

Environmental Insurance Litigation: 2007

A State By State Case Law Survey

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ALABAMA

"As Damages"

The Alabama Supreme Court ruled that Superfund "response costs" are "damages" Alabama Plating Co. v. USF&G, 690 So.2d 331 (Ala. 1996).

"Occurrence"

In U.S.F.&G. v. Armstrong, 479 So.2d 1164 (Ala. 1985), the Alabama Supreme Court ruled that contamination resulting from insured's removal of sewer line was an "occurrence" since harm though foreseeable, was not intended. More recently, a federal district court held in Associated Scrap Metal, Inc. v. Royal Globe Ins. Co., 927 F. Supp. 432 (S.D. Ala. 1995) that an insured was not precluded from obtaining coverage merely because it provided waste batteries to a third party, who then intentionally disposed of the acid contents of the batteries, since the insured had not expected or intended the resulting injury to occur.

Pollution Exclusion

After initially upholding the exclusion on August 30, 1996, the Alabama Supreme Court ruled on rehearing in Alabama Plating Co. v. USF&G, 690 So.2d 331 (Ala. 1996) that "sudden" is ambiguous and that the exclusion only applies to intentional pollution. Further, where the wastes were meant to be contained, as in a landfill, it only applies if the insured expected that the wastes would escape from the area in which they were placed, even if the initial disposal was intentional.

Earlier cases had declined to apply the exclusion in the cases that were not clearly "environmental." Compare Hicks v. American Resources Ins. Co., 544 So.2d 952 (Ala. 1989)(no coverage for discharge of chemicals and other contaminants from the insured's strip mining operations) with USF&G v. Armstrong, 479 So.2d 1164 (Ala. 1985) and Molton, Allen & Williams v. St. Paul Fire & Marine Ins. Co., 347 So.2d 95 (Ala. 1977)(erosion and mud run-off from insured's construction operations not excluded). See also Essex Ins. Co. v. Avondale Mills, Inc., 639 So.2d 1339 (Ala. 1994) (indoor exposures did not involve a discharge of pollutants "into the atmosphere").

"Absolute" Pollution Exclusion

In Federated Mut. Ins. Co. v. Abston Petroleum, Inc., 2007 WL 1098564 (Ala. April 13, 2007), the Alabama Supreme Court ruled that an absolute pollution exclusion clearly precluded coverage for the cost of cleaning up contamination from gasoline leaking out of pipes connecting above-ground storage tanks and gasoline pumps at the insured's service station. The court ruled that the focus of the inquiry under the absolute pollution exclusion was not in the nature of the substance alone, but on the substance in relation to the property damage or bodily injury, rejecting the insured's argument that it should nonetheless be entitled to coverage in light of its claimed "reasonable expectations."

Similar exclusions have generally been given broad effect by Alabama's federal courts. See Reliance Ins. Co. v. Kent Corp., 896 F.2d 501 (11th Cir. 1990)(personal injuries resulting from toxic fumes from chemical fire in insured's dumpster) and Kruger Commodities, Inc. v. USF&G, 923 F. Supp. 1474 (M.D. Ala. 1996)(auto dealer's lost profits claim due to foul odors from insured's animal rendering plant). See also Shalimar Contractors, Inc. v. American States Ins. Co., 975 F.Supp. 1450 (M.D. Ala. 1997)(no coverage for claims arising out of insured's disposal of lead-contaminated debris from construction project) and Haman, Inc. v. St. Paul Fire & Marine Ins. Co., 18 F.Supp.2d 1306 (N.D. Ala. 1998)(spraying of highly toxic pesticide inside insured's motel held excluded under first party "pollution" exclusion).

"Personal Injury" Claims

Efforts to characterize pollution claims as a covered "offense" were rejected by the U.S. District Court in Kruger, supra.

