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# LIABILITY INSURANCE FOR POLLUTION CLAIMS: AVOIDING A LITIGATION WASTELAND\*

Brooke Jackson\*\*

Coverage for pollution claims under Comprehensive General Liability ("CGL") insurance policies is a topic of considerable current interest to corporate officers, risk managers, insurance companies and others. Much has been written on the pertinent legal issues in recent months and years.<sup>1</sup>

This discussion, hopefully, will be a little different. It does analyze the legal issues and many of the cases, admittedly from a policyholder's perspective. However, it is organized from the viewpoint of a litigator preparing and trying a case. And it is written by a litigator who believes

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\* Copyright © 1990 by Brooke Jackson. The author thanks Camron R. Kuelthau, Jay S. Jester, and Rosalee L. Rodda of Holland & Hart who contributed research and ideas for many parts of this article.

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1. See, e.g., T. Milch, "Insurance Coverage for Environmental Claims: Some Key Coverage Issues," presented at the Joint Program of the Commercial Torts Committee, Economics of Law Practice Committee, Environmental Law Committee of the Litigation Section, and the Property Law Committee, ABA Annual Meeting (August 8, 1990); J. O'Leary, Jr., "Current Trends in CGL Insurance Coverage for Environmental Claims: An Introduction to Some Key Coverage Issues," *id.*; E. Anderson and J. Fried, "Insurance Claims for Environmental Damages," Insurance Claims for Environmental Damages Conference, Executive Enterprises, Inc. (April 17, 1990); T. Brunner and G. Cellucci, "Challenges for the Creative Defense Lawyer: Legal Issues in the 1990's," Mid-Year Meeting of the Committee on Insurance Coverage Litigation, ABA Section of Litigation (April 7, 1990); Comment, *Comprehensive General Liability Insurance Coverage for CERCLA Liabilities: A Recommendation for Judicial Adherence to State Canons of Insurance Contract Construction*, 61 U. COLO. L.REV. 407 (1990); Proceedings of the Fourth Annual Litigation Institute, Prentice Hall Law & Business (1989); Bradbury, *Original Intent, Revisionism, and the Meaning of the CGL Policies*, 1 ENV'T L. CLAIMS J. 279 (1989); A. Rudlin, LIABILITY FOR HAZARDOUS WASTE CONTAMINATION AND OTHER ENVIRONMENTAL POLLUTION CLAIMS, Defense Research Institute Seminar (Sep. 22, 1988); Pandygraft, Plews, Clark & Wright, *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 IND. L.REV. 117 (1988); E. Anderson and M. Lupi, *Environmental Risk Insurance: You CAN Count On It*, Risk Management 68 (Oct. 1987); D. Jernberg and M. Furse, *Environmental Risk Insurance: Don't Count On It*, Risk Management 42 (July 1987); Saylor & Zolensky, *Pollution Coverages and the Intent of the CGL Drafters: The Effect of Living Backwards*, Mealey's Litigation Reports—Insurance 4425 (1987); Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237 (1986).

that an incredible amount of time and money is being wasted in such litigation, to the benefit of the lawyers but not necessarily the policyholders, insurers or the environment.

### I. GETTING STARTED: THRESHOLD ISSUES TO RESOLVE EARLY.

The scenario that gives rise to this paper involves an environmental problem, typically a hazardous waste disposal situation of some kind, which causes an environmental regulatory agency to demand that it be investigated and cleaned up. Where any type of third-party property damage is involved, such as groundwater contamination, the party responsible for the clean-up is likely to seek a defense and indemnification from its liability insurers.

Among the many defenses that liability insurers raise, there are two that present purely legal, but potentially dispositive, issues. First, where the underlying claim by the environmental agency has not taken the form of a formal lawsuit, insurers frequently take the position that there is no duty to defend until a "suit" is filed in a court against the policyholder. Second, the insurers always assert that where the agency seeks to compel policyholders to clean up polluted sites, or to recover "response costs" incurred by the agency itself in cleaning up the site, such claims are equitable in nature, not claims for "damages" which is what liability policies cover.

Policyholders should consider bringing these issues to a head early. The best way to do this, in the author's opinion, is by a summary judgment motion in a declaratory judgment suit, regardless whether the suit is filed by the policyholder or the insurer. If you are in a federal court, you should consider a motion to certify the issue(s) to the state supreme court. There is no reason to subject yourself to expensive, voluminous discovery if the court is going to knock you out of the saddle on a purely legal issue. Besides, there is an adequate body of case law now, mostly pro-policyholder, to allow a relatively simple and easy presentation of these issues.

To put them in context, a slight diversion into a simplified discussion of the underlying claim is necessary.

#### A. CERCLA and its Relatives.

Hazardous waste problems that may be covered by insurance can

arise in a variety of ways such as claims asserted by governmental agencies, private party lawsuits, or discovery by the insured that it has a pollution problem. Probably the most common scenario commences when the Environmental Protection Agency ("EPA") asserts a claim under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA").<sup>2</sup> The claim seeks to impose liability for the investigation and clean-up of a contaminated site upon all parties deemed responsible by the Act.

The EPA is authorized to *remove*, or *arrange for the removal of*, hazardous substances; and to provide for *remedial action*.<sup>3</sup> Collectively, costs of removals and remedial actions are "response costs."<sup>4</sup> Any "responsible party," which is a broadly defined term, is liable for the response costs.<sup>5</sup> A responsible party is also liable for "damages for injury to, destruction of, or loss of natural resources."<sup>6</sup>

Note, the EPA has several options. It can conduct removals and remedial actions through contractors it hires.<sup>7</sup> In that scenario, the EPA pays the costs directly out of the "Superfund" and sues the responsible parties for repayment of such costs.<sup>8</sup> Alternatively, the EPA can sue but simultaneously file a consent decree which resolves the suit by ordering the responsible party to investigate and remediate the site. The EPA can also issue administrative clean-up orders.<sup>9</sup> The term "response costs" includes all of these actions.

In addition, "trustees" of natural resources, i.e., the federal or state agency charged with their management, can sue for natural resource "damages."<sup>10</sup> "Damages" is defined tautologically to mean "damages for injury or loss of natural resources as set forth in Section 9607 (a) or 9611 (b) of this title."<sup>11</sup> The United States Circuit Court of Appeals for the District of Columbia has held that "restoration or replacement" value is presumptively the appropriate measure of such damages.<sup>12</sup>

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2. Also known as "Superfund," 42 U.S.C.A. § 9601 *et seq.* (West 1983 & Supp. 1990).

3. 42 U.S.C. § 9604(a)(1) (1988) (emphasis added).

4. 42 U.S.C.A. §§ 9601(25), 9604(a) (1) (West 1983 & Supp. 1990).

5. 42 U.S.C.A. § 9607(a) (1-4) (A),(B) (West 1983 & Supp. 1990).

6. 42 U.S.C.A. § 9607(a)(1-4) (C) (West 1983 & Supp. 1990).

7. 42 U.S.C.A. § 9604 (a) (1) (A) (West 1983 & Supp. 1990).

8. 42 U.S.C.A. §§ 9607 (a), 9611(a), (West 1983 & Supp. 1990).

9. 42 U.S.C.A. § 9606 (a) (West 1983 & Supp. 1990).

10. 42 U.S.C.A. § 9607 (a), (f) (West 1983 & Supp. 1990).

11. 42 U.S.C. § 9601 (6) (1988).

12. *State of Ohio v. United States Dept. of Interior*, 880 F.2d 432, 448 (D.C. Cir. 1989). Regulations formerly prescribing the lesser of restoration costs or diminution in use value, 43 C.F.R. § 11.84 (g) (1) (1989), were struck down.

These claims are typically commenced when the EPA sends the policyholder a request for information about a site under investigation pursuant to its authority under CERCLA § 104.<sup>13</sup> Eventually, the EPA will notify the policyholder that it has been designated a "potentially responsible party" or "PRP." The EPA proceeds to attempt to negotiate an agreement with the PRP's to investigate and clean up the site.

Most state-instigated pollution claims, whether brought directly under a state program or pursuant to an EPA deference of its CERCLA role to the state, are essentially similar.

### B. *Duty to Defend Only "Suits"?*

The standard primary liability policy provides that "the company shall have the right and duty to defend any *suit* against the insured."<sup>14</sup> Does that mean that only if and when a court suit is filed does any duty to defend arise?

The term "suit" is undefined. Some courts have held that EPA administrative actions such as designating a policyholder a "potentially responsible party" in a letter are not suits.<sup>15</sup> However, the clear majority of the reported cases go the other way, holding that such actions are the substantial equivalent of lawsuits and trigger a duty to defend.<sup>16</sup>

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13. 42 U.S.C.A. § 9604 (e) (2) (West 1983 & Supp. 1990), [a "104(e) letter"].

14. A sample standard CGL policy containing all policy references can be found at 1 G. COUCH, COUCH ON INSURANCE § 1:72 (2d ed. 1984).

15. See, e.g., Harter Corp. v. Home Indem. Co., 713 F. Supp. 231, 232-33 (W.D. Mich. 1989); Dextrex Chem. Indus. v. Employers Ins. of Wausau, 681 F. Supp. 438, 442-55 (N.D. Ohio 1987).

16. See, e.g., Avondale Indus., Inc. v. Travelers Indem. Co., 887 F.2d 1200, 1206 (2d Cir. 1989), *reh'g denied*, 894 F.2d 498 (1990) (a "PRP letter" which demanded information and the submission of a remedial action plan under threat of monetary penalties, waiver of defense and suit for non-compliance was "sufficiently adversarial to constitute a suit under New York law and within the meaning of the policy"; a letter merely inviting voluntary action might not have amounted to a "suit"); Boeing Co. v. Aetna Casualty & Sur. Co., No. C86-352WD, slip op. at 20-24 (W.D. Wash. April 16, 1990), [reported in Mealey's Litigation Reports — Insurance, April 24, 1990, at App. B (a "suit" is "the attempt to gain an end by legal process") (quoting Webster's Third New World International Dictionary 1976); a PRP letter qualifies]; Higgins Indus. v. Fireman's Fund Ins. Co., 730 F. Supp. 774, 776-79 (E.D. Mich. 1989); Hazen Paper Co. v. United States Fidelity and Guar. Co., 407 Mass. 689, 693-97, 555 N.E.2d 576, 579-82 (1990) (EPA letter demanding implementation of all necessary remedial measures and reimbursing EPA's costs on a "voluntary" basis and requesting information but with possible criminal penalties for non-compliance was substantially equivalent to a lawsuit); C. D. Spangler Const. Co. v. Indus. Crankshaft and Eng. Co., 326 N.C. 133, —, 388 S.E.2d 557, 569-70 (1990), ("suit" has different meanings; state compliance orders qualify); Polkow v. Citizens Ins. Co. of Am., 180 Mich. Ct. App. 651, —, 447 N.W. 2d 853, 855-56 (1989). Earlier similar decisions are Fireman's Fund Ins. Co. v. Ex-Cell-O Corp., 662 F. Supp. 71 (E.D. Mich. 1987) and American Motorists Ins. Co. v. Levelor Lorentzen, Inc., No. 88-1994, slip op. at 6 n.2, 1988 WL 112142, 57 U.S.L.W. 2270 (D.N.J. Oct. 14, 1988), *appeal dismissed*, 879 F.2d 1165 (3d Cir. 1989). See also, Ryan v. Royal Ins. Co., No. 90-1217, slip op. at 10-29 (1st Cir. Sept. 27, 1990) (governmental administrative actions are "suits" if they have a sufficiently adversarial or coercive quality; a

If the issue can be viewed as a "policy matter," the correct answer seems clear. Potentially responsible parties regularly establish a primary goal of maintaining control over the investigation and clean up at the site. The general perception is that if the EPA or state agency conducts the investigation and clean up, the costs inevitably escalate, often in multiples, compared to the costs if the PRP does the work pursuant to an administrative order or consent decree. The policyholder and its insurer have strong economic motives for avoiding formal litigation. The agencies ordinarily are willing to forego formal litigation so long as they can obtain adequate response on an administrative level. It would be an absurd result, from the perspective of the policyholder, the insurer and the public, for policyholders to have to stonewall and force suits to be filed in order to trigger coverage.

