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**Current Trends in Application of the Absolute
Pollution Exclusion in CGL Policies:
Cross-Border Comparison Between
New York and Canadian Laws**

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As in many areas of law, jurisprudence on both sides of the 49th parallel has developed on similar tracks in the insurance area and specifically in how the pollution exclusion has been used and

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judicially interpreted in commercial general liability (CGL) policies. This Article looks at the history of the absolute pollution exclusion (the Exclusion), discusses leading cases under New York and Canadian law—which has relied on New York law—and considers general approaches that courts have used to interpret the Exclusion. Today, the Exclusion has evolved into a provision that excludes coverage for a broad range of pollution-related liability. Precisely how the Exclusion applies in different circumstances remains the subject of debate some thirty years after it became a part of the CGL policy form, even though its language is clear. To some extent, both New York and Canadian courts have artificially limited the Exclusion to “environmental” or “outdoor” pollution, even though those words do not appear in its text. In addition, courts have restricted policyholder efforts to expand coverage beyond contractual terms and have enforced the Exclusion even when the policyholder is blameless in causing the pollution—even for what may be considered nontraditional and nonenvironmental types of pollution. This approach gives effect to the longstanding, venerable principle in Anglo-American law that contracts should be read as written. Policyholders, insurers, and practitioners would be wise to consider these developments.

I

THE POLLUTION EXCLUSION WAS BORN IN 1986

In 1971, New York enacted a statute that required insurance carriers to include a limited pollution exclusion in all CGL policies issued in the State.¹ This limited pollution exclusion denied insurance coverage for damages from pollution but did not apply to “sudden and accidental” pollution.² The Insurance Services Office (the ISO), then known as the Insurance Rating Board, included a limited pollution exclusion as part of the basic CGL policy form in 1973.³ The relevant provision was as follows:

The insurance does not apply to:

bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids,

¹ This statute was repealed in 1982. *See* N.Y. Ins. Law § 46(13)–(14) (recodified as N.Y. Ins. Law § 1113 (McKinney 2017) by 1984 Laws ch. 367, § 2).

² *Id.*

³ The limited pollution exclusion was first introduced as an endorsement in 1970 before being incorporated into the ISO policy form in 1973. In 1986, the absolute pollution exclusion replaced the limited pollution exclusion. N.Y. Ins. Law § 1113 (McKinney 2017).

alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.⁴

Following much litigation about the meaning of “sudden and accidental,” New York’s highest court interpreted “sudden” to exclude long-term and continuous pollution and “accidental” to exclude intentional discharge with unexpected consequences.⁵ A similar history can be traced in Canada, which adopted the same exclusion in the standard CGL policy form.⁶

In 1986, the ISO removed the “sudden and accidental” exception to the pollution exclusion from its CGL policy form and applied the pollution exclusion to an expanded definition of “pollutants,” which included “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.”⁷ This revised language is referred to as the “absolute” pollution exclusion.⁸ The Insurance Bureau of Canada added the Exclusion to Canadian CGL policies in 1985, and the Exclusion is now largely standard—with some variations—in CGL policies issued in both the United States and Canada.⁹

⁴ Commercial General Liability Coverage Form, ISO 1973 Coverage Part Specimen, Section 1, Exclusion (f); Appendix B. 1973 Comprehensive General Liability (CGL) Insurance Policy, 3 ENVTL. INS. LITIG.: L. & PRAC. Appendix B (2018) (GL0002 Ed. 01-73) (quoting 1973 ISO CGL Form); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772, 113 S. Ct. 2891, 2896–97, 125 L. Ed. 2d 612 (1993) (referring to ISO standard CGL insurance form “that had been in use since 1973 (1973 ISO CGL form)”; ENVTL. INS. LITIG.: L. & PRAC. § 7:1 (2018), Westlaw (quoting 1973 ISO CGL Form).

⁵ See, e.g., *Technicon Elecs. Corp. v. Am. Home Assurance Co.*, 542 N.E.2d 1048, 1050–51 (1989) (holding that “accidental” provides an exception to the pollution exclusion only for unintentional pollution and “sudden” imposes a temporal requirement in order to prevent superfluity with “accidental”).

⁶ *Zurich Ins. Co. v. 686234 Ont. Ltd.*, 62 O.R. 3d 447, 453–54 (Can. Ont. C.A. 2002).

