

# LSU Journal of Energy Law and Resources

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Volume 8  
Issue 2 *Spring 2020*

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9-22-2020

## The Absolute Pollution Exclusion: How Adoption of Doerr Could Stop the Descent Into Absolute Chaos

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### Repository Citation

Ashley Randol, *The Absolute Pollution Exclusion: How Adoption of Doerr Could Stop the Descent Into Absolute Chaos*, 8 LSU J. of Energy L. & Resources (2020)

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# The Absolute Pollution Exclusion: How Adoption of *Doerr* Could Stop the Descent Into Absolute Chaos

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## INTRODUCTION

Imagine: your favorite football team has defied the odds and is playing in a conference championship game. Fans have filled the stadium, eager to cheer on their team. Your team fights their hardest, trying to overcome

their “underdog” status. This challenging match turns to overtime, and the crowd is going wild. In the final seconds of overtime, the referee’s obviously missed call results in your team’s loss. Not only were the teams competing against each other, but it seems they were also fighting the enforcers of the rules. Similarly, businesses across the country have found themselves not only fighting their insurance carrier over the existence of coverage, but also the court system for providing inconsistent and absurd applications of the policy in dispute.

The Pollution Exclusion, included in a standard Commercial General Liability (CGL) policy, attempts to limit or preclude insurance coverage for bodily injury or property damage arising out of the discharge of one or more pollutants.<sup>1</sup> Although the wording of the exclusion clause has not changed in decades, it has been inconsistently applied and interpreted by courts across the country, sometimes even within a single jurisdiction.<sup>2</sup> After an extensive review and analysis of the entire body of existing precedent on the interpretation of this exclusion, the Supreme Court of Alabama stated, “Rarely has any issue spawned as many, and as variant in rationales and results, court decisions as has the pollution-exclusion clause.”<sup>3</sup> This conflict has left policyholders unsure of the applicability of the policy to their business activities, and ultimately, the coverage available for claims made against them.<sup>4</sup>

When faced with a dispute between an insurance carrier and its insured over applicability and interpretation of the Pollution Exclusion, the Supreme Court of California evaluated the extensive litigation surrounding the scope of the exclusion in other jurisdictions.<sup>5</sup> As to the general nature of the jurisprudence, the court noted, “[t]o say there is a lack of unanimity as to how the clause should be interpreted is an understatement. Although the fragmentation of opinion defies strict categorization, courts are roughly divided into two camps.”<sup>6</sup> More simply

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1. David B. Goodman, *Avoiding the Pollution Exclusion in Your CGL Insurance*, GREENSFELDER, (Feb. 23, 2016, 3:35 PM), <https://www.greensfelder.com/business-risk-management-blog/avoiding-the-pollution-exclusion-in-your-cgl-insurance-policy> [<https://perma.cc/MWH6-DK8V>].

2. See *Porterfield v. Audubon Indem. Co.*, 856 So. 2d 789 (Ala. 2002).

3. *Id.* at 800.

4. Eric Little & Jacquelyn Beaumont, *The Absolute Pollution Exclusion: Navigating Pathways Around Total Confusion*, CALL & JENSEN, <http://calljensen.com/the-absolute-pollution-exclusion-navigating-pathways-around-total-confusion/> [<https://perma.cc/96KX-DAAP>] (last visited Oct. 26, 2019).

5. *MacKinnon v. Trucks Ins. Exch.*, 73 P.3d 1205, 1208 (2003).

6. *Id.*

stated, a jurisdiction's placement into either camp depends on whether it applies a broad or narrow scope of coverage when interpreting the pollution exclusion.<sup>7</sup>

Jurisdictions falling into the first camp are those which apply a narrow interpretation of the pollution exclusion. According to the court, this camp interprets the exclusion to apply "only to traditional environmental pollution into the air, water, and soil, but generally not to all injuries involving the negligent use or handling of toxic substances that occurs in the normal course of business."<sup>8</sup> To arrive at this interpretation, these courts typically find ambiguity in the specific wording of the exclusion when applied to such cases of negligence and interpret this ambiguity in favor of coverage for the insured.<sup>9</sup> In contrast, the courts with a broader scope of interpretation maintain that the wording of the exclusion is unambiguous and applies equally to both the traditional notions of environmental pollution and cases of negligence involving toxic substances.<sup>10</sup> This Comment will discuss the body of jurisprudence surrounding each camp, including the primary arguments and considerations adopted by the courts, the methods of interpretation used, and the reasonableness of the outcomes achieved by each. Additionally, this Comment will address the tests developed by the high courts of some states and consider which of these would be the most effective uniform interpretation.

Part I of this Comment will introduce the Commercial General Liability policy, including its application and limitations. It will also discuss the Pollution Exclusion, including the evolution and modern application of this exclusion clause. Part II will introduce the issue at hand, primarily the divide between the two camps categorized as by the California Supreme Court in *MacKinnon v. Trucks Insurance Exchange*. Part III will discuss the Louisiana Supreme Court's approach to this highly-litigated topic, as addressed in *Doerr v. Mobil Oil Corporation*. Part IV will propose a solution to this problem: a test for uniform interpretation of the Pollution Exclusion.

## I. BACKGROUND OF THE GAME

The Pollution Exclusion is a clause contained in a Commercial General Liability (CGL) policy that attempts to limit or preclude insurance coverage under the policy for bodily injury or property damage arising due

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7. *Id.*

8. *Id.* at 1209.

9. *Id.*

10. *Id.*

to one or more pollutants.<sup>11</sup> To understand the implications of this exclusion, this section will introduce the practical function of the CGL policy, and the evolution of the exclusion clause contained therein.

### A. *The CGL Policy*

A Commercial General Liability insurance policy provides broad coverage to business entities for injuries encountered in the everyday course of business.<sup>12</sup> The policies are purchased by both large and small business owners in an attempt to protect against losses that may result from unforeseen liability-imposing events or circumstances.<sup>13</sup> Due to the comprehensive nature of coverage under this policy type, it is typically the first line of coverage purchased by a business to protect against liability for general business risks.<sup>14</sup>

The Insurance Services Office (ISO) is an organization that develops the standard policy forms used by most insurance carriers.<sup>15</sup> This organization ensures that the policy language provided to each carrier complies with regulatory and statutory requirements and files necessary policy information with state regulators on the carrier's behalf.<sup>16</sup> Although specific language may vary slightly among the states,<sup>17</sup> the ISO form is

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11. *Id.* at 1210.

12. Michael W. Peters, Note, *Insurance Coverage for Superfund Liability: A Plain Meaning Approach to the Pollution Exclusion Clause*, 27 WASHBURN L.J. 161, 166 (1987) (“The purpose of standard CGL insurance is to provide the insured with the broadest spectrum of protection against liability for unintentional and unexpected personal injury or property damage arising out of the conduct of the insured’s business.”).

13. *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 127 (La. 2000).

14. Kenneth Abraham, *The Rise and Fall of Commercial Liability Insurance*, 87 VA. L. REV. 85 (2001).

15. *Insurance Policy Programs*, VERISK, <https://www.verisk.com/insurance/capabilities/actuarial/insurance-policy-programs/#> [<https://perma.cc/D77S-NE78>] (last visited Jan. 3, 2020).

16. *Id.*

17. 15 U.S.C. §§ 1011–1015 (2018). The McCarran-Ferguson Act was enacted in 1945 to outline the regulation of the insurance industry. The Act requires individual states to be responsible for the regulation of insurance within their state and allows insurance carriers to be held largely exempt from federal antitrust laws. Individual state regulators and insurance boards approve policy language for carriers, which has led to some variance in the policy language among states.

considered standard for the industry.<sup>18</sup> For that reason, general discussion of policy language and history in this Comment will be that of the published ISO forms.

In broad terms, the insuring agreement is a contract between an insurer and an insured whereby the insurer agrees to perform if some uncertain event comes about, in exchange for a certain sum of money.<sup>19</sup> The sum paid in advance by the insured is called the *premium*.<sup>20</sup> The subject matter of the contract is called the *risk*.<sup>21</sup> Within commercial general liability policy type, there are two main categories. The first category is comprised of those policies considered to be “all risk” in that they generally cover losses from any type of peril that is not specifically excluded.<sup>22</sup> In contrast, the second category is those policies considered “named-perils” which only covers specific perils listed in the policy.<sup>23</sup>

When a business organization is faced with liability for an alleged injury requiring restitution, a claim is filed with the insurance carrier for indemnification. The “trigger of coverage,” or the event that might activate insurance, has long been understood as the occurrence of bodily injury or property damage during the policy period.<sup>24</sup> Coverage litigation arises

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18. “The close relation between premium rates and forms of policies means that the same associations that aggregate and analyze claims experience also draft and license the use of policy forms. . . . In the area of commercial liability insurance, the largest United States association is the Insurance Services Office (ISO).” *Richardson v. Nationwide Mut. Ins. Co.*, 826 A.2d 310, 315 (D.C. Cir. 2003).

