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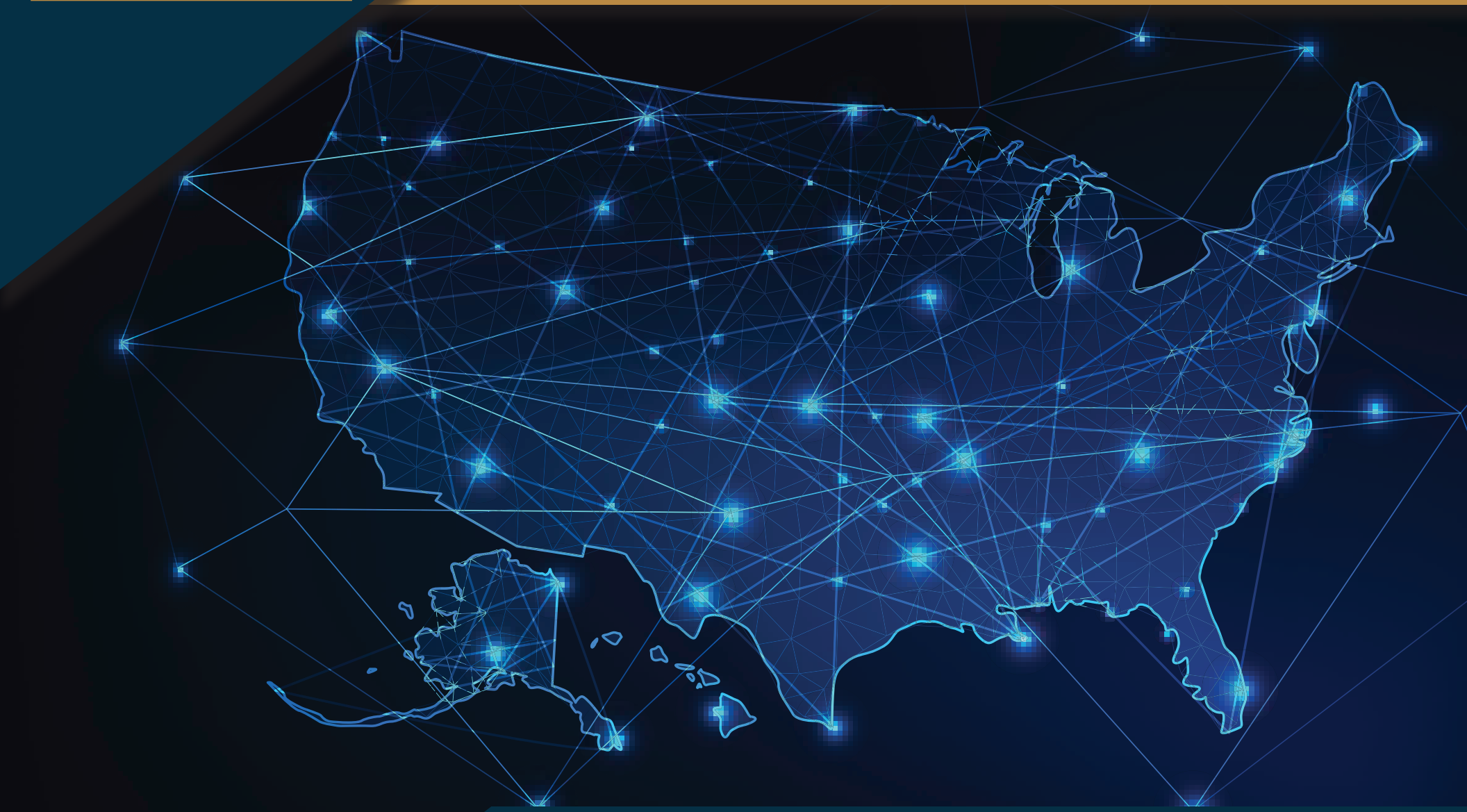
50 State Survey

Court Interpretations of the Pollution Exclusion in CGL Policies



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Court Interpretations of the Pollution Exclusion in CGL Policies

Most commercial general liability policies contain exclusions for pollution related losses. Courts are divided in their interpretation of these exclusions. Some courts hold that only traditional environmental "pollutants," such as oil and industrial waste, are excluded. Others interpret the exclusion more broadly, applying it to any substance that could be considered a "pollutant" (i.e. an "irritant or contaminant") under a plain reading of the term. Finally, some courts approach their interpretation of the exclusionary language in a fact-specific manner.

