

RISK

LEGAL ISSUES IN
INSURANCE
COVERAGE



NEWSLETTER

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YOUR CHECKLIST FOR D&O INSURANCE PROTECTION

by Mary Craig Calkins



Boards and company management are aware of Directors and Officers Liability Insurance (“D&O insurance”) as never before. Prior to corporate scandals such as those involving Enron, Tyco, WorldCom, and Adelphia, corporate officials devoted little attention to their D&O insurance policy renewal. They did not feel any compelling need to question whether a policy would be available if the company or any of its directors and officers were sued. Today, however, policyholders are aware that falling stock prices, restated financials, criminal indictments, and SEC investigations have caused the insurance market to harden. The result has been higher premiums and retentions as well as narrower coverage. *See, e.g.,* W. Bay and M. Darrough, *The Hardening Market for D&O Liability Insurance, Mid-West In-House*, www.midwestinhouse.com/bay.htm (Feb. 2, 2004) (“With these recent developments, companies approaching the market may find a considerable hardening.”).

All insurance policies are not “created equal” and do not all afford the same level of protection. As a result, a company must reevaluate its D&O insurance in light of its operations and exposures in this post-Enron world.

“HOT ISSUES” IN A PRE-PURCHASE D&O POLICY AUDIT

Policyholders should consider a pre-purchase D&O policy audit to lessen the chance of uninsured losses for which the company’s coffers may have to respond. Management should work with coverage counsel to consider at least the following “hot issues”:

- **Entity coverage** for the company (in addition to the coverage for individual directors and officers). For the past ten years, D&O insurance typically covered direct claims against the corporate entity as well as insured individuals. More recently, however, the insurance industry has

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PREPARING FOR WELDING ROD COVERAGE CLAIMS

by Daniel E. Chefitz and Catherine J. Serafin



Many companies currently face lawsuits in which plaintiffs claim that exposure to welding rod fumes has caused injury, such as a neurological condition known as Parkinsonism. Recent plaintiffs' verdicts ensure that these suits will continue to be filed. See, e.g., *Yencho v. A.W. Chesterton Inc. et al.*, No. 2003-0884 (Pa. Comm. Pls., Philadelphia Co., May 12, 2004, jury verdict). This article examines two issues that will be hotly contested in welding rod coverage claims: (1) whether an "occurrence" took place; and (2) the applicability of the "absolute" pollution exclusion.

THE PARTIES, COMMON ALLEGATIONS, AND POTENTIALLY RESPONSIVE POLICIES

Companies facing welding rod claims include manufacturers and distributors of welding products, and participants in various trade organizations such as the American Welding Society and the National Electrical Manufacturers Association. The complaints typically assert causes of action for conspiracy, negligent undertaking through trade organizations, negligence in the sale of a product, strict product liability, and failure to warn.

Plaintiffs generally are workers who allegedly were exposed to welding fumes while using welding products, or in proximity to people using them. The complaints allege that the welding process produces fumes that contain manganese and other toxic substances. Scientific literature in the 1930s or earlier discussed the causal connection between brain damage and manganese; plaintiffs

contend that defendants concealed material information regarding the health effects of welding fumes through their participation in a series of trade organization meetings from 1937 until 1995.

Because welding rod claims typically allege third-party bodily injury and/or personal injury claims, defendant's comprehensive general liability ("CGL") policies potentially are responsive. Separate products hazard coverage could also be implicated. Because the allegations may go back over many years, it is important to search for liability policies sold to predecessor companies named in any suit.

INSURANCE COVERAGE ISSUES

There are very few reported welding rod coverage decisions but, in certain ways, welding rod claims arguably are analogous to asbestos bodily injury cases. Numerous issues arise that may affect available coverage. This article focuses on two defenses that insurers will likely raise: (1) whether an "occurrence" took place; and (2) the applicability of the "absolute" pollution exclusion. Welding rod claims are similar to asbestos bodily injury claims in connection with these two issues and, therefore, case law on the latter is discussed below. However, it is important to note that each issue should be analyzed to determine an analogous line of cases. For example, depending on the medical evidence of the etiology of the condition or disease at issue, it may be more appropriate to analogize welding rod cases to lead paint ingestion cases, rather than to asbestos bodily injury cases, in determining the appropriate trigger of coverage.