⁷ Commercial General Liability Coverage Form, ISO Form CG 00 01 12 07, Section V(15).

⁸ See, e.g., Jeffrey W. Stempel, *Reason and Pollution: Construing the “Absolute” Pollution Exclusion in Context and in Light of Its Purpose and Party Expectations*, 34 TORTS & INS. L.J. 1, 2 (1998).

⁹ *Zurich*, 62 O.R. 3d at 453–54.

II

SOME CASES HAVE TRIED TO LIMIT THE EXCLUSION

A. New York

Some New York cases have interpreted the Exclusion to apply only to environmental pollution, even though nothing in the Exclusion's text expressly so limits it. These cases suggest that the terms "discharge, dispersal, release and escape" in the Exclusion are environmental terms of art meant to exclude only industrial pollution, even though nothing about these common English words actually suggests that.¹⁰ There is nothing on the face of the Exclusion that exempts it from applying to nonenvironmental pollution such as poisonous gasses,¹¹ biological organisms,¹² or lead paint, as some courts around the country have held.¹³ Commentators have noted that the deciding factor in New York appears to be where the pollutant is located, rather than what it is. But

¹⁰ See, e.g., *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 44 (2d Cir. 2006) (citing the Ninth Circuit to explain that "contamination" should be interpreted as an environmental term of art); *Belt Painting Corp. v. TIG Ins. Co.*, 795 N.E.2d 15, 17 (2003) (confirming that an insurance policy is interpreted in light of common speech and the reasonable expectations of a businessperson).

¹¹ See, e.g., *Assicurazioni Gen. S.P.A. v. Neil*, 160 F.3d 997, 1005–06 (4th Cir. 1998) (carbon monoxide); *Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 901 (3d Cir. 1997) (carbon monoxide); *Am. States Ins. Co. v. Nethery*, 79 F.3d 473, 475–76 (5th Cir. 1996) (paint and glue fumes); *IKO Monroe, Inc. v. Royal & Sun All. Ins. Co. of Canada, Inc.*, No. 00-834, 2001 WL 1568674, at 4–5 (D. Del. Dec. 7, 2001) ("noxious odors"); *Toledo v. Van Waters & Rogers, Inc.*, 92 F. Supp. 2d 44, 51–52 (D.R.I. 2000) (toxic fumes); *Bimminous Cas. Corp. v. R.J. Taylor Corp.*, 1998 WL 1992911, at 2 (Mich. Ct. App. May 8, 1998) (sewer gas and carbon dioxide buildup); *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 635 N.W.2d 112, 120–22 (Neb. 2001) (toxic fumes); *Leo Haus, Inc. v. Selective Ins.*, 801 A.2d 419, 423 (N.J. Super. Ct. App. Div. 2002) (carbon monoxide); *Madison Constr. Co. v. Harleyville Mut. Ins. Co.*, 735 A.2d 100, 108 (Pa. 1999) (sealant fumes); *Matcon Diamond, Inc. v. Penn Nat'l Ins. Co.*, 815 A.2d 1109, 1113–14 (Pa. Super. Ct. 2003) (carbon monoxide); *Zaiontz v. Trinity Universal Ins. Co.*, 87 S.W.3d 565, 573–74 (Tex. App. 2002) ("fire and odor eliminator").

¹² See, e.g., *Sharp v. Vick*, No. 02-1575, 2003 WL 21544114, ¶ 20 (Wis. Ct. App. July 10, 2003); see also *Royal Ins. Co. v. Bithell*, 868 F. Supp. 878, 880–81 (E.D. Mich. 1993) ("[I]n this Court's view, raw sewage is clearly a contaminant."); *Matcon Diamond*, 815 A.2d at 1113 (citing *Municipality of Mt. Lebanon v. Reliance Ins. Co.*, 778 A.2d 1228, 1233 (Pa. Super. Ct. 2001)); *Blackhawk-Cent. City Sanitation Dist. v. Am. Guar. & Liab. Ins. Co.*, 214 F.3d 1183, 1190 (10th Cir. 2000); *U.S. Fire Ins. Co. v. City of Warren*, 176 F. Supp. 2d 728, 732 (E.D. Mich. 2001).