Courts may use one of the following theories to explain their holdings:

Unambiguous Policy Language Approach: The "unambiguous policy language" approach holds that the plain wording of the pollution exclusion is not limited to traditional "pollutants" and, therefore, any substance that falls within the broad definition of "pollutant" is excluded.

Reasonable Expectations of the Insured Approach: The "reasonable expectations of the insured" approach holds that ambiguous insurance terms are resolved based on the reasonable expectations of the insured. Courts that follow this approach believe that the term "pollutant" is ambiguous, and thus requires an interpretation based upon the reasonable expectations of an ordinary insured, limiting the exclusion to traditional environmental pollutants.

This survey is intended to summarize the interpretations of the CGL policy's pollution exclusion across the fifty states.

The map on the following page identifies how each state has analyzed the meaning of the term "pollutant" in CGL pollution exclusions. Dark blue indicates the law is favorable to policyholders, in that the pollution exclusion has been limited to traditional environmental pollutants. Yellow indicates caution; the state may have interpreted the term "pollutant" in different ways or may not have addressed the meaning of the exclusion. Red indicates that the state has adopted an expansive interpretation of the term "pollutant," such that coverage is more likely excluded.

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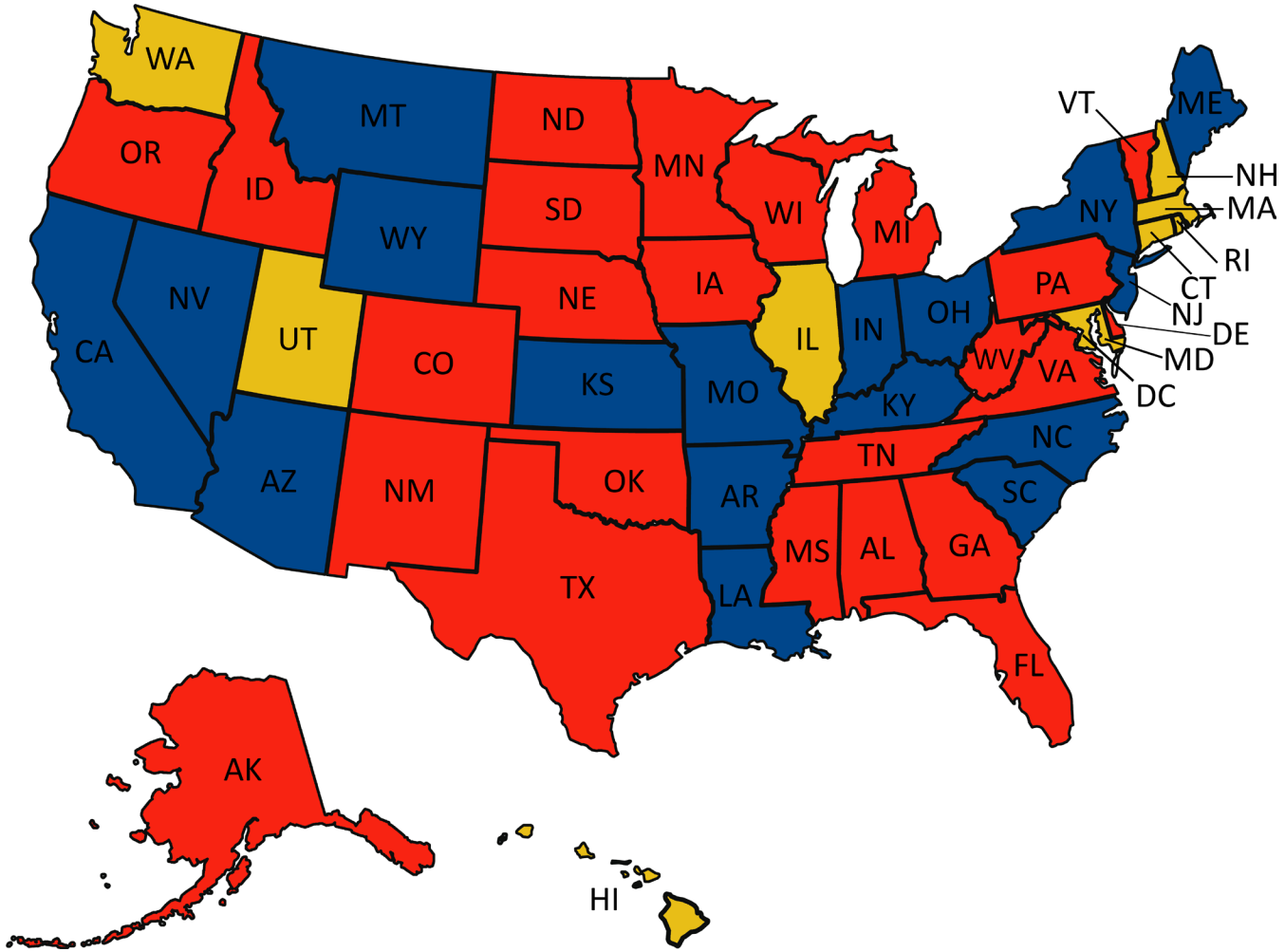
For more information or questions on pollution exclusion strategies, please contact us at coverage@sdvlaw.com.



