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The Standard Pollution Exclusion Clause in Commercial General Liability Insurance Policies Bars Coverage for Personal Injuries Resulting from On-Site Exposure to Pollutants Discharged within a Construction Envelope: *Madison Construction Co. v. Harleysville Mutual Insurance Co.*

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Recent Decisions

The Standard Pollution Exclusion Clause in Commercial General Liability Insurance Policies Bars Coverage for Personal Injuries Resulting from On-Site Exposure to Pollutants Discharged Within a Construction Envelope: *Madison Construction Co. v. Harleysville Mutual Insurance Co.*

INSURANCE CONTRACTS — COMMERCIAL GENERAL LIABILITY POLICIES — POLLUTION EXCLUSION CLAUSES — The Pennsylvania Supreme Court held that the standard pollution exclusion clause in commercial general liability policies, which bars coverage for the discharge of pollutants, is clear and unambiguous on its face, thereby requiring application of the clause's plain and ordinary meaning to bar coverage for personal injuries caused by exposure to fumes discharged by a useful product within a construction envelope.

Madison Construction Co. v. Harleysville Mutual Insurance Co., 735 A.2d 100 (Pa. 1999).

In 1991, Kelran Associates, Inc. ("Kelran"), a general contractor, was engaged in a construction project at the Boeing/Vertol Helicopters plant ("Boeing").[1] Kelran hired Madison Construction Company ("Madison"), a subcontractor, to install utility trenches inside a Boeing building.[2] Construction of the trenches involved the pouring of concrete and the application of a curing agent known as

1. *See* Madison Constr. Co. v. Harleysville Mut. Ins. Co., 678 A.2d 802, 803 (Pa. Super. Ct. 1996).

2. *See Madison Constr.*, 678 A.2d at 803.

Eucocure Floor Coat.[3] In order to capture and prevent the Eucocure fumes from escaping into the Boeing building, Madison enclosed the construction site in a polyethelene bubble, also known as a "construction envelope."[4]

Even with the construction envelope, the strong odor produced by the Eucocure Floor Coat permeated the Boeing building.[5] Nicholas Ezzi, an employee of Boeing, was instructed to set up a fan inside the construction envelope to increase ventilation and reduce the odor in the building.[6] As Mr. Ezzi entered the construction envelope with the fan, he was overcome by the Eucocure fumes, causing him to faint and fall into one of the utility trenches, where he suffered severe and permanent injuries.[7] As a result, Mr. Ezzi brought a negligence action against Madison.[8]

At the time of the accident, The Harleysville Mutual Insurance Company ("Harleysville") insured Madison under a commercial general liability policy.[9] This policy "requir[ed] Harleysville to defend Madison in any lawsuit that fell within the parameters of coverage."[10] However, the policy also contained a pollution exclusion clause that excluded coverage for " 'bodily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants."[11] Harleysville was informed of Mr. Ezzi's accident but it

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3. *See id.* Madison's contract with Kelran required it to apply a curing agent such as Eucocure Floor Coat to the utility trenches that it constructed. *See* Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 103 (Pa. 1999).

4. *See Madison Constr.*, 678 A.2d at 803.

5. *See id.*

6. *See id.*

7. *See id.*

8. *See Madison Constr.*, 735 A.2d at 102. Also named as defendants in Mr. Ezzi's suit were Kelran, the general contractor, and Kelran's project superintendent, Brian Murtaugh. *See id.* Kelran and Murtaugh later joined Euclid Chemical Company, the manufacturer of the Eucocure Floor Coat, as a third party defendant. *See id.*

9. *See id.*

10. *Id.*

11. *Id.* at 102-03. The pollution exclusion clause explicitly states as follows:

> This Insurance does not apply to: . . . f. (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants: (a) At or from any premises, site or location which is or was at any time owned occupied by, or rented or loaned to any insured; . . . (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations: (i) if the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor . . . .

Id. The term "pollutant" is defined in the policy as "any solid, liquid, gaseous or thermal

denied coverage and refused to defend Madison against Mr. Ezzi's lawsuit based on the policy's pollution exclusion clause.[12] Upon denial of its claim, Madison filed a declaratory judgment action to determine if Harleysville was contractually obligated to defend Mr. Ezzi's suit.[13] Madison and Harleysville both moved for summary judgment.[14]

The trial court granted summary judgment in favor of Madison.[15] Due to the lack of controlling Pennsylvania appellate authority, the trial court based its ruling on an interpretation of a similar pollution exclusion clause by the intermediate appellate court of North Carolina in *West American Insurance Co. v. Tufco Flooring*.[16]

Relying on *Tufco Flooring*, the trial court first concluded that the policy's definition of "pollutants" did not extend to the present situation because Madison had not brought vapors or fumes to the construction site.[17] Rather, it had brought a "pure raw material," Eucocure Floor Coat, which was neither an irritant nor a contaminant as required by the pollution exclusion clause.[18] The

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irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed." *Id.* Today, pollution exclusion clauses are one of the most litigated clauses in commercial general liability policies. *See id.* at 106.

12. *See id.* at 102.

13. *See Madison Constr.*, 735 A.2d at 103. A declaratory judgment is a "[s]tatutory remedy for the determination of a justiciable controversy where the plaintiff is in doubt as to his legal rights." BLACK'S LAW DICTIONARY 409 (6th ed. 1990).

14. *See Madison Constr.*, 735 A.2d at 103. A summary judgment is a "[p]rocedural device available for prompt and expeditious disposition of controversy without trial when there is no dispute as to either material fact or inferences to be drawn from undisputed facts, or if only question of law is involved." BLACK'S LAW DICTIONARY 1435 (6th ed. 1990).

15. *See Madison Constr.*, 735 A.2d at 103.

16. *See id.* (citing 409 S.E.2d 692 (N.C. Ct. App. 1991), *overruled in part by* Gaston County Dyeing v. Northfield Ins., 524 S.E.2d 558 (N.C. 2000)). No Pennsylvania appellate court had yet interpreted the term "pollutant" in a pollution exclusion clause. *See Madison Constr.*, 735 A.2d at 103.

