

What is a Pollutant in the Context of the Application of the Absolute and Total Pollution Exclusion?

By:
Thomas M. Jones
Michael D. Handler
Jamie Clausen

Cozen O'Connor
1201 Third Avenue, Suite 5200
Seattle, Washington 98101
(206) 340-1000

*“Just definitions either prevent or put an end to dispute.”
Nathaniel Emmons*

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Introduction

Since the mid-1980s virtually all Commercial General Liability (CGL) policies have contained some form of the total or absolute pollution exclusion.

The scope of this paper is to address those situations where the court's analysis of these exclusions turned on the issue of whether the substance at issue is a "pollutant" or otherwise qualified as pollution within the operative exclusion. Particular attention will be paid to the heavily litigated areas of carbon monoxide, lead paint, asbestos, biological contaminants, chemical fumes, and welding rod fumes.

1. Evolution Of the Pollution Exclusions

The pollution exclusion contained in the 1986 Insurance Services Office ("ISO") form was substantially revised from the 1973 ISO version to be much broader.

The 1986 ISO "absolute" pollution exclusion provides:

This insurance does not apply to:

f.(1)"Bodily injury" or "property damage" arising out of the [actual, alleged or threatened]¹ discharge, dispersal, release or escape of pollutants:

- a) At or from premises you own, rent or occupy;
- b) At or from any site or location used by you or for you or others for the handling, storage, disposal, processing or treatment of waste;
- c) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or

¹ Alternative versions of the exclusion would contain the bracketed language above addressing "threatened" discharges, perhaps to clarify that coverage is similarly limited in states where a threatened release of hazardous substances is sufficient to trigger strict liability (*e.g.*, Alaska Sec. 46.03.822(a)). No known reported authority stands for the proposition that the absence of the bracketed language would result in a narrower application of the exclusion.

d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:

- i) If the pollutants are brought on or to the site or location in connection with such operations; or
- ii) If the operations are to test for, monitor, clean up, remove, contain, detoxify, or neutralize the pollutants.

2) Any loss, cost, or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

ISO Form CG-00-01-11-85.

Pollutants mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes material to be recycled, reconditioned or reclaimed.

An amendatory endorsement to the 1986 edition of the “absolute” pollution exclusion added what is known as the “hostile fire exception” to the exclusion (ISO Form CG-00-41). As of 1988, the “hostile fire exception” was added to the body of the absolute pollution exclusion, and the cleanup cost portion of the exclusion was expanded to be broader.

ISO also introduced what has been referred to as a “total” pollution exclusion endorsement in 1988. Generally, a “total” pollution exclusion can be characterized as any post-“sudden and accidental” pollution exclusion which does not limit the exclusion to certain enumerated circumstances and, instead, precludes coverage for any and all exposure to pollutants.²

The 1988 ISO “total” pollution exclusion endorsement provides:

Exclusion f. under paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability is replaced by the following:

This insurance does not apply to:

² Tammaro, *Fuming About Coverage*, DRI’s “Insurance Coverage for Environmental and Mass Tort Claims” 251-52 (April 2000).

- f) Pollution
 - 1) “Bodily injury” or “property damage” which would have not occurred in whole or part but for the [actual, alleged or threatened] discharge, dispersal, seepage, migration, release or escape of “pollutants” at any time.
 - 2) Any loss, cost or expense arising out of any:
 - a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize or in any way respond to, or assess the effects of “pollutants”; or
 - b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of “pollutants.”

ISO Form CG-21-49.

2. General Comments On The Definition Of The Pollutants In These Exclusions

While the meaning of almost every term used in the Insurance Services Office (“ISO”) absolute pollution exclusion has been litigated, no one term in these exclusions has received more scrutiny than the term “pollutant.”³

As reflected below in Section 3, a majority of state and federal jurisdictions have held that the “absolute” and “total” pollution exclusions are unambiguous as a matter of law.⁴ Nevertheless, courts across the country have come to very different conclusions about what this “unambiguous” language might mean. Where several courts have narrowly interpreted such “absolute” or “total” exclusions, they have most commonly justified their interpretations by accounting for the exclusion’s origin or purported “purpose.” In the 2000 Supreme Court of Louisiana opinion *Doerr v. Mobil Oil Co.*,⁵ three “considerations” were set forth as purported conditions precedent to the exclusion’s application:

- 1. Whether the insured is a polluter within the meaning of the exclusion.

³ *Couch on Insurance*, 3d ed. § 127:12.

⁴ *Cincinnati Insurance Co. v. Becker Warehouse, Inc.*, 635 N.W.2d 112, 118 (Neb. 2001), and cases cited therein.

⁵ 774 So.2d 119 (La. 2000).

2. Whether the injury-causing substance is a “pollutant” within the meaning of the exclusion.
3. Whether there was a “discharge, dispersal, seepage, migration, release or escape” of a pollutant by the insured within the meaning of the exclusion.⁶

This paper will address “consideration” 2. above.

The definition “pollutant”, as provided in the exclusion itself, focuses on the notion of the substance. In application, certain courts have focused on a number of other factors including the general nature of the claim, the quantity of the substance(s) and whether it was being used for its intended purpose at the time of the occurrence, and the nature of the resultant damage.⁷ As a result of these factors, the same substances are at times found to be a pollutant in one jurisdiction, and not a pollutant in another. Even more troubling, the same substance has been found to be a pollutant in one setting (e.g., in a traditional environmental setting) and not a pollutant in another (e.g., in an indoor exposure), in the very same jurisdiction.⁸

When examining the definition of “pollutant” contained in post-1985 pollution exclusions, the courts typically will be presented with the following definition: “Any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkyls, chemicals and wastes. Waste includes materials to be recycled, reconditioned, or reclaimed.”

There is little dispute that either the “absolute” or “total” pollution exclusions will bar coverage for so-called “traditional” environmental harms:

Both policyholders and insurers agree on this much. The absolute exclusion was designed to bar coverage for gradual environmental degradation of any type and to preclude coverage responsibility for government-mandated cleanup such as Superfund, which was enacted in 1980. ... At this point, policyholders and insurers diverge.

⁶ *Id.* at 135.

⁷ *Id.*

⁸ Depending on whether carbon monoxide was released in a private home or at a hockey rink business, two rulings based on Massachusetts law reached different results in 1994 and 1997 (see Section 3.A., *infra.*) A more recent California Court of Appeals opinion has suggested that there may also be different determinations for similar substances in California, depending on whether an “absolute” pollution exclusion or a modified “total” pollution exclusion was issued to the insured. See *Garamendi v. Golden Eagle Ins. Co.*, 127 Cal. App.4th 480, 487-88 (2005).

