

Spring 2014

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Kelly Gorman

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### Recommended Citation

Kelly Gorman, *Missouri Court Limits the Reach of the Pollution Exclusion*, 79 MO. L. REV. (2013)

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## NOTE

# Missouri Court Limits the Reach of the Pollution Exclusion

*American National Property & Casualty Co. v. Wyatt*,  
400 S.W.3d 417 (Mo. App. W.D. 2013)

KELLY GORMAN\*

### I. INTRODUCTION

Insurance policies typically outline the types of liability that an insurance provider will cover and those that the insurer will not. One type of liability that has been highly litigated in recent decades has been liability for pollution related injuries or losses.<sup>1</sup> Today, the provisions that contemplate this type of liability are called “pollution exclusion clauses.”<sup>2</sup>

Pollution exclusion language, at its most basic level, sets out to limit an insurer’s liability for traditional environmental damage.<sup>3</sup> Since its conception, however, insurers have argued that the exclusionary language extends to preclude liability for non-traditional environmental pollution damage.<sup>4</sup> Unfortunately, courts have not ruled on this issue with uniformity.<sup>5</sup> In fact, one court has posited that “[r]arely has any issue spawned as many, and as variant in rationales and results, court decisions as has the pollution-exclusion

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\* B.S., Truman State University, 2008; J.D. Candidate, University of Missouri School of Law, 2015; Associate Editor, *Missouri Law Review*, 2014-2015. I would like to thank the members of the *Missouri Law Review* for their many rounds of helpful edits and also Professor Peters for working as my advisor throughout this process.

1. JEFFREY W. STEMPEL, INTERPRETATION OF INSURANCE CONTRACTS: LAW AND STRATEGY FOR INSURERS AND POLICYHOLDERS 825 (1994) (“One of the most hotly litigated insurance coverage questions . . . has been the scope and application of the pollution exclusion contained in the standard [general liability] policy.”); see also *Am. Nat’l Prop. & Cas. Co. v. Wyatt*, 400 S.W.3d 417, 422 (Mo. App. W.D. 2013); 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) (“The question of whether a particular material has been shown to be a substance within the scope of an absolute or total pollution exclusion has been the subject of much litigation.”).

2. Michael W. Peters, *Insurance Coverage for Superfund Liability: A Plain Meaning Approach to the Pollution Exclusion Clause*, 27 WASHBURN L.J. 161, 170-71 (1987).

3. See *id.*

4. *Wyatt*, 400 S.W.3d at 422.

5. See *Porterfield v. Audubon Indem. Co.*, 856 So. 2d 789, 800-01 (Ala. 2002).

clause.”<sup>6</sup> Nevertheless, before *American National Property & Casualty Co. v. Wyatt*, no court in Missouri had directly addressed whether pollution-exclusion language extended non-liability to “pollutants” that are not traditional environmental pollutants.<sup>7</sup> In *Wyatt*, consequently, the Missouri Court of Appeals for the Western District faced the novel issue of interpreting an insurance policy’s pollution exclusion to determine whether it encompassed non-traditional pollutants.<sup>8</sup>

This Note explains the conflicting viewpoints presented in *Wyatt* and how the court reached its conclusion that the pollution exclusion clause does not encompass non-traditional pollutants. Part II of this Note describes the facts of *Wyatt* and the particular position of each party. In Part III, this Note examines the history behind pollution exclusion language and the various forces that shaped its evolution. Part IV then considers how other jurisdictions have dealt with pollution exclusion clauses and what legal theories or principles shaped their decisions. Finally, Part V argues that the Court of Appeals’ rejection of a more broad “pollution exclusion” better comports with the history behind pollution exclusion language and the reasonable expectation of policyholders.

## II. FACTS AND HOLDING

In 2010, Joyce Bentley drove her granddaughter, Megan Wyatt, and her granddaughter’s friend, Robin Ferguson, to her apartment for an overnight visit.<sup>9</sup> Upon arrival, Megan Wyatt and Robin Ferguson exited the car in the driveway and entered Bentley’s apartment.<sup>10</sup> Bentley then parked her car in the garage attached to her apartment.<sup>11</sup> Bentley, however, failed to turn off the car’s engine before shutting her garage door and entering the apartment.<sup>12</sup> Later that day, police received a call from a neighbor about a suspicious odor.<sup>13</sup> When the police arrived, they found Bentley’s vehicle with the engine still running in the garage and the garage door closed.<sup>14</sup> The police then

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6. *Id.* at 800. The court continued saying, 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.*

7. *See Wyatt*, 400 S.W.3d 417.

8. *Id.* at 419.

9. *Id.* at 418.

10. Respondent’s Brief, *Wyatt*, 400 S.W.3d 417 (No. WD 75226), 2012 WL 5248672, at \*6.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

entered Bentley's apartment where they found Bentley and Robin Ferguson unconscious and Megan Wyatt dead from carbon monoxide inhalation.<sup>15</sup> Bentley later died at the hospital.<sup>16</sup>

Megan's father, Randall Wyatt (Wyatt), as a result of the incident, filed a wrongful death claim against Bentley and her insurance provider, American National Property & Casualty Company (ANPAC).<sup>17</sup> Robin Ferguson, by and through her father and next friend, also filed a negligence claim against Bentley and ANPAC.<sup>18</sup> ANPAC, in response to the suits, filed a declaratory judgment in the Circuit Court of Jackson County.<sup>19</sup> ANPAC argued that its liability policy did not cover the claims asserted against Bentley.<sup>20</sup> In particular, ANPAC asserted that the pollution exclusion clause contained in Bentley's policy precluded coverage for the incident.<sup>21</sup> The parties then filed cross motions for summary judgment.<sup>22</sup> Circuit Court Judge James Kanatzar granted ANPAC's motion and denied the plaintiffs' motion, concluding that the pollution exclusion clause found in Bentley's policy precluded coverage.<sup>23</sup> The circuit court reasoned that "[a]n average layperson knows that automobile exhaust fumes have a toxic, potentially fatal effect, especially when inhaled by a person in a confined space and therefore would understand that automobile fumes which contain carbon monoxide are 'pollutants.'"<sup>24</sup> Wyatt and Robin Ferguson (collectively, "the plaintiffs") appealed.<sup>25</sup>

On appeal, the plaintiffs argued that the language in the pollution exclusion clause was ambiguous and should have been construed against ANPAC.<sup>26</sup> The plaintiffs further argued that a reasonable homeowner purchasing the policy would not believe the policy excluded from its coverage damages caused by exposure to carbon monoxide within the home.<sup>27</sup> The plaintiffs reasoned that reasonable policyholders would instead construe the

15. *Id.*

16. *Id.* at \*7.

17. *Id.*

18. *Id.*

19. *Am. Nat. Prop. & Cas. Co. v. Wyatt*, 400 S.W.3d 417, 419 (Mo. App. W.D. 2013).

