

## 9th Circ. Could Expand Reach Of Insurers' Pollution Exclusion

By **Shane Dilworth**

Law360 (November 9, 2023, 3:37 PM EST) -- The Ninth Circuit's decision on whether a total pollution exclusion could relieve an insurer from covering an injury suit stemming from wildfire cleanup could expand the exclusion's application to suits outside the realm of conventional environmental contamination, experts say.



The Ninth Circuit will hear arguments Monday in a dispute over whether a total pollution exclusion bars coverage of an injury suit brought by a worker diagnosed with an inflammatory disease after stepping in ashes during cleanup of the 2018 Camp Fire. (AP Photo/Noah Berger)

During oral arguments Monday, the panel will evaluate whether a total pollution exclusion endorsement in a \$2 million policy issued by Wesco Insurance Co. to Brad Ingram Construction applies to David Vargas' personal injury suit, with the insurer arguing that coverage is barred because his injury was caused by exposure to toxic dust.

Here, Law360 takes a look at the case and the two sides' positions.

### **What's at Stake**

Total pollution endorsements such as those in the policy issued to Ingram by the AmTrust Financial Services Inc. unit typically come into play when coverage is needed to remediate hazardous substances

that have been released into the environment by the policyholder. However, in the present case, the toxic dust was out in the open following the deadly 2018 Camp Fire in California.

Joseph Saka, an insurance recovery partner at Nossaman LLP in Washington, D.C., told Law360 the case is important since the appeals court will have to address the interplay between the duty to defend and the language of an expansive total pollution exclusion. He said an insurer's duty to defend is broad, while the duty to indemnify is narrower.

Wesco contended that the exclusion applies since Vargas' development of sarcoidosis, an inflammatory disease that affects the lungs and other organs, was caused by his exposure to toxic dust that was dispersed as a result of Ingram's remedial activities. According to court records, Wesco's policy relieved the carrier of its defense and indemnification obligations if an injury is caused by a pollutant and results from its discharge, dispersal, seepage, migration, release or escape.

Ingram initially challenged the notion that the dust and debris from the wildfire were pollutants, but it later conceded on that issue.

Experts are intrigued by how the appeals panel will view the pollutants, particularly whether they were released into the environment by Ingram from a "contained" state.

Policyholder attorney Raymond A. Mascia Jr., a shareholder at Anderson Kill PC in New York, told Law360 the crucial issue before the Ninth Circuit is Ingram's reasonable interpretation of coverage. He said it's difficult to think that the cleanup of debris from a wildfire constituted an act of pollution by Ingram that would trigger the exclusion since the contaminants were not contained.

Mascia said the well-settled principles of insurance law require an insurer to defend a policyholder if there's any possibility of coverage and that the carrier must unambiguously show that an exclusion applies to avoid that duty. A policyholder's reasonable interpretation of coverage under the policy also weighs in its favor.

"I think this case really comes down to whether a reasonable policyholder would understand the words 'contained' and 'release' to apply to a substance that was already sitting on the ground out in the open," he said.

Nossaman's Saka agreed that containment is a critical issue that the Ninth Circuit will need to carefully consider.

Carrier-side attorney Rishabh Agny, an associate at TittmannWeix in Austin, Texas, told Law360 that the case is interesting since insurers don't often look to total pollution exclusions to avoid defense obligations for personal injury cases.

"I think it's an opportunity to create some case law that could be very good for a carrier," he said. "If you can preclude coverage for pollutants of this nature and expand the breadth of the term 'containment,' then it certainly creates a stronger exclusion and bar for coverage."

## **How We Got Here**

The 2018 Camp Fire caused 85 deaths and left the town of Paradise, California, in ruins, according to court records. Following the fire, the California Department of Resources, Recycling and Recovery, or CalRecycle, retained Ceres Environmental Services Inc. and two other contractors to clean up debris. Ceres contracted with Ingram for that work.

According to court records, Vargas was hired as a truck driver by Garlow Transport in June 2019 to haul debris collected by Ingram to a disposal site. Although he usually waited inside his truck while it was being loaded with debris, he exited the vehicle to put a tarp over the contents of the load and stepped in ashes containing pollutants. He also removed the tarp after he transported the debris to the specified location, court records say.