Trigger of Coverage

No environmental coverage cases. An "exposure" theory has been adopted by courts construing claims for asbestos bodily injury in Alabama. In Shook and Fletcher Asbestos Settlement Trust v. Safety National Casualty Corp., 909 A.2d 125 (Del. 2006) the Delaware Supreme Court predicted that the Alabama Supreme Court would adopt an "exposure" theory for asbestos BI claims and rejected the insured's contention that policies in effect after the date that the claimants' exposure ceased should also be triggered or that, being the rule that most state courts have adopted, the Alabama Supreme Court would also likely follow it. In fact, the court concluded that based upon its own analysis, exposure was the majority rule. See Commercial Union Ins. Co. v. Sepco Corp., supra and Safety National Casualty Corp. v. Shook & Fletcher Insulation Co., Jefferson No. CV-93-01574 (Ala. Cir. Ct. March 5, 1999). The period of exposure is deemed to terminate on the last date of the claimant's employment in the type of work causing injury. Simmons v. American Mutual Liability Ins. Co., 433 F.Supp. 747 (S.D. Ala. 1976).

ALASKA

"As Damages"

Superfund "response costs" were held to be covered in Mapco Alaska Petroleum, Inc. v. Central National Ins. Co. of Omaha, 784 F.Supp. 1454 (D. Alaska 1991).

"Occurrence"

No pollution cases.

Pollution Exclusion

No clear construction. In Sauer v. The Home Indemnity Co., 841 P.2d 176 (Alaska 1992), the Alaska Supreme Court suggested that it might follow an "actual polluter" approach. In Mapco, the federal district court ruled that "sudden" did have a possible temporal meaning but found that its principal meaning was "unexpected."

"Absolute" Pollution Exclusion

No reported environmental cases.

"Personal Injury" Claims

No reported environmental cases.

Scope and Allocation Issues

"Horizontal exhaustion" was rejected by a state trial court in Mapco Express, Inc. v. American International Specialty Lines Ins. Co., No. 3AN-95-8309 (Alaska Super. July 31, 1998). The court ruled instead that the insured could obtain excess coverage in any year for which the primary coverage was exhausted.

"Suit"

No reported environmental cases.

Trigger of Coverage

"Exposure" theory adopted in Mapco.

ARIZONA

"As Damages"

No environmental cases. "Damages" held not to extend to costs incurred in responding to claims for injunctive relief or equitable remedies. Holbrook Unified School District v. California Ins. Co., 942 F.2d 791 (9th Cir. 1991)(Table).

"Occurrence"

No reported environmental cases.

Pollution Exclusion

On February 13, 1996, the Arizona Supreme Court relinquished jurisdiction and republished TNT Beltway Transportation, Inc. v. Truck Ins. Exchange, 1 CA CV 92-0128 (Ariz. App. August 30, 1994), appeal dismissed, CV-95-0251 (Ariz. February 13, 1996) in which the Court of Appeals had rejected claims of ambiguity and drafting history arguments in finding that a gradual leakage of gasoline over an eighteen month period is not "sudden."

The exclusion was also upheld in Smith v. Hughes Aircraft, 783 F.Supp. 1222 (D. Ariz. 1991), aff'd in part, 10 F.3d 1448 (9th Cir. 1993) and Harris Trust Bank of Arizona v. Liberty Mutual Ins. Co., Maricopa No. CV 94-09093 (Ariz. Super. May 13, 1996) and Nucor Corp. v. Aetna Casualty & Surety Co., No. 93-0617 (D. Ariz. August 19, 1994), reversed and remanded, 110 F.3d 69 (9th Cir. 1997)(Unpublished).

The viability of these rulings has since been called into question by the Arizona Court of Appeals, however. In Maricopa County v. Arizona Property & Casualty Insurance Guaranty Fund, No. 2 CA CV 98-0076 (Ariz. App. April 27, 2000), the Court of Appeals ruled that a trial court had erred in granting summary judgment for insurers on the basis that gradual pollution is not "sudden." The Court of Appeals ruled that the insured should have been allowed to introduce extrinsic evidence concerning the alleged drafting history. Contrary to the insurers' arguments, the court ruled that "sudden and accidental" was not clearly unambiguous, as evidenced by the fact that at least 25 state courts and many federal courts had adopted conflicting interpretations of this language. The fact that the insured was unaware of and did not rely on statements made by insurers to state regulators at the time of the exclusion's adoption did not, in the court's view, render the materials irrelevant or unworthy of consideration. The court therefore rejected the Ninth Circuit's opinion in Hughes Aircraft as being unreflective of Arizona law. The issue was therefore remanded to the trial court for a preliminary evaluation and ruling with respect to the relevance of such materials.

