The 'irritating' differences in applications of the pollution exclusion across the nation: A national overview of pollution exclusion litigation

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In the past year, courts across the nation have continued their diverse approaches to and applications of insurance policy pollution exclusion and its exceptions. On a near daily basis, courts grapple with applying the exclusion to countless factual scenarios.

Yet, even when courts from different states face substantially similar facts, the application differs. When determining whether a substance qualifies as a pollutant, whether the pollution exclusion has been triggered, and whether any exception to the exclusion applies, a number of conflicting opinions result.

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. This overview serves as an update on previous articles written by these authors in 2015 and 2016.

Insurers and their counsel also need to understand how courts are reacting to recent developments by insurance companies in response to long standing case law. For example, the Oklahoma Supreme Court in *Siloam Springs Hotel LLC v. Century Surety Co.*, 392 P.3d 262 (Okla. 2017), interpreted an "indoor air" exclusion that was developed as an outgrowth of the pollution exclusion.

> On a near daily basis, courts grapple with applying the exclusion to countless factual scenarios.

In *Siloam* the plaintiff sought coverage under its commercial lines policy issued by Century Surety for injuries to hotel guests. Several guests inside the plaintiff's hotel suffered injury due to carbon monoxide that leaked from the indoor swimming pool's heater.

Century's policy included an indoor air exclusion that excluded coverage for:

> "Bodily injury," "property damage," or "personal and advertising injury" arising out of, caused by, or alleging to be contributed to in any way by any toxic, hazardous, noxious, irritating pathogenic or allergen qualities or characteristics of indoor air regardless of cause.

The court found the exclusion was ambiguous because it was subject to multiple reasonable interpretations. The hotel argued the words "qualities and characteristics" only apply to "an inherent and/or continuous attribute of the air quality" such as mold, fungi or some other ongoing condition.

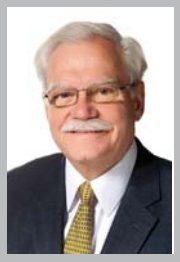
In light of this reasonable interpretation, the provision was construed in favor of the plaintiff, and the policy afforded coverage because the carbon monoxide leak was a "sudden, isolated leak" rather than an ongoing condition.

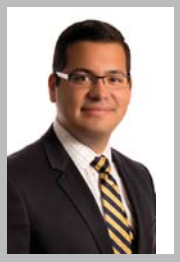
ALABAMA

Residential sewage is not a pollutant

Evanston Insurance Co. v. J&J Cable Construction LLC, No. 15-cv-506, 2016 WL 5346079 (M.D. Ala. Sept. 22, 2016).

The plaintiffs in the underlying suits sought damages for alleged bodily injury and property damage as a result of the defendants' release of sewage into their home. The defendants were performing underground boring work when they struck





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sewer laterals for two houses — pipes running from the main sewer line to a house.

The defendants sought coverage from Evanston Insurance Co., which filed a declaratory judgment action seeking a ruling that it had no duty to defend or indemnify.

The issue was whether Alabama law the relevant exclusion language unambiguously included sewage as a pollutant.

Evanston contended that the pollution exclusion in the policy applied to preclude all claims because sewage is a pollutant. The defendants relied on the Alabama Supreme Court's ruling in *U.S. Fidelity & Guaranty Co. v. Armstrong*, 479 So. 2d 1164 (Ala. 1985), and argued that the pollution exclusion at issue in this case is limited to industrial waste, and does not include residential waste.

The court agreed with the defendants and held that residential sewage is not a pollutant within the terms of the policy exclusion. Based on *Armstrong* ruling that sewage is not a "pollutant" the court found the exclusion did not apply.

The court stated that a reasonably prudent person would understand "pollutant" not to include sewage under the facts of this case.

> **Practice Note:** The court reasoned that the purpose of the pollution exclusion was to protect the environment by eliminating coverage for industry-related pollution damages. As a result, to deny coverage under the clause for residential waste would distort the very purpose of pollution exclusion.

CONNECTICUT

Indoor asbestos contamination from routine manufacturing is not barred by pollution exclusion

R.T. Vanderbilt Co. v. Hartford Accident & Indemnity Co., 156 A.3d 539 (Conn. App. Ct. 2017).

R.T. Vanderbilt Co. sued a number of its secondary insurers, seeking a declaratory judgment regarding Hartford Accident & Indemnity Co. and other insurers' duty to defend and indemnify.