See, e.g., Jeffrey W. Stempel, *Reason and Pollution: Correctly Construing the “Absolute” Exclusion in Context and in Accord with its Purpose and Party Expectations*, Tort & Ins. L. J. 1, 30 (Fall 1998)(“*Stempel, Reason and Pollution*”), at p. 5.

Even the most critical commentators have offered a definition of “true pollution claims” involving “long-term, widespread contamination of a wide area involving persons other than just those in immediate proximity to the commercial insured tortfeasor.”⁹

There are a number of courts which have found that applying the pollution exclusion in any circumstance other than the traditional environmental setting described above would be overbroad and stretch the meaning of the exclusion beyond the intention of the parties.

One of the most frequently cited cases for the proposition that the above definition of “pollutant” is overbroad is the Seventh Circuit Court of Appeals case *Pipefitters Welfare Education Fund. v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir. 1992). Interestingly, the court in that case ultimately found that the pollutant in question, polychlorinated biphenyls (“PCBs”) discharged onto the third party’s land, was a pollutant. Nevertheless, the decision contained *dicta* regarding potential problems with the definition that has been cited as persuasive authority in other jurisdictions. Specifically, the Seventh Circuit took issue with the broadness of the definition of the subterms “irritant” and “contaminant.” The court noted that these terms could be virtually boundless when viewed in isolation because “there is virtually no substance or chemical in existence” that would not irritate or damage some person or property.¹⁰ The court went on to speculate that:

Without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope and lead to some absurd results. To take but two simple examples, reading the clause broadly would bar coverage for bodily injuries by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injuries caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or

⁹ *Stempel, Reason and Pollution* at 46.

¹⁰ *Pipefitters*, 976 F.2d at 1043 citing *Westchester Fire Ins. Co. v. City of Pittsburg, Kansas*, 768 F. Supp. 1463, 1470 (D. Kan. 1991).

contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution.¹¹

Some commentators have criticized the “dictionary-literal breadth” of the exclusion, and raised the spectra of hypothetical claims such as the person who slips on spilled Drano.¹²

Others respond that such proffered hypotheticals often overlook that it is reasonable and consistent with the definition of “pollutant” to apply absolute pollution exclusions to those claims that arise from the irritating or contaminating nature of the substance at issue.¹³ Such jurisdictions have looked at the plain meaning of the wording of the exclusion and applied it in any circumstance where that plain meaning would dictate it should apply.

The Washington State Supreme Court has developed its own unique test for applying the pollution exclusion that was first introduced in its 2000 opinion *Kent Farms v. Zurich Ins. Co.*¹⁴ and expanded upon in 2005 by *Quadrant Corp. v. American States Ins. Co.*¹⁵ This test focuses not on the inherent nature of the substance but whether the substance was “acting like a pollutant” in causing the injury.

3. Survey of Case Law

When interpreting the definition of “pollutant,” courts have had little trouble finding the exclusion applies when facing common industrial and environmental pollutants such as benzene, coal tar, dioxin, insecticide, PCBs, and TCEs. Yet, the complexity of dealing with the “pollutant” definition can be seen in the case law surrounding some of the most litigated substances: carbon monoxide, fuel, lead paint, asbestos, chemical fumes, biological contaminants, and welding rod claims. In many jurisdictions, despite the static definition of pollutant, actual application of the definition is dynamic.

¹¹ *Pipefitters*, 976 F.2d at 1043.

¹² *See, e.g., Stempel, Reason and Pollution*, at 30.

¹³ *See* William P. Shelley and Richard C. Mason, *Application of the Absolute Pollution Exclusion in Toxic Tort Claims: Will Courts Choose Policy Construction or Deconstruction?*, 33 Tort & Ins. L.J. 749, at IV.C (Spring 1998).

¹⁴ *Kent Farms, Inc. v. Zurich Ins. Co.*, 998 P.2d 292, 295 (Wash. 2000).

¹⁵ 110 P.3d 733 (Wash. 2005).

A. Carbon Monoxide

One of the most highly contested pollutants is carbon monoxide. This should not be surprising given the prevalence of carbon monoxide related injuries and the fact that the vast majority of these injuries occur in indoor settings where courts are sometimes hesitant to apply the exclusion.

Carbon monoxide is a colorless gas or liquid that is practically odorless.¹⁶ It is classified as a nonorganic compound.¹⁷ At low concentrations, carbon monoxide can cause fatigue in healthy people and chest pains in people with heart disease.¹⁸ At higher concentrations, people experience impaired vision and coordination, headaches, dizziness, confusion, and nausea.¹⁹ However, carbon monoxide can also cause irreversible coma and death at high enough concentrations.²⁰ There are also some in the medical community who believe long term, low concentration exposures can cause allergies, asthma, brain dysfunction and birth defects.²¹ The U.S. Center for Disease Control, estimates that carbon monoxide exposure leads to as many as 40,000 emergency room visits and 450 unintentional deaths each year.

Dangerous levels of carbon monoxide can be caused by a number of sources including automobile exhaust, gas stoves, fireplaces, barbecues, furnaces, space heaters, wood stoves, and water heaters.

Jurisdictions that rely on the plain meaning of the wording of the pollution exclusion have tended to find that carbon monoxide is a pollutant.²² For example, the Pennsylvania Superior Court decision, *Matcon Diamond, Inc. v. Penn National Ins. Co.*, relied on the American Heritage Dictionary definition of carbon monoxide as “a colorless, odorless, poisonous gas” to find that carbon monoxide unambiguously fit the definition of a pollutant. The

¹⁶ Condensed Chemical Dictionary.

¹⁷ *Id.*

¹⁸ *Sources of Indoor Air Pollution-Carbon Monoxide*, U.S. Environmental Protection Agency at p. 11 www.epa.gov/iaq/co.html.

¹⁹ *Id.*

²⁰ *Id.*

²¹ <http://www.coheadquarters.com>.

