COVERAGE FOR WELDING ROD CLAIMS: NOT AN OXYMORON

THE POLICYHOLDER'S PERSPECTIVE[1]

I. GENERAL BACKGROUND

The past ten years have seen a proliferation of print and web-based solicitations, seeking to attract clients for actions against manufacturers, distributors and others engaged in the manufacture, sale, distribution or use of welding rods and collateral equipment. For example, the "Big Class Action" web site (www.bigclassaction.com) has questionnaires, to be answered and submitted by email, asking for the "Date of Injustice." These solicitations provide, to be sure, a slanted perspective both on the scope of the issue and, as well, the medicine supporting the claims. Nonetheless, the sheer level of targeted advertising dollars highlights the growing confidence of plaintiffs' lawyers in the wake of the *Elam* decision, which we discuss below.

While printed parallels have been drawn between the welding rod litigation exposures and the first and second wave asbestos exposures (a cottage litigation industry), the parallels are inapt. A co-lead plaintiff counsel in the Multi-District

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Litigation,[2] Don Barrett, stated in a recent article, "[I]f every welder in the country gets tested, that's going to translate into probably 35,000 cases… ." Barrett further opined that "the industry is in serious trouble." Jean Hellwege, Welding Rod Litigation Heats Up; Workers Claim Toxic Fumes Cause Illness, Trial, July 2004, at 1 (Trial article). Of course, while Mr. Barrett's prediction may be less than psychic, given the result in *Elam* and employing simple math, these are obviously significant issues urgently implicating the protection promised by insurance coverage.

A. THE *ELAM* CASE

Larry Elam, of Collinsville, Illinois, had been a welder since 1967, and is presently in his sixties. Elam claims to have long been exposed to the fumes emitted from welding rods, purportedly containing manganese.[3] Elam, who was only intermittently involved in welding, claimed both direct and occupational exposure to manganese fumes emitted during the welding process, and that these fumes caused a severe neurological disorder; if not Parkinson's disease, a close analog. Elam sued

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[2] *In re Welding Rod Products Liab. Litig.*, 269 F. Supp. 2d 1365 (Jud. Pan. Mult. Lit. 2003) (order of consolidation and centralization).

[3] We presume familiarity with the process of welding, and the chemical makeup of both the welding rods and the fumes generated as part of the welding process. Essential background may, however, be gleaned from *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 713-20 (7th Cir. 1999), the Trial article and Leonard Post, *Suits Sparked: Arc Welding Plaintiffs Trace Illness to Their Jobs*, Nat'l L.J., Dec. 8, 2003, at 1 (NLJ article). We profess no expertise on the scientific dispute and the etiology of the various illnesses that may be caused by exposure to the constituents of welding rods, although a basic understanding of the process is essential to informing the coverage issues.

only the manufacturers and not his employer(s).[4] Predictably, Elam claimed that the manufacturer had created a dangerous product, had failed to warn adequately of its dangers, and did not provide proper safety directions.

The first trial of the *Elam* case resulted in a hung jury. The second trial, however, produced a one million dollar verdict in Elam's favor, representing the first victory by a plaintiff in nine tries. NLJ article at 1. *See also Nat'l Elec. Mfrs. Ass'n v. Gulf Underwriters Ins. Co.*, 162 F.3d 821, 823 (4th Cir. 1998) (noting that NEMA "has not been found liable in the underlying actions and has been dismissed in all but four of the actions"); *Jones v. Lincoln Elec. Co.*, 188 F.3d 709 (7th Cir. 1999) (affirming verdict in favor of defendants in welder's action seeking recovery for neurological injuries).

As part of his proof, Elam sought to demonstrate that the welding rod manufacturing and distributing industry long knew of dangers associated with welding rod use. He cited as one example a 1937 safety pamphlet created by Met Life concerning the dangers of welding, which had been brought to the attention of the welding industry. Trial article at 2. While plaintiffs such as Elam might view welding industry knowledge as important to success on the failure-to-warn claims, such assertions by plaintiffs also have a definitive impact on coverage.

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[4] There are reasons not to sue an employer, including worker's compensation immunity.

The last chapter obviously has not been written in the *Elam* case, and the defendants have appealed the jury verdict. *Elam v. Lincoln Elec. Co.*, No. 01-L-1213 (Madison County, Ill., Cir. Ct. Oct. 29, 2003). For the moment, *Elam* has raised the temperature of the debate, and provides a useful template in discussing the insurance coverage issues likely to be triggered (pun intended) by a claim like Mr. Elam's.

II. GENERAL BACKGROUND ON THE LIABILITY POLICY

Without question, general liability policies (regardless of their moniker) are the mainstay liability insurance coverage purchased by the large and small, to protect from liabilities posed by injury-causing events that impact third parties and result in claims against the insured. GL policies cover the broadest range of possible claims, including those that, historically, were covered under more specific policies. Purchasers of GL policies reasonably expect to receive coverage for all unanticipated liabilities arising from business operations, except as specifically and unambiguously excluded. Indeed, the insurance industry took advantage of the expectations of policyholders by drafting a GL policy as an alternative to so-called "schedule" policies, which provided coverage only for specifically enumerated risks. As John H. Eglof, an executive for Travelers, commented in describing the all-risk approach to liability coverage:

> The burden of determining what to insure and what not to insure is removed from the shoulders of the insured and placed squarely on the producer and the carrier. How much better it is to say – "we cover <u>everything</u> except this, and this, and this – instead of – we cover <u>only</u> this, and this, and this."

