The National Forum
For Environmental And Toxic Tort Issues
Newsletter
July 2003

The views expressed in this newsletter are not necessarily those of the association nor any particular member of the association

Contents

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FETTI Annual Conference
Embassy Suites
Schaumburg, Illinois - October 2-3, 2003

Each year our organization convenes near Chicago to host a world-class seminar on a broad range of environmental issues with nationally recognized speakers. At our seminar, recognized experts offer informative and provocative programs to enhance our members' understanding of the ever-changing environmental and toxic tort issues they face in their professions.

Since The Forum is a non-profit organization, there is no better educational bang for your buck. The all-inclusive seminar fee of $195 includes a cocktail reception, lunch and nearly ten hours of professional education. Attendees tell us the printed materials and periodic updates are worth the price of admission.

See Page 2 for our 2003 Conference Agenda	See Page 7 for our 2003 Conference Registration Form

For hotel information, special rates and reservations, call the Embassy Suites in Schaumburg, IL at (847) 397-1313.

FETTI 2003 CONFERENCE AGENDA
OCTOBER 2-3, 2003
EMBASSY SUITES HOTEL - SCHAUMBURG, IL

WEDNESDAY - OCTOBER 1

7:00PM
Early Bird Cocktail Reception

THURSDAY - OCTOBER 2

8:45AM - 9:45AM
Bodily Injury and Property Damage Update
presented by Mike Aylward
Morrison Mahoney & Miller

9:45AM - 10:45AM
Asbestos Reform
presented by Mark Behrens
Shook, Hardy & Bacon

11:00AM - 12:00PM
Reawakening of Silicosis
presented by Tom Jensen
Lind, Jensen, Sullivan & Peterson

1:00PM – 2:00PM
Asbestos Bankruptcy Issues
presented by Linda Bondi Morrison
Tressler, Soderstrom, Maloney & Priess

2:00PM – 3:30PM
Reinsurance Issues
"10 Things You Don't Want To Hear From Your Reinsurer"
presented by Art Coleman
Nixon Peabody

3:45PM – 4:45PM
Pollution Topics
presented by John Shugrue
Zevnik Horton

FRIDAY - OCTOBER 3

9:00AM – 10:15AM
Bad Faith
presented by John Gross
Bishop, Barry, Howe, Haney & Ryder

10:30AM – 11:45AM
Madison County, IL and Meso cases
presented by Randy Bono
The Simmons Firm

11:45PM – 12:00PM
FETTI Business Meeting

California Appellate Court Finds The Pollution Exclusion Precludes An Insurer's Duty to Defend

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In *Westoil Terminals Co., Inc. v. Industrial Indemnity Company* (July 3, 2003), the California Court of Appeal, Second Appellate District, affirmed a trial court's ruling on summary judgment that a pollution exclusion contained in Industrial Indemnity Company's ("Industrial") commercial general liability policy was unambiguous and barred all claims arising out of underlying litigation between Coastal Corporation ("Coastal") and Westoil Terminals Company ("Westoil"). Industrial therefore did not have a duty to defend or indemnify Westoil for any costs incurred in the underlying litigation.

Westoil operated a tank farm for the storage and transfer of chemicals from 1950 until 1974. Westoil then leased the land to Coastal, which operated the facility between 1974 and 1996. In 1985 the California Regional Water Quality Control Board for Los Angeles issued a clean-up and abatement order requiring Coastal to investigate groundwater contamination arising from the facility and implement a remediation plan. In 1997 Coastal sued Westoil in federal court to recover costs associated with the investigation and clean-up. Coastal and Westoil eventually settled the underlying litigation for $11 million.

Westoil then sought coverage from Industrial, which issued a commercial general liability policy to Westoil between July 1, 1984 and July 1, 1987. The policy contained a pollution exclusion, which excluded coverage for all damages arising out of pollutants unless a:

> sudden, unexpected and unintended discharge, dispersal, release or escape takes place during the policy period and causes bodily injury or damage to tangible property during the policy period.

