

Commentary

Welding Fume Exposure Claims And Their Implications Under Contracts For General Liability Insurance

by

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I. Introduction

On October 28, 2003, Lawrence Elam obtained a \$1 million jury verdict in a lawsuit alleging injury from exposure to welding rod fumes.¹ His verdict, which marked the first jury verdict recovery by a plaintiff in such a lawsuit, touched off a renewed interest in welding fume exposure and its allegedly associated health risks. As a result, numerous welding fumes exposure cases are now pending or waiting in the wings. Indeed, in the months preceding the verdict, plaintiffs' attorneys had filed hundreds of comparable actions.² Many of these suits have been consolidated by the Judicial Panel on Multidistrict Litigation and will be litigated before U.S. District Judge Kathleen O'Malley in Cleveland.³ As the number of recently filed lawsuits illustrates, the interest in pursuing litigation against the welding industry continues to rise.

Moreover, the interest in welding fume exposure litigation is not likely to decrease because of the recent

mistrial in Presler v. The Lincoln Electric Co., where a jury could not reach a verdict after three days of deliberation.⁴ Presler is not expected to decrease the interest in welding fume exposure litigation, particularly where eight out of the twelve jurors were in favor of finding for Mr. Presler.⁵ Indeed, since the mistrial, the plaintiffs' attorneys have repeatedly emphasized that the case represents a positive development for future trials. For example, John Neese, one of Mr. Presler's attorneys, stated that "the good news is that eight of the 10 jurors needed for a verdict looked at the avalanche of scientific evidence and industry documents and agreed that manganese from welding rod fumes was the cause of Ronnie Presler's brain damage."⁶

Similarly, many commentators continue to believe that welding fume exposure litigation holds the potential to explode in a manner reminiscent of other areas of mass tort litigation.⁷ Nevertheless, whether it explodes or merely continues to expand, as the number of welding-related liability lawsuits rises, so too will the number of claims tendered to the welding industry's general liability insurers. For the insurance industry, the prospect of yet another series of mass tort lawsuits is daunting indeed. As with other mass torts, however, the insurance industry is not without defenses.

This article outlines the claims being asserted in welding-related litigation and certain of the more significant associated insurance coverage issues. The article first explores allegations typically seen in underlying welding fumes exposure lawsuits. The article then

describes and discusses issues that are likely to arise when underlying welding fume exposure lawsuits are tendered to liability insurers for a defense and/or coverage, including trigger of coverage, timely notice, fortuity-based defenses, the pollution exclusion, and the products-completed operations hazard exclusion.

II. The Welding Lawsuits

A. The Allegations Of Welding Lawsuits

1. The Process And Alleged Dangers Of Welding

Welding fume exposure lawsuits are based on the premise that exposure to fumes released during the welding process causes injuries. During the welding process, pieces of metal are joined together by heating, often using a rod or wire filler metal to supply additional metal to create the weld. Manganese, among other materials, is often added to the rods and the base metal for added strength. When the metal and its constituent products are heated during the welding process, components of the welded metal and the rod are released into the air in the form of smoke and fumes. Among the many components and contaminants of the smoke is manganese, which has drawn the most attention from plaintiffs' attorneys.⁸

Manganese is a naturally occurring element. To date, no study has identified manganese compounds as human carcinogens, but long term, high level exposure has been reported to produce neurotoxic effects known as manganism, a disorder affecting motor function that is often compared to Parkinson's disease.⁹ Though studies are ongoing, preliminary conclusions suggest that manganism and Parkinson's are not the same, with each having its own distinct physiological characteristics. For example, manganism affects the basal ganglia of the brain while Parkinson's primarily affects the substantia nigra.¹⁰ Symptoms of manganism have been reported to include "a 'mask-like' face, difficulty walking, monotonous speech and slurring, balance difficulties, impulsive laughter or weeping, a peculiar, high-stepped gait known as a 'cock-walk,' tremor, cogwheel resistance of the extremities to applied force, difficulty rising from a chair, and writing difficulty."¹¹

2. Nature Of The Insureds And Claimants

Defendants in underlying welding exposure lawsuits most frequently include: designers, trade associa-

tions, welding rod manufacturers, welding equipment manufacturers, retailers, distributors, and consumers of welding products; and industrial users of welding products.¹² One trade association that has received particular attention is the National Welding Defense Group, which comprises thirteen welding rod manufacturers and has been the target of a large number of toxic tort suits alleging exposure to welding fumes.¹³ In addition, the National Electrical Manufacturers Association (NEMA) has been named as a defendant in some underlying welding exposure lawsuits, including in *Presler*.¹⁴ NEMA also was the subject of lawsuits brought by welders alleging injuries from exposure to manganese fumes and also was the plaintiff in a coverage action seeking a defense and indemnification in connection with those underlying lawsuits.¹⁵

On the other hand, the plaintiffs in the underlying suits typically are pipefitters, sheetmetal workers, boilermakers, welders' helpers, fire watchers, and even bystanders.¹⁶ Significantly, however, not all of those who have filed suit have exhibited symptoms of illness.¹⁷

3. Typical Welding Fumes Exposure Lawsuits

Plaintiffs claiming injury from exposure to welding fumes typically allege exposure to fumes containing manganese particles with such exposure taking place during the ordinary and intended use of welding products.¹⁸ Injurious exposure has been alleged not only by those performing the welding, but by those working nearby as well.¹⁹ The complaints assert that manganese is toxic to the central nervous system and that exposure to manganese-laden fumes for as few as seven weeks can cause progressive, disabling, and permanent neurological damage.²⁰ Plaintiffs contend that the defendants knew about the health hazards inherent in the welding products and ignored or deliberately and fraudulently concealed that information so that they could continue to profit from the allegedly harmful product.

Allegedly injured welders assert a host of injuries and illnesses stemming from their exposure to welding fumes. These injuries and illnesses often include: "[p]ermanent neurological and physical damage; pain; loss of wages, earning capacity and the ability to enjoy life; and mounting medical expenses."²¹ Other alleged indirect injuries include emotional damages

and damages for the anticipation of having to suffer from a manganese-related illness.²² The neurological damage at issue is usually described as either Parkinson's disease, a Parkinson's-like disease, or manganism (*i.e.*, manganese poisoning).

Theories of recovery include "negligence, negligence/sale of a product, strict liability/unreasonably dangerous product and loss of consortium"²³ and wrongful death.²⁴ In addition, plaintiffs allege inadequate warning, conspiracy, failure to investigate,²⁵ and other tortious acts including "negligently misrepresenting, concealing, suppressing and omitting material information about the health effects of welding fumes and precautionary measures."²⁶

In response to these claims, defendants have asserted defenses based on statute of limitations, statute of repose, product identification, low or insufficient dose, failure to read product warnings, failure to wear respiratory equipment, state of the art, failure to establish medical causation, and employer conduct.²⁷

Nevertheless, despite the asserted defenses to liability, and confirmed by the verdict in Elam, both direct and indirect injuries and damages are compensable in the eyes of jurors. For example, in finding that Mr. Elam was entitled to a \$1 million recovery, the jury in Elam awarded the plaintiff \$100,000.00 for disfigurement, \$100,000.00 for disability, \$70,000.00 for emotional distress, \$30,000.00 for treatment already rendered, and a staggering \$700,000.00 for medical care and future medical treatment.²⁸

B. Substantiating The Underlying Claim

Much of the debate concerning welding related liability has focused on the lack of medical science confirming the plaintiffs' alleged theories of causation between long-term exposure to welding fumes and the supposed resulting injury. This debate is pertinent to the availability of insurance coverage for such underlying lawsuits because, while an insurer's defense obligation is triggered when the underlying allegations implicate or potentially implicate coverage,²⁹ the insurer has no obligation to indemnify the policyholder if the claimant ultimately fails to establish liability. Though a comprehensive discussion of the medical science involved in proving the underlying injury lawsuit is beyond the scope of this article, a few points are noteworthy.

Before Elam, little headway had been made in the attempts to tie exposure to welding fumes and development of Parkinson's disease.³⁰ At the time of the Elam case, neurology experts such as Paul Nausieda, M.D., of the Regional Parkinson Center at Aurora Sinai Medical Center and Brad Racette, M.D., associate professor in the Department of Neurology at Washington University in St. Louis, Mo., were in the process of conducting studies with small numbers of welders, but studies like these were incomplete and uncorroborated. Howard Sandler, Ph.D., an occupational medicine expert and professor in Peabody's Psychology and Human Development Department, also was performing an epidemiological study on welders.³¹ Based on his research, Sandler had acknowledged that as of the date of Elam, there were no good epidemiological studies linking Parkinson's to manganese exposure.³²

In addition to questions concerning whether exposure to manganese actually *causes* Parkinson's, there are also questions about what level of manganese existing in welding environments is actually harmful in any respect. A review of present-day research reveals, however, that there is simply no consensus on what level of manganese in the air is safe, how much exposure causes neurological problems, and whether a welder's exposure in the workplace is enough to cause injury.³³ Thus, despite the increase in welding related lawsuits, there still is no agreement on what, if any, level of manganese exposure is required to cause injury.

Critics of welders' causation theories note that despite the long history of welding in this country, until very recently, there were very few reported cases of injury stemming from exposure to welding fumes. For instance, between 1917 and 1981 there were only 26 reported cases of suspected manganese poisoning of welders, an unusually small amount given the large amount of welding being performed during the wars of the 20th century.³⁴ In addition, the National Institute of Occupational Safety and Health (NIOSH), in an article titled "Health Effects of Welding," noted the lack of clinical case studies establishing that the manganese in welding fumes affected the central nervous system.³⁵ True enough, according to these critics, exposure to pure manganese in the workplace is dangerous. What is not clear is whether the exposure described in the complaints actually leads to neurological problems.³⁶

As a result of the uncertain medical evidence of causation, most artfully drafted complaints are purposefully vague in their allegations. Oftentimes the complaints do not allege that the welder actually developed Parkinson's. Rather, the complaints point to a Parkinson's-like, but unspecified, illness, so as to leave the plaintiffs' attorneys flexibility to redirect their litigation to follow the emerging medical science.

