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TRACKING CASE NEWS AND RESEARCH IN EMERGING WELDING ROD AND RELATED LITIGATION

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The Pollution Exclusion: Will It Allow Insurers to Escape Manganese Fume Liability?

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About 30 years ago, concerned with expanding toxic tort claims, commercial general liability insurers began placing a "pollution exclusion" into their policies.[1] An absolute flood of litigation attempting to define this "pollution" ensued.[2] It became clear that businesses, faced with large toxic tort claims, were ready to litigate this exclusion, in order to find insurance coverage. After early 1980 court decisions suggested that the "pollution exclusion" only applied to Superfund or CERCLA pollution liabilities,[3] insurance companies, disagreeing, began to write "absolute pollution exclusion" and "total pollution exclusion" into their policies.[4]

This simply spawned more litigation, and more "ambiguities" over which attorneys and courts could argue.[5] Over the years, "pollution exclusion" litigation has produced an amazing disparity in court interpretations across the U.S., with policy holders winning coverage in New York and California, but not in Michigan and Texas.[6]

The scope of this article, fortunately for me, is the much more narrow issue of whether welding rod manganese fume exposure is a "pollutant," as defined in the "pollution exclusion" of commercial general liability policies.

Let's start with the bad news. In a case directly on point to our welding rod manganese fume cases, a group of welders sued the National Electrical Manufacturers Association (NEMA), claiming the association knew of the dangers of manganese fumes, but nonetheless published standards permitting use of manganese in welding rods.

Gulf Insurance refused to defend NEMA, stating the welders' claim fell under the "pollution exclusion" in the policy, even though the welders' claims were brought as a negligence action. NEMA sued Gulf, and in *National Electrical Manufacturers Association v. Gulf Underwriters Insurance Company* (1998) 162 F.3d 821, the Fourth Circuit Court of Appeals, citing District of Columbia law, found that Gulf Insurance had no obligation to defend, or to indemnify NEMA against the claims of welders. "Because the pollution exclusion unambiguously covers

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the welder claims this Court will not apply the reasonable-expectation test to limit the breadth of the pollution exclusion." *NEMA* at 826.

A similar case brought a slightly better result, this time involving Air Products and Chemicals, Inc., a welding rod manufacturer. The Third Circuit Court of Appeals found Air Products' insurers, Aetna Casualty, Liberty Mutual and The Hartford owed a duty to defend Air Products from the claims of welders exposed to manganese fumes.[7]

Unfortunately, the Court did not rule whether the insurance companies would be required to provide indemnity, should the welding rod claims be proven. Ruling that a duty to defend will lie, when allegations in a complaint could potentially fall within policy coverage, the Court withheld judgment on indemnity issues.[8]

Although there are few "pollution exclusion" cases directly concerning welding rod/manganese fume exposure, there are several "fume" and "vapor" cases, which are helpful to plaintiffs' claims. Just within the past year, the highest courts in New York and California have found the "pollution exclusion" did not apply to "non-traditional" pollution claims, such as paint fumes and pesticides.

In the New York case,[9] a claim was brought against Belt Painting, for injuries allegedly suffered by a tenant inhaling paint or solvent fumes in an office building where Belt was performing stripping and painting work. Belt tendered the defense of this case to his insurance company, TIG, which refused coverage, and defense, based on the TIG policy's "pollution exclusion.[10] Belt filed a declaratory relief action against TIG.

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At the trial court level, TIG was granted summary judgment, with the court concluding the underlying claim fell within the unambiguous language of the "pollution exclusion." On appeal, summary judgment was reversed, the court stating: "rejecting the insurer's literal reading of the pollution exclusion in favor of a common sense construction that the clause applies only where the damages alleged 'are truly environmental in nature' or result from 'pollution of the environment.' "[11]

In the latest California Supreme Court case on this issue, Truck Insurance Exchange was asked to defend and indemnify its insured, MacKinnon, in a wrongful death action stemming from pesticide exposure.[12] The Truck Insurance policy contained a "pollution exclusion" which defined "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste materials." The trial court, and the court of appeal, had found this exclusion language clearly and unambiguously precluded coverage.

The Supreme Court ruled that the exclusion did not exclude coverage for injury resulting from the spraying of pesticides, even though dictionary definitions of "irritant," "dispersal" and "discharge" supported the lower courts' opinion. Echoing the New York *Belt Painting* decision, the California Supreme Court decided the "pollution exclusion" in insurance policies would be limited to traditional environmental pollution, and did not apply to negligent spraying.[13]

Commenting on these two cases, in a January 2004 article, insurance company analyst Mindy Pollack stated: [Under these rulings] "The pollution exclusion applies only to conventional environmental pollution. This growing line of rulings may have implications for coverage litigation involving asbestos, lead paint, welding rods and a host of other contaminants associated with everyday or ordinary exposure."[14] (Emphasis added.)

