Explosions in the Sky: Coverage For Non-Contaminating Properties of Pollutants
by Dawn Krigstin and Brian Margolies

Introduction

By design, pollution liability insurance and general liability insurance should rarely afford overlapping coverage for the same loss event. In the typical pollution scenario involving hazardous materials released into the environment, the pollution exclusion in a general liability insurance policy should apply, leaving a pollution liability insurance policy as the only source of coverage. Alternatively, for loss events not involving pollution, a pollution liability policy will not be triggered, potentially leaving a general liability policy as the sole source of insurance recovery.

While this distinction between policy coverages works well in theory, there are a number of non-traditional scenarios in which it is difficult to determine whether a loss event should be considered for coverage under a general liability policy, a pollution liability policy, or both. One such scenario is explosions resulting from material that in and of itself may qualify as a pollutant, such as gas or other flammable materials. When a flammable material is caused to ignite, resulting in subsequent bodily injury or property damage not from the toxic or contaminating nature of the material, but instead from the concussive force or because of heat or fire resulting from an explosion, should these losses be considered the result of pollution?

The answer to this question has significant implications both for general liability insurers and pollution liability insurers, as well as to insureds. There have been a handful of decisions over the last decade addressing whether fire and explosion-related losses qualify as pollution events, both for the purpose of general and pollution liability insurance. As can be expected in insurance coverage disputes, the outcomes in these cases depend in large part on the insurance policy wordings as well as the case specific law within the applicable jurisdiction. Notwithstanding, these cases typically focus on two concepts underlying insurance coverage disputes in the pollution realm.

The first relates to the scope of the pollution exclusion. A general distinction can be drawn between those jurisdictions that limit application of the exclusion to matters involving traditional environmental harm or allow for broader application. This dichotomy is somewhat useful in predicting how a particular jurisdiction approaches insurance coverage disputes involving pollution, although it mistakenly implies that there is homogeneity within the two camps on how and when the exclusion applies, which certainly is not the case. For instance, those jurisdictions that limit application of the exclusion to matters involving “traditional”

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environmental harm often have different standards or tests to determine when the exclusion applies.\(^2\)

The second concept underlying these cases, which is related to the distinction between traditional and non-traditional pollution, is the applicable causation standard. Whether a court applies a proximate cause test, or a broader “but for” analysis requiring only a causal connection between the pollutant and the loss, obviously is specific to policy wording and is jurisdictionally dependent. But this analysis is often critical in determining coverage for non-traditional environmental harm scenarios, as will be addressed in this article.

**Case Law Addressing Coverage Under Pollution Liability Policies**

While there are thousands of cases nationally addressing the scope and application of the pollution exclusion, there is only a limited body of case law addressing coverage under pollution liability policies. And because pollution liability policies are non-standard, and the wordings typically differ from carrier to carrier, even case law addressing coverage under a pollution liability policy may have only limited precedential value. Notwithstanding, the decision by the Wisconsin Supreme Court in *Acuity v. Chartis Specialty Ins. Co.* provides a useful insight into the coverage issues resulting from an explosion in the context of pollution liability insurance.\(^3\)

*Acuity* concerned the issue of whether damages resulting from a gas line explosion triggered coverage under a contractors pollution liability policy. The explosion resulted from the construction activities of Dorner, Inc., which was insured by Acuity under a general liability policy and by Chartis under a contractors pollution liability policy. While performing excavation work, a Dorner employee disturbed an underground natural gas line, causing gas to leak out and later explode when the pipe itself sparked. The explosion resulted in several underlying suits, each alleging that Dorner’s work caused gas to leak from the line and ignite, and that the explosion and ensuing fire resulted in bodily injury and property damage.

While Acuity agreed that the underlying suits triggered a duty to defend under its general liability policy, Chartis took the position that its contractors pollution liability policy was not triggered since the underlying suits did not alleged bodily injury or property damage resulting from a “pollution condition,” a term defined in its policy as:

... the discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste and waste materials into or upon land, or any structure on land ...

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\(^2\) For example, compare *Doerr v. Mobil Oil Corp.*, 774 So.2d 119 (La. 2000) (limiting application of the pollution exclusion traditional environmental harms caused by active polluters) with *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377 (N.Y. 2003) (limiting application of exclusion to traditional environmental harms in light of the insured’s reasonable expectations).

