

By Michael J. Smith

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## Where There's Smoke

**A**round for a number of years, welding rod claims involve allegations of exposure to manganese fumes by industrial workers, or bystanders, resulting in permanent neurological impairment akin to Parkinson's disease. Welding rod litigation gained momentum in 2003, however, when an Illinois state court jury awarded \$1 million to Lawrence Elam, a 65-year-old Illinois worker. Since then, numerous welding rod cases have been filed, with many consolidated in federal multidistrict litigation pending in Ohio.

In connection with these suits, there has been much debate about whether medical and scientific evidence supports plaintiffs' allegations of neurological injury from welding fume exposure, including what level of manganese exposure is harmful.

These claims have in turn sparked a host of coverage issues present in other mass tort contexts. These issues include lost policies, trigger, allocation, timely notice and knowledge-based defenses, as well as the applicability of products/completed operations hazard exclusions. One issue likely to take center stage—and of great interest to insurance professionals—is the applicability of the pollution exclusion in welding rod cases which, if enforced, could bar coverage.

In the 1970s, Commercial General Liability policies began including a "sudden and accidental" pollution exclusion barring coverage for "releases" of "pollutants," unless the release was "sudden and accidental." By the mid-1980s, "absolute" or "total" pollution exclusions were utilized, which do not contain "sudden and accidental" language. The definition of "pollutant" under the standard form CGL policy includes "fumes."

To date, there have been relatively few published cases addressing coverage issues in the welding rod context, and even fewer addressing these claims under the pollution exclusion.

For example, in *National Electrical Manufacturers Association (NEMA) vs. Gulf Underwriters Insurance Company*, a group of welders sued NEMA claiming that it issued standards permitting the use of manganese in welding rods, even though it knew about the dangers of manganese fumes. Gulf refused to defend NEMA, arguing that the welders' claims fell under the absolute pollution exclusion in the policy, even though their claims were brought as a negligence action. NEMA thereafter sued Gulf for coverage.

The 4th Circuit Court concluded that Gulf had no obligation to defend or indemnify NEMA because the underlying complaint alleged exposure to "fumes," which squarely fell within the definition of "pollutant" in the exclusion. The court further stated that because the exclusion is

not limited to environmental pollution and unambiguously covers the welding claims, it would not apply the "reasonable expectations" of the policyholder as urged by NEMA. The court also noted that the underlying claimant's theory of liability (negligence) had no impact on the cause of the injury (pollution).

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More recently in 2003, U.S. Fire Insurance Co. in *United States Fire Insurance Co. vs. Clendenin Brothers Inc.*, brought a declaratory judgment action arguing that coverage for the underlying welding rod claims was barred due to the total pollution exclusion. In April 2005, the District Court certified to the Maryland Court of Appeals the question of whether a total or absolute pollution exclusion limits coverage for products liability claims that allege harm from non-environmental, localized workplace fumes such as welding fumes. A decision is pending.

Despite the relative dearth of reported decisions analyzing the pollution exclusion in connection with welding rod fumes, courts nationwide have analyzed the exclusion in relation to a variety of other substances, including other fumes.

A number of commentators have suggested that welding rod litigation may mushroom like other mass torts, such as asbestos. While it is still too early to tell whether there will be a flood or a just a steady stream of new cases, one thing is certain: As welding rod claims are tendered to CGL insurers, coverage issues similar to those presented in the asbestos context are likely to arise.

Meanwhile, insurance professionals should monitor pollution exclusion cases closely and look out for any decisions in their jurisdictions addressing whether the pollution exclusion should be applied to only so-called "traditional" forms of environmental pollution, or whether they also should be applied to so-called "nontraditional" forms of pollution such as ordinary workplace and consumer-type exposure.

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