

50-STATE SURVEY

Application of the Pollution Exclusion in First-Party Property Insurance Policies

Author:

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Alabama

Relevant Case: *Maxine Furs, Inc. v. Auto-Owners Ins. Co.*, 426 Fed. Appx. 687 (11th Cir. 2011) (applying Alabama law).

Description of Case:

In *Maxine Furs, Inc. v. Auto-Owners Ins. Co.*, 426 Fed. Appx. 687 (11th Cir. 2011) (applying Alabama law), the insured operated a fur shop, which shared air conditioning ducts with a neighboring restaurant. As a result of odors from the restaurant, the fur shop cleaned certain furs and sought coverage from its own insurer. The policy included a pollution exclusion and defined “pollutant” as “any solid, liquid gaseous or thermal irritant or contaminant...” After noting that a “contaminant” is something that “soil[s], stain[s], corrupt[s] or infect[s] by contact or association”, the court held that the aromas soiled the furs such that the pollution exclusion applied.

Relevant Case: *Haman, Inc. v. St. Paul Fire & Marine Ins. Co.*, 18 F. Supp. 2d 1306 (N.D. Ala. 1998).

Description of Case:

After the EPA forced a hotel to close and decontaminate because of the presence of methyl parathion, a highly toxic pesticide, the hotel made a claim to its property insurer for financial losses. *Haman Inc. v. St. Paul Fire & Marine Ins. Co.*, 18 F. Supp. 2d 1306 (N.D. Ala. 1998). In applying the pollution exclusion, the court held that methyl parathion is “a pollutant, irritant or contaminant, as defined in the insuring agreement.” The court also applied the policy’s contamination exclusion to preclude the loss. After noting that “[c]ontamination’ connotes a condition of impurity resulting from mixture or contact with a ‘foreign substance,’” the court held that “[b]ecause the atmosphere in the [hotel] was so ‘impure’ that it became uninhabitable and this impurity resulted from contact with a ‘foreign substance,’ methyl parathion, the extermination incident caused contamination.”

Alaska (No Law)

Arizona (No Law)

Arkansas (No Law)

California

Relevant Case: *Villa Los Alamos Homeowners Ass’n v. State Farm General Ins. Co.*, 198 Cal. App. 4th 522 (Cal. Ct. App. 2011).

Description of Case:

In *Villa Los Alamos Homeowners Ass’n v. State Farm General Ins. Co.*, 198 Cal. App. 4th 522 (2011), the court held that a pollution exclusion in a condominium association’s all-risk property insurance policy precluded coverage for remediation related to asbestos contamination. The court noted that asbestos is a “pollutant” and rejected the condominium association’s arguments that the exclusion did not apply because “the single, unintentional, localized asbestos release was a mere ordinary act of negligence and thus not environmental pollution” or because the release of asbestos was not “environmental pollution.” Citing *MacKinnon v. Truck Ins. Exchange*, 73 P.3d 1205 (Cal. 2003), the court held that the general principles concerning the pollution exclusion as respects third-party liability policies also apply to pollution exclusions found in first-party property policies.

Relevant Case: *Nicholson v. Allstate Ins. Co.*, 979 F. Supp. 2d 1054 (E.D. Cal. 2013).

Description of Case:

In *Nicholson v. Allstate Ins. Co.*, 979 F. Supp. 2d 1054 (E.D. Cal. 2013), the insured sought coverage for a claim arising out of a bat infestation under a homeowners insurance policy, which included an exclusion for damage caused by “[v]apors, fumes, acids, toxic chemicals, toxic gasses, toxic solids, waste materials or other irritants, contaminants or pollutants.” Relying on *MacKinnon*, the court held that insurer failed to meet its burden to prove that the exclusions in the policy applied, noting the bat infestation was not one of the “traditional situations in which a pollution clause would be invoked.”

Colorado

Relevant Case: *J&S Enterprises, Inc. v. Cont'l Cas. Co.*, 825 P.2d 1020 (Colo. App. Ct. 1991).

Description of Case:

Although not a pollution exclusion matter, in *J&S Enterprises, Inc. v. Continental Cas. Co.*, 825 P.2d 1020 (Colo. App. Ct. 1991), the court held an all-risk policy did not insure perils due to “contamination.” In that case, renovation of a mall led to asbestos particles being released into the retail store owned by the insured. The insureds initiated a lawsuit against their insurer for property and income losses related to the asbestos release. The court held that “since the asbestos was a substantial contributory cause of plaintiffs’ losses and damages, the contamination exclusion is applicable.”

Connecticut

Relevant Case: *Yale Univ. v. Cigna Ins. Co.*, 224 F. Supp. 2d 402 (D. Conn. 2002).

Description of Case:

In *Yale Univ. v. Cigna Ins. Co.*, 224 F. Supp. 2d 402 (D. Conn. 2002), the insured sought coverage under all-risk first-party property insurance policies to address the presence of lead and asbestos in buildings it owned. The policy excluded coverage for “loss or damage caused by, resulting from, contributed to, made work by actual or alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS...” The court held that the Contamination or Pollution Exclusion precluded coverage for the asbestos loss.

