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ABSTRACT

Approximately 400 individuals die each year and an additional 4000 individuals are hospitalized annually in the United States due to unintentional carbon monoxide exposure. For the past several decades, insurance policies have generally included a pollution exclusion. This Article is intended to contribute to the literature by examining pollution exclusion cases that involved carbon monoxide exposure.

A majority of courts uphold the validity of the pollution exclusion in insurance policies to bar coverage for personal injuries resulting from carbon monoxide exposure. The first part of this Article discusses the majority rule and the various arguments courts have utilized to uphold the exclusion. A minority rule has also emerged that the pollution exclusion does not apply to cases involving carbon monoxide. The second part of this Article examines the arguments courts have utilized in ruling that carbon monoxide is not a "pollutant."

In the wake of conflicting guidance from the courts on the applicability of the pollution exclusion in cases of carbon monoxide exposure, the final part of this Article proposes that as a matter of public policy states amend their respective insurance codes to require that insurance policies specifically provide coverage for personal injuries involving carbon monoxide exposure.

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To Laura Elizabeth Grice – yours always.

I. INTRODUCTION

Carbon monoxide, or "CO," is a colorless and odorless gas.[1] Carbon monoxide can be found anytime fuel is burned in items such as "cars or trucks, small engines, stoves, lanterns, grills, fireplaces, gas ranges, or furnaces."[2] Even at low levels of concentration, carbon monoxide can cause fatigue in a healthy individual.[3] At moderate to higher levels of concentration, it can cause more severe symptoms including dizziness, nausea, headaches and can even be fatal.[4] In the United States, it has been reported that approximately 400 individuals die each year and an additional 4000 individuals are hospitalized annually due to unintentional carbon monoxide poisoning.[5] Unfortunately, there are many news articles with reports of carbon monoxide poisoning.[6] Public safety officials generally encourage individuals to check the functionality of carbon monoxide detectors in their homes when daylight savings time begins as well as ends.[7]

Some of the cases in which personal injuries with carbon monoxide poisoning are incurred involve occupants of a home or apartment suffering injuries from carbon monoxide caused by a faulty heater, furnace, oven, or boiler. Others involve injuries suffered in a restaurant or even while on a boat. In a number of those cases, the occupant of the home files a personal injury claim with their homeowner's insurer or the tenant files a claim against the landlord or the patron of the restaurant files a claim against the restaurant. In many cases, the insurance company will deny its insured coverage under a commercial general liability policy for the personal injury claim due to a "total

1. *See Carbon Monoxide's Impact on Indoor Air Quality,* ENVTL. PROTECTION AGENCY (2017), https://www.epa.gov/indoor-air-quality-iaq/carbon-monoxides-impact-indoor-air-quality.

2. *Frequently Asked Questions – What is Carbon Monoxide?*, CENTERS FOR DISEASE CONTROL AND PREVENTION (2017), https://www.cdc.gov/co/faqs html.

3. *See Carbon Monoxide's Impact on Indoor Air Quality*, *supra* note 1.

4. *See id.*

5. *Frequently Asked Questions – What is Carbon Monoxide?*, *supra* note 2.

6. *See, e.g.*, Mike LaBella & Kiera Blessing, *Methuen family suffers carbon monoxide poisoning from generator*, EAGLE-TRIBUNE (Nov. 2, 2017), http://www.eagletribune.com/news/merrimack_valley/methuen-family-suffers-carbon-monoxide-poisoning-from-generator/article_fe0a8b67-0a5c-581e-a9b0-197496ebdaf0 html; Shiina LoSciuto & Shaun Towne, *Students tested for carbon monoxide exposure at Cranston High School East*, WPRI.COM EYEWITNESS NEWS (Nov. 2, 2017), http://wpri.com/2017/11/02/emergency-crews-respond-to-cranston-high-school-east/.

7. *See, e.g.*, Ken Krall, *"Fall Back" A Good Time to Update Home Safety Devices*, WXPR 91.7 FM (Nov. 2, 2017), http://wxpr.org/post/fall-back-good-time-update-home-safety-devices.

pollution exclusion" in the insurance policy.[8] If there is no insurance coverage, then the insured incurs the cost of the judgment. In some cases where the victims of the carbon monoxide poisoning obtain a judgment, it may be difficult for the victims to collect the judgment due to a lack of assets of the judgment debtor or even bankruptcy. Essentially, without the insurance coverage for carbon monoxide poisoning, some victims of carbon monoxide poisoning may be left uncompensated for their injuries.

The typical pollution exclusion in an insurance policy excludes coverage for personal injuries that "would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time."[9] "Pollutants" generally are defined in insurance policies as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."[10]

Over the past several decades, hundreds of courts have ruled upon the applicability of the pollution exclusion in a variety of factual scenarios.[11] There are many varied rulings on what constitutes a "pollutant," including

8. Rory Jurman & Steven Cula, *Will the 'Pollution Exclusion' Ever Die? Part I*, LAW360 (Nov. 18, 2016), https://www.law360.com/articles/864250/will-the-pollution-exclusion-ever-die-part-1.

9. Mark Bell, *The Elusive "Pollution" Definition in the CGL Policy*, IRMI (Mar. 2013), https://www.irmi.com/articles/expert-commentary/pollution-definition-in-the-cgl-policy/.

10. Am. States Ins. Co. v. Koloms, 687 N.E.2d 72, 74 (Ill. 1997).

11. *See* Randy Maniloff, *Could This Be The Most Significant And Pro-Policyholder Pollution Exclusion Case Ever?*, COVERAGE OPINIONS (May 1, 2017), http://www.coverageopinions.info/Vol6IssueSpecial/PolutionExclusion html.

conflicting rulings on things such as asbestos,[12] Chinese drywall,[13] gasoline,[14] lead,[15] manure,[16] and silica.[17] There is also a divide among courts on

12. *Compare e.g.*, Longhorn Gasket and Supply Co. v. U.S. Fire Ins. Co., 698 Fed. App'x 774, 781 (5th Cir. 2017) ("The pollution exclusion in U.S. Fire's excess policies is broad, and applies generally to 'irritants, contaminants, and pollutants.' Though the case law is mixed, we conclude, under the plain language of the policy exclusion, that asbestos constitutes a pollutant and an irritant."), *with* Cont'l Cas. Co. v. Rapid-Am. Corp., 609 N.E.2d 506, 512 (N.Y. 1993) stating:

> Asbestos could certainly be an irritant, contaminant or pollutant of the type encompassed by the clause . . . We conclude, however, that the clause is ambiguous with regard to whether the asbestos fibers at issue – fibers inhaled by persons working closely with or suffering long-term exposure to asbestos products – were discharged into the 'atmosphere' as contemplated by the exclusion.

13. *Compare e.g.*, Granite State Ins. Co. v. Am. Bldg. Materials, Inc., 504 Fed. App'x 815, 817-18 (11th Cir. 2013) stating:

> The plain language of the pollution exclusions at issue in this appeal includes the damage from Chinese drywall. The sulfide gas released by the Chinese drywall falls within the definition of 'pollutant' because it is a 'gaseous . . . irritant or contaminant.' And the bodily injury and property damage alleged 'would not have occurred in whole or in part but for the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape' of this pollutant.

with Auto-Owners Ins. Co. v. Am. Bldg. Materials, Inc., 820 F. Supp. 2d 1265, 1270 (M.D. Fla. 2011) ("Auto-Owners has not shown that the allegations contained in the underlying lawsuit unambiguously fall within the pollution exclusion.").

