SPECIAL REPORT

HOW ABSOLUTE IS THE ABSOLUTE POLLUTION EXCLUSION?

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This Special Report was written by Daniel P. Hale, J.D., CPCU, ARM, CRM, LIC, AIC, AIS, API of Marsh & McLennan Agency LLC. Mr. Dan Hale can be contacted at 734-525-2429 or dhale@mma-mi.com. More Special Reports are available at www.mma-mi.com.

INTRODUCTION

If you were to ask the average individual to describe a "pollution" incident, they would likely mention the Exxon Valdez oil spill in Prince William Sound[1] or perhaps the Pacific Gas & Electric Company hexavalent chromium water contamination in Hinkley, California.[2] However, pollution could also mean "non-traditional incidents" such as exposure to chemical fumes, pesticides, sewer back-up, lead paint chips, carbon monoxide, smoke, heat, dust or even an overflow of the average household septic system. In fact, some might say that a slip-and-fall on spilled Drano or a skin reaction from chlorine chemicals in a swimming pool would qualify as pollution claims.

When faced with allegations of bodily injury or property damage stemming from an environmental condition, both business and individuals look to their insurance policies for coverage. Arguably, one of the least understood and most litigated provisions of most insurance policies is the "pollution exclusion." Although most policies clearly exclude coverage for traditional pollution losses, there has been a great deal of confusion regarding the scope and extent of the exclusion as applied to non-traditional pollution losses.

The purpose of this Special Report is to analyze the history of the pollution exclusion within the Commercial General Liability ("CGL") policy and provide an overview of the Michigan case law interpreting the various forms of the exclusion.

THE HISTORY OF THE POLLUTION EXCLUSION AND ITS EXCEPTIONS

I. Evolution of the ISO CGL Pollution Exclusion

The Insurance Services Office[3] ("ISO") is an insurance industry trade organization which drafts and revises standard form liability insurance policies and endorsements.[4] When changes in coverage become necessary, the ISO publishes revisions to the standard forms.[5] Over the years, the ISO forms have become widely accepted as the benchmark for insurance policies within the property casualty insurance market.[6]

The ISO CGL policy is a business insurance policy designed to cover bodily injury and property damage claims made by third parties against the insured party. Some experts have said that the most significant change in the standard form CGL in its sixty years of usage is the growth in the number and specificity of exclusions to coverage.[7] In total, there have been five revisions to the ISO CGL Pollution Exclusion since 1973. Each of these revisions is provided in their entirety in Appendix A to this document.

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A. Pre-1970 Pollution Exclusions

The pre-1966 version of the CGL policy provided coverage for bodily injury or property damage that resulted from an "accident." The policy defined an "accident" as "a sudden and unforeseeable event."[8]

Eventually, insurance companies and policyholders began to disagree as to the meaning of the word "accident." Insurers argued that an accident meant a discrete event while policyholders argued that an accident meant fortuitous, unintended loss.[9] Most courts accepted the policyholders' view, prompting the insurance industry to revise the basic CGL.[10]

In 1966, the ISO responded to the discourse with a revision to the CGL which replaced the term “accident” with “occurrence.” This was an effort to provide the intended coverage while avoiding litigation. Under the revision, an “occurrence” was defined as “an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.”[11] The phrase “continuous or repeated exposure” provided coverage for losses such as slow and seeping pollution claims that would not necessarily have met the definition of an accident under prior policy forms.

The 1966 CGL revision explicitly recognized coverage for all accidents, impliedly even pollution losses, as long as the insured did not expect or intend to cause the damage.[12] This change in language from “accident” to “occurrence” language opened the door for an influx of pollution related environmental claims which were previously excluded under the prior definition of the term “accident.”[13]

B. The 1973 Qualified Pollution Exclusion – “Sudden and Accidental” Exception

The increase in environmental claims associated with the broad definition of an “occurrence” gave rise to the first-ever pollution exclusion, a mere 86 words.[14] The 1973 revision to the CGL excluded coverage for all pollution losses with the exception of those losses which qualified as “sudden and accidental.” The qualified pollution exclusion provided:

> This insurance does not apply to bodily injury or property damage (1) arising out of pollution or contamination caused by oil or (2) arising out of the discharge, dispersal, release or escape of smoke vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is **sudden and accidental.**[15] (Emphasis added)

The eighty-six words of the 1973 qualified pollution exclusion attempted to shut down any possibility of coverage for pollution liability claims arising out of continuous or repeated exposure.

The one and only exception to this exclusion was for a sudden and accidental discharge, dispersal, release or escape of a pollutant.

When analyzed in conjunction with the insuring agreement, the 1973 CGL had a three-step process for determining whether environ-mental liability was covered by the CGL:

(1) Did an “occurrence” occur?
(2) If so, does the pollution exclusion apply?
(3) If so, does the exception to the exclusion apply?[16]

Fueled by the newly-minted Environmental Protection Agency and later by the onset of environmental regulation enacted in the 1980s, liability insurers would soon learn that they were facing the perfect storm and that their policy forms would provide them with little protection.