19. Craig Stanovich, *A High-Level View of the CGL*, INT’L RISK MGMT. INSTL., <https://www.irmi.com/articles/expert-commentary/a-high-level-view-of-the-cgl-policy> [<https://perma.cc/GQ7K-EUZ7>] (last visited Nov. 1, 2019).

20. *Richardson v. Nationwide Mut. Insurance Co.*, 826 A.2d 310, 315 (D.C. Cir. 2003).

21. *Id.*

22. Robert Cornejo, *What does Contamination Mean? The Second Circuit’s Approach to an Insurance Policy’s Contamination Exclusion*, 15 MO. ENVTL. L. POL’Y REV. 171, 178 (2007).

23. *Id.*

24. *Global Warming Litigation and Insurance Coverage: Emerging Issues*, SIMPSON THACHER (Apr. 19, 2007), <http://www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/pub601.pdf?sfvrsn=2> [<https://perma.cc/P7CU-US7M>]. The “trigger” is the event itself, which triggers the seeking of coverage. The insurance industry adopted the “occurrence-based” CGL policy in 1966 which allows the insured to be covered if the occurrence of bodily injury or property damage happens within the policy period, even if the claim is made after the policy period. Craig F. Stanovich, *The Claims-Made CGL Policy*, INT’L RISK MGMT. INSTL., <https://www.irmi.com/articles/expert-commentary/the-claims-made-cgl-policy#1> [<https://perma.cc/CR6G-GTRE>] (last visited Nov. 1, 2019).

when the insured and the insurer do not agree on the existence of coverage for the given claim.<sup>25</sup>

### *1. The Pollution Exclusion*

The standard form CGL policy includes a clause that aims to limit or preclude coverage for bodily injury or property damage caused by pollution. This exclusionary clause generally attempts to exclude coverage that is afforded by the broad application of the CGL.

#### *a. Origin of the Pollution Exclusion*

The pollution exclusion was first introduced to CGL policies in the early 1970s.<sup>26</sup> This exclusion was contained in a popular endorsement, and therefore, was not included in the policy itself.<sup>27</sup> The 1973 CGL form published by the ISO was the first to incorporate this exclusion into the basic policy.<sup>28</sup> This new exclusion read:

This insurance does not apply . . .

. . .

(f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gasses, waste materials or other irritants, contaminants or pollutants into or upon 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.<sup>29</sup>

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25. *Global Warming Litigation and Insurance Coverage: Emerging Issues*, *supra* note 24.

26. Abraham, *supra* note 14.

27. An endorsement to an insurance policy is an amendment or addition to the contract which may alter the terms or scope of the original policy. Mila Araujo, *What is an Insurance Endorsement?*, THEBALANCE.COM, <https://www.thebalance.com/insurance-endorsement-or-rider-2645729> [<https://perma.cc/M3H4-NYKY>] (last updated Oct. 31, 2019).

28. Jeffrey W. Stempel, *Reason and Pollution: Correctly Construing the "Absolute" Exclusion in Context and in Accord with Its Purpose and Party Expectations*, 34 TORT & INS. L.J. 1 (1998).

29. Melody A. Hamel, Comment, *The 1970 Pollution Exclusion in Comprehensive General Liability Policies: Reasons for Interpretations in Favor*

This initial exclusion was known as the Sudden and Accidental Pollution Exclusion (SAPE), the Qualified Pollution Exclusion, or the Conditional Pollution Exclusion, and was a standard exclusion included in all CGL policies published by the ISO until 1986. Hereinafter, this version of the exclusion will be referred to as the Sudden and Accidental Pollution Exclusion.<sup>30</sup> As shown above, this version of the pollution exclusion states that all pollution claims were excluded from coverage *unless* the discharge of the pollutant was “sudden and accidental.”

Throughout the late 1960s until the early 1980s, there was a dramatic shift in the way society viewed pollution. Rachel Carson’s 1962 book, *Silent Spring*, alarmed readers across the United States about the dangers of pesticides and the chemical industry, and set the stage for the impending environmental movement.<sup>31</sup> Environmental catastrophes slowly became commonplace and attracted the attention of the press: in 1969, miles of the Santa Barbara, California coastline were devastated by an oil spill, killing birds and various wildlife living in the area; on June 22, 1969, the Cuyohoga River, near Cleveland, Ohio, burst into flames nearly five-stories high when oil-soaked debris floating on the surface was sparked by a passing train.<sup>32</sup> *Time Magazine* published a cover photo of a prior fire that also occurred on the Cuyohoga River and discussed the impact of industrial dumping into the nation’s rivers.<sup>33</sup> *Time* wrote that the river “oozes rather than flows” and that it contained “no sign of visible life.”<sup>34</sup> The following decade brought sweeping federal response to environmental catastrophes.

In December of 1980, during the final days of his term as president, Jimmy Carter signed into law the Comprehensive Environmental Response, Compensation and Liability Act (known as CERCLA or

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*of Coverage in 1996 and Beyond*, 34 DUQ. L. REV. 1083, 1087 (citing 1973 Comprehensive General Liability Insurance Policy, reprinted in Tod I. Zuckerman & Mark C. Raskoff, *Environmental Insurance Litigation Practice Forms Form VI-2*, at VI-23 (1995)) (emphasis added).

30. John C. Sullivan & Rick Perdian, *US Environment Law and its Impact on the Insurance Industry*, SWISS RE CENTRE FOR GLOBAL DIALOGUE (Oct. 16, 2014), [http://www.postschell.com/site/files/rdm\\_oct2014\\_usenvironmentallaw\\_sullivan\\_rperdian.pdf](http://www.postschell.com/site/files/rdm_oct2014_usenvironmentallaw_sullivan_rperdian.pdf) [<https://perma.cc/YV8B-CA2P>].

31. *Id.*

32. Jennifer Latson, *The Burning River That Sparked a Revolution*, TIME (June 22, 2015), <http://time.com/3921976/cuyahoga-fire/> [<https://perma.cc/PJ8E-R9CJ>].

33. *Id.*

34. *America’s Sewage System and the Price of Optimism*, TIME, Aug. 01, 1969.



“Superfund”).<sup>35</sup> The primary goal of CERCLA was to address the prompt cleanup of hazardous waste sites and impose liability for cleanup costs on responsible parties.<sup>36</sup> This goal was established using two primary mechanisms: (1) a federal fund, financed by the establishment of a tax on the chemical and petroleum industries, appropriations from general revenues, and certain costs and penalties recovered by the federal government; and (2) a liability scheme whereby the Environmental Protection Agency (EPA) was given authority to clean up uncontrolled or abandoned hazardous waste sites,<sup>37</sup> seek out responsible parties, Potentially Responsible Parties (PRPs),<sup>38</sup> and recover remediation costs from PRPs.<sup>39</sup> CERCLA imposed retroactive, strict,<sup>40</sup> joint and several liability for the cost of cleanup on any past or present owner or operator of a site, and on any off-site party who generated any hazardous materials deposited at a site.<sup>41</sup> Sites requiring remediation were placed on the National Priorities List,<sup>42</sup> and liability was imposed on the PRPs for the

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35. 42 U.S.C. § 9601 (Pub. L. No. 96-510).

36. Sullivan & Perdian, *supra* note 30.

37. *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund): 42 U.S.C. § 9601 et seq. (1980)*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act> [<https://perma.cc/CZ5D-L3EP>] (last visited Nov. 1, 2019).

38. *Vocabulary Catalog*, ENVTL. PROTECTION AGENCY, [https://iaspub.epa.gov/sor\\_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&glossaryName=Environmental%20Glossary](https://iaspub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do?details=&glossaryName=Environmental%20Glossary) [<https://perma.cc/6KU6-Y6DB>] (last visited Jan. 8, 2020). (“A Potentially Responsible Party is: Any individual or company--including owners, operators, transporters or generators--potentially responsible for, or contributing to a spill or other contamination at a Superfund site. Whenever possible, through administrative and legal actions, EPA requires PRPs to clean up hazardous sites they have contaminated.”). *See generally* 42 U.S.C. § 9607 (2018).

39. Hamel, *supra* note 29.

40. (“We agree with the State, however, that section 9607(a) (1) unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation.”). *See New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985).

41. 42 U.S.C. § 9607(a) (2018); *See Superfund Liability*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/enforcement/superfund-liability> [<https://perma.cc/9JG7-U684>] (last visited Oct 23, 2019).

