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## OREGON FEDERAL JUDGE RULES THAT COST OF PREVENTING FUTURE CONTAMINATION NOT A COVERED INDEMNITY COST

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An Oregon Federal Judge has adopted the Findings and Recommendations of an Oregon Magistrate Judge and granted partial summary judgment ordering that an insured is precluded from recovering as indemnity costs, \$6.8 million in claimed costs for an effluent pretreatment system to prevent future contamination from its operations of a municipal sewer system. (*Precision Castparts Corp. v. Hartford Accident and Indemnity Co., et al.*, No. CV04-1699, D. Or.).

Precision Castparts Corp. ("PCC"), a manufacturer of aircraft engine components, sought coverage for investigation and cleanup costs associated with its historical permitted industrial discharge of thorium oxide into the City of Portland's ("City") sewer system. Included in its \$9.3 million claim was \$6.8 million for the construction, operation, and maintenance of an effluent pretreatment system to prevent thorium oxide from its ongoing manufacturing operations from discharging into and contaminating the municipal sewer system.

In the early 1970's, PCC created a casting process for titanium parts using thorium oxide, a low-level radioactive material regulated by the Nuclear Regulatory Commission through the Oregon Health Division ("OHD"). PCC held a required license issued by the OHD to possess and discharge thorium oxide into the Portland sewer system beginning in the early 1970's, and a required waste water discharge permit issued by the City that required compliance with OHD regulations. However, in 1989, accumulations of thorium oxide in violation of its OHD license and City permit were identified in the City's sewer system. The City and OHD demanded measures be taken to stop the discharge of thorium oxide into the City sewer and to clean up existing thorium oxide deposits in the sewers and in PCC's on-site drain pipes. In response, PCC cleaned the off-site sewer lines and the on-site drain pipes to remove accumulations of thorium oxide and constructed an effluent pretreatment system to prevent further discharges. PCC stopped using thorium oxide in 1992. PCC sought coverage from its insurers for the costs associated with the off-site City sewer and on-site drain pipe cleaning projects as well as the costs associated with the effluent pretreatment system.

Hartford Accident and Indemnity Company and the Insurance Company of the State of Pennsylvania sought partial summary judgment, challenging PCC's assertion that the insurers were obligated to pay indemnity for the costs of the pretreatment system because the costs were incurred "because of" or "on account of" property damage. Rather, the insurers argued that the effluent pretreatment system was built to prevent future thorium contamination in the off-site City sewer system, not to clean up existing contamination.

Oregon Federal Magistrate Judge Dennis Hubel noted in his July 20, 2007 Findings and Recommendations that thorium oxide was found in PCC's two plants and the City sewers; that only the thorium oxide in the city sewers constitutes "property damage" under the policies; that the presence of thorium oxide contamination at PCC's premises cannot constitute damage to the property of a third party; and that the only route by which thorium oxide entered the City sewer system was through sumps and drains at PCC's plants.

"The question to be determined is whether the pretreatment system was intended to 'remediate' or repair existing property damage to the City sewers from this thorium or, rather, whether its purpose was to prevent future contamination," he said. Judge Hubel found no evidence that the pretreatment system was intended to repair existing property damage to the City sewers. Instead, PCC's evidence uniformly showed that the system was intended only to prevent future contamination of the City's sewers from PCC's operations, he said.

Thus, the only thorium contamination being mitigated by the pretreatment system was thorium on-site at PCC's facilities, not in the city sewers, he said. "While thorium contamination on site at PCC had the potential to cause third party property damage, so long as it was contained within PCC and collected before it left PCC's premises, it did not constitute third party property damage," he explained.

However, Judge Hubel noted that PCC also included the cost of constructing and operating the pretreatment system in its defense costs claim and that his decision does not preclude PCC from seeking those costs as part of the insurer's duty to pay defense costs.

PCC objected to Magistrate Hubel's July 20, 2007 Findings and Recommendations, and The "Insurance Company of the State of Pennsylvania responded to those objections. On August 27, 2007, United States Federal District Court Judge Garr M. King adopted the Magistrate's Findings and Recommendations and granted partial summary judgment.

Doug Tuffley and Thomas M. Jones of Cozen O'Connor's Seattle office represented The Insurance Company of the State of Pennsylvania.

*To discuss any questions you may have regarding the opinion discussed in this Alert, and how it may apply to your particular circumstances, please contact Doug Tuffley at (206) 373-7206 or [dtuffley@cozen.com](mailto:dtuffley@cozen.com) and/or Thomas M. Jones, at (206) 224-1242 or [tjones@cozen.com](mailto:tjones@cozen.com).*