20. *Id.*

21. *Id.* The relevant language in Bentley's policy follows:

Coverage E – Personal Liability and Coverage F – Medical Payments to Others do not apply to bodily injury or property damage: . . . n. arising out of the actual, alleged, or threatened discharge, dispersal, dispersal, seepage, migration, release, or escape of pollutants. . . . q. arising out of, caused by, contributed to, aggravated by or resulting from (whether directly or indirectly): . . . (4) pollution or contamination.

Respondent's Brief, *supra* note 10, at \*8-12.

22. *Wyatt*, 400 S.W.3d at 419.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

exclusion as being applicable in regards to traditional environmental pollutants only.<sup>28</sup>

The Missouri Court of Appeals for the Western District ultimately reversed the circuit court and entered judgment in favor of the plaintiffs.<sup>29</sup> In its unanimous opinion, the court acknowledged that the only issue on appeal was “whether, as a matter of law, ANPAC established that coverage was excluded under the language of the insurance contract.”<sup>30</sup> The court then quoted the governing principles of insurance policy interpretation under Missouri law and the actual policy at issue in the case.<sup>31</sup> The court, in recounting the history of the pollution-exclusion clause, observed that “[w]hile barely touched upon in Missouri case law, [t]he scope of [the pollution exclusion clause] has been described as one of the most hotly litigated insurance coverage questions to arise over the past three decades.”<sup>32</sup>

The court then analyzed the language in ANPAC’s policy and found that the provisions within the policy would appear on their face to provide broad liability coverage.<sup>33</sup> The court went on to state that the language in the pollution exclusion clause did not unambiguously include non-traditional pollutants in its exclusion.<sup>34</sup> The court reasoned that such an expansive reading of “pollution” and “pollutant” (one that would include non-traditional pollutants) was not consistent with what an ordinary person would consider a pollutant.<sup>35</sup> Ultimately, the court held that a pollution-exclusion clause cannot be read in isolation but must, instead, be construed in the context of the entire policy and in light of a reasonable person’s expectations.<sup>36</sup>

### III. LEGAL BACKGROUND

General liability policies, which protect the insured against most claims of bodily injury or property damage, are most often offered in comprehensive general liability (CGL) policies.<sup>37</sup> These CGL policies, though issued by different insurance companies, are all derivatives of the same standard-form CGL policy.<sup>38</sup> For the past few decades, the Insurance Services Office

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28. *Id.*

29. *Id.* at 427.

30. *Id.* at 419.

31. *Id.* at 419-21.

32. *Id.* at 420 (quoting *Apana v. TIG Ins. Co.*, 574 F.3d 679, 680 (9th Cir. 2009)).

33. *Id.* at 424.

34. *Id.*

35. *Id.*

36. *Id.* at 425.

37. *Reliance Nat. Ins. Co. v. Hatfield*, 228 F.3d 909, 915-16 (8th Cir. 2000). *See generally* George H. Tinker, *Comprehensive General Liability Insurance – Perspective and Overview*, 25 FED’N INS. COUNS. Q. 217 (1975).

38. *See Cincinnati Ins. Co. v. AMSCO Windows*, 921 F. Supp. 2d 1226, 1231 n.6 (D. Utah 2013); *see also Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F.

(ISO) has been, practically speaking, the exclusive promulgator of the standard CGL policy for the nation.<sup>39</sup> Because of this, courts have been prone to take persuasive authority and apply it when interpreting provisions of CGL policies.<sup>40</sup>

This section will examine the history behind pollution exclusion language and the various forces that shaped its evolution. Particular emphasis will be placed on the changes in the CGL policy that led to the pollution exclusion clause in use today. This section will then consider the language of today's pollution exclusion clause and how courts, confronted with the clause, have interpreted it.

### *A. History Behind the Pollution Exclusion Clause*

#### 1. Accident-Based Coverage

Before 1966, the standard CGL policy covered only property damage and personal injuries "caused by accident."<sup>41</sup> Although "accident" was not defined, insurance companies understood it to include an implicit requirement of suddenness.<sup>42</sup> This suddenness requirement was expected to bar coverage for "less clear-cut gradual injury or damage which may emerge over an uncertain period of time and in an uncertain area."<sup>43</sup> Specifically contemplated by this suddenness requirement were pollution-related injuries.<sup>44</sup>

Courts, however, frequently construed "accident" more broadly, often reading the policy as encompassing any "unexpected, unforeseen and unde-

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Supp. 1485, 1500-03 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984) (discussing history of the use of standard form policies).

39. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772 (1993). ISO is a national insurance industry association comprised of approximately 1400 domestic property and casualty insurers. *Id.*

40. 2 CAROLINE N. BROUN & JAMES T. O'REILLY, *RCRA AND SUPERFUND: A PRACTICE GUIDE* § 16:7 (3d ed. 2013).

41. E. Joshua Rosenkranz, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237, 1241 (1986).

42. See Gilbert L. Bean, *The Accident Versus the Occurrence Concept*, 1959 INS. L.J. 550, 551 (1959).

43. *Id.*

The . . . purpose of the [accident] phrase was to have coverage actuated by an identifiable event which is sudden, detrimental and fixed in time and place, rather than apply to the less clear-cut gradual injury or damage which may emerge over an uncertain period of time and in an uncertain area. The accident limitation was intended to carve out an easily identifiable area for coverage.

*Id.*

44. See Thomas M. Reiter & John K. Baillie, *Better Late Than Never: Holding Liability Insurers to Their Bargain Regarding Coverage for Unforeseen, Gradual Pollution*, 5 DICK. J. ENVTL. L. & POL'Y 1, 10-14 (1996).

signed happening or consequence from either a known or unknown cause.”<sup>45</sup> Some courts even *explicitly* rejected the implicit suddenness requirement.<sup>46</sup> For example, one Kentucky court stated that an “accident” as defined by a CGL policy “need not be a blow but may be a process . . . *It is not required to be sudden* . . . Where the accident is a process, how long is then not significant whether it takes three hours, three weeks or months.”<sup>47</sup> This more liberal judicial interpretation of “accident” and the lack of an enforced “suddenness” requirement allowed pollution-related injuries to easily fall within the confines of a CGL policy.<sup>48</sup>

## 2. Occurrence-Based Coverage

In 1966, the insurance industry, in an effort to narrow the scope of the standard CGL policy, changed the language so that it covered only injuries

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45. Hauenstein v. Saint Paul-Mercury Indem. Co., 65 N.W.2d 122, 126 (Minn. 1954); *see, e.g.*, Knight v. L. H. Bossier, Inc., 118 So. 2d 700, 703 (La. Ct. App. 1960) (defining an accident as “[a]n event happening without any human agency, or, if happening through such agency, an event which, under the circumstances, is unusual and not expected by the person to whom it happens.”) (quoting BLACK’S LAW DICTIONARY 31 (4th ed. 1957)); Moffat v. Metro. Cas. Ins. Co. of N.Y., 238 F. Supp. 165, 169 (M.D. Pa. 1964) (defining an accident as “an event that takes place without one’s foresight or expectation”); Travelers Ins. Co. v. Volentine, 578 S.W.2d 501, 503 (Tex. Ct. App. 1979) (defining an accident as an “unexpected, unforeseen and undesigned happening”).

