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EXPERT ANALYSIS

The Pollution Exclusion Continues to 'Pollute' the Courts: A National Overview of Pollution Exclusion Litigation

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Since the 1970s, courts have taken diverse approaches to the interpretation and application of various renditions of the pollution exclusion and its exceptions.

On a seemingly daily basis, they grapple with the unique facts of myriad situations and are forced to determine whether a substance qualifies as a pollutant, whether the pollution exclusion has been triggered, and whether any exception to the exclusion applies. The vast body of case law on this issue has resulted in a number of conflicting opinions.

The following overview examines recent court decisions around the country that address these issues and more. Insurers and their counsel need to understand the varying applications so they can implement, interpret and apply the proper policy exclusions and defend against claims should a coverage dispute arise.

With a full understanding of the differing applications of law, insurers and counsel will be in the best position to defend their rights under a policy like the insurer in *Nationwide Property & Casualty Insurance Co. v. Shearer*, No. 15-1837, 2016 WL 3018764 (3d Cir. May 26, 2016).

In this case, which was handled by the Goldberg Segalla environmental practice group, the court found the insurer was not estopped from asserting its right to deny coverage under the pollution exclusion.

It also decided that the insurer did not waive its right to assert the exclusion, where it had reserved its rights in numerous, detailed reservation-of-rights letters.

Based on the insurer's preservation of its rights, the court stated:

> The fact that Nationwide defended the case for some time before citing an exclusion and denying coverage does not somehow turn the defense it did provide into fraudulent inducement. Nor does it turn the policyholders' decision to allow Nationwide to provide them with a defense into detrimental reliance.
>
> Finally, the policyholders are unable to show prejudice. While they were understandably disappointed by Nationwide's decision to withdraw its defense, the fact that it was entitled to do so under the terms of the insurance contracts means that the defense it did tender was a temporary benefit to the policyholders.

CALIFORNIA

Broad allegations in underlying complaint impose duty to defend

Associated Indemnity Corp. v. Argonaut Insurance Co., No. B254858, 2015 WL 4099851 (Cal. Ct. App., 2d Dist. July 7, 2015).

Since the 1970s, courts have taken diverse approaches to the interpretation and application of various renditions of the pollution exclusion and its exceptions.

The purchaser of a property sued the former owner for environmental remediation costs after discovering contaminated soil and groundwater. The former owner had operated a sandblasting and powder-coating business on the property.

Associated Indemnity Corp. and Argonaut Insurance Co. had issued policies covering the former owner for different time periods during the alleged contamination period. Both policies contained pollution exclusions that included exceptions where pollution results from a sudden and accidental discharge.

AIC agreed to defend the former owner. Argonaut refused, arguing that the nature of the pollution meant the discharge of pollutants would have been known and expected, not sudden and accidental. The case eventually settled, and then AIC brought this equitable contribution action.

The court held that AIC was entitled to judgment as a matter of law. The underlying complaint alleged that the former owners caused or contributed to the "spilling, leaking, disposal, release and threatened release" of pollutants.

The court held that absent dispositive proof otherwise, this alone gave rise to the possibility of a sudden and accidental discharge and thus triggered the duty to defend.

> **Practice note:** Allegations in an underlying complaint alone are sufficient to establish an insurer's duty to defend.

Evidence of excessive rainfall and flooding gives rise to duty to defend

County of Stanislaus v. Travelers Indemnity Co., 142 F. Supp. 3d 1065 (E.D. Cal. 2015).

Stanislaus County operated a landfill adjacent to the Tuolumne River. Travelers provided the county with a comprehensive general liability policy for a portion of that time. The policy contained an exclusion for contamination, except where the contamination occurred as a result of a sudden and accidental discharge.

Groundwater contamination was eventually identified at the landfill. The county sued the city of Modesto for damages, and the city filed a cross-complaint for the same.

In this action to determine the extent of Travelers' obligations to the county, the county successfully established the possibility of a sudden and accidental discharge, thereby confirming Travelers' duty to defend. It did so by putting forth evidence of above-normal rainfall during the policy period that caused the river to crest, creating the possibility that landfill waste was flooded thus causing a sudden and accidental discharge.

> **Practice note:** Circumstantial evidence of rainfall and flooding can be sufficient to establish the possibility of sudden and accidental discharge and thus a duty to defend.

Sealed oil barrels are not pollutants

Guam Industrial Services. v. Zurich American Insurance Co., 787 F.3d 1001 (9th Cir. 2015).

