BEWARE OF "ABSOLUTES": "ABSOLUTE" OR "TOTAL" POLLUTION EXCLUSIONS SHOULD NOT BAR INSURANCE COVERAGE OF PRODUCT CLAIMS AGAINST PESTICIDE MANUFACTURERS

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Introduction

Pesticide manufacturers regularly confront lawsuits by individuals or property owners alleging that exposure to pesticide products has caused bodily injury or property damage. The cost of defending these product liability and toxic tort claims can be enormous, to say nothing of the potential liability. Manufacturers, therefore, look to their insurance companies for coverage under policies of comprehensive general liability (CGL) insurance that they purchased to protect them from claims by third parties. They are often disappointed when insurance companies deny that they have any responsibility, claiming that so-called "absolute" or "total" pollution exclusions in CGL policies prohibit coverage.

But pesticide manufacturers facing product-related claims should not accept insurance company coverage refusals based on "absolute" or "total" pollution exclusions. This is because the use of pollution exclusions to abrogate coverage for product claims is contrary to both insurance industry intent, and the plain language and purpose of the exclusion. Many courts and at least one state insurance department have rejected the insurance industry's overbroad use of these exclusions to swallow up intended coverage.

When it first promulgated the "absolute" pollution exclusion in the mid-1980s, the insurance industry represented that the exclusion, though "overdrafted," barred coverage only for industrial pollution. Notwithstanding these representations to state insurance regulators, insurance companies have used "absolute" pollution exclusions, and similar related "total" pollution exclusions, to convince courts to reject coverage for product liability and other claims unrelated to industrial pollution.

Some courts have ruled that the insurance industry misrepresented the scope of an earlier exclusion – the "sudden and accidental" pollution exclusion – when it sought approval of that clause from state insurance regulators in the early 1970s. As shown most recently by the Rhode Island Supreme Court's decision in *Textron, Inc. v. Aetna Casualty & Surety Co.*, 754 A.2d 742, 2000 R.I. LEXIS 150 (R.I. 2000) (*Textron*), these

courts have prevented insurance companies from taking anti-coverage positions in litigation that contradict prior representations to state insurance regulators.

As with the "sudden and accidental" pollution exclusion, the insurance industry made representations to state insurance regulators in seeking to secure regulatory approval of the "absolute" pollution exclusion. Those representations confirm that the insurance industry, at the time the exclusion was approved, intended it to preclude coverage only for discharge or disposal of "pollutants" in limited circumstances. Insurance company efforts in litigation to expand the reach of the "absolute" pollution exclusion beyond these circumstances should be rejected in the same way that certain courts have dismissed the insurance industry's overbroad and disingenuous application of the "sudden and accidental" exclusion. Absolute or total pollution exclusions therefore should not bar coverage of product-related claims against pesticide manufacturers.

Insurance Industry Analysis and Representations Regarding the 1986 Exclusion

The absolute pollution exclusion was first promulgated in 1986. It purports to exclude coverage for the "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants." The exclusion defines "pollutants" to mean "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

Testimony of insurance industry representatives and publicly available documents created by the insurance industry at the time of approval show that the exclusion is neither "total" nor "absolute." Rather, it contains exceptions for liability arising out of "products," "completed operations" and "certain off-premises discharges of pollutants." Even the most recent version of the absolute pollution exclusion, promulgated by the insurance industry in 1998, confirms that the exclusion does not bar coverage for liability arising from alleged pollution caused by a policyholder's products.

A 1995 workbook written by an insurance industry organization, the Insurance Services Office, Inc. (ISO), confirms that the absolute pollution exclusion does not apply to preclude coverage for alleged pollution arising from use of the policyholder's products. It states:

> There is some coverage for off-site emissions, including the product/completed operations exposure.
>
> Illustrations
>
> The insured would be covered for bodily injury and property damage liability arising out of the following situations, whether the emission of a pollutant is sudden or gradual:
>
> > The insured's chemical products are sold to a manufacturer and escaped while being used in the manufacturer's operations.

> The insured installs a tank on someone else's premises (other than a waste disposal or treatment site) and the tank leaks, resulting in the release of pollutants.

Insurance Services Office, Inc. Workbook: Policy Forms and Endorsements (1985). ISO created this workbook as a manual for training insurance company claims handlers and other personnel in the correct application of the 1986 CGL standard form policy, including the 1986 exclusion.