46. *See, e.g.*, Singaas v. Diederich, 238 N.W.2d 878, 881 (Minn. 1976).

47. Travelers v. Humming Bird Coal Co., 371 S.W.2d 35, 38 (Ky. 1963) (emphasis added).

48. *See, e.g.*, Moore v. Fid. & Cas. Co. of N.Y., 295 P.2d 154, 156-58 (Cal. App. Dep’t Super. Ct. 1956) (drain clog caused by gradual accumulation of lint was covered by insured’s policy); Kissel v. Aetna Cas. & Sur. Co., 380 S.W.2d 497, 505 (Mo. Ct. App. 1964) (policy covered damages caused by sliding and sinking of earth at site of construction); Moffat v. Metro. Cas. Ins. Co. of N.Y., 238 F. Supp. 165, 174 (M.D. Pa. 1964) (gradual damage caused by emanation of destructive gases and mining constituted an “accident” within the meaning of the policy); *Humming Bird Coal Co.*, 371 S.W.2d at 38 (damage to a landowner’s water supply caused by the insured’s strip mining operations was covered by insured’s policy); White v. Smith, 440 S.W.2d 497, 507-08 (Mo. Ct. App. 1969) (contamination of well arising from insured’s operation of slaughterhouse on adjoining premises was within coverage of liability policy); City of Kimball v. St. Paul Fire & Marine Ins. Co., 206 N.W.2d 632, 637-38 (Neb. 1973) (pollution of well due to seepage from city’s sewage lagoon was covered by city’s policy); Lansco, Inc. v. Dep’t of Env’tl. Prot., 350 A.2d 520, 521-25 (N.J. Super. Ct. Ch. Div. 1975) (release of thousands of gallons of oil from tanks was considered “accidental” and therefore covered by the policy); Ashland Oil, Inc. v. Miller Oil Purchasing Co., 678 F.2d 1293, 1321 (5th Cir. 1982) (*per curiam*) (damage caused by the disposal of hazardous waste into pipelines was covered by insured’s policy).

caused by “occurrences.”<sup>49</sup> The policy specified that an “occurrence” was an “accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.”<sup>50</sup> This language was meant to counter the prevailing judicial interpretations of “accident” which had no requirement of “suddenness” and, thus, encompassed even the most gradual environmental pollution claims.<sup>51</sup> Insurers believed that this language would effectively deny coverage to commercial clients who *knowingly* polluted the environment.<sup>52</sup> In other words, insurers assumed that this language would bar claims originally sought to be barred by the implicit “suddenness” requirement.<sup>53</sup>

Yet courts continued to interpret the policies as covering “damages resulting from long-term, gradual exposure to environmental pollution.”<sup>54</sup> These courts reasoned that damages caused by intentional discharge of pollutants qualified so long as the ultimate loss was neither intended nor expected.<sup>55</sup> For instance, in *Grand River Lime Co. v. Ohio Casualty Insurance Co.*, residents of the Fairport Harbor village sued manufacturer Grand River Lime for damages caused by Grand River’s manufacturing practices.<sup>56</sup> The court, in that case, acknowledged that Grand River’s activities were “wilfull [sic] and intentional misfeasance” but, nevertheless, held that the actual damage arising from the manufacturing practices was unintentional.<sup>57</sup> The court explained that there was a difference between an insured’s intentional *practices* and the unintentional *damage* that might result from said practices.<sup>58</sup> The latter, the court reasoned, was still covered since the damage itself was unintentional.<sup>59</sup>

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49. *Morton Int’l, Inc. v. Gen. Acc. Ins. Co. of Am.*, 629 A.2d 831, 849 (N.J. 1993).

50. Nancer Ballard & Peter M. Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 CORNELL L. REV. 610, 624 (1990).

51. *Id.*

52. Rosenkranz, *supra* note 41, at 1247-48.

53. *See id.*

54. 2 STEVEN PLITT & JORDAN ROSS PLITT, PRACTICAL TOOLS FOR HANDLING INSURANCE CASES § 13:29 (2013); *see also infra* cases cited in note 55.

55. *See New Castle Cnty. v. Hartford Acc. & Indem. Co.*, 933 F.2d 1162 (3d Cir. 1991); *see also Jackson Twp. Mun. Util. Auth. v. Hartford Acc. & Indem. Co.*, 451 A.2d 990, 994-95 (N.J. Super. Ct. Law Div. 1982) (finding that while the city’s depositing of wastes in landfill was intentional, the seepage through soil and contamination of neighboring wells was not); *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 489 (N.Y. App. Div. 1980) (holding that a situation can constitute an “accident” if the resulting damage could be viewed as unintended by a fact finder).

56. *Grand River Lime Co. v. Ohio Cas. Ins. Co.*, 289 N.E.2d 360, 362-65 (Ohio Ct. App. 1972).

57. *Id.*

58. *Id.* at 365.

59. *Id.*



### 3. The Pollution Exclusion

Around the time of the “occurrence” change in the standard CGL policy, Congress made substantial amendments to the Clean Air Act.<sup>60</sup> These amendments, enacted to better protect the quality of the nation’s air,<sup>61</sup> greatly increased the potential liability and financial responsibilities of insurers.<sup>62</sup> A number of untimely large-scale environmental disasters (*e.g.*, Times Beach, Love Canal, and Torrey Canyon) furthered compounded the economic plight of insurers.<sup>63</sup>

As a result of this increase in litigation, the courts’ overbroad interpretation of “occurrence,” and the public’s newfound environmental consciousness, the insurers again changed their policies.<sup>64</sup> This change, which came in 1970, appeared in the form of an exclusionary clause that applied specifically to pollution related claims:

[T]his policy does not apply . . . to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere, or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.<sup>65</sup>

Under this language, only pollution-related losses that arose from occurrences both “sudden” and “accidental” were covered.<sup>66</sup> The language also shifted the focus of the inquiry from the *loss* to the *discharge* that led to the

60. Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. §§ 7401-7642 (1983)).

61. Pub. L. No. 101-549, 104 Stat. 2399 (1990) (amending the Clean Air Act).

62. *Westchester Fire Ins. Co. v. City of Pittsburg*, 768 F. Supp. 1463, 1469 (D. Kan. 1991); *see, e.g.*, Christine F. Ericson, Comment, *Excluding the Pollution Exclusion: City of Johnstown, New York v. Bankers Standard Insurance Company*, 877 F.2d 1146 (2d Cir. 1989), 38 WASH. U. J. URB. & CONTEMP. L. 287, 288 (1990); Robert D. Chesler, Michael L. Rodburg & Cornelius C. Smith, Jr., *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 RUTGERS L.J. 9, 34-35 (1986).

