

Everything You Always Wanted To Know About The Pollution Exclusion

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A. Overview of Issues/Introduction

One of the most contentious issues in insurance coverage litigation over the past 20 years has been the interpretation of the pollution exclusion contained in many general liability policies. Initially, the dispute centered on the interpretation of the “sudden and accidental” pollution exclusion and, later, on the “absolute” pollution exclusion and its variants. There have been varying judicial interpretations of both the “sudden and accidental” and “absolute” pollution exclusion by the highest courts of numerous jurisdictions. Even though the Illinois Supreme Court has rendered decisions on both the “sudden and accidental” and “absolute” pollution exclusions, coverage disputes over the interpretation of the pollution exclusion still arise on a regular basis due to varying factual situations. Thus, jurisprudence interpreting the pollution exclusion continues to evolve. Despite rulings by the Illinois Supreme Court on both pollution exclusions, we can expect to see additional published decisions from Illinois courts addressing the pollution exclusion for quite some time in the foreseeable future.

This chapter discusses the history and issues surrounding both the “sudden and accidental” and “absolute” pollution exclusion under Illinois law.

B. The “Sudden and Accidental” Pollution Exclusion

1. History

Beginning in the early 1970s, liability insurers began inserting exclusions into their policies for bodily injury and property damage arising out of the escape or release of

pollutants. Originally, the pollution exclusion was attached as an endorsement to general liability policies. As a result of a number of high profile environmental contamination incidents such as Love Canal and Times Beach that attracted public attention, the pollution exclusion became a standard policy exclusion beginning with the 1973 Insurance Services Office (“ISO”) general liability form.

2. I.S.O. Form

The “sudden and accidental” pollution exclusion generally refers to the standard exclusion that is contained in the 1973 ISO general liability form. This exclusion has been the subject of numerous court decisions both in Illinois and other jurisdictions. The 1973 ISO “sudden and accidental” pollution exclusion provides as follows:

This insurance does not apply to:

Bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapor, soot, fumes, acids, alkalis, toxic chemicals, liquids, or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere, or any other water course or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

The “sudden and accidental” pollution exclusion contains two parts. The insurer initially excludes coverage for all claims arising out of the discharge of pollutants. The insurer, however, provides an exception to this broad exclusion and reinstates coverage for discharges that are both “sudden and accidental.”

3. Other Variants

In addition to the “sudden and accidental” pollution exclusion, two variants of the ISO exclusion also were developed, one by the London Market Insurers and another by the Travelers group of insurers in the 1970s.

a) London’s Pollution Exclusion

The London “pollution exclusion” which was generally attached as an endorsement to policies issued by Lloyds’ syndicates and various London Market Insurers is more restrictive than the 1973 ISO pollution exclusion. The London exclusion provides:

This Insurance does not cover any liability for:

- (1) Personal Injury or Bodily Injury or loss of, damage to, or loss of use of property directly or indirectly caused by seepage, pollution or contamination, provided always that this clause shall not apply to liability for Personal Injury or Bodily Injury or loss of or physical damage to or destruction of tangible property, or loss of use of such property damaged or destroyed, where such seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of this insurance.**
- (2) The cost of removing and nullifying or cleaning-up seeping, polluting or contaminating substances unless the seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of this insurance.**
- (3) Fines, penalties, punitive or exemplary damages.**

Accordingly, the London pollution exclusion, like the “sudden and accidental” pollution exclusion, contains two parts where coverage is initially excluded for all claims

arising out of the release, seepage, or discharge of pollutants. Coverage is, however, reinstated with respect to any property damage, personal injury or bodily injury claims caused by a sudden, unintended and unexpected happening.

4. Travelers' Pollution Exclusion

Likewise, the Travelers group of insurance companies in the 1970s developed their own pollution exclusion that was similar to London's pollution exclusion. The Travelers pollution exclusion provides:

This policy does not apply to . . . bodily injury or property damage arising out of any emission, discharge, seepage, release or escape of any liquid, solid, gaseous or thermal waste or pollutant if such emission, discharge, seepage, release or escape is either expected or intended from the standpoint of the insured or any person or organization for whose acts or omissions any insured is liable, but this exclusion does not apply to the emission, discharge, seepage, release or escape of petroleum or any petroleum derivative into any body of water.

The Travelers pollution exclusion, in contrast to the standard ISO pollution exclusion, does not concern itself with whether the discharge was either "sudden or accidental." Moreover, the Travelers exclusion also does not contain a time element. Accordingly, the Travelers pollution exclusion is a less onerous exclusion for insureds.

5. Representative Cases

a) Illinois Cases Pre-*Outboard Marine*

Prior to the Illinois Supreme Court's ruling in *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 154 Ill.2d 90, 607 N.E.2d 1204, 180 Ill. Dec. 691 (1992), Illinois courts

were divided on the interpretation of the “sudden and accidental” pollution exclusion. The first Illinois case to address the “sudden and accidental” exception to the pollution exclusion was *Willett Truck Leasing Co. v. Liberty Mutual Ins. Co.*, 88 Ill. App.3d 133, 410 N.E.2d 376, 43 Ill. Dec. 376 (1st Dist. 1980). In *Willett*, an employee of a trucking company was allegedly injured when exhaust fumes entered the cab of the truck which he was operating. The driver sued the insured trucking company, who then tendered its defense to its insurer. The insurer refused to defend, citing the pollution exclusion contained in the policy.

The insured then filed a declaratory judgment action. The trial court and Illinois Court of Appeals for the First District ruled in favor of the insured, finding that fumes could have entered the cab suddenly and accidentally. In its opinion, the First District noted that, if it was subsequently determined that the fumes were not sudden and accidental, the insurer would not have a duty to indemnify the insured.

The pollution exclusion was next addressed in *Reliance Insurance Co. of Illinois v. Martin*, 126 Ill. App.3d 94, 467 N.E.2d 287, 81 Ill. Dec. 587 (1st Dist. 1984). In *Martin*, the Illinois Court of Appeals addressed the issue of whether the pollution exclusion barred coverage for various claims asserted against a parking garage owner after carbon monoxide and soot allegedly migrated from the garage into neighboring condominium units. The parking garage’s insurer argued that, because fumes and soot could have entered the condominium building at varying times over a long time period, the fumes could not have fallen within the “sudden and accidental” exception to the pollution exclusion.

The Illinois Court of Appeals disagreed with the insurer's argument, finding that the phrase "sudden and accidental" meant "expected and intended." The court then noted that the relevant question was whether the insured could have "intended or expected" the carbon monoxide and soot to enter into the condominium unit, as opposed to the time frame of the release. The court further found that, because it was not clear if the insured expected a release of the fumes into the adjacent condominium building, the pollution exclusion would not apply. *Martin* is a noteworthy opinion because it was the first Illinois opinion that construed the term "sudden," as contained in the exception to the pollution exclusion, not to have a temporal meaning.

In *U.S. Fidelity and Guaranty Co. v. Specialty Coatings Co.*, 180 Ill. App.3d 378, 535 N.E.2d 1071, 129 Ill. Dec. 306 (1st Dist. 1989), the court addressed the issue of whether the insurer has a duty to defend its insured in an underlying action where the polluting acts were performed by a third party. In its ruling, the court found that the "sudden and accidental" pollution exclusion did not apply to bar coverage for an environmental claim that arose out of the insured's alleged delivery of hazardous waste to a third party recycler for disposal. The recycler allegedly disposed of the hazardous waste by dumping waste materials on its property. The court rejected the insurer's argument that it had no duty to defend or indemnify the insured because of the application of the pollution exclusion. In its holding, the court noted that the pollution exclusion was ambiguous when applied to a non-active polluter, and held that the "sudden and accidental" exception should be construed to mean "unintended and unexpected."