42. The National Priorities List is the list of sites of national priority among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States and its territories. The NPL is intended primarily to guide the EPA in determining which sites warrant further investigation. *See Superfund: National Priorities List*, ENVTL. PROTECTION AGENCY,

site contamination.<sup>43</sup> The EPA sent “Notice of Liability” letters to responsible parties, outlining their legal obligation to clean up the contaminated sites.<sup>44</sup>

Parties found liable by the EPA for remediation and cleanup turned to their insurance carriers and CGL policies to offset the burden of loss, seeking defense from government orders and the payment of remediation costs.<sup>45</sup> Insurers attempted to deny coverage for the claims, taking the position that the CGL policy excluded damage caused by pollution, unless the pollution was sudden and accidental.<sup>46</sup> Courts were tasked with interpreting the ambiguity of this policy exclusion. Ultimately, the qualifications of the Sudden and Accidental Pollution Exclusion failed to protect insurers from the liability of cleanup costs and coverage litigation covered the court system, based on the ambiguity of “sudden and accidental”<sup>47</sup> and its broad application to environmental damage incurred over decades of industrial practices.<sup>48</sup> Insurance carriers were left on the

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<https://www.epa.gov/superfund/superfund-national-priorities-list-npl> [<https://perma.cc/KJV8-TGUD>] (last visited Oct. 23, 2019).

43. The EPA employed a “Hazard Ranking System” to score a site based on actual or potential release of hazardous substances, with scores ranging from 0-100. A score of 28.5 would land the site on the NPL. See *Superfund Site Assessment Process*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/superfund/superfund-site-assessment-process> [<https://perma.cc/4V3T-R54F>] (last visited Oct. 23, 2019).

44. Craig Stanovich, *The CGL Pollution Exclusion*, INT’L RISK MGMT. INSTL., <https://www.irmi.com/articles/expert-commentary/the-cgl-pollution-exclusion> [<https://perma.cc/3W8R-8BFY>] (last visited Nov. 1, 2019).

45. *Id.*

46. *Id.*

47. See *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 126 (La. 2000) (citing Lee R. Russ, *Couch on Insurance* § 127:3 (3d ed. 2003)) (“As this legislation was enforced, considerable litigation ensued over the possible existence of coverage under the standard CGL policy, and, more particularly, over the meaning of the ‘sudden and accidental’ exception to the general pollution exclusion then en vogue.”). (“So long as the ultimate loss was neither expected nor intended, courts generally extended coverage to all pollution-related damage, even if it arose from the intentional discharge of pollutants.”) See *New Castle Cty. v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1196–97 (3d Cir. 1991).

48. A Pollution Exclusion clause was held inapplicable for damages caused by an oil spill. The spill was the result of intentional acts of vandals to a tanker owned by Lansco, Inc., resulting in damage to New Jersey’s Hackensack River and surrounding bodies of water. The New Jersey Department of Environmental Protection required Lansco to remediate the damage caused by the environmental contamination. Lansco sought by declaratory judgment an order to compel their general liability carrier to defend any and all claims made by the State and indemnify Lansco for the cost of remediation. The court found a duty to defend

hook for these monumental cleanup costs, the exact kind they hoped to side-step with the creation of the Sudden and Accidental Pollution Exclusion.<sup>49</sup> The result of this unexpected and overwhelming burden on the insurance industry resulted in a liability insurance crisis in the mid-1980s.<sup>50</sup> In an attempt to recover from this crisis, the ISO established the Absolute Pollution Exclusion in 1986.<sup>51</sup>

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and indemnify, holding that the spillage was sudden and accidental notwithstanding that it was caused by the intentional acts of third parties. It noted that the common meaning of “sudden” is “happening without previous notice or on very brief notice; unforeseen; unexpected; unprepared for. *Webster’s New International Dictionary*, (2 ed. unab. 1954); *Black’s Law Dictionary*, (4 ed. 1968),” and stated that “whether the occurrence is accidental must be viewed from the *standpoint of the insured*, and since the oil spill was neither expected nor intended by Lansco, it follows that the spill was sudden and accidental under the exclusion clause even if caused by the deliberate act of a third party.” *Jackson Twp. Mun. Utils. Auth. v. Hartford Acc. & Indem. Co.*, 451 A.2d 990, 992–93 (N.J. Super. L. Div. 1982) (citing *Lansco, Inc. v. Env’tl. Protec.*, 350 A.2d 520 (N.J. Super. Ch. Div. 1975), *aff’d* 368 A.2d 363 (N.J. Super. App. Div. 1976)).

49. See Abraham, *supra* note 14 at 94, 95 (citing Milton Russell et al., *Hazardous Waste Remediation: The Task Ahead*, at A3.6-7 (1991)); A.M. BEST CO., BEST’S AGGREGATES AND AVERAGES: PROPERTY CASUALTY 2 (1991) (“... within a decade estimates of the total cost of Superfund (as well as cleanup under analogous state liability regimes) exceeded \$500 billion. At that time, the total surplus (in effect, net worth) of the American property/casualty insurance industry was roughly twenty-five percent of this figure.”).

50. One article explains that incident in the following way:

From late 1984 to mid-1986, the liability insurance industry was characterized by dramatic changes in the pricing and availability of insurance coverage. Premiums in commercial casualty lines of insurance rose by hundreds of percent for some policies. Limits on coverage in many policies were reduced to a fraction of potential losses and insurers stopped covering some types of risks and entire lines altogether.

Ralph A. Winter, *The Liability Crisis and the Dynamics of Competitive Insurance Markets*, 5 YALE J. REG. 455 (1988).

51. Stempel, *supra* note 28, at 2. See also *MacKinnon v. Trucks Ins. Exch.*, 73 P.3d 1205, 1211 (Cal. 2003) (“Commentators have pointed as well to the passage of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA; 42 U.S.C. § 9601 et seq.) in 1980 and the attendant expansion of liability for remediating hazardous wastes (see *AIU Ins. Co. v. Superior Court* (1990) 51 Cal. 3d 807, 815-816 [274 Cal. Rptr. 820, 799 P.2d 1253 (*AIU Ins. Co.*)] as motivation for amending the exclusion.”).

*b. The Modern Pollution Exclusion*

In 1986, the Insurance Services Office introduced the Absolute Pollution Exclusion to the standard CGL policy form. This revision removed the exclusion's "sudden and accidental" language in an attempt to avoid judicial interpretation that coverage was required for environmental contamination caused by gradual, but unintentional, pollution.<sup>52</sup> Since its inception, the terms of the revised Pollution Exclusion have remained intact.<sup>53</sup> This revision was an attempt by insurers to avoid liability for pollution events and the uncertainty associated with the term "pollution" and ambiguous phrasing. However, this issue continued to be the subject of litigation between insurers and the insureds.<sup>54</sup> Hereinafter, the Absolute Pollution Exclusion will be referred to as the "pollution exclusion."

*B. Insurance Policy Interpretation*

*"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color according to the circumstances and the time in which it is used"* – Oliver Wendell Holmes

Professor Allan Farnsworth, one of the leading authorities on contract law, discussed the court's role in interpretation of the policy, stating, "[t]he concern of a court is not with the truth of this language but with the expectations that it aroused in the parties."<sup>55</sup> Before a court analyzes the specific language of an insurance policy, the court typically determines whether the terms of the policy are ambiguous.<sup>56</sup> Many courts do not conduct further analysis beyond the plain text of the insurance policy if these terms are found to be unambiguous.<sup>57</sup> This is a conclusion finding

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52. Stempel, *supra* note 28, at 1–2.

53. Mark Bell, *The Elusive "Pollution" Definition in the CGL Policy*, INT'L RISK MGMT. INSTI., <https://www.irmi.com/articles/expert-commentary/pollution-definition-in-the-cgl-policy> [<https://perma.cc/CA47-WWY5>] (last visited Nov. 1, 2019).

54. Christopher Meeks, Note, *The Pollution Delusion: A Proposal for a Uniform Interpretation of Pollution in General Liability Absolute Pollution Exclusions*, 77 GEO. WASH. L. REV. 824, 830 (2009).

55. E. ALAN FARNSWORTH, FARNSWORTH ON CONTRACTS, § 7.10 at 511 (2d ed. 1990).

56. RICHARD A. LORD, WILLISTON ON CONTRACTS, §30:4 (4th ed. 1999).

57. ("It is a generally accepted proposition that where the terms of a writing are plain and unambiguous, there is no room for interpretation or construction, since the only purpose of judicial construction is to remove doubt and uncertainty.") *Id.*

that “the language of the exclusion is unambiguous, that it plainly applies to the kind of factual scenario presented here, and that no consideration of the history of the clause or of other contextual or explanatory materials is required or appropriate.”<sup>58</sup>

Although different tests are used to determine ambiguity in an insurance policy, the same basic principle is consistent among the states: if the terms of the policy are clear and unambiguous, they must be given their plain and ordinary meaning. Conversely, if the terms of the policy are susceptible to more than one meaning, they are considered ambiguous and will be construed against the insurer who drafted the policy.<sup>59</sup> The overwhelming divide between courts over the exact meaning of the terms used in a pollution exclusion is evidence that these terms can be given a plethora of meanings.