What if a court decides that "suit" means exclusively a court suit, and the EPA never does file such a suit? There is no duty to defend, but there still is an obligation to indemnify against all sums the policyholder becomes obligated to pay as damages because of bodily injury or property damage. Insurers can argue that the policyholder cannot become legally obligated to pay damages if there is no suit. However, having declined to defend, the insurer is in a poor position to reject indemnity on the ground that the policyholder settled in response to an administrative proceeding or order.

In fact, a legal obligation to pay damages has been held to arise even in the absence of any claim, administrative proceeding or judicial determination.<sup>17</sup> Polluters inevitably will be called to task. Delay in responding is both economically and socially undesirable. That does not mean that insurance contracts may be re-written. However, if a policyholder accidentally causes pollution damage and wishes to repair the damage before being formally forced to do so, its right to indemnification should not be forfeited by a technical construction of "legally obligated to pay"

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request to submit plans for any proposed remedial action which did not, however, demand clean-up or reimbursement did not qualify).

17. *Compass Ins. Co. v. Cravens, Dargen & Co.*, 748 P.2d 724, 728 (Wyo. 1988) (CGL policy covered the cost of cleaning up damage to an adjacent property caused by an oil spill on the insured's property even though it was cleaned up before any claim was asserted, because a Wyoming statute required the clean-up); *Upjohn Co. v. New Hampshire Ins. Co.*, 178 Mich. Ct. App. 706, 444 N.W.2d 813, 819 (1989) ("[I]t makes no difference that Upjohn took the remedial action it did before being ordered to do so and, in fact, we believe that such swift remedial action should be encouraged rather than discouraged." (Citations omitted)). *But see Gelman Sciences, Inc. v. Fireman's Fund Ins. Cos.*, Nos. 111722, 112825, 114207 (Mich. Ct. App. April 17, 1990) [reported in *Mealey's Litigation Reports — Insurance*, April 24, 1990, at 7].

or "damages." Such costs, even though "voluntarily" incurred, should be eligible for coverage.

Interestingly, the new "Commercial General Liability Coverage Form" which went into use in 1986 defines "suit" to mean any "civil proceeding" in which damages "are alleged."<sup>18</sup> It expressly includes arbitration proceedings.<sup>19</sup> If anything, that suggests that the undefined term "suit" in the previous form was not unequivocally confined to formal complaints filed in a court.

### C. *The "as damages" Argument.*

The pertinent language from the coverage part of the standard policy reads:

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 injury or property damage to which this insurance applies, caused by an occurrence.<sup>20</sup>

If the insurer's argument that EPA or state claims for "cost recovery" of "response costs" do not seek "damages" is accepted, summary judgment will be entered for the insurer on both duty to defend and duty to indemnify. This makes the "as damages" issue very popular.

#### 1. The Cases.

There are literally dozens of cases from various state and federal courts with mixed results on this question. The overwhelming majority favors the policyholders.<sup>21</sup>

Washington was the first state supreme court to hold that costs incurred in cleaning up toxic waste pursuant to state cleanup orders are "damages;" North Carolina, Minnesota and Massachusetts have since agreed.<sup>22</sup> Maine is contrary.<sup>23</sup> Several other state supreme courts have the issue before them —California, Iowa, New Jersey, New York and

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18. See 1 G. COUCH, COUCH ON INSURANCE § 1:72 (2d ed. 1984).

19. *Id.*

20. *Id.*

21. See, e.g., *Boeing Co. v. Aetna Casualty and Sur. Co.*, 113 Wash. 2d 869, —, 784 P.2d 507, 511, 522 (1990) (calculating it at fifty-six to fifty-seven for the insureds at that time).

22. *Id.*; *C. D. Spangler Const. Co. v. Indus. Crankshaft and Eng. Co., Inc.*, 326 N.C. 133, —, 388 S.E.2d 557, 565-69 (1990); *Minnesota Mining and Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 178-84 (Minn. 1990); *Hazen Paper Co. v. United States Fidelity and Guar. Co.*, 407 Mass. 689, 698-702, 555 N.E.2d 576, 582-84 (1990).

23. *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16, 18-19 (Me. 1990).

West Virginia.<sup>24</sup> The federal appellate courts are divided.<sup>25</sup> Numerous federal district courts have joined the majority of state courts on this issue.<sup>26</sup>

The United States Supreme Court denied certiorari in both *NEPACCO* and *Armco* and, since state law issues are involved, it is questionable whether there will be any resolution at that level.

## 2. Analysis I: Equitable Damages.

Many courts favoring policyholders seem to accept the proposition that response costs under CERCLA are restitutionary and therefore an equitable remedy. However, they reason that the term "damages" in the liability policy, which is undefined, must be given its ordinary meaning, not a technical legal meaning dependent upon historic differences within the legal system between actions in equity and actions at law.<sup>27</sup> The insured is being forced to pay money to remedy property damage. The plain, ordinary meaning of "damages" as defined in dictionaries, and perceived by the layman, includes such costs. At a minimum, the term "damages" is ambiguous and must be construed against the insurer.<sup>28</sup> If the draftsmen of the policies wanted to provide that only remedies at law were covered, they could have done so.

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24. See BUSINESS INSURANCE, Feb. 19, 1990 at 1; Mealey's Litigation Reports — Insurance, July 25, 1989.

25. The Second Circuit in *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1206-07 (2d Cir. 1989) *reh'g denied*, 894 F.2d 498 (2d Cir. 1990), became the first federal appellate court squarely to counter the two oft-cited favorites of the insurers: *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir. 1988), *cert. denied*, 109 S.Ct. 66 (1988) (the "NEPACCO" case) and *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 489 U.S. 1008 (1988). See also *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188, 1194 (9th Cir. 1986) (predicting that the Oregon Supreme Court would hold that discharge of pollution into water causes property damage such that cleanup costs are recoverable under a property damage liability clause). *NEPACCO* and *Armco* have been criticized even within the Fourth and Eighth Circuits. See, e.g., *Chesapeake Utilities Corp. v. American Home Assurance Co.*, 704 F. Supp. 551, 558-61 (D. Del. 1989) (refusing to follow *Armco* because it "misstates Maryland law"); *Jones Truck Lines v. Transport Ins. Co.*, No. 88-5723 (E.D. Pa. May 9, 1989) [reported in Mealey's Litigation Reports — Insurance, May 23, 1989, at 3 (rejecting *NEPACCO*'s interpretation of Missouri law because the court "ignored clear signals emanating from the state courts or clearly misread state law")].

26. Good lists of the many decisions can be found in *C.D. Spangler Constr. Co. v. Indus. Crankshaft and Eng. Co.*, 326 N.C. 133, —, 388 S.E.2d 557, 564-65 n.9 (1990); *Minnesota Mining and Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 180-181 nn. 5 and 6 (Minn. 1990), and *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171, 1188 n.24 (N.D. Cal. 1988).

27. See, e.g., Spangler, *supra* note 22, 388 S.E.2d at 566-69; Boeing, *supra* note 21, 784 P.2d at 510-12.

28. See, e.g., *Minnesota Mining, supra* note 26, 457 N.W.2d at 179-81.



### 3. Analysis II: Response Costs Are Legal Damages.

Response costs include costs of removal, remedial action and enforcement activities related thereto.<sup>29</sup> These include the cost of investigating the problem and repairing the damage, plus ancillary EPA oversight and other administrative charges. There is obvious overlap between the remedy EPA can seek under the label "response costs" and that which it can seek under the label "damages." Regardless of the avenue chosen, repair costs should properly be classified as "damages" in even the technical legal sense.

Although CERCLA imposes statutory strict liability, analogies to ordinary common law negligence cases illustrate the point. Example 1: A car is damaged in an automobile accident. The owner's measure of damage is either the cost of repair (determined by the body shop's invoice) or replacement (if the car was totaled); the latter is ordinarily determined on a diminution in market value theory, i.e., the difference between the fair market value of the car before the accident and its as-is value (scrap value or zero). Example 2: Property is flooded after the neighbor's development changes the run-off pattern during storms. The landowner's measure of damages is either cost of repair or diminution in market value. Ordinarily, repair costs may not exceed before-injury value; but if the damaged property is uniquely important to the plaintiff, or he has no choice but to restore it to its original condition, courts may in their discretion permit recovery of the cost of repair even where it exceeds the value of the damaged property.<sup>30</sup> The critical point is that these types of cases are submitted to juries every day in courts throughout the country. This suggests that cost of repair is a recognized measure of legal damages.<sup>31</sup>

Claims brought under CERCLA are analytically no different. The EPA seeks to recover the costs of repairing the public's property (such as groundwater, air or other natural resources). The costs of repair are measured by the invoices of the contractors who investigate and clean up the damaged property. If the property cannot be fully repaired, the public trustee can seek additional compensation for the loss of a natural resource, i.e., diminution in value. Whether the EPA commissions the investigation and clean-up, or the PRP does so pursuant to an EPA order

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29. 42 U.S.C.A. § 9601 (25) (West 1983 & Supp. 1990).

30. See, e.g., *Heninger v. Dunn*, 101 Cal. App. 3d 858, —, 162 Cal. Rptr. 104, 106-09 (1980); *Board of County Comm'rs of County of Weld v. Slovek*, 723 P.2d 1309, 1313-1316 (Colo. 1986); *Denoer v. Lamb*, 22 Ohio App. 136, —, 490 N.E. 2d 615, 618-19 (1984).

31. *Id.*

or a consent decree, makes no more difference than whether a body shop that repairs a car is hired and directly paid by the plaintiff or by the defendant. Either way, the responsible party sustains a monetary loss. This is precisely the type of problem that liability insurance is purchased for in the first place.

Ultimately, efforts to analyze response costs as equitable versus legal depend upon theoretical and abstract notions that are difficult to explain or justify. It is no surprise that most courts do not feel compelled to interpret standard liability policies on this basis.

## II. THE CORE ISSUES.

### A. Occurrence.

The principal coverage-part issue is whether the bodily injury or property damage was caused by an "occurrence." An occurrence is defined in the standard form (1973 revision) as:

an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.<sup>32</sup>

In pre-1966 policies, the term "accident" was used instead of "occurrence," but judicial interpretation of the term "accident" gave it substantially the same meaning as the more modern "occurrence."<sup>33</sup>

The new form which went into use in 1986 is offered in alternative "occurrence" and "claims made" versions.<sup>34</sup> The claims made form changes the "trigger" analysis in some obvious, but complicated, ways that are beyond the scope of this article. This form has received relatively little market acceptance to date, and it is still in a state of flux due to reactions from the market. In any event, claims arising from environmental damage occurring before the new form came into being will wage on through the 1990's, and these claims are the subject of this article.

