

Pollution Exclusion, Duty to Defend Coverage Update

April 1, 2026

Pollution Exclusion – Seventh Circuit (Illinois)

Griffith Foods Int'l, Inc. v. Nat'l. Union Fire Ins. Co. of Pittsburgh, PA. and Sterigenics, U.S., LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.

Case Nos. 24-1217 and 24-1223, --- F.4th ----, 2026 WL 709203 (7th Cir. Mar. 13, 2026)

Following the Illinois Supreme Court's response to its certified question, the U.S. Court of Appeals for the Seventh Circuit reversed the district court's judgment in favor of Griffith Foods International, Inc. and its corporate successor, Sterigenics U.S., LLC (collectively, the insureds), holding that the pollution exclusion in standard-form Commercial General Liability (CGL) policies barred both coverage and any duty to defend the insureds in the underlying tort litigation. The appellate court remanded both cases with instructions to enter judgment in favor of National Union Fire Insurance Company of Pittsburgh, PA (National Union).

This insurance coverage dispute arose in the broader context of highly publicized tort litigation that involved over 800 individuals alleging bodily injuries, including cancer, caused by emissions of ethylene oxide (EtO) at the insureds' medical-equipment sterilization facility in Willowbrook, Illinois over a 35-year period from 1984 to 2019.

For two of the 35 years that EtO was alleged to have been emitted, National Union insured Griffith under two materially identical CGL policies, each in effect for one year between Sept. 30, 1983 and Sept. 30, 1985. National Union, relying on the pollution exclusion, denied coverage for the underlying tort litigation.

After the denial, the insureds sued National Union in the U.S. District Court for the Northern District of Illinois seeking a declaration that National Union had a duty to defend them in the mass tort litigation. The district court granted the insureds' motion for judgment on the pleadings, finding that National Union had a duty to defend because the pollution exclusion did not apply since the insureds had a permit from the Illinois Environmental Protection Agency (IEPA) to emit EtO. National Union appealed to the 7th Circuit, which, recognizing that Illinois law was unsettled on the question, certified to the Illinois Supreme Court the question of whether a pollution exclusion in a CGL policy applied to preclude coverage for claims involving emissions authorized by law.

The Illinois Supreme Court answered the certified question in unequivocal terms, holding that "a permit or regulation authorizing emissions (generally or at any particular levels) has no relevance in assessing

the application of a pollution exclusion within a standard-form commercial general liability policy.” With that answer in hand, the appellate court concluded that the pollution exclusion applied and that the insureds “have no claim to coverage and no basis for requiring National Union to defend them against the allegations in the Master Complaint.”

The insureds raised several arguments in opposition, principally contending that ambiguity in Illinois law at the time they requested a defense rendered the pollution exclusion inapplicable. The appellate court was unpersuaded, noting that its own prior reading of *American States Ins. Co. v. Koloms*, 177 Ill.2d 473, 227 Ill.Dec. 149, 687 N.E.2d 72 (1997) intimated that the exclusion applied. The appellate court further reasoned that the Illinois Supreme Court’s answer to the certified question confirmed that “the discharge of EtO emissions into the atmosphere at issue in this case fits squarely within” the “plain language” of the pollution exclusion, declining “to find an ambiguity where none exists.”

The appellate court, following the general rule against adding materials not before the district court, declined the insureds’ request to supplement the appellate record with exhibits purportedly showing National Union’s agreement to defend during the pendency of the appeal. The appellate court reached no conclusions and offered no view on the correspondence or arrangements between the parties during the pendency of the appeal.

Accordingly, the appellate court reversed the district court’s entry of judgment for the insureds and remanded the case to the district court with instructions to enter judgment in favor of National Union in both cases.

By: Amy Diviney

Duty to Defend – Colorado

Michel L. Schlup Revocable Trust v. Attorneys Title Guar. Fund, Inc.

Case No. 23CA1886, --- P.3d ---, 2026 WL 772107, 2026 COA 16 (Colo. Ct. App. Mar. 19, 2026)

In a matter of first impression, the Colorado Court of Appeals held that the “complete defense rule” – which in the general liability context obligates an insurer to defend all claims in a lawsuit if any single claim is arguably covered under a policy – does not apply in the title insurance context. Distinguishing title insurance from general liability insurance on several grounds, including its retrospective nature, single-premium structure, and the ease of bifurcating covered title claims from uncovered claims, the appellate court affirmed summary judgment in favor of the title insurer.

