

Products Pollution Liability Insurance:

Another Bridge Spanning the Pollution Exclusion Coverage Gap

Eric McCabe, *National Underwriter Director*
Great American Insurance Group, Environmental Division

Alexander E. Potente, *Partner*
Clyde & Co US LLP

Angela Probasco, *Senior Counsel*
Clyde & Co US LLP

Abstract

Since the introduction of the pollution exclusion in 1970, the scope of its application has remained one of the most highly litigated insurance coverage issues. Whether construed to bar coverage for all damages caused by contaminants, or only damages caused by traditional environmental pollution, the pollution exclusion's resulting coverage gap is significant. Although some form of pollution liability insurance has been available since 1977, pollution liability coverage has not, generally speaking, been a mirror image of the pollution exclusion – reducing, not eliminating, the pollution exclusion's coverage gap. Since the 1990s, the pollution liability insurance market has grown and evolved with an increasing number of options for insureds to further reduce the pollution exclusion's coverage gap, including products pollution liability coverage now offered by a small number of insurers.



Products Pollution Liability Insurance: Another Bridge Spanning the Pollution Exclusion Coverage Gap

INTRODUCTION

Insurers have been issuing pollution liability policies since the late 1970s to fill the gap in general liability coverage created by the pollution exclusion. Until recently, coverage under pollution liability policies has been centered on an insured's liability arising out of its premises and operations, largely overlooking environmental liabilities arising from an insured's products. Recognizing that environmental policies initially tailored to provide coverage for liabilities arising out of an insured's premises and operations left a gap in coverage for liabilities arising from an insured's products, a small number of insurers now offer products pollution liability coverage. This article provides an overview of the complementary relationship between the pollution exclusion and pollution liability insurance policies, focusing on the further reduction of the pollution exclusion's coverage gap by products pollution liability insurance policies.

POLLUTION EXCLUSION COVERAGE GAP

Pollution Exclusion History

"Pollution exclusions originated from insurers' efforts to avoid sweeping liability for long-term release of hazardous waste."¹

Before 1966, the insuring agreement in a standard CGL² policy afforded coverage for bodily injury and property damage "caused by accident."³ In 1966, the insurance industry modified the insuring agreement in a standard CGL policy to broaden coverage by replacing "accident" with "occurrence," defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage that was neither expected nor intended from the standpoint of the insured."⁴ As such, the 1966 revisions "covered property damage resulting from gradual pollution."⁵

POLLUTION EXCLUSION COVERAGE GAP *continued*

1970

Qualified Pollution Exclusion

In 1970, in the wake of the Torrey Canyon disaster,⁶ Santa Barbara off-shore oil spill,⁷ other pollution incidents, and increasing awareness of environmental pollution, the insurance industry introduced a pollution exclusion endorsement to the standard CGL policy, which excluded coverage for bodily injury and 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.”⁸ This “qualified” pollution exclusion included an exception and did “not apply if such discharge, dispersal, release or escape was sudden and accidental.”⁹ In 1973, the qualified pollution exclusion endorsement became part of the main CGL policy form as exclusion “f.”¹⁰

“The evident purpose of this exclusion was to protect the insurer against claims arising from pollution resulting from a gradual and/or continuous exposure to contaminants.”¹¹ “Courts nationwide split on the interpretation of that clause, most pointedly diverging on the application of the terms ‘sudden and accidental’ to instances of gradual pollution.”¹² Courts generally agreed, however, that the qualified pollution exclusion does not apply to product liability claims.¹³



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1985

Absolute Pollution Exclusion

As a result of the conflicting decisions regarding the interpretation of the “sudden and accidental” exception, in 1985, the insurance industry replaced the qualified pollution exclusion with the “absolute” pollution exclusion, which excluded coverage for bodily injury and property damage:

- a. arising out of the actual, alleged, or threatened discharge, dispersal, release, or escape of pollutants
- b. At or from premises you own, rent or occupy;
- c. At or from any site or location used by or for you or others for the handling, storage, disposal, processing or treatment of waste;
- d. 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
- e. 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, treat, detoxify or neutralize the pollutants.¹⁴

In addition to deleting the “sudden and accidental” exception, the absolute pollution exclusion deleted the phrase “into or upon the land, the atmosphere or any water course or body of water” and the word “toxic” from the definition of pollutants.¹⁵ The absolute pollution exclusion also added the four subsections (a)-(d), including “at or from premises you own, rent or occupy,” which some courts have interpreted as expanding the scope of the exclusion to “encompass more than traditional conceptions of pollution.”¹⁶

