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Overlapping Insurance Coverage Issues

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Comparing Insurance Policies for Different Environmental Risks

Carbon Monoxide and Ethylene Oxide Case Study: CGL Pollution Exclusions, Environmental Coverage, and Other Insurance Allocation

How CGL and Environmental Policies Interact

Independent Policy Analysis

Coverage under each insurance layer and type of policy is analyzed independently before allocation or "other insurance" considerations

CGL vs Environmental Policies

CGL policies cover "bodily injury" and "property damage" subject to pollution exclusions, while environmental policies insure "pollution conditions"

Coverage Overlaps and Disputes

Depending on the claim, CGL policies may have overlapping coverage and competing terms with environmental policies leading to disputes over defense obligations, allocation, and exhaustion of limits

Jurisdictional Variations

Different states apply various doctrines affecting disputes over defense obligations, allocation, and exhaustion of limits causing inconsistent coverage outcomes

Illinois: The Sharpest Judicial Line Between CO and EtO

Carbon Monoxide Exclusion Exception: Illinois law exempts indoor carbon monoxide from CGL pollution exclusions due to its non-industrial nature. *American States Insurance Co. v. Koloms*, 687 N.E.2d 72 (Ill. 1997) (CO emissions from a defective furnace are not traditional environmental pollution).

Ethylene Oxide Pollution Exclusion: Ethylene oxide emissions from industrial sterilization are classic pollution excluded from CGL coverage under Illinois law. *Griffith Foods International, Inc. v. National Union Fire Insurance Company of Pittsburgh, PA*, 2026 IL 131710 (Ill. 2026)("a permit or regulation authorizing emissions (generally or at any particular levels) has no relevance in assessing the application of a pollution exclusion within a standard-form commercial general liability policy").

Insurance Coverage Implications: Carbon monoxide claims often involve multiple insurance policies, while ethylene oxide claims rely solely on environmental insurance.

California: Narrow Pollution Exclusion and Policyholder-friendly interpretation

MacKinnon Case Overview: California Supreme Court ruled pollution exclusions must be clear and aimed at environmental pollution, not ordinary chemical negligence. *MacKinnon v. Truck Ins. Exchange*, 31 Cal 4th 635 (Cal. 2003)(court concluded that the common understanding of the word "pollute" was something creating impurity, something objectionable and unwanted, and did not include the normal application of pesticides around an apartment building in order to kill yellow jackets).

Carbon Monoxide Claims: CO from building equipment like a leaking furnace is usually treated as not involving traditional environmental pollution and covered under CGL policies.

Ethylene Oxide Claims: EtO emissions resemble traditional environmental pollution and are likely excluded under CGL policies and covered mainly by environmental liability policies.

California's Coverage Strategy: California favors vertical exhaustion, allowing insureds to choose coverage towers strategically in overlapping insurance claims. *Truck Ins. Exch. v. Kaiser Cement & Gypsum Corp.*, 321 Cal. Rptr.3d 761, 549 P.3d 781(CA 2024)(an insured has the right to seek funding from excess policies above exhausted primary policies regardless of whether or not primary policies in other years have exhausted their limits).

New York: Textual Analysis With Fact-Sensitive Limits

Literal Policy Interpretation: New York courts generally apply textual interpretation of insurance policies but consider pollution exclusions within context.

Ethylene Oxide as Pollution: To the extent the ethylene oxide emissions claim is considered traditional environmental pollution, CGL pollution exclusions are likely to apply shifting potential coverage to environmental liability policies.

Carbon Monoxide Coverage Variability: CO claims have mixed outcomes focused on the cause of the emission. NY courts distinguish between traditional environmental pollution and other exposures, making coverage results fact-dependent.

Horizontal Exhaustion Impact: New York's horizontal exhaustion requires all primary policies to be exhausted before excess coverage applies, increasing insured's burden.

Why Definitions Do Not Align: Pollution Exclusion vs. Pollution Condition

CGL – typical exclusion:

This insurance does not apply to:

Pollution

(1) "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or es cape of "pollutants" at any time.

