UIC Law Review

Volume 52 | Issue 3 Article 9

2019

Construing the Pollution Exclusion in Illinois, 52 UIC J. MARSHALL L. REV 805 (2019)

Robert Hartzer

CONSTRUING THE POLLUTION EXCLUSION IN ILLINOIS

ROBERT HARTZER

I. INTRODUCTION

A. How Absolute is the "Absolute Pollution Exclusion?" The Answer is Not Always so Clear.

Imagine a hypothetical situation where you are carrying a few bags of groceries into your house. Suddenly, the bag holding your extra-large bottle of bleach rips open. The bleach bottle falls out and hits the ground with enough force to break open the plastic container. A wave of bleach washes over your carpeting. The damage is done before you think to throw down a towel.

As you watch the color leave your carpet (and your towels), you realize the damage is significant and most likely will be costly. Your

carpeting is ruined, and you wonder if you can afford to replace it.[1] After briefly considering strategically placing area rugs to hide the vast constellation of stains, "Aha!" you think, "I'll see if my insurance will cover new carpeting." Many would simply call their agent or insurer, having long since lost or tossed the copy of the policy they were given ages ago. If, however, homeowners did happen to glance at their homeowners insurance policies, they might be surprised to see language denying coverage for this loss because it was caused by a "pollutant."[2] Language in an insurance

1. As a preliminary aside, losses involving hazardous materials, pollutants, chemicals, and other harmful substances can often cause tremendous damage. This is because liability arises not only from the physical loss itself (i.e., the physical damage to property or people caused by exposure to the substance), but also from ensuing losses (i.e., tort liability for negligence, or statutory penalties for violating applicable environmental laws and regulations). Ron Bousso, *BP Deepwater Horizon Costs Balloon to $65 billion*, REUTERS, (Jan. 16, 2018), www.reuters.com/article/us-bp-deepwaterhorizon/bp-deepwater-horizon-costs-balloon-to-65-billion-idUSKBN1F50NL (noting an early $19 billion settlement of federal and state claims (relating to cleanup, fines, and fees), and continued litigation over the most complex claims within the Court Supervised Settlement Program nearly 8 years after the spill).

For the purposes of this hypothetical example involving spilled bleach, it is safe to assume that the damage would require total replacement of the carpeting in at least the affected room. Other factors, like whether there are natural "breaks" in the carpeting (e.g., thresholds between rooms), and whether the old carpet could even be matched with the new, might increase the amount of the loss far beyond its appearance. *Damage Evaluation Guidelines*, TEXAS WINDSTORM INS. ASS'N & TEXAS FAIR PLAN 15 (2014), twia.org/wp-content/uploads/2015/03/2-Property-Damage-Evaluation-Guidelines.pdf (stating that "[t]he Field Claims Adjuster should allow for repairs to adjoining areas if there is no natural break between the damaged and undamaged areas," and that "[a] Field Claims Adjuster should consider whether or not any significant diminution in market value can be avoided by providing for matched shingles, siding, or components for single or multiple slopes, sides, or areas within a line of sight").

2. One common example of the pollution exclusion can be found in an industry standard homeowners insurance policy. The HO3 form drafted and promulgated by the Insurance Services Office (ISO) states the following with respect to the provision of coverage for "pollution":

> SECTION I – PERILS INSURED AGAINST
>
> Coverage A – Dwelling And Coverage B –
>
> Other Structures
>
> 2. We do not insure, however, for loss:
>
> c. Caused by:
>
> (6) Any of the following:
>
> (e) Discharge, dispersal, seepage, migration, release or escape of pollutants unless the discharge, dispersal, seepage, migration, release or escape is itself caused by a Peril Insured Against named under Coverage C.
>
> Pollutants means any solid, liquid, gaseous or thermal irritant or

policy that denies coverage for certain kinds of losses is often called an "exclusion."[3] The exclusion in this situation is known in the insurance industry as the "Absolute Pollution Exclusion" (hereinafter "APE").[4]

Yet the APE is often not absolute. The APE in the homeowners policy explicitly and literally disclaims coverage for losses caused by the "release" of "pollutants," and defines "pollutant" to include "alkalis."[5] Unfortunately for the hypothetical homeowner above, this means that there might not be coverage for the accidental bleach spill. This is because the cause of the loss seems to be attributable to the "release" of bleach, which technically meets the definition of a "pollutant."

Yet Illinois insurers (and scrupulous insurers everywhere) would likely pay the claim described above despite the strong wording found within the exclusion.[6] This paradox is attributable to what one court described as the outcome of pollution exclusion

---

> contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

Ins. Servs. Office Props., Inc., Homeowners 3 – Special Form, HO 00 03 05 11 (found in LEO P. MARTINEZ & DOUGLAS R. RICHMOND, CASES AND MATERIALS ON INS. LAW 1037, Appendix D (7th ed. 2013) [hereinafter MARTINEZ AND RICHMOND].

3. *Id*. at 1000 (defining "Exclusion" as "an insurance policy provision that denies coverage for certain perils, persons, property, or locations").

4. *Id*. at 179 (noting that "'absolute pollution exclusions' are ubiquitous among modern insurance policies"). Coverage the insurance policy gives in one section may be curtailed in a later section of the policy. In my personal experience as a claims adjuster I heard another adjuster once say that "the policy giveth and the policy taketh away." This is one reason that it is often difficult for the uninitiated to read an insurance policy.

Because knowing how to read an insurance policy is a skill that is beyond the scope of this article, it is sufficient for readers to simply know and understand terms like "coverage," "exclusion," "liability," and other terms of art in insurance law. This is because this comment reviews the APE *generally*, not in the specific context of one insurance policy. Accordingly, it is not necessary to know how to jump between the sections of a policy to perform a coverage analysis in order to understand how Illinois treats the APE.

5. *See* MARTINEZ AND RICHMOND, *supra* note 2 and accompanying text for an example of the language of the APE (which excludes coverage for losses caused by "pollutants" like those listed in the policy, which often include "alkalis" like bleach). *See, e.g.*, Image Linen Services, Inc. v. Ecolab, Inc., 5:09-CV-149-OC-10GRJ, 2011 U.S. Dist. LEXIS 24420 (M.D. Fla. Mar. 10, 2011) (describing a product containing bleach used by a commercial laundry as an "alkali detergent bleach soap and softener"). *See also* Monadnock Mills v. Fushey, 224 F. 386 (1st Cir. N.H. 1915) (describing "bleaching" as a "process effected by an alkali solution, caused to circulate through the fabric…").

6. Illinois interprets the APE to be limited to "traditional environmental contamination," and spilling bleach on the carpet cannot be thought of as "traditional environmental contamination." *See* American States Ins. Co. v. Koloms, 177 Ill. 2d 473, 494 (1997) (holding that Illinois interprets the APE to be limited to "traditional environmental contamination").

litigation: not just a split of authority, but a veritable "fragmentation of authority."[7] Despite the high volume of litigation addressing the APE, no clear consensus has formed around a proper interpretation.[8] However, in jurisdictions with fewer domestic insurers and polluters, litigation of the APE can be rare. This leads advocates and judges to look to jurisdictions with more active APE litigation, such as Illinois.[9]

B. Narrative Outline

This comment reviews Illinois judicial decisions regarding the APE. Illinois is a jurisdiction with a high volume of APE litigation. At the same time, many other jurisdictions have very little experience interpreting, litigating, and applying the APE.[10] Consequently, Illinois' interpretation of the APE is a more significant source of legal authority than a state like Mississippi, which has comparatively little APE litigation.[11] Because of this, Illinois' interpretation of the APE offers persuasive authority for the numerous jurisdictions that handle APE issues with less frequency than Illinois.[12] In short, the way Illinois treats the APE

7. RANDY MANILOFF & JEFFERY W. STEMPEL, GEN. LIABILITY INS. COVERAGE, § 15.00 (Jeffery W. Stempel ed., 3rd ed. 2006) [hereinafter MANILOFF & STEMPEL] (quoting Porterfield v. Audubon Indem. Co., 856 So. 2d 789, 800 (Ala. 2002) (describing litigation of the APE: "there exists not just a split of authority, but an absolute fragmentation of authority")).

8. Alison Frankel, *New Illinois Supreme Court Ruling Should Make 'Judicial Hellhole' Less Fiery*, REUTERS (Sept. 25, 2017), www.reuters.com/article/legal-us-otc-illinois/new-illinois-supreme-court-ruling-should-make-judicial-hellhole-less-fiery-idUSKCN1C02OC (stating that nearly one-third of all asbestos litigation occurs in Madison County courts).

9. Sulphuric Acid Trading Co. Inc. v. Greenwich Ins. Co., 211 S.W.3d 243, 248 (Tenn. App. Ct. 2006) (looking to Illinois case law on the APE in order to resolve a coverage dispute governed by Tennessee authority because "[t]he parties and this Court have been unable to locate any Tennessee authority discussing the Absolute Pollution Exclusion contained in comprehensive general liability policies such as the one at issue in the present case"). This illustrates one of the key points of this comment, which is that many jurisdictions look to Illinois for APE issues simply because Illinois has more experience dealing with APE issues than many other jurisdictions. Illinois' interpretation of the APE is therefore significant because other states look to Illinois for compelling authority on the APE.

10. Mississippi, for example, has just two cases on the books regarding the pollution exclusion: Colony Ins. Co. v. First Specialty Ins. Corp., 262 So. 3d 1128 (Miss. 2019) and Forbes v. Louis St. Martin, 145 So. 3d 1184 (Miss. Ct. App. 2013).