Guam Industrial Services owned a dry dock in Guam. The dry dock sank during a typhoon. At the time of the storm, the dock was loaded with barrels of oil. The barrels were recovered before any oil leaked into the ocean.

GIS had a policy with Zurich American Insurance Company. The policy covered property damage caused by the "discharge, dispersal, release, or escape" of pollutants. Zurich denied the claim, and GIS sued Zurich for costs it incurred in recovering the barrels.

The 9th U.S. Circuit Court of Appeals held that the District Court properly found in favor of Zurich. The court reasoned that while it was true the barrels had been discharged, dispersed and released, the pollutant itself — the oil — had not. Therefore, the insurance policy was never triggered.

> **Practice note:** Regardless of whether a container carries a pollutant, as long as the container remains sealed, there is no "discharge, dispersal, release, or escape" of that pollutant.

Case list

Associated Indemnity Corp. v. Argonaut Insurance Co., No. B254858, 2015 WL 4099851 (Cal. Ct. App., 2d Dist. 2015).

Brouse v. Nationwide Agribusiness Insurance Co., No. A14-1729, 2015 WL 4507996 (Minn. Ct. App. July 25, 2015).

Century Indemnity Co. v. Marine Group LLC, 131 F. Supp. 3d 1018 (D. Or. 2015).

Cincinnati Specialty Underwriters Insurance Co. v. Energy Wise Homes Inc., 120 A.3d 1160 (Vt. 2015).

Connors v. Zurich American Insurance Co., 872 N.W.2d 109 (Wis. Ct. App. 2015).

Country Mutual Insurance Co. v. Bible Pork Inc., 42 N.E.3d 958 (Ill. App. Ct., 5th Dist. 2015).

County of Stanislaus v. Travelers Indemnity Co., 142 F. Supp. 3d 1065 (E.D. Cal. 2015).

Evanston Insurance Co. v. Haven South Beach LLC, No. 15-cv-20573, 2015 WL 9459979 (S.D. Fla. Dec. 28, 2015).

Evanston Insurance Co. v. Lapolla Industries, 634 Fed. Appx. 439 (5th Cir. 2015).

Georgia Farm Bureau Mutual Insurance Co. v. Smith, 320 S.E.2d 261 (Ga. Ct. App. 2016).

Goodge v. Nationwide Mutual Fire Insurance Co., No. 14c-03-229, 2015 WL 5138240 (Del. Super. Ct. May 14, 2015).

Greuel v. Continental Insurance Co., No. 14-cv-303, 2015 WL 5709414 (E.D. Okla. Sept. 29, 2015).

Guam Industrial Services. v. Zurich American Insurance Co., 787 F.3d 1001 (9th Cir. 2015).

In re ATP Oil & Gas Corp., No. 12-36187, 2016 WL 270049 (Bankr. S.D. Tex. Jan. 20, 2016).

In re Liquidation of Legion Indemnity Co., 44 N.E.3d 1170 (Ill. App. Ct. 2015).

Mellin v. Northern Security Insurance Co., 167 N.H. 544 (N.H. 2014).

Mine Safety Appliances Co. v. AIU Insurance Co., No. 10c-07-241, 2016 WL 498848 (Del. Super. Ct. Jan. 22, 2016).

Nationwide Property & Casualty Insurance Co. v. Shearer, No. 15-1837, 2016 WL 3018764 (3d Cir. May 26, 2016).

Nationwide Property & Casualty Insurance Co. v. Shearer, No. 15-1837, 2016 WL 3018764 (3d Cir. May 26, 2016).

New NGC Inc. v. ACE American Insurance Co., 105 F. Supp. 3d 552 (W.D.N.C. 2015).

Peek v. American Integrity Insurance Co., 181 So. 3d 508 (Fla. 2d Dist. Ct. App. 2015).

Ramos v. Charter Oak Fire Insurance Co., 871 N.W.2d 866 (Wis. Ct. App. 2015).

Southern Nevada TBA Supply Co. v. Universal Underwriters Insurance Co., No. 15-cv-00046, 2015 WL 8664256 (D. Nev. Dec. 11, 2015).

St. Paul Fire & Marine Insurance Co. v. City of Kokomo, No. 13-cv-1573, 2015 WL 7573227 (S.D. Ind. Nov. 25, 2015).

West American Insurance Co. v. Tufco Flooring East Inc., 104 N.C. App. 312 (N.C. Ct. App. 1991).