John H. Eglof, Comprehensive Liability Insurance: The Outside, Best's Fire & Cas. News, May 1941, at 19 (emphasis added). This "piece of mind" coverage lies at the heart of the policyholders' expectations – fostered by the insurance industry when drafting, pricing and marketing its forms. *See, e.g.,* Note, The Applicability of General Liability Insurance to Hazardous Waste Disposal, 57 S. Cal. L. Rev. 745, 757 (1984).

The GL policy has seen many incarnations, but the signal change occurred in 1966 when, during one of those periodic tectonic events that form and shape the contents of an insurance policy, the industry through its drafting committees moved from an accident to an occurrence form of coverage. The accident form came into use back in the 1940s when standardized policies were first developed. *See* R.D. Chesler, M.L. Rodburg & C.C. Smith, Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability, 18 Rutgers L.J. 9, 13-16 (1986); Wheeler, "Caused by Accident" as Used in Comprehensive Liability Policies, 397 Ins. L.J. 87 (1956). Because of dissatisfaction in the insurance industry with the imprecise meaning of "accident," the GL policy was modified in 1966 to cover liability for an "occurrence." In 1973, the definition of occurrence was further changed, followed by the advent in 1985 of the Commercial General Liability policy, and revisions have continued since as the insurance industry tinkers with its liability exposures.

The structure of GL policies informs the interpretive matrix for cases such as *Elam* and, in part, dictates the sequence of our discussion here. Typically, following a cover page, the policy will have a declarations page – the index to the policy –

followed by the coverage grants, exclusions from coverage, definitions, and conditions to coverage, such as notice and cooperation. We start with the coverage grant.

III. OCCURRENCES, FORTUITY AND KNOWN LOSSES

The essential coverage grant of any CGL policy requires that exposure under the policy spring from an "accident" or, more commonly, an "occurrence." To be sure, the word "accident" is one of the more benighted terms in the insurance lexicon, and "occurrence" is not defined at all, save as a tautology, in the typical liability policy. What these terms resonate with, however, stems from the purpose of insurance; that is, to insure "risks." *Richardson v. Nationwide Mut. Ins. Co.*, 826 A.2d 310, 315 (D.C. Cir. 2003). A "risk," in turn, is something fortuitous that yet has come to pass, although it is both foreseeable and predictably recurrent.. Where in the continuum risk becomes certainty, and the foreseeable known, is the subject of this section of our materials. We begin with the rules of construction – oft-repeated in these materials lest they be forgotten.

Insurance contracts are to be construed in accordance with the plain language of the policies as bargained for by the parties. *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000). Insuring or coverage clauses are construed in the broadest possible manner to effect the greatest coverage. *Union Amer. Ins. Co. v. Maynard*, 752 So. 2d 1266, 1268 (Fla. 4th DCA 2000). Exclusionary clauses are construed even more strictly against the insurer than coverage clauses. *Anderson*, 756 So. 2d at 34; *accord Maynard*, 752 So. 2d at 1268 ("If the insurer fails in the duty of clarity by drafting an

exclusion that is capable of being fairly and reasonably read both for and against coverage, the exclusionary clause will be construed in favor of coverage."). When an insurer fails to define a term in a policy, it cannot take the position that there should be a "narrow, restrictive interpretation of the coverage provided." *State Farm Fire & Cas. Co. v. CTC Devel. Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998).

Any ambiguities in insurance contracts are interpreted liberally in favor of the insured and strictly against the insurer. *Prudential Prop. & Cas. Ins. Co. v. Swindal*, 622 So. 2d 467 (Fla. 1993). Likewise, ambiguous policy exclusions are construed against the drafter and in favor of the insured. *Anderson*, 756 So. 2d at 34. Significantly, if the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage, the insurance policy is considered ambiguous. *Anderson*, 756 So. 2d at 34; *accord Buckhalter v. Commercial Union Ins. Co.*, 787 So. 2d 949 (Fla. 2d DCA 2001) (*quoting Anderson*).

In 1966, the standard GL policy was modified to cover liability for an "occurrence" in lieu of an "accident":

> The company will pay on behalf of the insured all sums which the insured shall become legally liable to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence.

An "occurrence" is defined as:

> An accident, including an injurious exposure to harmful conditions which results, during the policy period, in personal injury or property damage neither expected nor intended from the standpoint of the insured.

In 1973, the definition of occurrence was changed. The phrase "injurious exposure to harmful conditions" was deleted, and "continuous or repeated exposure to conditions" was substituted. This change was caused, in part, by the insurance industry's reaction to *Maurice Pincoffs Co. v. St. Paul Fire & Marine Ins. Co.,* 447 F.2d 204 (5th Cir. 1971), in which the Fifth Circuit determined that each sale of a defective product constituted a separate occurrence. In the 1973 alteration, the insurance industry broadened its coverage so as to include not only continuous or repeated exposure to conditions, but also all instances of property damage "neither expected nor intended from the standpoint of the insured." *See* Jerry E. Cardwell, *Insurance and Its Role in the Struggle Between Protecting Pollution Victims and the Producers of Pollution*, 31 Drake L. Rev. 913, 914 (1982); James A. Hourihan, *Insurance Coverage for Environmental Damage Claims*, 15 Forum 551, 552 (1980).

Litigants then turned their focus to determining what event would constitute an "accident" because, while the standard CGL policy defined the term "occurrence," the operative term "accident" was largely left undefined. Policyholders took the position that any argument that an accident had or had not occurred placed an unduly restrictive meaning on the occurrence policies issued and delivered by the insurance providers. The Florida Supreme Court partly agreed with the arguments of the policyholders, ultimately ruling in their favor:

> We hold that where the term "accident" in a liability policy is not defined, the term, being susceptible to varying interpretations,

> encompasses not only "accidental events," but also injuries or damage neither expected nor intended from the standpoint of the insured.

State Farm Fire & Cas. Co. v. CTC Devel. Corp., 720 So. 2d 1072 (Fla. 1998).