Courts adopting a broad interpretation of the exclusion, often excluding coverage for injuries caused outside of the realm of traditional environmental pollution, find the terms of the contract to be unambiguous and, thus, do not consider other factors such as intent, insured expectations, and the history of the exclusion.<sup>60</sup> In contrast, the courts who find the terms of the exclusion clause to be ambiguous then extend the investigation beyond the four corners of the policy.<sup>61</sup> Thus, this discussion requires an analysis of how doctrinal principles are applied and considered by courts when giving meaning to the policy after finding the exclusion ambiguous.

### *1. Doctrine of Reasonable Expectation*

The doctrine of reasonable expectation is a well-established rule of insurance policy construction pointing to interpretation in favor of

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58. *Richardson v. Nationwide Mut. Ins. Co.*, 826 A.2d 310 (2003).

59. (“To be unambiguous, a contract must be reasonably capable of only one construction; in other words, a contract is unambiguous if it can be given a definite or certain meaning as a matter of law.”) *Outboard Marine Corp. v. Liberty Mut Ins. Co.*, 154 Ill. 2d 90, 107–08, 180 Ill Dec. 691, 607 N.E.2d 2014 (1992). (“A contract is ambiguous if a genuine doubt appears as to its meaning, that is if, after applying established rules of interpretation, the written instrument remains reasonably susceptible to at least two reasonable but conflicting meanings . . . .”) LORD, *supra* note 56. (“The terms of an insurance policy are ambiguous only if the policy’s provisions are reasonably susceptible to two or more constructions or there is reasonable doubt or confusion as to their meaning”) *Porterfield v. Audubon Indem. Co.*, 856 So. 2d 789, 799 (Ala. 2002).

60. *Deni Assocs. of Fla. v. State Farm Fire & Cas. Ins. Co.* 711 So. 2d 1135, 1139 (Fla. 1998).

61. *Stempel, supra* note 28, at 1.

coverage.<sup>62</sup> This doctrine holds that a policy should be interpreted in accordance with a policyholder's reasonable expectations of coverage.<sup>63</sup> As propounded by Judge Keeton, this modern doctrine of reasonable expectations is based upon a two-pronged rationale:

- (1) that an insurer should be denied any unconscionable advantage in an insurance contract; and,
- (2) that the reasonable expectations of the insurance applicants and intended beneficiaries regarding the terms of insurance contracts should be honored, even though a painstaking study of the policy provisions contractually would negate those expectations.<sup>64</sup>

Furthermore, Judge Keeton assessed that "expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."<sup>65</sup> While some courts consider this doctrine to govern policy interpretation, others will take the policyholders expectations into consideration when analyzing the application as a whole.<sup>66</sup> Courts use this doctrine to ultimately limit the scope of these complicated clauses.<sup>67</sup>

Policyholders often expect insurance coverage when liability arises from an injury related to materials potentially covered by a CGL policy.<sup>68</sup> However, insurers attempt to apply broad definitions to the terms of the pollution exclusion to deny coverage for those claims.<sup>69</sup> There is a disconnect between insurers and policyholders regarding this expectation, pertaining to the pollution exclusion.<sup>70</sup> This detached understanding of

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62. Hamel, *supra* note 29, at 1106.

63. *Id.* at 1107.

64. Peter Swisher, *A Realistic Consensus Approach to the Insurance Law Doctrine of Reasonable Expectations*, 35 TORTS & INS. L.J. 729, 733 (2000).

65. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provision*, 83 HARV. L. REV. 961, 967 (1970).

66. ("The scope of [the] Pollution Exclusion is governed by the expectation of a reasonable policyholder."). *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1044 (7th Cir. 1992) (citing *Canadian Radium & Uranium Corp. v. Indem. Ins. Co.*, 104 N.E.2d 250, 255 (Ill. 1952)).

67. Gail S. M. Evans & Ursula Spilger, *Just What is Pollution? The Evolution of the Pollution Exclusion on Liability Insurance Coverage for Losses*, S. L.J. 179, 186 (2009).

68. Meeks, *supra* note 54, at 825.

69. *Id.*

70. *Id.*

policy coverage by insureds potentially leads to costly litigation and because of competing interpretations of the Pollution Exclusion by courts nationwide can result in forum shopping.

## 2. *Intent of the Drafter*

It is clear the pollution exclusion was born from an environmental movement and has experienced a dramatic and controversial evolution.<sup>71</sup> The pollution exclusion clause was formulated as a response to the insurance industry's overwhelming liability resulting from environmental disasters.<sup>72</sup>

In *American States Insurance Co. v. Koloms*, the Supreme Court of Illinois considered the original intent, stating:

[T]he 1986 amendment to the exclusion was wrought, not to broaden the provision's scope beyond its original purpose of excluding coverage for environmental pollution, but rather to remove the "sudden and accidental" exception to coverage which, as noted above, resulted in a costly onslaught of litigation. We would be remiss, therefore, if we were to simply look to the bare words of the exclusion, ignore its *raison d'etre*, and apply it to situations which do not remotely resemble traditional environmental contamination. The Pollution Exclusion has been, and should continue to be, the appropriate means of avoiding "the yawning extent of potential liability arising from the gradual or repeated discharge of hazardous substances *into the environment*." Further, "[w]e think it improper to extend the exclusion beyond that arena."<sup>73</sup>

## 3. *Public Policy*

The doctrine of public policy incorporates the aspects of justice with the goals, purposes, and reasons for laws. This doctrine understands a limitation on the actions to enforce a right or protect an interest that is not in the interest of the public overall.<sup>74</sup> These doctrines mentioned above are not comprehensive, and the list is certainly not exhaustive. To the extent that an inquiry into those mentioned doctrines does not yield a definitive answer, a court may then look to public policy issues to compel a certain

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71. See discussion *supra* Part I.

72. *Id.*

73. *Koloms*, 687 N.E.2d at 81.

74. *Public Policy*, BOUVIER LAW DICTIONARY (Desk. Ed. 2012).

construction. Thus, public policy is a secondary principle, consulted when stronger arguments fail. A public policy argument would ensure the protection of American insurance consumers from misleading representations put forth by the insurance industry, in the form of the pollution exclusion clause.<sup>75</sup> Insurers must express the change in effect of a Commercial General Liability policy with candor when new policy language is implemented.<sup>76</sup> As a matter of fair representation, an insurance carrier cannot claim the coverage of this policy is far-reaching and protective, while simultaneously attempting to remove a range of coverage with one exclusion. To encourage honesty and fairness within the industry, insurers should not be permitted to hide behind the pollution exclusion to avoid providing customers with the very thing they were promised: insurance.

#### 4. *Absurdity of Result*

Finally, an additional factor that courts have chosen to consider when limiting the scope of the pollution exclusion is the absurdity of the result produced by their decision.<sup>77</sup> Using the absurdity of result consideration can provide a court with the means of avoiding the worst pitfalls of the textual-literal approach.<sup>78</sup> However, the application of this concept is questionable.<sup>79</sup> Professor Jeffrey Stempel, who has written extensively on insurance coverage litigation and the pollution exclusion, articulated a “working yardstick” for applying the absurd result test.<sup>80</sup> The following states the test:

An absurd result ensues when an insurance policy exclusion, if read literally, or construed broadly, would preclude coverage in situations where the claims arise for relatively common mishaps. In the course of the insured’s normal operations and where the nature of the underlying claim does not fundamentally fit the purpose for which the exclusion was incorporated into the policy.

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75. Hamel, *supra* note 29, at 1122.

76. *Id.* at 1087.

77. *Travelers Indem. Co. v. Milgen Dev., Inc.*, 297 So. 2d 845, 847 (Fla. Dist. Ct. App. 1974). (“Like other contracts, contracts of insurance should receive a construction that is practical and reasonable as well as just. If one interpretation, viewed with the other provisions of the contract and its general object and scope, would lead to an absurd conclusion, that interpretation must be abandoned . . .”).

78. Jeffrey W. Stempel, *Unreason in Action: A Case Study of the Wrong Approach to Construing the Liability Insurance Pollution Exclusion*, 50 FLA. L. REV. 463, 522 (1998).