17. *See id.*

18. *See id.* In *Tufco Flooring*, Tufco was resurfacing the floors of a Perdue chicken processing plant with a styrene monomer resin. *See id.* Fumes created by the resin allegedly contaminated chicken in a nearby freezer. *See id.* West American denied coverage of Perdue's claim against Tufco based on a similar pollution exclusion clause in Tufco's policy, and Tufco sought a declaratory judgment to determine if West American was contractually obligated to defend the claim. *See id.* The North Carolina Court of Appeals affirmed the trial court's entry of a summary judgment in favor of Tufco. *See id.* The appellate court explained that:

> Tufco did not bring the vapors or fumes which invaded the chicken to the Perdue plant. Rather Tufco brought an unadulterated, pure raw material, styrene monomer resin, in one-gallon metal cans with screw-on caps. When this raw material was brought onto the site, it was neither an "irritant [nor a] contaminant." It was a raw

court next concluded, again relying on *Tufco Flooring*, that no event had occurred to trigger the pollution exclusion clause.[19] The court reasoned that even though there was no explicit language in the policy requiring that the alleged pollution escape into the environment, the history of these pollution exclusion clauses, as outlined by the North Carolina Court of Appeals, clearly mandated such an implicit requirement.[20] Relying on this implicit requirement interpretation, the trial court held that the pollution exclusion clause had not been triggered because the Eucocure Floor Coat had not escaped the construction envelope and therefore had not entered the environment.[21]

Harleysville appealed the entry of summary judgment in Madison's favor, and a divided panel of the Pennsylvania Superior Court affirmed the trial court but on different grounds.[22] The appellate court flatly rejected the lower court's conclusion that the policy's definition of a "pollutant" did not extend to the Eucocure fumes.[23] However, the superior court stated "that the pollution exclusion was ambiguous in light of the existence of two contrary schools of thought concerning its interpretation"[24] and therefore

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material used by Tufco in its normal business activity of resurfacing floors. Yet, to be a "pollutant" under the exclusion, a substance must be precisely that, an "irritant or contaminant."

Madison Const., 735 A.2d at 103 (quoting *Tufco Flooring*, 409 S.E.2d at 698).

19. *See Madison Constr.*, 735 A.2d at 104.

20. *See id.* In *Tufco Flooring*, the North Carolina Court of Appeals stated that, prior to 1985, the pollution exclusion clause in general commercial liability policies was a qualified exclusion that required the alleged pollution to escape into the environment. *Tufco Flooring*, 409 S.E.2d at 699. The court explained that the purpose of this exclusion was to limit an insurer's potentially infinite liability arising from the repeated escape of toxic materials into the environment and that "[t]he historical purpose of the pollution exclusion [therefore] limits the scope of the exclusion to environmental damage." *Id.* Based on this historical purpose, the court reasoned that the change in 1985, to an absolute exclusion, which does not require the escape of the alleged pollutants into the environment, had no effect on the scope of the exclusion. *Id.* Consequently, the court held that even in the absence of explicit language, the exclusion still required the escape of pollutants into the environment. *Id.* The court was unwilling to expand the scope of the exclusion so that it could be used by insurers to deny coverage for non-environmental damage. *Id.*

21. *See Madison Constr.*, 735 A.2d at 104.

22. *See id.*

23. *See id.* The court reasoned that: "While the floor-covering material itself was a necessary instrument of Madison's work, the vapors, however unavoidable, were not. They were an unwanted irritating waste product of the floor covering, and thus could be construed to fit within the policy's definition of pollution." *Id.*

24. *Id.* "According to one school of thought, the exclusion did not apply where the pollution in question was not environmental or industrial in nature; according to the other, the exclusion was indeed absolute and applied to any set of facts that came within the literal meaning of its terms." *Id.*

should be construed against the drafter of the policy and in favor of the insured.[25] The superior court based its conclusion that the pollution exclusion clause was ambiguous on its earlier holding in *Cohen v. Erie Indemnity Co.*[26] In *Cohen*, the superior court held that a provision in an insurance policy is ambiguous when several appellate courts have ruled in favor of contrary interpretations of similar clauses.[27]

Upon affirmation of the trial court's entry of summary judgment in favor of Madison, Harleysville moved for reargument en banc, and the superior court granted the motion.[28] "The en banc court reversed the trial court, concluding that the pollution exclusion clause clearly and unambiguously applied to relieve Harleysville of its obligation to defend Madison."[29] Writing for the en banc court, President Judge Emeritus Cirillo noted that *Tufco Flooring*, upon which Madison and the trial court had relied, carried no precedential value in Pennsylvania.[30] Accordingly, the court first concluded that the pollution exclusion clause contained no explicit or implicit requirement that the alleged "pollutants" escape into the environment.[31] The court next concluded that the policy's definition of "pollutants" did extend to the fumes created by the Eucocure

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25. *See id.* at 105. "Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement. Where, however, the language of the contract is clear and unambiguous, a court is required to give effect to that language." Standard Venetian Blind Co. v. Am. Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983) (internal citation omitted).

26. 432 A.2d 596 (Pa. Super Ct. 1981).

27. *See Madison Construction*, 735 A.2d at 104-05. The precise holding that Judge Olszewski relied upon in *Cohen* was: "The mere fact that several appellate courts have ruled in favor of a construction denying coverage, and several others have reached directly contrary conclusions, viewing almost identical policy provisions, itself creates the inescapable conclusion that the provision in issue is susceptible to more than one interpretation." *Id.* (quoting *Cohen*, 432 A.2d at 599).

Several appellate courts, such as the North Carolina Court of Appeals, have denied coverage for non-environmental damage under similar pollution exclusion clauses, while other appellate courts have permitted coverage for non-environmental damage under these clauses. *See Tufco Flooring*, 409 S.E.2d at 699.

28. *See Madison Constr.*, 735 A.2d at 105. En banc "refers to a session where the entire membership of the court will participate in the decision rather than the regular quorum." BLACK'S LAW DICTIONARY 526-27 (6th ed. 1990).

29. *Madison Constr.*, 735 A.2d at 105.

30. *Madison Constr.*, 678 A.2d at 806.

31. *Madison Constr.*, 735 A.2d at 105. The superior court noted that "because the Harleysville-Madison provision contains no such 'into the environment' language, we as a court, will not 'convolute the plain meaning of a writing merely to find an ambiguity.'" *Madison Constr.*, 678 A.2d at 806 (quoting O'Brien Energy Sys. Inc. v. Am. Employer's Ins. Co., 629 A.2d 957, 960 (Pa. Super. Ct. 1993)).

Floor Coat.[32] As such, Harleysville was under no obligation to defend the claims against Madison.[33]

Madison appealed the superior court's reversal of the trial court.[34] The Pennsylvania Supreme Court granted allocatur because no appellate court in Pennsylvania had yet addressed the issue of whether a pollution exclusion clause "precludes coverage for an injury arising from exposure to the fumes of a useful product such as Eucocure Floor Coat."[35] On appeal, Madison argued that the policy's language was clear and unambiguous and that the Eucocure Floor Coat was not a "pollutant" and that even if it was, no event had occurred to trigger the exclusion because there was no "escape" or "discharge" of it.[36] In the alternative, Madison argued that if the language of the exclusion was found to be ambiguous, the policy must therefore be construed in its favor.[37] Madison further argued that Mr Ezzi's claim of negligence was based on a "failure to warn [and] not on the use or release of

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32. *Madison Constr.*, 735 A.2d at 105. The superior court explained that:

> This court simply cannot construe the policy language any way other than by finding that the fumes in the instant case were pollutants. First, the language of the exclusion provision clearly states that "fumes" are regarded as a "pollutant." Second, when canisters of a liquid or other compound are brought onto a premises, opened, and the material, upon exposure to the air or after application to a surface, causes noxious fumes to emanate and make persons dizzy, the fumes are clearly pollutants.