¹³ See, e.g., *Porterfield v. Audubon Indem. Co.*, 856 So.2d 789 15 (Ala. 2002); *Lititz Mut. Ins. Co. v. Steely*, 785 A.2d 975, 980 (Pa. 2001); *Mistick, Inc. v. N.W. Nat'l Cas. Co.*, 806 A.2d 39, 43–44 (Pa. Super. Ct. 2003); *Peace ex rel. Lerner v. N.W. Nat'l Ins. Co.*, 596 N.W.2d 429, 437–38 (Wis. 1999).

the Exclusion by its terms does not consider the pollutant's location.¹⁴ Thus, at least one New York court has ruled that indoor pollution that does not implicate pollutants discharged outdoors does not, absent other factors, fit in the Exception.¹⁵

In *Roofers' Joint Training, Apprentice & Educational Committee of Western New York v. General Accident Insurance Co. of America*, a New York appellate court held that the Exclusion did not preclude coverage for toxic fumes that were released during a construction safety course conducted by the policyholder.¹⁶ In *Roofers*, the court found that the specific exclusion was ambiguous, and the court then looked to what it believed was the exclusion's general purpose. The court found that purpose to be something other than the Exclusion's plain language indicated: excluding coverage for environmental pollution.¹⁷ Because the injured parties were in the immediate vicinity when they inhaled the toxic fumes, the court concluded that there was no "discharge, dispersal . . . release or escape of pollutants."¹⁸ The panel observed that without some limiting principle, "pollutants" could include virtually all chemicals and the pollution exclusion would completely preclude coverage.¹⁹ Thus, the court concluded that the pollution exclusion should be limited to what it described as "environmental" pollution.²⁰ Of course, the policyholder is free to purchase the precise coverage it needs without having a court expand the scope of coverage after the fact by limiting the Exclusion to "environmental" pollution—which is a term not found in the exclusion's text.

The New York Court of Appeals adopted this view about what it described as "environmental" pollution in *Belt Painting Corp. v. TIG Insurance Co.*, where the policyholder pursued coverage for injuries that arose from underlying claimants inhaling paint and solvent fumes

¹⁴ See William P. Shelley & Joshua A. Mooney, *Toxic Torts and the Absolute Pollution Exclusion Revisited*, 39 TORT TRIAL & INS. PRAC. L.J. 55 (2003) (discussing how cases have focused on the location of the pollution rather than how it fits within the exclusion's wording).

¹⁵ See, e.g., *Belt Painting Corp.*, 795 N.E.2d at 20.

¹⁶ *Roofers' Joint Training, Apprentice & Educ. Comm. v. Gen. Accident Ins. Co. of Am.*, 275 A.D.2d 90, 91 (N.Y. App. Div. 2000).

¹⁷ *Id.* at 92.

¹⁸ *Id.*

¹⁹ *Id.* at 92–93.

²⁰ *Id.* at 93.

during stripping and painting work in an office building.²¹ The court affirmed an intermediate appellate decision holding that the pollution exclusion applies “only where the damages alleged are truly environmental in nature or result from pollution of the environment.”²² The court held that that was not the case here.²³

Some federal courts applying New York law appear to come out the same way. In *Stoney Run Co. v. Prudential-LMI Commercial Insurance Co.*, the Second Circuit held that carbon monoxide released into an apartment building did not fall within the Exclusion.²⁴ In *Stoney Run*, the policyholder owned buildings where tenants died or suffered bodily injury after inhaling carbon monoxide that was emitted into their apartments through the heating and ventilation system.²⁵ The Second Circuit reviewed New York case law and concluded that the pollution exclusion clause was ambiguous.²⁶ To resolve this ambiguity, the court focused on what it considered to be the general purpose of the exclusion—to exclude coverage for environmental pollution, but in a more restricted way than the plain language suggests.²⁷ To that end, the Second Circuit held that “the release of carbon monoxide into an apartment is not the type of environmental pollution contemplated by the pollution exclusion clause.”²⁸

Several cases address the September 11th terrorist attack and hold that the Exclusion does not preclude coverage from the collapsed buildings that released noxious particulate matter into the air and settled in the policyholder’s buildings.²⁹ Those decisions are also based on the Exclusion’s potential ambiguity in relation to contaminants released from destroyed buildings that collapsed in the terrorist attack. In *Parks Real Estate Purchasing Group v. St. Paul Fire & Marine Insurance Co.*, the Second Circuit vacated the district court’s summary judgment ruling that the term “contamination” should be construed to exclude coverage in any situation, thus effectively determining that it

²¹ *Belt Painting*, 795 N.E.2d at 16.

