“First Look” is committed to providing you with timely, relevant insurance-related information through in-depth analysis of current issues and summaries of recent court decisions.

In this edition of First Look, we will be taking an in-depth look at the pollution exclusion in six states. An attorney licensed in Kentucky, Maryland, Ohio, Pennsylvania, Texas and West Virginia has written an article on his or her state’s interpretation of the pollution exclusion.

We hope you find this issue of First Look entertaining and informative and we welcome your thoughts on suggested topics.

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Colorado, Kentucky, Ohio, Pennsylvania, Texas, and West Virginia
www.steptoe-johnson.com  Susan S. Brewer, CEO
Commercial general liability (CGL) insurance policies often contain provisions excluding coverage for certain damages and injuries caused by pollution. In 1986, the Insurance Services Office propounded a standard clause that became known as the “absolute pollution exclusion.” Although insurance companies are permitted to use the absolute pollution exclusion in Kentucky CGL policies, this exclusion has been met with resistance from the Kentucky state courts.

In Kentucky, the Commissioner of the Department of Insurance must approve all insurance forms before they may be delivered or issued for delivery in the state. KRS §304.14-120. Over two decades ago, the Sixth Circuit applied Kentucky law and characterized coal dust as a pollutant. U.S. Fid. & Guaranty Co. v. Star Fire Coals, Inc., 856 F.2d 31, 33 (6th Cir. 1988). In 1996, the Kentucky Court of Appeals addressed the absolute pollution exclusion, which had been approved for use by the Commissioner, as a question of first impression. Motorists Mut. Ins. Co. v. RSJ, Inc., 926 S.W.2d 679, 680-81 (Ky. Ct. App. 1996). In RSJ, the Kentucky Court of Appeals did not strike down the absolute pollution exclusion as being invalid under Kentucky law. Id. at 680-82. However, the RSJ court decided not to give effect to the absolute pollution exclusion after the court determined that the clause was ambiguous as applied to the incident at issue.1 Id. at 682. After the decision in RSJ, it became apparent that the Kentucky state courts are more likely than the federal courts to find a pollution exclusion ambiguous and construe the provision in favor of the insured. Therefore, it is more likely that a Kentucky state court will hold that a substance which initially appears to be a “pollutant” is not excluded from coverage despite the existence of a pollution exclusion.

Kentucky courts have found that substances such as ammonia, noxious fumes, and contaminated solvents qualify as pollutants. However, under Kentucky law, pollution exclusions must be evaluated on a case-by-case basis. Certain Underwriters at Lloyd’s, London v. Abundance Coal, Inc., 352 S.W.3d 594, 598 (Ky. Ct. App. 2011); RSJ, Inc., 926 S.W.2d at 680-81. As a result, identifying the particular substance at issue is likely just the beginning of the court’s analysis.

As stated previously, federal cases had historically characterized coal dust as a “pollutant” under Kentucky law. See, e.g., Star Fire, supra. Subsequently, the federal courts in Kentucky cited the Star Fire Coals opinion and summarily found that there could be “no doubt that ‘coal dust’ is an irritant or a contaminant,” and “coal dust is clearly a pollutant for purposes of an insurance exclusion.” Grizzly Processing, LLC v. Wausau Underwriters Ins. Co., No. 7:08-226-KKC, 2010 WL 934250, at *5 (E.D. Ky. Mar. 11, 2010); Certain Underwriters at Lloyd’s of London v. NFC Mining, Inc., 427 Fed.Appx. 404, *405 (6th Cir. 2011). These federal opinions suggested that it was settled under Kentucky law that coal dust was a pollutant and coverage for such damage would be barred by a pollution exclusion. However, in 2011, the Kentucky Court of Appeals sharply criticized the federal approach as being inconsistent with state law. Abundance Coal, 352 S.W.3d at 597-99.