The plaintiffs in the underlying suit brought actions against Vanderbilt for personal injuries allegedly sustained as a result of asbestos exposure caused by Vanderbilt's mining operations.

Case list

Castoro & Co. v. Hartford Accident & Indemnity Co., No. 14-cv-1305, 2016 WL 5660438 (D.N.J. Sept. 29, 2016).

Cincinnati Insurance Co. v. Roy's Plumbing Inc., No. 13-cv-1000, 2016 WL 3212458 (W.D.N.Y. June 10, 2016).

Cincinnati Insurance Co. v. Roy's Plumbing Inc., No. 16-2511, 2017 WL 2347562 (2d Cir. May 31, 2017).

Colony Insurance Co. v. Victory Construction LLC, No. 16-cv-457, 2017 WL 960024 (D. Or. Mar. 9, 2017).

Evanston Insurance Co. v. J&J Cable Construction LLC, No. 15-cv-506, 2016 WL 5346079 (M.D. Ala. Sept. 22, 2016).

Evanston Insurance Co. v. Sandersville Railroad Co., No. 15-cv-247, 2016 WL 5662040 (M.D. Ga. Sept. 29, 2016).

Georgia Farm Bureau Mutual Insurance Co. v. Smith, 784 S.E.2d 422 (Ga. 2016).

Hanover Insurance Co. v. Superior Labor Services Inc., Nos. 11-cv-2375, 14-cv-1930 and 14-cv-1933, 2016 WL 1244337 (E.D. La. Mar. 30, 2016).

Hiland Partners GP Holdings LLC v. National Union Fire Insurance Co. of Pittsburgh, 847 F.3d 594 (8th Cir. 2017).

JTO Inc. v. Travelers Indemnity Co. of America, No. 16-cv-648, 2017 WL 1017468 (N.D. Ohio Mar. 16, 2017).

Meyer Natural Foods LLC v. Liberty Mutual Fire Insurance Co., 218 F. Supp. 3d 1034 (D. Neb. 2016).

Old Republic Insurance Co. v. Gary/Chicago International Airport Authority, No. 15-cv-281, 2016 WL 3971663 (N.D. Ind. July 25, 2016).

OneBeacon America Insurance Co. v. Narragansett Electric Co., 57 N.E.3d 18 (Mass. App. Ct. 2016).

PCS Phosphate Co. v. American Home Assurance Co., No. 14-cv-99, 2016 WL 1271031 (E.D.N.C. Mar. 29, 2016).

PQ Corp. v. Lexington Insurance Co., No. 13-cv-3482, 2016 WL 4063149 (N.D. Ill. July 29, 2016).

R.T. Vanderbilt Co. v. Hartford Accident & Indemnity Co., 156 A.3d 539 (Conn. App. Ct. 2017).

Siloam Springs Hotel LLC v. Century Surety Co., 392 P.3d 262 (Okla. 2017).

South Carolina Insurance Reserve Fund v. East Richland County Public Service District, 789 S.E.2d 63 (S.C. 2016).

Travelers Property Casualty Co. of America v. Klick, No. 15-cv-2403, 2016 WL 5349430 (D. Minn. Sept. 26, 2016).

Williams v. Employers Mutual Casualty Co., 845 F.3d 891 (8th Cir. 2017).

Xia v. ProBuilders Specialty Insurance Co. RRG, 393 P.3d 748 (Wash. 2017).

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The insurers moved for summary judgment, contending that the pollution exclusions contained in their policies exclude coverage for asbestos-related claims, including all the underlying actions.

They further argued that friable asbestos dust, an indisputably toxic substance that renders impure any air into which it may be released, constitutes a pollutant as defined in the Connecticut Supreme Court's ruling in *Heyman Associates No. 1 v. Insurance Co. of Pennsylvania*, 653 A.3d 122 (Conn. 1995).

In response, Vanderbilt argued that the pollution exclusions apply only to "traditional" environmental pollution and do not bar coverage for asbestos related claims that allege harms arising from exposure to asbestos dust released indoors in the course of routine manufacturing or construction activities.

The Appellate Court affirmed the trial court's decision and agreed with Vanderbilt's argument. It concluded that a reasonable insured would not expect the standard pollution exclusion to bar coverage for claims that do not qualify as traditional environmental pollution.

The court noted that pollution exclusions bar coverage only when the exposure arises from traditional environmental pollution, such as when the dumping of waste materials containing asbestos causes asbestos fibers to migrate to neighboring properties or into the natural environment.