Insurance companies have acknowledged – and relied upon – these well-recognized exceptions in testimony before courts and state insurance regulators. In 1985, for example, the New Jersey State Insurance Department held hearings to determine whether to approve what became the 1986 exclusion. In those hearings, the New Jersey insurance commissioners heard testimony from various members of the insurance industry regarding the absolute pollution exclusion. The regulators were concerned that the then-proposed exclusion sought to sweep too many potential non-environmental liabilities within its reach.

The insurance industry sought to allay those fears and, thus, secure the needed approval of this exclusion. Michael A. Averill, a manager of ISO's Commercial Casualty Division, stated that the insurance industry did not intend to use the revised pollution exclusion as a bar to coverage: "[The purpose of the change in policy language] is to introduce a complete on-site emission and partial off-site exclusion for some operations. <u>For some operations. It is not an absolute exclusion</u>." Transcript of Proceedings, *Hearing on the Proposed Exclusion of Sudden and Accidental Pollution Coverage from General Liability Policies*, New Jersey Dep't of Ins., at 15 (Dec. 18, 1995) (emphasis added).

Another speaker, Robert J. Sullivan, vice-president of Government Affairs for Crum & Forster in Morristown, New Jersey, testified that the exclusion would not eliminate coverage for liability for a policyholder's products and completed operations. Thus, the exclusion would not preclude coverage, for example, for the manufacturer of an underground storage tank:

> <u>[T]hese are not total, absolute pollution exclusions. It does have significant coverage for completed operations and product liability in certain off-site discharges</u>.
>
> While that may seem narrow, when you talk to a manufacturer of an underground storage tank, it provides, even with the exclusion, significant pollution coverages provided to that manufacturer for pollution liability coverages arising out of product liability claim for his underground storage tank. So, there is still a considerable amount, admittedly for certain classes of risk, of pollution liability coverage, even under the almost total pollution exclusion that the current forms provide.

Id. at 31 (emphasis added). Mr. Sullivan also acknowledged that an insurance company bears the burden of proving that it explicitly disclosed to its policyholder that a new exclusion had eliminated coverage:

> [T]o the extent the insured expected coverage and had every right to expect the coverage, . . . when the coverage issue is litigated, the insurer is going to have the burden of showing that there was some explanation to the insured that the coverage simply did not exist.

Id. at 74 (emphasis added).

Insurance industry representatives also affirmed these points to regulators at a 1985 hearing of the Texas State Board of Insurance. When Mr. Thornberry, a Texas regulator, termed the 1986 exclusion ambiguous, no industry representative present at the hearing denied it. Indeed, Liberty Mutual's representative, Wade Harrel, acknowledged in sworn testimony that the exclusion was ambiguous: " We have overdrafted the exclusion. We'll tell you, we'll tell anybody else, we overdrafted it." Transcript of Proceedings, *Hearing to Consider, Discuss, and Act on Commercial General Liability Forms Filed by the Insurance Services Office, Inc.*, Texas State Board of Insurance, No. 1472, Vol. III, at 8 (Oct. 31, 1985).

Regulator Thornberry was also concerned about the definition of "pollutants" in the proposed exclusion. He used a hypothetical of a bottle of Clorox chlorine bleach, a household cleaning product, falling off a shelf in a grocery store; in the hypothetical, a child slipped and fell, through negligent failure to clean up the spill of bleach, and was disfigured. The Texas regulator commented, "My reading of that exclusion is that's pollution excluded from the policy and there is no coverage. And that I guess is the correct reading." *Id.* at 7. Mr. Harrel disagreed, assuring the Texas regulators that no one would "read it that way":

> Mr. Harrel: That is a reading, yeah. It can be read that way, . . . I don't know anybody that's reading the policy that way, and I think you can read the new policy just the way you read it. But our insured would be at the state board – someone said yesterday – quicker than a New York minute if, in fact, every time a bottle of Clorox fell off a shelf at a grocery store and we denied the claim because it's a pollution loss.
>
> Mr. Thornberry: I have also heard the justification that if an insurance company denied the claim and you went to the courthouse, the courts wouldn't read the policy that way.
>
> Mr. Harrel: Nobody would read it that way.

Id. at 7-8 (emphasis added).

