

CASE NOTE

It's Not Easy Being Green: The Absolute Pollution Exclusion and the Changing Climate of Doing Business in California Post-*MacKinnon*¹

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“What is a weed? A plant whose virtues have not yet been discovered.”²

I. Introduction

As global temperatures continue to rise, California businesses may be feeling the heat more intensely than anyone. The recent passage of the new California Air Resources Board regulation demanding that diesel trucks and buses reduce carbon dioxide emissions is a vivid example of the rapidly increasing demand for greener ways of doing business.³ As the leading pioneer of environmental problem solving, California has played a crucial role in bringing about new and unique regulations that have potential global influence.⁴ The growing political clamor to reduce the environmental impact of businesses means that California companies must now master a complex array of environmental regulations. Their potential liabilities grow

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1. *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635 (2003).

2. Ralph Waldo Emerson, *Fortune of the Republic*, in BARTLETT'S FAMILIAR QUOTATIONS (Justin Kaplan ed., 1992).

3. On December 12, 2008, the California Air Resources Board adopted two regulations directly aimed at cleaning up harmful emissions from the estimated one million heavy-duty diesel trucks that operate in California. Beginning January 1, 2011, the Statewide Truck and Bus rule will require truck owners to install diesel exhaust filters on their rigs, with nearly all vehicles upgraded by 2014. Owners must also replace engines older than the 2010 model year according to a staggered implementation schedule that extends from 2012 to 2022.

4. Berkeley Law, University of California, Center for Environmental Law and Policy, *California and the Future of Environmental Policy*, http://www.law.berkeley.edu/centers/envirolaw/conferences/cal_enviro_policy/ (last visited Feb. 5, 2009).

with each passing day and each adopted law and regulation.⁵ If they fail to meet these increasing standards, they face not only the possibility of state sanction, but also the daunting specter of “green” lawsuits initiated by private individuals and citizen action groups. To decrease vulnerability and make the financial risk more palatable, companies routinely buy comprehensive general liability insurance policies (hereinafter “CGL”).⁶

As with any insurance coverage, policies contain important coverage exclusions.⁷ Originally introduced in 1970, the typical pollution exclusion clause permitted the insurer to deny coverage for losses resulting from the discharge of contaminants or pollutants, unless the loss was sudden and accidental, or occurred over an extended time period.⁸

Due to the increased liability for environmental disasters in the next decade, the insurance industry broadened the pollution exclusion by eliminating the “sudden and accidental” exception in 1985.⁹ The revision, known as the “absolute pollution exclusion” (hereinafter “APE”), remains in most CGL policies today.¹⁰ As a result, a standard umbrella policy provides little or no insurance coverage for the release of pollutants into the environment, which comes as a shock to the normal policyholder.¹¹

Faced with an environmental lawsuit with the potential to close the doors of an otherwise viable and valuable business, entrepreneurs need a reliable safety net.¹² The business owner ordinarily expects the insurer to cover his potential legal liability in exchange for paying a premium.¹³ On

5. For example: 1) In 2003, the California Integrated Waste Management Board introduced new Waste Tire Regulations (Title 14, Natural Resources—Division 7, CIWMB Chapter 6. Permitting of Waste Tire Facilities and Waste Tire Hauler Registration and Tire Manifests) and made them significantly more stringent in 2005; 2) The Global Warming Solutions Act of 2006 requires California to reduce its greenhouse gas emissions to 1990 levels by 2020; 3) President Obama has directed the EPA to review the Bush administration’s denial of a waiver request by California to cut global warming pollution from automobiles.

6. Craig F. Stanovich, *The CGL Pollution Exclusion*, <http://www.irmi.com/expert/Articles/2003/Stanovich03.aspx> (“The basic 2001 ISO CGL policy provides very little pollution coverage, particularly in the area of cleanup or remediation – perhaps the most important aspect of pollution coverage.”) (last visited Feb. 6, 2009).

7. Business.gov, Types of Business Insurance, General Liability Insurance, <http://www.business.gov/guides/finance/business-insurance/insurance-types.html> (last visited Feb. 6, 2009).

8. *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 644 (2003). See also Craig F. Stanovich, *The CGL Pollution Exclusion*, <http://www.irmi.com/expert/articles/2003/Stanovich03.aspx> (“One of the many legal arguments insurers put forth was that the CGL policy excluded pollution—unless the pollution was sudden and accidental.”) (last visited Feb. 6, 2009).