\(^3\) *Acuity v. Chartis Specialty Ins. Co.*, 861 N.W.2d 533 (Wis. 2015).
provided such conditions are not naturally present in the environment in the concentration or amounts discovered. Pollution Conditions shall include Microbial Matter in any structure on land and the atmosphere within that structure.

On motion for summary judgment, the trial court ruled against Chartis, holding that the release of natural gas was a “pollution condition” since people do not want gas “loose in the environment,” and as such, a gas leak would be considered a pollutant. On appeal, however, the Wisconsin appellate court reversed the lower court’s holding, concluding that the bodily injury and property damage alleged did not result from contact with the discharged natural gas, but instead resulted solely from the explosion and fire. The court reasoned that regardless of the fact that Dorner’s work resulted in a release of natural gas, it was the nature of the claim (harms caused by an explosion and fire) that determined Chartis’ coverage obligation, not the fact that the explosion would not have happened but for the gas release. As such, the court concluded that “[w]e do not deem it fairly debatable that any of the complaints allege even one theory to trigger [Chartis’] duty to defend.”

The Wisconsin Supreme Court did not agree. Finding that natural gas qualified as an irritant or contaminant for the purpose of the Chartis policy, and that there was a requisite release for the purpose of qualifying as a “pollution condition,” the Court addressed the more complicated question of whether the underlying bodily injury and property damage were caused by a pollution condition. The Court found this causation requirement satisfied since the gas caused an explosion and fire, and the explosion and fire caused the injury. The Court disagreed with the argument that the gas had to be the direct cause of the loss, concluding that the Chartis policy’s insuring agreement could be satisfied on a “but for” analysis.

Central to the Court’s reasoning was that the Chartis policy’s insuring agreement did not explicitly set forth a proximate cause requirement between the pollution condition and the harm, and that in any event, the “contaminating nature” of the natural gas was the cause of the resulting harms. As the Court explained:

... natural gas is a contaminant. It can cause injury through inhalation and when it mixes with air in certain concentrations, it can explode or ignite. In other words, part of the contaminating nature of natural gas is its capacity to cause explosions and fire. In the instant case, the escape of natural gas caused an explosion and fire that resulted in bodily injury and property damage. The

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5 Id. at *7.
6 Id.
7 Id.
9 Id. at 545.
10 Id. at 545-49.
alleged bodily injury and property damage were therefore caused by the contaminating nature of natural gas.\textsuperscript{11}

Notably, in arguing for a proximate cause standard, Chartis relied in part on New York law, and in particular the decision by a New York trial court in \textit{URS Corp. v. Zurich Am. Ins. Co.}\textsuperscript{12} Like \textit{Acuity}, the \textit{URS} decision involved a question of coverage under a contractors pollution liability policy for a fire. The loss event at issue in \textit{URS} was a fire at the former Deutsche Bank building which was in the process of being remediated and redeveloped as a result of damage sustained during the attacks of September 11, 2001.\textsuperscript{13}

At issue in \textit{URS} was a slightly different question; namely, whether the smoke and fire conditions within the building qualified as a pollution condition in the first instance. The court concluded that it did not. In reaching its holding, the court looked to New York case law limiting the application of the pollution exclusion to matters involving traditional environmental harms, and reasoned that the inverse of this should govern pollution liability policies:

Given the close identity between the traditional pollution exclusion provision and Hudson's pollution coverage provision, it would be logical to conclude that the two clauses share the same purpose and are complementary, with one meant to fill the gap in coverage created by the other. ... Even allowing the somewhat excessive stress the plaintiffs place on the stray references in two of the complaints to "toxic smoke," an allegation of injury from some sort of poisonous material is not enough to qualify for coverage; the injury must be caused by the "discharge, dispersal, release or escape" of such contaminant "into or upon land, the atmosphere or any watercourse or body of water" ... .\textsuperscript{14}