A different result was reached in *International Minerals and Chemical Corp. v. Liberty Mutual Ins. Co.*, 168 Ill. App.3d 361, 522 N.E.2d 758, 119 Ill. Dec. 96 (1st Dist. 1988). In this case, the Illinois Court of Appeals found that the sudden and accidental pollution exclusion operated to bar coverage for a claim asserted against the insured arising out of an environmental contamination claim at a barrel reconditioning facility which the insured owned between 1973 and 1976. In its opinion, the Illinois Court of Appeals opined that the “sudden and accidental” exception to the pollution exclusion required that the polluting activity, i.e. the discharge, dispersal or escape of pollutants, must both be “sudden” and “accidental.” Interestingly, the court departed from prior Illinois precedent and assigned a temporal meaning to the term “sudden,” holding that the term does not mean “unexpected” or “unintended.”

The *International Minerals* court relied on several decisions from other states in reaching its opinion. Moreover, in rejecting prior Illinois precedent that the term “sudden” means “unintended and unexpected,” the court specifically stated that the reasoning utilized in prior Illinois decisions was flawed because defining “sudden” as meaning “unintended and unexpected” renders it synonymous with the term “accidental,” as that term is used in the policy, thus rendering the word “accidental” as redundant surplusage. *International Minerals*, 552 N.E.2d at 768. Moreover, the *International Minerals* court opined that the term “sudden” is understood in its ordinary and most common and popular sense to have a temporal meaning. *Id.*

b) The *Outboard Marine* Decision

By 1992, there were conflicting Illinois appellate decisions concerning the interpretation of the “sudden and accidental” pollution exclusion, with the *International Minerals* opinion finding that the term “sudden” has a temporal context, while other decisions, such as *Specialty Coatings*, holding that the “sudden and accidental” exception should be construed to mean “unintentional and unexpected.” The Illinois Supreme Court first addressed the “sudden and accidental” pollution exclusion in *U.S. Fidelity and Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill.2d 64, 578 N.E.2d 926, 161 Ill. Dec. 280 (1991). The Illinois Supreme Court in *Wilkin* did not construe the “sudden and accidental” exception, but rather held that the pollution exclusion did not apply to bar coverage for a release of asbestos fibers within the confines of a building. The next year, however, the Illinois Supreme Court, addressed the interpretation of the “sudden and accidental” exception to the pollution exclusion in *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 154 Ill.2d 90, 607 N.E.2d 1204, 180 Ill. Dec. 691 (1992) (“*OMC*”).

The insured in *OMC* allegedly discharged PCB-contaminated wastewater into Waukegan Harbor over the course of several years. *OMC*’s insurers asserted that the pollution exclusion barred coverage for the damage caused by the releases. The insured responded that these gradual releases fell within the “sudden and accidental” exception to the pollution exclusion and, therefore, coverage was reinstated. The Lake County Circuit Court, citing *International Minerals*, held that the term “sudden,” in the context of the exception to the pollution exclusion, should be construed to include a temporal connotation synonymous with “abrupt;” it would not be construed merely to mean

“unexpected and unintended.” The Illinois Court of Appeals for the Second District affirmed. *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 212 Ill. App.3d 231, 570 N.E.2d 1154, 156 Ill. Dec. 432 (2nd Dist. 1991).

The Illinois Supreme Court reversed and found that the term “sudden” as contained in the exception to the pollution exclusion was ambiguous and could be defined to mean “unexpected and unintended.” In finding that gradual releases occurring over many years nonetheless qualified as “sudden and accidental” events, the court rejected the insurers’ argument that the term “sudden” was unambiguous and contained a temporal element meaning “quick” or “abrupt.” Consulting numerous dictionaries, the court noted that “sudden” is sometimes defined as “quick or abrupt,” but at other times is defined as “happening unexpectedly without notice or warning, or unforeseen.” *OMC*, 607 N.E.2d at 1218. The Illinois Supreme Court found that the various definitions were reasonable and, therefore, the term “sudden” was ambiguous.

Because ambiguous policy terms, especially when contained in an exclusion, are construed against the insurer, the court found that the term “sudden” in the standard ISO pollution exclusion means “unexpected” or “unintended,” not quick or abrupt. Having interpreted “sudden” to mean “unexpected,” the court found that the insured’s discharges of pollutants were unexpected (albeit not quick or abrupt). Accordingly, the court found that the “sudden and accidental” exception reinstated coverage for the insured’s claim.

The Illinois Supreme Court then held that the insurers had a duty to defend OMC and remanded the case to the trial court for a determination of the insurers’ indemnity obligation. The court also provided express instructions on the standard for applying the

pollution exclusion. Specifically, it noted that the “relevant consideration here is whether the insured expected and intended to discharge *the particular toxic it is alleged to have discharged and for what it now seeks coverage*” [Emphasis in the original]. *OMC*, 607 N.E.2d at 1222. The court emphasized that the focus should be on the “unexpected and unintentional” nature of the release or discharge and the resulting property damage or bodily injury. The Illinois Supreme Court rejected the insurers’ contention that “the expected or intended release of *any waste material* bars the application of” the “sudden and accidental” exception to the pollution exclusion [Emphasis in the original]. *Id.* Instead, the court instructed the lower court to “determine whether and, if so, at what point in time *OMC* expected and intended the releases of PCBs which it now seeks coverage” *Id.*

On remand, the Lake County Circuit Court found that *OMC* did not expect or intend the releases of PCBs into Waukegan Harbor. Accordingly, it found that the pollution exclusion did not apply to bar coverage. *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, Nos. 86 MR 308, 88 CH 98, 88 MR 332 (Ill. Cir. Ct., Lake Cty., March 20, 1995).

Thus, based on *OMC*, the Illinois Supreme Court does not recognize a temporal element to the “sudden and accidental” pollution exclusion. Nonetheless, the exclusion was not entirely written out of the policy because, under the exclusion, the insurer need only show that the “discharge or release” (as opposed to “damages” under the occurrence definition) was expected or intended.

c) Post-Outboard Marine “Sudden and Accidental” Pollution Exclusion Decisions

The *OMC* decision did not signal the end of litigation involving the “sudden and accidental” pollution exclusion. Illinois courts have issued several decisions subsequent to the *OMC* ruling. In *La Salle National Trust, N.A. v. Schaffner*, 818 F. Supp. 1161 (N.D. Ill. 1993), the United States District Court for the Northern District of Illinois, citing *OMC*, ruled that the “sudden and accidental” pollution exclusion did not preclude coverage with respect to an underlying action where the complaint alleged that the plaintiffs “knew or should have known of the release of PCE and other [hazardous] organic compounds.” *Id.* at 1169. In its opinion, the court noted that “the complaint simply alleges releases, which could be abrupt or otherwise, and which, if unintentional, could potentially create liability. . . . The complaint does allege conduct potentially covered by exceptions in the ‘sudden and accidental’ pollution exclusion.” *Id.* at 1169; *see also Riverside Oil Co. v. Federated Mutual Ins. Co.*, 1994 WL 904293 (C.D. Ill., Aug. 19, 1994) (“the court finds that the word ‘sudden’ as used in the exception to the exclusion means unexpected or unintended”).

The Illinois Court of Appeals for the First District, however, found the “sudden and accidental” exception to the pollution exclusion operated to bar coverage for a claim where the insured routinely and regularly spilled PCB-containing materials. *Fruit of the Loom, Inc. v. Travelers Indemnity Co.*, 284 Ill. App.3d 485, 672 N.E.2d 278, 219 Ill. Dec. 770 (1st Dist. 1996). In *Fruit of the Loom*, the First District held that the *OMC* ruling was inapplicable to claims where the insured deliberately released contaminants into the environment. Specifically, the court stated: “[the] evidence sufficiently

demonstrates that FOTF [insured] regularly experienced and endeavored to deal with discharges and release of the PBCs. To claim that such discharges and releases were unexpected is disingenuous.” 672 N.E.2d at 287.