9. *MacKinnon*, 31 Cal. 4th at 645.

10. *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 644 (2003) (citing *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 79-81 (Ill. 1997)).

11. Craig F. Stanovich, *The CGL Pollution Exclusion*, <http://www.irmi.com/expert/articles/2003/Stanovich03.aspx> (“Risk managers, brokers, and agents would do well to either extensively amend the CGL or obtain separate pollution coverage for any of their policyholders who have more than minimal or incidental pollution exposures.”) (last visited Feb. 6, 2009).

12. U. S. Small Business Administration, *Get Insurance*, http://www.sba.gov/smallbusinessplanner/manage/getinsurance/SERV_INSURANCE.html (last visited Feb. 6, 2009).

13. *Kransco v. Am. Empire Surplus Lines Ins. Co.*, 23 Cal. 4th 390, 407 (2000) (“In the context of comprehensive general liability coverage, however, the insured is purchasing insurance

the other hand, the insurer wants to avoid having to pay out what could be huge environmental damages.¹⁴ Since the inception of the APE clause,¹⁵ courts have struggled to agree on what constitutes “pollution” and “pollutants,” leading to continued uncertainty for policyholders and insurers alike.¹⁶

Five years ago, the California Supreme Court, in its opinion in *MacKinnon v. Truck Insurance Exchange*, theoretically assisted the business community by trying to provide clarity to the issues of coverage and the interpretation of the pollution exclusion clause.¹⁷ The unanimous court held that the APE clause in CGL policies should be narrowly construed against the insurer and in favor of the insured.¹⁸ However, the subsequent application of this supposedly business-friendly ruling has led to greater uncertainty amongst insurers and policyholders.¹⁹ As an example, the lower courts have subsequently used *MacKinnon* to support findings that both silica dust and compost odors are pollutants.²⁰ Silica is a well-known and well-documented health risk with the potential to cause respiratory failure and death;²¹ conversely, compost odors present no known health risks.²² In both cases, these airborne particles are a normal byproduct of their respective industries; yet the potential hazard associated with each is vastly different.

in exchange for the payment of premiums precisely to avoid financial liability for its own negligent or fault-based conduct causing injury to others, and to further insure against the inherent risks of litigation that can result in a larger verdict against it, up to the amount of its policy limits.”).

14. *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 653 (2003) (“[T]here appears to be little dispute that the pollution exclusion was adopted to address the enormous potential liability resulting from antipollution laws enacted between 1966 and 1980.” (citing *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 79-81 (Ill. 1997))).

15. *MacKinnon*, 31 Cal. 4th at 644.

16. *Compare* *American Casualty Co. of Reading, PA v. Miller*, 159 Cal. App. 4th 501 (2008) (denying coverage for furniture stripping business found criminally negligent for flushing solvent down the drain), *with* *Cold Creek Compost, Inc. v. State Farm Fire & Casualty Co.*, 156 Cal. App. 4th 1469 (2007) (compost facility denied coverage to defend against a private nuisance action related to odors and dust).

17. *MacKinnon*, 31 Cal. 4th at 655.

18. *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 656 (2003) (citing *State Farm Mut. Auto. Ins. Co. v. Jacober*, 10 Cal. 3d 193, 201-202. (1973)).

19. *Compare* Reply Brief for Appellant, *Cold Creek Compost, Inc. v. State Farm Fire & Casualty Co.*, 2006 CA App. Ct. Briefs 14623, 24 n.14 (2007) (“To the extent the facts in *MacKinnon* are different from the facts of this case, it cannot be argued that the differences help State Farm’s case.”), *with* Brief for Respondent, *Cold Creek Compost, Inc. v. State Farm Fire & Casualty Co.*, 2006 CA App. Ct. Briefs 14623, 2 (2007) (“None of these arguments can be squared with the record evidence or the law, including *MacKinnon*.”).

20. *See* *Garamendi v. Golden Eagle Ins. Co.*, 127 Cal. App. 4th 480 (2005). *See also* *Cold Creek Compost, Inc. v. State Farm Fire & Casualty Co.*, 156 Cal. App. 4th 1469 (2007).

21. U. S. Department of Labor, *Crystalline Silica Exposure*, <http://www.osha.gov/Publications/3177-2002-English.html> (last visited Feb. 6, 2009).

