THE ABSOLUTE POLLUTION EXCLUSION: POLLUTION AND FUNGUS, WET ROT, DRY ROT, AND BACTERIA

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I. INTRODUCTION

The history of the pollution exclusion clause in its early forms demonstrates that its purpose was to serve as a broad exclusion for traditional

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environmentally related damages.[1] The terms of the absolute pollution exclusion suggest that its reach extends well beyond those losses. However, some state and federal courts have cited the early history of the exclusion to narrow its application to traditional environmental pollution. This article notes the impact those disparate views have on coverage for damage due to "contaminants."

II. HISTORY OF THE EXCLUSION

A. *Adoption of the Standard Pollution Exclusion*

The circumstances that led the insurance industry to adopt the standard pollution exclusion clause are well documented.[2] Comprehensive general liability (CGL) policies prior to 1966 afforded liability coverage for bodily injury and property damage "caused by accident."[3] While the term "accident" was left undefined in the standard policy, courts generally construed the term to encompass ongoing events that inflicted injury over an extended period provided that the injury was unexpected and unintended from the insured's standpoint.[4] This broad interpretation generally encompassed pollution-related injuries.

In an effort to address the risk posed by these broad interpretations, the standard CGL policy was revised in 1966.[5] The revision modified the accident-based policy to an occurrence-based policy. The new policy defined an "occurrence" as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury and property damage that was neither expected nor intended from the standpoint of the insured."[6] Despite these changes, courts continued to interpret the policy to cover damages resulting from long-term, gradual exposure to environmental pollution. As one court observed, "so long as the ultimate loss

1. Nav-Its, Inc. v. Selective Ins. Co. of Am., 869 A.2d 929, 936–37 (N.J. 2005).

2. Morton Int'l, Inc. v. Gen. Accident Ins. Co. of Am., 629 A.2d 831, 848 (N.J. 1993) (citing Nancy Ballard & Peter Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 CORNELL L. REV. 610, 622–27 (1990); Robert Chesler et al., *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 RUTGERS L.J. 9, 31–38 (1986); Richard Hunter, *The Pollution Exclusion in the Comprehensive General Liability Insurance Policy*, 1986 U. ILL. L. REV. 897, 903–06; Thomas Reiter et al., *The Pollution Exclusion Under Ohio Law: Staying the Course*, 59 U. CIN. L. REV. 1165, 1187–203 (1991); E. Joshua Rosenkranz, Note, *The Pollution Exclusion Through the Looking Glass*, 74 GEO. L.J. 1237, 1241–53 (1986)).

3. Ctr. for Creative Studies v. Aetna Life & Cas. Co., 871 F. Supp. 941, 943 n.4 (E.D. Mich. 1994) (quoting JEFFREY STEMPEL, INTERPRETATION OF INSURANCE CONTRACTS: LAW AND STRATEGY FOR INSURERS AND POLICYHOLDERS 825 (1994)).

4. Anchor Cas. Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1949); Emp'rs Ins. Co. of Ala. v. Rives, 87 So. 2d 653 (Ala. 1955); McGroarty v. Great Am. Ins. Co., 329 N.E.2d 172 (N.Y. 1975).

5. Ballard & Manus, *supra* note 2, at 624.

6. *Morton Int'l, Inc.*, 629 A.2d at 849.

was neither expected nor intended, courts generally extended coverage to all pollution-related damage, even if it arose from the intentional discharge of pollutants."[7]

During this same period, Congress amended the Clean Air Act with the stated goal of protecting and enhancing the quality of the nation's air resources.[8] The amendments included provisions for cleaning up the environment, imposing potentially greater economic burdens on insureds and the insurers issuing standard form CGL policies.[9] The nature of the potential burdens was well illustrated by the environmental disasters at Times Beach, Love Canal, and Torrey Canyon.[10] Underwriters became increasingly concerned that the 1966 occurrence-based policies were tailor-made to cover most pollution-related injuries.[11]

In light of the potential increase in claims for environmentally related losses, policy drafters—aware that the occurrence-based CGL policy might act to broaden coverage for pollution damage—began the process of drafting and securing regulatory approval for the standard pollution exclusion clause in 1970.[12] The General Liability Governing Committee of the Insurance Rating Board instructed its drafting committee "to consider the question and determine the propriety of an exclusion, having in mind that pollutant-caused injuries were envisioned to some extent in the adoption of the current [policies]."[13] The result was the addition of an endorsement to the standard form CGL policy in 1970,[14] which provided in pertinent part:

> [This policy shall not apply to bodily injury or property damage] arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.[15]

7. Am. Nat'l Prop. & Cas. Co. v. Wyatt, 400 S.W.3d 417, 421 (Mo. Ct. App. 2013) (citing New Castle Cty. v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1196–97 (3d Cir. 1991)).

8. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (now codified at 42 U.S.C. §§ 7401–7642 (1983), as amended).

9. Westchester Fire Ins. Co. v. City of Pittsburg, Kan., 768 F. Supp. 1463, 1469 n.8 (D. Kan.1991), *aff'd*, 987 F.2d 1516 (10th Cir. 1993).

10. *See* Ctr. for Creative Studies v. Aetna Life & Cas. Co., 871 F. Supp. 941, 944 (E.D. Mich. 1994); *see also Morton Int'l, Inc.*, 629 A.2d at 850.

11. *Morton Int'l, Inc.*, 629 A.2d at 850 (citing Rosenkranz, *supra* note 2, at 1251).

12. *Id.* at 849–50.

13. *Id.* at 850 (quoting Reiter et al., *supra* note 2, at 1197).

14. *Id.* (citing Reiter et al., *supra* note 2, at 1197).

15. *Id.* at 836 (quoting exclusion "f"). In 1973, the insurance industry incorporated the above endorsement directly into the body of the policy as exclusion "f."

Litigation ensued concerning the exact meaning of the words "sudden and accidental."[16] Much of the litigation focused on whether the word "sudden" was intended to be given a strictly temporal meaning such that, in order for the exception to apply, the discharge of pollution had to have been "abrupt."[17] Insurers responded by drafting a new version of the exclusion, which first appeared in 1985 and is now commonly known as the absolute pollution exclusion.