(2) Any loss, cost or expense arising out of any: (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants"; or (b) Claim or suit by or on behalf of a govern mental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

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

Pollution policy typical definition:

Pollution incident means:

a. The discharge, emission, seepage, migration, dispersal, release or escape of any **pollutant** into or upon land, or any structure on land, the atmosphere (including indoor air) or any watercourse or body of water (including groundwater), provided such conditions are not naturally present in the environment in the concentration or amounts discovered;

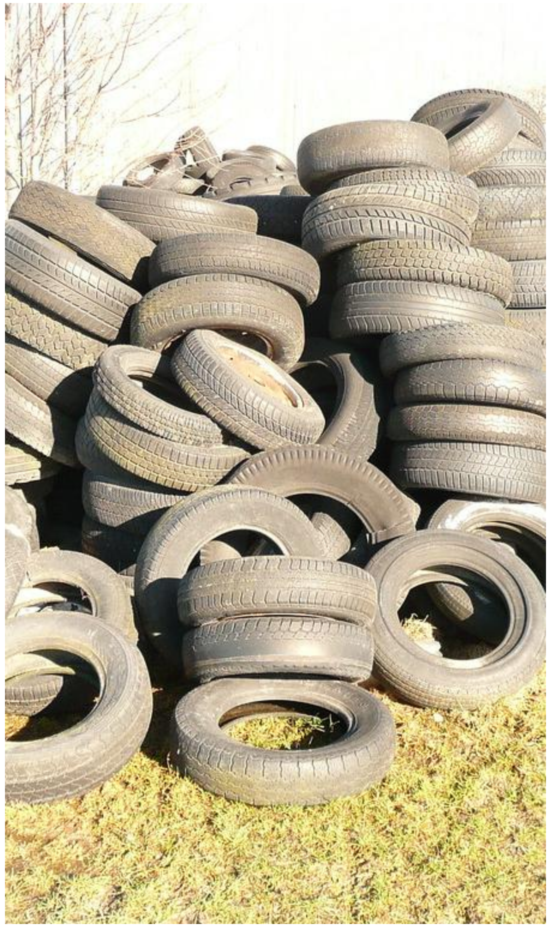
b. The presence of **microbial matter** on, at or within buildings or structures; or

c. The presence of **pollutants**, whether contained or uncontained, that have been illegally disposed of or abandoned at a **scheduled location** by parties other than an **insured**, provided that no **insured** had knowledge of such disposal or abandonment.

Pollutant means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, chemicals, hazardous substances, petroleum hydrocarbons, low-level radioactive material and waste, medical or infectious or pathological waste, waste materials, electromagnetic fields, *Legionella pneumophilia*, and **microbial matter**

What is a pollutant?

Scope of Pollutants



- Different jurisdictions interpret pollutants distinctly, impacting coverage eligibility and policy application
- Broad jurisdictions often exclude pollution from CGL policies – not just “traditional environmental pollution”
- “Traditional environmental pollution” cuts both ways –e.g., Covid
- Narrow jurisdictions allow CGL coverage and possible argument of no pollution coverage, or leading to disputes over allocation
- Understanding jurisdiction is necessary for evaluating scope of CGL and pollution coverage

Practical Takeaways for Coverage and Allocation

- Choice of law
- Other insurance clauses
- Cause of pollutant release
- Nature of the pollutant
- Location of the pollutant (indoor air vs. atmosphere)
- Quantity of pollutant released
- Insuring agreement v. exclusion
- Cleanup standard?

Perspectives from a Claim Advocate

- Split on the approach – courts look to broad definitions and environmental terms to narrow or expand exclusions
- As previously noted, in the CGL context there are two approaches:
  - Narrow approach – limiting the pollution exclusion to environmental contamination and industrial "traditional" pollution
    - Focus on contamination – such as discharges and waste disposal
    - Preserving coverage by limiting exclusion
      - Indoor paint and solvent during construction are not pollutants
      - Carbon monoxide from a building furnace
      - Diesel fuel delivered to a farm was not a pollutant
    - Contra proferentem – ambiguities construed against insurer
  - Broad literal approach – does the substance at issue irritate or contaminate and cause injury – "plain language" – pollutants include gases, fumes, sediment, debris or refuse if they irritate or contaminate in the circumstances.
  - Jurisdictional divergence – the same fact pattern can yield different outcomes (so choice of law can become particularly important)

