

RECENT DEVELOPMENTS IN INSURANCE  
COVERAGE LITIGATION

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I. RECENT DEVELOPMENTS IN LONG-TAIL  
LIABILITY COVERAGE

Several recent decisions have been handed down that involve long-tail liability coverage, i.e., occurrence-based claims involving bodily injury or property

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damage, often made years after both the triggering event and the expiration of the insurance policy.<sup>1</sup> These cases frequently deal with such issues as the insurer's duty to defend, trigger, allocation, notice, and the pollution exclusion. Although these issues have been around for some time, this year's decisions serve as a reminder about the lack of consensus on any of them.

### A. *Duty to Defend*

In *Emhart Industries, Inc. v. Century Indemnity Co.*,<sup>2</sup> the First Circuit, applying Rhode Island law, addressed when an insurer owes a duty to defend and the consequences of breaching the duty. In *Emhart Industries*, the U.S. Environmental Protection Agency (EPA) designated Emhart as a potentially responsible party for cleanup costs of a contaminated site under CERCLA.<sup>3</sup> The EPA later issued Emhart three separate unilateral administrative orders for removal action requiring performance of certain remedial action at the site.<sup>4</sup> Emhart tendered the claim to several of its insurers,<sup>5</sup> all of which denied coverage. Emhart sued three of them, including Century Indemnity, seeking coverage for its cleanup and defense costs. Although the jury concluded the insurers did not owe Emhart indemnification, the District Court found Century Indemnity owed Emhart a duty to defend the EPA matter. Moreover, since Century Indemnity had breached the duty, it owed Emhart the cost of the entire defense, and not just an allocated share, incurred up until the time the jury found there was no duty to indemnify.<sup>6</sup>

On appeal, Century Indemnity argued the district court incorrectly applied the pleadings test to determine the duty to defend.<sup>7</sup> Century Indemnity asserted the Rhode Island Supreme Court had never applied the pleadings test in a multi-insurer environmental coverage case,<sup>8</sup> and Rhode Island courts in such cases only looked beyond the complaint to affidavits and depositions. The First Circuit affirmed, dismissing Century Indemnity's pleadings test argument as meritless.<sup>9</sup> The court agreed Century

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1. Because the claims are often brought so long after the expiration of the policy, the policy is said to have a "long tail" of coverage. Typical long-tail claims include environmental contamination cases and asbestos cases.

2. 559 F.3d 57 (1st Cir. 2009).

3. *Id.* at 59.

4. *Id.* at 60.

5. *Id.*

6. *Id.* at 64.

7. *Id.* at 65. This test looks only to the "charging documents" in the case—the complaint. This has been sometimes referred to as the "four corners" test.

8. *Id.* at 65–66.

9. The court noted that any references in other Rhode Island cases to documents outside the complaint were likely for other issues involving, for example, the duty to indemnify, but not relevant in determining whether there was a duty to defend. *Id.* at 69.

Indemnity needed to pay the total cost of Emhart's defense even though Century Indemnity's policy covered only one year of a fifty-eight-year coverage profile.<sup>10</sup> The court found the all-sums and ultimate net loss policy provisions "do not admit to any limitation, temporal or otherwise," supporting Century Indemnity's argument that it could only be liable for a pro rata share of Emhart's defense costs.<sup>11</sup>

In *Griffin Dewatering Corp. v. Northern Insurance Co.*,<sup>12</sup> the California Court of Appeal found the insurer acted reasonably when it initially declined to defend its insured, but later reversed its position even though the prevailing case law supported the declination.<sup>13</sup> The insurer initially denied coverage for damages caused by a sewage backup under the total pollution exclusion,<sup>14</sup> but later changed its position and paid the insured's attorneys' fees incurred in the litigation.<sup>15</sup> The *Griffin* court held the insurer had not acted in bad faith on the principle that its initial denial of coverage was reasonable: "as shown by substantial case law in favor of its position, there can be no bad faith even though the insurance company's position is *later* rejected by the [California] Supreme Court."<sup>16</sup>

#### B. Notice Provisions and Recovery of Pre-Tender Costs

In *Venoco, Inc. v. Gulf Underwriters Insurance Co.*,<sup>17</sup> the California Court of Appeal found a sixty-day's notice condition in a seepage and pollution buy-back provision conspicuous and enforceable, thereby barring personal injury claims by students and employees at Beverly Hills High School against an oil company that previously operated oil wells at the school's location.<sup>18</sup> The insured argued California's notice prejudice rule, barring insurers from

10. *Id.* at 72, 74.