B. *Absolute or Total Pollution Exclusion*

The two most notable features of the absolute pollution exclusion are the lack of any exception for the "sudden and accidental" release of pollution and the elimination of the requirement that the pollution be discharged "into or upon land, the atmosphere or any watercourse or body of water."[18] An example of such a clause can be found in *James River Insurance Co. v. Ground Down Engineering, Inc.*[19] The policy included a pollution exclusion provision excluding from coverage "[a]ll liability and expense arising out of or related to any form of pollution, whether intentional or otherwise."[20] The pollution exclusion stated that the policy did not cover "any damages, claim, or suit arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants.'"[21] This included:

> Any loss, cost, expense, fines and/or penalties arising out of any (1) request, demand, order, governmental authority or directive or that any private party or citizen action that any insured, or others, test for, monitor, clean up, remove, contain, treat, detoxify or neutralize or in any way respond to, or assess same, the effects of pollutants, environmental impairments, contaminants, or (2) any litigation or administrative procedure in which any insured or others may be involved as a party as a result of actual alleged or threatened discharge, dispersal, seepage, migration, release, escape or placement of pollutants, environmental impairments, or contaminants into or upon land, premises, buildings, the atmosphere, any water course, body of water, aquifer or ground water, whether sudden, accidental or gradual in nature or not, and regardless of when.[22]

The policy defined "pollutants" as

16. One commentator described the dispute as one of "the most hotly litigated insurance coverage questions of the late 1980s." STEMPEL, *supra* note 3, at 825.

17. *See* Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1218 (Ill. 1992).

18. *See* Weaver v. Royal Ins. Co. of Am., 674 A.2d 975 (N.H. 1996).

19. 540 F.3d 1270 (11th Cir. 2008).

20. *Id.* at 1273.

21. *Id.*

22. *Id.*

> any solid, liquid, gaseous, fuel, lubricant, thermal, acoustic, electrical, or magnetic irritant or contaminant, including but not limited to smoke, vapor, soot, fumes, fibers, radiation, acid, alkalis, petroleums, chemicals or "waste." "Waste" includes medical waste, biological infectants, and all other materials to be disposed of, recycled, stored, reconditioned or reclaimed.[23]

The policy stated that this exclusion applied "regardless of whether . . . an alleged cause for the injury or damage is the Insured's negligent hiring, placement, training, supervision, retention, or, wrongful act."[24]

In the case, Ground Down was hired to conduct a "Phase I Site Assessment" of real property the developer was considering purchasing.[25] "[T]he purpose of this assessment was to satisfy one of the requirements for the developer to qualify for the 'innocent landowner defense' under the Comprehensive Environmental Response, Compensation, and Liability Act (known as CERCLA or Superfund)."[26] The assessment report stated that it was also intended to identify "Recognized Environmental Conditions," which referred to "the presence or likely presence of any Hazardous Substances or Petroleum Products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any Hazardous Substances or Petroleum Products."[27]

Ground Down completed its assessment and reported that "no recognized environmental conditions had been found."[28] After purchasing the property, the developer found "a significant amount of construction debris, several 55-gallon drums, and half of an underground storage tank."[29] The developer filed suit against Ground Down for "breach of contract, negligent misrepresentation, and negligence for failing to properly complete the Phase I Site Assessment."[30] The complaint alleged that "testing revealed the drums and the underground storage tank previously contained petroleum and that [the developer] therefore had to remove the drums and the surrounding soil and dispose of them at a special waste facility."[31] The complaint also alleged that "the construction debris caused an elevation in the level of methane gas on the property that also required expensive environmental remediation."[32]

Ground Down submitted a claim to its insurance company "requesting provision of a legal defense in the suit . . . and payment of any resulting

23. *Id.*
24. *Id.*
25. *Id.* at 1272.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 1272–73.

damages under its professional liability insurance policy."[33] The policy provided coverage for wrongful acts in Ground Down's "performance of or failure to perform professional services," defined as those that Ground Down was qualified to perform in its "capacity as an architect, engineer, landscape architect, land surveyor or planner."[34]

The insurer began providing a "defense under a reservation of rights but also filed suit in federal court seeking a declaratory judgment that it was not required to provide coverage owing to the 'pollution exclusion' contained in the policy."[35] The district court determined that the claim by the developer "fell outside of the pollution exclusion, because [its] claim arose out of the failure to carry out professional responsibilities, not out of pollution."[36] The court also held that it would be "unconscionable at best" to interpret the policy as excluding from coverage claims relating to "any form of pollution, regardless of causation."[37] Because Ground Down had not "caused the pollution, the district court found that the exclusion should not apply."[38] The district court "concluded that James River was obligated to provide a defense for Ground Down and dismissed its complaint;" the court then denied the insurer's motion for summary judgment as moot.[39]

The appellate court reversed, noting that although the alleged conduct was negligence in performing the site assessment, the developer's claim depended upon the existence of the environmental contamination.[40] The court observed the policy specified that damages related to pollution were excluded, in addition to causes of action directly referring to pollution.[41] The court also rejected the district court's conclusion that "it would be unconscionable at best" to interpret the pollution exclusion as covering the developer's claim against Ground Down "in light of uncontested facts that [Ground Down] in no way caused the pollution."[42] The

33. *Id.* at 1273.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 1275–76. The court cited *Technical Coating Applicators, Inc. v. U.S. Fidelity and Guaranty Co.*, 157 F.3d 843, 846 (11th Cir. 1998) (holding that a pollution exclusion applied to a claim against the insured for negligently exposing individuals to toxic vapors from roofing materials regardless of whether the roofing products were used properly or negligently because the policy excluded coverage for injuries sustained by breathing the vapors). *But see* Meridian Mut. Ins. Co. v. Kellman, 197 F.3d 1178, 1184 (6th Cir. 1999) (movement of fumes from toxic chemical used by insured was not "discharge, dispersal, seepage, migration, release or escape" within terms of total pollution exclusion).
41. James River Ins. Co. v. Ground Down Eng'g, Inc., 540 F.3d 1270, 1276 (11th Cir. 2008).
42. *Id.*

appellate court noted that courts have read pollution exclusions to exclude coverage for claims against insureds that were not themselves the polluters.[43]

The court then addressed the assertion that the insurer was obligated to provide a defense because one of the grounds for the suit, the existence of buried construction debris, fell outside the pollution exclusion, which defined a "pollutant" as an "irritant or contaminant," and the debris was neither.[44] The court found Ground Down's argument failed for two reasons. First, the complaint stated that the damages associated with the construction debris come from the elevated levels of methane gas caused by the debris and listed the debris under the heading "environmental contamination."[45] Second, the pollution exclusion "was not limited to irritants or contaminants."[46] The definition for pollutants stated that "irritants or contaminants" coverd "waste," which included "all . . . materials to be disposed of, recycled, stored, reconditioned, or reclaimed."[47]

III. DEFINING THE SCOPE OF THE EXCLUSION

A. "*Sudden and Accidental*"

As noted above, much of the litigation concerning the standard pollution exclusion addressed the exact meaning of the words "sudden and accidental," focusing on whether the word "sudden" was intended to be given a strictly temporal meaning such that, in order for the exception to apply, the discharge of pollution had to have been "abrupt."[48]

In *New Castle County v. Hartford Accident and Indemnity Co.*,[49] the Third Circuit found a split in authority regarding the meaning of the word "sudden" in pollution exclusion clauses, demonstrating that the word "sudden" was subject to more than one reasonable interpretation, was therefore ambiguous, and must be construed in favor of the insured.[50] The court noted that "the phrase 'sudden and accidental' was not new to the insurance industry. For many years, it had been used in the standard boiler and

43. *Id. See* N. Ins. Co. of N.Y. v. Aardvark Assocs., Inc., 942 F.2d 189, 194 (3d Cir. 1991); *see also* U.S. Fid. & Guar. Co. v. Korman Corp., 693 F. Supp. 253, 258 (E.D. Pa. 1988).