> **Practice Note:** The court observed a distinctive feature of an "absolute pollution exclusion," that it omits from the standard exclusion the exception that "this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental."

GEORGIA

Pollution exclusion absolves insurer of duty to defend injury claim from toxic fumes released by welding

Evanston Insurance Co. v. Sandersville Railroad Co., No. 15-cv-247, 2016 WL 5662040 (M.D. Ga. Sept. 29, 2016).

Sandersville Railroad Co. is not subject to state workers' compensation laws, but its employees are protected by the Federal Employers Liability Act. Sandersville purchased a CGL policy from Evanston with "premier railroad" liability coverage.

In 2013 John Flowers, an employee of Sandersville, notified the company of his FELA claim for exposure to welding fumes. Evanston filed suit seeking a determination that its policy did not provide coverage due to the pollution exclusion in the policy.

The pollution exclusion at issue stated that injuries "arising out of the discharge, dispersal, seepage, migration, release or escape of 'pollutants'" were excluded. Sandersville argued there must be an actual release or escape from "containment" because that is the "ordinary and common sense understanding of the concept of 'pollution.'"

Sandersville argued the pollutant must travel from "where it was expected to be to someplace where it was not wanted."

The court held that Evanston's absolute pollution exclusion precluded coverage. The court said Flowers was exposed to toxic fumes released by welding. Since the purpose of the exclusion is to absolutely exclude claims caused by pollutants, the claim was excluded.

> **Practice Note:** The court compared this instant claim to the ingestion of deteriorating lead-based paint, which was discussed in the recent Georgia Supreme Court case *Georgia Farm Bureau Mutual Insurance Co. v. Smith*, 784 S.E.2d 422 (Ga. 2016).

ILLINOIS

Phenol-formaldehyde resins in a warehouse is not pollution in its "traditional sense"

PQ Corp. v. Lexington Insurance Co., No. 13-cv-3482, 2016 WL 4063149 (N.D. Ill. July 29, 2016).

PQ Corp., a Pennsylvania company, stored sodium-silicate products at the Double D warehouse in Illinois. The products were allegedly damaged from the storage of nearby phenol-formaldehyde resins.

Double D filed a notice of loss with its insurer, Lexington Insurance Co., which denied coverage. PQ, acting as Double D's assignee, sued the insurer for a declaration of coverage, breach of contract and compensation.

Lexington argued that since PQ's property was allegedly damaged by chemical vapors, the loss falls squarely within the pollution exclusion, and, consequently Lexington was right to deny coverage in this case.

While the court agreed with Lexington's argument that the formaldehyde vapors were "vapors," "fumes" or chemicals in "gaseous" form, and thus constituted "pollutants" (or "contaminants") as defined in the endorsement, it did not extend the exclusion beyond injuries caused by traditional environmental pollution.

> A Minnesota federal court found that the pollution exclusion applied when the carbon monoxide was released directly into ambient or outdoor air, even if the pollutant indirectly affects air inside an enclosed structure.

The court, in arriving at this decision, relied on prevailing precedents in Illinois, which have curbed significantly the reach of pollutions exclusions as a matter of public policy.

> **Practice Note:** The court noted that for there to be traditional environmental pollution, the pollutant must actually spill beyond the insured's premises and into the environment; and since, the damage, as far as may be gleaned from the record, was contained to the warehouse itself, this was not "traditional" pollution under Illinois law, and so falls outside the bounds of the pollution exclusion here.

INDIANA

Ambiguous or overbroad exclusions may preclude summary judgment on duty to defend

Old Republic Insurance Co. v. Gary/Chicago International Airport Authority, No. 15-cv-281, 2016 WL 3971663 (N.D. Ind. July 25, 2016).

Old Republic Insurance Co. filed this insurance coverage suit against the Gary/Chicago International Airport Authority.

The Indiana Department of Environmental Management initiated an action against the Airport Authority when it identified an oily sheen in one area and detected concentrations of benzo(a)pyrene, arsenic and PCBs in another area of the Gary/

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Chicago International Airport.

In a summary judgment motion, Old Republic sought a declaration that it had no duty to defend or indemnify the Airport Authority with respect to the IDEM action because of the pollution exclusion contained in the 16 applicable insurance policies issued to the Airport Authority.

Old Republic argued that its insurance policies unambiguously excluded coverage for any and all "pollution" and "contamination."