14. *Compare e.g.*, Federated Mut. Ins. Co. v. Abston Petroleum, Inc., 967 So. 2d 705 (Ala. 2007) (holding gasoline is a pollutant), *with* Hocker Oil Co., Inc., v. Barker – Phillips – Jackson, Inc., 997 S.W.2d 510 (Mo. Ct. App. 1999) (holding gasoline is not a pollutant).

15. *Compare e.g.*, Auto-Owners Ins. Co. v. Hanson, 588 N.W.2d 777, 779 (Minn. Ct. App. 1999) stating:

> Applying an ordinary meaning approach to the pollution exclusion also coincides with Minnesota's general rule for insurance policy interpretation . . . This contradicts a line of cases in other states that find either (1) the exclusion unambiguously does not exclude lead paint in a home, or (2) the language is ambiguous and therefore the exclusion does not apply.

with Atl. Mut. Ins. Co. v. McFadden, 595 N.E.2d 762, 764 (Mass. 1992) stating:

> 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 . . . There simply is no language in the exclusion provision from which to infer that the provision was drafted with a view toward limiting liability for lead paint-related injury. The definition of 'pollutant' in the policy does not indicate that leaded materials fall within its scope. Rather, the terms used in the pollution exclusion, such as 'discharge,' 'dispersal,' 'release,' and 'escape,' are terms of art in environmental law which generally are used with reference to damage or injury caused by improper disposal or containment of hazardous waste.

16. *Compare* Wilson Mut. Ins. Co. v. Falk, 857 N.W.2d 156, 171 (Wis. 2014) stating:

> A reasonable insured may not consider manure safely applied to a field to be a pollutant; however, a reasonable insured would consider manure *in a well* to be a pollutant. Manure is a contaminant as it makes water impure or unclean when it comes into contact with or mixes with water. The injured parties and the DNR allege that the wells were contaminated and polluted by manure, bacteria, and nitrates, requiring the drilling of new wells, as the wells were unusable and the water undrinkable . . . Further, as fecal

the enforceability of the pollution exclusion in cases involving carbon monoxide exposure.

Many commentators have examined legal issues relating generally to pollution exclusions in insurance policies.[18] This Article is intended to contribute to the literature by examining pollution exclusion cases that involve

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> matter, manure fits within the ordinary definition of 'waste,' and waste is a type of pollutant under the Wilson Mutual policy's General Farm liability Coverage . . . Therefore, a reasonable insured would consider manure to be a largely undesirable and not universally present substance in a well, and would also consider cow manure to be a pollutant; thus, manure is unambiguously a pollutant under these circumstances.

with Country Mut. Ins. Co. v. Hilltop View, LLC, 998 N.E.2d 950, 958 (Ill. Ct. App. 2013) ("The fact a material is hazardous in certain situations does not always justify to label it constitutes a 'hazardous material.' Manure is one such material.").

17. *Compare* Garamendi v. Golden Eagle Ins. Co., 127 Cal. App. 4th 480 (Cal. Ct. App. 2005) (holding silica is not a pollutant), *with* Hanover Ins. Co. v. Superior Labor Servs., Inc., 179 F. Supp. 3d 656 (E.D. La. 2016) (holding pollution exclusion did not exclude coverage for alleged injuries due to silica dust exposure).

18. *See* John V. Garaffa & Michael W. Goodin, *The Absolute Pollution Exclusion: Pollution and Fungus, Wet Rot, Dry Rot, and Bacteria*, 50 TORT TRIAL & INS. PRAC. L.J. 105 (2014); Christopher Meeks, Note, *The Pollution Delusion: A Proposal for a Uniform Interpretation of Pollution in General Liability Absolute Pollution Exclusions*, 77 GEO. WASH. L. REV. 824 (2009); Adam M. Cole, John C. Ulin, Daniel A. Zariski, & Lisa M. Ciranda, *Insurance Coverage for Global Warming Liability*, 42 TORT TRIAL & INS. PRAC. L.J. 969 (2007); Carol J. Miller & Nancy J. White, *Contractors and Developers Seek Pollution Insurance Alternatives to Bridge Gap Left Off by CGL Policies*, 33 REAL EST. L.J. 401 (2005); Kurt C. Schultheis, *Sullins v. Allstate: Lead Paint and the Growing Ambiguity of the Pollution Exclusion Clause*, 27 U. BALT. L. REV. 475 (1998); William P. Shelley & Richard C. Mason, *Application of the Absolute Pollution Exclusion to Toxic Tort Claims: Will Courts Choose Policy Construction or Deconstruction?*, 33 TORT TRIAL & INS. L.J. 749 (1998); Jeffrey W. Stempel, *Reason and Pollution: Correctly Construing the "Absolute" Exclusion in Context and in Accord with its Purpose and Party Expectations*, 34 TORT TRIAL & INS. L.J. 1 (1998); 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 (1998); Thomas K. Bick & Lisa G. Youngblood, *The Pollution Exclusion Saga Continues: Does it Apply to Indoor Releases?*, 5 S.C. ENVTL. L.J. 119 (1997); Amy Timmer, *Are They Lying Now or Were They Lying Then? The Insurance Industry's Ambiguous Pollution Exclusion: Why the Insurer, and Not the Insured, Should Pay for Pollution Caused by Prior Landowners*, 46 BAYLOR L. REV. 355 (1994); Jacquelyn A. Beatty, *Exclusions Exclude: Let the Pollution Mean What it Says*, 28 GONZ. L. REV. 401 (1993); Edward Zampino, Richard C. Cavo, & Victor C. Harwood III, *Morton International: The Fiction of Regulatory Estoppel*, 24 SETON HALL L. REV. 847 (1993); Sharon M. Gordon, Note, *The "Sudden and Accidental" Exception to the Pollution Exclusion Clause in Comprehensive General Liability Politics: The Gordian Knot of Environmental Liability*, 45 VAND. L. REV. 161 (1992); Scott D. Marrs, *Pollution Exclusion Clauses: Validity and Applicability*, 26 TORT TRIAL & INS. L.J. 662 (1991); Thomas C. Mielenhausen, *Insurance Coverage for Environmental and Toxic Tort Claims*, 17 WM. MITCHELL L. REV. 945 (1991); Carl A. Salisbury, *Pollution Liability Insurance Coverage, the Standard-Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective America*, 21 ENVTL. L. 357 (1991); R. Steven Burke, *Pollution Exclusion Clauses: The Agony, the Ecstasy, and the Irony for Insurance Companies*, 17 N. KY. L. REV. 443 (1990); S. Hollis M. Greenhaw, *The CGL Policy and the Pollution Exclusion Clause: Using the Drafting History to Raise the Interpretation Out of the Quagmire*, 23 COLUM. J.L. & SOC. PROBS. 233 (1990); Scott C. Stirling, *Reasonable Expectations of Insurance Coverage and the Problem of Environmental Liabilities*, 22 ARIZ. ST. L.J. 395 (1990).

carbon monoxide exposure. In reviewing the cases involving the pollution exclusion and carbon monoxide, it has appeared that a majority of courts uphold the validity of the pollution exclusion in insurance policies to bar coverage for personal injuries resulting from carbon monoxide. Part I of the Article discusses the majority rule and the various arguments courts have utilized to uphold the exclusion. A minority rule has also emerged that the pollution exclusion does not apply to cases involving carbon monoxide. Part II of this Article examines the arguments courts have utilized in ruling that carbon monoxide is not a "pollutant." Finally, in the wake of conflicting guidance from the courts on the applicability of the pollution exclusion in cases of carbon monoxide exposure, Part III of the Article proposes that as a matter of public policy states should amend their respective insurance codes to require that insurance policies specifically provide coverage for personal injuries involving carbon monoxide exposure.