#### 1. When Does an Occurrence (or Accident) Occur: The "Trigger" Issue.

The question of when bodily injury or property damage occurs can be complicated and difficult as a matter of *fact*. In *Coordinated Asbestos*

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32. 1 G. COUCH, COUCH ON INSURANCE § 1:72 (2d ed. 1984).

33. 37. See, e.g., *Beryllium Corp. v. American Mut. Liability Ins. Co.*, 223 F.2d 71 (3d Cir. 1955); *Canadian Radium & Uranium Corp. v. Indemnity Ins. Co. of N. Am.*, 411 Ill. 325, —, 104 N.E.2d 250 (1952).

34. 1 G. COUCH, COUCH ON INSURANCE § 1:72 (2d ed. 1984).

*Insurance Coverage Cases*,<sup>35</sup> Judge Brown's lengthy legal analysis regarding when bodily injury occurs from asbestos exposure illustrates this.<sup>36</sup> Judge Brown also struggled with the factual trigger concerning property damage claims.<sup>37</sup>

As a matter of law, however, the question is simply and clearly answered on the face of the policy. "Bodily injury" means bodily injury, sickness or disease "which occurs during the policy period."<sup>38</sup> "Property damage" means physical injury to or destruction of tangible property (or loss of use of such property) which occurs "during the policy period."<sup>39</sup> An "occurrence" is an event "which results in bodily injury or property damage."<sup>40</sup> Plainly, the timing of an occurrence depends solely on when the bodily injury or property damage occurred.

Thus, if bodily injury or property damage occurs during the term of the policy, the policy is "triggered." As is thoroughly discussed in the *Coordinated Asbestos* opinions,<sup>41</sup> it was clearly intended by the draftsmen, and is clear also from the policy language, that when injury or damage occurs over time and overlaps more than one policy, each such policy is triggered. It is important to recognize that the question of which policies are triggered is distinct from the matter of "stacking" of coverages. This should not be a disputed issue in most cases. Fair-minded parties and competent counsel should be able to stipulate on the legal definition of the "trigger" of coverage.

Other theories such as (a) the date the waste was disposed of,<sup>42</sup> (b) the date the environmental injury is discovered or "manifests" itself,<sup>43</sup> and (c) the date of the victim's "exposure" to asbestos while inhaling it on the job, but not while the disease progresses after the inhalation stops,<sup>44</sup> are simply contrary to the plain language of the policy. Many of

35. *Asbestos Insurance Coverage Cases*, Judicial Council Coordination Proceedings No. 1072 (Cal. Super. Ct.); see *infra* notes 36, 37, 41, 47, 48, 59, 105 citing the various phases.

36. Tentative Decision Concerning Phase III Issues 12-57 (Calif. Super. Ct., May 29, 1987).

37. Statement of Decision Concerning Phase V-A Issues, released in draft form Dec. 13, 1989 (withdrawing Judge Brown's Tentative Aug. 29, 1988 ruling that asbestos property damage triggers insurance coverage continuously from the time asbestos is installed until it is removed or a claim is filed and substituting a final ruling that insurance coverage is triggered when the asbestos-containing products are installed, when they are in fact released, and when settled releases are disturbed and reentrained into the air).

38. 1 G. COUCH, *COUCH ON INSURANCE* § 1:72 (2d ed. 1984).

39. *Id.*

40. *Id.*

41. *Supra* note 35 and corresponding text.

42. See, e.g., *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.*, 811 F.2d 1180 (8th Cir. 1987), *rev'd en banc*, 842 F.2d 977 (8th Cir. 1988).

43. See, e.g., *Mraz v. Canadian Univ. Ins. Co. Ltd.*, 804 F.2d 1325 (4th Cir. 1986).

44. E.g., *Porter v. American Optical Corp.*, 641 F.2d 1128, 1143-44 (5th Cir. 1981).

these cases were born from the efforts of a policyholder to adapt his best coverage year or policy to some triggering *fact* other than the date when the injury or damage itself occurred, to maximize coverage. Just as frequently, the cases reflect the desire of an insurer, exposed under the correct trigger theory, to point the finger at another insurer or the policyholder (in an uninsured period), or at least to gain more partners to share the loss. Sometimes risk managers hear two different theories from insurers, who say they are mutually exclusive, and believe one more than the other — not realizing that multiple insurers' policies may be triggered. In short, greed has spawned some poor decisions in this area.

Of course, the new claims-made form radically changes (and confuses) the trigger; but, so far, few of the liability policies sold are of this type. The new "occurrence" form is substantially identical to the old one on the trigger concept.

## 2. "Expected or Intended": Subjective or Objective Standard?

A more interesting question is whether the term "neither expected nor intended" is to be applied using an objective or subjective standard. "Objective" means whether a reasonable insured in the same or similar circumstances would have expected or intended that bodily injury or property damage would result from his act. A "subjective" approach asks whether this particular insured expected or intended the injury or damage in question. This can potentially make a big difference before a jury. In today's society, we are all much more environmentally aware than in earlier decades; with the benefit of hindsight, it is easy to say that a policyholder should have realized that what he was doing would ultimately cause damage or injury. However, when a subjective standard is used, the trial becomes a credibility contest: did the men and women running the company actually expect to cause third-party damage or injury?

The plain language of the policy, "neither expected nor intended *from the standpoint of the insured*,"<sup>45</sup> focuses on the actual, subjective expectations and intentions of the insured. It requires the fact-finder to view the events as the insured viewed them, adopting the insured's perspective and outlook to determine the insured's motivations. Asking what another person similarly situated might have expected or intended would ignore the phrase "from the standpoint of the insured."<sup>46</sup>

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45. See 1 G. COUCH, COUCH ON INSURANCE § 1:72 (2d ed. 1984) (emphasis added).

46. The highest courts of numerous states have adopted a subjective standard in construing this

The drafting history of the occurrence definition, which can be developed through documents available in discovery, confirms the intent to use a subjective standard to determine what the insured expected and intended.<sup>47</sup> For example, in connection with the 1966 CGL policy revisions, an exclusion was proposed which provided:

This policy does not apply to bodily injury or property damage resulting from deliberate acts or omissions of the insured which with reasonable certainty may be expected to produce injury or damage.<sup>48</sup>

The proposal was rejected because, although the drafters meant to exclude coverage for "intentional results of intentional act[s], such as murder . . .," they did not mean to exclude coverage simply because damage was "foreseeable."<sup>49</sup>

In 1978, there was a proposal to exclude bodily injury or property damage either expected or intended from the standpoint of the insured, or substantially certain to occur as a result of an intended act or omission by the insured. The apparent intent was to eliminate the subjective standard and substitute an objective one, but the proposal was never adopted. In fact, the new form adopted in 1986 continues to use the "from the standpoint of the insured" language.<sup>50</sup>

A closely related question at the heart of liability insurance is whether injury foreseeably resulting from an intentional act is covered or excluded. To make out a prima facie case in tort, such as negligence, a victim must prove that his or her injury was foreseeable to the defendant.

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language. *Breland v. Schilling*, 550 So.2d 609, 611-613 (La. 1989); *United States Fidelity and Guar. Co. v. Armstrong*, 479 So.2d 1164, 1167 (Ala. 1985); *Patrons-Oxford Mut. Ins. Co. v. Dodge*, 426 A.2d 888, 892 (Me. 1981); *Northwestern Nat. Casualty Co. v. Phalen*, 597 P.2d 720, 725-726 (Mont. 1979); *Continental Western Ins. Co. v. Toal*, 309 Minn. 169, —, 244 N.W.2d 121, 125-26 (1976). *See also* *Rodriguez v. Williams*, 107 Wash.2d 381, —, 729 P.2d 627, 630 (1986); *Talley v. MFA Mut. Ins. Co.*, 273 Ark. 269, —, 620 S.W.2d 260, 262-63 (1981); *Nielsen v. St. Paul Cos.*, 283 Or. 277, —, 583 P.2d 545, 547-48 (1978); *Mohn v. American Casualty Co. of Reading*, 458 Pa. 576, —, 326 A.2d 346, 348 (1974); *State Farm Fire & Casualty Co. v. Muth*, 190 Neb. 248, —, 207 N.W.2d 364, 366 (1973). So have many other courts. *See, e.g.*, *City of Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1150-51 (2d Cir. 1989); *Health Care & Retirement Corp. v. St. Paul Fire & Marine Ins. Co.*, 621 F. Supp. 155, 161 (S.D. W.Va. 1985); *Lansco, Inc. v. Dept. of Env'tl. Protection*, 138 N.J. Super. 275, 350 A.2d 520, 523-524 (1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977).

47. *See* Coordinated Asbestos Ins. Coverage Cases: Tentative Decision Concerning Phase III Issues, No. 1072 (May 29, 1987) at 74.

48. Testimony of H. P. Schoen, Associate General Counsel, Hartford Accident & Indemnity Co., given in Coordinated Asbestos Ins. Coverage Cases, depo. 15901.

49. *Id.*

50. Commercial General Liability Coverage Form, Section I.A.2.a. (Form CG 00 01 11 85, Insurance Services Office, Inc., 1982, 1984).

It would be anomalous if that very proof were to nullify the defendant's insurance. Logically, it cannot.

There is a presumption in tort law that a person intends the natural and probable consequences of his intentional acts. However, this presumption has no application in the interpretation of the terms used in the "neither expected nor intended from the standpoint of the insured" coverage clause and the policy term "expected or intended injury" cannot be equated with foreseeable injury.<sup>51</sup>

Indeed, the draftsmen of the standard CGL policy intended that it would provide coverage for the unintended results of intentional acts.<sup>52</sup>

This fundamental understanding of liability insurance must be applied whether dealing with exclusionary language within the occurrence definition (which is in the coverage grant) or listed exclusions from coverage. Thus, per a federal district judge in New Jersey,

an insurance policy exclusion for manufacturing activities which carry a risk of causing environmental harm, although not known or intended to cause harm . . . would indeed create an exclusion swallowing the entire purpose of insurance protection for unintended consequences. Insurance is purchased and premiums are paid to indemnify the insured for damages caused by accidents, that is, for conduct not meant to cause harm but which goes awry . . . . If the policy holder were to be told that the words . . . excluding coverage for "expected or intended" damages actually mean that coverage is also lost for damage which a prudent person "should have" foreseen, there would be no point to purchasing a policy of liability insurance.<sup>53</sup>

In *Broderick Investment Co. v. Hartford Accident & Indemnity Co.*,<sup>54</sup> the court instructed the jury as follows:

For purposes of this determination [whether the policyholder expected or intended to cause damage], it does not matter what another person might have expected or intended in similar circumstances. You must decide what plaintiffs actually expected or intended. One cannot, however, avoid the consequences of conduct from being expected or intended merely by choosing to ignore that which is obvious.<sup>55</sup>

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51. *United States Fidelity & Guar. Co. v. Armstrong*, 479 So.2d 1164, 1167 (Ala. 1985), quoting *Alabama Farm Mut. Casualty Ins. v. Dyer*, 454 So.2d 921, 925 (Ala. 1984). See *Hutchinson Water Co., Inc. v. United States Fidelity and Guar. Co.*, 250 F.2d 892, 894 (10th Cir. 1957).