Whitney v. Vermont Mutual Insurance Co., 135 A.3d 272 (Vt. 2015).

Xia v. ProBuilders Specialty Insurance Co., 189 Wash. App. 1041 (Wash. Ct. App. 2015).

On a seemingly daily basis, courts grapple with the unique facts of myriad situations and are forced to determine whether a substance qualifies as a pollutant, whether the pollution exclusion has been triggered and whether any exception to the exclusion applies.

DELAWARE

Pollution exclusion results in no duty to defend carbon monoxide exposure claim

Goodge v. Nationwide Mutual Fire Insurance Co., No. 14c-03-229, 2015 WL 5138240 (Del. Super. Ct. May 14, 2015).

Debra and Ivor Goodge were sued for injuries sustained as a result of carbon monoxide exposure. The suit alleged that the alleged exposure was due to the Goodges' negligence.

At the time, the Goodges had an insurance policy with Nationwide that contained a pollution exclusion. Nationwide denied both coverage and defense on the basis of the exclusion.

The Goodges settled the case and then brought this action against Nationwide for indemnification and defense costs.

Nationwide put forth evidence that the injuries at issue resulted solely from carbon monoxide, which constituted a pollutant under its policy with the Goodges.

The court granted Nationwide's motion for summary judgment, holding that the pollution exclusion was clear, the underlying claim was indeed based solely on pollution, and thus Nationwide's denials were proper.

> **Practice note:** The court noted that there is no rule requiring insurers to present expert medical testimony to establish that injury was caused by exposure to an excluded material.

FLORIDA

Sulfur gases fall under pollution exclusion

Peek v. American Integrity Insurance Co., 181 So. 3d 508 (Fla. 2d Dist. Ct. App. 2015).

Chinese drywall was used in the construction of William and Stacey Peek's house. After the house was completed, a sulfur-like odor materialized and became increasingly potent. At the time, the Peeks had an insurance policy with American Integrity Insurance Co. The policy contained an exclusion for injuries caused by pollutants.

The court ultimately found that the pollution exclusion was triggered because the odor was in fact caused by sulfur gases emanating from the Chinese drywall. For that and other reasons, the court affirmed the trial court's final judgment in favor of AIIC.

> **Practice note:** The court noted that ordinarily, where there are potentially multiple causes of a particular injury, under the "efficient proximate cause" doctrine the finder of fact determines which was most responsible. But here, the Peeks affirmatively asked the trial court to address AIIC's motion for directed verdict.

No duty to defend seller of a polluted alcoholic beverage

Evanston Insurance Co. v. Haven South Beach, LLC, No. 15-cv-20573, 2015 WL 9459979 (S.D. Fla. Dec. 28, 2015).

Evanston Insurance Co. brought an action seeking a declaration that it had no duty to defend or indemnify Haven South Beach. While operating as a food and drink vendor at an event, Haven served an alcoholic beverage to a patron. Haven's employee added liquid nitrogen to the beverage to create a smoky effect. The patron was injured and sued Haven.

At the time, Haven had an insurance policy with Evanston that contained a pollution exclusion. Included in the policy's pollution definition was "irritants."

Haven argued that the policy was ambiguous, and that in any event, liquid nitrogen is not a pollutant. It said the intentional placement of the substance in the beverage did not constitute discharging, dispensing or releasing a pollutant.

The court found liquid nitrogen to be an irritant and thus a pollutant for purposes of the policy, and that including the substance in a beverage constituted a discharge. As a result, the court

found that Evanston had no duty to defend.

> **Practice note:** Liquid nitrogen can be classified as a pollutant, and including it in a beverage — even intentionally — constitutes discharge of a pollutant.

GEORGIA

Pollution exclusion absolves insurer of duty to defend lead-paint claim

Georgia Farm Bureau Mutual Insurance Co. v. Smith, 320 S.E.2d 261 (Ga. Ct. App. 2016).

The court was faced with an issue of first impression as to whether lead-based paint qualifies as a pollutant for purposes of absolute pollution exclusions.

In the underlying action, a tenant sued her landlord after the tenant's neighbor's child was exposed to lead-based paint in the tenant's apartment.

The landlord's commercial general liability carrier subsequently filed an action seeking a declaration that it had no duty to defend, in part because of an "absolute pollution exclusion" contained within the landlord's CGL policy.