In *CTC*, a builder mistakenly constructed a residence beyond the setback lines of the lot. The builder knew he was constructing the house beyond the setback but believed (erroneously, as it turned out) that the homeowners' association had approved his request to do so. The Court determined that because the builder did not openly defy the setback requirements, the fact that he intentionally constructed the house beyond the setback did not preclude coverage for the "occurrence."

A few years later, the Florida Supreme Court further broadened the meaning of "occurrence." In *Koikos v. Travelers Ins. Co.*, 849 So. 2d 263 (Fla. 2003), the issue was whether separate but successive shootings of two victims in a restaurant lobby constituted one occurrence or two. The insurer claimed that the "occurrence" was the restaurant owner's negligent failure to provide security, and thus there was only one "occurrence." The insured argued that there were two "occurrences" -- the separate shootings. The Florida Supreme Court agreed with the policyholder, holding that each shooting was a separate occurrence under the insured's general liability policy:

> It is the act that causes the damage, which is neither expected nor intended from the standpoint of the insured, that constitutes the "occurrence." The insured's alleged negligence is not the "occurrence"; the insured's alleged negligence is the basis upon which the insured is being sued by the injured party. Focusing on the immediate cause – that

> is the act that causes the damage – rather than the underlying tort – that is the insured's negligence – is also consistent with the interpretation of other forms of insurance policies.

Id. at 271. The Court further noted that the addition of the "continuous or repeated exposure" language normally found in the definition of "occurrence" expands the definition to include injuries that are ongoing or develop slowly. *Id.* at 268.

When an "occurrence" is defined in a CGL policy as an "accident," coverage is afforded for unexpected or unintended injuries. *See Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 841 (Cal. App. 1993). *Shell Oil* was a declaratory action brought by the insured to determine the liability of several insurers to defend and indemnify in an environmental claim setting. The Court made clear that any test whether an event was "expected" by an insured must be a subjective one, as was evident by standard policy language:

> Policies that base coverage on an "occurrence" commonly define the term as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended *from the standpoint of the insured*." The insurance industry apparently adopted the phrase, "from the standpoint of the insured," to clarify that whether an event is an "accident" is evaluated from the insured's perspective, not the injured victim's, as some courts had decided. Regardless of the motive for including the phrase, it focuses the inquiry on *the insured's* actual, subjective expectation, not the expectation of a hypothetical reasonable person.

15 Cal. Rptr. 2d at 834 (emphasis in original) (internal citations omitted).

Other jurisdictions have likewise noted that whether an event is a covered "accident" is to be judged from the insured's point of view. *See, e.g., Allstate Ins. Co. v.*

Steinemer, 723 F.2d 873, 875 (11th Cir. 1984) ("An 'intentional injury' exclusion will not apply if the insured intentionally does an act, but has no intent to commit harm, even if the act involves the foreseeable consequences of great harm or even amounts to gross or culpable negligence"); *Clemmons v. American States Ins. Co.*, 412 So. 2d 906, 908 (Fla. 5th DCA 1982); *Benedictine Sisters v. St. Paul Fire & Marine Ins. Co.*, 815 F.2d 1209 (8th Cir. 1987) (finding an "accident" notwithstanding that the release of soot from a malfunctioning boiler had built up over a period of time, and notwithstanding that additional releases occurred as a result of the policyholder's good faith but negligent efforts to clean the boiler).

Besides being unexpected or unintended, a loss must also be fortuitous in order to be covered. The fortuity doctrine holds that "a contract is not an insurance policy unless it covers some fortuitous event." *Chase Manhattan Bank v. New Hampshire Ins. Co.*, 749 N.Y.S. 2d 632, 638 (N.Y. Sup. Ct. 2002). Fortuity is judged at the outset of the policy. *Id.*

Related to the fortuity doctrine is the known loss doctrine, which provides that losses that the insured knows have already happened – or are substantially certain to occur in the future – are not proper subjects of insurance agreements. As one court has put it:

> No insurer would issue a fire insurance policy on a house that has already burned down or a life insurance policy on a person who has already died. The concept of insurance is that the parties, in effect, wager against the occurrence or non-occurrence of a specified event; the carrier insures a risk, not a certainty.

Warnock v. Office of Servicemembers' Group Life Ins., 2004 WL 1087364, at *3 (S.D. Ind. Apr. 28, 2004) (internal citation omitted).

Like with unexpected or unintended injuries, the fortuity/known loss inquiry is subjective. Under the doctrine, "[t]he relevant inquiry is whether [the insureds] knew at the time they entered the insurance policy that they were engaging in activities for which they could possibly be found liable." *Franklin v. Fugro-McClelland (Southwest), Inc.*, 16 F. Supp. 2d 732, 737 (S.D. Tex. 1997). *See also Rohm & Haas Co. v. Continental Cas. Co.*, 781 A.2d 1172 (Pa. 2001). The doctrine will thus bar a claim if a policyholder knowingly and willingly engages in conduct that he knows will cause harm and that he knows will expose him to legal liability. *RLI Ins. Co. v. Maxxon Southwest, Inc.*, 2004 WL 1941757, at *3 (5th Cir. Sept. 1, 2004).