What other policies can potentially be triggered

- CGL
- Pollution Liability (site or contractor)
- Property
- Transportation Coverage
- Cargo
- E&O/D&O

Potential Coverages

- Damages for bodily injury and property damage
- Defense costs
- First party cleanup costs for pollution versus debris removal
- First party business interruption
- Crisis management
- Natural resource damages
- Civil fines and penalties

Challenges

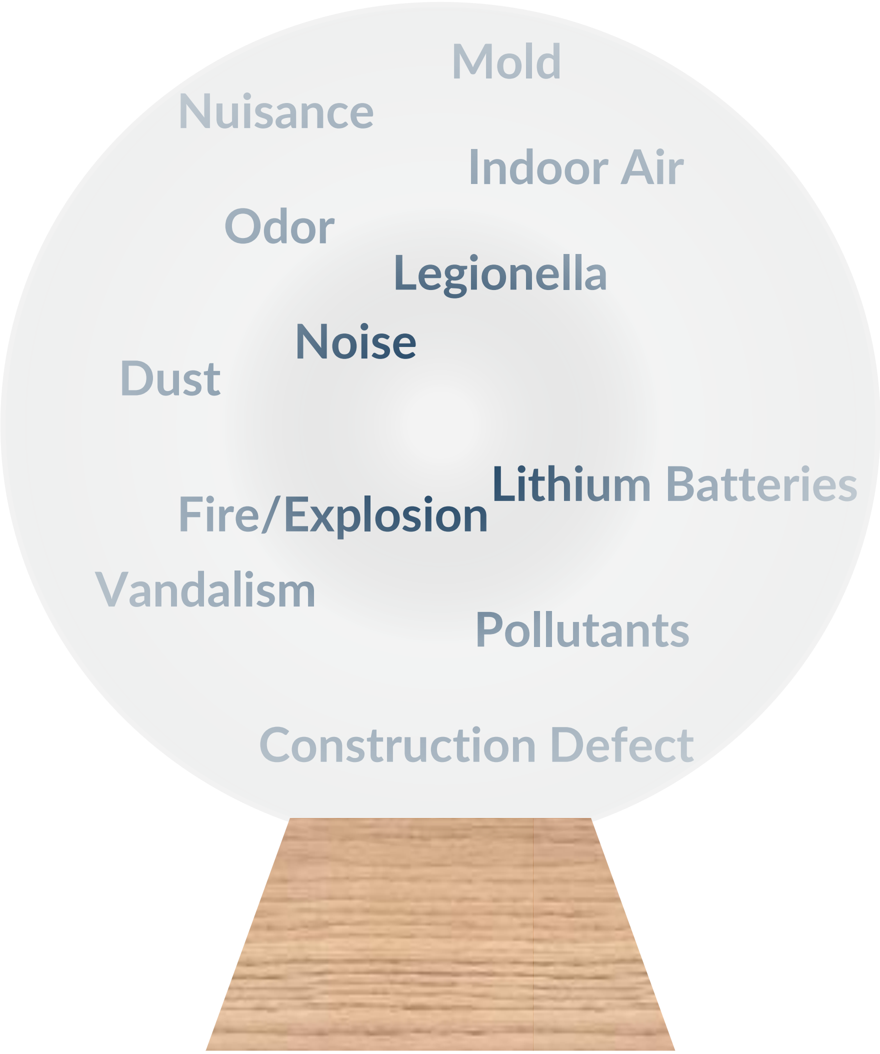
"It looks like you have everything under control."

