

But is it really a pollutant?

A national overview of pollution exclusion litigation

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Courts have grappled with the interpretation and application of various iterations of the pollution exclusion, and exceptions to the pollution exclusion, since the 1970s. A review of the cases digested in this current update demonstrates how courts throughout the United States continue to take a diverse approach. Consider that the court in the case of *Headwaters Resources Inc. v. Illinois Union Insurance Co.*, 770 F.3d 885, 889 (10th Cir. 2014), noted:

Generally speaking, jurisdictions that have addressed the scope to the “total pollution exclusion” fall into two camps: courts that apply the pollution exclusion as written because they find them clear and unmistakable; and courts that narrow the exclusion to “traditional environmental pollution,” often because they find the terms of the exclusion to be ambiguous due to their broad applicability.

Whether you are dealing with fly ash, diesel fuel, fireworks, chemicals, acrylic concrete sealant, carbon monoxide, dry cleaning solution, bodily fluids, smoke, asbestos, silica dust or lead, the courts continue to assess

whether to follow a narrow or broad focus, whether the various substances constitute a pollutant within the meaning of the exclusion and whether any exception even applies.

The following overview examines how courts have addressed these issues and more in recent cases across the country. Understanding where the courts stand in various jurisdictions, the rules of construction and how choice-of-law analyses are used to interpret and apply the relevant policy provisions is beneficial to insurers and their legal counsel alike as they work toward minimizing the risk of litigation or accessing available defenses when a coverage dispute arises.

ARIZONA

Pollution exclusion only applies to traditional environmental claims

Saba v. Occidental Fire & Casualty Company of North Carolina, No. 14-00377, 2014 WL 7176776 (D. Ariz. Dec. 16, 2014).

In an underlying action, the plaintiff sued Plumbing Specialists, a company that had installed a water heater in her home, and

alleged that the negligent installation resulted in carbon monoxide poisoning. Citing the pollution exclusion, the insurer for Plumbing Specialists refused to defend and indemnify the company in the plaintiff's case. Subsequent to the execution of a *Damron* agreement, the plaintiff sued the insurer in this action, seeking a declaration based on the policies and breach of contract. *Damron v. Sledge*, 105 Ariz. 151 (1969).

In considering the application of the total pollution exclusion endorsement, the U.S. District Court for the District of Arizona noted that Arizona courts have, on the basis of public policy limitations, very narrowly interpreted pollution exclusions that are indistinguishable from the one involved in this case. Although carbon monoxide is a pollutant, the court held that such exclusions cover traditional environmental pollution claims and not bodily injuries suffered by the plaintiff, which were a result of the negligent installation of a water heater.

Practice note: The court considered the application of a renewal policy and whether the plaintiff's injuries occurred during the policy period.

CALIFORNIA

Insurer must defend against sandblasting dust and debris negligence claim

EFK Investments LLC v. Peerless Insurance Co., No. 13-5910, 2014 WL 4802920 (N.D. Cal. Sept. 26, 2014).

The plaintiffs owned and managed two adjacent commercial properties in San Francisco. To prepare one property for painting, the plaintiffs sandblasted the property. The tenant of the neighboring property alleged that dust and debris “destroyed its entire inventory of high-end audio equipment,” damaged furnishings and disrupted business. Although testing prior to sandblasting did not reveal any lead in the paint, testing of the dust after sandblasting showed trace amounts of lead



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The plaintiffs sought defense and indemnity for the ensuing lawsuit, alleging negligence on the part of the plaintiffs through “improper sealing of the property for sandblasting.” The insurer argued that the claims were excluded by the pollution and lead exclusions of the policy. However, the plaintiffs contended that the harm arose from the negligent act, which resulted in dispersal of damaging substances regardless of whether the substances were “pollutants.” Since they were released by negligence, not “conventional environmental pollution,” the plaintiffs argued the claims were not barred.

Courts have grappled with the interpretation and application of various iterations of the pollution exclusion, and exceptions to the pollution exclusion, since the 1970s.

The U.S. District Court for the Northern District of California agreed with the plaintiffs, finding, under California law, that the scope of a total pollution exclusion is not based entirely on the nature of the irritant. Rather, the underlying circumstances must be considered. It went on to note that the exclusion was not meant to deny coverage for ordinary acts of negligence. Instead, it was to be used by insurers to avoid claims based on environmental laws. Without evidence to suggest that the incident constituted environmental pollution, the court found the insurer had a duty to defend.

Practice note: The court further found that the lead exclusion did not entirely exclude the claims because only a portion of the damages were caused by lead. For a discussion of claims under an environmental liability insurance policy, see *Lennar Mare Island LLC v. Steadfast Insurance Co.*, No. 12-02182, 2014 WL 2002204 (E.D. Cal. May 15, 2014).

CONNECTICUT

Various pollution exclusions are inapplicable in long-tail asbestos liability

R.T. Vanderbilt Co. v. Hartford Accident & Indemnity Co., No. X02UWYCV075016321, 2014 WL 1647135 (Conn. Super. Ct. Mar. 28, 2014).

In a massive coverage case involving long-tail asbestos liabilities and 30 insurers, the Connecticut Superior Court found that neither

pollution nor occupational injury exclusions barred coverage. The policies at issue dated back to the 1950s. The judge found that the three different types of pollution exclusions used could not be unambiguously applied to the talc asbestos exposure claims.

Discussing the standard and absolute pollution exclusions, the court held that the exclusions could apply to both “traditional” environmental contamination claims as well as the exposure claims. In finding the provisions ambiguous, the court stated “the very adoption of separate asbestos exclusions in policies beginning in 1986 is

evidence that insurers did not consider the pollution exclusion language to be clear enough to exclude those claims. To argue the pollution exclusion was unambiguous and therefore excluded asbestos-related claims would render the asbestos exclusion redundant and unnecessary.”