Such a finding requires a great deal of scienter on the part of the insured -- an unlikely prospect in welding rod litigation. An insurer attempting to avoid coverage would have to prove the policyholder, with full knowledge of the inherent danger of the welding rods, had a belief that the harm would occur when he purchased the policies. There are thus two hurdles for the insurer to surmount. The first is proving that, at the time the policies were purchased, the insured knew or should have known of the harmful nature of the welding rods. *See Roman Catholic Diocese of Dallas v. Interstate Fire & Cas. Co.*, 133 S.W.3d 887 (Tex. Ct. App. 2004). The second is the requirement that the insured have either a specific intent to injure or a belief that such injury is substantially certain to occur as a result of the welding rods, notwithstanding

warnings or protective devices. *See In re Matter of Celotex Corp.*, 152 B.R. 652, 657 (Bankr. M.D. Fla. 1993). This inherently subjective component to the doctrine typically precludes a summary judgment. *City of Sterling Heights v. United Nat'l Ins. Co.*, 2004 WL 252091, at *11 (E.D. Mich. Feb. 11, 2004).

The subjective element works to protect the policyholder, as it prevents an insurer from misusing hindsight to avoid coverage.[5] *Id.* at *10, *quoting Aetna Cas. & Sur. Co. v. Dow Chem. Co.*, 10 F. Supp. 2d 771, 789 (E.D. Mich. 1998). Thus, noted the *Sterling Heights* court:

> The crucial issue is whether the insured was aware of an immediate threat of the injury for which it now seeks coverage, not the insured's awareness of its legal liability for that injury.

Id.

One persuasive factor in determining whether a risk is a known, immediate threat is the frequency with which similar claims were made in the past. *See Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co.*, 2000 WL 34001917, at *25 (Kan. Dist. Ct. July 24, 2003) (defining natural and probable consequences of an intentional act to be "those which human foresight can anticipate because they happen so frequently they may be expected to recur, while possible consequences are those which happen so infrequently that they are not expected to happen again") (internal citations omitted).

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[5] What we view as post-claim underwriting.

The insured must have knowledge of the likelihood of the loss itself, not merely a risk that a loss could occur, unless the risk is substantially certain to result in a loss. *See id.* at *26. In *Atchison*, a Kansas trial court determined the insured did not have knowledge of a known loss because the number of claims that had been levied against it prior to the purchase of the policy had been minimal and had never even exceeded the railway's retentions.

In the nearly seventy year period from 1917 to 1981, there were only twenty-six cases reported nationwide of welding-related manganese poisoning. Furthermore, there are presently serious medical doubts that manganese exposure from welding rods causes such injuries. This causative uncertainty severely diminishes any claims that the welding industry either knew or should have known at the time the policies were purchased that manganese from welding rods would cause severe neurological problems.[6]

[6] Also militating against application of the known loss and fortuity doctrines is the not insignificant evidence that the insurance industry itself knew of the dangers posed by welding, choosing to insure at an increased premium anyway. The very evidence cited by plaintiffs in welding rod cases was equally known to the insurance industry at the time, as *Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.*, 210 F.3d 672 (6th Cir. 2000) demonstrates. Many insurers, of course, offered loss control and prevention services to their insureds and became equal partners in attempting to stanch the potential litigation. As well, the tort principle of foreseeability has no place in this analysis. Tartly, if a risk is foreseeable, that's why we purchase insurance.

IV. TRIGGER ISSUES

Trigger is the word used to determine what event, happening, thing or series of events, happenings or things must occur in order to give rise to obligations under a liability policy written on an accident or occurrence basis. The issue on its face seems simple, because in most circumstances, the event or series of events causing damage and the resulting harm occur well-nigh simultaneously; an automobile accident is an example. Problems arise, however, when the thing, event or happening causing harm is not known to be harmful at the time of its operation, but is discovered to be pernicious or made manifest only years — sometimes decades — later, when the cognitive link is drawn both factually and legally between the causative agent and the resulting harm. That is what happens when the event causing harm and the resulting harm are distinct in time. Here, courts have disagreed like members of a condo board, with different jurisdictions and even courts within jurisdictions reaching disparate conclusions under like facts and the same insurance policy language.

It is the writer's time-worn experience that trigger resolution is largely result-oriented. Assume the following hypothetical: The insured has either missing policies or exhausted policies in early years of exposure to the causative agent, but high limit policies with low deductibles in later years. Faced with these facts, and rules of construction discussed below, a court is more likely to find a trigger that would inure to the benefit of the policyholder. This is an issue likely to divide insurers more than any other — carriers on the risk in early years will likely disagree on trigger theory

with carriers on the risk in later years. Additionally, a carrier with a high deductible will likely take a position antithetical to the assumption of liability under its policy.

Trigger issues should be resolved as a matter of law. Carriers frequently take the position that trigger issues are highly fact-sensitive — that is, until the nuances of a particular process are well understood, or the manner by which damage is caused as certain as the sunrise, no decision can be made as to trigger. And, since a decision cannot be made as to trigger, what of the duties to defend or to indemnify, as the policy may not respond at all? Respectfully, this is incorrect.

As we note below, how trigger decisions are made is determined, in our view, by rules of contract interpretation. Indeed, most trigger cases are resolved on summary judgment. Trigger issues involve questions concerning the scope of insurance coverage independent of the exact amounts of liability in the underlying suits. The factors that go into determining the relative duties and benefits under an insurance policy are independent of the underlying claims and are presented in an adversarial context by parties with adverse interests. *See, e.g., A C and S, Inc. v. Aetna Cas. & Sur. Co.*, 666 F.2d 819 (3d Cir. 1981); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1081); *Sandoz, Inc. v. Employer's Liab. Assur. Corp.*, 554 F. Supp. 257 (D. N.J. 1983). Two federal appellate decisions applying state law, were themselves appeals from summary judgments determining trigger issues based on the particular state law involved: *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir.

1981) (applying Louisiana law); *Commercial Union Ins. Co. v. Sepco Corp.*, 765 F.2d 1543 (11th Cir. 1985) (applying Alabama law).