11. *Id.* at 71.

12. 176 Cal. App. 4th 172 (Ct. App. 2009).

13. *Id.* at 179–80.

14. *Id.* At the time of the denial, there was no California Supreme Court decision on the application of such an exclusion to a nontraditional environmental contamination event like a sewage backup. *Id.* at 200. In fact, the court noted that at this time, "there was zero precedent on point against the insurer's position at the time it made its coverage decision." *Id.* at 203.

15. *Id.* at 190. Six months after the insurer changed its position, the California Supreme Court held in an unrelated case, *MacKinnon v. Truck Insurance Exchange*, 73 P.3d 1205 (Cal. 2003), the total pollution exclusion was applicable only to traditional pollution events. In *MacKinnon*, the absolute pollution exclusion was limited to injuries arising from "conventional environmental pollution" and not to the injuries at issue in that case that arose out of the application of insecticide by a landlord. *Id.* at 1216.

16. *Griffin*, 176 Cal. App. 4th at 190 (emphasis in original). The court found this was exactly the situation in *Griffin*—the insurer based its original decision on ample case law existing at that time and in any event reversed itself prior to the California Supreme Court's decision on the application of the total pollution exclusion in nontraditional pollution events.

17. 175 Cal. App. 4th 750 (Ct. App. 2009).

18. *Id.* at 754.

“disavowing coverage on the basis of lack of timely notice unless the insurance company can show actual prejudice from the delay,” required Gulf to establish prejudice in order to avoid coverage.<sup>19</sup> The appellate court disagreed, holding where the policy provides special coverage for a particular type of claim, such as the pollution claim in *Venoco*, and such coverage is conditioned on express compliance with a reporting requirement, the time limit is enforceable without proof of prejudice.<sup>20</sup> Because the pollution buyback provision was a negotiated special coverage, the court found the provision was enforceable, stating that to require Gulf to show prejudice would “impermissibly alter [the insured’s] agreement with Gulf.”<sup>21</sup>

*Estee Lauder Inc. v. OneBeacon Insurance Group, LLC*<sup>22</sup> illustrates the requirement that insurers set forth all of their defenses as soon as practicable. Estee Lauder sought coverage for environmental claims relating to cleanup of certain landfills.<sup>23</sup> Estee Lauder could not locate the policy, but was able to identify it to OneBeacon by the policy number and policy period.<sup>24</sup> OneBeacon disclaimed coverage solely on the basis that it also could not locate evidence of a relevant Estee Lauder policy.<sup>25</sup> When Estee Lauder later came forward with sufficient secondary evidence to prove the policy’s existence,<sup>26</sup> OneBeacon for the first time asserted Estee Lauder had failed to provide it with timely notice.<sup>27</sup>

The New York Supreme Court’s Appellate Division held OneBeacon had waived its late notice defense by failing to raise it earlier.<sup>28</sup> The court noted OneBeacon had disclaimed coverage through several earlier letters to Estee Lauder, but never raised late notice and had sufficient knowledge of the circumstances surrounding the late notice defense when it sent those earlier letters.<sup>29</sup> The court reasoned that

[i]mposing the duty on the insurer to provide an early disclaimer based on late notice of an occurrence or claim, even where the insurer claims there is no policy, enables the insured to make a prompt and fully informed decision as to whether to pursue efforts to establish the existence of the policy or to better invest its resources on investigating the potential claim, and preparing a defense.<sup>30</sup>

19. *Id.* at 759–60.

20. *Id.* at 760.

21. *Id.*

22. 62 A.D.3d 33 (N.Y. App. Div. 2009).

23. *Id.* at 34.

24. *Id.*

25. *Id.* at 35.

26. *Id.* at 39.

27. *Id.* at 34.

28. *Id.* at 39.

29. *Id.* at 36.

30. *Id.* at 39 (quoting Foschio, M.J.).