"Expected or Intended"

Most CGL policies define an "occurrence" as an event that results in injury "neither expected or intended from the standpoint of the insured." If the claimant alleges the existence of early medical studies documenting injuries caused by manganese

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in welding fumes, insurers often deny coverage on the ground that no “occurrence” took place because the policyholder “expected or intended” harm.

Although no welding rod cases have addressed this issue yet, there are a number of analogous decisions involving asbestos claims. For example, the Court of Appeals for the Second Circuit held that the insurers bore the burden of proving “expected or intended” injuries from asbestos exposure because the language was exclusionary, despite the fact that it appeared in the “definitions” or “insuring agreement” sections of the policies. *Stonewall Ins. Co. v. Asbestos Claims Management Corp.*, 73 F.3d 1178, 1205 (2d Cir. 1995). The test is whether the insured *actually* expected or intended harm, not whether the insured *should have* expected harm. *Id.*

The relevance of historical medical studies to the insured’s subjective intent will likely be a key disputed issue in welding rod cases. Not surprisingly, insurers seek to use studies linking harm to the act in question, while policyholders may want to use studies showing uncertainty on the causation question. One Ohio court, presented with an insurer’s motion *in limine* in an asbestos case to exclude the expert testimony of doctors regarding historical medical information, found that such evidence may be admissible to prove the policyholder’s expectation or intent, but only if the policyholder knew of and relied on those studies. *Owens-Corning Fiberglas Corp. v. American Centennial Ins. Co.*, 74 Ohio Misc. 2d 258, 262, 660 N.E.2d 819, 822 (Lucas Cty. C.P. 1995).

The “Absolute” Pollution Exclusion

A typical “absolute” pollution exclusion clause precludes coverage for bodily injury “arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants.” Sometimes the exclusion will conclude with the phrase, “into or upon land, the atmosphere or any water course or body of water.” Insurers will likely argue that welding rod fumes constitute a released “pollutant,” and any resulting damage falls within the scope of the exclusion. Depending on the language of the exclusion and on

which state’s law applies, a policyholder may successfully avoid the application of the exclusion in the context of indoor or workplace exposure to welding fumes on the grounds either that the term “atmosphere” in the exclusion is ambiguous, or that the exclusion is limited to traditional environmental pollution.

Few cases discuss the exclusion in the welding rod context. In a case involving an errors and omissions policy, the United States Court of Appeals for the Fourth Circuit determined that welding fumes constituted a “pollutant” and that underlying welding rod claims were excluded by an absolute pollution exclusion (see *National Electrical Manufacturers Assn. v. Gulf Underwriters Ins. Co.*, 162 F.3d 821 (4th Cir. 1998)). However, the exclusion at issue in that case was not limited to pollution of the environment or the atmosphere; rather, it simply precluded coverage for the “actual or threatened discharge, dispersal or release of any pollutant.” *Id.* at 824. Recent unanimous high court decisions in New York and California discussed in this article have rejected the reasoning of this decision.

Interpreting the “sudden and accidental” pollution exclusion, the highest court in New York held that the term “atmosphere” in the exclusion is ambiguous as applied to claims for asbestos bodily injury. *Continental Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 609 N.E.2d 506 (N.Y. App. 1993). Recognizing that asbestos can be a “pollutant,” the court nonetheless concluded “that the clause is ambiguous with regard to whether the asbestos fibers . . . inhaled by persons working closely with . . . asbestos products . . . were discharged into the ‘atmosphere’ as contemplated by the exclusion.” *Id.*, 80 N.Y.2d at 653, 609 N.E.2d at 512. Because the term “atmosphere” is subject to more than one reasonable meaning, the court construed the term against the insurer-drafter and in favor of coverage. *Id.*, 80 N.Y.2d at 655, 609 N.E.2d at 513.

A recent decision by the same court went further, holding that the absolute pollution exclusion applies only to traditional environmental pollution, even if the qualifying terms “atmosphere” or “environment” are absent from the exclusion. *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 795 N.E.2d 15 (N.Y. App. 2003). In a unanimous decision, the court held that

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WELDING RODS: AN EMERGING LIABILITY RISK

by John S. Wyckoff and Mark McBride



Arc welding produces a fine mist of metal and oxide particles called “welding fume.” In the past five years, several thousand lawsuits have been filed alleging that exposure to the metal manganese in welding fumes causes “Parkinsonism,” a severe neurological disease similar to Parkinson’s disease.