The court further held that exclusions without the “discharge, dispersal, release, or escape of pollutants” language were also ambiguous. These exclusions applied to losses caused by “seepage, pollution or contamination.” The judge also found these terms ambiguous with regard to the asbestos claims.

Practice note: This decision was the first Connecticut appellate case to discuss the applicability of standard and absolute pollution exclusions in the context of asbestos exposure claims.

FLORIDA

Insured could not satisfy requirements of pollution buy-back endorsement

Composite Structures Inc. v. Continental Insurance Co., 560 Fed. Appx. 861 (11th Cir. 2014).

Composite Structures Inc. sought a declaratory judgment stating that Continental Insurance Co. had a duty to defend the company and indemnify it against employees’ injury claims for exposure to excessive amounts of carbon monoxide. The employees worked for Composite and were exposed to carbon monoxide during the policy period of November 2004 through

November 2005. A complaint was not filed until February 2007 and was not provided to Continental until March 2007. Continental disclaimed coverage under the pollution exclusion of both commercial general liability policies as modified by a pollution buy-back endorsement. The endorsement provided an exception to the pollution exclusion if all five conditions listed could be met. Relevant here were conditions 2, 3 and 4:

2. The “occurrence” can be identified as commencing at a specific time and date during the term of this policy.
3. The “occurrence” became known to the insured within 72 hours after its commencement.
4. The “occurrence” was reported in writing to us within 30 days after having become known to the insured.

The 11th U.S. Circuit Court of Appeals noted that the conditions above could not be met. The date of written notice was the day the complaint was forwarded to Continental, in March 2007. According to the court, the latest a covered occurrence could have occurred was on the last day of the policy, Nov. 30, 2005. Composite was required to have knowledge of that occurrence within three days and then provide notice within 30 days after that knowledge. Thus, the court held the latest date Composite could provide notice was 33 days after Nov. 30, 2005. Since the complaint/notice was given in 2007, it was well outside of the deadline and therefore was not covered.

Practice note: In reaching this decision, the court found this case to be an exception to the general rule in that the insurer was permitted to consider information outside of the complaint — namely, the date of notice to itself.

Bodily fluids considered a pollutant

Chestnut Associates Inc. v. Assurance Company of America, 17 F. Supp. 3d 1203 (M.D. Fla. 2014).

Chestnut Associates initiated an action seeking a declaration of its rights under a precision portfolio policy from Assurance Company of America. Assurance refused to defend the underlying action alleging two counts of intentional infliction of emotional distress. The complaint alleged that a man employed as a pool service technician by Chestnut “sexually pleased himself” in the underlying plaintiff’s pool.

Damage allegations included property damage to the swimming pool caused by the pool service technician's bodily fluids. The U.S. District Court for the Middle District of Florida found that the pollution exclusion applied to the extent property damage claims made against Chestnut Associates. The bodily fluids qualified as a pollutant that contaminated the swimming pool.

Practice note: The court noted that in Florida pollutants can include "natural bodily substances."

GEORGIA

Raw sewage leaks in rental properties excluded

Nationwide Mutual Insurance Co. v. Bader & Associates Inc., No. 13-00032, 2014 WL 231980 (N.D. Ga. Jan. 22, 2014).

A group of individuals and companies purchased 23 homes as investment properties. Eventually, tenants began reporting that raw sewage was spilling onto the yards of their properties. This was because the septic systems were insufficient to handle the number of tenants in each property. The property owners sued the construction companies that built the homes and the real estate agencies that sold them, alleging numerous misrepresentations and fraud claims regarding the capacity limitations of the properties.

The U.S. District Court for the Northern District of Georgia initially found that fraud and violations of the Georgia Fair Business Practices Act were not occurrences because they were not accidents. However, even still, the court noted the claims would be excluded as a matter of law by the total pollution exclusion, among other exclusions.

Practice note: Courts will first determine whether coverage is afforded before applying any exclusions.

HAWAII

Is the duty to defend triggered?

Charter Oak Fire Insurance Co. v. Endurance American Specialty Insurance Co., 40 F. Supp. 3d 1296 (D. Haw. 2014).

The liability insurers for a federal contractor that was hired to destroy seized fireworks brought this declaratory action against the CGL insurer for a subcontractor. The action alleged that the CGL insurer owed a duty to defend the contractor in an underlying action

instituted by five of the subcontractor's employees who were killed as a result of an explosion.

The U.S. District Court for the District of Hawaii held that the underlying complaints sufficiently trigger the CGL insurer's duty to defend, that the CGL policy was primary to the federal contractor's liability policy and that the CGL insurer failed to show that the application of the pollution exclusion was sufficient to preclude the duty to defend.

With respect to the application of the pollution exclusion, the court initially held that because only the duty to defend was at issue, the court need not decide whether the pollution exclusion actually applied. The court only needed to determine whether coverage was possible (for example, whether there is a possibility of coverage). Here the court concluded that it was uncertain that fireworks were considered to be a pollutant.

Practice note: The court provides an insightful discussion of the necessity that the pollutant cause the injuries alleged in the underlying actions.

INDIANA

Builders risk insurance and waiver of subrogation

Allen County Public Library v. Shambaugh & Son LP, 2 N.E.3d 132 (Ind. Ct. App. 2014).

At issue in this appeal was whether the owner of property was able to recoup from the defendant contractor the costs of cleaning up diesel fuel that leaked from underground pipes installed by the defendants. The owners had collected \$5,000 from their insurer toward the cleanup under a builder's risk policy and were seeking from the defendants the total sum of the cleanup. It was the position of the defendants that the owners were relegated to the \$5,000 in pollution cleanup coverage under the policy.

In interpreting the relevant American Institute of Architects contract under existing case law, the Indiana Court of Appeals held that if the contractor causes damage to the property other than "the work" performed under the contract, the property owner or its insurer, through subrogation, can seek recovery from the contractor for that damage, regardless of whether the damage was covered by insurance.