A. THE RULES OF CONSTRUCTION

As the interpretation of an insurance policy is an issue of law, and as rules of construction inform that interpretation, we now briefly reprise Florida law on insurance policy interpretation, which, in the main, is consistent with national law on the subject. If the terms of an insurance policy are susceptible to two interpretations, the interpretation that sustains the claim for indemnity or that allows the greater indemnity will be adopted. *Effort Enter. of Fla., Inc. v. Lexington Ins. Co.*, 666 So. 2d 930, 931-32 (Fla. 4th DCA 1995); *New York Life Ins. Co. v. Kincaid*, 186 So. 675, 677 (Fla. 1939). An insurance policy must be "liberally construed" in favor of the insured so as not to defeat "without a plain necessity" the right of indemnity. *Feldman v. Central Nat'l Ins. Co. of Omaha*, 279 So. 2d 897, 898 (Fla. 3d DCA 1973). An insurer cannot use obscure phrases or exceptions to defeat the purpose for which the policy was procured. *Rosen v. Godson*, 422 F.2d 1082 (5th Cir. 1970) (applying Florida law).

Of course, any insurance policy must receive a "reasonable and practical interpretation, consistent with the intent of the parties." *Florida Residential Prop. & Cas. Joint Und. Ass'n v. Kron*, 721 So. 2d 825, 826 (Fla. 3d DCA 1998); 2 Couch on Ins. §15:16 (1984). Florida courts liberally construe general liability policies in favor of the policyholders so as to promote the reasonable expectations of the policyholder that insurance will be available. *Pepper's Steel & Alloys, Inc. v. U. S. Fid. & Guar. Co.*, 668

F. Supp. 1541, 1545 (S.D. Fla. 1987). Predictably, some cases reach a particular result based upon a legal or technical definition of insurance policy language. This is not generally the law in the United States, including Florida. The terms used in an insurance policy are to be construed in light of the skill and experience of ordinary people. *General Star Indem. Co. v. West Fla. Village Inn, Inc.,* 874 So. 2d 26, 29 (Fla. 2d DCA 2004); *Brill v. Indianapolis Life Ins. Co.*, 606 F. Supp. 265, 268 (M.D. Fla. 1985).

B. THE TRIGGER CHOICES AVAILABLE

In a continuing damage or delayed manifestation case, the courts have adopted no less than five different theories of coverage. First, there is a continuous trigger theory of coverage, which holds that all policies on the risk from the initial exposure through manifestation and remediation are triggered. *See, e.g., Keene, supra.* Second, there is the exposure theory of trigger, which presumes that damage occurs when exposure to the causative agent takes place and not when the physical symptoms caused by exposure become manifest. *See, e.g., Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980). Third, there is the injury-in-fact theory, which focuses on when an injury actually occurred. The injury need not be manifest, but must exist in fact at some point in time. *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485 (S.D. N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984). Fourth, there is the manifestation theory, which holds that policies are triggered when damages become manifest or diagnosable. *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982). To make matters more addled, there

is even a double-trigger theory, which holds that there are two triggers — exposure and manifestation — and nothing in between. *Zurich Ins. Co. v. Raymark Indus., Inc.*, 514 N.E. 2d 150 (Ill. 1987).

Of course, the very existence of five different trigger theories reflects poorly on the clarity of the drafting of general liability policies. As one Florida court has stated,

> The insurance company contends that the language is not ambiguous, but we cannot agree and offer as proof of that pudding the fact that the Supreme Court of California and the Fifth Circuit in New Orleans have arrived at opposite conclusions from a study of essentially the same language.

Securities Ins. Co. of Hartford v. Investors Diversified Ltd., Inc., 407 So. 2d 314, 316 (Fla. 4th DCA 1981).

Of the trigger theories available, the continuous trigger — with its beneficial effects on allocation — is the obvious preference for policyholders, although the trigger advocated by any insurance carrier will likely depend on the effect on its coverages vis-à-vis a given claim.

C. A PLAIN MEANING ANALYSIS SUPPORTS A CONTINUOUS TRIGGER

The simple wording of a general liability policy supports the conclusion that a continuous trigger of coverage should be applied. Of course, this is a conclusion most insurance companies would disagree with, but there is ample support under Florida law. A comprehensive general liability policy prescribes the right to indemnity as "triggered" by an occurrence, including continuous or repeated exposure to

conditions, which causes property damage during a policy period. The focus, therefore, is on damages as the signal event, together with damage caused by continuous or repeated exposure to conditions. This has long been the law in Florida. *See Trizec Props., Inc. v. Biltmore Constr. Co.*, 767 F.2d 810, 812 (11th Cir. 1985) (interpreting Florida law); *Travelers Ins. Co. v. C.J. Gayfer's & Co., Inc.*, 366 So. 2d 1199 (Fla. 1st DCA 1979).

In cases such as *Elam*, typical allegations include repeated exposure to manganese-laden fumes emitted during the welding process, resulting in damage to the brain, which in turn impairs functioning. This damage purportedly can happen very quickly and incrementally worsens over many years to the point of manifestation or diagnosis. While we might engage in a metaphysical debate over what constitutes "damage" on a cellular level, it seems painfully clear that manganese poisoning and/or Parkinson's is not a quick injury, but remains asymptomatic pending degeneration of brain functions to the point where symptoms become discernable. Under the rules of construction applicable to insurance policies, consistent with the drafting history of the policies,[7] a flexible trigger was intended.[8]

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[7] *See, e.g., Asbestos Insurance Coverage Cases*, 904 P.2d 370 (Cal. 1995); Sayler & Zolensy, Pollution Coverage and the Intent of the CGL Drafters: The Effect of Living Backwards, 4 Mealey's Lit. Rpts. (Ins.) 425, 439 (1987); *Shell Oil Co. v. Accident & Cas. Ins. Co. of Winterthur*, Case No. 278953, (Cal. Sup. Ct., San Mateo Cty. July 13, 1988) reprinted in 2 Mealey's Lit. Rpts. (Ins.) 18 (1988), *aff'd in part*, *Shell Oil co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815 (Cal. App. 1993).

