Note

The Pollution Delusion: A Proposal for a Uniform Interpretation of Pollution in General Liability Absolute Pollution Exclusions

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Introduction

Suppose a supermarket shopper slips on Drano, which had spilled onto the floor, and suffers an injury.[1] When the supermarket seeks coverage for this potential liability under its commercial general liability ("CGL") insurance policy, the insurance provider rejects the claim, stating that it is barred by the policy's absolute pollution exclusion.[2] Under this important exclusion, general liability insurance does not cover "'[b]odily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of *pollutants*."[3] The policy also defines a pollutant as "any

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

2 *See id.*

3 21 Eric Mills Holmes, Holmes' Appleman on Insurance § 132.6, at 91–92 (2d ed. 2002 & Supp. 2007) (emphasis added).

solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."[4]

In *Pipefitters Welfare Education Fund v. Westchester Fire Insurance Co.*,[5] the Seventh Circuit used this hypothetical to highlight the problems courts face when applying the absolute pollution exclusion found in commercial general liability insurance policies.[6] Specifically, the court noted that under the terms of the pollution exclusion, the spilled Drano would not be covered by the insurance policy because it was a released liquid irritant.[7] The court also explained that this broad interpretation of pollution would lead to the absurd result of barring coverage for the claim, and that typically a policyholder would not characterize this event as pollution.[8]

The court's analysis in *Pipefitters* highlights the expectation gap that exists between insureds and insurance providers concerning the insurance policy's coverage. This expectation gap exists because policyholders often expect insurance coverage when liability arises from an injury related to materials potentially covered by pollution exclusions, like the spilled Drano hypothetical.[9] And yet, insurance companies believe that the broad language of their pollution exclusion provisions should bar coverage for these same claims.[10] Further, the expectation gap between insureds and insurers is even larger when untraditional pollutants are involved.[11] This expectation gap is a problem because it creates excessive costly litigation, and also potentially leads to forum shopping to find a court that will construe the provision in favor of, or against, coverage.[12]

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4 *Id.*

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

6 *See id.* at 1043.

7 *See id.*

8 *See id.*

9 The existence of an expectation gap is evidenced by the numerous cases where the definition of pollution under the absolute pollution exclusion is litigated. *See, e.g.*, Bituminous Cas. Corp. v. Sand Livestock Sys., Inc., 728 N.W.2d 216, 218 (Iowa 2007); Clendenin Bros. v. U.S. Fire Ins. Co., 889 A.2d 387, 390 (Md. 2006); Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc., 108 P.3d 469, 472 (Mont. 2005); Nav-Its, Inc. v. Selective Ins. Co., 869 A.2d 929, 930 (N.J. 2005); Quadrant Corp. v. Am. States Ins. Co., 110 P.3d 733, 735 (Wash. 2005).

10 *See, e.g.*, *Bituminous Cas. Corp.*, 728 N.W.2d at 218; *Clendenin Bros.*, 889 A.2d at 389–90; *Travelers Cas. & Sur. Co.*, 108 P.3d at 473; *Nav-Its, Inc.*, 869 A.2d at 930; *Quadrant Corp.*, 110 P.3d at 735.

11 *See* Irene A. Sullivan et al., *Developments in Environmental Coverage*, *in* INSURANCE COVERAGE IN THE NEW MILLENNIUM, (ALI-ABA Course of Study, Jan. 13, 2000), *available at* Westlaw, SE64 ALI-ABA 89, 102–10.

12 *Cf.* Theresa Gooley, Note, *The Changing Environment: Interpreting the Pollution Exclu-*

State courts have further exacerbated the expectation gap by failing to reach a uniform interpretation of what pollution falls under the absolute pollution exclusion. The highest courts in states across the country have established various tests to determine whether an alleged pollutant is covered by the absolute pollution exclusion.[13] These courts, however, have not created a uniform interpretation of the policy language and litigation continues in these states.[14] The inconsistent interpretations are evident in the fact that different courts have found that various materials including ammonium, carbon monoxide, and sealants have both met the definition of pollution and fallen outside that definition.[15] In fact, courts explicitly recognize the lack of a uniform interpretation of pollution, and have highlighted that this problem has led to much litigation.[16]

This Note proposes a uniform method for interpreting the term pollution to address the problems associated with an unclear definition of pollution in the absolute pollution exclusion. Specifically, this Note argues that state courts should first find that the term pollution is ambiguous, and should then apply a three-factor analysis to determine whether an alleged pollutant is a pollutant under the exclusion. By applying this uniform interpretation to define the term pollution,

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sion in the Context of CERCLA Liability, 44 DRAKE L. REV. 153, 180 (1995). Although this article was discussing a consistent interpretation of the sudden and accidental exception in the qualified pollution exclusion, *see id.* at 153–54, 169–70, the same analysis applies to the absolute pollution exclusion because similar inconsistent interpretations have arisen in numerous courts, *see supra* note 9.

13 *See infra* Part II.

14 *See, e.g.*, Ortega Rock Quarry v. Golden Eagle Ins. Corp., 46 Cal. Rptr. 3d 517, 525 (Cal. Ct. App. 2006); Garamendi v. Golden Eagle Ins. Co., 25 Cal. Rptr. 3d 642, 646 (Cal. Ct. App. 2005); Kim v. State Farm Fire & Cas. Co., 728 N.E.2d 530, 523-36 (Ill. App. Ct. 2000); Harrison v. R.R. Morrison & Son, Inc., 862 So. 2d 1065, 1072 (La. Ct. App. 2003).

15 For an extensive list of what materials have been defined as pollutants by various state courts, see Claudia G. Catalano, Annotation, WHAT CONSTITUTES "POLLUTANT," "CONTAMINANT," "IRRITANT," OR "WASTE" WITHIN MEANING OF ABSOLUTE OR TOTAL POLLUTION EXCLUSION IN LIABILITY INSURANCE POLICY, 98 A.L.R.5th 193 (2002).

16 *See, e.g.*, Clendenin Bros. v. U.S. Fire Ins. Co., 889 A.2d 387, 399 (Md. 2006) ("We expect that, our decision notwithstanding, interpretation of the scope of pollution exclusion clauses likely will continue to be ardently litigated throughout state and federal courts."); *see also* Porterfield v. Audubon Indem. Co., 856 So. 2d 789, 800 (Ala. 2002). The court in *Porterfield* stated:

> Our 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. Cases may be found for and against every issue any litigant has ever raised, and often the cases reaching the same conclusion as to a particular issue do so on the basis of differing, and sometimes inconsistent, rationales.

Id.

state courts will decrease the expectation gap between insureds and insurance providers.

This Note begins by examining the history of the absolute pollution exclusion. Part II of this Note then highlights various state court interpretations of pollution in the absolute pollution exclusion. Part III proposes a uniform method for interpreting the term "pollution" in pollution exclusions and applies it to various facts to demonstrate the application of this method. Finally, Part IV addresses why this proposed interpretation is better than the alternatives.

I. The Absolute Pollution Exclusion Emerges from Uncertainty

An understanding of CGL insurance policies, the language of the pollution exclusion, and the pollution exclusion's history are important background considerations for understanding the absolute pollution exclusion.

CGL insurance policies apply "to the liabilities of a business or other organization that are not covered under more specialized policies, such as automobile liability or workers' compensation liability policies."[17] In the United States, most businesses obtain these insurance policies to cover the potential liability they might incur from the typical operation of their business.[18] Nearly all CGL policies include a pollution exclusion, written in standard, or very similar, language.[19]

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17 20 HOLMES, *supra* note 3, § 129.1, at 4. The commercial general liability policy was formerly called the comprehensive general liability policy from the 1940s to 1986, when the name of the policy was changed. *Id.* Although there are some differences between coverage under the two policies, "both use the acronym CGL and are customarily called CGL policies." *Id.*

18 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.").

19 *See* Jonathan C. Averback, Comment, *Comparing the Old and the New Pollution Exclusion Clauses in General Liability Insurance Policies: New Language—Same Results?*, 14 B.C. ENVTL. AFF. L. REV. 601, 602 (1987).

Most insurance policies that are litigated adopt pollution exclusion policy language that is similar to the language used in the standard Insurance Services Office form. *See, e.g.*, Bituminous Cas. Corp. v. Sand Livestock Sys., Inc., 728 N.W.2d 216, 219 (Iowa 2007) ("'Pollutants' are defined in the policy as 'any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.'"); *Clendenin Bros.*, 889 A.2d at 390 ("'Pollutants means any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste. Waste includes material to be recycled, reconditioned or reclaimed.'"); Nav-Its, Inc. v. Selective Ins. Co., 869 A.2d 929, 932 (N.J. 2005) ("The policy defined pollutants as 'any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.' Under

The current common expression of the absolute pollution exclusion purports to exclude coverage for nearly every type of pollution. Specifically, the language of the current exclusion states that the insurance does not cover "'[b]odily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants . . . ."[20] Further, a pollutant is defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."[21]

As the Alabama Supreme Court pointed out, the language of this exclusion lends itself to three separate but related inquiries:

> [T]he bodily injury or property damage in question must have been caused by exposure to a "pollutant"; that exposure must have arisen out of the actual, alleged, or threatened discharge, dispersal, release, or escape of the pollutant; and that discharge, dispersal, release, or escape must have occurred at or from certain locations or have constituted "waste."[22]

This Note only addresses the first inquiry, whether or not a pollutant caused the injury, because most disputes revolve around whether an alleged pollutant is actually a pollutant as defined by the pollution exclusion.[23] Because much of the pollution exclusion litigation depends on the definition of pollution, clarifying this portion of the pollution exclusion analysis can best reduce the expectation gap between insureds and insurance providers.