Madison Constr., 678 A.2d at 806.

33. *Madison Constr.*, 678 A.2d at 807. Judge Del Sole filed a dissenting opinion in which Judges Cavanaugh and Beck joined, and in which President Judge McEwen concurred in the result. *Id.* (Del Sole, J., dissenting). In Judge Del Sole's opinion, the claim against Madison was based on its negligent acts and not on Madison's "discharge" of a pollutant; therefore, the claim was not excluded from coverage under the pollution exclusion clause. *Id.* at 808 (Del Sole, J., dissenting). He stated that:

> The injuries claimed by [E]zzi in his complaint have not been alleged to have resulted from Madison's "discharge" of a pollutant. The claims set forth against Madison in [E]zzi's complaint stem from Madison's neglect in failing to warn and protect others from the situation, failing to ventilate the area and failing to cover a hole into which [E]zzi fell. These alleged negligent acts by Madison are not excluded in the Harleysvile policy.

Id. (Del Sole, J., dissenting). Judge Del Sole also stated that the Eucocure Floor Coat was not a pollutant within the definition of that term in the pollution exclusion clause because it was a useful product. *Id.* at 810 (Del Sole, J., dissenting). He argued that a product that "was neither objectionable nor unwanted" could never be deemed an "irritant" or "contaminant" under a pollution exclusion clause. *Id.* at 809 (Del Sole, J., dissenting).

34. *See Madison Constr.*, 735 A.2d at 105.

35. *Id.* at 105-06. Allocatur is "an order or writ of a court . . . granting something requested [such] as an order allowing an appeal." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 57 (1986).

36. *Madison Constr.*, 735 A.2d at 105.

37. *Id.*

pollutants."[38]

The supreme court held that Mr. Ezzi's claim against Madison did fall within the pollution exclusion clause and therefore Harleysville was relieved of its contractual duty to defend the suit.[39] The majority opinion was authored by Justice Saylor, who began his analysis by stating that in interpreting an insurance policy, a court's only goal must be "to ascertain the intent of the parties as manifested by the language of the written instrument."[40] Justice Saylor explained that the language of the insurance policy is therefore the key factor in properly resolving this controversy.[41]

The majority first determined that the policy's definition of "pollutant" clearly and unambiguously applied to the Eucocure Floor Coat.[42] Justice Saylor explained that in determining whether there is an ambiguity, the product in question must be analyzed "by reference to a particular set of facts."[43] The majority relied on a material safety data report prepared by Euclid Chemical Company, the manufacturer of the Eucocure Floor Coat.[44] The report stated that Eucocure Floor Coat contained several toxic chemicals, one of which is a suspected carcinogen and others that are categorized as either hazardous air pollutants or toxic chemicals by the federal government.[45] The report also noted that the product's vapors can be irritating and that exposure to them can cause physical illness.[46] Based on this report, the majority concluded that regardless of the fact that the Eucocure Floor Coat was a useful and necessary product, it is an "irritant."[47] Consequently, the Eucocure Floor Coat

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38. *Id.* Following the rationale of Judge Del Sole's dissent, Madison argued that Mr. Ezzi's injuries were caused by its failure to warn Boeing employees of the fumes and not by the "discharge" of the fumes; therefore, the pollution exclusion clause was inapplicable to Mr. Ezzi's claim. *Madison Constr.*, 678 A.2d at 808.

39. *Madison Constr.*, 735 A.2d at 102.

40. *Id.* at 108-09 (quoting *Standard Venetian Blind*, 469 A.2d at 566).

41. *Id.* at 106. Justice Saylor explained that to resolve this controversy properly, a court must insert the policy's definition of a "pollutant" into the exclusion and then proceed to interpret the exclusion. *Id.* According to Justice Saylor, the exclusion therefore reads: "the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of . . . any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste [, . . . a]t or from any premises, site, or location . . . occupied by . . . [the] insured[.]" *Id.* at 106-07 (alterations in original).

42. *Id.* at 107.

43. *Id.*

44. *Madison Constr.*, 735 A.2d at 107.

45. *Id.*

46. *Id.*

47. *Id.* The material safety data report as summarized by the court states that:

[t]hese products may contain approximately "3-4% Xylene . . . ; 2-3% Cumene . . . ; 40%

was clearly and unambiguously a "pollutant" under the insurance policy.[48]

The majority next determined that the policy's definitions of "discharge" or "escape" clearly and unambiguously applied to this factual situation.[49] Justice Saylor noted that the insurance policy did not define these terms, so they "are to be construed in their natural, plain, and ordinary sense" because they are "[w]ords of common usage in an insurance policy."[50] He stated that the concept of movement was the essence of all of these terms; consequently, he reasoned that the exclusion applied to this factual situation because when the Eucocure Floor Coat was applied to the utility trenches, it moved "into the air above and around the trenches."[51]

The Pennsylvania Supreme Court rejected the trial court's reliance on *Tufco Flooring*.[52] Relying on *Tufco Flooring*, the trial court had held that the terms "discharge" or "escape" still require that the alleged "pollutant" enter the environment in order to trigger the pollution exclusion clause.[53] In *Tufco Flooring*, the North Carolina Court of Appeals reasoned that the purpose of these exclusions was to limit an insurer's liability with regards to environmental damage caused by pollution; therefore, this historical purpose limited the scope of the exclusion strictly to environmental damage and required that the pollution enter the environment.[54] In

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> Trimethylbenze [sic] . . . , which are considered toxic chemicals and 0.2 to 0.3 % Styrene . . . ; which is a suspected carcinogen." Xylene, cumene, and styrene have been classified as hazardous air pollutants by the federal government. 42 U.S.C. § 7412(b). In addition, the report states that the products' vapors may be irritating, that overexposure to such vapors "may cause CNS [central nervous system] effects, vertigo, muscular weakness, narcosis, confusion, [and] coma[,]" and that "[i]nhalation of dusts and vapors should be avoided."

Id. (alterations in original).

48. *Id.* The term "pollutant" is defined in the policy as "any solid, liquid, gaseous or thermal *irritant* or contaminant, including smoke, vapor, soot, fumes, acids, alkalais, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed." *Madison Constr.*, 735 A.2d at 103 (emphasis added).

An "irritant" is something that "tend[s] to produce irritation or inflammation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1197 (1986).

49. *Madison Constr.*, 735 A.2d at 109.

50. *Id.* at 108 (citing Easton v. Washington County Ins. Co., 137 A.2d 332, 335 (Pa. 1957)). A "discharge" is "a flowing or issuing out." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 644 (1986). An "escape" is "to issue from confinement or an enclosure." *Id.* at 774.