The court noted that under Georgia law, words used in insurance policies are given their "usual and common" meaning. The policy at issue defined pollutant as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste."

The court ultimately found that lead contained in paint unambiguously qualifies as a pollutant under that definition. For that reason, the Georgia Supreme Court reversed the lower court's ruling and held that the absolute pollution exclusion applied. Summary judgment in favor of the insurer was proper, it concluded.

> **Practice note:** Georgia law takes a "usual and common" meaning approach to insurance policy construction as opposed to first "consider[ing] the purpose and historical evolution of pollution exclusions."

Allegations in an underlying complaint are sufficient to establish an insurer's duty to defend.

ILLINOIS

It is unclear whether noises and odors from a hog factory constitute traditional pollution

Country Mutual Insurance Co. v. Bible Pork Inc., 42 N.E.3d 958 (Ill. App. Ct., 5th Dist. 2015).

Bible Pork constructed a hog facility. During construction, a lawsuit was filed against BP claiming in part that the facility would be the source of disagreeable noises, odors, dust particles and surface water contamination.

Country Mutual Insurance Co. declined to defend Bible Pork on both of its two active policies (a farm Agriplus policy and a farm umbrella policy). Country Mutual then brought this action seeking a declaration that it had no duty to defend or indemnify the company.

The insurer argued in part that the anticipated damages alleged in the underlying action constituted traditional environmental pollution. It said it was thus absolved of any duty to defend or indemnify pursuant to the policies' pollution exclusions.

The court, however, opined that it was unclear if the alleged damages constituted "traditional pollution," and that the pollution exclusions were ambiguous with respect to the alleged damages. Therefore, it said, the exclusions were inapplicable and there was a duty to defend.

> **Practice note:** Where there is either an ambiguous exclusion or a question of whether an exclusion applies, courts may find in favor of the insured.

INDIANA

Potentially ambiguous and overly broad pollution exclusions preclude summary judgment

St. Paul Fire & Marine Insurance Co. v. City of Kokomo, No. 13-cv-1573, 2015 WL 7573227 (S.D. Ind. Nov. 25, 2015).

The Environmental Protection Agency discovered various hazardous substances leaking from metal drums at a landfill operated by the city of Kokomo. Kokomo agreed to pay certain remediation expenses.

At the summary judgment stage, Travelers Indemnity Co. sought a declaration that it had no duty to defend the city, in part because of pollution exclusions contained in three sets of those policies.

As to the first set of policies, Travelers argued that the materials at issue constituted "waste" as mentioned in the policy's definition of "pollutant." The court found the definition of pollutant in the first policy to be identical to one found by the Indiana Supreme Court to be ambiguous.

As to the second set of policies, the court opined that the general incorporation of "11 federal laws; the environmental title of the Indiana Code"; any amendments to those; and any federal, state, or local list, regulation, or rule, does not sufficiently specify what falls within a pollution exclusion.

As to the third set of policies, the court held that an ordinary policyholder of average intelligence would not know what the term "inorganic contaminants" encompassed. Thus, that term too was deemed ambiguous.

As a result, the court denied Travelers' motion for summary judgment on these issues regarding its duty to defend.

> **Practice note:** For further discussion of exclusions, see the opinion the case, where the judge held that Travelers' mere disagreement with the court's decision did not provide a basis for a successful motion to reconsider.

MINNESOTA

Hydrogen sulfide emissions fall under absolute pollution exclusion

Brouse v. Nationwide Agribusiness Insurance Co., No. A14-1729, 2015 WL 4507996 (Minn. Ct. App. July 25, 2015).

The appellants became ill after being exposed to hydrogen-sulfide emissions from a neighboring dairy operation. The owner of that operation assigned its rights under its insurance policies to the appellants, who amended their complaint against the dairy operation to include its insurers.

The trial court granted the insurers' summary judgment motion, holding they could not recover under the policies.

The policies contained "absolute" pollution exclusions. The court noted that Minnesota follows a minority rule in that it takes "a non-technical, plain-meaning approach to interpreting pollution exclusions," one implication of which is that pollution exclusions are not limited to "traditional environmental pollution."

The court then went on to opine that because Minnesota does not require pollution exclusions to explicitly list every pollutant to which they apply, the exclusions at issue were not "so broad as to be nearly meaningless."

It also held that under the Minnesota approach, the exclusions at issue were not ambiguous. Because the appellants failed to support their contention that the provisions were ambiguous, it did not consider extrinsic evidence as to the provisions' meanings. The order granting the insurers' summary judgment motion was thus affirmed.