The Illinois Court of Appeals for the Fifth District in *St. Paul Fire & Marine Ins. Co. v. Lefton Iron and Metal Co., Inc.*, 296 Ill. App.3d 475, 694 N.E.2d 1049, 230 Ill. Dec. 771 (5th Dist. 1998), found that the “sudden and accidental” exception to the pollution exclusion did not preclude coverage for a claim involving contamination at a site which was acquired, but never developed, by the insured. *Lefton* involved a situation where the insured purchased a former industrial site with two wastewater ponds containing oil and other wood preservative solutions. The insured acquired the site on an “as is” basis and, at the time, the site already contained two wastewater ponds filled with oil, creosotes, pentachlorophenol (“PCP”) and other chemical preservatives. The insurers sought to exclude coverage, asserting that the insured was “aware of” the existence of the two wastewater ponds at the time it acquired the site. The court, however, rejected the insurer’s arguments, noting that the underlying complaint contained allegations of a “sudden accident involving pollution” as contemplated by the *OMC* ruling.

d) Brief Sampling Of Rulings From Other Jurisdictions

As previously noted, the “sudden and accidental” pollution exclusion is subject to divergent interpretations by the highest courts of various jurisdictions and, at times, between courts within a single jurisdiction. Notably, neighboring states have reached different conclusions on the interpretation of the “sudden and accidental” exception to the pollution exclusion. Courts in Indiana and Wisconsin have held that the “sudden and

accidental” exception to the pollution exclusion is ambiguous and does not bar coverage for environmental claims. *American States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996); *Seymour Mfg. Co., Inc. v. Commercial Union and Ins. Co.*, 665 N.E.2d 891 (Ind. 1996); *Just v. Land Reclamation, Ltd.*, 157 Wis.2d 507, 456 N.W.2d 570 (Wis. 1990); *Patz v. St. Paul Fire & Marine Ins. Co.*, 15 F.3d 699 (7th Cir. 1994) (applying Wisconsin law). The highest courts of Iowa, Michigan, Minnesota and Ohio, however, have found the “sudden and accidental” exception to the pollution exclusion to be clear and unambiguous and have applied a temporal meaning to the term “sudden.” *Iowa Comprehensive Petroleum Underground Storage Tank Fund v. Farmland Mutual Ins. Co.*, 568 N.W.2d 815 (Iowa 1997); *Weber v. IMT*, 462 N.W.2d 283 (Iowa 1990), *Upjohn Co. v. New Hampshire Ins. Co.*, 438 Mich. 197, 476 N.W.2d 392 (1991); *Polkow v. Citizens Ins. Co. of America*, 438 Mich. 174, 476 N.W.2d 382 (1991); *Anderson v. Minnesota Ins. Guaranty Assoc.*, 534 N.W.2d 706 (Minn. 1995); *Hybud Equipment Corp. v. Sphere Drake Ins. Co.*, 64 Ohio St.3d 657, 597 N.E.2d 1096 (1992).

These divergent interpretations of “sudden and accidental” pollution exclusion are not limited to the Midwest, but rather exist nationwide. Accordingly, the law of a particular jurisdiction will determine whether or not the “sudden and accidental” exception to the pollution exclusion will operate to bar coverage with respect to a particular claim.

6. Issues

There are several issues that occasionally arise in cases involving the application of the “sudden and accidental” pollution exclusion. Although a number of the following

issues were addressed in the cases cited above, these issues are worth discussing in further detail.²

a) “Sudden” Means “Unexpected And Unintended”

As noted above, the most contentious issue surrounding the “sudden and accidental” pollution exclusion is whether or not the exception includes a temporal element. It has generally been the position of insurers that the term “sudden” has a temporal connotation, generally meaning “quick” or “abrupt.” The Illinois Supreme Court has rejected this argument, holding that the term “sudden” is ambiguous. Thus, only “unexpected and unintended” discharges are excluded from coverage. *See generally, OMC*. Accordingly, under Illinois jurisprudence, the term “sudden” in the “sudden and accidental” exception to the pollution exclusion does not contain a temporal element. Rather, the exception will reinstate coverage with respect to those releases that were “unexpected and unintended” by the insured.

b) The “No Intent to Damage” Argument

A related issue is whether the “unexpected and unintended” releases were either expected or intended from the standpoint of the insured. This argument was discussed at length by the Michigan Supreme Court in *Arco Industries Corp. v. American Motors Ins. Co.*, 448 Mich. 395, 531 N.W.2d 168 (1995), *vacated in part, affirmed in part*, 456 Mich. 305, 572 N.W.2d 617 (1998). In *Arco*, the Michigan Supreme Court held that whether or

² A number of these issues are likewise applicable to the interpretation of the “absolute” pollution exclusion, as will be discussed more fully below.

not a release was “unexpected and unintended” was to be analyzed subjectively from the standpoint of the insured, as opposed to the objective “reasonable man” standard.

The Illinois Court of Appeals in *Lefton* arguably reached a similar conclusion. In addressing the “known loss” argument, the Fifth District found that the insurer failed to create a presumption that the insured “knew or had reason to know of a substantial probability that a loss would ensue.” *Lefton*, 674 N.E.2d at 1055. Although an Illinois court has not addressed the subjective versus objective standard with respect to “unexpected and unintended” releases of pollution, an Illinois court may find the Michigan Supreme Court’s ruling in *Arco* on this issue and the Fifth District’s ruling in *Lefton* persuasive.

c) The Secondary Discharge Argument

The secondary discharge argument arises where an insured places waste materials into what is believed to be a secure, confined disposal area, such as a clay-lined landfill, and the contaminants later are released into the soil or groundwater through either a defect in the containment vessel or through intervening circumstances such as a flood. The secondary discharge argument arises over whether the application of the pollution exclusion should be evaluated in the context of the initial placement of the waste into the landfill or in the context of its subsequent release into the environment. There are no Illinois decisions addressing this issue. Courts in other jurisdictions, however, appear to be divided on this issue.

In *Sylvester Brothers Development Co. v. Great Central Ins. Co.*, 480 N.W.2d 368 (Minn. App. 1992), *after remand*, 502 N.W.2d 793 (Minn. App. 1993), the Minnesota Court of Appeals held that the applicability from the pollution exclusion is to be determined by the release of pollutants from the landfill, as opposed to the initial placement of the contaminants into the landfill. *Sylvester* involved a landfill which was constructed in 1969 according to the then prevailing standards. The landfill, however, was not able to contain certain pollutants which migrated to the surrounding soil and groundwater. In its opinion, the Minnesota Court of Appeals stated: “since landfills were expected and intended to contain any waste placed in them, pollutants deposited in a landfill could only cause property damage if there was a ‘discharge, dispersal, release or escape’ of those pollutants into the surrounding environment. Thus, the deposit of a pollutant into a landfill cannot be the triggering event; rather, the ‘escape’ is a critical inquiry for the purposes of determining the applicability of the pollution exclusion.” *Sylvester Brothers*, 480 N.W.2d at 373-374. See *F.L. Aerospace v. Aetna Cas. & Sur. Co.*, 897 F.2d 214 (6th Cir. 1990) (the “sudden and accidental” exception applies to the discharge of pollutants into the environment and the pertinent discharge was not the storage of waste at the industrial waste disposal site).

Some courts, however, have held the application of the pollution exclusion is to be evaluated based on the initial placement of waste materials into the landfill, as opposed to any secondary discharge. *Broderick v. Investment Co. v. Hartford Accident & Indemnity Co.*, 954 F.2d 601 (10th Cir. 1992). In *Broderick*, the Tenth Circuit held that the placement of liquid waste materials into a containment pond was a discharge into or upon the land within the meaning of the pollution exclusion, even if damage to the

groundwater was not an intended result: “whether BIC [insured] intended the waste to seep into the groundwater and cause damage after the initial discharge into the land is not relevant.” *Broderick Investment*, 954 F.2d at 607; *see also Oklahoma Publishing Co. v. Kansas City Fire Marine Ins. Co.*, 805 F. Supp. 905 (W.D. Okla. 1992); (the pollution exclusion is determined by the initial deposit of waste into a landfill); *St. Paul Fire Marine Ins. Co. v. Warwick Dyeing Corp.*, 26 F.3d 1195 (1st Cir. 1994) (relevant discharge is a disposal of hazardous waste into the landfill and the release of substances into the environment was not a separate event constituting an independent discharge).

d) The No Knowledge of Pollution Argument

Some insureds attempt to avoid the application of the pollution exclusion by asserting that they had no knowledge that their waste handling or disposal practices resulted in contamination. Thus, in those situations where an insured contracts with a waste hauler for disposal of hazardous waste, subsequent releases of pollutants are considered “accidental” for purposes of insurance coverage as long as the insured had no knowledge that the waste was disposed of improperly by the third party, even in those situations where the waste hauler may have acted intentionally. There is little case law addressing this issue. The Illinois Court of Appeals, however, addressed this situation under Missouri law, and held that where an insured contracts with a waste hauler for disposal of hazardous waste, subsequent releases of the pollutants are “accidental” for the purpose of liability insurance coverage, provided the insurer had no knowledge that the waste was disposed of improperly even though the waste hauler may have acted intentionally. *Emerson Electric Co. v. Aetna Cas. & Sur. Co.*, 743 N.E.2d 629, 252 Ill.

