ABSOLUTE POLLUTION EXCLUSION

GIVING TRADITIONAL ENVIRONMENTAL POLLUTION MORE THAN JUST LIP SERVICE

Summary: This article notes the vast array of judicial decisions that have interpreted the absolute pollution exclusion as it exists in general liability policies. There is a glaring lack of unanimity as to how the exclusion should be interpreted, with some courts arguing that the exclusion should apply only to environmental pollution, and others maintaining that the exclusion applies to all types of pollution claims. Mr. Randy Maniloff describes the current status of the absolute pollution exclusion, and makes the case that a clear definition or test of traditional environmental pollution is needed in order to bring about a possible solution to the problem of varying judicial interpretations of the exclusion, interpretations that so bewilder and vex the insured and the insurer.

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Topics covered:

Introduction

Dizzying. That's the term used not long ago by the Northern District of Iowa to describe the array of results that have been reached by courts throughout the country interpreting the absolute pollution exclusion.[1] There the court had been asked to determine whether the exclusion applied to preclude coverage for a claim involving asphyxiation from carbon monoxide fumes. The fumes were produced by a propane power washer that had been placed in a room without an outside air supply. After discussing the history of the pollution exclusion and noting the abundance of cases nationally on both sides of the issue, the court ultimately determined that the wisest course of action was to certify the question to the Iowa Supreme Court—the judicial equivalent of *Go ask your mother.* See *Bituminous Casualty Corporation v. Sand Livestock Systems, Inc., et al.,* 2005 U.S. Dist. LEXIS 12276 (N.D. Iowa).

The fact that there is a plethora of diverse case law addressing the absolute pollution exclusion—with no end in sight—is hardly news to many coverage professionals.[2] But for those unfamiliar with the issue, a brief primer is in order. (And, incidentally, speaking of primer, the Sixth Circuit has held that the pollution exclusion does not preclude coverage for bodily injury caused by exposure to it. See *Meridian Mutual Insurance Co. v. Kellman,* 197 F.3d 1178 [6th Cir. 1999]).

What Does the Exclusion Mean?

When it comes to the protracted history of litigation surrounding the absolute pollution exclusion,

the California Supreme Court does a good job of making a long story short:

> To say there is a lack of unanimity as to how the [absolute pollution exclusion] clause should be interpreted is an understatement. Although the fragmentation of opinion defies strict categorization, courts are roughly divided into two camps. One camp maintains that the exclusion applies only to traditional environmental pollution into the air, water, and soil, but generally not to all injuries involving the negligent use or handling of toxic substances that occurs in the normal course of business. These courts generally find ambiguity in the wording of the pollution exclusion when it is applied to such negligence and interpret such ambiguity against the insurance company in favor of coverage. The other camp maintains that the clause applies equally to negligence involving toxic substances and traditional environmental pollution, and that the clause is as unambiguous in excluding the former as the latter. *Mackinnon v. Truck Insurance Exchange*, 73 P.3d 1205, 1208-1209 (Cal. 2003).

The *MacKinnon* court's use of the term *fragmentation* to describe the variation in opinions addressing the absolute pollution exclusion does not overstate the case, as the Alabama Supreme Court found out for itself in *Porterfield v. Audubon Indemnity Company*, 856 So. 2d 789 (Ala. 2002), *rehearing denied* 2003 Ala. LEXIS 291. After reviewing the entire body of existing precedent concerning the absolute pollution exclusion, the Alabama high court made this sobering discovery about the fragmentation of authority: "Cases may be found for and against every issue any litigant has ever raised, and often the cases reaching the same conclusion as to a particular issue do so on the basis of differing, and sometimes inconsistent, rationales." *Id.* at 800.

Specifics aside, for many courts, absolute pollution exclusion decisions are just as *MacKinnon* describes them: debates over the ideological camp in which the court belongs. One camp limits the exclusion to traditional environmental pollution and the other applies the exclusion more broadly to also include negligence involving hazardous substances. "The source of the disagreement within the jurisprudence seems to lie in the fact that the language of the clause is … quite specific on its face, and yet a literal interpretation of that language results in an application of the clause which is quite broad." *American States Insurance Co. v. Koloms*, 687 N.E. 2d 72, 78 (Ill. 1997).

