

No. 67952-0-I

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IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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MAXCARE OF WASHINGTON, INC.,  
a Washington corporation,

Appellant,

v.

WESTERN NATIONAL ASSURANCE COMPANY,  
a Washington corporation,

Respondent.

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**RESPONDENT'S BRIEF**

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## I. INTRODUCTION

Western National Assurance Company (“WNAC”) filed this action seeking a declaration that it has no duty to defend or indemnify Maxcare of Washington, Inc. (“Maxcare”) for allegations made against it in a lawsuit brought by Ricardo and Latisha Cueva and their minor daughter, Madeline (“the Cuevas”). The Cuevas’ complaint unambiguously alleges that toxic chemicals released by Maxcare injured them and damaged their property. Applying an unbroken line of dispositive Washington cases, the trial court correctly concluded that these allegations fell within the unambiguous Total Pollution Exclusion (“TPE”) in the WNAC policy, and therefore WNAC had no duty to defend or indemnify Maxcare.

An insurer’s duty to defend is determined at the time the lawsuit is filed, and is based upon the allegations in the complaint against the insured. Where the allegations in the complaint, if proven, would not be covered by the policy, there is no duty to defend. Moreover, where the complaint clearly and unambiguously alleges uncovered claims, the insurer need not resort to extrinsic evidence to determine its duty to defend. Maxcare bases its entire argument upon the incorrect legal premise that WNAC must look to evidence not contained in the complaint,

developed in the underlying litigation months after the complaint was filed, to determine its defense obligation.

Even if WNAC must consider such extrinsic evidence, Maxcare's argument fails. The Cuevas' allegations in the underlying litigation are entirely consistent with the allegations in their complaint. During the course of the underlying litigation, evidence has been developed by other witnesses, physicians and hygienists, which cast doubt upon the Cuevas' ability to prove their otherwise uncovered allegations (*i.e.*, that they were injured by Maxcare's chemicals). However, the possibility that the Cuevas' may not ultimately be able to prove their uncovered allegations does not change the nature of those allegations to fall within coverage. As the trial court correctly determined, those isolated facts do not create covered allegations, but instead simply cast doubt upon the Cuevas' ability to prove their uncovered allegations.

Maxcare has failed to show that the TPE does not apply to the Cuevas' allegations against it. Maxcare has cited no relevant Washington authority declining to apply the TPE in a similar context, nor has it adequately distinguished WNAC's dispositive authority. Maxcare has not identified a single allegation *by the Cuevas* that, if proven, would be covered. Testimony from witnesses other than the Cuevas, which merely

casts doubt upon the Cuevas ability to prove their uncovered allegations, and cannot be substituted for the Cuevas' own allegations. Therefore, WNAC respectfully requests that this Court affirm the trial court's order granting summary judgment in WNAC's favor.

## **II. STATEMENT OF THE CASE**

### **A. Background of the Cuevas' Loss**

On February 23, 2009, Latisha Cueva left her home to run errands, leaving a pot of boiling chicken stock on the stove. CP 54. The pot ran dry, and smoldering chicken caused heavy smoke and odor damage to the Cuevas' home. *Id.* The Cuevas were insured by Garrison Property & Casualty Ins. Co. ("USAA"). CP 88. USAA hired Maxcare to restore the property. CP 91. Maxcare used chemicals to repair the Cuevas' home. CP 97-114.

After moving back into the home, the Cuevas allegedly began suffering from respiratory ailments they attributed to the chemicals Maxcare used. CP 136-138. In response to the Cuevas' claim that they were suffering symptoms from Maxcare's chemicals, USAA agreed to have a hygienist test the home. CP 54-67. The ensuing report found

Volatile Organic Compounds (VOCs)<sup>1</sup> exceeding levels which might be expected to cause irritative symptoms. CP 63.

USAA then agreed to “bake out” the Cuevas’ home. CP 129-130. A “bake out” involves heating the home to high temperatures to volatilize the VOCs, which are then removed from the home by circulating the air out. Testing after the “bake out” identified VOC levels below which a person might be expected to suffer symptoms. CP 132-134.

The Cuevas continued to allege symptoms after the “bake out,” which they attributed to chemicals Maxcare used. CP 136-140. When USAA refused further repairs, the Cuevas hired an attorney who wrote to USAA, alleging that Maxcare’s chemicals contaminated the home and caused personal injury:

The Cuevas, your policyholders, are disappointed to learn that you refuse to provide further testing of their *contaminated* home....

[USAA] elected to repair the house and contents under your Property Direct Repair Program.... [USAA] failed to repair the damage, and directed repairs which *contaminated* the house and its contents.

Mr and Mrs. Cuevas have been sick, as a result of USAA and your contractor’s failure to consider their health. Madeline, age two, is the sickest. She has been ill every

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<sup>1</sup> According to the U.S. EPA, VOCs are gasses emitted from liquid chemicals, specifically including cleaning supplies, which can expose residents to “very high ‘pollutant levels’” and may cause, among other things, eye, nose and throat irritation. *An Introduction to Air Quality*, <http://www.epa.gov/iaq/voc.html>.

night and day she has spent in the family home. Her physician, Dr. Lee Vincent, has continued to believe that *chemical toxicity in the house is making her sick....*

. . .

This claim started with a small fire loss. One year later, the house is uninhabitable. The entire family is sick. The house may be valueless. Your policyholders, the Cuevas, cannot live in the house *because it is toxic....*

1. Your policyholders must immediately relocate to an *uncontaminated* house....
2. Your policy holders need *uncontaminated* rental furniture, personal property, food and clothing....
3. The *contaminated house* must be carefully and completely retested by professionals approved by your policy holders.... Once the *offending toxins* are fully identified, USAA must pay for medical testing and treatment for the Cuevas.

CP 136-140 (emphasis added).

#### **B. The Cuevas' Suit Against Maxcare**

The Cuevas sued Maxcare, alleging it used “potentially toxic chemicals” which “contaminated” their property and injured themselves and their minor daughter.<sup>2</sup> Specifically, the Cuevas’ complaint alleges:

- 2.15 Maxcare, with full knowledge of the danger, *contaminated* plaintiffs’ home during its efforts to repair damage caused by the fire. Maxcare did this after promising plaintiffs it would not use certain *potentially toxic chemicals*, which it negligently, intentionally, and recklessly used in violation of its promises to and clear instructions from plaintiffs.

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<sup>2</sup> The Cuevas also sued USAA in the same suit for allegedly mishandling the insurance claim.

CP 92 (emphasis added). Maxcare tendered this complaint to WNAC for defense and indemnity.<sup>3</sup> CP 116. After investigating and analyzing coverage, WNAC concluded that if the Cuevas' proved their allegations, they would not be covered, and denied coverage based upon the TPE in its policy. CP 118-120.

**C. The WNAC Insurance Policy**

WNAC issued a liability insurance policy to Maxcare. CP 159-287. The policy provides "bodily injury" and "property damage" coverage as follows:

**SECTION I – COVERAGES**

**COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

**1. Insuring Agreement**

- a. We 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. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.

CP 240. The standard policy form contains a pollution exclusion which excludes coverage for bodily injury and property damage arising out of the

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<sup>3</sup> Further allegations made by the Cuevas during the underlying litigation are set forth in Section III.C. *infra*.

release of pollutants under certain circumstances (e.g. related to the use of specific premises). CP 241-242. However, this pollution exclusion was deleted and replaced by a “Total Pollution Exclusion” endorsement, which broadens the exclusion to encompass all “bodily injury” and “property damage” that would not have occurred, in whole or in part, but for the actual or threatened release of “pollutants,” which the policy defines to include “contaminants” and “chemicals.” The TPE provides:

This insurance does not apply to:

**f. Pollution**

- (1) “Bodily injury” or “property damage” which would not have occurred in whole or in 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, 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.” . . .

CP 275. The policy defines “Pollutants” to include toxic “contaminants” and “chemicals”:

15. “Pollutants” means any solid, liquid, gaseous or thermal irritant or *contaminant*, including smoke, vapor, soot, fumes, acids, alkalies, *chemicals* and waste. Waste

includes materials to be recycled, reconditioned or reclaimed.