11. Illinois has approximately 53 absolute pollution exclusion cases according to a database search for "absolute pollution exclusion" conducted on Lexis Nexis on October 18, 2018.

12. A database search conducted on October 18, 2018 using Lexis Nexis's Shephard's feature shows 25 states and the District of Colombia have cited Koloms, an Illinois Supreme Court APE case discussed at length in this comment. In other words, half of the states in the country have examined a

influences the way smaller jurisdictions treat the APE.

Despite the fragmentation of authority on the APE, Illinois plays an important role in APE litigation. Illinois' fragment is larger than other jurisdictions.[13] This comment reviews how and why this fragmented, state-centric system came to be, and discusses an ambiguity that has arisen in APE cases involving permitted emissions.[14] By way of background, APE litigation draws upon combined principles of insurance law and environmental law. These principles are introduced below.[15] This comment also presents the history of the APE and the previously mentioned fragmentation of insurance authority.

Furthermore, this comment proposes that Illinois courts formally recognize that the APE is ambiguous when it is applied to permitted emissions or other lawful releases of pollutants. This will have the effect of providing coverage for losses arising from permitted activity (such as a lawsuit alleging a permitted pig-farm has polluted a well despite complying with the terms of its permit). As this comment demonstrates, this proposal is consistent with Illinois Supreme Court case law and has indeed already been adopted by the Third and Fifth District Courts of Appeals. This proposal is also consistent with a public policy to encourage compliance with environmental laws, and a policy to encourage the purchasing of insurance.

---

ruling by Illinois' highest court on Illinois' interpretation of the APE.

13. *See, e.g., Sulphuric Acid Trading*, 211 S.W.3d at 248 (looking to Illinois case law on the APE in order to resolve a coverage dispute governed by Tennessee authority because "[t]he parties and this Court have been unable to locate any Tennessee authority discussing the Absolute Pollution Exclusion contained in comprehensive general liability policies such as the one at issue in the present case").

14. For the purposes of the discussion in this comment, "permitted emissions" mean those for which a permit has been granted by an environmental enforcement agency with jurisdiction over the insured.

15. This comment deals exclusively with the APE. Accordingly, it is beyond the scope of this comment to engage in an exhaustive analysis of the background principles of insurance law and environmental law. Where possible, the author has attempted to elucidate pertinent operative principles within these domains of law. There sources cited herein are valuable resources for those interested in learning more about the basic elements of the law operating in the background of the APE.

Those with little or no knowledge of insurance contracts, administrative environmental law, or the statutes governing these areas of the law may be unfamiliar with the terminology and concepts used in this comment. Space does not permit a full discussion of each term that might be unfamiliar to such readers, so please understand that this article is geared towards insurance and environmental practitioners, and those curious about the subject matter.

II. BACKGROUND

A. Narrative Outline of Background Topics

This section begins with a discussion of the history of the state-centric insurance regulatory system. This system gives rise to the fragmentation of authority present not just in APE issues, but across the entire spectrum of insurance jurisprudence in the United States. The history of the pollution exclusion is examined next, followed by a summary of the leading case addressing the APE in Illinois. Finally, pertinent environmental laws and regulations are introduced to complete the framework within which the APE exists.

B. The Fragmentation of Authority Governing Insurance (or Why State Law Controls)

Various states have adopted nuanced and often sharply divergent interpretations of the APE, resulting in a fragmentation of authority.[16] In order to understand the significance of a particular state's interpretation of the APE, or any given insurance policy provision for that matter, it is helpful to understand why states are in the business of regulating insurance in the first place.

After all, comparably situated industries like the banking and pharmaceutical sectors are subject to regulation by numerous independent federal agencies, such as the Federal Deposit Insurance Corporation,[17] the Securities and Exchange Commission,[18] and the Food and Drug Administration.[19] The insurance industry occupies a sizeable portion of the gross domestic product of the United States[20] and employs millions of people.[21] Despite its size and importance, the business of insurance is mostly

16. MANILOFF AND STEMPEL, *supra* note 7 (quoting *Porterfield*, 856 So. 2d at 800) (describing litigation of the APE: "there exists not just a split of authority, but an absolute fragmentation of authority")).

17. Federal Deposit Insurance Corporation Act, 12 U.S.C. § 1811 et seq. (1993) (creating the FDIC and subjecting "banks" and various other financial institutions as defined in the act to the requirements therein).

18. Securities and Exchange Commission Act, 15 U.S.C. § 78d (2016) (establishing the Securities and Exchange Commission and subjecting regulated entities to measures designed to protect investors).

19. Food and Drug Administration Act, 21 U.S.C. § 393 (2011) (establishing the Food and Drug Administration and subjecting food and medical products to approval and review by the Administration).

20. *Insurance Spending*, ORG. FOR ECON. CO-OPERATION AND DEV., data.oecd.org/insurance/insurance-spending.htm (last visited Apr. 1, 2019) (estimating that insurance spending in the United States represents 11.28% of total gross domestic product).

21. *Insurance Carriers and Related Activities*, BUREAU OF LAB. STATS., www.bls.gov/iag/tgs/iag524.htm (last visited April 1, 2019) (estimating the insurance industry employed approximately 2.6 million people during the month of August 2017).

unregulated at the federal level.[22] There is a notable exception the federal program colloquially known as "Obamacare."[23] The National Flood Insurance Program, administered by the federal government, is another example of the federal government's limited role in the insurance sector.[24]

But despite these two limited examples, insurance is mostly statutorily exempt from federal regulation under the McCarran–Ferguson Act.[25] The law provides that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."[26]

1. Paul v. Virginia and the Early Development of the State-Based Insurance Regulatory System

From the Civil War to World War II, Congress thought that insurance was not "commerce" and thus could not regulate it pursuant to the Commerce Clause.[27] This was the conclusion of the Supreme Court in *Paul v. Virginia*.[28] In *Paul*, the State of Virginia had enacted a law requiring insurers not incorporated under the laws of Virginia to obtain license to operate their business in the State.[29] According to the arguments of counsel presented at the head of the case, Paul, an insurance agent in Virginia, issued a fire insurance policy written by a foreign corporation (meaning one not

22. MARTINEZ AND RICHMOND, *supra* note 2, at 52 (stating that "Congress has delegated broad authority to state legislatures in defining the scope and subject-matter of state insurance regulation").

23. Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 et seq. (2010).

24. National Flood Insurance Act, 40 U.S.C. § 4001 et seq. (1994).

25. McCarran–Ferguson Act, 15 U.S.C. § 1011 (1945).

26. *Id.* at § 1012(a).

27. U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce between the states).

28. Paul v. Virginia, 75 U.S. 168, 183 (1869) (holding that "[i]ssuing a policy of insurance is not a transaction of commerce." The Supreme Court goes on to explain that "policies are simple contracts of indemnity against loss . . . entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce . . . They are not subjects of trade and barter offered in the market . . . They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties . . . Such contracts are not inter-state transactions, *though the parties may be domiciled in different States*. The policies do not take effect -- are not executed contracts -- until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.") (emphasis added).

29. *Id.* at 177.

incorporated under the laws of Virginia).[30] He was convicted under the state law and appealed all the way to the Supreme Court, arguing that his conviction violated the Privileges and Immunities Clause[31] and the Commerce Clause[32] of the U.S. Constitution.[33]

Paul reasoned that requiring a non-domestic insurance corporation to obtain a license where no license was required for domestic insurers violated the Privileges and Immunities Clause.[34] This argument required assuming that corporations are "citizens," which the Supreme Court was unwilling to do at the time.[35] More importantly, Paul argued Congress had the authority to regulate insurance under the Commerce Clause.[36] The Supreme Court also rejected this argument.[37] By ruling that insurance was not commerce, the Court sent a clear signal that insurance was not subject to Congress' power to regulate under the commerce clause.

The Supreme Court would maintain its position, first expressed in *Paul*, for seventy-five years. The ruling in *Paul*, that insurance was not commerce, was consequently interpreted to mean that insurance regulation was to be left entirely to State governments.[38] It was not until *United States v. South-Eastern Underwriters Association* that the Court had a radical change of heart on the question of whether insurance was within the capacity of Congress' power to regulate commerce.[39]

---

30. *Id.*

31. U.S. CONST., art. IV, § 2 (providing that "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states").

32. U.S. CONST., art. I, § 8 (providing that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

33. *Paul*, 75 U.S. at 168-77 (syllabus).

34. *Id.* Paul essentially argues that requiring a non-domestic insurer to do something that a domestic insurer does not have to do deprives the non-domestic insurer of a privilege granted to the domestic insurer.

35. *Id.* at 177 (finding that "corporations are not citizens within [the meaning of the privileges and immunities clauses]," and further explaining that "[t]he term citizens as there used applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed").

36. *Id.* at 168-77.

37. *Id.* at 183 (rejecting the argument that insurance was subject to regulation under the commerce clause because insurance policies are not commodities moved between states, but rather locally made contracts, and are therefore not "commerce").

38. DANIEL MALDONADO ET AL., *COUCH ON INSURANCE*, § 2:4 - McCarran-Ferguson Act, (Westlaw, 3d ed. 201) (explaining that the consequence of *Paul* was that "the regulation of the insurance industry was thought to rest exclusively within the control of the States").

