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Courts continue to be 'contaminated' by the pollution exclusion: A national overview

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In 2018, courts across the United States continued to grapple with how to interpret and apply insurance policy pollution exclusions and their exceptions. Courts in various states have reached differing conclusions as to the scope of these exclusions, even when presented with substantially similar facts.

The following overview examines recent court decisions around the country that discuss the pollution exclusion and when its application bars coverage. Insurers and their counsel should understand the varying applications so that they can implement, interpret and apply the proper exclusions — as well as defend against claims should a coverage dispute arise.

This overview serves as an update to articles written by these authors in 2015, 2016 and 2017.

ALABAMA

Release of toxic chemicals into a river is excluded under Georgia law.

Grange Mutual Casualty Co. v. Indian Summer Carpet Mills Inc., No. 17-cv-1263, 2018 WL 3536625 (N.D. Ala. July 23, 2018).

The insured and other defendants allegedly discharged toxic chemicals that contaminated the Coosa River in Alabama. In an underlying matter, the plaintiff alleged it suffered damages including costs for monitoring and testing, lost revenues and profits, and remediation costs.

The insurer filed a declaratory judgment action seeking a judgment that it had no duty to defend and indemnify the insured in the underlying action.

The insured and insurer filed a consent motion to enter a declaratory judgment finding no coverage. The parties agreed that the pollution exclusion barred coverage.

Applying Georgia law, the court agreed, finding that "pollution exclusions such as the exclusion contained in the Grange policies are enforceable and apply to environmental claims similar to the claims asserted against [the insured]."

> **Practice Note**: When there isn't any dispute regarding the application of the exclusion it is prudent to seek a consent order relative to the applicable facts and law.

CALIFORNIA

Definition of pollutant under pollution exclusion applies to pollution coverage policy.

Essex Walnut Owner LP v. Aspen Specialty Insurance Co., 335 F. Supp. 3d 1146 (N.D. Cal. 2018).

The plaintiff owned a piece of property on which it sought to demolish existing structures and build a new, mixed-use development. The plaintiff purchased an environmental legal liability policy to cover certain "cleanup costs" resulting from "pollution conditions" on the site.

After demolition, the plaintiff performed excavation work during which it discovered debris such as wood, concrete, glass, metals, tires and tree trunks. The plaintiff-insured and defendant-insurer reached an agreement regarding payment of costs associated with removing the debris.

However, the parties could not agree on payment of costs associated with redesigning a new shoring system allegedly resulting from the discovery of debris outside of the excavated area.

The insurer moved for summary judgment and argued that debris is not a pollutant. It further argued that the cost of redesigning shoring was not a "cleanup cost" under the policy. The insured contended that the debris was a pollutant and that a "pollution condition" existed.

The court first noted that this was a policy for pollution coverage rather than a policy containing a pollution exclusion. It nonetheless found that the same definition of pollution should apply. Thus, coverage was available only for "environmental pollution."

The court went on to note that it was unclear whether the debris in this case constituted "environmental pollution." Without deciding either way, the court disposed of the matter based on the term "cleanup costs."

The plaintiff argued that the redesign costs were incurred to contain or neutralize contaminated soil. The court disagreed and found that the shoring was not installed to contain contaminated soil; rather, it was employed structurally to keep soil, which happened to be contaminated, out of the excavated soil.

Moreover, the court found that the policy required "damaged real or personal property."

Since the original shoring was not damaged, but rather was ineffective, the court found that there was no damage to property. Thus, the court granted the insurer's motion for summary judgment since the insured did not incur any cleanup costs.

> **Practice Note**: The rationale utilized by courts in interpreting pollution exclusions is highlighted in *Miller Marital Deduction Trust v. Estate of Dubois*, No. 16-cv-1883, 2018 WL 3245038 (E.D. Cal. July 3, 2018), where the court discussed application of two insurers' pollution exclusions to claims related to tetrachloroethylene contamination caused by a dry-cleaning business.

FLORIDA

Carbon monoxide from vehicles does not fall within exception to pollution exclusion.