Practice note: The court provides a detailed discussion of the waiver of

subrogation pertaining to damage to "the work" and "non-work."

INDIANA (APPLYING MARYLAND LAW)

Gradual release of perchlorate is 'traditional environmental pollution'

Chubb Custom Insurance v. Standard Fusee Corp., 2 N.E.3d 752 (Ind. Ct. App. 2014).

Standard Fusee manufactured road flares in which an essential ingredient is perchlorate. Perchlorate was found in water samples around its California plant. This caused Standard Fusee to test the water around its Indiana plant, where perchlorate was found as well. Standard Fusee applied and was accepted into a voluntary remediation program in Indiana.

Upon request for defense and indemnification, two insurers disclaimed coverage under the pollution exclusions of their respective CGL policies. The Indiana Court of Appeals noted that the perchlorate was released gradually over time, amounting to "traditional environmental pollution." Finding this, the court said the release fell squarely within the pollution exclusions.

Practice note: In concluding, the court noted that it expected that "interpretation of the scope of pollution exclusion clauses likely will continue to be ardently litigated throughout the state and federal courts." It also noted that it was aware that other courts may arrive at a different conclusion regarding "perchlorate contamination."

IOWA

Choice of law could affect outcome of case

Travelers Property Casualty Co. of America v. Flexsteel Industries, 847 N.W.2d 237 (Iowa Ct. App. 2014).

The defendant, a chair manufacturer, was sued in an underlying action by individuals claiming to have been exposed to chemicals released from two of its Indiana plants. The insurers contended that there was no coverage for these claims with the application of the pollution exclusion.

The Dubuque County District Court had previously granted summary judgment and concluded "Iowa law applies to all the policies at issue and ... the pollution exclusion provisions have full force and effect."

The Iowa Court of Appeals, however, concluded that the choice-of-law provisions require the application of Indiana law, not Iowa law, to the interpretation of the pollution exclusion clauses. The summary judgment rulings were vacated, and the court remanded the case.

Practice note: This case provides an analysis of choice-of-law provisions relevant to the interpretation of insurance contracts.

KENTUCKY

Total pollution exclusion unambiguous on its face and as applied

Travelers Property Casualty Company of America v. Begley Co., No. 13-199, 2014 WL 4678754 (E.D.KY. Sept. 18, 2014).

In assessing the facts of the case, the court had to grapple with a choice-of-law analysis as to which law applied to various dry cleaning business sites operated by the defendant/insured. The defendant/insured had received notification by the Kentucky Division of Waste Management to investigate and clean up various sites. With respect to policies of two of the insurers, the U.S. District Court for the Eastern District of Kentucky held that Kentucky law applied; whereas to another insurer, it was unable to determine which state law applied.

In interpreting Kentucky law, the court held that the total pollution exclusion precludes coverage and bars recovery for the insured's claims. It noted that the exclusion is unambiguous on its face and unambiguous as to its application in this case.

Practice note: A choice-of-law analysis is critical and, for judicial economy, should be resolved at the early stage of litigation.

LOUISIANA

Insured 'owned, rented, or occupied' the property leased under a mineral lease

Pioneer Exploration v. Steadfast Insurance Co., 767 F.3d 503 (5th Cir. 2014).

Pioneer operated a gas well on land leased under a mineral lease. The well was located near the boundary line of the property. After a blowout occurred, Pioneer acted immediately to limit the damages caused. However, 12 acres of property were

contaminated by the blowout, including portions of neighboring properties. Pioneer sought coverage under an umbrella policy for the costs of plugging the well, remediating the properties, and defending against and settling related lawsuits. A representative of the insured admitted that the blowout constituted an occurrence. However, the insurer argued that certain exclusions barred coverage.

Notably, the policy had an oil industry limitation endorsement and a blended pollution endorsement. The OIL endorsement excluded coverage for costs "in connection with controlling or bringing under control any oil, gas, or water well which becomes out of control." The blended pollution endorsement contained a buy-back clause that covered damages caused directly by pollution, provided Pioneer met certain conditions. However, it excluded coverage for damages that occurred on properties "owned, rented, or occupied" by the insured. At trial, the U.S. District Court for the Western District of Louisiana found the "own, rent, occupy" language to preclude coverage for remediation costs on the leased property.

On appeal, Pioneer argued that it did not "own, rent, or occupy" the surface property, but rather, it only had a mineral lease to subsurface minerals. The 5th U.S. Circuit Court of Appeals rejected this argument, finding that Pioneer had the right to occupy the land for exploration and production purposes. Under the broad exclusion, the court found these rights sufficient to say Pioneer "owned, rented, or occupied" the property on which it had the mineral lease. The court went on to hold that the costs of controlling and plugging the well were likewise excluded by the OIL endorsement.

Practice note: In reaching its decision, the court discussed an argument relating to an alleged "inherent conflict" between the blended pollution exclusion and a property damage exclusion.

MASSACHUSETTS

Negligent release of pollutants does not constitute 'wrongful entry'

Arrowood Indemnity Co. v. Oxford Cleaners and Tailors LLC, No. 13-12298, 2014 WL 4104169 (D. Mass. Aug. 15, 2014).

Oxford owned and operated a dry cleaning business that allegedly caused

contamination of an adjacent property. The neighboring property owner had an environmental investigation of its property which revealed elevated levels of petroleum and chlorinated solvents, including perchloroethylene. The Massachusetts Department of Environmental Protection was notified and eventually issued a notice of responsibility and request for an immediate response action plan to Oxford.

Arrowood denied defense and indemnity on three occasions for these DEP actions. The neighboring property owner also initiated an action against Oxford alleging, among other things, trespass because of the "hazardous materials" that entered onto the property and private nuisance because of the negligent actions that resulted in the migration of hazardous material. Arrowood agreed to defend Oxford in the suit under a reservation of rights.

There was no dispute that PCE was a pollutant or that property damages caused by its release were excluded from coverage.