22. U.S. Environmental Protection Agency (EPA) Office of Air Quality Planning and Standards, *Regulatory Options for the Control of Odors*, at 2 (1980).

Existing businesses in California are not the only group to face the ever-increasing mandate of regulatory compliance. Statewide economic development corporations, charged with attracting new business to California, must confront the added disadvantage of promoting a state business model that includes an unfriendly regulatory climate.²³ Similarly, the growth of potential liability along with the uncertainty about judicial interpretation only makes the insurance industry more cautious and less willing to provide adequate coverage to buffer businesses against a vastly growing number of pollution-based claims.²⁴ Even though the California Supreme Court attempted to refine and resolve these issues, the lower courts' subsequent application of *MacKinnon* has only managed to obfuscate matters for business owners and insurance companies alike.

II. Case Facts

Jennifer Denzin, a tenant in an apartment building owned by John MacKinnon, had reported an infestation of yellow jackets.²⁵ MacKinnon hired a professional extermination company who applied a spray insecticide around the apartment building on several occasions.²⁶ When Denzin died, her parents filed a wrongful death suit alleging MacKinnon sprayed the building with "dangerous chemicals," resulting in Denzin's fatal pesticide exposure.²⁷ MacKinnon's CGL policy carrier, Truck Insurance Exchange (hereinafter "Truck Insurance"), initially retained counsel and filed a response in his defense.²⁸ However, seven months later, MacKinnon was advised that Truck Insurance would withdraw its defense because the pollution exclusion clause precluded coverage for the Denzin wrongful death action.²⁹ Truck Insurance concluded the spraying of insecticide causing the death involved the use of a pesticide that is a chemical, which can be defined as a pollutant and, therefore, excluded under the APE clause.³⁰

After hiring new counsel and settling the wrongful death suit, MacKinnon filed an action against Truck Insurance. The suit alleged breach of the duty to defend and indemnify under the terms of the policy, and breach of both the contract and the implied covenant of good faith and fair dealing.³¹ Truck Insurance moved for summary judgment relying on the pollution exclusion clause contained in the policy issued to MacKinnon and was

23. California Association for Local Economic Development, Press, <http://www.caled.org/economicdevelopment/press/caled-economic-stimulus-short-and-medium-term-solutions-economic-development> (last visited Feb. 6, 2009).

24. Michele Flurer, *Insurance Hazards*, LOS ANGELES BUSINESS JOURNAL, July 13, 1992, available at <http://www.allbusiness.com/legal/314608-1.html> (last visited Feb. 6, 2009).

25. *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 640 (2003).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *MacKinnon*, 31 Cal. 4th at 640-641.

31. *Id.* at 640.

granted its motion by the trial court.³² On the basis of the trial court's finding that the pollution exclusion clause was clear and unambiguous as applied to the wrongful death claim, the California Court of Appeal affirmed.³³ The appellate court based its decision on a broad interpretation of the APE clause, citing several cases in other jurisdictions.³⁴

III. Interpretation by the California Supreme Court: Two Camps

The California Supreme Court granted review to determine if the lower courts had correctly interpreted the pollution exclusion language in the policy. The court noted that although "[t]he meaning of the current pollution exclusion has not received wide attention in this state . . . the scope of the exclusion has been litigated extensively in other jurisdictions" and "[t]o say there is a lack of unanimity as to how the clause should be interpreted is an understatement."³⁵ Those courts were roughly divided into "two camps."³⁶

One position held "that the exclusion applies only to traditional environmental pollution into the air, water, and soil, but generally not to all injuries involving the negligent use or handling of toxic substances that occur in the normal course of business."³⁷ This camp construed the clause narrowly, that is, against the insurance company and in favor of the policyholder, because it found the meaning of the pollution exclusion clause to be ambiguous when applied to cases where there had been negligent use of toxic chemicals.³⁸ The other view interpreted the clause as applying "equally to negligence involving toxic substances and traditional environmental pollution, and that the clause is as unambiguous in excluding the former as the latter."³⁹

IV. An Historical Perspective

The *MacKinnon* court reasoned that taking into account the historical development of the pollution exclusion clause in order to understand its meaning would be "useful."⁴⁰ In so doing, the court noted and relied heavily upon the Illinois Supreme Court, which comprehensively reviewed the historical meaning of the pollution exclusion clause in *American States Insurance Co. v. Koloms*:⁴¹ "[t]he events leading up to the insurance indus-

32. *Id.*

33. *MacKinnon*, 31 Cal. 4th at 640-641.

