OCCURRENCE AND THE POLLUTION EXCLUSION FROM THE PERSPECTIVES OF THE POLICYHOLDER AND THE INSURER: LATEST DEVELOPMENTS

ENVIRONMENTAL INSURANCE PAST, PRESENT, AND FUTURE

MARY KAY VYSKOCIL
SIMPSON THACHER & BARTLETT LLP

JUNE 15, 2000

I. "OCCURRENCE" DEFINED

The standard occurrence definition in CGL policies excludes coverage for injury or damages that is "expected or intended" by the insured, thus incorporating the fundamental concept that fortuitous loss is a prerequisite for coverage.

A. Expected or Intended: From Whose Perspective (Objective vs. Subjective)

1. Application of the objective "reasonable man" standard; if the insured knew or should have known that certain results would follow from its acts or omissions, there is no occurrence within the meaning of the policy.

a. *Rapid-American Corp. v. Allstate Ins. Co.*, No. QDS:22236162 (N.Y. Sup. Ct. July 30, 1999) (adopting an objective test for expected and intended)

b. *Weber v. IMT Ins. Co.*, 462 N.W.2d 283, 287 (Iowa 1990) (agreeing with Eighth Circuit's ruling in *City of Carter Lake v. Aetna Cas. & Sur. Co.*, 604 F.2d 1052 (8th Cir. 1979) that in analyzing "expected or intended," "[t]he indications must be strong enough to alert a reasonably prudent man not only to the possibility of the results occurring but the indications also must be sufficient to forewarn him that the results are highly likely to occur")

2. Application of a subjective standard; expectation and intention are to be judged from the standpoint of the insured and require actual or subjective knowledge.

   a. *Carter-Wallace, Inc. v. Admiral Ins. Co.*, 712 A.2d 1116, 1128-29 (N.J. 1998) (upholding jury instruction which focused on what Carter-Wallace knew or expected at time policy was in effect)

   b. *Ohio Cas. Ins. Co. v. Henderson*, 939 P.2d 1337, 1342-44 (Ariz. 1997) (applying subjective standard to determine insured's intent)

   c. *Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 882 P.2d 703, 713 (Wash. 1994) (because policy language is ambiguous as to which standard applies, ambiguity must be resolved against the insurer; thus a subjective rule applies)

   d. *James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 278-79 (Ky. 1993) (if injury was not actually intended or expected by the insured, coverage is provided)

B. Expected or Intended: Specific Intent Required?

1. The insured must expect or intend the specific injury for which it seeks indemnification in order for coverage to be barred. *See CPC Int'l Inc. v. Hartford Accident & Indemnity Co.*, 720 A.2d 408, 419 (N.J. App. Div. 1998) ("It is not enough that the insurer prove that the insured expected or intended any injury to the environment. The insurer must prove that the environmental injury expected or intended by the insured was qualitatively comparable in terms of severity and type with the environmental injury that is being remediated.").

2. Coverage may be barred even where there is no specific intent to cause particularized damage or injury. *See Diamond Shamrock Chem. Co. v. Aetna Cas. & Sur. Co.*, 609 A.2d 440, 463-64 (N.J. App. Div. 1992) ("The critical fact remains that . . . [the insured] knew it was dealing with a toxic substance. Perhaps it was not aware of the exact extent of the dangerous consequences emanating from its polluting activity. However, we cannot ignore reality . . . . [K]nowledge of harm was proven . . . .").

C. Expected or Intended: Whose Burden

1. The insured must demonstrate that the damage was neither expected nor intended in order to establish coverage.

a. *Morton Int'l Inc. v. Aetna Cas. & Sur. Co.*, 666 N.E.2d 1163, 1173 (Ohio Ct. App. 1995) (under Washington law, burden on insured to establish that injury or damage was "occurrence" — *i.e.*, neither expected nor intended — because, *inter alia*, the insured is in a better position to demonstrate its subjective intent)

b. *Hartford Acc.& Indem. Co. v. Employers Ins. of Wausau*, No. 847212, 1995 WL 870851, at *10 (Cal. Super. Ct. May 26, 1995) (in order to establish coverage, the insured must show that there was an occurrence during the policy period which was neither expected nor intended from the standpoint of the insured)