44. *James River Ins. Co.*, 540 F.3d at 1277. This was important because, under Florida law, "the insurer is obligated to defend the entire suit" "if a complaint alleges multiple grounds for liability and at least one claim is within the insurance coverage, even if other claims are not." *Id.* (citing Nova Cas. Co. v. Waserstein, 424 F. Supp. 2d 1325, 1332–33 (S.D. Fla. 2006); Baron Oil Co. v. Nationwide Mut. Fire Ins., 470 So. 2d 810, 813–14 (Fla. Dist. Ct. App. 1985)).

45. *Id.* at 1277.

46. *Id.*

47. *Id.*

48. *See* Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1218 (1992).

49. 933 F.2d 1162 (3d Cir. 1991).

50. *Id.* at 1198–99.

machinery policy and the courts uniformly had construed the phrase to mean unexpected and unintended."[51]

However, other state and federal courts have rejected the view that any unexpected or unintentional occurrence was "sudden." In *Sokoloski v. American West Insurance Co.*,[52] the Supreme Court of Montana noted that *New Castle* "had been abrogated by the decision in *Northern*, concluding that under Pennsylvania law an exception for 'sudden and accidental' events applies only to events which are abrupt and last a short time."[53] Other state and federal courts have adopted this interpretation, holding that "when used in a 'sudden and accidental' insurance policy phrase, . . . the word 'sudden' must include a temporal component; otherwise, the word is rendered mere surplusage."[54]

B. *Accident and Occurrence*

Typical policy provisions provide for coverage for property loss or liability claims where the loss is the result of an "occurrence" that results during the policy period in property damage which was neither expected nor intended from the standpoint of the insured. A sample policy provision might read:

> The term "occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which

51. *Id.* at 1197 (citing Anderson & Middleton Lumber Co. v. Lumbermen's Mut. Cas. Co., 333 P.2d 938 (Wash. 1959); New England Gas & Elec. Ass'n v. Ocean Accident & Guar. Corp., 116 N.E.2d 671 (Mass. 1953); 10A G. COUCH, COUCH ON INSURANCE 2D § 42:396, at 505 (M. Rhodes rev. 2d ed. 1982) ("When coverage is limited to a sudden 'breaking' of machinery the word 'sudden' should be given its primary meaning as a happening without previous notice, or as something coming or occurring unexpectedly, as unforeseen or unprepared for. That is, 'sudden' is not to be construed as synonymous with instantaneous.")). In *Jackson Township Municipal Utilities Authority v. Hartford Accident & Indemnity Co.*, 451 A.2d 990, 993 (N.J. Super. Ct. 1982), the court provided an early and comprehensive analysis of the meaning of the pollution exclusion, analyzing opinions from various jurisdictions and holding that the "sudden and accidental" exception contained in the exclusion was merely a reiteration of the occurrence requirement that the event triggering coverage be neither "expected nor intended from the standpoint of the insured." *Id.*

52. 980 P.2d 1043 (Mont. 1999).

53. *Id.* at 1045 (citing N. Ins. Co. of N.Y. v. Aardvark Assocs., Inc., 942 F.2d 189, 193–94 (3d Cir. 1991).

54. Travelers Cas. & Sur. Co. v. Super. Ct., 63 Cal. App. 4th 1440, 1455 (1998)); *see also* Liberty Mut. Ins. Co. v. FAG Bearings Corp., 153 F.3d 919, 922–23 (8th Cir. 1998) (rejecting the argument that "sudden and accidental" means "unexpected" and "unintentional" because under Missouri law the term "sudden" must include "a temporal element such that it is abrupt, immediate, and unexpected"); Iowa Comprehensive Petro. Underground Storage Tank Fund Bd. v. Farmland Mut. Ins. Co., 568 N.W.2d 815, 818–19 (Iowa 1997) (rejecting an argument that "sudden" is ambiguous or that when used in the phrase "sudden and accidental" it means unforeseen or unintended); S. Macomb Disposal Auth. v. Am. Ins. Co., 572 N.W.2d 686, 702 (Mich. Ct. App. 1997) (Michigan defines "sudden" in such usage as immediate and unexpected); Westling Mfg. Co., Inc. v. W. Nat'l Mut. Ins. Co., Inc., 581 N.W.2d 39, 45 (Minn. Ct. App. 1998) ("The term 'sudden' carries the temporal connotation of 'abruptness.'").

> unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.[55]

The issue is whether, under the definition of the term, it is the action that causes the damage claimed or the resulting damage of the type complained of by the insured that must be "unexpected or unintended" in order for the insured to recover under the policy.

In *Grand River Lime Co. v. Ohio Casualty Insurance Co.*,[56] the insured argued that the damage caused to adjacent property owners by residual emission of smoke and dust from its operations qualified as an occurrence because the damage to adjacent property owners was "accidental."[57] The insurer argued that the emissions were not accidental and thus there was no occurrence under the policy.[58] The appellate court held:

> To begin with, the word "occurrence," to the lay mind, as well as to the judicial mind, has a meaning much broader than the word "accident." As these words are generally understood, accident means something that must have come about or happened in a certain way, while occurrence means something that happened or came about in any way. Thus accident is a special type of occurrence, but occurrence goes beyond such special confines and, while including accident, it encompasses many other situations as well.
>
> We further adopt the plaintiff's proposition to the effect that while the activity which produced the alleged damage may be fully intended, and the residual results fully known, the damage itself may be completely unexpected and unintended.[59]

Under the same reasoning as the court in *Grand River Lime Co.*,

> the usual and ordinary meaning of the word "occurrence" extends to events included within the term "accident" and also to such conditions, not caused by accident, which may produce an injury not purposely or deliberately. To say it differently, in the context in which it is used, the word "accidentally" means "unintentionally," "undersigned" or not deliberately.[60]

55. Steyer v. Westvaco Corp., 450 F. Supp. 384, 388 (D. Md. 1978) (sample policy provision).

56. 289 N.E.2d 360, 364–65 (Ohio Ct. App. 1972); *see also* Aetna Cas. & Sur. Co. v. Martin Bros. Container & Timber Prods. Corp., 256 F. Supp. 145, 149–50 (D. Or. 1966) (citing Seiler v. Robinson, 95 A.2d 153 (N.J. Super. Ct. 1953)).

