

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

NAUTILUS INSURANCE COMPANY,)
)
 Plaintiff)
)
 v.)
)
 MICHAEL G. JABAR, d/b/a MIKE'S)
 ROOFING,)
)
 Defendant)
)
 and)
)
 LISA A. VARANO, STEPHEN M.)
 VARANO, and STERN COMPANY, INC.,)
)
 Parties-in-Interest)

Docket No. 97-284-P-H

RECOMMENDED DECISION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, Nautilus Insurance Company (“Nautilus”), moves for summary judgment on its complaint for declaratory judgment against defendant Michael G. Jabar (“Jabar”), d/b/a Mike’s Roofing, its insured, and parties-in-interest Lisa A. Varano, Stephen M. Varano and Stern Company, Inc. The defendant and the Varano parties-in-interest oppose the motion. I recommend that the motion be granted in part and denied in part.

I. Summary Judgment Standard

Summary judgment is appropriate only if “the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The summary judgment record reveals the following undisputed material facts. By a complaint dated June 3, 1997 the Varanos brought suit against Jabar in this court. Complaint (Docket No. 1), Exh. A (sometimes, “Underlying Complaint”). That complaint, which is pending, alleges, *inter alia*, that Lisa Varano was exposed to hazardous fumes on or about February 17, 1995

and March 12, 1995 as a result of roofing work being performed at her place of employment by Jabar. *Id.* ¶¶ 8, 11, 14-15. The complaint includes claims of strict products liability and negligence against Jabar and seeks punitive as well as compensatory damages against him. *Id.* ¶¶ 25-30, 32-33, 35. Party-in-interest Stern Company, Inc. is also named as a defendant in that action. *Id.* ¶¶ 3, 37-41.

Between April 26, 1994 and April 26, 1995 Jabar was insured under a commercial lines policy, Policy No. NS 019313, issued by Nautilus. Affidavit of Steve Franke (“Franke Aff.”) (Docket No. 8), ¶ 4. Part of the policy, titled “Coverage A. Bodily Injury and Property Damage Liability,” provides, in relevant part, that Nautilus “will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.” Policy, attached to Franke Aff., Coverage A(1), “Commercial General Liability Coverage Form” at 1. The policy also includes an exclusion that is the basis of the plaintiff’s motion, which provides:

EXCLUSION — TOTAL POLLUTION

[This insurance does not apply to]

* * * * *

- f. (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 escape of pollutants at any time.
- (2) Any loss, cost or expense arising out of any:
 - (a) Request, demand or order 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 government 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 means any solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste. Waste includes material to be recycled, reconditioned or reclaimed.

Id., Endorsement, Form S 051, “Additional Exclusions” (CG 21 49 11 88). The policy also includes the following exclusion:

EXCLUSION — PUNITIVE OR EXEMPLARY DAMAGE

The following exclusion is added to COVERAGES A, B and C (Section I):

This insurance does not apply to a claim of or indemnification for punitive or exemplary damages. If a suit shall have been brought against You for a claim within the coverage provided under the policy, seeking both compensatory and punitive or exemplary damages, then We will afford a defense for such action. We shall not have an obligation to pay for any costs, interest or damages attributable to punitive or exemplary damages.

Id., Form CG 21 47 09 89.

III. Discussion

The plaintiff seeks summary judgment on its claim that it has no duty under the policy to defend or indemnify Jabar for the claims raised in the underlying action and, in the alternative, that it has no duty to indemnify Jabar for any punitive damages that may be awarded in the underlying action. Neither Jabar nor the Varanos disputes the claim that the policy does not provide indemnification for punitive damages, and the policy language is clear and unambiguous on this point. Nautilus is entitled to summary judgment on the punitive damages issue.

The parties agree that Maine law applies to this dispute. The “total pollution exclusion” clause at issue here, and its predecessors, have been construed by several courts, but not by the Maine Law Court. Absent controlling state-law precedent, a federal court sitting in diversity has the discretion to certify a state-law question to the state’s highest court, or to predict what the high court would do when the path the state court would take is reasonably clear. *See Lyons v. National Car Rental Sys., Inc.*, 30 F.3d 240, 245 (1st Cir. 1994); *Nieves v. University of Puerto Rico*, 7 F.3d 270, 274 (1st Cir. 1993). My review of existing Maine case law, as well as the decisions of other jurisdictions on point, convinces me that the path the Law Court would take if faced with this issue is reasonably clear.

