

## How "Absolute" is the "Absolute Pollution Exclusion"?

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[Richard D. Porotsky Jr.](#)

In a recently published decision, Ohio's Third District Court of Appeals addressed the scope of the so-called "absolute pollution exclusion." *Bosserman Aviation Equipment, Inc. v. United States Liability Insurance Company* (3rd Dist.), 183 Ohio App. 3d 29, 2009-Ohio-2526. The Court found that the exclusion does have limits. Thus, despite the exclusion, coverage can be found for an employee's injuries arising out of exposure to toxic chemicals in certain workplace situations.

In this case, U.S. Liability Insurance Company ("U.S. Liability") argued that no coverage or defense was owed to Bosserman Aviation Equipment, Inc. when one of its employees sued for harmful exposure to chemicals in the workplace. The employee alleged an intentional tort, allowing him to seek recovery outside of the workers' compensation system. He allegedly developed aplastic anemia due to exposure to benzene and other harmful chemical agents contained in aircraft fuel. He came into contact with these chemicals in the scope of his employment, which involved reconditioning and repairing aircraft-refueling equipment.

Despite the exposure to toxic chemicals, the Court ruled that the absolute pollution exclusion did not apply. The Court cited two reasons. First, the Court referenced prior Ohio authority on the purpose of pollution exclusion clauses. These clauses were designed, wrote the Court, "to preclude coverage for traditional environmental contamination." *Id.*, 19 (citing *Andersen v. Highland House Co.* (2001), 93 Ohio St.3d 547, 757 N.E.2d 329). The exclusion did not apply here to an employee exposed "while conducting tasks within the normal course of his job duty in the confines of his work place." *Id.* Second, the Court found that there was no discharge, dispersal, release, or escape of benzene or other pollutants to satisfy the specific language of the exclusion. *Id.* 20. Rather, the exposure to these chemicals occurred while the employee was working in fuel tanks and in other confined areas containing aircraft fuel residue. *Id.*

Accordingly, the Court required U.S. Liability to provide a defense and coverage to its policyholder, limiting the reach of the absolute pollution exclusion in Ohio.