57. *Grand River Lime Co.*, 289 N.E.2d at 364.

58. *Id.*

59. *Id.*

60. Aerial Agric. Serv. of Mont., Inc. v. Till, 207 F. Supp. 50, 58 (N.D. Miss. 1962); *see, e.g.*, *Steyer*, 450 F. Supp. at 389 (damage to trees caused by discharges of pollutants over four-year period); *Martin Bros. Container & Timber*, 256 F. Supp. at 147 (emission of fly ash from insured's plant over a period of several months); U.S. Fid. & Guar. Co. v. Specialty Coatings & Co., 535 N.E.2d 1071, 1077 (Ill. App. Ct. 1989) ("'occurrence-based' coverages embraced not

Generally,

> [a]n insurer cannot deny coverage on grounds that conduct was intentional rather than accidental if the insured did not possess the requisite intent to do injury. . . . [C]ourts will infer intent to injure from "inherently injurious" acts, . . . [b]ut conduct is not considered inherently injurious unless it is "substantially certain to result in some injury."[61]

A contrary line of case provides that the accidental nature of the resulting harm does not mean that an occurrence will fall within the terms of the policy. For example, in *Protective National Insurance Co. of Omaha v. City of Woodhaven*,[62] the Michigan Supreme Court found no duty to defend under circumstances where it was clear from the outset of litigation that a pollution exclusion applied and there was no possibility for indemnification under the insurance contract.[63] The third party complaint alleged "damages sustained as an alleged result of exposure to chemical pesticide sprayed by Woodhaven."[64] It was not disputed that the City of Woodhaven intentionally sprayed the pesticide as part of a continuous program designed to control insects and pests and that the plaintiff's insurance policy had a pollution exclusion that provided coverage only for "discharges, dispersals, releases or escapes that were 'sudden and accidental.'"[65]

The insured argued the potential for coverage existed because, although the "release" of the pesticide into the atmosphere was intentional and therefore not "sudden and accidental," the subsequent dispersal of the pesticide may have been.[66] The court first interpreted the language of the pollution exclusion and then examined the allegations of the underlying complaint to determine whether the potential for indemnification existed.[67] The court held "the discharge, dispersal, release or escape to which both the exclusion and the exception refer is the initial discharge, dispersal, release, or escape into the atmosphere and not the subsequent migration."[68] The court further concluded that the pesticide was a "pollutant" within the meaning of the pollution exclusion, and Woodhaven's intentional release could not, as a matter of law, be "accidental" and thus did not fall within the "sudden and accidental" exception to the pollution exclusion.[69] Thus,

only the usual accident, but also exposure to conditions which continued for an unmeasured period of time.").

61. Westfield Ins. Co. v. Tech Dry, Inc., 336 F.3d 503, 509 (6th Cir. 2003).
62. 476 N.W.2d 374 (Mich. 1991).
63. *Id.*
64. *Id.*
65. *Id.* at 376.
66. *Id.* at 376–77.
67. *Id.* at 375–78
68. *Id.* at 377.
69. *Id.* at 377–79.

applying its construction of the policy language, the court concluded "[t]here is no doubt, even after looking behind the third party's allegations, whether coverage is possible. It is not."[70]

Similarly, in *Travelers Indemnity Co. v. Dingwell*,[71] the Supreme Court of Maine held that "[t]he behavior of the pollutants in the environment, after release, is irrelevant to [the application of the pollution exclusion]."[72] In *Technicon Electronics Corp. v. American Home Assurance Co.*,[73] the New York Court of Appeals also found that "the logical and proper application of the pollution exclusion depends solely upon the method by which the pollutants entered the environment. . . ."[74]

C. "*Pollutants*"

Since the adoption of the absolute pollution exclusion, courts have addressed the issue of whether the exclusion bars coverage for injuries that have occurred apart from traditional environmental pollution. Federal and state courts addressing the scope of the clause are split on the issue of whether an insurance policy's absolute pollution exclusion bars coverage for all injuries caused by contaminants, or whether the exclusion applies only to injuries caused by traditional environmental pollution.[75] One group of courts has found that the exclusion is limited and does not apply to exclude all injuries involving the negligent use or handling of toxic substances that occur in the normal course of business. These courts generally find ambiguity in the wording of the pollution exclusion when it is applied to such negligence and interpret such ambiguity against the insurance company in favor of coverage.[76] A second group of courts

70. *Id.* at 376; *see also* Arco Indus. Corp. v. Am. Motorists Ins. Co., 594 N.W.2d 61 (Mich. Ct. App. 1998) ("When determining whether a discharge is 'sudden and accidental,' the focus is on the initial entry of the pollutants into the environment, and not the subsequent migration of the pollutants after their release.").

71. 414 A.2d 220, 225 (Me. 1980).

72. *Id.* at 225.

73. 533 N.Y.S.2d 91 (N.Y. App. Div. 1988).

74. *Id.* at 103.

75. *See* Meridian Mut. Ins. Co. v. Kellman, 197 F.3d 1178, 1181 (6th Cir. 1999); NGM Ins. Co. v. Carolina's Power Wash & Painting, LLC, Civ. No. 2:08-CV-3378-DNC, 2010 WL 146482, at *4 (D.S.C. Jan. 12, 2010) ("It is clear that a nationwide split of opinion exists regarding: (1) whether 'absolute pollution exclusions' bar coverage for incidents outside of traditional environmental pollution (e.g., contamination of groundwater over a long period of time), and (2) whether 'absolute pollution exclusions' are unambiguous.").