"Absolute" Pollution Exclusion

The Arizona Court of Appeals ruled that absolute pollution exclusions are limited to "traditional environmental pollution." In Keggi v. Northbrook Property & Cas. Ins. Co., 13 P.3d 785 (Ariz. App. 2000), the Court of Appeals ruled that a trial court had erred in barring coverage for personal injuries suffered by a woman who drank water contaminated with e. coli from a fountain at the insured's golf resort. Division One declared that the exclusion is not intended to preclude coverage for contamination resulting from "bacteria" and that even if such an interpretation was reasonable, the exclusion, taken as a whole, "should not be interpreted to preclude coverage for bacterial contamination absent any evidence that the actual contamination arose from traditional environmental pollution."

Scope and Allocation Issues

A state trial court ruled in Nucor Corp. v. Hartford Accident & Indemnity Co., No. CV-97-08308 (Ariz. Super. September 29, 1997) that pollution claims that arose over a period of multiple years should be allocated on a "horizontal" basis.

"Suit"

Insurer argument that governmental edicts were not a "suit" were rejected as "nonsense" by a state trial court in Harris Trust Bank of Arizona v. Liberty Mutual Ins. Co., Maricopa No. CV 94-09093 (Ariz. Super. May 13, 1996).

Trigger of Coverage

Arizona has not yet had occasion to adopt a "trigger" for toxic tort or latent injury claims. In University Mechanical Contractors of Arizona, Inc. v. Puritan Ins. Co., 723 P.2d 658 (Ariz. 1986), the insurer on the risk when a plumbing system installed by the insured began to leak was held liable for all resulting damage, even though the full extent of harm was not apparently realized until after the policy expired.

The Arizona Court of Appeals has adopted a "continuous injury" trigger of coverage for toxic tort claims, ruling in Associated Aviation Underwriters v. Wood, (Ariz. App. September 29, 2004) that coverage under a 1960-69 "accident" policy was triggered both by "cellular injuries" that various Tucson residents claimed to have suffered due to exposure to TCE in their water as well as any continuing injuries suffered as a consequence of these exposures.

ARKANSAS

"As Damages"

U.S. District Courts in Arkansas have ruled that Superfund clean up costs are not "damages." Maryland Cas. Co. v. Grisham (W.D. Ark. January 6, 1989) and Parker Solvents Co., Inc. v. Royal Ins. Companies, No. 89-2293 (W.D. Ark. July 2, 1990).

"Occurrence"

No reported environmental cases.

Pollution Exclusion

In Murphy Oil USA, Inc. v. Unigard Security Ins. Co., 962 S.W. 735 (Ark. 2001), the Arkansas Supreme Court rejected arguments by insurers that it is the subsequent seepage or migration of pollutants away from the insured's property, rather than the initial spill, that must be "sudden and accidental."

"Absolute" Pollution Exclusion

Arkansas Supreme Court ruled in Minerva Enterprises v. Bituminous Cas. Co., 851 S.W.2d 403 (Ark. 1993) that such exclusions are only meant to "prevent persistent polluters from getting insurance coverage for general polluting activities...and was never intended to cover those who are not active polluters but had merely caused isolated damage by something that could otherwise be classified as a 'contaminant' or 'waste.'"

"Personal Injury" Claims

No reported environmental cases.

Scope and Allocation Issues

No reported environmental cases.

Trigger of Coverage

No reported environmental cases.

CALIFORNIA

"As Damages"

The California Supreme Court ruled that "response costs" are "damages" although coverage does not extend to prophylactic measures to prevent a mere threat of future releases of pollutants AIU Ins. Co. v. FMC Corp., 799 P.2d 1253 (Cal. 1990).

In Certain Underwriters at Lloyd's v. Superior Court, ("Powerine I") 24 Cal.4th 945, 16 P.3d 94 (Cal. 2001), the California Supreme Court ruled that policies insuring sums that the insured is "legally obligated as damages" only cover sums that the insured is ordered to pay by a court judgment and do not encompass "expenses required by an administrative agency pursuant to an environmental statute."