34. *Id.* at 641.

35. *Id.*

36. *MacKinnon*, 31 Cal. 4th at 641-642.

37. *Id.* at 642.

38. *Id.*

39. *Id.*

40. *MacKinnon*, 31 Cal. 4th at 643.

41. *American States Ins. Co. v. Koloms*, 687 N.E.2d 72 (Ill. 1997).

try's adoption of the pollution exclusion are 'well-documented and relatively uncontroverted.'"⁴²

The *Koloms* court held that coverage for a carbon monoxide leak from an apartment furnace was not excluded by the pollution exclusion clause, reasoning instead, "[t]he exclusion applies only to those injuries caused by traditional environmental pollution. The accidental release of carbon monoxide in this case, due to a broken furnace, does not constitute the type of environmental pollution contemplated by the clause."⁴³ *Koloms* considered the drafting history of the pollution exclusion and observed that "the history of the pollution exclusion amply demonstrates that the predominate [sic] motivation in drafting an exclusion for pollution-related injuries was the avoidance of the 'enormous expense and exposure resulting from the "explosion" of environmental litigation.'"⁴⁴ Moreover, the Illinois Supreme Court declined "to simply look to the bare words of the exclusion, ignore its *raison d'être*, and apply it to situations which do not remotely resemble traditional environmental contamination."⁴⁵

V. The Pollution Exclusion Clause Debate

To determine whether or not ambiguity existed, the *MacKinnon* court turned to the coverage language used in the CGL pollution exclusion clause.⁴⁶ The court decided interpreting "pollutant" to mean anything that "irritates or contaminates" would lead to "absurd or otherwise unacceptable results."⁴⁷ Under the Truck Insurance policy at issue in this case, the pollution exclusion clause stated: "We do not cover Bodily Injury or Property Damage (2) Resulting from the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants."⁴⁸ Further, "[p]ollution" or "[p]ollutants" are defined as meaning any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste materials."⁴⁹

An additional debate in other jurisdictions centered on whether the phrase "discharge, dispersal, release or escape" meant a widespread expulsion, or a localized toxic accident.⁵⁰ Those courts that used a dictionary-based interpretation often found that acts of negligence involving toxic sub-

42. *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 79 (Ill. 1997) (quoting *Morton Int'l. v. General Accident Ins. Co.*, 134 N.J. 1, 31 (N.J. 1993)).

43. *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 82 (Ill. 1997).

44. *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 81 (Ill. 1997) (quoting *Weaver v. Royal Ins. Co. of Am.*, 140 N.H. 780, 783 (1996)) (in turn quoting *Vantage Dev. Corp. v. Am. Env't Techs. Corp.*, 251 N.J. Super. 516, 525 (1991)).

45. *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 81 (Ill. 1997).

46. *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 649 (2003).

47. *Id.* at 645-646.

48. *Id.* at 639.

49. *Id.*

50. *Id.* at 646.

stances were excluded.⁵¹ As an example, the *MacKinnon* court cites *Peace v. Northwestern Nat'l Ins. Co.*⁵² in which the Supreme Court of Wisconsin swept up the “entire range of actions by which something moves from a contained condition to an uncontained condition” into the meaning of “discharge, dispersal, release or escape.”⁵³ The *Peace* court also found that the term “pollutant” was in fact not ambiguous because the policy provided a definition.⁵⁴ Simply stated, when the policy gives a specific meaning, merely arguing about the meaning does not make a word ambiguous. Further, if the courts do not find ambiguity, they also see no need for analyzing the history and how the clause came about.⁵⁵

VI. What Does the Pollution Exclusion Clause Mean: A Broad or Narrow Interpretation?

Most important, *MacKinnon* raised the question of whether the exclusion clause should extend to all acts of negligence involving substances characterized as irritants or contaminants. The answer could have a potentially profound impact. Truck Insurance, whose interests were clearly best served by a broad interpretation, argued that a literal reading would achieve such a result.⁵⁶ But the California Supreme Court refused to follow the approach taken by many courts of merely relying on dictionary definitions.⁵⁷ In taking such a precise and inflexible approach, a layperson’s understanding of the terms might easily be excluded—and that would go against the general rule of contract interpretation.⁵⁸ The policy language at issue in *MacKinnon* stated that the insurer would “pay all sums for which [the insured] become[s] legally obligated to pay as damages caused by bodily injury, property damage or personal injury.”⁵⁹ Therefore, for coverage to be denied, “the pollution exclusion [must have] conspicuously, plainly and clearly apprise[d] the insured that certain acts of ordinary negligence” would be excluded.⁶⁰

