



C&DR Briefings

Winter 2013

Pollution Exclusion Applied by Courts to Deny Coverage for Damages from Construction Activities

Pollution Liability Policies Necessary to Fill the Coverage Gap

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Introduction

This newsletter reviews several court decisions from around the United States that applied the pollution exclusion in contractor's commercial general liability (CGL) policies to deny coverage for damages that were deemed to arise from pollution – even though the contractors strenuously argued that pollution was not involved. Examples of matters the courts have found to be pollutants include naturally occurring materials such as dust, sand, dirt, gravel, silt, clay and rocks that become “pollutants” when they end up in a place such as groundwater, a stream or the air, where they would not naturally be located. Cases have also found sulfuric gasses released from Chinese drywall, asbestos from scraping ceiling tiles, diesel fumes from contractor's equipment, carbon monoxide from a faulty heater, non-hazardous construction debris, epoxy fumes and carbon monoxide released from a floor grinding machine all to be “pollutants” and, therefore, excluded from coverage under contractors' CGL policies.

Many of the decisions discussed herein demonstrate that courts are recognizing the intent of the CGL pollution exclusion to exclude coverage for situations even though the “pollutant” is naturally occurring and is not a substance that was man-made, such as chemical or hazardous wastes. After all these years of pollution exclusions being enforced by courts, it is surprising that so many law suits are filed seeking pollution coverage under policies that contain pollution exclusions. Instead of spending money on attorney's fees and court cases trying to force environmental pollution damages into standard policy coverage, a more prudent and cost-effective risk management approach would be for contractors and facility operators to purchase pollution insurance coverage, such as an owner's pollution legal liability (PLL) policy or a contractor's pollution liability (CPL) policy that is specifically designed to provide pollution coverage.

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Project owners hiring contractors can protect themselves from pollution liability arising out of the contractor’s work by requiring the contractor to maintain a CPL policy that names the owner as an additional insured. This is a good way to pre-qualify firms before contracting with them.

Additionally, contractors performing services that have a chance of creating a pollutant in the course of their operations should consider purchasing a contractor’s pollution liability (CPL) policy to cover that risk.

Cases have upheld applicability of the exclusion in a variety of settings involving CGL policies, including the following:

The widespread dissemination of silica dust as a by-product of industrial sandblasting operation would commonly be thought of as environmental pollution and thus came within the exclusion. The court also noted that there need not be wholesale environmental degradation to constitute pollution. *Garamendi v. Golden Eagle Ins. Co.* (2005) 127 Cal.App.4th 480, 486, 25 Cal.Rptr.3d 642.

The pollution exclusion precluded coverage of a rock quarry operator’s activities for placing dirt and rocks in creek bed; dirt and rocks were pollutants subject to the exclusion *Ortega Rock Quarry v. Golden Eagle Ins. Corp.* (2006) 141 Cal.App.4th 969, 980–981, 990, 46 Cal. Rptr.3d 517.

A layperson reasonably would understand release of methylene chloride into public sewer is a form of environmental degradation; coverage precluded even if the triggering event was a negligent one-time release. *American Casualty Co. of Reading, PA. v. Miller* (2008) 159 Cal. App.4th 501, 515, 71 Cal.Rptr.3d 571.

The pollution exclusion barred coverage for offensive and injurious odors coming from a compost facility and spreading more than a mile away. *Cold Creek Compost, Inc. v. State Farm Fire & Casualty Co.* (2007) 156 Cal. App.4th 1469, 1471, 68 Cal.Rptr.3d 216.

Natural organic fertilizer has been held to be a pollutant within the meaning of CGL pollution exclusions when the fertilizer leached into groundwater or contaminated water sources. *Space v. Farm Family Mutual Ins.*, 235 A.D.2d 797.

Naturally occurring hazardous substances are deemed pollutants when an “unnatural process” such as mining, causes them to be found in a location other than where they originally naturally occurred. *Gold Fields Am. Corp. v. Aetna Casualty*, 295 A.D.2d 289.