52. See *Heinz, Gallozzi and Gillis, Interpreting the Scope of Coverage for Unexpected Results*, 2 ENVTL L.J. 377, 378-79 (1990).

53. *J. T. Baker, Inc. v. Aetna Casualty & Sur. Co.*, No. 86-4794, slip op. at 13-14 (D.N.J. Feb. 14, 1989).

54. *Broderick Inv. Co. v. Hartford Accident & Indem. Co.*, No. 86-Z-1033 (D. Colo.), tried to a jury October 16-27, 1989.

55. *Id.*, Jury Instruction No. 13.

Similarly, in *Boeing*, the court ruled that "intended" meant "the insured wanted the damages to result," and "expected" meant "the insured knew that there was a high degree of probability or a substantial certainty that damage would result from its act;" it turns on the insured's state of mind, which is a jury issue.<sup>56</sup>

The insurance industry today wants to avoid its own policy language and take refuge in tort concepts; however, if the contract itself is not conclusive, the drafting history and the very purpose of liability insurance should be.

### 3. Burden of Proof.

Traditionally, policyholders have the burden to prove coverage,<sup>57</sup> whereas the insurer has the burden to prove an exclusion.<sup>58</sup> Thus, dealing with the phrase, "neither expected nor intended from the standpoint of the insured", becomes an important question.

Although this phrase is part of the definition of "occurrence," it is written in exclusionary-type language. The "neither expected nor intended" language is simply the more modern version of the traditional exclusion of intentional torts such as assault and battery. Numerous courts<sup>59</sup> have held it constitutes an exclusion, notwithstanding its location in the policy, because it has the effect of limiting coverage.

In the new (1986) standard CGL form, this "exclusion" is returned to the exclusion section; the first exclusion is of bodily injury or property damage expected or intended from the standpoint of the insured. In fact, the 1966 drafters initially had it in "exclusion (a)" but moved it for "merchandizing reasons," according to drafting history documents.<sup>60</sup>

In *Broderick Investment Co. v. Hartford Accident & Indemnity Co.*, the court instructed the jury as follows:

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56. *Boeing Co. v. Aetna Casualty & Sur. Co.*, 113 Wash. 2d 869, 784 P.2d 507 (1990).

57. *State v. National Auto Ins. Co.*, 290 A.2d 675, 678 (Del. Ch. 1972).

58. *West v. Credit Life Ins. Co.*, 30 Colo. App. 455, —, 494 P.2d 601, 602 (1972).

59. See, e.g., *Auto Owners Ins. Co. v. Jensen*, 667 F.2d 714, 720 (8th Cir. 1981); *Clemco Indus. v. Commercial Union Ins. Co.*, 665 F.Supp. 816, 820 (N.D. Cal. 1987), *aff'd*, 848 F.2d 1242 (9th Cir. 1988); *J.T. Baker, Inc. v. Aetna Casualty & Sur. Co.*, No. 86-4794, slip op. at 10 (D.N.J. Feb. 14, 1989); *Grange Ins. Co. v. Brosseau*, 113 Wash. 2d 91, —, 776 P.2d 123, 126, 130-31 (1989); *Woida v. North Star Mut. Ins. Co.*, 306 N.W.2d 570, 572-73 (Minn. 1987); *Coordinated Asbestos Ins. Coverage Cases, Tentative Decision Concerning Phase III Issues 72-73* (Calif. Super. Ct., Judge Brown, May 29, 1987) (purpose and function of "neither expected nor intended" clause is to limit coverage, so it must be treated in the same manner as other exclusions). *Contra Boeing Co. v. Aetna Casualty & Sur. Co.*, No. C86-352WD (W.D. Wash. April 16, 1990), slip op. at 7, Mealey's, April 24, 1990, App. B.

60. See Memorandum from Joint Drafting Committee to Joint Rating Committee, June 20, 1963, at 1.

In order to establish that there is no coverage under its policies, defendant has the burden of proving by a preponderance of the evidence that plaintiffs expected or intended property damage, i.e., that plaintiffs expected or intended to contaminate groundwater or adjoining property.<sup>61</sup>

There are documents obtainable from insurers' files which confirm that the industry itself viewed the "neither expected nor intended" language as an exclusion. These have been produced in some cases but generally pursuant to confidentiality agreements or protective orders.

In pollution cases, placing this burden on the policyholder would create an anomaly. The pollution exclusion excludes coverage for pollution damage unless the damage is "sudden and accidental," which most courts have interpreted to mean "unexpected and unintended." The insurer's burden of proving exclusions includes exceptions to exclusions.<sup>62</sup> Plainly, an insured cannot be required to prove that damage was neither expected nor intended while, in the same case, the insurer is required to prove that the "discharge, dispersal, release or escape" of the pollutants was expected or intended. The burden of proof for both terms must fall on either the insured or the insurer.

## B. *The Pollution Exclusion.*

### 1. History.

Before 1970 there was no pollution exclusion. The drafting history of the 1966 form shows an intent to include unexpected pollution losses.<sup>63</sup> For example, in a speech promoting the new form, Gilbert Bean of Liberty Mutual Insurance Company, who participated in the drafting process, commented that "[s]moke, fumes and other air or stream pollution have caused an endless chain of severe claims for gradual property damage," and that

. . . if the injury or damage from waste disposal should continue after the waste disposal ceased, as it usually does, it could produce losses on each side of a renewal date, and in fact, over a period of years, with a separate policy applying each year.<sup>64</sup>

Beginning in about 1970, the now notorious exclusion of pollution

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61. Broderick, *supra* note 54, Jury Instruction No. 13.

62. See, e.g., *Brammer v. Allied Mut. Ins. Co.*, 182 N.W.2d 169, 174 (Iowa 1970); 19 G. COUCH, COUCH ON INSURANCE § 79:385 (2d ed. 1983).

63. See *Just v. Land Reclamation, Inc.*, 155 Wis. 2d 737, —, 456 N.W.2d 570, 574 (1990).

64. Address by Gilbert Bean, "New Comprehensive General and Automobile Program — the Effect on Manufacturing Risks", Mutual Insurance Technical Conference (Nov. 15-16, 1965).



not "sudden and accidental" was added to policies by endorsement; after 1973 or so, the standard CGL form included that exclusion within its regular list. It provides that the insurance does not apply:

To bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.<sup>65</sup>

In about 1983 or 1984, many carriers began to add a so-called "absolute pollution exclusion" to their CGL policies by endorsement. The new occurrence and claims-made forms implemented in 1986 contain the absolute pollution exclusion. Thus, insureds can buy limited pollution coverage by endorsement only at very substantial premiums. The "absolute pollution exclusion" attempts to — and in most situations probably does — exclude virtually all pollution-related claims, illustrating, incidentally, that when the insurers wanted to do that, they knew how to do it.<sup>66</sup> CGL litigation in pollution cases, therefore, focuses upon bodily injury or property damage occurring during the years before the absolute exclusion was adopted.

## 2. Sudden and Accidental.

Most of the litigation and writing concerning the pollution exclusion has focused on the phrase "sudden and accidental." Obviously, these terms are extremely important. If "sudden" means temporally abrupt, summary judgment will likely be granted to the insurer in a "gradual pollution" case. If it means that unexpected and unintended pollution damage is covered, but intentional pollution damage is not, *i.e.*, a restatement or clarification of the occurrence standard, then whether the pollution exclusion bars coverage will turn on the jury's or court's resolution of that issue as a matter of fact.

It has been suggested that only a "lawyer's ingenuity" could find

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65. See 1 G. COUCH, COUCH ON INSURANCE § 1:72 (2d ed. 1984).

66. See, e.g., *Ascon Properties, Inc. v. Illinois Union Ins. Co.*, No. 89-55082, slip op. at 7-8 (9th Cir. July 13, 1990), Mealey's Litigation Reports — Insurance, July 31, 1990, at 6-7 and App. F (although "[s]tandard pollution exclusions are routinely deemed ambiguous and rejected by the courts," the California Supreme Court would probably find the absolute exclusion to be an unambiguous exclusion of coverage); *Time Oil Co. v. CIGNA Property & Casualty Ins. Co.*, No. C88-1235R (W.D. Wash. April 2, 1990), [reported in Mealey's Litigation Reports, April 10, 1990, at 11-13 (contrasting "absolute pollution exclusion" with the "qualified pollution exclusion")].

ambiguity in the pollution exclusion.<sup>67</sup> This is an exaggerated compliment to the legal profession. To begin with, some very illuminating drafting history evidence is available which shows what the draftsmen intended when the pollution exclusion was adopted in the early 1970's, and what was represented to state regulators at that time. Much of it is collected, and persuasively discussed, in the notorious brief filed in the Michigan Court of Appeals by, among others, the First State Insurance Company (a Hartford subsidiary).<sup>68</sup> The *Upjohn* brief draws the following conclusions from contemporaneous intent evidence appended to the brief:

[T]he [pollution] exclusion was designed to simply reinforce the fact that damages expected or intended on the part of the insured are not covered under the policy . . . Public representations made to state insurance authorities across the country prior to the adoption of the pollution exclusion indicate that the "sudden and accidental" requirement for coverage set forth in the pollution exclusion was not intended as an additional hurdle to recovery if the incident fell within the "occurrence" definition of "unexpected" and "unintended." . . . [T]he intended meaning of "sudden" as used in the exception to the pollution exclusion is "unexpected" and . . . "sudden and accidental" is nothing more nor less than a restatement of the requirement of the occurrence definition that events be "unexpected and unintended."<sup>69</sup>

Or, consider these observations in a letter from Thomas A. Jackson of The Travelers Insurance Company:<sup>70</sup>

In your letter of December 11th, you raised several objections; the most striking was the third which implied that the term "sudden and accidental" as used in Sections 46(3) and 46(14) of the New York Insurance Law prohibited covering gradual pollution incidents.

Is your opinion based upon legal interpretation of these sections or court decisions, or is it the prevailing opinion of the Department?

"Sudden and accidental" as a term standing by itself is capable of many interpretations.

The word "sudden" in Webster's New Collegiate Dictionary is defined as:

- 1 a: happening or coming unexpectedly
- b: changing angle or character all at once
- 2 : marked by or manifesting abruptness or haste

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67. *American Motorists Ins. Co. v. General Host Corp.*, 667 F.Supp. 1420, 1429 (D. Kan. 1987).

68. *Upjohn Co. v. New Hampshire Ins. Co.*, No. 98969 (Mich. Ct. App. filed Nov. 6, 1987).

69. *Id.* at 23-27.

70. Letter from Thomas A. Jackson, Secretary, Casualty-Property Commercial Lines Department, The Travelers Insurance Company, to the New York Insurance Department (Jan. 13, 1982).

3 : made or brought about in a short time

The word "accidental: [sic] is similarly defined as:

1 : arising from extrinsic causes

2 a: occurring unexpectedly or

b: happening without intent or through carelessness and often with unfortunate results

There is nothing in the term "sudden and accidental" which *requires* the elimination of gradually occurring events from the collective.

A number of court decisions in many jurisdictions have essentially reached the same conclusion: there is nothing which prevents gradually occurring events from being considered to be "sudden and accidental" as long as there is no intent to cause injury or damages.