Relevant Case: *R.T. Vanderbilt Co. v. Hartford Accident & Indem. Co.*, 156 A.3d 539 (Conn. App. Ct. 2017).

Description of Case:

However, in *R.T. Vanderbilt Co. v. Hartford Accident & Indem. Co.*, 156 A.3d 539 (Conn. App. Ct. 2017) the court questioned the decision in *Yale* based on *Allstate Ins. Co. v. Barron*, 848 A.2d 1165 (Conn. 2004), a Connecticut Supreme Court decision that found poisoning resulting from the inhalation of carbon monoxide gas released during a residential fire did not fall under the auspices of a pollution exclusion clause that expressly barred it. The court ultimately concluded that the most reasonable interpretation of the contract language is that the plain meaning of the exclusion does not bar coverage for the asbestos claim. Further, the court held that it is ambiguous whether asbestos dust constitutes an irritant, contaminant or pollutant as defined in the policies at issue.

Relevant Case: *Bell Power Systems, Inc. v. Hartford Fire Ins. Co.*, 13 Conn. L. Rptr. 501 (Conn. Super. Ct. 1995).

Description of Case:

The insured in *Bell Power Systems, Inc. v. Hartford Fire Ins. Co.*, 13 Conn. L. Rptr. 501 (Conn. Super. Ct. 1995) sought coverage for property damage caused by a progressive oil leak from an underground storage tank located on the property. The insured's first-party property insurer incorporated an exclusion that precluded coverage from "the release, discharge or dispersal of pollutants," unless the release, discharge or dispersal was caused by certain specified perils. The court granted summary judgment to the insurer and held that the foregoing exclusion precluded coverage for the progressive oil leak.

Relevant Case: *Farrell v. Royal Ins. Co. of Am.*, 989 F. Supp. 159 (D. Conn. 1997).

Description of Case:

In *Farrell v. Royal Ins. Co. of Am.*, 989 F. Supp. 159 (D. Conn. 1997), the insureds brought an action against their homeowners insurer for damages to their home from oil discharge into the foundation and drainage system of their home. The discharge was the result of misdelivery of fuel oil to the wrong tank in the home. The policy excluded coverage for property loss "caused by release, discharge or dispersal of contaminants or pollutants." The court held that the policy's pollution exclusion was ambiguous because it failed to state that "pollution or contamination is excluded without regard to how or why it resulted or what caused it in what sequence ..." The court noted that the contractor's misdelivery caused the loss and that "the excluded event of pollution was not the efficient proximate cause of the loss, but rather was the loss itself resulting from the covered occurrence."

Delaware

Relevant Case: *McKnight v. USAA Cas. Ins. Co.*, 871 A.2d 446 (Del. Super. Ct. 2005).

Description of Case:

In *McKnight v. USAA Cas. Ins. Co.*, 871 A.2d 446 (Del. Super. Ct. 2005), the plaintiffs experienced a water accumulation in the basement of their home that resulted in the development of mold and fungi in the residence. The homeowners policy included an exclusion which precluded coverage for "discharge, dispersal, seepage, migration, release or escape of pollutants" unless the discharge, dispersal, seepage, migration, release or escape was itself caused by a peril. The court held that neither mold nor fungi could be defined as a pollutant under the policy, which defined "pollutant" as "any solid liquid, gaseous or thermal irritant or contaminant, including, smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

District of Columbia (No Law)

Florida

Relevant Case: *Florida Farm Bureau Ins. Co. v. Birge*, 659 So. 2d 310 (Fla. Dist. Ct. App. 1994).

Description of Case:

In *Florida Farm Bureau Ins. Co. v. Birge*, 659 So. 2d 310 (Fla. Dist. Ct. App. 1994), the insurer denied a claim for damages related to raw sewage under a pollution exclusion which precluded coverage for “release, discharge or dispersal of contaminants or pollutants” The court held that “[t]he average homeowner’s examination of the insurance contract would not reveal the applicability of [this exclusion] to this type of disaster,” and held that the pollution exclusion did not apply to damages caused by the backup of raw sewage.

Relevant Case: *Peek v. American Integrity Ins. Co. of Fla.*, 181 So. 3d 508 (Fla. Dist. Ct. App. 2015).

Description of Case:

In *Peek v. Am. Integrity Ins. Co. of Fla.*, 181 So. 3d 508 (Fla. Dist. Ct. App. 2015), the insured sought coverage from a homeowners insurer for a loss that occurred when “Chinese drywall” used in the insured’s home deteriorated and caused a foul odor throughout the home. The court held that numerous exclusions and limitations in the policy barred coverage, including the pollution exclusion.

Relevant Case: *Hutchings v. American Home Assur. Co.*, 2012 WL 13005549 (S.D. Fla. Feb. 27, 2012).