The \textit{Acuity} court distinguished the \textit{URS} decision on the basis that the Chartis policy was governed by Wisconsin law rather than New York law, and that Wisconsin case law differs from New York case law as to the application of the pollution exclusion in that the exclusion is not limited to “broadly dispersed environmental pollution.”\textsuperscript{15} The Court, therefore, rejected the notion that a proximate cause standard was inherent in the language of the Chartis policy. The Court also rejected Chartis’ argument that a general liability and contractors pollution liability policy, by their very nature, cannot be triggered by the same loss, explaining that while this may be true in the general sense, the grant of coverage in the Chartis policy did not mirror the language of the pollution exclusion in the Acuity policy.\textsuperscript{16}

\textsuperscript{11} Id. at 545-46.
\textsuperscript{13} Id. at 507.
\textsuperscript{14} Id. at 510-11.
\textsuperscript{15} \textit{Acuity v. Chartis Specialty Ins. Co.}, 861 N.W.2d at 546-48.
\textsuperscript{16} Id. at 549.
Case Law Involving the Pollution Exclusion

The *Acuity* decision assumed that the general liability policy was triggered by the underlying loss, and as such the Court did not need to address whether the pollution exclusion in that policy applied to the underlying loss given the Court’s reasoning that the losses were, in fact, caused by the contaminating properties of natural gas. It is interesting to consider whether the result would have differed had the Chartis policy been governed by New York law, as are many pollution liability policies. Had the lawsuit proceeded in New York and both the general liability and pollution liability policies been governed by New York law, it is conceivable that the pollution exclusion would have been inapplicable to explosion-related losses and that the contractors pollution liability, as a result, would not be triggered.

Suggestive of this is the decision by an Illinois appellate court in *Greenwich Ins. Co. v. John Sexton Sand & Gravel Corp.*, an unpublished decision by an Illinois appellate court.17 *Sexton* concerned coverage for various harms resulting from the insured’s landfill operations. Included in these harms were tremors resulting from a subsurface fire as well as explosions caused by flares that the insured used to ignite gas at its premises, thereby preventing the gases from migrating offsite.18 An issue was raised as to whether the damage from these explosions should be covered under the insured’s general liability policy or its site pollution liability policy.

In considering whether the pollution exclusions in the general liability policies applied, the court noted that under Illinois law, similar to New York law, the exclusion applies only to injuries caused by traditional environmental harm.19 The court observed that the gas flares at the insured’s landfill were used for the purpose of keeping gas from escaping offsite, and that in any event “explosions are hardly traditional environmental pollution as such.” Notably, and in contrast to the reasoning employed by the *Acuity* court, the *Sexton* court rejected the insurer’s argument that a “but for” causation standard should apply, since it would “run contrary to the limitation of the exclusion to traditional environmental pollution adopted by our supreme court [sic] ... and raise the potential for absurd results.”20

It is possible to harmonize the *Sexton* and *Acuity* decisions in that one case concerned a grant of coverage whereas another concerned the application of an exclusion. In *Acuity*, the court broadly construed the grant of coverage, relying on a “but for” causation, whereas in the *Sexton* case, the court rejected a “but for” causation in order to remain consistent with the general maxim that insurance policy exclusions should be narrowly construed. An alternative explanation is that the standards applied by the courts relied in large part on each particular jurisdiction’s case law construing the pollution exclusion and its application to events other than traditional environmental harm.

18 *Id.* at *6-8.
19 *Id.* at 21.
20 *Id.*
A comparable case to Acuity, and preceding it by several years, was Noble Energy, Inc. v. Bituminous Cas. Co., a case decided under Texas law where the pollution exclusion is not restricted to matters involving traditional environmental harm. At issue in Noble was an explosion that was caused by a contractor’s efforts to extract basic sediment and water (BSW) from Noble’s storage tanks. The contractor left its tanker truck running during this process, and the truck was caused to explode when exposed to the combustible vapors from the BSW, which contained gas condensate. This explosion resulted in the death of several contractors on site, as well as injuries to numerous others. Noble sought coverage for the resulting suits as an additional insured under its contractor’s general liability policy.