Two cases have thus far attempted to reconcile trigger theories in welding fume cases. In *Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.*, 10 F. Supp. 2d 856 (N.D. Ohio 1998), *aff'd in part*, 210 F.3d 672 (6th Cir. 2000). The court held:

> The face of the [insurance policy] governs where the policy terms unambiguously contemplate coverage of long-term exposure and delayed manifestation injuries by incorporating a specific and articulated method of trigger and calculation. In the absence of clear guidance from the terms of the contract concerning long-term exposure and delayed manifestation injuries, there is a rebuttable presumption that all exposure prior to diagnosis contributed equally to an injury-in-fact; thus, all policies in effect at the time of both exposure to the offending product and actual manifestation will be construed to have been triggered.

Lincoln, 210 F.3d at 689-90. Lincoln, which cited to *Keene* with approval, seems to be a continuous trigger case despite its lip service to exposure theory.

In *Air Prods. and Chems., Inc. v. Hartford Accident & Indem. Co.*, 707 F. Supp. 762 (E.D. Pa. 1989), *aff'd in part, vacated in part,* 25 F.3d 177 (3d Cir. 1994), two types of personal injury suits involving hundreds of claims were asserted. One category included claims alleging bodily injury resulting from exposure to fumes and gases from welding rods sold by the policyholder. The court chose to follow the Third

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[8] *Keene* has been cited with approval by numerous cases, including cases arising in and interpreting Florida law. *See, e.g., CSX Transp., Inc. v. Admiral Ins. Co.*, 1996 WL 33569825, at *4 (M.D. Fla. 1996). Of course, of the 88 cases citing to *Keene*, some cite to it with approval, and others with disdain. As well, there is a bizarre case from the Florida Middle District, *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F. Supp. 2d 1248 (M.D. Fla. 2002) which bears mention. While admitting that the policy was "triggered" by something other than manifestation, citing *Trizec, supra,* the court nonetheless – in contrast to *Trizec* – found manifestation to be the appropriate trigger.

Circuit's decision in *AC and S, Inc. v. Aetna Cas. & Sur. Co.*, 764 F.2d 968 (3d Cir. 1985), holding "application of the continuous trigger [is required] to the underlying welding lawsuits." *Id.* at 768.

D. PRACTICAL CONSIDERATIONS

The existence of multiple trigger theories points to an important decision: Where to file suit, and what law to apply. Application of the law of a given jurisdiction may well be dispositive, since trigger theory can make irrelevant the very existence of years' worth of coverage.

V. THE POLLUTER'S EXCLUSION

The polluter's exclusion should be examined to determine its existence, applicability and scope. In 1970, a new exclusion was added to the standard Commercial General Liability policy, commonly as referred to as the "Pollution Exclusion."[9] The standard ISO form reads:

> This insurance does not apply…
>
> to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

[9] To be hyper-technical, some people refer to it as the "polluter's exclusion," due to court interpretations, or the "doubly-qualified polluter's exclusion" because of the express sudden and accidental exception to its scope.

1973 Comprehensive General Liability Insurance Policy, reprinted in Todd I. Zuckerman & Mark C. Raskoff, Environmental Insurance Litigation Practice Forms, Form VI-2, at VI-23 (1995). Because the pollution exclusion has the potential to eviscerate coverage otherwise afforded, questions concerning when the exclusion was introduced and became available are important. The exclusion was not approved for use in the United States until approximately June 10, 1970. Even then, its creation and drafting caused no little internal debate in the insurance industry, prompting several carriers initially to reject use of the exclusion, and others (famously, Travelers) to write their own, more in keeping with the "underwriting intent."[10] In fact, on multi-year policies the exclusion may not have been added as an endorsement until midstream in the policy course, and even then its addition was not accompanied by a reduction in premium or other consideration.

Once the existence and application in a given policy of the sudden and accidental pollution exclusion is confirmed, the battle has only just begun. First, the very wording of the exclusion begets issues concerning its scope: Is, for example, the release of manganese-laden fumes in a confined work-space a "release… of… vapors… into or upon land, the atmosphere or any watercourse or body of water?" A number of cases have held the words of exclusion require that the release occur into

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[10] Many cases have discussed its history. *See, e.g., Richardson v. Nationwide Mut. Ins. Co.*, 826 A.2d 310 (D.C. Cir. 2003), discussed below.

the "environment" as, in common understanding, air-conditioned space typically is not thought of as an "atmosphere." *Board of Regents of Univ. of Minn. v. Royal Ins. Co.*, 517 N.W.2d 888 (Minn. 1994); *U. S. Fid. & Guar. Co. v. Wilkin Insulation Co.*, 578 N.E.2d 926 (Ill. 1991). Second, the cases are sharply divided on the appropriate interpretation of the sudden and accidental exception, as the concurring, specially concurring and dissenting opinions in *Dimmitt Chevrolet, Inc. v. Southeastern Fidel. Ins. Corp.*, 636 So. 2d 700 (Fla. 1993) confirm.[11]

Moreover, various courts have wrestled with the manner in which endorsements setting forth pollution exclusions were added to policies, and whether such endorsements were intended to modify or limit all coverages, or leave available potential coverage under, for example, personal injury coverages in older GL policies. *See, e.g., Royal Ins. Co. of Am. v. Kirksville College of Osteopathic Medicine*, 191 F.3d 959 (8th Cir. 1999); *City of Delray Beach v. Agricultural Ins. Co.*, 85 F.3d 1527 (11th Cir. 1996); *New Castle Cty. v. Nat'l Union Fire Ins. Co.*, 243 F.3d 744 (3d Cir. 2001); *Gould v. Arkwright Mut. Ins. Co.*, 829 F.Supp. 722 (M.D. Pa. 1993); *Pipefitters Welfare Educ. Fund v. Westchester Fire*, 976 F.2d 1037 (7th Cir. 1992).