79. *Id.*

80. *Id.*



Literal or broad construction of a policy provision, either to create or deny coverage creates an absurd result where the resulting decision is negated by the objectively reasonable expectations of either insurer or insured, or where finding coverage is inconsistent with the purpose of the insurance agreement, the function of insurance, or public policy.<sup>81</sup>

## II. ISSUE: WHEN THE REFS PICK A FAVORITE

The pollution exclusion included in most Commercial General Liability policies excludes coverage for bodily injury or property damage caused by “pollution,” a term which is defined as an irritant or contaminant, whether in solid, liquid, or gaseous form, including—when they can be regarded as an irritant or contaminant—smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste.<sup>82</sup> There is currently a wide disparity among courts nationwide in the interpretation of this clause.<sup>83</sup> A universal application of the exclusion is a seemingly intangible goal, drifting further and further away from policyholders. The lack of consensus among the courts has created abounding confusion, primarily in defining the terms “pollution” and “pollutant.”<sup>84</sup> In referencing the application of this exclusion, the Supreme Court of Alabama in *Porterfield v. Audubon Indemnity Co.* stated: “[o]ur review and analysis of the entire body of existing precedent reveals that there exists not just a split of authority, but an absolute fragmentation of authority.”<sup>85</sup> As previously noted, judicial stances on the application of this clause tend to belong to one of two categories,<sup>86</sup> namely: a “literal” approach and a “situational” approach.<sup>87</sup> This Part will discuss these two competing approaches and the outcomes of each.

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81. *Id.* at 523.

82. *Pollution Exclusion*, INT’L RISK MGMT. INSTL., <https://www.irmi.com/term/insurance-definitions/pollution-exclusion> [<https://perma.cc/G5LU-8MHN>] (last visited Oct. 28, 2019).

83. *See* *Porterfield v. Audubon Indem. Co.*, 856 So. 2d 800 (Ala. 2002).

84. Bell, *supra* note 53.

85. *Porterfield*, 856 So. 2d at 800.

86. *See* *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1208–09 (2003) (explaining the division of authority).

87. *Apana v. TIG Ins. Co.*, 574 F.3d 679, 682 (9th Cir. 2009).

### A. *The Narrow, "Situational" Approach*

The narrow approach is one that “maintains that the exclusion applies only to traditional environmental pollution into the air, water, and soil, but generally not to all injuries involving the negligent use or handling of toxic substances that occur in the normal course of business.”<sup>88</sup> Jurisdictions applying this approach to insurance policy interpretation look to factual context and typically uphold the exclusion only in cases of traditional environmental pollution.<sup>89</sup>

The result of interpretations consistent with this approach is most often the finding of insurance coverage because the damage was not the result of the “discharge of a pollutant.”<sup>90</sup> Therefore, this is arguably a pro-insured interpretation. The following cases are examples of those which have applied this narrow method.

#### 1. *MacKinnon v. Trucks Insurance Exchange*

In *MacKinnon v. Trucks Insurance Exchange*, Trucks Insurance Exchange issued a CGL policy to insured John R. MacKinnon for a policy period of April 1996 to April 1997, covering an apartment building that MacKinnon owned and operated.<sup>91</sup> Following a tenant’s request for the extermination of yellow jackets, MacKinnon hired Antimite Associates, Inc., an exterminator, to treat the apartment building on several occasions

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88. *MacKinnon*, 73 P.3d at 1205, 1208–09.

89. *State Auto. Mut. Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845 (Ind. 2012).

90. *MacKinnon*, 73 P.3d at 1208.

91. Concerning the policy, the following was stated in that case:

That policy “obligated the insurer to pay all sums for which [the insured] become[s] legally obligated to pay as damages caused by bodily injury, property damage or personal injury.” The insurer must “pay for damages up to the Limit of Liability when caused by an occurrence arising out of the business operations conducted at the insured location.” Under “Exclusions” the policy states: “We do not cover Bodily Injury or Property Damage (2) Resulting from the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants: (a) at or from the insured location.” The terms “Pollution or Pollutants” are defined, in the definitions section at the beginning of the policy, as “mean[ing] any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste materials. Waste materials include materials which are intended to be or have been recycled, reconditioned or reclaimed.”).

*Id.* at 1207.

between 1995 and 1996.<sup>92</sup> Jennifer Denzin, a tenant in MacKinnon's building, died in the building in May of 1996 and her parents promptly filed a wrongful death suit against MacKinnon and Antimite.<sup>93</sup> Denzin's parents alleged that on or about May 13, 1996, defendants negligently failed to inform Denzin that her apartment was to be sprayed with "dangerous chemicals," and failed to evacuate her, as a result of which she died from pesticide exposure.<sup>94</sup> Trucks Insurance continued to represent MacKinnon under a reservation of rights<sup>95</sup> while investigating the matter to determine if coverage existed under the CGL.<sup>96</sup> In June 1998, Trucks Insurance concluded its investigation and informed MacKinnon that coverage was precluded under the pollution exclusion clause in his CGL policy.<sup>97</sup> MacKinnon subsequently brought a coverage action against Trucks Insurance, claiming he was owed a duty to defend and indemnify in the Denzin action.<sup>98</sup> This action reached the California Supreme Court in 2003. The court noted the extensive litigation surrounding the exclusion.<sup>99</sup> In an attempt to clear the confusion, the court determined that the pollution exclusion was ambiguous and offered a uniform analysis and interpretation of the clause, rejecting Trucks Insurance's argument for a broad, sweeping interpretation and coverage preclusion claim.<sup>100</sup> In this decision, the court considered the absurdity of the results, the principles of contract interpretation, and the familiar connotations of the words used in the exclusion.<sup>101</sup> Thus, the California Supreme Court adopted a narrow interpretation and outlined the necessary considerations for insurance coverage interpretation, with respect to the exclusionary clause, establishing a precedent for the State.<sup>102</sup>

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92. *Id.*

93. *Id.*

94. *Id.*

95. The following is a definition of Reservation of Rights:

An insurer's notification to an insured that coverage for a claim may not apply. Such notification allows an insurer to investigate (or even defend) a claim to determine whether coverage applies (in whole or in part) without waiving its right to later deny coverage based on information revealed by the investigation . . . .

INT'L RISK MGMT. INSTL., <https://www.irmi.com/term/insurance-definitions/reservation-of-rights> [<https://perma.cc/Q8Q6-P4TX>] (last visited Jan. 3, 2020).

96. *MacKinnon*, 73 P.3d at 1207.

97. *Id.* at 1208.

98. *Id.*

99. *Id.*

100. *Id.* at 1216.

101. *Id.*

102. *Id.* at 1212.

2. *Stoney Run Co. v. Prudential-LMI Commercial Insurance Co.*

The Stoney Run Company was a New York partnership that owned the Stoney Run Apartment Complex.<sup>103</sup> The real estate agent for the complex is a Virginia corporation, known as the Larrymore Organization.<sup>104</sup> Prudential LMI Commercial Insurance Company issued two CGL policies to Stoney Run Co and the Larrymore Organization (collectively, “Plaintiffs”) in connection with the Stoney Run Apartments.<sup>105</sup> During the policy period, several tenants at the complex were killed or injured allegedly due to the inhalation of carbon monoxide, which was emitted directly into their apartments due to faulty heating and ventilation systems.<sup>106</sup> Subsequent actions were filed by victims or their legal representatives against the owners of the apartment complex.<sup>107</sup> Stoney Run turned to Prudential to handle liability under the protection of their CGL policy.<sup>108</sup> Prudential denied coverage, claiming the harm was caused by the discharge of pollution, and thus excluded under the policy.<sup>109</sup> The plaintiffs brought an action in the United States District Court for the Northern District of New York against Prudential LMI for an alleged obligation, pursuant to the CGL policy, “to defend and/or indemnify” the plaintiffs with respect to the civil actions brought against them.<sup>110</sup> The district court applied a broad interpretation, holding that carbon monoxide poisoning clearly fell within the scope of the pollution exclusion clause.<sup>111</sup>

The Second Circuit Court of Appeals reviewed this action *de novo*.<sup>112</sup> Applying New York law, the court held that the pollution exclusion was ambiguous as applied to the facts of this case, reversing the decision of the district court.<sup>113</sup> The court relied on the exact wording of the exclusion in the policy, focusing on terms such as “dispersal” and “discharge,” which they reasoned are most commonly used within the context of environmental law, “in reference to injuries caused by disposal or

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

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 36.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 39.

containment of hazardous waste.”<sup>114</sup> In referencing the scope of the clause as applied to the facts of this case the court held:

[T]he reasonable interpretation of the Pollution Exclusion clause is that it applies only to environmental pollution, and not to all contact with substances that can be classified as pollutants. We hold that the release of carbon monoxide into an apartment is not the type of environmental pollution contemplated by the Pollution Exclusion clause.<sup>115</sup>

This court’s interpretation falls into the situational category for applying a narrow interpretation, focusing on the traditional notions of environmental pollution and the definition of “pollutant.”

