

**SEPT
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Variation in Application of Pollution Exclusions

5 Useful Pieces of Knowledge about Application Variations



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OTHER ENVIRONMENTAL PROSPECTS WE CAN HELP WITH!

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- Fire & Water Restoration Contractors
- Mold/Asbestos/Lead Contractors
- Asphalt and Paving Contractors
- Environmental Contractors
- Waste Water Treatment Plants
- Landfills
- Farms
- Municipalities
- School Districts
- Plumbers, Roofers, & Artisan Contractors
- Hotels, Condo & Apartment Building Owners or Managers
- Property Transfers Including Purchase & Sales, Mergers & Acquisitions
- Roustabouts, Freshwater Haulers, & Fracking Support Contractors

1

First, Some Background



First, Some Background

The creation and enforcement of environmental laws in the 1970s and 1980s imposed liability to businesses for the remediation and cleanup of environmental contamination. In response, to shield themselves from this ever-growing exposure, insurance companies introduced the first pollution exclusions on standard liability and property policies. On a very basic level, pollution exclusions eliminate coverage for bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants.

Probably the most widely-recognized pollution exclusion is the "Absolute" Pollution Exclusion that was brought into use in 1986. The reason "absolute" is in quotation marks is because this exclusion was never formally referred to as such; it was an industry-given nickname of sorts. The exclusion earned its name due to its removal

of the "sudden and accidental" exception found in the original 1973 Commercial General Liability standard pollution exclusion. Perhaps a better name for the infamous exclusion is the "broad form pollution exclusion".

The effects of this pollution exclusion on insurance coverage litigation are curious, to say the least, and continue to this day. As we know, insurance is regulated at the state level. Because of this, states and jurisdictions widely vary in their application of this exclusion. When it comes to litigation involving the "Absolute" Pollution Exclusion, courts generally apply one of two approaches for interpreting its application:

1. The first takes the view of traditional environmental pollution. Under this interpretation, courts interpret pollution exclusions to preclude coverage for those claims that are commonly considered to be "traditional" environmental pollution (i.e. chemical pollutants that cause harm to natural resources).
2. The second approach takes a much broader and literal interpretation of pollution exclusions. Here courts focus on the plain language of policies and apply pollution exclusions to all claims arising from contaminants or irritants that cause property damage or bodily injury.

As you can imagine, this creates a lot of back and forth and overall uncertainty in the insurance industry when it comes to pollution exclusions and how they play out in claims scenarios.



**But Wait,
There Are
More.**



2

But Wait, There Are More?

In addition to the standard pollution exclusion found in most property and liability policies, there are other variations on standard exclusions. Two common examples are the Total Pollution Exclusion and the Fungi or Bacteria Exclusion. The Total Pollution Exclusion, as its name implies, is total exclusion for pollution; it removes the products pollution giveback and other givebacks found in the "Absolute" Pollution Exclusion. The Total Pollution Exclusion is usually an endorsement to the policy.

The Fungi or Bacteria exclusion is unique as it is specific to fungi (mold, mildew, etc.) and bacteria. The exclusion is split into two parts. The first part contains anti-concurrent causation language similar to the Flood Exclusion on a property policy and eliminates coverage for bodily injury and property damage involving fungi or bacteria regardless of the sequence of events related to its presence

or exposure. The second part eliminates coverage basically for any work involving fungi or bacteria; this includes testing, cleaning up, treating, assessing, or in any way responding to fungi or bacteria. Essentially, if you deal with fungi (mold, mildew, etc.) or bacteria in any way in your course of work, you better not have this exclusion on your policy.

It's important to note what pollution exclusions are on your policy and how they read. They may not be called the same thing from policy to policy. The wording on one carrier's Fungi or Bacteria Exclusion may not match another's or it may be called something else entirely. Insurance professionals must stay vigilant and recognize how these exclusions affect their clients and what they do for a living.



Variation That Will Make Your Head Spin!