²² *Admiral Ins. Co. v. Feit Management Co.*, 321 F.3d 1326 (11th Cir. Feb. 2003), ; *Assicurazioni Generali, S.P.A. v. Neil*, 160 F.3d 997 (4th Cir. 1998); *Bernhardt v. Hartford Fire Ins. Co.*, 648 A.2d 1047 (Md. Ct. Spec. App. 1994); *Essex Ins. Co. v. Tri-Town Corp.*, 863 F. Supp. 38 (D. Mass. 1994); *Matcom Diamond, Inc., et al. v. Penn National Ins. Co.*, 815 A.2d 1109 (2003); *Reliance Ins. Co. v. VE Corp.*, 1995 WL 560024 (E.D. Pa. 1995); *Reliance Ins. Co. v. Moessner*, 121 F.3d 895 (3rd Cir. 1997).

court in *Matcon* also relied on carbon monoxide's status as "pollutant" regulated by the federal government.²³ The court specifically cited 40 CFR § 50 which established carbon monoxide as a "criteria air pollutant" endangering public health under the Clean Air Act, 42 USC § 7408(a)(1).

Maryland has followed a similar line of reasoning to determine that carbon monoxide is a pollutant. For example, the court in *Assicurazioni Generali v. Neil* found that because carbon monoxide is capable of being described as a "fume", "vapor", or "gas" it plainly fell within the definition of a "pollutant."²⁴ Similarly, the court in *Bernhardt v. Hartford Fire Ins. Co.*, found that carbon monoxide emission from a central heating system met the definition of "pollutant" because it qualified as a "gaseous irritant or contaminant" and constituted "fumes" and chemicals.²⁵

Florida has also taken a literal approach and has found not only that carbon monoxide is a pollutant, but also that carbon monoxide produced by a nonheating source, in this case a water heater, will not qualify for the pollution exclusion exception for "injury or damage sustained within a building and caused by smoke, fumes, vapor or soot from equipment used to heat the building." The court held that although the pollutant was transmitted via the heating ducts, it did not originate in the heating system.²⁶

Nevertheless, the majority of jurisdictions have found that carbon monoxide is outside the definition of a "pollutant."²⁷

The lion's share of these cases have focused not on the definition's wording but on the more abstract concept of "reasonable expectations." For example, the 10th Circuit, applying Colorado law, concluded that carbon monoxide was not a pollutant because "an ordinary policyholder would not reasonably characterize carbon monoxide emitted from a residential heater which malfunctioned as pollution."²⁸

²³ 815 A.2d at 1111 (2003).

²⁴ 160 F.3d 997 at 1000 (4th Cir. 1998).

²⁵ 648 A.2d 1047, 1051 (1994).

²⁶ *Admiral Ins. Co. v. Feit Management Co.*, 321 F.3d 1326, 1329 (11th Cir. 2003).

²⁷ *Regional Bank of Colorado, NA v. St. Paul Ins. Co.*, 35 F.3d 494 (1994); *American States Ins. Co. v. Koloms*, 687 N.E.2d 72 (Ill. 1997).

²⁸ *Regional Bank of Colorado*, 35 F.3d 494, 498.

A federal court applying New York law used similar logic to conclude that “while a reasonable person of ordinary intelligence might well understand that carbon monoxide is a pollutant when it is emitted in an industrial or environmental setting, an ordinary policyholder would not reasonably characterize carbon monoxide emitted from a residential heater which malfunctioned as ‘pollution.’”²⁹ The common logic to these cases is perhaps best summarized by the court in Massachusetts’s *Matzer* case, where the court held that as a rule a reasonable insured would not expect that a pollution exclusion would preclude coverage for carbon monoxide contamination resulting from “an every day activity gone slightly, but not surprisingly awry.”³⁰

One court has found that the definition of “pollutant” is on its face ambiguous in the context of the released substance of carbon dioxide.³¹ In that case, the Wisconsin Supreme Court held that “the insurance policies’ definition of ‘pollutant’ is ambiguous and that [the insured] could reasonably expect coverage from [insurer] for personal injury claims arising from the inadequate ventilation of exhaled carbon dioxide.”³² This case may have limited applicability to carbon monoxide issues however, since the exposure at issue in *Donaldson* was from naturally formed carbon dioxide from human breathing in an allegedly poorly ventilated building. The nature of carbon dioxide and its formation makes it in many ways more akin to the biological contaminants discussed later in this paper.

More common is the line of cases holding that carbon monoxide is not a pollutant because it falls outside the purpose of the pollution exclusion.³³ Courts have justified their reliance on drafting history in various ways. The Illinois Supreme Court’s rationale is representative:

²⁹ *Stoney Run Co. v. Prudential-LMI Commercial Insurance Co.*, 47 F.3d 34, 38 (2d Cir. 1995).

³⁰ *Matzer v. Seaco Ins.*, 1998 Mass. Super. Lexis 407 at 420.

³¹ *Donaldson v. Urban Land Interests*, 564 N.W.2d 728 (Wis. 1997).

³² *Id.* at 773.

³³ *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 81 (Ill. 1997); *Andersen v. Highland House*, 757 N.E.2d 329 (2001); *Stoney Run v. Prudential-LMI Commercial Insurance Co.*, 47 F.3d 34 (1995); *Kenyon v. Security Ins. Co. of Hartford*, 626 N.Y.S.2d 347 (1993); *Thompson v. Temple*, 580 So.2d 1133, 1134 (La. App. 1991); *Motorists Mutual Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679, 681 (Ky. App. 1996); *Western Alliance Ins. Co. v. Gill*, 686 N.E.2d 997, 999 (1997).

Our review of the history of the pollution exclusion amply demonstrates that the predominant motivation in drafting an exclusion for pollution-related injuries was the avoidance of the ‘explosion’ of environmental litigation . . . We would be remiss, therefore, if we were to simply look at the bare words of the exclusion, ignore its *raison d’être*, and apply it to situations which do not remotely resemble traditional environmental contamination.³⁴

Using this logic, the court held that the release of carbon monoxide from an apartment furnace was not the type of traditional environmental pollution for which the exclusion was intended.³⁵

Several courts around the country have agreed.³⁶ Along these same lines, a New York court in *Kenyon v. Security Ins. Co. of Hartford*, used the very wording of the exclusion to suggest that the plain meaning of those words should be ignored.³⁷ The court found that because the words used in the pollution exclusion are legal terms of art under the state’s environmental laws they should not be applied to injuries from accumulated carbon monoxide from a defective residential furnace, or other similar injuries.³⁸ Other courts have followed similar logic.³⁹

As a result of these policy concerns, at least in the state of Massachusetts, carbon monoxide would appear to be a pollutant when released by a business, such as the emissions

³⁴ *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 81 (1997).