51. *Madison Constr.*, 735 A.2d at 108.

52. *Id.*

53. *Id.*

54. *Tufco Flooring*, 409 S.E.2d at 699.

Madison Construction, the trial court adopted this approach.[55] However, the Pennsylvania Supreme Court found that this reasoning violated "settled principles of contract interpretation" because it failed to apply the plain meaning of "discharge" or "escape."[56] The "plain meaning" of "discharge" or "escape" without the qualification of "into the environment" simply requires movement of the alleged "pollutant."[57] Based on this interpretation, the supreme court held that the movement of the Eucocure Floor Coat from the concrete "into the air above and around the trenches" within the construction envelope was sufficient to trigger the exclusion.[58] The court declined to read into the exclusion an implicit requirement that the alleged "pollutant" escape into the environment beyond the construction envelope.[59]

Finally, the majority concluded that Madison's argument that Mr. Ezzi's claim of negligence was based on a "failure to warn [and] not on the use or release of pollutants"[60] had no merit.[61] Justice Saylor explained that regardless of the language used in Mr. Ezzi's complaint, his injuries were the result of "the release of the irritating fumes at the construction site" and therefore his claim fell within the pollution exclusion clause.[62]

Three justices filed dissenting opinions.[63] Justice Cappy's dissent reasoned that the phrase "arising out of" in the pollution exclusion clause was ambiguous and therefore should be construed against Harleysville, the insurer.[64] Additionally, Justice Cappy believed that the majority's "strictly literal interpretation" of the exclusion would lead to "absurd" results not contemplated by either party to the

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55. *Madison Constr.*, 735 A.2d at 108.

56. *Id.*

57. *Id.* Justice Saylor stated that:

> If the pollution exclusion clause, by its express terms, does not require that a discharge or dispersal be "into the environment" or "into the atmosphere," then the court is not at liberty to insert such a requirement in order to effect what it considers to be the true or correct meaning of the clause.

Id.

58. *Id.*

59. *Id.* at 108.

60. *Madison Constr.*, 735 A.2d at 105.

61. *Id.* at 110.

62. *Id.*

63. *Id.*

64. *Id.* (Cappy, J., dissenting). Justice Cappy explained that "[i]n construing the term 'arising out of' in the context of the pollution exclusion, it is questionable whether the phrase requires merely a causal relationship (i.e., a 'but for' relationship) or a proximate cause relationship." *Id.* (Cappy, J., dissenting).

insurance contract.[65] Justice Nigro's dissent concluded that Mr. Ezzi's allegations of negligence were not based upon Madison's discharge of "pollutants," but rather on "Madison's failure to warn and protect others from the hazardous situation."[66] Consequently, Justice Nigro concluded that Mr. Ezzi's suit did not trigger the pollution exclusion clause.[67] Justice Newman dissented because he believed that the trial court could not have properly determined whether the Eucocure Floor Coat was a pollutant "without a factual determination of the composition of the specific product at issue."[68]

In the first half of this century there was virtually no public concern about environmental pollution.[69] However, by the early 1960s, the public began to realize that environmental contamination created grave dangers to both the earth and its inhabitants.[70] As awareness of these dangers grew, the government and private citizens began a legal attack on polluters, which has increased in ferocity over time.[71] As a result, both federal and state legislatures have enacted statutes that impose near infinite liability on polluters for environmental damage caused by hazardous discharges.[72] With the ever increasing liability of polluters, insurance companies "attempted to limit [their] coverage of pollution related losses" through the insertion of pollution exclusion clauses in commercial insurance agreements.[73] By 1970, these pollution exclusion clauses were a standard feature of virtually all commercial general liability

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65. *Madison Constr.*, 735A.2d at 111 (Cappy, J., dissenting). Justice Cappy gave two examples of such absurd results:

> Reading the clause broadly would bar coverage for bodily injuries sufferd by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution.

Id. (Cappy, J., dissenting).

66. *Id.* at 112 (Nigro, J., dissenting).

67. *Id.* at 111-12 (Nigro, J., dissenting).

68. *Id.* at 113 (Newman, J., dissenting).

69. *See* Robert M. Tyler Jr. & Todd J. Wilcox, *Pollution Exclusion Clauses: Problems in Interpretation and Application Under the Comprehensive General Liability Policy*, 17 IDAHO LAW REV. 497 (1981).

70. *See id.*

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

72. *See id.* at 1237-39.

73. *See id.* at 1239-40.

policies.[74]

These clauses have led to "an explosion of litigation" as insurers and their insured struggle over whether the exclusion applies to particular pollution events.[75] Courts have had tremendous difficulty in resolving these disputes because of the widespread inconsistency in the interpretation of these exclusions, especially in the interpretation of the "sudden and accidental" exception to the exclusion.[76]

Pennsylvania appellate courts have interpreted these pollution exclusion clauses on several occasions. The first significant case interpreting such exclusions is the 1984 case of *Techalloy Co. Inc. v. Reliance Insurance Co.*[77] In that case, Reliance Insurance Company ("Reliance") denied coverage of a claim against Techalloy based on the pollution exclusion clause in the policy and on the grounds that the complaint failed to allege property damage or personal injury.[78] The pollution exclusion clause in this case not only required that the pollution escape into the environment, but also that the escape be "sudden and accidental."[79] The case was certified as a class action personal injury suit based on the allegation that Techalloy had negligently exposed its neighbors to the toxic chemical trichloroethylene (TCE).[80]

Upon denial of its claim, Techalloy successfully defended the

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74. *See id.* at 1239-40. An example of a standard pollution exclusion clause from 1970 follows:

> It is agreed that the insurance 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 land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Id. at 1251.

75. *Id.* at 1237.

76. *See* Rosenkranz, *supra* note 71, at 1253-54.

77. 487 A.2d 820 (Pa. Super. Ct. 1996).

78. *See id.*

79. *See id.* at 826. Reliance Insurance Company's general commercial liability policy contained a pollution exclusion similar to the exclusion in note 74.