Ingestion and absorption of lead in paint chips by an individual at a rental property was excluded from coverage. *Auto-Owners Insurance Co. v. Hanson*, 588 N.W.2d 777 (Minn. App. 1999).

Pollution exclusion barred coverage for lung injuries suffered by individuals inside an ice rink that resulted from nitrogen dioxide, a toxic by-product of a Zamboni ice-cleaning machine. The court held that “merely bringing a Zamboni machine on the premises merits exclusion under [the policy].” *League of Minn. Cities Insurance v. City of Coon Rapids*, 446 N.W.2d 419 (Minn. App. 1989).

Case Notes on Decisions Denying Pollution Coverage

Asbestos Damages Excluded under Condominium Association’s Property Insurance Policy

Where a property insurance policy for a condominium association contained a pollution exclusion, there was no coverage afforded for damages arising out of a contractor’s work for an asbestos remediation contractor. The association hired the contractor to scrape acoustical ceilings and stairways that contained some asbestos.

While performing the work, asbestos fibers were released into the air including the common area hallways, stairwells, some individual units and even some areas outside the building. A comprehensive building abatement was required. Recovery could not be obtained from the contractor since its GL policy contained a specific asbestos exclusion, and the firm itself was insolvent.

When the association’s property insurance carrier declined coverage, the association filed suit alleging the policy did not specifically state that damage caused by asbestos was not covered; the policy was ambiguous despite a broad and clearly stated total pollution exclusion that would appear to exclude any and all pollution claims regardless of the type of pollution.

The association also argued that the release of asbestos was only a one-time event caused by negligence of a contractor and was not the type of “release” that the pollution exclusion was

intended to apply to. In *Villa Los Alamos Homeowners Association v. State Farm Insurance Company*, 198 Cal. App. 4th 522 (Cal. 2011), the court upheld a trial court decision in favor of the insurance company, finding that damages were excluded from coverage under the policy.

In granting summary judgment for State Farm, the trial court stated it is a “fact of common knowledge” that asbestos is a pollutant. State and federal laws that define asbestos as a “toxic pollutant” were also deemed instructive as whether asbestos was a pollutant within the meaning of the policy. The question then was whether the manner in which it was released, and by whom, would affect whether it would be deemed a “pollutant” within the meaning of the “pollution exclusion” of the insurance policy. In this regard, the court concluded, “it is irrelevant whether it was negligent or intentional or a one-time incident.”

What was most important to the court was the scope of the release and the fact that it was released in the environment – particularly becoming airborne and making it to the street, driveways, gardens and sidewalk.

It did not matter to the court whether the dispersal of the asbestos was widespread or local, or whether it was recurring or just a “one-time” release. The court completely rejected the Association argument that “[r]elease of asbestos in a single condominium building is not [a] ‘dispersal’ such that a reasonable layperson insured would understand it to be ‘environmental pollution’ subject to the exclusion.” One-time events, says the court, can create a “pollution event” that is subject to the policy’s pollution exclusion.

Examples of such events provided by the court include a worker who sustains injury from contact with wastewaters containing chemicals from repairing a sewer line. Even a one-time event that causes an “impurity, something objectionable and unwanted” can constitute an “environmental pollution” subject to the pollution exclusion of the policy, explains the court.

Damages Caused by Chinese Drywall Excluded from Coverage under Homeowner’s Insurance

Chinese drywall caused damage that was not covered under a homeowner’s insurance policy because of several exclusions for (1) faulty, inadequate or defective materials; (2) latent defects; (3) rust or corrosion; and (4) pollution. Two years after purchasing their home, the homeowners began having chronic malfunctions in their heating, ventilation and air conditioning (HVAC) system. It was determined that Chinese drywall had been

used in building the home and that it was releasing sulfuric gases causing corrosion of various metal components including HVAC coils, refrigerator units, electrical wiring, plumbing, jewelry, appliances, electronics and other household items.

