California Supreme Court Rules:
Ordinary Negligence Involving Toxic Chemicals Not Excluded as Pollution

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Insurers, especially those in the excess and surplus lines business, in California must immediately change the way they investigate and adjust claims involving pollution. Where they had quickly and blithely denied claims where injuries to person or property was claimed as a result of exposure to toxic substances, they must now thoroughly investigate the claim of the insured and determine if the effect of pollutants was an "ordinary act of negligence" or a widespread pollution of the environment.

The California Supreme Court has, unanimously, in *John R. MacKinnon v. Truck Insurance Exchange*, 2003 DJDAR 9112; S104541 (8/14/03), concluded that the "pollution exclusion" of the Commercial General Liability ("CGL") policy "does not plainly and clearly exclude ordinary acts of negligence involving toxic chemicals such as pesticides." Insurers doing business in California must, as a result, reevaluate denials of claims based upon the pollution exclusion and should withdraw those denials and provide coverage for defense and indemnity in those cases that fall within the Supreme Court's definition.

Factual Basis for Decision

The case arose when Truck Insurance Exchange (Truck Insurance) issued a CGL insurance policy to MacKinnon, for the period of April 1996 to April 1997. That policy obligated the insurer to pay "all sums for which [the insured] become[s] legally obligated to pay as damages caused by bodily injury, property damage or personal injury." The insurer must "pay for damages up to the Limit of Liability when caused by an occurrence arising out of the business operations conducted at the insured location." Under "Exclusions" the policy states: "We do not cover Bodily Injury or Property Damage (2) Resulting from the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants: (a) at or from the insured location." The terms "Pollution or Pollutants" are defined, in the definitions section at the beginning of the policy, as "mean[ing] any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste materials. Waste materials include materials which are intended to be or have been recycled, reconditioned or reclaimed."

Jennifer Denzin was a tenant in MacKinnon's apartment building. She requested MacKinnon to spray to eradicate yellow jackets at the apartment building. MacKinnon hired a pest control company, Antimite Associates, Inc. (Antimite), to exterminate the yellow jackets. Antimite treated the apartment building for

yellow jackets on several occasions in 1995 and 1996. On May 19, 1996, Denzin died in MacKinnon's apartment building.

Denzin's parents filed a wrongful death lawsuit against MacKinnon, Antimite, and other defendants. They alleged that on or about May 13, 1996, defendants negligently failed to inform Denzin that her apartment was to be sprayed with "dangerous chemicals," and failed to evacuate her, as a result of which she died from pesticide exposure. MacKinnon tendered his defense to Truck Insurance under the CGL insurance policy.
The trial court found that Denzin action alleged the decedent died as a result of exposure to a pesticide used to eradicate yellow jackets at her apartment building; that the pollution exclusion in the Truck Insurance policy was clear and unambiguous; that there was no potential for coverage for the Denzin action because the injuries alleged in the Denzin complaint are excluded from coverage by the pollution exclusion; and because there was no potential for coverage, MacKinnon's breach of the good faith covenant cause of action also fails. The Court of Appeal affirmed. It too found the clause unambiguous as applied to MacKinnon's claim, citing several cases from other jurisdictions giving the exclusion a broad reading.

Analysis

The Supreme Court recognized that there were two different methods, across the country interpreting the pollution exclusion:

> Although the fragmentation of opinion defies strict categorization, courts are roughly divided into two camps. One camp maintains that the exclusion applies only to traditional environmental pollution into the air, water, and soil, but generally not to all injuries involving the negligent use or handling of toxic substances that occur in the normal course of business. These courts generally find ambiguity in the wording of the pollution exclusion when it is applied to such negligence and interpret such ambiguity against the insurance company in favor of coverage. The other camp maintains that the clause applies equally to negligence involving toxic substances and traditional environmental pollution, and that the clause is as unambiguous in excluding the former as the latter.

The court then conducted an extensive discussion of the historical background of the pollution exclusions. Truck Insurance contended that the pollution exclusion should be read literally. If read literally the "pollution exclusion" plainly and clearly extends to virtually all acts of negligence involving substances that can be characterized as an

irritant or contaminant. Specifically Truck Insurance argued that pesticides are "chemicals" capable of causing irritation and can therefore be defined as an "irritant" and a "pollutant." The spraying of pesticides can, also, Truck Insurance argued, could be described as a "discharge" or "dispersal" sufficient to exclude coverage for its insured.