If a court determines to apply the pollution exclusion as written, it will frequently conclude that it bars coverage, given the broad definition of the term "pollutant" (usually defined as any "solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed"). See ISO Form CG 00 01 12 04.[3] On the other hand, if a court concludes, fundamentally, that the absolute pollution exclusion should be interpreted narrowly, and limited solely to traditional environmental pollution, it will often conclude that the exclusion does not bar coverage. In general, if a dispute reaches the point of a judicial opinion, it is usually because there is something about the substance at issue that will enable a court, so inclined, to conclude that it is not traditional environmental pollution.

It is not unusual for a court to expend significant effort to resolve the fundamental ideological debate at the center of the absolute pollution exclusion. And when it's finished, while not everyone will agree with the result, the opinion probably can not be criticized for lack of reasoning. Not to mention, it may even point to a case or two from other states that reached the same conclusion when presented with similar facts.

But while courts usually do a thorough job of interpreting the absolute pollution exclusion, many that determine to limit its applicability to traditional environmental pollution skimp on the definition of that term. A popular mantra is that, because the pollution exclusion was purportedly adopted by the insurance industry in response to the passage of environmental laws, traditional environmental pollution is "industrial pollution" or the conditions that motivated these laws, especially the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9600 *et seq.*, better known as CERCLA or Superfund, enacted in 1980. See *Richardson v. Nationwide Mutual Insurance Co.*, 826 A.2d 310 (D.C. App. 2003), *vacated by settlement*, 844 A.2d 344 (D.C. App. 2004) ("The largely undisputed history of the adoption of the absolute pollution exclusion reveals that its purpose was to protect insurers, in light of then recently enacted federal environmental legislation, from liability in the billions of dollars for environmental cleanups of hazardous waste sites and industrial facilities.")

"CERCLA was a response by Congress to the threat to public health and the environment posed by the widespread use and disposal of hazardous substances. Its purpose was (1) to ensure the prompt and effective cleanup of waste disposal sites, and

(2) to assure that parties responsible for hazardous substances bore the cost of remedying the conditions they created." Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 880 (9th Cir. 2001) (citations omitted). The "CERCLA rationale" is cited by several state supreme courts in their analysis of the absolute pollution exclusion.[4]

A significant reason why litigation surrounding the absolute pollution exclusion continues unabated, even after a state's highest court has issued a comprehensive opinion addressing the boundaries of the exclusion, is that many courts that determine to limit the exclusion to traditional environmental pollution pay only lip service to what that term means. By providing nothing more than sound bites as to what qualifies as traditional environmental pollution—such as, industrial pollution or the conditions that led to the enactment of CERCLA—litigants in future cases are left to guess if the pollution exclusion applies to their particular substance and circumstances. Not to mention, the little guidance that is provided is frequently misunderstood by subsequent courts. For example, courts should take a moment and look at just what CERCLA was intended to cover, given that many of them point to this legislation as the basis for their narrow ideological interpretation of the absolute pollution exclusion. Some courts may be surprised to see that, notwithstanding its reputation, CERCLA is not just a waste site statute. More about this below.

Even the California Supreme Court in *MacKinnon*, despite issuing a unanimous opinion that the absolute pollution exclusion is limited to traditional environmental pollution, recognized this precise problem when it stated: "To be sure, terms such as 'commonly thought of as pollution,' or 'environmental pollution,' are not paragons of precision, and further clarification may be required." *MacKinnon* at 1218.

Making the Effort to Define Traditional Environmental Pollution

"What is traditional environmental pollution?" is a question that deserves more than the cursory discussion and self-defining answer that many courts give it. This is especially the case considering that courts that arrived at a narrow interpretation of the pollution exclusion in the first place got there by taking a detour from the plain language of the policy. While the court may still conclude, following an adequate analysis, that the substance at issue is not traditional environmental pollution, at least it would have done so after thoroughly vetting the issue. Additionally, the court would be leaving behind a more useful roadmap for future litigants than the bread crumbs that are currently being dropped.