The trial court found this pollution exclusion barred coverage because Coastal's complaint against Westoil only sought recovery from Westoil based on alleged negligent conduct that occurred during Westoil's operation of the facility. The appellate court affirmed the trial court's ruling based on the argument that Westoil's alleged negligent conduct could only have occurred prior to the issuance of Industrial's policy and, therefore, there could not have been a discharge, dispersal, etc. during the policy period.

The appellate court further found that the pollution exclusion's requirement that the release take place during the policy period in order to trigger coverage was not inconsistent with the "continuous trigger theory" announced in *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645 (Montrose II). The court reasoned that the insurer was free to limit coverage for pollution damages to occurrences that took place during the policy period if it so desired.

This case is significant to the extent that it supports the following arguments: 1) pollution exclusions may be used to deny a defense obligation under certain circumstances; and 2) courts may enforce exclusions that limit coverage to occurrences that take place during the policy period. ■

Environmental Response Costs Are "Damages" in Wisconsin

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Since 1994, environmental cleanup and remediation costs have not constituted "damages" under commercial general liability (CGL) policies in Wisconsin. However, on July 11, 2003, the Wisconsin Supreme Court held that environmental response costs are considered "damages" under CGL policies. In its decision in *Johnson Controls*, the Court stated:

> The resulting rule should be clear, comprehensive and logical: The liability imposed under CERCLA against an insured who has contributed to the contamination of property is covered "as damages" if the costs to satisfy that liability are expended to remediate, or pay for the

remediation of, the damaged property.

Johnson Controls, a Milwaukee-based manufacturer, brought a declaratory judgment action in Wisconsin state court against its liability insurers seeking coverage for various costs relating to the environmental cleanup of 21 sites. The sites are located in 16 different states where Johnson Controls and/or Globe Union (Johnson Controls acquired Globe Union in 1978) faced liability under CERCLA. The insurance policies at issue were either primary, excess or umbrella general liability policies and provided that the "company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily [or personal] injury or property damage to which the policy applies, caused by an occurrence…" Johnson Controls' insurers refused to defend or indemnify it for any cleanup costs flowing from CERCLA.

In 1994, the Wisconsin Supreme Court decided *City of Edgerton v. General Casualty Co. of Wisconsin*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994), *cert. denied*, 514 U.S. 1017 (1995), where the court held that cleanup and remediation costs under CERCLA did not constitute "damages" within the indemnification provisions of CGL policies. This holding was based on a conclusion that environmental response costs under CERCLA constitute equitable relief, not legal damages, and thus the insurer had no duty to indemnify its insured. In addition, the court held in *Edgerton* that the issuance of a letter by the EPA or the Wisconsin Department of Natural Resources, which either requested or directed an insured to participate in the environmental cleanup of contaminated property, did not constitute a "suit" sufficient to trigger the insurer's duty to defend.

In *Johnson Controls*, however, the Wisconsin Supreme Court overruled the *Edgerton* decision, holding that an insured's costs of restoring and remediating damaged property, whether the costs are based on remediation efforts by a third party (including the government) or are incurred directly by the insured, are covered damages under applicable CGL policies. The Wisconsin Supreme Court in *Johnson Controls* also held that a PRP letter triggers the CGL insurer's duty to defend.

As a result of the *Johnson Controls* decision, insurers will likely see an increase in environmental coverage litigation in Wisconsin. ■

With The New *Johnson Controls* Decision, The Wisconsin Supreme Court Reverses *Edgerton*

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On July 11, 2003, the Wisconsin Supreme Court issued its five-to-two split opinion in *Johnson Controls, Inc. v. Employers Insurance of Wausau*, 2003 Wisc. Lexis 484 (Slip Op. 01-1193, July 11, 2003) in which it overturned its own 9-year old decision in *City of Edgerton v. General Casualty Co. of Wisconsin*, 184 Wis. 2d 750, 517 N.W. 2d 463 (1994), cert. denied, 514 U.S. 1017 (1995). In the *Edgerton* decision, the Wisconsin Supreme Court had concluded that a PRP letter from the USEPA or a similar letter from a state agency was not a suit and had concluded that CERCLA response costs incurred by an insured pursuant to a government directive were not "damages" as that term was used in a general liability policy. The *Edgerton* court concluded that "damages" only meant legal damages: "It is legal compensation for past wrongs and is generally pecuniary in nature. The term 'damages' does not encompass the cost of complying with injunctive degrees." *Edgerton,* 517 N.W.2d at 478. In reaching this decision, the *Edgerton* court relied heavily on *School District of Shorewood v. Wausau Insurance Cos.*, 170 Wis. 2d 347, 488 N.W.2d (1992) (costs incurred in implementing injunctive relief to correct school segregation were not covered "as damages").