Four years later, the California Supreme Court declared in Powerine Oil v. Superior Court, 3 Cal. Rptr. 562 (2005) ("Powerine II") that broader language contained in certain excess and umbrella policies extends coverage to costs an insured must expend to comply with an administrative agency's pollution cleanup and abatement orders. Under the circumstances, the court found that an insured would harbor an objectively reasonable expectation that these policies would afford coverage for "expenses" over and beyond court-ordered "damages." The court also focused on language in the definition of "ultimate net loss" that extended coverage to sums paid both through adjudication and "compromise" for the "settlement, adjustment and investigation of claims..." The court found that this language plainly extended coverage beyond judgments ordered by a court of law.

On the other hand, a narrowly-divided Supreme Court ruled in County of San Diego v. Ace Property & Cas. Ins. Co., 37 Cal.4th 506 (2005) that the language in Ace's umbrella policies did not extend to administrative clean up directives. In contrast to the Central National policies, the definition of "ultimate net loss" in the Ace policies only included "the sum or sums which the insured shall become legally obligated to pay in settlement or satisfaction of claims, suits or judgments, including all expenses from the investigation, negotiation and settlement of claims and shall include legal costs. Additionally, the court noted that the Ace policy contained a "no action" clause that limited the insurer's indemnity obligation to sums owed as the result of a judgment unless the insurer otherwise consented.

In Block v. Golden Eagle Insurance Corporation, 17 Cal.Rptr.3d 13 (Cal. App. 2004), the Second District ruled that an economic loss suffered by the insured after the City of Long Beach reduced the amount that it agreed to pay him to take property by eminent domain due to concerns about the cost of cleaning up contamination on the property was not a claim for "damages." The Court of Appeal ruled that the eminent domain proceedings were not a suit seeking "damages" because of property damage since there was no contention that the insured was legally obligated to compensate the City in money as a result of a loss or detriment suffered by the City because of the contamination on its property, nor was the insured legally obligated during her any cleanup expenses as an *Morrison Mahoney LLP (Copyright 2007)*.

alternative remedy to compensating the City particularly as it was the City that was paying the insured for the taking of her property. The court refused to find that diminution in the value of property because of its environmental condition should be treated as a "constructive" expenditure or that the reduction in value constituted a set-off claim so as to trigger coverage under the California Supreme Judicial Court's ruling in Constructive Protective Services v. TIG.

"Occurrence"

A subjective standard was adopted by Supreme Court in Montrose Chemical Corporation v. Canadian Universal Ins. Co., 861 P.2d 1153 (Cal. 1993). The court ruled that despite evidence that pollution had occurred as the result of on-going business practices of Montrose, the insurers had not shown that all of the pollution was "intended" or "expected." The Court seemingly adopts the Shell "expected standard (did the insured know or believe that "its conduct was substantially certain or highly likely to result in that kind of damage." See also Aerojet Chemical Corp. v. Transport Ind. Co., 45 Cal. App.4th 1192, 53 Cal. Rptr.2d 398(1st Dept. 1996), aff'd on other grounds, 17 Cal. 4th 38, 70 Cal. Rptr. 118 (1997)(insured held to have subjectively expected pollution to occur).

Although the California Supreme Court agreed to accept review of Syntex Corp. v. Lowsley-Williams & Companies, 1998 WL 779036 (Cal. App. November 10, 1998), in which the Court of Appeal had ruled that the intentional acts of low level employees could be imputed to a corporation, the case settled while on appeal, eliminating its formal precedential value. The Court of Appeals has also ruled in FMC Corp. v. Plaistead & Companies, 72 Cal. Rptr.2d 467, 480 (1998), review denied, No. S045520 (Cal. May 27, 1998) that an insured cannot argue that it intended to cause soil contamination but that any resulting groundwater injury was unexpected and unintended. The court declared that it does not matter that the injury is greater than expected if a portion of it was intended.

Pollution Exclusion

As yet, the California Supreme Court has not construed the scope of the exclusion. In 1998, however, it ruled 4-3 that a policyholder has the burden of proving the "sudden and accidental" exception to the pollution exclusion, at least as regards the duty to indemnify. Aydin Corp. v. First State Ins. Co., 77 Cal. Rptr.2d 537, 959 P.2d 1213 (1998) Controversy persists, however, as to how this relates to the duty to defend.