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[11] See also *St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 923 P.2d 1200 (Or. 1996); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204 (Ill. 1992); *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083 (Colo. 1991); *Greenville Cty. v. Ins. Reserve Fund*, 443 S.E.2d 552 (S.C. 1994). There are many, many other cases on both sides of the issue concerning the proper interpretation of the words "sudden and accidental."

Under the form of the exclusion in effect from 1970 until 1985, even in jurisdictions that have determined the interpretation of the sudden and accidental exception, much remains for analysis. And, in analyzing the various lines of resistance in paying based upon the polluter's exclusion, choice of law becomes paramount.

The "absolute" pollution exclusion was inserted into standard form GL policies beginning in 1985.[12] *Hatco Corp. v. W.R. Grace & Co.-Conn.*, 801 F. Supp. 1334, 1352-53 (D. N.J. 1992), *citing* Nancer Ballard & Peter M. Manus, Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion, 75 Cornell L. Rev. 610, 633 (1990). The typical incarnation of the absolute pollution exclusion reads:

> This insurance does not apply to:
> …
> (f). (1) 'Bodily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:
> (a) At or from premises you own, rent or occupy;
> (b) At or from any site or location used by or for you or others for the handling, storage, disposal, processing or treatment of wastes;
> (c) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible…
> (2) Any loss, cost, or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.[13]

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[12] Various forms of a "total" pollution exclusion appeared more recently.

[13] We omit certain paragraphs of this lengthy exclusion for the sake of brevity.

As a preliminary issue, the exclusion on its face clearly is site-specific – "at or from premises" as an example. As the Supreme Court of Alabama recently stated in *Porterfield v. Audubon Indem. Co.*, 856 So. 2d 789, 801 (Ala. 2002):

> As may be discerned from a close reading of it, [the exclusion's] applicability depends upon the affirmative confluence of three elements: the bodily injury or property damage in question must have been caused by exposure to a "pollutant"; that exposure must have arisen out of the actual, alleged, or threatened discharge, dispersal, release, or escape of the pollutant; and that discharge, dispersal, release, or escape must have occurred at or from certain locations or have constituted "waste." In other words, the exclusion comes into play only with respect to bodily injury or property damage arising out of the discharge… of pollutants… at or from certain categories of locations… . (Emphasis added).

The notion that the absolute pollution exclusion was intended only to bar coverage for claims that were limited to on-premises risks is well-explained in *Kimber Petroleum Corp. v. Travelers Indem. Co.*, 689 A.2d 747 (N.J. Super. Ct. 1997). In *Kimber,* the Court quoted extensively from ISO circulars and explanations generated at the time the absolute pollution exclusion was committed for use. For example, a February 6, 1986, letter generated by the ISO indicates that "the new exclusion is designed to exclude all pollution damages except those arising out of products, completed operations and certain other off-premises emissions." *Kimber*, 689 A.2d at 753. Ultimately, the Court found that the pollution exclusion clause and completed-operations coverage can coexist "within the same policy because the conditions under which they each operate are distinct."

Additionally, a debate has raged (typical for these types of exclusions) among the courts concerning whether the absolute pollution exclusion was intended to apply solely to typical environmental exposures, or, as well, to industrial accidents or consumer-type exposures. The breadth of this dispute is exemplified by the court's decision in *Richardson v. Nationwide Mut. Ins. Co.*, 826 A.2d 310 (D.C. Cir. 2003).[14] *See also American States Ins. Co. v. Koloms*, 687 N.E.2d 72 (Ill. 1997); *MacKinnon v. Truck Ins. Exchange*, 73 P.3d 1205 (Cal. 2003); *Heringer v. American Family Mut. Ins. Co.*, 140 S.W.3d 100 (Mo. Ct. App. 2004); *Auto-Owners Ins. Co. v. Potter*, 2004 WL 1662454 (4th Cir. 2004); *Deni Assoc's of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135 (Fla. 1998).

Thus far, there has been little development of the law on the pollution exclusion in relation to welding claims. For example, in *Nat'l Elec. Mfrs. Ass'n v. Gulf Underwriters Ins. Co.*, 162 F.3d 821 (4th Cir. 1998), NEMA was sued by welders alleging that NEMA knew of the dangers of exposure to manganese fumes, but nevertheless promulgated standards that permitted the use of welding rods containing manganese. NEMA's E&O policy contained an exclusion of the total, rather than absolute, form as the ellipsed quotation to the exclusion makes clear from the opinion. *Id.* at 824. Finding that it did not matter how the welders styled their claims (i.e., as negligence

[14] The red flag appears on the Westlaw version of the opinion, as the court granted a rehearing *en banc*, and the case subsequently was settled and dismissed.

claims), the court held the exclusion plainly eliminated coverage for the "creation of an injurious condition involving any Pollutant." Notably, the court applied District of Columbia law, and did not have the benefit of the decision in *Richardson*.

VI. MULLING LATE NOTICE

Typically ending the policy, save for endorsements, are the conditions to coverage – notice, cooperation and so forth. The condition to coverage of timely notice is touted as a basis in welding rod claims for denying coverage. The carriers may argue (and likely will, if past is prelude) that various aspects of the welding rod industry, as alleged by Elam and others, knew of the dangers posed by prolonged exposure to welding fumes. Purportedly this knowledge became resident in the 1930s. In the 1960s, members of the American Welding Society Filler Metal Committee became aware of an article identifying manganese as a toxic substance. In the late 1970s and early 1980s, allegations surfaced in the form of claims of manganese poisoning. The insurance industry contends it should have been placed on notice by policyholders of these "occurrences."