It further contended that its policies did not contain a self-limiting definition of the term "pollutants," which lacked the specificity deemed necessary to eliminate coverage for particular contaminants. Rather, its policies expressly excluded coverage for claims resulting from pollution and/or contamination "of any kind whatsoever."

The court found Old Republic's pollution exclusion does not explicitly indicate what constitutes "pollution" or "contamination" so that an ordinary policyholder of average intelligence would know to a certainty that Old Republic would not be responsible for damages arising out of the oily sheen, benzo(a)pyrene, arsenic and PCBs discovered at the airport.

> The Washington Supreme Court stated that when applying pollution exclusions, "what matters most is whether the occurrence triggering coverage originates from a pollutant acting as a pollutant," that is, "traditional environmental pollution."

Also, not one of the 52 different pollutants/contaminants that the airport is required to test for are identified as being excluded from coverage. Consequently, the court denied Old Republic's motion for summary judgment on these issues regarding its duty to defend.

Practice Note: The court reasoned that in order for any pollution exclusion to be enforceable, the policy must specifically indicate what constitutes "pollution" or "contamination."

LOUISIANA

Homeowners' claims did not unambiguously fall within exclusion for silica, silicon and silicate

Hanover Insurance Co. v. Superior Labor Services Inc., Nos. 11-cv-2375, 14-cv-1930 and 14-cv-1933, 2016 WL 1244337 (E.D. La. Mar. 30, 2016).

Hanover Insurance Co. sought a declaration against its insured, Superior Labor Services Inc., that it had no duty to defend or indemnify third-party defendant Superior in an matter regarding the release of "silica dust and other hazardous substances [into] plaintiffs' neighborhood" caused by alleged "negligent sandblasting."

In the alternative, Hanover sought reimbursement from several insurers of Allied Shipyard Inc. and/or its contractors for defense costs incurred in underlying suits.

One of Superior's insurers, Arch Insurance Co., sought a declaration that the pollution exclusion in its policies unambiguously relieved it from any duty to defend.

The court applied the test established in *Doerr v. Mobil Oil Corp.,* 774 So. 2d 119 (La. 2000), to determine the applicability of the pollution exclusion, and turned on three considerations:

- Whether the insured is a "polluter" within the meaning of the exclusion.
- Whether the injury-causing substance is a "pollutant" within the meaning of the exclusion.
- Whether there was a "discharge, dispersal, seepage, migration, release or escape" of a pollutant by the insured within the meaning of the policy.

The court held that Arch never showed how the insureds qualify as "polluters" within the meaning of that exclusion, including whether the type of business conducted at the shipyard presents a risk of pollution.

Ultimately, the court denied Arch's motions for summary judgment with respect to the applicability of the pollution exclusion on its duty to defend.

Practice Note: The court found it was appropriate to construe a pollution exclusion in light of the clause's general purpose, which is to exclude coverage for environmental pollution, and under such interpretation, the clause will not be applied to all contact with substances that may be classified as pollutants.

MASSACHUSETTS

Release of pollutants at landfill was not sudden and accidental within meaning of "sudden and accidental" exception

OneBeacon America Insurance Co. v. Narragansett Electric Co., 57 N.E.3d 18 (Mass. App. Ct. 2016).

OneBeacon America Insurance Co., sought a declaration that it had no duty to defend or indemnify its insured, Narragansett Electric Co., for damages associated with environmental contamination at several sites formerly used for manufactured gas plant operations and waste disposal. NEC transferred contaminated waste to a third-party landfill operated by J.M. Mills.

Two relevant issues were before the court:

- Whether the release of pollutants was not sudden and accidental, sufficient to constitute an exception to the pollution exclusion.
- Whether Rhode Island's rather than Massachusetts' law should apply regarding the interpretation of pollution exclusion.

NEC argued that Rhode Island's law should apply because its predecessor, whose name is on the insurance policy was headquartered in the state, and Rhode Island construes the phrase "sudden and accidental" to mean "unintended and unexpected."

In Massachusetts, "sudden and accidental" connotes a temporal element, so that only an abrupt release of pollutants will fall within the exception.

The Massachusetts Appeals Court held that interpretation were governed by law of Massachusetts where primary and excess liability policies were issued to a Massachusetts business trust, rather than Rhode Island where the manufactured gas and power plant was located.

From there, the court held that release of pollutants at the J.M. Mills landfill cannot be characterized as sudden and accidental because it was not an abrupt release. Thus, the exception to the pollution exclusion did not apply.