The Indiana Supreme Court's decision in *Dreaded, Inc. v. St. Paul Guardian Insurance Co.*<sup>31</sup> was a rare success for insurers in a jurisdiction that traditionally favors policyholders. The insured received a letter from the Indiana Department of Environmental Management demanding it investigate possible soil contamination and "warning of potential enforcement actions and civil penalties."<sup>32</sup> Dreaded hired counsel to represent it in connection with the demand letter, but did not notify its insurer, St. Paul, until nearly four years later.<sup>33</sup> After Dreaded's tender, St. Paul agreed to defend Dreaded, but refused to reimburse it for pre-tender defense costs.<sup>34</sup>

Dreaded argued it was entitled to recover its pre-tender defense costs unless St. Paul could prove it was prejudiced by Dreaded's late notice.<sup>35</sup> The Indiana Supreme Court, stating "an insurer cannot defend a claim of which it has no knowledge,"<sup>36</sup> held that the "insurer's duty to defend simply does not arise until it receives the foundational information designated in the notice requirement."<sup>37</sup> The court acknowledged that a showing of prejudice was required in most similar circumstances under prevailing Indiana law.<sup>38</sup> However, the court found prejudice was "irrelevant" in this case because notice was a condition precedent to coverage, and St. Paul's duty to defend did not arise until Dreaded actually complied with the policy's notice provisions.<sup>39</sup>

### C. Multipolicy Insurance Allocation

In *Franklin Mutual Insurance Co. v. Metropolitan Property & Casualty Insurance Co.*,<sup>40</sup> the New Jersey Appellate Division considered how the continuous trigger theory for environmental contamination cases applied in allocating insurance coverage when there has been a change in property ownership during the relevant time period. The property contamination began when it was first owned by John Clark, but appeared to have continued after it was purchased by Peter and Carol Tsairis.<sup>41</sup> The Tsairises obtained coverage from Metropolitan and later from Franklin Mutual.<sup>42</sup>

31. 904 N.E.2d 1267 (Ind. 2009).

32. *Id.* at 1268–69.

33. *Id.*

34. *Id.*

35. *Id.* at 1270.

36. *Id.* at 1273.

37. *Id.*

38. *Id.* at 1272–73. Examples include when the insurer seeks to avoid coverage on the basis of a policyholder's failure to comply with a cooperation clause, or where the insured provides defective but otherwise sufficient notice.

39. *Id.* at 1273.

40. 406 N.J. Super. 586, 968 A.2d 1191 (N.J. Super. Ct. App. Div. 2009).

41. *Id.* at 589.

42. *Id.*

Franklin Mutual paid the cleanup costs on their behalf and then pursued Metropolitan for pro rata reimbursement.<sup>43</sup> Metropolitan took the position that its share should be calculated by considering the entire period of contamination, including the contamination period when Clark owned the property. Franklin, however, asserted the allocation should be between the insurers for the Tsairises only.<sup>44</sup> The court agreed, concluding pro rata allocation must be calculated among only those insurers for the same named insured, i.e., the Tsairises. “[T]hat others may also be responsible for a share of the cleanup costs is not a factor in the allocation of responsibility among an individual insured’s carriers for their respective share of their insured’s costs.”<sup>45</sup> Consequently, Metropolitan’s share for cleanup costs needed to be calculated without taking into consideration any insurance policies the previous owner might have had.<sup>46</sup>

In *Boston Gas Co. v. Century Indemnity Co.*<sup>47</sup> the First Circuit certified to the Massachusetts Supreme Judicial Court questions concerning the proper method of allocation in environmental contamination cases and the formula to be used in calculating each insurer’s obligation.<sup>48</sup> The first question was whether Massachusetts followed a pro rata method of allocation or a joint and several approach.<sup>49</sup> The court concluded fairness and policy considerations dictated Massachusetts follow the pro rata allocation method.<sup>50</sup> The second question was what method should be used for allocating damages on a pro rata basis.<sup>51</sup> Admitting that a fact-based alloca-

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43. *Id.*

44. *Id.*

45. *Id.* at 594.

46. *Id.*

47. 910 N.E.2d 290 (Mass. 2009). The First Circuit also certified a question as to how insureds would satisfy self-insured retentions or deductibles for environmental coverage cases covering several policy periods, but the court determined that the answers to the first two questions negated any need to answer the third. *See id.* at 314.

48. This case involved a manufacturing gas plant contaminated by tar. Boston Gas operated the plant from 1908 to 1969 and insured its operation of the site with concurrent comprehensive general liability policies from several different insurance companies. Century Indemnity, which insured Boston Gas from 1951 through 1969, was one of the insurers. After it began cleanup at the plant, Boston Gas filed a declaratory judgment action as to Century Indemnity’s obligations. The jury awarded Boston Gas a judgment of \$6.2 million in damages. The district judge applied the all-sums rule and allowed Boston Gas to choose the policy or policies from which it would seek indemnification. Boston Gas chose the policy with the highest limit and the only one that would cover the entire jury award. Boston Gas did not try to prove the damages only occurred from 1951 to 1969 and further indicated that doing so would be impossible.