80. *See id.* at 822. Techalloy is a company that strips and cuts steel and TCE is used in this process. *See id.* The class action suit alleged that Techalloy negligently stored or dumped TCE on its premises, thereby exposing its neighbors to the toxic chemical through contamination of the ground water. *See id.*

A class action suit "provides a means by which, where a large group of persons are interested in a matter, one or more may sue or be sued as representatives of the class without needing to join every member of the class." BLACK'S LAW DICTIONARY 249 (6th ed. 1990).

class action suit through the use of private counsel.[81] It then filed suit against Reliance, seeking reimbursement for the expenses incurred in the defense of the class action suit.[82] "Reliance filed preliminary objections in the nature of a demurrer" claiming that the pollution exclusion clause negated its duty to defend Techalloy because the water contamination was not "sudden and accidental."[83] The trial court granted the preliminary objections.[84] On appeal, Techalloy argued that the water contamination was "sudden and accidental" and that the pollution exclusion therefore did not apply.[85] The Pennsylvania Superior Court concluded that the terms "sudden and accidental" were clear and unambiguous and therefore their plain and ordinary meaning must be applied.[86] Although Techalloy may be able to show that the contamination was "accidental," the court found that the contamination could not be "sudden" because it occurred gradually over 25 years.[87] Based on this plain and ordinary meaning, the court concluded that no coverage exists under the policy unless the toxic discharge is both sudden and accidental.[88]

The next significant Pennsylvania case interpreting these pollution exclusions was the 1989 case of *Lower Paxon Township v. United States Fidelity and Guaranty Co* ("USF&G").[89] In that case, again, the superior court was faced with a pollution exclusion that contained the requirement that the pollution escape into the environment as well as the "sudden and accidental" exception to the exclusion.[90] Lower Paxon Township operated a landfill that was leaching methane gas into the basement of a neighboring home.[91]

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81. *See Techalloy*, 487 A.2d at 823.

82. *See id.*

83. *See id.*

84. *See id.*

85. *Id.* at 826.

86. *Techalloy*, 487 A.2d at 826 (citing Monti v. Rockwood Ins. Co., 450 A.2d 24, 25 (Pa. 1982)).

87. *Id.* at 826-27. Other jurisdictions have refused to apply the plain and ordinary meaning of the term "sudden and accidental." One court concluded that "acts are sudden and accidental regardless of how many deposits or dispersals may have occurred and although the permeation of the pollution into the ground water may have been gradual rather than sudden." Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co., 451 A.2d 990, 994-95 (N.J. Super. Ct. Law Div. 1982).

88. *See Techalloy*, 487 A.2d at 826-27.

89. 557 A.2d 393 (Pa. Super. Ct. 1989).

90. *See Lower Paxon*, 557 A.2d at 397.

91. *See id.* at 396. Methane gas is produced by landfills as organic materials decompose. *See id.* at 394. It is an odorless and colorless gas that is highly flammable. *See Id.* It either escapes through the soil covering the landfill into the atmosphere or it migrates

The township expended $200,000 in remedying the methane gas problem in the home and in the landfill as a whole and requested USF&G to reimburse it.[92] USF&G denied coverage based on the pollution exclusion clause in the policy.[93] The township sued and prevailed at the trial level.[94]

On appeal, USF&G argued that the leaching of methane gas into the neighboring homeowner's basement was not "sudden and accidental" and therefore coverage for the cost of the remediation was excluded.[95] The township argued that the pollution exclusion was ambiguous and should therefore be construed against the insurer.[96] Relying on *Techalloy*, the superior court concluded that the pollution exclusion clause was not ambiguous and that the plain and ordinary meaning of its terms must therefore be applied.[97] It then provided an explicit explanation of the meaning of the exclusion: "[t]hat meaning is simply that damages resulting from a pollution discharge are covered only if the discharge itself is both sudden, meaning abrupt and lasting only a short time, and accidental, meaning unexpected."[98] Relying on this interpretation, the court held that the exclusion precluded coverage because the facts indicated that the methane gas had been migrating into the homeowner's basement for several years, thus negating the viability of a claim of a "sudden" discharge.[99]

In *Lower Paxon*, in addition to determining the meaning of the language in the pollution exclusion clause, the court also addressed the issue of what role public policy should play in the interpretation of these exclusions.[100] Amici curiae writing in support of the Township argued that excluding coverage in these situations would cause municipal governments to collapse under the weight

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laterally underground as it did in this case. *See id.*

92. *See id.* The Township sealed the basement of the home and installed vents around its foundation. *See id.* at 395-96. It also installed a gas migration control system along the northern edge of the landfill which captured the gas and vented it into the atmosphere. *See id.* at 394.

93. *See id.*

94. *See id.* "Following a jury trial, a verdict for the Township in the amount of $212,000 was returned" and USF&G appealed. *Id.*

95. *See Lower Paxon*, 557 A.2d at 396.

96. *See id.* at 398.

97. *Id.* at 403.

98. *Id.* at 399.

99. *Id.* at 403. Consequently, the court reversed the judgment of the trial court and entered judgment for USF&G. *Id.* at 404.

100. *Lower Paxon*, 557 A.2d at 397.

of their environmental liabilities.[101] Nevertheless, the court held that no public policy, no matter what its merits, can be permitted to interfere with the plain meaning of the contract.[102]

Additionally, the court considered what role the drafting history and the regulatory approval process of the exclusion should play in the interpretation of the exclusion.[103] Amici curiae writing in support of the township argued that "the Township's coverage-promoting interpretation of the exclusion is correct because it was the insurer's own interpretation at the time they drafted it and was the interpretation relied upon by insurance regulators in approving it."[104] Bound by its holding that the language of the exclusion was clear and unambiguous on its face, the court was barred from inferring the drafter's subjective intent through extrinsic evidence and it applied the plain and ordinary meaning of the exclusion.[105]

The final significant Pennsylvania case interpreting pollution exclusion clauses is the 1993 case of *O'Brien Energy Systems Inc., v. American Employers' Insurance Co.*[106] In that case, again, the Pennsylvania Superior Court was faced with a pollution exclusion clause that contained the requirement that the pollution escape into the environment as well as the "sudden and accidental" exception to the exclusion.[107] O'Brien Energy Systems ("O'Brien") sought a declaratory judgment to determine whether American Employers' Insurance Company ("American") was obligated to defend a suit

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101. *Id.* Amicus curiae is a:

> person [or an entity] with strong interest in or views on the subject matter of an action, but not a party to the action, [who] may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views.

BLACK'S LAW DICTIONARY 82 (6th ed. 1990).

102. *Lower Paxon*, 557 A.2d at 397. The court adopted the reasoning of the Appellate Division of New Jersey, which was faced with similar policy arguments:

> [W]e underscore the limited nature of our inquiry. Whatever the relative merits of the competing public policies . . . we perceive no legal principle which would permit us to circumvent what the contract says. So it throws no light to inveigh against the "collapse of the pollution insurance market" . . . or, on the other hand, to argue that protection of "blameless victims" is best served by seeking to spread the financial risk . . . . Our role is merely to interpret the language of the insurance contract.

Id. (quoting Broadwell Realty Serv., Inc. v. Fidelity & Cas. Co., 528 A.2d 76, 80 (N.J. Super. Ct. App. Div. 1987)).

103. *Lower Paxon*, 557 A.2d at 402-03.

104. *Id.* at 402 n.5.

105. *Id.* at 402-03.

106. 629 A.2d 957 (Pa. Super Ct. 1993).

