Building owners and managers are increasingly facing claims arising from carbon monoxide exposure frequently caused by faulty furnaces. Who will pay these huge sums?

Building owners and managers are finding they can call upon today’s insurance policies as well as those sold years ago to pay for carbon monoxide exposure claims.

A variety of insurance policies provide building owners and managers with protection against carbon monoxide exposure claims, including comprehensive general liability insurance policies, umbrella, and excess liability policies. These policies are intended to provide coverage for bodily injury and property damage claims building owners and managers face in carbon monoxide cases.

Building owners and managers should make sure to provide notice to all insurance companies that sold them policies which may cover carbon monoxide liabilities. Since building owners and managers may be able to look to old policies to provide coverage for carbon monoxide cases, they should perform a diligent search for insurance policies and make sure that no policies are discarded in the course of document destruction.

The Pollution Exclusion

While it may seem obvious that carbon monoxide from a heater is not a “pollutant,” insurance companies attempt to avoid their contractual obligations by arguing that the “pollution exclusion” bars coverage for carbon monoxide claims. Numerous courts nationwide have rejected this argument. Most recently, the Illinois Supreme Court in American States Insurance Co. v. Harvey Koloms, (October 17, 1997) held that the pollution exclusion did not preclude claims for carbon monoxide poisoning from a furnace:

Our review of the history of the pollution exclusion amply demonstrates that the predominating motivation in drafting an exclusion for pollution-related injuries was the avoidance of the enormous expense and exposure resulting from the ‘explosion’ of environmental litigation. (Emphasis added.) Weaver, 140 N.H. at 783, 674 A.2d at 977, quoting Vantage Development Corp. v. American Environmental Technologies Corp., 251 N.J. Super. 516, 525, 598 A.2d 948, 953 (1991).

Significantly, the Koloms court rejected the insurance company’s argument that because carbon monoxide is defined as a “very toxic gas” and is regulated by the federal government as a pollutant under the Clean Air Act the so-called absolute pollution exclusion precludes coverage.

The federal appellate court for New York, Vermont, and Connecticut in Stoney Run Co. v. Prudential-LMI Commercial Ins., Co., 47 F.3d 34 (2d Cir. 1995), held that the pollution exclusion contained in Commercial General Liability insurance policies can reasonably be interpreted to apply only to environmental pollution, and not to all contact with substances which may be classified as pollutants, concluding that carbon monoxide poisoning from a faulty residential heater was not the type of environmental pollution contemplated by the pollution exclusion.

Similarly, in Thompson v. Temple, 580 So. 2d 1133 (La. Ct. App. 4th Cir. 1991) the Court of Appeals of
Louisiana held that a polluter’s exclusion in a homeowner’s policy did not exclude coverage for carbon monoxide injuries caused by a leaking gas heater in a residential rental property:

Pollution exclusion clauses are intended to exclude coverage for active industrial polluters, when businesses knowingly emitted pollutants over extended periods of time. It seems that the intent of the insurance industry in adding pollution exclusion clauses to their policies was to exclude coverage for entities which knowingly pollute the environment over a substantial period of time. That situation is totally different from a leaking gas heater within a home. It is unlikely that the insurance industry intended such an exclusion clause to apply to this situation. Id. at 1134-35.

In an analogous situation, A-1 Sandblasting & Steamecleaning Co. v. Baiden, 53 Or. App. 890, 632 P.2d 1377 (1981), aff’d, 293 Or. 17, 643 P.2d 1260 (1982), passing vehicles were damaged by the overspray of paint used while the policyholder was spray painting a bridge. The insurance company denied coverage for the policyholder’s liability for the damage to the cars on the ground that the paint was either a liquid, or alternatively, because of its chemical composition, an acid or alkali, and thus was excluded by the pollution exclusion. Id. at 1379. The lower court disagreed, finding that paint “in common understanding” is not thought to be an irritant, contaminant, or a pollutant. Id. at 1379. The Oregon Supreme Court affirmed, stating that a reading of the above list of substances, “is not ‘so clear as to cause a reasonable person in the position of the insured to believe that paint was one of the substances referred to in the so-called exclusion.” A-1 Sandblasting, 643 P.2d at 1262.

Similarly, in Gould, Inc. v. Continental Casualty Co., No. 3529 (Pa. Ct. C.P. July 26, 1991), the court held that the so-called sudden and accidental pollution exclusion did not bar coverage for a claim involving workplace exposure to lead fumes and dust because the pollution exclusion applied only to occurrences outside the workplace.

The “Absolute” Pollution Exclusion
In 1986 the insurance industry revised the Comprehensive General Liability policy to include a new pollution exclusion that has been nicknamed the so-called “absolute” pollution exclusion.

The two highest courts to have ruled on this issue have rejected the application of the so-called “absolute” pollution exclusion to bar coverage for carbon monoxide building claims. The new Illinois Koloms case involved the so-called “absolute” pollution exclusion and held it did not preclude coverage for carbon monoxide poisoning. On November 10, 1997, the Massachusetts Supreme Court, in Western Alliance Insurance Company v. Jarnail Singh Gill also held that the exclusion did not bar claims of a restaurant patron who was injured by carbon monoxide when a part malfunctioned.

The Massachusetts Supreme Court had already rejected the insurance company’s argument in the context of lead paint claims. In Atlantic Mut. Ins. Co. v. McFadden, 413 Mass. 90, 595 N.E.2d 762 (1992), the Supreme Court of Massachusetts held that in-place lead paint is not a “pollutant” under the pollution exclusion. Indeed, the McFadden lower court had ruled that, “there is no language in the policy which even suggests that lead in paint, putty, or plaster is a ‘pollutant’ within the meaning of the provision.” 595 N.E.2d at 763. The Massachusetts Supreme Court similarly rejected the insurance company’s argument. The court concluded:

There simply is no language in the exclusion provision from which to infer that the provision was drafted with a view toward limiting liability for lead paint-related injury. The definition of ‘pollutant’ in the policy does not indicate that leaded materials fall within its scope. McFadden, 595 N.E.2d at 764.

An example of how far an insurance company will go to deny coverage is Donaldson v. Urban Land Interests, Inc., 564 N.W.2d 728 (J1997). In Donaldson, the Wisconsin Supreme Court reviewed two lower court rulings which had excluded claims for bodily injury based on a build up of exhaled carbon dioxide, and held that the definition of “pollutant” in the so-called “absolute” pollution exclusion is ambiguous. While this result, stating that breathing is not a polluting activity, would appear obvious, the insurance company had denied coverage on this basis, two lower courts had denied coverage and
one Supreme Court judge dissented in *Donaldson*.

**Conclusion**

Liability insurance policies provide coverage for carbon monoxide cases and the pollution exclusion does not limit this coverage. Building owners and managers should aggressively seek coverage for their carbon monoxide claims.