However, Oxford argued that a personal injury provision, which required defense and indemnification for "wrongful entry into or eviction of a person from a room, dwelling or premises which the person occupies," applied to the lawsuit. The U.S. District Court for the District of Massachusetts noted that "wrongful entry" and "trespass" are equivalent under Massachusetts law. Finding that the parties only intended the provision to apply to intentional torts, the court held that the complaint did not trigger coverage because it alleged a claim of "negligent trespass." The court went on to hold that, in cases involving negligent release of pollutants, an insured cannot use personal injury coverage in Part Two of a policy to circumvent a pollution exclusion contained in Part One.

Practice note: In reaching this conclusion, the court stated that "an insured would have to do a pretzel-twist logically to believe on the one hand that Oxford was not entitled to coverage under the 'bodily injury' and 'property damage' sections of the policy because coverage is barred by the pollution exclusion, yet on the other hand believe he should receive coverage for the same risk under the personal injury liability coverage afforded by the policy."

MICHIGAN

Smoke from fire does not constitute pollution

Hobson v. Indian Harbor Insurance Co., No. 316714, 2015 WL 1069242 (Mich. Ct. App. Mar. 10, 2015).

The plaintiffs/tenants sought to recover for injuries, including smoke inhalation, which occurred during a fire in their apartment complex. The fire, according to the complaint, was caused by the negligence of the landlord's employees. The landlord was insured under a CGL policy containing a total pollution exclusion that defined a pollutant as including smoke. The insurers denied coverage on the basis of that exclusion.

The Michigan Court of Appeals, affirming the trial court's opinion, found that the pollution exclusion did not apply. The plaintiffs argued that the exclusion "clearly contemplates pollution as a substance that was confined" and then released. This, the plaintiffs said, is distinct from a fire. The court rejected the insurers' argument, which attempted to separate the smoke from the fire.

The insurers, according to the court, "would have [the court] hold that any 'pollutant' involved in the causal chain negates their liability. To so hold would ignore the context in which the pollution exclusion was written and to extend it far beyond its plain meaning." The court concluded there were no allegations of discharge or dispersal — instead, the plaintiffs were "allegedly injured when the fire and smoke engulfed them. It did not pollute them."

Practice note: For further discussion of the exclusion, see the Michigan Court of Appeals decision in *Township of Maple Forest v. Clearwater Drilling LLC*, No. 314798, 2014 WL 2355126 (Mich. Ct. App. 2014), in which the court found that a solution of bentonite and water was not a pollutant.

Products-complete operations exception did not apply

Visteon Corp. v. National Union Fire Insurance Co., 777 F.3d 415 (7th Cir. 2015).

Visteon, a Ford Motors Corp. subsidiary, sued for breach of contract after National Union refused to defend against and indemnify claims arising from the release of trichloroethylene from Visteon's plant. For a period of about 40 years, ending in 2000, Visteon used vapor degreasers that included

TCE. From 2000 to 2002, during the policy period, TCE was still used but not in vapor degreaser form. The plant closed in 2007.

Eventually, claims arose for groundwater contamination extending well beyond Visteon's property. Visteon's expert noted this contamination was released while TCE was in use at the plant, and the prior releases were the cause of continued releases of dissolved TCE.

The policy at issue contained an absolute pollution exclusion. However, an exception was contained in the complete operations hazard clause. The exception stated, in relevant part, that the exclusion did not apply to damages "occurring away from premises you own or rent and arising out of your work except work that has not yet been completed or abandoned."

Visteon argued that its "work" was "completed" each time a contract to supply goods was performed. This was, in part, because the definition of "complete" included, among other things, "when all of the work called for in your contract has been completed." The 7th Circuit disagreed. The court found that this interpretation would erase "the line between completed and ongoing operations."

Although the definition was "murky," adoption of Visteon's definition would swallow the entire exclusion because there would be no distinction between products made under contracts and those made with the hope of being sold. Instead, the court noted that this portion of the definition could have referred to the point in time when the relationship with a buyer ended.

Practice note: The court applied an interpretation of the word "complete" that was not addressed by the parties to find the exclusion applicable despite a "murky" definition.

MISSOURI

Pollution exclusion may be inapplicable

United Fire & Casualty Co. v. Titan Contractors Service, 751 F.3d 880 (8th Cir. 2014).

The defendant insured provides construction cleanup services, including cleaning and sealing concrete floors. It was sued in an underlying action for injuries sustained by a woman alleging that she was exposed to a sealant and sustained various injuries. At issue on this appeal was the application of the "absolute pollution exclusion." The U.S. District Court for the Eastern District of Missouri held that the sealant was not

Understanding where the courts stand in various jurisdictions is beneficial to insurers and their legal counsel alike as they work toward minimizing the risk of litigation or accessing available defenses when a coverage dispute arises.

a pollutant and, therefore, the pollution exclusion did not apply.

The 8th Circuit reversed and held that the sealant was a pollutant. In reaching its decision, the court considered whether an ordinary person of average understanding could consider the sealant fully unambiguously within the policy definition of a pollutant. The court, however, refused to grant summary judgment to the insurer because whether or not the complaint in the underlying action did not allege that there was a "discharge, dispersal, seepage, migration, release or escape" of the sealant, there is an issue of whether the pollution exclusion is applicable. The case was remanded.

Practice note: The dissent provides an interesting analysis of when a product constitutes a pollutant and would have held that the sealant was not a pollutant.

NEBRASKA

Policy language excludes all possible manners of lead paint exposure

State Farm Fire & Casualty Co. v. Dantzler, 289 Neb. 1 (Neb. 2014).

State Farm sought declaratory judgment against the insured landlord, Jerry Dantzler, his tenant and the tenant's child, stating that the pollution exclusion barred coverage for lead-based paint exposure. The tenant sued Dantzler, alleging that his child was exposed to high levels of lead because of lead paint contamination in the rental property. State Farm retained counsel for Dantzler subject to a reservation of rights. State Farm argued that the policy's pollution exclusion barred coverage.