³⁵ *Id.*

³⁶ See *Anderson v. Highland House*, 757 N.E.2d at 332 (because the insurance industry developed the pollution exclusion to preclude coverage for environmental pollution, it was reasonable for an insured to believe it would not preclude coverage for residential carbon monoxide leads.); *Thompson v. Temple*, 580 So.2d 1133, 1134 (La. App. 1991) (pollution exclusion clauses are intended to exclude coverage for active industrial polluters, when businesses knowingly limited pollutants over extended periods of time).

³⁷ 626 N.Y.S.2d 347 (1993).

³⁸ 626 N.Y.S.2d at 350 (1993).

³⁹ *Motorist Mutual Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679, 681 (Ky. App. 1996) (“the drafters’ utilization of environmental law terms of art (‘discharge,’ ‘dispersal,’ ‘seepage,’ ‘migration,’ ‘release,’ or ‘escape’ of pollutants) reflects the exclusion’s historical objective—avoidance of liability for environmental catastrophes related to intentional industrial pollution); *Western Alliance Ins. Co. v. Gill*, 686 N.E.2d 997, 999 (1997) (in addition to the inclusion of the terms “discharge”; “dispersal;” “release” and “escape,” the exclusion’s definition of “pollutants endeavors to particularize the more general words “irritant or contaminant” by reference to “smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.” Each of the later words bring to mind products or byproducts of industrial production that may cause environmental pollution or contamination.” *Westchester Fire Ins. Co. v. City of Pittsburgh*, 768 F. Supp. 1463, 1470 (D. Kan. 1991) (the terms “irritant” and “contaminant”, however, cannot be read in isolation but must be construed as substances generally recognized as polluting the environment).

from an ice resurfacing machine at a hockey rink in *Essex Ins. Co. v. Tri-Town Corp.*,⁴⁰ but not a pollutant when released in a private home such as in *Western Alliance Ins. Co. v. Gill*.⁴¹

B. Lead Paint

Lead is one of the world's basic building blocks.⁴² But in 1991, the Secretary of the Department of Health and Human Services labeled lead the "number one environmental threat to children in the United States."⁴³

Lead affects practically all systems within the body at high levels and can cause convulsions, coma, and death.⁴⁴ Lower levels of lead can have adverse effects on the central nervous system, kidneys, and blood cells.⁴⁵ Even at extremely low levels, as low as 10 micrograms per deciliter, lead can impair mental and physical development.⁴⁶ Fetuses, infants, and children are more vulnerable to lead exposure than adults because lead is more easily absorbed into growing bodies.⁴⁷

Lead-based paint is the most significant source of lead exposure in the United States today.⁴⁸ Harmful exposure can result from improper removal of paint or exposure of paint to open flames.⁴⁹ Most homes built before 1960 contain heavily leaded paint and some homes built as recently as 1978 may contain lead paint.

States like Florida, which have always relied upon a broad reading of the plain meaning of the pollution exclusion, have usually found that lead paint is a pollutant even while acknowledging that the court might prefer a different outcome.⁵⁰ In making these decisions, courts have sometimes cited the element's classification as a pollutant under state environmental

⁴⁰ 863 F. Supp. 38 (D. Mass. 1994).

⁴¹ 686 N.E.2d 997 (Mass. 1997).

⁴² *Condensed Chemical Dictionary*, 9th ed. (1977).

⁴³ Sources of Indoor Air Pollution – Lead at <http://www.epa.gov/iaq/lead.html>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Deni Associates v. State Farm Fire & Casualty Ins. Co. v.*, 711 So.2d 1135 (Fla. 1998).

statutes.⁵¹ This is the approach followed in Alabama⁵² and Wisconsin.⁵³ Other courts have found that lead paint is a pollutant when the policy itself explicitly defines lead as a pollutant.⁵⁴ States like New York, that have limited the exclusion's application to traditional environmental pollution, have generally found it easy to exclude claims for residential exposure to lead paint on the basis that such paints do not meet its definition of a pollutant regardless of the definition's plain meaning.⁵⁵ States have found that even the possibility of such an interpretation renders the term ambiguous, and therefore inapplicable to, household lead exposure.⁵⁶

Massachusetts continues to be a somewhat baffling state on these issues. Its state court found the definition of pollutant too ambiguous to enforce in the context of residential lead poisoning.⁵⁷ Three years later, a federal court applying Massachusetts law came to the opposite conclusion.⁵⁸

Perhaps no state has struggled longer and harder with the issue of lead paint than Pennsylvania. Pennsylvania has long been a leader in the literal interpretation of the definition of a pollutant and using this logic initially found that the exclusion would bar coverage of lead paint cases despite trial courts' obvious discomfort with this application.⁵⁹ In later cases, the courts have held that while lead paint is a pollutant, its release in the form of flaking and dust is not a "discharge, dispersal, release, or escape" within the meaning of the exclusion's language using a common understanding approach.⁶⁰

⁵¹ *Id.*

⁵² *Porterfield v. Audubon Ind. Co.*, No. 1010894 (Ala. Supp. 2002).

⁵³ *Peace v. Northwest Nat'l Ins. Co.*, 596 N.W.2d 429 (Wisc. 1999).

⁵⁴ *Heringer v. American Family Mutual Ins. Co.*, 140 S.W.3d 100 (Mo. Ct. App. 2004)

⁵⁵ *Sphere Drake Ins. Co. v. Y.L. Realty Co.*, 990 F. Supp. 240 (S.D.N.Y. 1997); *LeFrak Organization, Inc. v. Chubb Custom Ins. Co.*, 942 F.Supp. 949 (S.D.N.Y. 1996); *Cepeda v. Vareris*, 239 A.D.2d 536 (1997); *GA Ins. Co. of NY v. Naimberg Realty Assoc.*, 233 A.D.2d 363 (N.Y. App. Div. 1996); *General Accident Ins. Co. of America v. Idbar Realty Assoc.*, 622 N.Y.S.2d 417 (N.Y. Super. 1994), *aff'd as modified*, 229 A.D.2d 515 (N.Y. App. Div. 1996). Illinois reached the same conclusions. *See American County Ins. Co. v. Planned Real Ins. Co. of Illinois v. Stringfield*, 1997 WL 583482 (Ill. App. Ct. 1997).

⁵⁶ *Sullins v. Allstate Ins. Co.*, 667 A.2d 617 (Md. 1995).

