

# Pollution Exclusion Overview

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# POLLUTION Insights

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## Pollution Exclusion Decisions: Second Quarter 2007

By Amy P. Klie, Bates & Carey LLP

It has been over 25 years since the first pollution exclusion appeared in general liability policies. Those first “qualified exclusions” quickly came under attack and led to a host of disputes and battles of interpretation. Eventually, the “next generation” pollution exclusions were introduced, known as the “total” or “absolute” pollution exclusions. However, when courts in different jurisdictions applied these exclusions to an endless array of unique factual scenarios, these exclusions proved to sometimes be anything but total or absolute. In an effort to address the developing state of pollution exclusion law, some insurers responded by tweaking their pollution exclusions. This resulted in a wider array of provisions and interpretation issues facing the courts.

Today, the law addressing pollution exclusions continues to develop, as do the underlying toxic tort and environmental actions to which these provisions are applied. Insurers and insureds face questions such as: Does a pollution exclusion apply to bodily injury claims arising from toxic exposures, even if no environmental harm is involved? Is a material a “pollutant” if it was used in its ordinary and intended manner? Does the “sudden and accidental” analysis apply to the discharge of pollutants or the resulting damage? In the first quarter of 2007, these questions and others regarding the pollution exclusion continued to be the subject of litigation in courts across the country. Below is a summary of some of these pollution exclusion decisions and a brief discussion of where they fit in to the pollution exclusion landscape. For an overview of pollution exclusion decisions from the First Quarter of 2007, please visit our articles page at [www.BatesCarey.com](http://www.BatesCarey.com).

### Metal fragments mixed into cattle feed constitute “pollutant” under Absolute Pollution Exclusion.

*Judd Ranch, Inc. v. Glaser Trucking Service, Inc.*, 2007 WL 1520905 (D. Kan., May 22, 2007)

The insured trucking company was sued in an action for damages to cattle which arose after cattle feed hauled by the insured was allegedly contaminated with solid metal scraps, then delivered to the claimant. The underlying claimant, a

cattle rancher, alleged that the insured trucking company failed to adequately clean its trailer before hauling a load of cattle feed, allowing metal fragments to mix with feed pellets, thereby damaging the cattle.

The trucking company’s insurer argued that the claim fell within its policy’s pollution exclusion, which excluded coverage for property damage “arising out of an actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants.” The

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term ‘pollutants’ was defined as “any solid, liquid, gaseous or thermal irritant or containment, including smoke, vapor, soot, fumes, acids alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned, or reclaimed.”

Presented with the question of whether the solid metal scraps constituted a “pollutant” as that term was defined by the policy, the Kansas District Court found that, once mixed with the feed pellets, the aluminum scrap metal became harmful, and thus qualified as a “solid contaminant” within the policy definition of a ‘pollutant’.

Analyzing the alleged facts within the context of the pollution clause language, the court held that the pollution occurred when the aluminum scraps were allegedly dispersed, or distributed, into the feed pellets. It was immaterial that the feed pellets were added to the scrap metal, rather than the scrap metal being added to the feed pellets.

### Alabama Supreme Court finds gasoline becomes a “pollutant” when leaked from UST at gas station.

*Federated Mutual Insurance Co. v. Abston Petroleum, Inc.*, 2007 WL 1098564 (Ala., April 3, 2007)

An insured gasoline supplier and the injured gas station owner joined together to seek insurance for property damage the station owner sustained after the insured’s underground tanks leaked gasoline, rendering the gas station lot unusable. The insurer contended that the claim was precluded from coverage under the absolute pollution exclusion clause contained in the insured’s CGL policy. The clause excluded:

‘Bodily injury’ or ‘property damage’ arising out of the actual, al-

leged or threatened discharge, dispersal, seepage, migration, release or escape of ‘pollutants’: ....

“(f) At or from any tank, piping, pumps or dispensers at premises, sites or locations in addition to those described in subparagraphs (a), (b), (d) or (e), which are or were at any time owned, leased, installed, removed, tested, repaired or filled by or on behalf of any insured, wherever located (except at residences primarily used for dwelling purposes) which contain, transport or dispense or are designed to contain, transport or dispense: (i) motor fuels;....

The insured argued that the clause at issue was ambiguous because it did not specifically define gasoline as a “pollutant.” The insured also argued that, as a gasoline supplier, the insured did not reasonably expect that gasoline would constitute a pollutant.

The court explained that the focus of inquiry under the absolute pollution exclusion is “not on the nature of the substance alone, but on the substance in relation to the property damage or bodily injury.” Citing authority from other jurisdictions, the court held that gasoline, although not a pollutant when used properly for its intended purpose, clearly becomes a pollutant when it leaks into the soil from underground tanks, or where fumes from a leak become a serious hazard.

The court rejected the insured’s claim he did not reasonably expect gasoline to be a “pollutant.” In this regard, the court noted that the insured’s expectations were necessarily limited by the terms of the pollution exclusion clause, and in light of the language of that clause, the insured’s expectations that that policy would cover the station owners’ property damage were not objectively reasonable.