State Farm presented an expert affidavit setting forth common manners of lead paint exposure but did not opine specifically on how the child was exposed. The insured contended that State Farm did not prove that the alleged injuries were the result of a “discharge, dispersal, spill, release or escape of pollutants.” The Nebraska Supreme Court rejected the contention that only certain manners of exposure constitute a “discharge, dispersal, spill, release or escape.” Instead, it found that language to “encompass all possible movements by which harmful exposure to lead-based paint occurs.” As such, the court held that the manner of exposure to lead paint is not a material fact to prevent summary judgment.

Practice note: The court specifically noted that lead-based paint cannot cause injury unless it has separated from the painted surface. Thus, implicit in a claim of lead paint exposure is an allegation of “discharge, dispersal, spill, release or escape.”

Exclusion unambiguously excludes carbon monoxide exposure

Church Mutual Insurance Co. v. Clay Center Christian Church, 746 F.3d 375 (8th Cir. 2014).

Church Mutual instituted a declaratory judgment action seeking a determination that the pollution exclusions of a multi-peril policy and an umbrella policy precluded coverage. The insured, a church, assigned its claims to its pastor and his wife. The pastor died and his wife suffered injuries as a result of exposure to carbon monoxide that leaked from the heating system in the church’s parsonage.

The policies defined contained identical exclusions disclaiming coverage for pollutants — “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes acid, alkalis, chemicals and waste.” The pastor’s estate and his wife contended that the terms “irritant” and “contaminant” rendered the provision ambiguous.

The 8th Circuit disagreed. Although it noted that there has been no definitive ruling by the Nebraska Supreme Court, the 8th Circuit found that the court and the majority of others find the broad exclusion unambiguous. It went on to predict that the Nebraska high court would reject the contention that the terms “irritant” and “pollutant” created an ambiguity. Instead, it found the terms clear.

It further found that under the plain meaning of the provision’s language, carbon monoxide fell within the meaning of “contaminant” and, therefore, claims were excluded.

Practice note: This court reaffirmed that the majority of courts find the broad language of an absolute pollution exclusion unambiguous.

NEVADA

Absolute pollution exclusion only applies to traditional environmental pollution

Century Surety Co. v. Casino West Inc., 329 P.3d 614 (Nev. 2014).

In responding to certified questions from the 9th Circuit, the Nevada Supreme Court interpreted the scope of an absolute pollution exclusion as a matter of first impression. After four people died from carbon monoxide poisoning while sleeping in the Casino West Motel, Century denied coverage in part under the pollution exclusion. The carbon monoxide leaked from the pool heater directly below the room. Casino West argued that the exclusion only applied to “traditional environmental pollution.”

However, Century argued that it applied to both indoor and outdoor pollutants, and it specifically highlighted the presence of an exception for “bodily injury” if it was sustained within a building and caused by “smoke, fumes ... from equipment used to heat the building.”

The court found the provision ambiguous, since both interpretations were reasonable. Although it was reasonable to classify carbon monoxide as a pollutant, it was also reasonable to follow the more limited reading of the exclusion as argued by Casino West. On its face, the court noted, the exclusion was broad enough to cover soap, shampoo and bleach as contaminants or irritants. As a result, it could cover any accident caused by those items, including a slip and fall on a puddle of bleach or a rash caused by soap.

Thus, a reasonable policyholder could read the exclusion to cover only “traditional” environmental pollution. In light of both reasonable interpretations, the court found it must interpret the policy in favor of Casino West’s reading. In so holding, the court noted, considering the significant amount of authority from other jurisdictions finding the absolute pollution exclusion to only apply to traditional environmental pollution, an

insurer cannot point to an exception to prove that the exclusion also applies to indoor pollution. Instead, the insurer must plainly state that the exclusion is not limited to traditional environmental pollution.

Practice note: The court also found an “indoor air quality exclusion” to be ambiguous.

NEW YORK

Court overturns denial of summary judgment, finds exclusion unambiguous

Broome County v. Travelers Indemnity Co., 125 A.D.3d 1241 (N.Y. App. Div., 3d Dep’t 2015).

Broome County sought coverage for property damage claims related to silica dust that migrated up an elevator shaft of a building during construction of a parking garage. Travelers disclaimed coverage under the pollution exclusion. On appeal, the New York Supreme Court, Appellate Division, 3rd Department found the pollution exclusion applicable and overturned the trial court’s denial of summary judgment.

Broome County relied on a case from New York’s highest court, stating that the terms “discharge, dispersal, seepage, migration, release, or escape” in a third-party policy did not apply to ordinary paint fumes that drifted short distances. However, the appeals court stated that that case was inapplicable, finding that application of that concept in the context of a first-party policy would render the exclusion insignificant. This was especially true because the policy’s definition of “pollutants” included “unhealthy or hazardous building materials” such as asbestos and lead paint.

Practice note: This court’s decision indicates that the distinction between first-party and third-party policies may be relevant in applying a pollution exclusion.

Exclusions applied because use of pollutant was intended as part of operations

Travelers Indemnity Co. v. Northrop Grumman Corp., 3 F. Supp. 3d 117 (S.D.N.Y. 2014).

Starting in the 1930s, Northrop’s facility in Bethpage, N.Y., was used for manufacturing and testing airplanes, weapons and satellites. As part of its operations, it used vapor degreasers containing TCE and

Case list

Acuity v. Chartis Specialty Insurance Co., No. 2013AP1303, 2015 WL 1186150 (Wis. Mar. 17, 2015).

Advanced Waste Services Inc. v. United Milwaukee Scrap LLC, No. 2014AP1169, 2015 WL 868120 (Wis. Ct. App. Mar. 3, 2015).

Allen County Public Library v. Shambaugh & Son LP, 2 N.E.3d 132 (Ind. Ct. App. 2014).