76. *See* Langone v. Am. Family Mut. Ins. Co., 731 N.W.2d 334, 340 (Wis. Ct. App. 2007) ("A substance may or may not be a pollutant under the terms of a policy exclusion depending on the context or environment in which the substance is involved."); Stoney Run Co. v. Prudential–LMI Commercial Ins. Co., 47 F.3d 34, 39 (2d Cir. 1995) (applying New York law); Anderson v. Highland House Co., 757 N.E.2d 329, 333 (Ohio 2001); Am. States Ins. Co. v. Koloms, 687 N.E.2d 72, 79 (Ill. 1997); Motorists Mut. Ins. Co. v. RSJ, Inc., 926 S.W.2d 679, 680 (Ky. Ct. App. 1996); Kenyon v. Security Ins. Co. of Hartford, 626 N.Y.S.2d 347, 351 (N.Y. Sup. Ct. 1993); Thompson v. Temple, 580 So. 2d 1133, 1135 (La. Ct. App. 1991)

maintains that the clause applies equally to negligence involving toxic substances and traditional environmental pollution and that the clause is as unambiguous in excluding the former as the latter.[77]

The use of the terms "irritant or contaminant" in the definition of pollution has been criticized as an attempt "to exponentially expand the bounds of this exception beyond what an ordinary person would deem a pollutant."[78] One court found that, where the terms "irritant" and "contaminant" are not defined in the policy language, "[they] are virtually boundless, for there is virtually no substance or chemical in existence that would not irritate or damage some person or property."[79] As another court said, "[i]n other words, practically every substance would qualify as a 'pollutant' under this definition, rendering the exclusion meaningless."[80]

In support of the view that the pollution exclusion operates only in the traditional pollution context, the Missouri Court of Appeals in *American National Property & Casualty Co. v. Wyatt*[81] found this conclusion was "bolstered by the drafters' use of terms 'discharge,' 'dispersal,' 'seepage,' 'migration,' 'release,' and 'escape,' which are terms regularly applied to describe events of general environmental pollution."[82] The court advised that the terms discharge, dispersal, release, or escape, "'used in conjunction with 'pollutant,' commonly refer to the sort of conventional environmental pollution at which the pollution exclusion was primarily tar-

(carbon monoxide accumulating in a building as a result of a defective or negligently operated machine or due to inadequate ventilation not unambiguously excluded as a pollutant under the exclusion).

77. *See* Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135, 1137, 1141 (Fla. 1998) (injuries sustained from insecticide accidentally sprayed on bystanders are excluded); Sokoloski v. Am. W. Ins. Co., 980 P.2d 1043, 1046 (Mont. 1999) (property losses sustained due to contamination from soot and smoke emitted from candles are excluded); Bituminous Cas. Corp. v. Cowen Constr., Inc., 55 P.3d 1030, 1035 (Okla. 2002) (injuries sustained from exposure to lead negligently released into a kidney dialysis center are excluded); Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 108–110 (1999) (employee's injuries sustained from a fall caused by the inhalation of fumes from concrete curing compound are excluded); Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc., 907 S.W.2d 517, 522 (Tex. 1995) (property losses and injuries sustained from the accidental release of hydrofluoric acid from an oil refinery are excluded).

78. Am. Nat'l Prop. & Cas. Co. v. Wyatt, 400 S.W.3d 417, 424 (Mo. Ct. App. 2013).

79. Donaldson v. Urban Land Interests, Inc., 564 N.W.2d 728, 732 (Wis. 1997) ("Without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results.") (internal quotation omitted).

80. State Auto. Mut. Ins. Co. v. Flexdar, Inc., 964 N.E.2d 845, 850 (Ind. 2012); Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1043 (7th Cir. 1992); Reg'l Bank of Colo. v. St. Paul Fire & Marine Ins. Co., 35 F.3d 494, 498 (10th Cir. 1994) ("It seems far more reasonable that a policyholder would understand the exclusion as being limited to irritants and contaminants commonly thought of as pollution and not as applying to every possible irritant or contaminant imaginable.").

81. *Am. Nat'l Prop. & Cas. Co.*, 400 S.W.3d at 426.

82. *Id.*

geted.'"[83] In concurrence with this position, numerous cases have concluded that carbon monoxide accumulating in a building as a result of a defective or negligently operated machine or due to inadequate ventilation is not unambiguously excluded as a pollutant under the exclusion.[84]

For those courts adhering to the restricted view of the pollution exclusion, the question remains what constitutes "traditional environmental pollution." The Illinois Appellate Court in *Village of Crestwood v. Ironshore Specialty Insurance Company*[85] recently held that an absolute pollution exclusion precluded insurance coverage for a municipality alleged to have mixed polluted well water with tap water to save costs.[86] The insured argued that that the Illinois Supreme Court's holding in *American States Insurance Co. v. Koloms*[87] limiting the absolute pollution exclusion to "traditional environmental pollution" narrowed the effectiveness of the exclusion to situations where a "polluter . . . could be required to pay governmental cleanup costs pursuant to an environmental law, such as CERCLA. . . ."[88] The insured also argued that the exclusion should not apply because some of the underlying allegations allegedly involved negligence rather than intentional conduct and that the polluting emissions were below the contaminant levels allowed by law.[89]

In rejecting the insured's argument, the court in *Village of Crestwood* held that the city's "knowing contamination" of the water supply was a "textbook example" of traditional environmental pollution.[90] The court found "no indication in the exclusion itself or in precedent that the exclusion was limited to cleanup costs imposed by environmental laws such as CERCLA."[91] The court also rejected the assertion that the exclusion was "limited to intentional torts or any other particular theory of liability."[92] Finally, the court rejected the argument that the exclusion would not apply where polluting emissions were below the contaminant levels allowed by

83. *Id.* (citing MacKinnon v. Truck Ins. Exch., 73 P.3d 1205, 1214 (Cal. 2003)).

84. Stoney Run Co. v. Prudential–LMI Commercial Ins. Co., 47 F.3d 34, 39 (2d Cir. 1995) (applying New York law); Anderson v. Highland House Co., 757 N.E.2d 329, 329 (Ohio 2001); Am. States Ins. Co. v. Koloms, 687 N.E.2d 72, 81 (Ill. 1997); Langone v. Am. Family Mut. Ins. Co., 731 N.W.2d 334, 340 (Wis. Ct. App. 2007); Motorists Mut. Ins. RSJ, Inc., 926 S.W.2d 679, 682 (Ky. Ct. App. 1996); Kenyon v. Security Ins. Co. of Hartford, 626 N.Y.S.2d 347, 351 (N.Y. Sup. Ct. 1993); Thompson v. Temple, 580 So. 2d 1133, 1135 (La. Ct. App.1991).

85. 986 N.E.2d 678 (Ill. Ct. App. 2013).

86. *Id.* at 679.

87. 687 N.E.2d 72 (Ill. 1997).

88. *Vill. of Crestwood*, 986 N.E.2d at 684.

89. *Id.* at 688.

90. *Id.* at 687.

91. *Id.* at 686.