KNOWLEDGE OF RISKS

Welders have been exposed to manganese from welding rods since the 1920s, but knowledge of risk developed slowly and remains uncertain even today. A German paper by Beintker in 1932 published one of the first health warnings regarding welding fumes. In or about 1937, the Metropolitan Health and Life Insurance Company stated that manganese in welding fumes “causes a disease similar to paralysis agitans [Parkinson’s disease].” Subsequently, however, a 1951 British investigation of health risks to welders by A.T. Doig and L.N. Duguid of the Ministry of Labor and National Service concluded that “[n]o evidence of involvement of the nervous system was found even in the group of welders substantially engaged in working with high manganese steel . . .” and that “[t]he frequently quoted cases described by Beintker (1932) are not particularly convincing. . . .” Also in 1951, however, noted toxicologist N. Irving Sax stated in his *Handbook of Dangerous Materials* that manganese “affects the nervous system and can cause paralysis to a degree which may be disabling” and that “widespread . . . exposure occurs in electric arc welding since most welding-rod coatings contain manganese.”

By the 1960s, the recognition of health risks associated with breathing welding fumes was still not unanimous or definitive. *The Welding Encyclopedia* (1961) warned, somewhat ambiguously, that “[o]ne other element may be mentioned as having possible ill effects if breathed in vapor form. Some authorities believe that manganese fumes will affect the nervous system if breathed for long periods in high concentrations.” The *Encyclopedia* concluded, however, that “[u]nder normal working conditions, the fumes from most arc welding operations are not harmful.” In spite of his 1951 statements cited previously, by 1963 Sax apparently discounted risks from manganese from welding fumes. Sax’s *Dangerous Properties of Industrial Materials* (second edition, 1963) describes the health effects of manganese, but does not mention welding as a source of manganese exposure, even in the entry on welding fumes, in which the risks from other metals are described.

These investigations, as well as some recent testimony in the *Elam* case (discussed below), indicate that the link between manganese fume exposure and a resultant health effect is far from certain. That having been said, the plaintiffs, while alleging health effects, also allege in cases such as *Davis v. Lincoln* (No. CV-04-BE-0404-E, N.D. Ala., filed Feb. 27, 2004) that defendant companies acted through industry associations such as the American Welding Society (“AWS”) and the National Electrical Manufacturers Association (“NEMA”) to suppress knowledge of the health risks, including altering the conclusions of an investigation to say falsely that welding fumes were not harmful.

MANGANESE EXPOSURE AND SYMPTOMS

Although manganese is an essential nutrient in small quantities, larger exposures (for example, those associated with mining and milling, not

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welding rod exposure) are known to produce “manganism” or “manganese-induced Parkinsonism.” Under these exposures, manganese may produce symptoms such as weakness, apathy, headaches, muscle cramps, and joint pains, followed by uncoordinated speech and gait, and Parkinsonism as the third stage.

Parkinson’s disease has similar symptoms. Most cases of Parkinson’s do not have an identifiable cause, and are termed “idiopathic Parkinson’s disease” (“IPD”). Evaluating the risk of manganese exposure is complicated because of the close resemblance between manganese-induced Parkinsonism and IPD. Other conditions besides manganese exposure that can produce neurological symptoms similar to Parkinson’s disease include other brain diseases and injuries, infections, and therapeutic drugs.

PARKINSON’S DISEASE

In 1990, the incidence of idiopathic Parkinson’s disease in the United States was approximately 50,000 new cases per year, with a prevalence of about 500,000 to 650,000 cases existing at any time. Another estimate, for 1997, was that approximately 1 million cases existed.

The best current information on the incidence (number of new cases per year) of IPD appears to be from a study based on patients from a northern California health maintenance organization. This study showed an overall annualized incidence rate (adjusted for age and sex) of 13.4 cases of Parkinson’s disease per 100,000 individuals per year. Given an estimated U.S. population of 291 million in 2003, this implies about 39,000 new cases of Parkinson’s disease per year. The incidence rate for men was 19.0 cases per 100,000; for women, it was about half that rate at 9.9 per 100,000. Incidence increases rapidly with age. For men, almost no cases occur before the age of 30. Incidence was 0.5 per 100,000 individuals in the 30-39 age group and increased to 190.5 per 100,000 in the 80-89 age group.