> **Practice note:** Minnesota law uses a "non-technical, plain-meaning approach" in interpreting insurance policies and does not limit pollution exclusions to traditional environmental pollution.

NEVADA

Pollution by third parties at sites not owned by insured does not give rise to duty to defend

Southern Nevada TBA Supply Co. v. Universal Underwriters Insurance Co., No. 15-cv-46, 2015 WL 8664256 (D. Nev. Dec. 11, 2015).

Southern Nevada TBA Supply Co. was named as a defendant in a third-party complaint alleging it may have contributed to a chemical plume via a pollutant spill on its property.

Southern had a policy with Universal Underwriters Insurance Co. that covered pollution damage caused by Southern away from its premises. The policy contained a pollution exclusion for pollutants released on Southern's premises. Universal declined to defend pursuant to that exclusion.

Southern argued that Universal had a duty to defend in all suits based on claims of pollution emanating from any premises other than Southern's, regardless of whether it was attributable to Southern's conduct.

It further argued that because the exclusion applied only to pollutants released from Southern's property, the action at issue contained both covered and non-covered claims and thus gave rise to a duty to defend.

The court held that under the policy, the allegations of pollution occurring on Southern's property fell squarely within the pollution exclusion.

It further held that injuries from pollutants spilled by third parties away from Southern's property were not "covered pollution damages" contemplated by the policy.

The proper interpretation of the policy, it decided, limited any associated duty to defend to cases where Southern itself was alleged to have caused the pollution. Based on that reasoning, the court granted Universal's motion to dismiss.

> **Practice note:** Here, the court indicated that simply being party to a lawsuit in which others are incidentally alleged to be responsible for types of pollution for which the insured is covered does not give rise to a duty to defend.

NEW HAMPSHIRE

Ambiguity in pollution exclusion relating to the odor of cat urine does not preclude coverage

Mellin v. Northern Security Insurance Co., 167 N.H. 544 (N.H. 2014).

Doug and Gayle Mellin lived in a condominium complex. Their downstairs neighbor owned cats. Over time, the Mellins' apartment took on the odor of cat urine. Their homeowners insurance carrier, Northern Security Insurance Co., declined to reimburse them for losses to their condominium resulting from the odor, in part due to a pollution exclusion in the policy.

The Mellins argued that the exclusion was intended to apply only to widespread environmental contamination, which cat urine odor in a condominium is not. Northern contended that the policy's definition of "pollutants" was unambiguous and that cat urine odor qualified as a fume or vapor contaminant within that definition.

The New Hampshire Supreme Court reversed the trial court's decision on the issue, holding that in light of case law and the relevant facts, the policy was ambiguous as to whether cat urine odor fell under the pollution exclusion.

While an insured may have reasonably understood the exclusion to apply to damages resulting from odors emanating from things such as large-scale farms, waste-processing facilities or other industrial settings, the same could not be said for the odor of cat urine. As such, the exclusion did not preclude coverage.

> **Practice note:** The court explained that odors created in a private residence by common domestic animals are materially distinguishable from odors emanating from large-scale farms.

NORTH CAROLINA

No duty to defend where sulfur was released from defective drywall

New NGC Inc. v. ACE American Insurance Co., 105 F. Supp. 3d 552 (W.D.N.C. 2015).

New NGC Inc. manufactured building products including drywall. It became the target of a

number of individual and putative class-action lawsuits alleging, in part, respiratory ailments and allergy-like symptoms caused by defective drywall it produced.

NGC sued its insurers, including ACE American Insurance Co., for breach of contract following their refusal to defend and for a declaration that the insurers had a duty to indemnify NGC for the costs it had incurred.

One issue in the case was whether a pollution exclusion in ACE's policy applied to sulfur allegedly released into the air by NGC's drywall. ACE argued that the exclusion applied, while NGC claimed that the policy's definition of pollution was impermissibly broad. It further argued that in any event, it only excluded "traditional environmental pollution."

The court framed its analysis around the holdings in *West American Insurance Co. v. Tufco Flooring East Inc.*, 104 N.C. App. 312 (N.C. Ct. App. 1991). In light of that opinion, the court held that the exclusion was not ambiguous; that the sulfur in this case was a harmful or dangerous substance introduced into a structure; and that the pollution exclusion was not "absolute," was sufficiently defined and was not impermissibly broad.