2. The insurer must demonstrate the damage was expected or intended to deny coverage.

a. *Carter-Wallace, Inc. v. Admiral Ins. Co.*, 712 A.2d 1116, 1126 (N.J. 1998) (finding that unexpected and unintended language constitutes an exclusion and thus assigning burden of proof with insurer, regardless of whether such language is located in exclusion section or coverage section of policy)

b. *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1205 (2d Cir. 1995), *modified*, 85 F.3d 49 (2d Cir. 1996) (the insurer bears the burden of proving that damages are expected or intended because under New York law, exclusionary effect of policy language controls allocation of burden of proof)

3. The burden depends on the location of the contract language in the policy (exclusionary vs. definition of coverage).

a. *Monsanto Co. v. Aetna Cas. & Sur. Co.*, No. 88C-JA-118, 1993 WL 563251, at *9-*10 (Del. Super. Ct. Nov. 16, 1993) (under Missouri law, the insured bears the burden of proving the absence of expectation or intent for policies in which the "expected or intended" language is contained within a coverage provision)

b. *American Family Mut. Ins. Co. v. Pacchetti*, 808 S.W.2d 369, 370-71 (Mo. 1991) (burden on insurer because expected or intended language is part of exclusionary provisions)

D. Expected or Intended: Conjunctive or Disjunctive

1. Either expectation or intent will defeat coverage.

a. *West American Ins. Co. v. Keno & Sons Constr. Inc.*, No. 98-C-7066, 2000 WL 246262, at *5 (N.D. Ill. Feb. 25, 2000) (no "occurrence" established and summary judgment granted in favor of insurer where insured failed to establish that event was "unforeseeable or unexpected")

2. Coverage is defeated only where the insured acts with the purpose of causing harm.

a. *James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 278 (Ky. 1993) ("The 'expected or intended' exception is inapplicable unless the insured specifically and subjectively intends the injury giving rise to the claim.")

b. *American Family Mut. Ins. Co. v. Pacchetti*, 808 S.W.2d 369, 371 (Mo. 1991) ("It must be shown not only that the insured intended the acts causing the injury, but that the injury was intended or expected from these acts.")

II. POLLUTION EXCLUSION

Given that the standard form pollution exclusion unquestionably precludes coverage for gradual environmental pollution, decisions interpreting this clause typically center on the "sudden and accidental" buy back to the exclusion.

A. Sudden and Accidental: The Burden of Proof

1. While it is well-settled that the burden of proving the applicability of the pollution exclusion is on the insurer, a number of high courts have held that the burden of proof is on the insured to show that the sudden and accidental exception applies.

a. *Aydin Corp. v. First State Ins. Co.*, 18 Cal.4th 1183, 1190-93 (Cal. 1998) (the burden of proof is properly placed on the insured because the "sudden and accidental" exception essentially reinstates coverage, and thus is within the rule imposing on an insured the burden of establishing coverage)

b. *Northville Indus. Corp. v. National Union Fire Ins. Co.*, 679 N.E.2d 1044, 89 N.Y.2d 621, 634 (N.Y. 1997) (once insurer satisfies its burden of establishing that complaint alleges damages attributable to pollution, burden shifts to insured to demonstrate that complaint brings claims within sudden and accidental exception)

c. *E.I. duPont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997) (insured must satisfy "sudden and accidental" exception)

d. *Highlands Ins. Co. v. Aerovox Inc.*, 676 N.E.2d 801, 805 (Mass. 1997) ("We conclude that the insured must bear the burden of proving that the contamination was caused by a sudden and accidental release.")

e. *Sinclair Oil Corp. v. Republic Ins. Co.*, 929 P.2d 535, 543 (Wyo. 1996) ("the insured party claiming coverage must be able to identify and establish an event that occurred abruptly or was made or brought about in a short period of time . . . in order to avoid the exclusion clause")

f. *SCSC Corp. v. Allied Mutual Ins. Co.*, 536 N.W.2d 305, 314 (Minn. 1995) (once the insurer makes the requisite showing of an exclusion, the burden of proof shifts back to the insured to show applicability of the "sudden and accidental" exception to the pollution exclusion)

2. A few courts have placed the burden of proof on the insurer, even with respect to the "sudden and accidental" exception.