II. THE MAJORITY RULE – THE POLLUTION EXCLUSION APPLIES TO CARBON MONOXIDE

In examining court decisions involving the pollution exclusion in liability insurance policies and carbon monoxide specifically, a majority of court decisions have upheld the validity of the pollution exclusion in carbon monoxide cases. Generally, most courts which uphold the exclusion in cases involving carbon monoxide poisoning conclude that carbon monoxide unambiguously falls within the definition of "irritant," "contaminant," "fumes," or "chemicals." In addition, courts have also tended to focus on the observation that many state and federal environmental laws define carbon monoxide as a "pollutant."

A. THE *BERNHARDT* CASE – THE GENERAL APPROACH OF COURTS UPHOLDING THE POLLUTION EXCLUSION

Most courts that have upheld the application of the pollution exclusion to carbon monoxide cases have taken a similar approach to the Court of Appeals of Maryland in *Bernhardt v. Hartford Fire Insurance Co*.[19] In the *Bernhardt* case, several tenants of a home suffered injuries in the home due to carbon monoxide which emanated from an allegedly defective and improperly maintained central heating system in the home.[20] The landlord filed a

19. *See* Bernhardt v. Hartford Fire Ins. Co., 648 A.2d 1047, 1051-52 (Md. Ct. Spec. App. 1994).

20. *Id.* at 1047.

declaratory judgment action against its insurer seeking a determination that it was entitled to defense and indemnification from the insurer.[21] The insurer contended the pollution exclusion clause precluded coverage for the underlying lawsuit.[22]

The *Bernhardt* Court concluded that carbon monoxide fell within the definitions of "irritant," "contaminant," "fumes" and "chemicals."[23] Thus, carbon monoxide fell "within the clear language of the definition of 'pollutant.'"[24] Furthermore, the *Bernhardt* Court also noted the language of the contract was "quite specific" and that it was "unable to say a person of ordinary intelligence reading the language of this absolute pollution exclusion would conclude that it did not apply to the facts of this case."[25] Despite acknowledging that the insurance industry supported the inclusion of a pollution exclusion "so broad in its application that it sweeps away coverage well beyond that which might be required to meet the industry's legitimate aims," the *Bernhardt* Court emphasized it did so "in contract language that is clear and unambiguous."[26]

B. OTHER COURTS WHICH HAVE UPHELD THE POLLUTION EXCLUSION

Courts which have upheld the exclusion also have examined the plain and ordinary meaning of the contractual terms. The plain meaning rule has been described by one court that "[i]n interpreting contracts, 'the ordinary and usual meaning of the words used is given effect.'"[27] In *Colony Insurance Co. v. Victory Construction LLC*, the United States District Court for the District of Oregon examined the dictionary definitions of "irritant," "contaminant," and "carbon monoxide."[28] After reviewing the definitions of each, the *Victory Construction* Court held that under the plain meaning rule, "carbon monoxide is either an 'irritant' or 'contaminant' and, thus, is a 'pollutant' under the Policy."[29]

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21. *Id.* at 1048.
22. *Id.*
23. *Id.* at 1051.
24. *Id.*
25. *Bernhardt*, 648 A.2d at 1051.
26. *Id.* at 1052.
27. Warburton v. Virginia Beach Fed. Sav. & Loan Ass'n, 899 P.2d 779, 782 (Utah Ct. App. 1995).
28. *See* Colony Ins. Co. v. Victory Constr. LLC, 239 F. Supp. 3d 1279, 1285-86 (D. Or. 2017).
29. *Id.* at 1286.

In addition to the plain meaning rule, courts have examined federal and state environmental laws in finding carbon monoxide is a pollutant. For instance, the Supreme Court of Minnesota in *Midwest Family Mutual Insurance Co. v. Wolters* focused on the definitions in both the Clean Air Act and the Minnesota Pollution Control Agency.[30] The *Wolters* Court noted that not only does the Clean Air Act regulate carbon monoxide as a pollutant, but that the Minnesota Pollution Control Agency classifies carbon monoxide as a "criteria pollutant."[31] The Court in *Wolters* also remarked: "[w]hile there may be substances that are difficult to establish as 'pollutants' for purposes of the absolute pollution exclusion, carbon monoxide is not one of them."[32]

The Superior Court of Pennsylvania in *Matcon Diamond, Inc. v. Penn National Insurance Co.* referred to the definition of "pollutant or contaminant" in CERCLA in its analysis.[33] The CERCLA statute has the following definition of a "pollutant or contaminant":

> The term 'pollutant or contaminant' shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring . . . .[34]

In upholding the application of the pollution exclusion to a case involving carbon monoxide injuries, the Court in *Matcon Diamond* observed that "[c]arbon monoxide is a substance or compound which, upon inhalation, may reasonably be anticipated to cause death or physiological malfunctions."[35]

Some courts also have declined to review extrinsic evidence on the basis that the pollution exclusion is not ambiguous. In *Bituminous Casualty Corp. v. Sand Livestock Systems, Inc.*, the Supreme Court of Iowa held the pollution

30. *See* Midwest Family Mut. Ins. Co. v. Wolters, 831 N.W.2d 628, 637 (Minn. 2013).
31. *Id.* (citing 40 C.F.R. § 50.8 (2017); MINN. R. 7005.0100, subp. 8(a) (2011)).
32. *Id.*
33. Matcon Diamond, Inc. v. Penn Nat. Ins. Co., 815 A.2d 1113 (Pa. Sup. Ct. 2003).
34. 42 U.S.C. § 9601(33) (2017).
35. *Matcon Diamond*, 815 A.2d at 1113.

exclusion encompassed a situation where an individual died due to carbon monoxide poisoning in a hog confinement facility.[36] The Iowa Supreme Court held the pollution exclusion unambiguous and remarked "the plain language in the exclusions encompasses the injury at issue here because carbon monoxide is a gaseous irritant or contaminant, which was released from the propane power washer."[37] Therefore, since no ambiguity existed, the Iowa Supreme Court found that it would be inappropriate to refer to extrinsic evidence in order to create an ambiguity.[38]

Numerous other courts have upheld the pollution exclusion in cases involving carbon monoxide injuries, including the Supreme Court of Georgia,[39] Court of Appeals of Ohio,[40] Superior Court of New Jersey,[41] Superior Court of Connecticut,[42] United States Court of Appeals for the Fourth Circuit,[43] United States Court of Appeals for the Eleventh Circuit,[44] United States Court of Appeals for the Eighth Circuit,[45] United States Court of Appeals for the Fifth Circuit,[46] United States District Court for the District of Massachusetts,[47] United States District Court for the Southern District of Ohio,[48] United States District Court for the District of Columbia,[49] and the United States District Court for the Middle District of Florida.[50]

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36. Bituminous Cas. Co. v. Sand Livestock Sys., Inc., 728 N.W.2d 216, 222 (Iowa 2007).

37. *Id.*

38. *Id.*

39. *See* Reed v. Auto-Owners Ins. Co., 667 S.E.2d 90 (Ga. 2008).

40. *See* Owners Ins. Co. v. Singh, No. 98-CA-108, 1999 WL 976249 (Ohio Ct. App. Sept 21, 1999).

41. *See* Leo Haus, Inc. v. Selective Ins., 801 A.2d 419 (N.J. Super. Ct. App. Div. 2002).

42. *See* Wayland v. Atl. Mut. Cas. Co., No. X03CV116026748S, 2015 WL 5236636 (Conn. Super. Ct. July 29, 2015).

43. *See* Assicurazioni Generali v. Neil, 160 F.3d 997 (4th Cir. 1998).