107. *See O'Brien Energy*, 629 A.2d at 960-61. The American general commercial liability policy contains a pollution exclusion clause that is similar to the exclusion found in note 74.

against it for property damage caused by the leaching of methane gas from a landfill.[108] American denied coverage of the claim against O'Brien based on the pollution exclusion clause in O'Brien's policy, and the trial court held that coverage was excluded.[109]

On appeal, O'Brien argued that the exclusion did not apply to this situation because it was not an active polluter.[110] Relying on *Lower Paxon*, the superior court concluded that the pollution exclusion clause was clear and unambiguous and that its plain and ordinary meaning therefore must be applied.[111] The court held that coverage is barred for claims based on the escape of pollutants regardless of the role the insured played in causing the escape.[112] The court held that the terms "active" and "passive" polluter were not part of the exclusion and that it could not read such terms into the exclusion clause.[113] As such, O'Brien's claims were excluded under the policy because the migration of methane was not "sudden."[114]

Although *Techalloy*, *Lower Paxon*, and *O'Brien Energy*, all of which deal with qualified pollution exclusion clauses, establish the

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108. *See id.* at 959. SmithKline Beecham Corporation purchased a quarry from National Gypsum Company, which included an assignment of a lease with Montgomery County. *See id.* Montgomery County operated a landfill on a portion of the quarry property pursuant to the lease, and SmithKline and the County granted a license to O'Brien to extract methane gas from the landfill. *See id.* In 1987, methane from the landfill leached into a SmithKline utility conduit on its property, causing an explosion. *See id.* SmithKline filed suit against Montgomery County to recover its property damages, and the County joined O'Brien Energy as a defendant. *See id.*

109. *See id.* at 959-60.

110. *See id.* at 962. O'Brien argued that the averments in the complaint against it were based on the negligent "design, installation, maintenance and operation of its gas to energy facility" and that contamination caused by negligence made it a passive polluter. *See id.*

111. *Id.*

112. *O'Brien Energy*, 629 A.2d at 963.

113. *Id.* The Court adopted the reasoning of the United States District Court for the Western District of Pennsylvania:

> [T]he clause in question excludes coverage for bodily injury or property damage "arising out of the discharge, dispersal, release or escape" of pollutants, subject to the exception for "sudden and accidental" discharges . . . . We have scrutinized this language for any hint that it is limited to "active" polluters or those who "actually release pollutants", but we find no ambiguity and no support for Aardvark's argument. The clause unambiguously withholds coverage for injury or damage "arising out of the discharge, dispersal, release or escape" of pollutants (emphasis added), not merely the insured's discharge, dispersal, release, or escape "of pollutants." As the district court aptly wrote in Federal Insurance Co. v. Susquehanna Broadcasting Co., 727 F. Supp [169, 177 (M.D. Pa. 1989), *modified*, 738 F. Supp. 896 (M.D. Pa. 1990), *aff'd*, 928 F.2d 1131 (3d Cir. 1991)], "the exclusion clause makes no reference at all to active polluters or passive polluters. The terms are foreign to the policy in question."

Id. (quoting Northern Ins. Co. v. Aardvark Assoc., 942 F.2d 189, 194 (3d Cir. 1991)).

114. *O'Brien Energy*, 629 A.2d at 964.

principles upon which pollution exclusion clauses are to be interpreted in Pennsylvania, none of them address the specific issue in *Madison Construction.* The issue in *Madison Construction*, one of first impression for Pennsylvania courts, is whether an absolute pollution exclusion, which does not contain the requirement that the pollutants escape into the environment, precludes coverage for damages caused by the release of pollutants into an enclosed area.[115] Lacking controlling Pennsylvania authority, the trial court relied on *Tufco Flooring*, a North Carolina case, in holding that the absolute pollution exclusion did not preclude coverage in this factual situation.[116] Cases from other jurisdictions show a split in authority as to whether the absolute pollution exclusion precludes coverage for the release of pollutants into a confined space. A brief survey of these diverging decisions follows.

In interpreting absolute pollution exclusion clauses, unlike Pennsylvania, a few jurisdictions have required the pollutants to escape into the environment and have held exclusion clauses inapplicable to the release of pollutants into an enclosed area.[117] The North Carolina Court of Appeals arrived at this conclusion in *Tufco Flooring.*[118]

In *Tufco Flooring*, Tufco Flooring was resurfacing the floors of a Purdue chicken processing plant with a styrene monomer resin and fumes created by the resin allegedly contaminated chicken in a

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115. *Madison Constr.*, 735 A.2d at 103-04.

116. *See id.* at 104. The Pennsylvania Superior Court did, however, address the issue of whether a qualified pollution exclusion clause precluded coverage for the release of pollutants in an enclosed area in Gamble Farm Inn, Inc. v. Selective Ins. Co., 656 A.2d 142 (Pa. Super. Ct. 1995). In this case, a restaurant operated by Gamble Farm Inn was insured under a commercial general liability policy with a pollution exclusion that contained the requirement that the pollutants escape "into or upon land, the atmosphere, or any water course or body of water." *See Gamble Farm Inn*, 656 A.2d at 142-43. The restaurant's hot water heater malfunctioned and released carbon monoxide, injuring patrons. *See id.* at 142. In determining whether these damages were precluded by the exclusion, the court concluded that the term "atmosphere" was ambiguous and therefore must be construed in favor of the insured. *Id.* at 146. The court based its finding of ambiguity on the fact that the term "atmosphere" had more than one reasonable meaning. *Id.* at 144. In its broadest meaning, the term atmosphere could certainly include the air within the restaurant; however, in a narrower meaning, it would only include the air outside of the restaurant. *Id.* at 144-45. As a result, the court concluded that the qualified exclusion did not preclude coverage for damages caused by the release of pollutants in a confined space because the term "atmosphere" in the exclusion clause was ambiguous, and therefore the clause had to be construed against its drafter. *Id.* at 147.

117. *See Tufco Flooring*, 609 S.E.2d at 699. *See also* Sullins v. Allstate Ins. Co., 667 A.2d 617, 622-23 (Md. 1995).

118. *See Tufco Flooring*, 609 S.E.2d at 693.

nearby freezer.[119] Tufco Flooring was insured by West American under a general commercial liability policy that contained an absolute pollution exclusion clause.[120] West American denied coverage of Tufco Flooring's claim based on the exclusion, and Tufco Flooring sought a declaratory judgment to determine if West American was contractually obligated to provide coverage of the claim.[121] The trial court granted Tufco Flooring's motion for summary judgment.[122]

On appeal, the North Carolina Court of Appeals affirmed and held that the exclusion did not preclude coverage because the pollutants did not escape into the environment.[123] The court found that, prior to 1985, pollution exclusion clauses in general commercial liability policies were qualified exclusions that required the alleged pollution to escape into the environment.[124] Explaining that the historical purpose of an exclusion was to limit an insurer's potentially infinite liability arising from the repeated escape of toxic materials into the environment, the court reasoned that the change from qualified to absolute exclusions in 1985 did not alter the scope of these exclusions.[125] Additionally, the court relied on a drafting document that failed to indicate that the change from a qualified exclusion to an absolute exclusion was intended to "expand the scope of the clause to non-environmental damage."[126] Consequently, the court held that even in the absence of explicit language, the exclusion still required the escape of pollutants into the environment.[127]

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119. *See id.*

120. *See id.* at 694. The West American policy contains a pollution exclusion that is identical to the exclusion in *Madison Construction*, which can be found in note 12.