To demonstrate the insurer’s interpretation was too broad, the court then took an unusual step and considered not only dictionary definitions, but also how various public media used the term. Citing such sources as the L.A. Times, National Public Radio, the Washington Post, and others, the

51. *Id.*

52. *Peace v. Northwestern Nat'l Ins. Co.*, 596 N.W.2d 429 (Wis. 1999).

53. *Id.* at 438.

54. *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 647 (2003) (quoting *Peace v. Northwestern Nat'l Ins. Co.*, 596 N.W.2d 429, 442 (Wis. 1999)).

55. *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 647 (2003).

56. *Id.* at 649.

57. *Id.*

58. *Id.*

59. *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 649 (2003) (quoting Truck Insurance CGL policy language) (alteration in original).

60. *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 649 (2003) (quoting *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 271, 273 (1966)).

court concluded that the policy terms when “used *in conjunction* with [the term] ‘pollutant’ [did indeed] commonly refer to the sort of conventional environmental pollution at which the pollution exclusion was primarily targeted.”⁶¹ Further, a layperson’s understanding could only be divined by looking at the popular meaning, not just a black and white definition.⁶² Neither the insurer nor any of its supporting amici curiae offered any evidentiary support for the notion that the pollution exclusion clause was intended to bar coverage of acts of ordinary negligence, as opposed to limiting the clause to traditional environmental pollution.⁶³ The court made the salient point that had the insurance community so intended, there would be very little value left to a CGL policy because almost any injury caused by any substance that can harm would be excluded.⁶⁴

VII. Application to *MacKinnon*

The court then applied this approach to the *MacKinnon* case from the starting point of “the [standard] principles that govern the construction of insurance policy language in [California].”⁶⁵ These include the following fundamental contract interpretation rules: the “contract must give effect to the ‘mutual intent[]’ of the parties;”⁶⁶ if possible, only the four corners of the contract are to be considered;⁶⁷ to be considered ambiguous, a policy provision must be capable of two reasonable interpretations;⁶⁸ and the whole context must be considered, not just abstract portions.⁶⁹ Perhaps most important, to ensure “the greatest possible protection to the insured,” policy coverage would be “interpreted broadly” in favor of the insured, whereas exclusions would be interpreted “narrowly against the insurer.”⁷⁰ In other words, if an insurance company wants to exclude an event from coverage, it must say so explicitly in “clear and unmistakable language.”⁷¹

The *MacKinnon* court concluded that the language used by Truck Insurance in *MacKinnon*’s policy was far from clear and unmistakable. The unreasonableness of the Truck Insurance interpretation became clear when

61. *Id.* at 651-653.

62. *Id.* at 649.

63. *Id.* at 653.

64. *Id.* at 654.

65. *Id.* at 647.

66. *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 647 (2003) (quoting CAL. CIV. CODE § 1636 (West 2008)).

67. *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 647 (2003) (citing CAL. CIV. CODE § 1639 (West 2008)).

68. *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal. 4th 1, 18 (1995) (quoting *Bay Cities Paving Grading, Inc. v. Lawyers’ Mutual Insurance Co.*, 5 Cal. 4th 854, 867 (1993)).

69. *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal. 4th 1, 18 (1995) (quoting *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1265 (1992)).

70. *White v. Western Title Ins. Co.*, 40 Cal. 3d 870, 881 (1985).