44. *See* Admiral Ins. Co. v. Feit Mgmt. Co., 321 F.3d 1326 (11th Cir. 2003). The Eleventh Circuit also upheld the pollution exclusion in a carbon monoxide case in Scottsdale Ins. Co. v. Pursley, 487 Fed. App'x. 508 (11th Cir. 2012).

45. *See* Cont'l Cas. Co. v. Advance Terrazzo & Tile Co., 462 F.3d 1002 (8th Cir. 2006). The Eighth Circuit also upheld the pollution exclusion in a carbon monoxide case in Church Mut. Ins. Co. v. Clay Ctr. Christian Church, 746 F.3d 375 (8th Cir. 2014).

46. *See* Nautilus Ins. Co. v. Country Oaks Apartments, Ltd., 566 F.3d 452 (5th Cir. 2009).

47. *See* Essex Ins. Co. v. Tri-Town Corp., 863 F. Supp. 38 (D. Mass. 1994).

48. *See* Longaberger Co. v. U.S. Fid. & Guar. Co., 31 F. Supp. 2d 595 (S.D. Ohio 1998).

49. *See* Nationwide Mut. Ins. Co. v. Nat'l REO Mgmt., Inc., 205 F.R.D. 1 (D.D.C. 2000).

50. *See* Maxum Indem. Co. v. Fla. Constr. Services, Inc., 59 F. Supp. 3d 1382 (M.D. Fla. 2014). The United States District Court for the Middle District of Florida also upheld the pollution exclusion in a carbon monoxide case in Shaw v. Liberty Mut. Fire Ins. Co., No. 6:15-cv-686-Orl-TBS, 2016 WL 561409 (M.D. Fla. Feb. 12, 2016).

III. THE MINORITY RULE – THE POLLUTION EXCLUSION DOES NOT APPLY TO CARBON MONOXIDE

While it appears that a majority of courts uphold the validity of the pollution exclusion in carbon monoxide cases, a strong minority of cases have found the exclusion unenforceable in cases involving carbon monoxide exposure. An often-cited case for the strong minority of cases is the 1997 Supreme Court of Illinois case of *American States Insurance Co. v. Koloms*.[51] The underlying facts of the *Koloms* case involved injuries suffered by several employees of a company housed in a two-story commercial building.[52] A furnace in the two-story commercial building emitted carbon monoxide fumes.[53] The employees filed suit against the beneficial owners of the property, alleging the owners failed to keep the furnace in proper working condition and that the owners also failed to inspect repair work which had been completed on the furnace.[54] The insurer filed a declaratory judgment action seeking to obtain a determination it had no duty to defend or indemnify the beneficial property owners on the claims on the basis that the pollution exclusion excluded coverage for the injuries caused by carbon monoxide.[55] On appeal, the insurer generally argued the language in the exclusion was unambiguous and should thus be given its plain and ordinary meaning to exclude coverage.[56] The insureds argued that irrespective of the language of the exclusion it did not apply to fairly common hazards such as defective heating and ventilation systems and that the purpose of the exclusion limited it to cases involving large scale environmental pollution.[57]

In holding the pollution exclusion did not apply to bar coverage for the accidental release of carbon monoxide from a defective furnace,[58] the *Koloms* Court expressed a sense of concern that a reading of the clause which included the facts involving the accidental release of carbon monoxide from a furnace would bar insurance coverage in cases that have little or nothing to do with what is ordinarily understood as "pollution."[59] The *Koloms* Court

51. *See* Am. States Ins. Co. v. Koloms, 687 N.E.2d 72, 74 (Ill. 1997).
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 75.
57. *Koloms*, 687 N.E.2d at 77.
58. *Id.* at 82.
59. *Id.* at 79. ("Like many courts, we are troubled by what we perceive to be an overbreadth in the language of the exclusion as well as the manifestation of an ambiguity which results when the

also examined the history of the pollution exclusion and noted that the implementation of the Clean Air Act in 1970 placed "greater economic burdens on insurance underwriters."[60] The *Koloms* Court recognized the essential purpose of the pollution exclusion is to exclude environmental clean-up costs from insurance coverage and to avoid costs arising from an "explosion" of environmental litigation.[61] The *Koloms* Court cited with approval[62] the observation of the Supreme Court of North Carolina in *Waste Management of Carolinas, Inc. v. Peerless Insurance Co.* that a primary purpose of the pollution exclusion is to avoid "the yawning extent of potential liability from the gradual or repeated discharge of hazardous substances into the environment."[63] The *Koloms* Court thus limited the application of the pollution exclusion to cases involving "traditional environmental pollution."[64]

Courts that have found the pollution exclusion inapplicable to cases involving carbon monoxide have generally enunciated the following rationales: First, the drafting history and actual text of the pollution exclusion supports its application only to cases involving environmental and industrial pollution; Second, a reasonable policyholder would not expect injuries due to carbon monoxide to be excluded by the pollution exclusion; Third, the lack of a limiting principle on the pollution exclusion would lead to absurd results; Fourth, examining the insurance contract as a whole does not support the application of the pollution exclusion; and; Fifth, ambiguities with the pollution exclusion support a reading of it in favor of coverage.

Each of these rationales, which are distinct and comprise arguments of a strong minority rule, will be discussed further below.

A. THE DRAFTING HISTORY AND ACTUAL TEXT OF THE POLLUTION EXCLUSION SUPPORT ITS APPLICATION ONLY TO CASES INVOLVING ENVIRONMENTAL AND INDUSTRIAL POLLUTION

One of the most salient reasons courts cite to preclude the application of the pollution exclusion to cases involving carbon monoxide exposure is that

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exclusion is applied to cases which have nothing to do with "pollution" in the conventional, or ordinary, sense of the word.").

60. *Id.* at 80. ("The passage of these amendments, which included provisions for cleaning up the environment, imposed greater economic burdens on insurance underwriters, particularly those drafting standard-form CGL policies.").

61. *Id.* at 81.

62. *Id.*

63. *See* Waste Mgmt. of the Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374, 381 (N.C. 1986).

64. *See Koloms*, 687 N.E.2d at 82.

the drafting history of the exclusion does not support its application to areas outside of the realm of traditional environmental and industrial pollution. The Court of Appeals of Kentucky in *Motorists Mutual Insurance Co. v. RSJ, Inc.* cited[65] the Supreme Court of New Jersey opinion in *Morton International, Inc. v. General Accident Insurance Co. of America*, which detailed a history of the exclusion.[66] The Supreme Court of New Jersey in *Morton International, Inc.* summarized the history of the exclusion as follows:

> Foreseeing an impending increase in claims for environmentally-related losses, and cognizant of the broadened coverage for pollution damage provided by the occurrence-based, CGL policy, the insurance industry drafting organizations began in 1970 the process of drafting and securing regulatory approval for the standard pollution-exclusion clause . . . Commentators attribute the insurance industry's increased concern about pollution claims to environmental catastrophes that occurred during the 1960s . . . Other commentators observe that the insurance industry, concerned about public reaction to environmental pollution, desired to clarify and publicize its position that CGL policies did not indemnify knowing polluters.[67]

Another reason articulated for the presence of the pollution exclusion was to prevent insurers from bearing the potentially vast financial costs of environmental litigation.[68] As the Supreme Court of Nevada stated in *Century Surety Co. v. Casino West, Inc.*, "the theory underlying such exclusions appears to be that, if an insured knows that his or her policy covers any type of pollution, he or she may take fewer precautions to ensure that such environmental contaminations do not occur."[69]

In addition to the drafting history of the pollution exclusion, courts have also specifically analyzed the terms utilized in the exclusion itself. For instance, the Court of Appeals of Kentucky in the *RSJ* case specifically noted that terms such as "discharge," "dispersal," "seepage," "migration," "release," and "escape" are "environmental law terms of art."[70] As one example,

65. *See* Motorists Mut. Ins. Co. v. RSJ, Inc., 926 S.W.2d 679, 681 (Ky. Ct. App. 1996).
66. *See* Morton Int'l, Inc. v. Gen. Accident Ins. Co. of Am., 629 A.2d 831, 849-50 (N.J. 1993).
67. *Id.*
68. *See* Century Sur. Co. v. Casino W., Inc., 329 P.3d 614, 617-18 (Nev. 2014).
69. *Id.* at 618.
70. *See Motorists Mut. Ins. Co.*, 926 S.W.2d at 681.