39. United States v. South-Eastern Underwriters Association, 322 U.S. 533, 583 (1944) (Justice Stone noting in his dissent that the majority's decision in *South-Eastern Underwriters* overturned 75 years of precedent.) (Justice Jackson noting in his dissent-in-part that the majority was "making unprecedented use of the Act to strike down the constitutional basis of state

2. *South-Eastern Underwriters Association, the McCarran-Ferguson Act, and the Formalized State-Based Insurance Regulatory System*

The South-Eastern Underwriters Association (the "SEUA") was an industry group composed of almost 200 stock fire insurance companies that was indicted for violations of the Sherman Anti-Trust Act.[40] The crux of the Sherman violations were that the SEUA and its members had conspired to fix the price of fire and other insurance in Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, and had conspired to monopolize the insurance market in those states.[41] The Sherman Act makes it a violation to engage in conspiracies to fix prices or monopolize trade.[42] The conspiracy employed by the SEUA, in what can only be described as a textbook Sherman Act violation,[43] took the form of open and notorious boycotts, coercion, and intimidation directed at forcing non-members into the conspiracy and forcing those who needed insurance to buy only from SEUA members.[44] The cartel was extremely effective, controlling ninety percent of the markets in which it operated.[45]

Naturally, the SEUA argued that it was not subject to the Sherman Act because its insurance business was not commerce and thus did not fall under the Sherman Act or the Commerce Clause (citing the Supreme Court's conclusion in *Paul* that issuing a policy of insurance is not a transaction of commerce).[46] The Court had clarified things even further in subsequent cases, explicitly holding that insurance was not commerce.[47] Mysteriously, the Court in *South-Eastern* again reiterated that insurance is not necessarily

---

regulation").

40. United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944).

41. *Id.* at 534-35.

42. *See* Sherman Anti-Trust Act, 15 U.S.C. § 1 et seq. (2004) (making it a crime to engage in conspiracies to fix prices). *See also* 15 U.S.C. § 2 (making it a crime to monopolize a trade).

43. 15 U.S.C. §§ 1 and 2 make it a crime to engage in conspiracies to fix prices and to monopolize a trade, respectively. The SEUA, as a cartel of similarly interested insurance companies, conspired to fix prices and to monopolize the insurance trade in the Southeastern United States. This is exactly what the Sherman Act forbade.

44. *South-Eastern Underwriters*, 322 U.S. at 535.

45. *Id.*

46. *Id.* at 546-48.

47. Hooper v. California, 155 U.S. 648, 654-55 (1895) (reaffirming *Paul* and broadening its core holding by adding that "[t]he business of insurance is not commerce"). *See also* New York Life Insurance Company v. Deer Lodge County, 231 U.S. 495, 503-04, 510 (1913) (again reaffirming *Paul* and stating that "contracts of insurance are not commerce at all, neither state nor interstate").

interstate commerce.[48] Then the Court essentially overturned the core holding in *Paul* by holding that insurance is subject to regulation by Congress under the commerce clause.[49] The decision was handed down on Monday, June 5, 1944.[50] On the very next day, June 6, 1944, known as "D-Day," Allied Forces stormed the beaches of Normandy in the largest seaborne invasion in history.[51]

The effect of the holding in *South-Eastern Underwriters* was two-fold: it subjected the insurance industry to government-imposed liability for antitrust violations,[52] but in so doing it also upset the state-centric regulatory system that had governed the business of insurance since the industry's infancy in the United States.[53] Well aware of the implications in overturning *Paul*, 35 states filed *amicus curiae* briefs unanimously in favor of upholding *Paul* and shielding SEUA from Sherman Act liability.[54] Industry groups like the SEUA had become prevalent in the state-centric regulatory system, where the sort of competition encouraged by the Sherman Act was seen as detrimental to the interests of insurance customers.[55] Despite this, the Supreme Court gave Congress little

48. *South-Eastern Underwriters*, 322 U.S. at 546-47 (granting "that a contract of insurance, considered as a thing apart from negotiation and execution, does not itself constitute interstate commerce").

49. *Id.* at 552-53 (holding that the business of insurance is not excepted from the regulatory power of Congress under the Commerce Clause).

50. *Id.* at 533.

51. ANTONY BEEVOR, D-DAY: THE BATTLE FOR NORMANDY 74 (2009).

52. *South-Eastern Underwriters*, 322 U.S. at 562 (holding the Sherman Act applies to the business of insurance based on the principle that Congress may regulate the business of insurance as "commerce" under the Commerce Clause).

53. *Id.* at 561 (acknowledging that "it is argued at great length that virtually all the states regulate the insurance business on the theory that competition in the field of insurance is detrimental both to the insurers and the insured, and that if the Sherman Act be held applicable to insurance much of this state regulation will be destroyed." The court then chose to ignore that argument because "[w]hether competition is a good thing for the insurance business is not for us to consider. Having power to enact the Sherman Act, Congress did so; if exceptions are to be written into the Act, they must come from the Congress, not this Court.").

54. *Id.* at 533 (stating in the syllabus that "[b]riefs were filed (1) on behalf of the States of Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin and West Virginia, and (2) on behalf of the State of Virginia, as amici curiae, urging affirmance").

55. The Court acknowledged this state of affairs, which was essentially mandated by its decision in *Paul*, in *South-Eastern Underwriters*:

> "[I]t is argued at great length that virtually all the states regulate the insurance business on the theory that competition in the field of insurance is detrimental both to the insurers and the insured, and that if the Sherman Act be held applicable to insurance much of this state regulation will be destroyed. The first part of this argument is buttressed

choice but to act. And it did so at the height of World War II.[56] Essentially, the Supreme Court decision ordered Congress to write a law that would provide a national insurance system. This was short-sighted because Congress was busy with the far more important matter of World War II. A comprehensive piece of legislation on the scale of those regulating the banking and financial industries was simply not going to happen.

Congress, left with little alternative, drafted and enacted the McCarran-Ferguson Act within 10 months of the Supreme Court's decision in *South-Eastern Underwriters*.[57] Rather than create an independent federal agency as the Court might have been encouraging, Congress explicitly turned over regulation of the business of insurance to the States.[58] This codification of the state-centric system has enabled, and indeed encouraged States to go their own way ever since.[59] Simply put, any given State's interpretation of an insurance policy provision is given controlling authority within that State's jurisdiction (and can thus be used as persuasive authority by other courts).[60] This is why a State's interpretation of a given insurance policy provision, such as the APE, can be extremely significant. The State's interpretation, as the interpretation of the governing authority, often controls the crucial

---

> by opinions expressed by various persons that unrestricted competition in insurance results in financial chaos and public injury. Whether competition is a good thing for the insurance business is not for us to consider. Having power to enact the Sherman Act, Congress did so; if exceptions are to be written into the Act, they must come from the Congress, not this Court."

Id. at 561.

56. In his dissenting opinion in *South-Eastern Underwriters*, Justice Jackson questioned the timing of the decision "at a time like this," presumably in reference to Congress having better things to do during the middle of World War II than draft national insurance legislation:

> "To force the hand of Congress is no more the proper function of the judiciary than to tie the hands of Congress. To use my office, *at a time like this*, and with so little justification in necessity, to dislocate the functions and revenues of the states and to catapult Congress into immediate and undivided responsibility for supervision of the nation's insurance businesses is more than I can reconcile with my view of the function of this Court in our society."

Id. at 594-95 (emphasis added).

57. McCarran–Ferguson Act, 15 U.S.C. §§ 1011-1015 (1945).

58. *Id.* § 1012.

59. MARTINEZ AND RICHMOND, *supra* note 2, at 52 (stating that "[u]nder the McCarran-Ferguson Act, Congress has delegated broad authority to state legislatures in defining the scope and subject-matter of state insurance regulation")

60. Netherlands Ins. Co. v. Phusion Projects, Inc., 737 F.3d 1174, 1177 (7th Cir. 2010) (applying Illinois law) (noting that Illinois law applies to the interpretation of the policy at issue).

question of whether a loss is covered.[61]

C. History of the Pollution Exclusion

Before 1966, Commercial General Liability ("CGL") policies afforded coverage for bodily injury or property damage "caused by accident."[62] The pre-1966 CGL policy did not define "accident," leading to uncertainty as to whether pollution (or its costs) were covered under the CGL policy.[63] Some courts did not consider gradual pollution to be "accidental" in the strict meaning of the word.[64] But many courts construed the term broadly, finding coverage for "accidents" such as oil spills lasting several days,[65] gasoline leaking into a well,[66] and even the cracking and settling of a building foundation after months of excavation and construction on an adjacent property.[67] Insurance companies redrafted their policies in 1966 to provide coverage on an "occurrence" basis.[68] This change is typically understood to have broadened coverage available under the CGL.[69]

After noting its growing liability for environmental litigation, the insurance industry introduced the standard pollution exclusion in 1970.[70] The standard pollution exclusion disclaimed coverage for

61. *See Koloms*, 177 Ill. 2d 473 at 479 (stating that the interpreting of an insurance policy is a question of law subject to *de novo* review).

62. *Id.* at 489 (quoting Ctr. for Creative Studs. v. Aetna Life & Cas. Co., 871 F. Supp. 941, 943 n.3 (E.D. Mich. 1994)).

63. Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 574 (Wis. 1990) (explaining that while it (the Wisconsin Supreme Court) had ruled in Clark v. London & Lancashire Indem. Co., 21 Wis. 2d 268, that gradual pollution was not covered under the CGL policy, other jurisdictions had reached the opposite conclusion).