### *B. The Broad, “Literal” Approach*

The second category of judicial interpretation consists of “[holding] the exclusion to be an unambiguous contract provision, applying a broad reading and allowing preclusion of coverage for all claims even relatively involving a toxic substance.”<sup>116</sup> This interpretation does not consider whether the alleged injury is the result of conventional types of pollution to soil, land, air, or water, or whether it is the result of negligence in the course of business that involved exposure or interactions with harmful substances.<sup>117</sup> In contrast to their judicial counterparts, these courts apply a broad interpretation and find that coverage for the insured is precluded because the alleged harm was the result of the discharge of pollution.<sup>118</sup> Where a substance is acting in any manner as an “irritant or contaminant,” damage caused thereby is excluded from coverage.<sup>119</sup> Thus, this “camp” is pro-insurer. The following cases are examples of those which have applied this broad method.

#### *1. Hog’s Breath Saloon & Restaurant: Quantity Matters*

As their standard business practice, Hog’s Breath Saloon & Restaurant (Hog’s Breath) employees regularly emptied large amounts of cooking grease into the sewer drain outside of the restaurant.<sup>120</sup> Over time, this

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114. *Id.* at 38.

115. *Id.*

116. *See MacKinnon v. Trucks Ins. Exch.*, 73 P.3d 1205, 1209 (Cal. 2003).

117. Little & Beaumont, *supra* note 4.

118. *MacKinnon*, 73 P.3d at 1209.

119. *State Auto. Mut. Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845, 850 (Ind. 2012).

120. *Roinestad v. Kirkpatrick*, 300 P.3d 571, 573 (Colo. App. 2010).

grease congealed in the city's sewer system, creating a five-to-eight-foot clog in the line.<sup>121</sup> Sewer clogs create stagnant water, which in turn, can produce hydrogen sulfide as a poisonous gas.<sup>122</sup> When two city employees discovered this clog, they inserted a water jet tool in an attempt to remove the blockage; the first employee was overcome by the gas, lost consciousness, and tumbled into the manhole.<sup>123</sup> The second employee was then overcome as well, as he tried to rescue his co-worker from the viscous obstruction.<sup>124</sup> Once the clog was traced back to the practice of Hog's Breath, the two workers sued the restaurant in Colorado district court for their injuries, citing a city ordinance which prohibited the discharge of garbage or waste into the sewer line in amounts which will cause an obstruction.<sup>125</sup> Naturally, Hog's Breath turned the claim in to their insurance carrier, for coverage under their Commercial General Liability policy.<sup>126</sup>

Mountain States Mutual Casualty Company (Mountain States) issued a CGL policy to Tim Kirkpatrick d/b/a Hog's Breath Saloon & Restaurant.<sup>127</sup> Upon receipt of this claim, Mountain States originally defended the suit under a reservation of rights, while they continued to investigate the claim and determine if coverage was applicable under the CGL. Mountain States ultimately obtained a judgment declaring it had no duty to provide coverage to Hog's Breath,<sup>128</sup> citing the coverage was excluded under the pollution exclusion of the policy.<sup>129</sup> The federal court in this case was to determine whether cooking oil and grease qualified as "contaminants" within the meaning of the policy. Turning to the dictionary definition of "contaminants," the court reasoned that as substances that

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121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Mountain States Mut. Cas. Co. v. Roinestad, 296 P.3d 1020, 1024 (Colo. 2013).

126. Mountain States Mut. Cas. Co. v. Kirkpatrick, No. 06-cv-00221, 2007 U.S. Dist. LEXIS 67420, at \*1 (D. Colo. Aug. 30, 2007).

127. *Id.*

128. *Id.* at \*13.

129. The CGL issued to Hog's Breath stated:

This insurance does not apply to . . . "Bodily injury" . . . arising out of the . . . discharge, dispersal, seepage, migration, release or escape 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.

*Id.* (emphasis added).

soil and stain and otherwise made the sewer unfit for use, the cooking oil and grease were contaminants and the insurer was not obligated to provide coverage.<sup>130</sup>

The employees were eventually granted summary judgment in the suit against Hog's Breath and served a writ of garnishment on its insurer. Because the employees were not parties to the declaratory judgment action, the decision was not binding on them. The Colorado district court agreed with Mountain States that coverage was barred under the pollution exclusion clause, but an appellate court reversed and remanded the case for garnishment, finding that the exclusion was ambiguous insofar as its application to the grease used to cook food in.<sup>131</sup>

The Colorado Supreme Court set a new precedent in rendering a decision on the facts of this case.<sup>132</sup> The court found that the ordinary definition of "contaminant" probably covers "cooking grease . . . when discharged into a sewer in quantities sufficient to create a clog."<sup>133</sup> However, it was the extent of the clog that won the day, with the court stating:

While a resident of La Junta who dumps an occasional pan of greasy water into a sewer may not contaminate and therefore not pollute the sewer, a restaurant that repeatedly dumps large amounts of cooking grease or greasy water into a sewer over time, thereby creating a five- to eight-foot clog, is dumping contaminants . . . .<sup>134</sup>

The respondents in this matter, the two city employees, argued that the conclusion barring coverage would be in contradiction with the reasonable expectations doctrine, under which a court may override even unambiguous policy language, if that language would cause an ordinary, objectively reasonable person to believe she was entitled to coverage.<sup>135</sup> In connection with that argument, the respondents explained the historic connection between pollution exclusions and the growth of federal environmental law. The court rejected this argument, stating they could not rightfully conclude that, "an ordinary reasonable person would have

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130. *Kirkpatrick*, 2007 U.S. Dist. LEXIS 67420, at \*13.

131. *Roinestad v. Kirkpatrick*, 300 P.3d 571 (Colo. App. 2010), *as modified on denial of reh'g* (Nov. 18, 2010), *rev'd sub nom.* *Mountain States Mut. Cas. Co. v. Roinestad*, 296 P.3d 1020 (Colo. 2013).

132. *Mountain States Mut. Cas. Co. v. Roinestad*, 296 P.3d 1020 (Colo. 2013).

133. *Id.* at 1024.

134. *Id.*

135. *Id.*

been “deceived” into thinking that there would be coverage for the dumping of cooking grease in such a great volume as to clog the sewer, as respondents have produced no facts in this case to suggest such deception.”<sup>136</sup>

The Colorado Supreme Court clearly opted to apply a broad interpretation of the pollution exclusion by focusing on the dictionary definitions of the individual substances at issue and the quantities involved in the discharge.

## 2. Maxine Furs, Inc. v. Auto-Owners Insurance Co.

In another seemingly unusual application of the pollution exclusion, the Eleventh Circuit Court of Appeals for the United States applied Alabama law and determined that the pollution exclusion barred coverage where a business owner’s fur coats and shop products were soiled by the smell of curry.<sup>137</sup> Maxine’s Furs (Maxine’s) is a fur shop which happened to be next door to an Indian Restaurant.<sup>138</sup> Because the two businesses had communal air ducts, the furs and shop products at Maxine’s were exposed to the smell of curry.<sup>139</sup> Maxine’s had the affected furs and shop products cleaned, and then made a claim with its property policy insurance carrier, Auto-Owners Insurance Company (Auto-Owners).<sup>140</sup> Auto-Owners denied coverage based on the pollution exclusion clause in Maxine’s policy.<sup>141</sup> Maxine’s subsequently sued its insurer for breach of contract, and the district court concluded that coverage was indeed barred and granted summary judgment in favor of Auto-Owners.<sup>142</sup> On appeal, the Eleventh Circuit held that curry aroma is in fact a pollutant under the exclusion, and the insurer is not liable to pay for the damages under the property policy.<sup>143</sup> In considering the applicability of curry aroma as a “pollutant,” the court stated:

[A] contaminant is something that “soil[s], stain[s], corrupt[s], or infect[s] by contact or association.” Indeed, what happened here

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136. *Id.* at 1025.

137. *Maxine Furs, Inc. v. Auto-Owners Ins. Co.*, 426 F. App’x 687 (11th Cir. 2011).

138. *Id.*

139. *Id.*

140. *Id.* Maxine’s Furs held a property policy with Auto-Owners Insurance Company. This policy provided first party coverage to the insured, as opposed to the CGL’s coverage for the insured’s liability.

141. *Id.*

142. *Id.*

143. *Id.* at 688.



is that the curry aroma soiled Maxine's furs. Otherwise, they would not have needed cleaning. We do not think that a reasonable person could conclude otherwise. Accordingly, we conclude that curry aroma is a pollutant under the policy.<sup>144</sup>

Maxine's further argued that coverage should not have been barred based on the fact that the damage was not caused by the means specified in the policy.<sup>145</sup> Maxine's contended, instead, that the damage was caused by the "wafting" of the aroma.<sup>146</sup> This dispersal, the court held, was no different "than the aroma migrating, seeping, or escaping into Maxine's and contaminating the furs."<sup>147</sup>

In this case, the court applied Alabama law on insurance policy interpretation, which requires that policy language is found to be ambiguous only when it is open to different but reasonable interpretation by a person of ordinary intelligence within the context of the policy.<sup>148</sup> If the policy is found to be ambiguous, the ambiguity is to be resolved in favor of the insured.<sup>149</sup>

The court, in finding this exclusion unambiguous in its application to the curry aroma, did not believe that, "a person of ordinary intelligence could reasonably conclude that curry aroma is not a contaminant under these circumstances."<sup>150</sup> Thus, the court applied a broad interpretation, barring coverage for damage caused by pollution outside of the traditional notions of the exclusion.

