



Not Everything is a Pollutant: A Summary of Recent Cases Supporting a Common Sense and Narrow Interpretation of the CGL's Pollution Exclusion

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Those of us who suffered through law school are familiar with the argument that there are fundamental rules applicable to contract interpretation and that a certain contract language interpretation would “swallow the rule.” However, insurance companies have long advocated for an interpretation of the CGL policy's pollution exclusion that would “swallow the coverage” that the insureds thought they were purchasing. Insurers have successfully argued in several states that the pollution exclusion's definition of “pollutant” should be read literally, and be applied to any “solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste.” As anyone with children can attest to, the range of items and substances that can be considered an “irritant” is limitless. The logical extent of the insurer's interpretation brings to mind the high school student who, for his science fair project, convinced his fellow students to ban “dihydrogen monoxide.”¹ Citing evidence such as the fact that everyone who has ever died was found to have consumed “dihydrogen monoxide,” he convinced them of the dangers of . . . water. Similarly, an overly expansive reading of the definition of “pollutant” could lead to the absurd result of even applying it to ubiquitous harmless substances such as water. The pollution exclusion, therefore, has run amok in many states and has allowed insurers to avoid liability for otherwise covered claims.

Fortunately, insureds in many states have successfully argued that the pollution exclusion is subject to a more limited interpretation based on several different theories. For example, some courts have agreed that the pollution exclusion, as initially introduced by the insurance industry, should be limited to instances of traditional environmental pollution. Others have held that the exclusion is ambiguous as to its interpretation. The reasonable expectations of the insureds do not support a broad reading of the defined term “pollutant.” Below, this article addresses a number of recent decisions that have adopted a pro policyholder interpretation of the pollution exclusion. As with most insurance coverage issues, choice of law clearly matters.

¹https://www.washingtonpost.com/archive/opinions/1997/10/21/dihydrogen-monoxide-unrecognized-killer/ee85631a-c426-42c4-bda7-ed63db993106/?utm_term=.a0c5e38bdcd2

I. Fumes

a. Carbon Monoxide

Carbon monoxide has long been a substance that has divided courts. While some courts have found that bodily injury claims arising out of carbon monoxide exposure are excluded by the pollution exclusion, many others have recently found that the pollution exclusion does not apply to carbon monoxide claims.

i. Saba v. Occidental Fire & Cas. Co. of N. Carolina²

Saba presents a classic case of an insured successfully arguing that the pollution exclusion clause should be limited to traditional environmental pollution. The case presents the sad story of Roselle Gallego Saba, who moved to Arizona in November of 2006. She soon “began to experience severe headaches, nausea, and fatigue.” Id. It wasn’t until January of 2010 when she discovered that a faulty water heater was leaking carbon monoxide into an air conditioning system that pumped air into her bedroom. The end result was years of carbon monoxide poisoning that caused her permanent brain and heart damage. Her conditions were so severe that she eventually lost her job and her house after she could not afford her mortgage payments.

Faced with permanent illness and the loss of her house and job, Saba brought suit against the faulty water heater’s installer that had caused her so much misery. The installer, Plumbing Specialists (“Plumbing”), tendered the suit to its CGL insurer Occidental Fire & Casualty Company of North Carolina (“Occidental”). After Occidental refused to defend or indemnify Plumbing, Plumbing and Saba entered into a settlement agreement under which Plumbing admitted liability and assigned its right to recovery under the Occidental policy to Saba. Saba then brought suit against Occidental, who once again denied coverage, primarily on the basis of the policy’s pollution exclusion.

The court, applying Arizona law, relied heavily on Keggi v. Northbrook Property & Casualty Insurance Co., 199 Ariz. 43, 13 P.3d 785. (Ariz.App.2000). In Keggi, the Court of Appeals of Arizona ruled that claims for injuries arising out of drinking “total and fecal coliform bacteria” were not excluded by the pollution exclusion. The court held that even if bacteria had been included in the definition of “pollutant,” the purpose of the clause was to preclude coverage for claims arising out of traditional environmental pollution. The Keggi court determined that the exclusion had originated in the 1970s in response to industrial pollution, and Arizona public policy required that it be limited to traditional environmental pollutants.

With Keggi as its basis, the District Court in Saba, noting the similarity in language between the pollution exclusion and environmental statutes, held that “pollution exclusions cover traditional environmental pollution claims and not the bodily injury suffered by Saba as a result of Plumbing’s negligence in the installation of a water heater.”³ It is important to remember the people at the heart of the lawsuit in the context of these cases. Here, the ruling opens the door for Ms. Saba to be compensated for her unintentional injuries, exactly what insurance coverage is meant to do.