64. *See Clark*, 21 Wis. 2d at 283 (finding a pre-1966 CGL policy afforded no coverage for nuisance claim brought against insured for allowing his gravel pit to be used as a dump site because "[i]n the instant case the long exposure to injury by the obnoxious fumes was caused not only by the dumping operations but also by plaintiff's failure over many months to take effective steps to abate the nuisance. It necessarily follows that the damages were not "caused by accident" within the meaning of the policy.").

65. Cas. Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1949) (finding coverage for damage to neighboring properties caused by the flow of oil over two days).

66. Emprs. Ins. Co. v. Rives, 264 Ala. 310 (Ala. 1955) (holding that the gradual leaking of gasoline from an underground tank into a nearby well was a covered accident).

67. McGroarty v. Great Am. Ins. Co., 36 N.Y.2d 358, 361 (N.Y. 1975) (deciding in favor of coverage for accidental damage to structure caused by nearby excavating and construction of buildings).

68. Morton Int'l v. Gen. Accident Ins. Co., 134 N.J. 1, 32 (N.J. 1993). (explaining that the newly redrafted CGL policy defined "occurrence" as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage that was neither expected nor intended from the standpoint of the insured").

69. *Id.* at 33.

70. Weaver v. Royal Ins. Co. of Am., 140 N.H. 780, 782 (N.H. 1996)

discharges into land, air, or water that were not sudden and accidental.[71] Litigation over the standard pollution exclusion centered on the words "sudden and accidental," which was often determined to be ambiguous.[72] The finding of ambiguity within an insurance policy often resulted in the application of the doctrine of *contra proferentem*, whereby the ambiguity is interpreted against the drafter.[73] The insurance industry redrafted the pollution exclusion again in 1986, resulting in what is now known as the absolute pollution exclusion or APE.[74]

D. Illinois Interpretation of the Absolute Pollution Exclusion

Illinois has emerged as one of the nation's most significant contributors to the national insurance industry.[75] Illinois exercises an extra degree of influence on insurance because there are multiple insurance companies within its borders.[76] One state-funded study identified 192 property and casualty insurers, 39 life insurers, and 41 health insurers based in Illinois.[77] The presence of so many insurers has led, in some circumstances, to a significant amount of insurance litigation. Madison County, Illinois, for instance, is home to approximately one-third of all the asbestos related litigation in the United States, ranking it among the most active asbestos

(explaining that "[t]he standard pollution exclusion, introduced in 1970, eliminated coverage for damages arising out of the discharge, dispersal, release or escape of irritants, contaminants, or pollutants into the air, water, or land, except when the discharge was sudden and accidental")

71. JOHN A. APPLEMAN, INSURANCE LAW AND PRACTICE § 4524 at 143-44 (Supp. 1997).

72. *Id.*

73. Benjamin Moore & Co. v. Aetna Cas. & Sur. Co., 179 N.J. 87, 95 n.3 (N.J. 2004) (found in MARTINEZ AND RICHMOND, *supra* note 2, at 142) (noting that "[t]he doctrine of *contra proferentem* requires that an ambiguous provision of a written document "is construed most strongly against the person who selected the language").

74. *Weaver*, 140 N.H. at 782 (noting that the redrafted exclusion "eliminate[d] the exception for 'sudden and accidental' pollution and . . . omit[ted] language requiring the discharge to be 'into the air, water, or land,' resulting in what has been termed an 'absolute' exclusion").

75. *The Economic Impact of the Insurance Industry in Illinois: 2016 Study*, KATIE SCH. OF INS. & FIN. SERVS. AT IL STATE UNIV. (2016), insurance.illinois.gov/newsrls/2016/04/Economic ImpactOfTheInsuranceIndustryInIL.pdf (noting that one-fifth of every property casual premium is underwritten in Illinois (likely due to the high number of domestic domiciled insurers)) [hereinafter 2016 Katie School Study].

76. Corilyn Shropshire, *50 Illinois Companies Land on Annual Fortune 500 List*, CHI. TRIB. (June 7, 2017), www.chicagotribune.com/business/ct-fortune-500-illinois-companies-0608-biz-2-20170607-story.html (noting that Allstate and State-Farm, two of the largest insurers in the country, are headquartered in Illinois).

77. 2016 Katie School Study, *supra* note 75.

litigation dockets in the country.[78] Because Illinois has a large body of insurance case law, there is an increased likelihood that other states, where courts are less experienced in insurance matters, will turn to Illinois insurance decisions for guidance.[79]

The most recent Illinois Supreme Court decision addressing the APE is *American States Insurance Co. v. Koloms*. In *Koloms*, a furnace in a multistory commercial building in Lake County began emitting "carbon monoxide and other noxious fumes."[80] Employees of one of the tenants in the building became ill, and six of the affected employees sued Harvey and Nina Koloms as the building owners.[81] The complaint against the Koloms alleged that they had negligently maintained the furnace.[82]

The Koloms notified their insurance company, American States Insurance Company (hereinafter ASI), which agreed to defend the Koloms, subject to a reservation of its right to contest coverage under the APE contained in the Koloms' insurance policy.[83] Commonly called a "reservation of rights" ("ROR"), insurance companies employ RORs to shield themselves from liability for failing to uphold obligations under the insurance policy.[84] When an insurer reserves its rights in a letter to its insured, it is attempting to avoid the application of the doctrines of waiver and estoppel; "when an insurer defends a claim against its insured under a proper reservation of rights, the insured cannot then so easily claim that it was prejudiced."[85]

---

78. Alison Frankel, *New Illinois Supreme Court Ruling Should Make 'Judicial Hellhole' Less Fiery*, REUTERS (Sept. 25, 2017), www.reuters.com/article/legal-us-otc-illinois/new-illinois-supreme-court-ruling-should-make-judicial-hellhole-less-fiery-idUSKCN1C02OC (stating that nearly one-third of all asbestos litigation occurs in Madison County courts).

79. *Sulphuric Acid Trading*, 211 S.W.3d 243, 248 (Tenn. App. Ct. 2006) (looking to Illinois case law on the APE in order to resolve a coverage dispute governed by Tennessee authority because "[t]he parties and this Court have been unable to locate any Tennessee authority discussing the Absolute Pollution Exclusion contained in comprehensive general liability policies such as the one at issue in the present case").

80. *Koloms*, 177 Ill. 2d 473 at 476.

81. *Id.*

82. *Id.*

83. The Koloms' policy contained the following APE: "This insurance does not apply to: f.(1) 'Bodily injury' or 'property damage' arising out of actual, alleged or threatened discharge, dispersal, release or escape of pollutants: (a) At or from premises you own, rent or occupy . . . ." *Id.* "Pollutants" were defined in the policy as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." *Id.*

84. INT'L RISK MGMT. INST., GLOSSARY OF INSURANCE MANAGEMENT TERMS 192 (9th ed. 2004) (defining a "reservation of rights as '[a]n insurer's notification to an insured that coverage for a claim may not apply. Such notification allows an insurer to investigate (or even defend) a claim to determine if coverage applies (in whole or in part) without waiving its rights to later deny coverage based on information revealed by the investigation'").

85. Royal Ins. Co. v. Process Design Assoc., Inc., 221 Ill. App. 3d 966, 974 (1st Dist. 1991).

Here is an example: if an insurer suspects that a reported loss is not covered under the policy, the insurer would proceed under a reservation of rights. The reservation of rights notifies the insured that the insurer will thoroughly investigate and even defend the claim, but the insurer reserves the right to disclaim coverage if it eventually discovers circumstances that void or terminate coverage.[86] Although the reservation of rights protects the insurer against waiving or estopping its rights under the policy, it did not help the insurers in *Koloms* because the loss was covered. Ultimately, the Koloms' insurer was required to pay. The Illinois Supreme Court found that the APE did not apply to the release of carbon dioxide inside the building.[87] Since *Koloms*, lower Illinois courts have used it as a rubric in a wide variety of pollution cases.[88] Recently, it has been cited as a way to resolve ambiguity in cases involving permitted emissions.[89] This comment proposes that ambiguity in such cases be resolved in favor of coverage, as was the case in *Koloms*.

E. Environmental Law

Because this comment will attempt to show that environmental laws, such as permitting requirements, can have the effect of rendering the APE ambiguous, this section introduces pertinent environmental law. Pursuant to the Illinois Environmental Protection Act and in compliance with the federal Clean Air Act, the Illinois Environmental Protection Agency is authorized to issue operating permits for enterprises identified as sources of air pollution.[90] Permitting is also required, under Federal and State law, for generators of hazardous waste.[91] As shall soon be shown, the presence of these permits can preclude application of the APE by introducing ambiguity into the insuring agreement. This comment proposes that this ambiguity be resolved in favor of coverage.

---

86. Conn. Specialty Ins. Co. v. Loop Paper Recycling, Inc., 356 Ill. App. 3d 67, 69 (1st Dist. 2005) (noting that the insurer had agreed to defend its insured but had reserved the right to deny coverage at a future date, i.e., after providing a defense for the insured).

87. *Koloms*, 177 Ill. 2d 473 at 494.

88. *See* Kim v. State Farm Fire & Cas. Co., 312 Ill. App. 3d 770 (1st Dist. 2000) and *Loop Paper*, 356 Ill. App. 3d 67 (1st Dist. 2005) (applying and interpreting *Koloms*).

89. *See* Country Mutual Ins. Co. v. Bible Pork, Inc., 2015 IL App (5th) 140211 (applying *Koloms*' "traditional environmental pollution" standard to a case involving a hog farm operating under a state environmental permit).

90. 415 ILCS 5/3.298.

91. *Id.* at § 3.370.