Arrowood Indemnity Co. v. Oxford Cleaners and Tailors LLC, No. 13-12298, 2014 WL 4104169 (D. Mass. Aug. 15, 2014).

Broome County v. Travelers Indemnity Co., 125 A.D.3d 1241 (N.Y. App. Div., 3d Dep't 2015).

Burlington Insurance Co. v. JC Instride Inc., 30 F. Supp. 3d 587 (S.D. Tex. 2014).

Century Surety Co. v. Casino West Inc., 329 P.3d 614 (Nev. 2014).

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Chestnut Associates Inc. v. Assurance Company of America, 17 F. Supp. 3d 1203 (M.D. Fla. 2014).

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Church Mutual Insurance Co. v. Clay Center Christian Church, 746 F.3d 375 (8th Cir. 2014).

Composite Structures Inc. v. Continental Insurance Co., 560 Fed. Appx. 861 (11th Cir. 2014).

EFK Investments LLC v. Peerless Insurance Co., No. 13-5910, 2014 WL 4802920 (N.D. Cal. Sept. 26, 2014).

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Federal Insurance Co. v. Southern Lithoplate Inc., 7 F. Supp. 3d 579 (E.D.N.C. 2014).

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Headwaters Resources Inc. v. Illinois Union Insurance Co., 770 F.3d 885 (10th Cir. 2014).

Hobson v. Indian Harbor Insurance Co., No. 316714, 2015 WL 1069242 (Mich. Ct. App. Mar. 10, 2015).

Howard Industries Inc. v. Ace American Insurance Co., No. 2:13-0677, 2014 WL 978445 (S.D. Ohio Mar. 12, 2014).

Lennar Mare Island LLC v. Steadfast Insurance Co., No. 12-02182, 2014 WL 2002204 (E.D. Cal. May 15, 2014).

Nationwide Mutual Insurance Co. v. Bader & Associates Inc., No. 13-00032, 2014 WL 231980 (N.D. Ga. Jan. 22, 2014).

Pioneer Exploration v. Steadfast Insurance Co., 767 F.3d 503 (5th Cir. 2014).

Preisler v. General Casualty Insurance Co., 857 N.W.2d 136 (Wis. 2014).

R.T. Vanderbilt Co. v. Hartford Accident & Indemnity Co., No. X02UWYCV075016321, 2014 WL 1647135 (Conn. Super. Ct. Mar. 28, 2014).

Saba v. Occidental Fire & Casualty Company of North Carolina, No. 14-00377, 2014 WL 7176776 (D. Ariz. Dec. 16, 2014).

State Farm Fire & Casualty Co. v. Dantzler, 289 Neb. 1 (Neb. 2014).

Township of Maple Forest v. Clearwater Drilling LLC, No. 314798, 2014 WL 2355126 (Mich. Ct. App. 2014).

Travelers Indemnity Co. v. Northrop Grumman Corp., 3 F. Supp. 3d 117 (S.D.N.Y. 2014).

Travelers Property Casualty Company of America v. Begley Co., No. 13-199, 2014 WL 4678754 (E.D. Ky. Sept. 18, 2014).

Travelers Property Casualty Company of America v. Flexsteel Industries, 847 N.W.2d 237 (Iowa Ct. App. 2014).

Two Farms Inc. v. Greenwich Insurance Co., 993 F. Supp. 2d 353 (S.D.N.Y. 2014).

United Fire & Casualty Co. v. Titan Contractors Service, 751 F.3d 880 (8th Cir. 2014).

Visteon Corp. v. National Union Fire Insurance Co., 777 F.3d 415 (7th Cir. 2015).

Wilson Mutual Insurance Co. v. Falk, 857 N.W.2d 156 (Wis. 2014).

other contaminants. In the 1970s, the contaminants were found to have leached into the groundwater, extending nearly 2,000 acres.

Eventually, in the 1980s, the site was designated as a hazardous-waste site. In the 1990s, Northrop entered into a consent order with the New York State Department of Environmental Conservation to remediate the site. Travelers had no record of notification of either of those events. In 2012, Northrop notified Travelers that it had spent

more than \$40 million to date to remediate the site. Travelers denied coverage for the costs.

A number of Travelers policies were implicated by this dispute. Most policies contained a pollution exclusion that excluded coverage for the "discharge, dispersal ... of any pollutants ... unless such discharge is sudden or accidental." Later policies excluded coverage for discharges that were "expected or intended from the standpoint of any insured." The U.S. District Court for the Southern District of New York, noting

that the use of TCE and other contaminants was part of Northrop's business operations, found that the exclusions barred coverage. Northrop was intentionally using TCE. Thus, the court found that it could not be classified as "sudden or accidental" or "unexpected or unintended."

Practice note: For further discussion of pollution claims in New York, see the Southern District of New York's decision in *Two Farms Inc. v. Greenwich Insurance Co.*, 993 F. Supp. 2d 353 (S.D.N.Y. 2014).

NORTH CAROLINA

Central business activity exception inapplicable to prototypical pollution claim

Federal Insurance Co. v. Southern Lithoplate Inc., 7 F. Supp. 3d 579 (E.D.N.C. 2014).

Southern Lithoplate produces lithographic plates and other products for the graphics and photography industries. The company was sued in two separate lawsuits alleging groundwater contamination caused by its generation, storage, transport and disposal of various hazardous waste products, including TCE. Multiple insurers disclaimed coverage under the absolute pollution exclusion contained within their respective policies. The U.S. District Court for the Eastern District of North Carolina found that the allegations in both suits were the “precise type of pollution excluded by the policies” — each claim for damages arose from the negligent release of TCE and other hazardous wastes.

OHIO

Insured’s awkward reading of pollution cleanup provision applies

Howard Industries Inc. v. Ace American Insurance Co., No. 2:13-0677, 2014 WL 978445 (S.D. Ohio Mar. 12, 2014).