In general, California courts have ruled that the exclusion bars coverage for discharges that are either gradual or intentional. However, recent decisions suggest that the mere fact that pollution occurs over a period years will not preclude a duty to defend unless the insurer can establish the impossibility of gradual releases. See e.g. Dann v. Travelers Companies, 39 Cal. App. 4th 1610, 46 Cal. Rptr.2d 617 (1st Dist. 1995), review denied (Cal. 1996) and Reese v. The Travelers Ins. Co., 129 F.3d 1056 (9th Cir. 1997).

California courts have ruled that discharges do not become accidental merely because the insured's waste is disposed of by a third party. See Travelers Cas. & Sur. Co. v. Superior Court, 63 Cal. App.4th 1440, 75 Cal. Rptr.2d 54 (1998)(whether the insured meant to pollute or whether the polluting conduct was unlawful at the time was irrelevant to whether the discharges were "sudden and accidental"); Standun, Inc. v. Fireman's Fund Ins. Co., 73 Cal. Rptr.2d 116 (2d Dist. 1998). In Standun, the Court of Appeals further ruled that the relevant discharge in a landfill case is the initial placement of wastes into or upon the land.

On the other hand, the Court of Appeal ruled in State of California v. Underwriters at Lloyd's, 2006 Cal. App. LEXIS 2062 (4th Dist. 2006), as modified 2007 Cal. App. LEXIS 100 (4th Dist. January 25, 2007) the relevant discharge with respect to the exclusion was the release of pollutants from the Stringfellow Acid Pits. Unlike cases where claims have been brought against generators for disposing of waste materials into a landfill, the court pointed out that the claims against the State of California were not based on dumping waste into the site but rather for its negligent selection, design, building and operation of the site for which liability resulted from the release of waste materials from the site since, due to the State of California's negligence, Stringfellow had failed to contain them properly.

Courts have been reluctant to give effect to the exclusion merely because discharges have occurred periodically, however. In A-H Plating, Inc. v. American National Fire Ins. Co., 67 Cal. Rptr.2d 113 (2d Dist. 1997), the Court of Appeal ruled that a trial court had not erred in refusing to grant summary judgment for insurers in a case where an electroplater had come forward with affidavits and evidence of specific incidents in which TCA had been accidentally released on its property. Although the court agreed that discharges that occurred in the regular course of an insured's business would not be "accidental," the court refused to find that occasional spills occurring over a lengthy period of time were such that they were necessarily expected and therefore not "accidental."

Regulatory estoppel arguments were rejected by the Court of Appeal in State of California v. Underwriters at Lloyd's, 2006 Cal. App. LEXIS 2062 (4th Dist. 2006), as modified 2007 Cal. App. LEXIS 100 (4th Dist. January 25, 2007). Apart from the elements of estoppel that needed to be pleaded, the California Supreme Court distinguished cases such as Morton on the grounds that the State of California had presented no comparable evidence that the insurance industry made representations to California regulators concerning the scope of the "sudden and accidental" exception. Further, the Court of Appeal took note of evidence presented by the insurers that California regulators had not relied on any such representations. . Further, despite prior California case law that had cited drafting history, the court found that these cases only permitted such history in interpreting an insurance policy and did not support a claim of estoppel. In any event, the court found that this evidence was "inconclusive at best."

Some controversy persists as to whether "sudden" applies solely to the onset of pollution or also to its duration. The earliest case on this issue, Shell, declared that courts should look to the overall duration of pollution. See also, Service Control, *supra* ("the

duration of the discharge must be considered in addition to the abruptness of its inception in order to prevent the exception from being rendered meaningless"). However, some courts have suggested that it is solely the point of commencement that is crucial. See e.g. Vann v. Travelers Ins. Co., 39 Cal. App. 4th 1610, 46 Cal. Rptr.2d 617 (1st Dist. 1995).

Courts have generally rejected insured efforts to "microanalyze" sources of pollution to create coverage. Smith v. Hughes Aircraft Co., 10 F.3d 1448 (9th Cir. 1993) and Syntex Corp. v. Lowsley-Williams & Companies 1998 WL 779036 (Cal. App. November 10, 1998)(depublished). In Travelers Cas. & Sur. Co. v. Superior Court, 63 Cal. App.4th 1440, 75 Cal. Rptr.2d 54 (1998), the California Court of Appeal ruled that it was generally inappropriate to undertake a "microanalysis" of sources of pollution and cautioned that it would only consider evidence of discrete polluting events if they did not involve discharges in the ordinary course of operations and were a significant source of the pollution at the site.