III. ANALYSIS

A. Narrative Outline of Analysis

Broadly speaking, Illinois courts interpret the APE to have the effect of excluding coverage for "traditional environmental contamination."[92] In *Koloms*, the Illinois Supreme Court reached this conclusion to resolve the ambiguity that arises when the APE is "applied to cases which have nothing to do with 'pollution' in the conventional, or ordinary, sense of the word."[93] The Court found support for this conclusion in the drafting history of the APE, noting it had been drafted with the purpose of helping insurers avoid liability for an "explosion of environmental litigation."[94] Consequently, the Court restricted application of the APE to cases involving traditional environmental pollution, which the Court considered to be the problem the APE was intended to address.[95]

Without explicitly stating how traditional environmental pollution is to be defined, the Court nonetheless indicated that it refers to the discharge of pollutants into or upon land, atmosphere, or a body of water.[96] The facts of the loss, such as the nature of the injury and the scope of the pollution that caused it, is a primary

92. *Koloms*, 177 Ill. 2d at 494 (noting that "[g]iven the historical background of the absolute pollution exclusion and the drafters' continued use of environmental terms of art, we hold that the exclusion applies only to those injuries caused by traditional environmental pollution. The accidental release of carbon monoxide in this case, due to a broken furnace, does not constitute the type of environmental pollution contemplated by the clause").

93. *Id.* at 488.

94. *Id.* at 492-93 (explaining that its "review of the history of the pollution exclusion amply demonstrates that the predominate motivation in drafting an exclusion for pollution-related injuries was the avoidance of the 'enormous expense and exposure resulting from the 'explosion' of environmental litigation.'. . . We think it improper to extend the exclusion beyond that arena.") (internal citations omitted).

95. *Id.*

96. *Id.* at 493 (addressing an argument by the Koloms' insurer, ASI, the court states that "ASI submits that the deletion of the requirement that the pollution be '[discharged] into or upon land, the atmosphere or any watercourse or body of water' should be viewed by this court as a clear signal of the industry's intent to broaden the exclusion beyond traditional environmental contamination. We disagree.").

Before the introduction of the APE in 1986, the standard pollution exclusion from 1970 provided that

> "[t]his policy shall 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 491 (quoting from the standard-form pollution exclusion from 1970).

factor Illinois courts consider in determining whether the APE applies.[97]

However, Illinois courts have recently been confronted with an additional factor to consider in the APE analysis: environmental laws and regulations.[98] Illinois courts must also consider environmental permits as factors in determining the applicability of the APE. There is some legitimate fear that it would be improper to replace the words in an insurance policy with the words from an environmental statute absent some manifestation of Congressional intent. Nonetheless, as discussed in the analysis below, there are indications that Illinois courts will consider environmental permits in determining the applicability of the APE.

B. The APE Excludes Coverage for Losses Caused by Traditional Environmental Pollution.

Koloms stands for the proposition that the APE excludes coverage for losses caused by traditional environmental pollution.[99] The Court in *Koloms* reluctantly acknowledged that the literal words of the exclusion seem to defeat coverage because of the broad

97. *See, e.g.*, *Loop Paper Recycling,* 356 Ill. App. 3d at 67 (noting that "[t]hough [it is] not explicitly stated in either *Koloms* or *Kim*, a primary factor to consider in determining if an occurrence constitutes 'traditional environmental pollution' and, thus; is not covered under an absolute pollution exclusion, rests upon whether the injurious 'hazardous material' is confined within the insured's premises or, instead, escapes into 'the land, atmosphere, or any watercourse or body of water'") (comparing *Koloms*, 177 Ill. 2d at 494 (accidental leak of CO2 within the building is not traditional environmental contamination) with *Kim*, 312 Ill. App. 3d at 775 (discharge of hazardous material into the soil is traditional environmental contamination)).

98. *See, e.g. Bible Pork*, 2015 IL App (5th) at 32-33 (noting that "all the alleged injuries and damages came from Bible Pork's hog facility, which was granted regulatory approval by the Department and forced to comply with the requirements of the Act, as well as with numerous other state rules and regulations, prior to becoming operational."); *see also* Country Mut. Ins. Co. v. Hilltop View, LLC, 2013 IL App (4th) 130124, ¶¶ 40-41 (explaining an insurers use of an environmental regulatory definition of "air pollution" to disclaim lawsuit liability coverage: "Country argues characterizing the neighbors' odor claims as 'traditional environmental pollution' is consistent with the Illinois Environmental Protection Act's (Act) treatment of odors as 'air pollution.' We disagree. The Act does not classify all odors as 'air pollution.' Instead, the Act defines 'air pollution' as 'the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.'" (citation omitted). The Act defines "contaminant" as "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source." (citation omitted).

Even if the odors at issue in this case constituted air pollution for purposes of the Act, this does not mean the odors constitute "traditional environmental pollution.").

99. *Koloms*, 177 Ill. 2d at 488.

nature of the exclusion and its expansive definition of "pollutant."[100] However, the Court objected to this literal interpretation of the policy language.[101] The Supreme Court cited and quoted the decision of the Seventh Circuit Court of Appeals in *Pipefitters Welfare Education Fund v. Westchester Fire Insurance Co*., which states that "[w]ithout some limiting principle, the pollution exclusion clause would extend far beyond its intended scope and lead to some absurd results."[102] The Seventh Circuit points out that a strictly literal interpretation of the APE would exclude coverage for injuries such as a slip-and-fall upon spilled Drano, or a reaction to chlorine in a pool.[103] Consider the hypothetical case involving the spilled bleach above as another example: despite language which unambiguously and literally excludes coverage, reasonable people might disagree over whether it is pollution, and some might call the description absurd. Thus, the facts of the loss can expose ambiguity in the APE over whether or not there is in fact pollution.

In objecting to the literal interpretation of the APE, the *Koloms* Court importantly noted that ambiguity tends to manifest when the APE is applied in cases having nothing to do with what is ordinarily thought of as pollution.[104] Rules of insurance policy construction encourage interpretation against the drafter who is responsible for an ambiguous word or phrase, which is often the insurer.[105] In light of the nature of the loss in *Koloms*, which involved injuries from the release of gasses from a furnace, the Court was unwilling to simply hold that coverage was defeated by the literal interpretation of the APE.[106] In effect, the Court found the APE to be ambiguous as applied to the facts of *Koloms*, allowing it to reach a holding which restricts application of the APE. Drawing support from the drafting history of the APE, which illustrated attempts by the insurance

100. *Id.* (reasoning that "a purely literal interpretation of the disputed language, without regard to the facts alleged in the underlying complaints, fails to adequately resolve the issue presented to this court").

101. *Id.* at 489 (citing, as an example of similar thinking, Minerva Enters., Inc. v Bituminous Cas. Corp., 312 Ark. 128 (1993)).

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

103. *Id*.

104. *Koloms*, 177 Ill. 2d at 489 (reasoning that "[l]ike 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 exclusion is applied to cases which have nothing to do with "pollution" in the conventional, or ordinary, sense of the word*") (emphasis added) (citing *Minerva Enters.*, 312 Ark. at 851 (agreeing with the Plaintiff's argument that the definition of "pollutants" under an APE similar to that in *Koloms* was intended to apply to industrial pollution and not household waste, and that the definition was ambiguous).

105. *Benjamin Moore*, 179 N.J. at 95 n.3 (found in MARTINEZ AND RICHMOND, *supra* note 2, at 142) (noting that "[t]he doctrine of *contra proferentem* requires that an ambiguous provision of a written document "is construed most strongly against the person who selected the language").

106. *Koloms*, 177 Ill. 2d at 488.

industry to stem the tide of potential liability arising from costly environmental litigation, the Court reasoned that the APE, despite its broad wording, was intended to protect insurers from liabilities arising from traditional environmental contamination.[107] This begs the question of what exactly is meant by "traditional environmental pollution."

C. Traditional Environmental Pollution is the Discharge of Pollutants into or Upon Land, Atmosphere, or a Body of Water.

The *Koloms* Court did not offer much in the way of a definition of traditional environmental pollution. It simply agreed with another court's finding that "any 'discharge, dispersal, release, or escape' of a pollutant must be into the environment in order to trigger the pollution exclusion clause and deny coverage to the insured."[108] What the Supreme Court means is that the discharge must be into or upon land, atmosphere, or a body of water.[109] Interestingly, this definition of traditional environmental contamination is reminiscent of language that appeared in the standard pollution exclusion, but was later deleted during the drafting of the APE.[110] The standard pollution exclusion in use before the APE excluded coverage for discharges or pollutants into the "air, water, or land."[111] The insurer in *Koloms*, ASI, argued that the removal of this language from the APE signaled an intent by the insurance industry to broaden the exclusion beyond traditional

---

107. *Id*. at 492-93.

108. *Id.* at 494 (quoting West Am. Ins. Co. v. Tufco Flooring E., Inc., 104 N.C. App. 312 (N.C. Ct. App. 1991) (explaining that "[b]ecause the operative policy terms 'discharge,' 'dispersal,' 'release,' and 'escape' are environmental terms of art, the omission of the language 'into or upon land, the atmosphere or any watercourse or body of water' in the new pollution exclusion is insignificant. The omission of the phrase only removes a redundancy in the language of the exclusion that was present in the earlier pollution exclusion clause. Consequently, we find that any 'discharge, dispersal, release, or escape' of a pollutant must be into the environment in order to trigger the pollution exclusion clause and deny coverage to the insured.").