²² *Id.* at 17 (internal quotations removed).

²³ *Id.* at 17.

²⁴ *Stoney Run Co. v. Prudential-LMI Commercial Ins. Co.*, 47 F.3d 34, 35 (2d Cir. 1995).

²⁵ *Id.*

²⁶ *Id.* at 39.

²⁷ *Id.* at 37.

²⁸ *Id.* at 38.

²⁹ *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 36 (2d Cir. 2006).

is ambiguous.³⁰ Based on the court's understanding that "contamination . . . is an environmental term of art and applies only to discharges of pollutants into the environment,"³¹ the Second Circuit used a contextual definition of the Exclusion that it based on its own subjective perception of the parties' intent.³²

Similarly, in *Ocean Partners, L.L.C. v. North River Insurance Co.*, the policyholder sought coverage for damages to buildings from the September 11th attack, and the United States District Court for the Southern District of New York found the facts indistinguishable from *Parks Real Estate*.³³ Accordingly, the court held that the term "contaminant" was ambiguous about when the Exclusion applied.³⁴ Obviously, the September 11th cases have a unique context that may not easily extend to other fact patterns.

Note that the New York view that the Exclusion applies to pollutants discharged outdoors, as opposed to indoors, is not uniformly accepted across the country. States where the Exclusion applies more broadly than to pollutants discharged outdoors include Florida, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, Oklahoma, Pennsylvania, Texas, and Wisconsin.³⁵ Mississippi is undecided, but is leaning toward a broad reading of the Exclusion.³⁶ Whether the Exclusion applies to pollutants discharged outdoors appears to be an

³⁰ *Id.* at 48–49.

³¹ *Id.* at 44 (quoting *Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co.*, 132 F.3d 526, 530 (9th Cir. 1997)).

³² *Id.* at 48.

³³ *Ocean Partners, L.L.C. v. N. River Ins. Co.*, 546 F. Supp. 2d 101, 114–15 (S.D.N.Y. 2008).

³⁴ *Id.* at 115.

³⁵ See, e.g., *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1138 (Fla. 1998); *Atl. Ave. Assocs. v. Cent. Solutions, Inc.*, 24 P.3d 188, 191–92 (Kan. Ct. App. 2001); *McKusick v. Travelers Indem. Co.*, 632 N.W.2d 525, 531 (Mich. Ct. App. 2001); *Auto-Owners Ins. Co. v. Hanson*, 588 N.W.2d 777, 779–80 (Minn. Ct. App. 1999); *Cincinnati Ins. Co. v. German St. Vincent Orphan Assoc., Inc.*, 54 S.W.3d 661, 666 (Mo. Ct. App. 2001); *Sokoloski v. Am. West Ins. Co.*, 980 P.2d 1043, 1044–45 (Mont. 1999); *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 635 N.W.2d 112, 120 (Neb. 2001); *Bituminous Cas. Corp. v. Cowen Constr., Inc.*, 55 P.3d 1030, 1034–35 (Okla. 2002); *Madison Constr. Co. v. Harleyville Mut. Ins. Co.*, 735 A.2d 100, 109 (Pa. 1999); *Zhiontz v. Trinity Universal Ins. Co.*, 87 S.W.3d 565, 573 (Tex. Ct. App. 2002) (odor eliminator); *Peace ex. rel. Lerner v. Northwestern Nat'l Ins. Co.*, 596 N.W.2d 429, 442 (Wis. 1999).

³⁶ *Am. States Ins. Co. v. Nethery*, 79 F.3d 473, 477 (5th Cir. 1996) (applying to paint and glue fumes and vapors; "[t]he pollution exclusion at issue encompasses more than traditional concepts of pollution.").

area where the law will continue to evolve nationally. The law in New York could change with an evolving national consensus that the Exclusion should be enforced as written.