OTHER METALS IN LITIGATION

Tungsten welding rods used in tungsten inert gas (TIG) welding contain 1 percent to 2 percent thorium

oxide. Thorium dust is a known risk factor for lung damage or lung cancer and has the additional stigma of being mildly radioactive. Other metals – including beryllium, brass, bronze, cadmium, chromium, cobalt, copper, lead, nickel, vanadium, and zinc – can create hazardous fumes when welded. Mass tort lawyers have shown interest in litigation regarding some of these metals, but no metal has excited such widespread welding litigation as manganese.

MANGANESE LITIGATION EXPLOSION

Lawsuits alleging that manganese exposure from welding rods caused bodily injury began in the 1970s and were filed primarily against manufacturers of welding rods. After 1990, the defendants were broadened to include manufacturers of welding equipment.

Defendants were successful in defeating welding rod cases until *Elam* (*Lawrence E. Elam v. A.O. Smith Corp et al.*, No. 01-L-1213, Ill. Cir., Madison County) in 2003. *Elam* won a judgment of \$1 million against multiple defendants, including the BOC Group and Lincoln Electric. Another plaintiff’s verdict was rendered in May 2004 in *Yencho v. A.W. Chesterton Inc. et al.*, No. 2003-0884 (Pa. Comm. Pls., Philadelphia Co.). *Yencho* is reportedly just the third known verdict against welding rod manufacturers. In the *Yencho* case, a jury awarded the former welder \$500,000 and found that the welding companies negligently exposed him to defective products (welding rods containing asbestos) that caused his lung cancer. The case is reportedly going to be appealed, however.

The number of welding fume lawsuits has grown rapidly. BOC’s American subsidiary is a defendant in approximately 172 cases with 9,800 individual plaintiffs (December 31, 2003). In June 2003, the Welding Rod Product Liability MDL (Multi-District Litigation) 1535 was established. Up to March 2004, about 1,600 welding rod cases involving more than 3,000 individuals were consolidated into this multi-district litigation.

The number of workers who might make claims is difficult to estimate. About 360,000 Americans work as welders, based on employment statistics from the U.S. Bureau of Labor Statistics. Because of incidental

moved away from “entity” coverage. Entity coverage is still available, but at a price. The company needs to determine whether that price is worth the coverage. Without “entity” coverage, allocation battles between covered and uncovered insureds and claims will be inevitable, as noted below.

- **Preset allocations** between covered and uncovered claims and insureds. New coverage provisions set a contractual allocation of benefits between covered and uncovered claims, and covered and uncovered persons. For example, some allocation provisions provide that the insurer will pay 75% and the insured will pay 25% of defense costs relating to particular types of claims. In effect, these preset allocation provisions impose a co-insurance component to the policies and largely undo the benefits of the “Larger Settlement Rule” announced by some courts. This rule construes policy language to maximize coverage by requiring insurers to reimburse fees that are inextricably interwoven with the defense of covered claims or individuals, even where there also may be uncovered claims and individuals included within the litigation. *See, e.g., Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424-33 (9th Cir. 1995) (“[W]e will allocate only if there is some amount of corporate liability that is both independent of and not duplicated by liability against the directors and officers.”).
- **Severability language** in both the policy **applications** and **exclusions**. There are dozens of different severability provisions. They ensure that the wrongful acts and knowledge of some insureds – the “black hats” – are not imputed to innocent insureds so that one bad actor’s wrongful acts and knowledge can wipe out coverage even for innocent insureds (those who performed no wrongful acts and had no knowledge of them). A severability provision in an **application** will confirm that disclosures and representations in the application will be viewed separately for each

individual insured. A separate severability provision should appear in the “**exclusions**” portion of the policy, to ensure that conduct and knowledge implicating the exclusions governing personal profits or gain, fraudulent or criminal conduct, short swing profits, or unauthorized remuneration to one individual will not be imputed to others who are covered by the policy.

- **Bankruptcy protections**. When a corporation files for bankruptcy, and if there is entity coverage under the D&O insurance, there is a significant issue whether the company’s officers and directors will be entitled to the proceeds from the D&O insurance to pay “loss” – including reimbursement of ongoing defense fees and costs as well as settlement. A bankruptcy trustee may view the policy itself as property of the bankruptcy estate and attempt to seize the insurance proceeds to satisfy company creditors. Several bankruptcy courts have recognized the unfairness of this scheme, which deprives the individual directors and officers of the protection they purchased. *See, e.g., In re La. World Exposition, Inc.*, 832 F.2d 1391, 1400-01 (5th Cir. 1987) (bankruptcy estate could not claim a D&O policy as an asset if that would deprive the insured directors and officers of coverage).