C. Environmental Laws of the 1980s

The late 1970s and early 1980s saw two major environmental laws enacted that dramatically changed the way our society and the law viewed environmental contamination.

The Resource Conservation and Recovery Act[17] (“RCRA”) and the Comprehensive Environmental Response, Compensation and Liability Act[18] (“CERCLA”) imposed liability for damages associated with environmental cleanup and remediation without regard to fault.

RCRA gave the EPA the authority to regulate the life cycle of hazardous waste and mandate that all participants involved with that waste pay for any associated environmental cleanup.[19] This included the generation, transportation, treatment, storage, and disposal of hazardous waste.[20] Liability was not only joint-and-several[21] but it generally applied without regard to fault.[22]

CERCLA, commonly known as Superfund, was enacted by Congress in 1980.[23] This law imposed a tax on the chemical and petroleum industries and provided broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment.[24]

CERCLA also established prohibitions and requirements concerning closed and abandoned hazardous waste sites, exacted payment from polluters, and established a trust fund to provide for cleanup when no responsible party could be identified.[25]

This legislation not only created a heightened sense of awareness for environmental contamination, but it also created a federally-enforced statutory exposure that did not previously exist.

D. Litigation Under the Qualified Pollution Exclusion

Faced with the "qualified pollution exclusion" and its "sudden and accidental" exception, policy-holders attempted to "shoehorn" their claims into the sudden and accidental category. However, courts were quick to affirm the denial of these claims seeing that they were nothing more than a wolf in sheep's clothing.

As a last resort, policyholders argued that the language was ambiguous and that coverage should be granted under the doctrine of reasonable expectations[26]. However, Michigan refused to adopt the doctrine which ultimately left policy-holders to foot the bill.

In *Upjohn Co v New Hampshire Ins Co,*[27] the Michigan Supreme Court held that the phrase "sudden and accidental" as used in the qualified pollution exclusion was unambiguous.[28] In that case, the insured's underground storage tank caused major ground contamination as a result of corrosive leaks. The majority stated that "the definition of 'sudden' included a temporal element as well as a sense of the unexpected, and…that 'accidental' means 'unexpected and unintended'.[29] The court later stated that "'sudden'…is defined with a temporal element that joins together conceptually the immediate and the unexpected."[30] The court determined that as a matter of law, the insured had sufficient information available to it to expect that a chemical by-product was escaping from a leak in the underground tank.[31] The court held that "the release of environmentally contaminating material from the storage tank could not possibly be considered 'sudden' because the release was not unexpected by the insured."[32]

In contrast, other jurisdictions have held that the term "sudden" is ambiguous and thus interpreted the exception to the pollution exclusion in a

light most favorable to the insured. For example, in *Jackson Township Municipal Utilities Authority v Hartford Acc and Indemnity Co*,[33] a New Jersey court held that the "sudden and accidental" exception was ambiguous and that the plaintiff's pollution claims were within policy coverage[34].

In *Protective Nat Ins Co of Omaha v City of Woodhaven*,[35] the Michigan Supreme Court was asked to decide whether an insured's intentional discharge of pesticides into the environment fell within the "sudden and accidental" exception to the qualified pollution exclusion.[36] The court concluded that the application of the pollution exclusion depended exclusively on the discharge, dispersal, release, or escape of the pesticide into the atmosphere.[37]

In *Protective National*, the insured argued that the "sudden and accidental" analysis should not be applied to the insured's intentional release of the pesticides but instead to the subsequent sudden and accidental migration of those pesticides after they were released.[38] The court disagreed stating, "It is clear that the discharge, dispersal, release, or escape to which both the exclusion and the exception refer is the initial discharge, dispersal, release, or escape into the atmosphere and not the subsequent migration."[39] The behavior of the pesticide in the environment after the initial release is irrelevant.[40] The court concluded that since the release of the pesticide by the insured was intentional, it cannot, as a matter of law, have been accidental.[41]

In *Auto-Owners Ins Co v City of Clare*,[42] the Michigan Supreme Court analyzed whether the "sudden and accidental" exception to the qualified pollution exclusion applied to ground contamination which resulted from the leakage of waste materials disposed in a city landfill.[43] It had long been evident that the subject landfill was not a proper site for the disposal of waste materials.[44] In such a situation, it was not necessary that one be able to identify the hour when the release first occurred, or the precise spot within the affected region where the material first escaped.[45] Here, there was no doubt that the city must have expected these problems to occur.[46] The court found that since the insured must have expected the release of pollutants into nearby lands and waters, the release was not unexpected and as a matter of law could not be "sudden and accidental."[47]