Other courts have disagreed that the deletion of the phrase “into or upon the land, the atmosphere or any water course or body of water” and other modifications broadened the absolute pollution exclusion’s application beyond “traditional environmental pollution into the air, water, and soil.”¹⁷ Courts have remained in general agreement that the absolute pollution exclusion, like the qualified pollution exclusion, does not apply to product liability claims.¹⁸

1988

Total Pollution Exclusion

In 1988, the insurance industry introduced the total pollution exclusion, which excluded coverage for bodily injury and property damage “which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time.”¹⁹

The purpose of the total pollution exclusion was “to exclude coverage for product releases and certain off-site releases.”²⁰

Consequently, as with the absolute pollution exclusion, courts addressing the scope of the total pollution exclusion have reached conflicting conclusions as to whether the “exclusion bars coverage for all injuries caused by contaminants, or whether the exclusion applies only to injuries caused by traditional environmental pollution.”²¹

POLLUTION EXCLUSION COVERAGE GAP *continued*

Application of Total Pollution Exclusion to Product Liability Claims

While some courts have held that the total pollution exclusion is limited to bodily injury and property damage “arising from events commonly thought of as pollution, i.e. environmental pollution,”²² other courts have held that the total pollution exclusion extends to product liability claims.²³

Examples:

CASE:

The Eighth Circuit Court of Appeals, applying Minnesota law, held that the total pollution exclusion²⁴ applied to an underlying lawsuit arising out of the insured’s delivery of allegedly defective recycled fat that the claimant used as an ingredient in swine feed.²⁵ The court rejected the insured’s argument that the dispersal must be intentionally caused by the insured, as opposed to unintentionally caused by the claimant.²⁶ The claimant alleged that the insured delivered recycled fat, derived from sources such as restaurant cooking oil, which was contaminated with lasalocid and lascaldoil and caused harm including death to the claimant’s swine.²⁷

RESULT:

The court determined that the insured’s actions in “processing waste oil into fat products for use in animal feed” and the claimant’s actions in “blending the contaminated fat into its feed and transporting the feed to its swine facilities in Indiana and Illinois” qualified as “dispersal” of a pollutant for purposes of the pollution exclusion.²⁸

CASE:

A Florida federal court similarly held that the total pollution exclusion²⁹ was unambiguous and to an underlying lawsuit arising out of the insured’s alcoholic beverage that contained “liquid nitrogen to create a smoky effect” and allegedly caused bodily injury to the claimant.³⁰

RESULT:

The court determined that the liquid nitrogen was an “irritant” and, therefore, satisfied the policy’s definition of “pollutant.”³¹ The court also determined that “the allegations in the Underlying Complaint clearly support a finding that the insured poured forth the liquid nitrogen, a ‘pollutant’, into the claimant’s beverage,” relying on the Merriam-Webster Dictionary’s definition of “discharge” as “to pour forth fluid or other contents.”³²

CASE:

The California Court of Appeal also rejected an insured’s argument “that claims based on product defects or failures to warn are not within the scope of the exclusion,” which “relied heavily on a law review article appearing in the Environmental Claims Journal.”³³

RESULT:

In doing so, the court highlighted the differences between an absolute pollution exclusion and a total pollution exclusion:

- Although this article argues that products and completed-operations liability are not within the scope of the absolute pollution exclusion, Exclusion f in the “Coverages” section of claimant’s policy was replaced by a new endorsement, captioned “Total Pollution Exclusion Endorsement.” The contrast between the language of the two versions makes clear that under the operative endorsement in claimant’s policy, there is no coverage for any of the claims in the underlying complaints, even if the products liability claims apply to claimant.

- Exclusion f as it then read thus generally applied to pollution occurring at a particular location for which the insured was somehow responsible. Under this language, liability arising from the sale of a defective product may have fallen outside the exclusion. However, as indicated above, the language in the applicable version of the exclusion is far broader. It applies to any bodily injury “which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal of pollutants at any time.” **This language shifts the focus to injuries that would not have occurred “but for” the discharge of pollutants.** Thus, even on the assumption that claimant’s alleged liability is based on the sale of defective products that contributed to personal injuries caused by silica dust, the injuries would not have occurred but for the discharge of the pollutant. Absent some other provision in the policy excepting product liability claims from the exclusion,³⁴ the exclusion applies.³⁵