²No. CV-14-00377-PHX-GMS, 2014 WL 7176776, at *2 (D. Ariz. Dec. 16, 2014)

³Saba v. Occidental Fire & Cas. Co. of N. Carolina, No. CV-14-00377-PHX-GMS, 2014 WL 7176776, at *4 (D. Ariz. Dec. 16, 2014)

b. Cat Urine

i. Mellin v. N. Sec. Ins. Co., Inc.⁴

Any responsible cat owner can tell you that you need to empty the litter box in order to keep a handle on any unseemly odors. What they likely won't tell you, however, is that there are potential insurance implications for failing to do so. The Mellins learned firsthand the potential issues one can face.

The Mellins lived in a condominium unit upstairs from a neighbor who kept two cats. They leased their unit to a tenant, who began complaining of a noxious odor, cat urine. The smell was so disruptive that they were forced to move out. The condominium's health inspector came to the unit and determined that it was uninhabitable until the smell could be remediated. Unfortunately, "[r]emediation proved unsuccessful." The Mellins continued to reside in the unit for a period of time occasionally, and they determined that the unit was untenable. Finally, the Mellins sold the unit at what they claimed was a seriously depressed value. One can easily surmise the reason behind the loss of value.

Having suffered this loss, the Mellins sought coverage under their homeowner's policy, which Northern Security Insurance Company, Inc. ("Northern") denied. The Mellins brought suit, and Northern promptly filed summary judgment, asserting that there was no direct physical loss and that even if there were, the pollution exclusion precludes coverage.

The court first ruled that further analysis by the trial court was needed on the issue of physical damages, before turning to the pollution exclusion. Northern had argued that cat urine was a "vapor" or "fume" and therefore was a "pollutant." Northern cited cases that dealt with "damages resulting from odors emanating from large-scale farms, waste-processing facilities, or other industrial settings."⁵ The court indicated that while those cases might be closer to environmental pollution, odor from domestic cat urine was definitely not a traditional environmental pollutant.

The court noted the broad disagreement across the country, finding that both the literal reading of the language and the interpretation that focused on the clause's history, were reasonable. As such, the pollution exclusion was ambiguous. Noting that the language of the exclusion was drawn from environmental legislation, the court found it reasonable for the insured to expect that the exclusion did not preclude coverage for odor caused by cat urine. As such, the court held that cat odor in a residential setting was not a pollutant, and therefore the pollution exclusion did not apply.

c. Odors from a Pig Factory

i. Country Mut. Ins. Co. v. Bible Pork, Inc.⁶

What a pigsty! The noxious fumes caused by a hog facility highlight an interesting contrast to the reasoning in Mellin. In Mellin, the court had found that while odor from cat urine was not a traditional environmental pollutant, odors from animal farming and facilities might be. However, the court in Bible Pork disagreed, finding that under Illinois law, odors from a hog facility were not traditional environmental pollution. Therefore the pollution exclusion did not apply to Bible Pork's claim.

The court in Bible Pork primarily relied on a 2013 case, Country Mut. Ins. Co. v. Hilltop View, LLC,

⁴167 N.H. 544, 545, 115 A.3d 799, 801 (2015)

⁵Mellin v. N. Sec. Ins. Co., Inc., 167 N.H. 544, 555, 115 A.3d 799, 808 (2015)

⁶2015 IL App (5th) 140211, ¶ 16, 42 N.E.3d 958, 963, appeal denied, 48 N.E.3d 1092 (Ill. 2016)

in reaching its decision.⁷ Highlighting the prevalence of hog facilities in Illinois, Hilltop also involved odors emanating from a hog facility. The court first noted the long history of neighbors being subjected to the smells emanating from hog farms, and that despite the smells, these farms have been thought of as sources of food, not pollution. The Hilltop court then made a key distinction. It pointed out that the manner of the supposed pollution was important to determine whether the so-called “pollutant” was a traditional environmental pollutant or not. There is a difference, the court reasoned, between manure that is used to fertilize a field, thus creating a smell, and manure that is improperly dumped in a stream. Analogizing to the present case, the court found that the odor, even if it could be considered air pollution, was not traditional environmental pollution. Now that’s some home cooking!