This insurance coverage dispute arose after the Michel L. Schlup Revocable Trust (the trust) purchased an undeveloped parcel of land in Estes Park, Colorado, along with a title insurance policy from Attorneys Title Guaranty Fund, Inc. (ATGF). The only access to the trust’s property was an

unimproved private road (Homestead Lane) that crossed multiple adjacent properties owned by others. After the trust began constructing a residence on the property and paving Homestead Lane to comply with fire code requirements, Nicholas Stark (Stark) sued the trust, claiming that the trust had no legal right of access across his property (underlying lawsuit). Because the ATGF policy, among other things, insured against “[n]o right of access to and from the [Property],” ATGF retained an attorney who successfully defended the Trust against Stark’s claims.

A second neighbor, Michael Nassimbene (Nassimbene), intervened in the underlying lawsuit, asserting claims for trespass and unjust enrichment based on the trust’s paving of the portion of Homestead Lane that crossed his property without his consent. Unlike Stark, Nassimbene did not dispute that the trust had a legal right or easement to access its land. ATGF refused to defend the trust against Nassimbene’s claims, asserting they were not within the scope of coverage, and even if they were, certain exclusions applied. The trust hired its own counsel, eventually settled with Nassimbene, and then sued ATGF for its failure to provide a defense to Nassimbene’s claims.

The district court granted summary judgment in ATGF’s favor, concluding that Nassimbene’s claims were not covered by the title insurance policy and that the complete defense rule did not extend to title insurance. The trust appealed both determinations.

The Colorado Court of Appeals affirmed the district court’s ruling in favor of ATGF. The appellate court first rejected the trust’s argument that Nassimbene’s claims were covered under Covered Risk 4, which insures against “[n]o right of access to and from the [property].” Relying on Black’s Law Dictionary for the definition of “access,” the appellate court held that “no right of access” unambiguously means no right to enter, approach or pass to and from the property – and Nassimbene’s complaint never challenged the trust’s right to access the property. Rather, Nassimbene asserted trespass and unjust enrichment claims arising from the trust’s paving and expanding Homestead Lane, which damaged his land and potentially burdened him with future costs to maintain the paved road. The appellate court further rejected the trust’s argument that Covered Risk 4 required access sufficient to develop the property, noting that the trust always had access to and from the property.

The appellate court, likewise, rejected the trust’s argument that Nassimbene’s claims fell under Covered Risk 5, which covers violations of governmental regulations restricting the use of the property. The court found that no recorded notice of the fire code violation existed in the public records as of the policy’s effective date as required by the policy. The court also found that Exclusion 1 barred coverage because the fire code enforcement occurred after the effective date of the policy, and Exclusion 3 applied because the issue of paving the road was created by the trust after the trust decided to develop the property.

Turning to the complete defense rule, the appellate court held, as a matter of first impression, that the rule does not apply in the title insurance context. Relying on *Cherry Hills Farm Court, LLC v. First Am. Title Ins. Co.*, 428 F. Supp. 3d 516 (D. Colo. 2019) and persuasive authority from other jurisdictions,

the appellate court identified several key distinctions between title insurance and general liability insurance, including that title insurance is retrospective, covering only defects existing at the time the policy issues, rather than prospective risks; it requires only a single premium for indefinite coverage rather than ongoing premiums; its policy language typically limits the duty to defend to matters insured against; and covered title claims can be more readily bifurcated from uncovered claims. The court noted that expanding the title insurer's liability beyond the policy's unambiguous terms would create a windfall for the insured, who would receive significant benefits not bargained or paid for.

The facts of this case underscored this reasoning, as ATGF's retained attorneys had independently resolved Stark's access claim while the trust separately retained its own counsel to resolve Nassimbene's distinct trespass and unjust enrichment claims. Accordingly, the appellate court affirmed the district court's grant of summary judgment in ATGF's favor.

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