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Practice Note: The court applied Massachusetts law based on a finding that Massachusetts has a greater connection to the insurance transactions involved in NEC's purchase of the predecessor entity.

MINNESOTA

Fishing boat's engine compartment is "atmosphere" for the purpose of pollution exclusion

Travelers Property Casualty Co. of America v. Klick, No. 15-cv-2403, 2016 WL 5349430 (D. Minn. Sept. 26, 2016).

Christopher Klick allegedly sustained personal injuries from exposure to carbon monoxide gas released on a fishing boat. He sued Choice Financial Group and Rainy River Marina Inc., the entities that allegedly sold and serviced the boat.

The named insured, Rainy River, sought defense and indemnity from Travelers Property Casualty Co. of America, which moved for summary judgment because the pollution exclusion excluded coverage for any pollution of the "atmosphere."

Travelers argued that Klick's injuries arose out of carbon monoxide released from the fishing boat into the outside air, and therefore the release fell within the meaning of "atmosphere."

Klick contended that the pollution exclusion did not apply because the carbon monoxide was released from the fishing boat's engine into the engine compartment and then was re-released into the air surrounding the boat, including the wheelhouse where Klick was located.

The court found that the pollution exclusion applied when the carbon monoxide was released directly into ambient or outdoor air, even if the pollutant indirectly affects air inside an enclosed structure.

It also noted that pollution exclusion does not apply when the pollutant is released directly into air inside an enclosed structure such as a house or other building.

The court decided that the fishing boat's engine compartment is not an enclosed structure similar to a building; but instead, as part of the system that makes up the fishing boat's engine, it is not a separate "controlled environment" that can be polluted by the engine. Therefore, the carbon monoxide was released directly into the atmosphere, and that fell within the pollution exclusion.

Practice Note: In Minnesota, a pollution exclusion that does not use language descriptive of the natural environment, such as "atmosphere," applies to both indoor and outdoor pollution.

MISSOURI

Contamination of drinking water by radium, alpha particle activity and coliform bacteria fall within a pollution exclusion

Williams v. Employers Mutual Casualty Co., 845 F.3d 891 (8th Cir. 2017).

Barbara Williams sued Autumn Hills Mobile Home Park, which was owned by the Collier Organization Inc., alleging that the two wells that supplied Autumn Hills with drinking water contained illegal levels of radium-226, combined radium-226 and radium-228, gross alpha particle activity, and coliform bacteria.

Collier notified each of the insurers of Williams' complaint, and demanded defense and indemnity. Each of the insurers, including the defendant, declined, arguing that the pollution exclusions in their policies barred coverage.

Williams argued that alpha particles are not, as a matter of law, "pollutants" under the policy. Specifically, Williams argued there is a question of fact as to whether alpha particles are solid, liquid, gaseous or thermal, and that the terms "irritants" and "contaminants" are ambiguous and arguably do not apply to alpha particles.

Williams further contended that virtually any substance can be an irritant or contaminant in some contexts, and alpha particle activity is naturally occurring and not always harmful.

The 8th U.S. Circuit Court of Appeals affirmed a lower court's finding that alpha particles are emitted by radium during the decay process, that alpha particles can travel only very short distances away from radium, and that radium is indisputably a solid.

Citing an Environmental Protection Agency fact sheet, the lower court determined that Radium and alpha particles are contaminants under the plain meaning of that word.

The 8th Circuit concluded that regardless of whether alpha particles are pollutants, radium is a pollutant under the policies. Consequently, to the extent alpha particles caused the alleged bodily injury or property damage, that damage is excluded from the policy if the term "pollutants," as defined by the policies, includes either alpha particles or radium.

Practice Note: The burden of proving an insurance exclusion lies with the insurer, and insurance exclusions are strictly construed against the insurer.

NEBRASKA

Presence of E. coli in beef products meets the definition of "contamination" and therefore is excluded

Meyer Natural Foods LLC v. Liberty Mutual Fire Insurance Co., 218 F. Supp. 3d 1034 (D. Neb. 2016).

Meyer Natural Foods LLC contracted with Greater Omaha Packing Co. Inc. to purchase beef products. Omaha agreed to insure the value of all Meyer's property in its possession with Liberty Mutual Fire Insurance Co. and to name Meyer as an additional insured on the plan. Omaha later supplied Meyer with beef that was contaminated with E. coli.

Meyer sought a declaration that Liberty Mutual owed Meyer coverage amounting to $1.4 million, contending that E. coli does not constitute "contamination" because the term "contamination," if not expressly defined in the policy, may be overly broad and was ambiguous.