CP 253 (emphasis added).<sup>4</sup>

### III. ARGUMENT

#### A. The Trial Court Correctly Determined That WNAC Had No Duty to Defend.

##### 1. The Duty to Defend Is Based on the Allegations in the Complaint at the Time It Is Filed.

An insurer's duty to defend arises at the time the complaint is filed.<sup>5</sup> An insurer's duty to defend is determined by the allegations in the complaint.<sup>6</sup> More specifically, the duty to defend arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage.<sup>7</sup> However, if the allegations in the complaint are clearly not covered by the policy, the insurer is relieved of its duty to defend.<sup>8</sup> In other words, if the Cuevas are able to prove the allegations in their complaint, and those allegations would not be covered, WNAC would have no duty to defend.

In this case, the Cuevas allege that toxic chemicals were used ("released") in their home, contaminating property and causing bodily

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<sup>4</sup> Maxcare initially also alleged coverage under the policy's "advertising and personal injury coverage," but abandoned that contention. CP 901.

<sup>5</sup> *Holly Mountain Resources, Ltd. v. Westport Ins. Corp.*, 130 Wn. App. 635, 647, 104 P.3d 725 (2005).

<sup>6</sup> *Transamerica Ins. Co. v. Preston*, 30 Wn. App. 101, 103, 632 P.2d 900 (1981).

<sup>7</sup> *Unigard Ins. Co. v. Levin*, 97 Wn. App. 417, 425, 983 P.2d 1155 (1999).

<sup>8</sup> *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002).

injury. If the Cuevas prove those allegations, there is no coverage under the WNAC policy because any such damage would be excluded by the TPE. Thus, WNAC has no duty to defend.

**2. If the Complaint Unambiguously Alleges Uncovered Claims, Extrinsic Evidence Need Not Be Considered.**

Maxcare bases its entire argument upon the premise that WNAC must look to evidence outside the complaint, developed in the underlying litigation months after the complaint was filed, to determine its duty to defend.<sup>9</sup> Maxcare relies upon *Truck Ins. Exch. v. Vanport Homes* to support its contention that WNAC was required to consider evidence extrinsic to the complaint, developed months after the complaint was filed, to determine its duty to defend.<sup>10</sup> However, Maxcare misquotes *Vanport's* ruling when it claims that an insurer “must” consider extrinsic evidence which contradicts the complaint.<sup>11</sup> In fact, the *Vanport* court stated:

There are two exceptions to the rule that the duty to defend must be determined only from the complaint, and both exceptions favor the insured. If coverage is not clear from the face of the complaint but may exist, the insurer *must* investigate the claim and give the insured the benefit of the doubt in determining whether the insurer has an obligation to defend. [Citation omitted.] Similarly, facts outside the complaint *may* be considered if ‘(a) the allegations are in conflict with facts known or readily ascertainable by the

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<sup>9</sup> See, Appellant’s Opening Brief at 21-22, citing *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002).

<sup>10</sup> Opening Brief, at 22, n.20.

<sup>11</sup> Opening Brief, at 21.

insurer, or (b) the allegations of the complaint are ambiguous or inadequate.’ *Atl. Mut. Ins. Co. v. Roffe, Inc.*, 73 Wash. App. 858, 882, 872 P.2d 536 (1994) (quoting *E-Z Loader Boat Trailers, Inc. v. Travelers Indemn. Co.*, 106 Wn.2d 901, 908, 726 P.2d 439 (1986)).<sup>12</sup>

*Vanport* requires that an insurer investigate facts extrinsic to the complaint if coverage is not clear from its face. However, an insurer is *permitted*, but is not *required*, to consider extrinsic facts inconsistent with a clear and unambiguous complaint. Where, as here, it is clear from the face of the complaint that the allegations are not covered under the policy, an insurer may properly decline to defend, and need not consider evidence extrinsic to the complaint.<sup>13</sup> Because Maxcare’s central premise is incorrect, its entire argument fails, and the trial court’s decision should be affirmed.

The *Vanport* exceptions do not apply if the underlying complaint against the insured clearly and unambiguously alleges facts which, if true, would not be covered. As the court in *Holly Mountain* recognized:

Neither [Vanport] exception applies here, however, because it is clear from the face of [the] complaint against Holly Mountain that there was no coverage under the West Port policy.<sup>14</sup>

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<sup>12</sup> *Vanport*, 147 Wn.2d at 761.

<sup>13</sup> *Holly Mountain*, 130 Wn. App., at 649-650.

<sup>14</sup> See, *Holly Mountain*, 30 Wn. App., at 649-650; *Burns v. Scottsdale Ins. Co.*, 2010 WL 2947345, \*4 (W.D. Wash. 2010) (unpublished), *aff’d*, 434 Fed. Appx. 675 (9th Cir. 2011) (insurer not required to investigate when the allegation is clear). *Burns* is appropriately cited. See, discussion of GR 14.1, at n. 27, *infra*.

*Holly Mountain's* holding is supported by the case law from which the *Vanport* court developed its exceptions. In determining that an insurer may, but is not required to, consider extrinsic evidence when the complaint otherwise clearly alleges uncovered claims, *Vanport* relied upon *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*<sup>15</sup> *E-Z Loader*, in turn, relied upon *R.A. Hanson Co. Inc. v. Aetna Ins. Co.*, 26 Wn. App. 290, 612 P.2d 456 (1980).<sup>16</sup> The *R.A. Hanson* court held that use of extrinsic evidence is not required if the allegations in the complaint are clear and unambiguous:

There was no reason for Aetna to have looked beyond the face of these pleadings based on an assertion that they were ambiguous. Hanson asks us to adopt a rule requiring the insurer to go beyond the face of the pleadings to ascertain facts which might require the insurer to accept a tender of defense. This would be contrary to established law that, assuming no ambiguities in the pleadings ... the insurer need not look beyond the face of the pleadings.... To rule otherwise would mean that in every case, unless the averments in the complaint specifically disproved coverage, the carrier would have to investigate coverage. We do not perceive that to be the law.<sup>17</sup>

The Complaint here clearly and unambiguously alleges a claim excluded by the TPE in the WNAC policy. No resort to extrinsic evidence is required by Washington law.

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<sup>15</sup> *Vanport*, 147 Wn.2d, at 761 (citing *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 726 P.2d 439 (1986)).

<sup>16</sup> *E-Z Loader*, 106 Wn.2d, at 908.

<sup>17</sup> *R.A. Hanson*, 26 Wn. App., at 295-296.

**B. The TPE Applies to the Clear and Unambiguous Allegations in the Cuevas Complaint.**

The complaint alleges that Maxcare used (released) “potentially toxic chemicals” in the Cuevas’ home, damaging the property and injuring the Cuevas. The Cuevas’ complaint alleges:

Maxcare with full knowledge of the danger, *contaminated* plaintiffs’ home during its efforts to repair damage caused by the fire. Maxcare did this after promising plaintiff it would not use certain potentially *toxic chemicals*, which it negligently, intentionally, and recklessly used in violation of its promises to and clear instructions from plaintiffs.

CP 92 (emphasis added).

The TPE in the WNAC policy excludes coverage for “‘bodily injury’ or ‘property’ damage which would not have occurred, in whole or in part, but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release, or escape of ‘pollutants’ at any time.” “Pollutant” is defined as “any solid, liquid, gaseous or thermal irritant or *contaminant*, including smoke, vapor, soot, fumes, acids, alkalies, *chemicals*, and waste.”

The Cuevas’ complaint specifically alleges that Maxcare “*contaminated*” plaintiffs’ home with “potentially toxic *chemicals*” which it negligently, intentionally, and recklessly released in the Cueva property. The TPE defines “pollutant” to include chemical contaminants. If the

Cuevas prove these allegations, there is no coverage. Therefore, the trial court correctly concluded that WNAC had no duty to defend Maxcare.

Maxcare contends that the TPE is ambiguous. However, Washington courts have consistently held the TPE to be unambiguous in factually similar cases, and time and again have applied the TPE to claims involving the release of fumes from chemicals used as intended as part of the insured's business operations.