49. *Id.* at 299. This approach is also referred to as all-sums, vertical exhaustion, or vertical spike. *Id.* at 302.

50. *Id.* at 306–11 (“In sum, the pro rata allocation method promotes judicial efficiency, engenders stability and predictability in the insurance market, provides incentive for responsible commercial behavior, and produces an equitable result.”).

51. *Id.* at 312.

tion method, while ideal, was not feasible for these types of claims, the court considered several alternative methods. The time on the risk (TOR) method apportions the total damages by the number of years each policy was on the risk relative to the total number of years of triggered coverage.<sup>52</sup> The next method apportioned the losses based on the years the policies provided coverage as well as the policy limits.<sup>53</sup> The court chose the TOR method, given the nature of environmental contamination cases where there is no direct evidence of the actual distribution of damage over the time period.<sup>54</sup> The court reasoned the TOR method's "inherent simplicity promote[d] predictability, reduce[d] incentives to litigate, and ultimately reduce[d] premium rates."<sup>55</sup> Finally, the court held that in these circumstances, an insured is responsible for only a prorated portion of its per occurrence self-insured retention for each triggered policy, which is to be calculated based on each insurer's apportioned liability.<sup>56</sup>

A similar result was reached in Illinois in *Federal Insurance Co. v. Binney & Smith, Inc.*<sup>57</sup> That litigation arose from a class action complaint filed against Binney & Smith in 2000, *Schwab v. Binney & Smith*.<sup>58</sup> Schwab alleged Binney had represented, promised, or warranted to consumers in its advertisements and on its Crayola Crayon boxes that its crayons were safe and nontoxic. According to the class plaintiffs, the crayons purportedly contained asbestos fibers. Binney sought and was able to obtain confirmation from the Consumer Protection Safety Commission that its crayons were safe and its advertising on the Crayola crayons box was proper under federal law.<sup>59</sup> Shortly thereafter, Binney settled the *Schwab* action using a coupon settlement promotion, allowing anyone to buy crayons at a reduced amount. Binney incurred \$1.1 million in costs for the settlement. Binney then sought indemnification from its insurer. Federal Insurance Co., which insured Binney from 1969 through 1986, filed a declaratory judgment action against Binney, seeking a judicial determination that it did not owe Binney a duty to defend or indemnify the *Schwab* action. In response, Binney filed a counterclaim for breach of contract. The duty to defend issue

52. *Id.* at 313.

53. *Id.*

54. *Id.* at 314.

55. *Id.* In one of the policies, Century agreed to indemnify Boston Gas for the "ultimate net loss" that it "may sustain by reason of the liability imposed upon [it] by law, or assumed by [it] under contract or agreement . . . [f]or damages because of injury to or destruction of property, including the loss of use thereof, caused by an occurrence as defined herein." *Id.* at 306.

56. *Id.* at 316. The court held that the pro rata method "addresses a problem of proof" and indicated that the pro rata method may not be appropriate where evidence permits an "accurate estimation of the quantum of property damage in each policy period." *Id.*

57. 913 N.E.2d 43 (Ill. App. Ct. 2009).

58. *Id.* at 46.

59. *Id.* at 47.

was settled, and only the duty to indemnify remained to be determined at the trial level.<sup>60</sup>

Following a bench trial, judgment was entered for Binney.<sup>61</sup> The trial court ruled the advertising injury coverage was triggered.<sup>62</sup> Out of Binney's thirty years of coverage, Federal issued only three policies with advertising injury coverage, each with only \$500,000.00 in annual limits.<sup>63</sup> The trial court ruled Federal was obligated to pay the entire \$1.1 million *Schwab* settlement based on the all-sums approach. Federal appealed and argued, among other things, the trial court erred by refusing to allocate the settlement in *Schwab* on a pro rata basis.<sup>64</sup> Federal maintained that, unlike the cases applying the all-sums approach, the facts in the *Schwab* case were more akin to those in cases applying the pro rata approach.<sup>65</sup> The appellate court ruled the class plaintiffs bought the crayons on a date certain. Thus, if they were entitled to damages for that purchase, the damages were incurred on the date of purchase and would trigger the policy in effect at the time of purchase. The appellate court then ruled that, if Binney could not identify when class plaintiffs purchased the crayons on remand, the settlement amount would have to be allocated equally over all years that were potentially triggered for the damages.<sup>66</sup>

In *California v. Continental Insurance Co.*,<sup>67</sup> the California Court of Appeal addressed several issues involving the long-standing coverage litigation involving the Stringfellow hazardous waste disposal site,<sup>68</sup> including the applicability of the all-sums rule and whether the insured can stack policy limits across policy periods. The state sought to recover from its insurers the amounts a federal court ordered it to pay for the site's cleanup.<sup>69</sup> Notably, the state and its insurers stipulated that the property damage resulting from the state's actions "occurred continuously throughout all of the relevant policy periods."<sup>70</sup> The state argued it was entitled to recover more

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60. *Id.* at 48.