Court Interpretation of Pollution Exclusion in CGL Policies

The term "pollutant" has been limited to traditional environmental pollutants.

It is unclear whether "pollutants" are limited to traditional environmental pollutants.

The term "pollutant" has been found to include various substances not traditionally considered environmental pollutants.

State	Policyholder Impact	Pollution Exclusion Limited To Traditional Environmental Pollutants?	Relevant Authority	Substance at Issue/Holding
 Alabama	Unfavorable	No	*Federated Mut. Ins. Co. v. Abston Petroleum, Inc.*, 967 So.2d 705 (Ala. 2007) *Maine Fur, Inc. v. Auto-Owners Ins. Co.*, 426 Fed. Appx. 687 (11th Cir. Mar. 31, 2011)	Gasoline found to be a pollutant under unambiguous policy language approach. Curry aroma found to be a pollutant under the reasonable expectation of the insured's approach.
 Alaska	Unfavorable	No	*Whittier Props., Inc. v. Alaska Nat'l Ins. Co.*, 185 P.3d 84 (Alaska 2008)	Gasoline found to be a pollutant under unambiguous policy language approach.
 Arizona	Favorable	Yes	*Keggi v. Northbrook Property and Cas. Ins.*, 13 P.3d 785 (Ariz. Ct. App. 2000) *Nat'l Fire Ins. Co. of Hartford v. James River Ins.*, 2016 WL 613964 (D. Ariz. Feb 16. 2016)	Bacteria found not to be a pollutant because the plain language of the exclusion did not include bacteria. Hydrogen sulfide found not to be a pollutant because the plain language of the exclusion did not include hydrogen sulfide.
 Arkansas	Favorable	Yes	*Minerva Enters., Inc. v. Bituminous Cas. Corp.*, 851 S.W.2d 403 (Ark. 1993)	Septic tank back-up found not to be a pollutant because the policy was ambiguous as to the meaning of "pollutant."
 California	Favorable	Yes	*MacKinnon v. Truck Ins. Exchange*, 73 P.3d 1205 (Cal. 2003)	Pesticide used to kill insects found not to be a pollutant under reasonable expectations of insured doctrine.
 Colorado	Unfavorable	No	*Mountain States Mut. Cas. Co. v. Roinestad,* 296 P.3d 1020 (Colo. 2013)	Cooking grease found to be a pollutant under the reasonable expectations doctrine because exclusion was not limited to "traditional pollutants."
 Connecticut	Unclear	Unclear	Compare: *Yale Univ. v. CIGNA Ins.Co.*, 224 F. Supp. 2d 402 (D. Conn. 2002) with: *Nat'l Grange Mut. Ins. Co. v. Caraker*, 2006 Conn. Super. LEXIS 815 (Conn. Super. Ct. Feb. 28, 2006)	In *Yale*, asbestos was found to be a pollutant under the unambiguous policy language approach. (Note that the court addressed a pollution exclusion under a property policy, as opposed to a CGL policy. However, the court examined a number of cases involving CGL pollution exclusions, in order to reach its conclusions). In *Nat'l Grange*, asbestos was found not to be a pollutant under the reasonable expectations of insured doctrine.
 Delaware	Unfavorable	No	*Farm Family Cas. Co. v. Cumberland Ins. Co.*, 2013 Del. Super. LEXIS 427 (Del. Super. Ct. Oct. 2, 2013)	Lead paint found to be a pollutant under unambiguous policy language approach.