⁵⁷ *Atlantic Mutual Ins. Co. v. McFadden*, 595 N.E.2d 762 (Mass. 1992).

⁵⁸ *U.S. Liability Ins. Co. v. Bourbeau*, 49 F.3d 786 (1st Cir. 1995).

⁵⁹ *Lititz Mutual Ins. Co. v. Steely*, 746 A.2d 507 (Pa. Super. 1999), *rev'd on other grounds*, 785 A.2d 975 (2001), *Fayette County Housing Authority v. Housing and Development Ins. Ex.*, 771 A.2d 11 (Pa. Super. 2001).

⁶⁰ *Mistick v. Northwestern Nat'l Cas. Co.*, 806 A.2d 39 (Pa. Super. 2002); *Luitiz Mutual v. Steely*, 2001 WL 1523849 (Pa. 2002).

C. Asbestos

Asbestos is a unique mineral fiber useful in construction and insulation. However, exposure to asbestos fibers can cause long term risks of chest and abdominal cancers and lung disease.⁶¹

Most courts that have addressed the issue of whether asbestos is a pollutant have found the issue almost too obvious to warrant discussion.⁶² The product's artificial nature and well established health effects no doubt aided these decisions.

Yet, not all courts have agreed. In keeping with the state's reluctance to apply the pollution exclusions outside traditional environmental releases, a court in Ohio found not one but two reasons why asbestos was not a pollutant.⁶³ First, the court held that asbestos did not unambiguously meet the definition of a pollutant because "one would not usually associate asbestos with the substances listed in the exclusion, namely, smoke, fumes, or waste. Those substances bear a closer relation to industrial pollution, the usual subject of the ordinary pollution exclusion."⁶⁴ Second, the court found that the existence of a specific asbestos exclusion that was used by Allstate had meant for asbestos to be excluded, it would have included that exclusion.⁶⁵

The combination of these factors had led to a downright schizophrenic approach in two important jurisdictions – New York and California. New York has long led the pack in limiting the pollution exclusions application to traditional environmental pollution. Nevertheless, in 1991, it conceded that asbestos released during the removal of insulation from a residential property would be covered by the exclusion.⁶⁶ The state appeared to reverse this decision in

⁶¹ Sources of Indoor Air Pollution-Asbestos at <http://www.eap.gov/iaq/asbestos.html>.

⁶² *Cincinnati Ins. Co. v. German St. Vincent Orphan Assoc., Inc.*, No. ED78552 (Mo. Ct. App., E. Dist., July 24, 2001) (holding that Asbestos "unquestionably" fell within the definition of irritant or contaminant.) *Great Northern Ins. Co. v. Benjamin Franklin Savings & Loan Assoc.*, 953 F.2d 1387 (9th Cir. 1992) (applying Oregon law and finding, without further discussion, that, "Asbestos is a pollutant as defined in the policy because it is a solid irritant.") *American States Insurance Co. v. Zippro Const. Co.*, 455 S.E. 2d 133 (Ga. App. 1995) (holding that "there is little question asbestos constitutes a pollutant as unambiguously defined in the exclusion.")

⁶³ *Owens-Corning Fiberglass Corp. v. Allstate Ins. Co.*, 660 N.E.2d 746 (Ohio 1993).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Thomas Miano v. Everitt J. Hehn*, No. 19957/88 (Nassau Co. Sup. Ct., NY, 1991).

1993 when the court, in *Continental Cas. Co. v. Rapid-American Corp.*,⁶⁷ held that the exclusion was inapplicable because asbestos was outside the scope of traditional environment pollution, without making a specific holding as to whether asbestos was a pollutant.

However, despite this decision, trial courts and appellate courts have continued to find that the exclusion does preclude coverage for these claims.⁶⁸

California courts have also been split. In its *Flintkote Co. v. American Mut. Liab. Ins. Co.*⁶⁹ decision, a California court found that asbestos was not a pollutant because it did not constitute “smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids, or gaseous waste materials or other irritants, contaminants or pollutants.” The court also found that if the insurer had intended to include asbestos in the definition, it easily could have done so.

However, another California court reached the opposite conclusion in *Sunset-Vine Tower, Ltd. v. Commerce Industry Ins. Co.*⁷⁰

D. Biological Pollutants

The definition of pollutants becomes even less clear when the substance at issue is a naturally occurring biological pollutant. These pollutants can take the form of bacteria, molds, mildew, viruses, animal dander, mites, insects, and pollen in indoor environments.⁷¹ On a larger scale, human sewage and animal waste can cause property damage and bodily injury. These materials present unique challenges. Some only cause bodily injury in sensitive allergic populations. Some of these materials, particularly mold, have become hot topics among the plaintiff’s bar. States facing application of the pollution exclusion in these contexts have developed some novel approaches seen less frequently outside these areas.

Mold is a biological agent with the potential to raise claims for both property damage and bodily injury. Various jurisdictions have already begun to resolve in different ways the question

⁶⁷ 609 N.E.2d 506 (N.Y. 1993).

⁶⁸ *Kosich v. Metropolitan Property and Casualty Insurance Co.*, 214 A.D.2d 992 (N.Y. App. Div. 1995); *A-One Oil, Inc. v. Mass. Bay Ins. Co.*, No. 4397/95 (N.Y. Sup. 1995).

⁶⁹ No. 808-594 (Cal. Sup. 1992).

⁷⁰ No. C-738-874 (Cal. Sup. 1993).

⁷¹ Sources of Indoor Air Pollution-Biological Pollutants at <http://www.eap.gov/iaq/biologic.html>.

of whether “pollutants” may encompass the minute life forms known as “microbial” matter, or more simply as mold.

In 2002, mold was ruled not to be a “pollutant” under Arizona law, in *Cooper v. American Family Mutual*.⁷² The *Cooper* opinion addressed a homeowners’ policy expressly excluding mold as a cause of loss, and the policy’s “supplementary coverage” for pollutant cleanup and removal. The *Cooper* opinion further noted as support that “mold” was not part of the “pollutant” definition’s list of smoke, vapor, soot, fumes, and waste, among other items.⁷³

By contrast, mold was more recently determined to be a “pollutant” by the U.S. District Court for the Southern District of Florida, in March 2006. Finding persuasive a 2004 Wisconsin opinion addressing bacterial contamination of food products, *Nova Casualty Company v. Wasserstein* ruled that under Florida law, “microbial populations” and “indoor allergens” would fit the ordinary definition of a “contaminant.”⁷⁴ Because the underlying complaints of bodily injury alleged particular effects commonly thought of as “irritation” or “contamination,” the living mold organisms properly fit the pollution exclusion’s definition of a “pollutant.”⁷⁵

One of the more heavily litigated biological contaminants has been waste found in municipal sewage.