Colony Insurance Co. v. Great American Alliance Insurance Co., 317 F. Supp. 3d 1181 (S.D. Fla. 2018).

Colony Insurance Co. issued a commercial general liability policy to a purchasing group that included a homeowners association. The HOA controlled the common areas and elements of a condominium complex.

In August 2017, two people identified as either co-tenants or invited guests of one of the units died of carbon monoxide poisoning, and it was believed that the carbon monoxide came from a motor vehicle in the condominium unit's garage. The carbon monoxide seeped into the HVAC ducts and traveled to the bedroom in which the two people were sleeping.

One of the deceased's mother filed a wrongful-death suit. Thereafter, Colony commenced an action seeking a declaratory judgment that it did not owe a duty to defend.

In a motion for summary judgment, Colony argued that its total pollution exclusion precluded coverage. The exclusion also contained a "building heating, cooling and dehumidifying equipment exception," which provided that the pollution exclusion did not apply to injury that was sustained within the building and caused by "smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building."

The HOA argued that the claim potentially fell within that exception since the source of the carbon monoxide was unknown — the allegations in the wrongful-death case stated it was only believed that it came from a motor vehicle. As a result, the HOA argued there was a duty to defend.

The court found as an initial matter that carbon monoxide constituted a pollutant under the policy, and further concluded that the exception did not apply. Specifically, the court stated that a duty to defend cannot arise "from an inference that the carbon monoxide could have been produced by" HVAC equipment.

Since the wrongful-death case listed only the motor vehicle as a potential source of the carbon monoxide, the court could not infer any other sources to create a duty to defend.

> **Practice Note**: The HOA also argued that the carbon monoxide originated from the HVAC ducts since it entered the condominium unit through the ducts. The court rejected this argument as well, noting that the fact that the carbon monoxide entered the unit through the ducts did not mean it was produced by or originated from them.

GEORGIA

Stormwater is a pollutant.

Centro Development Corp. v. Central Mutual Insurance Co., 720 F. App'x 1004 (11th Cir. 2018).

The plaintiff sued Central Mutual Insurance Co., alleging that it wrongly denied coverage for damage caused by stormwater. Central Mutual denied coverage by citing the pollution exclusion in its policy, which stated that it was a pollutant.

At the trial court level, Central Mutual succeeded on a motion to dismiss the complaint by arguing that the pollution exclusion unambiguously excluded coverage for stormwater.

On appeal, the 11th U.S. Circuit Court of Appeals agreed that under Georgia law and its own prior case law, stormwater and stormwater runoff qualify as a pollutant.

> **Practice Note**: The court noted that, in Georgia, "the pollutant at issue need not be explicitly named in the policy for the exclusion to apply."

Fertilizer application endorsement does not supersede the pollution exclusion.

Recyc Systems Southeast LLC v. Farmland Mutual Insurance Co., No. 17-cv-225, 2018 WL 2247247 (M.D. Ga. May 16, 2018).

The insured used water disposed of by poultry plants as a liquid fertilizer on nearby farmlands. The water was stored in a holding pond that the insured maintained. Nearby property owners sued the insured for damage caused by odors emanating from the pond.

The insurer denied coverage, citing the pollution exclusion. The insured then filed a declaratory judgment action.

The court started by finding that "noxious odors" plainly fell within the policy's definition of pollutants. It was also undisputed that the damage arose from the "migration, release or escape" of those noxious odors. Thus, the court found the pollution exclusion barred coverage.

The insured argued that the policy's fertilizer application endorsement overrode the application of the pollution exclusion, but the court disagreed. The endorsement modified paragraph (1)(d) of the pollution exclusion by allowing coverage for claims arising from the application of fertilizer.

The insurer, however, excluded coverage based on paragraph (1)(a), which was not modified by the endorsement and which excluded coverage for pollutants that migrate, release or escape from premises rented by the insured. Since that paragraph applied, the policy unambiguously excluded coverage.

> **Practice Note**: Policy endorsements may override portions of the pollution exclusion. However, other portions may still apply.

ILLINOIS

Insured's specific steps to avoid release of hazardous materials precluded application of the pollution exclusion.

