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Jennifer Birckhead

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RECENT DEVELOPMENT

CLENDENIN BROS., INC. v. U.S. FIRE INS. CO.: TOTAL POLLUTION EXCLUSION PROVISIONS IN COMMERCIAL LIABILITY INSURANCE POLICIES DO NOT RELIEVE THE INSURER FROM ITS DUTY TO DEFEND THE INSURED WHERE THE ALLEGED HARM WAS CAUSED BY WORKPLACE MANGANESE FUMES

By: Jennifer Birckhead

In an issue of first impression, the Court of Appeals of Maryland held that a total pollution exclusion provision in a commercial insurance policy does not relieve the insurer from its duty to defend and/or indemnify the insured where the alleged harm was caused by localized, workplace manganese welding fumes. *Clendenin Bros., Inc. v. U.S. Fire Ins. Co.*, 390 Md. 449, 889 A.2d 387 (2006). The Court's holding is consistent with the overall purpose of commercial liability insurance coverage. More specifically, this holding also adheres to the historical purpose behind total pollution exclusion provisions, which is to allow insurers to avoid expensive litigation by denying coverage to the insured in cases where environmental pollution is unrelated to the insured's business practices.

U.S. Fire Insurance Co. ("Insurer") provided the Clendenin Brothers, Inc. ("Insured") with insurance coverage for claims alleging personal injuries arising out of the use of the Insured's welding products. The Insurer sought a declaratory judgment claiming it had no duty to defend or indemnify the Insured in cases where individuals sustained bodily harm and neurological damage from manganese fumes emitted while using the Insured's welding products. Insurer asserted that the "Total Pollution Exclusion" clause contained in the Insured's policy excluded them from providing coverage for injuries caused by such fumes because they constituted a pollutant under the language of the policy.

Each party filed a Motion for Summary Judgment in the United States District Court of Maryland. The Insured also filed a Motion for Certification requesting the District Court to certify questions of law regarding the scope of the total pollution exclusion under Maryland

law to the Court of Appeals of Maryland. The District Court stayed the consideration of the Motions for Summary Judgment pending the Court of Appeals' response to the certified question.

To determine whether the Insurer had a duty to provide coverage, the Court of Appeals engaged in a two-part inquiry: "(1) what is the coverage and what are the defenses under the terms and requirements of the insurance policy?; and (2) do the allegations in the tort action potentially bring the tort claim within the policy's coverage?" *Clendenin Bros., Inc.*, 390 Md. at 458, 889 A.2d at 393; articulated in *St. Paul Fire & Marine Ins. Co. v. Pryseski*, 292 Md. 187, 193, 438 A.2d 282, 285 (1981). In addressing the first prong of the analysis, the Court construed the policy as a whole and each word within the contract was given its ordinary and usual meaning pursuant to established principles of insurance contract interpretation. *Clendenin Bros., Inc.*, 390 Md. at 459, 889 A.2d at 393. The Court also looked to the nature, purpose, and facts surrounding the contract to identify the intention of the parties. *Id.* Upon this examination, the Court determined that the language of the provision was ambiguous, meaning "a reasonably prudent person" could interpret the provision to include or not include manganese welding fumes. *Id.* at 461, 889 A.2d at 394.

Given the ambiguous nature of the language within the provision, the Court referred to extrinsic evidence. *Id.* at 459, 462, 889 A.2d at 393, 395. The Court acknowledged that the United States Court of Appeals for the Fourth Circuit previously held that an insurer had no duty to defend an insured against allegations of injuries caused by manganese welding fumes, as these fumes are included within the definition of pollutant. *Id.* at 461, 889 A.2d at 395; see *Nat'l Elec. Mfrs. Ass'n v. Gulf Underwriters Ins. Co.*, 162 F.3d 824-25 (4th Cir. 1998).

However, the Court of Appeals, analyzed the subject clauses in a different manner than the Fourth Circuit. *Clendenin Bros., Inc.*, 390 Md. at 461, 889 A.2d at 395. The policy provides in pertinent part:

This Insurance does not apply to:

- f. (1) "Bodily Injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time.

Pollutants means any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste.

Id. at 453, 889 A.2d at 390. As defined in the policy, pollutant, among other things, specifically refers to fumes. *Id.* at 461, 889 A.2d at 395. However, the Court reasoned that in order to qualify as a pollutant under the definition provided, the physical matter must also constitute an irritant or contaminant. *Id.* In support, the Court opined that any other interpretation of this provision would result in a limitless list of pollutants, which could not have been the intention of the parties. *Id.* at 426, 889 A.2d at 395.

However, requiring that the substance be an irritant or contaminant leaves a potentially infinite number of pollutants. *Id.* The Court observed that under the right conditions any substance could constitute an irritant or contaminant. *Id.* at 464, 889 A.2d 396. The Court cited, as an example, how chlorine in a public pool could be considered an irritant and/or contaminant but most would not qualify it as a pollutant. *Id.*; see *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 512-13, 667 A.2d 617, 621 (1995).

In response to this limitless list, the Court looked to the nature and use of the alleged pollutant. *Clendenin Bros., Inc.*, 390 Md. 462, 889 A.2d 395. In comparison to carbon monoxide, which most would certainly consider a harmful substance, manganese is a natural element that is used by welders in manufacturing steel. *Id.* Although it cannot be denied that manganese is potentially harmful and toxic in nature, it cannot be characterized as a pollutant or contaminant because it is used intentionally and legally. *Id.* at 463, 889 A.2d at 396.

The Court of Appeals previously held in *Sullins* that an insurer had a duty to defend an insured against claims alleging injury from lead paint exposure, basing their decision on a review of the historical development of the total pollution exclusion clause. *Id.* at 464-65, 889 A.2d at 397; see *Sullins*, 340 Md. at 515-16, 667 A.2d at 623. The Court of Appeals concluded, like other federal and state courts, that this type of pollution exclusion was only intended by insurers to extend to environmental pollution. *Clendenin Bros., Inc.*, 390 Md. at 465, 889 A.2d at 397.

Additional support for this conclusion is found by taking into consideration that the purpose of commercial liability insurance coverage is to protect the insured from routine commercial hazards.

Id. at 466-67, 889 A.2d at 398. According to the Court, injuries caused by welding fumes that were sustained during the normal course of business are considered to be routine commercial hazards. *Id.* at 467, 889 A.2d at 398. In sum, the Court's response to the first prong of the two-part inquiry was that the insurance policy's total pollution exclusion provision did not include localized, workplace manganese welding fumes. *Id.*

The Court's second inquiry was whether this claim would potentially fall within the policy's coverage. *Id.* at 458, 889 A.2d at 393. The Court, with little discussion, answered in the affirmative for the reason that these allegations "*potentially* could be covered under the insurance policies." *Id.* at 468, 889 A.2d at 399. Therefore, the Insurer was obligated to defend and/or indemnify the Insured for these claims. *Id.* at 467-68, 889 A.2d at 398-99.

The narrow interpretation of standard total pollution exclusion provisions in insurance policies exemplifies the Court's intention to prohibit the insurer from using ambiguities in its policies to the disadvantage of the insured by denying coverage for good faith claims. *Id.* at 467, 889 A.2d at 398; *see West Am. Ins. Co. v. Tufco Flooring East, Inc.*, 104 N.C. App. 312, 409 S.E.2d 692, 697 (N.C. Ct. App. 1991). Although this specific situation will likely continue to be litigated in other jurisdictions, the Court of Appeals of Maryland has declined to accept a virtually boundless interpretation of these pollution exclusion clauses as they apply to manganese welding fumes, thereby affording some protection to the insured.