Notably, in 1985, prior to the 1986 exclusion's ultimate approval, the New Jersey deputy commissioner of Insurance, Jasper J. Jackson, summarily rejected an "absolute" pollution exclusion submitted to the Department of Insurance by Aetna. In doing so, New Jersey's deputy commissioner noted, "Your submission indicates no reduction of rates to reflect the proposed decrease in coverage." Letter from Deputy Commissioner Jasper Jackson to Robert C. Chilone, Superintendent of Insurance Department Affairs – Aetna Commercial Insurance Division, dated Nov. 20, 1985, at 2. When New Jersey finally approved the 1986 exclusion for use in the state, it was approved without a reduction of rates, based on insurance industry representations that the exclusion would not be applied as "overdrafted."

Louisiana Department Of Insurance Advisory Letter

Despite these representations made to help secure state insurance department approval of the absolute pollution exclusion, insurance companies have used it to disclaim coverage for products, completed operations and off-premises discharges of pollutants. Such disclaimers led the Louisiana Supreme Court to conclude in *South Central Bell Telephone Co. v. Ka-Jon Food Stores*, 644 So. 2d 357, *on reh'g, vacated, remanded*, 644 So. 2d 368 (La. 1994) (*Ka-Jon*), that the exclusion was ambiguous as a matter of law and so broad as to "eviscerate" the coverage promised under the commercial general liability insurance policy as a whole:

> The all inclusiveness of the words used in the exclusion are adverse to both the policy's nature and its primary purpose which is to insure [the policyholder] against fortuitous accidents and incidental business risks of running its [business]. The literal application of the exclusion's words leads to absurd consequences and is at odds with the policy's nature. CGL policies protect against the premises, operations, products, completed operations and independent contractor hazards of the insured. No reasonable insured would intend for a pollution exclusion to basically eviscerate this coverage. Since the language of the exclusion fails to clearly express the common intent of the parties, it is ambiguous as a matter of law.

Id. at 364 (emphasis added).

As the Illinois Supreme Court observed in another case, the events leading up to the insurance industry's adoption of the pollution exclusion are "'well documented and relatively uncontroverted.'" *American States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 494, 687 N.E.2d 72 (1997) (*Koloms*) (citation omitted).

Partly in reaction to *Ka-Jon*, the Louisiana Department of Insurance (LDOI) studied the exclusion and its application by insurance companies over a three-year period. At its hearings on the proper scope of the exclusion, an ISO representative reiterated the insurance industry's regulatory position that the 1986 "absolute" pollution exclusion does not apply to certain categories of liability:

> Some courts interpreted the sudden and accidental exception to the 1973 exclusion as ambiguous, and this caused some insurers to pay for gradual pollution losses. In order to create a more insurable coverage grant, ISO developed a completely new pollution exclusion which applied to all pollution claims other than products and completed operations and certain incidents under contract at the job site.
>
> In the new exclusion, the issue of "sudden and accidental" is removed. Later, the exclusion was revised to add an exception for heat smoke or fumes from a hostile fire. In the aftermath of the elimination of the sudden and accidental qualification, the new exclusion has been at times mislabeled as absolute. This is an unfortunate misnomer. Given the coverage exceptions I mentioned earlier, this is not an absolute pollution exclusion.

Transcript of Proceedings, *In the Matter of: The Revision of the Absolute Pollution Exclusion*, La. Dep't of Ins., Testimony of Robert Miller, ISO Regional Vice-President for the Southern Region, at 57 (Sept. 6, 1995).

The LDOI concluded that the various versions of the pollution exclusions, including the absolute pollution exclusion, properly apply only to environmental pollution. It criticized the insurance industry's inclusion of pollution exclusions in a wide variety of policy forms and its overuse of those exclusions in denying coverage.

The LDOI's Advisory Letter warned that insurance companies should rely on pollution exclusions to disclaim coverage only for claims made by "intentional active industrial polluters." State of Louisiana Advisory Letter No. 97-91 at 3-4 (June 4, 1997). The Louisiana Commissioner found that the insurance industry had been ignoring its regulatory promises to apply the exclusion in a principled manner, in cases involving industrial pollution. The LDOI's Advisory Letter stressed that the Department would take future action if it was needed to protect "the integrity of the regulatory process":

> The appropriate use of standard pollution exclusions in claims handling is an issue of grave concern. The [Louisiana Department of Insurance] will take such action as is necessary to assure that the integrity of the regulatory process is not undermined.