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 District of Columbia	Unfavorable	No	*Nat'l Elect. Mfrs. v. Gulf Underwriters Ins.*, 162 F.3d 821 (4th Cir. 1998) (Applying District of Columbia law)	Welding fumes found to be a pollutant under unambiguous policy language approach.
 Florida	Unfavorable	No	*Deni Associates v. State Farm Ins.*, 711 So. 2d 1135 (Fla. 1998) *First Specialty Ins. Corp. v. GRS Mgmt. Assoc. Inc.*, 2009 WL 2524613 (S.D. Fla. 2009)	Ammonia fumes found to be a pollutant under unambiguous policy language approach. Reasonable expectations of insured doctrine explicitly rejected. Contaminant in a swimming pool found to be a pollutant under the unambiguous language approach.
 Georgia	Unfavorable	No	*Reed v. Auto-Owners Ins. Co.*, 667 S.E.2d 90 (Ga. 2008)	Carbon monoxide found to be a pollutant under unambiguous policy language approach.
 Hawaii	Unclear	Unclear	*Apana v. TIG Ins. Company*, 504 F. Supp. 2d 998 (D. Haw. 2007) (applying Hawaii law)	Drain cleaner found to be a pollutant under unambiguous policy language approach, but court acknowledged that whether the total pollution exclusion applied to non-traditional pollutants had not been decided by the Hawaii Supreme Court. Note that this case was certified to the Hawaii Supreme Court and then dismissed.
 Idaho	Unfavorable	No	*Monarch Greenback, LLC v. Monticello Ins. Co.*, 118 F. Supp. 2d 1068 (D. Idaho 1999) (Applying Idaho law)	Mining tailings (i.e., residual byproducts of gold mining composed of sand, silt and clay) found to be a pollutant under unambiguous policy language approach.
 Illinois	Unclear	Unclear	Compare: *American States Ins. Co. v. Koloms*, 687 N.E.2d 72 (Ill. 1997) With: *Scottsdale Indem. Co. v. Village of Crestwood*, 673 F.3d 715 (7th Cir. 2012) (applying IL law)	Carbon monoxide found not to be a pollutant because reasonable expectations of insured would limit exclusion to traditional environmental pollutant. Contaminated tap water was deemed a pollutant. Rejecting the "traditional environmental pollution" approach, the 7th Circuit used an "adverse self-selection approach, which focused on the cause or likelihood of pollution,
 Indiana	Favorable	Yes	*State Auto Mut. Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845 (Ind. 2012)	Chemical solvent found not to be a pollutant because policy language was ambiguous.