### III. PRACTICAL RULES FOR IMPRACTICAL PROBLEMS

#### *A. How Louisiana Plays the Game: Doerr Factors*

The Louisiana Supreme Court is one of very few courts that has offered factors to be considered when determining the applicability of a pollution exclusion to a Commercial General Liability policy. Additionally, the court has acknowledged cooperation of the Louisiana Department of Insurance will

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144. *Id.* (citation omitted).

145. *Id.* at 687 (stating, "Maxine's policy with Auto-Owners excludes from coverage any damage or loss caused by 'discharge, dispersal, seepage, migration, release or escape . . . .'").

146. *Id.* at 688.

147. *Id.*

148. *Id.* at 688 (citing *Certain Underwriters at Lloyd's, London v. Kirkland*, 69 So. 3d 98 (Ala. 2011) (quoting *Twin City Fire Ins. Co. v. Alfa Mut. Ins. Co.*, 817 So. 2d 687, 691-92 (Ala. 2001)).

149. *Maxine Furs, Inc.*, 426 F. App'x at 688.

150. *Id.*

be necessary to ensure the integrity of the regulatory process is not undermined.

The Louisiana Supreme Court opinion, in *Doerr v. Mobil Oil Corp.*, stated that the implications of this decision were far-reaching, not only for establishing a factor test to guide judicial interpretation, but also overruled the *Ducote v. Koch Pipeline Co.* decision from 1999.<sup>151</sup> *Ducote* itself was seen as a departure from a line of well-established jurisprudence on the issue.<sup>152</sup>

*Doerr* originated as a class action brought by residents of St. Bernard Parish for injuries caused as a result of contamination to the Parish water supply.<sup>153</sup> The plaintiffs alleged that the Mississippi River was contaminated by hazardous and nonhazardous substances as the result of emissions from the Mobil Oil Corporation wastewater facility.<sup>154</sup> The residents brought suit against the St. Bernard Parish government, among others, for injuries resulting from the use of the contaminated water.<sup>155</sup> The Parish held a CGL policy with Genesis Insurance Company (Genesis) that provided coverage for bodily injury and property damage caused by the Parish.<sup>156</sup> Naturally, this policy contained a pollution exclusion.<sup>157</sup> The plaintiffs added Genesis as a defendant to the suit based on the policy they held with the St. Bernard Parish government.<sup>158</sup> Litigation subsequently ensued to determine the existence and applicability of the Parish's CGL policy and the Pollution Exclusion contained therein.<sup>159</sup>

The Supreme Court of Louisiana immediately recognized that the resolution of the matter between Genesis Insurance Company and St. Bernard Parish hinged on the interpretation of the Commercial General Liability policy issued to the Parish government.<sup>160</sup> On discussion of the approaches to policy interpretation, the court addressed the applicable articles of the Louisiana Civil Code dealing with interpretation of a contract.<sup>161</sup> Additionally, the court addressed the burden of proof that falls on each party in litigation of this type, as well as the shifting of that burden.<sup>162</sup> The insured is responsible for proving that an incident falls

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151. 774 So. 2d 119, 126 (La. 2000).

152. *Id.* at 132.

153. *Id.* at 122.

154. *Id.* at 123.

155. *Id.*

156. *Id.* at 122.

157. *Id.*

158. *Id.* at 123.

159. *Id.*

160. *Id.*

161. *Id.* at 124–25.

162. *Id.* at 124.

within the terms of a policy when the coverage afforded is being questioned.<sup>163</sup> In contrast, the applicability of a Pollution Exclusion clause to coverage is a burden that lies on the insurer.<sup>164</sup> A primary consideration the court addressed was the absurd results allowed by the policy exclusion when interpreted without limitation.<sup>165</sup>

The court illustrated the absurdity allowed by broad interpretation providing two examples that result in the barring of coverage: bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano and bodily injury suffered by one who has an allergic reaction to chlorine in a public pool.<sup>166</sup> While Drano and chlorine can both be considered “irritants” or “contaminants” in certain circumstances, these events would not be ordinarily described as pollution.<sup>167</sup> The possibility of such absurd results from a broad reading of the exclusion lends to the fact that the wording is ambiguous. Under Louisiana law, ambiguity in an insurance policy ought to be construed in favor of the insured, to afford coverage.<sup>168</sup> Additionally, the court shall look to extrinsic evidence to determine the intent of the contracting parties in order to determine the true meaning and interpretation of the pollution exclusion.<sup>169</sup> The court later looked to the origins of the pollution exclusion, including the effects of CERCLA, as this Comment previously discussed in detail.<sup>170</sup> The end to this mean was to recognize and understand the original intent of the clause and its applicability.

Ultimately, the Louisiana Supreme Court asserted that the “proper interpretation” of a Pollution Exclusion clause must necessarily turn on several considerations:

- (1) whether the insured is a “polluter” within the meaning of the exclusion;
- (2) whether the injury-causing substance is a “pollutant” within the meaning of the exclusion; and
- (3) whether there was a “discharge, dispersal, seepage, migration, release, or escape” of a pollutant by the insured within the meaning of the policy.<sup>171</sup>

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163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 125.

169. *Id.*

170. See discussion *supra* Section I.A.1.

171. *Doerr*, 774 So. 2d at 135.

The Louisiana Supreme Court addressed each element and the factors that should be considered to arrive at a reasonable conclusion. Whether the insured is classified as a “polluter” is a determination that relies on a fact-based analysis that encompasses “a wide variety of factors.”<sup>172</sup> These factors include:

- (1) the nature of the insured’s business;
- (2) whether that type of business presents a risk of pollution;
- (3) whether the insured has a separate policy covering the disputed claim;
- (4) whether the insured should have known from a read of the exclusion that a separate policy covering pollution damages would be necessary for the insured’s business;
- (5) who the insurer typically insures; any other claims made under the policy; and,
- (6) any other factor the trier of fact deems relevant to the conclusion.<sup>173</sup>

To determine whether the injury-causing substance is a “pollutant,” the trier of fact should also consider a wide variety of factors.<sup>174</sup> The court noted that a variety of substances could fall within the broad definition of “irritants” and “contaminants” as provided in the policy.<sup>175</sup> The court continued to provide examples of substances found to be pollutants under similar policy exclusions, which includes an array of substances that are not typically considered pollutants.<sup>176</sup>

Therefore, according to the court, the trier of fact should consider the nature of the substance, its typical usage, the quantity of the discharge, whether the substance was being used for its intended purpose when the injury occurred, whether the substance would be considered a pollutant as it is generally understood, and any other factor the trier of fact deems relevant.<sup>177</sup>

The final fact-based conclusion is the determination of whether there was a “discharge, dispersal, seepage, migration, release or escape” of the

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172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 135.

177. *Id.*

substance causing the injury.<sup>178</sup> To make this determination, the trier of fact should “consider all relevant circumstances.”<sup>179</sup> These relevant circumstances should specifically include whether the pollutant was intentionally or negligently discharged, whether the actions of the alleged polluter were active or passive, and any other consideration the trier of fact deems relevant.<sup>180</sup>

In *Doerr*, the Louisiana Supreme Court considered the position, and its importance, of the Louisiana Commissioner of Insurance on the interpretation of the pollution exclusion.<sup>181</sup> Any insurance policy issued in the State of Louisiana must first be approved by the Commissioner of Insurance.<sup>182</sup> In the approval process, the Commissioner is required to deny approval for a policy which is ambiguous in nature, or contains a misleading clause or exception which might be deceptive as to the risk which is assumed in the general coverage of the policy.<sup>183</sup> The Commissioner approves a policy which is considered favoring the insured, but is prohibited from approving a policy which clearly favors the insurer.<sup>184</sup> The Louisiana Department of Insurance (Department) issued an advisory letter intended to guide insurers on the proper application of the Pollution Exclusion, after investigating and reviewing the matter for a 3-year period.<sup>185</sup> In this advisory letter, Commissioner James Brown addressed the inclusion of the pollution exclusion in the policies of insureds who “do not present a pollution risk obviating the need for the broad exclusionary language found in standard Pollution Exclusions.”<sup>186</sup> Brown went on to discuss the Department’s concern for the application of the exclusion, stating:

[O]ur review has disclosed a number of incidents where the standard Pollution Exclusions have been used to disavow coverage even though there was no underlying pollution incident which would justify use of the exclusion. We are also concerned

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178. *Id.* at 136.