92. *Id.* at 688.

law, especially given the fact that Crestwood did not have a permit to distribute any water from the contaminated well.[93]

IV. APPLICATION TO PARTICULAR PERILS

Courts have reached differing conclusions as to whether certain perils, including mold, wet and dry rot, and bacteria are "contaminants" for the purposes of the pollution exclusion. In substance, the reasons for the divergent opinions appears to be based upon the respective court's adherence or rejection of the position that "pollution" should be limited to what was traditionally considered environmental pollution.

In *MacKinnon v. Truck Insurance Exchange*,[94] the California Supreme Court determined that a standard pollution exclusion in a CGL policy was intended to exclude coverage for injuries resulting from events commonly regarded as environmental pollution.[95] In *MacKinnon*, the insured landlord brought an action against its CGL insurer asserting that the insurer had breached the insurance contract by failing to defend and indemnify the landlord against liability to the tenant for death allegedly caused by pesticide spraying.[96] The trial court entered summary judgment in favor of the insurer and the insured appealed.[97] The Court of Appeal affirmed.[98] The California Supreme Court reversed, holding that the pollution exclusion was limited to environmental pollution and thus did not apply.[99]

In reaching this decision, the court reviewed the history of the pollution exclusion, observing that "[c]ommentators have pointed as well to the passage of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, 42 U.S.C. § 9601 et seq.) in 1980 and the attendant expansion of liability for remediating hazardous wastes as motivation for amending the exclusion."[100] The court advised that "the available evidence most strongly suggests that the absolute pollution exclusion was designed to serve the twin purposes of eliminating coverage for gradual environmental degradation and government-mandated cleanup such as Superfund response cost reimbursement."[101] The court concluded that

93. *Id.*
94. 73 P.3d 1205 (Cal. 2003).
95. *Id.* at 1218.
96. *Id.* at 1208.
97. *Id.*
98. *Id.*
99. *Id.* at 1218.
100. *Id.* at 1211 (citing AIU Ins. Co. v. Super. Ct., 799 P.2d 1253 (Cal. Ct. App. 1990)).
101. *Id.* (quoting Jeffrey W. Stempel, *Reason and Pollution: Correctly Construing the "Absolute" Exclusion in Context and in Accord with Its Purpose and Party Expectations*, 34 TORT & INS. L.J. 1, 32 (1998)).

> we would be remiss, therefore, if we were to simply look to the bare words of the exclusion, ignore its raison d'être, and apply it to situations which do not remotely resemble traditional environmental contamination. The pollution exclusion has been, and should continue to be, the appropriate means of avoiding "the yawning extent of potential liability arising from the gradual or repeated discharge of hazardous substances into the environment." We think it improper to extend the exclusion beyond that arena.[102]

Cases addressing each peril illustrate that this view or its rejection are determinative of whether a particular court finds the pollution exclusion bars coverage for the insured.

A. *Mold*

In *Lexington Insurance Co. v. Unity/Waterford-Fair Oaks, Ltd.*,[103] the insurer sought a declaratory judgment that it was not liable to its insured for damages that the insured incurred from mold damage to first and second floor apartment units.[104] The insurer contended

> the mold damage that developed in the first and second floor units fell within . . . [the policy's pollution exclusion] because it specifically exclude[ed] "damage caused by, resulting from, contributed to or made worse by the actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS," and "fungi" is specifically included in the list of "CONTAMINANTS or POLLUTANTS."[105]

The insurer "argued that the mold spores that caused the damage in question [were] unambiguously included in this definition because they are 'fungi' that 'can cause or threaten damage to human health,' and 'cause or threaten damage, deterioration, loss of value, marketability or loss of use to property insured.'"[106]

The insured "neither challenge[d] the validity of the Pollution and Contaminant Exclusion nor assert[ed] that it [was] ambiguous."[107] Instead, the insured "contende[d] that the exclusion was inapplicable to the present facts because the mold in the apartments 'was not released, discharged or dispersed nor did it escape.'"[108] As the sole support for this argument, the insured cited the testimony of "Lexington's mold expert that

102. *Id.* (citing Am. States Ins. Co. v. Koloms, 687 N.E.2d 72, 81 (Ill. 1997); *accord* Doerr v. Mobil Oil Corp., 774 So. 2d 119, 126–28 (La. 2000); Sullins v. Allstate Ins. Co., 667 A.2d 617, 622–23 (Md. 1995); Andersen v. Highland House Co., 757 N.E.2d 329, 334 (Ohio 2001); Gainsco Ins. Co. v. Amoco Prod. Co., 53 P.3d 1051, 1066 (Wyo. 2002)); *see also* Stempel, *supra* note 103, at 35–40.

103. No. Civ.A 399CV1623D, 2002 WL 356756 (N.D. Tex. Mar. 5, 2002).

104. *Id.* at *1.

105. *Id.* at *2.

106. *Id.*

107. *Id.*

108. *Id.*

mold and mold spores exist at *de minimis* levels in all apartment environments."[109] On the basis of this testimony, Texas One asserted that the mold that caused the extensive damage to the apartments "was simply already present and thrived because of the moisture."[110] The insured argued that "this leads to the legal conclusion that the mold that was the cause of the loss was neither released, discharged, or dispersed, nor did it escape within the meaning of the policy language."[111]

The court noted that the insurer presented evidence regarding the process "by which mold proliferates when an unusual amount of water is introduced into an apartment environment."[112] According to the court,

> this proof established that, under normal conditions, fungal mold spores exist at safe levels on the exterior and the interior of virtually all homes and businesses. Only when the living conditions for these mold spores are enhanced, as in an apartment building that has recently experienced a substantial influx of water, do mold spores proliferate to a degree that they can become unhealthy and damage the property. The process of mold proliferation involves existing mold bodies giving off reproductive spores that are dispersed via the air into the surrounding environment.[113]

The insured's mold expert described as follows the process of mold reproduction by the airborne transmission of spores:

> In other words, some of [the spores] are actually shot out of the organism itself, and that's just the way they help [re]produce, and some of them just float away; they're very powdery, and they're very buoyant in the air and they float away to an area. And if it's a wet area, they take ground and start growing.[114]

Finally, the court observed that the parties agreed that these "mycotoxins [were] dangerous to human health . . . [and that] the overall concentration of mold in many of the apartments [was] well beyond the level that is considered safe."[115] The court concluded that,

> [t]aking into account the uncontroverted physical evidence relating to the nature and scope of the mold contamination, the mold that was the cause of the damage at issue was dispersed within the covered properties and, consequently, that the damage caused thereby falls within the scope of the Pollution and Contamination Exclusion contained in the policy.[116]

109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at *3.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*