In the nine years since *Edgerton* was decided, there were several Wisconsin cases that tried to apply and/or distinguish *Edgerton's* holding. Of most significance was the Wisconsin Supreme Court's 1997 decision in *General Casualty Co. of Wisconsin v. Hills,* 209 Wis. 2d 167, 561 N.W.2d 178 (1997). In *Hills,* the Wisconsin Supreme Court held that the nature of the relief being sought should determine whether an action sought "damages" covered by a general liability policy. Where a third party seeks contribution from the insured for response

costs incurred by that third party in response to a governmental directive, the contribution sought is substitutionary in nature and, therefore, is considered covered "damages" under a CGL policy. The tension between *Edgerton* and *Hills* arises from the conclusion that CERCLA response costs would not be covered under *Edgerton* if a government entity forced the remediation, and yet there could be coverage under *Hills* if a third-party filed suit to seek reimbursement for incurring those same CERCLA response costs.

In *Johnson Controls*, the Wisconsin Supreme Court admitted that *Edgerton* and *Hills* "cannot be reconciled without generating arbitrary and illogical distinctions…. As a practical matter, if we do not remove or limit the force of *Edgerton*, we must remove or limit the force of *Hills*." *Johnson Controls*, 2003 LEXIS 484 at 81-82. The Wisconsin Supreme Court decided to eviscerate its decision in *Edgerton* and expand its holding in *Hills* to find that a liability policy will provide coverage for response costs no matter the identity of the party seeking such costs.

As justification for abandoning the *Edgerton* decision, the *Johnson Controls* court found that the *Edgerton* decision contained four significant errors. First, it found the *Edgerton* opinion was too quick to embrace the strict dichotomy between legal damages and equitable actions. *Id.,* at 31-33. The *Edgerton* court had adopted too broadly the key sentence in the *Shorewood* court's opinion – "the term 'damages' does not encompass the cost of complying with an injunctive decree." Instead, the *Johnson Controls* court explained that as long as an equitable action is "providing compensation for past wrongs – if it is 'remedial in nature' – it cannot be lumped indiscriminately with a typical injunction…." *Id.,* at 33.

The *Johnson Controls* court also found that *Edgerton's* second mistake was not appreciating the nature of liability for environmental cleanup costs under CERCLA or how that liability would be understood by a reasonable insured. *Id.,* at 34-42. The *Johnson Controls* court explained that CERCLA has both a prospective element and remedial element and that the nature of CERCLA relief is, at least in part, compensatory. *Id.*, at 36. Moreover, the *Johnson Controls* court found that, by Edgerton's failure to appreciate the remedial aspects of CERCLA, *Edgerton* treated CERCLA response costs as uncovered as though the issue had been decided in *Shorewood* when in fact the *Shorewood* court specifically declined to rule on that issue. *Id.,* at 42.

The Wisconsin Supreme Court's third criticism with *Edgerton* was that case improperly relied on misquoted authority to support the proposition that the "as damages" language in a CGL policy exempted CERCLA response costs. Although the *Edgerton* court relied on a 1973 edition of a remedies handbook, it failed to review the 1993 revision of the handbook which specifically concluded that CERCLA response costs are analogous to repair costs and consequential damages. *See* Dan B. Dobbs, Law of Remedies, § 5.2 (5) at 727 (1993). As a consequence, the *Johnson Controls* court found that the reliance on the 1973 edition of Professor Dobbs' handbook on the law of remedies was faulty and subsequent revisions to that treatise (which were in existence at the time of the 1994 *Edgerton* decision) weakened *Edgerton*'s basis for construing the "as damages" language as exempting CERCLA response costs. *Id.*, at 44.