121. *See id.* at 694. Perdue filed a complaint against Tufco Flooring asking for $500,000 in damages, the value of the contaminated chicken that had to be destroyed. *See id.* at 693.

122. *See id.* at 694.

123. *Tufco Flooring*, 409 S.E.2d at 699.

124. *Id.*

125. *Id.*

126. *Id.* In *Madison Construction*, the Pennsylvania Supreme Court held that the pollution exclusion clause was clear and unambiguous on its face. *See Madison Construction*, 735 A.2d at 110. Consequently, the court was barred from attempting to infer the intent of the parties to the insuring agreement from extrinsic evidence as the North Carolina Court of Appeals did in *Tufco Flooring*. *See Lower Paxon*, 557 A.2d at 402-03. The *Madison Construction* court was not free to consider the history of the exclusion or its drafting documents. *See id.*

127. *See Tufco Flooring*, 409 S.E. 2d at 699. Again, unlike the North Carolina Court of Appeals in *Tufco Flooring*, the Pennsylvania Supreme Court was not free to read terms into the exclusion. *See O'Brien Energy*, 629 A.2d at 963. Justice Saylor stated that:

> if the pollution exclusion clause, by its express terms, does not require that a

Other jurisdictions, like Pennsylvania, place primary emphasis on the language of the insurance contract and have precluded coverage for the release of pollutants into an enclosed area under absolute pollution exclusions.[128] These courts have refused to graft onto the absolute exclusion the additional requirement that the pollutants escape into the environment.[129]

In *League of Minnesota Cities Insurance Trust v. City of Coon Rapids*,[130] the City of Coon Rapids operated an ice skating arena that was insured by the League of Minnesota Cities Insurance Trust ("Insurance Trust") under a general commercial liability policy that included an absolute pollution exclusion.[131] Patrons of the arena were injured when nitrogen dioxide produced by a zamboni built up in the arena due to a lack of proper ventilation.[132] The Insurance Trust sought and was granted a declaratory judgment stating that coverage of the patrons' claims against the City was precluded under the pollution exclusion.[133] On appeal, the Minnesota Court of Appeals affirmed, holding that the exclusion was clear and unambiguous and that coverage was precluded, even though the nitrogen dioxide was released into the arena, an enclosed area.[134] Like the Pennsylvania Supreme Court in *Madison Construction*, the Minnesota Court of Appeals, in the absence of explicit language, refused to read into the exclusion the additional requirement that the pollutants be released into the environment.[135]

In *West American Insurance Co. v. Band & Desenberg*,[136] the partnership of Band & Desenberg owned an office building that was insured by West American Insurance Company ("West

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discharge or dispersal be "into the environment" or "into the atmosphere," then the court is not at liberty to insert such a requirement in order to effect what it considers to be the true or correct meaning of the clause.

Id. at 108.

128. *See* West American Ins. Co. v. Band & Desenberg, 925 F. Supp 758, 762 (M.D. Fla. 1996).

129. *See id.*

130. 446 N.W.2d 419 (Minn. Ct. App. 1989).

131. *See League of Minnesota Cities*, 446 N.W.2d at 420. The League of Minnesota Cities' policy contains a pollution exclusion that is similar to the exclusion in *Madison Construction* found in note 12.

132. *See id.*

133. *See id.* In their personal injury suit, the patrons "alleged the city was negligent in failing to adequately ventilate the arena, failing to properly maintain the zamboni machine, failing to warn the plaintiffs, and failing to test the air quality as required by Minnesota health regulations." *See id.*

134. *Id.* at 422.

135. *Id*; *see Madison Constr.*, 735 A.2d at 108.

136. 925 F. Supp 758 (M.D. Fla. 1996).

American") under a general commercial liability policy that included an absolute pollution exclusion.[137] Employees of one of the building's tenants claimed that they suffered from sick building syndrome, caused by pollutants in the building's air conditioning system.[138] The employees demanded that West American settle their claims against the partnership, but West American refused based on the pollution exclusion in its policy.[139] West American then sought a declaratory judgment in the United States District Court for the Middle District of Florida, precluding coverage of the employees' claims.[140]

Relying on *West American Insurance Co. v. Tufco Flooring*, the partnership argued that the pollution exclusion should only apply to preclude coverage for environmental pollution[141] and that they were covered by the policy because the pollutants in the air conditioning system were not discharged into the environment.[142] Finding for West American, the district court held that the exclusion was clear and unambiguous and that "dispersal of contaminants from the attic space of the building into the indoor air supply of the building" was sufficient to trigger the pollution exclusion.[143] Like the Pennsylvania Supreme Court in *Madison Construction*, the *Band & Desenberg* court held that the absolute pollution exclusion was applicable to indoor pollution, and it refused to rewrite the exclusion so as to require the discharge of pollutants into the environment.[144]

The pollution exclusion clauses in *Techalloy*, *Lower Paxon*, and *O'Brien Energy* are qualified exclusion clauses because they require that the pollutants escape into the environment to trigger the exclusion clause, and are inapplicable if the escape of the

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137. *See Band & Desenberg*, 925 F. Supp. at 759-60. The West American policy contains a pollution exclusion that is identical to the exclusion in *Madison Construction*, which can be found in note 12.

138. *See id.* at 760. Sick building syndrome "is caused by a variety of contaminants in the indoor air that give rise to indoor air pollution." *Id.* The employees claimed that there injuries resulted "from a poorly designed air conditioning system that has allowed air-borne contaminants from the attic space into into the buildings office space." *Id.*

139. *See id.*

140. *See id.*

141. *Band & Desenberg*, 925 F.Supp. at 761-62.

142. *Id.* at 760. The district court explained that in *West American Ins. Co. v. Tufco Flooring*, the North Carolina Court of Appeals based its holding that the absolute pollution exclusion still required a discharge into the environment on the historical purposes of the exclusion, and that Florida law barred it from examining such extrinsic evidence because it concluded that the exclusion was clear and unambiguous. *Id.* at 762.

143. *Id.* at 762.