The court adopted the plain meaning of the word and held that the term "contamination" is not ambiguous as it appears in the "contamination exclusion" of the policy. The court found the exclusion applied, in part, because the complaint alleged that the products were "contaminated" by E. coli.

Finding that the word "contaminate" means "to render unfit for use by the introduction of unwholesome or undesirable elements," the court concluded that the presence of E. coli in the beef clearly rendered the food unfit for consumption, and it therefore meets the plain and ordinary meaning of the word.

Practice Note: The court found that it was the "contamination exclusion" — not the "pollution exclusion" — that governed the outcome of this dispute. Hence, there was no need to address the applicability, if any, of the remaining exclusions to the facts of this claim

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after finding that the "contamination exclusion" applied.

NEW JERSEY

Unintentional contamination of land with excavation and paving waste materials does not trigger absolute pollution exclusion in New Jersey

Castoro & Co. v. Hartford Accident & Indemnity Co., No. 14-cv-1305, 2016 WL 5660438 (D.N.J. Sept. 29, 2016).

Castoro & Co. sued its insurer, Hartford Accident & Indemnity Co., when Hartford denied coverage for remediation costs. The plaintiff used the Grovers Mill property as a disposal site for its waste materials.

The New Jersey Department of Environmental Protection investigated the site and found contaminants. The NJDEP identified Castoro as the sole party responsible for the contamination at the site.

Hartford argued that a pollution exclusion in its policy barred coverage for Castoro's remediation costs.

Castoro contended that the pollution exclusion can only apply to a "traditional environmental pollution." Castoro further argued that its polluting conduct was unintentional because the "materials seemed innocuous at the time."

Hartford responded that that neither the exclusion nor New Jersey law requires intent.

The court noted that the insurance policy should be narrowly construed. New Jersey case law limits the application of absolute pollution exclusions to "traditional environmental" claims, that is, environmental catastrophe related to intentional industrial pollution.

As a result, the court held that Hartford failed to allege that Castoro intentionally polluted the site, and therefore, Hartford's summary judgment motion as to the absolute pollution exclusion was denied.

> **Practice Note:** Even when a pollution exclusion's language does not require intent, New Jersey public policy requires intent to avoid unregulated and sweeping eliminations of pollution-caused damage coverage.

NEW YORK

Contamination of property by halogenated hydrocarbons, non-aqueous phase liquids and other toxic sewage wastes was not covered

Cincinnati Insurance Co. v. Roy's Plumbing Inc., No. 13-cv-1000, 2016 WL 3212458 (W.D.N.Y. June 10, 2016).

Cincinnati Insurance Co. sought a judgment declaring that it had no duty to defend and indemnify Roy's Plumbing Inc. in underlying suits related to ineffective remediation of contamination in the Love Canal area of Niagara Falls.

The underlying plaintiffs alleged that defendant negligently performed inspected and constructed work at their homes, resulting in the discharge of myriad hazardous chemicals onto and into the property and homes of the underlying plaintiffs.

Roy's argued that the policies covered the underlying litigation because its business included the handling of sewage, and it purchased the policy to cover damages arising in its normal course of business.

New York courts have found that total pollution exclusion only applied in cases of environmental pollution, as opposed to a "literal approach" to pollution exclusions. This approach reflects policy reason behind pollution exclusions — "to prevent industrial polluters from spreading the risk of environmental pollution to the insurance industry" and "to strengthen New York's environmental protection standards by imposing the full risk of loss ... upon the commercial or industrial enterprise that does the polluting."

Although the court found that a plumbing, heating and cooling business does not necessarily fit into the "mold of a traditional industrial polluter," it found the exclusion barred coverage. The court said the injuries alleged, and the hazardous substances at issue, made it clear that this case fit into the "traditional environmental pollutants category."

The court went on to state that, even though Roy's had no part in the original placement of toxic chemicals in the area, the claim was still excluded because the exclusion applies "irrespective of who was responsible for generating the pollutants."

> **Practice Note:** The 2nd U.S. Circuit Court of Appeals affirmed the trial court's decision and stated all the alleged toxic substances, including any sewage that may have been released along with the Love Canal chemicals, were "pollutants." *Cincinnati Ins. Co. v. Roy's Plumbing Inc.*, No. 16-2511, 2017 WL 2347562 (2d Cir. May 31, 2017).