States that have relied on a literal reading of the exclusion have had little trouble finding sewage itself meets the definition, often finding it meets the test by being simultaneously a contaminant, irritant, and waste.⁷⁶

⁷² 184 F. Supp.2d 960 (D. Ariz. 2002).

⁷³ *Id.* at 965-66.

⁷⁴ *Nova Casualty Company v. Wasserstein*, 2006 U.S. Dist LEXIS 17743 (S.D. Fla. March 24, 2006).

⁷⁵ *Id.*

⁷⁶ *City of Salina v. Maryland Cas. Co.*, 856 F. Supp. 1467 (Kansas 1994); *Hydrodynamics, Inc. v. Auto Owners Ins. Co.*, No. 193389 (Mich. App. 1996); *Pacificorp v. Wausau Underwriters Ins. Co.*, No. 93-1569 (Ore. Cir. Ct. 1994); *City of Maple Lake v. American States Ins. Co.*, No. C8-83-831 (Minn. Ct. of App. 1993); *Quincy Mutual Fire Ins. Co v. Borough of Bellmawr*, 769 A. 2d 1053 (N.J. Super.App.Div. 2001) (waste leaching into groundwater sewage fell within pollution exclusion, which was not against public policy); *Matheny v. Ludwig*, 742 So.2d 1029 (La.App. 1999) (damage arising from waste grease for recycling is not covered, because definition of pollutant includes material to be recycled); *City of Gross Pointe Park v. Michigan Municipal Liability and Property Pool*, No. 125630, 2005 Mich. LEXIS 1133 (Mich. 2005)(city’s discharge of sewage into nearby creek meets the definition of a pollutant as sewage is waste).

Similarly, states with a strong history of not finding substances to be “pollutants” outside traditional industrial and environmental contexts have been able to draw these same distinctions in cases of residential sewage backups.⁷⁷ States purporting to rely on a consumer’s “reasonable expectations” have also found the clause’s definition of “pollutant” inapplicable.⁷⁸

However, other states have found the issue more troublesome, especially in policies that specifically cover water damage from plumbing backups in residences. These states have added a new wrinkle to the pollutant test by looking not at the nature of the substance in the abstract and looking instead at what quality of the substance caused the damage. Using this analysis, several courts have found that sewage is a pollutant when the underlying action involves damage specifically caused by its toxic nature and is not a pollutant when the same damage could have been caused by water.⁷⁹

Interestingly, courts have had much less difficulty finding that animal waste unambiguously meets the definition of pollutant.⁸⁰ However, at least in Wisconsin, courts have been willing to find that some damage, such as structural damage from the rupture of an effluent pit, may be covered if it is unrelated to the contaminating nature of the substance.⁸¹

Courts have also had to address the application of the “pollutant” definition to bacterial contamination, often from sewage or manure releases. The majority of courts facing this issue have found that bacteria, particularly *E. coli*, can be a pollutant.⁸² As noted above, the Wisconsin Court of Appeals affirmatively ruled in 2004 that bacteria rendering food unfit for consumption would be a “contaminant” within the definition of “pollutant,” and that the alleged resultant *Listeria* outbreak would meet the ordinary definition of “contamination.”⁸³ In Arizona,

⁷⁷ *Minerva Enterprises, Inc. v. Bituminous Cas. Co.*, 851 S.W.2d 403 (Ark. 1993); *U.S. Fidelity & Guar. Co. v. Jewel Armstrong*, 479 So.2d 1164 (Ala. 1985).

⁷⁸ *Camp Delaware, Inc. v. Markel Ins. Co.*, CV990080225S (Conn. Super. 2001).

⁷⁹ *Village of Cedarhurst v. Hanover Ins. Co.*, No. 247 (N.Y. App. 1996); *Titan Holdings v. City of Keene, New Hampshire*, 898 F.2d 265 (1st Cir. 1990); *Guenther v. City of Onalaska*, 588 N.W.2d 375 (Wisc. App. 1998).

⁸⁰ *Weber v. IMT Ins. Co.*, 462 N.W.2d 283 (Iowa 1990); *Space v. Farm Family Mutual Ins. Co.*, 235 A.D.2d 797 (N.Y. App. 1997); *Norks v. American Family Mutual Ins. Co.*, 551 N.W.2d 62 (Wisc. App. 1996).

⁸¹ *Norks v. American Family Mut. Ins. Co.*, 551 N.W.2d 62 (Wisc. App. 1996).

⁸² See, e.g., *East Quincy Services Dist. v. Continental Ins. Co.*, 864 F.Supp. 976, 979 (E.D. Cal. 1994)(addressing “fecal coliform and other sewage-borne bacteria”).

⁸³ *Landshire Fast Foods v. Employers Mutual Cas. Co.*, 269 Wis. 2d 775, 676 N.W.2d 528 (2004), *rev. denied.*, 679 N.W.2d 546 (2004).

however, a court found that bacteria could not be a pollutant because as a biological organism, it did not meet the definition of solid, liquid, or gas.⁸⁴

Since 1998, the Washington Court of Appeals and the U.S. District Court for the Eastern District of Washington repeatedly have held that odors from waste treatment facilities come within CGL exclusion definitions of “pollutants.”

In *City of Bremerton v. Harbor Ins. Co.*,⁸⁵ residents living near the Bremerton, Washington, sewage treatment plant had sued the City for damages based on the “emission of . . . noxious and toxic fumes” and the “emission of foul and obnoxious odors and toxic gases” that they claimed resulted from the plant’s siting, design and operation. The court affirmed summary judgment for the insurers, agreeing that the odors from the sewage treatment plant came within the definition of “pollutant,” even if the term “odors” failed to appear in the definition itself:

...the specified examples of “irritants or contaminants” in the exclusion language are listed as not exclusive types of “pollutants” subject to exclusion from coverage. The list is illustrative and non-exhaustive and odors are effectively excluded as well. A reasonable person reviewing this language would expect that “noxious and toxic fumes” and “foul and toxic odors and gases” are “pollutants” within the meaning of the pollution exclusion.⁸⁶

In January 2002, one Federal Judge in the Eastern District of Washington ruled that odors from a municipal treatment facility qualified as pollutants within the meaning of the liability policy pollution exclusions at issue. In *City of Spokane v. United National Ins. Co.*,⁸⁷ the City of Spokane operated a compost facility. Persons living near the compost facility sued the City, alleging that the facility emitted “offensive, noxious, unlawful, and otherwise unreasonable odors.”⁸⁸ The neighbors asserted four causes of action arising from the release of odors from the facility: nuisance, trespass, negligence, and inverse condemnation. The neighbors alleged that

⁸⁴ *Keggi v. Northbrook Property and Cas. Ins. Co.*, 13 P.3d 785 (Ariz. Ct. App. 2000); cf. *Motorists Mutual Ins. Co v. Hardinger*, 131 Fed. Appx. 823, 828-29 (3rd Cir. 2005)(Ambro, J. concurrence)(predicting Pennsylvania law).

