

## Question Of Fact Exists On Policy's Uncontrollable Fire Exception, Judge Says

(March 19, 2020, 9:09 AM EDT) -- ANN ARBOR, Mich. — A Michigan federal judge on March 17 partially granted an insurer's motion for summary judgment after determining that the policy's pollution exclusion applies to an underlying carbon monoxide poisoning claim but denied the motion as it pertained to the policy's uncontrollable fire exception because a question of fact exists as to whether the exception applies to provide coverage (Housing Enterprise Insurance Co. v. Hope Park Homes Limited Dividend Housing Association Limited Partnership, et al., No. 18-14022, E.D. Mich., 2020 U.S. Dist. LEXIS 45690).

(Opinion available. Document #03-200325-005Z.)

Housing Enterprise Insurance Co. Inc. filed suit in the U.S. District Court for the Eastern District of Michigan, seeking a declaration that it has no duty to defend or indemnify a number of property owners and insurers in connection with an underlying suit arising out of the carbon-monoxide poisoning of a family who lived in insured property. Housing Enterprise claims that it owes no duty to defend or indemnify because the underlying claims are barred by its policy's pollution exclusion.

### Furnace Malfunction

The underlying suit arose out of a furnace malfunction in the rental home of Frederick Agee and his family. The Agee family was poisoned and severely injured as a result of a carbon monoxide leak caused by the malfunctioning furnace.

The Agee family sued various defendants for negligence, arguing that the defendants had not properly equipped the underlying property with functioning carbon monoxide detectors and that the property did not have adequate ventilation to protect occupants from the harm of carbon monoxide.

Housing Enterprise insured Hope Park Homes Limited Dividend Housing Association Limited Partnership (HPHLP), the company that owned the home where the Agee family lived.

Housing Enterprise filed the instant suit against 11 defendants. The defendants consist of the parties named in the underlying litigation in addition to three insurance companies that were not parties to the underlying litigation.

AIG Specialty Insurance Co. (ASIC), which was not a party to the underlying litigation, filed a motion to dismiss for lack of subject matter jurisdiction. Housing Enterprise filed a motion for summary judgment. StarStone National Insurance Co., which was also not a party to the underlying litigation, joined Housing Enterprise's motion for summary judgment and filed its own cross-motion for summary judgment.

### No Controversy

Judge Judith E. Levy granted ASIC's motion to dismiss for lack of subject matter jurisdiction, agreeing with ASIC that Housing Enterprise fails to allege any facts that create a controversy between ASIC and Housing Enterprise.

"There is no current controversy between Plaintiff and Defendant ASIC, and any future controversy is speculative," the judge said in granting ASIC's motion.

Next, the judge said that while Housing Enterprise has demonstrated that carbon monoxide is a pollutant under the terms of its policy and that its pollution exclusion applies, a question of fact applies as to whether the policy's "uncontrollable fire" exception applies to provide coverage.

Therefore, Housing Enterprise's motion for summary judgment is partially granted on the applicability of the pollution exclusion.

The judge also denied StarStone's motion because StarStone's excess policy is a follow-form policy to Housing Enterprise's policy.

#### Counsel

Housing Enterprise is represented by Alan R. Lyons, Herrick of Feinstein in New York and Stephen M. Kelley in St. Clair Shores, Mich.

HPLP is represented by R. Daniel Webster in Detroit. The underlying plaintiffs are represented by Douglas Young of Young Insurance Law in Royal Oak, Mich., and Griffith Joel Winthrop III of Alvarez, Winthrop, Thompson & Storey in Orlando, Fla.

AIG is represented by Philip E. Kalamaros of Hunt Swedhoff in St. Joseph, Mich., and Richard Hodyl Jr., of Hinkhouse Williams Walsh LLP in Chicago. StarStone is represented by Timothy J. Jordan of Garan Luow in Detroit.