For example, earlier this year, the Appellate Court of Illinois was called upon to address the absolute pollution exclusion and gave considerable thought—much more than most courts—to what is meant by traditional environmental pollution. In Connecticut Specialty Insurance Company v. Loop Paper Recycling, Inc., 824 N.E. 2d 1125 (Ill. App. 2005), the court examined coverage for diagnosis and medical monitoring necessitated by the release of smoke and hazardous substances caused by a cardboard fire at the insured's recycling facility. The insurer undertook the insured's defense under a reservation of rights and then filed a declaratory judgment action, arguing that the absolute pollution exclusion precluded any obligation to defend or indemnify the insured. The trial court held that the pollution exclusion barred coverage for bodily injury and personal injury, if personal injury was even alleged.[5]

The Illinois appeals court recognized that the starting point for its analysis had to be the Illinois Supreme Court's decision in *American States Insurance Co. v. Koloms*, *supra*. In *Koloms*, the court concluded that, in order for the absolute pollution exclusion to apply, there must be traditional environmental pollution, which includes any discharge, dispersal, release or escape of a pollutant into the environment. Applying this rule, the *Koloms* court concluded that the absolute pollution exclusion did not bar coverage for injury caused by the accidental release of carbon monoxide inside a building. *Loop Paper* at 1136 – 1137.

The *Loop Paper* court also noted that in *Kim v. State Farm Fire and Casualty Co.*, 728 N.E. 2d 530 (Ill. 2000), the Illinois Supreme Court held that the absolute pollution exclusion barred coverage to an insured cleaning company because, unlike in *Koloms*, the hazardous material had escaped beyond the walls of the insured's building and into the soil below. Therefore, the court found that traditional environmental pollution had occurred. *Loop Paper* at 1137.

With this background, the *Loop Paper* court turned to its own situation: whether the smoke and hazardous substances at issue qualified as traditional environmental pollution. Unlike many others, the *Loop Paper* court gave the issue deserved analysis and adopted the following test for determining whether a substance is a traditional environmental pollutant:

> Though not explicitly stated in either *Koloms* or *Kim*, a primary factor to consider in determining if an occurrence constitutes

> "traditional environmental pollution" and thus is not covered under an absolute pollution exclusion, rests upon whether the injurious "hazardous material" is confined within the insured's premises or, instead, escapes into "the land, atmosphere, or any watercourse or body of water." This distinction becomes even more reasonable when the purpose behind an absolute pollution exclusion is taken into account: to exclude governmental clean up costs and avoid the enormous expense and exposure resulting from the explosion of environmental litigation. *Loop Paper* at 1137-1138 (citations omitted).

The court held that, because the toxic smoke containing chemicals emitted from the burning cardboard was not confined to the insured's facility, but, instead, spread to the surrounding neighborhoods, traditional environmental pollution occurred and the absolute pollution exclusion barred coverage. *Id*. at 1138.

The *Loop Paper* court seemed to sense that its test for determining traditional environmental pollution would be met with some criticism. It attempted to mollify its critics with the following:

> We note that "the distinction we draw here is by no means scientific, but one must remember that insurance contract interpretation is at bottom a practical art." Pipefitters, 976 F.2d at 1044, quoting Continental Casualty Co. v. Pittsburgh Corning Corp., 917 F.2d 297, 301 (7th Cir. 1990). Nevertheless, we 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. Id.[6]

Knowing Traditional Environmental Pollution When You See It

The *Loop Paper* court gets high marks for making an effort to define traditional environmental pollution. But a look at some recent decisions addressing the absolute pollution exclusion reveals that other courts are coming up short in providing an adequate analysis of this issue. The consequence of this shortcoming is that they are simply setting the stage for more disagreement—translation: reasons to litigate—over the scope of the exclusion. This could hardly be the intended result after a state supreme court has handed down a detailed opinion addressing an issue.

For example, compare *Loop Paper* to another court that was required to address whether a substance qualified as traditional environmental pollution and did so based solely on whether it knew it when it saw it. In *Merchants Insurance Company of New Hampshire, Inc. v. Hessler*, 2005 U.S. Dist. LEXIS 18173 (D.N.J.), the District Court of New Jersey addressed the applicability of the pollution exclusion to a claim for bodily injury and property damage caused by exposure to lead paint. Homeowners hired the insured to paint the exterior of their home and alleged that the insured's negligent performance caused such exposure.

The *Hessler* court stated that the New Jersey Supreme Court had recently defined the parameters of the pollution exclusion in *Nav-Its, Inc. v. Selective Insurance Company of America*, 869 A.2d 929 (N.J. 2005). According to *Hessler*, in *Nav-Its* the Supreme Court "reviewed the history and development of pollution exclusions and held that these exclusions 'should be limited to injury or property damage arising from activity commonly thought of as traditional environmental pollution. ...' Traditional environmental pollution was defined as 'environmental catastrophe related to intentional industrial pollution.'" *Hessler* at *9, citing *Nav-Its*.