Ms. Pollack later wrote: "*Belt Painting, MacKinnon* and similar decisions require claims handlers to take great care when making coverage determinations. These courts have told us that policy language, no matter how clear, will not always be read "strictly" when insureds are not protected for everyday, ordinary activities. When claim facts indicate a "non-environmental" or everyday business activity, the insurer should be alert to possible coverage questions and check appropriate state law. A strict reading may lead the company into litigation and even a bad faith claim in some states."[15]

The cases in which insurance coverage, both to defend and indemnify, have been found, (and which should be your model for drafting around the "pollution exclusion,") differentiate between "traditional" and "non-traditional" pollution claims, aka "environmental" and "non-environmental" claims. "Traditional" and "environmental" claims are generally not covered by insurance, pursuant to the "pollution exclusion." "Non-traditional" and

"non-environmental" claims are covered by insurance policies, and are not excluded by the "pollution exclusion." (I didn't say this would be easy.) In a nutshell, your welding rod, manganese fume exposure cases should characterize plaintiff's injury as arising out of ordinary work place exposure to ordinary substances, which in sustained exposure, caused damage. Courts are very reluctant to deny insureds the coverage they believed they had purchased. Ordinary commercial activities, such as welding, and any damages caused thereby, should be, and I believe will be, covered.

Footnotes

[1] The original 1970s general pollution exclusion excluded coverage for: "Bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water." *Couch on Insurance, Third Edition,* (2003) 127:6.

[2] A not-fancy Lexis search produced over 400 hits on "pollution exclusion."

[3] *American States Insurance Company v. Koloms,* (Ill.1997) 687 N.E. 2d 72, at 81.

[4] ISO Commercial General Liability Coverage Form CG 00 01 11 85 states: " This insurance does not apply §(e) to ultimate net loss arising out of or in connection with the discharge, dispersal, release, escape or seepage of oil, petroleum substances or derivatives (including any oil, refuse or oil mixed with wastes), smoke, vapors, soot, fumes, acid, alkalis, toxic chemicals, liquids or gases waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere, or any water course, body of water, bog, marsh, swamp or wetland and including but not limited to hazardous substances in the ground water, the subsoil or anything contained therein." "This insurance does not apply to (1) 'bodily injury" or 'property damage' arising out of the actual, alleged or threatened emission, discharge, dispersal, seepage, migration, release or escape of 'pollutants.' Pollutants are defined as "any noise, solid, semi-solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, mists, acids, alkalis, chemicals, biological and etiologic agents or materials, electromagnetic ionizing radiation and energy, genetically engineered materials, teratogenic, carcinogenic and mutagenic materials, waste and any irritant or contaminant."

[5] "Pollution Exclusions: The Insurance Industry's Attempt to Limit Exposure" by Ronald Arthur Lowry, (c) *Law Offices of Ronald Arthur Lowry.*

[6] For an analysis of the viability of the pollution exclusion, state by state, with leading cases, see "Toxic Torts and the Absolute Pollution Exclusion Revisited," William P. Shelley, Joshua A. Mooney, 39 *Tort Trial And Insurance Practice Law Journal* 55, (Fall, 2003)

[7] *Air Products and Chemicals Inc. v. Hartford Accident and Indemnity Company, the Liberty Mutual Insurance Company and Aetna Casualty and Surety Company et al* (1994) 25 F3d 177.

[8] The Third Circuit cited Pennsylvania law, *Gedeon v. State Farm Mutual Automobile Insurance Co.* (1963) 410 Pa. 55; 188 A.2d 320, 321,11 and *Wilson v. Maryland Casualty Co.* (1954) 377 Pa. 588; 105 A.2d 304, 307.

[9] *Belt Painting Corp. v. TIG Insurance Company* (July 2003) 100 N.Y. 2d 377; 795 N.E. 2d 15.

[10] The TIG policy defined "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant including * * * * *fumes.*" (Emphasis added by the court.) *Ibid,* at 387.

[11] *Ibid,* at 383.

[12] *MacKinnon v. Truck Insurance Exchange,* (2003) 31 Cal.4th 635; 3 Cal.Rptr. 228

[13] For a definitive and exhaustive discussion of the California courts' reasoning in insurance coverage issues, please see, John K. DiMugno, *Insurance Litigation Reporter,* "The Shifting Tides of Insurance Policy Interpretation: Does MacKinnon v. Truck Insurance Exchange Change How Courts Will Interpret Insurance Policies?" 25 No. 19 Ins. Litig. Rep. 565.

[14] Mindy Pollack, in *Gen Re; Claims Department Viewpoint,* "Pollution Exclusion Fails Non-traditional Tests."

[15] *Ibid,* at p. 11

About the Author

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Valerie McGuire graduated from the University of California at Santa Cruz with a double major in Environmental Studies and Politics. She then attended law school at the University of California at Berkeley, where she was the Editor–in–Chief of the Journal of Employment and Labor Law, and served on the Steering Committee of the Boalt Hall Women's Association.

Prior to becoming an associate at Brayton Purcell in 2003, Ms. McGuire had a general civil litigation practice in Santa Cruz, California for fifteen years. Her practice emphasized plaintiff's personal injury and worker–side employment law. She also served as general counsel for the Santa Cruz Firefighter's Union, the Santa Cruz Communications Workers of America, and the Santa Cruz County Central Labor Council. In her private practice, Ms. McGuire was lead counsel in numerous jury trials, winning six and seven–figure jury verdicts for injured plaintiffs.