NORTH CAROLINA

Environmental contamination by a blown-out and leaking transformer was not sudden and accidental and did not constitute exception to pollution exclusion

PCS Phosphate Co. v. American Home Assurance Co., No. 14-cv-99, 2016 WL 1271031 (E.D.N.C. Mar. 29, 2016).

PCS Phosphate Co. sent its transformers for repair to Ward Transformer Co., where there was an alleged release of PCBs from the transformers. PCS notified American Home Assurance Co. that PCS was identified as potentially responsible for contamination and demanded defense and indemnity in any resulting suits.

American Home sued Zurich American Insurance Co. and Federal Insurance Co. as third parties, seeking indemnification or contribution. The dispute, in part, turned on whether the blowout and release of oil from the transformer occurred at the Ward site or before.

Zurich argued that the pollution exclusions in each of its policies preclude any duty to defend or indemnify PCS or American Home. Initially, American Home alleged that a "sudden and accidental discharge" occurred at the Ward site, but it later retracted that statement.

The court considered the repair notes accompanying the transformers to show that the transformers were leaking upon arrival. Thus the blowout and oil leakage described in the transportation record must have occurred offsite.

Therefore, the court concluded that the release of contamination in question was not sudden and accidental, and consequently falls within the pollution exclusion, which relieved Zurich of any liability to defend or indemnify American Home.

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Practice Note: A "sudden" release must occur in a rapid or otherwise abrupt manner. The release of pollutants over an extended period of time cannot qualify as "sudden" for purposes of the exception to the pollution exclusion.

NORTH DAKOTA

Environmental contamination caused by "condensate" falls within pollution exclusion

Hiland Partners GP Holdings LLC v. National Union Fire Insurance Co. of Pittsburgh, 847 F.3d 594 (8th Cir. 2017).

Hiland Partners HP Holdings LLC brought a coverage action against National Union Fire Insurance Co. of Pittsburgh, alleging that the insurer had a duty to defend and indemnify it in connection with a lawsuit related to an explosion at its natural gas processing facility. The explosion occurred when a subcontractor of Hiland's contractor attempted to remove water from hydrocarbon condensate tanks.

National Union denied coverage, arguing that the explosion in question falls within the commercial general liability policy's pollution exclusion.

Hiland argued that condensate is not a pollutant because it is in the business of selling condensate. The plaintiff further argued that even if "condensate" was a contaminant, it does not fall within the policy's definition of a contaminant because it caused harm in a manner other than by contamination.

The 8th Circuit, refusing to accept Hiland's arguments, held that "condensate" is a contaminant because it is flammable, volatile and explosive. And since the underlying plaintiff's injuries were the result of an explosion, the nature of the harm here is directly related to the nature of the contaminant.

Practice Note: In North Dakota, a "pollution exclusion will not necessarily apply where the substance causing injury has the potential to irritate but has ... caused harm in a manner other than by irritating."

OHIO

Dredge and fill material are pollutants, and their contamination of waterways precludes coverage under pollution exclusion

JTO Inc. v. Travelers Indemnity Co. of America, No. 16-cv-648, 2017 WL 1017468 (N.D. Ohio Mar. 16, 2017).

JTO Inc. sued Travelers Indemnity Co. of America, seeking a declaration that Travelers defend and indemnify it in a case filed by federal and state environmental regulators. The underlying suit alleged JTO discharged dredged and fill material into U.S. waterways without permission.

Travelers moved for a judgment on the pleadings on all JTO's claims, arguing that the absolute pollution exclusion in the policies forecloses any duty to defend or indemnify.

JTO argued that the pollution exclusion does not apply because dredged and fill material does not meet the policy definition of "pollutant."

The court stated that both the Clean Water Act and the comparable Ohio statute define dredge and fill as pollutants. As a result, the court held that the environmental regulators' complaints against JTO are exactly the kind of environmental actions that fall within the raison d'etre of the absolute pollution exclusion, and therefore, absolved Travelers from any liability to defend or indemnify JTO.

Practice Note: To avoid coverage on the basis of an exclusion for expected or intentional injuries, the insurer must demonstrate that the injury itself was expected or intended.

OREGON

Carbon monoxide is a pollutant, and poisoning caused by its emission into a private home bars insurance coverage under pollution exclusion

Colony Insurance Co. v. Victory Construction LLC, No. 16-cv-457, 2017 WL 960024 (D. Or. Mar. 9, 2017).

Colony Insurance Co. moved for summary judgment in a coverage case concerning whether it has a duty to defend and indemnify Victory Construction LLC in two personal injury lawsuits.