The *Hessler* court rejected the insurer's argument that there was an environmental component to the homeowners' claims inasmuch as the insured was requested by the health department to remediate the lead paint chips by removing the top layer of soil from the property and lay down fresh soil. Instead, the *Hessler* court stated that the pollution exclusion did not apply because "the act of removing the top layer of soil does not constitute an 'environmental catastrophe related to intentional industrial pollution.'" *Hessler* at *10. That was the extent of the *Hessler* court's traditional environmental pollution analysis. Blink and you missed it.

By simply dismissing the traditional environmental pollution issue out of hand, the *Hessler* court ignored the fact that in *Nav-Its*, the New Jersey Supreme Court unanimously stated: "[T]he available evidence most strongly suggests that the absolute pollution exclusion was designed to serve the twin purposes of eliminating coverage for gradual environmental degradation and government-mandated cleanup such as Superfund response cost reimbursement." *Nav-Its* at 936, citing Jeffrey W. Stempel, "Reason and Pollution: Correctly Construing the 'Absolute' Exclusion in Context and in Accord with Its Purpose and Party Expectations," 34 *Tort & Ins. L.J.* 1, 29-32 (1998). See also *MacKinnon*, *supra* at 1211.

To summarize, *Nav-Its* stated that the pollution exclusion was designed to eliminate coverage for *govern-*

ment-mandated cleanup such as Superfund response costs. In *Hessler*, an insured was ordered by the *health department* to remediate lead paint chips by removing the top layer of soil from property and laying down fresh soil. Yet, the court still concluded that the pollution exclusion did not apply. Not to mention, by deciding the issue so matter-of-factly, the *Hessler* court seemed to be saying that it wasn't even close enough to warrant any analysis.

Taking a Closer Look at the "CERCLA Rationale"

In the words of the *Loop Paper* court, the *Hessler* court knew environmental pollution when it saw it, and the health department-mandated remediation of lead paint chips by the removal and replacement of soil was not it. The *Hessler* court may have been quick to decide that the lead paint remediation at issue was not environmental pollution based on an erroneous belief that CERCLA—pointed to just a few months earlier by *Nav-Its* as the impetus for the pollution exclusion—somehow only applies to the remediation of waste sites. CERCLA's applicability, however, is not nearly so limited—as its legislative history shows:

> Doubtless CERCLA found its start in the publicity and concern that surrounded toxic waste sites. That theme resonated throughout the legislative process and became the moving force behind the creation of the Superfund. Nevertheless, nothing in the legislative record indicates that Congress intended to restrict CERCLA to that sole purpose. To the contrary, the legislative materials on the passage of the statute show, with reasonable clarity, that over the course of the legislative process Congress expanded the statute beyond its original underpinnings so as to address releases of hazardous substances generally, not just disposals at toxic waste sites. Uniroyal Chemical Company, Inc. v. Deltech Corp., et. al., 160 F.3d 238, 248 (5th Cir. 1998).[7]

In reaching this conclusion, the *Uniroyal* court did not ignore the fact that several courts have "labored under the conception that CERCLA applies only to waste disposal sites." *Uniroyal* at 249. *Uniroyal* also did not try to sweep the following unpleasant comments made by other courts about CERCLA and its legislative history under the rug: "The legislative history of CERCLA gives more insight into the 'Alice-in-Wonderland'-like nature of the evolution of this particular statute than it does helpful hints on the intent of the legislature."; "CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage."; and "The legislative history of CERCLA is unusually riddled by self-serving and contradictory statements." *Uniroyal* at 246 (citations omitted). But despite this criticism, the *Uniroyal* court undertook its own review of CERCLA's legislative history and concluded that it was "remarkably clear with respect to the *core legislative purpose* behind the passage of the statute." *Id.* (emphasis added).