Description of Case:

In *Hutchings v. American Home Assur. Co.*, 2012 WL 13005549 (S.D. Fla. Feb. 27, 2012), the insured owned a property that incorporated “Chinese drywall.” The defective drywall emitted dangerous chemicals, which resulted in corrosion damage to copper wire and tubing, air and major appliances. The insured filed a claim with its property insurer. The insurer denied coverage under the applicable policy’s Pollution or Contamination Exclusion, which defined a pollutant as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.” The insurer argued that the property was exposed to dangerous chemicals, including sulfur compounds. The court agreed with the insurer in holding that “an objectively reasonable insured would not have expected that damage caused by the defective Chinese drywall, which allegedly emitted harmful gases and caused damage to property, would have been covered under the Policy.”

Georgia (No Law)

Hawaii

Relevant Case: *Association of Apartment Owners of Imperial Plaza v. Fireman’s Fund Ins. Co.*, 939 F. Supp. 2d 1059 (D. Haw. 2013).

Description of Case:

In *Association of Apartment Owners of Imperial Plaza v. Fireman’s Fund Ins. Co.*, 939 F. Supp. 2d 1059 (D. Haw. 2013), the court evaluated whether the pollution exclusion in an “all risk” insurance policy applied to loss caused by arsenic contamination. Water infiltration allegedly caused arsenic to seep into existing portions of the building structure. The insured sought coverage for damage caused by the arsenic. While the pollution exclusion precluded coverage for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollution, the exclusion contained an exception that provided coverage for pollution caused by a covered cause of loss. The court found that the plain language of the exception prevailed over the anti-concurrent causation’s clause restriction of coverage. Because the arsenic was directly caused by water infiltration—a covered cause of loss—the physical loss or damage caused by arsenic was covered by the Policy under the exception to the pollution exclusion. Notably, the court declined to examine whether or not the pollution exclusion applied to the leaching of the arsenic.

Idaho (No Law)

Illinois (No Law)

Indiana (No Law)

Iowa (No Law)

Kansas

Relevant Case: *Gerdes v. American Family Mut. Ins. Co.*, 713 F. Supp. 2d 1290 (D. Kan. 2010).

Description of Case:

In *Gerdes v. American Family Mut. Ins. Co.*, 713 F. Supp. 2d 1290 (D. Kan. 2010), the court held a pollution exclusion in a homeowners insurance policy applied to preclude coverage for clean-up costs related to mercury contamination, even though the all-risk policy provided coverage for damages caused by the fire from soot and smoke.

Kentucky (No Law)

Louisiana

Relevant Case: *Ross v. C. Adams Constr. & Design, LLC.*, 70 So. 3d 949 (La. Ct. App. 2011).

Description of Case:

In *Ross v. C. Adams Constr. & Design, LLC.*, 70 So. 3d 949 (La. Ct. App. 2011), the insured sought coverage for a loss resulting from defective drywall, which caused corrosion to the inside of the home and emitted a sulfuric smell, under a homeowner insurance policy. The court held that several provisions in the policy barred coverage, including a pollution exclusion, concluding the “sulfuric gas emitted” from the drywall constituted a “pollutant”.

Relevant Case: *Marcelle v. Southern Fid. Ins. Co.*, 954 F. Supp. 2d 429 (E.D. La. 2013).

Description of Case:

In *Marcelle v. Southern Fid. Ins. Co.*, 954 F. Supp. 2d 429 (E.D. La. 2013), the insured filed a claim for an accumulation of guano in their attic following an infestation of bats, and the insurer denied the claim. The court found that the policy’s pollution exclusion, which defined “pollutants” to include irritants and contaminants, including “waste,” was unambiguous and applied to bat urine and guano.

Relevant Case: *In Re Chinese Manufactured Drywall Products Liability Litig.*, 759 F. Supp. 2d 822 (E.D. La. 2010).

Description of Case:

The court in *In Re Chinese Manufactured Drywall Products Liability Litigation*, 759 F. Supp. 2d 822 (E.D. La. 2010) found the pollution exclusions in all-risk homeowners policies did not apply to preclude coverage. The court found the presence of “Chinese drywall” in the plaintiffs’ homes was outside the ambit of the Louisiana Supreme Court’s concern with and focus upon environmental pollution for purposes of the exclusion. The court found the plaintiffs were not polluters nor does “Chinese drywall” cause environmental pollution by its presence in the plaintiffs’ homes.

Maine (No Law)

Maryland (No Law)

Massachusetts

Relevant Case: *Jussim v. Massachusetts Bay Ins. Co.*, 610 N.E.2d 954 (Mass. 1993).

Description of Case:

In Jussim v. Massachusetts Bay Ins. Co., 610 N.E.2d 954 (1993), the court did not enforce a pollution exclusion to a claim arising out of a heating oil spill.

Relevant Case: *Andrew Robinson v. Hartford*, 21 Mass. L. Rep. 60 (Mass. 2006).