In *Matakas v Citizens Mut Ins Co*[48] the Michigan Court of Appeals analyzed whether the "sudden" and "accidental" exception to the pollution exclusion applied to ground contamination from an accumulation of cyanide laced chips on the insured's premises.[49] The court stated that the focal point of the inquiry was whether the release was "sudden and accidental" from the standpoint of the polluter. Considering the facts in a light most favorable to plaintiffs, under no circumstances could the above-described activity be considered "sudden" or "accidental." The polluting activity in this case began in May of 1983, stopped for a period when EPA officials advised of the danger to the environment, and then began again, continuing for a sufficient period of time to allow a vast amount of polluted chips to accumulate on the property and to allow corrosion of the storage receptacles.[50] The court determined that the insured's activity could not be considered "happening, coming, made or done quickly, without warning" nor could it be considered to have occurred "unexpectedly and unintentionally" from the standpoint of the polluter as required to fit the established definition of "accidental."[51]

In *American Bumper and Mfg Co v Hartford Fire Ins Co*,[52] the Michigan Supreme Court analyzed whether an insurer was obligated to defend an insured against the EPA's allegations of environmental liability in light of a qualified pollution exclusion.[53] In that case, the insured discharged "wastewater" which included phosphoric acid, sulfuric acid, nitric acid, nickel acetate, and trace amounts of certain metals, including aluminum and iron, into a seepage lagoon on the insured's premises. The EPA conducted an investigation and mandated that the insured perform a remedial investigation and feasibility study.[54] American Bumper's insurers denied both defense and indemnity coverage based on the language of the qualified pollution exclusion.[55] The court decided that fairness required that there be a duty to defend at least until there is sufficient factual development to determine what caused the pollution so that a determination can be made regarding whether the discharge was sudden and accidental.[56] Until that time, the allegations must be seen as "arguably" within the comprehensive liability policy, resulting in a duty to defend at the very least.[57] Because uncertainty existed here regarding whether there was contamination requiring cleanup and what the cause and source of the possible contamination was, the insurer could not escape its duty to defend on grounds of the pollution-exclusion.[58] The court ultimately held that under the qualified pollution exclusion, the insurer had a

duty to defend the insured during the investigation process to determine whether the site was in fact contaminated.[59]

As evidenced by the above, the sudden and accidental exception to the 1973 qualified pollution exclusion opened the flood gates for litigation on environmental coverage. The ISO had no choice but to respond with an even more sweeping pollution exclusion.

E. The 1985 Absolute Pollution Exclusion

Faced with the influx of pollution claims couched in terms of a "sudden and accidental" loss, the ISO drafted yet another revision to the CGL policy which cut off the possibility of any coverage for pollution-related liability losses. In 1985, the ISO debuted the now-famous "Absolute Pollution Exclusion" which provided:

> This coverage 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 or for 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 or for 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, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.[60]

The ISO coverage pendulum had swung from full pollution coverage to no pollution coverage in the blink of an eye. Where previous forms had attempted to provide coverage in limited circumstances, the 1985 version of the CGL exclusion removed any possibility of pollution coverage whatsoever. Now, not even the sudden and accidental losses were covered.

In *McGuirk Sand & Gravel v Meridan Mutual Ins Co*,[61] the Michigan Court of Appeals analyzed whether an insurer was obligated to defend allegations of pollution liability when the insured's CGL policy contained an absolute pollution exclusion. The *McGurick* case involved environmental contamination which was the result of numerous leaks in the insured's underground storage tanks.[62] Consistent with the vast majority of courts, the Michigan Court of Appeals determined that the absolute pollution exclusion was clear and unambiguous, and thus precluded coverage.[63] The court held that the exclusion precluded coverage for property damage arising out of even an *alleged* discharge or escape of pollutants and entirely precluded coverage for the insured's alleged release of hazardous substances into the environment.

F. <u>The 1988 Absolute Pollution Exclusion</u>

In 1988, ISO began the first in a series of four revisions which were designed to give back some the coverage previously excluded under the all-inclusive absolute pollution exclusion. The 1988 revision provided that:

> This exclusion does not apply to "bodily injury" or "property damage" arising out of heat, smoke or fumes from a hostile fire. As used in this exclusion, a hostile fire means one which becomes uncontrollable or breaks out from where it was intended to be.[64]

This exception not only covered injury or damage resulting from hostile property fires but could potentially cover any fire as long it met the hostile requirements. This was the case in *Griffith v Premium Tank Lines, Inc* where the hostile fire erupted from a gasoline spill at a service station.[65]

G. <u>The 1996 Absolute Pollution Exclusion</u>

In 1996, ISO added another major exception to the absolute pollution exclusion for pollution losses associated with certain equipment. In short,

the exception allowed coverage for pollution losses that resulted from the escape of the normal operating fluids of the insured's mobile equipment, stating:

> This exclusion does not apply to "bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the fuels, lubricants or other operating fluids are intentionally discharged, dispersed or released, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent to be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor.[66]

The policy was very specific in defining Mobile Equipment:

> "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:
> a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
> b. Vehicles maintained for use solely on or next to premises you own or rent;
> c. Vehicles that travel on crawler treads;
> d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
> (1) Power cranes, shovels, loaders, diggers or drills; or
> (2) Road construction or resurfacing equipment such as graders, scrapers or rollers;
> e. Vehicles not described in a., b., c. or d. above that are not self-propelled and are main-tained primarily to provide mobility to permanently attached equipment of the following types:
> (1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geo-physical exploration, lighting and well servicing equipment; or
> (2) Cherry pickers and similar devices used to raise or lower workers;
> f. Vehicles not described in a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.
> However, self-propelled vehicles with the following types of permanently

attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:
   (a) Snow removal;
   (b) Road maintenance, but not construction or resurfacing; or
   (c) Street cleaning;
(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.[67]