Policyholders should request language confirming that filing a petition in bankruptcy will not void the benefits of the D&O insurance. Assuming the existence of entity coverage, a “**priority of payments**” provision will control the order in which payments will be made, so that the potential bankrupt entity will be last in line behind the individual directors and officers. Finally, care should be given to the negotiation of exclusions – such as the “**Insured vs. Insured**” exclusion that attempts to preclude coverage for claims “brought on behalf of” a corporate entity or any other party that would qualify as an “insured” – which can minimize the chance of losing coverage for individual directors and officers.

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■ **Narrowing your exclusions.** There is a basic inconsistency between the insuring agreements that grant coverage and the exclusions that purport to take it away. Conduct exclusions should be narrowed so that they expressly require a “final judicial determination” of guilt, rather than a lesser standard such as a determination through arbitration or non-judicial weighing of the facts, before they can act to preclude coverage. Be aware of other exclusions, such as the “prior acts,” “prior notice,” “other insurance,” and “bodily injury/property damage” exclusions, among others, that may purport to limit the potential for full recovery under a D&O policy.

POLICY PROVISIONS TO CONSIDER TO MAXIMIZE COVERAGE

A savvy policyholder should consider at least the following policy provisions to maximize coverage for its specific businesses and possible claims:

- ☒ **Policy limits and retentions**, to make sure the coverage attaches at a point beneficial to the company.
- **“Co-insurance” clauses**, confirming that the company has not assumed a greater portion of the risk than it otherwise might, which some insurers see as an incentive to defend expensive D&O claims more aggressively.
- The **“Named Insureds”** definition, which must be broad enough to cover all appropriate employees and related companies.
- The **“Subsidiary”** definition, confirming that companies acquired in mergers and acquisitions are covered on an interim or permanent basis, without “gaps” in coverage.
- **Outside director coverage**, protecting a company’s employees who sit on boards of other companies at the request of the policyholder’s management.
- **Independent director liability (“IDL”) coverage**, protecting non-employee directors.
- **Audit committees, general counsel, and inside lawyer coverage** – are all managerial employees covered, or should the company consider separate policies?
- **Joint ventures or limited partnerships**, covering the company’s actions in conjunction with ventures other than its primary business.
- **International exposures**, so that policies contain favorable provisions covering international operations.
- **Criminal, civil, administrative, regulatory, and arbitration coverage**, so that the definition of “claim” broadly covers all potential threats against a company and investigations as well as formal lawsuits.
- **Coverage for SEC investigations** in early, pre-lawsuit stages that will provide coverage immediately when an individual is subpoenaed or receives notice.
- **ERISA and plan manager-based claims** to ensure coverage if not protected by separate fiduciary liability policies.
- **Punitive damages** coverage and language broadening allowable “losses,” where allowed by law.
- **Prior acts or pending litigation exclusions** that may eliminate coverage for claims that are “related to” or “arise out of” a previous claim or proceeding; some language is far more beneficial than other language.
- **“Failure to maintain” provisions**, mandating that the company keep certain levels of coverage in place at the risk of losing other policies.
- **Notice provisions**, which describe exactly when a company must give notice of a claim or circumstances that potentially may give rise to a claim.
- **Related acts or “interrelated acts”** exclusions, so that the company can determine how an insurer will react to a claim.
- **Other conditions** that are prerequisites to coverage, such as provisions requiring that the insurer consent in advance of any settlement or other “voluntary payment” provisions.
- **Mandatory ADR or arbitration provisions** through which a policyholder may give up its right to a civil action and jury trial, or even the right to compel an arbitrator to follow the law.
- **“Hammer” clauses**, through which a policyholder must agree to an insurer-recommended settlement or lose a substantial portion of its coverage.
- **Renewal alternatives**, so that coverage can remain in place.

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INSURANCE COVERAGE CASE HIGHLIGHTS

by Charles K. Park



These summaries are not intended to be an exhaustive analysis of legal developments in the insurance field. Rather, they are an overview of recent “highlights” of developments in selected states. Should the need arise, Howrey is able to assist its clients in a more detailed analysis of recent legal developments pertaining to insurance coverage in any state.

CALIFORNIA

POLICY LIMITATIONS AND EXCLUSIONS MUST BE BOTH CONSPICUOUS AND CLEAR TO BE ENFORCEABLE

Haynes v. Farmers Ins. Exch., 32 Cal. 4th 1198 (2004)
The California Supreme Court affirmed the Court of Appeal’s conclusion that a provision in an automobile insurance policy – purporting to limit the amount of coverage to the legal minimum in California for permissive users – was not enforceable because it was not conspicuous, plain, and clear.