61. *Id.*

62. *Id.* at 53.

63. *Id.* at 47.

64. *Id.* at 46-47.

65. *Id.* at 56-58.

66. *Id.* at 58.

67. 88 Cal. Rptr. 3d 288 (Ct. App. 2009), *rev. granted*, 203 P.3d 425 (Cal. 2009).

68. The hazardous waste site had opened in 1956 and closed in 1972 due to groundwater contamination discovered at the site.

69. *Id.*

70. *Id.* at 296. The trial court ruled that

once coverage for . . . continuous . . . damage . . . is triggered under a liability policy, the insurer is required to pay for all sums (up to the policy limits) of the insured's liability—not just liability specifically allocable to damage during the policy period.

*Id.* at 297.

than the total policy limits in effect for any one policy period.<sup>71</sup> The court applied the all-sums rule and held when “there is a continuous loss spanning multiple policy periods, *any* insurer that covered *any* policy period is liable for the *entire* loss, up to the limits of the policy,” finding that the insurer’s remedy for overpayment to the insured was a contribution suit against other insurers on the risk.<sup>72</sup> The court also held that, absent contrary policy language, an insured can stack policy limits across policy periods.<sup>73</sup>

D. *Absolute Pollution Exclusion and the Sudden and Accidental Exception*

Another California appellate decision involving the Stringfellow site, *California v. Allstate Insurance Co.*,<sup>74</sup> focused primarily on the nature and timing of the discharges from the Stringfellow evaporation ponds related to the application of, inter alia, the sudden and accidental pollution exclusion. The insurers argued the state’s “initial disposals of waste into the unlined ponds” was the relevant discharge for purposes of determining whether the state’s discharge of pollutants was sudden and accidental.<sup>75</sup> Under the insurers’ analysis, since such discharges were intentional, the pollution exclusion barred coverage.<sup>76</sup> The California Supreme Court disagreed, holding the “relevant set of polluting events” was the “subsequent escape of chemicals from the Stringfellow ponds into the surrounding soils and groundwater, as that was the basis of the insured’s liability.”<sup>77</sup>

Acknowledging the lack of Hawai’ian precedent on the application of total pollution exclusions, the Ninth Circuit, in *Apana v. TIG Insurance Co.*,<sup>78</sup> certified a question to the Hawai’i Supreme Court concerning whether the exclusion applies to “localized uses of toxic substances in the ordinary course of business” or whether it was limited to what a layperson

71. *Id.* at 301.

72. *Id.* (emphasis in original).

73. The court specifically rejected an earlier California Court of Appeal decision on this issue, stating that the appellate court’s reasoning in that case was “unpersuasive,” *id.* at 313, and “flawed,” *id.* at 306. In reaching its decision in favor of application of the all-sums method, the *Continental Insurance* court relied heavily on language found in two duty to defend cases decided by the California Supreme Court. In fact, the court evidenced its inclination to follow precedent by stating that “the Insurers’ arguments . . . founder on the fact that we must follow the California Supreme Court’s lead.” *Id.* See generally *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878 (Cal. 1995); *Aerojet-Gen. Corp. v. Transport Indem. Co.*, 948 P.2d 909 (Cal. 1997).

74. 201 P.3d 1147 (Cal. 2009).

75. *Id.* at 1155.

76. *Id.*

77. *Id.* at 1157.