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 Iowa	Unfavorable	No	*Bituminous Cas. v. Sand Livestock Systems*, 728 N.W.2d 216 (Iowa 2007)	Carbon monoxide found to be a pollutant under unambiguous policy language approach.
 Kansas	Favorable	Yes	*Westchester Fire Ins. Co. v. City of Pittsburg*, 794 F. Supp 353 (D. Kan. 1992) (Applying Kansas law)	Malathion pesticide found not the be a pollutant because it was not a traditional environmental pollutant.
 Kentucky	Favorable	Yes	*Motorists Mut. Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679, (Ky. Ct. App. 1996)	Carbon monoxide found not to be a pollutant because the policy language was ambiguous and because of the the reasonable expectations of insured doctrine.
 Louisiana	Favorable	Yes	*Thompson v. Temple*, 580 So. 2d 1133 (La. Ct. App. 1991) See also: *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119 (La. 2000)	Carbon monoxide found not to be a pollutant under reasonable expectations of insured doctrine. Note that the case involved a homeowner's insurance policy, although the court examined a number of CGL cases as part of its analysis. Hydrocarbons discharged into water found not be a pollutant because the exclusion was designed to exclude coverage for environmental pollution and not all interactions with irritants or contaminants .
 Maine	Favorable	Yes	*Nautilus Ins. Co. v. Jabar*, 188 F.3d 27 (1st Cir. 1999) (Applying Maine law)	Hazardous fumes from roofing materials found not to be a pollutant under reasonable expectations of insured doctrine.
 Maryland	Unclear	Unclear	Compare: *Bernhardt v. Hartford Fire Ins. Co.*, 648 A.2d 1047 (Md. 1994); with: *Clendenin Bros. v. U.S. Fire Ins. Co.*, 889 A.2d 387 (Md. 2006) But see: *Clipper Mill Fed., LLC v. Cincinnati Ins. Co.*, 2010 WL 4117273 (D. Md. 2010)	The *Bernhardt* court held that carbon monoxide was a pollutant under the unambiguous policy language approach. The *Clendenin* court, while distinguishing *Bernhardt* on its facts, held that welding fumes were not a pollutant because the policy language was ambiguous, and the fumes were non-environmental. Airborne pollutants released by HVAC system into residential property considered a pollutant. Pollution includes substances which are generally recognized as harmful or toxic to persons, property, or the environment.

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 Massachusetts	Unclear	Unclear	*Western Alliance Ins. Co. v. Gill*, 686 N.E.2d 997 (Mass. 1997) *McGregor v. Allamerica Ins. Co.*, 868 N.E.2d 1225 (Mass. 2007)	Carbon monoxide found not to be a pollutant under reasonable expectations of insured doctrine. Home oil spill found to be a pollutant. The fact that the oil spill was located at a residence rather than a worksite did not alter the classification of spilled oil as a pollutant.
 Michigan	Unfavorable	No	*Protective Nat'l Ins. Co. v. Woodhaven*, 476 N.W. 2d 374 (Mich. 1991)	Pesticide found to be a pollutant under unambiguous policy language approach.
 Minnesota	Unfavorable	No	*Midwest Family Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628 (Minn. 2013)	Carbon monoxide found to be a pollutant under unambiguous policy language approach.
 Mississippi	Unfavorable	No	*American States Ins. Co. v. Nethery*, 79 F.3d 473, 477 (5th Cir. 1996) (Applying Mississippi law)	Paint and glue fumes found to be pollutants under unambiguous policy language approach.
 Missouri	Favorable	Yes	*Am. Nat'l Prop. v. Wyatt*, 400 S.W.3d 417 (Mo. Ct. App. 2013)	Carbon monoxide found not to be a pollutant under reasonable expectations of insured doctrine. Note that the case analyzed a tenant's homeowner's policy, although the court examined a number of liability insurance policy cases.
 Montana	Favorable	Yes	*Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., Ltd.*, 132 F.3d 526 (9th Cir. 1997) (Applying Montana law)	"B-G mix" (butane-natural gas mix, also known as "indirect liquids") found not to be a pollutant because the exclusion was limited to environmental pollutants.
 Nebraska	Unfavorable	No	*Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 635 N.W.2d 112 (Neb. 2001)	Xylene sealant found to be a pollutant under unambiguous policy language approach.
 Nevada	Favorable	Yes	*Century Sur. Co. v. Casino W., Inc.*, 329 P.3d 614 (Nev. 2014)	Carbon monoxide found not to be a pollutant under reasonable expectations of insured doctrine.