a. *Kirchner v. Fireman's Fund Ins. Co.*, No. 90-5367, 1991 WL 177251, at *9 (S.D.N.Y. Sept. 4, 1991) (in order to avoid a duty to defend, the insurer bears the burden of demonstrating that no allegation in the claim letter can be construed as alleging a sudden and accidental discharge)

b. *United States Fidelity & Guar. Co. v. Morrison Grain Co.*, 734 F. Supp. 437, 442-43 (D. Kan. 1990) (the insurer has the burden of proof with respect to the sudden and accidental exception)

B. Sudden and Accidental: Independent Requirements

1. The insured must prove both conditions: sudden *and* accidental.

a. *Kerr-McGee Corp. v. Admiral Ins. Co.*, 905 P.2d 760, 764 (Ok. 1995) (sudden and accidental must be read as two separate conditions to give effect to the language of the policy)

b. *Liberty Mut. Ins. Co. v. SCA Servs., Inc.*, 588 N.E.2d 1346, 1350 (Mass. 1992) (the use of the conjunctive indicates the intent to

define the two words differently, stating two separate requirements)

2. In contrast, a number of courts have interpreted the "sudden and accidental" exception to be merely a restatement of the "occurrence" definition and thus to preclude coverage only for damages that are expected and intended (i.e., accidental).

   a. *Alabama Plating Co. v. United States Fidelity & Guar. Co.*, 690 So.2d 331, 335-36 (Ala. 1996) (finding term "sudden" ambiguous, and concluding that "the addition of the exclusion was merely a clarification that the policy does not provide coverage for intentional polluters")

   b. *In re Combustion, Inc.*, 960 F. Supp. 1076, 1079-80 (W.D. La. 1997) (ruling that the sudden and accidental exclusion was added to clarify the meaning of "occurrence" and thus does not include a temporal element)

   c. *Hudson v. Farm Family Fire & Marine Ins. Co.*, 697 A.2d 501, 503-04 (N.H. 1997) (noting that term "sudden" is ambiguous, and thus ruling that it should be construed broadly, to mean "unexpected or unintended" without a temporal restriction)

   d. *St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 923 P.2d 1200, 1217-18 (Or. 1996) (because "sudden" is ambiguous, it should be construed in favor of insured to mean "unexpected or unintended" without a temporal restriction)

   e. *American States Ins. Co. v. Kiger*, 662 N.E.2d 945, 947-48 (Ind. 1996) (noting insurers had previously represented that the phrase "sudden and accidental" was nothing more than a clarification of the term "occurrence" and so holding)

C. Sudden: A Temporal Requirement

1. A growing number of courts have determined that the term "sudden" includes the temporal element of briefness or abruptness.

   a. *Gulf Metals Indus. Inc. v. Chicago Ins. Co.*, 993 S.W.2d 800, 807 (Tx. Ct. App. 1999) (without temporal element, the term sudden would be mere surplusage)

b. *Sokoloski v. American West Ins. Co.*, 980 P.2d 1043, 1045 (Mont. 1999) (the word sudden encompasses a temporal element because unexpectedness is already incorporated by the word "accidental")

c. *E.I. duPont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997) (the term sudden has a temporal element and means abrupt)

d. *Northville Indus. Corp. v. National Union Fire Ins. Co.*, 679 N.E.2d 1044, 89 N.Y.2d 621, 632-33 (N.Y. 1997) (noting that without temporal requirement, term "sudden" is redundant of accidental)

e. *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Indus. Corp.*, 636 So.2d 700, 704 (Fla. 1994) (as expressed in the pollution exclusion, the term "sudden" includes a temporal aspect "with a sense of immediacy or abruptness")

2. Some courts have held that the "sudden" is ambiguous, and thus should be construed against the insurer.

a. *Public Service Co. of Colorado v. Wallis and Cos.*, 986 P.2d 924, 933 (Colo. 1999) (finding that the term "sudden" means more than unexpected and unintended, but need not have a temporal requirement, and is ambiguous, and thus must be construed against the insurer)

b. *In re Combustion, Inc.*, 960 F. Supp. 1076, 1079-80 (W.D. La. 1997) (the term "sudden" is ambiguous and thus must be construed in favor of the insured; accordingly, interpreted to mirror definition of "occurrence")

c. *American States Ins. Co. v. Kiger*, 662 N.E.2d 945, 948 (Ind. 1996) (finding term "sudden" ambiguous and thus construing it in the more expansive way)

d. *Grindheim v. Safeco Ins. Co. of Am.*, 908 F. Supp. 794, 807-08 (D. Mont. 1995) (finding that the term "sudden" has a temporal element, but is nonetheless ambiguous as to whether commencement of damage or duration of damage must be "sudden")

D. <u>The Relevant Discharge (Initial Discharge vs. Secondary Discharge)</u>

In applying the sudden and accidental exception to the pollution exclusion, policyholders and insurers often disagree as to the relevant discharge of

pollutants. In particular, courts have been faced with disputes as to whether the proper focus is the initial discharge of wastes into a landfill, container, pit, *etc.* or the secondary discharge of those wastes from the intended container into the environment.