Rogers Cartage Co. v. Travelers Indemnity Co., 103 N.E.3d 504 (Ill. App. Ct., 5th Dist. 2018).

The insured was in the business of hauling toxic and hazardous materials. After hauling materials, the insured cleaned the interior and exterior of the trailers. The insured's original site used containment ponds for the hazardous materials. Later, a second site utilized the sewer system to transport truck-washing waste to a publicly owned treatment center.

Both locations ultimately became Superfund sites. Policies between 1960 and 1970 did not contain pollution exclusions, whereas policies between 1971 and 1986 contained pollution exclusions that applied if the pollution was "expected or intended."

Based on that exclusion, the insurer sought a declaratory judgment stating that it had no duty to defend or indemnify the insured in underlying matters against the insured for contribution to cleanup costs.

The insurer argued that coverage was excluded because liability arose from decades of intentional discharges of hazardous chemicals into the soil, unlined ponds and a public sewer.

It contended that the insurer should be estopped from raising any exclusions, that its use of containment ponds and the sewer system did not implicate the pollution exclusion, that it did not expect or intend overflows from the sewer system or retention ponds, and that its use of sewers and ponds was not illegal.

Initially, the court found that the insurer breached its duty to defend by refusing to allow the insured to settle the underlying case well within the policy limits and by threatening that settling would negate coverage. As a result, the court found the insurer was estopped from raising any exclusions, including the pollution exclusion.

However, the court went on to note that "even if estoppel did not apply, we find the pollution exclusions inapplicable."

In reaching this finding, the court noted that, under Illinois law, there is a distinction between direct discharge of material into the environment versus placement of the material into an area the insured reasonably believed would contain the material.

The court found that the insured never expected the pollutants to enter the environment, given that the insured took specific steps to keep the hazardous materials out of the environment by placing them in both containment ponds and the sewer system, which went to a treatment facility. Because the insured never expected or intended for the material to enter the environment, the pollution exclusion did not bar coverage.

> **Practice Note**: An insurer has the burden to prove both the terms and conditions and the application of an exclusion; however, the insurer can, in certain circumstances, be estopped from ever raising the exclusion.

LOUISIANA

'Black liquor soap' is a pollutant, but the loss of the product itself is not unambiguously excluded.

Meridian Chemicals LLC v. Torque Logistics LLC, No. 18-cv-2, 2018 WL 4656396 (M.D. La. Sept. 27, 2018).

The plaintiff landlord sued its tenant and its insurer after a "a spill, release or discharge of black liquor soap," a byproduct of industrial paper manufacturing, was discovered on the leased property.

The tenant's lease stated that it would manage and oversee the tanks. It also provided that if the property became contaminated as a result of the tenant's act, then the tenant had to remediate any hazardous materials.

After the spill, the plaintiff alleged that it incurred $2.6 million in cleanup and remediation costs. The plaintiff also sought the loss of the value of the black liquor soap.

The insurer moved for summary judgment, arguing that the absolute pollution exclusion barred coverage. The plaintiff opposed the motion, arguing that there was an issue of fact over whether the exclusion applied.

Under Louisiana law, application of a total pollution exclusion turns on three considerations: whether the insured is a polluter, whether the substance was a pollutant, and whether there was a discharge, dispersal, seepage, migration, release or escape of the pollutant.

The court found that all three considerations were satisfied. It thus concluded that damages resulting from the release and contamination caused by the black liquor soap were excluded. However, the court stated that the exclusion did not unambiguously exclude a claim for damages of the value of the black liquor soap itself, which was lost.

> **Practice Note**: When discussing whether the plaintiff was a polluter, the court noted that Louisiana jurisprudence did not provide guidance on whether a trucking and storage company could be a polluter. However, evidence showed that the insured anticipated that its business presented a risk of pollution.

MARYLAND

Applying Georgia law to exclude lead paint coverage does not violate Maryland's public policy.

Brownlee v. Liberty Mutual Fire Insurance Co., 456 Md. 579 (Md. 2017).

The plaintiffs resided in a property in which they were exposed to lead-based paint. As a result, they suffered permanent brain damage and elevated blood lead levels.