Dec. 761 (1st Dist. 2001). Accordingly, if an insured contracts with a waste hauler who deliberately and intentionally disposes of contaminants, and the insured has no knowledge of the intentional actions of the waste disposal contractor, such discharges may be considered “accidental” for the purposes of reinstating coverage pursuant to the “sudden and accidental” exception to the pollution exclusion.

e) **The Inside/Outside Pollution Argument**

The inside/outside pollution argument arises in situations where the discharge or release of contaminants are confined within a building or other structure. The pollution exclusion generally applies to discharges to the “air, atmosphere, or water,” but is silent with respect to releases that are contained within an indoor, or other confined, environment. Illinois courts have found that the release or discharge of contaminants which are confined to the interior of a building are not subject to the pollution exclusion. For example, in *Wilkin*, the Illinois Supreme Court held that the term “atmosphere” in the pollution exclusion was ambiguous with respect to the release of allegedly toxic asbestos fibers that were confined to the interior of a building. In its opinion, the Illinois Supreme Court noted that the term “atmosphere” “connotes the external atmosphere which surrounds the earth and consists of the air and any gases or particles therein.” *Wilkin*, 578 N.E.2d at 933. The Illinois Supreme Court then expressly held that the term “atmosphere” in the pollution exclusion did not include “the internal environs of individual buildings.” *Id.* See also *American States Ins. Co. v. Koloms*, 177 Ill.2d 473, 680 N.E.2d 672, 229 Ill. Dec. 149 (1997) (“absolute” pollution exclusion did not apply to

bar coverage for release of carbon monoxide confined within the interior of a building as a result of a broken furnace).

Thus, Illinois case law on this issue clearly provides that the pollution exclusion will likely not apply to any release of contaminants that are confined to the interior of a building or structure.

f) Regulatory Estoppel

Under the doctrine of regulatory estoppel, insurers are estopped to deny coverage based on the operation of the “sudden and accidental” pollution exclusion because of alleged misrepresentations made to various state insurance commissioners or insurance departments in the early 1970s when they applied for permission to use the “sudden and accidental” pollution exclusion. Under this argument, the alleged misrepresentation occurred in an explanatory memorandum that the “insurance industry” submitted to state insurance departments in their applications for approval of the “sudden and accidental” pollution exclusion. The memorandum submitted by the ISO to various state insurance departments provided, in pertinent part:

Coverage for pollution or contamination is not provided in most cases under the present policies because the damages can be said to be expected or intended and are thus excluded by the definition of occurrence. The above [“sudden and accidental” pollution] exclusion clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries where the pollution or contamination results from an accident.

Sunbeam Corp. v. Liberty Mutual Ins. Co., 740 A.2d 1179, 1189 n.7 (Pa. Super. 1999).

The doctrine of regulatory estoppel was first recognized by the New Jersey Supreme Court in *Morton International v. General Accident Ins. Co. of America*, 134 N.J. 1, 629 A.2d 831 (1993). In *Morton*, the New Jersey Supreme Court held that regulatory estoppel existed based on an alleged misrepresentation by the Insurance Rating Board (“IRB”), the predecessor to ISO, in the explanatory memorandum addressing the scope of the “sudden and accidental” pollution exclusion, which the court construed to only preclude coverage in cases where the insured intentionally discharged a known pollutant. See also *Joy Technology v. Liberty Mut. Ins. Co.*, 187 W.Va. 742, 421 S.E.2d 493 (1992).

At this time, there is no published Illinois opinion addressing the doctrine “regulatory estoppel.” Most courts, however, have rejected the regulatory doctrine argument. In rejecting a regulatory estoppel argument, the Delaware Supreme Court stated:

First, no representations were made to the Delaware insurance regulators concerning the application and interpretation of the NMA 6285 [“sudden and accidental” pollution exclusion] provision. Second, regulatory estoppel is inapplicable where, as here, the contract language is clear and unambiguous.

E.I. DuPont DeNemours & Co. v. Allstate Ins. Co., 693 A.2d 1059, 1062 (Del. 1995).

Likewise, the *Sunbeam* court stated:

The extrinsic evidence that Sunbeam offers in this case does not constitute court “usage in trade” that concept has been applied by our courts. A single explanatory memorandum written to the Pennsylvania Insurance Department in 1970 certainly does not constitute evidence of a generally

accepted and applied usage of the phrase “sudden and accidental” by the insurance industry as a whole.

Sunbeam, 740 A.2d at 1184-85. See also *Federated Mutual Ins. Co. v. Botkin Grain Co.*, 64 F.3d 537 (10th Cir. 1995) (applying Kansas law); *Polaroid Corp. v. Travelers Indem. Co.*, 414 Mass. 747, 610 N.E.2d 912 (1993).

Based on the fact that the majority of the courts that have addressed the regulatory estoppel argument have rejected the theory, it is unlikely that the doctrine will be recognized by an Illinois court.

C. The “Absolute” Pollution Exclusion

1. History

The “absolute” pollution exclusion began to appear regularly in liability policies in the mid-1980’s, primarily in response to those court rulings that found the ISO “sudden and accidental” pollution exclusion to be ambiguous and limited its application to any expected or intended pollution. In the early 1980’s, liability insurers began to attach, as an endorsement, an “absolute” pollution exclusion that was designed to eliminate coverage for all pollution claims. ISO incorporated the “absolute” pollution exclusion as a standard policy exclusion in its 1984 general liability form. Most general liability policies issued since the late 1980’s are likely to contain an “absolute” pollution exclusion or a variant thereof. Like the “sudden and accidental” pollution exclusion, the “absolute” pollution exclusion has been subjected to various interpretations by courts in Illinois and other jurisdictions.

2. The I.S.O. Absolute Pollution Exclusion Form

The 1984 I.S.O. Exclusion reads as follows:

This insurance does not apply to:

* * *

- f. (1) **“Bodily injury or “property damage” arising out of the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants:**
- (a) **At or from premises you own, rent or occupy;**
 - (b) **At or from any site or location used by you or others for the handling, storage, disposal, processing or treatment of waste;**
 - (c) **Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by you or any person or organization for whom you may be legally responsible; or**
 - (d) **At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:**
 - (i) **if the pollutants are brought on or to the site or location in connection with such operations; or**
 - (ii) **if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.**
- (2) **Any loss, cost, or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.**

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acid, alkalis,

chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

The distinguishing features of the “absolute” pollution exclusion, as compared to the “sudden and accidental” pollution exclusion, is that the “absolute” pollution exclusion does not contain an exception for sudden and accidental events. Moreover, the “absolute” pollution exclusion also eliminates the requirement that the pollution be discharged into or upon land, the atmosphere or any watercourse or body of water that was required under the “sudden and accidental” pollution exclusion.

a) Hostile Fire Exception

In 1986, ISO made a minor amendment to its 1984 pollution exclusion. According to an ISO circular: “Concern has arisen that a literal interpretation of the revised [1984 pollution] exclusion might preclude coverage for injury or damage caused by smoke from a hostile fire.” To address this situation, ISO amended the pollution exclusion in 1986 to reinstate coverage for those situations involving a hostile fire. The 1986 ISO “absolute” pollution exclusion provides:

This insurance does not apply to:

- (1) “Bodily injury”, “property damage”, “personal injury” or “advertising injury” which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time.**
- (2) Any loss, cost or expense arising out of any:**
 - (a) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or**

- (b) **Claim or suit by or on behalf of a governmental authority or others for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants.**

Pollutants means solid liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste.