Under the new exceptions, coverage now applied to a release from the insured's mobile equipment if the pollutants were for the normal operation of that equipment, such as diesel fuel, motor oil, or hydraulic fluid.[68] On the other hand, the exception did not apply if the release was intentional, such as oiling down a road prior to paving. By way of example, consider a contractor who hits a large boulder with his bulldozer and rips open the bulldozer's diesel fuel tank. Coverage would apply to the damage caused by the bulldozer's discharge of diesel fuel used as an operating fluid.

In *McKusick v Travelers Indem Co*,[69] a group of employees were injured in the course of their employment when a high-pressure hose used to carry polyhydroxyl resin and toluene diisocyanate (TDI) failed, causing them to be exposed to and injured by TDI, a highly toxic substance.[70] The employees brought a products liability action against the manu-facturer of the high-pressure hose who in turn submitted the claim to their insurance carrier, Travelers Insurance Company.[71] Travelers denied coverage for the loss on the basis of the absolute pollution exclusion. The insured then brought an action against Travelers, demanding defense and indemnification coverage for the underlying products liability action. The *McKusick* court recognized that while the products/completed operations hazard provision did provide coverage for negligence resulting in damages arising from the insured's completed product or work, the court found that the pollution exclusion clearly provided an exception to that coverage when a pollutant was the cause of such damages.[72] The court concluded that the insurer was under no duty to defend or indemnify the manufacturer based on the pollution exclusion.[73]

In *Carpet Workroom v Auto-Owners Insurance Company*,[74] the Michigan Court of Appeals decided whether adhesive vapors or fumes associated with the plaintiff's operation constituted a pollutant under the terms of the absolute pollution exclusion. The insured, Carpet Workroom, used an industrial grade contact cement when installing new carpeting in an enclosed common stairway joining two floors of an office building.[75] One of the employees on the second floor was overcome by fumes from the adhesive and subsequently transported by ambulance to a hospital.[76] The court concluded that as a matter of law the pollution exclusion at issue was clear and unambiguous, that the bodily injury arose out of the discharge, dispersal, migration, release of a gaseous irritant, and that the adhesive vapors from industrial contact cement constituted a pollutant.[77] In this case, the pollution exclusion did apply, and the defendant insurer was under no obligation to either defend or indemnify the plaintiff for any injuries sustained by the third party.[78]

In *Thomas Brown Roofing and Siding Company v Travelers Indemnity Co*[79] the Michigan Court of Appeals again held that the CGL pollution exclusion was clear and unambiguous. In that case, the insured was a roofing contractor who was performing roof work on a residence hall at Central Michigan University.[80] The insured regularly used containers of diesel fuel to clean roofing equipment. In the course of its work, the insured accidentally knocked a container of diesel fuel off the roof of the building which resulted in the diesel/tar mixture being spilled through the window of a resident's room.[81] The resident claimed injuries resulting from inhalation of the fumes and stemming from the insured's negligence.[82] Relying on the plain language of the absolute pollution exclusion, the court held that the pollution exclusion clearly and unambiguously barred coverage for any injury that resulted from "discharge, dispersal, seepage, migration, release or escape of pollutants.[83] The insurer had no duty to defend or indemnify the insured.

In *Gulf Insurance Co v City of Holland*, [84] the insured received a delivery of bleach for use in its water treatment plant. The delivery truck mistakenly pumped the bleach into a tank containing aluminum sulfate.[85] The bleach reacted with the aluminum sulfate to create chlorine gas.[86] The release of the chlorine gas resulted in several people being treated at local hospitals, the evacuation of the insured's facilities, damage to electrical equipment, and various cleanup and related expenses.[87] The underlying third-party injuries for which the insured sought indemnity were caused by the chlorine

gas, not the bleach.[88] The insurer denied coverage based on the pollution exclusion. The court held that the absolute pollution exclusion was unambiguous and applicable, so there was no duty to defend or indemnify.[89]

H. The 1998 Absolute Pollution Exclusion

In 1998, the ISO added the third in a series of four exceptions which expanded the coverage provided under the absolute pollution exclusion.[90] The first of these revisions alleviated the ongoing controversy over whether fumes released by a faulty furnace are excluded as a pollutant or covered as building operations.[91] Some insureds had argued that furnace fumes should qualify for coverage under the hostile fire exception to the pollution exclusion. ISO agreed and responded with the following provision:

> This exclusion does not apply to "bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot from equipment used to heat that building.[92]

The CGL made clear that such injury or damage is covered as it is part of the premises exposures which may arise from the operations of a building.[93] It is important to note that the original exception did not provide coverage for emissions from an air conditioning unit,[94] a water heater, or any other appliance that was not used to heat a building.