A contrary result was reached in *Leverence v. U.S. Fidelity & Guaranty Co.*,[117] In *Leverence*, suit was brought by 798 occupants of 222 manufactured homes premised on strict liability and negligence theories.[118] The occupants sought "damages from the insurance companies for their bodily injuries and for the cost of repairs required due to their bodily injuries or illnesses."[119] The occupants alleged that "their homes retained excessive moisture within their exterior walls [that] allegedly promot[ed] mold, mildew, fungus, spores, and other toxins that are a continuing health risk and adversely affect the value of the units."[120] The occupants further alleged that "the excessive moisture resulted from the defective design of the walls and roofs, inappropriately selected building materials and faulty construction practices."[121]

The insurance policy contained a pollution exclusion that provided:

> This insurance does not apply:
>
> f. to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden or accidental.[122]

The insurers argued that this language was broad enough to include the home environment and the mold, moisture, release of fungus and mildew. Insurers further argued that:

> As long as the tortfeasor's negligence was a substantial factor in and proximate cause of the pollution (i.e., in this case, the release of molds, spores and airborne irritants) . . . [t]he causal connection between the tortfeasor and the resulting pollution should be sufficient. It is further argued that whether it be creating a home that allows water vapor to be trapped, thus producing airborne contaminants through a rotting process or whether the home initially emits airborne contaminants, the exclusion applies.[123]

The trial court ruled that

> the alleged cause of the bodily injuries and property damage was water vapor trapped in the walls, which in turn caused the growth of microorganisms. No

117. 462 N.W.2d 218 (Wis. Ct. App. 1990), *rev'd on other grounds*, Wenke v. Gehl Co., 682 N.W.2d 405 (Wis. 2004) (phrase "foreign period of limitation" in borrowing statute pertains equally to foreign statutes of limitation and foreign statutes of repose).

118. *Id.* at 222.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 232.

123. *Id.*

> contaminants were released, but rather formed over time as a result of environmental conditions. The trial court concluded that the insurance companies' stance ran contrary to the plain meaning and intent of the policies.[124]

The Wisconsin Court of Appeals agreed with the trial court's determination that the pollution exclusion clause does not apply, observing

> [i]n addition, in *Just v. Land Reclamation Ltd.*, 155 Wis.2d 737, 456 N.W.2d 570 (1990), our supreme court interpreted identical policy language. It concluded that the meaning of the phrase "sudden and accidental" means unexpected and unintended. It is undisputed that the growth of the molds, fungus, mildew, etc., were unexpected and unintended. Based on the *Just* decision, the exclusion is inapplicable.[125]

Although this portion of the court's opinion would appear undermined by the absolute pollution exclusion's deletion of the "sudden and accidental" exception, the court's finding that mold does not represent the release of contaminants but rather is a peril that forms over time as a result of environmental conditions remains problematic.

B. *Wet and Dry Rot*

While this article addresses the application of the pollution exclusion, we have included the peril of "wet and dry rot" because dry rot is commonly caused by types of fungus and thus the analysis of the loss is analogous to that used to determine coverage for losses due to mold. In *Glaviano v. Allstate Insurance Co.*,[126] the court held that, under California law, a provision of an insurance policy excluding "damage 'consisting of' or 'caused by dry rot'" unambiguously excluded coverage for damage caused by fungus *meruliporia incrassate* (Poria), even though the term was not defined by the policy.[127] This characterization of the term "dry rot" is confirmed by *Webster's Third New International Dictionary* (1966):

> dry rot n. 1: a decay of seasoned timber caused by certain fungi (as the house fungi and some polypores) that consume the cellulose of wood leaving a mere soft skeleton that is readily reduced to powder, 2: a rot of plant tissue in which the affected areas are not soft and wet but dry and often firmer than normal or more or less mummified: as a: decay of standing timber involving such rot and caused chiefly by polypores, . . . 3: a fungus causing dry rot. . . .[128]

Wet and dry rot are typically excluded under provisions "exclud[ing] coverage for damage caused by or resulting from, among other things,

124. *Id.*
125. *Id.*
126. 35 F. App'x 493 (9th Cir. 2002).
127. *Id.* at 495.
128. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966). *See* Jordan v. Allstate Ins. Co., 116 Cal. App. 4th 1206, 1216 (2004).

gradual deterioration, mold, and wet or dry rot."[129] However, causation of rot in a particular claim is often the subject of dispute. For example, in *Fireman's Fund Insurance Co. v. Oregon Cold Storage*,[130] the insured purchased a building and "[then] discovered that the support beams and posts under the floors had been damaged."[131]

Evidence established that "[t]here was extensive rotting, and three experts were hired by [the insurer] to investigate the problem."[132] The experts "concluded that the deterioration and rot of the wood subflooring were a result of a long-term process of moisture condensation, freezing, heaving and deterioration that began ten to twenty years earlier."[133]

> [The experts] pointed to moisture, condensation, and fungal growth as the causes of the wood rot, and one expert pointed to the defective design of the insulation system and under-floor warming system that caused the failure of the freezer storage warehouse to function properly. [The insured's] two consultants added that contributing causes included the lack of a vapor barrier in the crawl space, the restricted air flow, the lack of an under-floor ventilation system adequate to handle the moisture, and gravel and dirt in the ventilation culverts, which further reduced the airflow.[134]

The insured argued the moisture and condensation were the causes of the damage and that the rotting was the damage rather than cause of the damage.[135] The court found the insured's assertions "untenable" and held that, "although moisture and condensation may have been causes of the rotting, this did not eliminate rotting as a cause of the damage."[136]

C. *Bacteria*

In *Keggi v. Northbrook Property and Casualty Insurance Co.*,[137] a golfer became seriously ill after she "consumed contaminated water from the taps at her parents' home and from [the insured's] facilities."[138] The insured tendered defense of the Keggi lawsuit to its insurers, but both insurers denied coverage and refused to defend.[139] Insurer Northbrook disclaimed coverage based on the pollution exclusion clause.[140] After cross motions

129. Fireman's Fund Ins. Co. v. Or. Cold Storage, 11 F. App'x 969 (9th Cir. 2001).
130. *Id.*
131. *Id.* at 970.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. 13 P.3d 785 (Ariz. Ct. App. 2000).
138. *Id.* at 787.
139. *Id.* Northbrook provided CGL and umbrella insurance coverage for the facility; TIG provided excess liability coverage. *Id.*
140. *Id.*

for summary judgment, the trial court granted summary judgment to insurers, "ruling that the pollution exclusion clauses in each of the insurance policies precluded coverage for Keggi's claims."[141] The policies provided:

> This insurance does not apply to:
>
> (1) Bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
>
> . . . .
>
> Pollutants means 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.[142]

The insurer contended that "the term 'pollutants' includes 'any . . . contaminant' (unmodified by the terms 'liquid, solid, gaseous or thermal'), that Keggi concede[d] that the bacteria in this case 'contaminated' the water, and that the bacteria must therefore be a 'contaminant' and, by definition, a pollutant."[143] The appellate court concluded that the "plain language of the pollution exclusion did not include total and fecal *coliform* bacteria within the definition of 'pollutants.'"[144] Thus, the exclusion did not apply to preclude coverage for Keggi's injuries.[145] The court held that

> [a]lternatively, even if the language could be interpreted broadly enough to include "bacteria," we conclude that the purpose of the clause, public policy, and the transaction as a whole, demonstrate that the language nevertheless should not be interpreted to preclude coverage for bacterial contamination absent any evidence that the actual contamination arose from traditional environmental pollution.[146]

The court explained this conclusion by finding the language of the exclusion made it difficult to fit bacteria with the definition of pollutant, observing:

> While the terms "irritant" and "contaminant" may be extraordinarily broad, we note that the Northbrook policies limit "pollutants" to "irritants" and "contaminants" that are "solid, liquid, gaseous or thermal." The waterborne bacteria alleged to have caused Keggi's injury do not fit neatly within this definition. To the extent that bacteria might be considered "irritants" or

141. *Id.*
142. *Id.* at 789.
143. *Id.* at 790.
144. *Id.*
145. *Id.*
146. *Id.* at 792.

> "contaminants" they are living, organic irritants or contaminants which defy description under the policy as "solid," "liquid," "gaseous," or "thermal" pollutants.
>
> We further note that the exclusion delineates the types of contaminants or irritants included within the definition of "pollutants": "smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." Because use of the term "including" in a definition generally indicates that unlisted items may nevertheless fall within the definition, we conclude that the list is non-exhaustive. However, under the rule of *ejusdem generis*, any unlisted items that are construed to fall within the definition must be similar in nature to the listed items.
>
> Finally, we turn to the term "waste," which arguably could include organic waste material which is a potential source of fecal *coliform* bacteria. "Waste" is defined under the policies to include "materials to be recycled, reconditioned or reclaimed." This definition of "waste" implies that the term refers to industrial byproducts, rather than to the organic matter which might have caused the contamination of the water with total and fecal *coliform* bacteria.[147]

Consistent with the narrow view of "pollution," the court opined that

> [w]ithout 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 suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution.[148]

Reaching the opposite result, the U.S. District Court for the Southern District of Florida in *Nova Casualty Co. v. Waserstein*[149] found the insurers had no duty defend suits against the insured.[150] The complaints alleged that, due to the negligence of the insured,

> the eight plaintiffs in the underlying suit were physically injured by exposure to the following while working for Bank of America inside the building . . . exposure to harmful chemicals and living organisms; hazardous particles and chemicals; hazardous particles and chemical toxicants; dangerous chemicals, particulates and microbial populations; indoor allergens, and airborne and microbial contaminants.[151]

Citing to the decision of the Florida Supreme Court in *Deni Associates*, the court noted that *Deni* rejected the insured's argument that pollution

147. *Id.* at 789–90.
148. *Id.* at 792.
149. 424 F. Supp. 2d 1325 (S.D. Fla. 2006).
150. *Id.* at 1331.
151. *Id.* at 1328–29.

exclusion clauses only apply to industrial and environmental pollution because the clause at issue did not contain any such limiting language.[152] The court rejected the reasoning of the court in *Keggi* regarding the nature of bacteria, namely, that "to the extent that bacteria might be considered 'irritants' or 'contaminants' they are living, organic irritants or contaminants which defy description under the policy as 'solid, liquid, gaseous, or thermal' pollutants."[153] The court stated:

> I reject the argument, however, as inconsistent with Florida law. There is nothing in the plain meaning of the term "solid" that limits it to non-living, or non-organic irritants and contaminants. The dictionary definition of "solid" certainly does not preclude living or organic things from being described as "solid." *See Webster's New World College Dictionary* 1364 (4th ed. 2000) (defining "solid" as "tending to keep its form rather than to flow or spread out like a liquid or gas; relatively firm or compact[;]"); *Webster's Third New International Dictionary* 2169 (4th ed. 1976) (defining "solid" as "marked by density or compactness: of uniformly close and coherent texture or consistency; not disintegrated, loose, or spongy[;] . . . being neither liquid nor gaseous."); *Shorter Oxford English Dictionary* 2915 (5th ed. 2002) (defining "solid" as "of a material substance; of a dense or massive consistency; firmly coherent; hard and compact").[154]

The court also rejected the *Keggi* court's application of the doctrine of *ejusdem generis*.[155] The court found the doctrine was "inapplicable because the plain language of the pollution exclusion clause is not ambiguous as 'living organisms,' 'microbial populations,' 'microbial contaminants,' and 'indoor allergens' fit the ordinary meaning of 'pollutants.'"[156] The court concluded that

> the parties do not dispute that one set of alleged causes in the underlying complaints, pursuant to the pollution exclusion clause, are excluded from coverage. The other set of causes, 'living organisms,' 'microbial populations,' 'airborne and microbial contaminants,' and 'indoor allergens' are contaminants, and are excluded from coverage under the pollution exclusion clause as well. Because Nova has no duty to defend under the policy, it necessarily has no duty to indemnify under the policy.[157]

152. *Id.* at 1333 (citing Deni Assocs. v. State Farm Fire & Cas., 711 So. 2d 1135, 1138–39 (Fla. 1998)) ("We cannot accept the conclusion reached by certain courts that because of its ambiguity the pollution exclusion clause only excludes environmental or industrial pollution. . . . We cannot place limitations upon the plain language of a policy exclusion simply because we may think it should have been written that way.").

153. *Id.* at 1335.

154. *Id.*

155. *Id.* at 1336.

156. *Id.* at 1336–37.

157. *Id.* at 1340.

V. CONCLUSION

As noted at the beginning, the history of the pollution exclusion clause in its various forms has resulted in disparate views on the exclusion's application to losses resulting from a wide variety of "contaminants." Depending on the jurisdiction, the exclusion may be limited to losses resulting from traditional environmental pollution. While the terms of the absolute pollution exclusion seem written to curtail coverage well beyond losses resulting from environmental pollution, judicial interpretations of its early history have been used to narrow its application. Practitioners are thus cautioned to pay close attention to the state and federal cases in their own jurisdictions when rendering coverage advice.