Waste includes materials to be recycled, reconditioned or reclaimed.

This exclusion does not apply to “bodily injury”, “property damage”, “personal injury”, or “advertising injury” caused by heat, smoke or fumes from a hostile fire. As used in the exclusion, a hostile fire means one which becomes uncontrollable or breaks out from where it was intended to be.

3. Other Variants

There are several other variants of the “absolute” pollution exclusion. In addition to the ISO absolute pollution exclusion, many insurers developed their own form of the absolute pollution exclusion, which were generally broader than ISO’s exclusion. One commonly used variant of the “absolute” pollution exclusion provides:

This policy does not apply:

- (1) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acid, alkalis, toxic chemicals, liquids, or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, whether or not such discharge, dispersal, release or escape is sudden or accidental.**

4. Representative Cases

There have been several Illinois decisions addressing the “absolute” pollution exclusion, including an Illinois Supreme Court decision which holds that the “absolute” pollution exclusion applies to only those injuries caused by “traditional” environmental pollution. *American States Ins. Co. v. Koloms*, 177 Ill.2d 473, 687 N.E.2d 72, 227 Ill. Dec. 149 (1997).

a) Pre-Koloms Absolute Pollution Exclusion Opinions

The Illinois Supreme Court in *OMC* examined an “absolute” pollution exclusion and found that it barred coverage for OMC’s property damage claim arising out of the discharges of PCBs into Waukegan Harbor. The court, therefore, granted summary judgment in the insurer’s favor, finding that the insured’s polluting activities fell within the scope of the “absolute” pollution exclusion. The court found that, under the “absolute” pollution exclusion, unlike the standard ISO “sudden and accidental” pollution exclusion, no exception existed in the exclusion that would reinstate coverage. The Illinois Court of Appeals in *Central Illinois Public Service Co. v. Allianz Underwriters Ins. Co.*, 240 Ill. App.3d 598, 668 N.E.2d 155, 181 Ill. Dec. 82 (1st Dist. 1992), also held that the “absolute” pollution exclusion was unambiguous and barred coverage for losses arising out of contamination at a former gas manufacturing plant. *See also Riverside Oil, Inc. v. Federated Mutual Ins. Co.*, No. 94-2038, 1994 WL 904293, 1994 U.S. Dist. Lexis 20394 (C.D. Ill. Aug. 19, 1994) (the “absolute” pollution exclusion barred coverage for a claim involving gasoline that leaked from a storage tank).

The “absolute” pollution exclusion was discussed at length in *Economy Preferred Ins. Co. v. Grandadam*, 275 Ill. App.3d 866, 656 N.E.2d 787, 212 Ill. Dec. 190 (3rd Dist. 1995). The Third District in *Grandadam* held that the “absolute” pollution exclusion contained in a homeowner’s policy precluded coverage for damage or injuries caused when the insured spilled a container of mercury in a neighbor’s home. In *Grandadam*, the insured attempted to argue that the pollution exclusion is limited only to “active polluting conduct,” citing *Specialty Coatings*. The court rejected the insured’s argument, holding that the *Specialty Coatings* opinion applied only to the interpretation of the “sudden and accidental” pollution exclusion as opposed to the “absolute” pollution exclusion. In its opinion, the *Grandadam* court held:

In the case before us, a container of mercury was brought into a house and spilled. In such a situation, we have no doubt about the applicability of the pollution exclusion clause. However, we might view this case differently if mercury was released from a broken household thermostat or thermometer. It is possible that in such a situation mercury would not be considered a pollutant. However, under the peculiar facts of this case, we find that the pollution exclusion applies and Economy does not have a duty to defend in the underlying suit.

Grandadam, 656 N.E.2d at 791. *Grandadam* is noteworthy in that it espoused a theory that the “absolute” pollution exclusion may not apply to releases involving common household items, thus establishing the foundation that the “absolute” pollution exclusion could be limited to traditional polluting activities, such as contamination released from a landfill.

The broad scope of the “absolute” pollution exclusion was limited by the First District’s holding in *Insurance Co. of Illinois v. Stringfield*, 292 Ill. App.3d 471, 685

N.E.2d 980, 226 Ill. Dec. 525 (1st Dist. 1997). In *Stringfield*, the court held, as a matter of first impression, that the “absolute” pollution exclusion did not apply to a bodily injury claim arising out of the ingestion of lead based paint chips. In its opinion, the court stated: “a pollutant is a substance that ‘pollutes’ or renders impure a previously unpolluted object, as when chemical wastes leach into a clean water supply.” *Id.* 685 N.E.2d at 983. The court then noted: “the lead did not pollute the paint; but was purposely incorporated into the paint from the start. The paint was intentionally applied to the premises. At that time, the paint was legal. It was considered neither impure nor unwanted.” *Id.* at 983-4. In its holding, the *Stringfield* court relied on the First District’s ruling in *American States Ins. Co. v. Koloms*, 281 Ill. App.3d 725, 666 N.E.2d 699, 217 Ill. Dec. 30 (1st Dist. 1996), which held that the “absolute” pollution exclusion was ambiguous and applied only to traditional “environmental pollution.”

b) *American States Insurance Company v. Koloms*

In *Koloms*, the First District held that the “absolute” pollution exclusion did not bar coverage for bodily injury claims caused by carbon monoxide leaking from a faulty furnace. In affirming the Cook County Circuit Court’s ruling, the First District explained that a reasonable insured would not consider carbon monoxide leaking from a furnace to be a “pollutant” within the meaning of the “absolute” pollution exclusion. The court theorized that it seemed far more reasonable that an insured would understand the “absolute” pollution exclusion to apply only to irritants and contaminants commonly thought of as “pollution” as opposed to all other possible irritants.

The First District's ruling in *Koloms* was appealed to the Illinois Supreme Court. The Illinois Supreme Court affirmed the First District's ruling and held that the "absolute" pollution exclusion contained in a commercial landlord's liability policy applied only to those injuries caused by "traditional" environmental pollution. *American States Ins. Co. v. Koloms*, 177 Ill.2d 473, 687 N.E.2d 72, 227 Ill. Dec. 149 (1997). The court found that the accidental release of carbon monoxide due to the broken furnace did not constitute environmental pollution as contemplated by the exclusion.

The Illinois Supreme Court's opinion contained a lengthy discussion of the history of the "absolute" pollution exclusion and determined that the "predominant motivation" of the absolute pollution exclusion was the "avoidance of the enormous expense and exposure resulting from the 'explosion' of *environmental* litigation" [Emphasis in original]. *Koloms*, 687 N.E.2d at 81. The court stated that it would be inappropriate to "ignore the 'absolute' pollution exclusion's *raison d'etre* and apply it to situations which do not remotely resemble traditional environmental contamination." *Id.* The court then held that the exclusion would bar coverage only for those claims involving "traditional" environmental contamination, which the court defined as "potential liability arising from the gradual or repeated discharge of hazardous substances *into the environment*" [Emphasis in original]. *Id.*

Thus, under *Koloms*, a determination must be reached concerning whether or not the particular claim involves "traditional environmental pollution" prior to invoking the "absolute" pollution exclusion. Unfortunately, the Illinois Supreme Court's decision provides little guidance to ask to what constitutes "traditional environmental pollution,"

with the exception of stating that it involves the gradual or repeated discharge of hazardous substances into the environment.

c) Post-Koloms Decisions

Illinois case law addressing the absolute pollution exclusion after *Koloms* focuses on whether or not the facts at issue constitute “traditional environmental pollution.” In *Kim v. State Farm Fire & Cas. Co.*, 312 Ill. App.3d 770, 728 N.E.2d 530, 245 Ill. Dec. 448 (1st Dist. 2000), the First District found that the “absolute” pollution exclusion applied to bar coverage with respect to a claim involving the release of tetrachloroethane (“perc”) from a malfunctioning dry cleaning machine. The insureds, Moon and Sue Kim, doing business as the Oriental Cleaning Company, attempted to obtain coverage from their insurer, State Farm Fire & Casualty Company (“State Farm”), with respect to environmental remediation costs resulting from the discharge of perc from a malfunctioning dry cleaning machine. State Farm denied coverage based on the “absolute” pollution exclusion contained in its policy.