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the policy, '[w]aste includes materials to be recycled, reconditioned or reclaimed.'"); Quadrant Corp. v. Am. States Ins. Co., 110 P.3d 733, 736 (Wash. 2005) ("'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.'").

This Note is applicable to nearly all CGL policies that contain an absolute pollution exclusion because insurers often adopt standardized policy terms. *See* Averback, *supra*, at 602. Insurers adopt standard policy language because "standard policy language affords several advantages to insurers including elimination of costs of negotiating with individual policyholders, predictability and consistency in judicial interpretations, and facilitation of reinsurance and claims adjusting." Melody A. Hamel, Comment, *The 1970 Pollution Exclusion in Comprehensive General Liability Policies: Reasons for Interpretations in Favor of Coverage in 1996 and Beyond*, 34 DUQ. L. REV. 1083, 1101 (1996) (citing GRACE A. CARTER & KEITH A. MEYER, ENVIRONMENTAL INSURANCE HANDBOOK § 3.1, at 27 (1992)).

20 21 HOLMES, *supra* note 3, § 132.6, at 91.

21 *Id.* at 92.

22 Porterfield v. Audubon Indem. Co., 856 So. 2d 789, 801 (Ala. 2002).

23 *See id.*

The history of the absolute pollution exclusion in CGL policies reveals several problems.[24] The absolute pollution exclusion is based on a long history of pollution exclusions that began in the 1970s.[25] The original pollution exclusion was a qualified exclusion, which typically "barred coverage or a defense for pollution-related liability claims against the policyholder unless the discharge of [the] pollutant was 'sudden and accidental.'"[26] This qualified pollution exclusion "was adopted to address the enormous potential liability resulting from antipollution laws enacted between 1966 and 1980."[27] Specifically, the amendments to the Clean Air Act,[28] which strengthened environmental standards and imposed some liability on insurance providers, along with other environmental legislation, exposed insurers to substantial liability for environmental cleanup costs, which the exclusion was drafted to avoid.[29]

The qualified pollution exclusion had several problems that led to the adoption of the absolute pollution exclusion in the 1980s. The qualified pollution exclusion failed to protect insurers from liability from environmental cleanup costs, and the exclusion resulted in excessive litigation over the definition of the sudden and accidental exception.[30] As one commentator noted, "[t]he insurance industry introduced the absolute pollution exclusion into the CGL as a reac-

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24 Much has been written about the history of the pollution exclusion in general liability insurance policies. For a detailed overview of the emergence of the exclusion from the perspective of both the insurance industry and insureds, see 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). Several cases have also undertaken an in-depth review of the history of the exclusion. *See, e.g.*, MacKinnon v. Truck Ins. Exch., 73 P.3d 1205, 1209–11 (Cal. 2003); Am. States Ins. Co. v. Koloms, 687 N.E.2d 72, 79–82 (Ill. 1997).

25 *See* 1 MITCHELL L. LATHROP, INSURANCE COVERAGE FOR ENVIRONMENTAL CLAIMS § 3.07[1]–[2] (2004).

26 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, 467 (1998).

27 *MacKinnon*, 73 P.3d at 1216.

28 Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401–7671(q) (2006)).

29 *See Koloms*, 687 N.E.2d at 80. For an in-depth history of the qualified pollution exclusion, see Carl A. Salisbury, *Pollution Liability Insurance Coverage, the Standard-Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia*, 21 ENVTL. L. 357 (1991). Also, for a detailed examination of the history of the drafting of the 1973 qualified exclusion, see Eugene R. Anderson et al., *Liability Insurance Coverage for Pollution Claims*, 12 U. HAW. L. REV. 83 (1990).

30 *See Koloms*, 687 N.E.2d at 80–81; Stempel, *supra* note 26, at 466–67. Numerous cases where the sudden and accidental exception was litigated discussed the meaning of those terms. *See, e.g.*, Hecla Mining Co. v. N.H. Ins. Co., 811 P.2d 1083, 1091–92 (Colo. 1991); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1219–20 (Ill. 1992).

tion to what insurers viewed as excessive coverage obligations incurred under the former 'qualified' pollution exclusion."[31]

This history of the pollution exclusion highlights the problem of the expectation gap. One of the failings of the qualified pollution exclusion was the excessive litigation that resulted from the unclear language.[32] This excessive litigation was the result of the expectation gap and led the insurance industry to rewrite the exclusion to avoid or limit litigation and circumvent liability for various pollution events.[33] Unfortunately, the insurance industry's attempt to close the expectation gap by writing the absolute pollution exclusion failed, and the uncertainty associated with the term pollution has created a new expectation gap between insureds and insurance providers.

II. State Courts Confuse an Already Confusing Problem

In an attempt to resolve the expectation gap surrounding the absolute pollution exclusion, courts have interpreted the exclusion in several key ways. As a preliminary matter, before a court begins interpreting the language of the absolute pollution exclusion, the court must determine whether the policy language is ambiguous.[34] This Part begins by exploring this threshold question and the role of ambiguous language in insurance policies. Then this Part discusses the decisions in three states, California, Louisiana, and Illinois, to reveal three approaches to interpreting the term pollution.[35] Specifically, California adopted an interpretation of the exclusion that looks to whether the alleged pollution can "commonly [be] thought of as pollution."[36] In Illinois, the court's test considers whether the pollutant is "traditionally associated with environmental pollution."[37] Finally, in Louisiana the court adopted a more elaborate test to analyze the absolute pollution exclusion and suggested numerous characteristics to analyze

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31 Stempel, *supra* note 26, at 466–67; *see also Koloms*, 687 N.E.2d at 81 ("Our review of the history of the pollution exclusion amply demonstrates that the predominate 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.'" (quoting Weaver v. Royal Ins. Co. of Am., 674 A.2d 975, 977 (N.H. 1996) (emphasis omitted))).

32 *See Koloms*, 687 N.E.2d at 80–81.

33 *See* 1 LATHROP, *supra* note 25, § 3.07[1].

34 *See* 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 30:4 (4th ed. 1999).

35 Other states have adopted similar interpretations of pollution. *See, e.g.*, Clendenin Bros. v. U.S. Fire Ins. Co., 889 A.2d 387, 395–96 (Md. 2006) (pollution includes things covered under the typical definition of pollution); Gainsco Ins. Co. v. Amoco Prod. Co., 53 P.3d 1051, 1066 (Wyo. 2002) (pollution means environmental pollution).

36 MacKinnon v. Truck Ins. Exch., 73 P.3d 1205, 1216 (Cal. 2003) (emphasis omitted).

37 *See Koloms*, 687 N.E.2d at 79.

when determining if the alleged pollutant is a hazard that is traditionally classified as pollution.[38] These states' interpretations of pollution reveal the problems associated with differing definitions of pollution and the problems that lower courts have experienced when applying the state supreme court's vague interpretations.

A. The Role of Ambiguous Language in Judicial Interpretations of Insurance Policies

Before courts begin analyzing the language of an insurance policy, they typically determine whether the terms of the agreement are ambiguous.[39] This is an important first step because many state courts will not go beyond the plain text of an insurance policy if its terms are unambiguous.[40] Addressing this threshold question, some states find the language of the absolute pollution exclusion unambiguous and apply the pollution exclusion broadly to cover any claim that falls under the plain text of the exclusion.[41] As demonstrated by the varying interpretations of the exclusion, which show that the term pollution is subject to more than one reasonable interpretation, the exclusion should be considered ambiguous based on how states typically interpret insurance policies.[42]

State courts use various tests to determine whether an insurance policy's language is ambiguous.[43] As noted by Richard A. Lord in *Williston on Contracts*:

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38 Doerr v. Mobil Oil Corp., 774 So. 2d 119, 135 (La. 2000).

39 *See* 11 LORD, *supra* note 34, § 30:4.

40 *See id.* ("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.").

41 *See, e.g.*, Bituminous Cas. Corp. v. Sand Livestock Sys., Inc., 728 N.W.2d 216, 222 (Iowa 2007); Quadrant Corp. v. Am. States Ins. Co., 110 P.3d 733, 743 (Wash. 2005). For an in-depth discussion of the role of ambiguity in interpreting the absolute pollution exclusion, see Stempel, *supra* note 24, at 17–27.

42 *See infra* Part III.B.

43 *See* Porterfield v. Audubon Indem. Co., 856 So. 2d 789, 799 (Ala. 2002) ("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."); Am. States Ins. Co. v. Koloms, 687 N.E.2d 72, 75 (Ill. 1997) ("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 strictly against the insurer who drafted the policy." (citations omitted)); Sullins v. Allstate Ins. Co., 667 A.2d 617, 619 (Md. 1995) ("If the language in an insurance policy suggests more than one meaning to a reasonably prudent layperson, it is ambiguous. A term which is clear in one context may be ambiguous in another." (citations omitted)).