The homeowners filed suit against the homebuilder, the builder’s CGL insurance carrier (State Farm Insurance) and their homeowner’s insurer (Louisiana Citizens). On cross motions for summary judgment on the homeowner’s policy, Louisiana Citizens argued that each of the four exclusions reference above applied to bar coverage under the policy. The trial court granted summary judgment in favor of the insurance company. This was affirmed on appeal in *Ross v. C. Adams Construction & Design, LLC*, 70 So.3d 949 (La. 2011) for the reasons explained herein.

CGL Pollution Exclusion Applies to Dust and Diesel Fumes

Dust and exhaust fumes emanating from a cement company’s construction operations at a nearby airport caused injuries to a group of nearby homeowners including contaminated drinking water, breathing disorders and psychological damage. The cement company tendered the claim to its CGL insurer to defend and indemnify it against the pending lawsuit. However, a provision in the policy excluded coverage caused by pollution. The trial and the appeals court in *Devcon Int’l Corp. v. Reliance Ins. Co.*, 609 F.3d 214 (3d Cir. 2010), concluded the exclusion was clear and unambiguous in its application to the injuries in this case.

In this case, a cement company was sued by a group of homeowners alleging that during construction of a nearby airport, the company generated large quantities of dust and exhaust fumes. The plaintiffs in the personal injury case claimed that the dust contaminated the homeowners’ drinking water and cisterns and caused breathing disorders, which led to other “unspecified physical, emotional and psychological damage.” They also alleged that emissions from construction vehicles were causing similar problems.

The trial court found that the pollution exclusion removed coverage for the plaintiffs’ injuries and that the insured had no reasonable expectation of coverage for such harms because they were beyond

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the scope of coverage. Summary judgment for the insurer was entered by the trial court.

On appeal, the cement company argued that it reasonably believed its policy would provide coverage for construction-related harms, such as those caused by dust and engine fumes, and it urged the court to extend coverage under the doctrine of reasonable expectations. It further argued that the policy exclusion was meant to exclude coverage for environmental pollution akin to dumping of hazardous waste and that "the exclusion is ambiguous, not because a particular term in the policy is susceptible to multiple interpretations, but because the exclusion would remove coverage for a large number of harms that do not implicate the environmental catastrophes that the exclusion was supposedly intended to address."

In affirming the trial court decision, the appellate court determined that the harms alleged by the homeowners were not covered because "the policy provides no insurance coverage when bodily injury or property damage results from airborne solids and fumes such as the dust clouds and engine exhaust."

The court acknowledged the result of its decision might seem harsh but that it is not the court's responsibility to provide a result different from that for which the parties bargained for in their policy. As explained by the court:

"If it seems harsh to leave [insured] without coverage, we reiterate that both [insured] and [insurer] are sophisticated businesses capable of bargaining to protect their interests. Indeed, it is no stretch to consider that injuries caused by clouds of dust and diesel fumes generated constantly over a period of several months represent the type of harm from which [insurer] sought to shield itself when drafting the pollution exclusion. [Insured] accepted the insurance policy with full knowledge of the exclusion's broad language. It is not inequitable to hold [insured] to the terms of its bargain, even if, in retrospect, it wishes that it had negotiated for greater insurance coverage."

For these reasons, the court concluded that the pollution exclusion applied to the injuries described in the underlying complaint and that the policy provided no coverage for the alleged harms.

Construction Debris is an Excluded Pollutant under Professional Liability Policy

Where an engineering company was sued by its real estate developer client for allegedly negligently performing a Phase I Environmental Site Assessment (ESA) for failing to discover and report that

construction debris and underground storage tanks were buried on the site, the engineer's professional liability carrier denied coverage due to the pollution exclusion in the policy. In *James River Ins. Co. v. Ground Down Engineering*, 540 F.3d 1270 (11th Cir. 2008), the court concluded that the construction debris described in the complaint "would be considered an environmental impairment," and coverage would be denied by the first sentence of the exclusion that states, "Pollution/ environmental impairment/ contamination is not covered under this policy."

The developer purchased the affected property after the engineer reported there were no recognized environmental conditions. Subsequently, the developer found a significant amount of buried construction debris, several 55 gallon drums and "half an underground storage tank." The developer alleged that the construction debris caused elevated levels of methane gas that required environmental remediation.