The permissive user limitation at issue was referenced in plain text on the tenth page of the policy in a section entitled “Liability.” In addition, the limitation was not highlighted, stated as a subheading in the policy, or otherwise effective for the purpose of attracting a reader’s attention to the limiting language. *Id.* at 1205. The court also noted that nothing on the declarations page of the policy alerted the insured to the permissive user limitation and the language of the limitation was “not bolded, italicized, enlarged, underlined, in different font, capitalized, boxed, set apart, or any other way distinguished from the rest of the fine print.” *Id.* at 1207 (quoting *Thompson v. Mercury Casualty Co.*, 84 Cal. App. 4th 90, 97 (2000)).

Citing numerous other reasons supporting the lower court’s holding, the court held that the permissive user limitation was unenforceable, given the placement of the limitation – buried among other provisions, rendering it inconspicuous and potentially confusing to the lay reader – and given the failure of the policy to define “permissive user.” In addition, the court refused to enforce a confusing endorsement purporting to effect the insertion of the limitation at two different points in the policy.

LOSS OF MARKET VALUE DUE TO COST OF ENVIRONMENTAL REMEDIATION DOES NOT CONSTITUTE “DAMAGES” FOR PURPOSES OF LIABILITY COVERAGE

Block v. Golden Eagle Ins. Corp., No. B166460, 2004

Cal. App. LEXIS 1257 (Cal. Ct. App. July 30, 2004)
Distinguishing *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807 (1990), the case that established that “damages” includes costs of remediation and mitigation of hazardous waste sites as well as costs of compliance for purposes of liability coverage, the court in *Block* determined that, in accordance with the court’s reasoning in *AIU*, the policyholder suffered no damages in the form of diminution of market value of the policyholder’s property, although such diminution was caused by a valuation of the costs to remediate the environmental condition of the property.

In *Block*, the policyholder sought coverage for loss in property value attributable to the estimated cost to remediate environmental damage to the property that the policyholder sought to sell to the city of Long Beach. Noting that the policy did not define the term “damage,” the court emphasized that the court in *AIU* determined “that an insured’s obligation to reimburse agencies for [environmental] response costs constituted damages because such costs constituted losses or detriment suffered by the agencies and the insured’s reimbursement constituted monetary compensation for such losses.” *Id.* at *14 (citing *AIU* at 829). In contrast, the policyholder in *Block* was not legally obligated to compensate any money as the result of any loss or detriment suffered by an environmental agency. *Id.* at *17 (“Accordingly, Block suffered no damages.”).

TEXAS

INSURER OWED DUTY TO DEFEND UNDER “EIGHT CORNERS RULE”

American Home Assurance Co. v. United Space Alliance, LLC, No. 03-20241, 2004 U.S. App. LEXIS 15606 (5th Cir. July 29, 2004)

Applying the “Eight Corners Rule” under Texas law, the Fifth Circuit Court of Appeals affirmed a jury verdict that found that American Home Assurance breached its duty to defend United Space Alliance against a third-party lawsuit pursuant to a general liability policy. The Fifth

Circuit also affirmed the summary judgment granted *sua sponte* by the district court in favor of United Space Alliance, maintaining that the lawsuit as pled gave rise to American Home's duty to defend.

United Space Alliance, in its capacity as the general contractor for the National Aeronautics and Space Administration's space shuttle program, was sued by a subcontractor, Hi-Shear Technology Corporation. Hi-Shear alleged, *inter alia*, breach of contract and fraudulent inducement pertaining to a contract for separation bolts used to detach the space shuttle's rocket boosters from the space shuttle after launch. United Space Alliance's requests to its insurers for a defense and indemnification under umbrella and miscellaneous professional liability policies were refused.

In affirming summary judgment in favor of United Space Alliance, the court acknowledged that the Eight Corners

Rule in Texas starts with the factual allegations of the underlying complaint that show the origin of the damages rather than with the legal theories alleged. Accordingly, the court affirmed that United Space Alliance met its burden of showing coverage, given that the facts alleged by Hi-Shear included conduct that potentially fell within the offenses covered by the personal injury provisions of the policy. In addition, the court affirmed the district court's finding that the "knowing falsity exclusion" did not apply, notwithstanding that some of Hi-Shear's allegations fell within the exclusion. The court confirmed that, under Texas law, an insurer must defend when there is at least one cause of action within the policy coverage.