Thus, in contrast to the courts’ general agreement that the qualified and absolute pollution exclusions do not apply to product liability claims, courts have reached conflicting conclusions regarding the applicability of the total pollution exclusion to product liability claims as a result of the differing opinions on whether the total pollution exclusion applies only to “traditional environmental pollution.”³⁶

REDUCTION OF COVERAGE GAP THROUGH POLLUTION LIABILITY INSURANCE

Pollution Liability Insurance History



Environmental Impairment Liability Policies

In 1977, insurers began offering “environmental impairment” policies, which provided coverage for “claims arising from single, repeated, or continuing environmental impairments.”³⁷ These early environmental impairment policies typically provided liability coverage “for damage caused by gradual pollution” and excluded coverage for “sudden and accidental” environmental impairment in light of the “sudden and accidental” exception to the qualified pollution exclusion.³⁸

Environmental impairment liability policies were “fairly uncommon and rarely discussed in case law.”³⁹ In the mid to late 1980s, environmental impairment liability policies “largely disappeared from the insurance market” due to “claim expenses significantly outweighing premiums,” “difficulties obtaining reinsurance on these risks,” insureds’ “reluctance to purchase the insurance,” and the policies’ failure to “close up many of the gaps that existed in CGL policies,” among other reasons.⁴⁰

REDUCTION OF COVERAGE GAP THROUGH POLLUTION LIABILITY INSURANCE *continued*

Pollution Buyback Policies

In 1985, when the insurance industry promulgated the absolute pollution exclusion, it also “submitted a companion pollution liability insurance policy to the nation’s insurance regulators,” which was “designed to restore the insurance coverage excluded by the exclusion.”⁴¹

Complementing the language of the absolute pollution exclusion, this “pollution liability buyback policy covered bodily injury and property damage resulting only from a ‘pollution incident,’” defined as “emission, discharge, release or escape of pollutants into or upon land, the atmosphere, or any watercourse or body of water, provided that such emission, discharge, release or escape results in ‘environmental damage.’”⁴² “Environmental damage,” in turn, was defined as “the injurious presence in or upon land, the atmosphere, or any watercourse or body of water of solid, liquid, gaseous or thermal contaminants, irritants or pollutants.”⁴³ These pollution buyback policies did “not provide product liability, completed operations, or toxic tort coverage.”⁴⁴

Post-1990 Resurgence and Expansion of Pollution Liability Policies

From 1990 to 2010, the number of insurance companies offering pollution insurance products increased from four to forty.⁴⁵ By 2010, the available pollution insurance products included pollution legal liability, premises or site-specific pollution liability, contaminated property development, lender environmental protection insurance, and contractor’s pollution liability.⁴⁶ This resurgence and expansion of pollution liability insurance products has been attributed to “the increased interest of federal and state governments in redeveloping contaminated properties known as brownfields.”⁴⁷

Today, more than fifty insurers offer pollution insurance products.⁴⁸ “Unlike property, casualty, and liability insurance, which insurers sell in standard form, the terms of environmental policies are often rigorously negotiated,”⁴⁹ and the terms are customizable.⁵⁰

Although the insurance industry has not promulgated a standard policy form for pollution liability coverage, a typical pollution legal liability policy provides coverage on a claims made and reported basis for both third-party claims and first-party cleanup costs.⁵¹ The liability insuring agreement in a premises or site-specific policy generally provides coverage for loss and cleanup costs resulting from any “pollution condition” on, at, under, or migrating from any covered location.⁵² Likewise, the liability insuring agreement in a contractor’s pollution liability policy generally provides coverage for loss and cleanup costs resulting from a “pollution condition” caused by “covered operations.”⁵³

Neither policy typically provides pollution liability coverage for losses resulting from a “pollution condition” caused by an insured’s product.⁵⁴ Examples of product liability claims that might be excluded from coverage by a total pollution exclusion and outside the coverage afforded by a typical pollution liability policy include the following:



The manufacturer of a rubber piping sealant was named as a defendant in a lawsuit. It was alleged that at a site where its product was used, liquid toxic chemicals seeped from the manufacturing equipment. As a result of the chemical seep, the toxic discharge migrated into the soil and groundwater outside of the facility.



A contractor for a PERC dry cleaner installed a ventilation fan system in its vapor barrier room. The ventilation fan was intended to collect vapor and exhaust it through the stack above the building, relieving dense buildup. The fan was installed correctly; however, due to an alleged manufacturing error, the fan malfunctioned. Unfortunately, several occupants of the dry cleaner complained that they suffered injuries from being exposed to the vapor in the building.