> 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.
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> 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, when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement, and who is cognizant of customs, practices, usages, and terminology as generally understood in the particular trade or business.[44]

Although state courts have not adopted this specific test to interpret the language of insurance policies, the analysis state courts generally use is essentially the same.[45] Under this analysis, state courts must determine whether the pollution exclusion is subject to more than one reasonable interpretation before they can begin to interpret the definition of pollution.

Applying this test, some courts have concluded the pollution exclusion is unambiguous. The Wisconsin Supreme Court, for example, used this interpretation of the exclusion when determining whether an injury that resulted from ingesting lead paint flakes was excluded from coverage under the absolute pollution exclusion.[46] The court held that the pollution exclusion was not ambiguous because pollutants "is specifically defined in the policy; the definition cannot be undone by different notions of 'pollution' outside the policy, unrelated to the policy language, unless such a 'reading' produced absurd results. In the text here, the words are not fairly susceptible to more than one construction."[47] After finding the clause unambiguous, the court went on to

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44 11 LORD, *supra* note 34, § 30:4.

45 *See supra* note 43.

46 *See* Peace v. Nw. Nat'l Ins. Co., 596 N.W.2d 429, 431, 435–40 (Wis. 1999).

47 *Id.* at 442. The court also noted that:

> The pollution exclusion clause does not become ambiguous merely because the parties disagree about its meaning, or because they can point to conflicting interpretations of the clause by different courts. If the existence of differing court interpretations inevitably meant ambiguity, then only the first interpretation by a court would count.

Id. (citation omitted).

hold that the pollution exclusion barred coverage for the underlying injury.[48]

In contrast, other courts have found the language of the pollution exclusion ambiguous for several reasons. First, some courts argue that under a broad interpretation of pollution, which defines pollutants expansively, the pollution exclusion is ambiguous.[49] Reading the exclusion in these broad terms implies that every irritant or contaminant is covered by the pollution exclusion.[50] As the court in *Westchester Fire Insurance Co. v. City of Pittsburg*[51] noted, "there is virtually no substance or chemical in existence that would not irritate or damage some person or property."[52] Accordingly, because virtually anything could be considered an irritant or contaminant, this broad reading of the exclusion renders the terms virtually meaningless and negates any application of the policy.[53]

Using similar reasoning, other courts have also found that the pollution exclusion is ambiguous because it is overbroad. In *American States Insurance Co. v. Koloms*,[54] the Illinois Supreme Court noted, "[a] number of courts, while acknowledging the lack of any facial ambiguity, have nevertheless questioned whether the breadth of the language renders application of the exclusion uncertain, if not absurd."[55] Further, the Indiana Supreme Court stated, "[c]learly, this clause cannot be read literally as it would negate virtually all coverage."[56] These statements suggest that courts have recognized that the pollution exclusion is ambiguous because a literal reading of the term pollution would exclude virtually any claim, which would render the policy meaningless.

Additionally, courts have also considered the drafting history of the pollution exclusion in finding that the pollution exclusion is ambiguous.[57] In *Koloms*, the court examined the history of the pollution exclusion and determined that the insurance industry added the abso-

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48 *See id.* at 440, 442, 448. The court also stated that because the clause was unambiguous there was no duty to consider factors outside of the policy. *Id.* at 444.

49 *See* Am. States Ins. Co. v. Koloms, 687 N.E.2d 72, 79 (Ill. 1997).

50 *See id.*

51 Westchester Fire Ins. Co. v. City of Pittsburg, 768 F. Supp. 1463, 1470 (D. Kan. 1991).

52 *Id.*

53 *See Koloms*, 687 N.E.2d at 79.

54 Am. States Ins. Co. v. Koloms, 687 N.E.2d 72 (Ill. 1997).

55 *Id.* at 79.

56 Am. States Ins. Co. v. Kiger, 662 N.E.2d 945, 948 (Ind. 1996).

57 *See Koloms*, 687 N.E.2d at 79–81; Stempel, *supra* note 24, 27–30 (providing an analysis of the history of the pollution exclusion and explaining why that history does not support a broad interpretation of the exclusion).

lute exclusion to avoid the costly litigation associated with the exception to the qualified exclusion, and to avoid the cost of traditional environmental cleanup.[58] After addressing this history, the court stated, "[w]e 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."[59] Considering this drafting history, as the court in *Koloms* did, further reveals that the plain text of the pollution exclusion is ambiguous.

The highest courts in California, Illinois, and Louisiana all determined that the pollution exclusion was ambiguous. These courts thus overcame this threshold question and developed three separate interpretations of pollution under the absolute pollution exclusion.

B. California: An Ordinary Meaning Definition of Pollution

In *MacKinnon v. Truck Insurance Exchange*,[60] the California Supreme Court interpreted the absolute pollution exclusion in the insurance policy at issue, and held that the term pollution only includes events commonly thought of as pollution.[61] In that case, MacKinnon, the owner of an apartment building, was seeking coverage from his insurance provider for a claim that arose when one of his tenants died.[62] The claim against MacKinnon stated that his resident died from being exposed to chemicals that were applied by a pest control company when the resident requested that MacKinnon exterminate yellow jackets in the building.[63] The insurance company refused to defend or indemnify MacKinnon in the underlying suit because the

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58 *See Koloms*, 687 N.E.2d at 79–81.

59 *Id.* at 81.

60 MacKinnon v. Truck Ins. Exch., 73 P.3d 1205 (Cal. 2003).

61 *Id.* at 1213–18. The court in *MacKinnon* explained the pollution exclusion at issue by quoting various parts of the policy:

> "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.

62 *See id.* at 1207–08.

63 *Id.* at 1207.

absolute pollution exclusion, according to the insurer, barred coverage for the claim.[64]

Before interpreting the term pollution under the absolute pollution exclusion, the court examined the application of the pollution exclusion in other jurisdictions and the history of the development of the absolute pollution exclusion.[65] After this analysis, the court reasoned that "because Truck Insurance's broad interpretation of the pollution exclusion leads to absurd results and ignores the familiar connotations of the words used in the exclusion, we do not believe it is the interpretation that the ordinary layperson would adopt."[66] Following this conclusion, the court provided a narrower definition of pollution by holding that pollution should be interpreted to include events "commonly thought of as pollution, i.e. environmental pollution."[67] Under this definition, the court concluded that spraying for yellow jackets would not commonly be thought of as pollution, and therefore, was not barred by the absolute pollution exclusion.[68]

Although the California Supreme Court attempted to provide a uniform interpretation of the absolute pollution exclusion, lower courts in California have not always utilized this interpretation. One lower California court circumvented the supreme court's interpretation by finding the pollution exclusion clause unambiguous, which required a very different analysis from that used by the supreme court.[69] In this case, *Ortega Rock Quarry v. Golden Eagle Insurance Corp.*,[70] a California appeals court interpreted an absolute pollution exclusion clause.[71] Ortega Rock Quarry requested indemnification and defense from its insurance provider for claims arising out of an Environmental Protection Agency ("EPA") order and lawsuit that arose from the quarry's placement of fill dirt and rocks, along an access road, that

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64 *Id.* at 1207–08.

65 *See id.* at 1208–12.

66 *Id.* at 1216.

67 *Id.*

68 *See id.* at 1218.

69 *See* Ortega Rock Quarry v. Golden Eagle Ins. Corp., 46 Cal. Rptr. 3d 517, 527–32 (Cal. Ct. App. 2006). *But see* Garamendi v. Golden Eagle Ins. Co., 25 Cal. Rptr. 3d 642, 646 (Cal. Ct. App. 2005) (applying *MacKinnon* and holding that "the widespread dissemination of silica dust as an incidental by-product of industrial sandblasting operations most assuredly is what is 'commonly thought of as pollution' and 'environmental pollution'" (quoting *MacKinnon*, 73 P.3d at 1216)).

70 Ortega Rock Quarry v. Golden Eagle Ins. Corp., 46 Cal. Rptr. 3d 517 (Cal. Ct. App. 2006).

71 *See id.* at 519.

later discharged into a creek.[72] The insurance company denied coverage for the two actions under the absolute pollution exclusion because, it argued, dirt and rocks were pollutants.[73] After discussing *MacKinnon* and other cases involving similar pollution events, the court determined that the pollution exclusion was not ambiguous and denied coverage for the claim.[74] In reaching this conclusion, however, the court never explicitly explained why dirt and rocks could be commonly thought of as pollution.[75]

The interpretation of the absolute pollution exclusion in California reveals several important developments in the law. First, the supreme court's decision in *MacKinnon* recognized the problem that the absolute pollution exclusion presents and attempted to provide an interpretation to solve this problem.[76] Specifically, the fact pattern the court addressed, a death resulting from spraying for bees,[77] is a form of untraditional pollution that the court attempted to analyze by crafting a definition of pollution that only covered incidents that could "commonly [be] thought of as pollution."[78] Although the court did not explicitly mention the expectation gap between insureds and insurance providers, the court's proposed interpretation could be seen as an attempt to solve this problem. Because an insured would typically expect that the exclusion would only cover events commonly thought of as pollution, this interpretation of the exclusion could be an effort to align the expectations of insureds and insurance providers in an attempt to solve the problem of excessive litigation.