In Abundance Coal, the Kentucky Court of Appeals explained that Kentucky state courts are not bound by the holdings of federal court decisions applying state law and that pollution exclusions should be analyzed on a case-by-case basis. Id. 352 S.W.3d at 598. The Court of Appeals cited its prior decision, RSJ, which held, “insurance policies, and their absolute pollution exclusions, which do not appear ambiguous on their face can be ambiguous in application given certain factual situations.” Id. (citing RSJ, 926 S.W.2d at 680-81). Kentucky courts look at the pollution exclusion as a whole and consider several factors when determining if it is ambiguous as applied to the specific claim at issue. Abundance, 352 S.W.3d at 598-99.

First, Kentucky courts have found that conflicting judicial interpretations of the same or similar language used in a clause is a factor to be considered. Id. at 598. Second, the terms in the insurance contract are to be given their “ordinary meaning as persons with the ordinary and usual understanding would construe them.” Id. Under this factor, the courts may consider terms of art incorporated in the clause and the historical purpose for the clause. Id. at 598-99. Third, Kentucky state courts have cautioned against the absurd consequences that may result from a “blind application of the literal terms of the pollution exclusion.” Id. at 599. This last factor, the potential for absurd consequences, appears to be an issue of great concern for the Kentucky state courts and was the critical point where Kentucky state and federal courts differed in their interpretations of pollution exclusions prior to Abundance Coal.

When the Court of Appeals incorporated the third factor into its analysis, it adopted the reasoning of the Maryland Court of Appeals and explained,

The terms “irritant” and “contaminant,” when viewed in isolation, are virtually boundless, for “there is virtually no substance or chemical in existence that would not irritate or damage some person or property.” Without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results. Take but two simple examples, reading the clause broadly would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants and contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution…

1 In RSJ, the plaintiffs brought an action for damages they incurred when a vent pipe from a boiler used in the defendant’s dry cleaning business leaked and released carbon monoxide. RSJ, 926 S.W.2d at 679-80.
RSJ, 926 S.W.2d at 682 (citations omitted). Based on this reasoning, the Kentucky Court of Appeals explained that substances which initially appear to be pollutants may not qualify as pollutants under the facts of a particular case. Abundance Coal, S.W.3d at 599.

In Abundance Coal, the Court of Appeals applied these three factors and found the contract at issue was ambiguous. Id. The Court remanded the case for the lower court to determine if the substance, coal dust, was in fact a pollutant based on the plaintiffs’ alleged injuries. Id. at 599-600. The Court instructed that coal dust may qualify as a pollutant if the plaintiffs had alleged damages such as contaminated drinking water or respiratory problems; conversely, the coal dust would not be pollution if the injuries were limited to physical damage to their property or an accumulation of dirt without environmental harm. Id. at 599.

From the decision in Abundance Coal, it is apparent that Kentucky courts will not automatically classify a particular substance as a pollutant for purposes of insurance exclusions. Instead, the courts will look to see if the clause is ambiguous, based on both the language of the policy and application to the facts of the case at hand. The courts may focus more on the damage caused by the substance than the specific type of substance involved when making this determination. Additionally, after the decision in Abundance Coal, the federal courts in Kentucky recognize that Kentucky law necessitates a thorough analysis of pollution exclusions on a case-by-case basis. Hardy Oil Co. v. Nationwide Agribusiness Ins. Co., No. 5:11-CV-00075, 2013 WL 142428, at *2-3 (E.D. Ky. Jan. 11, 2013). This recognition indicates that Kentucky federal and state courts are likely to become more aligned in their analysis of pollution exclusion issues.

Ohio
By: Lyle B. Brown

Ohio courts construe pollution exclusions in accordance with the standard rules of insurance contract construction. For example, the insurance contract is to be construed based upon the ordinary meaning of the language used. In addition, it is generally presumed that something that is not clearly excluded from the policy will be included. Where the insured seeks coverage under the insurance contract, the insurer has the burden to demonstrate that the insurer’s construction of the contract – to exclude coverage – is the only possible construction.