63. *Ctr. for Creative Studies v. Aetna Life & Cas. Co.*, 871 F. Supp. 941, 943-44 (E.D. Mich. 1994). *See generally* STEMPEL, *supra* note 1, at 825.

64. Rosenkranz, *supra* note 41, at 1251 n.73.

65. 35 MATTHEW KING, WASHINGTON PRACTICE § 20:11 (2013) (quoting the Insurance Rating Board form). The exclusion first appeared in an endorsement to the policy. Rebecca M. Bratspies, *Splitting the Baby: Apportioning Environmental Liability Among Triggered Insurance Policies*, 1999 BYU L. REV. 1215, 1224-25 (1999) (citing Robert S. Soderstrom, *The Role of Insurance in Environmental Litigation*, 11 FORUM 762, 766 (1976)). In 1973, however, it was integrated into the standard GCL policy as “exclusion (f)” in substantially the same form. *Id.*

66. *See* KING, *supra* note 65, at § 20:11.

loss.<sup>67</sup> Insurance companies hoped that these changes and the restoration of the suddenness requirement would reduce coverage and litigation.<sup>68</sup> The following thirteen years, however, were riddled with lawsuits as litigants and courts struggled to make sense of the terms “sudden and accidental.”<sup>69</sup>

Much of the litigation centered on whether the word “sudden” was meant in a strictly temporal sense.<sup>70</sup> Courts noted that a strictly temporal interpretation would exclude damages in all pollution-related claims *except* those in which the discharge of pollution had been “abrupt.”<sup>71</sup> Other courts, however, interpreted “sudden” more broadly.<sup>72</sup> These courts held that insurers were liable for pollution-related damages that were “unintended or unexpected.”<sup>73</sup> No interpretation was uniformly adopted and so judicial construction of “sudden and accidental” varied from state to state – both in rationale and result.<sup>74</sup>

For example, some courts, including courts in North Carolina, Massachusetts, and Michigan, held that “sudden” was unambiguous and interpreted the term in the strictly temporal sense.<sup>75</sup> These courts often relied on the common meaning of the word and thus construed “sudden” to mean “happening abruptly without prior notice.”<sup>76</sup> These courts frequently noted that defining “sudden” as “unexpected” would render the word “accidental” meaningless because “accidental” also meant unexpected or unintended.<sup>77</sup>

Nonetheless, other courts, including courts in Colorado, Georgia, New Jersey, and Washington, found the term to be ambiguous and construed it to mean “unintended or unexpected.”<sup>78</sup> These courts often stressed that “sud-

67. Rosenkranz, *supra* note 41, at 1252-53.

68. *Id.*

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

70. *See* Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1225 (Ill. 1992).

71. *Koloms*, 687 N.E.2d at 80-81.

72. *See id.*

73. *See id.* at 80.

74. Porterfield v. Audubon Indem. Co., 856 So. 2d 789, 800 (Ala. 2002); *see also* Outboard Marine Corp., 607 N.E.2d at 1218.

75. *See, e.g.*, Liberty Mut. Ins. Co. v. Triangle Indus., Inc., 957 F.2d 1153, 1157 (4th Cir. 1992) (finding that “sudden” is unambiguous and is understood to mean *abrupt*); U.S. Fid. & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31, 34 (6th Cir. 1988) (same); Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374, 381-83 (N.C. 1986) (same); Lumbermen Mut. Cas. Co. v. Belleville Indus., Inc., 555 N.E.2d 568, 572 (Mass. 1990) (same); Upjohn Co. v. N.H. Ins. Co., 476 N.W.2d 392, 397 (Mich. 1991) (same).

76. Claudia G. Catalan, Annotation, *Construction of Qualified Pollution Exclusion Clause in Liability Insurance Policy*, 88 A.L.R. 5TH 493 (2001).

77. *Id.*

78. Hecla Mining Co. v. N.H. Ins. Co., 811 P.2d 1083, 1091-92 (Colo. 1991) (holding that “sudden” is ambiguous and should be interpreted to mean “unintended or unexpected”); Claussen v. Aetna Cas. & Sur. Co., 380 S.E.2d 686, 688 (Ga. 1989) (same); Broadwell Realty Servs., Inc. v. Fid. & Cas. Co. of N.Y., 528 A.2d 76, 83-86

den” as used in the pollution exclusion clause of an insurance policy was susceptible of more than one reasonable interpretation.<sup>79</sup> These courts further stated that any construction of the ambiguity, according to well-established rules of law, must be in favor of the insured.<sup>80</sup> Consequently, the courts that found an ambiguity often held that “sudden” meant “unexpected.”<sup>81</sup> In support of their interpretation, these courts often pointed out that various courts had construed the language of an insurance policy differently.<sup>82</sup> These discrepancies, the courts reasoned, were some indication of ambiguity.<sup>83</sup>

### B. *The Current Law*

#### 1. The Absolute Pollution Exclusion

The enormous amount of litigation caused by the terms “sudden and accidental” forced insurance companies to once again draft a new version of the exclusion.<sup>84</sup> The newest version, which became standard in the mid-1980s, is now commonly known as the “absolute pollution exclusion.”<sup>85</sup> An early version of the absolute pollution exclusion provided as follows:

This policy does not apply: to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants . . . [whether or not] such discharge, dispersal, release, or escape is sudden or accidental.<sup>86</sup>

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(N.J. Super. Ct. App. Div. 1987) (same); *United Pac. Ins. Co. v. Van’s Westlake Union, Inc.*, 664 P.2d 1262, 1265 (Wash. Ct. App. 1983) (same).

79. Catalan, *supra* note 76, at 493.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Ballard, *supra* note 50, at 633.

85. *Am. States Ins. Co v. Koloms*, 687 N.E.2d 72, 80-81 (Ill. 1997).