The *Johnson Controls'* fourth criticism of *Edgerton* was that the decision failed to address the long held law of Wisconsin that the cost of repairing and restoring damaged property and water to its original condition was a proper measure of compensatory damages. *Id.,* at 44-45.

Justice Prosser, writing for the majority, explained that the *Hills* decision had made a "valiant attempt" to coexist with the rulings in *Edgerton*. *Id.,* at 46. However, the *Johnson Controls* court concluded that *Hills* "effectively obliterated [*Edgerton's*] intellectual foundation." *Id.,* at 47. Justice Crooks, in a concurrence, was a bit more forceful when he indicated that *Hills* should have come right out and overruled *Edgerton* six years ago. *Id.,* at 105. As a consequence, the *Johnson Controls'* court found the distinction between the contact by a government entity in *Edgerton* and the contact by a third party in *Hills* to be arbitrary, and refused to honor the fortuity of government contact as determinative of coverage.

Finally, the *Johnson Controls* court repeatedly criticized the *Edgerton* decision for not sufficiently addressing the "primary importance" of the "reasonable expectations" of policyholders. The *Johnson Controls* court explained that the

insured has a reasonable expectation that environmental response costs are covered under a CGL policy regardless of the claimant's identity. Thus, *Edgerton's* failure to address the reasonable expectation of the insured was fatal to *Edgerton's* continued viability. In fact, the *Johnson Controls* decision referenced "reasonable expectations" at least seven times. Id*.,* at 26, 34, 41, 47, 49, 54 and 65.

In addition to overturning *Edgerton*'s holding that CERCLA response costs are not damages under a CGL policy, the *Johnson Controls* court also reversed *Edgerton* on whether or not PRP letters constitute a suit. *Id.,* at 58-70. Based on the reasonable expectation of the insured, the *Johnson Controls* court concluded that the PRP letter is the "functional equivalent" of a suit because such letters establish an adversarial proceeding between the insured and a governmental agency.

On both issues, the *Johnson Controls* court further noted that *Edgerton*'s precedent provided improper incentives to Wisconsin companies to refuse voluntary remediation efforts in order to obtain a defense and indemnification from an insurer. Specifically, the court noted that an insured might refuse to participate and wait for it to be sued for contribution for response costs incurred by someone else. *Id.,* at 53. It also noted that an insured might refuse to respond to a PRP letter and wait for a formal lawsuit. *Id.,* at 69.

After deciding that the *Edgerton* decision was incorrectly based on faulty logic, the remaining bulk of the *Johnson Control* opinion addressed the court's ability to overturn the *Edgerton* decision despite the principles of *stare decisis*. Here the court noted that any reliance on *Edgerton* in calculating expected costs and obligations between insurers and policyholders "is not the type of 'reliance' that is relevant to this kind of analysis." *Id.,* at 97, fn. 49. The court also rejected the insurers' prediction that there will be an increase in coverage litigation in Wisconsin. *Id.*, at 98.

Justice Wilcox wrote a candidly harsh dissenting opinion, to which Justice Bradley joined, that expresses what many on the insurance carriers' sides might suspect… "[t]he only thing that has changed [since *Edgerton*] is the personnel of this court." *Id.,* at 107. Moreover, this dissent points out the precarious message that is sent by overturning the *Edgerton* precedent: "By overturning established precedent today, after repeatedly refusing to do so in the past, the court tells litigants with means to do so that they are better served through constant expostulations and challenges to adverse decision than by acknowledging the validity of the state's law.…" *Id.,* at 122.

In the aftermath of *Johnson Controls*, insurers and their attorneys will be well served to reevaluate their pending Wisconsin environmental claims and to start anticipating whether there are any other coverage issues that might receive a similar attack in Wisconsin that this one received from the policyholder's bar.■

THE NATIONAL FORUM FOR ENVIRONMENTAL AND TOXIC TORT ISSUES
2003 ANNUAL CONFERENCE
EMBASSY SUITES, SCHAUMBURG, IL

OCTOBER 2-3, 2003

REGISTRATION FORM

The fee for this year's seminar is $195.00 per person. FETTI membership is free to all seminar attendees.

Name(s): _____

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