Depending on the jurisdiction (delayed notice, no coverage or notice/prejudice), the carrier will then argue that, unlike many other claims, in this instance the insurance industry would have been galvanized into action, working hand-in-glove with its insureds in order to mitigate and perhaps eliminate these exposures.

Most GL policies require that a form of timely notice be given. For example, we quote from a USF&G primary policy bearing the 1CC policy designation. Bear in mind the definition of occurrence described above.

> In the event of an **occurrence**, written notice containing particular sufficient to identify the **insured** and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured [sic] and of available witnesses, shall be given by or for the **Insured** to the Company or any of its authorized agents as soon as practicable.

We know that the insurance company inevitably argues that it has no obligation to defend unless there is an actual lawsuit and its express policy-based obligation to investigate extends only to the "investigation and settlement of any claim or suit… ." The policy itself does not trigger an obligation to investigate "occurrences" even if notice is provided, although the argument is certainly made that the purpose of giving notice of an occurrence is to afford the insurance company an opportunity to investigate. *See, e.g., Pfizer, Inc. v. Employers Ins. of Wausau*, 712 A.2d 634 (N.J. 1998).

We confess to no little befuddlement on what happens next. Let's assume notice is given and an investigation ensues -- resulting in what? The policy is silent on what happens once an occurrence is investigated unless a "claim" or "suit" happens. As well, since notice is tied to the existence of an occurrence, we must assume that the insured knew or reasonably should have known: (1) that there has been an accident, including an injurious exposure to harmful conditions; (2) that during the policy period someone suffered personal injury or property damage; and (3) that the

ensuing personal injury or property damage in turn resulted from the accident, including an injurious exposure to harmful conditions. Only once all of these things have coalesced, can we trot down the path of what it means.

There are two schools of thought in this country on late notice: the grim institution that says late notice bars claim regardless of prejudice, and the enlightened notice/prejudice doctrine. In Florida, the Methuselah is *Tiedtke v. Fidelity & Cas. Co. of New York*, 222 So. 2d 206 (Fla. 1969). *Tiedtke* is a notice/prejudice case, which involved an accident between a car and a pedestrian. The accident occurred on March 30, 1964, suit was filed on July 17, 1964, and notice provided on July 30. The form required notice "as soon as practicable." The court adopted the rule, extant in many states, that "while prejudice to the insurer is presumed [based upon late notice], if the insured can demonstrate that the insurer has not been prejudiced thereby, then the insurer will not be relieved of liability merely by a showing that notice was not given as soon as practicable."

The other line of cases is exemplified by New York law. Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy (similar to claims-made law) and the insurer "need not show prejudice before it can assert the defense of non-compliance." *Unigard Sec. Ins. Co. v. North River Ins. Co.*, 594 N.E.2d 571, 573 (N.Y. App. Div. 1992); *Mount Vernon Fire Ins. Co. v. Harris*, 193 F. Supp. 2d 674 (E.D. N.Y. 2002). In the latter type of jurisdiction, obviously, the battle is over whether the

insured's knowledge was sufficient to trigger an obligation to give notice. In the prejudice jurisdictions, the policyholder has a much better chance.

In *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815 (Cal. App. 1993), the court dealt with various aspects of the late notice argument in an environmental claim spawned by the rather grotesque pollution of the Rocky Mountain Arsenal. Cleanup costs were estimated to be 1.8 billion dollars and Shell had agreed to shoulder a substantial portion. The court dispensed with the prejudice argument, finding that prejudice would require proof that the "lack of timely notice had an adverse effect on the ability of the insurer to investigate and prepare a defense in the underlying claim." *Id.* at 760. Here, the insurers sought to prove prejudice by demonstrating that 18 people had died or were unavailable between the date of alleged knowledge and the date of notice, and that cleanup costs had escalated from an initial estimate of 60 million dollars to the 1.8 billion described above. The court gave short shrift to the carriers' claims, finding neither to be an adequate demonstration of prejudice. Importantly, the court focused on an aspect of late notice that, while well-entrenched under Florida law, is not often discussed.

If an insurance carrier denies coverage on grounds other than late notice, then late notice, as a matter of law, cannot have prejudiced the insurer. Simply put, if it had been given notice earlier, the carrier would simply have denied coverage earlier.

> The law is established that where an insurance company denies liability under a policy which it has issued, it waives any claim that the notice provisions of the policy have not been complied with.

Id. at 846. In Florida, as well, even a technical violation of Fla. Stat. § 627.426(2)(b), the Florida Claims Administration Statute, will lead to a waiver by the insurance company of all defenses to coverage based on policy conditions. In certain jurisdictions, moreover, if the insurance carrier fails timely to reserve its rights, or to specify lack of notice as a basis for reservation, this too may result in a waiver.

Last, and as discussed above, the insurance industry itself likely had intimate knowledge of these exposures as evidenced not only by Elam's proof, but by reported decisions. Certain members of the insurance industry (if not all) may well be estopped to contend either late notice of an occurrence, or prejudice.

CONCLUSION

The coverage issues arising from claims like Elam's obviously will spawn passionate debate between those representing policyholders and representatives of the insurance industry. For example, literally hundreds of decisions have now been rendered in both published and unpublished form solely on the polluter's exclusion. The discourse, at times, has been rancorous, proving the stakes. We hope that the foregoing, while necessarily superficial, informs the reader, and serves to fuel the creative juices of the dialogue already begun.