Your Martini May Be Really Dirty

The Ever-Evolving CGL Pollution Exclusion

By Andrea Reisbord and Kerri Nelson

The number of jurisdictions that have adopted the "minority view" on the pollution exclusion is not insubstantial.

Commercial general liability (CGL) coverage claims stemming from pollutants or contaminants present unique and complex insurance coverage issues. Environmental contamination cases may span decades, implicating multiple insurers and multiple policies with differing pollution exclusions or no exclusion at all. Personal and industrial injury claims can also span decades, but such cases more often present questions regarding whether the injury's source can properly be characterized as a "pollutant." To address the insurance coverage issues that these types of claims present, it is important to understand the evolution of the CGL policy's pollution exclusion and the contexts in which it applies (or doesn't apply). Interpretation of even standard pollution exclusion language can vary widely across jurisdictions. While issues arising when multiple insurers or policies are implicated is beyond the scope of this article, and this article cannot address every interpretation of the pollution exclusion, many of the issues pertinent to its application are discussed.

A Brief History of the Pollution Exclusion

The drafting history of the CGL policy and its pollution exclusion have been extensively discussed and summarized by the courts. *See, e.g., MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205 (Cal. 2003); *American States Ins. Co. v. Koloms*, 687 N.E.2d 72 (Ill. 1997); *Upjohn Co. v. New Hampshire Ins. Co.*, 476 N.W.2d 392 (Mich. 1991) (Levin, J. *dissenting*). *See also New Castle County v. Hartford Acc. & Indem. Co.*, 933 F.2d 1162 (3rd Cir. 1991).

Early CGL policies contained no pollution exclusion. Before 1966, the standard CGL policy provided coverage for bodily injury and property damage "caused by an accident." *MacKinnon*, 73 P.3d at 1209. As the term "accident" was not defined in the policy, courts generally held that the term

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encompassed "unintended injury or damage resulting from, among other things, extended exposure to pollutants." *Upjohn*, 476 N.W.2d at 408. *See also New Castle County*, 933 F.2d at 1196.

In response to the courts' interpretation of the policy, the insurance industry revised the CGL policy in 1966 to provide "occurrence-based" coverage, and the revision defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results, during the policy period, in bodily injury and property that was neither expected nor intended from the standpoint of the insured." *New Castle County*, 933 F.2d at 1196–97. After this amendment, courts continued to construe the policy to cover damages resulting from long-term, gradual exposure to environmental pollution. *MacKinnon*, 73 P.3d at 1210. Further, courts extended coverage to all pollution-related damage as long as the ultimate loss was neither expected nor intended, even if it arose from the intentional discharge of pollutants. *New Castle County*, 933 F.3d at 1197; *Upjohn*, 476 N.W.2d at 408.

Around the same time, public awareness of the environmental effects of pollution increased, and Congress substantially amended the Clean Air Act, adding environmental cleanup provisions. *MacKinnon*, 73 P.3d at 1209–10. Some states required pollution exclusions in all commercial and industrial liability policies to ensure that corporate polluters would "bear the full burden of their own actions spoiling the environment." *See Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 385 (2003). Thus, in the early 1970s the standard-form CGL policy was revised, and a pollution exclusion added. The exclusion, which would come to be known as the "qualified" pollution exclusion, provided in relevant part:

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

See MacKinnon, 73 P.3d at 1210. What followed has been decades of litigation over the meaning of the phrase "sudden and accidental," and in particular, the meaning of the word "sudden." *Id.*

Following years of litigation, the standard ISO CGL Coverage Form was again amended in 1985 to incorporate a new pollution exclusion: the "absolute" pollution exclusion. *MacKinnon*, 73 P.3d at 1210. The two most notable features of the absolute pollution exclusion were the elimination of the exception for the sudden and accidental release of pollution and the removal of any reference to "land, the atmosphere or any watercourse or body of water." *Id.* The exclusion, which continues to be used today, is prefaced by the simple statement that the insurance does not apply to these circumstances:

> f. Pollution
> (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants"

See ISO Properties, Inc. Form CG 00 01 04 13. While the current version of the CGL Coverage Form goes on to limit application of the pollution exclusion to releases of pollutants from certain types of sites and locations, general liability policies are frequently endorsed with a "total pollution exclusion endorsement" that attempts to eliminate all coverage for pollution-related incidents regardless of their location, source, or cause. *See, e.g.,* ISO Form 21 49 09 99 (stating that the insurance does not apply to injury that "would not have occurred in whole or in part but for the actual, alleged or threatened discharge… of 'pollutants.'").

Issues Arising Under the "Qualified" Pollution Exclusion

Coverage issues arising under the "qualified" pollution exclusion have tended to center on (1) the meaning of the term "sudden and accidental," and (2) whether it is the discharge or the damage flowing from the discharge or release that must be "sudden and accidental." The former issue has been described as "one of the most hotly litigated insurance coverage questions of the late 1980's [*sic*]" and one that has "precipitated 'a legal war… in state and federal courts from Maine to California.'" *See Koloms,* 687 N.E.2d at 81 (quoting J. Stempel, *Interpretation of Insurance Contracts: Law and Strategy for Insurers and Policyholders* 825 (1994)); *Sokoloski v. American West Ins. Co.*, 980 P.2d 1043, 1045 (Mont. 1999) (quoting *Northern Ins. Co. of New York v. Aardvark Assoc., Inc.*, 942 F.2d 189, 191 (3rd Cir. 1991).

The meaning of the term "sudden" continued to be litigated well into the 2000s.

Coverage issues arising under the "qualified" pollution exclusion have tended to center on (1) the meaning of the term "sudden and accidental," and (2) whether it is the discharge or the damage flowing from the discharge or release that must be "sudden and accidental."

Ultimately, the majority of jurisdictions considering the issue have concluded that the term "sudden" connotes a temporal limitation, requiring that the discharge be instantaneous or abrupt, as opposed to merely unexpected, for the exception to apply. A state-by-state survey of the issue can be found in Randy J. Maniloff and Jeffrey W. Stempel, *General Liability Insurance Coverage Key Issues in Every State* 437–70 (Matthew Bender & Co. Inc. 3d. ed. 2015). While analytic variations exist, the basic, common thread that runs through the majority line of cases is the general rule of construction that insurance policies should be interpreted in a manner that gives meaning to all terms and avoids rendering terms superfluous. Under these rules, "sudden" must inject a temporal element because the word "accidental" already encompasses notions of unexpectedness

and lack of intent. *See, e.g., Sokolowski v. American West Insurance Co.,* 980 P.2d 1043 (Mont. 1999); *Hybud Equipment Corp. v. Sphere Drake Ins. Co., Ltd*., 597 N.E. 2d 1096, 1101–03 (Ohio 1992) (collecting cases). One court explained its reasoning as follows: "The word 'sudden' is used in tandem with 'accidental,' and 'accidental' in liability insurance parlance means unexpected or intended; thus to construe 'sudden' to mean 'unexpected' is to create a redundancy." *Bd. of Regents of the Univ. of Minn. v. Royal Ins. Co. of Amer.*, 517 N.W.2d 888, 892 (Minn. 1994). Courts have further reasoned that because the policy's "occurrence" requirement already required that the event be unexpected to fall within the insuring agreement, the term "sudden" had to have a temporal aspect; otherwise the phrase "sudden and accidental" would add nothing to the policy. *See, e.g., Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 847 (N.J. 1993).

While the current exclusion has come to be known as the "absolute," or in the case of the endorsement, "total," pollution exclusion, in practice, it appears to be anything but.