II. Organisms

a. Bacteria

i. Connors v. Zurich Am. Ins. Co.⁸

Patrick Connors just wanted a job. He visited the Grede Foundries, where he had previously worked, for an interview, never expecting that there was something harmful in the air. After leaving the facility, Patrick became ill. He visited a doctor, who diagnosed him with pneumonia caused by exposure to *Legionella pneumophila*, a bacteria. The bacteria had grown in the foundries’ cooling towers. The towers were, unfortunately for Mr. Connors, placed near fresh air intakes that spread the bacteria. Mr. Connors brought suit against Grede’s insurer directly, Charter Oak Insurance Company. Charter Oak declined coverage, asserting that the pollution exclusion applied, and argued for adopting the following test to determine whether a substance is a pollutant:

[A] reasonable insured would consider a substance to be a pollutant if (1) the substance is largely undesirable and not universally present in the context of the occurrence that the insured seeks coverage for; and (2) a reasonable insured would consider the substance causing the harm involved in the occurrence to be a pollutant.⁹

While the court indicated that Charter Oak ultimately would have been successful in arguing that the pollution exclusion applied to the airborne bacteria under that test, they did not accept Charter Oak’s arguments regarding the interpretation of *Legionella* under Wisconsin law. The court indicated that under the standard pollution exclusion bacteria and *Legionella*, in particular, could not categorically be considered pollutants without further analysis.

More fatal to Charter Oak’s argument, however, was the fact that Charter Oak’s policy contained an endorsement that modified the pollution exclusion. Although the definition still contained the standard language, it added the following to the definition of a pollutant:

“Pollutants” includes:

- a. Petroleum or petroleum derivatives, gasoline, fuels, lubricants, and their respective

⁷Interestingly, Country Mutual Insurance Company was at the losing end of the decision in both of these cases. Whether Country Mutual will need to wait for a third strike before accepting that odors from hog facilities are not excluded by the pollution exclusion under Illinois law remains to be seen. This author waits with bated breath...and a plugged nose.

⁸2015 WI App 89, ¶ 7, 365 Wis. 2d 528, 534, 872 N.W.2d 109, 112

⁹Wilson Mut. Ins. Co. v. Falk, 2014 WI 136, ¶ 38, 360 Wis. 2d 67, 92, 857 N.W.2d 156, 167

additives and individual chemical components, including benzene and toluene;

b. Chlorinated and halogenated solvents, including tetrachloroethylene (PCE or PERC), trichloroethylene (TCE), trichloroethane (TCA) and vinyl chloride, and their degradation products;

c. Coal tar, manufactured gas plant (MGP) byproducts and polynuclear aromatic hydrocarbons (PAHs), phenols, and polychlorinated biphenyls (PCBs); and

d. Organic and inorganic pesticides, and inorganic contaminants, including arsenic, barium, beryllium, lead, cadmium, chromium, and mercury.¹⁰

Charter Oak initially argued that this additional language did not impact the interpretation of a “pollutant” under the policy. However, Charter Oak ran afoul of the old contractual maxim, that each term in a contract must be given meaning. What remained for the court then, was to determine the meaning to be assigned to these additional terms.

At first glance, this modification would appear to expand the definition of what constitutes a pollutant. However, the court determined that a reasonable insured would naturally understand the list of four categories to be a “commercial or industrial product or a byproduct of particular kinds of business operations.” Although the court was unwilling to go so far as to say that the categories were all necessarily “industrial pollutants,” they did determine that whether *Legionella* was a pollutant under one of the four categories was ambiguous as a matter of law. As such, the language of the endorsement essentially served to limit the scope of the pollution exclusion.

Charter Oak also attempted to argue that *Legionella* was a pollutant under the remaining language of the endorsement, which stated that the above categories applied whether or not the specific substance “is specifically identified or described in this definition, such as waste from manufacturing operations.” Once again, Charter Oak could not overcome the ambiguity inherent in this provision. The court, applying *ejusdem generis*, determined that a reasonable insured could read the language as only applying to those “pollutants” that were similar to those enumerated. Therefore, the “such as waste from manufacturing operations” portion of the language indicated to the court that the “other pollutants” needed to fit into the four categories listed earlier in the endorsement. As such, *Legionella*, which didn’t neatly fit in any of the categories, was found not to be a pollutant under the policy’s amended pollution exclusion.

ii. Paternostro v. Choice Hotel Int’l Servs. Corp.¹¹

You don’t need Dateline to tell you that hotel rooms can contain bed bugs, germs, or bacteria. However, no one would expect to die from exposure to *Legionella* after a hotel stay, such as the lead plaintiff in this class action. The plaintiffs alleged that Choice Hotel had failed to clean the hot tub and spa in the hotel properly. The hot tub essentially became a steaming crockpot for *Legionella*, which soon spread throughout the hotel.