Some Ohio appellate courts have upheld the enforceability of pollution exclusions in appropriate circumstances. See, e.g., The Cincinnati Ins. Co. v. Thomas (Dec. 11, 2006), 12th Dist. App. No. CA2005-12-518, 2006-Ohio-6540 (pollution exclusion was triggered when residential real estate developer retained firm to remediate lead-contaminated soil at former shooting range); Rybachki v. Allstate Ins. Co. (April 28, 2004), 9th Dist. App. No. 03CA0079-M, 2004-Ohio-2116 (pollution exclusion barred coverage for spill caused by rupture of underground heating oil storage tank). Thus, where unambiguous pollution exclusion language clearly applies to a particular incident, an Ohio court will hold that there is no coverage under the policy. In one case, an appellate court held that the pollution exclusion precluded coverage for a contractor that, while removing vinyl flooring with a sander, unknowingly caused friable asbestos fibers to spread throughout the house. Selm v. American States Ins. Co. (Sept. 21, 2001), 1st Dist. App. No. C-010057, 2001 Ohio App. LEXIS 4207. The court focused on the fact that “asbestos is an irritant or contaminant, and therefore a pollutant under the policy.” Id. at *10.

However, where the pollution exclusion language is ambiguous as to whether a discharge of a particular substance falls within the exclusion, Ohio courts may construe the language against the insurer and find that coverage is required. In such cases, Ohio appellate courts have looked to the language used in the contract, the nature of the claim, and the insured’s reasonable expectations as to the availability of coverage. For example, the Ohio Supreme Court held that an insurer had a duty to defend the owner and manager of residential rental property against tenant injury claims because “the absolute pollution exclusion policy language in question does not clearly, specifically, and unambiguously state that coverage for residential carbon monoxide poisoning is excluded.” Andersen v. Highland House Co. (2001), 93 Ohio St.3d 547, 548. The court noted that the insureds “reasonably believed that [the insurer] would defend and indemnify them against claims related to potential premises hazards and did not anticipate that such claims would be denied based on the pollution exclusion.” Id. at 551.

Thus, historically, litigation has surrounded the issue of whether the alleged discharge was “sudden and accidental.” Indeed, the Supreme Court has held that although an insured had deposited pollutants in a landfill, and those pollutants subsequently seeped into groundwater, the pollution exclusion provision did not bar coverage. Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co. (2002), 95 Ohio St.3d 512, 2002-Ohio-2842. Per the Goodyear Court, the pollution exclusion “is triggered when the policyholder expects or intends that the contaminants will migrate from the location in which they were first deposited.” Id. at ¶23. In Goodyear, therefore, coverage applied because the insured had not expected or intended that the pollutants would escape the landfill.

However, as noted by the Court in Andersen, supra, “the absolute pollution exclusion ‘was drafted during the early 1980s and was incorporated in the standard CGL [policies] in 1986.’ . . . The purpose of the new exclusion was ‘to replace the 1983 ‘sudden and accidental’ exclusion because insurers were distressed by judicial decisions holding that the 1973 exclusion did not preclude coverage for gradual but unintentional pollution.’ . . . Further, ‘[t]he absolute exclusion was designed to bar coverage for gradual environmental degradation of any type and to preclude coverage responsibility for governmental cleanup[s].’” Andersen, supra at 550 (citations omitted). Indeed, the Anderson Court found coverage, at least in part, based upon the insured’s “reasonable beliefs” as predicated upon “the history and original purposes for the pollution exclusion.” . . . Id. In other circumstances, however, the absolute pollution exclusion has been upheld. See, e.g., West American Ins Co. v. Hopkins, 1994 WL 559055 (Ohio Ct. App. Oct. 14, 1994). Thus, it appears that the analysis of the pollution exclusion in Ohio involves a thorough examination of the relevant policy language in conjunction with the claim at issue, bearing in mind the traditional rules of contract construction.
Maryland
By: Bridget M. Cohee

In Maryland, to determine coverage where a pollution exclusion may apply depends upon first, the policy language, and second, the allegations of injury. Initially, the Court will determine the scope and limitations of the policy at the time of execution. Then the Court will consider the specific allegations. If there is any doubt regarding potential coverage, the issue will be resolved in favor of the insured. Clendenin Brothers, Inc. v. US Fire Insurance Co., 889 A.2d at 393 (2006).