In *Cook v. Evanson*,<sup>18</sup> office workers sued a contractor for respiratory injuries caused by fumes from concrete sealing chemicals. The workers alleged in their complaint that “toxic vapors” from these chemicals caused their injuries. This Court held that the policy definition of a pollutant, identical to WNAC's policy, was not ambiguous, and that the concrete sealant fumes, as a chemical contaminant applied by the insured in the normal course of its business, met the definition of a pollutant and fell squarely within the TPE.<sup>19</sup>

Similarly, in this case, the Cuevas have sued Maxcare for respiratory type injuries caused by chemical irritants and contaminants Maxcare released in the Cuevas' home. *Cook* and the present case are factually indistinguishable.

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<sup>18</sup> *Cook v. Evanson*, 83 Wn. App. 149, 290 P.2d 1223 (1997).

<sup>19</sup> *Cook*, 83 Wn. App., at 154.

The insured in *Cook* argued that the TPE should be limited to “traditional” environmental pollution, and should not apply to injuries arising from chemicals used during ordinary business operations. Considering the unambiguous language of the TPE, this Court rejected that argument.

[The insureds] suggest that we interpret the clause to apply to traditional environmental pollution but not to injuries arising from business operations. This might be a reasonable interpretation if the policy simply precluded coverage for “pollution.” Here, however, it specifically defines “pollutants.” The exclusion makes no exception for pollutants used in the insured’s business operations. Nor does the exclusion limit its application to classic environmental pollution....<sup>20</sup>

Division II reached the same conclusion in *City of Bremerton v. Harbor Ins. Co.*<sup>21</sup> There, the City brought a declaratory judgment action against its liability insurer, seeking a declaration that its general liability policy covered claims arising out of the emission of noxious gases, odors and fumes from a municipal sewage treatment plant. Specifically, nearby

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<sup>20</sup> *Id.* In support of its opinion, this Court cited with approval a number of cases from other jurisdictions where an insured used potentially toxic chemicals in the ordinary course of business: *American States Ins. Co. v. Nethery*, 79 F.3d 473 (5<sup>th</sup> Cir. 1996) (TPE applied to claims that paint and glue fumes injured claimant); *Brown v. American Motorist Ins. Co.*, 930 F. Supp. 207 (E.D. Pa. 1996) (fumes from chemical waterproofing sealant applied to exterior of plaintiff’s home fell within the TPE); *Bernhardt v. Hartford Fire & Cas. Co.*, 648 A.2d 1047 (Md. 1994) (carbon monoxide poisoning excluded by TPE); *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 678 A.2d 802 (Pa. 1996) (fumes from commonly-used sealant was a pollutant within TPE). These cases all remain good law.

<sup>21</sup> *City of Bremerton v. Harbor Ins. Co.*, 92 Wn. App. 17, 963 P.2d 194 (1998).

residents allegedly suffered physical and economic harms, attributed to noxious fumes and toxic gases emanating from the City's sewage treatment plant.

The Court held that the TPE unambiguously applied to the allegations in the underlying complaints against the City:

Here, the policy excluded coverage for any 'any injury, damage or other liability arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants,' defined as 'all irritants or contaminants, including ... vapor, fumes, or ... gases.' West Hills' alleged damage resulted from the emission of 'noxious and toxic fumes' and 'gaseous effluent', and the Charleston Beach damages allegedly resulted from the release of 'foul and obnoxious odors and toxic gases.'

We agree with [insurer] that liability for alleged damages was subject to the exclusion because the claim involves "pollutants." The policy defines a "pollutant" as any "irritant or contaminant" and specifically lists "fumes" and "gases" as examples. The language unambiguously excludes claims arising from "fumes" and "gases" from coverage. Furthermore, the specified examples of "irritants or contaminants" in the exclusion language are listed as non-exclusive types of "pollutants" subject to exclusion from coverage. The list is illustrative and not exhaustive and odors are effectively excluded as well. A reasonable person reviewing this language would expect that 'noxious and toxic' fumes and "foul and toxic odors and gases" are 'pollutants' within the meaning of the pollution exclusion.<sup>22</sup>

Similarly, in the present matter, the complaint alleges "contamination" by "potentially toxic chemicals." "Chemicals" are specifically included in

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<sup>22</sup> *City of Bremerton*, 92 Wn. App., at 22-23. The court apparently concluded the insurer had no duty to defend based upon the allegations in the complaints. *Id.* at 22, n.1.

the definition of the term “pollutants”. The complaint further alleges that these chemicals “contaminated” the Cueva property. “Pollutant” is defined as any “irritant or *contaminant*.” The complaint alleges damages falling squarely within the TPE.

In *Quadrant Corp. v. American States Ins. Co.*,<sup>23</sup> the Supreme Court adopted the reasoning of *Cook* and *City of Bremerton*, and applied the TPE to respiratory injuries caused by the release of fumes from chemicals used in the ordinary course of business. In *Quadrant*, the insured apartment complex was sued when fumes from waterproofing chemicals applied to a nearby deck allegedly injured a tenant. The Supreme Court first noted that the majority of cases from other jurisdictions applied the TPE to injuries arising the alleged release of toxic fumes from ordinary chemicals.<sup>24</sup> The Court upheld the applicability of the TPE in a context indistinguishable from the present case. Applying *Cook* and *City of Bremerton*, the court stated:

Because the tenant in this case was injured by fumes emanating from water proofing material that was being used as intended, the air in her apartment was ‘polluted.’ Thus, the pollution exclusion applied and the court affirmed summary judgment dismissal of the insured’s suit. ... We agree.<sup>25</sup>

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<sup>23</sup> *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 110 P.2d 733 (2005).

<sup>24</sup> *Quadrant*, 154 Wn.2d, at 173-174.

<sup>25</sup> *Quadrant*, 154 Wn.2d, at 179.

Similarly, in this case, the Cuevas allege that they have been injured by fumes released from chemicals used by Maxcare. The Cuevas' air in their home was similarly polluted, and the TPE applies.

Finally, in *City of Spokane v. United Nat'l Ins. Co.*,<sup>26</sup> the claimants alleged that odors from the insured's municipal compost facility produced "rotting smells, sour, earthy smells, and sour offensive odors." The nearby residents also alleged that the compost facility emitted offensive, noxious, and unlawful odors. The allegations included causes of action for nuisance, trespass, and the negligent release of odors, as well as taking by inverse condemnation. The claimants alleged that the compost facility had decreased the value of their property and interfered with their use and enjoyment.

The Court held that the sole issue for consideration was whether odors from a compost facility constituted a pollutant as defined by the policy. Relying upon *City of Bremerton*, the Court held that although the TPE did not specifically list odors within the definition of a pollutant or contaminant, the policies nevertheless excluded coverage for compost facility odors by specifically excluding coverage for smoke, vapors, fumes, gases and other irritants and contaminants. Since the claimants

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<sup>26</sup> *City of Spokane v. United Nat'l Ins. Co.*, 190 F. Supp. 2d 1209 (E.D. Wash. 2002).

alleged that the odors arising from the compost facility damaged their property, the TPE applied.

In addition to these dispositive Washington cases, the Third Circuit Court of Appeals' decision in *Mark I Restoration SVC v. Assurance Co. of America*<sup>27</sup> is factually and legally indistinguishable from the present case. In *Mark I*, the claimant's home was damaged when a skunk became trapped inside. Mark I was hired to restore the home with chemicals, just as Maxcare did in the present case. Similarly, the claimant in *Mark I* alleged that she was injured by the restoration chemicals used by the insured. In Pennsylvania, as in Washington, a "court determines an insurer's duty to defend by analyzing the allegations in the complaint ... and determining whether those allegations state a claim conceivably falling within coverage."<sup>28</sup> The court determined that the insurer had no duty to defend or indemnify Mark I, holding that the claimant's allegations fell squarely within the TPE:

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<sup>27</sup> *Mark I Restoration SVC v. Assurance Co. of America*, 112 Fed. Appx. 153 (3<sup>rd</sup> Cir. 2004) (unpublished) (applying Pennsylvania law). *Mark I* is an unpublished decision. However, it may be cited under Washington GR 14.1, which provides that unpublished decisions from other jurisdictions may be cited if the Court from which the decision issues does not prohibit citation. See, RAP 10.4(h). FRAP 32.1 states that Federal Courts may not prohibit citation to post-2007 unpublished decisions. FRAP 32.1 is silent as to pre-2007 decisions. Although the Third Circuit does not, as a matter of tradition, cite to unpublished decisions, the Third Circuit does not prohibit such citation. Third Cir. LAR, App. I, IOP 5.7. *Mark I* has been cited by at least one Third Circuit reported decision, *Fireman's Ins. Co. of Washington, D.C. v. Kline & Son Cement Repair, Inc.*, 474 F. Supp. 2d 779, 794 (E.D. Va. 2007).