179. *Id.*

180. *Id.* at 135.

181. *Id.* at 133.

182. *Id.* (referring to LA. REV. STAT. § 22:620(A)(1)) (“No insurance policy is permitted to be issued in this state without the prior approval of its provision by the Louisiana Commissioner of Insurance.”).

183. LA. REV. STAT. § 22:621(3) (2019).

184. LA. REV. STAT. § 22:623 (2019).

185. See James H. Brown, Louisiana Commissioner of Insurance, Advisory Letter 97-01 (June 4, 1997). *Doerr*, 477 So. 2d at 133.

186. See sources cited *supra* note 185.

that the broad definition given to the term “pollutant” creates an opportunity for abuse. This is a particular concern as regards commercial enterprises whose ongoing business activities do not present a risk to the environment.<sup>187</sup>

Further, the letter stated the appropriate application of the exclusion by insurers was an issue of grave concern for the Department, and that action would be taken as necessary to assure the integrity of the regulatory process and the proper application of the exclusion in line with its stated purpose.<sup>188</sup>

The Louisiana Supreme Court opted to face this dividing issue head-on. Furthermore, the court addressed the necessity for a black-and-white test to apply to each set of facts and created a wide array of considerations and factors which must guide the determination.<sup>189</sup> The court successfully analyzed the exclusion clause, applying a narrow interpretation and considering the importance of maintaining traditional notions of environmental pollutions.

#### IV. SOLUTION: ONE GAME, ONE RULEBOOK

The overwhelming amount of jurisprudence surrounding this topic suggests that a bright-line, uniform interpretation is desperately needed by policyholders, insurers, and the judicial system. Inconsistent construction and interpretation leave the insured unsure of their coverage and unable to tailor their business activities to their liability. The insurance industry is massive, extensively organized, and legislatively exempt from most antitrust laws. To prevent the industry from taking advantage of consumers and protect the interests of policyholders, the court system must recognize and employ the well-recognized contract principles. Therefore, to equip all parties involved in the insurer-insured relationship, the courts of the United States should adopt the three-factor test developed by the Louisiana Supreme Court in *Doerr v. Mobil Oil Corp.*<sup>190</sup> In furtherance of this uniformity, it is imperative that the insurance industry regulators strictly monitor the application of the pollution exclusion, to ensure its rightful and fair use.

Uniform application of the *Doerr* test is the appropriate solution for a multitude of reasons. Not only is a narrow interpretation (“first camp”) the most common-sense solution, but the *Doerr* factors provide a holistic framework of considerations for equitable and fair adjudication.

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187. *Id.*

188. *Id.*

189. *Doerr*, 774 So. 2d at 135.

190. See discussion *supra* Part III.

*A. Doerr Factors*

The factors that the Louisiana Supreme Court asserted are essential in the interpretation of a pollution exclusion when applying to the facts of a particular occurrence are ones which consider many contract interpretation doctrines and principles.<sup>191</sup> As discussed previously, the doctrine of reasonable expectation considers the expectations of the insured with regard to the coverage options they possess under their policy period.<sup>192</sup> By determining whether the insured is a “polluter” within the meaning of the clause, the court considers the expectations of the insured and whether they may classify themselves as a business possibly excluded from this type of coverage.<sup>193</sup> It is clear the court attempted to narrow the “expectation gap” between the insured and insurers based on the considerations that the court determined to be necessary.<sup>194</sup> By taking the nature of the insured’s business, the insured’s additional pollution coverage, and the business’s risk of pollution into account, the test applies the doctrine of reasonable expectation and ensures that consumers have a basic understanding of their coverage.<sup>195</sup>

The second factor of this three-part test encompasses the intent of the Pollution Exclusion clause, as originally drafted.<sup>196</sup> When applying the facts of an occurrence to the terms of the pollution exclusion, this test requires a fact-based inquiry into whether the injury-causing substance is a “pollutant” within the meaning of the exclusion.<sup>197</sup> When courts across the country deny coverage for the discharge of cooking grease, carbon monoxide, and condensation because they are pollutants, it is clear that this element is a vital consideration to maintain the original purpose of this exclusion.<sup>198</sup> The pollution exclusion addresses the monumental liability associated with serious contamination of actual pollutants into our environment.<sup>199</sup> This test is beneficial in application of this understanding, and considering the nature of the substance, its typical usage and whether it is one that would typically be considered a pollutant.<sup>200</sup> By narrowing the class of substance to those which are “pollutants” under these strict

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191. *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 139 (La. 2000).

192. *See* discussion *supra* Part II.

193. *Doerr*, 774 So. 2d at 138.

194. *Id.*

195. *Id.*

196. *See* discussion *supra* Part I.

197. *Doerr*, 774 So. 2d. at 140.

198. *Id.*

199. *Id.* at 141.

200. *Id.*

considerations, the *Doerr* test is maintaining the integrity and purpose of this exclusionary clause.

The third and final step is the fact-based determination of whether there was a “discharge, dispersal, seepage, migration, release or escape” is important for ensuring the pollutant was released in such a way that actually qualifies as “pollution.”<sup>201</sup> For example, this factor does not bar coverage for Drano which has spilled on the floor of a supermarket.<sup>202</sup> By considering the method of dispersion which led to the injury, this three-part test eliminates the absurd results reached by courts nationwide by ensuring each injury requiring coverage is the result of pollution and aligns with the meaning of the exclusion.

The *Doerr* test is in no way a perfect test for analyzing the meaning of a Pollution Exclusion clause. However, this framework offers an attempt to close the expectation gap and provide guidance to courts faced with a question of coverage under the Pollution Exclusion. While other courts across the country have attempted to confront this problem, the Louisiana Supreme Court offered the most comprehensive, narrow analysis.

### *B. Insurance Commissioners*

In order to fully implement a uniform interpretation throughout the court system, as well as the insurance industry, it is crucial that the industry regulators encourage and enforce a fair and equitable application of the Pollution Exclusion. The Louisiana Supreme Court in *Doerr* addressed the position of the Louisiana Commissioner of Insurance, evidenced through an advisory letter issued, and took this position into consideration when the decision was rendered.<sup>203</sup> Commissioners across the country should offer guidance to insurers issuing policies within their state on accepted application of the exclusion, as well as a claim to take action if it is found that insurers are applying this clause too broadly. The National Association of Insurance Commissioners should provide additional guidance to these insurance carriers to encourage a more consistent application of the exclusion clause between jurisdictions.<sup>204</sup> Ultimately, it

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201. *Id.* at 143.

202. *See* Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1043 (7th Cir. 1992).

203. *Doerr*, 774 So. 2d at 138.

204. The National Association of Insurance Commissioners is an organization made up of state insurance commissioners from across the country. This association is the U.S. standard-setting and regulatory support organization governed by the chief insurance regulators from the 50 states, the District of Columbia and five U.S. territories. Through the NAIC, state insurance regulators establish standards and



is important that the industry regulators demand uniformity and fairness for the sake of the consumer.

#### CONCLUSION

The insurance industry uses the Pollution Exclusion as a shield, protecting their massive assets at the detriment of unknowing policyholders. Unfortunately, the judicial system effectuates this abuse by denying coverage to the insureds who have no way of knowing their actions constitute pollution. State courts continue to exacerbate this problem, ultimately widening the expectation gap between insurers and insureds. To maintain the integrity of CERCLA and the progressive environmental movement, it is imperative that courts across the country refuse to allow the broad application of the Pollution Exclusion attempted by insurance carriers. This Comment addressed the considerations that must drive a court's analysis when determining the presence of coverage for an injury which an insurer is claiming was the result of pollution. In furtherance of fairness to the consumer, honesty among insurers, and the purpose of the Pollution Exclusion, a uniform interpretation employing the three-part test developed by the Louisiana Supreme Court in *Doerr v. Mobil Oil Corporation* is the most pragmatic solution.

*Ashley Randol\**

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best practices, conduct peer review, and coordinate their regulatory oversight. NAIC staff supports these efforts and represents the collective views of state regulators domestically and internationally. NAIC members, together with the central resources of the NAIC, form the national system of state-based insurance regulation in the U.S. *About the NAIC*, NAT'L ASS'N INS. COMMISSIONERS, [https://www.naic.org/index\\_about.htm](https://www.naic.org/index_about.htm) [<https://perma.cc/XGZ2-LG8Q>] (last visited Oct. 28, 2019).

\* J.D./D.C.L. 2020, Paul M. Hebert Law Center. The author wishes to acknowledge that completion of this Comment would not be possible without her father, Dale Randol, whose contributions both to her educational endeavors and subject of this Comment are invaluable. She further extends gratitude to her mother and Senior Editor, whose encouragement and patience allowed the passion for this Comment to flourish. Finally, the author wishes to thank her family and friends for their unwavering support and guidance.