Thus, if the analysis of the policy language is such that the terms are found to be plain and unambiguous, the Court will determine the meaning of the terms of the contract as a matter of law. If there is any ambiguity, the analysis will turn to extrinsic evidence. If the language is plain and unambiguous, and the Court finds that a reasonably prudent person would interpret the language to exclude coverage for the alleged injury, then there is no duty to defend and indemnify. Such was the Court’s finding in the context of carbon monoxide fumes that escaped from the central heating system of a residential apartment building. The Court found the policy language to be unambiguous as to carbon monoxide fumes, and carbon monoxide met the literal language in the policy as a “pollutant”, therefore, the insurer in the case was not obligated to defend or indemnify the landlord in claims made by tenants in the building. Bernhardt v. Hartford Fire Insurance Company, 648 A.2d 1047 (1994).

A year later, however, the pollution exclusion was found to be ambiguous with regard to lead paint exposure claims brought by tenants against their landlord. Consequently, the insurer was obligated to defend and indemnify the landlord in Sullins v. Allstate Insurance Company, 667 A.2d 617 (1995). In Sullins, the Court reviewed the evolution of the pollution exclusion and concluded that the insurance industry intended the pollution exclusion to apply to environmental pollution only. Furthermore, the Sullins opinion distinguished other cases in which lead paint was found to be a “pollutant” and thus excluded, stating that the differing and conflicting interpretations of policy language in judicial opinions is a factor to be considered in determining the existence of ambiguity.

The most recent opinion addressing application of the pollution exclusion in Maryland is Clendenin Brothers, Inc. v. US Fire Insurance Co., 889 A.2d 387 (2006). The Court found that the language of the total pollution exclusion was ambiguous in the context of manganese welding fumes. The total pollution exclusion did not relieve the insurer from the duty to defend and indemnify the insured in an underlying tort action for damages caused by localized, non-environmental workplace manganese welding fumes. The language of the contract was found to be ambiguous. While a reasonably prudent person could conclude that the contractually defined term “pollutant” encompassed manganese welding fumes, the Court found that a reasonably prudent person could also conclude, based upon the character and purpose of the policy and the facts and circumstances of its execution, that the fumes were not included in the meaning of “pollutant” as defined in the policy.

Thus, in Maryland, the scope of pollution exclusions in state and federal court are subject to divergent decisions, even where the alleged injuries are the same. If the defined terms are susceptible to two interpretations by a reasonably prudent layperson, the Court will hold the insurer has the duty to defend and indemnify. If a reasonably prudent person could interpret the contractually defined terms to include the alleged injury, the question will be resolved against the party drafting the policy. The Maryland Court of Appeals considered and rejected a broader view, refusing to extend the pollution exclusion to bar coverage for bodily injuries beyond what the Court has held was the industry’s intended exclusion of environmental pollution.

Pennsylvania
By: Brian J. Pulito and Jon C. Beckman


Pennsylvania courts are split over whether “pollutant,” as defined in a pollution exclusion, encompasses odors or microorganisms. Compare Travelers Prop. Cas. Co. of Am. v. Chubb Custom Ins. Co., 864 F.Supp.2d 301, 316 (E.D. Pa. 2012) (holding that odor emanating from pig manure is a “pollutant” as commonly defined) with Motorists Mut. Ins. Co. v. Hardinger, 131 F.App’x 823, 827 (3d Cir. 2005) (Ambro, J. concurring) (concluding that “living, organic irritants or contaminants . . . def[y] description under the policy” as pollutants); see also Certain Underwriters at Lloyd’s London v. Cresno, No. 12-571, 2013 WL 3213345 at *6 (E.D. Pa. June 26, 2013) (noting the split and declining to address whether fluid seeping from a dead body is “pollution” under the policy terms since the coverage was precluded on other grounds).