<sup>28</sup> *Mark I*, at 155.

[A]ll of [claimant's] claims 'rest upon the fundamental averment' that [claimant] suffered personal injury due to her exposure to *potential* 'pollutants' and therefore, regardless of the precise legal theory the allegations may take, they undoubtedly fall within the pollution exclusion clause.<sup>29</sup>

Similarly, in this virtually identical case, the Cuevas alleged that they were injured by "potentially toxic chemicals."

In *Mark I*, the insured argued that the claim was covered because the specific chemicals Mark I used were not identified in the complaint, and therefore the court could not determine whether they were "pollutants." The court rejected this argument:

Again, the policy defines pollutants as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." Taken in context, and with reference to 'a particular set of facts' . . . this language is not ambiguous. [The] complaint alleged that Mark I introduced 'chemicals, deodorizers, odor eliminators, and/or other foreign substances' at the [claimant's] residence. Although the terms 'chemicals, deodorizers, odor eliminators and/or foreign substances' are conceptually quite broad, and certainly may, in theory, include benign substances rather than pollutants, the specific nature of the claim alleged against Mark I prevents this court from engaging in such untethered speculation. Rather, as used in the . . . complaint, the terms 'chemicals, deodorizers, odor eliminators, and/or foreign substances' unambiguously refer to the 'irritants or contaminants' described as pollutants in the policy.<sup>30</sup>

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<sup>29</sup> *Id.* at 156 (emphasis added).

<sup>30</sup> *Mark I*, 112 Fed. Appx., at 157.

Similarly, the Cuevas allege that Maxcare “contaminated” their home, and injured them physically, by using “potentially toxic chemicals.” The unidentified chemicals “unambiguously refer to” the contaminants identified in the policy as pollutants. The fact that the chemicals are not specifically identified in the complaint does not prevent the TPE from applying to the Cuevas’ allegations.<sup>31</sup>

Maxcare argues that *Kent Farms v. Zurich Ins. Co.*<sup>32</sup> controls this case.<sup>33</sup> It does not. In *Kent Farms*, a fuel oil delivery driver was filling a storage tank with fuel oil. When he removed the filling hose nozzle from the tank, a defective intake valve in the tank caused fuel oil to backflow out of the tank. As he tried to force the hose back into the tank to stop the fuel from spilling, fuel oil sprayed into his eyes and he aspirated some of the fuel, suffering injury. The Supreme Court held that the pollution exclusion did not apply to a substance that directly injured a person, even though that substance could be considered to be a pollutant *in some other context*. *Kent Farms* is unique and limited to its facts, as was made clear in the subsequent *Quadrant* decision. In *Quadrant*, the Supreme Court

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<sup>31</sup> *Accord, Zaiontz v. Trinity Universal Ins. Co.*, 87 S.W.3d 565 (Tex. App. 2002) (TPE applied to fumes from a smoke deodorizing chemical sprayed in smoke damaged airplane).

<sup>32</sup> *Kent Farms v. Zurich Ins. Co.*, 140 Wn.2d 396, 998 P.2d 292 (2000).

<sup>33</sup> Opening Brief, at 33.

explained the difference between the *Cook* line of cases and *Kent Farms*, and why the latter did not apply to cases such as this one:

It was the defect in the shutoff valve, not the toxic characteristic of the fuel, that was central to the injury. Thus, the [*Kent Farms*] court framed the issue as whether the mere fact that a pollutant appears in the causal chain can trigger the application of the exclusion.<sup>34</sup>

The court explained further:

Unlike the diesel fuel in *Kent Farms*, *Cook* involved a substance whose toxicity caused injury even when used as intended. ... Thus, the *Cook* reasoning and not the *Kent Farms* rule would control when fumes caused injury and where the pollutant was being used as it was intended... Because the tenant in this case was injured by fumes emanating from water proofing material that was being used as intended, the air in her apartment was “polluted”. Thus, the pollution exclusion applied, and the Court affirmed summary judgment dismissal of the insured’s suit. We agree.<sup>35</sup>

The *Cook* court could not have been clearer. “The *Cook* reasoning and not the *Kent Farms* rule would control when fumes caused injury and where a pollutant was being used as intended.” That is precisely what the Cuevas allege happened in this case. The Cuevas allege injury arising out of the toxic characteristics of chemical fumes released when the chemicals were used as intended. The Cuevas do not allege they were injured by a stream of chemicals striking them as the result of an independent failure of

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<sup>34</sup> *Quadrant*, at 176.

<sup>35</sup> *Id.* at 179.

application equipment, nor do they allege they slipped and fell in a puddle of spilled chemicals. Such accidents would invoke *Kent Farms*. No such accident is alleged here.

**C. The Cuevas' Extrinsic Allegations Are Consistent with Their Allegations in the Complaint.**

Even if WNAC must consider the Cuevas' allegations extrinsic to the Complaint, those allegations do not conflict with the clear and unambiguous allegations in their Complaint. Therefore, resort to extrinsic evidence does not trigger WNAC's duty to defend.

The Cuevas' answers to interrogatories in the underlying litigation are consistent with the allegations in the complaint. The Cuevas alleged that the chemicals used by Maxcare caused personal injury and property damage. For example, Ricardo Cueva answered:

INTERROGATORY 3: If you are making a claim for bodily injury in this lawsuit ... [identify] the specific cause that you contend caused your bodily injury;

ANSWER: ...

*I was injured by toxic chemicals in our home. These were introduced by Maxcare, which was working for Garrison Insurance, during the process of repairing fire damage.*

CP 143(emphasis added). Latisha Cuevas answered similarly. CP 148.

When asked about the cause of Madeline's injuries, the Cuevas responded

"Toxic contamination of Madeline's home." CP 151-152.

MAXCARE commenced cleaning the fire damage, and Madeline got sick.... Mrs. Cuevas confronted a MAXCARE employee, Amber, about MAXCARE's use of the chemicals. Amber apologized and said that MAXCARE was using the same chemicals it always used.

CP 156-157.

Similarly, in her deposition, Ms. Cuevas testified at least 15 times that she and her family were injured by chemicals Maxcare released.<sup>36</sup>

For example, she testified:

Q. ...While you were living outside of the house ... between February 23, 2009, and April 29, 2009, did you ever experience any symptoms or problems that you attribute to exposure to chemicals or cleaning products in the Auburn house following the smoke incident?

A. Yes.<sup>37</sup>

. . .

Q. At the time did you attribute it to -- the symptoms to the exposure that you had to the cleaning products?

A. Oh, yes, ma'am.<sup>38</sup>

. . .

Q. Were there any other occasions on which you were in the house between February 23, 2009, and April 29, 2009, when you developed any sort of symptoms that you attribute to the cleaning products or chemicals used

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<sup>36</sup> CP 1037:12-18; CP 1038:13-22; CP 1039:11-14; CP 1040:4-10; CP 1041: 5-9; CP 1042:25-1043:7; CP 1044:13; CP 1045:6-10; CP1046-23-1047:10; CP 1048:23-1049:17; CP 1049:24-1050:3; CP 1051:13-17; CP 1052:8-12; CP 1053:22-25; CP 1054:5-12.

<sup>37</sup> CP 1038:13-22.

<sup>38</sup> CP 1039:11-14.

in the cleaning following this February 23, 2009, smoke incident?

A. Yes.<sup>39</sup>

. . .

Q. When was the first time that you sought medical treatment for any symptoms that you attributed to exposure to cleaning chemicals at the Auburn house?