Note: United Space Alliance, LLC was represented throughout the proceedings and trial by Curtis Porterfield of Howrey Simon Arnold & White, LLP. ■

WELDING RODS: AN EMERGING LIABILITY RISK *(continued from page 5)*

use of welding in other trades such as boilermaking, perhaps 500,000 workers might plausibly claim to be exposed to welding fumes.

Dr. Paul Nausieda, a neurologist, testified in the *Elam* trial that, out of 20,000 welders examined, about 2,500 (about 12 percent) have "Parkinson's-type disease." If this percentage holds for welders in general, more than 40,000 welders nationwide may have identifiable manganese-induced Parkinsonism. It should also be noted that Dr. Nausieda was asked whether any published, peer-reviewed study confirmed a link between welding and an increased risk of Parkinson's disease. "Nausieda said there is no such study, but added: 'There's a lot of data floating around that certainly suggests that's true.'" (Brian Brueggemann, "Lawsuit blames welding for illness," *Belleville [Illinois] News-Democrat*, October 13, 2003)

CONCLUSIONS

Potential defendants need to be prepared for a large number of claims. Plaintiff attorneys are using strategies that they employed in the asbestos mass tort, including mass screenings and aggressive media campaigns to recruit potential claimants. Preparation should include an assessment of availability of insurance for these liabilities, the number of workers potentially exposed, the nature of the exposures, and the company's health

and safety practices involving welding rod use.

Companies should continue to pay attention to the rapidly evolving federal and state laws involving tort reform (caps on punitive damages, retroactive liability, unimpaired registries, and so on) as well as track events in the welding rod, asbestos, and silica mass torts. As we have seen in the recent *Yencho* case involving asbestos exposure from welding rod use, welding rod claims involving asbestos and possibly other constituents such as thorium and silica may potentially drive future claim numbers and values.

Finally, companies must stay current on the science and connection between occupational exposure to contaminants (welders, etc.) and health effects. In doing so, a company will be able to adopt a strategic approach to any lawsuit, determining whether to employ a settlement and/or litigation strategy, and – in the course of litigation – employing tactics such as seeking to throw out junk science, inadmissible evidence, and unqualified experts. ■

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the exclusion did not apply to a bodily injury claim arising out of the inhalation of paint or solvent fumes in an office building in which the insured was painting. The court found that the exclusion is ambiguous and applies only to traditional environmental pollution, for the following reasons:

- “Discharge,” “dispersal,” “release,” and similar words used in the exclusion are terms of art in environmental law regarding damage caused by waste disposal, and not personal injury resulting from the intended use of products. *Id.*, 100 N.Y.2d at 387, 795 N.E.2d at 20.
- The term “pollutant” – construed literally – could include any “chemical” or “material to be recycled” that could “irritate” a person or property, which would “seemingly contradict” the reasonable expectations of a business person. *Id.*
- Even if paint or solvent fumes are a “pollutant,” the exclusion applies only if the injury is caused by “discharge, dispersal, seepage, migration, release or escape,” and “[i]t cannot be said that this language unambiguously applies to ordinary paint or solvent fumes that drifted a short distance from the area of the insured’s intended use and allegedly caused inhalation injuries to a bystander.” *Id.*, 100 N.Y.2d at 387-88, 795 N.E.2d at 20.
- The removal of the language “into or upon the land, the atmosphere or any water course or body of water” from the exclusion “simply removes a redundancy in the exclusion” because “any pollution will necessarily involve discharge or release into land, atmosphere or water”; the language was not intended to extend the exclusion to indoor, as well as outdoor, pollution. *Id.*, 100 N.Y.2d at 388, 795 N.E.2d at 20-21.

In another unanimous decision – *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 73 P.3d 1205 (Cal. 2003) – the California Supreme Court also held that the absolute pollution exclusion is ambiguous, and should be limited to injuries from events commonly thought of as environmental pollution. In *MacKinnon*, the court found that the exclusion did not apply to a claim alleging the negligent indoor application of pesticides. Courts in other states similarly hold that the “absolute”

pollution exclusion is ambiguous, and must be interpreted in favor of coverage, in the following cases:

- Injury resulting from the ingestion of lead in the paint on premises under the control of the insured. *Porterfield v. Audubon Indemnity Co.*, 856 So. 2d 789 (Ala. 2002).
- Injury from inhalation of carbon monoxide from a leak in an apartment furnace. *American States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 687 N.E.2d 72 (1997).
- Injury from exposure to fumes discharged by roofing products. *Nautilus Ins. Co. v. Jabar*, 188 F.3d 27 (1st Cir. 1999).