The Chubb Custom Insurance decision illustrates how one federal court analyzed the definition. In that case, the U.S. District Court for the Eastern District of Pennsylvania applied Pennsylvania law and granted the insurers’ motion for summary judgment, denying coverage under a pig farmer’s policies where noxious odors emanating from the farm caused injuries to several neighbors. Chubb Custom Ins. Co., 864 F.Supp.2d 301. The insured operated industrial-sized pig farms, one of which, located in Indiana, caused personal injury and property damage to the individuals living nearby. Id. at 305. The pig farm collected excrement generated by 2,800 sows in a pit, removed the excrement through a dragline and deposited it on nearby fields as fertilizer. Id. The neighbors claimed physical injury and property damage resulting from the noxious odors emanating from the farm. Id. The insurance policies in question contained pollution exclusions. Id. at 306. The court considered whether the policies’ definitions of “pollutant” applied unambiguously to the noxious odors. Id. at 313. The court, reviewing this issue of first impression, noted that other Pennsylvania decisions
have examined the applicability of pollution exclusions “virtually identical to those at issue here,” and that Pennsylvania courts “frequently look to dictionary definitions” to determine whether a substance is a pollutant. Id. at 313. After considering the dictionary definitions analyzed by other Pennsylvania courts, the court concluded, “noxious odors produced by pig excrement (or waste) that cause bodily injury and property damaged appear to fit squarely within the definition of pollutant under the policies.” Id. at 313-314. Finding the odors within the definition of “pollutant,” the court sided with the insurers and held the pollution exclusion barred coverage under the policy. The Chubb Custom Insurance Court’s decision demonstrates how Pennsylvania courts determine the definition of “pollutant” on a case-by-case basis.

Texas

By: Seema Mir

The pollution exclusion included in some Texas commercial general liability (CGL) insurance policies eliminates virtually all coverage for pollution incidents and applies in both first party and third party insurance policies. Generally speaking, “pollutant” is defined to mean an irritant or contaminant, whether in solid, liquid, or gaseous form, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. Over time, and as a result of continuous litigation and modifications in policy language, varying interpretations of the pollution exclusion have evolved. Texas has adopted and continues to enforce what has been developed as the “absolute pollution” exclusion, wherein the insurer has the burden of proving that an exclusion exists and bars coverage for a claim resulting from any type of pollution. See Nat’l Union Fire Ins. Co. v. CBI Indus., 907 S.W.2d 517, 521-22 (Tex. 1995); see also TEX. INS. CODE ANN. § 554.002 (Vernon 2005). Generally, “exclusions are narrowly construed, and all reasonable inferences must be drawn in the insured’s favor.” Gore Design Completions, Ltd. v. Hartford Fire Ins. Co., 538 F.3d 365, 370 (5th Cir. 2008). Though the absolute standard has been set in Texas, constant litigation in the field has modified the realm of coverage as terms such as “pollutant” are defined and redefined in case law, and discrepancies between “traditional” and “non-traditional” pollution claims are made.