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 New Hampshire	Unclear	Unclear	*Weaver v. Royal Ins. Co . Am.*, 674 A.2d 975 (N.H. 1996) But see: *Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265 (1st Cir. 1990) (applying NH law)	Lead paint found not to be a pollutant because policy language was ambiguous. Noxious odors from sewage plant found to be a pollutant under the reasonable expectations of the insured doctrine.
 New Jersey	Favorable	Yes	*Nav-Its, Inc. v. Selective Ins. Co.*, 869 A.2d 929 (N.J. 2005)	Toxic fumes from floor sealant found not to be a pollutant under reasonable expectations of insured doctrine.
 New Mexico	Unfavorable	No	*Bituminous Cas. Corp. v. Basin Disposal, Inc.*, 1989 U.S. Dist. LEXIS 19174 (D.N.M. Apr. 20, 1989) (Applying New Mexico law) *Mesa Oil, Inc. v. Ins. Co. of North America*, 123 F.3d 1333 (10th Cir. 1997) (applying New Mexico law)	Benzenes, heavy metals, and hydrogen sulfide found to be pollutants under unambiguous policy language approach. Oil sold by oil recycler to company whose mishandling of oil resulted in soil and groundwater contamination at location which was declared Superfund site was a "pollutant," even though oil was insured's primary product.
 New York	Favorable	Yes	*Belt Painting Corp. v. TIG Ins. Co.*, 795 N.E.2d 15 (N.Y. 2003)	Paint and solvent fumes found not to be pollutants under reasonable expectations of insured doctrine.
 North Carolina	Favorable	Yes	*Auto-Owners Ins. Co. v. Potter, 105 F. App'x 484, 496 (4th Cir. 2004) (Applying North Carolina law)*	Concentrations of manganese, iron, calcium, arsenic, barium, and chloride that seeped into water supply were found not to be pollutants because they were not traditional environmental pollutants.
 North Dakota	Unfavorable	No	*Hiland Partners GP Holdings, LLC v. National Union Fire Ins. Co. of Pittsburgh, PA*, 847 F.3d 594 (8th Cir. 2017) (applying ND law)	Condensate found to be a pollutant under the unambiguous policy language approach.
 Ohio	Favorable	Yes	*Andersen v. Highland House Co.*, 757 N.E.2d 329 (Ohio 2001)	Carbon monoxide found not to be a pollutant based on the reasonable expectations of insured doctrine.

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 Oklahoma	Unfavorable	No	*Bituminous Cas. Corp. v. Cowen Constr., Inc.*, 55 P.3d 1030 (Okla. 2002)	Lead found to be a pollutant under the unambiguous policy language approach.
 Oregon	Unfavorable	No	*K-T Tracy, Inc. v. Allied Ins. Co.*, 2008 U.S. Dist. LEXIS 68764 (D. Or. Sept. 3, 2008) (Applying Oregon law)	Gasoline found to be a pollutant under the unambiguous policy language approach.
 Pennsylvania	Unfavorable	No	*Lititz Mut. Ins. Co. v. Steely*, 785 A.2d 975 (Pa. 2001)	Lead paint found to be a pollutant under the unambiguous policy language approach.
 Rhode Island	Unclear	Unclear	No CGL decisions involve this precise issue; however, see: *GeoVera Specialty Ins. Co. v. Poulton*, 2017 WL 4279649 (D. R.I. Sept. 26, 2017) (Applying Rhode Island law) *Picerne-Military Hous., LLC v. Am. Int'l Specialty Lines Ins. Co.*, 650 F. Supp. 2d 135 (D. R.I. 2009) (Applying Rhode Island law)	Under homeowners policy, court found that surface water, erosion, sediment and effluent were not clearly within the definition of "pollutant" so as to make the pollution exclusion applicable to the resulting damage caused therefrom. In deciding issue of coverage under pollution liability policy (not pollution exclusion of CGL policy), court, adopting reasonable expectation of insured analysis, stopped short of finding that construction and demolition debris could never be pollutants, stating determination is always fact intensive and hotly contested.
 South Carolina	Favorable	Yes	*Ngm Ins. Co. v. Carolina's Power Wash & Painting, LLC,* 2010 U.S. Dist. LEXIS 2362 (D.S.C. Jan. 12, 2010) (Applying South Carolina law)	Paint fumes, vapor, and dust were found not to be pollutants because the policy language was ambiguous.
 South Dakota	Unfavorable	No	*S.D. State Cement Plant Comm'n v. Wausau Underwriters Ins. Co.*, 616 N.W.2d 397 (S.D. 2000)	Cement dust considered a pollutant under unambiguous policy language approach.
 Tennessee	Unfavorable	No	*Certain Underwriters at Lloyd's, London v. Qahtan Mohammed Alkabsh,* 2011 U.S. Dist. LEXIS 26593 (W.D. Tenn. Mar. 15, 2011) (Applying Tennessee law)	Gasoline found to be a pollutant under unambiguous policy language approach.