The property was owned by the Salvation Army and was insured by Liberty Mutual Fire Insurance Co. pursuant to a comprehensive general liability policy. The policy did not include a lead-based paint exclusion but did include a pollution exclusion.

The plaintiffs sought a declaration that Liberty Mutual was obligated to defend and indemnify the Salvation Army for and against the plaintiff's claims.

The underlying matter was pending in the U.S. District Court for the District of Maryland. At that court, Liberty Mutual argued that Georgia law applied because the insurance policy was formed there. It said that pursuant to Georgia law, the pollution exclusion excluded coverage.

The plaintiffs argued that a Maryland court would not apply Georgia's interpretation of the pollution exclusion because it violated Maryland's public policy.

Based on those arguments, the District Court certified the following question to Maryland's Court of Appeals: "Would application of Georgia's interpretation of the pollution exclusion contained in the insurance policy issued by Liberty Mutual Insurance Co. to the Salvation Army as excluding coverage for bodily injuries resulting from the ingestion of lead-based paint violate Maryland public policy?"

The court analyzed and compared *Georgia Farm Bureau Mutual Insurance Co. v. Smith*, 298 Ga. 716 (Ga. 2016), and *Sullins v. Allstate Insurance Co.*, 340 Md. 503 (Md. 1995).

In *Georgia Farm Bureau*, the Georgia Supreme Court found that an absolute pollution exclusion, which was identical to the exclusion at hand, unambiguously excluded coverage for lead paint exposure.

In *Sullins*, the Maryland Court of Appeals found that a different exclusion was ambiguous and thus did not preclude coverage.

In the case at hand, the court found that the decisions in *Georgia Farm Bureau* and *Sullins* could coexist and that the decisions were not so different as to require application of Maryland law.

Sullins ultimately concluded that the pollution exclusion at issue was intended to exclude environmental hazards — not lead-based paint. Despite the difference, the court concluded it would not contravene Maryland's public policy to apply

Georgia law since the differences were not so contrary so as to override application of the doctrine of lex loci contractus, or the law of the place where the contract is made.

> **Practice Note**: When comparing and contrasting the *Georgia Farm Bureau* and *Sullins* decisions, the court focused on the ability to unambiguously interpret the policy's language.

MASSACHUSETTS

Under the applicable facts, the insured did not have to prove the exclusion's exception applied.

Plaistow Project LLC v. ACE Property & Casualty Insurance Co., No. 16-cv-11385, 2018 WL 4357480 (D. Mass. Sept. 13, 2018).

The plaintiff alleged that a family-owned laundromat leaked chemicals onto the plaintiff's property. The laundromat's insurer denied coverage under the pollution exclusion. As part of a settlement with the plaintiff, the laundromat assigned its rights against its insurer.

In the ensuing coverage litigation, the plaintiff alleged that the insurer breached its duty to defend. The insurer argued that the insured had the burden to demonstrate that the policy's sudden and accidental exception to the pollution exclusion applied — and that based on the allegations in the complaint, the insured could not meet that burden.

The court rejected the insurer's argument and held that when assessing the duty to defend, the insurer had the burden to show that the pollution did not fit within the exception.

That is, when determining whether there is a duty to defend, "shifting of the burden to the insurer ... is necessary to protect the insured because a failure to defend might make it more difficult for the insured to prove that the underlying claim falls within the insurance coverage."

> **Practice Note**: The court noted that, in the indemnity context, the insurer may have the burden to prove the exception applied.

MISSOURI

Lead particulate is unequivocally excluded by the policy.

Doe Run Resources Corp. v. American Guarantee & Liability Insurance, 531 S.W.3d 508 (Mo. 2017).

The plaintiff owned a smelting facility in La Oroya, Peru, that produces lead and lead concentrate. In an underlying suit, several minors sued the plaintiff alleging they were injured by toxic pollution released from the facility. The plaintiff sued its insurers for reimbursement of defense costs incurred during that underlying litigation.