Besides CERCLA being more than a waste site statute, there is also no minimum level of hazardous substance required to implicate the Act. This point was made clear by the Ninth Circuit in *A & W Smelter & Refiners v. Clinton,* 146 F.3d 1107, 1110 (9th Cir. 1998) (citations omitted):

> A & W asks us to read a minimum level requirement into the statute and regulations. It argues that trace levels of hazardous substances are present just about everywhere. Read as the EPA suggests, CERCLA seems to give the agency carte blanche to hold liable anyone who disposes of just about anything. Drop an old nickel that actually contains nickel? A CERCLA violation. Throw out an old lemon? It's full of citric acid, another hazardous substance.
>
> It is not surprising that an agency would urge an interpretation which gives it such broad discretion. Perhaps more surprising is that CERCLA leaves us little choice but to agree. Section 9601(14) refers simply to "any substance" designated under one of the various regulations, and the regulations in turn give no minimum levels. The table in 40 C.F.R. § 302.4 does list reportable quantities, but this refers to notification requirements under 42 U.S.C. §§ 9602 & 9603. Nothing in the law suggests that quantities of a hazardous substance below its reportable level render it no longer hazardous. The Second, Third and Fifth Circuits have faced this very question and all agree that CERCLA's definition of hazardous substance has no minimum level requirement. We see no basis for parting company.[8]

Thus, if the *Hessler* court was thinking that the remediation of lead paint arising out of residential house painting was not on a wide enough scale to qualify as an "environmental catastrophe related to intentional industrial pollution," it failed to appreciate the manner of operation of the federal environmental law discussed in *Nav-Its*.

If CERCLA does not apply to a localized release of lead dust, don't tell that to the defendant in *BCW Associates, Ltd. v. Occidental Chemical Corp.,* 1988 U.S. Dist. LEXIS 11275 (E.D. Pa.). And if CERCLA does not apply to the contamination of soil with lead (and other substances) by a seemingly small excavating company during the course of its operations, don't tell that to the defendant in *Kaiser Aluminum & Chemical Corporation v. James L. Ferry & Son, Inc.,* 976 F.2d 1338 (9th Cir. 1992). In both of these cases, the defendants were found liable under CERCLA in these circumstances.

The failure of courts to appreciate the scope of environmental laws, when considering the applicability of the absolute pollution exclusion, is a point that was made, albeit in vain, by Judge Glickman in his dissenting opinion in *Richardson v. Nationwide Mutual Insurance Company*, *supra*:

> Although the majority thinks that the absolute pollution exclusion should be interpreted in light of federal environmental laws, the majority makes no effort whatsoever to ascertain whether those laws are limited to industrial pollution or in fact might apply to non-industrial indoor air pollution.… [T]he requirements of CERCLA are by no means applicable only to industrial pollution. The definition of a "hazardous substance" in CERCLA makes no distinction dependent upon whether the substance's source was industrial, commercial, municipal or household. Whether the substance is a consumer product, a manufacturing byproduct, or an element of a waste stream is irrelevant.… Moreover, quantity or concentration of the hazardous substance is not a factor either. Even minimal amounts of pollution are within CERCLA's purview. *Richardson* at 349 (citations omitted).

Policyholders will likely criticize an interpretation of traditional environmental pollution that takes into account whether the underlying release qualifies for CERCLA liability as overly inclusive. While CERCLA is unquestionably a broad remedial statute, it is subject to a consumer product exception. The plaintiff in a CERCLA private cost recovery action must prove, among other things, that the site in question is a facility under 42 U.S.C. § 9607(a). The definition of facility excludes any consumer product in consumer use.

In *Uniroyal*, *supra* the Fifth Circuit held that "[b]ased on the plain language of the exception, the applicable legislative history, and the broad remedial purpose of CERCLA, … 'consumer product in consumer use' means any good normally used for personal, family, or household purposes, which was being used in that manner when the subject release occurred." *Uniroyal* at 257.

California Approach: Knowing It When You See It Through Sunglasses

Hessler was not the only court of late that found it necessary to determine whether a certain substance qualified as traditional environmental pollution, and, with no guidance available, simply went with its gut. In *SEMX Corporation v. Federal Insurance Company*, United States District Court for the Southern District of California, No. 04-CV-2449-WQH (WMc) (Order, August 31, 2005), the court held that the pollution exclusion did not preclude coverage for damages caused by a release of ammonia gases from the insured's facility into the air. In reaching this decision, the *SEMX* court stated that, in *MacKinnon*, the California Supreme Court "pointed out that the purpose of the pollution exclusion was originally an effort by the insurance industry to avoid claims based on new environmental laws passed in the 1970s and 1980s—not to avoid coverage for ordinary acts of negligence." *SEMX* at 21, citing *MacKinnon*.