Nautilus argues that, because the complaint in the underlying action alleges that Lisa Varano was injured as a result of inhaling “hazardous and toxic air pollutants and fumes emitted and discharged” by roofing products being used by Jabar, Underlying Complaint ¶¶ 8-9, 11, her claims are excluded from coverage by the pollution exclusion endorsement because the substances causing her injury were pollutants within the meaning of the language used in the exclusion. Memorandum of Law in Support of Plaintiff’s Motion for Summary Judgment (“Plaintiff’s Memorandum”), included in Docket No. 6, at 6-7. The plaintiff also argues that the specific substance mentioned in the complaint as a cause of the alleged injury, toluene diisocyanate, Underlying Complaint ¶11, is identified by the United States Environmental Protection Agency as a hazardous air pollutant subject to regulation, 40 C.F.R. Part 63, Subpart F, Table 2,¹ and therefore must be considered a pollutant

¹ Nautilus relies on *Guilford Indus., Inc. v. Liberty Mut. Ins. Co.*, 688 F. Supp. 792 (D. Me. 1988), to support its argument that it is appropriate for a court to look to the treatment of the substance at issue by regulatory agencies in order to determine whether the substance is a pollutant within the meaning of the policy exclusion. Plaintiff’s Memorandum at 7. However, in *Guilford* (continued...)

within the meaning of the policy exclusion. Plaintiff's Memorandum at 7.

Nautilus also cites case law in which absolute pollution exclusion clauses were, it asserts, found to be unambiguous, *i.e.*, *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16, 18 (Me. 1990) (interpreting policy language extending coverage to legal obligation to pay damages), and *Guilford*, 688 F. Supp. at 794 n.1 (holding that "it is common knowledge" that oil spills into waterways are "commonly considered polluting events"), and concludes that the pollution exclusion clause at issue here, although differing in precise language, must therefore be held to be unambiguous as applied to an injury resulting from inhalation of fumes released during the contemplated use of a product in the normal course of business, and, by logical extension, as applied in any context. This argument ignores the fact that an exclusionary clause in an insurance policy can be ambiguous in one context and not in another. *Stoney Run Co. v. Prudential-LMI Comm. Ins. Co.*, 47 F.3d 34, 37 (2d Cir. 1995); *Garfield Slope Hous. Corp. v. Public Serv. Mut. Ins. Co.*, 973 F. Supp. 326, 337 (E.D.N.Y. 1997). More to the point, a finding that an exclusionary clause is not ambiguous as to the meaning of "damages" does not mean that the clause cannot be ambiguous as to any other word or phrase, nor does a finding that the word "pollutant" is not ambiguous in one context mean that it cannot be ambiguous in another.

Under Maine law, an insurance policy is ambiguous "if an ordinary person in the shoes of the insured would not understand that the policy did not cover claims such as those" at issue.

¹(...continued)

the regulatory definition to which the court referred was one that was applicable to the insured and the business for which the insured sought coverage. 688 F. Supp. at 794 (state regulation). Here, the regulatory definition cited by Nautilus is found in a section of EPA regulations entitled "National Emission Standards for Organic Hazardous Air Pollutants From the Synthetic Organic Chemical Manufacturing Industry," 40 C.F.R. Part 63, Subpart F. Jabar is not engaged in the manufacture of synthetic organic chemicals. He is in the roofing business.

Allstate Ins. Co. v. Elwell, 513 A.2d 269, 271 (Me. 1986). “A liability insurance policy must be construed to resolve all ambiguities in favor of coverage.” *Maine Drilling & Blasting, Inc. v. Insurance Co. of N. Am.*, 665 A.2d 671, 673 (Me. 1995). “The language of a contract of insurance is ambiguous if it is reasonably susceptible of different interpretations.” *Brackett v. Middlesex Ins. Co.*, 486 A.2d 1188, 1189 (Me. 1985). If the insurance contract is ambiguous, “it will be construed against the insurer so as to comply with the objectively reasonable expectations of the insured.” *Colford v. Chubb Life Ins. Co. of Am.*, 687 A.2d 609, 614 (Me. 1996). See generally *Golden Rule Ins. Co. v. Atallah*, 45 F.3d 512, 516 (1st Cir. 1995) (discussing Maine law).

In applying these rules of construction, we view the contract language from the perspective of an average person, untrained in either the law or the insurance field, in light of what a more than casual reading of the policy would reveal to an ordinarily intelligent insured.

Peerless Ins. Co. v. Wood, 685 A.2d 1173, 1174 (Me. 1996).