The insurer moved for summary judgment, arguing that coverage was barred under the pollution exclusion. The trial court found that the pollution exclusion was ambiguous and unenforceable because the exclusion did not explicitly list lead or metals in its pollution exclusion.

This case raised a matter of first impression for the Missouri Supreme Court: whether a general pollution exclusion bars coverage for toxic tort claims arising from industrial pollution.

Sitting en banc, the court reversed the lower court's findings and entered summary judgment in favor of the insurer by holding that the exclusion unambiguously applied.

The policy did not define the terms "irritant" or "contaminant." As a result, the court relied on the dictionary definition of those terms. Under those definitions, the court found that lead particulate was unequivocally a pollutant under the exclusion.

> **Practice Note**: The specific pollutant need not be listed within the pollution exclusion under Missouri law. This is true even if the pollutant is the same substance as the product commercially produced by the insured.

NEW YORK

Pollution exclusion does not apply to asbestos remediation after house fire.

Cotillis v. New York Central Mutual Fire Insurance Co., 158 A.D.3d 1030 (N.Y. App. Div., 3d Dep't 2018).

The insured owned a two-unit house that was partially destroyed by a fire. It filed suit after the insurer denied coverage because the insured did not reside at the premises on the date of loss. A jury ultimately awarded $164,000 in damages to the insured. Those damages included approximately $12,000 in demolition and abatement costs for asbestos that was in the home.

On appeal, the insurer argued that various portions of damages should be reduced, including the asbestos abatement costs. This argument was based on a pollution exclusion that excluded losses "caused directly or indirectly" by an ordinance or law requiring cleanup, removal, containment, treatment or neutralization of any pollutants.

The court rejected the insurer's argument, stating that even assuming asbestos is a pollutant, there was no evidence to show the asbestos directly or indirectly caused the loss.

> **Practice Note**: Causation of the damages sought can be determinative as to the application of the pollution exclusion to those damages.

PENNSYLVANIA

Heating oil constitutes a pollutant.

Barg v. Encompass Home & Auto Insurance Co., No. 16-cv-6049, 2018 WL 487830 (E.D. Pa. Jan. 19, 2018).

The plaintiff-insured's home was heated by an oil-powered system consisting of an oil tank and furnace. Condensation caused by the furnace led to rusting of the oil tank. Eventually a hole formed in the oil tank and 50-75 gallons of heating oil spilled into the plaintiff's basement. Extensive remediation was required, including removal of concrete floors and walls in the basement along with subfloor stone and soil.

The defendant, Encompass Home & Auto Insurance Co., denied coverage, citing, among other provisions, the pollution exclusion. The plaintiff cited *Whitmore v. Liberty Mutual Fire Insurance Co.*, No. 07-cv-5162, 2008 WL 4425227 (E.D. Pa. Sept. 30, 2008), a case in which the court held heating oil was not a pollutant.

The court rejected the plaintiff's reliance on *Whitmore* because the record in that case did not contain any evidence to establish heating oil as a pollutant. In this case, however, the court found that there was extensive evidence to support that conclusion.

Among other things, the plaintiff was required to hire an environmental services firm, rather than an ordinary contractor, to remediate the spill. The contractor repeatedly washed and tested portions of the structure until the oil was cleaned up. In addition, the contaminated material was disposed of at a special facility.

Lastly, the soil tests showed that the soils and other material removed from the plaintiff's home contained substances recognized as pollutants, including ethyl benzene, isopropyl benzene, naphthalene and toluene.

Based on all of that, the court concluded that the heating oil was a pollutant and therefore that the pollution exclusion applied to preclude coverage.

> **Practice Note**: When determining whether something is a pollutant, a court may look to the nature of its cleanup and disposal to determine whether the substance qualifies as a contaminant.

Different policies can contain different language, which can affect the exclusion's application.

Consolidated Rail Corp. v. Ace Property & Casualty Insurance Co., 182 A.3d 1011 (Pa. Super. Ct. 2018), appeal denied, 191 A.3d 1288 (Pa. 2018).

The plaintiff insured was a railroad company that owned, operated and otherwise employed various pieces of real property for its operations. In the 1980s and 1990s, the Environmental Protection Agency and the Pennsylvania Department of Environmental Protection discovered the presence of various hazardous materials on the properties.