A company leased a hydraulic boom lift for a construction project. The lift was stationed and sat vacant at the job site for two weeks. When the lift was moved, they discovered that the diesel fuel tank had been leaking onto the ground, contaminating the surrounding soil. Authorities were notified, requiring an investigation as well as subsequent soil cleanup. The project owner sought recovery from the leasing company.



When a plant was opening for first shift, a spill of chemicals was discovered around plastic tubing used in its manufacturing process. When the tubing had been installed, it operated properly, with compatible chemicals successfully flowing through the tubing. After an investigation of the spill was conducted, it was determined that the plastic tubing had simply failed, leading to costs necessary to remediate the spill. A claim was made against the tubing distributor.⁵⁵

Products Pollution Liability Coverage

Recognizing that pollution liability policies providing coverage for environmental liabilities arising out of an insured's premises and operations left the pollution exclusion's coverage gap for environmental liabilities arising from an insured's products, several insurers, including Great American Insurance Group,⁵⁶ offer products pollution liability coverage.

Like premises and operations pollution liability policies, the product pollution liability policies provide coverage for loss and clean-up costs as a result of a claim for bodily injury, property damage, or environmental damage because of a pollution condition caused by the insured's product after the product has been put to its intended use by a person other than the insured.⁵⁷ Like other pollution liability policies, a products pollution liability policy is customizable, subject to underwriting guidelines. Potential additional coverages include loss and cleanup costs resulting from a pollution condition caused by the insured's product during transportation by a third party and waste disposal.⁵⁸ Certain product lines, e.g., cosmetics and pharmaceuticals, may not be eligible for products pollution liability coverage.⁵⁹

CONCLUSION

Since the issuance of the first pollution liability policies in the late 1970s, an insured's ability to fill the gap in general liability coverage created by the pollution exclusion has grown significantly. One recent example is the emergence of products pollution liability insurance policies, which provide coverage for an insured's environmental liabilities arising from its products after the products have been put to their intended use by a person other than the insured.

ABOUT THE AUTHORS



Eric McCabe

National Underwriter
Director, Great American
Insurance Group,
Environmental Division

Eric McCabe is a divisional vice president with Great American's Environmental Division, serving as director of the national underwriting department. In his role, he oversees underwriting operations for all lines of insurance products. With an extensive environmental background, McCabe has accumulated over 20 years working within the insurance field and brings expert guidance to his team of underwriters. He is based out of the New York office.

Prior to joining Great American, McCabe worked for a world leading property-casualty and general insurance company as a senior national underwriter, dealing with complex accounts. His responsibilities included evaluating commercial and industrial facilities, environmental consultants and contractors for environmental exposures in order to provide risk transfer solutions.

McCabe's career began as an environmental analyst, conducting various organic and inorganic analyses in accordance with EPA and ASTM methods. After earning his Juris Doctorate degree, he started working at the Town of Smithtown's Department of Environment & Waterways (DEW). At that time, the DEW had the largest environmental budget of any municipality in New York State. Here he reviewed site plans, maintained records and oversight for town environmental compliance issues pursuant to federal, state and county statutes and regulations.

After passing the New York State Bar Exam, McCabe began working as an environmental claims analyst at leading multinational finance and insurance company. Initially working with pollution claims filed under pre-pollution exclusion GL policies, McCabe quickly transferred to the Pollution Insurance Products (PIP) claims department where he handled claims arising under fixed site and contractor's pollution policies.

McCabe's legal training, background in real estate and understanding of secured transactions lead to his promotion to complex director of the PIP high profile claims department where he handled Secured Creditor (SC) and Cost Cap Claims with reserves exceeding five million dollars. McCabe settled over 200 million dollars in claims while simultaneously mitigating millions of dollars through the divestiture of contaminated real estate acquired under the SC program.



Alexander E. Potente

Partner,
Clyde & Co US LLP

Alex Potente is an experienced trial lawyer who represents insurers in complex commercial and insurance litigation matters, including the defense of consumer class actions against insurers, coverage disputes pertaining to general liability and professional liability policies, and bad faith coverage litigation. He handles complex coverage issues arising from pollution (pollution liability and long-tail CGL/excess), product defects, public sector liability, business interruption, medical device, environmental, employment, and sexual and elder abuse. Alex also represents insurance brokers in defense of professional negligence claims.

Chambers USA 2018 has ranked Alex in the category for Insurance, and clients say “he brings youth and enthusiasm, has a good presence and is sophisticated in his analysis.” Alex is a fellow for the prestigious American College of Coverage Counsel.

