Unintended and unexpected seepage is covered under the "sudden" exception to the standard form-pollution exclusion.

Sound Public Policy

Stating that its decision "represents sound public policy", the Rhode Island Court held "the clause rewards manufacturers with coverage if they undertake a good faith effort to dispose of

contaminants safely yet suffer an unexpected discharge despite these efforts."

Concurrent Causation

The Court in *Textron-Wheatfield* further favored policyholders by embracing the "concurrent causation doctrine", under which policyholders are entitled to insurance coverage if there is one covered cause of damage, even if other non-covered causes also contributed to the property damage. Because Textron had shown evidence of sudden and accidental discharges which inadvertently had caused environmental property damage in addition to the releases which its insurance companies alleged were expected and intended, the Court remanded the case for findings of fact to apportion between covered and non-covered damages.

Ambiguity

In finding the term "sudden" ambiguous, the Supreme Court reviewed numerous definitions of the word "sudden" in different dictionaries and held "the original and still perfectly functional meaning of the word is happening without warning or anticipation.". The Court further noted that "a slim but persuasive majority of other jurisdiction holds that the word "sudden" in this type of clause is ambiguous; that is, it is susceptible to more than one reasonable interpretation". Recognizing that "a multitude of cases exist on both sides", the Court reaffirmed its holding in *Zanfagna v. Providence Washington Insurance Co.,* that "diversity of judicial opinion [as to the meaning of terms in an insurance contract] is proof positive of ambiguity."

Drafting and Regulatory History

In reaching its decision, the Rhode Island Supreme Court also expressly relied on drafting history, on internal understandings within the insurance industry, and on the insurance industries' representation to state insurance regulators. The Court expressly noted that the President of INA himself had commented that "INA will continue to cover pollution which results from an accidental discharge of effluents" when he announced the adoption of the pollution exclusion.

The Court held that "sudden" should be construed in favor of policyholders because "it is reasonable to hold insurers to the representations they made to regulators …," which were that it merely clarified there was no coverage for reckless or intentional polluters. For example, an officer of Travelers Insurance Company represented to state regulators that "there is nothing in the term 'sudden and accidental' which requires the elimination of gradually occurring events …" In its analysis of the drafting and regulatory history of the pollution exclusion, the *Textron-Wheatfield* Court cited with approval the decision in which the Supreme Court of New Jersey refused to enforce a strict interpretation of the pollution exclusion and instead held the insurance industry to the meaning of the word "sudden" as it was represented to regulators when the exclusion was adopted.

"Sophisticated" Policyholder Defense Rejected

The *Textron-Wheatfield* decision should benefit all policyholders with general liability insurance subject to Rhode Island law. Because Textron is a Fortune 500 corporation, the insurance companies argued it was a "sophisticated policyholder' which should not receive favorable interpretation of poorly-drafted insurance policies. The Supreme Court rejected this argument, holding "an ambiguous policy term should be construed in favor of coverage and against the insurer …[T]his principle holds not only when the insured is an unsophisticated consumer, but also when, a here, the insured is a corporation that might presumably have more business acumen and bargaining power." The Court explained:

> "To apply this principle to large corporations such as Textron makes more sense in the insurance-policy context than it might in other settings: while business customers of insurance companies may at first glance appear to have more power in negotiating an insurance contract, in fact the only negotiation that typically occurs over the policy language is that between state regulators and the insurers."

Textron was represented in both *Textron-Wheatfield* and *Textron-Gastonia,* by Eugene R. Anderson, Robert M. Horkovich and Edward J. Stein of Anderson Kill & Olick, P.C. in New York City. ■

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