The New York law is sensibly applied only when it is interpreted to mean that deliberate polluters cannot be insured.

When it is interpreted to mean that unexpected or unintended gradual pollution may not be insured, it will deprive insureds and claimants of protection which should be available and which the insurance industry is willing to provide.

How, rationally, can the law be interpreted to prevent insurance for "non-sudden" or gradually occurring pollution liabilities created by accidental, unexpected or unintended actions?<sup>71</sup>

The drafter apparently found the "sudden and accidental" clause in earlier boiler and machine policies,<sup>72</sup> whereunder the term "sudden" had been interpreted to mean unforeseen or unexpected.<sup>73</sup> In any event, several courts have now discussed the evidence in depth before coming to the conclusion that only expected or intended pollution was meant to be excluded.<sup>74</sup>

The meaning of the pollution exclusion likely would never have been questioned if the environmental situation had not changed radically from the time when the standard language was adopted. It has been suggested

71. *Id.*

72. Deposition of Richard Schmaltz, General Counsel of The Hartford, cited in Memorandum in Support of Plaintiff The Boeing Company's Motion for Partial Summary Judgment as to the So-Called "Pollution Exclusion," at 12 n. 7, *Boeing Co. v. Aetna Casualty & Sur. Co.*, No. C86-352WD (W.D. Wash.), filed February 8, 1990.

73. *See, e.g., Anderson & Middleton Lumber Co. v. Lumberman's Mut. Cas. Co.*, 53 Wash. 2d 404, —, 333 P.2d 938, 940 (1959). *See also* 10A G. COUCH, COUCH ON INSURANCE § 42:396 (2d ed. 1982).

74. *Just v. Land Reclamation, Inc.*, 155 Wis.2d 737, —, 456 N.W.2d 570, 574-75 (1990); *Clausen v. Aetna Casualty & Sur. Co.*, 259 Ga. 333, —, 380 S.E. 2d 686, 689 (1989); *United States Fidelity & Guar. Co. v. Specialty Coatings Co.*, 180 Ill. App.3d 378, —, 535 N.E.2d 1071, 1077 (1989), *appeal denied*, 136 Ill. D.C. 609, 545 N.E. 2d 133 (1989); *Kipin Industries, Inc. v. American Universal Ins. Co.*, 41 Ohio App. 3d 228, —, 535 N.E.2d 334, 338 (1987). *See Anderson and Passannante, Insurance Industry Doublethink: The Real and Revisionist Meanings of "Sudden and Accidental"*, 12 INS. LIT. REP. 186 (1990).

that the marketing efforts in the early 1970's were based on misrepresentations.<sup>75</sup> This author disagrees. The drafting history shows that unexpected and unintended pollution damage was genuinely intended to be covered. However, in the early 1970's and even into the early 1980's, the enormous CERCLA claims that are commonplace today were not contemplated. It is this economic fact change that has caused the industry and its lawyers to reinterpret the policy language.

However, extrinsic evidence is unnecessary. The undefined term "sudden" is ambiguous on the face of the policy for at least two reasons. First, "sudden" is defined in most dictionaries in both ways. For example, Webster's Third New International Dictionary defines "sudden" as:

Happening without previous notice or with very brief notice: coming or occurring unexpectedly: not foreseen or prepared for; b: changing angle or character all at once: precipitous: abrupt . . .<sup>76</sup>

Second, there is an inherent inconsistency between the "temporally abrupt" definition and the recognition in the definition of "occurrence" that an "accident" includes continuous or repeated exposure to conditions, *i.e.*, gradual events. How can something be both "sudden" (temporally abrupt) and "accidental" (including gradual events)? That inconsistency creates an ambiguity.<sup>77</sup> In *Chevron*,<sup>78</sup> Judge Carrigan declined to apply automatically the familiar maxim that an ambiguity in an insurance policy must be construed against the draftsman and in favor of coverage, because there was evidence of the specific intent of the insurer and the insured regarding the inclusion of the pollution exclusion in a manuscript policy. Because of this unique circumstance, the court indicated that it would require an evidentiary hearing on that intent before construing the ambiguous term.<sup>79</sup> Absent that circumstance, an ambiguity within a term, or one created by conflict with another part of the policy, should be construed in favor of the insured under the applicable

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75. See, e.g., *Claussen v. Aetna Casualty & Sur. Co.*, 676 F. Supp. 1571, 1572-73 (S.D. Ga. 1987), *reversed*, 888 F.2d 747 (11th Cir. 1989) (the district court found that insurance industry representations to the Georgia Insurance Department in 1970 were dishonest but nevertheless interpreted "sudden" as connoting abruptness. The eleventh circuit reversed after certifying the question to the Georgia Supreme Court and receiving the answer that "sudden and accidental" means "unexpected and unintended").

76. WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed. 1971).

77. *Time Oil Co. v. CIGNA Property & Casualty Co.*, No. C88-1235R, slip op. at 14-15 (W.D. Wash. April 2, 1990); *City of Northglenn v. Chevron U.S.A., Inc.*, 634 F. Supp. 217, 222 (D. Colo. 1986).

78. *Chevron*, *supra* note 77.

79. *Id.* at 222-23.

state's law.<sup>80</sup>

This paper is not intended to be another encyclopedia of the case law, but it must be acknowledged that some courts have found "sudden and accidental" to be unambiguous and have construed it to exclude gradual, albeit unexpected and unintended, releases.<sup>81</sup> However, many—almost certainly the substantial majority—of the cases take the position that "sudden" in this context means "unexpected" and has nothing to do with the temporal characteristics of the event.<sup>82</sup>

Frankly, policyholders can bring problems upon themselves when they disregard the reasoning of these cases. Occasionally a policyholder was aware, when it purchased the insurance, that it was causing groundwater contamination or other environmental damage yet, nevertheless, pursues an insurance claim. Bad facts can breed bad law in the pollution exclusion context as in any other.<sup>83</sup> A policyholder which cannot legitimately show (regardless who bears the burden of proof) that it was unaware of the third party damage when it purchased its policy, should not pursue an insurance claim. If such a claim is brought, it should be decided summarily in favor of the insurer without construing the pollution exclusion in a manner that excludes proper claims.

### 3. What Must Be "Sudden and Accidental"?

A phrase that has not yet received much attention is "discharge, dispersal, release, or escape." Its interpretation can be critical. For example, even if "sudden and accidental" is interpreted to mean "unexpected and unintended," the insured often admits that it expected and intended the discharge of pollutants in the first instance. Using the example of waste chemicals in holding ponds, the insured clearly expected and intended to discharge its hazardous materials into the ponds; but it may

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80. See, e.g., *Worsham Const. Co., Inc. v. Reliance Ins. Co.*, 687 P.2d 988, 990 (Colo. Ct. App. 1984); *Colard v. American Family Mut. Ins. Co.*, 709 P.2d 11, 13 (Colo. Ct. App. 1985).

81. See, e.g., *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E. 2d 374, 382 (N.C. 1986); *United States Fidelity & Guar. Co. v. Murray Ohio Mfg. Co.*, 693 F. Supp. 617, 621 (M.D. Tenn. 1988), *aff'd*, 875 F.2d 868 (6th Cir. 1989); *FL Aerospace v. Aetna Casualty & Sur. Co.*, 897 F.2d 214, 218-20 (6th Cir. 1990).

82. See, e.g., *Benedictine Sisters v. St. Paul Fire & Marine Ins. Co.*, 815 F.2d 1209, 1211 (8th Cir. 1987); *United States Fidelity & Guarantee Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1156-57 (W.D. Mich. 1988); *Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co.*, 668 F. Supp. 1541, 1548-50 (S.D. Fla. 1987); *New Castle County v. Hartford Accident Indem. Co.*, 673 F. Supp. 1359, 1364 (D. Del. 1987); *Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co.*, 451 A.2d 990, 992-95 (N.J. Super. 1982).

83. See, e.g., *American Motorists Ins. Co. v. General Host Corp.*, 667 F. Supp. 1423, 1428-32 (D. Kan. 1987), *appeal pending*, No. 88-1503 (10th Cir. 1990); *compare Alcolac Inc. v. St. Paul Fire and Marine Ins. Co.*, 716 F. Supp. 1541, 1544-45 (D. Md. 1989).

well not have expected or known that such materials would escape (seep) from the ponds and contaminate underground water.

It must be remembered that the pollution exclusion is part of a liability insurance policy. Liability insurance protects the insured against injury or damage it may cause to third persons. Viewed in this context, the "discharge, dispersal, release or escape" logically must involve: a third person's property (e.g., groundwater which belongs to the State or the public under most states' laws); an adjoining property; or, actual injuries to a third person. Using the hypothetical of holding ponds again, the issue is not whether the discharge of waste chemicals into the ponds was "sudden and accidental", but whether the escape of the chemicals from the ponds and entry (whether it be deemed a "discharge," "dispersal," "release" or "escape") of chemicals into groundwater (owned by the public) or onto another landowner's property was "sudden and accidental." This is in accord with the intent of the draftsmen of the CGL policy to provide coverage for the unintended results of intentional acts.<sup>84</sup>

In *Broderick Investment Co. v. The Hartford Accident & Indemnity Co.*, the court instructed the jury on the pollution exclusion as follows:

The Hartford policies provide that:

This insurance does not apply to property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

*You are instructed that the phrase "discharge, dispersal, release or escape" applies to the entry of the chemicals into the groundwater.*

Because the word "sudden" is ambiguous and has more than one meaning and for other legal reasons, you are instructed that, in this case, the word "sudden" means unexpected and unforeseen. Thus, gradual and continuous events can be "sudden" if they were unexpected and unforeseen by plaintiff. The word "accidental" means unintended by Broderick.

Thus, in order for this clause to exclude coverage under the policies, Hartford must show by a preponderance of the evidence that the occurrence of the chemicals entering the groundwater was expected or foreseen by plaintiffs, or that Broderick intended the chemicals to enter

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84. See Heinz, Gallozzi, and Gillis, *Interpreting the Scope of Coverage for Unexpected Results*, 2 ENVTL. L.J. 377, 378-79 (1990).

the groundwater.<sup>85</sup>

### C. *The Owned Property Exclusion.*

This exclusion simply provides that the insurance does not apply to property damage to property owned, occupied by, rented to, used by, or in the care, custody or control of the insured.<sup>86</sup> Logically, it is an unnecessary exclusion, since liability insurance is designed only for third-party damage in the first place.

The exclusion does not preclude coverage where there is damage to third-party property such as groundwater or adjoining property.<sup>87</sup> The exclusion does not apply where the policy holder must clean up its own property to remedy, prevent or mitigate damage or injury to the property of third parties.<sup>88</sup>

It is reasonable for the insurer to apportion the damages, but not to do so on the basis of clean-up of third-party property instead of clean-up of the insured's property. Instead, the covered damage should include clean-up of the third-party property plus any part of the clean-up of the insured's own property which is necessary to prevent continuing contamination or re-contamination of the third-party property. Juries are capable of determining, based upon expert testimony, which part of the ultimate clean-up is unrelated to third-party property and should therefore be excluded.