Two Court of Appeal decisions had ruled that the insured cannot recover for pollution losses unless it can show what portion of the loss was attributable to "sudden and accidental" releases. Golden Eagle Refinery Co. v. Associated International Ins. Co., 85 Cal. App.4th 1300 (2001) and Lockheed Corp. v. Continental Ins. Co., 134 Cal. App.4th 187 (2005). In Golden Eagle, the Second Appellate District held that even some of the pollution on the property had resulted from "sudden and accidental" causes would have triggered the insurer's duty to defend, the insured could not obtain indemnity in view of its failure to come forward with clear evidence as to the amount of actual damage attributable to any "sudden and accidental" events. Insofar as this is a contractual action, the court ruled that the insured must prove not only the insurer's breach of contract but the amount of damages caused by the breach. Further, "to prove a claim for breach of contract, more is required than evidence that a covered cause was a "substantial contributing cause" of its damage."

However, in State of California v. Underwriters at Lloyd's, 2006 Cal. App. LEXIS 2062 (4th Dist. 2006), as modified 2007 Cal. App. LEXIS 100 (4th Dist. January 25, 2007), the Court of Appeal held that a specific discharge in 1969, in which heavy rainfall caused a lagoon to wash out a surrounding dike, triggered coverage for all the contamination at the site, without regard to whether there were other non-covered causes of pollution. Notwithstanding opinions such as Golden Eagle and Lockheed, which had declared that the insured had the burden of proving that all of the cleanup costs were attributable to sudden and accidental discharges, the Fourth District found that these rulings were in conflict with the efficient proximate cause analysis that the California Supreme Court State Farm Mutual Automobile Ins. Co. v. Partridge, 10 Cal. 3d 94, 514 P.2d 123, 109 Cal. Rptr. 811 (1973). As a result, the court held that under California law, the insured need not negate the possibility that any part of the damages for which it seeks indemnity were caused by a non-sudden and accidental discharge. As a result, the court found that the insurer should be liable for all of the damages for which a covered risk is a proximate cause even if excluded causes also contributed to that injury. While agreeing that principles of tort liability were not governing with respect to contract law, the court held

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that tort principles were relevant since they measured the insured's liability for which coverage was sought. Applying Partridge to the facts of this case, the Fourth District held that the insurers were fully liable for all the contamination at the Stringfellow site since, by reason of the 1969 discharge, the State was jointly and severally liable for all the resulting damage at the site and not just the amount directly traceable to its own negligence. As an offset to this apparently unreasonable result, the court observed that the insurers would, of course, have a right of equitable subrogation against other polluters who had contributed to the site's contamination. The court rejected the insurers' argument that Partridge was limited to causes of injury that occurred contemporaneously and concurrently as opposed to the situation here where pollution had occurred through diverse causes over a period of decades. As a result, the court concluded that the State is not required to allocate its liability based on the cause of the underlying damage as long as a covered cause is a concurrent contributing cause. The case was therefore remanded for further proceedings.

"Absolute" Pollution Exclusion

The California Supreme Court ruled that a wrongful death claim against a landlord due to a tenant's ingestion of pesticides was not excluded as involving any discharge or "release" of a pollutant. The Supreme Court ruled in MacKinnon v. Truck Ins. Exchange, 31 Cal.4th 635, 73 P.3d 1205, 3 Cal. Rptr.3d 228 (2003) that such exclusions did not "plainly and clearly exclude ordinary acts of negligence involving toxic chemicals such as pesticides." While recognizing the split in authority around the country concerning this question, the Supreme Court concluded, taking into account the words of the exclusion and its history, that such exclusions were adopted by the insurance industry to limit their exposure to the "enormous potential liability" created by CERCLA and other anti-pollution statutes enacted between 1966 and 1980, that the exclusion should be limited in scope to "injuries arising from events commonly thought of as pollution, i.e. environmental pollution.."

The court ruled that giving a literal meaning to terms such as "irritant" or "contaminant" as proposed by Truck would lead to overbroad and absurd results.