Vargas sued Ceres and CalRecycle after he was diagnosed with sarcoidosis in late 2019, alleging they didn't warn him about the risks associated with the removal of the debris or provide him with protective equipment. Ceres later filed a cross-complaint that sought indemnification from Ingram.

Wesco's refusal to defend Ingram against Ceres' counterclaims sparked the current coverage case. Wesco

lodged a suit in California federal court in **June 2021**, seeking an order saying it has no defense obligations.

The parties eventually filed competing motions for summary judgment that focused on the application of the total pollution exclusion. In June 2022, U.S. District Judge William H. Orrick of the Northern District of California agreed with Wesco that the exclusion applied since the pollutants in the debris were released by Ingram's activities.

### **Is it a Pollution Case?**

The policyholder said in its **opening brief** in January that Judge Orrick's ruling warrants reversal since Vargas' suit does not involve pollution but rather CalRecycle and Ceres' alleged failure to warn and provide protective equipment. Ingram pointed out in its briefing that "Vargas makes no allegation that Ceres and Ingram were solely responsible for airborne toxins."

The contractor contended that the exclusion is inapplicable since the debris was not contained and therefore released.

The policyholder said the controlling authority on the application of the total pollution exclusion, the California Supreme Court's 2003 ruling in **MacKinnon v. Truck Insurance Exchange** , provides some guidance since it says the release of a pollutant is akin to "some kind of freedom from containment."

Anderson Kill's Mascia said the ruling in MacKinnon is important because it supports the argument that pollutants must be contained to be released. Unlike pollutants in typical environmental contamination cases, he said, the remnants of the wildfire were not contained.

"MacKinnon held that the pollution exclusion was intended to apply to your traditional act of polluting," he said. "I don't think anyone can reasonably understand the cleanup of a wildfire, which had allegedly toxic substances already out in the open, to be an act of pollution."

He went on to say that courts typically understand that the pollution exclusion does not apply to natural disasters such as the Camp Fire.

"This is not a type of situation, like in **The Villa Los Alamos Homeowners Association v. State Farm General Insurance Co.** , where you have asbestos that's contained in a product, applied in a building, and then a contractor comes after the fact and disturbs and breaks open the material which releases asbestos out into the atmosphere," he said. "That's not this situation. This was a natural disaster."

Nossaman's Saka agreed that it would be strange to apply the pollution exclusion to the present case.

### **'But For' Causation**

Wesco countered in **an answering brief** in March that the "but for" causation standard in the policy language applied and barred coverage since Vargas' injury was the result of pollution. According to the carrier, Vargas' injury would not have occurred in whole or in part but for the release of pollutants in the wildfire debris caused by Ingram's activities.

TittmannWeix's Agny said the carrier makes a strong argument since Vargas alleged in the underlying complaint that his exposure to the toxic dust caused his lung injury.

Anderson Kill's Mascia countered that Ingram could reasonably interpret the "but for" causation theory to apply only if it were a polluter in the conventional sense.

"There are no allegations that even suggested Ingram was a polluter," he said. "In fact, I think the allegations are the exact opposite. The allegations are that Ingram was cleaning up and hauling away substances that were created by a wildfire. I think that's really important in this case because it goes to the policyholder's reasonable understanding of the exclusion, and when you read the underlying complaint, there's no suggestion or allegation that Ingram was a polluter in the traditional sense."

The insurer also argued that MacKinnon and a California appeals court ruling in the Villa Los Alamos case support Judge Orrick's finding. In Villa Los Alamos, the appeals panel held that a pollution exclusion was applicable in an injury case involving asbestos scraped from ceilings in a condominium complex. The panel concluded that the contractor's work caused the release of asbestos.

Agy said that while the rulings in MacKinnon and Villa Los Alamos are both important, Villa Los Alamos may have stronger authority since it is newer and applies the principles of the state high court's ruling.

Mascia, however, said the ruling in Villa Los Alamos should have no application to the present case since the asbestos was contained.

Representatives for the parties did not respond to requests for comment.

Wesco is represented by James C. Nielsen and Daniel N. Katibah of Nielsen Katibah LLP.

Ingram is represented by Noreen M. Evans of Evans Kingsbury LLP and Samuel F. Barnum of the Law Offices of Samuel F. Barnum.

The case is Wesco Insurance Co. v. Brad Ingram Construction, case number 22-16584" >22-16584, in the U.S. Court of Appeals for the Ninth Circuit.

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