The Supreme Court, taking the argument to its logical extreme, concluded:

> But Truck Insurance's reading of the clause is predicated on a basic fallacy, one shared by many of the courts on which it relies: the conclusion that the meaning of policy language is to be discovered by citing one of the dictionary meanings of the key words, such "irritant" or "discharge." (See *American States Ins. Co. v. Nethery* (5th Cir. 1996) 79 F.3d 473, 476; *Peace*, *supra*, 596 N.W.2d at p. 438; *Deni Assoc*., *supra*, 711 So.2d at p. 1139.) Although examination of various dictionary definitions of a word will no doubt be useful, such examination does not necessarily yield the "ordinary and popular" sense of the word if it disregards the policy's context. *(Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265.) Rather, a court properly refusing to make " 'a fortress out of the dictionary,' " *(Russian Hill Improvement Assn. v. Board of Permit Appeals* (1967) 66 Cal.2d 34, 42, quoting Justice Learned Hand's dictum in *Cabell v. Markham* (2d Cir. 1945) 148 F.2d 737, 739), must attempt to put itself in the position of a layperson and understand how he or she might reasonably interpret the exclusionary language. *(AIU Ins. Co.*, *supra*, 51 Cal.3d at p. 822.)

The Supreme Court recognized that virtually any substance can act under the proper circumstances as an "irritant or contaminant." A single aspirin, for instance, will help avoid heart attacks while thousands of aspirin in the soil will kill plants. Chlorine can irritate but is perfect for keeping a swimming pool clean and healthful to use. For a chemical to be a "pollutant" the analysis must include more than a dictionary definition. It must combine the definitions with the context of the claimed injury. The Supreme Court said:

> Our conclusion that Truck Insurance's interpretation is overly broad is bolstered by a closer examination of the connotations of the terms "discharge, dispersal, release or escape" in the context of the present case. "A 'release' is defined as 'the act of liberating or freeing: discharge from restraint.' " (Webster's 3d New Internat. Dict. (2002) p. 1917.) An "escape" is defined as an "evasion of or deliverance from what confines, limits, or holds." *(Id*. at p. 774.) These terms connote some sort of freedom from

containment, and it would be unusual to speak of the normal, intentional application of pesticides as a "release" or "escape" of pesticides.

To "disperse" is defined, variously, as "to cause to become spread *widel*y," " to dissipate, dispel," "to spread or distribute from a fixed or constant source," or" to cause to break up and go in different ways." (Webster's 3d New Internat. Dict., *supr*a, at p. 653, italics added.) The notion of "dispersal" as a *substantial* dissemination is reinforced by its use with the term "pollutant." Indeed, the word ***"dispersal," when in conjunction with "pollutant," is commonly used to describe the spreading of pollution widely enough to cause its dissipation and dilution.*** (See, e.g., Milloy, *Northeast Blowing Smoke on Cause of Its Pollutio*n, Chicago Sun-Times (Dec. 16, 2002) p. 53 ["beyond 100 to 200 miles, air pollutants are dispersed]; Sanchez, *In Calif., A Crackling Controversy over Smo*g, Washington Post (Feb. 16, 2003) p. A1 [" the valley . . . is bordered on three sides by mountain ranges and cannot naturally disperse . . . the pollution it creates"].) Knowledge of common usage does not lead us to believe that the term "disperse pesticides" is generally used as a substitute for "spray" or "apply" pesticides, except perhaps when the pesticides are being spread throughout a large area. (See, e.g., Ritter, *Pesticide Trucks Go After Mosquitoe*s, Chicago Sun-Times (Sept. 9, 2002) p. 4 [referring to "one teaspoon of the pesticide sumiturin is dispersed over an area the size of a football field"; Simmons, *Tanzania Begins to Deal with Toxic Wastelan*d, L.A. times (Mar. 30, 2000) [referring to "some cataclysmic meteorological event that would wash or disperse large quantities of . . . persistent pesticide[s] into the environment"].) In the present case, the application of pesticides in and around an apartment building does not plainly signify to the common understanding the "dispersal" of a pollutant. (See *Kellma*n, *supr*a, 197 F.3d at p. 1185 [strains the meaning of "discharge, dispersal, seepage, dispersal, release or escape" to apply it to localized toxic injury occurring in the vicinity of intended use] … 'Discharge" is defined most pertinently as "to send forth" or "to give outlet to: pour forth." (Webster's 3d New Internat. Dict., *supr*a, at p. 644.) Although the application of pesticides could literally be described as a "discharge" of pesticides, that term is rarely used in this manner. (Italics in original, ***Bold Italics*** added)