1. Where the initial discharge of pollutants was into a licensed landfill, the relevant discharge for purposes of the pollution exclusion is the secondary discharge — *i.e.*, the escape of contaminants from the landfill into the environment.

    a. *City of Albion v. Guaranty Nat'l Ins. Co.*, 73 F. Supp.2d 846, 851-52 (W.D. Mich. 1999) (holding that if the landfill at issue was licensed by the state and constructed in accordance with the then-contemporary standards in order to contain the contents to be placed in the landfill, the relevant release would be the secondary release from the landfill into the environment)

    b. *Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 616-18 (Colo. 1999) (where insured placed wastes into a licensed landfill, the relevant release was that of the pollutants from the landfill into the environment — the secondary release — and not the initial disposal of the pollutants into the landfill. *See also Blackhawk-Central City Sanitation Dist. v. American Guar. and Liab. Ins. Co.*, No. 98-1075, 2000 WL 369372 (10th Cir. April 11, 2000) (applying *Compass*).

    c. *Sylvester Bros. Dev. Co. v. Great Central Ins. Co.*, 480 N.W.2d 368, 373-74 (Minn. Ct. App. 1992) (where groundwater contamination was caused by leaking of pollutants from a landfill, the relevant discharge was the escape of the pollutants into the groundwater)

    d. *But see Standun, Inc. v. Fireman's Fund Ins. Co.*, 73 Cal.Rptr.2d 116, 120-22 (Cal. Ct. App. 1998) (because the wastes were not placed in a container, such as a tank or drum, but rather were poured directly onto the "land," the relevant discharge for the purpose of the pollution exclusion was the initial disposal of wastes into the land, not the secondary movement of those wastes, despite the fact that the wastes were placed in a municipal landfill); *St. Paul Fire and Marine Ins. Co. v. Warwick Dyeing Corp.*, 26 F.3d 1195, 1202-04 (1st Cir. 1994) (the relevant discharge for purposes of the pollution exclusion is the discharge of waste at the landfill, and not any subsequent release of contaminants into the environment)

2. Where the initial discharge of pollutants was not into an intended containment device, the relevant discharge is the initial discharge.

a. *South Macomb Disposal Auth. v. Westchester Fire Ins. Co.*, Nos. 214504, 214825, 2000 WL 20913, at *3 (Mich. App. Jan 11, 2000) (because the "underdrain" through which the pollutants moved was not considered or designed to be a containment system, the relevant discharge was the initial discharge of contaminants into the environment, whereas the secondary migration of those contaminants was irrelevant)

3. Courts reviewing the primary vs. secondary discharge question have also framed the issue as one of discharge vs. resultant damage. In other words, courts have addressed whether the relevant event (for purposes of applying the pollution exclusion) is the actual discharge of materials into the environment, or the resulting damage to the environment.

a. Generally, it is the initial discharge, not the resultant damage, to which the pollution exclusion applies. *See, e.g., Northville Indus. Corp. v. National Union Fire Ins. Co.*, 679 N.E.2d 1044, 89 N.Y.2d 621, 633 (N.Y. 1997); *E.I. du Pont de Nemours & Co., v. Allstate*, 693 A.2d 1059, 1062 (Del. 1997); *North Pacific Ins. Co. v. Mai*, 939 P.2d 570, 573 (Idaho 1997); *Southern Solvents, Inc. v. New Hampshire Ins. Co.*, 91 F.3d 102, 105 (11th Cir. 1996) (Florida law); *St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp.*, 26 F.3d 1195, 1202-03 (1st Cir. 1994) (R.I. law).

b. A few courts, however, have refused to enforce the pollution exclusion, finding that regardless of whether the discharge was an intentional act, the resulting damage was unexpected or unintended. *See, e.g., Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co.*, 451 A.2d 990, 994 (N.J. Super. Ct. 1982) (an event is sudden and accidental whenever the resultant damage or injury is unexpected or unintended from the standpoint of the insured); *United Pacific Ins. Co. v. Van's Westlake Union, Inc.*, 664 P.2d 1262, 1264 (Wash. 1983) (the pollution exclusion was not intended to apply where the damage caused was neither expected nor intended).