According to the court, NGC's belief that this type of scenario would be covered did not render the policy ambiguous. Therefore, ACE had no duty to defend.

> **Practice note:** The court held that the mere belief that a certain scenario is covered does not necessarily create ambiguity in a policy.

OKLAHOMA

Damages arising from improperly disposed-of sludge trigger pollution exclusion

Greuel v. Continental Insurance Co., No. 14-cv-303, 2015 WL 5709414 (E.D. Okla. Sept. 29, 2015).

In an underlying action, Thomas and Faustina Greuel sued Sludge Technology Inc. for alleged wrongful disposal of municipal sewage sludge that entered upon the Greuels' land. The Greuels were awarded actual and punitive damages as well as attorney fees and costs.

They sought to collect on the judgment from Sludge's insurer, Continental Insurance Co. The Gruels and Continental filed cross-motions for summary judgment.

Continental argued that the damages in the underlying case fell under a multipart pollution exclusion. The Greuels argued that the incident fell under an exception to one of the subparts of the pollution exclusion.

The court rejected the couple's argument for two reasons. First, it said the Greuels failed to sufficiently establish one of the technical prongs required for the exception.

Moreover, it noted that Continental explicitly stated that it was not employing the particular part of the overall pollution exclusion for which the Greuels were claiming exception. The court therefore denied the Greuels' summary judgment motion and granted Continental's.

> **Practice note:** Where a pollution exclusion was made up of multiple discrete and independent sub-exclusions, claimants could not employ an exception to a pollution exclusion different from the exclusion(s) relied upon by the insurer.

OREGON

Language of various policies determines obligations of various insurers

Century Indemnity Co. v. Marine Group LLC, 131 F. Supp. 3d 1018 (D. Or. 2015).

The underlying contamination claims arose from the EPA's notification that various insureds were potentially responsible for contamination for a stretch of river designated as a federal Superfund site.

Interpreting various policies and provisions, the court found that some insurers had no duty to defend based on self-insured retention language, excess coverage provisions and hazardous substance exclusions.

With regard to the pollution exclusions, National Union Fire Insurance Co. of Pittsburgh issued a policy that expressly excluded environmental claims by or on behalf of any federal, state or local government authority. The court ruled this exclusion relieved National Union of any duty to defend with regard to the substance remediation action.

The court also found Century Indemnity Co. had no duty to defend because the policy excluded defense for "environmental claims." The court noted, however, that there would an indemnification obligation if the self-insured retention was exceeded.

> **Practice note:** The court's decision contains an interesting discussion regarding whether a suit brought by an American Indian tribe, acting as a national resource trustee under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9601, constitutes a government action. The court determined that such actions constitute an exercise of governmental authority for purposes of a pollution exclusion.

PENNSYLVANIA

Insurer's withdrawal of defense after two years did not harm insured where insurer had properly issued a reservation of rights

Nationwide Property & Casualty Insurance Co. v. Shearer, No. 15-1837, 2016 WL 3018764 (3d Cir. May 26, 2016).

In a coverage dispute related to an underlying pollution action, the 3rd U.S. Circuit Court of Appeals found that Nationwide Insurance was entitled to withdraw as counsel pursuant to the pollution exclusion, even after defending the insureds for two years.

The underlying action arose after a property owner discovered that sewage pipes from a number of neighboring properties were draining onto his property. Initially, the property owner capped the pipes. However, according to the complaint, the caps were later removed.

After the suit was filed, the insurer, Nationwide, agreed to defend the insureds (the owners of the neighboring properties). At numerous times during its defense, Nationwide issued reservation-of-rights letters expressing concern that coverage did not exist because of the presence of pollution and biological deterioration exclusions.

After defending the insured for two years, Nationwide filed suit claiming that, pursuant to the pollution exclusion, there was not coverage or obligation to defend.

The insureds did not challenge the exclusion's application. Instead, they argued the late withdrawal was unfair and harmful to them.

Applying Pennsylvania law, the 3rd Circuit found that Nationwide's numerous reservation-of-rights letters made it clear that its defense did not constitute a waiver of the right to assert coverage defenses.

> **Practice note:** See the Delaware Superior Court's decision in *Mine Safety Appliances Co. v. AIU Insurance Co.*, No. 10c-07-241, 2016 WL 498848 (Del. Super. Ct. Jan. 22, 2016), applying Pennsylvania law, in which the court found a pollution exclusion did not apply where the underlying claim was based on a defective product that resulted in exposure to dangerous materials.

