Limiting the "Absolute" Pollution Exclusion to "Traditional" Pollution

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The scope of pollution exclusions has been in dispute for decades, centering first on the “sudden and accidental” pollution exclusion that appeared in the 1970s, and next on the so-called “absolute” pollution exclusions that became relatively standard in liability policies in the mid-1980s. The latest battles have centered on whether claims arising out of “non-traditional” pollution – that is, not the traditional property damage caused by hazardous waste – come within the purview of the exclusion.

Carriers argue the “plain language” of the exclusion, when read broadly, includes both “traditional” and “non-traditional” pollution. A growing number of courts, however, refuse to construe the breadth of pollution exclusions beyond “traditional” environmental pollution. Courts generally reach this conclusion based on the originally stated purpose of the exclusion and policyholders’ reasonable expectations, though some rely solely on the language of the exclusion. This article addresses recent judicial opinions in which courts refused to apply the exclusion to specific types of “non-traditional” pollution, such as: (1) painting and sealing fumes; (2) toxic chemicals; (3) carbon monoxide; and (4) pesticides.

I. Painting & Sealing Fumes. The New Jersey Supreme Court addressed the “traditional” versus “non-traditional” issue squarely in the 2005 case Nav-Its, Inc. v. Selective Insurance Co. of America. The issue addressed by the court was “whether we should limit the applicability of the pollution exclusion clause to traditional environmental pollution claims.” The court concluded the pollution exclusion precluded recovery only for “traditional” types of pollution and refused to find that the exclusion was applicable to the claims by the policyholder.

The policyholder, a construction contractor, hired a painting subcontractor to perform painting, coating and floor sealing work in an office building. A physician within the of-

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2. Id. at 933.
3. Id.
The physician subsequently filed a complaint against the insured for personal injuries from exposure to fumes. The insurer relied on the pollution exclusion as a basis for denying coverage under its comprehensive general liability (“CGL”) policy.

The policy’s pollution exclusion barred coverage for damage “to persons or property” arising out of, or which would not have occurred but for, the “pollution hazard.” The policy defined “pollution hazard” as “an actual exposure or threat of exposure to the corrosive, toxic or other harmful properties of any ‘pollutants’ arising out of the discharge, dispersal, seepage, migration, release or escape of such pollutants.” Pollutants included “any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.” The insurer argued the fumes constituted a “pollutant” within the scope of the pollution exclusion.

The trial court disagreed and granted summary judgment in favor of the policyholder. As the trial court explained, “the pollution exclusion clause in the policy applied only to traditional environmental pollution claims.” The Appellate Division reversed, finding the pollution exclusion was not limited to the cleanup of traditional environmental damage.

The Supreme Court of New Jersey began its analysis with a review of the drafting history and purposes behind pollution exclusions. It cited to assurances by the insurance industry to New Jersey insurance regulators during the approval process for the absolute pollution exclusion that “[the purpose of the change in policy language in the abso-

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4. Id.
5. Id.
6. Id.
7. Id. at 931.
8. Id.
9. Id. at 932.
10. Id. at 930.
11. Id. at 931.
12. Id.
lute pollution exclusion] is to introduce a complete on-site emission and partial off-site exclusion for some operations" and “the exclusion would not preclude coverage for liability for a policyholder's products and completed operations.” Also persuasive to the Supreme Court was the fact that carriers developed the absolute pollution exclusion to address expanding liability under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”). The Supreme Court concluded that the pollution exclusion clause “in its various forms demonstrates that its purpose was to have a broad exclusion for traditional environmentally related damages.”

According to the court, painting and sealing fumes did not constitute “traditional” forms of pollution. Thus, it considered the insurer’s interpretation of the pollution exclusion “overly broad, unfair, and contrary to the objectively reasonable expectations of the New Jersey and other state regulatory authorities that were presented with an opportunity to disapprove the clause.” The pollution exclusion therefore did not bar coverage for the bodily injury resulting from exposure to fumes.