"release" is defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA")[71] as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding or barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant.").[72] In addition, the definition of "pollutant" references words such as "smoke," "vapor," "soot," "fumes," "acids," alkalis," "chemicals," and "waste," terms the Supreme Court of Massachusetts noted in *Western Alliance Insurance Co. v. Gill* "brings to mind products or byproducts of industrial production that may

71. There is a vast academic literature on the legal issues relating to CERCLA. Some law review articles discussing CERCLA include: Christopher D. Thomas, *Tomorrow's News Today: The Future of Superfund Litigation*, 46 ARIZ. ST. L.J. 537 (2014); Margaret J. Pollans, *A "Blunt Withdrawal"? Bars on Citizen Suits for Toxic Site Cleanup*, 37 HARV. ENVTL. L. REV. 441 (2013); Ronald G. Aronovksy, *A Preemption Paradox: Preserving the Role of State Law in Private Cleanup Cost Disputes*, 16 N.Y.U. ENVTL. L.J. 225 (2008); Ronald G. Aronovsky, *Federalism and CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes*, 33 ECOLOGY L.Q. 1 (2006); Amy Luria, *The Suitability of CERCLA Liability for Municipal Pollution of Rivers*, 30 SETON HALL LEGIS. J. 57 (2005); Fenton D. Strickland, Note, *Brownfields Remediated? How the Bona Fide Prospective Purchaser Exemption from CERCLA Liability and the Windfall Lien Inhibit Brownfield Redevelopment*, 38 IND. L. REV. 789 (2005); Gregg W. Kettles, *Bad Policy: CERCLA's Amended Liability for New Purchasers*, 21 UCLA J. ENVTL. L. & POL'Y 1 (2002-2003); John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405 (1997); Robert B. McKinstry, Jr., *The Role of State "Little Superfunds" in Allocation and Indemnity Actions Under the Comprehensive Environmental Response, Compensation and Liability Act*, 5 VILL. ENVTL. L.J. 83 (1994); James R. Deason, Note, *Clear as Mud: The Function of the National Contingency Plan Consistency Requirement in a CERCLA Private Cost-Recovery Action*, 28 GA. L. REV. 555 (1994); Daniel R. Avery, *Enforcing Environmental Indemnification Against a Settling Party Under CERCLA*, 23 SETON HALL L. REV. 872 (1993); Andrew W. Reitze, Jr., Andrew J. Harrison, Jr., & Monica J. Palko, *Cost Recovery by Private Parties Under CERCLA: Planning a Response Action for Maximum Recovery*, 27 TULSA L.J. 365 (1992); Alfred R. Light, *Antidote or Asymptote to Contribution: Non-Contractual Indemnity Under CERCLA*, 21 ENVTL. L. 321 (1991); Denise Rodosevich, *The Expansive Reach of CERCLA Liability: Potential Liability of Executors of Wills and Inter Vivos and Testamentary Transfers*, 55 ALB. L. REV. 143 (1991); J.B. Ruhl, *The Plight of the Passive Past Owner: Defining the Limits of Superfund Liability*, 45 S.W. L.J. 1129 (1991); Debra L. Baker & Theodore G. Baroody, *What Price Innocence? A Realistic View of the Innocent Landowner Defense Under CERCLA*, 22 ST. MARY'S L.J. 115 (1990); John C. Buckley, *Reducing the Environmental Impact of CERCLA*, 41 S.C. L. REV. 765 (1990); David C. Clarke, Note, *Successor Liability Under CERCLA: A Federal Common Law Approach*, 58 GEO. WASH. L. REV. 1300 (1990); Monica Conyngham, Comment, *Robbing the Corporate Grave: CERCLA Liability, Rule 17(b), and Post-Dissolution Capacity to be Sued*, 17 B.C. ENVTL. AFF. L. REV. 855 (1990); Diane H. Nowak, Comment, *CERCLA's Innocent Landowner Defense: The Rising Standard of Environmental Due Diligence for Real Estate Transactions*, 38 BUFF. L. REV. 827 (1990); Steven Ferrey, *The Toxic Time Bomb: Municipal Liability for the Cleanup of Hazardous Waste*, 57 GEO. WASH. L. REV. 197 (1988) & David E. Feder, *The Undefined Parameters of Lessee Liability Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA): A Trap for the Unwary Lender*, 19 ENVTL. L. 257 (1988).

72. *See* 42 U.S.C. § 9601(22) (2017).

cause environmental pollution or contamination."[73] As the Court of Appeals of Kentucky in the *RSJ* case remarked, the utilization of terms from environmental statutes in the pollution exclusion "reflects the exclusion's historical objective – avoidance of liability from environmental catastrophes related to intentional industrial pollution."[74]

A number of other courts, including the Supreme Court of Ohio,[75] Missouri Court of Appeals,[76] Court of Appeals of Louisiana,[77] Supreme Court of New York,[78] United States Court of Appeals for the Second Circuit,[79] and United States District Court for the District of Arizona[80] have cited the observation that the pollution exclusion has been traditionally associated with environmental pollution in holding that the pollution exclusion does not apply to bar coverage for injuries involving carbon monoxide.

B. A REASONABLE POLICYHOLDER WOULD NOT EXPECT INJURIES DUE TO CARBON MONOXIDE TO BE EXCLUDED BY THE POLLUTION EXCLUSION

Some courts also cite to the reasonable expectations of the insured in favor of coverage in carbon monoxide cases. The reasonable expectations doctrine in insurance law has been adopted in some form by a number of states.[81] As an example of one court that has adopted the reasonable expectations doctrine, in *Public Service Co. of Colorado v. Wallis and Co.'s*, the Supreme Court of Colorado stated that "if the various provisions conflict with each other, then we must construe the contract in a manner that protects the reasonable expectations of the insured at the time the insured purchased the policies."[82]

In citing the reasonable expectations doctrine in cases involving the pollution exclusion and carbon monoxide exposure, courts have focused on the

73. *See* W. All. Ins. Co. v. Gill, 686 N.E.2d 997, 999 (Mass. 1997).

74. *See Motorists Mut. Ins. Co.*, 926 S.W.2d at 681.

75. *See* Andersen v. Highland House Co., 757 N.E.2d 329, 332-33 (Ohio 2001).

76. *See* Am. Nat'l Prop. & Cas. Co. v. Wyatt, 400 S.W.2d 417, 420-23 (Mo. Ct. App. 2013).

77. *See* Thompson v. Temple, 580 So.2d 1133, 1134-35 (La. Ct. App. 1991).

78. *See* Kenyon v. Sec. Ins. Co. of Hartford (DPIC Cos.), 626 N.Y.S.2d 347, 350-51 (N.Y. Sup. Ct. 1993).

79. *See* Stoney Run Co. v. Prudential – LMI Commercial Ins. Co., 47 F.3d 34, 47 (2d Cir. 1995).