A. Probably within a week of moving back home.<sup>40</sup>

. . .

Q. And when you moved back into the house on April 29, 2009, did you develop any sort of symptoms that you attribute to the condition of the house following the cleaning?

A. Yes.<sup>41</sup>

Mr. Cueva testified at least 14 times that he attributes injuries to himself and his family to chemicals Maxcare released.<sup>42</sup> For example:

Q. Did you experience any symptoms of any kind during that time period April 28, 2009, and June 23, 2009, that you attribute to the cleaning work that has been done at the house, Auburn House, following the February 23, 2009 smoke incident?

A. Yes.<sup>43</sup>

. . .

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<sup>39</sup> CP 1040:4-10.

<sup>40</sup> CP 1041:5-9.

<sup>41</sup> CP 1042:25-1043:7.

<sup>42</sup> CP 1057:8-1058:2; CP 1058:10-20; CP 1059:4-1060:1; CP 1060:7-17; CP 1060:19-25; CP 1061:3-5; CP 1061:22-1062:2; CP 1062:8-10; CP 1062:21-22; CP 1603:13-16; CP 1064:19-21; CP 1065:8-14; CP 1066:5-15; CP 1066:21-1067:2.

<sup>43</sup> CP 1058:10-20.

Q. What do you understand your symptoms to be caused by?

A. The chemicals at our house.<sup>44</sup>

. . .

Q. Well, isn't it your contention that you have symptoms because of chemicals that are in the house?

A. Correct.<sup>45</sup>

These allegations, by the Cuevas, are all consistent with the allegations in the complaint, and therefore do not trigger a duty to defend.

**D. Testimony by Witnesses Other than the Cuevas Merely Reflect the Difficulty the Cuevas Face in Proving Their Uncovered Allegations.**

There is no doubt that the evidence developed in the underlying case will make it difficult for the Cuevas to prove that they were injured by Maxcare's chemicals. However, the possibility that the Cuevas may not be able to prove their uncovered allegations does not make their complaint ambiguous, nor does such testimony create covered allegations. Instead, the isolated bits of testimony identified by Maxcare merely reflect the difficulty the Cuevas face in proving their otherwise uncovered allegations. However, the inability to prove uncovered allegations is not the same thing as alleging facts which, if true, would be covered.

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<sup>44</sup> CP 1060:21-22.

<sup>45</sup> CP 1063:13-16.

Keeping in mind the Cuevas' allegations set forth in Section III.C., *supra*, it becomes clear that the evidence cited by Maxcare does not create the potential for *covered* claims. In its statement of the case, Maxcare identifies only a few bits of testimony by the Cuevas themselves.<sup>46</sup> Remarkably, this testimony does not reappear in Maxcare's subsequent 35 pages of argument. This is likely because this testimony merely goes to whether the Cuevas can prove they were injured by Maxcare's chemicals. It does not change the fact that the Cuevas allege such injury.

For example, with respect to Mr. Cuevas, Maxcare points out that:

- No one told him Maxcare's chemicals caused his injuries;
- Dr. Van Hee does not believe Maxcare's chemicals caused his symptoms; and
- Dr. Mitchell (who does believe the chemicals caused his symptoms) knew nothing about the conditions of the home.<sup>47</sup>

All of these "facts," however, relate to the difficulty the Cuevas' will have establishing their claims that they were injured by Maxcare's chemicals. Such facts, however, create no potentially covered claim.

Similarly, Maxcare points to Ms. Cuevas' testimony that:

- Madeline has never been tested for chemical sensitivity;

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<sup>46</sup> Opening Brief, at 15-16. The Cuevas testified over 4 vols. and more than 700 pgs.

<sup>47</sup> Opening Brief, at 15. A fourth reference, dealing with formaldehyde, is considered in more detail in Section III.D.2, *infra*.

- Dr. Sathyanarayana’s diagnosis was based entirely on Ms. Cuevas’ statements;
- Hygienist Baudette concluded the “post bake-out condition of the home would allow occupancy;
- Dr, Van Hee concluded the post bake-out number looked safe;
- Ms. Cuevas continued to experience the same symptoms while out of the house, and even while wearing a respirator; and
- Ms. Cuevas doctors were unfamiliar with the chemicals Maxcare used.<sup>48</sup>

Each and every one of these extrinsic facts relates solely to whether the Cuevas can prove that Maxcare’s chemicals caused their injuries (i.e., the uncovered allegations in the Cuevas’ Complaint). None of this testimony raises a potential for a covered claim.

Because the Cuevas themselves do not provide Maxcare any support for its contention that there are potentially covered extrinsic allegations, Maxcare relies on the testimony of witnesses *other than the Cuevas*. However, as the trial court correctly determined, this testimony likewise merely focuses on those witnesses’ inability to support the Cuevas’ *uncovered allegations*. The evidence does not, as Maxcare suggests, create new allegations which, if true, would be covered. For example, Maxcare cites:

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<sup>48</sup> Opening Brief, at 15-16.

- Dr. Vincent’s [Madeline’s treating pediatrician] understanding of Madeline’s symptoms and his other medical opinions were based upon what Ms. Cuevas’ did and did not tell him.

. . .

- Dr. Van Hee [Mr. and Mrs. Cuevas’ treating physician] believes the Cuevas’ alleged symptoms are based on psychological fears or independent respiratory problems rather than exposure to chemicals present in the home.<sup>49</sup>

This medical testimony does not allege that the Cuevas’ injuries *were caused by a covered event*. Instead, the testimony merely demonstrates the difficulties the Cuevas may have proving their *uncovered allegations* that they were injured by chemicals Maxcare released. The fact that Dr. Vincent (who actually supports the Cuevas’ uncovered allegations of injury from pollutants) bases his opinions solely on information received from Ms. Cuevas, merely goes to the weight of his opinions. Similarly, the fact that Dr. Vincent might believe that the Cuevas’ reactions are psychosomatic merely calls into doubt whether the Cuevas’ were actually injured by Maxcare’s chemicals. This testimony does not change the fact that the Cuevas allege injury from Maxcare’s chemicals.

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<sup>49</sup> Opening Brief, at 16-17. Maxcare’s Brief does not accurately reflect Dr. Van Hee’s testimony. Dr. Van Hee testified that the Cuevas’ current “odor driven anxiety” may result from an initial exposure to chemicals prior to the “bake out.” CP 1069-1071. This specific testimony is addressed in Section III.D.3, *infra*.

Expert testimony selected by Maxcare similarly does not allege that the Cuevas' were injured by a covered cause. Maxcare cites to:

- Dr. Faeder testified he believes that formaldehyde levels in the Cueva home pre-existed the fire and may be unrelated to the smoke incident or Maxcare's cleaning activities.

. . .

- Laurence Lee concluded that organic particulates unrelated to Maxcare's cleaning exist in the Cueva home, and may be contributing to the Cuevas' symptoms.<sup>50</sup>

This testimony just further reinforces the difficulty that the Cuevas may have in proving their uncovered allegations (for which there is no duty to defend). They testify, in essence, that something other than Maxcare's chemicals may have caused the injuries. This testimony does not change the Cuevas' allegations that they were injured by Maxcare's chemicals. It simply highlights the difficulties the Cuevas may face in proving that Maxcare's chemicals did cause injury.

In sum, the Cuevas clearly and unambiguously allege (not only in their complaint, but in their consistent interrogatories and deposition testimony) that they were injured by the release of chemical contaminants used by Maxcare to restore their house after the fire. The evidence cited by Maxcare does not alter those basic allegations by alleging facts that, if

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<sup>50</sup> Opening Brief, at 17-18.

true, would be covered. Instead, the evidence merely reflects that the Cuevas may not be able to prove their otherwise uncovered allegations.