In construing pollution exclusion clauses in cases in which the underlying claim was for personal injury or property damage other than environmental damage, courts in other jurisdictions have found ambiguous the words “pollutants,” as it is defined in the Nautilus policy, e.g., *Sargent Const. Co. v. State Auto. Ins. Co.*, 23 F.3d 1324, 1327 (8th Cir. 1994) (property damage from fumes from acid used to treat concrete floor; Missouri law); *Garfield*, 973 F. Supp. at 337 (fumes from carpet adhesive caused injury; New York law), and “discharge,” “dispersal,” and “escape,” e.g., *Bituminous Cas. Corp. v. Advanced Adhesive Tech., Inc.*, 73 F.3d 335, 338 (11th Cir. 1996) (fumes from carpet adhesive caused injury; Georgia law); *Weaver v. Royal Ins. Co. of Am.*, 674 A.2d 975, 977-78 (N.H. 1996) (lead paint carried from worksite caused injury; New Hampshire law), none of which is defined in the Nautilus policy.

Nautilus cites two reported cases to support its contention that the language of the pollution exclusion clause is unambiguous for claims like that presented by the Varanos, *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Triangle Paving, Inc.*, 973 F. Supp. 560 (E.D.N.C. 1996), and *Tri-County Serv. Co. v. Nationwide Mut. Ins. Co.*, 873 S.W.2d 719 (Tex. App. 1993), and two unreported cases. Nautilus repeatedly asserts, without citation to authority, that this is the majority position on the issue. Plaintiff's Memorandum at 11; Plaintiff's Reply Memorandum in Support of It's [sic] Motion for Summary Judgment (Docket No. 15) at 4. While this issue is certainly not characterized by unanimity among the courts that have considered it, my own research suggests that it is in fact Nautilus's position that is in the minority. *See, e.g., Western Alliance Ins. Co. v. Gill*, 686 N.E.2d 997, 999-1000 & n.5 (Mass. 1997), and cases cited therein, and *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 78 & n. 3 (Ill. 1997), and cases cited therein. In addition, both of the cases upon which Nautilus relies deal with environmental damage, which is distinguishable from the instant claim for personal injury, and *Triangle Paving* is very similar to *Guilford* in that a regulation applicable to the industry in which the insured was engaged defined the substance that caused environmental damage as a pollutant. 973 F. Supp. at 565. *See also United States Liab. Ins. Co. v. Bourbeau*, 49 F.3d 786, 789 (1st Cir. 1995) (distinguishing between environmental pollution and personal injury for purpose of application of pollution exclusion clause).

The distinction between environmental damage and personal injury is an important one when the policy language at issue here is viewed from the perspective of an average person, in light of what a more than casual reading would reveal to an ordinarily intelligent insured. *Peerless*, 685 A.2d at 1174. The New York courts have construed the pollution exclusion language to apply only to

environmental pollution.² *Stoney Run*, 47 F.3d at 38; *Garfield*, 973 F. Supp. at 338. It is reasonable that an ordinary person in Jabar’s shoes would also construe the language this way. An individual engaged in a business not known to present the risk of causing environmental pollution would not understand that the Nautilus policy excludes coverage for injuries arising from the use of products associated with that business for the purpose for which those products are intended. *See Atlantic Mut. Ins. Co. v. McFadden*, 595 N.E.2d 762, 764 (Mass. 1992) (insured could reasonably have understood pollution exclusion clause to exclude coverage for injuries caused by industrial pollution but not for injury caused by presence of leaded material in private residence).

Even if this were not the case, the terms “discharge, dispersal, seepage, migration, release or escape” in the exclusion clause are reasonably susceptible of different interpretations. In *Advanced Adhesive* the court held that the inhalation of dichloromethane fumes from a carpet adhesive being used to install carpeting on a boat, resulting in death, was not “unambiguously described” by the terms “discharge,” “dispersal,” “release,” or “escape,” so that the insurer could not deny coverage under the pollution exclusion clause. 73 F.3d at 338-39. In addition, even if the words were not ambiguous, the mechanism of Lisa Varano’s injury does not necessarily fit within these terms at all. In *Center for Creative Studies v. Aetna Life & Cas. Co.*, 871 F. Supp. 941, 942, 946 (E. D. Mich. 1994), the court found that a complaint claiming an injury due to exposure to fumes from a photographic chemical product being used in a darkroom did not allege injury resulting from “discharged, dispersed, released or escaped” pollutants. For all practical purposes, this factual

² Although reliance on the history of the pollution exclusion clause would be inconsistent with the rules of construction for insurance contracts established by the Law Court, the analysis of that history presented in *Koloms*, 687 N.E.2d at 79-81, is entirely consistent with the conclusions I draw from the application of those rules in this case.

scenario is indistinguishable from that presented by the instant case. I find the reasoning in these cases to be persuasive and to fit easily within the rules of construction adopted by the Law Court for insurance policy coverage disputes.

IV. Conclusion

For the foregoing reasons, I recommend that the plaintiff's motion for summary judgment be **GRANTED** as to any claims for indemnification for any award of punitive damages that may be made in the underlying action and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 19th day of March, 1998.

*David M. Cohen
United States Magistrate Judge*