Description of Case:

In *Andrew Robinson v. Hartford*, 21 Mass. L. Rep. 60 (Mass. Super. Ct. 2006), relying on *Jussim*, the court held that the pollution exclusion in a property insurance policy was ambiguous as to whether it applied to a claim by an insured that its unit was contaminated with lead-containing dust as a result sandblasting operations at the unit below, and that the hazard of “property damage caused by a cloud of fine particulate matter, i.e., dust or smoke, containing lead” may qualify as a specific cause of loss.

Relevant Case: *Matzner v. Seaco Ins. Co.*, 9 Mass. L. Rptr. 41 (Mass. 1998).

Description of Case:

In *Matzner v. Seaco Ins. Co.*, 9 Mass. L. Rptr. 41 (Mass. Super. Ct. 1998), the insured property owner discovered a carbon monoxide buildup resulting from obstruction of a chimney and incurred costs to perform repairs to clear the obstruction and to clean and test the chimney. The court held that a pollution exclusion in the insured’s property insurance policy did not apply because an “objectively reasonable insured” would not expect a pollution exclusion to bar coverage for a carbon monoxide claim.

Michigan

Relevant Case: *Royal Ins. Co. v. Bithell*, 868 F. Supp. 878 (E.D. Mich. 1993).

Description of Case:

In *Royal Ins. Co. v. Bithell*, 868 F. Supp. 878 (E.D. Mich. 1993), the insured sought coverage under an all-risk homeowner insurance policy for a loss resulting from sewage flooding in their basement after a sewer line beneath their home broke. The court held that a pollution exclusion in the homeowners policy barred coverage because it qualified as a “release, discharge or dispersal of contaminants or pollutants.”

Minnesota (No Law)

Mississippi (No Law)

Missouri

Relevant Case: *Cincinnati Ins. Co. v. German St. Vincent Orphan Ass’n*, 54 S.W.3d 661 (Mo. Ct. App. 2001).

Description of Case:

In *Cincinnati Ins. Co. v. German St. Vincent Orphan Ass’n*, 54 S.W.3d 661 (Mo. Ct. App. 2001), the court enforced a pollution exclusion and found damages from asbestos-containing dust was excluded.

Montana

Relevant Case: *Sokoloski v. American West Ins. Co.*, 980 P.2d 1043 (Mont. 1999).

Description of Case:

In *Sokoloski v. American West Ins. Co.*, 980 P.2d 1043 (Mont. 1999), the court held that a pollution exclusion did not bar coverage for damage caused by smoke and soot from scented candles.

Nebraska (No Law)

Nevada (No Law)

New Hampshire

Relevant Case: *Mellin v. Northern Security Ins. Co.*, 115 A.3d 799 (N.H. 2015).

Description of Case:

In *Mellin v. Northern Security Ins. Co.*, 115 A.3d 799 (N.H. 2015), the court found the pollution exclusion was ambiguous and did not apply to a claim arising out of cat urine.

New Mexico (No Law)

New York

Relevant Case: *Broome County v. The Travelers Indem. Co.*, 125 A.D.3d 1241 (N.Y. App. Div. 2015).

Description of Case:

In *Broome County v. The Travelers Indem. Co.*, 125 A.D.3d 1241 (N.Y. App. Div. 2015), the court held that a pollution exclusion in a first-party property insurance policy issued to an insured county barred coverage for silica contamination to the county's building resulting from the construction of a parking garage below. Rejecting the insured's argument that the exclusion was ambiguous based on a third-party insurance case involving an inhalation claim, the court found that the terms "[d]ischarge, dispersal, seepage, migration, release or escape" as used in the first-party policy described "short migratory events" and noted that the definition of "pollutants" included "building materials."

Relevant Case: *Henry Modell & Co. v. General Ins. Co. of Trieste & Venice*, 193 A.D.2d 412 (N.Y. App. Div. 1993).

Description of Case:

In *Henry Modell & Co. v. General Ins. Co. of Trieste & Venice*, 193 A.D.2d 412 (N.Y. App. Div. 1993), the court held that the insured employed a company to remove the paint from the exterior of their building, and discovered the paint contained lead and had contaminated portions of the interior of the building as well as the some of the air conditioning system. The court held that the insured’s commercial property insurer owed no coverage for multiple reasons, including that “the damage to property was due to ‘pollutants’ or ‘contaminants’ specifically excluded under the policy’s pollution exclusion.”

Relevant Case: *PepsiCo, Inc. v. Winterthur Int’l Am. Ins. Co.*, 13 A.D.3d 599 (N.Y. App. Div. 2004).

Description of Case:

In *PepsiCo, Inc. v. Winterthur Int’l Am. Ins. Co.*, 13 A.D.3d 599 (N.Y. App. Div. 2004), the court evaluated the application of the pollution exclusion to an all-risk first-party property policy. The insured sought coverage for a loss that occurred when faulty raw ingredients in their product causing a non-harmful but off tasting soda that was unmerchantable. The court held a “Seepage and/or Pollution and/or Contamination Exclusion” did not preclude coverage, reasoning that the “general purpose of pollution exclusions... is to exclude coverage for environmental pollution.”