In finding that gasoline may constitute a “pollutant” within the meaning of a







standard pollution exclusion provision, the Alabama Supreme Court's holding in *Abston Petroleum* is consistent with numerous other cases to have addressed the issue. See, e.g. *Legarra v. Federated Mutual Insurance Co.*, 42 Cal. Rptr. 2d 101 (Cal. Ct. App. 1995); *Truitt Oil & Gas Co. v. Ranger Insurance Co.*, 498 S.E.2d 574 (Ga. Ct. App. 1998); *Millers Mutual Insurance Association of Illinois v. Graham Oil Co.*, 668 N.E.2d 223 (Ill. App. Ct. 1996); *Crescent Oil Co., Inc. v. Federated Mutual Insurance Co.*, 888 P.2d 869 (Kan. App. Ct. 1995); *Wagner v. Erie Insurance Co.* 801 A.2d 1226 (Pa. Super Ct. 2002).

### Injuries from gas explosion were caused by fire and not by pollutants, therefore Absolute Pollution Exclusion did not apply.

*Foremost Signature Insurance Co. v. Parker*, 2007 WL 1863385 (D.S.C., June 26, 2007)

When the insured failed to properly disconnect a natural gas line from his mobile home, a fire resulted causing various bodily injuries. When the insured sought coverage, the insurer argued that its pollution exclusion precluded coverage for bodily injuries arising out of "the actual, alleged or threatened discharge, dispersal, release, escape, of, or the ingestion, inhalation or absorption of pollutants at or on the property you own..." The policy defined a "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, metals, lead paint components and compounds, and waste."

The court rejected the insurer's attempt to fit the claim within the scope of the pollution exclusion. Instead, the court found that, according to the underlying complaint, the plaintiff's bodily injuries arose as a result of the insured's negligent failure to cap off a natural gas line, and from the subsequent explosion and

fire, but not from the release of pollutants.

The court further noted that the plaintiff's injuries, burns from a fire which followed the natural gas explosion, were the result of a fire. Thus, the court explained that further support for its holding that the pollution exclusion was inapplicable could be found in the fact that "fire" was not among the pollutants enumerated in the policy's pollution exclusion provision.

### Arkansas Supreme Court finds gasoline a "pollutant," but that decision could vary on case by case basis.

*State Auto Property & Casualty Insurance Co. v. The Arkansas Department of Environmental Quality*, 2007 WL 1707358 (Ark., June 14, 2007)

The insured's gas tanks leaked gasoline into the soil on its neighbor's land. When the neighbor sought indemnity from the insured's carrier, the lower court held that the insurer was liable for the damage. The pollution exclusion was found to be inapplicable because: (1) the definition of "pollutant" was ambiguous as a matter of law; and (2) an accidental release of gasoline from a retail service station was not the type of persistent industrial pollution intended to be excluded.

On appeal to the Arkansas Supreme Court, the insurer argued that the Arkansas Supreme Court should overrule its seminal pollution exclusion case, *Minerva Enterprises, Inc. v. Bituminous Casualty Corp.*, 312 Ark. 128, 851 S.W.2d 403 (Ark.1993). *Minerva* had ruled that the undefined term "pollutant" in the pollution exclusion was ambiguous.

The Arkansas Supreme Court affirmed the ongoing viability of its holding in *Minerva*, reiterating its finding that the "pollutant" definition set forth in standard CGL policies is ambiguous, and thus requires clarification though parole evidence on a case by case basis. Accepting the ad-

missibility of parole evidence to clarify the meaning of the “pollutant” definition, the court then permitted the insurer to introduce extrinsic evidence. Although the court did not provide a discussion of the evidence presented, it found the documents presented by the insurer demonstrated that, for purposes of the case before it, gasoline was a contaminant, and constituted a pollutant under the policy’s pollution exclusion provision.

### Malodorous air inside a building is not excluded from coverage—unless it first passes through the “atmosphere” in traveling from the insured’s premises.

*Wakefield Pork, Inc. v. RAM Mutual Insurance Co.*, 731 N.W.2d 154 (Minn. App., May 15, 2007)

The insured, a pig farmer, was sued in a nuisance action by its neighboring homeowners. The neighbors claimed that “gasses, hydrogen sulfide, among others” and “noxious and offensive odors” from the farm had deprived them of the use and enjoyment of their property. When the insured sought insurance coverage, its insurer disclaimed any obligation to indemnify on the grounds that the homeowners’ claims were excluded under the policy’s pollution exclusion clause. That provision excluded coverage for any liability resulting either directly or indirectly from:

The discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gasses, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere of water course, body of water, bog, marsh, ground water, swamp, or wetland, except as provided by Incidental Liability Coverage.

In reaching its holding that the claims fell within the policy’s pollution exclusion,

the Minnesota Court of Appeals first noted that the homeowners’ alleged loss of use and enjoyment of their property constituted “property damage” within the meaning of the insured’s policy, which defined that term as either “physical injury to tangible property including all resulting loss of the use of that property” or “loss of use of tangible property”.