**1. The Cuevas Do Not Allege They Were Injured by Dust or Other Organic Particles.**

Maxcare cites to a hygienist report that attributes the Cuevas' injuries to "organic particulate."<sup>51</sup> Maxcare then makes the unsupported conclusion that "the Cuevas *appear* to be alleging" that Maxcare may be liable for its failure to clean this particulate.<sup>52</sup> However, the Cuevas allege nothing of the sort. Maxcare does not cite to any evidence in the record that *the Cuevas* have adopted allegations that Maxcare is liable for failing to clean organic particulate. This evidence does nothing more than cast doubt upon the Cuevas' allegations that chemicals caused their injuries. Maxcare cannot avoid application of the TPE by substituting a report prepared by a third party for the Cuevas' own allegations.

Moreover, Maxcare fails to recognize key language in the TPE which renders its argument moot. The TPE applies to the "alleged" release of pollutants. The fact that one witness posits that organic particulate *may be a* cause of the Cuevas' injuries, does not alter the fact

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<sup>51</sup> Opening Brief, at 26.

<sup>52</sup> Nothing in the record remotely suggests that Maxcare was hired by USAA to clean skin flakes, clothing fiber, dog dander or insect parts. Maxcare's conclusion that it faces liability for failing to do so is unsupported by the record. Nor does Maxcare offer any conceivable legal theory under which it might be held liable for organic matter it was not hired to clean.

that the Cuevas *allege* that their injuries were caused by the release of toxic chemicals. The TPE applies to injuries from allegedly released pollutants.

**2. Witness Testimony About Formaldehyde Does Not Trigger WNAC's Duty To Defend.**

Maxcare next cites to testimony of Dr. Faeder, who opines that the Cuevas' symptoms may be caused by the release ("off-gassing") of formaldehyde, which may have preexisted the fire event.<sup>53</sup> Dr. Faeder opines that Maxcare should have tested for and warned the Cuevas of the presence of this chemical, and are liable for failing to do so. First, there is nothing in the record suggesting that *the Cuevas* allege that their injuries result from Maxcare's failure to identify and clean pre-existing formaldehyde.<sup>54</sup>

Second, the TPE is not dependent upon Maxcare "causing" the pollution, nor is it dependent upon the theory of liability posited against Maxcare. The TPE applies if Maxcare is held liable for bodily injury which would not have occurred in whole or in part but for the alleged<sup>55</sup>

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<sup>53</sup> Opening Brief, at 28.

<sup>54</sup> Maxcare again states that the Cuevas "appear" to allege that Maxcare is liable for preexisting formaldehyde, yet cite nothing in the record to support that conclusion. In fact, it appears that the only allegation in this regard comes from Mr. Cuevas, who believes that the chemicals Maxcare used combined to create formaldehyde. CP 454:23-455:6. Again, Maxcare fails to offer any conceivable legal theory under which it might be liable for failing to detect and warn about preexisting formaldehyde.

<sup>55</sup> Again, the TPE applies to the alleged release of pollutants, even if the actual cause may be something different. See, III.D.1., *supra*.

release of a pollutant. Maxcare need not be the cause of the release of pollutants. For example, in *Quadrant, supra*, the TPE applied to the insured apartment owner, even though the pollutants were released by an independent contractor.

The TPE applies when the release of pollutants “in whole or in part” causes the injury. The theory of liability against the insured, whether it be failure to detect, to warn or misrepresentation, does not alter the application of the TPE. In *Mark I*, the court noted:

Thus, even though certain of Broadwell's allegations sounded in theories such as failure to warn or failure to train, the injuries Broadwell allegedly suffered thereby certainly “ar[ose] out of” the dispersal of potential “pollutants.” *Id.* At bottom then, even if Work Restoration's third party complaint did incorporate against Mark I the broader negligence allegations of the Broadwell complaint, those broader theories nonetheless implicated the pollution exclusion clause.<sup>56</sup>

Numerous other cases from around the country have routinely applied the TPE to cases of failure to investigate and failure to warn cases. *See, e.g., Continental Cas. Co. v. City of Jacksonville*, 654 F. Supp. 2d 1338 (M.D. Fla. 2009) (school board sued for building school on contaminated property—TPE applied to alleged failure to warn); *Continental Cas. Co. v. Advance Terrazzo Tile Co.*, 462 F.3d 1002 (8<sup>th</sup> Cir. 2006) (carbon

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<sup>56</sup> *Mark I*, 112 Fed. Appx., at 156.

monoxide emitted by tile grinder excluded allegations of failing to monitor work environment); *League of Minn. Cities Ins. Trust v. City of Coon Rapids*, 446 N.W.2d 419 (Minn. 1989) (TPE applied to emission of carbon monoxide from Zamboni against allegations of failure to test, failure to warn); *Garamendi v. Golden Eagle Ins. Co.*, 127 Cal. App. 4th 480 (Cal. 2005) (pollution caused by silica excluded against allegations of failure to warn of effects of silica); *American States Ins. Co. v. Skrobis Painting & Decorating, Inc.*, 513 N.W.2d 695 (Wis. 1994) (TPE applied to negligent oil spillage); *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100 (Pa. 1999) (TPE applied to fumes from concrete curing against allegations of negligent failure to warn); *Hartford v. Estate of Turks*, 206 F. Supp. 2d 968 (E.D. Missouri 2002) (TPE applied to injuries from lead paint against allegations of failure to inspect and failure to warn); *Northbrook Indemn. Ins. Co. v. Water Dist. Mgmt. Co., Inc.*, 892 F. Supp. 170 (S.D. Tex. 1995) (TPE applied to contaminated water against allegations of failure to warn).

Maxcare also argues that Dr. Faeder's testimony relates only to the mere "presence" or existence of pollutants, which Maxcare attempts to distinguish from the discharge, dispersal, seepage, migration, release or escape of pollutants. First, this argument ignores the Cuevas' own

allegations, that the formaldehyde was caused by the mixing of chemicals Maxcare used (i.e. released). CP 454:23-455:6. Moreover, as Maxcare admits in its opening brief, formaldehyde is *released* by “off gassing” from other household construction products, such as woods, plastics, glues and the like.<sup>57</sup> As Dr. Faeder testified:

Q. So you’re saying that the source of those static high levels of formaldehyde could be the construction of the house itself?

A. Could be.

Q. And that would involve what parts of the house?

A. I’d have to see the house to know, but it’s anything made of wood or wood-like materials or plastics that can offgas.

CP 1086.

Finally, Maxcare contends that the TPE does not apply to chemicals released within a structure or confined space. This is an artificial distinction. In both *Cook* and *Quadrant*, the chemicals were applied to the exterior of a structure, and found their way into the interior. There is no reasonable or logical reason to distinguish between a chemical which is applied to the exterior of a building, and makes its way in, and a chemical that is released within that building. Furthermore, nothing about the TPE (unlike its predecessor) requires a release into the

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<sup>57</sup> Opening Brief, at 29.

environment.<sup>58</sup> A vast number of cases have rejected this artificial distinction, and applied the exclusion to releases within a structure.<sup>59</sup>

Formaldehyde is unquestionably a gaseous chemical irritant.<sup>60</sup> If the Cuevas have been exposed to the chemical formaldehyde that has been released from building products within the home, and Maxcare is allegedly liable for failing or investigate or warn against that injury, the TPE applies, because the liability would not exist, in whole or in part, but for the release of a pollutant.

### **3. The Policy Does Not Cover the Cuevas' "Fear" Caused by Pollutants.**

Maxcare argues that testimony from Dr. Van Hee alleges facts which, if proved, would be covered.<sup>61</sup> Specifically, Maxcare argues that its use of chemicals psychologically triggered Ms. Cueva's "fear."

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<sup>58</sup> The prior "qualified" pollution exclusion required a discharge to the land, atmosphere or any watercourse or body of water. See, *Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 74, 882 P.2d 703 (1994). WNAC's TPE includes no such requirement.

<sup>59</sup> See, e.g., *Advance Terrazzo Tile Co., supra*; *Peace v. Northwestern Nat'l Ins. Co.*, 596 NW.2d 429, 440 (Wis. 1998) (flaking lead paint within structure excluded); *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 635 N.W.2d 112, 122 (Neb. 2001) (TPE applied to floor sealant); *Atlantic Ave. Assoc. v. Central Solutions, Inc.*, 24 P.3d 188 (Kan. 2001) (TPE applied to cement cleaner which leaked from drum inside building); *Terra Matrix, Inc. v. U.S. Fire Ins. Co.*, 939 P.2d 483 (Colo. App. 1997) (TPE applied to fumes from printing machine housed in leased office space); *Hamm v. Allstate Ins. Co.*, 286 F. Supp. 2d 790, 794-796 (N.D. Tex. 2003) (TPE applied to chemicals applied in bathroom during remodel).