III. Coverage Issues

Although many types of insurance policies are at risk of exposure to welding-related claims, commercial general liability (CGL) policies are most directly at risk given their popular use among commercial enterprises and their familiarity among the policyholder's bar. CGL policies typically provide coverage for "sums" that an insured "becomes legally obligated to pay as damages."³⁷ The damages must flow from a third party's "bodily injury" or "property damage" and must be caused by an "occurrence," which is typically defined as an accident.³⁸ In addition, coverage will be available only where the insured timely notifies its insurer both of the event giving rise to the loss and any suit arising out of the loss.³⁹

Even where coverage is triggered and all conditions precedent to coverage have been satisfied, however, coverage may be explicitly excluded under the policy. In the welding context, the most pertinent policy-based exclusions are those concerning the release of pollutants or contaminants and those concerning loss arising out of the insured's product. Lastly, where the loss is not excluded, coverage still may not be available where the loss is one that the insured expected or intended to occur, or which occurred before the inception or procurement of coverage altogether.

A. Trigger Of Coverage

As is the case with most claims made under general liability insurance, before there can be coverage for a welding fume exposure claim, an "event," "accident," or "occurrence" causing injury must "trigger" coverage under the policy.⁴⁰ In some instances, the appropriate trigger is relatively easy to establish, such as where injury occurs at the discrete moment of the "accident" or "occurrence" from which it arises. Courts have struggled, however, where injury or damage occurs over time. To resolve the trigger question in circumstances where the alleged act causing the injury and the injury itself are not simultaneous, such

as often will be the case with occupational exposure to welding fumes, courts typically adopt one of four generally accepted trigger theories: "manifestation," "exposure," "injury-in-fact," and "continuous" or "triple-trigger."⁴¹ Each is discussed below.

1. The Manifestation Trigger

Under a manifestation trigger, coverage is implicated under those policies in effect at the time injury is discovered or, (if discovery is unreasonably delayed) at the time when the damage could have been discovered. Because the manifestation trigger focuses on discovery of the injury or damage, the date of the "accident" or "occurrence" that caused the injury or damage is of no consequence.⁴² Under a manifestation trigger theory, therefore, a policy on the risk on the date that injury becomes reasonably capable of medical diagnosis is triggered even where that injury or damage is the result of years of exposure to injurious conditions.⁴³

Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.,⁴⁴ a coverage action involving injuries allegedly caused by exposure to asbestos, describes the rationale underlying the manifestation trigger theory. In Eagle-Picher, the court found the policy's "bodily injury" language ambiguous and, in resolving that ambiguity, reasoned bodily injury is most often caused by some external violence or impact to the body.⁴⁵ By contrast, the asbestosis at issue in Eagle-Picher did not involve such external violence. Rather, asbestosis is a disease that cannot be detected until it results in symptoms from which a professional can diagnose the disease. The court concluded, therefore, that only those policies on the risk when the symptoms become diagnosable would be triggered.⁴⁶

In jurisdictions applying a manifestation theory, current and recent insurers of the welding industry could find their policies triggered by lawsuits alleging injury based on years of exposure to welding fumes where that prior exposure results in an injury diagnosed during a later policy period. That the alleged exposure occurred years or even decades before the inception of the coverage in place when diagnosis occurs would be of no consequence. Rather, whether a particular policy is triggered will depend largely, if not solely, upon the date when the alleged injury first manifested or was reasonably capable of diagnosis.

2. The Exposure Trigger

In contrast to a manifestation trigger, which would be unaffected by the dates of exposure to welding fumes, under an exposure trigger, only those policies in effect at the time of exposure would be triggered.⁴⁷ The rationale behind the exposure theory is, as articulated in the asbestos context, that “[a]lthough the diseased condition itself may not be capable of diagnosis for years, the subcellular changes are considered an ‘injury’ such that each exposure is treated as a separate and distinct injury.”⁴⁸ Under an exposure theory, therefore, those policies on the risk when the underlying claimant is exposed to the injury causing substance are triggered because, at the cellular level, injury is occurring upon exposure, even though that injury might not be detectable for years to come.⁴⁹ Of course, this rationale assumes that subcellular injury occurs upon exposure — something that may be the case with asbestos, but may be less clear in the context of exposure to welding fumes.

Applied in the context of a welding fume exposure claim, the number of triggered policies could be large, with each policy in effect during the period over which a claimant was exposed to welding fumes potentially being triggered. Thus, because welding plaintiffs typically allege repeated, if not daily, exposures to welding fumes, under an exposure trigger a single lawsuit, such as the *Elam* suit, could trigger dozens of policies. Indeed, in *Elam*, it was alleged that Mr. Elam had been exposed to welding fumes on a regular basis since 1967. It is possible, therefore, that all policies held by Mr. Elam’s employers and/or products suppliers during the period of his alleged exposure could be triggered under an exposure trigger.

The success of an exposure trigger is dependent, however, upon medical support that injury actually occurs upon exposure to the welding fumes. Thus, to the extent that medical science cannot support such a causal nexus between exposure to welding fumes and resulting injury, an exposure trigger theory may fail. In addition, given the current debate about whether exposure to welding fumes causes any injury at all, it may be years before insurers are willing to concede the requisite causal connection to support an exposure trigger. Nevertheless, because a liability insurer’s duty to defend is broader than its duty to indemnify, courts applying an exposure trigger still may find insurers

responsible for providing at least a defense for those years during which exposure is alleged.

3. The Injury-In-Fact Trigger

Under an injury-in-fact trigger, only those policies in effect at the time of actual injury are triggered. Thus, for every date that a claimant can prove injury was sustained, policies on the risk on that date are triggered.⁵⁰ This assessment is made “without regard to when exposure occurred or when the injury first became manifest.”⁵¹

An injury-in-fact trigger was adopted by the court in *American Home Products Corp. v. Liberty Mutual Insurance Co.*,⁵² which rejected both the exposure and manifestation triggers. Doing so, the court held that by virtue of the plain meaning of “occurrence,” only those injuries, sicknesses, or diseases that occur while the policy is in effect should be compensable. The *American Home Products* court listed several factors to consider in determining when such an “occurrence” has taken place, including the nature of the allegedly injurious substance, the intensity of the exposure to the substance, the capacity of the exposed person to withstand the danger and chance. Applying these factors, the court determined that the date of exposure and manifestation mattered only if the exposure or manifestation was accompanied by an identifiable and compensable injury, such as coughing up blood, since the physical manifestation would be indicative of an actual injury.

Applying an injury-in-fact trigger to injuries allegedly caused by welding-related exposures could result in coverage being triggered under those policies in effect when identifiable, compensable injuries, such as tremors or slurred speech are discovered. The application of this theory could be difficult in the welding context, however, because the nature of welders’ injuries is not always clear. For instance, as discussed above, significant questions still exist concerning the causal nexus between exposure to welding fumes and the alleged injuries and physical manifestations. There also are significant questions concerning the plaintiffs’ ability to prove the exact point in time that each particular injury occurred.

4. The Continuous / Triple Trigger

The broadest of the trigger theories is the continuous/triple trigger, under which policies are implicated from

the time of initial exposure through manifestation.⁵³ One court has applied this theory in the welding context.⁵⁴ In Lincoln Electric Co. v. St. Paul Fire & Marine Ins. Co., the insurer, St. Paul, issued policies to its insured over the fifty-one year period between 1945 to 1996. During that period, the insured became the target of various lawsuits alleging exposure to, among other things, welding fumes. In the ensuing coverage litigation, the district court found that, under Ohio law, coverage would be triggered continuously from the time of exposure through manifestation, diagnosis, and death. The Sixth Circuit affirmed, concluding that in the absence of explicit guidance from the policy at issue concerning injuries arising from long-term exposure and delayed manifestation, the policy created a rebuttable presumption that all policies in effect at the time of both exposure to welding fumes and manifestation of injury are triggered. The Lincoln Electric court relied upon the Federal Circuit's earlier decision in Keene Corp. v. Insurance Co. of North America,⁵⁵ in support of its conclusion that coverage is triggered anywhere along the continuum of injury, from exposure to actual injury.

B. Failure To Provide Timely Notice

In addition to proving that coverage has been triggered, it is also incumbent upon the insured to demonstrate compliance with all conditions precedent to coverage, such as timely notice of occurrence and timely notice of suit. Where conditions precedent to coverage are not satisfied, coverage may be precluded.

The allegations in underlying welding lawsuits raise serious questions about whether policyholders have complied with the terms of the policies, specifically, whether there was proper insurer notification. This is so mainly because the welding industry and its member companies allegedly have known for years about the suspected dangers associated with welding fume exposure. For example, it was alleged in Elam that the defendants knew about the hazards of welding fume exposure since 1937.⁵⁶ To the extent that proves to be the case and the insured failed to identify such risks to its insurers in a timely manner, coverage for claims arising out of those risks may be precluded.