The second revision provides that if property damage to a third party is covered by the policy, any resultant cleanup claims would also be covered. A common example of this situation is a hostile fire. If chemicals or pollutants are inadvertently released from the insured's premises during a hostile fire, causing property damage to a third party, not only is the damage covered, but any necessary cleanup would be covered as well. [95]

> This exclusion does not apply to "bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured.[96]

Note that pollution caused by a fire in a fireplace or burning candles would not be covered since they do not qualify as hostile.

The third revision to the 1998 exclusion provided coverage for injury or damage that resulted from the release of gases, fumes or vapors from materials which were brought into a building in connection with operations performed by or on behalf of the insured.

> This exclusion does not apply to "bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor.[97]

The revision paved the way for coverage of items such as paint, cleaning solvents, chemical treatments or carpet/tile glue as long as those materials were brought into a building by the insured or a contractor of the insured to be used in connection with the insured's operations.[98] If, for example, a customer became ill from paint fumes while the building was being painted, a claim by the customer against the building owner or painter would not be excluded under the CGL.[99]

I. <u>The 2004 Absolute Pollution Exclusion</u>

The most recent version of the CGL absolute pollution exclusion was issued in 2004. A fourth and final exception was added recognizing coverage for pollution which results from certain utilities in addition to just the equipment used to heat a building.

> This exclusion does not apply to "bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, <u>cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests</u>.[100]

This particular change was due in part to the holding in *Admiral Insurance Co v Feit Management Co.*[101] In that case, the injuries for which the insured and third-party beneficiaries sought coverage were caused by toxic fumes that came from the hot water heater in their apartment building.[102]

Based on the plain language of the exclusion prior to 2004, coverage was clearly excluded and was not resurrected by any of the exceptions.[103] The court sided with the insurance company in holding that the exception for "equipment used to heat a building" was not broad enough to apply to a water heater, even if the toxic fumes were carried through the building by heating ducts.[104]

J. Total Pollution Exclusion Endorsement

In light of the many exceptions to the absolute pollution exclusion, insurers were apprehensive to insure pollution-prone risks under a standard general liability policy.

In response, ISO drafted the "Total Pollution Exclusion Endorsement" in an effort to take back the exceptions and restore the absolute pollution exclusion to its original form. The endorsement provides as follows:

> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> Exclusion f. under Paragraph 2. , Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability is replaced by the following:
>
> This insurance does not apply to:
>
> f. Pollution
>   (1) "Bodily injury" or "property damage" which would not have occurred in whole or 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, order or statutory or regulatory requirement 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 govern-mental authority 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."

A policy which includes the Total Pollution Exclusion Endorsement effectively abrogates all pollution coverage, including coverage under any exception, which was covered under the unendorsed policy forms. This form is primarily used with waste haulers, recycling plants, chemical reclamation companies, and any other company that may have an increased exposure to pollution losses. For example, the pollution damage from a hostile fire in a paint factory would be much greater than a hostile fire in bakery. Therefore, insurance companies are quick to endorse their policies with the Total Pollution Exclusion in order to limit their exposure to pollution claims.

K. <u>What Constitutes a Pollutant?</u>

While there have been a number national cases interpreting exactly what qualifies as a pollutant, Michigan courts have addressed the issue on only a few occasions. It is interesting to note that there have been no changes to the definition of the term "pollutant" despite the many revisions to the exclusionary language.

> "Pollutants" mean 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.

In *Royal Ins Co v Bithell*,[105] a homeowner suffered damages when raw sewage from the Oakland Hills Country Club sewer line spilled into the basement of their home. The homeowner filed a first-party property claim with their insurer for the damages.[106] The insured asserted that in order to remediate the damage, the soil underneath their home, and within twelve feet of their home, must be excavated and replaced with clean fill dirt and the interior of the home must be gutted and rebuilt in order to remove the contamination.[107] The insurer denied coverage based on the policy exclusion for losses caused by release, discharge, or dispersal of contaminants or pollutants.[108] The court concluded that there was no question that the raw sewage that leaked into defendants' home was in fact a pollutant and therefore, the clear language of the policy excluded coverage for the homeowner's claim.[109]

In the *City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool*,[110] the Michigan Supreme Court was asked to decide whether sewage was truly a "pollutant" under the terms of the pollution exclusion clause.[111] In *Grosse Pointe,* the city's water treatment facility had regularly and intentionally released sewage into a local river when confronted with excess rainwater. Nearby property owners brought an action (the underlying matter) alleging property damage and bodily injury. The city's insurer denied coverage indicating that sewage constituted a pollutant under language of the absolute pollution exclusion. [112] The city's insurance policy did not specifically define "waste."[113] Where a term is not defined in the policy, it is accorded its commonly understood meaning.