The lower court's decision in *Ortega Rock Quarry* also reveals the problem that can arise when lower courts do not apply the interpretation suggested by the state supreme court. When the lower court failed to apply the supreme court's interpretation of pollution,[79] the

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72 *See id.* at 519–20.

73 *Id.* at 521. The pollution exclusion at issue in this case defined pollutants as "'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.*

74 *See id.* at 527–32.

75 Although the court never explicitly explained why rocks and dirt were commonly thought of as pollution, the court supported its conclusion with a separate analysis. In particular, the court relied on other decisions, both inside and outside of California, which found that similar runoff pollutants were covered by the pollution exclusion. *See id.* at 526–32. This fact-focused analysis, however, failed to explain why the court was not bound by the state supreme court's finding that the clause only applied to pollutants commonly thought of as pollution.

76 *See* MacKinnon v. Truck Ins. Exch., 73 P.3d 1205, 1208–16 (Cal. 2003).

77 *See id.* at 1207.

78 *See id.* at 1216 (emphasis omitted).

79 *See supra* note 75 and accompanying text.

expectation gap increased because both insureds and insurance providers became uncertain about whether the supreme court's test would be used by lower courts in the future.

C. Illinois: Those Hazards Traditionally Associated with Environmental Pollution

The Illinois Supreme Court also interpreted the term pollution in the absolute pollution exclusion. In *American States Insurance Co. v. Koloms*,[80] the court interpreted the pollution exclusion to include "only those hazards traditionally associated with environmental pollution."[81] The underlying suit in *Koloms* stemmed from injuries that resulted from a faulty furnace emitting carbon monoxide fumes.[82] Following the filing of this suit, the insurance provider sought a declaratory judgment that it did not have a duty to defend or indemnify Koloms because of the pollution exclusion in the CGL policy.[83] The court began its analysis by noting that courts across the country have not reached a consensus on how to interpret the exclusion and have in fact differed on whether carbon monoxide is considered a pollutant.[84] The court then stated:

> [W]e agree with those courts which have restricted the exclusion's otherwise potentially limitless application to only those hazards traditionally associated with environmental pollution. We find support for our decision in the drafting history of the exclusion, which reveals an intent on the part of the insurance industry to so limit the clause.[85]

The court then went on to examine the history of the absolute pollution exclusion and determined that the exclusion was drafted to avoid liability for traditional environmental pollution and the excessive litigation surrounding the earlier qualified exclusion.[86] Relying on this interpretation of the history of the exclusion, the court held, without explicitly outlining why, that the release of carbon monoxide

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80 Am. States Ins. Co. v. Koloms, 687 N.E.2d 72 (Ill. 1997).

81 *Id.* at 79.

82 *See id.* at 74.

83 *See id.* The policy in question contained a pollution exclusion that "defined 'pollutants' as 'any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.'" *Id.*

84 *See id.* at 78.

85 *Id.* at 79.

86 *See id.* at 79–81. For a discussion of the qualified exclusion, see *supra* Part I.

in this case was not traditional environmental pollution barred by the policy.[87]

Lower courts in Illinois have applied the Illinois Supreme Court's interpretation of pollution when interpreting the scope of the absolute pollution exclusion and have attempted to clarify the supreme court's vague definition.[88] In *Connecticut Specialty Insurance Co. v. Loop Paper Recycling, Inc.*,[89] the appellate court interpreted a CGL policy's pollution exclusion.[90] In that case, vandals had set fire to cardboard at a recycling plant, and the resulting toxic smoke allegedly injured several individuals.[91] When the recycling company requested coverage for these claims, the insurance provider sought a declaratory judgment that the pollution exclusion barred coverage.[92]

The lower court determined that toxic smoke was a traditional environmental pollutant, and therefore, coverage was properly barred under the exclusion.[93] Although the court applied *Koloms*, it noted the problems of a vague definition of pollution.[94] Specifically, the court stated, "we are not satisfied, nor is it helpful, to have a 'We-know-it-when-we-see-it' standard for what constitutes traditional environmental pollution."[95] In an attempt to solve this problem, the court further clarified that for an alleged pollutant to constitute environmental pollution, "the pollutant must actually spill beyond the insured's premises and into the environment."[96]

Like the California Supreme Court,[97] the Illinois Supreme Court attempted to provide an interpretation of pollution that would apply to untraditional pollution.[98] Also, like the California court, the Illinois court never explicitly mentioned the expectation gap, but its opinion

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87 *See id.* at 82.

88 *See* Conn. Specialty Ins. Co. v. Loop Paper Recycling, Inc., 824 N.E.2d 1125, 1135–38 (Ill. App. Ct. 2005); Kim v. State Farm Fire & Cas. Co., 728 N.E.2d 530, 535–36 (Ill. App. Ct. 2000) (applying *Koloms* and holding that the absolute pollution exclusion barred coverage for the release of a dry cleaning chemical that leaked into the soil below a dry cleaning store).

89 Conn. Specialty Ins. Co. v. Loop Paper Recycling, Inc., 824 N.E.2d 1125 (Ill. App. Ct. 2005).

90 *Id.* at 1129–38.

91 *See id.* at 1127–28.

92 *See id.* at 1129. Under the policy at issue, pollutants were defined as "'any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.'" *Id.* at 1135.

93 *See id.* at 1138.

94 *See id.*

95 *Id.*

96 *Id.*

97 *See supra* text accompanying notes 76–78.

98 *See* Am. States Ins. Co. v. Koloms, 687 N.E.2d 72, 79–82 (Ill. 1997).

could have been based on this analysis because it is likely that both insureds and insurance providers expected that the pollution exclusion would cover traditional environmental pollution.

The lower court in Illinois attempted to apply the state supreme court's test, but the court struggled because the test is vague.[99] *Loop Paper*'s restatement of the *Koloms* test, however, also fails to provide enough guidance to eliminate the expectation gap. Specifically, this added analysis is better suited to address other parts of the pollution exclusion that examine whether the pollution was dispersed, and not whether the alleged pollutant was a pollutant as defined by the policy.[100] To create a uniform interpretation of the pollution exclusion, which would decrease the expectation gap by leading to predictable decisions, courts need to propose an interpretation of pollution that provides a clear framework for analyzing the alleged pollutant within a fact pattern.

D. Louisiana: A Three-Part Test to Determine What Is Covered by the Absolute Pollution Exclusion

The Louisiana Supreme Court attempted to clarify what pollution is excluded under the absolute pollution exclusion by establishing a three-part test that, in part, defines pollution by referring to numerous characteristics of the alleged pollutant.[101] In *Doerr v. Mobil Oil Corp.*,[102] the court addressed whether the absolute pollution exclusion barred coverage for the release of an alleged pollutant.[103] The story of the pollution in this case began when a refinery released hazardous substances into the Mississippi River.[104] Downstream from this release, the water system in St. Bernard Parish drew in some of the contaminated water and distributed it to locations within the Parish.[105] When plaintiffs filed a suit against the Parish and their insurance provider, the insurance provider filed a motion for summary judgment stating that the total pollution exclusion barred coverage.[106]

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99 *See Loop Paper*, 824 N.E.2d at 1138.

100 *See supra* note 22 and accompanying text.

101 Doerr v. Mobil Oil Corp., 774 So. 2d 119, 135 (La. 2000).

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

103 *See id.* at 122.

104 *See id.*

105 *Id.*

106 *See id.* at 123. The pollution exclusion in question defined pollutants as "solid liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste. Waste includes material to be recycled, reconditioned or reclaimed." *Id.* at 122.

After reviewing these facts, the court addressed whether a previous case, which found the total pollution exclusion unambiguous and applied it broadly, should be upheld.[107] The court turned to the history of the pollution exclusion and its application in Louisiana, and determined that the exclusion was not intended to be interpreted strictly to cover all irritants or contaminants.[108] Instead, the court stated that the pollution exclusion should be read to bar coverage for environmental pollution, and that this turns on three concerns: "(1) Whether the insured is a 'polluter' . . .; (2) Whether the injury-causing substance is a 'pollutant' . . .; and (3) Whether there was a 'discharge, dispersal, seepage, migration, release or escape' of a pollutant by the insured . . . ."[109] In clarifying the second part of the test, whether the substance is a pollutant, the court highlighted several things that should be considered by lower courts:

> [T]he trier of fact should consider the nature of the injury-causing substance, its typical usage, the quantity of the discharge, whether the substance was being used for its intended purpose when the injury took place, whether the substance is one that would be viewed as a pollutant as the term is generally understood, and any other factor the trier of fact deems relevant to that conclusion.[110]

The court then remanded the case to the lower court to apply this three-part analysis to the facts of the case.[111]

Following the supreme court's ruling in *Doerr*, lower courts in Louisiana attempted to apply the broad *Doerr* factors to determine if the terms of the absolute pollution exclusion covered an alleged pollutant.[112] In *State Farm Fire & Casualty Co. v. M.L.T. Construction Co.*,[113] a court of appeals of Louisiana addressed whether a pollution exclusion barred coverage for a claim.[114] The underlying suit in that case involved a former employee's personal injury claim that stemmed from her exposure to mold resulting from flooding through a leaky

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107 *See id.* at 126–29.

108 *See id.* at 135.