Typical CGL policies require that, as a condition precedent to coverage, the insured notify the insurer in the event of a "claim," a "suit" or an "occurrence" that might expose the insured to liability. In order

to give the insurance company ample opportunity to investigate and minimize further losses, these notice conditions usually require that the insurer be provided with such notice "as soon as practicable." This means the insured must report an occurrence to its insurer when the insured has possession of facts that would suggest to a reasonable person that a claim, suit or occurrence is possible.⁵⁷

Courts routinely enforce such notice provisions, with a failure to comply possibly abrogating coverage.⁵⁸ In New York, for example, courts routinely require that insureds comply with their policy notice provisions.⁵⁹ Failure to do so is a violation of a condition precedent to coverage relieving the insurer of its obligations to the insured.⁶⁰

In some jurisdictions, however, an insured loses its right to coverage based on a failure to timely notify its insurer only when the insurer has been prejudiced by the untimely notice.⁶¹ In Port Services Co. v. General Insurance Co.,⁶² for example, the insured, a vehicle processing facility, decoated its vehicles using a solvent containing kerosene. In April 1990, the owner of the site notified the insured that kerosene had leaked and seeped into the soil. The site owner immediately demanded that the insured remediate the contamination. The insured, however, waited three months — until July of 1990 — to report the occurrence to its insurer. In the subsequent coverage litigation, the insurer asserted that coverage was barred because the insured failed to provide timely notice of the occurrence. The court rejected the technical assertion and required that the insurer prove prejudice from the untimely notice. In doing so, the court explained that prejudice occurs when the insurer is precluded from making reasonable investigation of the loss. The court then concluded, as a matter of law, that the insured's decision to wait three months, during which time corrective excavation took place without the insurer's input or guidance, prejudiced the insurer because the insurer was denied the opportunity to participate in the remedial efforts.

In other jurisdictions, such as Connecticut, late notice gives rise to a presumption of prejudice.⁶³ In such jurisdictions, the insured has the burden of showing that the delay has not prejudiced the insurer.⁶⁴ In Aetna Casualty & Surety v. Murphy, for example, the insured was sued for damages resulting from the way

he dismantled his office after termination of a lease.⁶⁵ The insured received a complaint from the landlord on November 21, 1983, but did not notify his insurers until January 10, 1986. In subsequent coverage litigation, the insurer sought summary judgment based on the insured's untimely notice of suit. The court granted summary judgment to the insurer after finding that the insured failed to prove the absence of prejudice from the untimely notice.

In still other jurisdictions, timely notice is a condition precedent to coverage without regard to the existence of insurer prejudice.⁶⁶ In Olin Corp. v. Insurance Co. of North America,⁶⁷ for example, the court held, under New York law, that the insured's untimely notice was a complete bar to coverage. The Olin court found that the company knew or should have known that the discharge of mercury from one of its plants into the Holston River could and did cause property damage. The company knew of the mercury problem in the early 70s, as evidenced by internal memoranda and monitoring, as well as the negotiation of a consent decree in 1982, although the company did not notify its insurer until 1983.

Olin's failure to provide timely notice precluded coverage as a matter of law. The court explained that even giving Olin the benefit of the doubt and finding that there was no reportable occurrence until 1982, the insured's decision to wait a year before contacting the insurers precluded coverage.

Regardless of whether prejudice is required, insurers have a strong argument that the members of the welding industry have for years failed or deliberately refused to provide insurers with notice of events likely to give rise to claims. As in Olin, the underlying welding complaints now being filed allege that the industry defendants have been aware of the dangers associated with prolonged exposure to welding fumes since the 1930s.⁶⁸ For example, according to the Elam complaint, in the 1930s, members of the welding industry received copies of an article documenting two cases of neurological injury in welders caused by manganese poisoning from welding fumes.⁶⁹ It is further alleged that, in 1966, members of the American Welding Society Filler Metal Committee reviewed an article identifying manganese as a toxic substance in welding.⁷⁰ Perhaps most significant from a late notice standpoint, however, is that in the late 1970s and

early 1980s, the American Welding Society Safety and Health Committee allegedly learned that welders were suffering neurological injuries supposedly caused by manganese in welding fumes.⁷¹

As the welding industry became aware of alleged injuries and concerns over injuries arising out of occupational exposure to welding fumes, the industry may have been under an obligation, under the notice provisions of the CGL policies then in effect, to inform insurers of the alleged injuries and concerns. Likewise, as discussed below in the context of whether welding fume-related injuries were expected or intended by the welding industry, welding industry insureds may have been under an obligation to disclose in their insurance applications their knowledge or expectation that claims arising out of exposure to welding fumes may materialize. In either case, dozens of years may have passed between the welding industry's apparent knowledge of relevant facts and notice to its insurers. As a result, the industry's insurers may have been prejudiced in both their ability to investigate claims and their ability to mitigate their losses, including the ability to refrain from issuing coverage altogether, or issuing coverage without specific welding or products-related exclusions, limitations or sub-limits. Consequently, insurers may now have persuasive arguments that coverage is barred due to the industry's failure to provide timely notice.

C. Coverage Is Available Only For Fortuitous Losses

1. Known Losses And Losses-In-Progress

Fortuity, which is implicit in every contract for insurance, ensures that coverage only is available for events that are "beyond the control of either party."⁷² Courts have long recognized the necessity that a loss be fortuitous in order for the loss to be one covered by insurance. Fortuity is typically enforced through one of two doctrines — the "known loss" doctrine and the "loss-in-progress" doctrine. Regardless of the name, both operate to preclude coverage for losses that existed prior to the inception of the insurance policy.⁷³ Moreover, these doctrines bar recovery even in the absence of explicit fortuity provisions in the insurance contract.⁷⁴

The known loss doctrine has been applied to bar coverage for acts or losses that preceded the procurement

of coverage. The doctrine is premised on the concept that insurance policies are contracts based upon some contingency or act to occur in the future.⁷⁵ Similarly, the loss-in-progress doctrine operates to bar coverage for losses that are imminent or in progress at the inception of coverage. A classic example of a loss-in-progress involves an insured who procures a flood insurance policy after floodwater poses an immediate threat to his home.⁷⁶

The known loss and loss-in-progress doctrines are particularly applicable to welding fume exposure claims and, based on information currently available, the doctrines should provide insurers of the welding industry with another substantial defense. For example, documents obtained through certain underlying lawsuits strongly suggest that the welding industry has known of the dangers associated with welding since the 1930s. This was the case with Elam, where the amended complaint specifically alleged that on March 16, 1937, on January 20, 1938, and on June 23, 1938, NEMA and AWS, two welding industry trade groups, with the defendants in attendance, actively, intentionally concealed known hazards associated with welding fumes by forming a "Dust and Smoke Committee" to preempt investigation, and by changing the language of a publication used by an insurance company to delete the original statement that manganese fumes caused a disabling illness similar to Parkinson's.

Armed with that and similar information, the welding industry apparently failed to adequately inform and safeguard its employees from the dangers of welding fume exposure and may have even misrepresented and/or omitted reference to those dangers when preparing their insurance applications. Where such allegations and facts are provable, an insurer should be able to defeat coverage to the extent that the insured exposed either itself or its insurer "to a calculated risk, himself calculating and the insurance company unknowingly taking the risk."⁷⁷

Over time, however, courts have become increasingly reluctant to defeat coverage based solely on a lack of fortuity. This shift was seen in Stonewall Insurance Co. v. National Gypsum Co.⁷⁸ There, the court acknowledged the existence of the fortuity doctrine, but concluded that the insurers failed to provide evidence that the insured sufficiently knew of the loss. The evidence presented instead demonstrated that the insured

knew of the *risk* of a loss, which was not compelling enough to survive a summary judgment motion. Factually, the insurance company in this asbestos case argued that it should not be required to pay for property damage known to exist prior to the inception date of the policy. The insurer argued that the insured was on notice of the loss by virtue of EPA documents, an Act of Congress, an attorney general report, a report from the company noting the existence of class actions, and other facts. The court, however, found the information only amounted to knowledge of the risk of loss, not knowledge of an actual loss.

The facts of Stonewall, which failed to support a known loss defense, are distinguishable from those typically alleged in suits involving exposure to welding fumes. For example, as illustrated by the complaint in Elam, rather than relying on reports conducted by government entities, much of the information available to the welding industry originated from the industry's own investigations, research and reports. Further, the welding industry is alleged to have known not just about the risk of injury, but of actual reports of manganese poisoning and neurological injuries in welders. As a consequence, insurers of the welding industry may have a stronger argument than asbestos insurers that injuries alleged by welders are not part of the calculated risks knowingly assumed by insurers.

2. Expected Or Intended

In addition to fortuity-based defenses such as known losses and losses-in-progress, general liability policies do not provide coverage for injury that is expected or intended. This concept arises in two ways. On the one hand, the concept that coverage is not available for bodily injury or property damage expected or intended by the insured can arise through the definition of "occurrence," which some policies define as "an accident . . . which results . . . in bodily injury or property damage neither expected nor intended from the standpoint of the insured." On the other hand, other policies omit the "neither expected nor intended" language from the definition of occurrence, but insert similar language back into the policy in the form of an exclusion. The purpose of the language is the same regardless of its location in the policy — to defeat coverage for bodily injury or property damage that the insured expected or intended to occur. But, the distinction in location can be significant.

In Farmland Mut. Ins. Co. v. Scruggs, for example, the underlying lawsuit alleged misappropriation of patented seeds.⁷⁹ The policy provided that “bodily injury or property damage must be caused by an occurrence. . . .” “Occurrence” was defined as “an accident. . . .” “Accident,” in turn was defined as a “sudden unforeseen or unintended event.” The court found, however, that only intentional conduct and intentional torts were alleged in the underlying lawsuit. Consequently, the court concluded that there could be no coverage for the underlying lawsuit because all of the insured’s alleged conduct was intentional — *i.e.*, not “unforeseen or unintended.” Thus, there was no “accident,” and, as a result, the alleged loss was not caused by an “occurrence.”