The insured attempted to argue that the perc was legitimately placed in the dry cleaning machine as a part of a normal business activity and, accordingly, was not a waste product. The First Circuit rejected the insured’s argument, holding that the perc became a hazardous waste material when it was discharged into the land underneath the dry cleaning store and caused a threat to the groundwater. The court also rejected the insured’s argument that it reasonably expected that the State Farm policy would protect it from any liability resulting from an accidental release of perc. In its opinion, the court stated: “under *Koloms*, the dispositive determination is whether the release of perc

constituted traditional environmental pollution. This release of perc did constitute such traditional pollution, the pollution exclusion applies to bar coverage regardless of the cause of the perc release.” *Kim*, 728 N.E.2d at 536.

d) Brief Sampling Of Rulings In Other Jurisdictions

Like the “sudden and accidental” pollution exclusion, courts in other jurisdictions have reached differing results with respect to scope of the “absolute” pollution exclusion. An overwhelming majority of courts, however, have upheld the applicability of the “absolute” pollution exclusion, and, consequently, have excluded coverage.³ In those cases where the exclusion was found to be inapplicable, the issue was generally whether the substance allegedly causing the pollution was a pollutant or irritant as contemplated by the exclusion. For example, the Michigan Court of Appeals found that the “absolute” pollution exclusion precluded coverage for a claim alleging bodily injury as a result of exposure to carbon monoxide that allegedly collected inside of a building due to a faulty ventilation system. *Bituminous Casualty Corp. v. R. G. Taylor Corp.*, No. 203334, 12 Mealey’s Ins. Litigation Reports No. 29 (Mich. App. May 8, 1998). The pollution exclusion, however, was found not to apply injuries arising from exposure to chemicals in a photography laboratory. *Center for Creative Studies v. Aetna Life and Cas. Co.*, 871 F. Supp. 941 (E.D. Mich. 1994). The Wisconsin Court of Appeals found that the “absolute” pollution exclusion did not bar coverage for a claim involving a backup of

³ See generally, *McGuirk Sand & Gravel, Inc.*, 220 Mich. App. 347, 559 N.W.2d 93 (1996); *Zell v. Aetna Cas. & Sur. Ins. Co.*, 114 Ohio App.3d 677, 683 N.E.2d 1154 (1996); *Just v. Land Reclamation Ltd.*, 151 Wis.2d 593, 445 N.W.2d 683 (Ct. App. 1989), *reversed and remanded on other grounds*, 155 Wis.2d 737, 456 N.W.2d 570 (1990), *Board of Regent of Univ. of Minnesota v. Royal Ins. Co.*, 517 N.W.2d 888 (Minn. 1994), *Casualty Indemnity Exchange v. City of Sparta*, 997 S.W.2d 545 (Mo. App. 1999), *Town of Harrison v. National Union Fire Ins. Co.*, 89 N.Y.2d 308, 675 N.E.2d 829, 653 N.Y.S.2d 75 (1996).

sewage water, *Guenther v. City of Onalaska*, 223 Wis.2d 206, 588 N.W.2d 375 (Wis. 1998), *review denied*, 604 N.W.2d 571 (Wis. 1999), but nonetheless found that an injury arising out of the ingestion of lead-based paint chips was barred by the “absolute” pollution exclusion. *Peace ex rel Lerner v. Northwestern National Ins. Co.*, 228 Wis.2d 106, 596 N.W.2d 429 (Wis. 1999). The current trend with respect to the “absolute” pollution exclusion is that a number of courts, like Illinois, now focus on whether release is traditional environmental pollution, and whether the particular substance released could qualify as a “pollutant.”

e) “Hostile Fire Exception”

As previously indicated, some “absolute” pollution exclusions contain a “hostile” fire exception. Under the “hostile fire” exception, coverage is reinstated with respect to those situations where the pollutant or contaminant was released as a result of a “hostile fire,” which is generally defined as a fire that “become uncontrollable or breaks out from where it was intended to be.” There is no Illinois case that has addressed the “hostile fire” exception to the “absolute” pollution exclusion. Case law from other jurisdictions, however, indicates that the exception is subject to varying interpretations.

In *Maffei v. Northern Ins. Co. of New York*, 12 F.3d 892 (9th Cir. 1993) (applying California law), the Ninth Circuit adopted a definition of hostile fire involving “heat and light.” *Maffei*, 12 F.3d at 896. The court found that the term “hostile fire” as contained in the “absolute” pollution exclusion generally referred to any “unintended fire in an unintended location.” *Id.* The court then remanded the action back to the trial court to determine whether or not a hostile fire occurred in the closed and sealed chemical drum.

Id.; see also *Schmid v. Fireman's Fund Ins. Co.*, 97 F. Supp.2d 967 (D. Minn. 2000) (misplaced flame in a hot water heater that released carbon monoxide constituted a "hostile fire").

Other courts, however, have not applied a stringent definition to the "hostile fire" exception. For example, in *Owners Ins. Co. v. Singh*, 1999 WL 976249 (Ohio App. 1999), the Ohio Court of Appeals found that the "hostile fire" exception did not reinstate coverage with respect to a claim arising out of carbon monoxide fumes that were released from a faulty furnace. In its opinion, the court noted that the fumes were released into a building due to a blocked flue as opposed to being caused by a fire which broke out from where it was intended to be. *Id.*; See also *Bernhardt v. Hartford Fire Ins. Co.*, 102 Md. App. 45, 648 A.2d 1047 (1994) (build-up of carbon monoxide released from a furnace was not the result of a hostile fire); *E&L Chipping Co., Inc. v. Hanover Ins. Co.*, 962 S.W.2d 272 (Tex. App. - Beaumont, 1998) (the "hostile fire" exception did not reinstate coverage with respect to a claim involving contamination caused by contaminated water which was used to fight a fire at the insured's location and subsequently migrated off-site).

D. Issues Relating to Both the "Sudden and Accidental" and "Absolute" Pollution Exclusions

1. What Is A "Pollutant"

As noted above, a general consideration addressed by the courts in determining whether or not the "pollution" exclusion is applicable depends on whether the substance discharged into the environment constitutes a pollutant. There is a plethora of case law

addressing what a “pollutant” is in a variety of factual situations. In Illinois, the general rule is that a “pollutant” is a substance that “pollutes” or “renders impure a previously unpolluted object.” *Stringfield*, 685 N.E.2d at 983. Illinois courts have thus held that hazardous materials contained in “common household items” are arguably not considered to be “pollutants.” *Grandadam*, 656 N.E.2d at 791. For example, carbon monoxide emitted from a faulty furnace was not considered to be a pollutant. *Koloms*, 177 Ill.2d 473, 687 N.E.2d 72 (1997). Non-household items, however, have been found to be pollutants. For example, in Illinois, coal tar (*Central Illinois Public Service v. Allianz Underwriters Ins. Co.*, 240 Ill. App.3d 598, 608 N.E.2d 155 (1992)), gasoline (*Millers Mutual Ins. Assoc. of Illinois v. Graham Oil Co.*, 282 Ill. App.3d 129, 668 N.E.2d 233 (1996)), mercury (*Grandadam*) and PCBs (*OMC*) have been found to be “pollutants.” Other states have found that common items such as cooking grease (*Matheny v. Ludwig*, 742 So.2d 1029 (La. App. 1999)), dust (*Park-Ohio Indus. v. Home Indem. Co.*, 975 F.2d 1215 (6th Cir. 1992)), and saltwater (*Mesa Operating Co. v. California Union Ins. Co.*, 986 S.W.2d 749 (Tex. App.-Dallas 1999)) all constitute “pollutants” as contemplated under the pollution exclusion. In contrast, some courts have found traditionally hazardous items such as asbestos (*Owens-Corning Fiberglas Corp. v. Allstate Ins. Co.*, 74 Ohio Misc.2d 144, 660 N.E.2d 746 (Ohio Ct. Cm. Pleas, 1993)), carbon monoxide (*Koloms*), radioactive materials (*Minnesota Mining and Mfg. Co. v. Walbrook Ins. Co.*, 1996 WL 5787 (Minn. App. 1996)), and sewage (*U.S. Fidelity and Guaranty Co. v. Armstrong*, 479 So.2d 1164 (Ala. 1985)) are not “pollutants.” Thus, it is important to bear in mind that what constitutes a “pollutant” may vary based upon the nature of the discharge and the resulting damage.