Experience

- Represents insurance company in lender-placed insurance class actions
- Represented insurance company in multi-state coverage litigation regarding claims for insurance coverage for over 2,000 allegedly defective medical devices
- Represents insurance broker with regard to its errors and omission claims
- Represented insurer as named defendant in putative federal class action regarding self-storage insurance program
- Litigated insurance coverage liability and bad faith claims arising from dry cleaner site; successfully arbitrated California Civil Code § 2860 fee dispute
- Litigated and favorably settled insurance coverage action pertaining to coverage for molestation claims, including bad faith claims
- Represents insurer in coverage dispute pertaining to Los Angeles area Superfund site on National Priorities List
- Currently representing insurer regarding the liabilities of its insured, a dissolving trust, for the Portland Harbor Superfund site
- Represents insurance company in federal coverage and bad faith litigation regarding insurance coverage claims in connection with a landslide which killed many people, injured others and caused massive property damage



Angela Probasco

Senior Counsel,
Clyde & Co US LLP

Angela Probasco has wide-ranging experience representing clients in insurance coverage, extra-contractual, and bad faith litigation as well as in employment, ERISA, and other civil matters. Her core practice consists of advising clients on, and representing them in litigation related to, novel and complex insurance coverage issues, time-limited settlement demands, and a myriad of bad faith allegations. Angela began her legal career as a law clerk to the Honorable Philip Hall, Arizona Court of Appeals.

Experience

- Chaudhri v. State Auto Prop. & Cas. Ins. Co., 795 F. App'x 477 (8th Cir. 2020) Affirmed district court's entry of summary judgment in favor of insurer on breach of contract and vexatious refusal to pay claims arising out of denial of insured's theft claim under business property policy.
- Schuster v. Quanta Specialty Lines Ins. Co., 455 F. App'x 724 (8th Cir. 2012) Affirmed district court's entry of judgment on the pleadings in favor of insurer on breach of contract and bad faith claims arising out of denial of coverage under a broker/dealer and registered representative professional liability policy for underlying lawsuits filed by insured's former clients alleging aggressive and risky investment and excessive trading.
- D & S Realty, Inc. v. Markel Ins. Co., 816 N.W.2d 1 (Neb. 2012) Reversed trial court's judgment entered in favor of insured and remanded for new trial on issues related to insured's failure to comply with policy's repair/replace condition.
- Behrens v. Arch Ins. Co., 631 F.3d 895 (8th Cir. 2011) Affirmed district court's entry of summary judgment in favor of insurer on claims arising out of denial of coverage under life insurance agents errors and omissions policy for underlying lawsuits filed by SEC and insured's former clients alleging he engaged in a Ponzi-like scheme and misappropriated investor funds.

References:

- ¹ *Quadrant Corp. v. Am. States Ins. Co.*, 110 P.3d 733, 737 (Wash. 2005).
- ² From 1940, when the insurance industry issued the first standard liability coverage form, until 1986, CGL stood for "comprehensive general liability." 9A Steven Plitt et al. *Couch on Ins.* § 129:1 (3d ed. Dec. 2020 update). Since the 1986 revisions to the standard liability coverage form, CGL means "commercial general liability." *Id.*
- ³ *Morton Int'l, Inc. v. Gen. Acc. Ins. Co. of Am.*, 629 A.2d 831, 849 (N.J. 1993).
- ⁴ *Id.*
- ⁵ *New Castle Cty. v. Hartford Acc. & Indem. Co.*, 933 F.2d 1162, 1197 (3d Cir. 1991) (Del. law) ("So long as the ultimate loss was neither expected nor intended, courts generally extended coverage to all pollution-related damage, even if it arose from the intentional discharge of pollutants."). See also Thomas M. Reiter et al., *The Pollution Exclusion Under Ohio Law: Staying the Course*, 59 U. Cin. L. Rev. 1165, 1191-94 (1991) (citing primary sources, secondary authorities, and cases in support of conclusion that "the 1966 'occurrence' policy was specifically designed and marketed by the insurance industry, and construed by the courts, to provide coverage for pollution claims arising from long-term exposure to hazardous substances").
- ⁶ On March 18, 1967, tanker ship Torrey Canyon "grounded off the coast of England and eventually broke up and sank after being bombed and burned by aircraft of the Royal Air Force. Its cargo, 119,328 tons of crude oil, was discharged into the Atlantic Ocean and substantial amounts found their way to the beaches on both sides of the English Channel." *In re Barracuda Tanker Corp.*, 409 F.2d 1013, 1013 (2d Cir. 1969).
- ⁷ The "Santa Barbara oil spill disaster of 1969" occurred on January 28, 1969, when "large amounts of crude oil escaped from the ocean floor," "floated to the surface of the ocean, and was carried by wind and tide until it virtually permeated the waters of the Santa Barbara Channel and harbor." *Oppen v. Aetna Ins. Co.*, 485 F.2d 252, 253-54 (9th Cir. 1973).
- ⁸ *States Ins. Co. v. Koloms*, 687 N.E.2d 72, 80 (Ill. 1997); *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374, 381 (N.C. 1986) ("[T]he lessons of Love Canal and sites like it have revealed the yawning extent of potential liability arising from the gradual or repeated discharge of hazardous substances into the environment.").
- ⁹ *Koloms*, 687 N.E.2d at 80.
- ¹⁰ *Id.*
- ¹¹ *Masonite Corp. v. Great Am. Surplus Lines Ins. Co.*, 224 Cal. App. 3d 912, 916-17 (1990).
- ¹² *Belt Painting Corp. v. TIG Ins. Co.*, 795 N.E.2d 15, 19 (N.Y. 2003).
- ¹³ *Cont'l Cas. Co. v. Rapid-Am. Corp.*, 581 N.Y.S.2d 669, 673 (App. Div. 1992) (holding that qualified pollution exclusion "extends to environmental pollution occasioned by intentional discharge of a pollutant in the course of manufacturing or distributive activities by the producer of a product, but does not embrace the harm inflicted by a product fully and finally launched into the stream of commerce, and over which the manufacturer no longer exercises any control"), *aff'd*, 609 N.E.2d 506 (N.Y. 1993). See also Jordan Stanzler & Robert A. Johnson, *Product Liability and Completed Operations Coverage: The Pollution Exclusion Does Not Apply*, 4 *Env'l Claims J.* 479, 481-82 (Summer 1992) (citing cases). But see *Park-Ohio Indus., Inc. v. Home Indem. Co.*, 975 F.2d 1215, 1223 (6th Cir. 1992) (Ohio law) ("[T]he manufacturing defect allegedly resulted in the discharge of pollutants, and the [qualified] pollution exclusion provision precludes coverage for this activity").
- ¹⁴ William P. Shelley & Richard C. Mason, *Application of the Absolute Pollution Exclusion to Toxic Tort Claims: Will Courts Choose Policy Construction or Deconstruction?*, 33 *Tort & Ins. L.J.* 749, 752-53 (1998).
- ¹⁵ *Peace ex rel. Lerner v. Nw. Nat'l Ins. Co.*, 596 N.W.2d 429, 445 (Wis. 1999).
- ¹⁶ *Am. States Ins. Co. v. Nethery*, 79 F.3d 473, 477 (5th Cir. 1996) (Miss. law) (holding that absolute pollution exclusion applied to injuries caused by fumes and chemicals in paint and glue used by insured instead of "non-toxic" paint and glue specifically requested by insured's customer). See also *Peace*, 596 N.W.2d at 448 (holding that absolute pollution exclusion applied to "lead poisoning injuries arising out of the ingestion of lead derived from lead-based paint chips, flakes, or dust").