86. Mark S. Dennison, *Insured’s Proof That Pollution Exclusion Clause Does Not Bar Coverage for Environmental Claims*, 38 AM. JUR. 3D *Proof of Facts* § 477 (1996). In 1986, the insurance industry adopted a more comprehensive version of the absolute pollution exclusion:

This policy does not apply to . . . (f) (1) “Bodily injury” or “property damage” arising out of the actual alleged or threatened discharge, dispersal, release or escape of pollutants: (a) At or from premises you own, rent or occupy; (b) At or from any site or location used by or for you or others for the handling, storage, disposal, processing or treatment of waste; (c) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or (d) At or from any site or location on which you or any contractors or

The absolute pollution exclusion differs from the original pollution exclusion – sometimes known as the “qualified pollution exclusion” – in two significant ways.<sup>87</sup> First, it removes the exception for “sudden and accidental” pollution. Second, it eliminates the language requiring the discharge to be “into the air, water, or land.”<sup>88</sup>

## 2. Judicial Interpretation

This absolute pollution exclusion, however, has not brought litigation to a halt as the drafters hoped it would. It has, instead, opened the door for new issues to litigate.<sup>89</sup> The most recent issue, and the one most relevant to this Note, is whether the pollution exclusion clause as it appears today extends beyond “traditional environmental pollution.”<sup>90</sup> This issue, in the words of one scholar, has “spurred heated litigation . . . and debate[]” with “policyholders and insurers divide[d] markedly in their view of the historical background of the pollution exclusion and the meaning of changes to the exclusion’s language.”<sup>91</sup>

Courts in Arizona, California, the District of Columbia, Illinois, New Jersey, Ohio, and Wyoming have held that the absolute pollution exclusion clause cannot extend beyond “traditional environmental pollutions.”<sup>92</sup> These

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subcontractors working directly or indirectly on your behalf are performing operations: (i) if the pollutants are brought on or to the site or location in connection with such operations; or (ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants. (2) Any loss, cost or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

*Id.*

87. See Ballard, *supra* note 50, at 633.

88. Weaver v. Royal Ins. Co. of Am., 674 A.2d 975, 977 (N.H. 1996).

89. See NGM Ins. Co. v. Carolina’s Power Wash & Painting, LLC, No. CIV. 2:08-CV-3378-DC, 2010 WL 146482, at \*4 (D.S.C. Jan. 12, 2010), *aff’d sub nom.* NGM Ins. Co. v. Kuras, 407 F. App’x 653 (4th Cir. 2011).

90. See *id.* (“It is clear that a nationwide split of opinion exists regarding: (1) whether ‘absolute pollution exclusions’ bar coverage for incidents outside of traditional environmental pollution and (2) whether ‘absolute pollution exclusions’ are unambiguous.”); see also Francis C. Amendola, *Pollution*, 46 C.J.S. *Insurance* § 1381 (2013).

91. 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, 3, 6 (1998).

92. See, e.g., Keggi v. Northbrook Prop. & Cas. Ins. Co., 13 P.3d 785, 792 (Ariz. Ct. App. 2000) (holding that the absolute pollution exclusion was not intended to preclude coverage “absent any evidence that the actual [damage] arose from traditional environmental pollution”); MacKinnon v. Truck Ins. Exch., 73 P.3d 1205, 1216

courts often emphasize the doctrine of reasonable expectations, which requires courts to interpret pollution exclusion language in light of the reasonable expectations of an ordinary policyholder.<sup>93</sup>

In *MacKinnon v. Truck Insurance Exchange*, for example, the Supreme Court of California considered whether a pollution exclusion clause precluded coverage for damages after a tenant died from exposure to pesticide spraying.<sup>94</sup> The court first analyzed the basic principles governing the interpretation of insurance policy language.<sup>95</sup> It concluded that the most fundamental rule of contract interpretation is that the interpretation must give effect to the “mutual intention” of the parties.<sup>96</sup> The court further noted that a provision’s “clear and explicit” meaning must be interpreted in its “ordinary and popular sense,” unless it is “used by the parties in a technical sense or a special mean-

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(Cal. 2003) (holding that the exclusion should be “limit[ed] [in] scope . . . to injuries arising from events commonly thought of as pollution, i.e. environmental pollution”); *Richardson v. Nationwide Mut. Ins. Co.*, 826 A.2d 310, 339 (D.C. 2003) (applying District of Columbia law) (finding that carbon monoxide poisoning caused by a malfunctioning furnace is covered under the standard CGL policy), *vacated on other grounds*, 844 A.2d 344 (D.C. 2004); *Am. States Ins. Co. v. Koloms*, 687 N.E.2d 72, 82 (Ill. 1997) (holding that the scope of the “absolute” pollution exclusion is limited to traditional environmental contamination); *Nav-Its, Inc. v. Selective Ins. Co. of Am.*, 869 A.2d 929, 938 (N.J. 2005) (finding that the history of pollution exclusions makes it clear that the intent is to preclude coverage for traditional environmentally-related damages *only*); *Andersen v. Highland House Co.*, 757 N.E.2d 329, 334 (Ohio 2001) (stating that the true purpose behind pollution exclusion clauses was to limit the “enormous expense and exposure resulting from the explosion of environmental litigation”); *Gainsco Ins. Co. v. Amaco Prod. Co.*, 53 P.3d 1051, 1066 (Wyo. 2002) (holding that the total pollution exclusion should be limited to “environmental pollution” claims).

93. *See, e.g.*, *Atl. Mut. Ins. Co. v. McFadden*, 595 N.E.2d 762, 764 (Mass. 1992) (“When construing language in an insurance policy, we consider what an *objectively reasonable* insured reading the relevant policy language, would expect to be covered . . . . We conclude that an insured could reasonably have understood the provision at issue to exclude coverage for injury caused by certain forms of industrial pollution, but *not* coverage for injury allegedly caused by the presence of leaded materials in a private residence.”) (emphasis added) (citations omitted) (internal quotations omitted); *Harrell v. Minn. Mut. Life Ins. Co.*, 937 S.W.2d 809, 812 (Tenn. 1996) (refusing to honor insurance company’s intent, finding its use of language and purported distinctions “illusory and contrary to the normal expectations of the average policy holder”); *Richardson*, 826 A.2d at 314 (applying District of Columbia law) (“A reasonable person reading the [pollution exclusion] clause at the time it was written by the insurance industry. . . could fairly conclude that its language was fully consistent with [the purpose of protecting insurers from enormous liability for *environmental* damages], and that the exclusion therefore had no application to a malfunctioning furnace [which caused carbon monoxide poisoning] in an apartment house.”).

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

95. *Id.* at 1212.

96. *Id.* at 1212-13.

ing is given to them by usage.”<sup>97</sup> The court reasoned that the terms used in the standard absolute pollution exclusion clause supported an interpretation that limited the exclusion to damage from environmental pollution because terms like “discharge,” “dispersal,” “release,” and “escape” were commonly used to describe events of general environmental pollution.<sup>98</sup>

A number of courts, however, including courts in Alabama, Alaska, Colorado, Georgia, Minnesota, Virginia, and Wisconsin, have refused to apply the doctrine of reasonable expectations to the absolute pollution exclusion clause.<sup>99</sup> These courts reason that the language of the absolute pollution exclusion is clear and unambiguous.<sup>100</sup> Consequently, the exclusion does not need a doctrine of reasonable expectations, or any other judicial device, to establish meaning. In fact, one Florida court stated candidly:

We decline to adopt a doctrine of reasonable expectations. There is no need for it if the policy provisions are unambiguous . . . . To apply the

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97. *Id.* at 1213 (citation omitted).