The Fifth Circuit, applying Texas law, agreed that the pollution exclusion in the general liability policy, applicable to bodily injury “arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants,” applied to the underlying suits since the gas condensate was the proximate cause of the injuries. In reaching its conclusion, the court considered and rejected the insurer’s argument that the injuries “resulted from a fire caused by the combustible vapors … acting not as a pollutant but as an accelerant.” Similar to the reasoning that later would be applied by the Acuity court, the Fifth Circuit reasoned that “the hazardous quality of the vapors was the proximate cause of the explosion that killed or injured the workers.”

An almost identical fact pattern was at issue in Hiland Partners GP Holdings, LLC v. National Union Fire Ins. Co., decided this year by the United States Court of Appeals for the Eighth Circuit under North Dakota law. Hiland, like Noble, involved the process of removing water from a hydrocarbon condensate tank. One of the tanks overflowed while this work was being performed, causing the condensate within the tank to explode, which in turn caused injury to an employee of a subcontractor. Hiland sought coverage for the resulting bodily injury suit as an additional insured under its subcontractor’s general liability policy issued by National Union. National Union argued, among other things, that the pollution exclusion barred coverage for the matter.

Hiland contended that while condensate may have inherent properties of a contaminant, the exclusion should not apply since the injuries caused to the subcontractor were not the result of contamination, per se. In considering this argument, the court observed that not every injury resulting from substances that can qualify as pollutants will be excluded – relying on the oft-cited example of someone slipping as a result of spilled contents of a Drano

22 Id. at 644.
23 Id. at 646-47.
24 Id. at 647.
25 Id.
27 Id. at 597.
28 Id. at 599-600.
The court nevertheless reasoned that condensate is considered a contaminant because it is flammable, volatile and explosive, and that the underlying injuries were the direct result of these properties; namely, an explosion caused when the condensate was introduced into the environment. Relying in part on the Fifth Circuit’s decision in Noble, the court agreed that the exclusion applied to bar coverage for the underlying suit.

Whereas Noble and Hiland resulted in a lack of coverage for injuries resulting from exclusions, the decision in Gaylord Container Corp. v. CNA Ins. Cos., rendered by a Louisiana intermediary court, demonstrates how the outcome can differ when considered under case law restricting application of the exclusion to traditional environmental harms. Gaylord involved an explosion when nitric acid within a railcar was mixed with water. This incident resulted in numerous suits for bodily injury and property damage. Applying Louisiana case law to the issue, which among other things restricts the pollution exclusion to traditional environmental harms, the court concluded that “when a fortuitous event such as an explosion occurs, and that event incidentally involves a chemical agent, the absolute pollution exclusion operates to exclude coverage for environmental damage only.”

CONCLUSION

Given the disparity in case law across the country regarding the circumstances under which the pollution exclusion will apply, it is impossible to state as a general proposition whether harms resulting from an exclusion are excluded. Instead, decisions such as Sexton, Noble, Hiland and Gaylord, demonstrate that this question is dependent on whether applicable case law restricts application of the exclusion to traditional environmental harms as well as what degree of causation is required. Decisions such as Acuity and URS demonstrate that this case law can inform the coverage determination under pollution liability policies.

There are very real implications to whether loss resulting from an explosion-related event is insured under a general liability policy. To the extent that an insured does not have a pollution liability policy, the application of the pollution exclusion can be fatal to the insured’s right to coverage. But even when the insured does have a pollution policy, slotting coverage under a pollution liability policy as opposed to a general liability policy can have significant consequences for the insured, since under many pollution liability policies defense costs are within as opposed to outside of policy limits and since these policies typically have higher deductibles or self-insured retentions than contained in general liability policies.

If the purpose of pollution liability insurance was to fill in the gap created by the pollution exclusion, then it should follow that the coverage afforded under these policies should be limited to matters involving traditional pollution. Obviously, there are some

29 Id. at 600.
30 Id.
32 Id. at 867.
33 Id. at 872.
exceptions, given that many pollution policies expressly provide coverage for indoor-related events or other types of pollution, such as mold and asbestos, that may not traditionally come within scope of the pollution exclusion. But as a general proposition, these policies are intended to insure against the harms resulting from pollutants acting as pollutants. Just as many courts agree that the pollution exclusion should not apply to situations where a pollutant is not acting as a pollutant, such as the classic example of a claimant slipping in a puddle of bleach, it should follow that when a loss results from the non-contaminating qualities of material, a pollution liability policy should not respond.