109 *Id.*

110 *Id.*

111 *See id.* at 136.

112 *See* State Farm Fire & Cas. Co. v. M.L.T. Constr. Co., 849 So. 2d 762, 769–71 (La. Ct. App. 2003); *see also* Grefer v. Travelers Ins. Co., 919 So. 2d 758, 771 (La. Ct. App. 2005) (applying *Doerr* and determining that the byproduct of cleaning oil pipes was pollution under the second part of the test).

113 State Farm Fire & Cas. Co. v. M.L.T. Constr. Co., 849 So. 2d 762 (La. Ct. App. 2003).

114 *See id.* at 769.

roof.[115] In response to this suit, the insurance provider claimed that the pollution exclusion barred coverage for the employee's personal injury claim.[116]

The court in *M.L.T. Construction* applied the *Doerr* framework to determine whether the absolute pollution exclusion barred coverage.[117] Applying the second part of the *Doerr* test, the court determined that the rainwater and mold that caused the injury were not pollutants.[118] In making this determination, the court considered the additional factors set forth in *Doerr* and noted "rainwater is not a substance that is usually viewed as a pollutant."[119] Finally, after applying the other two parts of the *Doerr* test, the court determined that the pollution exclusion did not bar coverage in this case.[120]

Like the California[121] and Illinois[122] Supreme Courts, the Louisiana Supreme Court created a rule focused on a broad interpretation of pollution to determine whether the absolute pollution exclusion barred coverage. The Louisiana Supreme Court, however, came closer to creating a uniform interpretation of pollution by providing more specific guidance to lower courts on whether a substance should be considered a pollutant. The decision in *M.L.T. Construction*, relying on *Doerr*,[123] highlights this conclusion. Nevertheless, although the *Doerr* test provides a better framework for analyzing the meaning of pollution, the court's long list of nonexclusive factors, including the nature of the substance, its usage, and its quantity,[124] can still leave lower courts confused about what weight to give each factor and whether other factors introduced by the parties should be considered. Because of this confusion, both insureds and insurance providers may not feel confident that they can accurately predict the result of litigation and the expectation gap will persist.

Although the vague interpretations of the California, Illinois, and Louisiana Supreme Courts provide some guidance to lower courts

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115 *See id.* at 765–68.

116 *Id.* at 769–70. The pollution exclusion in this case defined a pollutant as "'any solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste. Waste includes material to be recycled, reconditioned or reclaimed.'" *Id.* at 769.

117 *See id.* at 770–71.

118 *See id.*

119 *Id.* at 770.

120 *See id.* at 770–71.

121 *See supra* note 69.

122 *See supra* text accompanying notes 88–95.

123 *M.L.T. Constr.*, 849 So. 2d at 770.

124 *See* Doerr v. Mobil Oil Corp., 774 So. 2d 119, 135 (La. 2000).

struggling with the pollution exclusion by limiting the scope of the exclusion, the interpretations do not provide a framework clear enough to eliminate the expectation gap. The result of this vague analysis is that even when courts attempt to confront the expectation gap problem, the interpretations that the courts propose fail to provide enough guidance to insureds and insurance providers. Because these parties may still be uncertain about what pollution is covered by the exclusion, litigation will continue over the meaning of the term pollution. Resolving this problem thus requires courts to implement and consistently apply a specific interpretation of pollution that insureds and insurance providers can understand and use when making decisions without resorting to litigation.

III. Consistency and Clarity: A Three-Factored Approach to Interpretation

Because of the lack of uniformity and clarity that has resulted from state court analysis of the pollution exclusion, a uniform interpretation of pollution is necessary to reduce the expectation gap. Varying judicial interpretations of the pollution exclusion have exacerbated the expectation gap and caused excessive litigation. To prevent this problem, courts should adopt a three-factor analysis that will provide a clearer definition of what constitutes a pollutant under the absolute pollution exclusion.

A. Problems Arising from the Disparate Interpretations of the Absolute Pollution Exclusion

The current interpretation of the absolute pollution exclusion has led to several important problems. As discussed briefly above, the current interpretation of the pollution exclusion has led to an expectation gap that has resulted in excessive costly litigation over the meaning of the term pollution in the absolute pollution exclusion. Beyond that, the current interpretation may also lead to forum shopping.

The current expectation gap has resulted in costly litigation. One study in the early 1990s found that a substantial majority of the money being paid for environmental cleanup by insurance companies was going towards transaction costs and legal fees.[125] As one commentator

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125 *Cf. Insurers Spending Hundreds of Millions, But Most Goes for Legal Fees, Not Cleanups*, 23 Env't Rep. (BNA) 9 (May 1, 1992) ("Insurance companies are paying out nearly $500 million annually for superfund-related liabilities, but an average of 88 percent goes for legal fees and other transaction costs that are unrelated to actual cleanups, according to a study released April 24 by the RAND Institute for Civil Justice."). Arguably, the money saved by decreasing

discussed, "[c]ontinuous relitigation of coverage issues is not in the interest of judicial efficiency or economy."[126] By decreasing the expectation gap between insureds and insurers, litigation will decrease, saving the insurance industry a substantial amount of money each year. This goal can be accomplished by providing both insureds and insurance providers with clear guidance on how courts will analyze pollution exclusion cases so that litigation is unnecessary in a majority of disputes.

Forum shopping is also a problem that has resulted from the current interpretations of the absolute pollution exclusion. One commentator highlighted the problem of forum shopping when she stated, "[w]ith a split among federal and state courts, either the insurer or insured would seek the most favorable forum."[127] These concerns about forum shopping are very real considering the disparate interpretations that various courts give to the pollution exclusion and the different findings of ambiguity.[128] This problem can be solved by uniformly interpreting the exclusion, which would decrease the expectation gap and incentives for forum shopping.

B. A Preliminary Note About Finding Ambiguity

To apply the proposed three-factor analysis of the pollution exclusion, a state court will first need to find that the definition of pollution in the absolute pollution exclusion is ambiguous.[129] To demonstrate ambiguity, courts need look no further than the numerous contradictory decisions that have found the exclusion both appli-

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the amount of litigation may even lead to a cleaner environment. *Cf.* Hamel, *supra* note 19, at 1122 (arguing that "a pro-coverage interpretation of the pollution exclusion clause is good environmental policy because it provides more resources for the daunting task ahead of cleanup" and because this "interpretation will also serve to control transaction costs by redirecting insurers' resources from disputing environmental claims to indemnifying cleanup").

126 Gooley, *supra* note 12, at 180. Although this article was discussing a consistent interpretation of the sudden and accidental exception in the qualified pollution exclusion, the same analysis applies to the absolute pollution exclusion. *See supra* note 12.

127 Gooley, *supra* note 12, at 180. As noted above, this article discusses the previous qualified exclusion, but the same analysis would apply to the absolute pollution exclusion. *See supra* note 126.

128 *See* Jim L. Julian & Charles L. Schlumberger, Essay, *Insurance Coverage for Environmental Clean-Up Costs Under Comprehensive General Liability Policies*, 19 U. ARK. LITTLE ROCK L.J. 57, 69 (1996) (suggesting that litigators should consider the court's interpretation of the pollution exclusion when choosing a forum).

129 *See supra* Part II.A; *see also* 11 LORD, *supra* note 34, § 30:4 ("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.").

cable and inapplicable to the same alleged pollutant.[130] For example, courts have held that raw sewage, construction debris, and radioactive material have both fallen under the definition of pollution and outside that definition.[131] Based on this analysis, courts should find the meaning of pollution in the pollution exclusion ambiguous and apply the proposed interpretation of pollution.

C. Application of Factors to Determine if an "Alleged Pollutant" Is Pollution.

After finding that the pollution exclusion is ambiguous, courts should apply a three-factor analysis to determine if an alleged pollutant is, in fact, pollution, which would then trigger the application of the CGL's pollution exclusion. The three factors are (1) whether the alleged pollutant is mainly natural or chemical in origin, (2) whether the alleged pollutant is typically hazardous in the way it caused the harm, and (3) whether the insured is typically a polluter. As the examples in the Section below demonstrate, courts should make sure to analyze all three of these factors when determining whether an alleged pollutant is a pollutant under the absolute pollution exclusion.

Courts should first consider whether the alleged pollutant is mainly natural or chemical in origin. If the alleged pollutant is natural, this suggests that it should not be covered by the exclusion. On the contrary, if the alleged pollutant is primarily composed of a chemical compound, this would then suggest that the pollutant be considered a pollutant under the policy. Several courts have discussed this factor.[132] One court addressed the distinction between natural and

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130 A court has rejected this idea by saying that "[i]f the existence of differing court interpretations inevitably meant ambiguity, then only the first interpretation by a court would count." Peace v. Nw. Nat'l Ins. Co., 596 N.W.2d 429, 442 (Wis. 1999). However, this argument does not withstand scrutiny with regard to the absolute pollution exclusion because of the extent of differing judicial interpretations of the term pollution. In this case, the argument does not rely on only two different interpretations, but instead, it relies on numerous interpretations across and within different jurisdictions.

131 *See* Catalano, *supra* note 15, at 195.