The plaintiff was directed to remediate the properties and was involved in multiple litigations regarding the contamination. As a result, the plaintiff sought coverage from multiple insurers for tens of millions of dollars for remediation costs, defense costs, and fines and penalties paid.

Some of the insurers moved for summary judgment and the plaintiff cross-moved. Ultimately, the trial court granted summary judgment to the insurers based on an interpretation of the "operations clause" and found that the policies covered only those occurrences that grew out of the plaintiff's operations. The court said coverage was afforded only when the plaintiff could prove that it had discharged some of the pollutants.

On appeal, the court upheld that interpretation but found that the plaintiff showed that pollution at some sites was potentially covered. As a result, the court said the burden shifted to the insurers to show that the pollution exclusion applied.

With regard to policies in effect from 1985 and onward, the court found that all contamination fell within the pollution exclusion and thus summary judgment was appropriate.

However, the policies in effect between 1976 and 1985 contained a "sudden and accidental" or "accidental" exception. Stating that those terms are synonymous with "unexpected and unintended," the court found that the plaintiff raised an issue of fact regarding whether those occurrences fell within the exception.

> **Practice Note**: When assessing the application of the pollution exclusion, it is important to have a clear understanding of who has the burden of proof.

Accidental discharge of carbon monoxide by a furnace does not fall within the 'accidental fire' exception to the pollution exclusion.

Foremost Insurance Co. v. Nosam LLC, No. 17-cv-2843, 2018 WL 5801312 (E.D. Pa. Nov. 11, 2018).

The plaintiff instituted a declaratory judgment action seeking defense and indemnification for a carbon monoxide poisoning claim brought by the plaintiff's tenants. According to the underlying complaint, a furnace in the rental unit was leaking carbon monoxide and caused personal injuries to the tenants.

The insurer moved for summary judgment, arguing the pollutant exclusion barred coverage. The exclusion contained

the typical definition of a pollutant; however, it also stated that "irritants and contaminants released by an accidental fire on your premises are not a pollutant."

The underlying plaintiff opposed summary judgment, arguing that the carbon monoxide was released by an accidental fire because the furnace system had improperly been converted to a gas fire system. To make that argument, the underlying plaintiff relied on a work order and testimony from a residential heating specialist.

The court found that coverage was barred because it was undisputed that carbon monoxide is a pollutant. As a result, the burden shifted to the underlying plaintiff to prove the accidental fire exception applied.

The court found that the underlying plaintiff failed to meet this burden. Although the underlying plaintiff contended that it did not know that the heating system was converted to gas, there was no suggestion that the fire was not knowingly and intentionally started when the furnace was started. Thus, although the carbon monoxide buildup was accidental, the fire was not.

> **Practice Note**: The court allowed the specialist's work order and testimony in as extrinsic evidence even though courts typically look to the four corners of the complaint. The court stated that extrinsic evidence may be introduced to rebut an insurer's claim that a policy exclusion bars coverage.

TEXAS

Innocuous rock fines are a pollutant.

Great American Insurance Co. v. Ace American Insurance Co., 325 F. Supp. 3d 719 (N.D. Tex. 2018).

An umbrella insurer brought a declaratory judgment action against its insured, stating that its absolute pollution exclusion barred coverage in an underlying matter. The underlying matter alleged that the insured caused pollution damages when it accidently discharged rock fines into a stream. The insured operated a rock quarry in New Jersey where rocks were crushed into smaller stones and fines, which were washed off with water and placed in settling ponds.

In 2017, in anticipation of substantial rainfall, the insured began lowering the water levels in its settling ponds through permitted pumping into the Spruce Run stream. The quarry manager failed to shut off the pumping before the rock fines began to be pumped.

"The pumping of rock fines into Spruce Run caused physical damage to the stream and stream bed by changing the flow and contours of the stream and filling in depressions in the stream bed," according to the court's opinion.