78. 574 F.3d 679 (9th Cir. 2009), *dismissed pursuant to settlement*, 2010 WL 1434763 (Hawai’i Apr. 7, 2010).

would consider to be traditional environmental pollution.<sup>79</sup> In *Apana*, the plaintiff was injured after inhaling noxious fumes released when a contractor used chemicals to treat a clogged drain at a Costco where she was employed.<sup>80</sup> The Ninth Circuit acknowledged the “two broad camps” that had addressed the issue would either: (1) apply the exclusion literally or (2) limit the application of the exclusion to traditional environmental pollution either because the terms of the exclusion were found to be ambiguous or because the exclusion “contradict[ed] policyholders’ reasonable expectations.”<sup>81</sup> The Ninth Circuit noted that while Hawai’ian law generally holds “policies are to be construed in accord with the reasonable expectations of a layperson,” Hawaiian courts had often found policies should be “interpreted according to their plain, ordinary, and accepted sense.”<sup>82</sup>

In *Nautilus Insurance Co. v. Country Oaks Apartments Ltd.*,<sup>83</sup> the Fifth Circuit analyzed the scope of the absolute pollution exclusion under Texas law, specifically, whether an apartment furnace’s carbon monoxide emission fell within a policy’s pollution exclusion.<sup>84</sup> The Fifth Circuit affirmed the district court’s ruling, holding that the pollution exclusion unambiguously barred coverage for the plaintiff’s injuries resulting from the inhalation of the carbon monoxide, notwithstanding the fact that “a reasonable insured might not expect this result.”<sup>85</sup>

The policy exclusion stated coverage did not apply to any bodily injury or property damage that would not have occurred “but for the actual, alleged, or threatened discharge, dispersal, seepage, migration, release, or escape of ‘pollutants’ at any time.”<sup>86</sup> “Pollutant” was defined as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.”<sup>87</sup> The two issues before the Fifth Circuit were: (1) whether carbon monoxide constituted a pollutant under the policy; and (2) if so, whether it was discharged, dispersed, seeped, migrated, released, or escaped into the apartment. The court held carbon monoxide, at the levels ingested by the plaintiff, undoubtedly constituted a pollutant, as it caused severe and permanent injuries to the plaintiff.<sup>88</sup> Second, the court held the carbon monoxide emission from the furnace met the plain and ordinary meaning of the terms “discharge,” “dis-

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79. *Id.* at 684.

80. *Id.* at 680.

81. *Id.* at 682–83.

82. *Id.* at 684.

83. 566 F.3d 452 (5th Cir. 2009).

84. *Id.* at 453.

85. *Id.* at 458.

86. *Id.* at 454.

87. *Id.*

88. *Id.* at 456.

perse,” “seep,” and “release” contained in the exclusion.<sup>89</sup> As such, there was no coverage for the injuries.

The Ohio Court of Appeals, however, took the opposite position in its analysis of a similar pollution exclusion in *Bosserman Aviation Equipment, Inc. v. U.S. Insurance Co.*<sup>90</sup> The *Bosserman* case involved coverage for an employee’s injuries resulting from his repeated exposure to benzene and other harmful chemical agents while performing tasks within the scope of his employment, including reconditioning and repairing aircraft refueling equipment.<sup>91</sup> U.S. Liability Insurance Co. argued it had no coverage obligation because the employee’s injuries fell squarely within the terms of the policy’s pollution exclusion, i.e., bodily injury arising from “discharge, dispersal, seepage, migration, release or escape of pollutants.”<sup>92</sup> In rejecting U.S. Liability Insurance Co.’s position and holding that the pollution exclusion did not bar coverage, the court noted that the employee’s exposure to pollutants in his workplace “was outside the reasonable expectation of the exclusion,” since it was not the traditional kind of environmental contamination that the exclusion was meant to preclude.<sup>93</sup> The court also based its conclusion on the fact that the employee’s exposure to the harmful chemicals was over a period of time, not a “discharge, dispersal, release, or escape of pollutants” as required for the exclusion to apply.<sup>94</sup> U.S. Liability Insurance Co., therefore, had an obligation to provide coverage.<sup>95</sup>

## II. RECENT DEVELOPMENTS IN INSURANCE COVERAGE FOR INTELLECTUAL PROPERTY AND BUSINESS TORTS CASES

Cases analyzing offense-based policies include a number addressing variant policy language from standard ISO CGL policy forms in which courts explore the scope of coverage for intellectual property and business tort claims. These cases explore a range of fact scenarios typically encountered in litigation of these issues and include findings both for and against coverage.

### A. Copyright Infringement

In *United National Insurance Co. v. Spectrum Worldwide, Inc.*,<sup>96</sup> the Ninth Circuit affirmed summary judgment for the insurer, finding the first pub-

89. *Id.* at 457.

90. 915 N.E.2d 687 (Ohio Ct. App. 2009).

91. *Id.* at 688–89.

92. *Id.* at 689.

93. *Id.* at 695.