109. *See, e.g.*, *Kim*, 312 Ill. App. 3d at 775 (noting that "the words 'discharge,' 'dispersal,' 'release,' and 'escape,' . . . are terms of art used in environmental law to indicate the release of hazardous material into the environment").

110. *Id.*

111. 21-132 Appleman on Ins. Law & Practice Archive § 132.6 (2nd 2011) (explaining that "[t]he standard ISO 1973 pollution exclusion eliminates coverage under the comprehensive general liability policy (CGL) for damages that arise out of the discharge of irritants, contaminants, or pollutants into the air, water, or land, except when the discharge is "sudden and accidental").

The exception for "sudden and accidental" discharges was litigated so frequently that one commentator noted it may be "the most hotly litigated insurance coverage question of the late 1980s." *Koloms*, 177 Ill. 2d at 492 (quoting J. STEMPEL, INTERPRETATION OF INS. CONTRACTS: LAW AND STRATEGY FOR INSURERS AND POLICYHOLDERS 825 (1994)).

environmental pollution.[112] The Supreme Court recognized that the language had been deleted, but characterized its deletion as the elimination of a "redundancy," noting the continued use of other environmental terms of art like "discharge," "release," "escape," and "dispersal."[113] Thus, the inquiry into whether traditional environmental pollution occurred, and subsequently whether the APE applies, focuses in part on whether the injurious discharge was into land, atmosphere, or a body of water.

As a general principle, if the discharge is limited to the inside of a building, such as the hypothetical bleach spill, or the Koloms' furnace gasses, then the APE is probably not triggered.[114] This is because there has been no discharge into or upon land, atmosphere, or a body of water. In other words, if nothing has been released into the environment because the discharge is contained within a structure, then the APE is not triggered. If we were to tear up our hypothetical bleach-damaged carpet and dump it in a wetland, or vent the Koloms' dysfunctional furnace to the outdoors, then we have gotten closer to traditional environmental pollution, and coverage may be defeated if injury or damages should arise. One of the factors of the "traditional environmental pollution" test mandated by *Koloms* is to distinguish between a discharge into the environment, consisting of land, atmosphere, or bodies of water, and a discharge inside of a building or within the insured premises.[115] The logic is attractively simple: a discharge indoors (or at least completely contained on the insured property) is not pollution, but a discharge outdoors may very well be pollution. In some cases, this has made for an exceedingly straightforward and easy-to-apply

112. *Koloms*, 177 Ill. 2d at 493 (explaining that ASI argued drafting changes to the APE signaled an intent by the insurance industry to broaden the exclusion beyond traditional environmental pollution).

113. *Id*. at 494 (explaining that "[t]he omission of the phrase only removes a redundancy in the language of the exclusion that was present in the earlier pollution exclusion clause").

114. Pekin Ins. Co. v. Pharmasyn, Inc., 2011 Ill. App. (2d) 101000-U (summarizing the holding of *Koloms*: "…the insurer's duty to defend was triggered because the release of carbon monoxide *inside a commercial building* did not constitute "traditional environmental pollution.") (emphasis added); *Loop Paper Recycling,* 356 Ill. App. 3d at 81-82 (explaining that "for there to be traditional environmental pollution, triggering the absolute pollution exclusion, *the pollutant must actually spill beyond the insured's premises and into the environment*.") (emphasis added).

115. *Kim*, 312 Ill. App. 3d at 775 (finding, after a lengthy discussion of *Koloms*, that "the hazardous material [here]was not confined within the cleaning company's building, unlike *Koloms*, but was discharged into the soil underneath its dry cleaning and laundry store. The cleaning company's discharge of a hazardous material into the soil meets the definition of traditional environmental pollution. Thus, the cleaning company's resulting injuries, specifically, the remediation costs, the removal and replacement of the dry-cleaning equipment, the replacement of the store's floor and floor liner, and lost profits, are excluded from coverage under the absolute pollution exclusion.").

rule.

In *Kim v. State Farm Fire & Casualty Co*., the Illinois First District Appellate Court barred coverage for a dry cleaner whose malfunctioning machinery caused the release of a chemical, tetrachloroethane (also known as "perc"), into the land beneath the building.[116] Citing *Koloms* extensively, the First District determined that the discharge of "hazardous materials," i.e., perc, into the land beneath the building was traditional environmental pollution and, under *Koloms*, the APE applies to defeat coverage.[117] *Kim* is the first in a line of First District cases that figure importantly in Illinois' APE jurisprudence, all building upon the concept of traditional environmental pollution outlined by the Supreme Court in *Koloms*.

In a subsequent case following the reasoning in *Koloms* and *Kim*, *Connecticut Specialty Insurance Company v. Loop Paper Recycling, Inc.*, the First District, applying the APE, barred coverage for personal injuries arising from a fire set by vandals which caused the insured's cardboard waste to burn for several days, releasing a plume of smoke and other hazardous materials into the air.[118] The First District, as it did in *Kim*, frames its inquiry as whether the injury-causing "hazardous material" is confined to the insured's premises or, instead, released into the land, air, or a body of water.[119] The language referring to "hazardous material" appearing in *Kim* and *Loop Paper*, while undefined, is employed as a catch-all term encompassing the pollutants, contaminants, and irritants to which the APE applies.[120] *Kim* and *Loop Paper*, building upon *Koloms*, answers the question of whether an occurrence is traditional environmental pollution (and consequently excluded under the APE) by reference to the scope of the pollution.

In a more recent example of the First District Court of Appeal's approach to the APE, *Village of Crestwood v. Ironshore Specialty Insurance Co*., the court applied the APE to defeat coverage for injuries caused when the insured, Village of Crestwood, negligently provided contaminated drinking water to its residents.[121] The

116. *Id*.

117. *Id.* at 777.

118. *Loop Paper Recycling,* 356 Ill. App. 3d at 67.

119. *Id*. at 81.

120. *See, e.g.*, *Kim*, 312 Ill. App. 3d at 775 (noting that "the words 'discharge,' 'dispersal,' 'release,' and 'escape,' . . . are terms of art used in environmental law to indicate the release of hazardous material into the environment"); *Loop Paper Recycling*, 356 Ill. App. 3d at 82 (explaining that "[b]ecause the underlying complaint alleged that the hazardous material (toxic smoke containing chemicals emitted from the burning cardboard) was not confined to the Riverdale facility, but, instead, spread to the 'surrounding neighborhoods,' we find that traditional environmental pollution occurred, i.e., hazardous material discharged into the atmosphere, and that the policy's absolute pollution exclusion barred coverage").

121. Vill. of Crestwood v. Ironshore Specialty Ins. Co., 2013 IL App (1st) 120112,

Village argued, somewhat spuriously, that the *Koloms* decision meant coverage should only be excluded for entities that qualified as "active polluters," essentially meaning those that could be liable for government clean-up costs.[122] *Koloms* imposed no such requirement. The First District rejected the Village's characterization of *Koloms*, "[finding] no indication in the exclusion itself or in precedent that the exclusion is limited to clean-up costs imposed by environmental laws such as CERCLA."[123]

D. Environmental Law a Factor to Consider in Determining the Applicability of the APE.

APE litigators have tried, with mixed success, to tie application of the APE to environmental statutes and regulations. In *Country Mutual Insurance Co. v. Hilltop View, LLC*, the Fourth District Court of Appeals rejected application of the APE to bar coverage for the defense of nuisance and negligence suits arising from the odor and use of manure at the insured's pig farm.[124] The Fourth District, citing *Koloms*, found that the odors and use of manure did not constitute traditional environmental pollution.[125] The insurer argued that odors, such as those from pig farms, could be treated as an "air pollutant" under the Illinois Environmental Protection Act, and because of that can fairly be called traditional environmental pollution.[126] The Fourth District rejected this argument, noting that the Act defines "air pollution" as the presence of quantities of contaminates sufficient to cause injury or unreasonable interference with the enjoyment of life or property, with

¶ 25.

122. *Id.* at ¶ 13 (explaining that "[a]ccording to the Village, *Koloms* determined the underlying complaints must depict the Village as an 'active polluter' or an entity that could be required to pay governmental clean-up costs pursuant to an environmental law such as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, which is commonly known as CERCLA or the Superfund Act. 42 U.S.C. § 9601 et seq. (1980)").

123. *Id.* at ¶ 20.

124. Country Mut. Ins. Co. v. Hilltop View, LLC, 2013 IL App (4th) 130124, ¶ 54. In another hog farm case, Indem. Ins. Co. of N. Am. v. Silver Creek Pig, Inc., 2015 U.S. Dist. LEXIS 57201 (C.D. Ill. 2015), the Illinois Central District Court did not find the APE applicable to the negligent storage and land application of odorous manure at the insured's hog farm. *Silver Creek Pig*, 2015 U.S. Dist. LEXIS at 36.

125. *Hilltop*, 2013 IL App (4th) at ¶ 37 (stating that "based on the allegations in the neighbors' complaint, we do not find the hogs, their manure, nor the smells associated with these things constitute traditional environmental pollution").

126. *Id.* at ¶ 40 (explaining that "Country [Mutual] argues characterizing the neighbors' odor claims as "traditional environmental pollution" is consistent with the Illinois Environmental Protection Act's (Act) treatment of odors as 'air pollution'").