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 Texas	Unfavorable	No	*Nat'l Union Fire Ins. Co. v. CBI Indus.*, 907 S.W.2d 517 (Tex. 1995) See also: *Evanston Ins. Co. v. Lapolla Indus., Inc.*, 2015 WL 9460301 (5th Cir. 2015) (applying Texas law)	Hydrofluoric acid cloud produced by an accidental explosion found to be a pollutant under unambiguous policy language approach. Spray-foam insulation considered a pollutant under the unambiguous policy language approach.
 Utah	Unclear	Unclear	Compare *United Nat'l Ins. Co. v. Int'l Petroleum & Exploration*, 2007 WL 4561460 (D. Utah Dec. 20, 2007) (Applying Utah law) With *Headwaters Resources, Inc. v. Illinois Union Ins. Co.*, 770 F.3d 885 (10th Cir. 2014)	Hydrocarbon fumes from waste found not to be pollutants because policy language was ambiguous. Coal ash found to be a pollutant because policy language was not ambiguous
 Vermont	Unfavorable	No	*Cincinnati Specialty Underwriters Ins. Co. v. Energy Wise Homes, Inc.*, 120 A.3d 1160 (Vt. 2015)	Chemicals from spray-foam insulation found to be a pollutant under unambiguous policy language approach.
 Virginia	Unfavorable	No	*PBM Nutritionals, LLC v. Lexington Ins. Co.*, 724 S.E.2d 707 (Va. 2012)	Filter materials found to be pollutants because exclusion was not limited to "traditional environmental pollution." Note that the case was addressing a pollution exclusion under a property policy, as opposed to a CGL policy. However, the court examined a number of cases involving liability coverage in order to reach its conclusions.
 Washington	Unclear	Unclear	Compare: *Kent Farms, Inc. v. Zurich Ins. Co.*, 998 P.2d 292 (Wash. 2000) With: *Quadrant Corp. v. Am. States Ins. Co.*, 110 P.3d 733 (Wash. 2005)	Diesel fuel was found to be "not acting as a 'pollutant'" when it spilled on, struck, engulfed, and choked fuel deliveryman due to defect in shutoff valve. Deliveryman was not "polluted" by the diesel fuel. Exclusion does not apply merely because a pollutant is involved in the chain of causation and reasonable expectations of the insured would be that the exclusion was designed to exclude coverage for traditional environmental harms. Sealant fumes were found to be pollutants under unambiguous policy language approach. Quadrant court distinguished *Kent Farms*, holding that the injury was caused by the toxic character of the fumes.
 West Virginia	Unfavorable	No	*Supertane Gas Corp. v. Aetna Cas. & Sur. Co.*, 1994 U.S. Dist. LEXIS 21602, (N.D. W. Va. Sept. 27, 1994) (Applying West Virginia law)	Coal gas fumes found to be a pollutant under unambiguous policy language approach. Reasonable expectations of insured doctrine explicitly rejected.

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 Wisconsin	Unfavorable	No	*Hirschhorn v. Auto-Owners Ins. Co.*, 809 N.W.2d 529 (Wis. 2012) See also: *Wilson Mut. Ins. Co. v. Falk*, 857 N.W.2d 156 (Wis. 2014)	Bat guano found to be a pollutant under unambiguous policy language approach. Note that the case involved a homeowner's policy. However, the court examined a number of CGL policies as part of its analysis. Cow manure considered a pollutant under the unambiguous policy language approach.
 Wyoming	Favorable	Yes	*Gainsco Ins. Co. v. Amaco Prod. Co.*, 53 P.3d 1051 (Wyo. 2002)	Poisonous gas found not to be a pollutant under reasonable expectations of insured doctrine