⁸⁵ 92 Wash. App. 17, 963 P.2d 194 (1998).

⁸⁶ 92 Wash. App. at 22-23.

⁸⁷ 190 F. Supp. 2d 1209 (E.D. Wash. 2002).

⁸⁸ 190 F. Supp. 2d at 1213.

the facility had decreased the value of their property and interfered with their use and enjoyment of the property.

The City of Spokane settled the neighbors' claims and sued its three excess liability insurers, claiming that they were obligated to fund the City's settlement. The court agreed with the insurers that *City of Bremerton* controlled and that the odors from the compost facility qualified as "pollutants" under their policies' pollution exclusions. In the process, the court found that specific Washington law in *City of Bremerton* guided the determination, and overruled policyholder's position that the Washington Supreme Court's generalized statements about the absolute pollution exclusion's applicability to Superfund site cleanups in 2000 overruled the 1998 *City of Bremerton* opinion without even mentioning that case.

Six months after one Judge's issuance of *City of Spokane v. United National Ins. Co.*, another Judge of the Eastern District of Washington similarly ruled in favor of three municipal liability insurers in *City of Yakima v. Lexington Ins. Co. et al.*⁸⁹ The Court ruled that the absolute pollution exclusions issued in "special excess liability" policies to the City of Yakima excluded, as a matter of law, any alleged indemnification or defense obligation on the lawsuits bought by residents nearby to the City of Yakima Wastewater Treatment (plant and spray fields) Facility. The underlying plaintiffs had alleged that odors, gases, fumes, and other contaminants from the City's wastewater treatment facility extended over large areas. Their claims certified as a class action to include an alleged 3,000 residents, were for nuisance, negligence, and inverse condemnation, and alleged that the City facility's biological emissions adversely impacted the use and enjoyment of their properties. Among the City's positions rejected by the trial court as any basis to obtain coverage under the policies, were that the City alleged other parties (a neighboring City and a nearby fruit canning plant) were actually responsible for the alleged odors, and that following a temporary composting project, there were no longer any unreasonable odors issuing from the Yakima facility that could possibly qualify as an "actual" pollutant within the exclusion. The court relied on the plainly stated underlying action's

⁸⁹ E.D. Wash. No. CV-01-3080EFS (Order on Summary Judgment, July 29, 2002).

contentions and the policies' plain terms, in addition to the existing controlling authority of *City of Bremerton*.⁹⁰

Courts in other jurisdictions have also found that odors from human or animal waste products come within the absolute pollution exclusion.⁹¹

E. Chemical Fumes

Courts have found cases involving exposure to toxic fumes every bit as challenging as their natural counterparts. Much of the confusion in this area relates to whether a relatively safe and everyday product can become a "pollutant" through misuse and when a pollutant becomes such.⁹²

Many states have followed the lead of states like Mississippi, which has held that courts should not substitute a common definition of pollutant for that used in the policy when confronted with fumes given off by common everyday products.⁹³ Other states have come to the same conclusion for substances such as glue and paint which do not normally cause injury.⁹⁴

Pennsylvania's state Supreme Court came to a similar conclusion in its decision in *Madison Construction Co. v. Harleysville Mutual Ins. Co.*⁹⁵ In that case, the court faced an argument that the substance in question, Euro Floor Coat, was not a pollutant because the insured

⁹⁰ *Id.*

⁹¹ See, e.g., *Kruger Commodities, Inc. v. United States Fidelity and Guaranty*, 923 F. Supp. 1474, 1479 (M.D. Ala. 1996) (under Nebraska law, odors produced by processing cooking oils and animal fats at rendering plant fell within pollution exclusion); *Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265, 269 (1st Cir. 1990) (under New Hampshire law, insurer had duty to indemnify for claims of excessive noise and light but not claims of noxious odors under pollution exclusion); *Tri-Municipal Sewer Commission v. Continental Ins. Co.*, 636 N.Y.S. 2d 856, 857 (N.Y. App. Div. 1996) (odors emanating from sewage treatment plant fell within pollution exclusion).

⁹² The distinction between indoor releases and outdoor releases of chemical fumes, and the extent to which this distinction (in and of itself) may impact the application of pollution exclusions, is beyond the scope of this paper's detailed analysis. See generally, *Hydro Systems, Inc. v. Continental Insurance Company*, 717 F. Supp. 700, 702 (C.D. Cal. 1989) (under California law, odors associated with styrene emissions from manufacturing plant were "pollutants" under pollution exclusion).

⁹³ *American States Ins. Co. v. Nethery*, 79 F.3d 473, 475-76 (5th Cir. 1996).

⁹⁴ *Reliance Ins. Co. v. Kent Corp. Inc.*, 896 F.2d 501 (11th Cir.) vacated 909 F.2d 424 (11th Cir. 1990) (holding exclusion applied because "under Alabama law, emissions from hazardous waste containers during dumpster fire constitutes a polluting event."); *City of St. Petersburg, Fla. v. U. S. Fidelity & Guar. Co.*, No. 92-1224-CIV-T-23C (M.D. Fla. 1994); *Lyman v. Stuart Corp.*, No. C3-95-2460 (Minn. App. 1996); *BUD Sheetmetal Inc. v. Massachusetts Bay Ins. Co.*, No. 3513-93 (NY Sup. Ct. 1995); *Zell v. Aetna Cas. & Sur. Co.*, 683 N.E. 2d 1154 (Ohio Ct. App. 1996); *Brown v. American Motorists Ins. Co.*, 930 F.Supp. 207 (E.D. Pa. 1996); *Nat'l Union Fire Ins. Co. v. CBI Indus. Inc.*, 907 S.W. 2d. 517 (Tex. 1995); *Cook v. Evanson*, 920 P.2d 1223 (Wash. Ct. App. 1996) review denied, 936 P.2d 416 (1997); *Durham v. Bituminous Cas. Co.*, No. 2003-SC000192 (Ky. Sup. 2003).