There is tremendous source put together by BatesCarey LLP that investigates a number of court cases across all 50 states to show whether the pollution exclusion applied or did not apply to a particular substance, material, constituent, or product. For example, the element lead has been put to the "Pollutant Test" many times in numerous states. Specifically, the pollution exclusion was applied against lead in Delaware, Georgia, Nebraska, Oklahoma, and Wisconsin; it was not applied in Alabama, Connecticut, New Hampshire, and Pennsylvania. It's a similar situation for other constituents as well. Take gasoline for example. The pollution exclusion has applied to and deemed gasoline a pollutant in Alabama, Alaska, Arkansas, Indiana, Maine, Montana, and Vermont. In Indiana, Missouri, and Washington, the pollution exclusion was not applied against gasoline. Notice how it was both applied and not applied in Indiana. Confusing, right? This happens more than you think! And these are just the ones

recorded in this report; there are many other cases that aren't mentioned where the pollution exclusion is being applied and when it's not. The main takeaway is it's hit-or-miss when it comes to the application of pollution exclusions, making it something you don't want to mess around with!



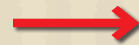
Coming Right Out of Left Field!

Now, let's discuss a few substances or things that have been considered pollutants that might just blow your mind. You might be surprised at some of the things that courts have deemed pollutants and, therefore, pulled the trigger on pollution exclusions. The first is manure. Surprising, right? How can something that farmers purposely spread on fields to fertilize crops be considered a pollutant? Manure has been referred to as "**liquid gold**" for crying out loud! Nevertheless, this is in fact the case. Most recently in Wisconsin, the Wisconsin Supreme Court ruled that manure is a pollutant bringing to the forefront an enormous environmental exposure for farms and farming operations.

Another fun one that many might not think of as a traditional pollutant is curry aroma. In this specific case, a business owner claimed that their products were soiled by the smell of curry, which had been absorbed through shared air duct with a neighboring Indian restaurant. The pollution exclusion was applied in this case and excluded coverage for the loss. Not only is this a surprising application of the pollution exclusion (or maybe not so surprising given the wording in the exclusion), this provides precedence for application in future cases involving odor nuisance.

This next one is kind of a fun one that is worth mentioning: bat guano. To lead off, this particular substance was mentioned in the BatesCarey LLP report in not one, not two, but three different states. The pollution exclusion applied to bat guano in Louisiana and Wisconsin, but was not applied in California. In the two cases the pollution exclusion applied, the argument held that bat guano and its odor are clearly a waste or contaminant within the language of the policies. In California, the court ruled it is not classified as a pollutant, because the insured could not be reasonably expected to believe that the policy excluded coverage for bat infestation.

All in all, there is a good amount of flip flop from state to state, and even within the same state, on what is considered a pollutant and also under what situations something is considered a pollutant and, therefore, coverage is precluded by the pollution exclusion.



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Don't Play Insurance Roulette!

In the first section, we introduced the two main approaches the court system will take when interpreting the application of pollution exclusions. Despite clear prevalence of both of these approaches, a majority of people operate as if only the traditional environmental pollution approach exists. Too many times the response to an explanation on pollution exclusions and the presentation of environmental or pollution insurance is, "But I don't work or deal with hazardous materials or waste, so pollution exclusions don't apply to me and I don't need pollution coverage." The first part may be true, they don't work with hazardous materials or waste, but the second part is a total fallacy. It's clear from case law that pollution exclusions can and do apply to many other things and in no way are restricted to hazardous materials or waste. The evidence is right there in the Bates Carey LLP presentation.

We've seen how courts are all over the board when it comes to their application of pollution exclusions. Sometimes something is a pollutant and in other situations it isn't. It may be in one state and not in another. Our advice is don't play insurance roulette with pollution exclusions. No one can accurately predict how a pollution exclusion will apply pre-loss; it's not until after a loss and in the courts do we see how it turns out. Our favorite saying is, "If you think you know what you're doing when it comes to pollution exclusions, you're probably just confused." It's in your best interest to purchase environmental insurance coverage to fill the gaps created by pollution exclusions; that is the most responsible way to cover environmental loss exposures.

Sources:

Fleischer, Adam H. and Ellen J. Zabinski. *The Pollution Exclusion: Is It Limited to Environmental Harm? A 50-State Survey*. BatesCarey LLP. June 2017.

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- Property Transfers Including Purchase & Sales, Mergers & Acquisitions
- Roustabouts, Freshwater Haulers, & Fracking Support Contractors