The number of jurisdictions espousing the "minority view," however, is not insubstantial. *See* Maniloff & Stempel, *supra*. These courts cite a number of bases for concluding that the phrase "sudden and accidental" is, at best, ambiguous and should refer to unexpected and unintended pollution. First, they attach considerable significance to the existence of multiple dictionary definitions of the term "sudden," which refer both to the temporal element, and to the unexpectedness of the happening. *See, e.g., Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570 (Wis. 1990); *New Castle County*, 933 F.2d at 1193; *Upjohn Co.*, 476 N.W.2d at 406 (Levin, J. *dissenting*). Courts also find the jurisdictional split significant, noting that while the presence of conflicting judicial decisions does not automatically mandate a finding of ambiguity, the division at least suggests that the term "sudden" is susceptible to more than one meaning. *See, e.g., New Castle County*, 933 F.2d at 1196; *Greenville County v. Ins. Reserve Fund*, 443 S.E.2d 552 (S.C. 1994). Finally, courts adopting the "minority" view place particular significance on the drafting history, particularly representations made to various state regulators at the time the qualified pollution exclusion was introduced. *See, e.g., Just*, 456 N.W.2d at 575; *New Castle County*, 933 F.2d at 1197–98; *American States Ins. Co. v. Kiger*, 662 N.E.2d 945, 948 (Ind. 1996). Notably, the insurance companies and rating agencies represented to the various insurance commissioners that the proposed exclusions were merely clarifications of existing coverages, the occurrence definition in particular, and were intended to exclude only intentional polluters. *Just*, 456 N.W.2d at 575; *New Castle County*, 933 F.2d at 1197–98. *See also Queen City Farms v. Aetna Cas. & Sur. Co.*, 882 P.2d 703, 723 (Wash. 1994).

A second issue arising under the "qualified" pollution exclusion concerns whether it is the release or event that has to be "sudden and accidental," or whether the phrase applies solely to the resulting damage. Courts generally resolve this question by highlighting the distinction between the "occurrence" requirement, which focuses on the property damage, and the pollution exclusion itself. *See New Castle County*, 933 F.2d at 1200 n.68 (compiling cases). *See also United States Fidelity & Guarantee Co. v. Star Fire Coals, Inc.,* 856 F.2d 31 (6th Cir. 1988); *In re Acushnet River & New Bedford Harbor*, 725 F. Supp. 1264, 1268 n.8 (D. Mass. 1989). They have concluded that the focus of the sudden and accidental exception "is on the nature of the discharge of the pollution itself, not on the nature of the damages caused." *Star Fire Coals*, 856 F.2d at 34. *See also New Castle County*, 933 F.2d at 1200 and n.68; *Transamerica Ins. Co. v. Sunnes*, 711 P.2d 212 (Or. App. 1985). Accordingly, these courts have generally held that, for the exception to apply, the discharge itself must be sudden and accidental.

Issues Arising Under the "Absolute" Pollution Exclusion

As indicated, a new pollution exclusion was introduced in the mid-1980s remaining relatively unchanged to the present. This version removed the "sudden and accidental" exception that had impelled so much litigation, and it also eliminated any reference to the "land, the atmosphere or any watercourse or body of water." While the current exclusion has come to be known as the "absolute," or in the case of the endorsement, "total," pollution exclusion, in practice, it appears to be anything but.

Two primary issues have consumed the courts since the "absolute" pollution exclusion was introduced, specifically whether the damage at issue was caused by a "pollutant," and whether the damage was caused by a "discharge, dispersal, release or escape" of the pollutant. While the courts' decisions on these issues tend to be highly fact specific, resolution often seems to turn on whether the jurisdiction views the exclusion as applying solely to traditional environmental pollution claims, or broadly interprets it to extend to any injury involving a toxic substance. *See* Maniloff & Stemple, *supra,* at 471–510. At least one state, Indiana, simply finds the standard absolute pollution exclusion to be ambiguous in all respects, refusing to apply it even to traditional environmental contamination claims. *See id*. at 486–87.