B. Canada

The leading Canadian case on the Exclusion is *Zurich Insurance Co. v. 686234 Ontario Ltd.*, decided by the Ontario Court of Appeal, which is the highest court in Canada's most populous and most commercially important province.³⁷ There, as in *Stoney Run*, the policyholder owned apartment buildings where carbon monoxide from a leaking furnace led to bodily injury claims.³⁸ The litigants' respective positions in the Canadian appeal paralleled those in the New York cases—the insurer argued that the Exclusion unambiguously excluded coverage, and the insured argued that the Exclusion was limited to pollution of the natural outdoor environment from industrial, commercial, or large-scale pollution (i.e., not indoor pollution from routine commercial hazards, such as a faulty heating system).³⁹

American jurisprudence informed much of the *Zurich* analysis because the Exclusion had previously been the subject of little judicial attention in Canada. The Ontario Court of Appeal was particularly swayed by *Stoney Run* (and a related line of cases), where the Second Circuit applied New York law, rather than by cases that interpreted the pollution exclusion more broadly.⁴⁰ As in *Stoney Run*, the court concluded that the Exclusion was ambiguous and then considered what it regarded as the Exclusion's inconclusive history as well as purpose to resolve that perceived ambiguity. The court did not focus on the text's plain meaning.⁴¹

³⁷ *Zurich Ins. Co. v. 686234 Ont. Ltd.*, 62 O.R. 3d 477 (Can. Ont. C.A. 2002).

³⁸ *Id.* ¶ 17.

³⁹ *Id.* ¶¶ 5–6.

⁴⁰ *Id.* ¶ 36. The court considered and rejected another line of American cases interpreting the pollution exclusion more literally such that there would be no coverage for common business hazards such as carbon monoxide poisoning (which are not normally viewed as pollution). *Id.*

⁴¹ *Id.* at 37.

III
**FOR THE EXCLUSION TO APPLY THERE MUST BE A NEXUS
BETWEEN THE POLLUTANT AND THE DAMAGE**

A. New York

A connection must exist between the pollution and the underlying injury for the Exclusion to apply. In *Cedarhurst v. Hanover Insurance Co.*, the policyholder sought coverage for damages and injuries that arose from sewage overflow.⁴² Because the underlying complaint against the policyholder did not allege any pollution-related injuries, the New York Court of Appeals held that the Exclusion did not preclude coverage.⁴³ Although the court held that the insurer must pay to defend the policyholder in the underlying litigation,⁴⁴ the court did not rule on indemnification because if evidence of pollution-related injuries were to come to light then the Exclusion *would* preclude indemnification.⁴⁵ While the court did not clearly rule on whether sewage was a pollutant for purposes of the Exclusion, it explained that the allegations of the underlying complaint informed the insurer's duty to defend.⁴⁶ The mere existence of pollutants, without pollution-related injuries, was not sufficient to implicate the Exclusion.⁴⁷

The sewage issue is currently being litigated around the country, even where a nexus between the sewage and the damage is present. For example, in *Evanston Insurance Co. v. J&J Cable Construction, L.L.C.*, the insurer sought a declaratory judgment that the Exclusion precluded coverage for damages that arose from sewage that overflowed when a construction company struck a pipe.⁴⁸ The damages included hospitalization for sewage exposure, water contamination, and seepage into homes.⁴⁹ Nonetheless, the court found that while the damage was related to the pollutant nature of sewage, the Exclusion did

⁴² Inc. Vill. of Cedarhurst v. Hanover Ins. Co., 675 N.E.2d 822, 823 (N.Y. 1996).

⁴³ *Id.*

⁴⁴ *Id.* at 825.

⁴⁵ *Id.* at 823.

⁴⁶ *Id.* at 824.

⁴⁷ *Id.*

⁴⁸ *Evanston Ins. Co. v. J&J Cable Constr., L.L.C.*, No. 3:15cv-506-WHA, 2016 U.S. Dist. LEXIS 129371, at 6–10 (M.D. Ala. 2016), *aff'd*, 719 Fed. App'x. 1002 (11th Cir. 2018).