In Belt Painting Corp. v. TIG Insurance Company, the Court of Appeals of New York similarly refused to apply the pollution exclusion to bodily injury resulting from fumes. One of the policyholder’s workers alleged injury due to inhalation of paint or solvent fumes while performing work in an office space. In the insurance coverage declaratory judgment action that followed, the trial court granted summary judgment to the insurer on the ground that the claim fell within the pollution exclusion. The Appellate Division reversed, finding the pollution exclusion “applies only where the damages alleged ‘are truly environmental in nature’ or result from ‘pollution of the environment.’”

13. Id. at 936.
14. Id.
15. Id. at 936-37.
16. Id. at 937.
17. 100 N.Y.2d 377 (2003).
18. Id. at 382.
19. Id. at 383.
20. Id.
The Court of Appeals surveyed nationwide judicial interpretation of the pollution exclusion, noting courts have split on whether it applies to “non-traditional” pollution.\textsuperscript{21} The Court of Appeals fell in line with case law denying application of the exclusion to “non-traditional” pollution, finding the exclusion ambiguous as applied to the fumes at issue.\textsuperscript{22} Though the policy broadly defined “pollutants” to include “fumes,” the Court of Appeals was “reluctant to adopt an interpretation that would infinitely enlarge the scope of the term ‘pollutants,’ and seemingly contradict both a ‘common speech’ understanding of the relevant terms and the reasonable expectations of a business person.”\textsuperscript{23} The Court of Appeals ultimately held “[i]t cannot be said that this language unambiguously applies to ordinary paint or solvent fumes that drifted a short distance from the area of the insured’s intended use and allegedly caused inhalation injuries to a bystander.”\textsuperscript{24}

In a recent decision, the federal court for the District of South Carolina dealt with application of the absolute pollution exclusion in a contractor’s insurance policy to bodily injuries arising from paint fumes. In \textit{NGM Insurance Co. v. Carolina’s Power Wash & Painting, LLC}, the policyholder faced potential liability for alleged injuries suffered by postal workers during painting of a post office.\textsuperscript{25} The definition of “pollutant” included any “irritant or contaminant” as well as “fumes.”\textsuperscript{26} The insurer argued the paint fumes constituted a “pollutant” within the exclusion.

Under South Carolina law, the reasonable expectations of a policyholder have no bearing on the interpretation of an insurance policy.\textsuperscript{27} Furthermore, no South Carolina case law addressed the “traditional” versus “non-traditional” pollution issue. Thus, the District Court reviewed judicial opinions nationwide and relied most heavily on \textit{Belt Painting, above}, which involved a nearly identical exclusion, to reach its conclusion that the pollution exclusion did not bar coverage. It focused on the New York Court of Appeals’

\begin{itemize}
  \item \textsuperscript{21} Id. at 384-87.
  \item \textsuperscript{22} Id. at 387.
  \item \textsuperscript{23} Id.
  \item \textsuperscript{24} Id. at 387-88.
  \item \textsuperscript{25} No. 2:08-cv-3378-DCN, \textit{2010 U.S. Dist. LEXIS 2362} (D.S.C. Jan. 12, 2010).
  \item \textsuperscript{26} Id. at *6.
  \item \textsuperscript{27} Id. at *17.
\end{itemize}
analysis that the insurer’s interpretation of the exclusion was over inclusive.\textsuperscript{28} It also found persuasive the New York court’s finding that when fumes drift a short distance from the work area, no “discharge, dispersal, seepage, migration, release or escape” unambiguously occurs.\textsuperscript{29} As a result, the District Court found the exclusion ambiguous and, in accordance with basic tenets of policy interpretation, construed it in favor of the policyholder.

Though it did not frame the issue this way, the federal court for the Southern District of Texas recently refused to apply the pollution exclusion to “non-traditional” pollution, addressing the issue from a purely textual approach. In \textit{National Casualty Insurance Co. v. Orion Transport, Inc.}, the policyholder’s trailer exploded and killed a maintenance worker.\textsuperscript{30} The estate filed suit, alleging the trailer had been used to transfer oil that left a “dangerous and potentially explosive residue” in the trailer.”\textsuperscript{31} The insurer filed a declaratory judgment action, alleging it had no coverage obligations because of the pollution exclusion.\textsuperscript{32}

The District Court focused on the language of the policy, stating:

“Pollutant” is defined by the Policy to mean “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.” There is no dispute that the “dangerous and potentially explosive residue” that [the underlying complaint alleges] “remained in the trailer” is a “pollutant” under the Policy.\textsuperscript{33}

Nonetheless, the District Court held the pollution exclusion did not bar coverage. By its language, the exclusion applied to “bodily injury or property damage arising out of

\textsuperscript{28} \textit{id. at *19.}
\textsuperscript{29} \textit{id.}
\textsuperscript{31} \textit{id. at *16.}
\textsuperscript{32} \textit{id. at *4.}
\textsuperscript{33} \textit{id. at *17.}
the...discharge, dispersal, seepage, migration, release or escape of pollutants."\textsuperscript{34} The underlying injury did not involve a “discharge, dispersal, seepage, migration, release or escape.”\textsuperscript{35} The pollution exclusion therefore was inapplicable. Though the opinion rests solely on policy language, it is in agreement with cases finding the exclusion applies only to “traditional” pollution discharged into the environment.

Similarly, the Sixth Circuit held in \textit{Meridian Mutual Insurance Co. v. Kellman} that the absolute pollution exclusion did not preclude coverage for injuries caused by toxic substances confined within the general area of their intended use.\textsuperscript{36} In that case, a teacher sued a contractor for alleged injuries arising out of fumes from chemicals used to seal a floor in the school where the teacher worked.\textsuperscript{37} The insurer denied coverage to the contractor based on the absolute pollution exclusion.\textsuperscript{38}

The parties agreed the sealer constituted a pollutant.\textsuperscript{39} Nonetheless, the trial court ruled for the insured, stating:

\begin{quote}
[T]he pollution exclusion clause is intended to protect the insurer from liability for the enforcement of environmental laws. The exclusion contains environmental terms of art because it is intended to exclude coverage only as it relates to environmental pollution. When a toxic substance is confined to an area of intended use it does not come within the exclusion clause.\textsuperscript{40}
\end{quote}

The Sixth Circuit agreed, stating “no reasonable person could find that the insurance policy at issue unambiguously excluded coverage for injuries suffered by an employee

\textsuperscript{34} \textit{id.}
\textsuperscript{35} \textit{id.} at 21.
\textsuperscript{36} 197 F.3d 1178 (6th Cir. 1999).
\textsuperscript{37} \textit{id.} at 1180.
\textsuperscript{38} \textit{id.}
\textsuperscript{39} \textit{id.}
\textsuperscript{40} \textit{id.} at 1180-81.
who was legitimately in the immediate vicinity of the chemicals, and where the injury occurred only a few feet from whether the chemicals were being used.”

II. Toxic Chemicals. In perhaps the most recent opinion to address the “traditional” versus “non-traditional” issue, the federal court for the Northern District of Illinois denied application of the pollution exclusion to toxic chemicals. Pacific Employers Insurance Co. v. Clean Harbors Environmental Services, Inc. involved an underlying complaint for bodily injury due to inhalation of poisonous and toxic fumes emitted from fuel at the insured’s facility. In the coverage action, the District Court was bound by an Illinois decision that found, based on the drafting history and over-inclusiveness of the pollution exclusions, the exclusion applied “to only those hazards traditionally associated with environmental pollution.”

Thus, the issue before the court was whether fumes from toxic chemicals constituted “traditional” pollution. The District Court drew a distinction between environmental pollution and injuries sustained during day-to-day operations of a company, even if they arguably resulted from pollutants. The injuries at issue occurred during the day-to-day duties of the injured party. Hence, the pollution exclusion had no bearing upon the insured’s claim for coverage because the toxic chemicals did not constitute “traditional” pollution.