The court found that under the law of Texas, where the policy was issued, the pollution unambiguously excluded coverage. The court found that the rock fines were "solids" and became "irritants or contaminants when they were discharged and dispersed where they did not belong." Thus, even though the state of New Jersey would not require remediation, the material was still a pollutant.

> **Practice Note**: In reaching its decision, the court noted that substances can constitute pollutants regardless of their ordinary usefulness. Thus, the fact that the rock fines are wanted or useful does not change their nature.

VIRGINIA

Concrete dust is akin to smoke and therefore falls under an exception to the pollution exclusion.

Allied Property & Casualty Insurance Co. v. Zenith Aviation Inc., No. 18-cv-264, 2018 WL 4112588 (E.D. Va. Aug. 29, 2018).

The defendant was an aircraft parts distributor that hired a construction company to install an elevator in its warehouse. A construction contractor used a wet saw to cut away some concrete for a pit for the elevator.

The contractor did not use any water with the wet saw, which caused a large amount of concrete dust to billow out of the warehouse. Local businesses called the fire department, believing it was smoke. The dust settled on everything in the warehouse, including inventory and equipment.

The defendant sought coverage from Allied Property & Casualty Insurance Co. for the damage caused by the concrete dust. The insurer sought a declaratory judgment stating that coverage the pollution exclusion barred coverage.

Allied conceded that the defendant suffered a direct physical loss under the policy and thus, at summary judgment, the central issue was whether the pollution exclusion applied.

Allied argued that concrete dust was a pollutant because it was a "solid or thermal irritant or contaminant." The defendant argued that the dust was not a pollutant but, even if it was, the loss was caused by or resulted from "smoke," which was a "specified cause of loss" that removed it from the pollution exclusion.

The court found that "no Virginia court has definitely ruled on the scope and application of the pollution exclusion, or a close approximation, under facts comparable to those presented."

Initially the court found that the dust was a pollutant because it can "undoubtedly function as both an 'irritant'

and a 'contaminant'" and there was no dispute that the dust contaminated the defendant's inventory and machinery.

However, the court went on to find that it fell within an exception to the pollution exclusion. According to the defendant, the dust qualified as smoke because, pursuant to a Massachusetts court decision, smoke is "a cloud of fine particulate matter" or any "visible suspension of solid particles in a gaseous medium." Allied argued that smoke is "the visible product of combustion."

Since the court found both definitions were reasonable, the court was required to adopt the defendant-insured's definition and afford coverage.

> **Practice Note**: The court relied on the definitions of smoke employed by courts in other states as well as the dictionary definition to conclude that numerous definitions existed and nothing in the policy supported the conclusion that the parties intended to adopt the more narrow definitions.

WISCONSIN

Virus or bacteria exclusion does not supersede the pollution exclusion.

Foley v. Wisconsin Mutual Insurance Co., 381 Wis. 2d 471 (Wis. Ct. App. 2018).

The plaintiffs hired a contractor to remodel their home, including the addition of a bathroom. They later discovered black mold on the ceiling below the bathroom. They claimed that the mold resulted from leaking water caused by negligent construction. The mold allegedly released trichothecene into the residence, rendering it uninhabitable and causing health problems.

After coverage was denied, the plaintiffs filed suit against their own insurer, the contractor's insurer and the contractor.

The contractor's insurer sought a declaratory judgment stating that there was no duty to defend or indemnify the contractor under the fungi or bacteria exclusion and the total pollution exclusion. The plaintiffs' insurer moved for summary judgment under the pollution exclusion and the virus or bacteria exclusion in its policy.

With regard to their own insurer, the sole argument presented by the plaintiffs regarding the pollution exclusion was that the exclusion was superseded by the virus or bacteria exclusion. Since the parties agreed that trichothecene is a pollutant, there was no issue of fact as to whether the pollution exclusion applied.

In making their argument, the plaintiffs disregarded paragraph four of the virus or bacteria exclusion, which stated that the exclusion could not displace another exclusion already in the policy that would exclude claims. As a result, the court found the unambiguous terms of the policy barred coverage.

> **Practice Note**: The court found that the contractor's insurer's fungi exclusion applied to bar coverage and therefore did not address that insurer's pollution exclusion.

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