What Exactly Is A Pollutant Under The Pollution Exclusion?

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Here's a riddle: When is a substance a pollutant? The answer may affect you, because the standard general liability policy contains a coverage exclusion for damages arising out of the release of pollutants. As the policy forms change and evolve, so do the insurers' definitions of pollutants. Although the standard insurance policy promulgated by the Insurance Services Office – ISO – tries to define "pollution," the courts still wrestle with that term. Thus, the answer depends on several factors, which makes for an elusive answer, particularly after one looks at the varying judicial interpretation of the general liability pollution exclusion.

ISO stated that the original pollution exclusion was intended to avoid coverage for ongoing dumping of pollutants into the environment. In 1973, ISO's "Comprehensive General Liability" policy excluded damages "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 water course or body of water." The exclusion did not apply if the discharge was "sudden and accidental."

The reference to "discharge" of "toxic chemicals" into bodies of water, or land, or the atmosphere thus conjured up images of blackened factory smokestacks billowing gaseous waste into the environment. As one state's Supreme Court observed, the "ordinary, popular meaning of the phrase 'the atmosphere' connotes the external atmosphere that surrounds the earth and consists of the air and any gases or particles therein." This understanding was in line with the intent of the original pollution exclusion. But ISO revises its pollution exclusion every few years, which makes things a little more confusing.

By 1986, after extensive litigation and varying precedent concerning the scope of the original exclusion, ISO introduced the "absolute pollution exclusion," a new version of the pollution exclusion, now excluding damages "arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants…at or from premises you own, rent or occupy." The revised policy broadened the definition of "pollutants" to "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." The requirement that the discharge be made into the "atmosphere" or "watercourse" expanded to "premises you own, rent or occupy." The intended result was to eliminate insurance coverage in most situations for any pollution damage, although later versions allowed for several exceptions to the exclusion, which would allow coverage.

For its part, ISO dubbed the revamped exclusion the "absolute pollution exclusion." Although we still called it a "CGL" policy, with the adoption of the absolute pollution exclusion, the formal name of the liability policy changed from a "comprehensive general liability" policy to a "commercial general liability" policy.

Subsequent ISO forms broaden the exclusion slightly to include "seepage" or "migration" of pollutants to "any premises, site or location" currently "or at any time" owned or occupied by the insured, among other things. The list of the pollution-related injuries not covered by the policy, with an equally substantial list of exceptions to those exclusions, makes up the longest exclusion in the general liability policy. Nevertheless, many questions remain as to what is a pollutant.

The pesky answer that is still unclear to both the ordinary policyholder, and in many cases, the claims handler, is what is covered and what is excluded under the policy. Most people will probably agree that the stuff coming out of a factory smokestack or illegally dumped in a river is pollution. But what about when an insurance carrier invokes the pollution exclusion to disclaim coverage for illness or damages due to less obvious sources, such as furnaces leaking carbon monoxide, pool chemicals, or household chemicals?

There have been mixed judicial decisions, even where different courts are interpreting the same policy language. For instance, where carbon monoxide is released indoors, some courts rule in favor of coverage, looking to the initial intent of the exclusion and the reasonable expectations of the insured, finding coverage for "injuries resulting from everyday activities gone slightly awry." Examples include faulty home furnaces, leaking restaurant exhausts, or even emissions from the use of a Zamboni inside a hockey rink. These courts found coverage under the respective policies, even though these chemical emissions are harmful to people.

In other jurisdictions, courts have found that carbon monoxide is a pollutant and is excluded by the pollution exclusion. These courts reason that the policy no longer requires an "industrial" or environmental release, and moreover, the federal government classifies carbon monoxide as a pollutant. Therefore, in contrast to the other jurisdictions, injuries caused by leaks of carbon monoxide from household furnaces and – oddly enough – emissions in another Zamboni case were *not* covered. Clearly, there are some jurisdictional differences that contribute to seemingly opposite results. But carbon monoxide is a harmful waste product; what about chemicals that are useful?

Even with useful products, too much of a good thing is bad. Damages from ordinary chemicals such as soap, ammonia, bleach, and fabric softener have been excluded under the pollution exclusion. Of course, what constitutes "too much" has been debated. One court refused to classify ordinary chemical compounds as pollutants, where the chemicals were harmful only in high concentration, such as a small room. Another court framed the issue completely differently, writing that it "defies logic" to suggest that a chemical compound does not qualify as a pollutant simply because when highly diluted, it doesn't noticeably irritate the human body. Moreover, "any discharge could, theoretically, be dispersed with adequate ventilation," resulting in very few, if any, chemicals which would qualify as pollutants.

In other words, while the first court said that a high concentration of a chemical to which people are normally exposed in low concentrations *is not* pollution, the second court wrote that when people are exposed to very low amounts of a pollutant normally concentrated, that that substance is pollution. Clearly, judges frame the issue quite differently.

At different times, many courts have enumerated the substances generally found to be "pollutants" within the pollution exclusion. These lists often include asbestos, carbon monoxide, gasoline, fuel oil, lead paint, pesticides, and emissions from Chinese drywall as excluded under the policy, but not always, because it depends on where the substances are found. For example, fuel oil in a tank is not categorized as a pollutant until it is introduced to a place where is doesn't belong, which usually is after a discharge into the environment. The substances most often cited as not being pollutants are muriatic acid, styrene resins, carbon monoxide, pesticides, carbon monoxide, lead paint, bacteria and spray paint. Note there is some overlap between the two lists.

Other courts have observed, quite correctly, that pollutants that cause damage not because of their toxic nature, but because of other effects, do not fall within the pollution exclusion. Thus, the rushing liquid from an overflowing sewer pipe that caused flood damage was not necessarily an excluded event under a commercial policy. While the liquid was both waste and an irritant, the flood-like nature of the discharge, rather than its polluting character, was at issue. Another court observed that bodily injury suffered by one who trips and falls on the spilled contents of a can of Drano is not injured because of a pollutant, nor is an individual suffering from an allergic reaction to chlorine in a public pool.

Insurance policies do not attempt to list each and every substance and the circumstances under which it is a pollutant; nor could they, and as a result the exclusion refers broadly to irritants or contaminants, which then leaves some room for interpretation. At that point, the elasticity of the English language further complicates the matter. One court summed it up as follows: "So it is that we speak of releasing a balloon into the atmosphere but letting the air out of a tire."

Thus, the original question of "when is a substance a pollutant?" simply involves too many variables to reach a general answer. Whether interpreting the earlier or the later broadened exclusions, American courts are divided as to the applicability of the pollution exclusion. The definition of a pollutant varies by several factors, including the state where the risk is located, by the precise version of the insurance policy at issue, by the nature of the discharge and by the nature of the injury. So the final answer to the pollution riddle must wait for another day.

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