TEXAS

Spray foam causes respiratory harm, constitutes a pollutant

Evanston Insurance Co. v. Lapolla Industries, 634 Fed. Appx. 439 (5th Cir. 2015).

The underlying action was brought against Lapolla Industries, a manufacturer of spray polyurethane foam insulation, after odors from the insulation caused respiratory distress to inhabitants of a home where it was used. The inhabitants were forced to abandon the home.

Evanston Insurance Co., which insured Lapolla at the time, sought and was granted by the trial court a declaration that it had no duty to defend Lapolla because the claims fell under a pollution exclusion.

The 5th U.S. Circuit Court of Appeals affirmed the lower court's ruling. Applying Texas contract law and the "eight-corners rule" ("when an insured is sued by a third party, the liability insurer is to determine its duty to defend solely from [the] terms of the policy and the pleadings of the third-party claimant"), the court held that the pollution exclusion was not ambiguous and that all of the allegations against Lapolla in the underlying complaint fell under it.

In reaching its decision, the court refrained from considering deposition testimony of the original plaintiffs specifically because of the eight-corners rule.

> **Practice note:** See the Illinois Appellate Court decision in *In re Liquidation of Legion Indemnity Co.*, 44 N.E.3d 1170 (Ill. App. Ct., 1st Dist. 2015), applying Texas law, where intent to exclude mold under a pollution and health hazard exclusion was not clear and unambiguous, the exclusion did not apply to mold-related injuries. Also see the decision in *In re ATP Oil & Gas Corp.*, No. 12-36187, 2016 WL 270049 (Bankr. S.D.Tex. Jan. 20, 2016), where the court evaluated the significance of which party in a contractor-subcontractor relationship brought pollutants to the premises for purposes of applying a pollution exclusion.

VERMONT

Pollution exclusion includes spray foam insulation, extends beyond traditional environmental hazards

Cincinnati Specialty Underwriters Insurance Co. v. Energy Wise Homes Inc., 120 A.3d 1160 (Vt. 2015).

In the underlying action, Energy Wise, a company specializing in insulation work, installed spray foam insulation in a school where the plaintiff worked. She claimed she was injured as a result of exposure to airborne chemicals and residuals from the insulation.

At the time of the installation, Energy Wise had a commercial general liability "surplus lines" policy with Cincinnati Specialty Underwriters Insurance Co. The policy contained a "total pollution exclusion."

Cincinnati initially agreed to defend Energy Wise, but eventually it sought a declaratory judgment on the grounds that the claims fell under the pollution exclusion.

Opposing the motion, the plaintiff argued that the exclusion was intended to cover only "traditional environmental hazards" because otherwise the policy would effectively be rendered meaningless.

Cincinnati, on the other hand, contended that the exclusion clearly went beyond traditional environmental hazards because the policy's definition of pollutants included materials recognized to be harmful "to persons, property or the environment."

The court rejected the plaintiff's position because even under Cincinnati's proposed reading, the policy still covered a number of claims such as slip and fall injuries. The court noted that numerous authorities had identified the airborne chemicals from the spray foam as harmful.

It said the spraying of the insulation constituted a "dispersal" or "release" and that the language was "clear and susceptible of only one possible interpretation." Thus, it concluded that the injuries fell under the exclusion.

> **Practice note:** The Vermont Supreme Court's ruling applies only to "surplus lines insurers" because state law requires all insurers issuing liability policies in Vermont to provide coverage for pollution by endorsement unless a "consent to rate" application has been approved by the Vermont Department of Financial Regulation.

Intentional release of harmful pesticide constitutes release of a pollutant

Whitney v. Vermont Mutual Insurance Co., 135 A.3d 272 (Vt. 2015).

The plaintiffs hired an exterminator to remove bedbugs from their home. The exterminator used a pesticide called chlorpyrifos, which is both extremely dangerous and banned from residential use by the Environmental Protection Agency.

Extremely high concentrations of the substance were found in plaintiffs' home. As a result, they were instructed to stay out of the home indefinitely.

The plaintiffs had a homeowners policy with Vermont Mutual Insurance Co. They tried to claim damages under the policy, but VMIC denied the claim, citing the policy's pollution exclusion.

The plaintiffs then filed a declaratory judgment action against VMIC. The trial court granted summary judgment in their favor, concluding that under the facts of the case, the terms pollution, discharge, dispersal, release and escape, as they were used in the policy, were ambiguous.