E. Regulatory Estoppel: Another Attempt to Nullify the Pollution Exclusion

1. The seminal case on regulatory estoppel is *Morton International, Inc. v. General Accident Insurance Co. of America*, 629 A.2d 831, 848 (N.J. 1993), in which the New Jersey Supreme Court found that the insurers were estopped from narrowly construing the sudden and accidental exception to the pollution exclusion so as to deny coverage because the insurance industry represented to the insurance regulatory agencies decades earlier

that coverage would continue under the exclusion for intentional discharge resulting in unintended pollution.

2. Since the New Jersey Supreme Court's decision in *Morton*, other jurisdictions have weighed in on the viability of the so called "regulatory estoppel" doctrine as promulgated by Morton. The result has been overwhelming rejection of the theory, finding that the pollution exclusion (and its sudden and accidental exception) constitutes clear and unambiguous contract language which must be given its literal interpretation without regard to extrinsic evidence.

   a. *Employers Ins. Co. of Wasau v. Duplan Corp.*, No. 94 Civ. 3143, 1999 WL 777976, at *12-*14 (S.D.N.Y. Oct. 20, 1999) (because the pollution exclusion is clear and unambiguous, extrinsic evidence is not admissible to vary the terms of the exclusion)

   b. *North Georgia Petroleum Co. v. Federated Mut. Ins. Co.*, 68 F. Supp.2d 1321, 1328 (Ga. 1999) (holding that Georgia courts would likely not adopt *Morton* to hold a pollution exclusion invalid as against public policy)

   c. *Wysong and Miles Co. v. Employers of Wausau*, 4 F. Supp.2d 421, 427 (M.D.N.C. 1998) (noting that most courts have rejected the regulatory estoppel doctrine)

   d. *E. I. du Pont de Nemours and Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1062 (Del. 1997) (regulatory estoppel is inapplicable because contract language is clear and unambiguous)

   e. *Snydergeneral Corp. v. Great Am. Ins. Co.*, 928 F. Supp. 674, 682-83 (N.D. Tex. 1996), *aff'd*, 133 F.3d 373 (5th Cir. 1998) ("regulatory estoppel argument has been rejected by virtually every other state and federal court to address the issue")

   f. *Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 373 (6th Cir. 1995) (declining to examine drafting history of unambiguous pollution exclusion clause in connection with estoppel argument)

   g. *Federated Mutual Ins. Co. v. Botkin Grain Co.*, 64 F.3d 537, 541 (10th Cir. 1995) (rejecting estoppel argument because extrinsic evidence is not permitted to interpret unambiguous pollution exclusion)

   h. *Anderson v. Minnesota Ins. Guar. Assoc.*, 534 N.W.2d 706, 709 (Minn. 1995) (rejecting estoppel argument because reliance on

explanations contrary to plain meaning of provision is unreasonable as a matter of law)

i. *EDO Corp. v. Newark Ins. Co.*, 878 F. Supp. 366, 374 (D. Conn. 1995) (refusing to consider drafting history because sudden and accidental exception is unambiguous)

j. *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 153 (7th Cir. 1994) (refusing to look beyond the unambiguous policy language of the exclusion)

3. A number of jurisdictions have, however, either endorsed the regulatory estoppel principle or rejected it merely on the facts presented, rather than as a matter of law.

a. *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 740 A.2d 1179, 1190-91 (Pa. Super. 1999) (regulatory estoppel argument rejected because insured had failed to present evidence that the state regulatory authorities had relied upon the insurance industry's memorandum when it approved the pollution exclusion)

b. *Kimber Petroleum Corp. v. Travelers Indem. Co.*, 689 A.2d 747, 754 (N.J. Super. Ct. 1997) (declining to apply *Morton* estoppel to bar application of absolute pollution exclusion because unlike the facts of *Morton*, the insurance industry in *Kimber* candidly acknowledged that the absolute pollution exclusion would totally prohibit coverage for pollution-related damages, allowing only for very narrow exceptions)

c. *Charter Oil Co. v. American Employers' Ins. Co.*, 69 F.3d 1160, 1168-70 (D.C. Cir. 1995) (plaintiff failed to submit evidence demonstrating material inconsistency between previous representations made by insurers and position taken by insurers in lawsuit)

d. *Joy Tech., Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493, 498-500 (W. Va. 1992) (because insurer had officially represented to state insurance commission that exclusion did not alter coverage and merely clarified the pre-existing "occurrence" clause, court held that policies issued by insurer covered gradual pollution so long as it was not expected or intended)