98. *Id.* at 1215-16 (“It may be an overstatement to declare that ‘discharge, dispersal, release or escape,’ by themselves, are environmental law terms of art. But . . . these terms, used *in conjunction with* ‘pollutant,’ commonly refer to the sort of conventional environmental pollution at which the pollution exclusion was primarily targeted.”).

99. *See, e.g.,* Federated Mut. Ins. Co. v. Abston Petroleum, Inc., 967 So.2d 705, 712, 714-15 (Ala. 2007) (precluding coverage for damages caused by an indoor gasoline leak and rejecting the insured’s argument that coverage should be afforded based on the ordinary policyholder’s “reasonable expectations”); Whittier Props., Inc. v. Alaska Nat’l Ins. Co., 185 P.3d 84, 90-91 (Alaska 2008) (holding that gasoline that leaked from insured’s service station was clearly a “pollutant” under the unambiguous terms of the policy); Mountain States Mut. Cas. Co. v. Roinestad, 296 P.3d 1020, 1025 (Colo. 2013) (finding that insurance coverage may be excluded under absolute pollution exclusion clauses for both nontraditional and “traditional” pollution); Reed v. Auto-Owners Ins. Co., 667 S.E.2d 90, 91-92 (Ga. 2008) (holding that an absolute pollution exclusion precludes coverage for carbon monoxide poisoning claims against a landlord and finding that carbon monoxide was clearly a toxic fume within the exclusion’s definition of a “pollutant”); Midwest Family Mut. Ins. Co. v. Wolters, 831 N.W.2d 628, 636-39 (Minn. 2013) (holding that the release of carbon monoxide inside a house was excluded from coverage despite the insured’s argument that pollution exclusions should be limited to “environmental” releases); PBM Nutritionals, LLC v. Lexington Ins. Co., 724 S.E.2d 707, 714-15 (Va. 2012) (holding that pollution exclusions are not limited to “traditional environmental contamination losses”); Hirschhorn v. Auto-Owners Ins. Co., 809 N.W.2d 529, 537 (Wis. 2012) (finding that damage to insured’s home from bat infestation was excluded from coverage because bat guano is “a solid, liquid, or gaseous irritant or contaminant” and therefore a “pollutant”).

100. *See* Park-Ohio Indus., Inc. v. Home Indem. Co., 975 F.2d 1215, 1223 (6th Cir. 1992); Constitution State Ins. Co. v. Iso-Tex Inc., 61 F.3d 405, 410 (5th Cir. 1995); Resure, Inc. v. Chem. Distribs., Inc., 927 F. Supp. 190, 194 (M.D. La. 1996), *aff’d*, 114 F.3d 1184 (5th Cir. 1997); *see also* cases cited *supra* note 99.

doctrine to an unambiguous provision would be to rewrite the contract and the basis upon which the premiums are charged.<sup>101</sup>

These courts argue that application of the reasonable expectations doctrine in pollution exclusion cases creates nothing more than a convoluted mess.<sup>102</sup> One federal district court, for example, held that “[c]onstruing insurance policies upon a determination as to whether the insured’s subjective expectations are reasonable can only lead to uncertainty and unnecessary litigation.”<sup>103</sup>

#### IV. INSTANT DECISION

In *American National Property & Casualty Co. v. Wyatt*, the Missouri Court of Appeals for the Western District considered whether an insurance policy’s absolute pollution exclusion clause precluded coverage for injuries when said injuries were *caused by* the emission of carbon monoxide from a car accidentally left running in a garage.<sup>104</sup> The Court of Appeals reversed the Jackson County Circuit Court’s judgment and entered summary judgment in favor of the plaintiffs.<sup>105</sup> In an opinion drafted by Judge Joseph M. Ellis, all three judges agreed that the absolute pollution exclusion did not bar coverage in such circumstances.<sup>106</sup> The judges also agreed that an insured’s expectations of coverage should be honored when reasonable.<sup>107</sup> The court reached this decision in three steps. First, it considered the history of the pollution exclusion clause and the purpose behind it.<sup>108</sup> Next, the court considered whether the pollution exclusion terms within the policy were ambiguous.<sup>109</sup> Finally, the court considered whether a reasonable person purchasing said policy would expect the pollution exclusion clause to preclude coverage in circumstances like the one at hand.<sup>110</sup>

The court first assessed the history of the pollution exclusion clause and the forces that shaped its evolution.<sup>111</sup> The clause’s various stages, the court observed, revealed a struggle for control between two independently motivat-

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101. *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135, 1140 (Fla. 1998).

102. *See, e.g., Allen v. Prudential Prop. & Cas. Ins. Co.*, 839 P.2d 798, 801-06 (Utah 1992); *Deni Assocs.*, 711 So.2d at 1140.

103. *Pac. Emp’rs Ins. Co. v. Wausau Bus. Ins. Co.*, 508 F. Supp. 2d 1167, 1180 (M.D. Fla. 2007) (quoting *Deni Assocs.*, 711 So.2d at 1140).

104. *Am. Nat. Prop. & Cas. Co. v. Wyatt*, 400 S.W.3d 417, 419 (Mo. App. W.D. 2013), *reh’g and/or transfer denied* (Apr. 30, 2013).

105. *Id.* at 427.

106. *Id.*

107. *Id.* at 426.

108. *Id.* at 420-23.

109. *Id.* at 423-25.

110. *Id.* at 425-27.

111. *Id.* at 420-22.

ed powers.<sup>112</sup> On one side of the struggle were the insurers who, in response to the public's growing environmental consciousness, sought to extend the situations under which coverage was precluded.<sup>113</sup> In their opposition were the courts that, despite insurer's efforts, continued to interpret the policies in a way that afforded coverage.<sup>114</sup> As succinctly summed up by the court, "the history of the pollution-exclusion clause in its various forms demonstrates that its purpose was to have a broad exclusion for traditional environmentally related damages."<sup>115</sup>

The court then addressed whether the pollution exclusion terms within the policy were ambiguous.<sup>116</sup> It began by reciting the rules that structured its analysis.<sup>117</sup> The court noted that interpreting an insurance policy and determining whether coverage and exclusion provisions were ambiguous are questions of law that must be reviewed *de novo*.<sup>118</sup> Precedent further required the court to construe the terms of an insurance policy as "an ordinary person of average understanding purchasing this insurance" would construe them.<sup>119</sup> The court observed that a policy is ambiguous under Missouri law when it can be "reasonably and fairly" interpreted in more than one way.<sup>120</sup> The existence of an ambiguity, it concluded, required an examination of the exclusionary clause in the context of the entire policy.<sup>121</sup>

The court then assessed the arguments presented by both sides.<sup>122</sup> ANPAC, it noted, relied heavily on a dictionary definition of "pollutant" which encompassed "any irritant or contaminant."<sup>123</sup> Using this definition as its basis, ANPAC asserted that the pollution clause excluded any injury caused by an irritant or contaminant.<sup>124</sup> The court, however, rejected this interpretation of "pollution."<sup>125</sup> The court reasoned that a dictionary's definition of a word is not sufficient proof of the "ordinary and popular" meaning

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112. *Id.* at 419-23.