### D. *Timely Notice.*

A standard policy "condition" requires written notice of an occurrence "as soon as practicable."<sup>89</sup> It also states that if a claim is made or suit is brought against the insured, every demand, notice, summons or other process must be forwarded to the insurer "immediately."<sup>90</sup> Failure to comply with these conditions bars the claim. Note, an insurer who asserts that no duty to defend has arisen because no "suit" has been filed, i.e., that the insurance claim is premature, is in a very poor position to complain about untimely notice.

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85. Broderick, *supra* note 54, Jury Instruction No. 15 (emphasis added).

86. See 1 G. COUCH, COUCH ON INSURANCE § 1:72 (2d ed. 1984).

87. See Intel Corp. v. Hartford Accident & Indem. Co., 692 F. Supp. 1171, 1183 (N.D. Cal. 1988); United States Aviex Co. v. Travelers Ins. Co., 336 N.W.2d 838, 843 (Mich. Ct. App. 1983).

88. Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co., 528 A.2d 76, 81-2 (N.J. 1987); Bankers Trust Co. v. Hartford Accident & Indem. Co., 518 F. Supp. 371, 373, *vacated on other grounds*, 621 F. Supp. 685 (S.D.N.Y. 1981).

89. 1 G. COUCH, COUCH ON INSURANCE § 1:72 (2d ed. 1984).

90. *Id.*

It is important to remember, the "occurrence" is the accidental event which results in property damage or bodily injury. As soon as an insured learns of property damage potentially caused by an occurrence, regardless of whether a governmental agency has asserted any type of a claim, its liability insurers should be notified. However, while insureds today have a better understanding of the potential for coverage of their pollution claims and the need for notice to their insurers than they did as recently as five or ten years ago, it remains fairly common for a large gap to exist between the date when a company discovers a pollution problem and the realization by a risk manager or someone else that there may be insurance coverage.

In some states, such delay in giving notice bars otherwise valid claims only if the insurer has been prejudiced.<sup>91</sup> Since the policyholder ordinarily responds to potential and actual environmental claims vigorously on its own behalf, prejudice will be hard to show.

In other states, prejudice or lack of prejudice is irrelevant. Untimely notice is a bar unless the delay is "justifiably excused"; but if there is a justifiable excuse, even prejudice to the insurer does not bar the claim.<sup>92</sup>

A typical "justifiable excuse" is that the insured was unaware of the policy because old policies were not retained. More likely, the insured did not realize it was even covered. The insured may have been advised by a broker or agent, its own risk manager, or even by legal counsel that because of the pollution exclusion or some other reason, there was no coverage. If so, it is up to the jury to decide whether the excuse is justified.

### III. PROCEDURAL MATTERS.

#### A. *Discovery.*

##### 1. The Sky Isn't the Limit.

A lawyer who represents one of the leading liability carriers in pollution cases was heard to boast that, "a policyholder will never win any of these cases, because we will make it so expensive for him that he can't

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91. See, e.g., *Northwestern Title Security Co. v. Flack*, 6 Cal. App. 3d 134, 140-42, 85 Cal. Rptr. 693, 696-97 (1970); *Washington v. Federal Kemper Ins. Co.*, 60 Md. App. 288, —, 482 A.2d 503, 505-06 (1984); *Found. Reserve Ins. Co. v. Esquibel*, 94 N.M. 132, —, 607 P.2d 1150, 1152 (1980). *Nestle Foods Corp. v. Aetna Casualty & Sur. Co.*, No. 89-1701-CSF (D.N.J. Jan. 26, 1990) [reported in *Mealey's Litigation Reports — Insurance*, Feb. 13, 1990, at 9-10]. *Accord*, *Chemical Leaman Tank Lines v. Aetna Casualty and Sur. Co.*, No. 89-1543 (Magistrate, D.N.J. Jan. 10, 1990) [reported in *Mealey's Litigation Reports*, Mar. 27, 1990, at 10-11.]

92. See, e.g., *Marez v. Dairyland Ins. Co.*, 638 P.2d 286, 289-90 (Colo. 1981); *Colard v. American Family Mutual Ins. Co.*, 709 P.2d 11, 15 (Colo. Ct. App. 1985).



afford it." Whether true or apocryphal (and at least the conclusion has been proven wrong), the story underscores a fact well known to policyholders who have pursued these claims. Carriers seem ready, willing and able to squander endless dollars waging litigation: interrogatories upon depositions upon motions. Although the prospect of an attorney's fee award to the policyholder may chill the ardor a little,<sup>93</sup> policyholders must spend their money wisely.

The insurer can be expected to spend whatever it takes to try to prove that the pollution damage was known or expected by the policyholder. Production of virtually every record in the insured's history and depositions of present and former employees, neighbors, etc., are inevitable — and much of it may be legitimate. The lawyer's plan must not be to prevent this discovery but, instead, to prevent waste.

Waste comes from duplication of effort. Interrogatories should be answered fully and fairly, but only once — multiple sets by multiple carriers must be answered by reference and incorporation. Documents should be carefully screened for privilege and then produced, but only once. Witnesses should be freely produced for depositions, but—again—only once. A good paralegal can handle much of this.

The policyholder's discovery should be specific, narrowly drawn, and difficult to dodge. The policyholder needs primarily four things: the policies themselves; information concerning the insurers' knowledge of the site, such as the inspection reports prepared by investigators or auditors that many liability carriers send to the insured's premises periodically to inspect for unsafe conditions or practices; representations about coverage (pro or con) made by the selling agent; and "drafting history" information. When objections are made to reasonable discovery in these areas, the lawyer should file a motion to compel early in the proceedings. This will avoid the obfuscation that otherwise snowballs.

## 2. Drafting History.

The intent of the draftsmen of the standard policy language can be gleaned from memoranda, minutes, published articles, speeches, presentations to insurance commissioners and other documents generated before changes to the standard forms were adopted. These documents are in the files of the insurers (particularly those actively involved in the 1966 and 1973 revisions such as Hartford, Aetna, Travelers, and Liberty Mutual) and the Insurance Services Office, Inc.

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93. See § IV.D. *infra*.

Many of the "hot documents," including those referenced in this outline, have been produced without protective orders. It is common, however, for insurers to insist on confidential treatment. This provides a means for waging expensive litigation by objecting, moving for protective orders, or interpreting requests narrowly in each new case. When challenged, the demand for confidential treatment has not fared too well. One magistrate, noting that insurance company information-sharing arrangements contradict the purported need for confidential treatment, and that sharing of the fruits of discovery from case to case "comes squarely within the purposes of the Federal Rules," denied the carriers' request for a protective order covering certain discovery materials.<sup>94</sup>

Fortunately, the courts and magistrates are, for the most part, ordering production of this information so long as the requests to produce are reasonably specific in terms of subject matter and time frame.<sup>95</sup> These "adhesion" contracts employ standard policy language which was adopted only after extensive consideration by insurance industry task forces and committees. Numerous courts have found drafting history evidence to be relevant to their interpretation of policy terms.<sup>96</sup>

In a brief filed in *Armstrong Corp. v. Aetna Casualty & Surety Co.*,<sup>97</sup>

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94. *Nestle Foods Corp. v. Aetna Casualty & Sur. Co.*, No. 89-1701-CSF (D.N.J. Jan. 26, 1990) [reported in Mealey's Litigation Reports—Insurance, Feb. 13, 1990, at 9-10]. *Accord*, *Chem. Leaman Tank Lines v. Aetna Casualty & Sur. Co.*, No. 89-1543 (Magistrate, D.N.J. Jan. 10, 1990) [reported in Mealey's Litigation Reports, Mar. 27, 1990, at 10-11].

95. *See, e.g.*, *Monsanto Co. v. Aetna Casualty and Sur. Co.*, C.A. No. 88C-JA-118 (Del. Super. Ct. May 30, 1990) [Mealey's Litigation Reports, June 12, 1990, at 17 (special master)]; *Anaconda Minerals Co. v. Stoller Chem. Co.*, No. C-87-118W (C.D. Utah Feb. 8, 1990) [reported in Mealey's Litigation Reports — Insurance, Mar. 27, 1990, at 12 (federal judge)]; *Leski, Inc. v. Federal Ins. Co.*, No. 88-4123 (D.N.J., Nov. 30, 1989) [reported in Mealey's Litigation Reports, Jan. 30, 1990, at 17-18 (magistrate)]; *Reichhold Chem. Inc. v. Hartford Accident & Indem. Co.*, No. CV-88-0351985 (Conn. Super. Ct., filed Jan. 12, 1990) [reported in Mealey's, Jan. 30, 1990, at 18-20 (state judge)]; *Champion Int'l Corp. v. Liberty Mut. Ins. Co.*, No. 88 Civ. 1634 (S.D.N.Y. Nov. 16, 1989 and Jan. 4, 1990) [reported in Mealey's Litigation Reports, Jan. 30, 1990, at 20 (federal judge)]; *Boeing Co. v. Aetna Casualty and Sur. Co.*, No. C86-352D (W.D. Wash. May 11, 1989) [reported in Mealey's Litigation Reports, Sept. 12, 1989, at Appendix E (special master)]. Two other recent cases to the same end are *Central Illinois Public Service Co. v. Allianz Underwriters Ins. Co.*, No. 87-L-39 (Ill. Cir. Ct. Mar. 15, 1990), and *Mapco Alaska Petroleum, Inc. v. Central National Ins. Co. of Omaha*, No. A89-470 (D. Alaska, filed Feb. 16, 1990) [Mealey's, Litigation Reports, Mar. 27, 1990, at 11 and 12].

96. *See, e.g.*, *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570, 574-75 (1990); *Claussen v. Aetna Casualty & Sur. Co.*, 259 Ga. 333, —, 380 S.E.2d 686, 689-90 (1990); *United States Fidelity & Guar. Co. v. Specialty Coatings Co.*, 180 Ill. App. 3d 378, —, 535 N.E.2d 1071, 1077 (1989); *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co. of N.Y.*, 218 N.J. Super. 516, —, 528 A.2d 76, 84-85 (1987); *Kipin Indus., Inc. v. Am. Universal Ins. Co.*, 41 Ohio App. 228, —, 535 N.E.2d 334, 338 (1987); *see also American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1500 (S.D. N.Y. 1983), *mod. on other grounds*, 748 F.2d 760 (2d Cir. 1984); *Coordinated Asbestos Ins. Coverage Cases*, slip op. at 33-35 (May 29, 1987).

97. No. C315367 (Cal. Super. Ct. filed Dec. 21, 1980).

Travelers Indemnity Company summarized the important role of drafting history evidence in a case where the meaning of insurance policy terms are in dispute:

Because of the way the insurance industry operates, most of the relevant policy language is found in standardized insuring forms, drafted by insurance associations or bureaus, and used industry-wide. Thus, questions of intent may be addressed on a standardized basis. Predictably, there will be precious little evidence of the negotiation of individual policies. The primary evidence on the intent of the parties drafting the contracts, and their expectations about scope of coverage, will be obtained through document productions from key industry-wide organizations, and depositions of personnel.<sup>98</sup>

Another well-known example of insurance industry confirmation of the significance of drafting history documents is found in the brief filed by Upjohn and the First State Insurance Co. in *Upjohn Co. v. New Hampshire Ins. Co.*<sup>99</sup>

The drafting history shows that the industry, or at least certain insurance companies, took different positions on the same language "then" versus "now." Does this alone constitute "bad faith" in an actionable sense? If the coverage battles continue into the 1990's, we will likely find out.