2. Personal Injury Issues

Some general liability policies provide coverage for personal injury. This coverage is generally distinct from, and in addition to, coverage for bodily injury and property damage claims typically found within the policies. A number of disputes have recently arisen regarding the applicability of personal injury coverage with respect to pollution claims. Most “sudden and accidental” and “absolute” pollution exclusions generally exclude coverage for only bodily injury and property damage claims, as opposed to personal injury claims. Personal injury provisions vary among policies, and generally pertain to those injuries arising from specifically enumerated torts, such as trespass, wrongful eviction, wrongful entry, nuisance and the invasion of the right of private occupancy.

In underlying environmental actions, claimants often seek relief under theories of trespass, nuisance, loss of use and other common law trespassory theories. Insureds have often argued that these theories constitute “wrongful entry” or “other invasion or the right of private occupancy, thus falling within the scope of the “personal injury” provision. Because most pollution exclusions apply to only bodily injury and property damage claims, some insureds attempt to avoid the application of the pollution exclusion by using the “personal injury” provision of the exclusion. A number of courts have addressed the issue of whether environmental pollution claims generally fall with one or more of the specified torts contained in the personal injury definition.

Illinois courts have found that the pollution exclusion generally does not preclude coverage with respect to personal injury claims. For example, in *Illinois Toolworks v.*

Home Indem. Co., 998 F. Supp. 868 (N.D. Ill. 1998), the insured sought coverage for a lawsuit filed against it seeking damages for trespass and nuisance as a result of contamination which migrated from its facility to neighboring property. The insurer denied coverage based on the pollution exclusion, which was applicable only to bodily injury and property damage claims. The insurer asserted that the environmental damage claims did not fall within the personal injury provision of the policy, which the insurer argued was limited to “wrongful entry torts that injure natural persons.” *Id.*, 998 F. Supp. at 871. The court, however, found that the term personal injury encompassed claims of trespass arising from environmental contamination: “The policy language does not expressly limit ‘personal injury’ to ‘natural persons.’” *Id.* Thus, the pollution exclusion did not apply.

Likewise, the Seventh Circuit in *Pipefitters Welfare Educational Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir. 1993), found that PCB contamination that was released from a transformer constituted a “wrongful entry” as contemplated by the personal injury provision contained in a general liability policy. In *Pipefitters*, the insurer denied coverage based on the pollution exclusion; personal injury claims, however, were not subject to the pollution exclusion. The insurer rejected the insured’s argument that the migration of PCBs to neighboring property fell within the scope of the personal injury provision. Specifically, the insurer argued that personal injury coverage only encompassed conduct that is: (1) undertaken by one claiming an interest in property; and (2) intended to deprive “the injured party of its right to privately occupy” that property. *Id.* at 1040. In its opinion, the Seventh Circuit rejected the insurer’s

argument and held that one can commit a wrongful entry without intending to deprive the occupant of his right of occupancy. *Id.* at 1041.

Finally, the Second District in *Millers Mutual Ins. Co. Assoc. of Illinois v. Graham Oil Co.*, 282 Ill. App.3d 129, 668 N.E.2d 223, 218 Ill. Dec. 60 (2nd Dist. 1996), found that the personal injury coverage provision contained in a liability policy was broad enough to include trespassory actions involving environmental contamination: “we conclude that the facts alleged at bar detailing the unauthorized seepage and migration of gasoline on to the property of an adjoining neighbor was sufficient to bring the underlying complaint within the personal injury coverage of the policy.” *Id.*, at 668 N.E.2d at 231; *see also Country Mutual Ins. Co. v. Cedar Road District No. 3-96-0217*, Mealey’s Ins. Litigation Reports (April 8, 1997) (Ill. App. March 20, 1997) (the personal injury coverage grant is ambiguous and provides coverage for the wrongful entry of petroleum which was released by a pipeline puncture and migrated to property occupied by others).⁴

E. CONCLUSION

Despite Illinois Supreme Court rulings on both the “sudden and accidental” and “absolute” pollution exclusion, Illinois law continues to develop with respect to both exclusions. Thus, it is conceivable that additional nuances and coverage issues will continue to arise with respect to the application of these pollution exclusions under general liability policies in the future.

⁴ Other jurisdictions, however, have taken opposite positions and have held that pollution claims do not fall within the scope of personal injury coverage. *South Macomb Disposal Authority v. American Ins. Co.*, 225 Mich. App. 635, 572 N.W.2d 686 (1997); *County of Columbia v. Continental Ins. Co.*, 83 N.Y.2d 618, 634 N.E.2d 946, 612 N.Y.S.2d 345 (1994).

NOTE: THIS PAGE IS FOLLOWED BY THE 2005 UPDATE

Pollution Exclusion Update 2005

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II. Sudden and Accidental Pollution Exclusion

D. Representative Cases

3. [14S.9] Post-*Outboard Marine* Sudden and Accidental Pollution Exclusion Decisions

E. Issues

2. [14S.13] No Intent To Damage Argument

III. Absolute Pollution Exclusion

E. Representative Cases

3. [14S.25] Post-*Koloms* Decisions
5. [14S.27] Hostile Fire Exception

IV. Issues Relating to Both “Sudden and Accidental” and “Absolute” Pollution Exclusions

- A. [14S.28] Definition of “Pollutant”
- B. [14S.29] Personal Injury Issues

II. SUDDEN AND ACCIDENTAL POLLUTION EXCLUSION

D. Representative Cases

3. [14S.9] *Post-Outboard Marine Sudden and Accidental Pollution Exclusion Decisions*

Add at the end of the section:

The “sudden and accidental” pollution exclusion was addressed by the United States District Court for the Northern District of Illinois in *American Motorists Insurance Co. v. Stewart Warner Corp.*, No. 01 C 2078, 2004 W.L. 1444889, 2004 U.S. Dist. LEXIS 11802 (N.D.Ill. June 25, 2004), which concerned an insurance coverage dispute involving groundwater contamination that migrated to a neighboring parcel. American Motorist Insurance Company (AMICO) issued various general liability policies to the Stewart Warner Corporation between 1975 to 1988. From 1975 to 1985, the AMICO policies contained a “sudden and accidental” pollution exclusion, while policies covering the 1986 to 1988 period contained an “absolute” pollution exclusion.

The Northern District held that the “sudden and accidental” exception to the pollution exclusion did not apply to repeated incidents of improper and intentional disposal of chemicals and solvents by the insured’s employees at its facility. The court noted that pollution exclusion applies to the expectation of releasing the contaminant and not to an expectation of the specific damage that the pollution may cause. Because employees were deliberately dumping solvents and liquid wastes on site, the court found that the “sudden and accidental” pollution exclusion operated to bar claims asserted against Stewart Warner for environmental contamination that migrated to neighboring property.

E. Issues

2. [14S.13] *No Intent To Damage Argument*

Add at the end of the section:

In *American Motorists Insurance Co. v. Stewart Warner Corp.*, No. 01 C 2078, 2004 W.L. 1444889, 2004 U.S. Dist. LEXIS 11802 at *14 (N.D.Ill. June 25, 2004), the Northern District opined that the focus of the “sudden and accidental” pollution exclusion is based on the expectation of releasing a contaminant and not to an expectation as to damages that may result due to such a release of contaminants:

[I]t is not important if [the insured] did not expect or intend the contamination of soil and groundwater beneath its site and [the neighboring] property, because the pollution exclusion applies to an expectation of releasing the contaminant, not to an expectation of the specific damage that the pollution will cause.