Relevant Case: *Vigilant Ins. Co. v. V.I. Tech., Inc.*, 253 A.D.2d 401 (N.Y. App. Div. 1998).

Description of Case:

In *Vigilant Ins. Co. v. V.I. Tech., Inc.*, 253 A.D.2d 401 (N.Y. App. Div. 1998), the insured owner and operator of a center that separated blood into its components sought coverage under an all-risk insurance policy for a loss when it was discovered some of the blood plasma was contaminated by ethylene glycol from the cooling coils of a processing machine. The court held that an exclusion for “pollutants” did not bar coverage, finding that the insured is not a “polluter” within the ordinary meaning of that term, and there was no “release, discharge or dispersal.”

Relevant Case: *Ocean Partners LLC v. North River Ins. Co.*, 546 F. Supp. 2d 101 (S.D.N.Y. 2008).

Description of Case:

Ocean Partners LLC v. North River Ins. Co., 546 F. Supp. 2d 101 (S.D.N.Y. 2008), involved the application of the pollution exclusion and collapse exclusion in a first-party property insurance policy. The insured's building was damaged by the collapse of the World Trade Center. The court held that the policy was ambiguous as to whether the particulate in the building materials qualified as a "contaminant" under the pollution exclusion.

Relevant Case: *Herald Square Loft Corp. v. Merrimack Mut. Fire Ins. Co.*, 344 F. Supp. 2d 915 (S.D.N.Y. 2004).

Description of Case:

In *Herald Square Loft Corp. v. Merrimack Mut. Fire Ins. Co.*, 344 F.Supp.2d 915 (S.D.N.Y. 2004), the insured building owner sought coverage for damage caused by lead paint dust contamination. The insured's policy excluded "[d]ischarge, dispersal, seepage, migration, release or escape of 'pollutants'" and defined "pollutants" as "any solid ... irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." The court held that the exclusion did not apply because it was so broad as to render it ambiguous and based on common sense and the reasonable expectations of the parties, New York law, and the underwriting history of the insureds' policies.

Relevant Case: *Janart 55 West 8th L.L.C. v. Greenwich Ins. Co.*, 614 F.Supp.2d 473 (S.D.N.Y. 2009).

Description of Case:

In *Janart 55 West 8th L.L.C. v. Greenwich Ins. Co.*, 614 F.Supp.2d 473 (S.D.N.Y. 2009), the court held that a pollution exclusion in a commercial property insurance policy did not apply to costs incurred in the cleanup and renovation expenses resulting from the mercury spill based on its conclusion that "it is appropriate to construe the standard pollution exclusion clause in light of its general purpose, which is to exclude coverage for environmental pollution."

North Carolina (No Law)

North Dakota (No Law)

Ohio

Relevant Case: *Pure Tech Systems, Inc. v. Mt. Hawley Ins. Co.*, 95 Fed. Appx. 132 (6th Cir. 2004) (applying Ohio law).

Description of Case:

In *Pure Tech Systems, Inc. v. Mt. Hawley Ins. Co.*, 95 Fed. Appx. 132 (6th Cir. 2004) (applying Ohio law), the insured's waste oil processing and recycling facility and accepted a pair of 55-gallon drums of waste from a customer that contained polychlorinated biphenyls "PCBs." The insured submitted a claim for losses from the PCB-contamination under property insurance policies. The insurers denied the claims based on a pollution exclusion clause in the policies. The court affirmed the trial court's award of summary judgment in favor of the insurers, ruling that the pollution exclusion applied to the loss from PCB-contamination.

Relevant Case: *Whitt Machine Inc. v. Essex Ins. Co.*, 631 F. Supp. 2d 927 (S.D. Ohio 2009).

Description of Case:

In *Whitt Machine Inc. v. Essex Ins. Co.*, 631 F. Supp. 2d 927 (S.D. Ohio 2009), the insured sought coverage under a property insurance policy for amounts it incurred in the removal of asbestos removal following a fire. The insurer paid a \$10,000 debris removal limit, but denied coverage for asbestos removal, relying on the pollution exclusion. The court held that the pollution exclusion barred coverage for the asbestos removal.

Oklahoma (No Law)

Oregon

Relevant Case: *Fleming v. United Servs. Auto. Ass'n.*, 88 P.2d 378 (Or. 1999).

Description of Case:

In *Fleming v. United Servs. Auto. Ass'n.*, 88 P.2d 378 (Or. 1999), the insured brought a claim for damage caused to a residential rental property and the insurer denied coverage based on the pollution exclusion in the dwelling policy for lead and mercury contamination caused by a tenant's methamphetamine laboratory on the property. The Oregon Supreme Court held the appearance of the exclusion under a section of the policy entitled "PERILS INSURED AGAINST" violated a statute requiring that restrictive policy provisions be preceded by a sufficiently explanatory title and therefore, the policy should be construed "as though it did not contain the exclusion."