⁴⁹ *Id.* at 2.

not preclude coverage.⁵⁰ The court reached this odd conclusion by relying on Alabama Supreme Court precedents.⁵¹

B. Canada

While no Canadian court has held that the Exclusion's applicability depends on the link between the pollution and the underlying injury, the British Columbia Court of Appeal has arguably come close. In *Precision Plating Ltd. v. AXA Pac. Insurance Co.*, the court held that the key question when considering the Exclusion's applicability is the source of the alleged liability, not the source of the damage.⁵² The court went on to distinguish "the original or proximate cause of the damage" (fire) from "the source of the liability" (pollutant spill).⁵³ If the spilled pollutant caused the liability, then the Exclusion applies—so long as what caused the liability is actually a pollutant.⁵⁴ *Precision Plating* also acknowledged the proposition that a carrier's defense obligations are broader than its indemnification obligations, which is also generally true in New York.⁵⁵ While *Precision Plating* can be read as creating more predictability in the law with regard to the Exclusion, the distinction between the original cause of the damage and the source of the liability is arbitrary and metaphysical. Such apparent randomness in the law could well lead to more rather than less litigation.

IV

THE POLLUTION EXCLUSION APPLIES EVEN IF THE POLICYHOLDER IS BLAMELESS IN THE POLLUTION

A. New York

The Exclusion applies even if the policyholder is blameless in the pollution. In *Budofsky v. Hartford Insurance Co.*, the court held that whether the policyholder accidentally or intentionally committed pollution was irrelevant to the Exclusion's applicability, where the pollutants at issue were found to fall within the meaning of the Exclusion.⁵⁶ There, lessees of the policyholders' land had released industrial waste into dry wells and cesspools. While the policyholder

⁵⁰ *Id.* at 6–7.

⁵¹ *Id.* at 6–7.

⁵² *Precision Plating Ltd. v. AXA Pacific Ins. Co.*, 2015 BCCA 277, ¶ 54.

⁵³ *Id.* ¶ 41.

⁵⁴ *Id.*

⁵⁵ *Id.* ¶¶ 31–32.

⁵⁶ *Budofsky v. Hartford Ins. Co.*, 556 N.Y.S.2d 438, 441 (N.Y. Sup. Ct. 1990).

was clearly blameless for this conduct, what mattered more to the court was that the industrial waste was a form of environmental pollution.⁵⁷ Although the policyholder neither intended to nor caused the pollution, the court held that the Exclusion applied.⁵⁸

The New York Court of Appeals reaffirmed this holding in *Town of Harrison v. National Union Fire Insurance Co.*⁵⁹ In *Town of Harrison*, policyholders sought coverage for liability that arose from the policyholders' excavation contractor dumping noxious waste on neighboring land.⁶⁰ Like the *Budofsky* court, the Court of Appeals held that so long as the released matter was a pollutant, the Exclusion unambiguously precluded coverage, even where the policyholder was blameless in causing the actual pollution.⁶¹

B. Canada

A similar development in the law occurred north of the border. In *ING Insurance Co. of Canada v. Miracle*, the Ontario Court of Appeal held that whether the policyholder is "active" or "passive" in causing the pollution is irrelevant, because the Exclusion applies when the insured does something that is known to have pollution risk.⁶² This reasoning is akin to the *Town of Harrison* and *Budofsky* line of cases, which held that the Exclusion precludes coverage even in situations where the policyholder is blameless—or at least not active—in causing the pollution.⁶³

In *Miracle*, the insured operated a gas station where underground storage tanks leaked toxins onto adjacent property.⁶⁴ The *Miracle* court focused on the fact that the insured did something that carried an obvious risk of pollution and that the claim alleged damage to the natural environment by a well-recognized form of pollution.⁶⁵ That the insured was passive or blameless was irrelevant in determining whether the Exclusion applied.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Town of Harrison v. Nat'l Union Fire Ins. Co.*, 675 N.E.2d 829 (N.Y. 1996).

⁶⁰ *Id.* at 830–31.

⁶¹ *Id.* at 832.

⁶² *ING Ins. Co. v. Miracle*, 2011 ONCA 321, ¶ 23.

⁶³ See *Town of Harrison*, 675 N.E.2d at 832; *Budofsky v. Hartford Ins. Co.*, 556 N.Y.S.2d 438, 441 (N.Y. Sup. Ct. 1990).

⁶⁴ *Miracle*, ¶ 1.

⁶⁵ *Id.* ¶ 22.

