

Jim's Perspective...

Coverage for Methamphetamine Damage to House

Mr. Kaiser owned real property that he maintained as a rental house. He carried a rental insurance policy on the house with Allstate. Tenants occupied the house for about a year. At some point during this occupancy, Kaiser was informed that the house was being used for drug-related activity. Eventually, the tenants voluntarily left the house. Kaiser inspected the house once the tenants were gone and found evidence of methamphetamine (meth) in the house. Absolute Bio Recovery Service discovered meth vapor and residue throughout the house and recommended that the house be decontaminated before renting it to new tenants. Kaiser removed flooring, HVAC equipment and light fixtures in the house. He also hired Meth Lab Cleanup LLC, which specializes in restorations of this kind.

Kaiser submitted a claim to Allstate of about \$38,000 for the cost to decontaminate and restore the house. The rental policy provided all-risk coverage. Allstate denied the claim because the loss “consisted of or was caused by” perils described in the following exclusions:

12. Any type of vapors, fumes, acids, toxic chemicals, toxic gasses, toxic solids, waste materials, irritants, contaminants or pollutants
13. Contamination, including, but not limited to, the presence of toxic, noxious, or hazardous gasses, chemicals, liquids or other substances at the residence premises or in the air, land or water serving the residence premises. . . .
18. Vandalism. However, we do cover **sudden and accidental** direct physical loss caused by fire resulting from vandalism. . . . (emphasis added)
19. Any act of a tenant, or guests of a tenant, unless the act results in **sudden and accidental** direct physical loss caused by smoke. (emphasis added)

Allstate has the burden of proof to show that a policy exclusion applies to the policyholder's claim. Based on the evidence submitted at trial, the trial court found that Kaiser's tenants had manufactured meth in the house and that Kaiser's property loss was caused by the presence of meth vapor and meth residue in the house. Allstate had an opinion from an expert, a professor of chemistry from UNO, which the trial court relied on to find that meth vapor and residue damaged Kaiser's property in two ways listed below all of which was excluded under exclusions 12 and 13. (The trial court also found that exclusions 18 and 19 applied and resulted in no coverage for the loss) The expert said:

1. Meth vapor is a toxic chemical, gas or liquid, depending upon the assumed physical state at a particular point in time.
2. Meth residue is a contaminant, chemical residue and pollutant.

On appeal to the Nebraska Supreme Court¹, Kaiser asserted that the trial court's finding that his claim was excluded under the rental policy was incorrect in a number of ways. Kaiser argued that exclusions 12 and 13 are ambiguous because some of the terms used in these two exclusions

¹Kaiser v. Allstate, 307 Neb. 562 (2020)

are synonymous. Kaiser noted that “toxic chemicals,” “toxic gasses” and “contaminants” are listed in both exclusions which creates further ambiguity. Any ambiguity in the language of the policy must be construed in favor of the policyholder. The Court disagreed stating:

Simply because multiple provisions in an insurance policy individually exclude coverage for a single peril does not mean that those terms are necessarily ambiguous. Instead, a well-written insurance policy will likely have terms that overlap, which might support the denial of coverage on several grounds in an appropriate case.

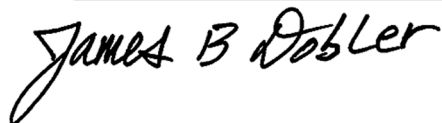
Next, Kaiser argued that even if exclusions 12 and 13 above apply, the Allstate policy still provides coverage based upon the exception to the vandalism exclusion (18) and the exception to the exclusion related to acts of the tenant (19). Kaiser said that other jurisdictions have found the manufacture of drugs in a house to constitute vandalism. As shown above, the vandalism exclusion provides an exception for “sudden and accidental direct physical loss caused by fire resulting from vandalism.” The “acts of tenant” exclusion provides an exception for “sudden and accidental direct physical loss caused by smoke.” Kaiser noted that the policy contains a condition (concurrent causation language) which states that “when property loss resulted from multiple causes, the loss was wholly excluded from coverage if the predominant cause of loss is excluded. According to Kaiser, his property loss was predominantly caused in accordance with one or both of these exclusions and, additionally, the exceptions to these exclusions apply and therefore exclusions 12 and 13 have no application to this loss. (Only a lawyer would come up with this argument!)

The Court noted that if the insurer meets its burden of proof and shows that an exclusion applies, the burden of proof shifts to the policyholder to prove that some type of exception to an exclusion applies to the loss. The Court did not address concurrent causation or whether meth production constituted vandalism, but instead focused on only the exceptions to exclusions 18 and 19. It said that in order for the two exceptions to apply, the loss must be “sudden and accidental.” The Court cited a 2006 Nebraska case (Dutton-Lainson Co. v. Continental Ins. Co.) involving a pollution exclusion which had an exception for sudden and accidental pollution. This case involved pollution that occurred over 37 years. The policyholder argued that when it discovered the pollution event, that discovery was sudden and accidental. The court disagreed and held that 37 years of polluting the environment was not sudden. The Court said the term “sudden” must be understood and interpreted from an objective standpoint, and not from the subjective standpoint of an insured who at some point in time discovers a loss. Consequently, the production of meth on a regular basis in the rental house was not sudden from an objective standpoint.

Finally, Kaiser argues that production of meth in the rental house was sudden because the use and production of meth created a residue that quickly bonded to most surfaces of the house. Because this “bonding” occurred quickly, the loss as a whole was sudden. Each time residue bonded, this was a separate sudden event which makes the entire loss a sudden event. The Court disagreed and again noted that it did not adopt this reasoning in Dutton-Lainson. The Court said:

In Dutton-Lainson we could also have framed the property loss as a result of numerous sudden discharges of pollutants over 37 years. . . . But we opted against framing the property loss in terms of its smallest components. Instead, because Dutton-Lainson sought indemnification for one property loss – that is, the cleanup from one pollution – we framed it accordingly. And because that one property loss occurred over a period of 37 years, it was not sudden. Here too, Kaiser’s claim to Allstate is for one whole property loss, not its component parts. . . . Thus we frame the property loss at issue not by each release of meth vapor and residue, but by the loss that resulted from their many releases and for which Kaiser sought indemnification. We decline to embrace Kaiser’s logic of death by a thousand paper cuts.

Overall, the circumstances of this claim involving repeated and intentional production and use of meth over a period of a year, just doesn’t seem to fall within one of the fundamental characteristics of insurance, which is that the loss must be fortuitous, random or accidental. Granted, if you want to look at it from only the subjective viewpoint of Kaiser, perhaps it was sudden to him since he knew nothing about it until he entered the house, but I still think the Court came to the right conclusion that this loss was not sudden. It is not an easy decision and I know there are some old pollution cases out there that held years of pollution to be sudden, because the policyholder “suddenly” discovered the pollution, but, again, 37 years of pollution, or a year of continuous production and use of meth, is not the sort of thing you would expect insurance to cover. The argument that each event of pollution should be considered by itself to be sudden and accidental, or that when the insured first discovers the pollution, that discovery is sudden and accidental, is why ISO and most insurers removed the pollution exclusion which had an exception for “sudden and accidental pollution” and adopted the “absolute pollution exclusion” which no longer had this exception.



Jim Dobler, CPCU

PIA Legislative Coordinator

Questions or Comments? Please email jbdobler@outlook.com