III. Carbon Monoxide. The United States Bankruptcy Court for the District of Delaware’s recent opinion in In re IdleAire Technologies Corp. reached a similar conclusion in a case involving bodily injury arising from carbon monoxide. The insured produced HVAC delivery systems that provided heating, cooling, and ventilation for trucks at rest

41. Id. at 1183.
42. No. 08 C 2180, 2010 U.S. Dist. LEXIS 10668, at *4-5 (N.D. Ill. Feb. 4, 2010).
43. Id. at *10 (citing Am. States Ins. Co. v. Koloms, 177 Ill. 2d 473 (1997)).
44. Id. at *11.
45. Id. at *14.
46. Id. at *15.
47. Id.
stops while drivers slept.\textsuperscript{49} Two drivers suffered injuries from carbon monoxide that allegedly resulted from the insured’s HVAC unit.\textsuperscript{50} The insurer argued the pollution exclusions in its CGL and umbrella/excess policies precluded coverage.\textsuperscript{51}

Like the New Jersey Supreme Court, the court began with a review of the history of pollution exclusions.\textsuperscript{52} During the approval process of the absolute pollution exclusion, regulators were aware of “the possibility of over-broad application of the exclusion.”\textsuperscript{53} In response, the insurance industry represented that “coverage would not be denied for events outside of the traditional understanding of environmental pollution.”\textsuperscript{54} Approval of the exclusion was based in part upon these reassurances.\textsuperscript{55}

The court then addressed the policyholder’s reasonable expectations. It concluded the policyholder had a reasonable expectation of coverage for two reasons: (1) the insurance industry’s representations during approval of the exclusion; and (2) the fact that the policyholder was not a “polluter” but rather an HVAC producer.\textsuperscript{56} Next, the court found the exclusion ambiguous because the terms “irritant” and “contaminant,” excluded from coverage under the pollution exclusion, “are virtually boundless in their inclusion, for there is virtually no substance or chemical in existence that would not irritate or damage some person or property.”\textsuperscript{57} Thus, it applied a “limiting principle,” which it termed the “common sense approach,” to conclude “the circumstances are too far removed from the common understanding of pollution and applying the exclusion here would lead to an absurd result.”\textsuperscript{58}

\begin{itemize}
\item \textsuperscript{49} \textit{Id.} at *2-3.
\item \textsuperscript{50} \textit{Id.} at *3.
\item \textsuperscript{51} \textit{Id.} at *3-4.
\item \textsuperscript{52} \textit{Id.} at *12-24.
\item \textsuperscript{53} \textit{Id.} at *17.
\item \textsuperscript{54} \textit{Id.} at *18.
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Id.} at *27-28.
\item \textsuperscript{57} \textit{Id.} at *30-31.
\item \textsuperscript{58} \textit{Id.} at *36-37.
\end{itemize}
On March 4, 2010, the federal court for the District of Nevada, applying Nevada law, construed a pollution exclusion in favor of coverage when the insurer attempted to apply it to bodily injury resulting from carbon monoxide exposure. In Century Surety Co. v. Casino West, Inc., four individuals died from inhalation of carbon monoxide in a hotel room.\(^\text{59}\) The carbon monoxide arose from the motel’s pool heater and entered the room because the air intake openings were blocked.\(^\text{60}\) The motel’s insurer denied coverage under a CGL policy and filed a declaratory judgment action.\(^\text{61}\)

The pollution exclusion barred coverage for bodily injury “arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of ‘pollutants.’”\(^\text{62}\) The exclusion contained an exception for bodily injury “sustained within a building and caused by smoke, fumes, vapor or soot from equipment used to heat that building.”\(^\text{63}\) The insurer argued the exception evidenced “an intent to apply the pollution exclusion to all indoor air quality issues except when the fumes are generated by the building’s heater.”\(^\text{64}\)

The District Court directly refuted the insurer’s argument, holding:

> While a reasonable person of ordinary intelligence might understand carbon monoxide is a pollutant when emitted in some settings, an ordinary policyholder may not reasonably characterize carbon monoxide emitted from a motel pool heater as pollution. Additionally, a reasonable policyholder might not view the exception regarding fumes from the building’s heater as an indication that all other possible types of indoor fumes would be excluded as “pollutants.”\(^\text{65}\)


\(^{60}\) Id.

\(^{61}\) Id. at *4.

\(^{62}\) Id. at *3.

\(^{63}\) Id. at *9.

\(^{64}\) Id. (emphasis in original).