The engineer's PL insurance policy contained a pollution exclusion, and the carrier denied coverage in reliance upon that exclusion. In agreeing with the carrier that the damages were excluded from coverage, the court made several significant points. They rejected the argument that for pollution to be subject to the exclusion, it must have been "caused by" the insured. According to the court, because the exclusion applies to pollution claims "arising out of" the insured's performance of services, it does not matter whether or not the insured "caused" the condition. With regard to the claims for damages based on the construction debris, the court found that they are explicitly within the exclusion and barred from coverage. As stated by the court, "Although the alleged conduct was negligence in performing the site assessment, Priority's claim depends upon the existence of environmental contamination."

The argument that construction debris is not a pollutant within the meaning of the exclusion fails for two reasons, per the court.

- (1) The complaint plainly alleged that the damages associated with the construction debris "come from elevated levels of methane gas caused by the debris." The complaint even listed the debris under the heading "environmental contamination."

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(2) The pollution exclusion is not limited just to matters normally considered as “irritants” and “contaminants.” The definition of “irritants or contaminants” includes “waste.” The definition of “waste,” in turn, includes “all ... materials to be disposed of, recycled, stored, reconditioned or reclaimed.” The court concluded, “Only a strained reading of this language would exclude construction debris causing elevated levels of methane gas from this definition.”

Epoxy Fumes are “Pollutants” and Excluded from Coverage under CGL Policy

The pollution exclusion in a CGL policy issued by Firemen’s Fund excluded coverage for damages arising out of a claim asserted by a warehouse employee alleging she developed respiratory problems as a result of inhaling fumes from epoxy sealant. Firemen’s insured the subcontractor that installed concrete flooring (with an epoxy and urethane protective sealant) at that warehouse. In a declaratory judgment action against the insurance company, the subcontractor and additional insured prime contractor asked the court to rule that the pollution exclusion was ambiguous and could not be enforced to exclude coverage for the injuries in this case. In *Firemen’s Ins. Co. of Washington, D.C. v. Kline & Son Cement Repair, Inc.*, 474 F. Supp. 779, the appellate court reached two significant determinations in holding that the exclusion barred coverage: (1) the court found that epoxy/urethane fumes are pollutants as defined by the CGL policy and (2) the terms “discharge,” “dispersal,” “seepage,” “migration,” “release” and “escape” are not ambiguous in the context of this case.

The insureds argued that the policy definition of “pollutant” was ambiguous and unenforceable as applied to the personal injury allegations.

In holding that epoxy fumes fall within the definition of “pollutant” and are excluded from coverage, the court cited a Virginia decision that confronted the issue of whether heating oil is a “pollutant.” The court ultimately concluded that the ordinary meaning of the word “contaminant” encompassed fuel oil leaking from fuel lines into the soil and that a plain reading of the entire pollution exclusion clause supported the court’s conclusion that heating oil was considered a pollutant pursuant to relevant policy language. In the current case, the court cited a scientific report stating that the harmful effects of epoxy fumes are well known: it may cause moderate irritation to the respiratory system, its vapor may irritate the nose and throat, and persons using the product should guard against inhaling its harmful fumes and vapors.

“In addition,” said the court, “when canisters of a liquid or other compound are brought onto

premises, opened, and the material, upon exposure to the air or after application to the surface, causes noxious fumes to emanate and make a person nauseous, dizzy or otherwise feel ill, the fumes are clearly pollutants.” The court found the term “pollutant” unambiguously includes the fumes released from the epoxy/urethane sealant applied to the warehouse floor.

In this case, the insureds argued that the words “discharge, dispersal, seepage, migration, release or escape” are environmental terms of art that should apply only to discharges of pollutants into the environment. In rejecting this argument, the court stated that the policy did not reference the words “environment,” “environmental,” “industrial” or any other limiting language that would suggest the pollution exclusion is not equally applicable to both “traditional” and indoor pollution scenarios. The court concluded that the pollution exclusion clause applied to the situation in the case where a pollutant (epoxy floor sealant) was applied to the surface of the warehouse floor, was dispersed into the air above and around the warehouse floor, and eventually reached a worker’s office where she later inhaled the toxic fumes.