Allstate Ins Co v McCarn.[114] In holding that sewage is in fact a pollutant, the Grosse Point Park court found that "waste" is commonly understood to include urine and feces, bathwater and dishwater, toilet paper and the countless other substances typically introduced into a sewer system and therefore falls within the scope of the CGL pollution exclusion.[115] Other states have analyzed the definition of "pollutant" in terms of the pollution exclusion and arrived at various results.[116]

In *Michigan Municipal Risk Management Authority and City of Westland v Seaboard Surety Company*, a 2003 unpublished opinion, the Michigan Court of Appeals held that the pollution exclusion was unambiguous and applied in a situation where homes were flooded with a mixture of water and sewage.[117] In that case, hundreds of basements were flooded as a result of the negligent installation of a bulkhead by a contractor.[118] When one the insurers, Seaboard, refused to contribute to the settlement fund, MMRMA filed suit seeking coverage.[119] The MMRMA court concluded that even though the bulk of the contaminant was rainwater, a sewage-water mixture constituted a "pollutant" and therefore released the insurer from any obligation to defend or indemnify the insured.

This line of cases begs the ultimate question, "at what point does a pollutant become a pollutant?" In *Center for Creative Studies v Aetna Life and Cas Co*,[120] (hereinafter "*C.C.S.*") the United States District Court for the Eastern District of Michigan, interpreting Michigan law, recognized that without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results.[121] The court stated that reading the clause broadly would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a

bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool.[122] Although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution.[123]

In *C.C.S*, a student alleged that she became ill from exposure to a "photographic chemical" product that she was using to develop film in a darkroom during a photography class. In holding that the pollution exclusion did not exclude coverage for the claim and that the insurer had a duty to defend and indemnify the insured for the claims asserted by student, the C.C.S. court stated that it would strain the plain meaning and obvious intent of the "discharge" language to suggest that the exposure to a photo-developing chemical resulted from a "discharge, dispersal, release or escape."[124]

In *Nugent Sand Co v Century Indem Co*,[125] the U.S. District Court for the Western District of Michigan held that the displacement of naturally occurring elements constitutes pollution.[126] Nugent sold high-grade processed sand for use in a variety of commercial applica-tions.[127] Nugent dredged a local lake and then washed the natural impurities from the sand using lake water.[128] The carbonates, fatty acid and pine oil which were washed from the sand were subsequently discharged directly into the lake.[129] Nugent was sued by a group of local property owners who used the lake as their primary water source. Nugent's insurer denied defense and indemnity coverage. The court held that the fatty acid discharged by Nugent was a "pollutant" within that term's meaning in the absolute pollution exclusions and the absolute pollution exclusions operated to bar coverage.[130]

L. Conclusion

Having reviewed each revision to the ISO CGL pollution exclusion, as well as various Michigan cases interpreting those provisions, we now return to the original question, "How absolute is the absolute pollution exclusion?" Judged by the number of exceptions that have been added over the years, the term "Absolute Pollution Exclusion" is really nothing more than an antiquated misnomer. While insurers remain steadfast in their position that the pollution exclusion is "absolute" or "total," the plain language of the provision speaks for itself.

As for judicial interpretation of the exclusion, Michigan courts have consistently held that the language is clear and unambiguous despite finding to the contrary in other states. While the litigation and technical revisions surrounding the pollution exclusion will likely continue for many years to come, the language does by and large accomplish its purpose; that is, to absolutely preclude coverage for all claims involving environmental contamination that have not been specifically, intentionally, and expressly assumed by the insurer.

APPENDIX A

ISO POLICY FORMS

NOTE: Revised language has been underlined

1941 CGL Policy Insuring Agreement

Coverage A: Bodily Injury Liability

We agree to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed by him under contract, as defined herein, for damages, including damages for care and loss of services, because of bodily injury, sickness or disease, including death at any time resulting there-from, sustained by any person or persons and caused by accident.

Coverage B: Property Damage Liability

We agree to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed by him under contract as defined herein for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident**.**

An accident is a sudden and unforeseeable event.

1985 ISO CGL "Absolute" Pollution Exclusion

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 or for 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 or for 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.

Pollutant means 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.

CG 00 01 11 85

1973 ISO CGL "Qualified" Pollution Exclusion

This insurance does not apply to bodily injury or property damage (1) arising out of pollution or contamination caused by oil or (2) arising out of the discharge, dispersal, release or escape of smoke vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

1988 ISO CGL "Absolute" Pollution Exclusion

This coverage does not apply to:
f. (1) "bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

(a) At or from any premises, site or location which is <u>or was at any time owned or occupied by, or rented or loaned to, any insured;</u>
(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
(c) Which are <u>or were</u> at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom you may be legally responsible; or
(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:
  (i) if the pollutants are brought on or to the premises, site or location in connection with such operations <u>by such insured, contractor or subcontractor</u>; or
  (ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.

Subparagraphs (a) and (d)(i) do not apply to "bodily injury" or "property damage" arising out of heat, smoke or fumes from a hostile fire.

As used in this exclusion, a hostile fire means one which becomes uncontrollable or breaks out from where it was intended to be.

(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 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 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.

CG 00 01 11 88

1996 ISO CGL "Absolute" Pollution Exclusion

This coverage does not apply to:

f. Pollution
- (2) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
  - (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured;
  - (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
  - (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom you may be legally responsible; or
  - (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:

(i) If the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor; or

(ii) If the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.