In contrast, rather than requiring that the bodily injury or property damage be caused by some event neither expected nor intended by the insured, some policies specifically exclude coverage that is either expected or intended by the insured. This was the case in Morris v. Travelers Indem. Co., an action arising out of a shootout.⁸⁰ In Morris, the underlying lawsuit sought relief for, among other things, defendant’s “willful and wanton negligence” — *i.e.*, the defendant intended to shoot the gun but did not intend the resulting harm. The court ruled characterizing the cause of action as “willful and wanton negligence” does not resolve the matter; for purposes of determining insurance coverage, the focus should be on the *specific facts alleged* in the underlying complaint. In the underlying complaint, the plaintiff alleged that there was a “strong probability” that shooting would cause injury to another. Based on this allegation, the court ruled that the injury was “expected” and coverage was barred by the expected/intended exclusion.

While the net effect of including the expected or intended language in either the definition of “occurrence” or in an exclusion remains the same — that there can be no coverage for bodily injury or property damage expected or intended by the insured — the location of the language does make a difference in who bears the burden of proving that the injury was, in fact, expected or intended. Specifically, and consistent with the general principles governing insurance contract construction which require that the insured prove the existence of a covered occurrence after which the insurer prove the applicability of any policy-based exclusions, where the expected or

intended limitation is contained within the definition of “occurrence” or “accident,” the burden will be on the insured to demonstrate that the loss was neither expected nor intended.⁸¹ On the other hand, where the expected or intended limitation is in the form of a policy-based exclusion, the burden may be on the insurer to prove the applicability of the exclusion.⁸² This difference in burden can be significant and can make the difference in whether coverage is available for a particular claim.

D. Coverage May Be Altogether Excluded

Whether there has been an “event,” “accident,” or “occurrence” resulting in injury is not alone determinative of whether a claim for welding related injury is covered. Indeed, even where there has been an event worthy of triggering coverage, the resulting bodily injury or property damage still may be excluded from coverage under one or more applicable policy-based exclusions. One such exclusion that is particularly pertinent to claims arising from the alleged exposure to manganese-laden welding fumes is the pollution exclusion. Another pertinent exclusion is the products hazard exclusion. Both are discussed below.

1. Pollution Exclusion

Coverage for claims of bodily injury arising out of exposure to welding fumes may be expressly excluded under contracts for general liability insurance by virtue of the contracts’ pollution exclusions. These exclusions typically bar coverage for claims caused by pollutants, which in most liability insurance contracts, are defined to include, among other things, irritants, contaminants and fumes.

a. The Terms Of The Pollution Exclusion

Pollution exclusions typically preclude coverage for claims arising out of the “release” or “discharge” of “pollutants,” a term defined to include smoke, vapor, soot, and fumes, among other substances. Beginning in the early 1970s, most general liability policies included a pollution exclusion that excluded coverage for “‘releases’ and ‘discharges’ of ‘pollutants,’” but only if the release or discharge was not “sudden and accidental.”⁸³ In other words, where the release of the pollutant occurred suddenly and accidentally, an exception to the pollution exclusion could restore coverage. Whether a release was, in fact, “sudden” or

“accidental,” however, has been aggressively litigated and, by 1985, the phrase had drawn so much debate⁸⁴ that insurers began to replace the sudden and accidental exclusion with “absolute” or “total” pollution exclusions, which do not include such an exception.

Like its predecessor, the “absolute” pollution exclusion precludes coverage for claims arising directly or indirectly from the release or dispersal of pollutants or contaminants. The “absolute” exclusion, however, does so without regard for any so-called temporal limitations or whether the losses were expected. One variation of such an exclusion was applied as a total bar to coverage for welding fume related bodily injuries in *NEMA v. Gulf Underwriters Ins. Co.*, where the Fourth Circuit Court of Appeals held that claims for welding fume-related injuries fall squarely within the scope of the absolute pollution exclusion.

In 1988, the “total” pollution exclusion was introduced. The “total” version of the exclusion differed from the “absolute” version only in that the “total” version precluded coverage for releases from products as well as off-site releases of pollutants.⁸⁵

b. Are Welding Fumes Pollutants?

Pollution exclusions in modern general liability policies typically exclude coverage for “‘bodily injury’ or ‘property damage’ arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants. . . .” The policies typically go on to define a “pollutant” as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.”⁸⁶

Thus, as its name implies, the pollution exclusion bars coverage for loss caused by pollutants. This is the case regardless of the nature of the underlying claim.⁸⁷ Policyholders, however, often argue that pollution exclusions only apply to traditional forms of environmental contamination. Such an argument ignores the plain meaning of the exclusion, which contains no such limitation, and seeks to judicially rewrite the pollution exclusion.

Nevertheless, despite policyholders’ attempts to limit the scope of the pollution exclusion in a manner inconsistent with the exclusion’s plain language,

courts at present are divided as to whether the pollution exclusion applies to damages and/or injuries arising from exposure to substances that are not viewed as traditional pollutants, such as lead paint, carbon monoxide, and sewage. Some courts find the language of the exclusion to be broad and unambiguous.⁸⁸ These courts generally hold that there is no coverage for claims involving such substances.⁸⁹ Other courts, however, have examined the exclusion within the context of its historical development and found the exclusion ambiguous when applied to non-traditional environmental pollutants.⁹⁰

In light of these and other decisions, the issue of whether welding fumes and their constituent elements constitute a pollutant has been the subject of litigation, although that litigation was quickly resolved. This is because the definition of “pollutant” under the standard form CGL policy, which defines “pollutant” to include “fumes.” Thus, as the court in *NEMA* explained:

The exclusion serves to relieve Gulf of its duty to defend claims where those claims arise from “the creation of an injurious condition involving any Pollutant.” The exclusion defines “pollutant” to include any “solid, gaseous or thermal irritant,” including “fumes,” and operates to exclude coverage “whether or not [NEMA] caused or contributed to the pollution.” As NEMA acknowledges, the welder claims arise from the creation of injury resulting from exposure to manganese fumes, and fumes qualify as a pollutant under the exclusion.⁹¹

Consequently, as the court correctly concluded in *NEMA*, because pollution in the context of CGL policies includes, by definition, fumes, claims caused by or arising out of fumes from the welding process should be and, in fact, were, excluded from coverage by the pollution exclusion.

c. Indoor vs. Environmental Pollution / Contamination

In addition to arguing that the pollution exclusion applies only to certain types of pollutants, policyholders also seek to artificially limit the pollution exclusion to only exclude coverage only for so-called “traditional”

or “environmental” pollution, such as the gradual leakage of fuel or sewage from a rusting storage vessel.

Some courts have been sympathetic to this argument. For example, in Board of Regents v. Royal Insurance Co.,⁹² the court held that coverage for contamination of air within a building was not precluded by the pollution exclusion, because the exclusion only applied to contamination to the “atmosphere,” which did not include the ambient air. Similarly, the courts in Continental Casualty Co. v. Rapid-American Corp.⁹³ and Queen City Farms, Inc. v. Aetna Casualty & Surety Co.⁹⁴ found that similar exclusions did not apply where the contaminants were released in a confined environment. Likewise, in Enron Oil Trading & Transportation Co. v. Wallbrook Insurance Co.,⁹⁵ the Ninth Circuit affirmed a trial court’s conclusion that “contamination” is an environmental term of art applying only to discharges into the environment. The Enron court held that words like “seepage, pollution and contamination” send “an unmistakable message to the reasonable reader that the exclusion deals with environmental-type harms.”⁹⁶

Conversely, many courts correctly apply the plain language of the pollution exclusion, which contains no limitation as to the environment, as a bar to all pollution-related claims. In Cook v. Evanson,⁹⁷ for example, the court refused to artificially limit the exclusion to the environmental context because the exclusion specifically defined “pollutants” without limiting its application to classic environmental pollution.⁹⁸

Similarly, in NEMA, the court applied the pollution exclusion as a bar to coverage for underlying welding exposure claims and, in doing so rejected NEMA’s contention that the exclusion only applied in the limited context of environmental contaminants.⁹⁹ Instead, the NEMA court relied on the plain and unambiguous terms of the policy, concluding that the pollution exclusion unambiguously and explicitly excludes coverage for welding fumes. The court provided two reasons for its finding. First, the court found that the underlying complaint specifically alleged exposure to “fumes, particulates and gases.” As the terms of the pollution exclusion defined “pollutant” to include “any solid, gaseous or thermal irritant or contaminant” including “fumes,” the court concluded that the injury described in the complaint plainly came within the scope of the exclusion.

Second, the NEMA court rejected the policyholder’s contention that coverage was not barred because the underlying allegations sounded in negligence. Rather, the court concluded that the underlying claimant’s theory of liability had no bearing on the cause of the injury, which was pollution. As a result, the pollution exclusion plainly barred coverage.¹⁰⁰

The NEMA court conclusion is consistent with decisions from other courts around the country that have applied the pollution exclusion to a host of contaminant release situations, without regard to whether the claims involve so-called traditional, environmental pollution.¹⁰¹ These decisions suggest, therefore, that courts will continue to do so when faced with welding coverage disputes, which, as NEMA illustrates, fall squarely within the plain language of the exclusion.

d. Is There A ‘Discharge, Dispersal,’ Or ‘Release?’