113. *Id.* at 420-23.

114. *Id.* at 419-23.

115. *Id.* at 422 (quoting *Nav-Its, Inc. v. Selective Ins. Co. of Am.*, 869 A.2d 929, 936-37 (N.J. 2005)).

116. *Id.* at 419-21.

117. *Id.*

118. *Id.* at 419 (citing *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. 2010) (en banc)).

119. *Id.* at 419-20 (quoting *Schmitz v. Great Am. Assur. Co.*, 337 S.W.3d 700, 705-06 (Mo. 2011) (en banc)).

120. *Id.* (citing *Vega v. Shelter Mut. Ins. Co.*, 162 S.W.3d 144, 147 (Mo. App. W.D. 2005)).

121. *Id.* (citing *Jensen v. Allstate Ins. Co.*, 349 S.W.3d 369, 377 (Mo. App. W.D. 2011)).

122. *Id.* at 420-25.

123. *Id.* at 424.

124. *Id.*

125. *Id.*



of the word.<sup>126</sup> It reasoned that a term within a policy must be read in the context of the entire policy as an ordinary person purchasing the policy would so read it.<sup>127</sup> In other words, a term in a policy must derive its meaning with reference to the words around it and with respect to the meanings that it is given in daily life.<sup>128</sup>

The court then considered the plaintiffs' argument that a reasonable homeowner would not read the exclusionary provision so liberally.<sup>129</sup> They argued that reasonable persons would instead see the clause as only reaching traditional environmental pollution.<sup>130</sup> The court ultimately agreed with the plaintiffs stating, "It seems far more reasonable that a policyholder would understand the exclusion as being limited to irritants and contaminants commonly thought of as pollution and not as applying to every possible irritant or contaminant imaginable."<sup>131</sup> The court determined that the language was reasonably susceptible to different constructions and was, therefore, ambiguous as a matter of law.<sup>132</sup>

Finding the provision ambiguous, the court went on to assess whether a reasonable person would consider residential carbon monoxide poisoning to be precluded by the terms of the provision.<sup>133</sup> ANPAC argued that even if the provision was not read to encompass all irritants and/or contaminants, a reasonable person would still understand the clause to cover carbon monoxide poisoning because most people are aware of carbon monoxide and the dangers associated with extended exposure to it.<sup>134</sup> The court, however, found this argument unpersuasive because determining whether "a substance [is] a pollutant under the terms of a policy exclusion depend[s] on the context or environment in which the substance is involved."<sup>135</sup> The court reasoned that injuries caused by carbon monoxide inhalation *in a residential setting* would not be perceived by an ordinary person as "pollution."<sup>136</sup> Residential carbon monoxide was, therefore, not unambiguously excluded as a pollutant under the exclusion.<sup>137</sup> In reaching this conclusion, the court relied on a number of cases from varying jurisdictions that also considered the applicability of the

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126. *Id.* (quoting *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1213 (Cal. 2003)).

127. *Id.* at 424-25 (quoting *MacKinnon*, 73 P.3d at 1213).

128. *Id.*

129. *Id.* at 419.

130. *Id.*

131. *Id.* at 425 (quoting *Reg'l Bank of Colo. v. St. Paul Fire & Marine Ins. Co.*, 35 F.3d 494, 498 (10th Cir. 1994)).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* (quoting *Langone v. Am. Family Mut. Ins. Co.*, 731 N.W.2d 334, 340 (Wis. Ct. App. 2007)).

136. *Id.*

137. *Id.* at 425-26.

pollution exclusion clause with respect to residential carbon monoxide inhalation injuries.<sup>138</sup>

The court gave particular attention to *MacKinnon v. Truck Insurance Exchange*, in which an insured landlord was sued for damages after a tenant died from exposure to pesticide spraying.<sup>139</sup> The Supreme Court of California held that the pollution exclusion clause did not preclude coverage for such an injury when it occurred in a *residential context*.<sup>140</sup> Its conclusion, the court argued, was supported by the terms used in the policy's pollution exclusion clause (e.g., discharge, dispersal, release, or escape) because these terms were commonly used to describe events of general environmental pollution.<sup>141</sup>

*MacKinnon's* rationale, the *Wyatt* court reasoned, applied to the facts in *Wyatt*.<sup>142</sup> The court inferred that an insured could reasonably believe that "accidentally leaving a car running in a closed garage, thereby allowing carbon monoxide to accumulate in the garage and house" would not qualify as a "discharge, dispersal, seepage, migration, release or escape" of pollutants as used in the policy's exclusion clause.<sup>143</sup> The language of the pollution exclusion clause should, therefore, not preclude coverage for the injuries at hand.<sup>144</sup>

In *Wyatt*, the Missouri Court of Appeals for the Western District considered the extent of an insurance policy's pollution exclusion clause.<sup>145</sup> By reading the clause in the context of the whole policy and bearing in mind the reasonable expectations of the ordinary policyholder, the court found that the policy's pollution exclusion clause did not preclude coverage in claims for damages caused by exposure to carbon monoxide within the home.<sup>146</sup>

## V. COMMENT

In *Wyatt*, the court considered the scope of an insurance policy's pollution exclusion clause.<sup>147</sup> Although no Missouri court had squarely addressed the issue, the decision in *Wyatt* was unanimous.<sup>148</sup> *Wyatt* established the fac-

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138. See *supra* notes 38-40 and accompanying text.

139. See *supra* notes 94-98 and accompanying text.

140. See *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1218 (Cal. 2003).

141. *Id.* at 1215-16 ("It may be an overstatement to declare that 'discharge, dispersal, release or escape,' by themselves, are environmental law terms of art. But . . . these terms, used *in conjunction with* 'pollutant,' commonly refer to the sort of conventional environmental pollution at which the pollution exclusion was primarily targeted.").

142. *Wyatt*, 400 S.W.3d at 426.

143. *Id.*

144. See *id.*

145. *Id.* at 419.

146. *Id.* at 426-27.

147. *Id.* at 419.