F. Pollution Exclusion Must Be Timely Reserved

1. *American Ref-Fuel Co. of Hempstead v. Employers Ins. Co. of Wausau*, 705 N.Y.S.2d 67, 71 (N.Y. App. Div. 2000) (disclaimer of coverage based on pollution exclusion untimely as a matter of law where insurer had issued general disclaimer approximately one month after insured gave notice of claim, but did not specifically disclaim coverage based on pollution exclusion until approximately four months after insured gave notice of claim).

2. *But see Sphere Drake Ins. Co. v. Block 7206 Corp.*, 2000 WL 311440, at *4 (N.Y. App. Div. March 27, 2000) ("On the facts presented . . . [insurer]'s disclaimer of coverage, made approximately 45 days after receiving notice of the claim . . . was timely as a matter of law.").

G. Pollution Exclusion As Applied To Bodily Injury Claims

1. Several courts have concluded that the pollution exclusion does not apply to bodily injury claims. By and large, these holdings have arisen in the lead paint context.

a. *Sullins v. Allstate Ins. Co.*, 667 A.2d 617, 620, 623-24 (Md. 1995) (because the terms "pollutant" and "contaminant" are ambiguous and thus must be construed against the insurer so as not to encompass lead paint, a product used legally and intentionally)

b. *Atlantic Mut. Ins. Co. v. McFadden*, 595 N.E.2d 762, 764 (Mass. 1992) (there is no language in pollution exclusion that implies that it was drafted with a view toward limiting liability for lead paint related injuries)

2. Other courts, however, have enforced a pollution exclusion to bar coverage for bodily injuries.

a. *See* cases cited in Section III, C, *infra.*

III. ABSOLUTE POLLUTION EXCLUSION

A. A substantial majority of courts that have addressed the issue have concluded that the absolute pollution exclusion is clear and unambiguous and precludes coverage for "all" pollution-related liability.

1. *Blackhawk-Central City Sanitation Dist. v. American Guar. and Liab. Ins. Co.*, No. 98-1075, 2000 WL 369372, at *6 (10th Cir. April 11, 2000) (absolute exclusion set forth in endorsement prevails over qualified pollution

exclusion in policy and is binding on the policyholder); *but see Reliance Ins. Co. v. VE Corp.*, No. Civ. A. 95-538, 2000 WL 217511, at *9-*11 (E.D. Pa. Feb. 10, 2000) (absolute exclusion not given effect where it was contrary to expectations of insured because change in policy was made six months after policy renewal and thus could not be negotiated prior to occurrence).

2. *Maska U.S., Inc. v. Kansas Gen. Ins. Co.*, 198 F.3d 74, 80-83 (2d Cir. 1999) (reversing trial court's ruling that absolute pollution exclusion was invalid under Vermont law as against public policy, finding that even if Vermont had a policy favoring coverage of environmental claims, such a policy could not, as a matter of law, invalidate all pollution exclusions absent a formal rule properly adopted in accordance with the state's Administrative Procedure Act).

3. *Deni Assoc. of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135, 1137-39 (Fla. 1998) (finding exclusion clear and unambiguous and applicable to both environmental and non-environmental pollution, and noting that more than 100 cases from 36 other states have applied the plain language of the exclusion to deny coverage).

4. *Town of Harrison v. National Union Fire Ins. Co.*, 675 N.E.2d 829, 89 N.Y.2d 308, 316-17 (N.Y. 1996) (absolute exclusion barred coverage for disposal of waste even though dumping was not done by insured itself, because the broad language of the exclusion does not require that the insured be the actual polluter for the exclusion to apply).

B. Courts that have limited or denied the application of the absolute pollution exclusion have generally done so in the non-traditional environmental coverage context.