\(^{65}\) Id. at *12.
Concluding the exclusion was subject to more than one reasonable interpretation, the District Court found it ambiguous and construed it against the insurer.66

Langone v. American Family Mutual Insurance Company also involved the potential application of the pollution exclusion to carbon monoxide. The Langone brothers suffered injury, and one died, after they inhaled carbon monoxide in a residential apartment.67 The Langones sued the building’s owner and the owner’s insurer.68 The insurer contended it had no coverage obligation as a result of the absolute pollution exclusion in the policy, arguing carbon monoxide constituted a “pollutant.”69

The policy defined “pollutant” as “any…gaseous or thermal irritant or contaminant, including…vapor [and] fumes.”70 Even with this broad definition, the court found “[t]he policy and dictionary definitions of the term ‘pollutant’ do not suffice to unambiguously categorize carbon monoxide as pollution under the facts of this case.”71 Essential to the court’s decision was its recognition that:

...most people are exposed to carbon monoxide in small quantities every day. Like carbon dioxide, carbon monoxide is colorless, odorless, and present in the air around us. According to the Environmental Protection Agency, homes without a gas stove have average carbon monoxide levels between .5 and 5 parts per million while areas near a properly adjusted gas stove may have levels as high as 5 to 15 parts per million. Thus the concentrated level of carbon monoxide in the Longones’ apartment could be described as a normal condition gone awry.72

The court concluded carbon monoxide “becomes harmful when levels are abnormally high or exposure is unusually extended” and the extraordinary concentration of carbon

66. Id.
67. 731 N.W.2d 334, 335 (Wis. Ct. App. 2007).
68. Id.
69. Id. at 335-36.
70. Id. 337.
71. Id. at 338.
72. Id.
monoxide at the residence “would not ordinarily be characterized as a ‘pollutant.’” Thus, the pollution exclusion did not bar coverage.

IV. Pesticides. In MacKinnon v. Truck Insurance Exchange, the policyholder’s tenant died from exposure to pesticides during extermination of bees. The insurer argued the pollution exclusion applied because pesticides are “chemicals” that may constitute an “irritant” and “pollutant,” and the spraying constituted a “discharge” or “dispersal,” within the exclusion. The Supreme Court of California, however, refused to apply the pollution exclusion to permit the insurer to avoid coverage.

In its review of the pollution exclusion’s purpose, the court found “[e]ven commentators who represent the insurance industry recognize that the broadening of the pollution exclusion [from the ‘sudden and accidental’ to ‘absolute’] was intended primarily to exclude traditional environmental pollution rather than all injuries from toxic substances.” Like the New Jersey Supreme Court, the California court noted the broadening of the exclusion arose largely from the passage of CERCLA, which addressed remediation of environmental pollution.

The court then recognized the absurdity of the insurer’s position, finding “[v]irtually any substance can act under the proper circumstances as an ‘irritant or contaminant.’” Next, the court found that neither dictionary definitions nor common usage of “disperse” or “discharge” included “spray” or “apply.” Thus, the court held that “the plain meaning of the pollution exclusion…turns on the meaning of the term ‘pollutant.’” In the court’s view, this term did not include pesticides. Therefore, the court limited the pollution exclusion to “traditional” pollution in accordance with “the purpose of CGL policies – which ‘is to provide the insured with the broadest spectrum of protection against liability for un-

73. Id. at 340.
74. 3 Cal. Rptr. 3d 228, 252 (Cal. 2003).
75. Id. at 235.
76. Id. at 236.
77. Id. at 240.
78. Id. at 241.
79. Id. at 242.
intentional and unexpected personal injury or property damage arising out of the conduct of the insured's business." 80

V. Conclusion. Although courts are still split on application of the pollution exclusion to "non-traditional" pollution, a broad consensus has emerged that the exclusion applies only to "traditional" environmental pollution. Courts recognize that while the language of the exclusion may be broad, the purpose, as evidenced by the insurance industry’s assurances, was to preclude coverage for "traditional" pollution. Furthermore, inclusion of "non-traditional" pollution within the purview of the exclusion does not comport with the reasonable expectations of policyholders and often defies the text of the exclusion.

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80. Id. at 243 (citing Westchester Fire Ins. Co. v. City of Pittsburg, 768 F. Supp. 1463, 1468 (D. Kan. 1991)).