

# Question Of Fact Exists As To Pollution Exclusion, Alabama Federal Judge Says

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## **Body**

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An Alabama federal judge on Oct. 28 denied an insurer's motion for summary judgment in a Chinese drywall coverage dispute after determining that a question of fact exists regarding whether a pollution exclusion applies to the products/completed operations portion of a policy (SUA Insurance Co. v. S&O Investments LLC, et al., No. 10-0313, S.D. Ala.; [2011 U.S. Dist. LEXIS 125044](#)).

(Opinion available 03-111102-001Z )

SUA Insurance Co. issued two insurance policies to S&O Investments LLC. S&O built two houses in 2006, which it sold the same year. The houses were sold to Charles and Rachel Parker and Joseph Fernandez. After the houses were sold, it was discovered that the houses were constructed using Chinese drywall. The Parkers and Fernandez eventually became class representatives in a suit naming numerous defendants, including S&O.

### Bodily Injury

SUA then filed suit in the U.S. District Court for the Southern District of Alabama, seeking a declaration that it has no duty to defend or indemnify S&O in connection with the underlying class lawsuit. SUA filed a motion for summary judgment, arguing that no coverage exists because there was no bodily injury or property damage within the policy period and the policies' pollution exclusion and tract housing exclusion preclude coverage.

SUA argued that because Fernandez took possession after the second policy expired, no coverage is afforded for Fernandez's claims. SUA also claimed that because the Parkers took possession after the first policy expired, no coverage is afforded under that policy for the Parkers' claims.

Judge William H. Steele determined that the first policy does not potentially or actually cover the claims of Fernandez and the Parkers against S&O for bodily injury. The judge also determined that the second policy does not provide any coverage for the claims of Fernandez against S&O for bodily injury.

## Question Of Fact Exists As To Pollution Exclusion, Alabama Federal Judge Says

The judge denied SUA's motion as it pertained to the pollution exclusion, noting that the underlying defendants seek coverage based on products/completed operations (PCO) and do not seek coverage based on commercial general liability (CGL).

## Pollution Exclusion

The judge noted that the second policy, unlike the first policy, does not include a PCO form. The judge said a question of fact exists regarding whether the pollution exclusion applies to the PCO portion of the second policy.

"The plaintiff suggests that no PCO form was needed for Policy 2 because the CGL form itself addresses PCO coverage. And so it does, but this was equally true for Policy 1, yet Policy 1 contains a PCO form. While the plaintiff may be able ultimately to establish that Policy 2 contains no such form, it has yet to do so. It therefore has not established a necessary predicate to its argument ? as to which it bears the burden ? that the pollution exclusion endorsement excludes coverage in this case. The Court therefore pretermits discussion of the parameters of the pollution exclusion vis-à-vis Chinese drywall," the judge said.

Andrew C. Clausen and Christina May Bolin of Alford Bolin Dowdy in Mobile, Kevin M. Lougachi and Richard M. Kuntz of Bollinger Ruberry & Garvey in Chicago represent SUA. Jonathan S. Shewmake, Christopher M. Odom, Dennis Patrick McKenna and J. Ritchie Prince of Prince, McKean, McKenna & Broughton in Mobile, represent S&O.

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