The Meaning of "Discharge, Dispersal, Release or Escape"

With respect to "discharge, dispersal, release or escape," courts that narrowly interpret the absolute pollution exclusion again focus on drafting history and the "raison d'etre" for the 1980s amendment, which was to provide an "appropriate means of avoiding 'the yawning extent of potential liability arising from the gradual or repeated discharge of hazardous substances *into the environment*.'" *MacKinnon,* 73 P.3d at 1211 (quoting *Koloms,* 687 N.E.2d at 81) (emphasis in original). And despite the removal of any reference to land, air, or water, these courts view "discharge, dispersal, release or escape" as terms of art that describe environmental

pollution, the common meaning of which imply the expulsion of the pollutant over a considerable area rather than a "localized toxic accident occurring in the vicinity of intended use." *See id*. (cataloging cases).

Thus, in states adopting the narrow view, the exclusion will not apply to toxic injuries stemming from the localized application of pesticides in and around a building, a carbon monoxide leak from an appliance, exposure to lead paint or paint fumes, or other injuries resulting from everyday activities "gone slightly, but not surprisingly, awry." *See MacKinnon*, 73 P.3d 1205 (pesticide sprayed to kill wasps); *Western Alliance Ins. Co. v. Gill*, 686 N.E.2d 997 (Mass. 1997) (carbon monoxide from malfunctioning oven and listing everyday activities); *Porterfield v. Audubon Indem. Co.*, 856 So.2d 789 (Ala. 2002) (lead paint); *Atlantic Mut. Ins. Co. c. McFadden*, 595 N.E.2d 762 (Mass. 1992) (lead paint); *Arnold v. Cincinnati Ins. Co.*, 688 N.W.2d 708 (Wis. App. 2004) (finding that the application of chemicals for their intended use of removing mold from siding was not a discharge or release).

On the other hand, a minority of jurisdictions apply the absolute pollution exclusion literally, finding its terms unambiguous and holding that the exclusion is not limited to traditional environmental pollution. *See Midwest Family Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628 (Minn. 2013) (listing jurisdictional split). These courts reason that the omission of the "into or upon the land, atmosphere, or any water course or body of water" clause significantly broadened the scope of the exclusion. *Auto-Owners Ins. Co. v. Hanson,* 588 N.W.2d 777 (Minn. App. 1999); *Shalimar Contractors v. American States Ins. Co.*, 975 F. Supp. 1450, 1457 (M.D. Ala 1997); *Oates by Oates v. State*, 597 N.Y.S.2d 550, 554 (N.Y. Ct. Cl. 1993) ("[W]e cannot imagine a more unambiguous statement of intent than, after being told by the courts that 'land, atmosphere, and water course' imply industrial pollution, to replace such language with 'premises you own, rent, or occupy'"); *Apana v. TIG Ins. Co.*, 504 F. Supp. 2d 998, 1006 (D. Haw. 2007) ("The Total Pollution Exclusion Endorsement… excludes coverage for bodily injuries resulting from the contamination of the air" after a plumber working at a Wal-Mart poured strong drain cleaner down a maintenance drain, resulting in noxious fumes that affected a person near that drain).