148. *Id.* at 427.

tors that a Missouri court must contemplate when determining the extent of an insurance policy's pollution exclusion clause.<sup>149</sup> It held that a court must consider the meaning of the clause within context of the policy as a whole and the way that the clause would be understood by the ordinary policyholder.<sup>150</sup> In rejecting the insurers' all-excluding interpretation, *Wyatt* more accurately conforms with the history behind the pollution exclusion clause.<sup>151</sup>

*Wyatt*'s narrower reading of the clause makes sense considering the principles that govern judicial interpretation of insurance policies in Missouri. Under Missouri law, an ordinary policyholder's reasonable expectations must be taken into consideration when interpreting the actual policy at hand.<sup>152</sup> It is undisputed that policyholders purchase insurance for protection.<sup>153</sup> Policyholders further understand their insurance policies as providing them "with the broadest spectrum of protection against liability for unintentional and unexpected personal injury or property damage arising out of the conduct of [their] business."<sup>154</sup> Thus, a reasonable person purchasing a homeowner's insurance policy would expect coverage for any significant risk of injury related to homeownership. Because carbon monoxide poisoning is "one of the more significant and well-known risks of injury related to homeownership in this country[.]" an ordinary person purchasing a homeowner's policy would reasonably expect that the policy covered such a risk.<sup>155</sup> The court in *Wyatt* agreed with this reasoning and set a precedent that requires Missouri courts to interpret exclusionary clauses in a way that does not invalidate the purpose for which the policy was purchased.<sup>156</sup>

The holding in *Wyatt* also prevents Missouri courts from reaching absurd results. ANPAC, in arguing that the pollution exclusion clause precluded coverage, emphasized that a "pollutant" was "any irritant or contaminant."<sup>157</sup> This definition, however, reaches far beyond what an ordinary person would consider a pollutant. In fact, under this theory, the pollution exclusion clause precludes from coverage any injury caused by anything that can "irritate" or "contaminate."<sup>158</sup> This interpretation of "pollutant" would, in effect, make the pollution exclusion clause boundless because almost every substance and chemical in existence can irritate or damage some person or

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149. *Id.* at 419-20.

150. *Id.*

151. *Id.* at 421.

152. *Schmitz v. Great Am. Assur. Co.*, 337 S.W.3d 700, 705-06 (Mo. 2011) (en banc) ("When interpreting the terms of an insurance policy, this Court applies the meaning that would be understood by an ordinary person of average understanding purchasing the insurance.").

153. *Peters*, *supra* note 2, at 166.

154. *Id.*; *see also* *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1213 (Cal. 2003).

155. *Wyatt*, 400 S.W.3d at 426-27.

156. *Id.*

157. *Id.* at 424.

158. *Id.*

property.<sup>159</sup> *Wyatt* ensures that Missouri courts are not encumbered with arguments that hinge on the various linguistic implications of a single word. In fact, *Wyatt*'s focus on context and the "ordinary person" prevents lawyers who are trained "to parse careful arguments and to pay close attention to the meaning of individual words" from eliciting absurd or anomalous results.<sup>160</sup>

*Wyatt*'s holding also discourages frivolous litigation. An all-encompassing reading of "pollutant," like the one suggested by ANPAC, would open the floodgates to waves of new non-liability suits.<sup>161</sup> For example, since the adoption of the absolute pollution exclusion, insurance companies have tried to evade coverage in claims involving property damage from lake water,<sup>162</sup> injuries caused to a child after playing with a bottle of carpet-dye,<sup>163</sup> damages stemming from an ammonia spill in an office,<sup>164</sup> and injuries from a vehicular collision caused by reduced visibility from the smoke of a non-hostile fire.<sup>165</sup> In fact, one court stated that such a broad interpretation of the absolute pollution exclusion could result in litigation over whether the injuries from a gunshot were precluded by the clause, since the "person [was] 'polluted' by being struck in the face by a speeding bullet."<sup>166</sup> Thus, the holding in *Wyatt* is not only sensible but also judicially prudent, considering the quantity of litigation that accompanies such a broad interpretation of "pollutant."<sup>167</sup>

The decision reached in *Wyatt* also better comports with the history of pollution exclusion language.<sup>168</sup> The evolution of the pollution exclusion clause was largely a reaction to increased environment regulations by the government, the public's newfound environmental conscience, and a number

159. *Donaldson v. Urban Land Interests, Inc.*, 564 N.W.2d 728, 732 (Wis. 1997).

160. *Jolliff v. N.L.R.B.*, 513 F.3d 600, 616 (6th Cir. 2008).

161. *See Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043 (7th Cir. 1992) (stating that a broad reading of "pollutant" could instigate litigation over whether a pollution exclusion clause barred coverage "for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano" or "for bodily injury caused by an allergic reaction to chlorine in a public pool" and that "although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize [the previously described] events as pollution").

162. *Purity Spring Resort v. TIG Ins. Co.*, No. CIV. 99-295-JD, 2000 WL 1507429 (D.N.H. July 18, 2000).

163. *Regent Ins. Co. v. Holmes*, 835 F. Supp. 579, 580-81 (D. Kan. 1993).

164. *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.* 711 So. 2d 1135, 1136-37 (Fla. 1998).

165. *Perkins Hardwood Lumber Co. v. Bituminous Cas. Corp.*, 378 S.E.2d 407, 408 (Ga. Ct. App. 1989).

166. *See In re Idleair Techs. Corp.*, No. 08-10960(KG), 2009 WL 413117, at \*8 (D. Del. Feb. 18, 2009) (quoting *Bodine v. Fireman's Fund Ins. Co.*, No. 150364 (Cal. App. Dep't Super. Ct. Sept. 24, 1992)).

167. *See supra* notes 157-160 and accompanying text.

168. *See supra* Part III.A.

of untimely large-scale environmental disasters.<sup>169</sup> Consequently, any judicial interpretation of pollution exclusion language should complement, not contradict, the historical forces that shaped it. In the same vein, the clause should not be expanded to exclude instances that were not originally contemplated or considered. To do so would be to deny the well-documented understanding of the term and give it new meaning. *Wyatt*, by reaching its conclusion only *after* recounting the history of the pollution exclusion, demonstrates that exclusionary clauses are best interpreted and explained when their purpose and shaping forces are explored and understood.

## VI. CONCLUSION

In *Wyatt*, the Missouri Court of Appeals for the Western District held that the pollution exclusion clause did not exclude carbon monoxide inhalation in residential circumstances.<sup>170</sup> *Wyatt* established a precedent under which the interpretation of insurance language depends on the history and forces that shaped it. Thus, the court in *Wyatt* did not reach its holding until it acknowledged and analyzed the original intention and historical purpose of the pollution exclusion.<sup>171</sup>

The decision in *Wyatt* also places a greater emphasis on the reasonable expectations of policyholders. Given how important assent is to a contract, the holding in *Wyatt* should be viewed as a huge step forward. It forces insurance companies to cover claims that a reasonable policyholder would expect to be covered. It further comports with the reasons for which persons purchase CGL policies in the first place. In other words, *Wyatt*, by making insurance companies liable for damages caused by non-traditional pollutants, ensures that policyholders who purchase insurance for protection *actually* receive the protection that they need and expect.

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169. See *supra* Part III.A.

170. Am. Nat. Prop. & Cas. Co. v. Wyatt, 400 S.W.3d 417, 426-27 (Mo. App. W.D. 2013), *reh'g and/or transfer denied* (Apr. 30, 2013).

171. *Id.*