Pollution Exclusion Bars Coverage for Damage Caused by Dirt and Rocks

The case of *Ortega Rock Quarry v. Golden Eagle Insurance Corp.*, 141 Cal. App. 4th 969, held that the pollution exclusion applies to dirt and rock that is discharged into a creek for a construction site. The U.S. Environmental Protection Agency (EPA) issued an administrative order to the operator of a rock quarry, and subsequently filed a lawsuit, alleging that the operator had discharged fill material consisting of dirt and rocks into a creek without a permit. The quarry operator tendered defense to its CGL insurers who denied coverage based on policy pollution exclusions.

The rocks and dirt in question were placed by the operator along a stream bed to fill in the quarry’s main access road, which had been washed out by the overflowing creek during severe storms. Some of these fill materials then apparently eroded into the creek. The EPA order directed the quarry operator to cease the discharge of fill material and submit an erosion control plan and site restoration plan for both the site and for the creek.

The insurers asserted that dirt and rocks were pollutants within the policy definitions and thus subject to the pollution exclusion. It did not matter that dirt and rocks are naturally occurring in nature.

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The fact that the operator dumped them into the waterway made them pollutants.

The court held that natural dirt and rocks are pollutants within the meaning of the Clean Water Act when placed in waters of the United States. Because the rocks and dirt had been moved from their natural location into the stream bed, they became pollutants within the meaning of the pollution exclusion of the policies.

Carbon Monoxide is a Pollutant and Excluded from CGL Coverage

Several decisions have enforced the pollution exclusion of a CGL policy to exclude coverage for injuries allegedly caused from carbon monoxide. In the first case, the plaintiff was injured by carbon monoxide emitted from a propane-powered grinder being used to grind terrazzo floors while another contractor's worker was working in the same area installing drywall.

The worker filed suit in state court against the owner of the grinder, alleging the company was negligent in failing to provide proper ventilation when operating its grinders and failed in its duty to properly monitor the work environment for carbon monoxide gas.

The insurance companies filed a separate declaratory judgment action in federal court contending that the absolute pollution exclusion bars coverage. The court granted summary judgment in favor of the insurance companies, and was affirmed in *Continental Casualty Co. v. Advance Terrazzo*, 462 F.3d 1002 (8th Cir. 2006), with the court holding carbon monoxide is an "irritant" that was "dispersed" throughout the work site by the insured contractor. Moreover, the court held that this was a pollutant "brought on" to the premises by the contractor and was excluded from coverage.

The court rejected *Advance Terrazzo's* argument that it did not bring the pollutant (carbon monoxide) onto the premises but instead merely brought on the machine containing LP gas, which is not a pollutant. The court declined to make a distinction between bringing on the machine with LP gas and that carbon monoxide was directly emitted by using the machine. As explained by the court, because the contractor brought the machine that produced the carbon monoxide onto the premises, "it falls squarely into the policy language triggering the absolute pollution exclusion."

Similarly, the court in the case of *Nautilus Ins. Co. v. Country Oaks Apartments*, 566 F.3d 452 (5th Cir. 2009), found that the pollution exclusion of a CGL policy unambiguously applied to exclude liability coverage for injuries caused by carbon monoxide

"seeping, discharging, releasing and dispersing" into an apartment.

The coverage question arose when an apartment tenant filed suit against the landlord, alleging that as a result of carbon monoxide accumulating in her apartment from a stopped-up heater vent, she gave birth to child with a number of problems, including seizures.

Although the property owner admitted that carbon monoxide is a gas, it argued that it is not an "irritant or contaminant" because it does not generally irritate or contaminate but rather is a naturally occurring environmental substance encountered by individuals at various concentrations on a daily basis. In rejecting the owner's argument, the court cited previous case law in which it had explicitly rejected the argument that a substance must generally or usually act as an irritant or contaminant before it can be considered to constitute a "pollutant" under the pollution exclusion. Even a normally occurring substance such as saltwater can be a "contaminant," explained the court, "when it is introduced accidentally onto property that is not meant to receive it."