71. *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 648 (2003) (quoting *State Farm Mut. Auto Ins. Co. v. Jacober*, 10 Cal. 3d 193, 201-202 (1973)) (in turn quoting *Harris v. Glens Falls Ins. Co.*, 6 Cal. 3d 699, 701 (1972)).

the court considered the full implications of such a broad interpretation. “Without some limiting principle the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results.”⁷² Therefore, it decided the normal household application of pesticide did not fall into the category of conventional environmental pollution.⁷³ Truck Insurance based the attempt to deny coverage on an overly broad and unreasonable interpretation of the language; language the court believed did not plainly and clearly exclude the landlord’s actions.⁷⁴ Further, the court adopted a narrow interpretation in keeping with the historical purpose of the exclusions and the general purpose of a CGL policy.⁷⁵

VIII. The *MacKinnon* Effect

Since the court’s opinion was published in 2003, the *MacKinnon* case has been used to support two broad categories of cases. The first group considers the interpretation of exclusion clauses generally. The second, what is, or is not, a pollutant. In the interpretation of exclusion clauses generally, the case has been cited frequently to support the general notion that coverage should be construed broadly in favor of the insured and exclusion clauses narrowly against the insurer.⁷⁶ The question of what constitutes pollution has been less frequently argued since *MacKinnon*, but the few cases that have dealt directly with this have only served to muddy the already murky waters in which the answer dwells. Each of the three primary cases decided by the California Courts of Appeal leads to a different answer.

Silica, which in both small and large amounts is a serious health hazard, certainly fits the layperson’s idea of traditional environmental pollution.⁷⁷ Consequently, the First Appellate District in *Garamendi v. Golden Eagle Ins. Co.* concluded that the negligent dispersal of silica met *MacKinnon*’s description of pollution.⁷⁸ Yet the plaintiffs in *Garamendi* were workers who sued the manufacturers of protective respiratory equipment, not neighbors or bystanders. They alleged the defective products were re-

72. *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 650 (2003) (quoting *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043 (7th Cir. 1992)).

73. *Id.* at 654.

74. *Id.*

75. *Id.* at 655.

76. *See TRB Investments, Inc. v. Fireman’s Fund Ins. Co.*, 40 Cal. 4th 19 (2006) (the word construction could not reasonably be understood to mean new structures only). *See also E.M.M.I. Inc. v. Zurich American Ins. Co.*, 32 Cal. 4th 465 (2004) (policy language of “actually in or upon” found to support coverage of theft from a vehicle when the driver was underneath vehicle inspecting the exhaust pipe).

77. U. S. Department of Labor, Crystalline Silica Exposure, <http://www.osha.gov/Publications/3177-2002-English.html> (last visited Feb. 6, 2009).

78. *Garamendi v. Golden Eagle Ins. Co.*, 127 Cal. App. 4th 480, 486 (2005) (concluding that the production of silica as an expected “by-product of industrial sandblasting operations most assuredly is what is ‘commonly thought of as pollution’ and ‘environmental pollution.’”).

sponsible for ill health triggered by long-term exposure to silica in their work environment.⁷⁹ *Garamendi* was therefore about long-term industrial exposure to a byproduct of an industrial process, caused by negligence, not a sudden, accidental dispersal of a harmful pollutant. Furthermore, Golden Eagle Insurance Company had replaced their original APE clause with a Total Exclusion Clause.⁸⁰ Hence, the *Garamendi* court's use of *MacKinnon* in a product liability case adds another possible layer of cases that may be excluded by pollution exclusion clauses.

MacKinnon was next used to support the conclusion that non-toxic, intermittent compost odors were pollution. In *Cold Creek Compost, Inc. v. State Farm Fire & Casualty Co.*, the California Court of Appeal confirmed the trial court's finding that compost odors constituted a nuisance,⁸¹ that this nuisance was a form of pollution,⁸² and that therefore this fell within the insurer's pollution exclusion clause.⁸³ Unlike silica though, there are no known health effects linked to compost odors.⁸⁴ Hence, though potentially a nuisance, such odors cannot reasonably be defined as *toxic*.⁸⁵ Likewise, the court ascribed the release of odors to the negligent operation of ordinary composting practices.⁸⁶ Thus, the holding further broadened the reach of the exclusion, and directly contradicted the *MacKinnon* court's apparent desire to adopt the narrow interpretation of the APE clause.

Most recently, in *American Casualty Co. of Reading, PA v. Miller*,⁸⁷ an owner of a furniture stripping business was criminally charged with the negligent disposal of solvents down a drain, resulting in serious injury to a sewer worker.⁸⁸ In analyzing the appropriate standard the court stated, "[t]he test in *MacKinnon* is not based upon the extent of injury, but upon the type of pollutant and how it is released into the environment. Making a distinction based upon the extent of bodily injury or property damage would be unworkable in practice."⁸⁹ Hence, in this most recent decision *MacKin-*

79. *Garamendi*, 127 Cal. App. 4th at 483.

80. *Id.* at 484.