The *SEMX* court was not persuaded that, following the California Court of Appeals' decision in *Garamendi v. Golden Eagle Insurance Company,* 127 Cal. App. 4th 480 (2005), review denied 2005 Cal. LEXIS 6676, the pollution exclusion precluded coverage. In *Garamendi,* the California appeals court held that the pollution exclusion served to preclude coverage for claims for injuries caused by the repeated long-term exposure to silica dust. The *Garamendi* court stated:

> [U]nder *MacKinnon* the mere fact that silica, like almost anything else, may be an irritant or contaminant under some circumstances is not dispositive. But unlike the residential use of a pesticide for the purpose of killing insects, the widespread dissemination of silica dust as an incidental by-product of industrial sandblasting operations most assuredly is what is "commonly thought of as pollution" and "environmental pollution." *Garamendi* at 486.

While the *SEMX* court gave *Garamendi* some thought, it ultimately rejected the argument that the ammonia release fell into the category of industrial operations commonly thought of as pollution:

> [T]he court concludes that the facts in the instant case more closely resemble those in

> *MacKinnon* than the facts in *Garamendi*. Here, unlike *Garamendi*, the injury causing event was a one-time release of ammonia in a high concentration into the air. There is no suggestion that Plaintiff's normal operations released large quantities of ammonia into the air. By contrast, in *Garamendi* the insured's normal operations released silica and silica dust into the air. *SEMX* at 26.

The *SEMX* court determined that the applicability of the pollution exclusion turned on whether the release at issue was one-time versus the result of an insured's normal operations. The flaw in this distinction is that, in *MacKinnon*, the court stated that there is little dispute that the pollution exclusion was adopted to address the enormous potential liability resulting from antipollution laws enacted between 1966 and 1980. So when you consider that no minimum level of "hazardous substance" is required to implicate CERCLA, the *SEMX* court's one-time versus normal operations distinction makes little sense. See *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 260 (3rd Cir. 1992) ("It is difficult to imagine that Congress intended to impose a quantitative requirement on the definition of hazardous substances and thereby permit a polluter to add to the total pollution but avoid liability because the amount of its own pollution was minimal.… [C]ourts that have addressed this issue have almost uniformly held that CERCLA liability does not depend on the existence of a threshold quantity of a hazardous substance.")

Another recent California decision also demonstrates that, without guidance, the question whether something qualifies as traditional environmental pollution is a case of first impression every time. In *Garamendi v. Mission Insurance Company*, 2005 Cal. App. Unpub. LEXIS 4293, the Court of Appeal of California failed to see the *SEMX* court's distinction that the applicability of the pollution exclusion turned on whether the release at issue was one-time versus the result of an insured's normal operations. Here the court held that the pollution exclusion did not apply to preclude coverage for claims brought by over 600 plaintiffs for injury due to chemical exposure at a Lockheed facility from the 1940s through 1995. Surely claims involving exposure to chemicals over a 50 year period is more closely akin to an insured's normal operations than a one-time release. Thus, under the *SEMX* court's test, the pollution exclusion should have applied to preclude coverage.

But the *Garamendi v. Mission Insurance Company* court did not analyze the issue that way. Instead, the court took its own know-it-when-it-sees-it approach to industrial pollution and did not see it: "On balance, we conclude that the Lockheed litigation does not qualify as an 'environmental catastrophe[] related to intentional industrial pollution,' although clearly it involved more widespread dispersal of toxic substances than the residential application of bug spray." *Garamendi v. Mission Insurance Company* at *35-*36. The court's decision provided no guidance on what qualifies as traditional environmental pollution, other than to say that, while exposure to chemicals over a 50 year period is not it, the insurer was getting warmer.

SEMX and the two *Garamendi* decisions demonstrate the complete lack of predictability that is left in the wake of courts, like *MacKinnon*, that score points for providing a detailed rationale for their interpretation that the absolute pollution exclusion is fundamentally limited to traditional environmental pollution, but then drop the ball when it comes to providing a useful definition of that term.

Conclusion

There is no simple solution to prevent absolute pollution exclusion decisions from continuing to leach from America's courthouses. Nonetheless, a step in that direction would be taken if courts that determine to limit the exclusion's applicability to traditional environmental pollution give the meaning of that term adequate consideration.