94. *Id.* at 695–96.

95. *Id.* at 696.

96. 555 F.3d 772 (9th Cir. 2009) (applying California law).

lication exclusion barred a defense for otherwise potentially covered trademark and trade dress claims, reasoning:

Spectrum's argument would require us to ignore sections (c) (misappropriation) and (d) (infringement) of the advertising injury definition in order to find an ambiguity. . . . In order to find Spectrum's interpretation reasonable, we would have to conclude that it is reasonable to ignore Monticello's efforts to carefully define the term advertising injury to mean injury arising out of defamation, invasion of privacy, misappropriation, and/or infringement and set the term off in quotation marks throughout the policy.<sup>97</sup>

The court noted that in California a mere split in authority did not render an exclusion ambiguous.<sup>98</sup>

Nevertheless, the Ninth Circuit's determination that  $4[(a)(b)(c)(d)]$  minus  $2[(a)(b)]$  equals  $4[(a)(b)(c)(d)]$ , not  $2[(c)(d)]$ , suggests a need to revisit basic math. Although all offenses are necessarily implicated by the definition of "advertising injury," the operative first publication exclusion defines the term "advertising injury" to include all four operative defenses (a) through (d). It then notes "advertising injury" should only bar coverage "arising out of oral or written publication of material" whose first publication took place before the beginning of the policy. Thus, the exclusion only impacts the operative offenses arising out of "oral or written publication of material" (a) and (b), but not (c) and (d).

Following the court's reasoning, all sections, i.e., even those that only implicate infringement, misappropriation, or both without any necessity of an oral or written publication of material, must flow within the exclusion. However, this is but one possible construction, albeit not the most reasonable, and thus should not prevail in light of the logic of *MacKinnon*, a case the Ninth Circuit cited but failed to follow on this point.

### B. Personal Injury (Defamation)

The Illinois Appellate Court in *Cincinnati Insurance Co. v. American Hardware Manufacturers Association*<sup>99</sup> affirmed the trial court's conclusion that an insurer had a duty to defend the insured for claims of defamation arising out of competing national hardware trade shows.<sup>100</sup> The insured had assigned its rights under the Cincinnati policies to Federal Insurance when Federal agreed to provide a defense.<sup>101</sup> The court found 50 percent con-

97. *Id.* at 778 (internal footnote omitted).

98. *Id.* (citing *MacKinnon v. Truck Ins. Exchange*, 73 P.3d 1205, 1212 (Cal. 2003)).

99. 898 N.E.2d 216 (Ill. App. Ct. 2008).

100. *Id.* at 219–20. One trade show was sponsored by the AHMA and the other by Reed Elsevier, Inc. and others.

101. *Id.* at 224–25.

tribution obligations arose between the co-insurers for allegations that “in an attempt to save its show and to hurt Reed’s show, AHMA embarked on a campaign to publicly impugn Reed’s integrity in a desperate attempt to shift industry interest to AHMA’s new trade show and away from the National Hardware Show.”<sup>102</sup>

The court rejected Cincinnati’s argument that the fortuity doctrine had application to the kind of allegations in the counterclaim, implicating libel coverage because “[a]llegations of recklessness may bring a defamation claim within the potential coverage of a policy which covers defamation but excludes knowing falsehoods.”<sup>103</sup> An atypical occurrence limitation in Cincinnati’s applicable personal injury coverage created an inconsistency that required its construction against the insurer and compelling a defense.

Distinguishing other law,<sup>104</sup> where only intentional acts were asserted, the court found that “the Cincinnati policies contain internal inconsistencies because, on the one hand Cincinnati purports to provide coverage for intentional tort claims, and on the other hand Cincinnati denies coverage for those same claims.”<sup>105</sup> The court found it noteworthy that an intent to injure or expectation of injury was not an element of the tort of defamation and, thus, even if such claims were excluded, they were not asserted there.<sup>106</sup>

### C. Infringement of Title

Analyzing the “use of another’s advertising idea in your ‘advertisement’” offense, the Minnesota Supreme Court in *General Casualty Co. v. Wozniak Travel, Inc.*<sup>107</sup> found that a trademark infringement/false advertising claim for wrongful use of the word “hobbit” by Hobbit Travel triggered a defense on questions certified by the district court. Adopting the broader definition of advertising in *Acuity v. Bagadia*,<sup>108</sup> the Minnesota court construed “the term ‘advertising’ . . . as: ‘any oral, written, or graphic statement made by the seller in any manner in connection with the solicitation of business.’”<sup>109</sup> The term “hobbit” was an “advertising idea” used in the insured’s advertisement because “Tolkien also alleged that Hobbit Travel used the word ‘hobbit’ in its domain name and on its website to attract the national

102. *Id.* at 224.