81. *Cold Creek Compost, Inc. v. State Farm Fire & Casualty Co.*, 156 Cal. App. 4th 1469, 1486 (2007).

82. *Id.* at 1480.

83. *Cold Creek Compost, Inc. v. State Farm Fire & Casualty Co.*, 156 Cal. App. 4th 1469, 1485 (2007) ("The widespread dissemination of offensive and injurious compost odors as occurred in this case is environmental pollution, which is clearly and plainly excluded from coverage by the words of the pollution exclusion understood in their ordinary and popular sense.").

84. San Diego State University, Comprehensive Compost Odor Response Project 7 (2007).

85. MERRIAM-WEBSTER ONLINE DICTIONARY (2009), <http://www.merriam-webster.com/dictionary/toxic> (toxic: "Containing or being poisonous material especially when capable of causing death or serious debilitation.") (last visited January 18, 2009).

86. San Diego State University, Comprehensive Compost Odor Response Project 3 (2007) ("[S]everal decades of commercial-scale composting practice have convinced most discerning observers that odor generation is an inevitable result of the inevitable decomposition of organic matter.").

87. *American Casualty Co. of Reading, PA v. Miller*, 159 Cal. App. 4th 501 (2008).

88. *Id.* at 504-506.

89. *Id.* at 516.

non was again used to support the denial of a claim based on negligence, even though the *MacKinnon* court expressly adopted the narrow interpretation which purportedly allows insurers to deny coverage for traditional environmental pollution but not for “all injuries involving the negligent use or handling of toxic substances that occur in the normal course of business.”⁹⁰

IX. Conclusion

In California, there is a strong state-sponsored drive toward greener energy and greater waste diversion.⁹¹ However, many of the businesses that can help meet these goals must be able to recycle and re-process materials, the natural emissions of which may not always be pleasant or desirable as far as their neighbors are concerned.⁹² Businesses must therefore be able to rely on their CGL policy when faced with liability for environmental discharge via ordinary negligence. Unless they can insure against the potentially catastrophic losses of nuisance and regulatory lawsuits, these businesses will either fail or never start.⁹³

In an example of the law of unforeseen consequences, the language of *MacKinnon* encourages the lower courts to look at a broad, populist understanding of what is pollution.⁹⁴ Insurers and businesses obviously want and need to know what constitutes traditional environmental pollution. However, as the court admitted in *MacKinnon*, it did not provide a precise definition of “pollution.”⁹⁵ This appears to have produced results that directly contradict the court’s directive, i.e., to interpret the exclusion clause narrowly. Rather, insurance companies have found judicial support for their efforts to exclude coverage of incidents that are more accurately described as accidental or involving ordinary negligence.⁹⁶

For now, judicial analysis of Commercial General Liability insurance and its Absolute Pollution Exclusion clause has shifted to the blurry distinction between traditional environmental pollution and ordinary acts of negli-

90. *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 642 (2003).

91. California Integrated Waste Management Board, *Press Release 2008-Release 56*, December 29, 2008.

92. San Diego State University, *Comprehensive Compost Odor Response Project 46* (2007) (“Once odorants leave the surface of an open window, pile, bin or other surface (e.g., pond, puddle, tainted soil), their fates are subject to the whims of the natural environment (e.g., weather, geography, atmospheric chemistry). Those whims can deliver the odorants to unwelcoming neighbors.”).

93. U. S. Small Business Administration, *Get Insurance*, http://www.sba.gov/smallbusiness/planner/manage/getinsurance/SERV_INSURANCE.html (last visited Feb. 6, 2009).

94. *MacKinnon*, 31 Cal. 4th 635, 651 (2003) (using resources from popular culture to help formulate a definition of “pollution”).

95. *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 654 (2003) (“To be sure, terms such as ‘commonly thought of as pollution,’ or ‘environmental pollution,’ are not paragons of precision, and further clarification may be required.”).

96. *See generally* *Cold Creek Compost, Inc. v. State Farm Fire & Casualty Co.*, 156 Cal. App. 4th 1469 (2007).

gence involving toxic chemicals.⁹⁷ If California is to maintain its progressive reputation as an environmental leader, its laws must support businesses as well as protect the environment. Otherwise, business might just turn away from going green in the Golden state.

97. *See generally* Garamendi v. Golden Eagle Ins. Co., 127 Cal. App. 4th 480 (2005).