For these jurisdictions, "dispersal" can encompass processes that might otherwise not be considered traditional environmental pollution. For example, in *Restaurant Recycling, LLC v. Employer Mut. Cas. Co.*, 2017 WL 3016763 (D. Minn. Jul. 14, 2017), the insured processed waste cooking oil into products that were later blended into animal feed. Several shipments of the oil products were contaminated with lasalocid and lascadoil, which in sufficient quantities can harm animals. The insured argued, among other things, that the "contaminants were not dispersed because they were never separated from the fat product," and the "damage… was not caused by the *dispersal* of lasalocid and lascadoil but rather their *presence* in the feed." *Id.* at *4 (emphasis in original). The district court quickly dispensed with these arguments. It noted that the dictionary definition of "disperse" includes "to cause to break up" and "to cause to become spread widely." The court reasoned that the contaminants were blended into the products, which were then blended again into the animal feed: "[i]n other words, contaminants were dispersed throughout fat and then dispersed again through the swine feed." *Id.* at *3. The Eighth Circuit agreed, noting that the exclusion's use of passive voice also defeated the insured's argument that "dispersal" must imply intentional acts by the insured. *Restaurant Recycling, LLC v. Employer Mut. Cas. Co.*, 922 F.3d 414, 418–19 (8th Cir. 2019). Although not cited in *Restaurant Recycling*, in 2017 a Michigan state court faced with a similar lasalocid and lascadoil case had reached the same conclusion under Michigan law. *Capitol Specialty Ins. Corp. v. Superior Feed Ingredients, LLC,* Kent County, Michigan Case No. 16-01276-CKB, (citing *Townsends of Arkansas, Inc. v. Millers Mut. Ins.*, 823 F. Supp. 233, 241 (D. Del. 1993)); *Pure Tech Sys., Inc. v. Mt. Hawley Ins. Co.*, 95 F. App'x 132, 136 (6th Cir. 2004) (applying Ohio law).

But again, other courts disagree. *See Sphere Drake Ins. Co. v. Y.L. Realty Co.*, 990 F. Supp. 240, 243 (S.D.N.Y. 1997) (noting that the exclusion was not broadened to cover lead paint, in part because the "discharge, dispersal, release or escape" "terms of art" still remained); *Belt Painting Corp.,* 100 N.Y.2d at 386 (rejecting *Oates,* 597 N.Y.S.2d 550).

Defining the Term "Pollutant"

For the most part, courts have tended to take similar approaches in evaluating whether a given substance constitutes a "pollutant" as defined in the policy. Policies incorporating the absolute pollution exclusion define "pollution" to mean "any solid, liquid, gaseous or thermal irritant or contaminant, including vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed." *See* ISO Form CG 00 01 04 13, at 15.

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The federal government classifies carbon monoxide as a pollutant and regulates its concentration under the Clean Air Act. 40 C.F.R. §50.8 (2012). The Minnesota Pollution Control Agency classifies carbon monoxide as a "criteria pollutant" that it actively regulates. Minn. R. 7005.0100, subp. 8(a) (2011). While there may be substances that are difficult to establish as "pollutants" for purposes of the absolute pollution exclusion, carbon monoxide is not one of them.…

> Carbon monoxide is also an "irritant" under the Midwest policy. Merriam-Webster's Collegiate Dictionary 171 (10th ed. 2001) defines carbon monoxide as "a colorless odorless very toxic gas." Here, carbon monoxide was discharged or released into the air, causing physical irritation to appellants.

Wolters, 831 N.W.2d at 637. In applying the "non-technical, plain-meaning approach," the court followed prior precedent in which it had found that asbestos fibers were "irritants" under the qualified pollution exclusion despite the fact that asbestos was a naturally occurring mineral rather than a by-product of industrial pollution or a waste material. *Id.* (citing *Board of Regents of the University of Minnesota v. Royal Insurance Company of America*, 517 N.W.2d 888, 892 (Minn. 1994)).

For jurisdictions applying this nontechnical approach, "contamination" can also encompass substances that might otherwise not be "pollutants" as the term is traditionally understood. For example, in *Restaurant Recycling,* 2017 WL 3016763, the contamination involved lasalocid and lascadoil that were unknowingly incorporated into the swine feed. Lasalocid is a medication used in chicken and turkey feed. Lascadoil is a byproduct of lasalocid production that can be used as a biofuel but not for consumption by animals. *Id.* at *1. The insured argued that the pollution exclusion should not preclude coverage for the resultant liability lawsuit "because lasalocid can be administered to swine and other animals at safe levels and, therefore, is not a contaminant." *Id.* at *3. The court disagreed, noting that "the mere fact that a substance is safe at certain levels does not necessarily exclude it from being a contaminant." *Id.* at *3.