Texas courts have broadly construed the term “pollutant” by rejecting arguments that it was limited to only widespread environmental harm and, accordingly, barring coverage under CGL policies. According to Texas law, a substance does not need to act as an irritant or contaminant to constitute a “pollutant” under the pollution exclusion. Nautilus Ins. Co. v. Country Oaks Apt. Ltd., 566 F.3d 452, 455 (5th Cir. 2009) (holding a newborn’s injuries sustained as the result of her mother’s inhalation of carbon monoxide in her apartment while she was pregnant are subject to a total pollution exclusion contained in the landlord’s CGL policy). As such, in particular situations, Texas courts have held that biomedical radioactive waste is a pollutant, as is phenol gas. See Construction State Ins. Co. v. Iso-Tex, Inc., 61 F.3d 405 (5th Cir. 1995); see also Certain Undum’s at Lloyds v. C.A. Turner Constr. Co., 112 F.3d 184 (5th Cir. 1997). Additionally, “dust, sand, gravel, silica and other particles” have also been deemed pollutants excluded from insurance coverage. Clarendon America Ins. Co. v. Bay, Inc., 10 F.Supp. 2d 736 (S.D. Tex. 1993). Further, and not surprisingly in an oil and gas-based state such as Texas, the absolute pollution exclusion has been extended to bar coverage for groundwater contamination caused by oil and gas production. Bituminous Cas. Corp. v. Kenworthy Oil Co., 912 F. Supp. 238, 241 (W.D. Tex. 1996), aff’d, 105 F.3d 6561 (5th Cir. 1996).

While courts have consistently enforced the pollution exclusion to bar claims for traditional pollution, non-traditional pollution claims have and continue to face controversial and varying treatment by the courts. Just because the Texas courts have appeared to broaden the absolute pollution exclusion in late 1990s litigation by expanding the term “pollutant,” recent litigation proves that it is still possible to obtain some pollution coverage under a CGL in non-traditional analyses. For example, a Texas court rejected the insurer’s argument that there was no coverage for an insured’s employee who died after sustaining injuries from a trailer transferring oil that left a “dangerous and potentially explosive residue” which remained in the trailer after the load was transported. Nat’l Cas. Inc. Co. v. Orion Transp., Inc., 2010 U.S. Dist. LEXIS 15004 at 28-29 (Feb. 22, 2010 S.D. Tex.—Houston). Not persuaded by the insurer’s proposed definitions and constructions of the terms used in the subject policy’s pollution exclusion or relative textbook definitions, the court held the pollution exclusion did not bar coverage. Id.

Further, and based on this non-traditional type of pollution claim and analysis, a specific breed of non-traditional claims under the pollution exclusion has developed for Chinese drywall claims. As a result of the importation of Chinese drywall used to satisfy a high building demand after Hurricane Katrina and other natural disasters in and around the Texas, Missouri, and Louisiana areas, many insureds are filing insurance claims for bodily injury and property damage resulting from the indoor release of sulfur from the Chinese drywall. Insurers are generally refusing to pay the claims under the pollution exclusion and litigation has ensued. While it appears that under Texas law, the Fifth Circuit has generally been holding that the drywall falls under the exclusion, thereby barring coverage, there has been varying treatment in these cases. See e.g. In re Chinese Manufactured Drywall Prods. Litig., 2011 U.S. Dist. LEXIS 12934 (E.D. La. 2011) (reconfiguring the transfer and consolidation of all federal actions involving claims of bodily harm and property damage arising from toxic releases from Chinese drywall to the Eastern District of Louisiana, including claims arising in Houston, Texas); see also Cause No. 2012-50584, Perry Homes, LLC, et al, v. Aurora Comm. Constr., Inc., et al. (filed Aug. 12, 2012, Harris County, Texas). Another issue specific to the pollution exclusion in Texas relates to the preclusion of coverage for “sudden and accidental” polluting events. These events have been fiercely litigated in the state with respect to whether the event must be merely unexpected, or whether “sudden” conveys a temporal element. Texas appears to adopt the temporal requirement. See Gulf Metals Indus., Inc. v. Chicago Ins. Co., 933 S.W.3d 800 (Tex. App.—Austin 1999, pet. denied); see also Mesa Operating Co. v. Cal Union Ins. Co., 986 S.W.2d 749 (Tex. App.—Dallas 1999, pet. denied).

Notably, insureds who have specific pollution exposure may be able to “buy back” limited coverage. For example, some policies allow insureds to purchase additional coverage for short-term pollution events on a limited basis. See, e.g., Starr Idem. & Liab. Co., v. SGS Petroleum Serv. Corp., 718 F.3d 700 (5th Cir. 2013).