132 *See* Hicks v. Am. Res. Ins. Co., 544 So. 2d 952, 954 (Ala. 1989); Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co., 347 So. 2d 95, 99 (Ala. 1977). In *Molton, Allen & Williams*, the Alabama Supreme Court, limiting its decision to the specific facts and policy clause at issue, held that mud and sand were not covered by the pollution exclusion. *See Molton, Allen & Williams, Inc.*, 347 So. 2d at 100. The court in that case stated:

> It is believed that the intent of the "pollution exclusion" clause was to eliminate coverage for damages arising out of pollution or contamination by industry-related activities. The use of specific industry-related irritants, contaminants and pollutants seem to indicate this was the reason for the exclusion. We judicially know that during the last decade, much emphasis has been placed upon protecting the envi-

chemical alleged pollutants and found that the exclusion is ambiguous with regard to natural pollutants.[133] Although that court used this factor in determining whether the exclusion was ambiguous, courts should similarly consider the make-up of a substance when determining if an alleged pollutant is a pollutant covered by the absolute exclusion.

Second, courts should determine whether the alleged pollutant is typically hazardous in the way it caused the harm. Specifically, courts should look at whether the harm that resulted from the alleged pollutant was the type of harm that is typically associated with the pollutant in question. If the alleged pollutant caused a harm that is typically not associated with the reasons that the pollutant is classified as hazardous, this factor should count against the finding of a pollutant covered by the absolute pollution exclusion.[134] This idea was suggested in an oral argument before the Florida Supreme Court when the court asked the insurers in the case a hypothetical question about the application of the absolute pollution exclusion to a slip-and-fall case involving ammonium.[135] The attorney for one of the insurer's responded that the "'toxic nature' of the injury should be the controlling factor in determining whether the pollution exclusion applied."[136] Using this logic, the exclusion would not apply to the slip-and-fall case because there was no toxic nature to the typical slip-and-fall injury.[137] Although this factor should not control the overall determination of whether an alleged pollutant is a pollutant under the absolute pollu-

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> ronment. The pollution exclusion was no doubt designed to decrease the risk where an insured was putting smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into the environment.

Id. at 99.

133 *See Hicks*, 544 So. 2d at 954. The Alabama Supreme Court highlighted the distinction between natural pollutants and chemical-like pollutants and determined that the chemical-like pollutants were covered by the pollution exclusion. *Id.* Specifically, the court stated that "while this Court found the exclusionary clause ambiguous in *Molton, Allen, & Williams*, as regarding the natural material (i.e., sand) that damaged the plaintiffs' property, in the present case, the clause is not ambiguous as to the pollutants that contaminated the Hickses' property (i.e., acids, alkalis, toxic chemicals, etc.)." *Id.*

134 A similar factor was discussed in *Pipefitters Welfare Education Fund*, where the court analyzed the reasoning of other cases that suggested that the pollution exclusion should not be applied when the underlying injury resulted "from everyday activities gone slightly, but not surprisingly, awry" because "[a] reasonable policyholder . . . would not characterize such routine incidents as pollution." Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1044 (7th Cir. 1992).

135 *See* Stempel, *supra* note 26, at 490–91.

136 *Id.* at 491.

137 *See id.*

tion exclusion, as the examples below demonstrate, it should be one element courts consider.

Third, in determining whether an alleged pollutant is excluded by the absolute pollution exclusion, courts should consider whether the insured is typically a polluter.[138] This factor does not look at the actual alleged pollutant; instead, it looks to the insured's status in defining whether the insured actually released a pollutant in a specific case. If an insured normally releases certain pollutants in the course of its business, this factor would suggest that those alleged pollutants are actually pollution under the absolute pollution exclusion.

This third factor is similar to one part of the test that the Louisiana Supreme Court announced in *Doerr* because it considers the characteristics of the alleged polluter.[139] In *Doerr*, however, the court considered whether the insured was a polluter as a separate factor unrelated to the analysis of whether an event was pollution as defined by the exclusion.[140] In contrast, this Note recommends that courts consider whether the insured was a polluter to help determine whether an alleged pollutant is a pollutant under the exclusion. Although this part of the *Doerr* test is analytically distinct from this Note's third proposed factor, some of the considerations that the *Doerr* court suggested in explaining its test are helpful to provide courts with more guidance on applying this proposed factor. Specifically, the *Doerr* court noted that "the determination of whether an insured is a 'polluter' . . . should encompass consideration of a wide variety of factors. . . . [T]he trier of fact should consider [1] the nature of the insured's business, [and] [2] whether that type of business presents a risk of pollution . . . ."[141] These two considerations help reveal whether the insured is typically a polluter, which clarifies

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138 It is important to note that this factor is distinct from a theory that looks at whether the alleged polluter was an "active polluter." In describing the "active polluter" theory, it has been stated that "[c]overage should be excluded only if the insured caused the pollution; pollution generated by others for which the insured may be held liable is not within the purview of the exclusion." Kirk A. Pasich, *The Breadth of Insurance Coverage for Environmental Claims*, 52 Ohio St. L.J. 1131, 1157–59 (1991). Although this argument is similar to whether the insured is a polluter, it should not be used in determining whether the definition of pollution is met. Instead, this theory should be relied on when the court considers another aspect of the absolute pollution exclusion: whether the exposure to the pollution arose "out of the actual, alleged, or threatened discharge, dispersal, release, or escape of the pollutant." Porterfield v. Audubon Indem. Co., 856 So. 2d 789, 801 (Ala. 2002).

139 *See* Doerr v. Mobil Oil Corp., 774 So. 2d 119, 135 (La. 2000).

140 *See id.* (introducing a test that considers, among other things, whether the insured is a polluter and whether the substance is a pollutant); *see also supra* Part II.D.

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

whether the alleged pollutant is a pollutant covered by the absolute pollution exclusion.

Courts determining whether the pollution exclusion applies to a particular alleged pollutant should apply these three factors—and only these factors. By following these steps, courts can create a more uniform interpretation of pollution and decrease the expectation gap between insureds and insurance providers. Further, this proposed three-factor analysis will produce better results than the alternatives.

D. Proposed Application of the Three-Factor Analysis

Additional guidance is necessary to ensure that this Note's proposed three-factor analysis is uniformly applied. As a preliminary matter, it is important to note that under this proposed test there will be some close cases and some room for judicial discretion. However, following these general rules will ensure that lower courts, insureds, and insurance providers will have enough guidance to accurately predict whether an alleged pollutant is covered by the absolute pollution exclusion.

The first consideration that courts should recognize is that this three-factor analysis exists to ensure that the expectations of the insureds and insurance providers are aligned. Because of this underlying goal, courts should consider the perspective of both the insured and insurance provider while applying the factors. By doing this, courts will be able to decrease uncertainty and its associated problems.

With this goal in mind, and as the examples below demonstrate, courts should analyze each factor and consider the extent that each factor weighs in favor of or against a finding of pollution. As a general matter, if two factors weigh in favor of a finding of pollution and one factor weighs against a finding, there should be a presumption that the alleged pollutant is pollution under the exclusion. However, if the one factor against a finding of pollution strongly suggests the alleged pollutant is not pollution, while the two other factors are ambivalent, the court may find that the event was not pollution. This is especially true when the alleged polluter is typically a polluter and the alleged pollutant is mainly chemical in nature, but the injury resulted in a way that is not associated with why the substance is considered hazardous. In these cases, the way that the injury was caused might control the analysis because it strongly supports a finding that there was not pollution, even though the insured might typically be consid-

ered a polluter and the injury causing substance was chemical in nature.

Finally, courts should remember that if the factors suggest that the pollution exclusion applies to an alleged pollutant, courts will still need to consider the other two parts of the pollution exclusion, namely whether there was a discharge from a certain location.[142] Courts may also be able to apply the underlying goal of these factors, which is aligning expectations, to the other parts of the pollution exclusion to further ensure that the expectation gap is decreased.

E. Applying the Factors to Existing Facts

Applying this Note's proposed three-factor analysis to three previously discussed fact patterns reveals how the test can easily function and reduce the expectation gap.

1. Case 1: Ortega Rock Quarry v. Golden Eagle Insurance Corp.

In *Ortega Rock Quarry*, the alleged pollution resulted when a rock quarry released rocks and dirt into a creek to maintain an access road that was washed out when the creek flooded.[143] As a preliminary matter, the court first must find that the pollution exclusion is ambiguous so that the court can apply the proposed three-factor analysis of pollution.

Following the finding of ambiguity, the court would apply the proposed three-factor analysis. First, the court would consider the composition of the alleged pollution to determine whether it was natural or chemical in origin. In this case, the first factor is easily determined because rocks and dirt are natural materials. In fact, this is an abnormally clear case because the rocks and dirt at issue did not contain any potential chemical material. Because the alleged pollutant consists of natural materials, this factor suggests that the alleged pollutant falls outside the pollution exclusion's definition of pollution.

Next, the court would apply the second factor of the test: whether the alleged pollutant is typically hazardous in the way it caused the harm. In this case, the rocks and dirt were hazardous in the way they

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142 Specifically, the other two aspects of the pollution exclusion are: "that exposure [to the pollutant] must have arisen out of the actual, alleged, or threatened discharge, dispersal, release, or escape of the pollutant; and that discharge, dispersal, release, or escape must have occurred at or from certain locations or have constituted 'waste.'" Porterfield v. Audubon Indem. Co., 856 So. 2d 789, 801 (Ala. 2002); *see also supra* notes 22–23 and accompanying text.