Relevant Case: *Great Northern Ins. Co. v. The Benjamin Franklin Fed. Sav. & Loan Ass’n*, 793 F. Supp. 259 (D. Or. 1990).

Description of Case:

In *Great Northern Ins. Co. v. The Benjamin Franklin Fed. Sav. & Loan Ass’n*, 793 F. Supp. 259 (D. Or. 1990), the court held that a pollution exclusion in a property insurance policy barred coverage to a building owner for asbestos removal because asbestos qualified as a “pollutant” under the policy.”

Pennsylvania

Relevant Case: *Raybestos-Manhattan, Inc. v. Indus. Risk Insurers*, 433 A.2d 906 (Pa. 1981).

Description of Case:

In *Raybestos-Manhattan, Inc. v. Indus. Risk Insurers*, 433 A.2d 906 (Pa. 1981), the insured mistakenly directed a delivery driver to put fuel oil into its heptane tank and caused damage. The pollution exclusion clause provided: “This policy does not insure against loss caused by or resulting from three. dampness or dryness of atmosphere, extremes or changes of temperature, shrinkage, evaporation, loss of weight, leakage of contents, marring, scratching, exposure to light, contamination, change in flavor or color or texture or finish; unless such loss is caused directly by physical damage to the property covered or to premises containing such property, by a peril not excluded in this policy.” The court found that “[b]y any reasonable definition, the damage to appellee's work in progress in this case was caused by contamination.” However, the court still found coverage because “[t]he all-risk policy provides...that there shall nevertheless be coverage if such a loss is caused “by a peril not excluded in this policy,” and while “various external causes are specifically excluded, there is no exclusion for the negligent acts of third persons or employees and no exclusion specifically applicable to an external cause comparable to that which brought about appellee's loss.”

Relevant Case: *Graham v Harleysville Ins. Co.*, 632 A.2d 939 (Pa. Super. Ct. 1993).

Description of Case:

In *Graham v Harleysville Ins. Co.*, 632 A.2d 939 (Pa. Super. Ct. 1993), the court held that an exclusion for the “release, discharge or dispersal of contaminants or pollutants” in a homeowners insurance policy barred coverage for a claim for damage to the insured’s property resulting from oil escaping from a neighbor’s oil tank.

Relevant Case: *Brown v. American Motorist Ins. Co.*, 930 F. Supp. 207 (E.D. Pa. 1996).

Description of Case:

In *Brown v. American Motorist Ins. Co.*, 930 F. Supp. 207 (E.D. Pa. 1996), the court held the pollution exclusion in a homeowner’s insurance policy applied to a claim resulting from fumes that entered the insured’s house as a result of the insured’s application of waterproof sealing to the exterior of the home, causing the insured to vacate the residence. The court held that fumes from a household product fell within the policy’s definition of “pollutant” and that there was no ambiguity in the language of the exclusion requiring a “discharge, dispersal, seepage, migration, release or escape.”

Relevant Case: *Vale Vista Assoc., L.P. v. The Cincinnati Cas. Co.*, 2020 WL 1025216 (W.D. Pa. Mar. 3, 2020).

Description of Case:

In *Vale Vista Assoc., L.P. v. The Cincinnati Cas. Co.*, 2020 WL 1025216 (W.D. Pa. Mar. 3, 2020), the insured sought coverage under a property insurance policy for a loss arising out of a black powder throughout a warehouse resulting from a previous tenant’s use of the property. The court held that a pollutants exclusion in the policy barred coverage, rejecting the insured’s argument that the insurer did not meet its burden to prove the substance was a “pollutant.” The court noted that the insurer’s expert report identified toxic levels of chromium and the insured took the position that the warehouse needed to be “decontaminated.”

Rhode Island (No Law)

South Carolina (No Law)

South Dakota (No Law)

Tennessee (No Law)

Texas

Relevant Case: *McConnell Constr. Co. v. Ins. Co. of St. Louis*, 428 S.W.2d 659 (Tex. 1968).

Description of Case:

In *McConnell Constr. Co. v. Ins. Co. of St. Louis*, 428 S.W.2d 659 (Tex. 1968), the court held an exclusion for “loss by contamination” did not apply to corrosion damage to the insured’s residence and fumes arising therefrom caused by application of muriatic acid to brick flooring. The court found the policy’s coverage for corrosion applied.

Relevant Case: *Auten v. Employers Nat’l Ins. Co.*, 722 S.W.2d 468 (Tex. App. 1986).

Description of Case:

In *Auten v. Employers Nat’l Ins. Co.*, 722 S.W.2d 468 (Tex. App. 1986), the court held a contamination exclusion barred coverage for damage resulting from an exterminator’s excessive use of a pesticide in the house, which resulted in bodily injury, chemical odor, stained carpet, and oily film on furniture. The court rejected the insured’s argument that there was no contamination because the chemical used was appropriate for extermination, and the ultimate cause of the loss was the exterminator’s negligence in using too much of the chemical.

Relevant Case: *Lexington Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd.*, 2002 WL 356756 (N.D. Tex. 2002).