At summary judgment, Ace American and Howard Industries disputed the scope of coverage for a building that was destroyed by fire and owned by chemical manufacturer Howard. There was no dispute that at least some of the damage was covered; however, in part, the parties disagreed on the application of a pollution cleanup provision. That provision did not cover damages from the release, discharge or dispersal of pollutants unless the release, discharge or dispersal was caused by fire or other catastrophes. That exception extended coverage to “expenses actually incurred by the insured to cleanup and remove debris defined as a pollutant and other pollutants from land or water on covered premises.”

In a massive coverage case involving long-tail asbestos liabilities and 30 insurers, the Connecticut Superior Court found that neither pollution nor occupational injury exclusions barred coverage.

However, Southern Lithoplate argued that the exclusion was not applicable on the basis of North Carolina’s judicially created “business activities exception.” Under this exception, an insurer cannot deny coverage arising out of the insured’s “central business activities” if it renders the policy “virtually useless.” However, the court disagreed with Southern Lithoplate’s broad application of this exception. Instead, it noted that the exception only applies in narrow situations in which an ambiguity exists between application of the pollution exclusion to the particular facts alleged and the insurer’s primary business activity itself. The court found the exception could not “possibly apply to the claims alleged in the underlying complaint.” The claims against Southern Lithoplate were “prototypical environmental claims.”

Practice note: This case illustrates that courts regularly apply absolute pollution exclusions to typical environmental pollution claims, and an insured’s argument around such application will probably be unsuccessful.

The U.S. District Court for the Southern District of Ohio was forced to determine whether the term “land and water” modified “debris defined as a pollutant and other pollutants” or just “and other pollutants.” Ace argued that the provision only covered pollutants removed from land and water. However, as Howard Industries pointed out, the policy excluded coverage for all restoration costs of land and water. Howard Industries, instead, argued that the policy should be read as covering expenses actually incurred by the insured to clean up and remove debris defined as a pollutant, and other pollutants from land and water, on the covered premises.

The court acknowledged that Howard Industries’ “proposed construction creates a somewhat awkward reading of the cleanup provision.” However, since it was drafted by Ace, through an agent, and the agent could have clarified the language, the ambiguous language must be construed against Ace. Although Ace’s proposed reading created a contradiction, Howard Industries’ reading, albeit awkward, was not unreasonable.

Thus, coverage up to the \$50,000 limit was afforded to Howard Industries.

Practice note: Applying the doctrine of *contra proferentem*, the court found that the only reasonable interpretation of those presented was awkward.

PENNSYLVANIA

‘Arising out of asbestos’ was ambiguous, did not preclude coverage

General Refractories Co. v. First State Insurance Co., No. 04-3509, 2015 WL 918797 (E.D. Pa. Mar. 3, 2015).

General Refractories manufactured and sold products that, at times, contained asbestos. After being named in various asbestos-related suits, General Refractories sued its insurance carriers for a declaration of coverage under the excess policies and breach of contract. All insurers, except Travelers, settled with General Refractories. The Travelers policy contained an exclusion that eliminates coverage for damages “arising out of asbestos.”

Travelers argued that the provision was broad and covered all forms of asbestos, not just one form in particular. The argument stated that damages from raw asbestos caused by mining, milling or manufacturing were the same as those caused by finished products containing asbestos. General Refractories, however, presented other policies from that era and expert testimony showing that there is a distinction between exclusions stating “arising out of asbestos” and those stating “arising out of asbestos-containing products.” Whereas the latter were for finished products, the former only covered the raw mineral that was mined, milled, processed and produced.

Despite the fact that General Refractories did not mine, mill, produce or manufacture raw-mineral asbestos, the U.S. District Court for the Eastern District of Pennsylvania found the exclusion ambiguous. It noted that the “common usage” of the word asbestos revealed a latent ambiguity: It could mean the raw, unprocessed mineral, it could include the fibers and dust as well or it could include all products that include asbestos. Finding that the interpretation of General Refractories was objectively reasonable, the court found the exclusion inapplicable to finished products.

Practice note: The court noted that Pennsylvania law required exclusions to be “strictly and narrowly” construed, favoring coverage. As such, it found Travelers’ broad interpretation inapplicable.

TEXAS

Exclusion precludes indemnity for insured's own indemnification agreement

Federal Insurance Co. v. Northfield Insurance Co., No. H-14-262, 2014 WL 4718984 (S.D. Tex. Sept. 22, 2014).

In an action between insurers, one insurer sought a declaration that the other was required to reimburse a portion of defense costs and fees. The underlying insured executed an agreement with ExxonMobil through which the insured agreed to defend and indemnify Exxon for all liabilities connected to a certain property. The indemnification clause specifically included language referring to environmental liabilities.

After environmental claims arose over the property, the insured did not defend Exxon in those suits. Exxon then filed a breach-of-contract action against the insured. The insured had policies with two insurers. Federal defended the insured in the breach-of-contract action, but Northfield did not.

The U.S. District Court for the Southern District of Texas found that Northfield was relieved from its obligation to defend the insured under the pollution exclusion. All claims in the underlying actions against Exxon alleged environmental damage. The court found that the "contractual liability ExxonMobil claims against [the insured] is a form of 'liability or damages' and that liability 'arises out of' harm from pollutants." Thus, the court found that the exclusion relieved Northfield of any obligation to defend the insured in the breach-of-contract action.

Practice note: The court went on to find that a buyback provision was not triggered because the work was not performed by the insured or on the insured's behalf.

Exclusion not triggered when there were no allegations of "dispersal"

Burlington Insurance Co. v. JC Instride Inc., 30 F. Supp. 3d 587 (S.D. Tex. 2014).

Benjamin Malone was employed to clean a "mud tank" used in oil and gas drilling operations. The general contractor on the site told Malone that the tank contained water-based mud but did not inform him that it contained "large quantities of caustic chemicals." On this basis, Malone entered the tank without the proper safety equipment.