III. ABSOLUTE POLLUTION EXCLUSION

E. Representative Cases

3. [14S.25] *Post-Koloms Decisions*

Add at the end of the section:

In *Connecticut Specialty Insurance Co. v. Loop Paper Recycling, Inc.*, 356 Ill.App.3d 67, 824 N.E.2d 1125, 291 Ill.Dec. 875 (1st Dist. 2005), the First District Appellate Court addressed the application of the “total” and “absolute” pollution exclusions with respect to a claim filed by a paper recycling company seeking coverage for a lawsuit filed by neighbors alleging injuries as a result of being exposed to smoke and toxic substances from a fire at a recycling facility. The fire involved an unknown amount of waste cardboard that was intended to be recycled at Loop Paper Recycling’s Riverdale facility. The fire burned for several days and allegedly sent a large amount of smoke and toxic substances into a residential neighborhood surrounding the facility. As a result of the fire, neighboring residents filed suit against Loop Paper, alleging that smoke from the fire released highly toxic and hazardous pollution into the environment. The neighboring residents asserted that they were exposed to hazardous and toxic substances and sought damages for medical diagnosis and testing in order to determine the impact of their exposure. Loop Paper tendered the claims to its insurer, Connecticut Specialty Insurance Company, which agreed to defend Loop Paper under a full reservation of rights.

Shortly after issuing its reservation of rights letter, Connecticut filed a declaratory judgment action against Loop Paper and, eventually, moved for summary judgment motion in which Connecticut argued that the “total” and “absolute” pollution exclusions contained in its policy operated to bar coverage for the neighboring residents’ claims of bodily injury.

The trial court granted Connecticut’s motion for summary judgment, holding that the “total” pollution exclusion contained in the policy did not provide coverage for the neighboring residents’ claims of bodily injury. The First District affirmed the lower court’s ruling. In rejecting Loop Paper’s appeal, the court held that the smoke was the result of a fire of “waste materials.” The court specifically noted that the definition of “waste” contained in the pollution exclusion includes “materials to be recycled.” 824 N.E.2d at 1131. Because the fire consumed “waste materials” and thus spread smoke from those materials to neighboring areas, the First District found that the pollution exclusion applied to bar coverage for the underlying claims:

Loop Paper Recycling’s policy sets forth a clear and unambiguous, though limited, definition of the term “waste.” Because that term includes “materials to be recycled,” because the underlying plaintiffs’ complaint sufficiently alleged that Loop Paper Recycling was involved in the business of recycling cardboard at its Riverdale facility, and because the effects from the burning of that cardboard were the basis for the underlying plaintiffs’ lawsuit against Loop Paper Recycling, the circuit court properly found that the policy’s total pollution exclusion barred coverage for the underlying plaintiffs’ bodily injuries. 824 N.E.2d at 1135.

Moreover, the First District stated that a primary factor to consider in determining if an “occurrence” constitutes “traditional environmental pollution,” as contemplated in *Koloms*, is whether the injurious “hazardous material” is confined within the insured’s premises or whether it escapes into “the land, atmosphere, or any watercourse or body of water.” 824 N.E.2d at 1137, quoting *Koloms, supra*, 687 N.E.2d at 81. The First District found that the pollution exclusion barred coverage for the underlying claim due to the fact that the allegedly hazardous material (toxic smoke) emitted from the burning cardboard was not confined to the insured’s facility (as was the case in *Koloms*) but instead migrated to the surrounding neighborhood:

Here, the underlying plaintiffs’ complaint alleged that the fire burned “for several days sending clouds of smoke into the air and sending highly toxic substances into the air throughout the surrounding neighborhoods.” Because the underlying complaint alleged that hazardous materials (toxic smoke containing chemicals emitted from the burning cardboard) was not confined to the Riverdale facility, but, instead, spread to the “surrounding neighborhoods,” we find that traditional environmental pollution occurred, i.e., hazardous materials discharged into the atmosphere, and that the policy’s absolute pollution exclusion barred coverage. 824 N.E.2d at 1138.

Further, the First District also rejected the adoption of a specific standard as to what constitutes “traditional” environmental pollution:

[W]e draw this distinction because we are not satisfied, nor is it helpful, to have a “We-know-it-when-we-see-it” standard for what constitutes traditional environmental pollution.

Furthermore, we do not say that the release of a pollutant that is contained within an insured’s *property* cannot constitute traditional environmental pollution. We only hold that, in this case, the release of toxins by the burning cardboard into the neighborhoods surrounding the Riverdale facility constituted traditional environmental pollution. [Emphasis added.] *Id.*

Likewise, the United States District Court for the Northern District of Illinois found that the “absolute” pollution exclusion contained in an insurance policy issued to the Chicago Housing Authority (CHA) operated to bar coverage with respect to an underlying action seeking damages for alleged bodily injury resulting from exposure to environmental contamination at a CHA residential development. *Housing Authority Risk Retention Group, Inc. v. Chicago Housing Authority*, No. 02 C 4474, 2003 W.L. 22282385, 2003 U.S. Dist. LEXIS 17442 (N.D.Ill. Sept. 30, 2003), *aff’d*, 378 F.3d 596 (7th Cir. 2004). The Northern District rejected the CHA’s argument that the “absolute” pollution exclusion contained in its liability policy was inapplicable because the alleged environmental contamination originated off site. The court noted that the contamination at issue (*i.e.*, hazardous materials discharged by surrounding industrial plants, abandoned factories, a waste dump, and landfills) occurred over an extended period of time and thus constituted “traditional environmental contamination” as contemplated by *Koloms*. Therefore, the Northern District found that the “absolute” pollution exclusion contained in the policy issued to the CHA did not provide coverage for the underlying claims.

5. [14S.27] Hostile Fire Exception

Add at the end of the section:

The hostile fire exception was addressed by the First District Appellate Court in *Connecticut Specialty Insurance Co. v. Loop Paper Recycling, Inc.*, 356 Ill.App.3d 67, 824 N.E.2d 1125, 291 Ill.Dec. 875 (1st Dist. 2005). The First District held that the “hostile fire exception” to the “absolute” pollution exclusion was inapplicable to the cardboard fire at Loop Paper’s Riverdale facility due to an exception within the “hostile fire” exception that barred coverage if the “hostile fire” occurred at a location where any insured, contractors, or subcontractors were working

directly or indirectly on any insured's behalf to "monitor, clean-up, remove, contain [or] treat . . . pollutants." 824 N.E.2d at 1134. The court noted that because Loop Paper was recycling waste cardboard, it was thus containing and treating a "pollutant." The court further stated that the hostile fire exception does not apply to situations in which the insured is involved in any sort of waste storage, treatment, processing, or clean up activity that is conducted at its premises.

IV. ISSUES RELATING TO BOTH "SUDDEN AND ACCIDENTAL" AND "ABSOLUTE" POLLUTION EXCLUSIONS

A. [14S.28] Definition of "Pollutant"

Add at the end of the section:

The First District Appellate Court in *Connecticut Specialty Insurance Co. v. Loop Paper Recycling, Inc.*, 356 Ill.App.3d 67, 824 N.E.2d 1125, 291 Ill.Dec. 875 (1st Dist. 2005), held that smoke emitted during the burning of waste cardboard was considered to be a "pollutant" as contemplated by the "absolute" pollution exclusion. Likewise, petrachloroethane (PERC) released from a malfunctioning dry cleaning machine was also considered to be a "pollutant" that falls within the scope of an "absolute" pollution exclusion. *Kim v. State Farm Fire & Casualty Co.*, 312 Ill.App.3d 770, 728 N.E.2d 530, 245 Ill.Dec. 448 (1st Dist. 2000).

B. [14S.29] Personal Injury Issues

Add at the end of the section:

The Northern District rejected the argument in *American Motorists Insurance Co. v. Stewart Warner Corp.*, No. 01 C 2078, 2004 W.L. 1444889, 2004 U.S.Dist. LEXIS 11802 at *14 (N.D.Ill. June 25, 2004), that the personal injury coverage section of a general liability policy provided coverage for damage caused by environmental contamination. The court stated that the pollution exclusion would be rendered a nullity if the personal injury section was interpreted to provide coverage for environmental contamination claims.