#### B. Judge or Jury Trial.

Insurance companies favor a three-phased procedural approach to resolution of these cases based upon the model of *Shell Oil Co. v. Accident & Casualty Insurance Co.*<sup>100</sup> Indeed, some carriers have invited trial judges to contact Judge Lanam to "discuss his experiences" and obtain assistance in understanding and duplicating his approach.

The first phase is a "trial" to the court, during which the key policy terms will be interpreted as a matter of law. Next, if necessary, a jury trial will resolve fact questions. These include: whether the damage was expected or intended, whether the pollution was sudden and accidental (per the judge's definition of these terms from Phase I), and what portion of the damages exclusively relates to damage to the insured's own property. The third phase (if necessary) is a bench "trial" or hearing to the court to resolve such issues as stacking of coverages, apportionment of

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98. *Id.*, Brief for Travelers Indemnity Co. at 7-8.

99. No. 98969 (Mich. Ct. App. filed Nov. 6, 1987).

100. *Shell Oil Co. v. Accident & Casualty Co. of Winterthur*, No. 278953 (Cal Super. Ct., San Mateo, Cal.), *verdict rendered* Dec. 30, 1988.

liability among insurers, and whether consulting costs are defense or indemnity.

Some cynics suggest that the reason for this approach is to isolate the drafting history evidence from the jury. Only the court, in Phase I, hears what was intended when the terms were adopted versus what is being asserted now. In Phase II, the insurers can appear above reproach by highlighting the pollution and the policyholder's attempt to foist off on the insurer its responsibility to clean up its own mess, without any unsavory evidence coming from the other direction. This writer believes Phase III to be theoretical only, since insureds are unlikely to survive to that point. Of course, whether there is any truth to such speculation is known only to those who have advocated the three-phased approach.

In fact, the three-phased approach has much to commend it. Interpretation of the meaning of insurance policy terms is a matter of law. It is much easier to prepare for a jury trial if the governing law is known. Mixing drafting history evidence with site-specific fact evidence complicates the trial and potentially could lead to jury boredom if not confusion. It may even be worth considering a similarly phased approach to discovery, so that the scope of coverage is decided before discovering facts regarding the policyholder's knowledge and intent.

The procedural problem would, of course, be simpler if no jury were demanded. However, insurers are demanding jury trials in these cases. It is unclear whether they are entitled to it. These are declaratory judgment actions, but that begs the question. One needs to look at the underlying remedy being sought. The policyholder seeks an order requiring specific performance of the insurer's duties to defend and indemnify under the insurance contract. Some courts have declined to allow jury trials on that basis.<sup>101</sup> Other courts have held that where there is a disputed fact that is relevant to the interpretation of an insurance policy, there is a right to a jury trial on those questions of fact.<sup>102</sup> If that is the case, the fact question regarding the intent of the draftsman of the standard form language, if admissible at all, should also be a matter for jury determination. If it is, it remains unanswered whether there must be a two-phased jury trial, whereby the jury would first resolve questions of fact material

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101. See *Zurich Ins. Co. v. Northbrook Excess & Surplus Ins. Co.*, 145 Ill. App. 3d 175, —, 494 N.E.2d 634, 649 (1986), *aff'd. sub. nom. Zurich Ins. Co. v. Raymark Indus., Inc.*, 118 Ill. 2d 23, —, 514 N.E.2d 150, 166 (1987); *Keene Corp. v. Columbia Casualty Co.*, No. 4454-85 (Super. Ct. D.C., Order striking jury demand entered June 22, 1989).

102. See, e.g., *Auto-Owners Ins. Co. v. Jensen*, 667 F.2d 714, 717 (8th Cir. 1981); *Aetna Casualty and Sur. Company of Hartford v. Means*, 382 F.2d 26, 28-29 (10th Cir. 1967).

to determining what the policy terms mean and then decide fact questions necessary to apply the "law" (policy terms) to the specific facts of the case.

Although the three-phased approach probably works as well as any, the policyholder must keep two ideas firmly in mind. Interpretation of the policy's terms (Phase I) does no more than give him a chance of ultimate success. That is where the legal scholars and drafting history experts are helpful. Phase II depends on the skill of the trial lawyer. The attorney can concentrate on thoughtful and skillful preparation and presentation of the facts concerning such subjects as the history of the policyholder's operation, knowledge of pollution and the like, which is where the case will be won or lost.

#### IV. POST TRIAL.

##### A. *Stacking of Coverages.*

The term "stacking" has been used in a variety of ways by different courts. In this paper, it means whether, in a situation where more than one policy is triggered "horizontally" by a continuous occurrence, each such policy indemnifies the loss up to its policy limits so that the insured gains the benefit of more than one policy. The courts have taken three basic approaches.

The oft-cited case of *Keene Corp. v. Insurance Co. of North America*<sup>103</sup> is thought of as a pro-policyholder decision because of its so-called "triple trigger" (more accurately described as a "continuous trigger") approach to the trigger issue. On the more difficult, and potentially more important, stacking issue, it represents the most conservative of the three approaches to this question. The policyholder is allowed to recover the per-occurrence limits of only one policy.<sup>104</sup> The *Coordinated Asbestos* case followed the *Keene* approach.<sup>105</sup> These courts reasoned that even though a continuous occurrence may trigger more than one policy, the limits are defined "per occurrence"; if the policyholder could recover the "per occurrence" limit on more than one policy, it would get more than it bargained for.<sup>106</sup> This reasoning is very questionable, because this approach ordinarily does not result in loss of coverage for asbestos

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103. 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

104. *Id.* at 1049.

105. Tentative Decision Concerning Phase IV Issues, no. 1072, slip op. at 69-70 (August 29, 1988).

106. *Keene*, 667 F.2d at 1049; *Coordinated Asbestos*, *supra* note 35, slip op. at 69-70.

claims. Each claim is relatively small. The coverage part of each policy provides indemnity for "all sums" which an insured becomes legally obligated to pay. The policyholder contracts, and pays, for this coverage separately with each successive policy. An insured who purchases several policies loses the benefit of his bargain on all but the selected one and ends up with the same coverage as an insured who purchased only one policy. The insurers whose policies were triggered but not selected may receive a windfall (subject to apportionment under the "Other Insurance" clause). At least the *Keene* and *Coordinated Asbestos* cases permitted the policyholder to select the best year.

A second approach allows the policyholder to recover the per occurrence limits of all policies, but with the proviso that each insurer's exposure is to be calculated proportionately, *i.e.*, the number of years it provided coverage divided by the number of years when damage was occurring.<sup>107</sup> This approach allocates to the insured whatever pro rata share is attributable to uninsured periods or periods where insolvent, unidentified or settled insurers provided the coverage. Again, this approach is not suggested by the policy language; each policy provides coverage for "all sums" which the insured becomes obligated to pay, up to the policy limits. It is an attempt to apportion the loss in what the courts thought was an equitable manner. However, the "Other Insurance" clause in the policy provides for apportionment among insurers in appropriate circumstances.<sup>108</sup>

The third, and preferred, approach is that the policyholder may recover the per occurrence limits of as many of the triggered policies as it takes to cover the sums which the policyholder is obligated to pay.<sup>109</sup> This squares with the "all sums" language and the principle that policies must be interpreted to maximize coverage. In *Dayton*, the indemnification and defense costs (for asbestos property damage) were within the scope of the primary and excess policies in effect for any one year. Thus, the court allowed the insured to choose which policy year to apply. It is evident from the court's discussion, however, that if the indemnification

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107. *Insurance Co. of N. Am. v. Forty-Eight Insulations*, 633 F.2d 1212, 1224-1225 (6th Cir. 1980); *Ducre v. Mine Safety Appliances*, 645 F. Supp. 708, 714 (E.D. La. 1986).

108. Note, while it is clear that the *Forty-Eight* court approved of "stacking" on the approach mentioned, its actual discussion of the "stacking problem" refers to a very different issue, namely, whether each inhalation of an asbestos fiber was a separate "injury" resulting in potentially infinite occurrences and liability — an obviously absurd scenario. 633 F.2d at 1226, n. 28.

109. *See, e.g., Dayton Indep. School Dist. v. National Gypsum Co.*, 682 F. Supp. 1403, 1410-11 (E.D. Tex. 1988), *rev'd on other grounds sub nom; W.R. Grace & Co. v. Continental Casualty Co.*, 896 F.2d 865 (5th Cir. 1990).

and defense costs had been greater than the insurance provided by one year's policies, then the court would have allowed the insured to recover under as many policies as necessary to make it whole for its loss.<sup>110</sup>

In *Broderick Investment Co. v. Hartford Accident & Indemnity Co.*,<sup>111</sup> the court adopted the Dayton method and held that unexpected and unintended property damage which occurred continuously from 1976 through 1983 both "triggered" and made "applicable" all Hartford policies issued in those years.<sup>112</sup>

### B. *The Other Insurance Clause.*

This clause in the standard primary policy provides, in pertinent part:

When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, the company shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below:

(a) *Contribution by Equal Shares.* If all of such other valid and collectible insurance provides for contribution by equal shares, the company shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so paid, the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each such insurer has paid its limit in full or the full amount of the loss is paid.

(b) *Contribution by Limits.* If any of such other insurance does not provide for contribution by equal shares, the company shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.<sup>113</sup>

This clause is a potential "trap for the unwary" in situations where policies issued by multiple insurers are "triggered" and the insured settles with some and goes to trial against others. For example, suppose the

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110. Dayton, *supra* note 109, at 1411 and n.23. See also *Air Products and Chem. Inc. v. Hartford Accident & Indem. Co.*, 707 F. Supp. 762, 769 (E.D. Pa. 1989) (suggesting that the triggered policies must be applied in chronological order, but seemingly upon exhaustion, the next policy applies).

111. 742 F. Supp. 571 (D. Colo. 1989).

112. *Id.* at 573. There is support in the drafting history for stacking as well, such as the Gilbert Bean speech referenced in § II.B., *supra* note 64.

113. 1 G. COUCH, COUCH ON INSURANCE § 1:72 (2d ed. 1984).

insured settles claims with several carriers whose collective policy limits are \$20 million for a total of \$1.5 million. The insured obtains a judgment against the remaining insurer for the full amount of its policy limits of \$5 million. The ultimate damages the insured becomes obligated to pay total \$10 million. Does the insured recover from the non-settling defendant its full \$5 million policy limits, or just \$2 million worth? (20% of the total damages.)

“Other insurance” clauses are designed to prevent double recovery when more than one insurance company is obligated to respond to a claim.<sup>114</sup> Thus, they are designed to prevent a windfall on the part of the insured while fairly apportioning the insured’s loss between or among the carriers. They may not be used as a basis to allocate part of the loss to the insured.<sup>115</sup>

In the case of *New Castle County v. Continental Casualty Co.*,<sup>116</sup> which addresses ground water contamination originating from a municipal landfill, eleven of twelve insurers settled with the policyholder.<sup>117</sup> The court held that the one nonsettling insurer, Continental, could not use the “Other Insurance” clause to impose liability upon the insured, because that clause applies only to rights among carriers.<sup>118</sup>

In the foregoing hypothetical, the full \$5 million should apply. What if the total cleanup in the hypothetical case were \$5 million? The settlement funds should be the first dollars applied, such that the nonsettling carrier pays only \$3.5 million and receives the benefit of the “Other Insurance” clause.<sup>119</sup>

Also, the settling carriers’ policies must apply to the loss “on the same basis” and must be “valid and collectible” insurance before the “Other Insurance” clause even applies. An appellate court in Louisiana

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114. Broderick, 742 F. Supp. 571, 573 (D. Colo. 1989).