143 *See* Ortega Rock Quarry v. Golden Eagle Ins. Corp., 46 Cal. Rptr. 3d 517, 519–20 (Cal. Ct. App. 2006); *see also supra* Part II.B.

caused the harm. Here, the fact that rocks filled the creek is the harm, and this is the exact harm that insureds and insurance providers would have contemplated when deciding whether rocks could be hazardous pollution. This is thus unlike a case where a toxic chemical was hazardous because of the harm it could cause if ingested, but instead caused harm because it was wet and someone slipped on it. In this case, the parties likely understood that the reason that rocks can pollute is because the rocks could interfere with a waterway, and the rocks were thus actually hazardous in this case for that reason—because they filled the creek. This factor, therefore, would suggest a finding of pollution under the pollution exclusion.

Finally, the court would apply the third factor: whether the insured was a polluter. In this case, the insured operated a rock quarry. A rock quarry is a type of business that risks polluting through the use of chemicals in typical mining operations or inadequately disposing of waste material, which could include excess rocks and dirt. Typically, one would expect that a rock quarry polluted by releasing various chemicals used in the mining process, and not by releasing rocks and dirt that were used to build up a washed out road. Therefore, because a rock quarry does not typically pollute by repairing an access road with rocks and fill, the quarry in this case would not be considered a polluter with respect to this specific pollution. Although this factor would weigh toward defining various chemical discharges from the quarry as pollution, it does not similarly suggest this conclusion when the pollutants were rocks and dirt used to reinforce a road. Under the facts before the court, this factor counts against applying the pollution exclusion.

In this case, considering the expectations of the parties, two factors suggest that the rocks and dirt were not pollutants and one factor weighs in favor of the rocks being pollutants. Specifically, the first factor strongly weighs against a finding of pollution because the rocks and dirt did not contain any potential chemical material. The third factor also weighs against a finding of pollution, but is less conclusive because a rock quarry may be commonly thought of as a polluter in numerous other circumstances. In contrast, the second factor strongly suggests that there was pollution because the rocks and dirt caused harm in the way that they were hazardous. Because two factors weigh in favor of finding the alleged pollutant to not be pollution there would be a presumption that the rocks and dirt in this case were not pollutants covered by the pollution exclusion. Considering the expectations of the insured and insurance provider supports this presump-

tion and suggests that the court should find that the rocks and dirt were not pollution under the exclusion. In this case, both parties would likely not expect that the exclusion to apply to something that was completely natural even though the harm caused was typical. Because of this analysis, the court would find that the rocks and dirt were not pollution as defined by the pollution exclusion.

2. *Case 2:* Connecticut Specialty Insurance Co. v. Loop Paper Recycling, Inc.

Analyzing the facts of *Loop Paper* also reveals how this Note's proposed test would operate. *Loop Paper* involved vandals setting fire to cardboard at a recycling plant, which caused toxic smoke that allegedly injured several individuals.[144] Again, a court analyzing these facts must first determine that the term pollution is ambiguous so that the court can apply the three-factor analysis. Next, applying the first factor, the court would determine whether the composition of the alleged pollution was mainly natural or chemical in origin. In this case, the toxic smoke can be considered mainly a chemical compound because it is made up of chemical toxins released from the cardboard. Although smoke is generally natural, in this case the smoke at issue was composed of concentrated chemical toxins, which took it from a natural compound to one that is chemical in nature. Because the smoke was mainly chemical, this factor suggests that the alleged pollutant is actually pollution as defined by the absolute pollution exclusion.

The court would next look to the second factor: whether the alleged pollutant is hazardous in the way it caused the harm. Here, the smoke was hazardous because it was toxic and could be inhaled, and it caused harm from being inhaled. This factor's application is straightforward in this case because the toxic smoke caused harm in the traditional way that insureds and insurance providers would expect toxic smoke to cause harm—through inhalation. After this analysis, the court would conclude that this factor weighs strongly in favor of a finding of pollution.

Finally, the court would look to the third factor: whether the insured was a polluter. Here, the insured was a recycling facility that could have been a polluter. However, the pollution in this case occurred as a result of vandals burning cardboard, which falls outside

144 Conn. Specialty Ins. Co. v. Loop Paper Recycling, Inc., 824 N.E.2d 1125, 1127–28 (Ill. App. Ct. 2005); *see also supra* Part II.C.

the scope of why the company would normally be considered a polluter and suggests that the company was not a polluter. In fact, because the pollution resulted in a way that was so far removed from the way that the insured and insurer would typically expect pollution to be caused by a recycling facility, this factor weighs strongly against a finding of pollution.

Based on this three-factor analysis, the court would decide that the toxic smoke was pollution as defined by the pollution exclusion. Here, factors one and two weigh in favor of a finding of pollution. In contrast, the third factor weighs strongly against a finding of pollution. Again, because two factors suggest that the toxic smoke is pollution, the court should presume that the smoke is in fact pollution under the exclusion. This presumption is supported by the fact that both insureds and insurance providers would likely expect toxic smoke to be pollution under the pollution exclusion. After this analysis, the court should conclude that the smoke was pollution and falls under the absolute pollution exclusion's definition of pollution.

It is important to note that after the court reaches this result, the court would need to determine whether the remaining two elements of the pollution exclusion are met.[145] These two elements consider whether the pollutant arose from "the actual, alleged, or threatened discharge, dispersal, release, or escape of the pollutant; and [whether the] discharge, dispersal, release, or escape . . . occurred at or from certain locations or have constituted 'waste.'"[146] If either of these elements were not satisfied, the court would not apply the pollution exclusion to bar coverage of this pollutant.

3. Case 3: The Drano Hypothetical

Finally, this proposed three-factor analysis would resolve the Drano hypothetical. In the Drano hypothetical, someone was injured by slipping on Drano, which had spilled on the floor.[147] Again, the court's first step would be to find the term pollution ambiguous. The court would then apply the first factor to determine if the alleged pollutant was mainly natural or chemical in origin. Here, the composition of the pollution is mainly chemical, so this factor would strongly weigh toward a finding that there was pollution.

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145 *See supra* notes 22–23, 142 and accompanying text.

146 *Porterfield*, 856 So. 2d at 801.

147 Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1043 (7th Cir. 1992); *see also supra* Introduction.

Next, the court would consider the second factor: whether the alleged pollutant is typically hazardous in the way it caused the harm. In this case, the pollutant was not hazardous in the way that it caused harm. Drano is typically hazardous because of the dangers associated with being exposed to a harsh chemical, not simply because it is wet and slippery. This factor would therefore strongly weigh toward a finding that the Drano was not the type of pollution excluded under the absolute pollution exclusion.

The court would then apply the third factor: whether the insured is a polluter. Here, the hypothetical insured is a store, which is typically not considered a polluter because of spills within the store. Some stores may be considered polluters, but because the pollution at issue was a spill within the store and not some other pollution event, neither the insured nor insurer would consider the store a polluter. This factor would also suggest a finding that the Drano was not pollution.

Based on this three-factor analysis, the court would determine that the Drano was not a pollutant as defined by the absolute pollution exclusion because the second and third factors weigh against a finding of pollution. Although the first factor strongly weighs in favor of a finding of pollution, this should not outweigh the presumption that results when two factors suggest the opposite conclusion. Again, this presumption is supported by the expectations of the parties who would likely not expect this claim to be barred by the absolute pollution exclusion. The parties in this case would likely not have imagined that a store would be a polluter in this way, or that the chemical Drano would cause a slip-and-fall injury, and therefore neither party would have expected this event to be covered by the exclusion. By considering these expectations while analyzing the factors, the court would find that the pollution exclusion did not apply in this case.

IV. A Uniform Approach Will Minimize the Expectation Gap and Better Address the Problem than Other Proposals

This proposed three-factor analysis of pollution will decrease the expectation gap because it will provide more guidance for insureds and insurance companies. The first factor considers whether the alleged pollutant is mainly natural or chemical in origin. Because of this factor, insureds that deal primarily with natural products are less likely to be subject to the pollution exclusion. This will help to eliminate the expectation gap because these same insureds likely do not reasonably expect that their activities to be considered pollution. The

second factor considers whether the alleged pollutant is typically hazardous in the way it caused the harm. Under this factor, an insured will not be surprised by a denial of coverage for a seemingly covered accident that involved some potential pollutant. Finally, a similar result is achieved through the third factor, which considers whether the insured is a polluter. This factor goes to the expectations of the insured and the insurer when the policy was sold because it demonstrates what the parties likely intended pollution to mean when the policy was created.[148] These three factors therefore work together to decrease the expectation gap that exists between insureds and insurance providers.

This Note's proposed solution is also preferable to other alternatives. The three main alternatives to this proposed analysis—adopting similar or more factors, finding the exclusion unambiguous, and looking at what is traditionally considered pollution—would not effectively decrease the expectation gap.