103. *Id.* at 237.

104. *Id.* at 239–40 (citing *Steadfast Ins. Co. v. Caremark Rx, Inc.*, 835 N.E.2d 890 (2005)).

105. *Id.* (citing *Hurst-Rosche Eng’rs, Inc. v. Commercial Union Ins. Co.*, 51 F.3d 1336, 1345 (7th Cir. 1995)).

106. *Id.* at 240–41.

107. 762 N.W.2d 572 (Minn. 2009).

108. 750 N.W.2d 817, 827 (Wis. 2008).

109. *Wozniak*, 762 N.W.2d at 579.

public's attention to its travel agency, and capitalize on the goodwill surrounding the Tolkien works."<sup>110</sup>

#### D. *Personal Injury (Invasion of Privacy)*

Answering a certified question from the District of South Carolina, the South Carolina Supreme Court in *Super Duper Inc. v. Pennsylvania National Mutual Casualty Insurance Co.*<sup>111</sup> concluded that a trademark infringement lawsuit could implicate potential liability insurance coverage under the offenses of "misappropriation of advertising ideas or style of doing business"; "infringement of copyright, title, or slogan"; "use of another's advertising idea in your 'advertisement'"; and "infringing upon another's copyright, trade dress or slogan in your 'advertisement.'"<sup>112</sup> Notably, the court found that alleged trademark infringement was only in the first certified question, but not the remaining three.<sup>113</sup>

Its discussion of why an advertising idea is implicated is of greatest interest<sup>114</sup>:

[T]he use of another's advertising idea may include trademark infringement because to infringe upon someone's trademark, which is an advertising device, one improperly uses another's advertising idea to draw the consumer's attention to a product. Accordingly, we answer the third certified question, yes.<sup>115</sup>

The court concluded that a trademark may be a product slogan and that trademark infringement potentially relates to the improper use of another's slogan. Moreover, it found a trademark infringement may occur when a party infringes upon another's trade dress or slogan in its advertisement because "a trademark may serve as an element to the overall trade dress of a product."<sup>116</sup>

#### E. *Trademark and Trade Dress Infringement (1998 ISO)*

In *Australia Unlimited, Inc. v. Hartford Casualty Insurance Co.*,<sup>117</sup> the Washington Court of Appeals found the pertinent advertising injury offense was "copying, in your 'advertisement,' a person's or organization's 'advertising idea' or style of 'advertisement.'"<sup>118</sup> Advertisement was defined as "the widespread public dissemination of information or images that has the

110. *Id.* at 580.

111. 683 S.E.2d 792 (S.C. 2009).

112. *Id.* at 796-97.

113. *Id.*

114. *Id.* at 797-98.

115. *Id.* at 798.

116. *Id.* at 798.

117. 198 P.3d 514 (Wash. Ct. App. 2008).

118. *Id.* at 521-22.

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purpose of inducing the sale of goods, products, or services through . . . any other publication that is given widespread public distribution.”<sup>119</sup> The term “advertising idea” meant “any idea for an ‘advertisement.’”<sup>120</sup>

Crocs’ complaint asserting trade dress liability pled an advertising injury because “it also specifically included in its trade dress description its ‘marketing and sales materials’ that ‘share an overall unique look and feel’ that serve to identify Crocs as the origin.”<sup>121</sup> A causal connection between injury and the insured’s advertising activity arose as the complaint alleged that “[d]efendants market, import, and/or sell footwear that infringes the Crocs Trade Dress,” and that “[d]efendants copied the Crocs Trade Dress with the intent to trade on the goodwill developed by Crocs in establishing the Crocs Trade Dress.”<sup>122</sup>

Finding that the coverage fell outside an intellectual property exclusion, the Washington court observed that “[e]ven though the underlying insurance here admittedly does not cover intellectual property claims, the underlying insurance covers *other* personal and advertising injury claims,” such as those implicated where potential coverage was at issue.<sup>123</sup> Thus, facts evidencing unfair competition beyond those essential to prove trade dress created a defense duty despite a broad intellectual property exclusion.

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119. *Id.* at 518.

120. *Id.*

121. *Id.* at 520.

122. *Id.* at 521.

123. *Id.* at 523 (emphasis in original).