The underlying plaintiffs alleged negligent installation and ventilation of natural gas pool heaters and negligent failure to warn of the risks of carbon monoxide poisoning associated with operating the heater in an insufficiently ventilated area.

Colony denied coverage and argued that "hazardous materials," as defined in the commercial general liability policy, includes carbon monoxide. The insurer pointed to the Clean Air Act, which regulates carbon monoxide as a pollutant.

Victory contended that carbon monoxide was neither an "irritant" nor a "contaminant." The company argued that by its nature, carbon monoxide is odorless, colorless, tasteless and harmful only in excessive amounts; because of that, it is not an irritant.

Victory further argued that carbon monoxide is not a contaminant because it exists in the human body and in nature. Therefore it is not a foreign substance introduced into the environment.

Adopting dictionary meanings of the words "irritant" and "contaminant," the court concluded that carbon monoxide irritates an organ or tissue, so much so that it can cause serious illness or death.

The court held that the plain meaning of "contaminant" as an undesirable element whose introduction soils or makes an environment unfit for use comports with the description of carbon monoxide filling the underlying plaintiffs' home and making it uninhabitable.

Practice Note: In Oregon, the court is not tasked with considering alternative plausible interpretations of the pollution exclusion when the policy terms' plain meaning resolves the case.

SOUTH CAROLINA

Discharge of offensive odors, which is within ordinary operations, does not constitute an exception to pollution exclusion

South Carolina Insurance Reserve Fund v. East Richland County Public Service District, 789 S.E.2d 63 (S.C. 2016).

East Richland County Public Service District was sued by Coley Brown, who alleged the district had installed a sewage force main and an air relief valve on his street, releasing offensive odors on his property multiple times a day. The district tendered the complaint to its insurer, South Carolina Insurance Reserve Fund, which said the pollution exclusion barred coverage.

The district argued the exclusion is inapplicable because it does not mention

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offensive odors or explain why such odors should be considered as pollution when they are not harmful and not regulated.

It also contended that even if the pollution exclusion applies, the exception to the exclusion operates to require coverage because the circumstances surrounding the release of the odors were unique and unexpected. The district further argued that the release of the gas was accidental.

The court found the pollution exclusion applied because the odors at issue could be classified as "fumes" or "gases," both of which are listed in the exclusion.

The court also rejected the district's argument that the odor has to be harmful to constitute pollutants, and instead, held that the fact that the odors were comprised of irritating and offensive gases suffices to demonstrate the odors are encompassed within the ordinary meaning of the pollution exclusion's terminology.

Practice Note: The court also found the release of pollutants (the valve gases in the instant case) was a routine and expected necessary function of the system. Thus, it declined to apply the pollution exclusion's exception.

WASHINGTON

Traditional environmental pollution covered where initial occurrence in chain of events does not typically pollute

Xia v. ProBuilders Specialty Insurance Co. RRG, 393 P.3d 748 (Wash. 2017).

A new homeowner initially sued the contractors of her home after discovering the hot water tank was improperly vented. The tank was leaking carbon monoxide into the home and caused the plaintiff to become ill.

The claims administrator for the contractor's insurer, ProBuilders Specialty Insurance Co. RRG, denied defense and indemnity obligations by relying on the policy's absolute pollution exclusion and a townhouse exclusion.

After the matter settled for $2 million, the contractor assigned its rights and claims against ProBuilders.

The Washington Supreme Court stated that when applying pollution exclusions, "what matters most is whether the occurrence triggering coverage originates from a pollutant acting as a pollutant," that is, "traditional environmental pollution."

The court engaged in a two-step analysis.

First, the court was to determine whether the carbon monoxide was acting as a traditional pollutant.

Second, the court had to decide whether the legal cause of the loss was covered under a different policy provision.

The second step, known as the "efficient proximate cause rule," provides coverage "where a coverage peril sets in motion a causal chain, the last link of which is an uncovered peril." Thus where the initial event is a covered legal cause, then there is coverage under the policy even if a later cause in fact in the chain is excluded.

The court found that it was "clear that a polluting occurrence happened when the hot water heater spewed forth toxic levels of carbon monoxide into [the plaintiff's] home." Despite this finding, the court went on to conclude there was coverage. The court held that the polluting occurrence only occurred after the initial covered occurrence: the negligent installation of a hot water heater.

Practice Note: Depending on the state of practice, a polluting event may be covered where a causation theory applies. WJ



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