Subparagraph (d)(i) does not apply to “bodily injury” or “property damage” arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the fuels, lubricants or other operating fluids are intentionally discharged, dispersed or released, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent to be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor.

Subparagraphs (a) and (d)(i) do not apply to “bodily injury” or “property damage” arising out of heat, smoke or fumes from a hostile fire.

As used in this exclusion, a hostile fire means one which becomes uncontrollable or breaks out from where it was intended to be.

(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 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 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.

CG 00 01 01 96

1998 ISO CGL "Absolute" Pollution Exclusion

This coverage does not apply to:

f. Pollution

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot from equipment used to heat that building;

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

(i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This

exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

(e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement 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 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".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

CG 00 01 07 98

2004 ISO CGL "Absolute" Pollution Exclusion

This coverage does not apply to:

f. Pollution

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:

(i) Any insured; or

(ii) Any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

(i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property

damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

(e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement 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 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".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

CG 00 01 12 04

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[1] On March 23, 1998, the oil tanker Exxon Valdez departed the Valdez oil terminal in Alaska with 53 million gallons of crude oil bound for California. The ship struck Bligh Reef and discharged approximately 11 million gallons of oil (240,000 barrels) into Prince William Sound.

[2] In 1993, 77 residents of the town of Hinkley, California filed a lawsuit against the Pacific Gas & Electric Company ("PG&E"). The suit was a direct result of the utility's environmental misconduct. The case alleged contamination of drinking water in the southern California town of Hinkley with hexavalent chromium, also known as Cr(VI). At the center of the case was a facility called the Hinkley Compressor Station, part of a natural gas pipeline connecting to the San Francisco Bay Area and constructed in 1952. The plaintiffs--648 by the end--ended up recovering for injury claims and settling with PG&E in 1996 for $333 million – the largest settlement ever paid in a direct action lawsuit in U.S. history. In addition, PG&E agreed to stop using Cr(VI) and clean up the contamination.

[3] ISO is the successor to the Insurance Rating Board ("IRB") and the Mutual Insurance Rating Bureau ("MIRB")

[4] *Recent Development in the Law Related to the Absolute Pollution Exclusion*, 21, John N. Ellison (2005).
[5] See, Hartford Fire Ins Co v California, 509 US 764, 772
[6] Id.
[7] Robert H. Jerry, *Understanding Insurance Law*, 541 (3rd ed., LexisNexis 2002).
[8] 1966 ISO Commercial General Liability Policy
[9] Jeffrey W. Stempel, *Interpretation of Insurance Contracts: Law and Strategy for Insurers and Policyholders,* 825 (1994). [hereinafter "*Interpretation*"]
[10] Id. at 825
[11] Id.
[12] John J. Tarpey, *The New Comprehensive Policy: Some of the Changes*, 221 (1998)
[13] Id. at 223
[14] Jerry, supra at 562
[15] *Commercial General Liability Policy*, Insuring Agreement, (1941)
[16] Jerry, supra at 562
[17] 42 U.S.C. s/s 321 et seq. (1976)
[18] 42 U.S.C. s/s 9601 et seq. (1980)
[19] 42 U.S.C. s/s 321 et seq. (1976)
[20] Id.
[21] Under joint and several liability, a claimant may pursue an obligation against any one party as if they were jointly liable and it becomes the responsibility of the defendants to sort out their respective proportions of liability and payment. This means that if the claimant pursues one defendant and receives payment, that defendant must then pursue the other obligors for a contribution to their share of the liability.
[22] Id.
[23] 42 U.S.C. s/s 9601 et seq. (1980)
[24] Id.
[25] Id.
[26] The doctrine of reasonable expectations is a legal principle that states that the provisions of an insurance policy are to be interpreted according to how a reasonable person, who is not trained in the law, would interpret them. The doctrine generally favors the objectively reasonable expectations of the weaker party (the insured). While some states have adopted the doctrine, Michigan has not.
[27] Upjohn Co v New Hampshire Ins Co
[28] Id. at 208
[29] Id. at 201
[30] Id. at 209, n9
[31] Id. at 212
[32] Id. at 209
[33] Township Municipal Utilities Authority v Hartford Acc and Indemnity Co , 186 NJ Super 156, 451 A2d 990 (1982)
[34] Id. at 994
[35] Protective Nat. Ins. Co. of Omaha v. City of Woodhaven 438 Mich 154, 476 N.W.2d 374 (1991)
[36] Id. at 157.
[37] Id. at 162.
[38] Id
[39] Id.
[40] Id.
[41] Id. at 163
[42] Auto-Owners Ins Co v City of Clare , 446 Mich 1 (1994)
[43] Id. at 16
[44] Id. at 16
[45] Id.
[46] Id.
[47] Id. at 14
[48] Matakas v Citizens Mut Ins Co , 202 Mich App 642 (1993)
[49] Id. at 655
[50] Id. at 656
[51] Id.
[52] American Bumper and Mfg Co v Hartford Fire Ins Co, 452 Mich. 440 (1996)
[53] Id. at 442
[54] Id. at 445
[55] Id. at 449
[56] Id. at 449
[57] Id. at 452, citing Polkow v Citizens Ins Co, 438 Mich. 174, 178-180 (1991)
[58] Id. at 455
[59] Id.
[60] *Commercial General Liability Policy*, Absolute Pollution Exclusion, CG 00 01 11 85, (1985)
[61] McGuirk Sand & Gravel v Meridan Mutual Ins Co, 220 Mich App 347, 559 NW2d 93 (1996)
[62] Id. at 351
[63] Id. at 356
[64] *ISO Commercial General Liability Policy*, Absolute Pollution Exclusion, CG 00 01 11 88, (1988)
[65] See Griffith v Premium Tank Lines, Inc., No. A2401-98-0429 (Miss, Harison County Cir. Ct. Dec. 8, 1999) where a Mississippi trial court held that the CGL absolute pollution exclusion did not apply where the driver of a gasoline tanker truck failed to close the valve of an underground tank and gasoline poured out , flowed through a service station parking lot, ignited, and subsequently resulted in a fire that killed five people and severely injured another.
[66] *ISO Commercial General Liability Policy*, Absolute Pollution Exclusion, CG 00 01 11 96, (1996)