- ¹⁷ *Mackinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1208-09 (Cal. 2003) ("To say there is a lack of unanimity as to how the clause should be interpreted is an understatement. Although the fragmentation of opinion defies strict categorization, courts are roughly divided into two camps. One camp maintains that the exclusion applies only to traditional environmental pollution into the air, water, and soil, but generally not to all injuries involving the negligent use or handling of toxic substances that occur in the normal course of business. The other camp maintains that the clause applies equally to negligence involving toxic substances and traditional environmental pollution ...").
- ¹⁸ John N. Ellison et al., *Recent Developments in the Law Regarding the "Absolute" and "Total" Pollution Exclusions, the "Sudden and Accidental" Pollution Exclusion and Treatment of the "Occurrence" Definition*, SN050 ALI-ABA 1, 82 n.103 (2008) ("most absolute pollution exclusions do not bar coverage for product liability"); 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, 36 (1998); Stanzler & Johnson, *supra* note 13, at 481-82.
- ¹⁹ *Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 899-900 (3d Cir. 1997).
- ²⁰ *9 Couch on Ins.* § 127:3; see also Ellison et al., *supra* note 18, at 21 ("The endorsement eliminates the pollution coverage left in the policy by the absolute pollution exclusion - products/completed operations coverage and certain off-site discharges.") (quoting *Ins. Servs. Off. Explanatory Memorandum*).
- ²¹ *Am. Nat. Prop. & Cas. Co. v. Wyatt*, 400 S.W.3d 417, 423 (Mo. App. 2013) (internal quotation omitted). See also *Apana v. TIG Ins. Co.*, 574 F.3d 679, 680 (9th Cir. 2009) ("The scope of this exclusion has been described as one of the most hotly litigated insurance questions to arise over the past three decades.") (internal quotation omitted).
- ²² *Doerr v. Mobil Oil Corp.*, 774 So.2d 119, 135 (La. 2000) ("finding that the total pollution exclusion was neither designed nor intended to be read strictly to exclude coverage for all interactions with irritants or contaminants of any kind" and instead should be construed "in light of its general purpose, which is to exclude coverage for environmental pollution") (quoting 9 *Lee R. Suss, Couch on Ins.* § 127:6 n. 62 (3rd ed. 1997)), *op. corrected on reh'g*, 782 So.2d 573 (La. 2001).
- ²³ *E.g., Rest. Recycling, LLC v. Emp'r Mut. Cas. Co.*, 922 F.3d 414, 417-18 (8th Cir. 2019); *Evanston Ins. Co. v. Haven S. Beach, LLC*, 152 F. Supp. 3d 1370, 1375 (S.D. Fla. 2015); *Garamendi v. Golden Eagle Ins. Co.*, 127 Cal. App. 4th 480, 487-88 (2005).
- ²⁴ *Rest. Recycling*, 922 F.3d at 417 (policy excluded coverage for property damage that "would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time").
- ²⁵ *Id.* at 416.
- ²⁶ *Id.* at 416-17.
- ²⁷ *Id.* at 418 ("[T]he policy . . . does not even specify that the insured must cause the 'dispersal,' intentionally or otherwise. . . . Likewise, the processing of the liscadooil into the fat product, and the blending of the fat product into the swine feed, constitutes a 'dispersal' of liscadooil, even if [the insured] and [the claimant] were unaware of its presence.").
- ²⁸ *Id.* at 418 (concluding that these actions "involve[d] the breaking up and distributing of the liscadooil throughout the processed fat product and [claimant's] swine feed") (internal quotations omitted). See also *Evanston Ins. Co. v. Lapolla Indus., Inc.*, 634 F. App'x 439, 441-42 (5th Cir. 2015) (unpublished) (holding that, under Texas law, total pollution exclusion applied to underlying lawsuit arising out of insured's manufacture of spray polyurethane foam that allegedly caused odors and respiratory distress).
- ²⁹ *Haven S. Beach*, 152 F. Supp.3d at 1372 (policy excluded coverage for bodily injury that "would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time").
- ³⁰ *Id.*
- ³¹ *Id.* at 1375.
- ³² *Id.* at 1376.
- ³³ *Garamendi*, 127 Cal. App. 4th at 486 (citing Stanzler & Johnson, *supra* note 13).
- ³⁴ Some total pollution exclusions include an exception for bodily injury and property damage arising out of the "products-completed operations hazard." *Hydro Sys., Inc. v. Cont'l Ins. Co.*, 929 F.2d 472, 475 (9th Cir. 1991) (Cal. law) (holding that styrene gas "liberated in the manufacturing process of [the insured's] true finished good, fiberglass bathtubs," was not "your product" for purposes of exception because styrene gas was not a good "which the insured deals in as his stock or trade") (citation omitted).