"contaminates" defined to include "any odor."[127] The Fourth District did not find the manure odor to be sufficient to cause injury. Furthermore, the Fourth District noted that the statutory definition of pollution employed today is considerably more expansive than what the Supreme Court meant when it referred to "traditional environmental pollution" in *Koloms*.[128] Consequently, adopting a statutory definition of pollution would greatly expand the scope of activities subject to the APE, thus retroactively modifying coverage under numerous contracts of insurance with the stroke of a pen. Interestingly, the Fourth District describes hog farms as traditional sources of food, and an example of a traditional agricultural practice.[129] Because of the traditional nature of pig farming[130], and the evolving notion of what constitutes a pollutant, the Fourth District elected not to allow a statutory definition of pollution to determine the applicability of the APE.[131] Doing so would expose those engaged in traditional and important activities like raising hogs to potentially ruinous liability, solely because of the evolving nature of environmental regulation.

Yet Illinois courts are not wholly reluctant to draw from statutory and regulatory authority in order to resolve coverage disputes. Several courts have found that the APE is arguably ambiguous as to whether permitted emissions constitute excluded traditional environmental pollution. In *Erie Insurance Exchange v. Imperial Marble Corp.*, the Third District Court of Appeals ruled the APE in the insured's policy was ambiguous as to whether the

---

127. *Id.* (clarifying that "[t]he Act does not classify all odors as 'air pollution.' Instead, the Act defines 'air pollution' as 'the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.' The Act defines 'contaminant' as "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.") (citing 415 ILCS 5/3.115 for the definition of "air pollution" and 415 ILCS 5/3.165 for the definition of "contaminant.").

128. *Id.* at ¶ 41 (noting "…the scope of the things seen as hazardous to the environment, as reflected in environmental protection laws today, is far greater than what we conclude our supreme court had in mind when it spoke of "traditional environmental pollution.").

129. *Hilltop*, 2013 IL App 1st 130124 at ¶ 42 (explaining that "[i]f anything . . . the spreading of manure on farm fields is a traditional agricultural practice and would not constitute 'traditional environmental pollution.'") (citing the Livestock Management Facilities Act, 510 ILCS 77/1 – 77/999, which states that "[t]he application of livestock waste to the land is an acceptable, recommended, and established practice in Illinois. However, when livestock waste is not applied in a responsible manner, it may create pollutional problems." 510 ILCS 77/20(f)).

130. *Id.* at ¶ 39 (noting that "[h]og farms have been around for a long time, and neighbors of hog farms have dealt with the smells created by hog farms ever since. These farms have been traditionally thought of as a source of food, not pollution").

131. *Id.* at ¶ 54.

emissions of the insured's manufacturing plant, permitted by an Illinois Environmental Protection Agency permit, were traditional environmental pollution.[132] Resolving the ambiguity in favor of coverage, the Third District noted that the Supreme Court in *Koloms* had rejected a literal interpretation of an identical APE, finding the exclusion ambiguous.[133] This ambiguity arises regardless of the fact that, like the dry cleaner in *Kim*, the hazardous materials in *Erie* escaped the insured's premises and entered the environment.[134] This suggests a policy which favors finding coverage for losses arising from permitted or otherwise lawful pollution. Similarly, in *Bible Pork*, the Fifth District Court of Appeals found an APE ambiguous as to whether emissions from a permitted hog farm were traditional environmental contamination and thus excluded by the APE.[135] *Erie* and *Bible Pork* show that a consensus is emerging around the ambiguity of the APE when it is applied to permitted emissions.[136] A new policy may be emerging, one which would tend toward coverage in cases which implicate the APE, but for the presence of a permit or other government authorization to release pollutants. This leads to my proposal.

---

132. Erie Ins. Exch. v. Imperial Marble Corp., 957 N.E.2d 1214, 1221 (3d Dist. 2011) (deciding that "[t]he policy's pollution exclusion is arguably ambiguous as to whether the emission of hazardous materials in levels permitted by an IEPA permit constitute traditional environmental pollution excluded under the policy").

133. *Id.* (noting that "[i]n *Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 489, 687 N.E.2d 72, 227 Ill. Dec. 149 (1997), the court rejected a literal interpretation of a pollution exclusion that was identical to the provisions in the instant policy, finding the exclusion ambiguous").

134. *Id.* (surmising that "[i]n concluding that Erie did not owe Imperial a duty to defend, the trial court relied on *Loop Paper,* 356 Ill. App. 3d at 67, and considered that since Imperial's emissions migrated beyond its premises, they constituted traditional environmental pollution and were excluded under the policy. At this stage in the proceedings, it is not necessary to determine whether Imperial's emissions constitute traditional environmental pollution. Rather, we merely need to find that the policy's pollution exclusion is ambiguous as to this issue.").

135. *Bible Pork*, 2015 IL App (5th) at ¶ 43 (holding that ". . . the allegations in the underlying complaint in the underlying lawsuit constituted a claim for damages and set forth the elements necessary to trigger a duty to defend. We further find that the pollution exclusions do not apply to abrogate Country Mutual's duty to defend.").

136. *Id.* at ¶ 41 (explaining that "[w]e also agree with Erie that the exclusion is ambiguous because '[w]hen the allegations in the underlying complaint are compared to the relevant provisions in the insurance [policies], it is unclear whether permitted emissions constitute traditional environmental pollution that is excluded.'") (quoting *Erie*, 957 N.E.2d at 1221).

IV. PROPOSAL

A. Narrative Outline of Proposal

This comment proposes that Illinois courts follow their peers in the Third and Fifth District Courts of Appeals by recognizing that the APE is ambiguous when applied to permitted emissions. This proposal would have the effect of providing coverage for losses arising from permitted emissions. The basic idea is that businesses that operate lawfully under conditions determined by a regulatory agency should be covered for suits alleging injury caused by their permitted operations. In other words, if the State approves a pig farm and grants it a permit, the farmer should have liability insurance to protect her as she engages in her permitted business. Her insurer should have to defend her if the neighbors sue alleging the smell is pollution, or that runoff is polluting neighboring farms.

Construing the APE to be ambiguous when applied to permitted emissions is firmly rooted in the methods commonly used to interpret insurance policies. One method which comports with this proposal is the doctrine of *contra proferentum* as discussed above. The doctrine of *contra proferentum* is frequently used to settle insurance coverage disputes over ambiguous exclusions in favor of the insured.[137] Furthermore, construing the APE to be ambiguous when applied to permitted emissions is consistent with the line of Illinois APE cases beginning with *Koloms*. These cases consistently identify ambiguities where there is a question as to whether the APE applies. The *Koloms* cases also consistently resolve ambiguities in favor of insureds where there is an APE question.

Other states have looked favorably upon Illinois' approach to APE issues. This should encourage courts of the workability of Illinois' approach. California, known for promoting policies that protect the environment and the people of California[138], has adopted an interpretation of the APE that is explicitly modeled on Illinois' interpretation.[139] Ohio, too, has cited *Koloms* favorably and adopted

137. *See* Founders Ins. Co. v. Munoz, 237 Ill. 2d 424, 433 (2010) (explaining that contract interpretation rules govern the interpretation of insurance policies because insurance policies are contracts, and that ambiguous policy provisions are interpreted in favor of coverage); *See also Benjamin Moore*, 179 N.J. at 95 n.3 (found in MARTINEZ AND RICHMOND, *supra* note 2, at 142 (noting that "[t]he doctrine of *contra proferentem* requires that an ambiguous provision of a written document is construed most strongly against the person who selected the language")).

138. American readers are likely aware of the familiar disclaimer seen on products as variable as artificial sweetener and glassware: "This product contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm." Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Saf. Code, § 25249.5 et seq.

139. *Compare* MacKinnon v. Truck Ins. Exch., 31 Cal. 4th 635, 653 (Cal.

a similar interpretation of the APE.[140]

Moreover, construing the APE to be ambiguous as applied to permitted emissions makes for sound public policy. This proposal places the burden of insuring polluters where it belongs: on polluters themselves and their insurers. This shifts the burden from the environment and the public to those responsible for the pollution. This proposal protects and promotes the public health and welfare, and it provides a bright-line rule for the insurance industry. Bright-line rules benefit the industry because they allow for certainty when pricing risk and coverage.

B. Construing the APE as Ambiguous when Applied to Permitted Emissions is Consistent with Principles of Insurance Policy Interpretation

As discussed above, ambiguous exclusions in insurance policies are typically interpreted against the drafting party, which is typically the insurer.[141] This is reflected in the frequent application of the doctrine of *contra proferentum* to settle insurance coverage disputes. Because the doctrine is well-recognized in the context of insurance coverage litigation, it is appropriately applied in the context of APE litigation. Therefore, it is consistent with the principles of insurance policy interpretation to construe the APE to be ambiguous when applied to permitted emissions.

At least one court has expressed discomfort with allowing environmental statutes and regulations to color the interpretation of an insurance policy. The trial court in *Erie*, which held that the APE *did* apply to exclude coverage for losses caused by permitted emissions, expressed discomfort with employing statutory or regulatory conceptions of pollution in the interpretation of a policy

---

2003) (holding, among other things, that the APE refers to "conventional environmental pollution"), *with Koloms,* 177 Ill. 2d at 494 (holding that the APE refers to "traditional environmental pollution"). *See also* Am. Cas. Co. of Reading, PA v. Miller, 159 Cal. App. 4th 501 (2008).

MacKinnon presents a lengthy summary of the Illinois Supreme Court's discussion of the history of the APE in *Koloms. Koloms* itself is cited extensively throughout *MacKinnon*. Most importantly, the California Supreme Court ultimately adopts a formulation of the APE (excluding "conventional environmental pollution") that is very similar to Illinois' (excluding "traditional environmental pollution"). This lends support to the notion that Illinois' interpretation of the APE matters, and that it is in a position to set standards in this area.