80. *See* Saba v. Accidental Fire & Cas. Co. of North Carolina, No. CV-14-0037-PHX-GMS, 2014 WL 7176776, at *4 (D. Ariz. Dec. 16, 2014).

81. *See* RANDY MANILOFF & JEFFREY STEMPEL, GENERAL LIABILITY INSURANCE COVERAGE: KEY ISSUES IN EVERY STATE 753 (3d ed. 2015).

82. *See* Pub. Serv. Co. of Colorado v. Wallis and Co.'s, 986 P.2d 924, 939 (Colo. 1999).

idea that a reasonable insurance policyholder would not characterize carbon monoxide emissions that result from a malfunctioning device to be "pollution." In *Regional Bank of Colorado, N.A. v. St. Paul Fire and Marine Insurance Co.*, the United States Court of Appeals focused its analysis on the terms "irritant" and "contaminant" that are contained in the pollution exclusion.[83] In holding that the reasonable expectations doctrine precluded the application of the pollution exclusion to carbon monoxide injuries, the Court in the *Regional Bank of Colorado* case remarked "a reasonable policyholder would not understand the policy to exclude coverage for *anything* that irritates."[84] On the contrary, the Court stated a more reasonable reading of the provision is 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."[85]

Courts have also cited the fact that an insurance contract is a contract of adhesion[86] in support of applying the doctrine of reasonable expectations in cases involving the pollution exclusion and carbon monoxide exposure. In *American National Property & Casualty Co. v. Wyatt*, the Missouri Court of Appeals specifically stated that, coupled with ambiguous policy language, "the fact that the policy was a contract of adhesion makes applicable the doctrine of reasonable expectations."[87]

The reasonable expectations doctrine has also been cited by the Supreme Court of Nevada,[88] Supreme Court of Massachusetts,[89] and the United States Court of Appeals for the Second Circuit[90] in finding that a pollution exclusion is unenforceable in cases involving carbon monoxide injuries.

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83. *See* Reg'l Bank of Colorado, N.A. v. St. Paul Fire and Marine Ins. Co., 35 F.3d 494, 498 (10th Cir. 1994).

84. *Id.*

85. *Id.*

86. *See* James M. Fischer, *Why are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context*, 24 ARIZ. ST. L.J. 995, 1008 (1992).

87. *See* Am. Nat'l Prop. & Cas. Co. v. Wyatt, 400 S.W.2d 417, 426 (Mo. Ct. App. 2013).

88. *See* Century Sur. Co. v. Casino W., Inc., 329 P.3d 614, 618 (Nev. 2014) ("In light of the exclusion's ambiguity, we must interpret the provision to effectuate Casino West's reasonable expectations.").

89. *See* W. All. Ins. Co. v. Gill, 686 N.E.2d 997, 1000 (Mass. 1997) ("An objectively reasonable insured, reading the language of the typical pollution exclusion, would not expect a disclaimer of coverage for these types of mishaps even though they involve 'discharges,' 'dispersals,' 'releases,' and 'escapes' of 'contaminants' and 'irritants.'").

90. *See* Stoney Run Co. v. Prudential - LMI Commercial Ins. Co., 47 F.3d 34, 39 (2d Cir. 1995) ("A reasonable policyholder might not characterize the escape of carbon monoxide from a faulty residential heating and ventilation system as environmental pollution.").

C. THE LACK OF A LIMITING PRINCIPLE ON THE POLLUTION EXCLUSION WOULD LEAD TO ABSURD RESULTS

Courts have also reasoned that the lack of a limiting principle on the pollution exclusion would lead to absurd results. As the pollution exclusion has specifically listed "irritants" or "contaminants" as pollution, the Supreme Court of Nevada in the *Casino West* case noted that an overly expansive reading of the pollution exclusion could include household items such as soap, shampoo, and bleach.[91] The Court in *Casino West* observed that if soap and bleach were defined as "pollutants," then the pollution exclusion would apply to bar coverage for personal injuries such as "a person slipping on a puddle of bleach or developing a skin rash from using a bar of soap."[92] Such results, the Court noted, would be "absurd."[93]

The Court of Appeals in the *RSJ* case specifically adopted the reasoning of the Maryland Court of Appeals in *Sullins v. Allstate Insurance Co.*[94] in holding the pollution exclusion inapplicable to a case involving carbon monoxide poisoning.[95] The *Sullins* Court cited the United States Court of Appeals for the Seventh Circuit in *Pipefitters Welfare Educational Fund v. Westchester Fire Insurance Co.*, which stated the following:

> The terms 'irritant' and 'contaminant,' when viewed in isolation, are virtually boundless, for "there is virtually no substance or chemical in existence that would not irritate or damage some person or property . . . Without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results. To take but two simple examples, reading the clause broadly would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injured caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution.[96]

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91. *See Century Sur. Co*., 329 P.3d at 617.
92. *Id.*
93. *Id.*
94. Sullins v. Allstate Insurance Co., 667 A.2d 617 (Md. Ct. App. 1996).
95. *See* Motorists Mutual Insurance Co. v. RSJ, Inc., 926 S.W.2d 679, 682 (Ky. Ct. App. 1996).
96. *Sullins*, 667 A.2d at 621 (citing Pipefitters Welfare Ed. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1043 (7th Cir. 1992)).

The presence of a limiting principle on the text of the pollution exclusion strongly supports a finding that the pollution exclusion does not apply to cases involving injuries due to carbon monoxide poisoning.

D. EXAMINING THE INSURANCE CONTRACT AS A WHOLE DOES NOT SUPPORT THE APPLICATION OF THE POLLUTION EXCLUSION

Courts also have cited the purpose of the insurance contract as a whole and the insurer - insured relationship in declining to enforce the pollution exclusion in cases not involving environmental or industrial pollution. The underlying facts of the *Gill* case in the Supreme Court of Massachusetts involved a patron who incurred injuries from carbon monoxide due to fumes which emanated from an oven in the insured's restaurant.[97] In holding that the pollution exclusion did not apply, the *Gill* Court observed that at the time it purchased its commercial general liability insurance policy the insured would have contemplated injuries to patrons as a result of employee negligence or equipment malfunctioning would be covered by insurance.[98] In a case involving an insured that was an architectural and engineering firm, the Supreme Court of New York in *Kenyon v. Security Insurance Co. of Hartford (DPIC Companies)* remarked the insured did not routinely generate hazardous substances as part of the business and would have purchased a professional liability policy to insure claims arising out of professional pursuits.[99] The Superior Court of Pennsylvania in *Gamble Farm Inn, Inc. v. Selective Insurance Co.* described the responsibility of an insurer to its insured in cases involving carbon monoxide injuries in very strong terms by stating an insurer

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97. *See* W. All. Ins. Co. v. Gill, 686 N.E.2d 997, 998 (Mass. 1997).

98. *Id.* at 1000, where it was found:

> The insureds obviously did not contemplate that their ordinary cooking operations would poison patrons while they were enjoying traditional Indian foods and dinners. Surely, when they purchased their policy from Western Alliance, they expected that accidents causing injuries to patrons at the restaurant due to the negligence of employees or the malfunctioning of ovens and other equipment-claims arising during the course of normal business activities would be covered.

