

Specializing in systems used in hotels, Fresh Air, LLC is a successful manufacturer of heating, ventilation and air conditioning equipment with over 20 years in business. Tom Hagen, who founded, owns and operates Fresh Air (he is the managing member), has always purchased the latest edition of the standard ISO Commercial General Liability, which lists Fresh Air, LLC as a named insured.

**Fresh Air CGL** While he would readily concede he is no insurance expert, Tom knows that he needs liability insurance for many activities, not the least of which is products liability. So he takes a look at his policies each year and notes that while he has the latest liability form, his policy includes a few endorsements that restrict the standard coverage.

**Total Pollution Exclusion** This year, one endorsement in particular catches Tom's eye – an endorsement entitled "Total Pollution Exclusion". Tom is a bit puzzled by this as he understands his CGL policy has included the Absolute Pollution Exclusion since he began his business – and wonders what the difference is between "total" and "absolute". Nonetheless, while Tom does not anticipate that his business or products would contaminate the environment, he requests the Total Pollution Exclusion be removed from his policy. The insurance company agrees and his policy is changed accordingly.

### The Incident

Apparently, a product made by Fresh Air designed to vent a hot water heater's carbon monoxide fumes *out of the hotel* has failed. The result of the failure is that, instead of venting the fumes out of the hotel, the fumes were released into a guest room adjoining the hot water heater, causing serious injury to one of the hotel guests renting the room.

**The Litigation** Shortly after hearing of this incident, Tom is served with a complaint in which Fresh Air, LLC is the named defendant, and the complaint alleges Fresh Air's product caused the bodily injury to the guest. Count I alleges the product was negligently made; Count II alleges Fresh Air's product was defective. The conclusion in the complaint is that Fresh Air's product proximately caused the bodily injury to the guest and thus Fresh Air is legally liable for the guest's damages, which exceed \$500,000, including pain and suffering, loss of income, medical expenses and loss of consortium.

Of course, Tom forwards the complaint immediately to his insurance company and insurance broker – and also his own attorney because of the magnitude of the damages being demanded.

### The Coverage Denial

Tom is furious when he receives a letter from his insurance company categorically denying any coverage for Fresh Air for the complaint filed by the hotel guest. Upon closer examination, and in conjunction with his insurance broker and attorney, Tom is able to determine the insurer is relying on the Total Pollution Exclusion to the policy – the very endorsement Tom had removed earlier.

**Pollution** Aside from the issue of the Total Pollution Exclusion, Tom demands to know why this claim is considered pollution in the first instance. He did not contaminate the environment. Isn't that what pollution means? And didn't he purchase coverage for product liability?

Tom's insurance broker explains that while the exclusion is referred to as the "pollution" exclusion, in reality the exclusion may apply to bodily injury or property damage that arises out of the release or discharge of pollutants. In other words, the exclusion is written in such a way that it may apply to claims that contaminate the environment – there is no requirement that there must be traditional environmental damage.<sup>1</sup> Further, Tom's attorney explains in the limited research he has done, carbon monoxide may well be considered a pollutant in the state under which Tom's CGL policy would be interpreted.

**Correcting the Policy** Tom cannot abide any of this – he knows he bought product liability insurance – and the meeting quickly deteriorates. Upon leaving the meeting, Tom's insurance broker frantically contacts the insurer, sending to the adjuster who wrote the denial letter a copy of the endorsement to Fresh Air's CGL policy removing the Total Pollution Exclusion. Upon receipt of communications from Tom's broker, the adjuster readily concedes not having the endorsement removing the Total Pollution Exclusion and agrees to reconsider the coverage denial. Tom is relieved to hear from his insurance broker that the adjuster has conceded the Total Pollution Exclusion will be removed and the coverage issue will be addressed again.

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**Same Answer** Explosive is an apt description of Tom's anger when he receives a second letter from the same adjuster, acknowledging removal of the Total Pollution Exclusion but again flatly denying any coverage for the complaint by the guest against Fresh Air. The adjuster contends the unendorsed CGL policy, and the Absolute Pollution Exclusion applies in the same manner as the Total Pollution Exclusion.

**Total and Absolute Pollution Exclusion** Tom's insurance broker gets the unwelcome news of the second coverage denial (as well as a copy of the slightly singed second letter from Tom).