The point of this article is not to advocate for one particular definition or test of traditional environmental pollution. Rather, it is simply to make the case that one is needed. As the *Loop Paper* court astutely observed, it is not helpful to have a "We-know-it-when-we-see-it" standard for what constitutes traditional environmental pollution. While the California Supreme Court's decision in *MacKinnon* is a contribution to the problem, at least the court also acknowledged a willingness to consider a solution when it noted that the term "environmental pollution" is not a "paragon of precision" and that further clarification may be required. Moreover, when providing that clarification, courts that point to CERCLA as the basis for their narrow ideological interpretation of the absolute pollution exclusion should at least consider the actual scope of CERCLA, and not simply rely on its reputation.

1 In *Continental Casualty Company v. Advance Terrazzo Company*, United States District Court, District of Minnesota, No. 03-cv-5446 (Memorandum of Law and Order, August 10, 2005), another court also recently placed its hand into the adjective bag

when addressing the absolute pollution exclusion and pulled out "illogical" to describe the results of those courts that apply the plain meaning approach to the interpretation of the exclusion.

2 Consider the following. In "Absolute Pollution Exclusion: Drano And The Litigation Clog; Five Reasons Why There Is No End In Sight To The Litigation," published in the June 24, 2003 issue of *Mealey's Litigation Report: Insurance*, I noted that a combined federal and state search on Lexis for "'pollution exclusion' w/3 absolute or total," undertaken at that time, produced 380 hits. The same search undertaken now returns 439 hits, and that doesn't count the scores of pollution exclusion decisions that don't make it to Lexis.

3 There are, of course, some courts that conclude that the substance at issue meets the definition of pollutant, but nonetheless conclude that the pollution exclusion still does not bar coverage. These courts sometimes conclude that the discharge component of the pollution exclusion has not been satisfied. See *Lititz Mutual Insurance Company v. Steeley*, 785 A.2d 975, 981 (Pa. 2001) (In holding that lead-based paint is a pollutant, but that the pollution exclusion nonetheless did not bar coverage, the court stated, "One would not ordinarily describe the continual, imperceptible, and inevitable deterioration of paint that has been applied to the interior surface of a residence as a discharge ("a flowing or issuing out"), a release ("the act or an instance of liberating or freeing"), or an escape ("an act or instance of escaping")".

4 See also *MacKinnon*, *supra* at 1211; *Nav-Its, Inc. v. Selective Insurance Company of America*, 869 A.2d 929, 936 (N.J. 2005) ("[T]he available evidence most strongly suggests that the absolute pollution exclusion was designed to serve the twin purposes of eliminating coverage for gradual environmental degradation and government-mandated cleanup such as Superfund response cost reimbursement," citing Stempel, Reason and Pollution: Correctly Construing the "Absolute" Exclusion In Context and in Accord with Its Purpose and Party Expectations (1998) 34 *Tort & Ins. L.J.* 1, 32.); *Doerr v. Mobile Oil Corp.,* 774 So. 2d 119 (La. 2000) ("As this legislation [CERCLA] was enforced, considerable litigation ensued over the possible existence of coverage under the standard CGL policy and, more particularly, over the meaning of the 'sudden and accidental' exception to the general pollution exclusion then en vogue. As this litigation expanded, insurers responded with the 'absolute' pollution exclusion."); *Kent Farms, Inc. v. Zurich Insurance Co.*, 998 P.2d 292 (Wash. 2000).

5 Although not relevant to this article, the *Loop Paper* court also concluded that the hostile fire exception to the pollution exclusion did not apply because the exception to the exception applied—the hostile fire originated at a site in which the insured was handling, storing, disposing, processing or treating waste.

6 The *Loop Paper* court also clarified its holding: "[W]e 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. Thus, the circuit court correctly found that the absolute pollution exclusion in Coverage B barred coverage." *Id.*

7 See also *United States of America v. Tropical Fruit, S.E.*, 96 F. Supp. 2d 71, 90-91 (D.P.R. 2000) ("Tropical Fruit has not proffered any authority that convinces that (sic) Court that a misapplication of pesticides which causes contamination on adjacent properties is afforded shelter under the [CERCLA] pesticides exemption. Practically the Court's holding makes sense with purpose (sic) of CERCLA to deter hazardous waste proliferation. The drift of pesticides can readily be analogized to an industrial polluter that allows hazardous substances to infiltrate neighbors properties.")

8 See also *Tropical Fruit,* 96 F. Supp. 2d at 85 ("Although the allegations are that the pesticides drifted onto adjacent properties in minute amounts, no minimum level of hazardous substance is required to trigger CERCLA coverage.").