¹⁰Connors v. Zurich Am. Ins. Co., 2015 WI App 89, ¶ 11, 365 Wis. 2d 528, 535, 872 N.W.2d 109, 112–13

¹¹No. CIV.A. 13-0662, 2014 WL 6460844, at *14 (E.D. La. Nov. 17, 2014), opinion clarified on denial of reconsideration, No. CIV.A. 13-0662, 2015 WL 471784 (E.D. La. Feb. 4, 2015)

Along with suing the hotel, the plaintiffs brought suit against the insurers directly via the Louisiana Direct Action Statute. The various insurers in the action denied coverage, primarily asserting that the fungi and bacteria exclusions in the policy barred coverage. In an interesting twist to most of the cases here, the plaintiffs argued that the pollution exclusions in the policies rendered the bacteria exclusions ineffective. The fatal flaw in the plaintiff's argument, however, reveals a positive expansion of Louisiana law on the pollution exclusion.

The court noted the Supreme Court of Louisiana's seminal decision on the pollution exclusion, Doerr v. Mobil Oil Corporation.¹² Doerr held that a variety of factors determine whether a substance is a pollutant under Louisiana law, including:

[T]he nature of the injury-causing substance, its typical usage, the quantity of the discharge, whether the substance was being used for its intended purpose when the injury took place, whether the substance is one that would be viewed as a pollutant as the term is generally understood, and any other factor that the trier of fact deems relevant to that conclusion.¹³

The court noted that bacteria was different from the typical environmental pollutants that are excluded under the pollution exclusion and held that "the bacteria *Legionella* and *Pseudomonas aeruginosa* do not qualify as pollutants." This decision is important to keep in mind in the time of COVID-19, as similar logic could be applied to viruses.

b. Mold

i. In re Liquidation of Legion Indem. Co.¹⁴

When is insurance, not insurance? When it's bankrupt! While this joke may be lacking, the court's analysis as to whether mold constitutes a pollutant was spot on in this case. The case arises out of a large construction project in Texas. The government building campus was completed, and employees filtered in like worker bees. Rather than a vibrant hive of activity, however, they discovered that their confines were damp and had "a distinct smell of mold." Soon the "smell of mold" unsurprisingly turned into complaints of visible mold. The county brought suit against the architects and construction company, alleging negligent construction, and a number of parties intervened, including employees who had been exposed to toxic levels of mold. The end result of the litigation was a massive \$37,756,053.03 judgment in favor of the claimants collectively. The construction company assigned its right of recovery under the policy to the claimants, who filed a claim against Legion.¹⁵ The Liquidator of Legion promptly denied the claim under the pollution and health hazard exclusion.

The court first noted that the definition of "pollutant" in the policy did not specifically include mold, fungi, or any similar word. Legion, the court held, easily could have added the words mold or fungi to the exclusion. Indeed, the court noted that Legion itself had written other policies that specifically listed mold and fungi as excluded perils but failed to do so in this policy.

¹² 2000-0947 (La. 12/19/00), 774 So. 2d 119, opinion corrected on reh'g, 2000-0947 (La. 3/16/01), 782 So. 2d 573

¹³ Doerr, 2000-0947, at p. 26; 774 So.2d at 135.

¹⁴ 2015 IL App (1st) 140452, ¶ 16, 44 N.E.3d 1170, 1175

¹⁵ Legion was in bankruptcy at this time, and the Director of Insurance of the State of Illinois was acting as Liquidator of Legion. One might say that the claims against mold, just like the presence of mold at the sight, were legion.

The Liquidator¹⁶ also attempted to argue that mold fit under the more general terms such as irritant or contaminant. In an interesting twist on the analysis, the court went beyond the ordinary “reasonable insured” analysis, finding that:

Applying these broad and generic terms, as the circuit court did, anything—solid, liquid, gas, or substance—that would potentially cause injury to a person would be excluded from coverage, making the Policy illusory.

This ruling is much stronger than those decisions that find the pollution exclusion ambiguous. While many courts side with the insured's interpretation, they rarely go so far as to find that the exclusion renders the coverage illusory. However, given the broad interpretations adopted by insurers with regard to the pollution exclusion, it is easy to see how the pollution exclusion could swallow all coverage afforded by a policy.