1 Special thanks to Christina Denmark for her assistance in preparing this article.
In *Joy Technologies, Inc. v. Liberty Mutual Ins. Co.*, 187 W. Va. 742, 421 S.E.2d 493, 495 (1992), the Supreme Court of Appeals of West Virginia examined a predecessor form of the modern-day “absolute pollution” exclusion. For many years Joy Technologies Inc. (“Joy”), a Pennsylvania company, operated a mining equipment cleaning facility in southern West Virginia. To clean the mining equipment, Joy used oil containing polychlorinated biphenyls (“PCBs”). Despite containment efforts, PCBs began to contaminate Joy Technologies' facility and adjacent properties. This PCB contamination resulted in several lawsuits against Joy Technologies.

Joy's insurer denied coverage for the various claims under the policy's pollution exclusion which precluded coverage for “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, contaminant or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.”

Joy then filed a declaratory judgment action seeking indemnification. The insurer moved for summary judgment arguing that the release of PCBs was not “sudden and accidental” as required for coverage under the policy. The trial court, applying Pennsylvania law, granted the insurer's motion and Joy appealed.

On appeal, the Supreme Court of Appeals of West Virginia concluded that West Virginia law applied to Joy's claims. The Court then recognized the insurance industry's representations that the form of exclusion at issue in *Joy Technologies* was not designed to narrow coverage. *Id.* at 748, 499. Rather, according to information submitted to the West Virginia Insurance Commissioner during the form approval process, the exclusion was drafted to clarify “occurrence” language in liability policies. *Id.* Based on these considerations, the trial court's order was reversed and the case was remanded for further factual development. *Id.* at 749, 500.

In light of the holding in the *Joy Technologies* case, the term “occurrence” in a pollution exclusion will be given a broad interpretation that comports with the representations made by the insurance industry during the exclusion's approval process.

The United States District Court for the Northern District of West Virginia had the opportunity to examine an “absolute pollution exclusion” in *Supertane Gas Corp. v. Aetna Cas. and Surety Co.*, 1994 WL 1715345 (N.D. W. Va. Sept. 27, 1994). In that case, Supertane Gas Corp.'s (“Supertane”), predecessor operated a coal gas fuel generation plant that contaminated the facility's property with a coal tar-like substance. After the contamination was discovered, Supertane was required to remediate the property. Supertane then filed suit against its insurer to recover the cleanup costs. The insurer moved for summary judgment, arguing that coverage for Supertane's claim was barred by the policy's “absolute pollution” exclusion.

In finding that the exclusion was unambiguous, the Court noted that it could find no West Virginia cases on the absolute pollution exclusion. *Id.* at *3. Nonetheless, the Court was persuaded that West Virginia would find such an exclusion to be unambiguous. *Id.* The Court further stated that it was aware of the ruling in *Joy Technologies, supra*, but distinguished that case on the basis that the ruling in *Joy Technologies* turned on the definition for the word “occurrence” and on the insurer's representations to the West Virginia Insurance Commissioner when seeking approval to include the exclusionary language in its policies. *Id.* at *3-4. In support of its decision, the Court noted that “[t]here is no evidence here that Transamerica ever represented that its absolute pollution exclusion meant something else. Although Supertane tries to assert an expectation of coverage in this case, given the prominence of the exclusion and its clarity, such an expectation would not be reasonable.” *Id.*

While the West Virginia Supreme Court has not addressed the absolute pollution exclusion, such exclusions are being included in policies issued in this state. Because W. Va. Code § 33-6-8 requires all insurance forms to be approved by the West Virginia Insurance Commissioner prior to issuance or delivery, the form of the absolute pollution exclusion being used in West Virginia apparently complies with all applicable insurance regulations. Thus, there is persuasive authority upon which carriers can base an argument that the provisions of the “absolute pollution” exclusion are clear, unambiguous, and enforceable.
### Pollution Exclusion - State by State

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