The Vermont Supreme Court disagreed, finding the terms to be unambiguous and opining that the incidents giving rise to the case clearly fell within the scope of the exclusion. As such, the court reversed the lower court's ruling and instructed it to award summary judgment to VMIC.

> **Practice note:** The Vermont Supreme Court has relied heavily on how other courts, including those from other states, have dealt with claims of ambiguity in pollution exclusions as well as their substantive application.

WASHINGTON

Carbon monoxide leak from water heater triggers pollution exclusion

Xia v. ProBuilders Specialty Insurance Co., 189 Wash. App. 1041 (Wash. Ct. App. 2015).

The appellant began suffering from carbon monoxide poisoning after moving into a home for which the respondent insurer's insured was the general contractor. It was determined that carbon monoxide was leaking from the house's water heater because the heater's exhaust vent was never connected to an exterior vent.

The insurer declined to defend or indemnify, in part due to a pollution exclusion in its policy with the contractor. After settling the case, the contractor assigned appellant its rights against its insurer.

At summary judgment, the lower court rejected the appellant's argument that her cause of action was rooted in negligence, not the release of pollutants, making the pollution exclusion inapplicable.

The Washington Court of Appeals agreed with the lower court, holding that the policy "clearly exclude[d] coverage for [the appellant]'s claim." According to the court, carbon monoxide was a pollutant, as it is a toxic gas that escaped from a hot water heater and thereby adversely affected her health.

The policy also stated that the exclusion applied "regardless of the cause of the pollution," which would include damages caused by pollution arising from the insured's negligence. For those reasons, the court held that the appellant was not entitled to summary judgment.

> **Practice note:** The court noted that the case did not fall into the category of cases where the pollutant's toxic character is not central to the injury (for example, where a deliveryman choked on diesel fuel). In contrast, here, the toxic nature of carbon monoxide caused the injuries.

WISCONSIN

Pollution exclusion purporting to exclude bacteria as commercial or industrial product or byproduct was ambiguous

Connors v. Zurich American Insurance Co., 872 N.W. 2d 109 (Wis. Ct. App. 2015).

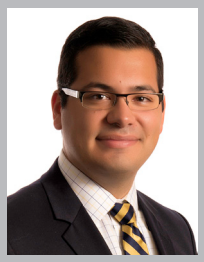
Patrick Connors developed pneumonia, allegedly as a result of inhaling a type of bacteria at his place of employment. Connors sued his employer's insurer directly, but the lower court granted the insurer's motion for summary judgment.

The court said the bacteria was a contaminant and therefore a pollutant, thus triggering a pollution exclusion in the employer's policy.

The Wisconsin Court of Appeals reversed the lower court's holding on the basis of language found in an endorsement to the policy. The endorsement seemingly altered which materials were to be considered pollutants for purposes of the policy.

The court opined that the policy was ambiguous because "[u]nder at least one interpretation, a reasonable insured may expect coverage because the bacteria in this context are not obviously in the nature of the commercial or industrial products or byproducts specified as pollutants in the pollution exclusion."

> **Practice note:** See the decision in *Ramos v. Charter Oak Fire Insurance Co.*, 871 N.W.2d 866 (Wis. Ct. App. 2015), where the court applied *Connors* to very similar facts and reached the same result.



Thomas F. Segalla (L), a founding partner of **Goldberg Segalla LLP** in New York, is an internationally recognized authority on insurance, reinsurance and bad faith. He is the editor of "Couch on Insurance, 3d" and the "Reinsurance Professional's Deskbook." He has been retained by major insurance carriers and policyholders in more than 35 jurisdictions internationally, and he has served as an expert witness in more than 100 bad-faith, coverage and extra-contractual cases across the country. He can be reached at tsegalla@goldbergsegalla.com. **James D. Macri** (R), an associate in the firm's global insurance services practice group in Buffalo, New York, focuses his practice on insurance coverage analysis and reinsurance, including matters involving commercial general liability, professional liability and property insurance policy coverage issues. He is a frequent contributor to the firm's blog (www.insurerereport.com), as well as its CaseWatch: Insurance, Bad Faith Focus and Reinsurance Review newsletters. He can be reached at jmacri@goldbergsegalla.com. This article is an update to "But is it really a pollutant? A national overview of pollution exclusion litigation," which was published April 29, 2015, in Westlaw Journal Environmental.