Description of Case:

In *Lexington Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd.*, 2002 WL 356756 (N.D. Tex. Mar. 5, 2002), the court held an exclusion for loss or damage caused by the “release, discharge, escape or dispersal” of contaminants or pollutants applied to mold damage. The court rejected the insured’s argument that the mold was simply present, instead concluding mold was “dispersed” in the insured’s property.

Utah (No Law)

Vermont

Relevant Case: *Whitney v. Vermont Mut. Ins. Co.*, 135 A.3d 272 (Vt. 2015).

Description of Case:

In *Whitney v. Vermont Mut. Ins. Co.*, 135 A.3d 272 (Vt. 2015), the court held an exclusion for “discharge, dispersal, seepage, migration, release or escape of pollutants” applied to damage to an insured’s residence caused by spraying of pesticide chlorpyrifos. The court concluded chlorpyrifos is an “irritant” and “contaminant” because it is toxic to humans and causes a variety of ailments and illnesses.

Relevant Case: *Sperling v. Allstate Indemnity Co.*, 944 A.2d 210 (Vt. 2007).

Description of Case:

In *Sperling v. Allstate Indemnity Co.*, 944 A.2d 210 (Vt. 2007), the court held an exclusion for “[v]apors, fumes, acids, toxic chemicals, toxic gasses, toxic liquids, toxic solids, waste materials or other irritants, contaminants or pollutants” and “contamination” that included toxic liquids applied to damage resulting from a spill of home heating oil. The court rejected the argument that the doctrine of predominant and efficient causation applied and the true cause of the loss was the falling of a suitcase onto a valve that resulted in the release of the oil, concluding the release of the oil was the cause of the damage.

Virginia

Relevant Case: *Travco Ins. Co. v Ward*, 736 S.E.2d 321 (Va. 2012).

Description of Case:

In *Travco Ins. Co. v Ward*, 736 S.E.2d 321 (Va. 2012), the court held that an exclusion for loss caused by “[d]ischarge, dispersal, seepage, migration, release or escape of pollutants” subject to an exception applied to a claim for damage to an insured’s residence caused by toxic gases released by defective drywall. The court rejected the insured’s arguments that the process by which drywall emits sulfur is not a “discharge” of “pollutants” and that the exclusion was unreasonably broad.

Relevant Case: *PBM Nutritionals, LLC v. Lexington Ins. Co.*, 724 S.E.2d 707 (Va. 2012).

Description of Case:

In *PBM Nutritionals, LLC v. Lexington Ins. Co.*, 724 S.E.2d 707 (Va. 2012), the court held that an exclusion for damage “solely and directly caused by or resulting from the presence, release, discharge or dispersal of ‘pollutants’” subject to exceptions applied to damage to the insured’s infant formula that was “unsaleable due to the presence of melamine and disintegrated filter components in the formula.” The court rejected the insured’s arguments that the definition of “pollutant” was overly broad or that the exclusion should only apply to traditional environmental pollution and held that the melamine and filter material unambiguously qualified as contaminants and pollutants.

Relevant Case: *Proto v. Future Group, L.L.C.*, 83 Va. Cir. 21 (Va. Cir. Ct. 2011).

Description of Case:

In *Proto v. Future Group, L.L.C.*, 83 Va. Cir. 21 (Va. Cir. Ct. 2011), the court held that an exclusion for “pollution” applied to “off-gassing” or the emission of sulfur dioxide from defective drywall. The court held that the terms in the exclusion, such as “released,” “discharged” and “contaminant” were unambiguous, and the exclusion was not limited to industrial pollution.

Washington

Relevant Case: *Graff v. Allstate Ins. Co.*, 54 P.3d 1266 (Wash. App. 2002).

Description of Case:

In *Graff v. Allstate Ins. Co.*, 54 P.3d 1266 (Wash. App. 2002), the court held that an exclusion for “contamination” did not bar coverage for damage to the insured’s rental house resulting from a tenant’s methamphetamine lab, including repair of damage when the police broke in, replacement of carpet and painting and environmental remediation. The court held that the loss was caused by vandalism, a covered risk under the policy.

West Virginia (No Law)

Wisconsin

Relevant Case: *Hirschhorn v. Auto-Owners Ins. Co.*, 809 N.W.2d 529 (Wis. Ct. App. 2012).

Description of Case:

In *Hirschhorn v. Auto-Owners Ins. Co.*, 809 N.W.2d 529 (Wis. App. 2012), the court held that damage resulting from bat guano in the insured's house fell within an exclusion for loss resulting from "discharge, release, escape, seepage, migration or dispersal" of "pollutants." The court found bat guano qualified as an irritant or contaminant and therefore a "pollutant" because it is a "unique and largely undesirable substance that is commonly understood to be harmful."

Relevant Case: *Landshire Fast Foods of Milwaukee, Inc. v. Employers Mut. Cas. Co.*, 676 N.W.2d 528 (Wis. Ct. App. 2004).