Tom's broker correctly points out to Tom and his attorney that the Total Pollution Exclusion *did eliminate* coverage for any pollution that *arises from Fresh Air's products*, but that the Absolute Pollution Exclusion does no such thing and the insurer is completely wrong – Tom is covered for this complaint.

**Absolute Pollution Exclusion** Whether the incident involved traditional environmental damage or whether carbon monoxide is a pollutant are both beside the point, Tom's broker explains. In his letter to the adjuster, Tom's broker succinctly explains the Absolute Pollution Exclusion (exclusion f.) as found in Fresh Air's latest CGL policy is limited in its application.

The exclusion applies if and only if:

- The pollutants were released from Fresh Air's premises (with numerous exceptions) - clearly the hotel is not Fresh Air's premises; or
- If the incident involved waste – and carbon monoxide is not waste; or
- If the pollution occurred at the hotel while Fresh Air was in the process of *actually performing operations* and Fresh Air brought the pollutants with them to the job (also with numerous exceptions) – as Fresh Air did not (and could not) have brought the carbon monoxide with them since they never once entered the hotel premises, this part of the exclusion has no application; or
- The demand was to clean up or remove pollutants – in this instance, the demand was for damages because of bodily injury, not cleanup.<sup>2</sup>

### Reversal of the Coverage Denial

After further consideration, Fresh Air's insurer agrees with the insurance broker's explanation of how the Absolute Pollution Exclusion in Fresh Air's CGL policy applies – and further agrees that the exclusion does not apply to the release of carbon monoxide due to the alleged failure of Fresh Air's product. To Tom's satisfaction, Fresh Air's CGL insurer agrees to defend Fresh Air and, if found liable, is prepared to pay damages on Fresh Air's behalf.

### Conclusion

In most instances, the standard ISO CGL Absolute Pollution Exclusion does *not* eliminate coverage for bodily injury or property damage that falls within the products-completed operations hazard. However, the pollution exclusion may still restrict or eliminate products-completed operations coverage in some circumstances – for example, if the product/completed operation involves waste or if pollution that results from a failure/defect in a product triggers a demand to clean up pollutants or otherwise comply with governmental orders/regulations to clean up pollutants (provided such demands are beyond what constitutes property damage).

Further, there are substantial and material differences in coverage when an insurer amends the standard ISO CGL policy with various pollution exclusion changes, including but not limited to the Total Pollution Exclusion.

<sup>1</sup> Courts are sharply divided on this issue – whether the pollution exclusion is to be read broadly and literally to apply to any injury or damage that results from any “pollutant” or whether the exclusion applies only to “traditional environmental damage” and of course numerous findings in between, including what constitutes a “pollutant”. “There exists not just a split of authority, but a fragmentation of authority.” *Porterfield v. Audubon Indemn. Co.* 856 So.2d 789 (Ala. 2002)

<sup>2</sup> This summary of the CGL “absolute” pollution exclusion is for the purposes of illustration only in the context of the overall example. Interpretation and application of the CGL “absolute” pollution exclusion is an extremely complex undertaking that is beyond the scope of this article.

#### Editor's Note

*AmWINS brokers are well versed in products pollution issues. Agents need to be aware that many carriers attach Total Pollution Exclusions to their General Liability policies. These eliminate the limited pollution coverages, including products pollution, that are available under the standard ISO General Liability policy. These restrictions can leave insureds with limited, or no, products liability coverage.*

*For manufacturers whose products present significant products pollution exposures (e.g. chemical, gas, valve manufacturers, and many others) it is important to work with your AmWINS broker to either negotiate for the removal of the Total Pollution Exclusion from the General Liability policy or to arrange for the purchase of separate products pollution coverage. AmWINS has access to dozens of specialized markets that can meet the pollution coverage needs of all types of customers including manufacturers, contractors, healthcare facilities and property owners.*

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About the Author – Craig F. Stanovich is co-founder and principal of Austin & Stanovich Risk Managers, LLC, a risk management and insurance advisory consulting firm specializing in all aspects of commercial insurance and risk management, providing risk management and insurance solutions, not insurance sales. Services include fee based risk management, expert witness and litigation support and technical/educational support to insurance companies, agents and brokers. Email at [cstanovich@austinstanovich.com](mailto:cstanovich@austinstanovich.com). Website [www.austinstanovich.com](http://www.austinstanovich.com)