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Recent Ruling on the 'Pollution Exclusion':

'Do What You Say' Rules the *Diversified Industries* Court

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Until recently, policyholders seeking to obtain insurance coverage for environmental liabilities in states such as Pennsylvania, where anti-policyholder rulings on the so-called "pollution exclusion" existed, believed they had little reason for optimism in receiving a friendly ear from the courts. See *Lower Paxon Township v. United States Fidelity & Guar. Co.*, Pa. Super., 1989. Those anti-policyholder rulings appeared to preclude policyholders from recovering for environmental liabilities from their insurance companies unless a short-term "boom" event caused the environmental damage.

The ruling in *Continental Cas. Co. v. Diversified Indus.* (East. Dist., Penn., Mar. 1995) has changed the tide. At the very least, Pennsylvania courts seem willing to hear evidence of the fraud perpetrated on insurance regulatory bodies and policyholders throughout the country in obtaining regulatory approval for the "polluter's exclusion." Once these courts hear the full story surrounding the insurance industry's spin on the "polluter's exclusion," they will join the growing list of jurisdictions that allow policyholders to recover fully for gradual environmental liabilities.

Details of the Diversified Industries *Holding*

In *Diversified Industries*, AT&T Nassau Metals Corp. was able to avoid the application of the Pennsylvania courts' erroneous interpretation of the "polluter's exclusion." The court, in a ruling by Chief Judge Edward Cahn, denied Continental Casualty Co.'s motion to dismiss AT&T's claim of conspiracy to misrepresent or conceal facts related to the "polluter's exclusion." AT&T alleged that Continental had conspired with several members of the insurance industry to mislead and defraud state regulators, the public, and AT&T itself, when the "polluter's exclusion" was first added to the standard-form Comprehensive General Liability policy (CGL policy) in the early 1970's.

In avoiding the application of prior Pennsylvania cases interpreting the "polluter's exclusion," AT&T argued that Continental should, in essence, be estopped from relying on the "polluter's exclusion." AT&T claimed that when the exclusion was added to the standard-form CGL policies, Continental told AT&T and others that added exclusion did not change the level or extent of coverage provided for environmental occurrences or accidents. Thus, through the representations of the Insurance Rating Board (IRB) and the Mutual Insurance Rating Bureau (MIRB), Continental fraudulently misrepresented and concealed facts which would have informed AT&T and other policyholders that the clause did in fact reduce coverage for environmental claims.

Rejecting Continental's claim that the exclusion was not an additional limitation on AT&T's insurance coverage, the court found that the exclusion did change the extent of coverage under the CGL policies (as interpreted by Continental) and concluded that "the pollution-exclusion clause does not merely clarify the occurrence-based policies; it acts as an additional limitation upon the insurer's liability."

Next, Continental contended that AT&T's claim was contrary to Pennsylvania law because AT&T sought to introduce evidence of the drafting history of the "polluter's exclusion" even though the terms of the CGL policies were unam-

biguous. Continental relied upon *Lower Paxon* for the proposition that "[h]aving found the exclusion unambiguous on its face, we are bound to construe it in accordance with its plain meaning and may not refer to extrinsic evidence of the drafter's intent."

The court, however, quickly dismissed the applicability of *Lower Paxon* because that case involved a breach of contract claim, rather than a misrepresentation claim, like that in *Diversified Industries.* For this same reason, the court further ruled that the parol evidence rule was also not applicable in *Diversified Industries*.

Finally, the court pointed out that AT&T did not seek to alter the language of the "polluter's exclusion," but rather sought to void the clause. Accordingly, the court ruled that AT&T's claims were actionable under Pennsylvania law.

Principles Underlying the Diversified Industries *Ruling*

The fundamental principle underlying the *Diversified Industries* ruling is simple—you will be bound by the representations you make. This principle is widely recognized throughout the law in a variety of forms.

For example, a policyholder would be entitled to present the drafting history and other information generated by the insurance industry that contradicts its present interpretation of the "polluter's exclusion" as admissions against interest. See *Ham v. Gouge, Penn. Super. Ct.*, 1969 (evidence offered by a party in another context is admissible as an admission against interest in subsequent litigation). The Federal Rules of Evidence are consistent with this point. For example, Federal Rule of Evidence 801 (d) (2) provides for the admission into evidence of statements by a party opponent. *Derby & Co., Inc. v. Seaview Petroleum Co.*, East. Dist., Penn., 1991 (party's proposed findings of fact and joint pre-trial order in prior litigation can constitute admissions).

In addition, Federal Rule of Evidence 613 (b) provides that prior inconsistent statements by a witness may be admissible under certain circumstance. The drafting history and other public statements concerning the meaning of the "polluter's exclusion" is evidence which falls within the scope of these evidentiary rules and should be made available to juries deciding cases involving the provision. The inconsistent statements, at a minimum, relate to the credibility of insurance company representatives who now claim the "polluter's exclusion" has an entirely different meaning from what was said at the time of the exclusion's presentation to the regulatory authorities. Finally, federal jury instructions also recognize that inconsistent statements properly may be presented. See *Modern Federal Jury Instructions*, 1993.

In addition, inasmuch as cases concerning the meaning of the "polluter's exclusion" involve the interpretation of insurance policies, the Restatement of Contracts prohibits parties to an insurance policy from asserting a position in litigation which is contrary to the party's own understanding of the contract. *Restatement (Second) of Contracts*, 1981. What the insurance industry is doing now is asserting a litigation position that is contrary to its understanding of the "polluter's exclusion" when it was drafted and added to the standard-form CGL Policy.

Conclusion

These examples are a few of the principles upon which the insurance industry's contradictory positions can be admitted before a court ruling on the meaning of the "polluter's exclusion." One point is inescapably clear. Insurance companies should be made to live up to promises they made to the insurance regulators and policyholders nationwide, whether or not it is economically expedient to do so. The *Diversified Industries* ruling is a giant step in that direction. ■

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