The California Supreme Court concluded that an interpretation limiting the exclusion to environmental pollution is reasonable in light of the purpose of CGL policies—which "is 'to provide the insured with the broadest spectrum of protection against liability for unintentional and unexpected personal injury or property damage arising out of the conduct of the insured's business.'[citations omitted]"

In *AIU Insurance Co. v. Superior Court,* 51 Cal. 3d 807 (1990), the California Supreme Court applied statutory rules of contract interpretation to insurance contracts. The *AIU* cour set up a three part test that considered the "plain meaning" of the policy language, examined the "objectively reasonable expectations" of the insured and resolved any remaining dispute against the insurer.

Some courts have fused the parts, sometimes using "reasonable epectations" in evaluation "plain meaning." [*Nissel v. Certain Underwriters at Lloyd's of London,* 62 Cal.App.4th 1103 (1998). *MacKinnon* seems to have limited the three part test of *AIU* and, as one commentator has opinied that the three part test:

> [M]ay be a relic of the past. Instead, an analysis using many concepts at once may develop. Trrial courts doubtlessly will be inundated by policy and statutory history, computer searches and out-of-state decisions.
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> Consideration of the "reasonable expectations" of the insured, at least at some point in the process, seems quite desireable. But it is a concept, particularly at the beginning of policy construction analysis, that can be turned and twisted for a host of contentions and rebuttals. In short, policy interpretation in California soon may become more complicated. [Rex Heeseman, Los Angeles Daily Journal, September 8, 2003, " 'MacKinnon' Case May Change How Courts Interpet Insurance Contracts"]

Investigation Now Required

As a result of the decision in *MacKinnon* insurers faced with a claim of injury to person or property by exposure to toxic substances commonly understood to be pollutants must now include:

- A detailed investigation of the methods by which the substance was applied.
- A determination of the extent of the spread of the substance.
- A determination of the methods by which the substance was spread.

To do so the insurer must, at a minimum do the following:

- ✓ Conduct a detailed interview of the insured.
- ✓ Conduct a detailed interview of the claimant(s).
- ✓ Retain the services of experts sufficiently competent to determine the toxicity of the substance, the normal and reasonable use of the substance, whether it was negligently applied, and the extent of its spread.

If the insurer finds that the injury incurred by persons or property were due to "ordinary acts of negligence" it may conclude the exclusion does not apply and must provide a defense or indemnity to the insured. Similarly, if the substance was applied in a small or confined area, like the spraying of a single apartment, as in *MacKinnon*, it will be difficult to reject coverage for defense or indemnity. The decision will be more difficult when there is a dispersal of the substance into the soil or water but the Supreme Court seems to indicate a need for a widespread dispersal. Dispersal of toxic substances less than 100 miles, or throughout the Los Angeles basin, or some less than a wide dispersal is not the type of "pollution" the California Supreme Court concludes is sufficient to allow an insurer to apply the "pollution exclusion."

Conclusions

Insurers in California can no longer deny every claim that alleges injury to person or property by a toxic substance as excluded by the CGL's pollution exclusion. The thorough investigation required by *Egan v. Mutual of Omaha Insurance Co*., 24 Cal. 3d 809, 620 P.2d 141, 169 Cal. Rptr. 691 (Cal. 08/14/1979) where the Supreme Court concluded that "an insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial."

The *MacKinnon* case provides guidelines for the investigation and sets limits on the exclusion. To comply with the requirement of a thorough investigation it is necessary that, before a claim is denied for pollution, that the insurer establishes that the spread of the substance was not due to "ordinary acts of negligence" and that the substance was dispersed over a wide area.

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