BINDING AUTHORITY
Insurance Coverage Decisions: Issued Today - Impact Tomorrow
White and Williams LLP
Randy J. Maniloff
maniloffr@whiteandwilliams.com

May 11, 2009

N.Y. Federal Court and the Pollution Exclusion -- Tooth is Stranger than Fiction

You would think it's a safe bet that when the judge in a coverage case starts out by describing the insurance policy as a document that "consists of many pages of single-spaced, densely worded language concerning coverage, to which declarations, schedules, riders and exclusions are appended, like ornaments on a Christmas tree, although without their charm," it is not going to be a happy ending for the insurer.

So it was a surprise that it wasn't all bad news for the insurer in the Southern District of New York's May 6th decision in *Janart 55 West 8th LLC v. Greenwich Insurance Co*.

But that's not the only unusual aspect of *Janart*.

Janart is a pollution exclusion case. But it is no ordinary pollution exclusion case. While the legal issues are fairly pedestrian, the case has very unusual facts. They may indeed be the most unusual circumstances surrounding a discharge, dispersal or release of pollutants that you've ever seen. And that's saying a lot. Since, as we all know, there have been many, many … many pollution exclusion cases over the years. [Exactly how many? Nobody knows. It is as much a mystery as how many licks it takes to get to the center of a Tootsie Pop. But suffice to say, it is an enormous number.]

So while the legal issues in *Janart* don't have legs, and would not have qualified as material for *Binding Authority*, the facts were just too strange to ignore.

Janart owned a commercial and residential building located at 55 West 8th Street in Manhattan. As the court described it, "The quiet enjoyment of Apartment 2 by its tenant, Carol Wilson, was disturbed when, in the early morning hours of January 12, 2006, she noticed liquid mercury dripping into her apartment through a hole in the ceiling." *Janart* at 3.

The New York City Fire Department and the City of New York Department of Environmental Protection responded and examined the mercury spill in Apartment 2. FDNY HazMat personnel captured and bagged about **15 pounds** of mercury that had fallen into Apartment 2 from the ceiling. *Id.* Huh?

Apartment 4 was directly above Apartment 2. The FDNY searched Apartment 4, all of the other apartments and the roof, but could not determine the source of the mercury spill. The City directed that the building be vacated by all tenants until the mercury-created hazardous condition was cleaned up. *Id*.

Janart retained cleanup and renovation contractors to restore the building. Several weeks later, during that process, a glass ampule with significant mercury readings was found buried among the floor joists of apartment 4, *i.e.*, the space between Apartment 4's floor and Apartment 2's ceiling. *Id*.

It turns out that, from the 1940s through the late 1960s, before Janart purchased the property, Apartment 4 had been the office of a dentist. Dentists, of course, used to use mercury to make fillings for their patients' teeth. Janart contended (and the judge seemed to agree) that the most likely cause of the mercury leak into Apartment 2 was the dentist's practice of storing mercury in the space between the two apartments. *Id.* at 3-4.

Now I read a lot of pollution exclusion cases. And this is certainly no sleepy leaching landfill case or run of the mill exposure to carbon monoxide or fumes.

As for the ensuing coverage case, and the dispute over the pollution exclusion, it is not significant enough to discuss in any detail. But in case you are wondering, the Pollution Exclusion clauses at issue were not Sudden and AcciDENTAL.

In general, at issue was Janart's property policy issued by Greenwich Insurance Co. and whether the pollution exclusion, contained in both the policy and by endorsement, was limited to "environmental" pollution (which the court concluded the mercury release was not). For various reasons the court concluded that neither Greenwich nor Janart were entitled to summary judgment.

Other oddities in the case – the court stated that, when construing the pollution exclusion, there is no distinction between property and liability policies. The court's authority for that, you ask – an April 16, 2009 Op-ed in *The New York Times*. There was also no mention whatsoever of *Belt Painting* – the Court of Appeals of New York's seminal case on the pollution exclusion and the "environmental" vs. "non-environmental" issue.

Attached is a copy of the Southern District of New York's May 6th decision in *Janart 55 West 8th LLC v. Greenwich Insurance Co*.

Please let me know if you have any questions.

Randy

Randy J. Maniloff
White and Williams LLP
1800 One Liberty Place | Philadelphia, PA 19103-7395
Direct Dial: 215.864.6311 | Direct Fax: 215.789.7608
maniloffr@whiteandwilliams.com