<sup>60</sup> Formaldehyde is a colorless, pungent smelling gas that can cause watering eyes, burning eyes and throat, nausea and difficulty breathing. Health effects include eye, nose and throat irritation, wheezing, coughing, fatigue and skin rash. <http://www.EPA.gov/IAQ/formaldehyde.html>.

<sup>61</sup> Opening Brief, at 32.

However, Dr. Van Hee is merely a fact witness offering his assessment of the Cuevas' ailments. The Cuevas' have not adopted his theories, and Maxcare fails to identify any such allegation by the Cuevas themselves. Instead, all testimony by the Cuevas is to the contrary. Maxcare cannot, by some legal alchemy, manufacture a duty to defend by substituting the testimony of a fact witness for the allegations of the Cuevas. At most, Dr. Van Hee's testimony merely casts doubt upon the Cuevas' ability to prove their uncovered allegations (*i.e.*, that they were injured by Maxcare's chemicals).

Maxcare contends that Van Hee's theory of "odor-triggered anxiety" (*i.e.*, fear) is not excluded because it does not involve pollutants. Maxcare's argument is unpersuasive for several reasons. First, Maxcare's argument is based upon the premise that the Cuevas were not "actually" injured by Maxcare's release of chemicals. However, the Cuevas need not have been actually injured by the release of pollutants. The TPE applies to injury arising out of the "actual, *alleged* or *threatened*" release of pollutants. Even if the Cuevas only suffered a psychological injury because they thought they pollutants were released, such injury would fall within the TPE.

Second, Maxcare's characterization of Dr. Van Hee's testimony does not accurately reflect his entire opinion. While Dr. Van Hee does testify that the Cuevas' "post-bake-out" symptoms are most likely related to odor triggered anxiety, Dr. Van Hee's complete theory is that the anxiety may be the result of the Cuevas' actual "pre-bake-out" exposure to chemicals. Dr. Van Hee's records relating to Ms. Cueva state:

It is possible that the patient is experiencing a significant amount of anxiety surrounding the previously high levels of chemicals in her home. Some of her symptoms are consistent with vocal cord dysfunction, although not classic. I discussed with the patient that odor triggered anxiety can produce multiple non-specific symptoms *when patients are re-exposed to odors that initially provoked irritation.*

CP 1069-1070 (emphasis added). With respect to Mr. Cueva, Dr. Van Hee's records similarly reflect:

Irritative symptoms possibly related to exposure to previously levels VOCs [sic] in his home environment. Based on the air monitoring, it appears that the patient's prior exposure to VOCs could have been sufficient enough to cause the irritative symptoms that he was experiencing prior to the bake out which occurred in September. Since then, the patient has also had some symptoms when he returns to the house which, although consistent with exposure to airborne irritants, would not be consistent with the findings of presently very low levels of VOCs in the house.

*... It is possible his symptoms are related to odor triggered anxiety. In some cases, patients who are exposed to relatively high levels of irritants can then have symptoms when exposed to much lower levels because of anxiety triggered by the odor.*

CP 1071 (emphasis added). Thus, even if the Cuevas are now experiencing only fear, that fear is allegedly a remnant of their initial actual exposure to high levels of chemical VOCs in the home. Thus, the TPE would apply to this anxiety.

Finally, Washington law is clear that the TPE applies to “odors.”<sup>62</sup> If Dr. Van Hee is correct, the Cuevas’ odor-triggered anxiety is nevertheless excluded by the TPE.

Maxcare also relies upon a portion of Mrs. Cueva’s deposition in which she relates that Maxcare did not follow her instructions.<sup>63</sup> These claims arise out of, and are inextricably intertwined with, the use of the chemicals. Even a cursory review of the deposition testimony establishes that these allegations arise out of Maxcare’s alleged use of chemicals. Mrs. Cueva testified:

They cleaned our home with chemicals when they were not supposed to. They misled us, lied about using them with complete disregard to my family, to my daughter.

CP 394. The Cuevas allege that the chemicals used by Maxcare injured them. The fact that Maxcare may have allegedly failed to warn or misled

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<sup>62</sup> *City of Bremerton v. Harbor Ins. Co.*, 92 Wn. App. 17, 963 P.2d 194 (1998) (TPE applied to allegations of noxious gases, odors and fumes from a municipal sewage treatment plant); *City of Spokane v. United Nat’l Ins. Co.*, 190 F. Supp. 2d 1209 (E.D. WA 2002) (TPE applied to allegations of odors from the insured’s municipal compost facility which produced “rotting smells, sour, earthy smells, and sour offensive odors”).

<sup>63</sup> Opening Brief, at 31.

them, which caused Ms. Cueva to go in the house and become exposed, does not change the fact that the injury was caused, “in whole or in part,” by the release of chemicals.

#### **4. Maxcare’s Underwriting Evidence Is Irrelevant.**

Maxcare argues that the TPE can never apply to it (regardless of the facts or circumstances), because it is a cleaning company that uses cleaning chemicals, and WNAC knew that when it issued the policy.<sup>64</sup> This argument fails factually, logically, and legally.

Maxcare incorrectly asserts that WNAC agreed to insure Maxcare for its “cleaning and janitorial” operations.<sup>65</sup> In fact, a review of Maxcare’s application discloses that Maxcare represented its general operations as:

Custom hardwood floors installed & refinished. Also, interior repairs from fire damage for various insurance companys [sic].<sup>66</sup>

Under the liability portion of the application, Maxcare’s operations are classified as “interior carpentry,” “interior finish,” “interior paint,” and “interior janitorial.”<sup>67</sup> Maxcare also subcontracted work for exterior repair

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<sup>64</sup> Opening Brief, at 35.

<sup>65</sup> Opening Brief, at 36.

<sup>66</sup> CP 327.

<sup>67</sup> CP 330.

work.<sup>68</sup> This description in Maxcare’s application of this operations (and therefore potential liability exposures) extends far beyond simple “cleaning and janitorial services,” as suggested by Maxcare.

In a WNAC liability premium audit, the auditors identified Maxcare’s work as:

The insured’s business consists of interior carpentry repairs to fire and water damaged homes and buildings. Approximately 90% of the insured’s work is for single family residences, and the remaining 10% for commercial buildings. The insured employed 31 employees during the audit period in class code 91341, carpentry. These employees use hand and power hand tools such as hammers, ladders, table saws and nail guns to complete their work.<sup>69</sup>

The insurance policy itself describes Maxcare’s business as “Hardwood Floor Installation”<sup>70</sup> and classifies Maxcare’s commercial liability operations as “Carpentry-interior” and “Contractor’s Sub Work In Connection with Building Construction.”<sup>71</sup> Again, Maxcare’s work, and exposures, involved more than simply cleaning and janitorial services.

Maxcare specifically refers to survey that WNAC obtained while underwriting the account, which Maxcare characterizes as identifying it as a cleaning company.<sup>72</sup> However, this survey was conducted for purposes

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<sup>68</sup> CP 331.

<sup>69</sup> CP 336.

<sup>70</sup> CP 164.

<sup>71</sup> CP 165.

<sup>72</sup> Opening Brief at 7.

of evaluating Maxcare's "commercial property" risk (i.e., the risk of damage to Maxcare's own property).<sup>73</sup> It had nothing to do with Maxcare's potential liability to others. Therefore, the surveyors were not examining Maxcare's operations with an eye toward potential liability exposures.

Nevertheless, the surveyors did recognize that Maxcare's operations consisted of more than just cleaning and janitorial work. The language from the survey quoted by Maxcare in its Opening Brief is incomplete, omitting a crucial portion of the discussion. The entire relevant passage states:

The insured's business is cleaning and restoring customer's furnishings that have been damaged either by fire or water, usually resulting in an insurance claim. The insured is very much the same type of business that 'Service Master' performs, working with the insurance companies to restore damaged furnishings and physical property to its original position prior to such loss. *The insured will also do construction which is necessitated for the same types of losses.*<sup>74</sup>

The italicized language was omitted from Maxcare's Brief, and discloses that Maxcare's operations involved more than simply cleaning. Maxcare's construction operations pose the risk of a host of potential exposures.