115. Dayton Indep. School Dist. v. National Gypsum Co., 682 F. Supp. 1403, 1411, n. 21 (E.D. Tex. 1988) *rev'd on other grounds sub nom*; Air Products and Chem. Inc. v. Hartford Accident and Indem. Co., 707 F. Supp. 762, 771 (E.D. Pa. 1989); W.R. Grace & Co. v. Continental Casualty Co., 896 F.2d 865 (5th Cir. 1990).

116. *New Castle County v. Continental Casualty Co.*, 725 F. Supp. 800, (D. Del. 1989). *See also* Zurich Ins. Co. v. Northbrook Excess and Surplus Ins. Co., 494 N.E.2d 634, 650 (Ill. App. 1986) (“Other Insurance” provisions do not effect the insurer’s duty to the insured to provide full defense and indemnification). *But see* Cooper Indus. Inc. v. The Aetna Casualty & Sur. Co., No. 374 C.D. 1985 (Court of Common Pleas, Mercer County, Pa. 1987) (holding that the insured stepped into the shoes of the settling carriers and became liable to itself for their pro rata share of the liability for a CERCLA claim).

117. *New Castle County*, 725 F. Supp. at 802.

118. *Id.* at 817.

119. *See, e.g.*, Childs v. New Jersey Mfrs. Ins. Co., 531 A.2d 723, 727 (N.J. 1987).



held that other insurance is not valid and collectible until a court so determines in a proceeding to which the other insurer is a party.<sup>120</sup> Under this approach, settling insurers' policies would never be analyzed under the "Other Insurance" clause. At a minimum, if the settling insurers had different coverage language, different exclusions, or other differences, this clause should not apply.

Finally, it has traditionally been held that each insurer whose policy is "triggered" independently owes a duty to defend which cannot be apportioned.<sup>121</sup> The D.C. Circuit, in *Keene Corp. v. Insurance Co. of North America*, permitted defense costs to be allocated among the insurers whose policies were triggered.<sup>122</sup> Another jurisdiction allowed proration of defense costs among insurers *and insureds for uninsured periods*.<sup>123</sup> Since insurers have traditionally been held liable to defend suits in their entirety where only one claim arguably is covered, it is hard to understand how any portion of the defense can be allocated to the policyholder. The Illinois Supreme Court, noting that *Forty-Eight* was wrong in its "exposure" trigger theory, simply refused as a result to consider its proration theories.<sup>124</sup>

### C. Consulting Costs.

A "potentially responsible party" responds to an EPA claim by hiring both attorneys and technical consultants. Are the "consultants costs" part of the "duty to defend," or are they part of the damages covered by the indemnification obligation under the policy? This can make a significant difference to the insured in policies where the duty to defend is not integrated into the policy limits.

Although this issue has not been extensively litigated, a relevant case is *Arco Industrial Corp. v. Home Indemnity Co.* where fees of consulting firms were deemed defense costs to the extent they related to "general investigative consulting work to aid Arco in defending the underlying litigation," or advice relating to the conduct of the defense.<sup>125</sup>

Since one of the purposes for a policyholder's consenting to conduct

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120. *Wilks v. Allstate Ins. Co.*, 195 So.2d 390, 399 (La. Ct. App. 1967).

121. *See, e.g., United States Fidelity & Guar. Co. v. Tri-State Ins. Co.*, 285 F.2d 579, 582 (10th Cir. 1960); *Zurich Insurance Co. v. Raymark Indus.*, 514 N.E.2d 150, 165 (Ill. 1987).

122. 667 F.2d 1034, 1050 n. 37 (D.C. Cir. 1981), *cert.denied*, 455 U.S. 1007 (1982).

123. *Insurance Co. of N. Am. v. Forty-Eight Insulations*, 633 F.2d 1212, 1224-25 (6th Cir. 1980) (by years of coverage).

124. *Zurich*, *supra* note 121, 514 N.E.2d at 165.

125. No. 87-0218-CK (Mich. Cir. Ct. July 11, 1989) (Mealey's Litigation Reports — Insurance, August 8, 1989).

the investigation and clean-up in the first place is to keep some control of the costs, it is reasonable to view all of the consultants' work as part of the defense effort. A reasonable compromise approach is to recognize that the consultants perform two functions. One is to take and analyze samples and write up reports. Another is to assist the PRP, and PRP's counsel, in conceiving, negotiating and implementing a program of investigation and clean-up that is not only environmentally but also economically sound, i.e., minimizing the costs. This is similar to the traditional use of experts to defend liability claims. Insureds should be advised to have their consultants divide billings into the two categories from the outset.

#### D. Attorneys' Fees.

The infamous case of *Shell Oil Co. v. Accident & Casualty Co. of Winterthur*<sup>126</sup> in California apparently set new records for litigation expense. It has been rumored that Shell spent over \$50 million, and the insurers spent multiples of that. While this was obviously an extraordinary case, the fact remains that declaratory judgment litigation in this complex area can be very expensive. PRP's are faced with two problems: 1) they must defend themselves against the underlying EPA claim, which consumes vast quantities of money; 2) they simultaneously pay lawyers to chase after insurance coverage that may not turn out to exist. Even if it does, their funds will be greatly depleted by the effort.

Fortunately, some states, such as Colorado and Kansas, have recognized that, where an insured prevails in a declaratory judgment suit, it should receive an award of attorneys' fees.<sup>127</sup> As a policy matter, if an insured has to pay vast sums to establish what he had all along, he has lost the benefit of his insurance contract in the process. Further, standard liability insurance contract language requires the insurer to reimburse the insured for all reasonable expenses incurred during litigation at the request of the insurer. This requirement can be interpreted to include attorneys' fees for declaratory judgment suits — whether started by the insurer or the insured. Because the insurers have won most of the pollution cases, the issue has only once arisen in that context. In *Broderick*, the court held that the prevailing policyholder was entitled to reasonable

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126. No. 278953 (Cal. Super. Ct., San Mateo, Cal., *verdict rendered* Dec. 30, 1988).

127. *Hedgecock v. Stewart Title Guar. Co.*, 676 P.2d 1208 (Colo. App. 1983); *Allstate Ins. Co. v. Robins*, 597 P.2d 1052 (Colo. App. 1979); *Upland Mut. Ins. v. Noel*, 519 P.2d 737 (Kan. 1974).

attorneys' fees in an amount to be determined. This holding was based in part on the contractual language obligating the insurer to pay

reasonable expenses incurred by the insured at the company's request in assisting the company in the investigation or defense of any claim or suit . . . .<sup>128</sup>

It was also based on the conclusion that "granting attorneys' fees to plaintiffs will restore the insured to the position they would have occupied had the defendant honored its contracts of insurance."<sup>129</sup>

## V. LOOKING AHEAD.

Environmental claims are frightening to insurers. It is reasonably clear that when policies were sold in the 1940's, 1950's, 1960's and even the 1970's and early 1980's, the enormity and expense of pollution-related claims was unanticipated — by either side. The costs of defending against these claims, and more significantly the types of clean-up costs incurred, are so enormous as to threaten the profitability and, in some instances, the existence of carriers which sold the insurance. They also threaten the existence of many insureds. This common threat should be the basis for a partnership to solve the problem.

This author has offered his own thoughts and proposals from the policyholder's perspective.<sup>130</sup> Insurance industry representatives have also stepped forward with proposals for resolving the allocation of the costs of pollution remedies on a non-litigation basis.<sup>131</sup>

The Committee on Insurance Coverage Litigation of the American Bar Association's Litigation Section discussed the creation of a bipartisan task force to explore the problem at its mid-year meeting, April 5-7, 1990. Plainly, a protocol or understanding between insurers and policyholders regarding the interpretation and application of the policies would re-route both sides' dollars from litigation to clean-up and be a marvelous achievement. We can hope this isn't merely a pipe dream.

It is submitted that most insureds are not looking to foist their problems off onto their insurers. What they are looking for is help —

128. 1 G. COUCH, COUCH ON INSURANCE § 1:72 (2d ed. 1984).

129. Broderick, No. 86-Z-1033 (D. Colo.) at 3-4.

130. Jackson, *Environmental Cleanups and Insurance: Isn't There a Better Way?*, 21 ENVTL. REP. (BNA) 767 (1990).

131. See, e.g., Cheek, *Insurance Coverage for Superfund Liability Defense and Clean-up Costs: The Need for a Non-Litigation Approach*, 19 ENVTL. L.REP. 10203 (1989); Bradford, *Insurer Advocates No-Fault Cleanup Fund*, BUSINESS INSURANCE, Oct. 2, 1989, at 17; Shalowitz, *Insurer's Proposal Could Cut EIL Costs*, BUSINESS INSURANCE, Feb. 29, 1988, at 1.

some relief in the form of cost-sharing to help them cope with the cost of responding to enormously expensive claims. Something more sensible than litigation must exist. If it doesn't, then insurers and insureds will continue to litigate these outrageously costly games of "chicken," and ultimately the environment and the public will lose.

If "business as usual" prevails, we may see fifty different approaches as the cases reach the various state supreme courts. The standard CGL form simply is not clear or conclusive on several key issues. Courts struggling with these cases should be guided by the basic maxim of insurance policy construction that where there is any question or ambiguity concerning interpretation of a term in an insurance policy, or how different terms fit together, the contract should be interpreted to fulfill the fundamental purpose of indemnification.<sup>132</sup>

Insurance policy language should not be tortured to provide coverage; insurers are entitled to the benefit of their bargain, just like any other party to a contract. However, these are contracts of adhesion, in the nature of private legislation, prepared by the Insurance Services Office or other trade associations. They are based upon extensive study and input from the insurance industry. If ambiguities exist, either due to poor draftsmanship or market factors, they should be construed to maximize coverage.

But, again, this is a litigation wasteland. Even without a "global settlement," insureds and insurers ought to be able to sit down, on an individual case-by-case basis, and work out a cost-sharing approach to the defense against, or response to, the EPA claims. In terms of clean-up, insureds and insurers should cooperate in trying to develop, and finance, a sound and cost-effective program. Ideally, the EPA should be a participant in these discussions. Reasonable minds can conceive a scenario where the EPA agrees to an investigation program which does not pile study upon study and a clean-up which is not hideously expensive. The EPA, using Superfund dollars, could assist the insured and the insurer in reaching an agreement on a cost-sharing approach. Creative ideas, such as the type of structured settlements typically used in personal injury cases, might successfully be employed to accomplish these objectives. This doesn't seem too much to hope for.

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132. See, e.g., *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1207 (2d Cir. 1989) (pollution property damage and bodily injury); *Air Products and Chemicals., Inc. v. Hartford Accident & Indem. Co.*, 707 F. Supp. 762, 770 (E.D. Pa.1989)(asbestos and welding fume personal injury); *Dayton Indep. School Dist. v. National Gypsum Co.*, 682 F. Supp. 1403, 1406 (E.D. Tex. 1988)(asbestos property damage).