The only way carbon monoxide could have accumulated in the apartment was for it to be "emitted" from the furnace, said the court, and "[t]he normal emission of carbon monoxide from an apartment furnace falls within the plain meaning of the terms 'discharge,' 'disperse,' 'seep,' and 'release.'" A gradual release is deemed sufficient by the court to meet these requirements. The court rejected the property owner's argument that a "more robust event" than the normal emission of carbon monoxide from a home appliance is required to trigger the pollution exclusion.

In the case of *Concord Gen. Mutual Insurance v. Green & Co. Bldg. & Dev. Corp.*, 2010 WL 3618713 (N.H., 2010), a court held that there was no "occurrence" as defined by the CGL policy when repairs had to be made to chimneys in new houses due to leaking flue gasses and carbon monoxide.

Soon after the houses were completed and sold, the developer began receiving complaints from homeowners about the chimneys, and the homeowners filed suit. In response to the suit, the developer demanded that its CGL insurer provide it with defense and indemnification.

The developer's insurance company filed a declaratory judgment action against both the developer and the contractor's insurer, asking the court to declare that coverage was not triggered under the policy for the allegations contained in

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the lawsuits. The insurance carriers filed for summary judgment, arguing that the carbon monoxide caused no physical damage and that the claims were essentially for faulty workmanship, which they contend was not covered by the policies. Summary judgment was granted and affirmed on appeals with the court finding that the carbon monoxide caused no physical, tangible alteration to any property. As far as arguments that bodily injury from carbon monoxide could occur to homeowners if the chimneys were not repaired, the court concluded carbon monoxide can be considered a "pollutant," and, consequently, any bodily injury resulting from the carbon monoxide could be excluded from coverage pursuant to the pollution exclusion.

Silica Claim Barred by Total Pollution Exclusion in CGL Policy

Silica dust from sand-blasting operations was deemed to be a "pollutant" and subject to the pollution exclusion of the CGL policy. Plaintiffs alleged they were exposed to silica and silica dust at their employment for many years, as a result of actions by 49 defendants. Among the defendants was Pauli Systems, Inc., which was alleged to have designed, tested, evaluated, manufactured, mined, packaged, furnished, supplied and/or sold abrasive blasting products, protective gear and equipment, safety equipment and/or sandblasting-related materials, equipment, products, etc.

In response to plaintiffs' suit, Pauli Systems tendered the defense to Golden Eagle, which denied coverage based on the pollution exclusion endorsement. Pauli

Systems (hereinafter the "Claimant") then sued Golden Eagle, seeking a court order for coverage. Claimant argued that silica is not a pollutant because it is not smoke, vapor, soot, fumes, acid, alkalis, chemicals or waste, and is found in commonplace materials such as sand, glass and concrete.

In rejecting that argument, the court in *John Garamendi v. Golden Eagle Ins. Co.*, 127 Cal. App. 4th 480 (2005) stated that even if silica is not one of the enumerated items of pollution in the policy, the listing is not exclusive. In addition, the court found that silica dust comes within the broad definition of "any solid, liquid, gaseous or thermal irritant or contaminant." The court also pointed out that silica dust is identified by federal regulations to be an air contaminant. Thus, the court explained that:

"The widespread dissemination of silica dust as an incidental byproduct of industrial sandblasting operations most assuredly is what is 'commonly thought of as pollution' and 'environmental pollution.'"

The court held that:

"Even on the assumption that the 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, the exclusion applies."

...silica dust comes within the broad definition of "any solid, liquid, gaseous or thermal irritant or contaminant."

Conclusion

There are numerous court decisions holding that the CGL pollution exclusion can be applied to deny coverage for a wide variety of items that courts have found to be "pollutants" based on the meaning of the policy. Rather than asking courts to grant pollution coverage that carriers never intended to cover under a CGL policy, a more prudent insurance solution for those companies with a known environmental risk would be to maintain a separate policy specifically designed to cover its potential pollution liability.

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