PERRIN CONFERENCES

INSURANCE COVERAGE AND ALLOCATION ISSUES CONFERENCE

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EMERGING TRENDS ON THE POLLUTION EXCLUSION

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The Montrose Case

The Qualified ("Sudden & Accidental") Pollution Exclusion in California Law

- On January 30, 2026, California's Supreme Court agreed to take up the proper method to construe the "sudden and accidental" exception to the pollution exclusion in pre-1986 CGL policies
- This will be the first case at the Supreme Court addressing this question:
  - Lower appellate decisions previously interpreted "sudden" as having only a temporal meaning—not merely "unexpected and unintended" (Shell Oil, ACL Technologies—both 1993)
  - Those decisions predated the Supreme Court's 2003 holding in Mackinnon v. Truck Ins. Exchange that drafting history may be considered in determining whether contract language is ambiguous
  - The Court will decide whether extrinsic evidence can defeat a prior judicial construction that is (arguably) contrary to drafting history

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The Montrose Case

Issues for discussion

- Can courts consider extrinsic evidence to overrule prior precedents?
  - Textualism vs. contextualism in interpreting insurance policies
- What does the extrinsic evidence show?
  - Does the consideration of the extrinsic evidence ultimately lead to a policyholder win?

Emissions permits vs. pollution exclusions

A regulator's authorization of emissions does not alter interpretation of a pollution exclusion

- *Griffith Foods v. National Union* (Ill. Sup. Ct., Jan. 23, 2026)
  - Insured argued that pollution exclusion in CGL policy did not apply because its emissions of ethylene oxide were Illinois EPA-permitted
  - Illinois Supreme Court (on certification from 7th Circuit) ruled that regulatory permits do not alter interpretation of pollution exclusion
  - Government-authorized pollution is still pollution

- *Noetic Specialty Ins. v. B. Braun Medical* (3rd Circuit, Dec. 30, 2025)
  - Differently-worded policies might provide coverage
  - Insured argued that a regulatory-clearance exception to the pollution exclusion applied, meaning that liability for its emissions should be covered
  - But court held that insured's permits didn't fit within regulatory-clearance exception

Emissions permits vs. pollution exclusions

Issues for discussion

- Can courts consider extrinsic evidence of how pollution exclusions came about?
  - Textualism vs. contextualism in interpreting insurance policies
- If an emission is government-permitted, is it pollution?
- If an emission does not increase ambient environmental levels, is it pollution?
- Intersection with arguments in underlying tort claims

Recent Case Law:
PFAS and Pollution Exclusion

Courts may apply, especially if **total or absolute pollution exclusion**[1]

Direct vs. indirect exposure distinction[2]

- Some courts have found that pollution exclusions do not apply to **direct** exposure claims resulting from ordinary and intended use of products
- But exclusions do apply to **indirect** exposure claims involving PFAS-contaminated water sources
  - However, if other covered pollution events cause the PFAS contamination, exclusion may not apply[3]

1. *Grange Ins. Co. v. Cycle-Tex, Inc.*, No. 4:21-cv-147, 2022 WL 18781187 (N.D. Ga. Dec. 5, 2022)
2. *Nat'l Foam Inc. v. Zurich Am. Ins. Co.*, 768 F. Supp. 3d 1009 (N.D. Ca. Feb. 26, 2025); *Colony Ins. Co. v. Buckeye Fire Equip. Co.*, No. 3:19-cv-00534, 2020 WL 6152381 (W.D.N.C. Oct. 20, 2020),
3. *Town of Harrietstown v. Westchester Fire Ins. Co.,* No. 24-CV-1184, 2025 WL 2391758 (N.D.N.Y. Aug. 18, 2025)

Recent Case Law:
PFAS and Pollution Exclusion

	Direct Exposure	Indirect Exposure
How exposure occurs	Ordinary product use	Environmental contamination
Examples	• Handling product that contains PFAS—e.g., AFFF Foam • Skin contact with PFAS materials	• Drinking water contaminated by PFAS • PFAS migrating in soil, air, or water • PFAS exposure from landfill or other reservoirs
Types of Liability	Products liability	Environmental and cleanup
Insurance impact	Pollution exclusion usually does not apply	Pollution exclusion more likely to apply

Recent Case Law: PFAS and Pollution Exclusion

Qualified pollution exclusion (present policies between 1970-1985): contains exception for sudden and accidental discharge, dispersal, release, or escape

- Courts: <u>depends on allegations</u>
  - Exclusion may not apply if allegations regarding source and cause of PFAS broad and thus triggering duty to defend[3]
  - May not be sudden and accidental if alleged to be a known discharge as part of manufacturing process over time

3. *Wolverine World Wide, Inc. v. Am. Ins. Co.*, No. 1:19-cv-10, 2021 WL 4841167 (W.D. Mich. Oct. 18, 2021)
4. *Tonoga, Inc. v. N.H. Ins. Co.*, 201 A.D.3d 1091, 159 N.Y.S.3d 252 (N.Y. App. Div. 3d Dep't Jan. 6, 2022)

Recent Case Law: PFAS and Pollution Exclusion

Town of Harrietstown v. Westchester Fire Ins. Co., 2025 WL 2391758 (N.D.N.Y. Aug. 18, 2025)

- Polices contained an exclusion for "Noise and pollution and other perils": "This policy does not cover claims directly or indirectly occasioned by, happening through or in consequence of . . . pollution and contamination of any kind whatsoever . . . **unless caused by or resulting in a crash fire explosion or collision or a recorded in-flight emergency causing abnormal aircraft operation**."
- NYSDEC sent the Town a potentially responsible party letter regarding contamination at an airport and then a Superfund Site Classification Notice related to PFAS in the ground and surface water—neither referred to PFAS contamination arising from the circumstances listed in the exclusion's exception
- Insurers denied coverage based on lack of proof to meet the exception for AFFF contamination caused by "a crash fire explosion or collision or a recorded in-flight emergency causing abnormal aircraft operation."
- The Court found that the initial letter from NYSDEC asserting the claim "does not foreclose the possibility that such contamination was the result of one of the enumerated exceptions to the Pollution Exclusion."
- Second Circuit affirmed last week

Recent Case Law:
PFAS and Pollution Exclusion

Town of Harrietstown, Issues for discussion

- What level of allegation or evidence necessary to demonstrate application of exception?

- Importance of who has burden to demonstrate?