Id. at 2 (emphasis added).

With this backdrop, the Louisiana Supreme Court recently ruled that a total pollution exclusion cannot be read to bar coverage for all liabilities related to alleged exposure to "irritants" or "contaminants." *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 2000 La. LEXIS 3609 (Dec. 19, 2000). Holding that the total pollution exclusion eliminates coverage for environmental pollution only, the court relied upon the findings of the LDOI that insurance companies routinely rely on total and absolute pollution exclusions to preclude coverage in factual circumstances far outside the area of the exclusions'

intended reach.

Case Law Limiting the "Absolute" Pollution Exclusion to Its Intended Purpose

Courts have refused to apply the exclusion to preclude coverage for a policyholder's products and other non-environmental liability, particularly when an insurance company's position pays no heed to drafting intent or the insurance industry's representations to state insurance regulators. Some cases have rejected use of both the "sudden and accidental" and "absolute" pollution exclusions in the same products-liability coverage case.

Cases Limiting the Reach of "Absolute" or "Total" Pollution Exclusions

Many courts have limited the reach of "absolute" or "total" pollution exclusions to true environmental or "industrial" pollution. They have found that these exclusions were intended to preclude coverage for environmental pollution, not for "all contact with substances that can be classified as pollutants." *Stoney Run Co. v. Prudential-LMI Commercial Ins. Co.*, 47 F.3d 34, 38 (2d Cir. 1995). Moreover, some courts have stated that the words used in pollution exclusions – such as "discharge," "dispersal," "release" or "escape" – are terms of art in environmental law that generally are employed with reference to damage or injury caused by improper disposal or containment of hazardous waste. *See, e.g., Atlantic Mut. Ins. Co. v. McFadden*, 595 N.E.2d 762, 764 (Mass. 1992).

Although versions of the absolute pollution exclusion differ, most of them define "pollutant" in a similar fashion. They generally define it to include anything that is an "irritant" or "contaminant." Since any substance, regardless of how benign, potentially could be an "irritant" or "contaminant," the exclusion would be subject to abuse if applied literally. This concern moved one federal appeals court to observe:

> The terms "irritant" and "contaminant," when viewed in isolation, are virtually boundless, for "there is virtually no substance or chemical in existence that would not irritate or damage some person or property." Without some limiting principle, the pollution exclusion clause would extend beyond its intended scope, and lead to some absurd results. To take but two simple examples, reading the clause broadly would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution.

Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 972 F.2d 1037, 1043 (7th Cir. 1992) (citations omitted).

In *Koloms*, noted earlier, the Illinois Supreme Court held that the 1986 "absolute" pollution exclusion did not preclude coverage for the policyholder's potential liability for carbon-monoxide poisoning from a furnace, based in part on the history of the exclusion:

> Our review of the history of the pollution exclusion amply demonstrates that the predominant motivation in drafting an exclusion for pollution-related injuries was the avoidance of the "enormous expense and exposure resulting from the 'explosion' of environmental litigation." . . . Similarly, the 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.

177 Ill. 2d, 687 N.E.2d at 81 (emphasis added).

The court refused in *Koloms* to ignore the insurance industry's original intent in promulgating pollution exclusions, and refused then to expand the exclusion's reach to situations outside the area of environmental pollution:

> We would be remiss, therefore, if we were to simply look to the bare words of the exclusion, ignore its *raison d'être*, 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." . . . We think it improper to extend the exclusion beyond that arena.

Id. The *Koloms* court rejected the insurance company's argument that, because carbon monoxide is defined as a "very toxic gas" and is "regulated by the federal government as single 'pollutant' . . . under the Clean Air Act," the 1986 exclusion precludes coverage. *Id*. at 76.

The *Koloms* court criticized the overbroad language of the exclusion, and its overbroad application, particularly in light of the exclusion's ambiguity: "Like many courts, we are troubled by what we perceive to be an overbreadth in the language of the exclusion as well as the manifestation of an ambiguity which results when the exclusion is applied to cases which have nothing to do with 'pollution' in the conventional, or ordinary, sense of the word." *Id.* at 79. As another court found, if applied as urged by the insurance company, "the exclusion would be virtually limitless, extending to claims for product liability . . . or for negligence . . . ." *Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co.*, 132 F.3d 526, 530 (9th Cir. 1997).