A. Adopting Similar Factors or More Factors

This Note's proposed three-factor analysis is better than an analysis that considers more or different factors. In *Doerr*, the Louisiana Supreme Court provided an extensive, nonexclusive list of factors that lower courts could consider when determining whether an alleged pollutant was pollution as defined by the exclusion.[149] That list could include the three specific factors proposed in this Note in addition to other factors and considerations that lower courts would find useful. Although this interpretation could presumably provide an extensive analysis of whether each alleged pollutant was a pollutant, it would not successfully decrease the expectation gap for two reasons.

First, using numerous factors can create uncertainty because insureds and insurance providers may not be clear about which factors the court will consider and how much weight the court will put on

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148 The Louisiana Supreme Court discussed this idea. *See* Doerr v. Mobil Oil Corp., 774 So. 2d 119, 127 (La. 2000). The court noted that "[i]mportantly, there is no history in the development of this exclusion to suggest that it was ever intended to apply to anyone other than an active polluter of the environment." *Id.*

149 *See id.* at 135. The court suggested that:

> [T]he trier of fact should consider the nature of the injury-causing substance, its typical usage, the quantity of the discharge, whether the substance was being used for its intended purpose when the injury took place, whether the substance is one that would be viewed as a pollutant as the term is generally understood, and any other factor the trier of fact deems relevant to that conclusion.

Id.

each factor. By limiting the number of factors, and by eliminating the ability of lower courts to add more factors, this uncertainty can be minimized and litigation will become more predictable. The proposed three-factor analysis is therefore superior to the more intensive analysis proposed by the *Doerr* court.

Second, this Note's proposed three factors focus on elements that both insureds and insurers would consider when determining if something would be characterized as pollution. Although other factors may be able to capture this idea, these three factors provide enough guidance without the added uncertainty that could result from additional factors. Furthermore, lower courts, insureds, and insurance providers can apply the proposed three factors without performing an extensive investigation into the specifics of the alleged pollutant. Because of this, insureds and insurers can quickly and accurately predict the result of the analysis and avoid unnecessary, costly litigation.

Because insureds and insurance providers can analyze these three factors before litigation occurs, and because lower courts will explicitly consider the expectation of the insureds and insurance providers when applying the three factors, this proposed solution provides a clear framework that will decrease the expectation gap.

B. Finding the Pollution Exclusion Unambiguous and Applying It Broadly

As another solution, some courts have decided that the language of the pollution exclusion is not ambiguous and have applied the exclusion broadly.[150] Although it is arguable that accepting this view and uniformly adopting a finding that the exclusion is unambiguous would likely lessen the expectation gap, this alternative does not have the other benefits of this Note's proposed solution.[151]

In particular, this interpretation of the pollution exclusion is inconsistent with the history and purpose of the absolute exclusion.[152]

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150 *See, e.g.*, Bituminous Cas. Corp. v. Sand Livestock Sys., Inc., 728 N.W.2d 216, 222 (Iowa 2007); Quadrant Corp. v. Am. States Ins. Co., 110 P.3d 733, 743 (Wash. 2005); *supra* Part II.A.

151 First, this Note's proposed solution is superior to this alternative because the pollution exclusion should be found ambiguous for various reasons. *See supra* Part II.A, III.B. Moreover, it is also arguable that this alternative would not close the expectation gap as successfully as this Note's proposed solution because it is more likely that insureds would expect coverage for various nontraditional pollutants and may still attempt to bring lawsuits when that coverage is denied, even with the clear change in the law.

152 Although advocates of finding the policy unambiguous might argue, like the court in *Peace* did, that the history should not be considered because the language of the policy is unambiguous, *see* Peace v. Nw. Nat'l Ins. Co., 596 N.W.2d 429, 431, 442, (Wis. 1999); *see also supra*

Although the history of the pollution exclusion is not completely undisputed, in general, policyholders have the better argument that the exclusion was only intended to cover traditional environmental pollution.[153] As the court in *MacKinnon* stated, "[e]ven commentators who represent the insurance industry recognize that the broadening of the pollution exclusion was intended primarily to exclude traditional environmental pollution rather than all injuries from toxic substances."[154]

C. Defining Pollution as Traditional Environmental Pollution

Courts have also adopted a definition of pollution that considers whether the alleged pollutant is commonly thought of as pollution or is traditional environmental pollution.[155] Although this test would be in line with the history of the pollution exclusion,[156] it would not sufficiently decrease the expectation gap for several reasons.

This interpretation is too vague to clarify the meaning of pollution under the absolute exclusion. Interpretations that look to whether an alleged pollutant could commonly be thought of as pollution,[157] or is considered traditional environmental pollution,[158] do not

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note 47, this argument fails to respond to the fact that the policy is also ambiguous because it is overly broad, *see supra* text accompanying notes 55–56.

153 *See* Stempel, *supra* note 24, at 27–32 (providing an extensive analysis of the purpose and background of the pollution exclusion and reaching the conclusion that the policyholders are more correct).

154 MacKinnon v. Truck Ins. Exch., 73 P.3d 1205, 1210 (Cal. 2003). The court in *MacKinnon* also noted:

> [T]here appears to be little dispute that the pollution exclusion was adopted to address the enormous potential liability resulting from antipollution laws. . . . On the other hand, neither Truck Insurance nor the considerable number of amicus curiae from the insurance industry writing on its behalf point to any evidence that the exclusion was directed at ordinary acts of negligence involving harmful substances.

Id. at 1216 (internal citations omitted); *see also* Motorists Mut. Ins. Co. v. RSJ, Inc., 926 S.W.2d 679, 681 (Ky. Ct. App. 1996) ("The drafters' utilization of environmental law terms of art ('discharge,' 'dispersal,' 'seepage,' 'migration,' 'release,' or 'escape' of pollutants) reflects the exclusion's historical objective—avoidance of liability for environmental catastrophes related to intentional industrial pollution.").

155 *See MacKinnon*, 73 P.3d at 1216; *supra* Part II.B. A similar proposed test considers if the alleged pollutants are "widely . . . understood to be dangerous." *See id.* at 1217–18 (emphasis, quotations, and citation omitted) (noting that an amicus curiae proposed this test, which was similar to the one used in *Peace*, 596 N.W.2d at 443). This test, however, suffers from the same problems that will be discussed in association with the commonly-thought-of-as-pollution test and does not need separate discussion. The only difference with this test is that it may suffer from the additional problem of not being consistent with the history of the pollution exclusion clause. *See supra* notes 152–53 and accompanying text.

156 *MacKinnon*, 73 P.3d at 1210.

157 *See id.* at 1217.

provide sufficient guidance to courts analyzing the pollution exclusion clause. Specifically, the Drano hypothetical introduced in *Pipefitters* highlights the problem of vagueness.[159] Under this proposed test, courts could still find that an injury that resulted from slipping on Drano was covered by the pollution exclusion because Drano may be traditionally or commonly thought of as environmental pollution.[160] Without additional guidance, an alleged pollutant that is traditionally considered a pollutant could be considered pollution covered by the pollution exclusion even if the harm resulted from an unexpected use of that pollutant. Further, under this vague test, litigation is likely to continue, which will create more uncertainty and further the problem of the expectation gap. In contrast to the uncertainty caused by this vague interpretation of pollution, the three-factor analysis that this Note proposes provides courts, insureds, and insurance providers, with clear guidance as to when something will be considered a pollutant.

This Note's proposed solution will thus be successful because it provides a detailed framework that can be used by lower courts to create a uniform interpretation of the pollution exclusion. Further, insureds and insurers can apply the three-factor analysis to predict the result of litigation and decrease the uncertainty associated with the current interpretation of the pollution exclusion.

Conclusion

Uncertainty surrounding the definition of pollution in the absolute pollution exclusion has led to an expectation gap between insurance providers and insureds. Although state courts across the country have attempted to reinterpret the exclusion to provide more guidance for insureds and insurers, these attempts have been largely unsuccessful and a significant amount of litigation continues over the meaning of this exclusion. This Note proposes a solution that would decrease some of the uncertainty associated with the pollution exclusion. This solution is better than the alternatives because it provides a more uni-

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158 *See* Am. States Ins. Co. v. Koloms, 687 N.E.2d 72, 82 (Ill. 1997).

159 *See* Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1043 (7th Cir. 1992) (highlighting the problems associated with the pollution exclusion by suggesting a hypothetical case where an injury resulted from someone slipping on spilled Drano).

160 It is unclear whether the result might be different under a test that looks for traditional environmental pollution. In this hypothetical, the Drano may not be a traditional environmental pollutant because of the way it caused the harm. This uncertainty, however, further reveals that the test is too vague to close the expectation gap because litigation will likely arise to determine exactly what is traditional environmental pollution.

form way of interpreting the term pollution in an attempt to limit the expectation gap.

After applying this Note's proposed analysis, the court, nonetheless, also needs to determine if the other factors of the exclusion are met. Because of this additional analysis, there may still be litigation about whether a pollutant was dispersed, but this litigation will be limited compared to litigation surrounding whether the alleged pollutant was actually pollution as defined under the policy.

Further, although this solution will provide relief under the absolute pollution exclusion currently being used in CGL policies, insurers can eliminate these problems in the future by providing clear language in insurance policies explicitly limiting the types of pollution or nonpollution that the insurer wants to exclude. However, even if insurance providers act to draft more specific policy language, this Note's proposed solution is necessary to solve the disputes that will continue to arise under the current version of the exclusion.