- ³⁵ *Garamendi*, 127 Cal. App. 4th at 486-88 (internal citations omitted). See also *Moessner*, 121 F.3d at 899 (Pa. law) (Insurer "does not deny that the original policy would have covered claims similar to those asserted in the underlying product liability actions and that the [absolute] pollution exclusion clause contained therein would not have barred coverage.").
- ³⁶ See, e.g., *In re FEMA Trailer Formaldehyde Prod. Liab. Litig.*, 780 F. Supp. 2d 514, 518-20 (E.D. La. 2011) (discussing differences between Florida and Louisiana law with respect to application of total pollution exclusion to claims against insured).
- ³⁷ *Waste Mgmt.*, 340 S.E.2d at 381 n.5. (internal quotation omitted).
- ³⁸ *Masonite*, 224 Cal. App. 3d at 917.
- ³⁹ *Id.* at 916. See also Robert M. Horkovich et al., *Site Pollution Liability Insurance*, in *Environmental Liability and Insurance Recovery* 499, 506-13 (David L. Guevara & Francis J. DeVeau eds., 2012).
- ⁴⁰ *Id.* at 513-15.
- ⁴¹ Ellison et al., *supra* note 18, at 17.
- ⁴² *Id.* (quoting James H. Brown, La. Ins. Comm'r, Letter to the Editor, *Nat'l Underwriter Prop. & Cas. Ed.*, Apr. 22, 1996 at 30).
- ⁴³ *Id.* at 17-18 (quoting Brown, *supra* note 42).
- ⁴⁴ Stempel, *supra* note 18, at 36.
- ⁴⁵ *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 969 (9th Cir. 2013).
- ⁴⁶ Horkovich et al., *supra* note 39, at 515; Ann M. Waeger, *Current Insurance Policies for Insuring Against Environmental Risks*, SS003 ALI-ABA 1431, 1436 (2010).
- ⁴⁷ Horkovich et al., *supra* note 39, at 515; Waeger, *supra* note 46, at 1434. A "brownfield site" is "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." 42 U.S.C. § 9601(39)(A).
- ⁴⁸ www.usi.com/content/downloads/2019-2020_Q4_Market_Update.pdf.
- ⁴⁹ Caroline Vazquez, *Into the Unknown: The Reach of Environmental Insurance in Cases*, 16 *Conn. Ins. L.J.* 467, 475 (2010).
- ⁵⁰ www.usi.com/content/downloads/2019-2020_Q4_Market_Update.pdf.
- ⁵¹ Horkovich et al., *supra* note 39, at 516; Tod I. Zuckerman, 1 *Env't Ins. Litig.: Prac. Forms* § 7-7 (2020 ed.); Space Sys., 710 F.3d at 973.
- ⁵² *Colonial Oil Indus. Inc. v. Indian Harbor Ins. Co.*, 528 F. App'x 71, 73 (2d Cir. 2013).
- ⁵³ *Atl. Bulk Carrier Corp. v. ALG Specialty Ins. Co.*, 448 F. Supp. 3d 547, 550 (E.D. Va. 2020).
- ⁵⁴ *E.g., Peace Coll. of Raleigh, Inc. v. Am. Int'l Specialty Lines Ins. Co.*, No. 5:09-CV-479, 2010 WL 3743539, at *9 (E.D.N.C. Sept. 16, 2010) (noting that commercial pollution legal liability policy excluded coverage for losses "arising from the Insured's Products after possession of such Insured's Products have been relinquished to others by [insured] or others trading under its name"). Some contractors pollution policies, however, provide products liability coverage for products installed as part of covered operations. See www.aig.com/content/dam/aig/america-canada/us/documents/business/environmental/contractors-pollution-liability-overview-brochure.pdf.
- ⁵⁵ www.greatamericaninsurancegroup.com/for-businesses/property-casualty-divisions/environmental/insider/claims-scenarios-library/details/product-pollution
- ⁵⁶ www.greatamericaninsurancegroup.com/docs/default-source/environmental/products-pollution-fact-sheet.pdf?sfvrsn=e0de43b1_8
- ⁵⁷ www.greatamericaninsurancegroup.com/docs/default-source/environmental/products-pollution-fact-sheet.pdf?sfvrsn=e0de43b1_8; www.ironshore.com/pdfs/press/Environmental_SPILLS_Policy_Enhancement_6_06_2019_002.pdf; www.westchester.com/en/products/brokerage/environmental/monoline-products-pollution.html.
- ⁵⁸ www.greatamericaninsurancegroup.com/docs/default-source/environmental/products-pollution-fact-sheet.pdf?sfvrsn=e0de43b1_8; www.ironshore.com/pdfs/press/Environmental_SPILLS_Policy_Enhancement_6_06_2019_002.pdf
- ⁵⁹ See www.greatamericaninsurancegroup.com/docs/default-source/environmental/products-pollution-fact-sheet.pdf?sfvrsn=e0de43b1_8 ("Ineligible products include cosmetics, products that can be ingested, talcum powder, medical products (invasive), nutraceuticals, pharmaceuticals, turf fields, gym floors, products containing benzene, etc."); www.westchester.com/en/products/brokerage/environmental/monoline-products-pollution.html (restricted classes include "Food, Cosmetic and Pharmaceutical related products, Aerospace products, Medical equipment, Consumer products, Hydraulic fracturing & oil/gas drilling products").