In addition to qualifying welding fumes and their constituent manganese as a “pollutant” or “contaminant,” in order for the pollution exclusion to bar coverage, there also must be an “actual, alleged or threatened discharge, dispersal . . . [or] release . . .” of the pollutant or contaminant. Whether exposure involves a “discharge, dispersal,” or “release,” as those terms are used in the pollution exclusion, has focused largely on whether the “discharge dispersal,” or “release” occurred indoors or outdoors into the environment. Several courts have narrowly construed these terms and held that the pollution exclusion does not apply to claims concerning indoor air quality. Rather, these courts hold that the pollution exclusion only applies in instances of traditional industrial pollution — *e.g.*, into the land, air and water by a polluter actively engaged in the pollution as part of a business enterprise.¹⁰²

For example, in Island Associates v. Eric Group, Inc., a Pennsylvania federal court found that the pollution exclusion does not bar coverage for fumes confined to a small area within a worksite because such fumes had not been “discharged, dispersed, [or] released.”¹⁰³ The court explained:

Without belaboring the obvious, we hold that this exclusion is intended to shield the insurer from the liabilities of the insured to outsiders, either neighbor-

ing landowners or governmental entities enforcing environmental laws, rather than injuries caused by toxic substances that are still confined within the area of their intended use.¹⁰⁴

Similarly, in Lumbermens Mutual Casualty Co. v. S-W Industries, Inc., the Sixth Circuit refused to classify the presence of fumes in a manufacturing plant as a “discharge dispersal,” or “release.”¹⁰⁵ In S-W Industries, the policy terms at issue excluded coverage for damages arising out of “the discharge, dispersal, release or escape” of pollutants “into or upon land, the atmosphere, or any watercourse or body of water.”¹⁰⁶ In construing the meaning of those terms, the court explained, under Ohio law, that:

A “discharge” is defined as “a flowing or issuing out.” To “disperse” is defined as “to cause to breakup and go in different ways”; “to cause to become spread widely.” A “release” is defined as “the act of liberating or freeing discharge from restraint.” An “escape” is defined as an “evasion of or deliverance from what confines, limits, or holds.”¹⁰⁷

In S-W Industries, the fumes and dust leading to the injuries at issue were confined to the inside of the plant and, more particularly, to the area where the injuries occurred.¹⁰⁸ The court concluded, therefore, that the presence of the fumes and dust in the air inside the plant did not fall within the scope of the pollution exclusion.¹⁰⁹

The Fourth Circuit reached an opposite result in Assicurazioni Generali v. Neil, where the court held, applying Maryland law, that a liability policy’s pollution exclusion would bar a claim for indoor air contamination.¹¹⁰ In Assicurazioni, hotel guests suffered from carbon dioxide poisoning while staying at the insured’s hotel. The court rejected the insured’s argument that the pollution exclusion was inapplicable as a bar to coverage because the pollution exclusion applied only to environmental pollution, concluding instead that the exclusion indeed applied to the carbon dioxide contamination of the hotel.¹¹¹

Similarly, in Lexington Insurance Co. v. Unity/Waterford-Fair Oaks, Ltd.,¹¹² a Texas federal court

concluded that a policy’s pollution exclusion would bar coverage for an indoor mold claim resulting from rain-related flooding.¹¹³ In doing so, the court rejected the insured’s argument that mold was not “released, discharged, or dispersed” into the air.¹¹⁴ Rather, the court found that the “process of mold proliferation involves existing mold bodies giving off reproductive spores that are dispersed via the air into the surrounding environment.”¹¹⁵ The Lexington court concluded, therefore, that the pollution exclusion had adequately been triggered.

There can be little question that the emission of manganese-laden welding fumes constitutes as “discharge, dispersal . . . [or] release . . .” of a pollutant or contaminant. The more difficult question for some court will instead be whether such a “discharge, dispersal . . . [or] release . . .” occurring indoors or in a confined location will constitute a “discharge, dispersal . . . [or] release . . .” for purposes of triggering the pollution exclusion and thereby barring coverage. As the better reasoned cases suggest, the answer to that question is in the affirmative. As a result, following those decisions, coverage for welding fume exposure claims should be barred by the pollution exclusion.

2. Products — Completed Operations Hazard Exclusion

In addition to excluding coverage for welding fume claims because those claims arise out of exposure to pollutants, coverage also may be excluded where the claims arise out of the insured’s products. General liability policies typically afford coverage for product-related liabilities under what is known as the products-completed operations hazard (Products Hazard). This hazard is not an extension of coverage. Rather, it is a definition that categorizes particular types of claims that are otherwise covered under the policy so that a separate limit of liability can be applied. Likewise, where no products coverage is to be afforded, an exclusion can easily be appended to the policy thereby removing coverage for claims falling within the Products Hazard. Such exclusions are known as products-completed operations hazard exclusions (PHE).

The typical PHE incorporates the policy-defined products hazard and thereby excludes all claims (1) “arising out of” the insured’s work or product; (2) occurring away from the insured’s premises; and (3) resulting in bodily injury or property damage as defined in the pol-

icy. As the definition provides, the PHE does not apply to liabilities caused by products that are still within the physical possession of the insured manufacturer or work that has not yet been completed or abandoned.

Most courts that interpret the Products Hazard definition to be unambiguous construe that definition broadly, applying it to all product-related claims, regardless of the underlying theory of recovery.¹¹⁶ For example, in Brazas Sporting Arms, Inc. v. American Empire Lines Insurance Co.,¹¹⁷ the First Circuit held that, by its plain meaning, the PHE applied to all product-related injuries.¹¹⁸ According to the Brazas court and others, the relevant inquiry is not whether the underlying claim is grounded in tort liability; instead, it is whether the claim comes within the plain meaning of the Products Hazard definition in the insurance contract.

By its own terms, the Products Hazard includes all bodily injury or property damage “arising out of” the insured’s work or product. Therefore, in determining whether a product claim will be excluded, the issue is whether the claim can be said to “arise out of” the insured manufacturer’s completed product, so long as the other conditions of the definition are satisfied.¹¹⁹ For example, in Brazas, the First Circuit held that a firearms distributor’s claims for defense and indemnity arising out of the manner in which the distributor sold its guns were barred by the PHE contained in the distributor’s general liability policies.¹²⁰ The underlying claimants alleged that the firearms distributor had “negligently, willfully, knowingly, and recklessly flooded the firearms market [with handguns].”¹²¹ No defect in the firearms themselves was alleged. Nonetheless, in seeking coverage, the distributor claimed that the PHE was ambiguous and that a reasonable insured would interpret the exclusion narrowly, thus applying it only to defective products.¹²² Because the guns were not alleged to be defective, the distributor demanded that the claims be covered. The First Circuit soundly rejected the distributor’s argument and refused to read into the PHE the policyholder’s artificial defective product limitation. According to the court, the PHE was unambiguous and, consequently, would be given its plain meaning, which in Brazas, meant that the exclusion applied to all product-related injuries.¹²³

Similarly, in Beretta U.S.A. Corp. v. Federal Insurance Co.,¹²⁴ the Fourth Circuit held a PHE to unambigu-

ously bar coverage for claims arising out of the insured gun manufacturer’s allegedly negligent marketing and distribution practices.¹²⁵ Applying Maryland law, the court noted that, so long as the claim emanated from the marketing and distribution of the insured’s product, the exclusion applied “irrespective of the theory of liability by which [the plaintiff sought] redress for his injury.”¹²⁶ The Beretta court then recognized the First Circuit’s decision and reasoning in Brazas and agreed that “the plain language of the [Products Hazard] exclusion was not limited to defective products claims.”¹²⁷

Courts taking the position that the “arising out of” language in the Products Hazard definition and, by incorporation, the PHE, is unambiguous tend to construe that language broadly. For example, according to the First Circuit in Brazas, Massachusetts courts interpret “arising out of” as requiring “intermediate causation,” a standard somewhere between the concepts of “proximate causation” and “but-for” causation in tort law.¹²⁸ On the other hand, according to the Fourth Circuit in Beretta, Maryland courts find that “arising out of” is satisfied by mere “but-for” causation.¹²⁹ In either case, the “arising out of” language “indicates a wider range of causation than the concept of proximate causation in tort law.”¹³⁰ By contrast, claims under the Restatement (Third) apparently require the same proximate causation requisite of tort claims generally. Thus, Brazas and Beretta hold that the PHE is potentially broader than liability in tort under the Restatement (Third) both because application of the exclusion does not require the “proximate causation” requisite of tort claims and because the exclusion potentially applies to all product-related injuries, even those where no product defect has been alleged.

Nevertheless, although many courts have found the Products Hazard definition to be unambiguous, the view is not universal. For instance, in Taurus Holdings, Inc. v. United States Fidelity and Guaranty Co.,¹³¹ a federal district court initially found the exclusion to be ambiguous in the context of claims alleging injury arising out of the insured’s product, but which also alleged that the injuries were caused by the manner in which the insured designed, marketed, sold and distributed the product.¹³² The court’s finding of ambiguity was premised on several seemingly conflicting intermediate appellate decisions, includ-

ing Westmoreland v. Lumbermens Mutual Casualty Co.,¹³³ where a Florida appellate court had previously discussed the "inherent ambiguity" of the phrase "arising out of,"¹³⁴ Florida Farm Bureau Mutual Insurance Co. v. Gaskins,¹³⁵ where a Florida appellate court construed the "arising out of" language as requiring proximate causation,¹³⁶ and the more recent appellate decision in Associated Electric and Gas Insurance Services, Ltd. v. Houston Oil and Gas Co.,¹³⁷ which required a lesser standard of causation.¹³⁸ The Taurus court labeled these conflicting decisions an ambiguity and found in favor of the insured gun distributor.¹³⁹

Several months later, the Florida Supreme Court decided Koikos v. Travelers Insurance Co.,¹⁴⁰ and, in doing so, clarified the manner in which Florida courts should construe the phrase "arising out of." The Taurus court then reconsidered its earlier finding of ambiguity and, following Koikos, concluded that a correct analysis of the phrase "arising out of" should focus on the cause of the injury (*i.e.*, the shooting of the gun), and not the more attenuated negligence that might have contributed to the shooting. The district court concluded on reconsideration, therefore, that the underlying injuries, all of which allegedly were caused by the insured's product, arose out of the product.¹⁴¹ Coverage, therefore, would be barred.¹⁴²

The Taurus decision is currently pending appeal, and the issue of whether the PHE applies to on-premises negligence of the insured, which results in off-premises injury caused by the insured's product, has been certified to the Florida Supreme Court. Nevertheless, until the decision is affirmed, the decision stands as a reminder that at least some courts may construe the "arising out of" language of the PHE as requiring proximate cause, akin to proximate cause in tort, thus limiting the scope of the PHE to claims arising only out of the insured's product and not out of the insured's marketing activities.¹⁴³

The PHE should apply equally to claims against the welding industry as it did and continues to apply to claims against the firearm industry. This is particularly the case where, as in Beretta and Taurus, the claims are asserted against insureds involved in the manufacture of a product that allegedly causes injury. The exclusion also should be particularly effective where, as in Brazas, the insured is not a manufacturer, but merely a distributor of allegedly injurious products.