⁹⁵ 735 A.2d 100 (Pa. 1999).

had bought it on the premises in sealed containers in which the product was safe.⁹⁶ The court found that the sealant contained materials classified as pollutants under 42 USC § 7412(b).⁹⁷ The court held that the determinative issue was not whether the definition of “pollutant” was so broad that useful and necessary products can fall within its scope; the determinative issue was whether the definition was ambiguous as applied.⁹⁸ The court held that these fumes unambiguously fit the definition.⁹⁹

Not all courts have agreed. New York has generally found fumes not to be “pollutants” when they are the result of indoor exposure to everyday materials, especially in residential settings.¹⁰⁰ In making these decisions, New York courts have relied upon the exclusion purported purpose of excluding only traditional environmental claims. The Supreme Courts of California and New Jersey have followed New York and have limited pollution exclusions to traditional environmental claims.¹⁰¹

The Indiana Court of Appeals ruled, in *Freidline v. Shelby Ins. Co.*,¹⁰² that an insurer’s denial of a bodily injury claims by tenants exposed to fumes during carpet installation was not only wrong but bad faith because such exposure was not unambiguously included in the definition.

Chemical fume cases can also raise interesting issues regarding when a pollutant becomes a pollutant. The Washington Supreme Court addressed this issue in *Quadrant Corp. v. American*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 107.

⁹⁹ *Id.* See also *Brown v. American Motorists Ins. Co.*, 930 F. Supp. 207, 208 (E.D. Pa. 1996) *aff’d* 111 F.3d 125 (3d Cir. 1997) (table) (rejecting insured’s argument that noxious fumes from waterproofing sealant were not “pollutants” because fumes can from an over the shelf product used in everyday activity).

¹⁰⁰ *Belt Painting Corp. v. TIG Ins. Co.*, 293 A.D.2d 206 (N.Y. App. 2002) (The policy under review does not apply so as to exclude coverage in the case of a claimant allegedly injured as the result of the temporary indoor dissemination of paint or paint solvent fumes); *Republic Franklin Ins. Co. v. L&J Realty Corp.*, 280 A.D.2d 351 (NY 2001); *Roofers Joint Training Apprentice & Educational Committee of Western NY v. General Accident Ins. Co. of America*, 713 NYS 2d 615 (App. Div. 2000).

¹⁰¹ *Nav-Its, Inc. v. Selective Ins. Co. of America*, 869 A.2d 929 (N.J. 2005); See also *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205 (Cal. 2003) (holding that the spraying of insecticide on an apartment building was not traditional environmental pollution), *But see Garamendi v. Golden Eagle Ins. Co.*, 127 Cal. App.4th 480 (2005) (silica dust exposure is traditional environmental pollution) and *Lewis v. Hartford Casualty Ins. Co.*, Slip Copy, 2006 WL 249516 (N.D. Cal.) (discharge of perchloroethylene resulting in soil and groundwater pollution from a dry cleaning operation constitutes pollution commonly thought of as environmental pollution precluding insurance coverage under the pollution exclusion clause).

¹⁰² 739 N.E.2d 178 (Ind. App. 2000).

*States Ins. Co.*¹⁰³ In *Quadrant*, the claimant was injured by fumes emanating from waterproofing materials being applied to her building. The court not only looked to the plain meaning of the term pollutant but also whether it was acting as a pollutant with respect to the harm alleged in the claim. The court held that the fumes were pollutants and that it was their irritating, contaminating, or polluting qualities that caused the injury.

Similarly, many substances are not always toxic but become toxic when applied, mixed, or heated. While most courts have found this irrelevant, at least one court has held that when a product is not dangerous until applied to an exposed surface, it is not a pollutant.¹⁰⁴

F. Welding Rods

Around for a number of years, welding rod claims involve allegations of exposure to manganese fumes by industrial workers, or bystanders, resulting in permanent neurological impairment akin to Parkinson's disease. Welding rod litigation gained momentum in 2003, when an Illinois state court jury awarded a \$1 million individual verdict. Since then, numerous welding rod cases have been filed. Yet to date, there have been relatively few published cases addressing coverage issues in the welding rod context, and even fewer addressing these claims under the pollution exclusion.

For example, in *National Electrical Manufacturers Association (NEMA) v. Gulf Underwriters Insurance Company*, 162 F.3d 821 (4th Cir. 1998), a group of welders sued NEMA claiming that it issued standards permitting the use of manganese in welding rods, even though it knew about the dangers of manganese fumes. Gulf refused to defend NEMA, arguing that the welders' claims fell under the absolute pollution exclusion in the policy, even though their claims were brought as a negligence action. NEMA thereafter sued Gulf for coverage.

¹⁰³ 110 P.3d 733 (Wash. 2005).

¹⁰⁴ *Western American Ins. Co. v. Tufco*, 409 S.E.2d 692 (N.C. App. 1991); *See also Urethane International Products v. Mid-Continent Casualty Company*, No. 10-04-00177-CV, 2006 Tex. App. 876 (Tex. App. 2006) (chemical raw material discharged from truck was not waste and therefore not a pollutant).

The 4th Circuit Court concluded that Gulf had no obligation to defend or indemnify NEMA because the underlying complaint alleged exposure to “fumes,” which squarely fell within the definition of “pollutant” in the exclusion. The court further stated that because the exclusion is not limited to environmental pollution and unambiguously covers the welding claims, it would not apply the “reasonable expectations” of the policyholder as urged by NEMA. The court also noted that the underlying claimant’s theory of liability (negligence) had no bearing on the cause of the injury (pollution).

More recently in 2006, in *Clendenin Brothers, Inc. v. United States Fire Insurance Co.*, 2006 WL 27432 (Maryland, January 6, 2006), the court ruled on a declaratory judgment action arguing that coverage for the underlying welding rod claims was barred due to the total pollution exclusion. The decision found that manganese, as used in the ordinary course of the particular business involved, would not be considered by a reasonably prudent person to be a “pollutant” and therefore excluded through a pollution exclusion provision. The court refused to follow the plain meaning of the pollutant definition holding that “without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results.”

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