

# Wiley Rein's 'Well-Reasoned' *Amicus* Brief Cited by Alabama Supreme Court in Key Pollution Coverage Ruling

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In a case in which Wiley Rein LLP represented as *amicus curiae* the Complex Insurance Claims Litigation Association (CICLA), a group of major property-casualty insurers, the Supreme Court of Alabama ruled Friday that an absolute pollution exclusion similar to that issued by the Insurance Services Office unambiguously barred coverage because gasoline leaking from pipes connecting above-ground storage tanks and gasoline pumps is a "pollutant" within the clear meaning of the absolute pollution exclusion. *Federated Mutual Insurance Co. v. Abston Petroleum, Inc.*, No. 1051589, 2007 WL 1098564 (Ala. Apr. 13, 2007). The court also rejected the policyholder's argument that the 'reasonable expectations' doctrine may overcome unambiguous policy language. In reaching its conclusion, the court relied extensively on CICLA's *amicus curiae* brief and agreed with its "well-reasoned approach."

The Alabama high court expressly quoted CICLA's argument that: "Gasoline leaking from piping connecting an above ground storage tank and gasoline pumps is plainly a liquid "irritant" or "contaminant" excluded by the term "pollutants." The focus of the inquiry under the absolute pollution exclusion is not on the nature of the substance alone, but on the substance *in relation to* the property damage or bodily injury. Even if a substance such as gasoline is commercially useful in one context, it may become a pollutant when it is released and becomes a "foreign" substance in another medium."

In reaching its conclusion, the court recognized that, "[t]he simple fact that gasoline serves a vital purpose when released from a properly constructed tank into the confines of an internal combustion engine

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does not permit us to blink reality and overlook the deleterious consequences that occur when gasoline is introduced into the soil or when its fumes escape into the atmosphere." Because it found the absolute pollution exclusion unambiguous, the court refused to consider the policyholder's arguments based on the drafting and regulatory history of the absolute pollution exclusion.

The court also rejected the policyholder's argument that the absolute pollution exclusion did not preclude coverage because such a result would frustrate the policyholder's reasonable expectations of coverage. Noting that the policyholder made this argument notwithstanding his testimony that he never read the absolute pollution exclusion before the insurer denied coverage, the court rejected the "reasonable expectations" argument, holding that the policyholder's "expectations were limited by the unambiguous terms of the pollution-exclusion clause; therefore, his expectations of coverage could not be 'objectively reasonable.'"

With this decision, Alabama joins state high courts in sixteen other jurisdictions that have concluded that the exclusion is unambiguous in applying to a variety of different pollutants; including decisions in Connecticut, Florida, Illinois, Iowa, Michigan, Nebraska, Nevada, New York, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Virginia, Washington, and Wisconsin.

Wiley Rein LLP attorneys Laura A. Foggan and Paul A. Dame represented CICLA as *amicus curiae* in this case. Ms. Foggan is a co-chair of the firm's Appellate Practice and member of its Insurance Practice. Mr. Dame is an associate in the firm's Insurance Practice.