IV. Conclusion

As has been the case for asbestos, firearm and mold litigation, welding fumes exposure litigation is likely to result in millions if not billions of dollars in underlying claims. Although claims involving welding fume exposure are relatively new, these new claims raise coverage issues that have already been litigated and decided in other mass tort matters. Those decisions suggest that insurers have strong defenses to coverage against claims presented by the welding industry.

Endnotes

1. See, *e.g.*, "Welding Rod/Magnesium Litigation Update," NEWS AND NOTES (Karbal Cohen Economou Silk Dunne) July 2004, at 1-4.
2. Joseph K. Hetrick, Ann K. Snyder, and Benjamin J. Goldman, "Plaintiff Verdict in Welding Rod Case Prompts Flood of Litigation," LITIGATION WATCH: WELDING RODS, April 2004, at 1.
3. "Welding Rod/Magnesium Litigation Update," *supra*, note 2, at 2-3.
4. Presler v. The Lincoln Electric Co., (Tex. Dist. Ct.) (No. 23472).
5. Richard Stewart, "Judge declares mistrial in lawsuit by welder," Houston Chronicle, Feb. 11, 2005, available at <http://www.chron.com/cs/CDA/ssistory.mpl/metropolitan/3036152>.
6. *Id.*
7. Hetrick, *supra* note 3, at 1, 6 ("While welding rod litigation is currently in its nascent stages, there is no reason to believe that it will diverge from the patterns set by other areas of mass tort litigation . . . According to the U.S. Department of Labor's Bureau of Statistics, there are approximately 521,000 workers employed as welders in the United States").
8. Howard M. Sandler, M.D., "Potential Health Risks Associated with Welding and Manganese Expo-

- sure," Presentation at *Mealey's Welding Rod Litigation Conference* (March 11-12, 2004). Other components include magnesium, sodium, cadmium, iron, nickel, zinc, ozone, calcium, aluminum, chromium, lead, silica, CO, potassium, beryllium, fluorides, titanium, and Nox. *Id.*
9. *Id.*
 10. *Id.*
 11. *Id.*
 12. See, e.g., Hetrick, *supra* note 3.; "Louisiana Man Alleges Trade Associations Concealed Manganese Welding Hazards," 1-2 **Mealey's Litig. Report Welding Rods** 8 (2004) [hereinafter Trade Associations article]; Jeffrey Hebrank, The Defense Case, PowerPoint Presentation at *Mealey's Welding Rod Litigation Conference* (March 11, 2004).
 13. "Welding Rod Manufacturer Sues Insurers for Breach of Defense Agreement," 6-7 **Mealey's Emerg. Ins. Disps.** 6 (April 2001).
 14. Presler v. The Lincoln Electric Co., (Tex. Dist. Ct.) (No. 23472).
 15. See generally Nat'l Elec. Mfrs. Ass'n v. Gulf Underwriters Ins. Co., 162 F.3d 821 (4th Cir. 1998).
 16. See, e.g., Hebrank, *supra* note 13.
 17. Hetrick, *supra* note 3, at 5.
 18. See, e.g., Am. Compl., Elam v. AIRCO/BOC Group, Inc., (Ill. Cir. Ct. April 15, 2003) (No. 01-L-1213).
 19. See, e.g., Hebrank, *supra* note 13.
 20. See, e.g., Compl. ¶¶ 5, 6, Buritz v. Airco, Inc., (N.D. Ill. Aug. 28, 2003) (No. 03C 6111).
 21. *Trade Associations article, supra* note 13. See also, e.g., Class Action Compl., Davis v. Lincoln Elec. Co., (Ct. Com. Pl. Pa. 2003) (2003 WL 23180988); Am. Compl., Elam (No. 01-L-1213); Compl., Clinger v. Lincoln Elec. Co., (E.D. Ohio February 16, 2004) (No. 1:2003cv17000); Compl., LeBlanc v. Lincoln Elec. Co., (W.D. La. March 26, 2004) (No. CV04-0738-LC).
 22. See, e.g., Class Action Compl. at Counts VII, VIII, Davis, (2003 WL 23180988).
 23. *Trade Associations article, supra* note 13.
 24. See, e.g., Class Action Compl. at Count IX, Davis, (2003 WL 23180988).
 25. See, e.g., Hebrank, *supra* note 13.
 26. *Trade Associations article, supra* note 13.
 27. See *id.*
 28. See Verdict Form A, Elam (No. 01-L-1213) (available upon request from authors).
 29. See, e.g., Am. Cont'l Ins. Co. v. Pooya, 666 A.2d 1193, 1197 (D.C. 1995).
 30. See, e.g., "Welding Rod/Magnesium Litigation Update," *supra*, note 2.
 31. *Id.*
 32. *Id.*
 33. Hetrick, *supra* note 3.
 34. Michael W. Ulmer, Emerging Issues in Welding Litigation, Presentation at *Mealey's Welding Rod Litigation Conference* (March 12, 2004).
 35. *Id.*
 36. *Id.*
 37. See, e.g., ISO form CG 00 02 10 01.
 38. *Id.*
 39. *Id.*
 40. See, e.g., M. Jane Goode, "Bodily Injury and Personal Injury," 2 Law and Prac. of Ins. Coverage Litig. § 6.6 (2002) (describing the development of

- the interpretation of "accident" and "occurrence" with respect to trigger of coverage).
41. *See id.* (noting that many of these theories "were developed in response to the deluge of claims for asbestos bodily injury").
 42. *See, e.g., Eagle-Picher Indust., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982).
 43. Liberty Mut. Ins. Co. v. Commercial Union Ins. Co., 978 F.2d 750 (1st Cir. 1992).
 44. 682 F.2d 12.
 45. *Id.*
 46. *Id.* at 19-20.
 47. This theory was first advanced in Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980).
 48. Goode, *supra* note 41.
 49. *See, e.g., Commercial Union Ins. Co. v. Sepco Corp.*, 765 F.2d 1543 (11th Cir. 1985); Cole v. Celotex Corp., 599 So. 2d 1058 (La. 1992); Chantel Assoc. v. Mount Vernon Fire Ins. Co., 656 A.2d 779 (Md. 1995); United States Liab. Ins. Co. v. Selman, 70 F.3d 684 (1st Cir. 1995); Imperial Cas. & Indem. Co. v. Radiator Specialty Co., 862 F. Supp. 1437 (E.D.N.C. 1994); Guar. Nat'l Ins. Co. v. Azrock Indus., Inc., 211 F.3d 239 (5th Cir. 2000).
 50. Zurich Ins. Co. v. Raymark Indus., Inc., 514 N.E.2d 150 (Ill. 1987); Monsanto Co. v. Aetna Cas. & Sur. Co., No. 88C-JA-118, 1994 WL 161953 (Del. Super. April 15, 1994), *rev'd on other grounds*, 652 A.2d 30 (Del. Supr. 1994); Diamond Shamrock Chems. Co. v. Aetna Cas. & Sur. Co., 609 A.2d 440 (N.J. Super. 1992); In re Prudential Lines, Inc., 158 F.3d 65 (2d Cir. 1998).
 51. Goode, *supra* note 41. *See, e.g., Am. Home Prod. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485 (S.D.N.Y. 1983).
 52. 565 F. Supp. 1485 (S.D.N.Y. 1983).
 53. *See, e.g., Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981); Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co., 10 F. Supp. 2d 856 (N.D. Ohio 1998) *affirmed in part, reversed in part, and remanded*, 210 F.3d 672 (6th Cir. 2000); Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co., 45 Cal. App. 4th 1(1996); Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974 (N.J. 1994); Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178 (2d Cir. 1995); Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co., 660 N.E.2d 770 (Ohio Com. Pl. 1995); J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502 (Pa. 1993); Gulf Chem. & Metallurgical Corp. v. Assoc. Metals & Minerals, 1 F.3d 365 (5th Cir. 1993); Skinner Corp. v. Fireman's Fund Ins. Co., No. C95-995WD, 1996 WL 376657 (W.D. Wash. April 3, 1996).
 54. Lincoln Electric Co. v. St. Paul Fire & Marine Ins. Co., 10 F. Supp. 2d 856 (N.D. Ohio 1998).
 55. 667 F.2d 1034 (D.C. Cir. 1981).
 56. Am. Compl. at 29, Elam (No. 01-L-1213).
 57. Commercial Union Ins. Co. v. Int'l Flavors & Fragrances, Inc., 822 F.2d 267, 271-72 (2d Cir. 1987). *See also Metro Wastewater Reclamation Dist. v. Fireman's Fund Ins. Co.*, 35 Fed. Appx. 839 (10th Cir. 2002) (holding that a five-year delay was probably not permissible); Mount Vernon Fire Ins. Co. v. Harris, 193 F. Supp. 2d 674 (E.D.N.Y. 2002) (holding that a six-month delay precluded coverage). *But see Western Heritage Ins. v. Giuliani*, 38 Fed. Appx. 974 (4th Cir. 2002) (holding that a seventeen-month delay was permissible); Commercial Underwriters Ins. Co. v. Aires Envtl. Servs., 259 F.3d 792 (7th Cir. 2001) (holding that a two-year delay was permissible).
 58. *See, e.g., Olin Corp. v. Ins. Co. of N. Am.*, 743 F. Supp. 1044 (S.D.N.Y. 1990).
 59. *See, e.g., Abner Herrman & Brock, Inc. v. Great N. Ins. Co.*, 308 F. Supp. 331 (S.D.N.Y. 2004), Fein v. Chicago Ins. Co., No. 01Civ11386, 2003 WL 21688239 (S.D.N.Y. July 18, 2003), Sec. Mut. Ins. Co. v. Acker-Fitzsimons Corp., 293 N.E.2d 76 (N.Y. 1972); Agway, Inc. v. Travelers Indem. Co.,