99. *See* Kenyon v. Sec. Ins. Co. of Hartford (DPIC Cos.), 626 N.Y.S.2d 347, 351 (N.Y. Sup. Ct. 1993) stating:

> The defendant . . . was in the business of engineering and architecture . . . he did not generate or produce hazardous substances routinely in the course of his profession, nor did he dispose of toxic waste as a part of his business. He purchased a sweeping professional liability policy to protect himself from claims of damage resulting from the pursuit of his profession. Under the broad coverage he purchased, he reasonably expected coverage under the policy. D.P.I.C., as his insurer, certainly knew the nature of his business and, if they desired to do so, could have drafted unambiguous endorsements to eliminate coverage for the negligent design of heating, ventilation, and air conditioning systems.

cannot hide "behind the language of its pollution exclusion, to eliminate its responsibility to its insured for the type of loss suffered by appellee."[100]

E. AMBIGUITIES WITH THE POLLUTION EXCLUSION SUPPORT A READING OF IT IN FAVOR OF COVERAGE

Finally, several courts have also cited the rule of insurance law that any ambiguities in an insurance contract should be resolved in favor of the insured.[101] Multiple interpretations of the pollution exclusion exist. As the Supreme Court of Nevada stated in the *Casino West* case, "the absolute pollution exclusion permits multiple reasonable interpretations of coverage."[102] In addition, the Court of Appeals of Kentucky in the *RSJ* case emphasized that the pollution exclusion generated conflicting judicial interpretations throughout the country.[103] The *RSJ* Court noted the fact other judges have declined to enforce the pollution exclusion "certainly lends some credence to the proposition that the language is ambiguous and must be resolved against the drafter."[104] The Supreme Court of Ohio also commented on the split in judicial opinions and stated other opinions "provide persuasive support for the underlying notion that this particular policy language is ambiguous and therefore should be interpreted in favor of the insured."[105]

IV. PROPOSAL – STATE LEGISLATIVE ACTION

With the courts reaching varying decisions throughout the country on the question of whether a pollution exclusion in an insurance policy is enforceable to bar coverage for cases of carbon monoxide poisoning, future courts which may encounter this issue are left with a lack of consistency across jurisdictions. It is clear that over two decades worth of litigation on this issue has not led to a decisive trend either way. As a matter of public policy, to protect victims of carbon monoxide exposure, states should specifically amend their state insurance codes to specifically provide for coverage in insurance policies in cases of carbon monoxide exposure.

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100. *See* Gamble Farm Inn, Inc. v. Selective Ins. Co., 656 A.2d 142, 147 (Pa. Super. Ct. 1995).

101. *See* Washington Nat'l Ins. Corp. v. Ruderman, 117 So.3d 943, 950 (Fla. 2013) ("Where the provisions of an insurance policy are at issue, any ambiguity which remains after reading each policy as a whole and endeavoring to give every provision its full meaning and operative effect must be liberally construed in favor of coverage and strictly against the insurer.").

102. Century Sur. Co. v. Casino W., Inc., 329 P.3d 614, 617 (Nev. 2014).

103. *See* Motorists Mut. Ins. Co. v. RSJ, Inc., 926 S.W.2d 679, 681 (Ky. Ct. App. 1996).

104. *Id.*

105. Andersen v. Highland House Co., 757 N.E.2d 329, 334 (Ohio 2001).

A. STATE STATUTES AND REGULATIONS REQUIRING CARBON MONOXIDE DETECTORS

The risk and dangers posed by carbon monoxide poisoning have led many state legislatures to require the installation of carbon monoxide detectors in a number of buildings. According to the National Conference of State Legislatures, approximately twenty-seven states have specific state statutes which require carbon monoxide detectors in private dwellings, and another eleven states have regulations requiring carbon monoxide detectors through state building codes.[106] Several states, including Florida,[107] require detectors to be installed in newly constructed dwellings.[108] Surprisingly, only fifteen states have statutes or administrative regulations which require carbon monoxide detectors for hotels and motels.[109]

There is momentum for the implementation of strengthened laws which require the installation of carbon monoxide detectors. In 2017, the Minnesota Legislature passed a law requiring carbon monoxide detectors on some

106. *See* National Conference of State Legislatures, *Carbon Monoxide Detector Requirements, Laws and Regulations* (Apr. 3, 2017), http://www ncsl.org/research/environment-and-natural-resources/carbon-monoxide-detectors-state-statutes.aspx (hereinafter "National Conference of State Legislatures").

107. *See* FLA. STAT. § 509.211(4). The statute states the following:

> (4) Every enclosed space or room that contains a boiler regulated under chapter 554 which is fired by the direct application of energy from the combustion of fuels and that is located in any portion of a public lodging establishment that also contains sleeping rooms shall be equipped with one or more carbon monoxide detector devices that are listed as complying with the American National Standards Institute/Underwriters Laboratories, Inc., "Standard for Gas and Vapor Detectors and Sensors," ANSI/UL 2075, by a nationally recognized testing laboratory accredited by the Occupational Safety and Health Administration, unless it is determined that carbon monoxide hazards have otherwise been adequately mitigated as determined by the local fire official or his or her designee. Such devices shall be integrated with the public lodging establishment's fire detection system. Any such installation shall be made in accordance with rules adopted by the Division of State Fire Marshal. In lieu of connecting the carbon monoxide detector device to the fire detection system as described in this subsection, the device may be connected to a control unit that is listed as complying with the Underwriters Laboratories, Inc., "Standard for General-Purpose Signaling Devices and Systems," UL 2017, or a combination system that is listed as complying with the National Fire Protection Association "Standard for the Installation of Carbon Monoxide (CO) Detection and Warning Equipment," NFPA 720. The control unit or combination system must be connected to the boiler safety circuit in such a manner that the boiler is prevented from operating when carbon monoxide is detected until it is reset manually.

108. *See* National Conference of State Legislatures, *supra* note 106.

109. *Id.*

boats.[110] The law, known as "Sophia's Law," was enacted largely in response to the 2015 death of a seven-year-old girl on a boat due to carbon monoxide poisoning from a hole in a boat's exhaust pipe.[111] The law requires any boat with designated sleeping accommodations, a galley area with a sink, or a head compartment to be equipped with a carbon monoxide detector.[112] Sophia's Law takes effect in Minnesota on May 1, 2018.[113]

B. PROPOSED FEDERAL LEGISLATION – CARBON MONOXIDE POISONING PREVENTION ACT

Since the 110th Congress in 2008, during almost every successive Congress Democratic Senator Amy Klobuchar of Minnesota has introduced the Carbon Monoxide Poisoning Prevention Act.[114] First introduced in 2008, the Carbon Monoxide Poisoning Prevention Act would require all manufacturers and distributors to meet the American National Standards Institute (ANSI)[115] standard for single and multiple station carbon monoxide alarms.[116] In addition, the legislation would require all new portable generators sold include an interlock safety device that would shut off the generator if carbon monoxide levels reached a level that "would cause serious bodily injury or death to people."[117] As a public policy matter, the legislation stated that "Congress should promote the purchase and installation of carbon monoxide alarms in

110. *See* Kelly Smith, *New Minnesota rule requiring carbon monoxide detectors on boats pushed to 2018*, MINNEAPOLIS STAR TRIBUNE (June 2, 2017), http://www.startribune.com/new-minnesota-rule-requiring-carbon-monoxide-detectors-on-boats-pushed-to-2018/425984043/.

111. *Id.*

112. *See* MINN. STAT. § 86B.005 (2016).

113. *See Sophia's Law – Carbon Monoxide Law for Boaters*, MINNESOTA DEP'T OF NAT. RESOURCES (2018), http://www.dnr.state mn.us/safety/boatwater/sophias-law html.

114. *See* S. 3660, 110th Cong. (2008).

115. *See About ANSI,* ANSI (2017), https://www.ansi.org/about_ansi/overview/overview?menuid=1stating:

> As the voice of the U.S. standards and conformity assessment system, the American National Standards Institute (ANSI) empowers its members and constituents to strengthen the U.S. marketplace position in the global economy while helping to assure the safety and health of consumer and the protection of the environment. The Institute oversees the creation, promulgation and use of thousands of norms and guidelines that directly impact businesses in nearly every sector: from acoustical devices to construction equipment, from dairy and livestock production to energy distribution, and many more. ANSI is also actively engaged in accreditation – assessing the competence of organizations determining conformance to standards.