[67] *ISO Commercial General Liability Policy*, Absolute Pollution Exclusion, CG 00 01 11 96, (1996)
[68] The CGL Pollution Exclusion, by Craig F. Stanovich, March 2003, International Risk Management Institute
[69] McKusick v Travelers Indem Co, 246 Mich App 329, 330-331, 632 NW2d 525, 527 (2001)
[70] Id. at 331
[71] Id.
[72] Id. at 340
[73] Id. at 341
[74] Carpet Workroom v Auto-Owners Insurance Company, ____ Mich App ____ (Unpublished No 223646, July 30, 2002)
[75] Id. at 1
[76] Id.
[77] Id. at 4
[78] Id. at 5
[79] Thomas Brown Roofing and Siding Company v Travelers Indemnity Co ____ Mich App ____ (Unpublished No 253127, April 12, 2005)
[80] Id. at 1
[81] Id.
[82] Id.
[83] Id at 6
[84] Gulf Insurance Co v City of Holland, No 198CV774, 2000 US Dist WL 33679413 (WDMich Apr.3, 2000).
[85] Id. at 3-4
[86] Id.
[87] Id. at 2
[88] Id. at 4.
[89] Id. at 11-18.
[90] "*CGL98: 1998 ISO CGL Changes*" Rough Notes, Jan 1999, Kowatch, Diana
[91] Kowatch, supra at 3
[92] *ISO Commercial General Liability Policy*, Absolute Pollution Exclusion, CG 00 01 11 98, (1998)
[93] Kowatch, supra at 3
[94] Such as those causing legionnaires disease.
[95] Id.
[96] *ISO Commercial General Liability Policy*, Absolute Pollution Exclusion, CG 00 01 11 98, (1998)
[97] *ISO Commercial General Liability Policy*, Absolute Pollution Exclusion, CG 00 01 11 98, (1998)
[98] Kowatch, supra at 3
[99] Id.
[100] *ISO Commercial General Liability Policy*, Absolute Pollution Exclusion, CG 00 01 11 04, (2004)
[101] Admiral Insurance Co v Feit Management Co , 321 F3d 1326 (11th Cir 2003)
[102] Id.
[103] Id.
[104] Id. at 1330
[105] Royal Ins Co v Bithell, 868 F Supp 878, 879 (ED Mich,1993)
[106] Royal Ins Co involves a pollution exclusion with the exclusionary language of a first-party property claim as opposed to a third party liability claim.
[107] Id. at 880
[108] Id.
[109] Id. at 882
[110] City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool 473 Mich 188, 190, (2005)
[111] Id. at 199
[112] Id. at 193
[113] Id.
[114] Allstate Ins Co v McCarn , 466 Mich. 277, 280, 645 N.W.2d 20 (2002) (McCarn I)
[115] Id at 199, See also Black Marsh Drainage Dist v Rowe, 350 Mich 470, 477; 87 NW2d 65 (1957), Hydrodynamics, Inc v Auto-Owners Ins Co, 1997 WL 33344492, (Mich.App.,1997)
[116] Jerry, supra at 563
[117] Michigan Municipal Risk Management Authority and City of Westland v Seaboard Surety Company, 2003 WL 21854655 (Mich App 2003).
[118] Id.
[119] Id.
[120] Center for Creative Studies v Aetna Life and Cas Co, 871 F Supp 941, 945
[121] Id. at 945
[122] Id.
[123] Id.
[124] Id. at 946
[125] Nugent Sand Co v Century Indem Co, No 105CV599, 2006 US Dist WL 3469612, 1 (WDMich, 2006)
[126] Id. at 8
[127] Id. at 1
[128] Id.
[129] Id.
[130] Id. at 8

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