V

EMERGING NEW YORK LAW SUGGESTS THAT NONTRADITIONAL ENVIRONMENTAL POLLUTION MAY FALL WITHIN THE EXCLUSION FOR FIRST-PARTY COVERAGE

New York law suggests that various forms of nontraditional environmental pollution may fall within the Exclusion for first-party insurance coverage. In *Broome County v. Travelers Indemnity Co.*, the policyholder purchased a first-party property policy that excluded “discharge, dispersal, seepage, migration, release or escape” of pollutants.⁶⁶ An intermediate New York appellate court held that the Exclusion applied to short, migratory events that damaged the policyholder’s property, which in that case was silica dust migrating through an elevator shaft.⁶⁷ The appellate court reasoned that to hold otherwise would render the Exclusion meaningless.⁶⁸ The court distinguished first-party from third-party insurance (for which the Court of Appeals had limited the Exclusion to what it considered environmental pollution).⁶⁹ The *Broome County* court held that the only reasonable reading that would give meaning to the Exclusion in first-party property insurance was to preclude coverage.⁷⁰ Similar results as in *Broome County* could be expected in other cases, given the New York rule of interpretation that contractual terms—including insurance policies—are not to be read in such a way that renders other terms meaningless.⁷¹

Rather than drawing a distinction between first-party and third-party insurance, in *Palliser Regional Division No. 26 v. Aviva Scottish*, an Alberta trial court drew a line between the insured’s business and nonbusiness activities.⁷² There, a group of residents alleged that coal dust from a neighboring insured school’s property had blown onto the residents’ land and caused damage.⁷³ The court held that coal-dust

⁶⁶ *Broome Cty v. Travelers Indem. Co.*, 145 A.D.3d 1241, 1241–42 (N.Y. App. Div. 2015).

⁶⁷ *Id.* at 1242–43.

⁶⁸ *Id.* at 1242.

⁶⁹ *Id.*

⁷⁰ *Id.* The court also noted that the insurance contract defined pollutants to include building materials and that a faulty workmanship clause independently and alternatively precluded coverage. *Id.*

⁷¹ See, e.g., *Cty. of Columbia v. Cont’l Ins. Co.*, 634 N.E.2d 946, 950 (1994).

⁷² *Palliser Reg’l Div. No. 26 v. Aviva Scottish & York Ins. Co.*, 2004 ABQB 781, at para. 25, 39, 40.

⁷³ *Id.* at para. 1, 3.

pollution damage was not excluded because it did not flow from the insured's main business activity.⁷⁴ The court determined that coal dust was a pollutant but concluded that the Exclusion did not apply because the school's industrial or business activity had nothing to do with releasing the coal dust.⁷⁵ Presumably, if the coal dust had blown off a coal-powered electricity-generating plant, then under the same policy the Exclusion would apply. Under those circumstances, the result would be similar to *Broome County*: no coverage under the pollution exclusion for losses off the insured's property. The Ontario Court of Appeal has supported the idea that the Exclusion should be applied to the industrial or business activities of the insured, but has not explicitly stated that the Exclusion is limited to such activities.⁷⁶ How the distinction between insured's business and nonbusiness activities plays out in the appellate courts when they squarely address the issue remains to be seen.

CONCLUSION

The Exclusion is written broadly to expressly exclude coverage for pollution-related liability. Nevertheless, some courts in New York and Canada have struggled to insert absent phrases such as "environmental" or "outdoor" as qualifiers to limit the type of pollution that the Exclusion captures. In trying to extend coverage to what some judges regard as sympathetic policyholders, these result-oriented decisions typically cite vague notions of parties' expectations. But the best guide to the parties' bargain is the actual policy language. Courts that focus on sympathies and ill-defined extrinsic evidence (that is often not even mentioned in the opinion) create an unwieldy legal system where parties' expectations can be upended depending on the length of the chancellor's proverbial foot. Courts should focus on the parties' expectations and enforce the policies' terms, including any exclusions, as written because that gives effect to the parties' expectations and bargains. Indeed, the most recent trend is to enforce plain policy language as written even where the policyholder is blameless in causing the pollution.

⁷⁴ *Id.* at para. 25, 39, 40.

⁷⁵ *Id.*

⁷⁶ *ING Ins. Co. of Canada v. Miracle*, 2011 ONCA 321, at para. 19–22.