III. Inorganics

a. Copper

i. Netherlands Ins. Co. v. Butler Area Sch. Dist.¹⁷

Coming in hot on the heels of the tainted water situation in Flint, Michigan, Butler deals with insurance coverage for alleged lead and/or copper consumed by elementary school students. This is an interesting case to follow as the water systems in this country are only growing older, with many installed before the second World War.

In an effort to improve the drinking water for its students, the school district installed a chlorinator. Unfortunately, the allegations claim that along with cleaning the water, the chlorinator dissolved the aging pipe system, resulting in lead and copper leaching into the elementary school's water system. The students who became ill as a result of ingesting the water brought suit against the district, who tendered defense of the claim to their insurers. Both insurers denied coverage asserting that the pollution exclusion applied. Both policies contained the standard pollution exclusion.

The court first noted that although one of the policies contained a lead exclusion, it did not contain a copper exclusion. Turning to the pollution exclusions, the court referred to prior Pennsylvania case law on lead. In Lititz Mut. Ins. Co. v. Steely,¹⁸ the court dealt with human consumption of lead-based paint. The analysis focused on the manner in which the lead had emerged from the paint, and whether that process was a “discharge, dispersal, release or escape.” This analysis proved so challenging that the court required expert analysis from the parties. The experts “explained that the lead exposure was the result of a continuous and slow rate of degradation.” To the court, this description did not fit into the above list. While it was close to a “dispersal,” the court determined that the language was ambiguous and that a reasonable interpretation is that this slow degradation was not a dispersal. Ultimately, the court determined that the pollution exclusion was ambiguous as to the facts alleged and that for purposes of the duty to defend, it did not apply to preclude coverage.

¹⁶Not to be confused with The Terminator.

¹⁷No. 17CV341, 2017 WL 2533525, at *11 (W.D. Pa. June 9, 2017)

¹⁸567 Pa. 98, 785 A.2d 975 (2001)

b. Coal Dust

i. Mine Safety Appliances Co. v. AIU Ins. Co.¹⁹

Mine Safety Appliances ("MSA") ... wait for it ... manufactures mine safety equipment. In this endeavor, they produced respiratory equipment. Unfortunately, the respirators proved to be faulty, and the miners who were using them inhaled coal dust. The miners brought suit against MSA for their resulting injuries. MSA tendered defense of the action to AIU, who denied coverage, citing, among other reasons, the pollution exclusion.

The court noted that the miner's claims were to be reasonably anticipated because of their work as miners. The exposure to pollutants was not an accident, as it was a necessary and expected part of the job, which "is why safety equipment was worn." The incredulity that the court felt about the insurer's denial seeps through the words of the opinion as the coal dust seeped through the defective respirators. The court decisively held that:

In this context, coal dust is not a pollutant excluded by the policy language. Any other interpretation would render the coverage illusory. To permit the Insurers to deny coverage under these circumstances would mean that there could never be coverage for any alleged failure or defect in the respiratory safety equipment manufactured by MSA. The Insurers could not have been surprised by the fact that the insured, Mine Safety Appliance Company, manufactured mine safety appliances.

Let us consider what the insurer is really arguing here. They sold a policy to MSA, which manufactures mine safety equipment, the purpose of which is to prevent the inhalation of coal dust. Apparently, AIU accepted MSA's premiums, all while believing that they would not cover any claim arising from coal dust exposure that resulted from faulty equipment. Fortunately, the court recognized that adoption of the insurer's argument would render the coverage illusory and found in favor of MSA.

c. Crude Oil

i. Central Crude, Inc. v. Liberty Mutual²⁰

If it walks like a duck, swims like a duck, and quacks like a duck, then it's a duck. Many insurers would say the same thing about a crude oil spill. If it looks like a pollutant, and smells like a pollutant, then it's probably a pollutant. But what happens when the spiller of the oil ... is an oil transporter? This question was tackled by the United States District Court for the Western District of Louisiana. Central Crude operates pipelines that run through Louisiana, and in January of 2007, crude oil was released, causing damage to Central Crude's own land, and the land of its neighbors. You can imagine an adjuster reviewing this claim -- was it a pollutant? Check: was it released? Check: is it excluded? Check. But the District Court said not so fast.