Some states take a contextual approach to whether the injury-causing substance meets the definition of a "pollutant," finding that a substance's status as either a valued ingredient or a contaminant depends on where it is. *United States Fire Ins. Co. v. Ace Baking Co.*, for instance, concerned a dispute over the contamination of ice cream cones that were stored in the same warehouse as was a fabric softener containing linalool, an otherwise harmless ingredient that had migrated from the softener to the ice cream cones and its packaging, causing the cones to smell and taste of soap. 476 N.W.2d 280 (Wis. App. 1991). The Wisconsin Court of Appeals held that the pollution exclusion precluded coverage for the contamination of the insured's products by any substance foreign to those products. *Id.* at 283. Noting that "it is a rare substance indeed that is *always* a pollutant" and that "the most noxious of materials have their appropriate and non-polluting uses," the court concluded that although linalool was a valued ingredient for some uses, and therefore, not a contaminant for those uses, it fouled the insured's baking products, so it was a "pollutant" in relation to those products. *Id.* (emphasis in original).

Another example of this concept can be found in *Wilson Mutual Ins. Co. v. Falk*, 857 N.W.2d 156 (Wis. 2014), a case that addressed whether cow manure that had seeped into neighboring wells was a pollutant. Describing the manure as "liquid gold," the Wisconsin Court of Appeals concluded that a reasonable farmer would not consider manure to be a pollutant because manure has long been a normal and necessary part of the operation of a dairy farm. The Wisconsin Supreme Court, however, reversed. It stressed that the harm-causing substance had to be viewed in the context of the occurrence for which the insureds sought coverage. *Falk*, 857 N.W.2d at 168–70. Thus, while a reasonable insured might not consider manure safely applied to a field to be a pollutant, a reasonable insured would consider it to be a pollutant when introduced into a well. *Id.* at 171.

The Fifth Circuit recently took this approach in a case involving "rock fines," small rock particles from a quarry generated by crushing stone. *E. Concrete Materials, Inc. v. ACE Am. Ins. Co.*, 948 F.3d 289, (5th Cir. 2020). Generally, these rock particles are washed and sold. But when the particles were accidentally released into a nearby creek, the court, applying Texas law and using a context-specific analysis, held that the pollution exclusion applied:

> We agree that *Cleere Drilling Co.* [v. *Dominion Expl. & Prod., Inc.*, 351 F.3d 642, 651 (5th Cir. 2003)] is instructive. The definitions of "contaminant" this court adopted in that case are particularly helpful. The court noted that "Black's Law Dictionary defines contamination as a '[c]ondition of impurity resulting from mixture or contact with foreign substance.'" *Id.* (alteration in original) (quoting Black's Law Dictionary 318 (6th ed. 1990)). The court also cited Webster's Third New International Dictionary, which "defines the verb, 'to contaminate' as 'to soil, stain, corrupt, or infect by contact or association… to render unfit for use by the introduction of unwholesome or undesirable elements.'" *Id.* (alteration in original) (quoting Webster's Third New International Dictionary 491 (1986)).
>
> Rock fines do not fit either definition when we ask whether they affected the quality of the water in Spruce Run Creek. Perhaps rock fines were "undesirable elements" when discharged into the creek. But they did not "mix" with the creek in a way that made it "impure." Nor did they "soil, stain, corrupt, or infect" the creek or "render [it] unfit for use." To the contrary, according to a notice issued by the Department shortly after the incident, the rock fines posed "no threat to drinking water, nor to anyone who would use the area for fishing nor to the fish that they might catch."
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> But when we look at the effects on the overall ecosystem, rock fines are contaminants. Eastern Concrete's own counsel described the incident as pumping "a deleterious substance resulting in a negative impact to a trout producing stream and a documented habitat for threatened or endangered species." And Eastern Concrete's expert explained that the incident "chang[e]d the flow and contours of the stream, including areas used for trout spawning" and "physically cover[e]d the micro and macro invertebrates that serve as a food source for fish and other species." The rock fines, in short, "render[e]d [the creek] unfit for use" as a habitat for trout and other species. This explains why Eastern Concrete was required to remove the rock fines from Spruce Run Creek.