1. Lead paint cases

a. *Fayete County Hous. Auth. v. Housing & Redevelopment Ins. Exch.*, No. 2440 (Pa. Ct. Common Pleas, April 7, 1999) (finding that language of pollution exclusion is ambiguous as to lead paint)

b. *Byrd v. Blumenreich*, 722 A.2d 598, 602 (N.J. App. Div. 1999) (absolute pollution exclusion ambiguous as to whether flaking and peeling of lead paint chips constitutes "discharge, dispersal, seepage, migration, release or escape of pollutants" and does not exclude coverage)

c. *Danbury Ins. Co. v. Novella*, 727 A.2d 279, 283-84 (Conn. Super. Ct. 1998) (insurer's motion for summary judgment denied because

absolute pollution exclusion ambiguous as applied to injuries caused by lead paint)

2. Cases where the "pollutant" or "pollution" is not traditionally associated with environmental contamination

   a. *Hocker Oil Co., Inc. v. Barker-Phillips-Jackson, Inc.*, 997 S.W.2d 510, 518 (Mo. Ct App. 1999) (gasoline not a pollutant where not named in exclusion and where insured was service station which would reasonably understand gasoline-related injuries to be included in coverage)

   b. *Nautilus Ins. Co. v. Jabar*, 188 F.3d 27, 30-31 (1st Cir. 1999) (fumes emanating from roofing products not within pollution exclusion because not traditionally associated with environmental pollution)

   c. *Meridan Mutual Ins. Co. v. Kellman*, 197 F.3d 1178, 1184-85 (6th Cir. 1999) (pollution exclusion did not bar coverage for personal injuries caused by floor sealant chemical because exclusion not intended to shield the insurer from liability for injuries caused by toxic substances that are still confined within the general area of their intended use)

C. Some courts have nonetheless applied the absolute pollution exclusion to bar coverage even in non-traditional pollution cases, emphasizing the unambiguous nature of the exclusion.

   1. Lead paint cases

      a. *Auto-Owens Ins. Co. v. Hanson*, 588 N.W.2d 777, 780 (Minn. 1999)

      b. *Lititz Mut. Ins. Co. v. Steely*, 746 A.2d 607, 611 (Pa. Super. Ct. 1999)

      c. *Peace v. Northwestern Nat'l Ins. Co.*, 596 N.W.2d 429, 436-40 (Wis. 1999)

      d. *Shalimar Contractors Inc. v. American States Ins. Co.*, 975 F. Supp. 1450, 1456-58 (M.D. Ala. 1997)

      e. *St. Leger v. American Fire & Cas. Ins. Co.*, 870 F. Supp. 641, 643 (E.D. Pa. 1994)

2. Other non-traditional pollutants

   a. *Gulf Ins. Co. v. City of Holland*, No.1:98-CV-774 (W.D. Mich. April 3, 2000) (exclusion applied to bar coverage for injuries and damage caused by release of chlorine gas into air)

   b. *Moon and Sue Kim v. State Farm Fire & Cas. Co.*, No. 1-98-3741, 2000 WL 306852, at *5 (Ill. App. Ct. March 24, 2000) (absolute pollution exclusion bars coverage for losses sustained as a result of chemical spill into soil from dry cleaning business)

   c. *DuCote v. Koch Pipeline Co.*, 730 So.2d 432, 437 (La. 1999) (pollution exclusion applied to single incident involving release of ammonia)

   d. *Matheny v. Ludwig*, 742 So.2d 1029, 1034 (La. Ct. App. 1999) (pollution exclusion bars coverage for property damage caused by waste grease)

   e. *Michigan Mut. Ins. Co. v. MITCO*, No. 98-11745 (Minn. Dist. Ct. Aug. 30, 1999) (water mist contaminated with bacteria was "pollutant")

   f. *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 107-09 (Pa. 1999) (pollution exclusion bars coverage for injury arising out of exposure to fumes from a floor coating substance)

   g. *United States Fidelity & Guar. Co. v. Jones Chem., Inc.*, 194 F.3d 1315 (6th Cir. 1999) (Ohio law) (pollution exclusion is unambiguous and bars coverage for bodily injury arising from exposure to liquid chlorine)

   h. *Certain Underwriters at Lloyd's London v. C.A. Turner Constr. Co.*, 112 F.3d 184, 188 (5th Cir. 1997) (absolute exclusion is not limited to discharges causing environmental harm because the language "does not support a distinction between environmental pollution and workplace contamination")