While the District Court agreed that crude oil had been found to be a pollutant in Louisiana, there were several key distinctions to the Liberty Mutual Policy that needed to be considered. First, the Liberty Mutual policy was an umbrella policy, designed to provide excess coverage to Central Crude's

¹⁹No. CV N10C-07-241 MMJ, 2016 WL 498848, at *4 (Del. Super. Ct. Jan. 22, 2016)

²⁰2019 WL 3227580 (W.D.La.).

underlying insurance. Second, the Liberty Mutual Policy contained an endorsement that stated that it provided coverage for liability arising out of Central Crudes' premises and operations where Central Crude's underlying insurance covered that liability. Central Crude argued that the Premises Operations Liability Endorsement created an ambiguity with the pollution exclusion, as they appeared to lead to conflicting results as to what was covered.

The District Court, similar to the court in the Mine Safety Appliances case, took a practical look at Central Crude's business. The court noted that the coverage provided by the underlying insurance and the Premises Operations Liability Endorsement:

[S]eem[ed] tailor-made for Central Crude's risks and alleged losses. Given Central Crude's line of business – the transport of oil – it could yield absurd results to [...bar] any coverage for oil spills under the Pollution Exclusion. In other words, such a reading would require the court to find that Central Crude purchased an umbrella policy that provided no coverage for one of the major risks of its line of business. While this may ultimately be the case, Louisiana law still permits further interpretation in light of the potential absurdity. Great American's argument that the Pollution Exclusion must trump all other provisions of the policy cannot withstand these findings.²¹

Based on this interpretation, the District Court denied Liberty Mutual's motion for summary judgment. The takeaway here is that the practical nature of the insurance being purchased and the reasons that the insurance is being purchased cannot be ignored. Our hypothetical adjuster looking at the exclusion language would have thought the application of the pollution exclusion was a slam dunk. But like a seven-foot rim protector rising to block the shot, the District Court focused instead on the realities of Central Crude's business and for what types of risk they had purchased insurance. Just like in Mine Safety, it is important not to miss the forest for the trees.

d. Fireworks

i. Charter Oak Fire Ins. Co. v. Endurance American Specialty Ins. Co.²²

Charter Oak is the tragic tale of five workers who were killed by exploding fireworks. VSE Corporation, the workers' employer, had a contract to destroy fireworks that had been seized by the government. Unfortunately, the fireworks unexpectedly exploded while in storage. The families and estates of the workers sued VSE, who tendered the claim to its insurer, Charter Oak, who then tendered the claim to Endurance, claiming that VSE was an additional insured on the Endurance policy.

Endurance argued that the fireworks constituted a "waste" and were, therefore, a pollutant for purposes of the pollution exclusion. Endurance further argued that the explosion of the fireworks was a discharge of pollutants. The District Court, in holding that the pollution exclusion did not absolve Endurance of its duty to defend VSE, performed a careful analysis of the nature of fireworks. The court first began its analysis with the correct framework. The pollution exclusion should be interpreted by what a layperson or insured would consider to be a pollutant and excluded by the

²¹Id.

²²40 F.Supp.3d 1296 (D. Haw. 2014)

pollution exclusion. The court noted that although fireworks are dangerous, it was not the fireworks themselves that caused the injury. Fireworks that are just sitting around would not emit anything a layperson would consider a pollutant.

The court looked at the definition of pollutant, which read, "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." The court then noted that "waste," defined as "materials to be recycled, reconditioned or reclaimed,"²³ was merely an example of an irritant or contaminant, and that a "waste" that is not "irritating or contaminating" is not a pollutant. Applying this logic, the court determined that even if the fireworks were a waste, they may not be an irritant or contaminant. Further delving into the depths of the exclusion, the court found that even if the fireworks were a pollutant, the injuries sustained may not have been from the discharge of pollutants, but from the explosions themselves. The court, ultimately, read the exclusion narrowly and held that Endurance owed a duty to defend, as they had not proven that there was no possibility of coverage.

Conclusion

The interpretation of the CGL's standard "pollution exclusion" varies widely around the country. When interpreting the pollution exclusion, courts should be mindful of the applicable rules of policy interpretation. All exclusions must be narrowly construed as they have been drafted by the insurer and are seldom subject to any negotiation. Insurance terms should be interpreted as a layperson would interpret them, not as an insurance underwriter or other insurance professional would. Also, when the pollution exclusion as applied to a particular substance is susceptible to two reasonable interpretations, the term should be declared ambiguous, which in many states requires the court to adopt the interpretation favorable to the insured. Ultimately, it is also important for the court not to overlook the nature of the insured's business and the purposes for which they purchased insurance. Applying these policy interpretation rules and common sense should help insureds maximize their insurance recovery and avoid an unreasonable and expansive interpretation of the pollution exclusion.

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²³Id. at 1307