The Supreme Judicial Court of Massachusetts rejected an insurance company's reliance on a polluter's exclusion to deny coverage for lead-paint liability. In *Atlantic*

Mutual Insurance Co. v. McFadden, 595 N.E.2d 762 (Mass. 1992) (*McFadden*), the court held that in-place lead paint is not a "pollutant" under the pollution exclusion. The lower court in *McFadden* had ruled that "there is no language in the policy which even suggests that lead in paint, putty or plaster is a 'pollutant' within the meaning of the provision." *Id.* at 763. The Massachusetts high court similarly concluded that "[t]here simply is no language in the exclusion provision from which to infer that the provision was drafted with a view toward limiting liability for lead paint-related injury. The definition of 'pollutant' in the policy does not indicate that leaded materials fall within its scope." *Id.* at 764.

Other courts have refused to read the term "pollutant" to include non-industrial pollution. For example, in *West American Insurance Co. v. Tufco Flooring East, Inc.*, 409 S.E.2d 692 (N.C. App. 1991) (*Tufco*), the policyholder resurfaced the floor of a Perdue chicken-processing facility with styrene monomer resin, releasing vapors. As a result, $500,000 worth of chicken parts were damaged. Perdue sued the policyholder, and the policyholder submitted a claim for coverage. The insurance company denied coverage based on an "absolute" pollution exclusion. The trial court upheld the policyholder's insurance coverage. It found that, because the flooring material contained styrene monomer resin, it did not constitute a "pollutant" under the exclusion.

On appeal, the North Carolina Court of Appeals affirmed. It concluded that, because the flooring material was not an "unwanted purity," but something the policyholder used appropriately, as intended, the exclusion did not qualify as a "pollutant" under the "absolute" pollution exclusion:

> [T]he common understanding of the word "pollute" indicates that it is something creating impurity, something objectionable and unwanted. The flooring material (styrene monomer resin) brought upon the premises by [the policyholder] was wanted. It was not impure. When [the policyholder] purchased its CGL insurance, it understood "pollutant" in the same way that the Oxford English Dictionary defines "pollutant," as an unwanted impurity, not as the raw materials which [the policyholder] purchased to do its job.

Id. at 698.

The *Tufco* court also considered an insurance industry publication explaining a pollution exclusion entitled "Commercial Liability Insurance, Vol. 1, Section V, Annotated CGL Policy (1985)." *Id.* at 699. After careful consideration, the court found no indication that, in revising the pollution exclusion, the insurance industry intended to extend the clause to preclude coverage for non-environmental damage. *Id.* at 699-700. Instead, the court found that the clause's continued use of environmental terms of art such as "discharge" and "release" evidenced the insurance industry's intent to exclude coverage only for environmental pollution. The *Tufco* court thus refused to expand the exclusion's scope by judicial fiat: "[T]his Court agrees with the . . . historical limitation that the pollution exclusion clause does not apply to non-environmental damage." *Id.* at

699.

Recently, an Arizona appeals court reached a similar conclusion, ruling that the absolute pollution exclusion bars coverage only for traditional environmental pollution. In *Keggi v. Northbrook Property & Casualty Insurance Co.*, 13 P.3d 785, 2000 Ariz. App. LEXIS 173 (Dec. 5, 2000) (*Keggi*), the Arizona Court of Appeals held that a claim for personal injury arising from the consumption of bacteria-contaminated water did not fall within the ambit of the exclusion. The court concluded that bacteria-contaminated water is not a "pollutant" under the exclusion. Even if it could be considered a "contaminant," the court noted, the exclusion would be ambiguous, thereby requiring insurance coverage.

On its own initiative, the court in *Keggi* also examined the history of the absolute pollution exclusion and found that the "drafters intended it to apply to traditional 'environmental pollution' situations and substances." *See also Kent Farms, Inc. v. Zurich Ins. Co.*, 140 Wash.2d 396, 998 P.2d 292 (2000) (Washington Supreme Court refused to apply absolute pollution exclusion to eliminate coverage for bodily injury liability arising from spilled diesel fuel, holding that exclusion applied only to "traditional environmental harms").