116. *See* S. 3660, 110th Cong. (2008) at § 3.

117. *Id.* at § 4.

residential homes and dwelling units nationwide in order to promote the health and public safety of citizens throughout the Nation."[118]

The legislation has not yet been enacted into law, despite being introduced in the United States Senate during the 111th Congress (2009-2010),[119] 112th Congress (2011-2012),[120] 113th Congress (2013-2014),[121] and 114th Congress (2015-2016).[122] Companion legislation has been introduced in the United States House of Representatives during the 111th Congress (2009-2010),[123] 112th Congress (2011-2012),[124] 113th Congress (2013-2014),[125] and 114th Congress (2015-2016).[126] In the 114th Congress, five Democratic Senators co-sponsored the legislation (Senators Charles Schumer, Robert Casey Jr., Al Franken, Richard Blumenthal, and Robert Menendez).[127] The version of the legislation in the United States House of Representatives received bipartisan support from co-sponsors in the 114th Congress, including co-sponsorship by thirteen Democrats and four Republicans.[128]

C. PROPOSAL – MANDATING INSURANCE COVERAGE IN INSURANCE POLICIES FOR PERSONAL INJURIES CAUSED BY CARBON MONOXIDE

With numerous states which have laws that require installation of carbon monoxide detectors in private dwellings and the presence of some support for more stringent standards at the federal level regarding carbon monoxide detectors, there is a strong public policy to prevent the dangers of carbon monoxide exposure. In cases where courts have upheld the validity of the

118. *Id.* at § 2.
119. *See* S. 1216, 111th Cong. (2009).
120. *See* S. 3343, 112th Cong. (2012).
121. *See* S. 1793, 113th Cong. (2013).
122. *See* S. 1250, 114th Cong. (2015).
123. *See* H.R. 1796, 111th Cong. (2009).
124. *See* H.R. 4326, 112th Cong. (2012).
125. *See* H.R. 4864, 113th Cong. (2014).
126. *See* H.R. 4701, 114th Cong. (2016).
127. *See* S. 1250, 114th Cong. (2015).
128. *See* H.R. 4701, 114th Cong. (2016). The bill was sponsored by Democratic Congresswoman Ann Kuster of New Hampshire. The thirteen Democrats who co-sponsored the bill are as follows: G.K. Butterfield of North Carolina, Eleanor Holmes Norton of the District of Columbia, Brenda Lawrence of Michigan, Donna Edwards of Maryland, James McGovern of Massachusetts, Paul Tonko of New York, Chaka Fattah of Pennsylvania, Steve Israel of New York, Katheen Rice of New York, Collin Peterson of Minnesota, Debbie Dingell of Michigan, Mark DeSaulnier of California, and Raul Grijalva of Arizona. The four Republicans who co-sponsored the bill were Leonard Lance of New Jersey, Erik Paulsen of Minnesota, Gregg Harper of Mississippi, and Chris Collins of New York.

pollution exclusion clause in liability insurance policies in cases involving carbon monoxide poisoning, the lack of insurance coverage for an insured may very well lead to a situation where the judgment creditor is possibly left to try to collect a judgment against an insolvent defendant. In such a case, the victim of carbon monoxide exposure may be left uncompensated for their injuries.

The judicial uncertainty of the application of the pollution exclusion in liability insurance policies to cases involving carbon monoxide exposure can be resolved by state legislative action. Since the implementation of the McCarran-Ferguson Act of 1945, the regulation of insurance has traditionally occurred at the state level.[129] It is not atypical for states to mandate that insurance coverage be provided in a number of situations. For example, many states require that automobile liability insurance policies provide an equal amount of uninsured/underinsured motorists coverage to the insured and in such cases an insured must usually expressly reject the uninsured/underinsured motorists coverage.[130] In the state of Florida, homeowner's insurance policies must provide coverage for damage from "catastrophic ground cover collapse"[131] and homeowner's policies must offer sinkhole coverage as an additional option.[132] With the requirements for insurance coverage in other areas of insurance, it would not be unusual for a state to enact a law making a pollution exclusion or any other exclusion inapplicable in cases of personal injuries arising from carbon monoxide exposure.

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129. *See* Angela D. Krupar, Note, *The McCarran-Ferguson Act's Intersection with Foreign Insurance Companies*, 58 CLEV. ST. L. REV. 883, 889 (2010) ("The enactment of the McCarran-Ferguson Act in response to South-Eastern, coupled with the Act's stated purpose, the legislative history, and case law, establish that Congress intended for the states to regulate the industry of insurance.").

130. *See, e.g.*, FLA. STAT. § 627.727(1) (2017); IOWA CODE § 516A.1 (2017).

131. *See* FLA. STAT. § 627.706(1)(a) (2017). The statute defines a "catastrophic ground cover collapse" in section (2)(a) as

> geological activity that results in all the following: The abrupt collapse of the ground cover; A depression in the ground cover clearly visible to the naked eye; Structural damage to the covered building, including the foundation, and The insured structure being condemned and ordered to be vacated by the governmental agency authorized by law to issue such an order for that structure.

132. *See* FLA. STAT. § 676.706(1)(b) (2017). The statute states the following:

> The insurer shall make available, for an appropriate additional premium, coverage for sinkhole losses on any structure, including the contents of personal property contained therein, to the extent provided in the form to which the coverage attaches. The insurer may require an inspection of the property before issuance of sinkhole loss coverage. A policy for residential property insurance may include a deductible amount applicable to sinkhole losses equal to 1 percent, 2 percent, 5 percent, or 10 percent of the policy dwelling limits, with appropriate premium discounts offered with each deductible amount.

States can amend their respective state insurance code in the following manner to fully resolve issues of insurance coverage for carbon monoxide exposure and to mandate such coverage be available for personal injuries:

> It is a public policy of the state of _____ to prevent the risk of carbon monoxide and to protect victims of carbon monoxide poisoning. In every policy of liability insurance sold in this state, a pollution exclusion or any other type of exclusion in the policy of liability insurance shall be inapplicable to bar insurance coverage for any personal injuries arising as a result of carbon monoxide exposure.[133]

The adoption of a statutory provision would provide clarity to the issue of application of the pollution exclusion in cases involving carbon monoxide exposure and would serve to protect victims of carbon monoxide exposure.

V. CONCLUSION

There is an encouraging overall movement that states are taking more action to address the risk of carbon monoxide exposure. The enactment of laws such as the law in Minnesota discussed earlier which require carbon monoxide detectors on certain boats are intended to help protect individuals from the dangerous risk of carbon monoxide poisoning.[134] In the wake of a morass of judicial decisions on the enforceability of the pollution exclusion in insurance policies to cases involving carbon monoxide poisoning, the legislative branches of state legislatures throughout the country can provide clear guidance on this issue. Specifically, state legislatures can amend state insurance codes to mandate insurance policies provide coverage for personal injuries involving carbon monoxide exposure and protect victims of carbon monoxide who in some situations may be left uncompensated for their losses.

133. The author of this Article offers this language as an example of how states can amend their state insurance codes.

134. *See* Kelly Smith, *Minnesota law requiring carbon monoxide detectors on boats wins national recognition*, MINNEAPOLIS STAR TRIBUNE (Nov. 2, 2017), http://www.startribune.com/minnesota-s-new-law-requiring-carbon-monoxide-detectors-on-boats-the-first-in-the-nation-wins-national-recognition/454759933/.