Coverage, coverage everywhere but nobody wants to pay?*

- Claims made vs. occurrence
- Other insurance clauses
- Multiple occurrences
- Multiple policy periods
- Defense costs inside or outside the limits
- Different attachment points
- SIR v. Deductible
- Differing adjustment practices
- Allocation
- Cleanup costs, injunctive relief and fines and penalties (“oh my…”)

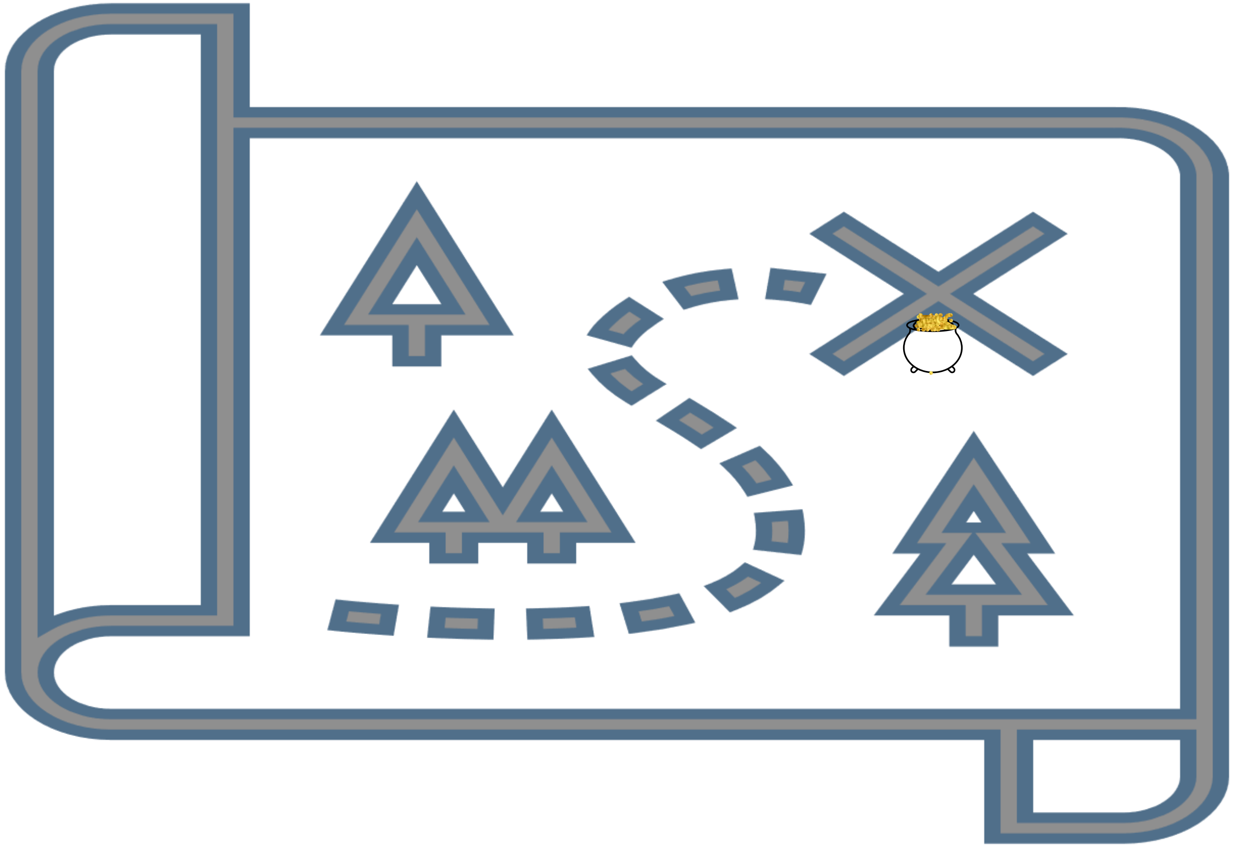
*Reimagining the “Rime of the Ancient Mariner” – as the agony of a stranded policyholder surrounded by an island of insurance but nobody paying….

The Crystal Ball – What could be the cause of loss?



Underwriting Map of Challenges

- Mega Projects
- Data Centers
- Regulatory Environment
- Loss Cost Inflation
- Emerging Contaminants
- Non-Traditional Pollutants
- First Party v Tort Liability
- Social Inflation
- Long Tail
- Market Cycle



Thank you!