The rationale of these cases forcefully supports the conclusion that absolute pollution exclusions should not be invoked to abrogate coverage for damages or injury allegedly resulting from the use of pesticide products. There are also decisions with similar results in the specific context of pesticide products. In *Westchester Fire Insurance Co. v. City of Pittsburgh, Kansas*, 768 F. Supp. 1463 (D. Kan. 1991), *aff'd*, 987 F.2d 1516 (10th Cir. 1993), the court found that the absolute pollution exclusion did not preclude coverage in a case involving an insecticide because the insurance company did not prove that it was a contaminant. Similarly, in *Red Panther Chemical Co. v. Insurance Company of Pennsylvania*, 43 F.3d 514 (10th Cir. 1994), a federal appeals court ruled that the exclusion was ambiguous and did not bar coverage for injuries resulting from the expulsion from a truck of a container filled with an insecticide.

Case Law Applying Pollution Exclusions to Preclude Coverage

The reader must be aware that other courts have adopted insurance company arguments that absolute or total pollution exclusions limit coverage for non-industrial pollution claims. In many of these cases, courts were not presented with the evidence, discussed above, of the insurance industry's historical purpose and intent regarding the 1986 absolute pollution exclusion. Also many of them were decided before the more recent cases rejecting attempts by insurance companies to fit so many square pegs into a round "absolute pollution exclusion" hole. Insurance companies have even given policyholders favorable settlements to preserve rulings that reject coverage for non-environmental claims in reliance on absolute pollution exclusions.

For example, in *Bernhardt v. Hartford Fire Insurance Co.*, 648 A.2d 1047 (Md. App.),

cert. denied, 655 A.2d 400 (Md. 1995) (appeal dismissed due to settlement) (*Bernhardt*), tenants sued their landlord for personal injuries allegedly caused by inhalation of carbon monoxide fumes from a faulty heating plant in the building. The landlord notified his insurance company of the claims. Hartford rejected coverage under an exclusion precluding coverage for bodily injury "arising out of the . . . release of . . . pollutants" and where "pollutants" was defined to include "smoke, vapor, [and] fumes." 648 A.2d at 1048. The landlord argued that the exclusion in question was intended to apply only to environmental pollution of the atmosphere and not pollution of the air inside a building. No insurance industry analyses of the exclusion or regulatory history were presented to the court.

The court rejected the policyholder's argument. "Applying established contract law to the facts of this case," the court found that carbon monoxide constituted an irritant or contaminant within the meaning of the exclusion, precluding insurance coverage. *Id.* at 1051-52. Despite that holding, the *Bernhardt* court expressly recognized that different facts may yield different results: " Whether the absolute pollution exclusion is viewed as clear and unambiguous will, of necessity, depend upon the facts of each case to which it is applied." *Id*. at 1050 (citations omitted).

The policyholder appealed *Bernhardt*. Before that appeal was completed, however, the insurance company settled the case for an undisclosed amount, preserving the anti-coverage result reached by Maryland's intermediate court of appeal. Insurance companies seeking to avoid coverage under an absolute or total pollution exclusion typically cite *Bernhardt* without disclosing the history of its settlement on appeal.

Conclusion

Despite its moniker – chosen by insurance industry drafters – the so-called "absolute" or "total" pollution exclusion does not apply to any claim that an insurance company claims adjuster or lawyer decides may involve a "pollutant" or "pollution." The insurance industry obtained approval for the exclusion in the 1980s based on representations that "nobody would read it that way." Both the LDOI and various federal and state courts have rejected the overuse – and abuse – of the exclusion to disclaim coverage for all manner of claims that do not involve industrial pollution. As the Rhode Island Supreme Court stated at the end of June 2000 in discussing the 1973 predecessor of the 1986 exclusion:

> As these cases suggest, state regulators as a practical matter often are the only parties who are in a position to negotiate language changes in proposed commercial insurance contracts. Under these circumstances, it is reasonable to hold insurers to the representations they made to regulators when seeking approval for a **pollution-exclusion** clause like this one, which is susceptible to more than one plausible interpretation.

Textron, 2000 R.I. LEXIS 150, at *31.

The regulatory history of the absolute pollution exclusion similarly gives the lie to the litigation position taken by many insurance companies seeking to avoid coverage for liabilities arising from products and operations off the policyholders' premises. Based on that history, absolute pollution exclusions in CGL policies should not preclude coverage for product liability and toxic tort claims against pesticide manufacturers.

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