CONCLUSION

Welding rod claims present many insurance coverage issues. Because the issues are analogous, policyholders should look to insurance decisions in the asbestos bodily injury area to challenge denials of coverage based on the “expected or intended” language and “absolute” pollution exclusion clause in CGL policies. ■

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YOUR CHECKLIST FOR D&O INSURANCE PROTECTION *(continued from page 7)*

- **Extended reporting or discovery provisions**, which extend the time for reporting a claim.
- **“Laundry listing” provisions** that allow threats to be covered if they later mature into bona fide claims.
- **Inconsistent policy terms or exclusions**, which can create ambiguity later; a company should attempt to correct such issues when the policy is negotiated, rather than waiting for a claim.
- **Other miscellaneous provisions**, such as **panel counsel requirements, professional services exclusions, presumptive indemnification provisions, pollution exclusions** that are too broadly read, a panoply of other legalistic pitfalls lurking in the “fine print,” and other limitations on coverage.

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HOWREY INSURANCE NEWS AND EVENTS



RECENT ARTICLES, PUBLICATIONS AND MEDIA APPEARANCES

Danielle Gilmore and **William Um** were included in the September 2004 issue of *Los Angeles Magazine* as Southern California “Rising Stars.”

Ty Childress wrote “New ISO-CGL Changes Raise Concerns for Additional Insureds and Indemnitors,” which was published as the lead article in the Summer 2004 issue of *Risk Management Letter*.

Yuri Mikulka was quoted and pictured in the *ABA Journal*, August 2004, in an article titled, “There’s Still Corporate Work for Law Firms, But They Have to Start Thinking About the Company They Want to Keep.” She served as a moderator and a panelist for an ABA CLE program related to this article on August 18, 2004.

RECENT APPOINTMENTS

Mary Craig Calkins has been elected 2005 Midyear CLE Meeting Co-Chair of the Insurance Coverage Litigation Committee of the ABA Section of Litigation.

Ty Childress has been elected to the Board of Directors of the Los Angeles County Bar Foundation, which supports and funds numerous programs

throughout Los Angeles designed to improve the administration of justice and delivery of critical legal services, and provide law-related assistance to the poor and neglected.

RECENT AND UPCOMING SPEAKING ENGAGEMENTS

Insurance Recovery Co-Chairs **Robert Shulman** and **David Steuber** will be speakers at the program “Directors and Officers in the Spotlight: Liability, Indemnification and Insurance,” being held October 28, 2004, in New York City.

Mary Craig Calkins gave a presentation at the ABA Annual Meeting in Atlanta, Georgia, on August 7, 2004. The presentation, “New Policies = New Challenges: Advertising Injury Coverage for Intellectual Property Claims,” was made at the Insurance Coverage Litigation Committee Breakfast Briefing.

Ken Remson gave a presentation on “Changes in Insurance Coverage” at a Mold Litigation & Management Update seminar sponsored by Bridgeport Continuing Education in Los Angeles on September 23, 2004.

YOUR CHECKLIST FOR D&O INSURANCE PROTECTION *(continued from page 10)*

A policyholder must be willing to audit the proposed policy and fight for the best terms. Conditions and exclusions offered by competing insurers will vary substantially, even in a “hard” market. New products are available that may be beneficial to a particular insured, including coverage only for individuals, coverage that is non-rescindable, “portable” policies that will follow an individual from company to company, Independent Director Liability (“IDL”) policies covering independent directors only, and other new packages.

Policyholders also should be diligent in obtaining insurance. Brokers and underwriters sometimes make mistakes, and policies may not be issued in hard-copy form for several months. Policyholders should look for, and avoid, potential gaps in

coverage as well as overlapping coverage. They also should weigh the strength of the insurance company and its claims-handling capabilities and proclivities. Further, policyholders should take steps to ensure that their financial data and other company information are accurate.

Finally, policyholders should remember the adage: “You don’t ask – you don’t get.” Working with attorneys who know current legal issues and sophisticated brokers who are knowledgeable about competing forms and alternative provisions can help avoid coverage problems before they occur. ■

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