- No. 93-cv-557, 1993 WL 771008 (N.D.N.Y. Dec. 6, 1993).
60. *Id.*
61. *See, e.g.,* Baugh Constr. Co. v. Mission Ins. Co., 836 F.2d 1164 (9th Cir. 1988); In re: Texas E. Transmission Corp. PCB Contamination Ins. Coverage Litig., 870 F. Supp. 1293 (E.D. Pa. 1992); Port Servs. Co. v. Gen. Ins. Co. of Am., 838 F. Supp. 1402 (D. Or. 1993).
62. 838 F. Supp. 1402 (D. Or. 1993).
63. *See, e.g.,* Aetna Cas. & Sur. Co. v. Murphy, 538 A.2d 219, 223-24 (Conn. 1988).
64. *See id.*
65. *Id.*
66. *See, e.g.,* Olin Corp., 743 F. Supp. 1044; Sec. Mut. Ins. Co., 293 N.E.2d 76.
67. 743 F. Supp. 1044 (S.D.N.Y. 1990).
68. *See, e.g.,* Am. Compl., Elam (No. 01-L1213) (offering of timeline of what the industry knew and when).
69. *Id.* at 28-29.
70. *Id.* at 32.
71. *Id.* at 35-37.
72. Chase Manhattan Bank v. New Hampshire Ins. Co., 749 N.Y.S.2d 632 (Sup. Ct. 2002).
73. Richard L. Fruehauf, "The Cost of Knowledge: Making Sense of 'Nonfortuity' Defenses in Environmental Liability Insurance Coverage Disputes," 84 VA. L. REV. 107 (1998).
74. *Id.*
75. *See, e.g.,* Ins. Co. of N. Am. v. Historic Cohoes II, 879 F. Supp. 222 (N.D.N.Y. 1995), Adams-Arapahoe Joint Sch. Dist. v. Cont'l Ins. Co., 891 F.2d 772 (10th Cir. 1989) ("a loss caused by a pre-existing defect is fortuitous so long as neither party knew of the defect or expected the loss.").
76. Ins. Co. of N. Am., 879 F. Supp. 222; Adams-Arapahoe Joint Sch. Dist., 891 F.2d 772.
77. Finkelstein v. Cent. Mut. Ins. Co., 166 N.Y.S.2d 989, 993 (1957) (noting also that "fraud or intentional wrongdoing or gross negligence, such as deliberate disregard of plainly foreseeable consequences . . . would defeat recovery").
78. No. 86 Civ. 9671, 1991 WL 320046 (S.D.N.Y. Dec. 31, 1991). Despite this shift, there are some recent cases applying the fortuity defense to bar coverage. *See, e.g.,* RLI Ins. Co. v. Maxxon Southwest Inc., No. 03-10660, 2004 WL 1941757 (5th Cir. Sept. 1, 2004) (ruling that lack of fortuity barred coverage because alleged discriminatory price fixing began at least four years before policy was in effect).
79. Farmland Mut. Ins. Co. v. Scruggs, 886 So.2d 714 (Miss. 2004).
80. Morris v. Travelers Indem. Co., 31 Va. Cir. 306 (1993)
81. Reliance Ins. Co. v. Morrison, 297 S.E.2d 187 (N.C. 1982) (insured has burden of proving coverage).
82. Utica Mut. Ins. Co. v. Prudential Prop. & Cas. Ins. Co., 477 N.Y.S.2d 657, 660 (1984) (noting that "the insurer . . . has the burden of proof to establish that a claim is encompassed by an exclusion in the policy").
83. John N. Ellison and Richard P. Lewis, "Recent Developments in the Law Regarding the "Absolute" and "Total" Pollution Exclusions, the "Sudden and Accidental" Pollution Exclusion and Treatment of the "Occurrence" Definition," SJO99 ALI-ABA 1, 6 (2004).
84. *See, e.g.,* FMC Corp. v. Plaisted & Cos., 61 Cal. App. 4th 1132 (1998) ("sudden" means, at least, "abrupt" and thus coverage does not apply to gradual releases of pollutants no matter how unexpected); EDO Corp. v. Newark Ins. Co., 878 F. Supp. 366 (D. Conn. 1995) ("sudden" is unam-

biguous and means "abrupt" as a matter of law, and the releases of solvents were the results of leaks and/or spills that occurred during the ordinary course of business); E.I. du Pont de Nemours & Co. v. Allstate Ins. Co., 693 A.2d 1059 (Del. 1997) ("sudden" in context only has one meaning and that is "abrupt"); Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392 (Mich. 1991) (exclusion unambiguously includes a temporal element as well as a sense of the unexpected); Technicon Elecs. Corp. v. Am. Home Assurance Co., 542 N.E.2d 1048 (N.Y. 1989) (the exclusion precludes coverage for all intentional or knowing discharges whether or not the resulting damages were intended or unintended and even if the discharges were legal); Smith v. Hughes Aircraft Co., 22 F.3d 1432 (9th Cir. 1994) (holding that "sudden" and "accidental" are not synonyms, thus suggesting a temporal quality); Aerojet-General Corp. v. Fidelity & Cas. Co. of N.Y., No. 527932 (Cal. Super. Aug. 26, 1999) (concluding that "sudden and accidental" did not include long-term releases); Zero-Max Inc. v. Liberty Mut. Ins. Co., CV970059915S, 1999 WL 1246922 (Conn. Super. Dec. 6, 1999) (ruling that "sudden and accidental" did not include the gradual discharge of pollutants over a long period); N. Pac. Ins. Co. v. Mai, 939 P.2d 570 (Idaho 1997) (finding that "sudden" was not ambiguous); Nashua Corp. v. First State Ins. Co., 648 N.E.2d 1272 (Mass. 1995) (holding that the relevant "sudden event" was the release of the pollutants occurring suddenly); Westling Mfg. Co. Inc. v. W. Nat'l Mut. Ins. Co., 581 N.W.2d 39 (Minn. App. 1998) (concluding that "sudden" did not include numerous discharges of contamination over a long period of time); Bd. of Regents v. Royal Ins. Co., 517 N.W.2d 888 (Minn. 1994) (ruling that "sudden" is the opposite of gradual and thus the exclusion bars recovery for gradually released pollutants); Mesa Oil, Inc. v. Ins. Co. of N. Am., 123 F.3d 1333 (10th Cir. 1997) (holding that "sudden" would be superfluous without a temporal limitation); Asbestos Removal Corp. v. Guar. Nat'l Ins. Co., 846 F. Supp. 33 (E.D. Va. 1994) (concluding that "sudden" pollution occurs abruptly, instantly, or within a very short period of time); Sinclair Oil Corp. v. Republic Ins. Co., 929 P.2d 535 (Wyo. 1996) (finding the pollution exclusion did not cover gradual and unintentional discharges). *But see, e.g.*, Blackhawk-Central City Sanitation Dist.

v. Am. Guarantee and Liab. Ins. Co., 214 F.3d 1183 (10th Cir. 2000) (holding that "sudden and accidental" was ambiguous and did not include a temporal component); Lumbermens Mut. Cas. Co. v. Plantation Pipeline Co., 447 S.E.2d 89 (Ga. App. 1994) (concluding that "sudden and accidental" meant unintended or unexpected and did not contain a temporal component); St. Paul Fire & Marine Ins. Co. v. Lefton Iron & Metal Co., Inc., 694 N.E.2d 1049 (Ill. App. 1998) (finding that "sudden" was ambiguous and had to be construed in favor of the policyholder to mean there was no temporal component); Textron Inc. v. Aetna Cas. and Sur. Co., 754 A.2d 742 (R.I. 2000) (ruling that the pollution exclusion did not bar coverage for gradual pollution).