144. *Id.*

pollutants is "sudden and accidental."[145] In contrast, the pollution exclusion clause in *Madison Construction* is an absolute exclusion clause; it does not explicitly require that the pollutants escape into the environment to trigger the exclusion, and there is no "sudden and accidental" exception.[146] Although the exclusion clauses differ, *Techalloy*, *Lower Paxon*, and *O'Brien Energy* establish the principles of interpretation that Pennsylvania courts should follow in interpreting absolute pollution exclusion clauses. First, in general, pollution exclusion clauses are clear and unambiguous and therefore must be afforded their plain and ordinary meaning.[147] Second, public policy considerations cannot be permitted to interfere with the application of this plain and ordinary meaning.[148] Third, because the exclusion clauses are clear and unambiguous on their face, extrinsic evidence cannot be used to demonstrate the subjective intent of the parties to the insuring agreement.[149] Fourth, courts are not permitted to read terms or requirements into the exclusion clause.[150]

With these principles and the Pennsylvania Supreme Court's strong commitment to the canon that in a contract dispute, its only goal is to "ascertain the intent of the parties as manifested by the language of the written instrument,"[151] it was no surprise that the court held that the absolute pollution exclusion clause in Madison Construction's commercial general liability policy relieved Harleysville of its duty to defend Madison against Mr. Ezzi's claim.[152] Looking at the plain and ordinary meaning of the language in the exclusion clause, the court concluded that the language was clear and unambiguous.[153] The exclusion clause used the terms "discharge, dispersal, seepage, migration, release, or escape of pollutants"[154] and the court used the dictionary definition of these

145. *See Madison Constr.*, 735 A.2d at 104.

146. *See id.*

147. *See Techalloy*, 487 A.2d at 826.

148. *See Lower Paxon*, 557 A.2d at 397.

149. *See id.* at 402-03. "The primary objective of contract interpretation is to ascertain and effectuate the intent of the parties as it is reasonably manifested by the language of their written contract." *O'Brien Energy*, 629 A.2d at 960 (citing Toombs NJ Inc. v. Aetna Casualty & Surety Co., 591 A.2d 304, 307 (Pa. Super. Ct. 1991)).

150. *See O'Brien Energy*, 629 A.2d at 962.

151. *Standard Venetian Blind*, 469 A.2d at 566.

152. *Madison Constr.*, 735 A.2d at 110.

153. *Id.* at 108. "Words of common usage in an insurance policy are to be construed in their natural, plain, and ordinary sense . . . . " *Id.* (citing *Easton v. Washington County Ins. Co.*, 137 A.2d 332, 335 (Pa. 1957)).

154. *Madison Constr.*, 735 A.2d at 102.

terms to conclude that they only required movement of the pollutant.[155] Applying the plain and ordinary meaning of the terms, the court held that the movement of the Eucocure Floor Coat from the concrete to the air in the construction envelope was sufficient to trigger the exclusion clause.[156] As a result, the court refused to read into the exclusion clause the additional requirement that the pollutants escape into the environment.[157]

The Pennsylvania high court's adherence to the plain meaning standard in *Madison Construction* is far too rigid for the just resolution of modern insurance contract disputes. It looked at the plain and ordinary meaning of the terms in the pollution exclusion clause as determined by their dictionary definitions, and from these definitions concluded that no ambiguity existed.[158] This method of interpretation is clearly problematic because no word has one plain and ordinary meaning. Wigmore eloquently stated this point when he wrote, "[t]he fallacy consists in assuming there is or ever can be some one real or absolute meaning."[159] The meaning of a word depends upon its context; thus, a word's meaning changes as the context in which the word must be read changes. This is a truth that the Pennsylvania Supreme Court failed to apply.

The Pennsylvania Supreme Court did not read the terms "discharge, dispersal, seepage, migration, release, or escape"[160] in the proper context of a specialized clause in an insurance contract designed to deal with environmental pollution. Rather, it read the terms in a more general, all-purpose context. Consequently, the court failed to recognize that, in addition to their general meaning as determined by a standard dictionary, these terms also could have specialized meanings as "environmental terms of art."[161] If read in the proper context, the terms in the exclusion clause have two reasonable meanings. The first meaning, merely requiring any movement of the pollutant, and the second meaning, requiring the movement of the pollutant into the environment. As a result, the court should have concluded that the terms in the exclusion clause where susceptible to two different reasonable interpretations and

155. *Id.* at 108.

156. *Id.*

157. *Id.*

158. *Id.*

159. 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2462 (1981).

160. *Madison Constr.*, 735 A.2d at 102.

161. *Id.* at 109.

thus ambiguous.[162]

In *Tufco Flooring*, the North Carolina Court of Appeals took a more flexible approach to the interpretation of a similar pollution exclusion clause, which is better suited to the just resolution of modern insurance contract disputes. Instead of only looking to the language of the exclusion clause, the *Tufco Flooring* court considered the history of these exclusion clauses.[163] From this history, the court realized that the purpose of these pollution exclusion clauses was to limit the liability of insurers for environmental pollution and that this purpose narrowed the scope of the exclusion clauses to environmental damage, requiring the movement of pollutants into the environment.[164]

In *Madison Construction*, the trial court adopted this progressive reasoning, but the supreme court dismissed it as a blatant violation of "settled principles of contract interpretation," because the trial court failed to "acknowledge" the plain meaning of the language in the exclusion clause.[165] While this may be true, the supreme court should have and could have relaxed these rigid principles. As Dr. John Murray states in his well-known treatise on contracts, "[w]hile the interpretation process should begin with the usual and ordinary meaning of the words in a contract, courts should be willing to admit evidence that would supercede the usual meaning."[166] If the supreme court had considered the history of these pollution exclusion clauses, while it may not have concluded that the terms "discharge, dispersal, seepage, migration, release, or escape"[167] absolutely required the movement of pollutants into the environment as the North Carolina Court of Appeals did in *Tufco Flooring*,[168] it may have realized that the terms were at least

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162. *Id.* at 106 (citing *Gamble Farm*, 656 A.2d at 144).

163. *Id.* at 104.

164. *Tufco Flooring*, 409 S.E.2d at 699. As mentioned *supra* in note 16, *Tufco Flooring* was overruled in part by *Gaston County Dyeing*. *See Gaston County Dyeing*, 524 S.E.2d at 565. In *Gaston County Dyeing*, the North Carolina Supreme Court stated that:

> [I]t is well-established North Carolina law that the language of the insurance policy controls, and in the instant case, we determine that property damage occurred for purposes of the applicable policies at the time of the injury-in-fact. To the extent that *Tufco* purports to establish a bright-line rule that property damage occurs "for insurance purposes" at the time of manifestation or on the date of discovery, that decision is overruled.

Gaston County Dyeing, 524 S.E.2d at 565.

165. *Madison Constr.*, 735 A.2d at 108.

166. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 86 (3d ed. 1990).

167. *Madison Constr.*, 735 A.2d at 102.

168. *Id.* at 104.

susceptible to two different reasonable interpretations and were therefore ambiguous.[169]

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169. *Id.* at 106 (citing *Gamble Farm*, 656 A.2d at 144).