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<sup>73</sup> CP 346.

<sup>74</sup> CP 349.

More importantly, Maxcare simply cannot contend that it was unaware that its policy did not provide pollution coverage. During the policy period, Maxcare asked WNAC whether separate pollution liability insurance was available. CP 1078-1079. One of Maxcare's clients required that Maxcare maintain "Contractor's Environmental Liability" insurance. CP 1073-1076. Maxcare, through its agent, inquired about this specialized pollution coverage. CP1978-1079. WNAC responded, advising Maxcare that for an additional \$475, Maxcare could obtain \$1,000,000 limits in Limited Pollution Liability Coverage. CP 1081-1082. Maxcare did not to purchase pollution coverage.

In *Westman Indus. Co. v. Hartford Ins. Group*,<sup>75</sup> the court observed that the insured could have purchased a specific policy to cover the otherwise excluded risk. The court concluded that when an insured has the opportunity to purchase insurance that would have covered the loss, but chooses not to, the insured "cannot seek coverage for a risk he specifically declined to purchase."<sup>76</sup>

Maxcare suggests that because WNAC knew it used cleaning chemicals in its business, the TPE should not apply to injuries arising out

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<sup>75</sup> *Westman Indus. Co. v. Hartford Ins. Group*, 51 Wn. App. 72, 81, 751 P.2d 1242, n.2, rev. denied, 110 Wn.2d 1036 (1988).

<sup>76</sup> *Westman Indus. Co. v. Hartford Ins. Group*, 51 Wn. App., at 83. *Accord, Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 688, 871 P.2d 146 (1994) (court found that availability of other coverage "highly significant").

of the use of those chemicals. However, WNAC was also aware that Maxcare employees drove autos to get to their various work sites (CP 336), yet Maxcare's general liability policy excludes injuries arising out of the use of an auto. CP 242-243. It makes no less sense to suggest that an insurer must provide auto coverage under a general liability policy simply because it was aware that the insured drove to its clients' property, than it does to require that the policy provide pollution coverage because the insured used cleaning chemicals.

Maxcare further attempts to support its argument by asserting that the chemicals it used were "ordinary cleaning supplies." However, Maxcare used more than simply Dawn and Windex. It used industrial restoration chemicals designed to remove smoke, soot and grease resulting from fires. These chemicals go by the names Unsmoke, Hydra Dry, Impression, Quake, Degrease-All and Double O. The Materials Safety Data Sheets (MSDS) for these chemicals indicate they are more than dish soap. For example, "Unsmoke" is a respiratory irritant in "low concentrations." CP 1012-1015. Hydra-Dri, Impression and Quake are described as eye, skin and inhalation irritants. CP 1018-1020. Chemicals mentioned by Maxcare in its brief, "Degrease-All" and "Double O," are likewise described as respiratory irritants. CP 1027-1034. In *Cook v.*

*Evanson*,<sup>77</sup> and *Quadrant Corp.*,<sup>78</sup> the chemical sealants applied by the restoration contractors are similarly described in MSDS.<sup>79</sup> Although Maxcare downplays the toxic potential of these chemicals by referring to them as “ordinary,” Maxcare does not appear to dispute that these chemicals may be eye, skin and respiratory irritants.

##### **5. The WNAC Policy Is Not Illusory.**

Maxcare argues, without citation, that the existence of a TPE renders the policy “illusory.”<sup>80</sup> It is not. An insurance policy is illusory when its provisions make its performance optional or discretionary.<sup>81</sup> An illusory promise is one that is so indefinite that it cannot be enforced or one whose provisions in effect make its performance optional or entirely discretionary on the part of the promisor.<sup>82</sup> That is not the case here. Maxcare’s work includes interior carpentry, restoring fire damaged property, painting, and packing, transporting and storing a client’s personal property. Maxcare’s work may create all sorts of hazards, such as construction defect and slip/fall hazards, unrelated to the allegedly toxic nature of the restoration chemicals. In an extreme case, chemicals or

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<sup>77</sup> *Cook* 83 Wn. App., at 151.

<sup>78</sup> *Quadrant*, at 180-181.

<sup>79</sup> *Accord, Mark I, supra.*

<sup>80</sup> Opening Brief, at 39.

<sup>81</sup> *Cascade Auto Glass v. Progressive Cas. Co.*, 135 Wn. App. 760, 770 (2006).

<sup>82</sup> *Spooner v. Reserve Life Ins. Co.*, 47 Wn.2d 454, 458, 287 P.2d 735 (1955).

application equipment used by Maxcare could result in a client's home being badly damaged by fire or water. In fact, the court in *Quadrant*, in rejecting the insured's argument that the policy was illusory, recognized this analysis:

We conclude that because the pollution exclusion does not preclude coverage for many accidents that could occur on the building owners' property, the exclusion does not render the insurance contracts illusory. For example, slip and fall injuries would clearly fall outside of the pollution exclusion. Therefore the covered "occurrences" and excluded incidents are not mutually exclusive, and the exclusion does not render the insurance contracts illusory.<sup>83</sup>

The WNAC policy covers WNAC against a host of potential liabilities. It is not illusory.

**E. Because There Is No Duty to Defend, There Can Be No Duty to Indemnify.**

The trial court correctly held that if WNAC has no duty to defend the Maxcare allegations, then by definition, WNAC can have no duty to indemnify Maxcare. The duty to defend is broader than the duty to indemnify.<sup>84</sup> The duty to defend exists where the Complaint may cover the allegations, even if those allegations are false. In contrast, the duty to indemnify hinges on the insured's actual liability.<sup>85</sup> Therefore, it is possible for an insurer to have a duty to defend (where the claimant falsely

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<sup>83</sup> *Quadrant*, at 185.

<sup>84</sup> *National Sur. Corp. v. Immunex Corp.*, 162 Wn. App. 762, 770, 256 P.3d 439 (2011)

<sup>85</sup> *Id.*

alleges facts which would, if true, be covered by the policy), but no duty to indemnify (because the claimant's allegations are false, there is no liability, and thus nothing to indemnify).<sup>86</sup>

The converse, however, is not true, where, as here, there is no duty to defend the allegations in the complaint, there can be no duty to indemnify. Whether or not the Cuevas' allegations are true (they were injured by pollutants released by Maxcare) or false (they are unable to prove they were injured by pollutants released by Maxcare) the allegations are not covered. Since there is no scenario in which the Cuevas' allegations (true or false) would be covered, then as a matter of law, there can be no duty to indemnify.

#### IV. CONCLUSION

The Cuevas clearly and unambiguously alleged facts against Maxcare which, if true, would not be covered by the WNAC policy. WNAC was not required to resort to extrinsic evidence where the Cuevas' complaint was clear and unambiguous. Even if WNAC was required to consider extrinsic evidence, that evidence is consistent with the Cuevas' allegations as set forth in the complaint. At most, facts extrinsic to the complaint merely cast into doubt the Cuevas' ability to prove their

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<sup>86</sup> *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 564, 951 P.2d 1124 (1998).

uncovered allegations. WNAC respectfully requests that the Court affirm the trial court's order granting summary judgment in favor of WNAC.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of April, 2012.

FORSBERG & UMLAUF, P.S.

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**CERTIFICATE OF SERVICE**

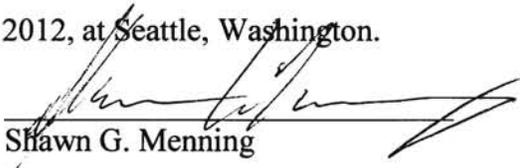
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing **RESPONDENT'S BRIEF** on the following individuals in the manner indicated:

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COURT OF APPEALS DIV 1  
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2012 APR 16 AM 11:21

SIGNED this 16<sup>th</sup> day of April, 2012, at Seattle, Washington.

  
Shawn G. Menning