140. Andersen v. Highland House Co., 93 Ohio St. 3d 547, 551-52 (2001).

141. *See Munoz*, 237 Ill. 2d at 433 (explaining that contract interpretation rules govern the interpretation of insurance policies because insurance policies are contracts, and that ambiguous policy provisions are interpreted in favor of coverage); *See also Benjamin Moore*, 179 N.J. at 95 n.3 (found in MARTINEZ AND RICHMOND, *supra* note 2, at 142 (noting that "[t]he doctrine of *contra proferentem* requires that an ambiguous provision of a written document is construed most strongly against the person who selected the language")).

of insurance.[142] This is a legitimate concern, but the more important concern is ambiguity. The ambiguity in the permitted emissions cases does not turn on the definition of pollution employed by this or that regulatory agency. It turns on the far simpler question of whether permitted emissions caused a loss that could be excluded under the APE. It is this question that raises the latent ambiguity of the APE, and not the more esoteric inquiry into the statutory and regulatory definitions of pollution. Also, it is noteworthy that the Fourth Circuit expressed no discomfort with analyzing and comparing a statutory definition of pollution against that employed in the APE, and even entertained an insurer's argument that the statutory definition should inform the policy definition.

C. Construing the APE as Ambiguous when Applied to Permitted Emissions is Based on Sound Public Policy

The APE should be construed to be ambiguous as applied to permitted emissions for reasons of sound public policy. This is because permitted emissions are themselves creatures of policy. The purpose of using permits is to prevent excessive amounts of pollution by balancing the benefits of industry against the costs of pollution.[143] Permitting thus represents an attempt by policy makers to strike a balance between industry and society. This balance should be considered when it is applicable to the APE

142. *Erie*, 957 N.E.2d at 1218 (explaining that "[t]he trial court . . . found that it was inappropriate to replace the language in the policy's pollution exclusion with the definition of pollution under the United States Environmental Protection Agency (USEPA) and the IEPA. The trial court stated: 'I think the Complaint itself, which is the underlying issue here, filed by the citizens, is alleging contamination, noxious odors, etcetera, and that's enough to constitute traditional environmental pollution.'").

143. *See, e.g.*, S. Ill. Asphalt Co. v. EPA, 15 Ill. App. 3d 66, 79 (5th Dist. 1973) (stating, in dicta, that ". . . the purpose of requiring an installation permit is merely to prevent the possibility of air pollution from a plant which might, when operated, cause such pollution"). *See also* 415 ILCS 5/9.1(a):

> "The General Assembly finds that the federal Clean Air Act, as amended, and regulations adopted pursuant thereto establish complex and detailed provisions for State-federal cooperation in the field of air pollution control, provide for a Prevention of Significant Deterioration program to regulate the issuance of preconstruction permits *to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources*, and also provide for plan requirements for nonattainment areas to regulate the construction, modification and operation of sources of air pollution to insure that economic growth will occur in a manner consistent with the goal of achieving the national ambient air quality standards, and that the General Assembly cannot conveniently or advantageously set forth in this Act all the requirements of such federal Act or all regulations which may be established thereunder." (emphasis added).

coverage analysis. It seems uncontroversial to say that emissions of the kind regulated by permitting agencies are pollution. What is less clear is whether it is appropriate to use the "traditional environmental pollution" test from the line of cases beginning with *Koloms* when referring to emissions that are within permissible standards set by a regulatory agency or legislative body. A hyper-literal application of the test would result in a lack of coverage for emissions that are permitted by policy. Insurance coverage disputes should not be resolved against the interests of a recognized public policy.[144]

Shifting from a fact-specific inquiry, such as the kind undertaken in cases like *Koloms*, *Kim*, *Loop Paper,* and *Crestwood*, to a more generalized policy inquiry into whether the pollutant at hand is permitted or otherwise authorized would allow courts to find the APE to be ambiguous.[145] Once a finding of ambiguity has been reached, the ambiguous provision can be interpreted against the drafting insurance company. This provides a path to coverage for permitted emissions. Losses arising from permitted emissions which implicate the APE would therefore be covered. The fact-based analysis attendant to the traditional environmental pollution test should yield a softer, policy-based analysis in cases where the injurious pollutant is permitted or otherwise authorized by statute or regulation.

This proposal does not answer the question of whether permitted emissions, those allowed under State and Federal law by merit of an operating or construction permit, are in fact "traditional environmental pollution" and thus excluded by the APE. There is a latent ambiguity in the APE when it is applied to losses involving permitted emissions.[146] It is the view of this comment that this ambiguity means permitted emissions could fairly be called traditional environmental pollution or nothing of the sort. As discussed above and below, ambiguity in an insurance policy is construed against the drafter and in favor of coverage. Illinois

144. Nicor, Inc. v. Associated Elec. & Gas Ins. Servs., 223 Ill. 2d 407, 417 (Ill. 2006) (explaining that "[w]here the provisions of a policy are clear and unambiguous, they will be applied as written unless doing so would violate public policy") (internal citations omitted).

145. Strictly adhering to the traditional environmental pollution test employed in *Koloms*, *Kim*, *Loop Paper,* and *Crestwood* would cut in favor of finding that permitted emissions are excluded by the APE. Illinois courts have been reluctant to do this.

146. *See Erie*, 957 N.E.2d at 1221 (explaining that "[w]hen the allegations in the underlying complaint are compared to the relevant provisions in the insurance [policies], it is unclear whether permitted emissions constitute traditional environmental pollution that is excluded"). *See also Bible Pork*, 2015 IL App (5th) 140211, ¶ 41 (explaining that "[w]e also agree with Erie that the exclusion is ambiguous because '[w]hen the allegations in the underlying complaint are compared to the relevant provisions in the insurance [policies], it is unclear whether permitted emissions constitute traditional environmental pollution that is excluded'") (quoting *Erie*, 957 N.E.2d at 1221).

courts strongly favor finding coverage during coverage disputes, even if there is not an official policy favoring coverage in Illinois.[147]

It is good policy to cover damages and injuries arising from permitted emissions because it provides a remedy for harm caused by permissible emissions. Furthermore, this policy smooths the contradiction between permitting emissions while excluding coverage for injuries arising from permitted emissions. If the emissions have been deemed permissible by a regulatory agency, but insurers are allowed to exclude coverage for injuries alleged to have arisen from the same permitted emissions, then there is a gap in coverage that contradicts the purpose of both environmental permitting and liability insurance. We, as a society, want businesses to get permits, and we also want them to have insurance. Under the current regime, businesses may be inclined to forego one or the other. Why pay for insurance that doesn't cover your operations? Conversely, why get a permit that will pigeon-hole you as a "polluter" and void your insurance coverage? It makes good sense from a policy perspective to cover damages and injuries arising from permitted emissions because it smooths out a contradiction that effectively creates a gap in coverage for activities that are both permitted and beneficial.

V. CONCLUSION

This comment reviewed Illinois' interpretation of the APE. Authority governing the applicability of the APE is highly fragmented, but Illinois is a larger and more important fragment in this fragmentation of authority. The state-centric system of insurance regulation codified by the McCarran-Ferguson Act has ensured that States take the lead on insurance regulation. Since Illinois is a leader in the insurance industry and insurance litigation, its interpretation of the APE influences other jurisdictions. Indeed, even California, with stringent environmental policies and pro-consumer approach, has adopted Illinois' interpretation of the APE.

As we have seen, the Illinois APE operates to exclude bodily injury or property damage resulting from the release of pollutants.

147. Yamada Corp. v. Yasuda Fire & Marine Ins. Co., 305 Ill. App. 3d 362, 370-71 (noting that ". . . there is no public policy in Illinois ensuring that there is insurance coverage for insureds and injured third parties. Admittedly, Illinois courts liberally construe the insurance policy and the underlying complaint in favor of the insured when determining the duty to defend. Federated Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 282 Ill. App. 3d 716, 725 (2d Dist. 1996). Similarly, Illinois courts liberally construe any doubts as to coverage in favor of the insured, especially when the insurer seeks to avoid coverage based on an exclusion in the policy. Oakley Transp., Inc. v. Zurich Insur. Co., 271 Ill. App. 3d 716, 722 (1995). Conversely, courts should not torture the language of a policy to find coverage where none clearly exists. Cohen Furniture Co. v. St. Paul Ins. Co. of Ill., 214 Ill. App. 3d 408, 411 (3d Dist. 1991).").

This is because the Illinois Supreme Court has interpreted the APE to apply to "traditional environmental pollution," which is the discharge of pollutants into or upon the land, air, or a body of water. Moreover, when a pollutant is discharged into or upon the land, air, or a body of water, but under a lawful environmental permit, Illinois courts have been reluctant to apply the APE (and thus disclaim coverage). This is due to the principle of *contra proferentem*, which favors coverage where ambiguities exist.

Several Illinois courts have found that the APE is ambiguous as to whether it applies to permitted emissions. This comment proposes that other Illinois courts recognize this ambiguity and follow the principles of insurance by interpreting the ambiguity in favor of coverage. This proposal is consistent with rules of insurance policy interpretation. It is also based on sound public policy for the insurance industry and the environment. We can tell partly because other states have begun following Illinois' interpretation of the APE. Lastly, and most importantly, this proposal is consistent with the interpretation of the APE set forth by the Illinois Supreme Court in *Koloms* and subsequent cases. For the foregoing reasons, Illinois Courts, and ultimately the Illinois Supreme Court, should formally recognize that the APE is ambiguous as applied to permitted or otherwise authorized emissions.