The caustic chemicals disintegrated his clothing, severely burned large portions of his skin and caused parts of his skin to fall off. In his complaint, Malone alleged that the general contractor was negligent by failing to inform him of the caustic chemicals, failing to provide adequate safety equipment and failing to train employees to respond to caustic burn injuries. The general contractor requested defense under its policy, which contained a total pollution exclusion. The insurer agreed to defend under a reservation of rights.

In the insurer's declaratory judgment action, it sought a judgment stating there was no duty to defend or indemnify the general contractor or owner. With regard to the general contractor, the insurer argued that the pollution exclusion barred coverage. The court found that the complaint did not allege any of the enumerated release mechanisms: "discharge, dispersal, seepage."

The allegations stated that Malone entered the tank and waded through the mud, where he came in contact with the large quantities of caustic chemicals. According to the insurer, the pollutants were "dispersed" in the mud and "dispersed" onto Malone's clothing. The U.S. District Court for the Southern District of Texas disagreed and instead stated the allegations could not be read in that way. Rather, the allegations made no reference to whether the caustic components of or in the mud were dispersed or emitted. Nor did Malone allege how the caustic materials wound up in the tank.

Practice note: Relying on the dictionary definition of "disperse," the court stated that the insurer failed to meet its burden and show that the caustic materials "broke up and scattered" onto Malone's clothing or person prior to his injuries.

UTAH

Total pollution exclusion bars coverage

Headwaters Resources Inc. v. Illinois Union Insurance Co., 770 F.3d 885 (10th Cir. 2014).

In this action, the plaintiff/insured sought reimbursement for its litigation costs arising from a case instituted by homeowners who alleged that fly ash used in construction of a nearby golf course devalued their homes and created health risks. The defendant/insurers advised the plaintiff/insured that the defense costs related to pollution were outside the scope of coverage and denied the claim.

The 10th Circuit affirmed the granting of summary judgment by the U.S. District Court for the District of Utah, holding that this exclusion in the policy applied to the insured's release of fly ash mixture into the environment. The court, in reaching its decision, interpreted the "total pollution exclusion" and held that it was clear and unambiguous.

The court also held that the insurers satisfied their duties of good-faith performance in the investigation of the facts and comparing the facts to the policy.

Practice note: The court traces the history of the application of the pollution exclusion, including those courts that have provided a broad interpretation and those that have provided a various interpretation.

WISCONSIN

Contractor's pollution liability policy covers natural gas explosion

Acuity v. Chartis Specialty Insurance Co., No. 2013AP1303, 2015 WL 1186150 (Wis. Mar. 17, 2015).

Two insurers disputed whether a contractor's pollution liability, or CPL, policy applied to property damage and bodily injury claims caused by a natural gas line explosion. A contractor was hired to construct a road that required excavation. During excavation, the contractor hit a natural gas line, causing a leak. The gas leak caused an explosion.

At the time of the explosion, the contractor was covered by a CGL policy and the CPL policy. The CGL insurer defended and indemnified the contractor. In this action, the CGL carrier sought to recover half of the payments made.

The CPL policy covered injury and property damage claims that were caused by "pollution conditions." A definition of "pollution condition" did not define the words "irritant" or "contaminant." Overturning the appellate court, the Wisconsin Supreme Court found that the gas leak was a contaminant because it rendered the surrounding air unclean. Those impurities caused the danger and resulting explosion. The court went on to reject the CPL carrier's argument that it was the explosion, not the "contaminating nature" of the natural gas that caused the injuries and damages.

Third party's dispersal of pollutant was excluded by first-party policy

Advanced Waste Services Inc. v. United Milwaukee Scrap LLC, No. 2014AP1169, 2015 WL 868120 (Wis. Ct. App. Mar. 3, 2015).

United Milwaukee, as a third-party plaintiff, sued Illinois National, its insurer, after Illinois National refused to defend it in a suit through which Advanced Waste alleged that United Milwaukee supplied wastewater contaminated with PCBs. Illinois National contended that it had no duty to defend because of a "total pollution exclusion." United Milwaukee countered by arguing that the exclusion did not apply because it was not the entity that dispersed the pollutant, or in the alternative, the exclusion was ambiguous. According to United Milwaukee,

the PCBs were not released until after the wastewater left its possession.

The Wisconsin Court of Appeals disagreed and affirmed summary judgment in favor of Illinois National. The court found, under the plain language of the policy, that there was no requirement that the insured itself disperse the pollutant. Instead, the court noted, the phrase “at any time” evidenced that the parties considered scenarios in which a pollutant might be, either intentionally or unintentionally, dispersed without any action of the insured. It also concluded that the exclusion was not ambiguous.

Practice note: This court found that absolute pollution exclusions are intended to cover all releases, escapes and dispersals of pollutants, and so forth, even those done or caused by other parties.

Septage contamination excluded by policy for septic pumping services

Preisler v. General Casualty Insurance Co.,
857 N.W.2d 136 (Wis. 2014).

Dairy farmers Tina and Frederick Preisler sued a septic pumping services company that transported, stored and disposed of septage.

Septage was applied to the Preislers' farm fields for several years. Eventually, they noted that their cattle were dying at an abnormally high rate. Testing revealed that the well from which the cows' water came was contaminated with an elevated level of nitrates. The Preislers sued the septic company and its insurer.

The Wisconsin Supreme Court found that a reasonable insured would understand that the pollution exclusion clearly excluded coverage for the water-well contamination. The exclusion specifically included waste within the definition of “pollutant,” and septage is a “waste product.” Since septage seeped into the water well and caused excess levels of nitrates, it was considered to be a contaminant under the policy. Thus, the well contamination was excluded.

Practice note: For further discussion by the Wisconsin Supreme Court, see *Wilson Mutual Insurance Co. v. Falk*, 857 N.W.2d 156 (Wis. 2014). The opinion was decided the same day as *Preisler* and involves claims regarding a water well contaminated with cow manure.

WJ

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