Next, the court addressed whether the word “atmosphere” in the policy’s pollution exclusion meant that pollution exclusion would apply only to air outside of buildings and not the air in a neighbor’s home. The Minnesota Court of Appeals was called upon to interpret the Minnesota Supreme Court’s holding in *Board of Regents v. Royal Insurance Co. of America*, 517 N.W.2d 888 (Minn. 1994).

In *Board of Regents*, the Minnesota Supreme Court held that the term “atmosphere” in the pollution exclusion at issue did not include contaminated air inside a building. However, the Minnesota Court of Appeals noted that, in *Board of Regents*, the alleged pollution (asbestos contamination from fire insulation installed in the building) originated from inside the building. Conversely, the Minnesota Court of Appeals found the facts presented by *Wakefield* to be distinguishable.

The Court of Appeals noted that the underlying action involved a claim for damages in which the alleged pollution was actually released directly into the atmosphere, and then indirectly affected the inside of the claimants’ home. Accordingly, the court held, in this case, the insured’s claim was excluded under the policy’s pollution exclusion.

### Pollution exclusion does not exclude coverage for environmental consultant’s failure to identify pre-existing pollution.

*James River Insurance Co. v. Ground Down Engineering, 2007 WL 1730102 (M.D. Fla., June 14, 2007)*

The underlying claimant, a land developer, had contracted with the insured, an environmental site assessor, to provide environmental site evaluation services on a parcel of land the claimant planned to develop.

The underlying complaint alleged that the insured breached its contract and/or acted negligently when it failed to detect the existence of old underground chemical storage tanks at the site and accompanying historic contamination. When the insured submitted this claim to its insurer, the insurer brought an action for declaratory relief on the grounds that the absolute pollution and pollution related liability exclusion set forth in its professional liability insurance policy relieved it of any obligation to defend and indemnify the insured environmental consultants in an action for negligence, breach of contract, promissory estoppel and negligent misrepresentation.

The pollution at issue in the underlying case was on the site prior to the insured's assessment, and was therefore neither actually nor proximately caused by the insured. Nevertheless, the insurer contended that the claim fell within the broad language of its absolute pollution exclusion. That exclusion precluded coverage for:

All liability and expense arising out of or related to any form of pollution, whether intentional or otherwise and whether or not any resulting injury, damage, devaluation, cost or expense is expected by any insured or any other person or entity is excluded throughout this policy.

This exclusion applies regardless of whether:

1. An alleged cause for the injury or damage is the insured's ... wrongful act.

The insurer argued that, because the absolute pollution exclusion at issue precluded liability where the insured caused the pollution, it should likewise extend to preclude coverage where the insured failed to detect pollution in its assessment. Rebuffing the insurer's claim, the court explained that, notwithstanding the broad language of the absolute pollution exclusion, "it would be unconscionable at best to interpret a professional liability policy as covering anything of substance if this Court were to construe the language of the Pollution Exclusion to limit the Insurer's liability to any form of pollution, regardless of causation resulting from the Insured's wrongful act. If so construed, liability for negligence in any shape or form would be precluded with ease by attaching any relation, as far removed as one could imagine, to pollution."

**Purposeful business activities are not "sudden and accidental" discharges.**

*Bituminous Coal Corp. v. Hems, 2007 WL 1545641 (E.D. Pa., May 3, 2007)*

The New Jersey Department of Environmental Protection sought to recover costs associated with the cleanup of a landfill, claiming that, on various occasions from 1971 through 1983, the insured had transported and discharged hazardous waste into the landfill. The insured's insurer denied coverage for the claim, arguing that the insured's dumping activities were precluded from coverage by the policies' "sudden and accidental" pollution exclusion.

In focusing on the "sudden and accidental" exception to the pollution exclusion provided in the policies, the court found that the insured's continued dumping of hazardous substances over an eight year





period, was a purposeful business activity, the result of which “could have been expected, or should have been anticipated by the insured.” Accordingly, the court held that, even if it had otherwise fallen within the scope of the policies, the conduct at issue was exempt from coverage under the pollution exclusion.

### Unexpected water damage taking place over years is not “sudden” and is therefore excluded from coverage.

*Tinucci v. Allstate Insurance Company, 487 F.Supp.2d 1058 (D. Minn., April 11, 2007)*

Insured homeowners brought an action seeking a declaratory judgment as to the insurer’s obligation to indemnify them for water damage to their home. It was undisputed that the water damage at issue oc-

curred over a period of several years, but went undiscovered until the insured made plans to sell their home and learned of the damage. The insurer argued that the damage was excluded by a provision precluding coverage for water damage, while the insured argued that the unexpected discovery of the damage fell within the “sudden and accidental” exception to the exclusion.

The court rejected the insureds’ argument that their unexpected discovery of the damage rendered the damage “sudden” within the meaning of the exception to the exclusion. The court found that the “sudden and accidental” language does have a temporal element, and that the meaning of the phrase was well documented under Minnesota law, including in cases addressing its meaning as an exception to the pollution exclusion.

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