Id. at 301–02. Similarly, excess storm water has been held to be an excluded pollutant:

> With respect to the pollutant exclusion, the only question before the court is whether water was a pollutant in this instance. It is undisputed that excess water, resulting from the Defendant's

development activity and perhaps exacerbated by unexpected rainfall, caused damage when it left Defendant's development site and ran onto the Claimants' property and ultimately into creeks and rivers. [Under prior case law], storm water is a pollutant and "[w]hen rain water flows from a site where land disturbing activities have been conducted… it falls within [the description of a pollutant]."

Travelers Indem. Co. of Connecticut v. Douglasville Dev., LLC, 2008 WL 4372004, at *9 (N.D. Ga. Sept. 19, 2008) (second and third alterations in original) (internal citations omitted).

One surprising use of the contextual approach—this time to conclude that a substance that one ordinarily would consider a pollutant was not—was by the Missouri Court of Appeals in *Hocker Oil Company, Inc. v. Barker-Phillips-Jackson, Inc.*, 997 S.W. 2d 510 (Mo. App. 1999). *Hocker Oil* involved the failure of a drain plug at a gas station. The resulting spill released approximately 2,000 gallons of gasoline into the surrounding soil, which migrated onto private property. The insurer, Ranger Insurance Company, denied coverage, citing the pollution exclusion, but the appellate court held that the exclusion was ambiguous and did not apply because it did not explicitly list "gasoline" as a pollutant. Despite the extent of the spill, the court noted, "Hocker is in the business of transporting, selling and storing gasoline on a daily basis. Gasoline is not a pollutant in its eyes. Gasoline is the product it sells." *Id.* at 518. The Missouri Supreme Court distinguished *Hocker Oil* in a subsequent case involving a metallurgical facility that released toxic emissions into the environment, holding that the pollution exclusion was not ambiguous in that context. *Doe Run Resources Corp. v. American Guarantee and Liability Ins.*, 531 S.W.3d 508 (Mo. 2017). However, it did not reject the holding of *Hocker Oil* that "an ordinary insured would not construe the policy to exclude the very business operations for which it purchased coverage." *Id.* at 512.

Finally, perhaps one of the more interesting recent applications of the pollution exclusion—and the inspiration for the title of this article—is found in *Evanston Ins. Co. v. Haven S. Beach*, LLC, 152 F. Supp. 3d 1370, 1372 (S.D. Fla. 2015). The plaintiff was served "an alcoholic beverage containing liquid nitrogen," which was used "to create a smoky effect." The plaintiff was injured when she drank "the liquid nitrogen infused beverage." The court held that liquid nitrogen was an "irritant," and the beverage vendor "discharged" the liquid nitrogen by pouring it forth into the drink. *Id.* at 1376.

Conclusion

The extended timelines involved in many environmental or industrial-related injury claims mean that practitioners will continue to see policies with many varieties of the qualified, absolute, and total pollution exclusions. Additionally, some insurers are writing state-specific endorsements that modify the pollution exclusion to attempt to address idiosyncratic interpretations by the courts of those states. And some claims will trigger older policies that have no pollution exclusion whatever. Coverage practitioners need to be cognizant of the many potential issues that arise across various jurisdictions. Finally, as science continues to identify new substances such as nanoparticles, insurers and practitioners will need to stay abreast of new potential pitfalls. We expect that the pollution exclusion and its applications will continue to undergo further evolution—and possibly dispersal and migration, as well.