85. Ellison, *supra* note 85.
86. ISO Form CG 00 01 01 96 (emphasis added).
87. NEMA, 162 F.3d at 825.
88. Nat'l Elec. Mfrs. Ass'n v. Gulf Underwriters Ins. Co., 162 F.3d 821 (4th Cir. 1998) (court concluding that it "need look no further than the exclusion's plain language to conclude that it explicitly applies to the underlying" welding fume claims) (emphasis added); Cook v. Evanson, 920 P.2d 1223 (Wash. Ct. App. 1996) (refusing to artificially limit pollution exclusion to environmental claims); Hale v. Am. Family Mut. Ins. Co., 639 N.W.2d 802 (Wis. 2001) (pollution exclusion unambiguous when applied to claim resulting from exposure to lead paint).
89. Matcon Diamond, Inc. v. Penn. Nat'l Ins. Co., 815 A.2d 1109 (Pa. Super. Ct. 2003) (pollution exclusion barred coverage for claims alleging injury from exposure to carbon monoxide fumes when employee was working in enclosed area); Ins. Comm'r v. Golden Eagle Ins. Co., No. A087172, 2000 WL 968215 (Cal. Ct. App. May 8, 2000) (pollution exclusion barred coverage for injury caused by exposure to carbon monoxide escaping from gas engine used indoors).
90. Recent decisions illustrate this split. Compare Anderson v. Highland House Co., 757 N.E.2d 329 (Ohio 2001) (pollution exclusion ambiguous as applied to damages from carbon monoxide fumes);

- Lititz Mut. Ins. Co. v. Steely*, 785 A.2d 975 (Pa. 2001) (pollution exclusion does not preclude coverage for lead paint claims); *Mt. Lebanon v. Reliance Ins. Co.*, 778 A.2d 1228 (Pa. Super. 2001) (pollution exclusion ambiguous as to natural gas); *Camp Delaware v. Markel Ins. Co.*, No. CV990080225S, 2001 Conn. Super. LEXIS 1237 (Conn. Super. Ct. May 4, 2001) (pollution exclusion inapplicable to raw sewage); with *United States Fire Ins. Co. v. Warren*, 176 F. Supp. 2d 728 (E.D. Mich. 2001) (pollution exclusion bars coverage for raw sewage claim); *At. Ave. Assoc. v. Cent. Solutions, Inc.*, 24 P.3d 188 (Kan. App. 2001) (pollution exclusion bars coverage for solvent exposure); *Mackinnon v. Truck Ins. Exch.*, 95 Cal. App. 4th 235 (2002) (exclusion is unambiguous as applied to pesticides applied in apartment complexes); *Hale v. Am. Family Mut. Ins. Co.*, 639 N.W.2d 802 (Wis. 2001) (pollution exclusion unambiguous as to injuries caused by lead paint).
91. *NEMA*, 162 F.3d at 825 (emphasis added).
92. 517 N.W.2d 888 (Minn. 1994).
93. 609 N.E.2d 506 (N.Y. 1993).
94. 882 P.2d 703 (Wash. 1994).
95. 132 F.3d 526 (9th Cir. 1997).
96. *Id.* at 530. See also, *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043 (7th Cir. 1992) (“without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope”).
97. 920 P.2d 1223 (Wash. Ct. App. 1996).
98. *Id.* at 1226-27.
99. 162 F.3d 821.
100. *Id.* at 825 (citing *Bolle v. Hume*, 619 A.2d 1192, 1197 [D.C. 1993] [holding that the court was bound by the “well-settled rule . . . that if a policy is plain and unambiguous ‘the court will construe it without reference to any acts or conduct of the parties thereto which evince their interpretation of such contract’”]).
101. See *Kruger Commodities, Inc. v. United States Fid. & Guar.*, 923 F. Supp. 1474 (M.D. Ala. 1996) (concluding that the absolute pollution exclusion barred coverage for businesses’ claims that odors from process of animal carcasses hurt sales); *Bechtel Petroleum Operations, Inc. v. Cont’l Ins. Co.*, 96 Cal. App. 4th 571 (2002) (ruling that alleged injuries from exposure to toxic substances at work site were barred by the absolute pollution exclusion and that the allegation of exposure to toxic substances implied discharge and release of those substances); *Ins. Comm’r v. Golden Eagle Ins. Co.*, No. A087172, 2000 WL 968215 (Cal. Ct. App. May 8, 2000) (finding that the total pollution exclusion barred coverage for injury caused by carbon monoxide escaping from a gas engine not properly vented and used inside by contractor); *Employers Cas. Co. v. St. Paul Fire & Marine Ins. Co.*, 52 Cal. Rptr. 2d 17 (Cal. Ct. App. 1996) (holding that no coverage was owed for the application of acetylene torches to chemical coating on desks by virtue of the absolute pollution exclusion); *Technical Coating Applicators, Inc. v. United States Fid. & Guar. Co.*, 157 F.3d 843 (11th Cir. 1998) (concluding that injury caused by vapors emitted by products used to repair the school roof were excluded by the absolute pollution exclusion); *Owners Ins. Co. v. Farmer*, 173 F. Supp. 2d 1330 (N.D. Ga. 2001) (ruling that the absolute pollution exclusion barred coverage for injuries caused by the release of diesel fuel to exterminate insects); *Crabtree v. Hayes-Dockside, Inc.*, 612 So.2d 249 (La. App. 1993) (holding that the absolute pollution exclusion barred coverage for claims involving PVC dust generated in the course of the policyholder’s business); *Am. States Ins. Co. v. Nethery*, 79 F.3d 473 (5th Cir. 1996) (finding that the absolute pollution exclusion barred coverage for damages from plaintiff’s hypersensitivity to fumes from standard paint and glue); *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 635 N.W.2d 112 (Neb. 2001) (ruling that the absolute pollution exclusion barred coverage for injuries from floor fumes from floor sealant); *White v. Freedman*, 227 A.D.2d 470 (N.Y. App. Div. 1996) (holding that the absolute pollution exclusion barred coverage for damages from fumes, vapors, and gasses in the workplace); *Zell v. Aetna Cas. & Sur. Ins. Co.*, 683 N.E.2d 1154 (Ohio App. 1996) (concluding that the absolute pollution exclusion barred coverage for injury from fumes released from weatherproofing

- materials); Mark I Restoration SVC v. Assurance Co. of Am., 248 F. Supp.2d 397 (E.D. Pa. 2003) (holding that the absolute pollution exclusion barred coverage for injuries stemming from exposure to chemicals applied to get rid of skunk odor); Brown v. Am. Motorists Ins. Co., 930 F. Supp. 207 (E.D. Pa. 1996) (ruling that fumes from a chemical sealant are pollutants and thus fall within the absolute pollution exclusion); Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100 (Pa. 1999) (concluding that fumes from concrete sealer were pollutants and that injury from the fumes was excluded by the absolute pollution exclusion); Matcon Diamond, Inc. v. Penn Nat'l Ins. Co., 815 A.2d 1109 (Pa. Super. 2003) (finding that the absolute pollution exclusion barred coverage for injuries from exposure to carbon monoxide fumes when employee was cutting concrete with a gasoline-powered saw in an enclosed area); Vander Hamm v. Allstate Ins. Co., 286 F. Supp. 2d 790 (N.D. Tex. 2003) (finding that the absolute pollution exclusion barred claims of injury from inhalation of fumes from chemicals applied during the remodeling of a bathroom).
102. *See, e.g.*, Minerva Enter., Inc. v. Bituminous Cas. Corp., 851 S.W.2d 403 (Ark. 1993).
103. 894 F. Supp. 200, 203 (W.D. Pa 1995). *But see* Peace v. Northwestern Nat. Ins. Co., 596 N.W.2d 429, 440 (Wis. 1999) (the pollution exclusion applies to the release of paint in an insured's apartment).
104. Island Assoc., 894 F. Supp. at 203.
105. 39 F.3d 1324 (6th Cir. 1994).
106. *Id.*
107. *Id.* at 1336 (quoting Webster's Third New International Dictionary (1986)).
108. *Id.* at 1336-37.
109. *Id.*; *see also* Lititz Mut. Ins. Co., 785 A.2d 975 (underlying lead paint bodily injury tort claims were not barred by the absolute pollution exclusion because the process by which lead paint degraded and became available for ingestion/inhalation did not unambiguously involve a "discharge, dispersal, release or escape" as required by the exclusion).
110. Assicurazioni Generali v. Neil, 160 F.3d 997 (4th Cir. 1998).
111. *Id.*
112. No. Civ. A. 399CV1623D, 2002 WL 356756 (N.D. Tex. March 5, 2002).
113. *Id.* *See also* Leverence v. United States Fid. & Guar., 462 N.W.2d 218, 232 (Wis. 1990) (finding that the alleged cause of the bodily injuries and property damage was water vapor trapped in the walls, which in turn caused the growth of microorganisms, however, "no contaminants were released, but rather formed over time as a result of environmental conditions"), *overruled on other grounds by* Wenke v. Gehl Co., 682 N.W.2d 405 (Wis. 2004).
114. Lexington Ins. Co., 2002 WL 356756, at *2.
115. *Id.*
116. *See e.g.*, N. Assurance Co. v. EDP Floors, Inc., 533 A.2d 682, 689 (Md. 1987) (holding exclusion applies irrespective of theory of liability by which plaintiff seeks redress for his injury).
117. 220 F.3d 1 (1st Cir. 2000).
118. *Id.* at 6.
119. *See e.g., id.* at 5-6.
120. *Id.* at 8-9.
121. *Id.* at 3.
122. *Id.* at 5.
123. *Id.* at 6.
124. No. 00-2387, 2001 WL 1019745 (4th Cir. Sept. 6, 2001).
125. *Id.* at *5.
126. *Id.* at *3, *quoting* EDP Floors, 533 A.2d at 689.

127. *Id.* at *3, quoting Brazas Sporting Arms, 220 F.3d at 4.
128. Brazas Sporting Arms, 220 F.3d at 7.
129. Beretta U.S.A., 2001 WL 1019745, at *3.
130. Brazas Sporting Arms, 220 F.3d at 7, quoting Rischitelli v. Safety Ins. Co., 671 N.E.2d 1243, 1245 (Mass. 1996).
131. No. 01-2236, slip op. (S.D. Fla. August 14, 2003).
132. *Id.*
133. 704 So. 2d 176 (Fla. Dist. App. 1997).
134. Taurus Holdings, No. 01-2236 slip. op. (S.D. Fla. Oct. 24, 2002) at *19, citing Westmoreland, 704 So. 2d at 180-86.
135. 405 So. 2d 1013 (Fla. App. 1981).
136. *Id.* at 1015.
137. 552 So. 2d 1110 (Fla. App. 1989).
138. *Id.* at 1112-13.
139. Taurus Holdings, No. 01-2236, slip op. at *24 (S.D. Fla. Oct. 24, 2002).
140. 849 So.2d 263 (Fla. 2003).
141. See Taurus Holdings, No. 01-2236, slip op. (S.D. Fla. Oct. 24, 2002).
142. *Id.*
143. The authors of this paper represent USF&G in the Taurus litigation. ■