Description of Case:

In *Landshire Fast Foods of Milwaukee, Inc. v. Employers Mut. Cas. Co.*, 676 N.W.2d 528 (Wis. Ct. App. 2004), the court held that a pollution exclusion applied to losses resulting from a listeria bacteria outbreak at an insured's food processing facility because bacteria is a "contaminant." The court rejected the insured's argument that the term "contaminant" only included "inorganic material."

Relevant Case: *Arnold v. Cincinnati Ins. Co.*, 688 N.W.2d 708 (Wis. Ct. App. 2004).

Description of Case:

In *Arnold v. Cincinnati Ins. Co.*, 688 N.W.2d 708 (Wis. Ct. App. 2004), the court held that a pollution exclusion did not apply to water damage to exterior finishes and windows caused by stripping chemicals applied to the insured's house to remediate mold damage. The court held that even if the chemicals were "pollutants," application of the stripping chemicals was not a "discharge, dispersal, seepage, migration, release or escape."

Relevant Case: *Richland Valley Products, Inc. v. St. Paul Fire & Cas. Co.*, 548 N.W.2d 127 (Wis. Ct. App. 1996).

Description of Case:

In *Richland Valley Products, Inc. v. St. Paul Fire & Cas. Co.*, 548 N.W.2d 127 (Wis. Ct. App. 1996), the court held an exclusion for contamination applied to loss caused by clogging of a cooling system that the insured used to manufacture ice cream as a result of the mixing of brine with ammonia. The court rejected the trial court’s finding that contamination must be a slow process or that the contamination exclusion was limited to fungal or bacterial contamination.

Relevant Case: *United States Fire Ins. Co. v. Ace Baking Co.*, 476 N.W.2d 280 (Wis. Ct. App. 1991).

Description of Case:

In *United States Fire Ins. Co. v. Ace Baking Co.*, 476 N.W.2d 280 (Wis. Ct. App. 1991), the court held an exclusion for loss caused by the release, discharge or dispersal of “pollutants” barred coverage for loss that occurred when the insured’s fabric softener fragrance affected the scent of a fragrance additive used in ice cream cones. The court concluded that linalool, the ingredient in the fabric softener fragrance additive, qualified as a “pollutant.”

Wyoming (No Law)

Questions?

We’re here to help.



Contact Tressler LLP attorney **Michael DiSantis** at

mdisantis@tresslerllp.com or (412) 925.1571

[Click here to view Michael's biography.](#)

Thank you!

QUICK FACTS

Tressler is Headquartered in Chicago, Illinois, with eight offices in five states: IL, CA, NJ, NY and PA.

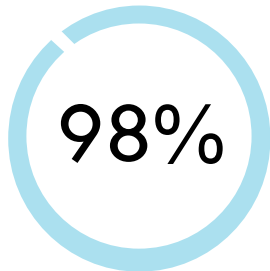
Tressler attorneys have....

- » Conducted more than 1,000 trials
- » Handled over 1,000 appeals
- » Appeared in court in all 50 states
- » Prepared more than 10,000 analyses of insurance coverage issues
- » Represented over 100 governmental entities
- » Bought, sold or organized over 1,500 businesses
- » Contributed to over 100 charitable causes
- » Participated in over 100 professional organizations
- » Delivered more than 500 educational presentations
- » Published more than 700 articles

Tressler attorneys appear in state and federal courts in all 50 states.



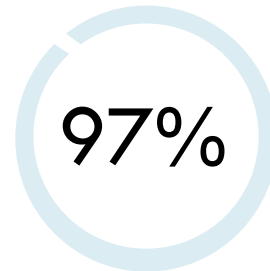
Here's What Our Clients Have To Say



Of Our Clients Believe Their Matters Were Handled Well



Of Our Clients Would Work With Tressler Attorney(s) Again



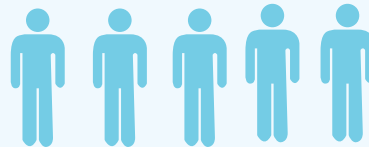
Of Our Clients Would Recommend Tressler To Others

Our clients matter. Their opinions matter.



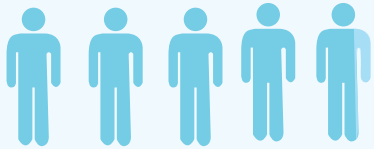
98%

Believe That Tressler's Attorney(s) Communicated Effectively



97%

Believe Tressler's Staff Is Professional And Helpful



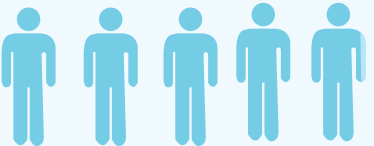
95%

Believe The Value Of Tressler's Service Is Worth What They Paid



98%

Believe They Received Assistance In A Timely Manner



97%

Believe They Were Able To Reach Tressler's Attorney(s) Whenever They Needed To

Results from 2019 Tressler Client Satisfaction Survey.

Tressler clients can provide feedback at any time through our Client Satisfaction Survey System: tresslerllp.com/clientsurvey

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