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## **Pollution exclusions after MacKinnon**

By Samuel H. Ruby

The court in MacKinnon embraced the view that the exclusion was intended "primarily to exclude injuries from toxic pollution." Surveying the legal landscape, the California court found other jurisdictions split into two camps. The court said, "One camp maintains that the exclusion applies only to traditional toxic torts, generally not to all injuries involving the negligent use or handling of toxic substances that occur in the workplace. The other camp maintains that the [pollution exclusion] applies equally to negligence involving toxic substances that occur in the workplace. The court sided with the position that the exclusion should be applied narrowly based on: (1) its examination of the policyholder's interpretation of "pollutant" as literally any contaminant or irritant would bring virtually any chemical release, dispersal, release or escape" could imply "expulsion over a considerable area rather than a local use."

In examining the progeny of MacKinnon in California, the commentary reviews cases involving (1) the discharge of asbestos fibers; (2) the discharge of leftover dirt and rocks from quarrying operations into an area used for composting operations; and (4) the release of methylene chloride into a public sewer system. The California appellate courts have found the [California] Supreme Court's 'narrow' interpretation of "pollutant" in these circumstances." Thus, lethal chemicals are not the only substances that may qualify as "pollutants" under the exclusion clauses. commonplace natural material like silica and even foul odors may qualify as pollutants under the exclusion clauses. Moreover, the pertinent "discharge" or "dispersal" need not be a permanent or ongoing activity in a defined area, a small stretch of road adjacent to a creek, or a one-time release.

The commentary further reviews how the MacKinnon decision has been received outside of California, Tennessee, and Virginia. The commentary concludes with significant advice to attorneys for policyholders regarding the MacKinnon decision. In a case involving lead paint poisoning, the Missouri Court of Appeals affirmed the policyholder's recovery because the policy at issue expressly defined "pollutant" to include lead. The Tennessee Court of Appeals affirmed the policyholder's recovery because the policyholder's sulphuric acid met both the narrow interpretation of the pollution exclusion and the literal, broad definition of "pollution."

The commentary concludes by warning those that thought the MacKinnon decision would limit their "environmental nightmares" should "reconsider the case's impact on claims involving lesser situations."

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