Despite MacKinnon, recent opinions have not limited the scope of the exclusion to clean up claims. In Garamendi v. Golden Eagle Ins. Co., 127 Cal. App.4th 480 (1st Dist. 2005), review denied, 2005 Cal. LEXIS 6676 (2005), the Court of Appeal upheld the application of the exclusion to claims that workers were exposed to silica particles due to defective respiratory apparatus manufactured by the insured. The First District distinguished MacKinnon since "unlike the residential use of a pesticide for the purpose of killing insects, the widespread dissemination of silica dust as an incidental by-product of industrial sandblasting operations most assuredly is what is commonly thought of as pollution and environmental pollution." The Court of Appeal also rejected the insured's argument that the exclusion should not apply to products claims. See also Ortega Rock Quarry v. Golden Eagle Ins. Corp., E037906 (Cal. App. July 27, 2006)(soil run off) and Lewis v. Hartford Casualty Ins. Co., (N.D. Cal. January 31, 2006)("the discharge, or potential discharge, of perchloroethylene resulting in soil and groundwater pollution at or from plaintiff's dry cleaning operation constitutes pollution commonly thought of as

environmental pollution precluding insurance coverage under the pollution exclusion clause in light of the California Supreme Court's analysis of similar exclusions in Mackinnon").

The exclusion has also generally been upheld in cases that plainly involve clean up claims. Titan Corp. v. Aetna Cas. & Sur. Co., 22 Cal. App. 4th 457 (1994) (landfill clean up); Legarra v. Federated Mut. Ins. Co., 42 Cal. Rptr.2d 101 (Cal. App. 1995).

"Personal Injury" Claims

California courts have refused to allow insureds to avoid pollution exclusions by recasting environmental liability claims as actions for "wrongful entry or invasion of the right of private occupancy." Lakeside Non-Ferrous Metals, Inc. v. Hanover Ins. Co., 172 F.3d 302 (9th Cir. 1999); Titan Corp. v. Aetna Cas. & Sur. Co., 22 Cal. App. 4th 457, 27 Cal. Rptr. 476 (1994) and Legarra v. Federated Mutual Ins. Co., 42 Cal. Rptr.2d 101 (3d Dist. 1995). But see, Martin Marietta Corp. v. Ins. Co. of North America, 40 Cal. App. 4th 1113, 47 Cal. Rptr.2d 670 (2d Dist. 1995) (permitting coverage for trespass claims where policies lacked pollution exclusion).

Scope and Allocation Issues

After years of conflicting lower court rulings, the California Supreme Court ruled in December 1997 that insureds have no duty to share defense costs on a "time on the risk" basis. In Aerojet-General Corp. v. Transport Ind. Co., 17 Cal. 4th 38, 70 Cal. Rptr. 118 (1997), the court held that insurers are obligated to indemnify an insured in full for "all sums" and must provide a complete defense to any suit that implicates their period of coverage, even if the suit also encompasses later periods of time.

While rejecting arguments that the insurers' obligations are "joint and several," the Supreme Court effectively adopted Keene v. INA and expressly rejected pro-allocation rulings such as INA v. 48 Insulations, Owens-Illinois and Sharon Steel. In particular, the Supreme Court ruled that the Court of Appeals had erred in adopting a "time on the risk" approach or in finding that an insured must contribute a share corresponding to periods of time for which it "self-insured" (a term that the Supreme Court described as a "misnomer"). As with Buss, insureds are only obligated to pay defense costs that are not also attributable to any period of time for which an insurer owes coverage. Accordingly, if an insurer only provided coverage for Year 1 and the insured is sued for damage from Year 1 to Year 30, the insurer must still defend the entire case, subject only to rights of equitable contribution against other insurers (but not the policyholder). The Supreme Court gratuitously added that the "all sums" language in the insuring agreement would also compel the Year 1 insurer to pay its entire policy limit for any resulting judgment if any part of the damages are attributable to Year 1 damage.

The Supreme Court cited with approval three earlier allocation rulings of the Court of Appeals. In County of San Bernardino v. Pacific Indemnity Co., 56 Cal. App. 4th 666 (4th Dist. 1997), review denied (Cal. 1997) the Court of Appeal had ruled that a polluter who

failed to purchase coverage after 1973 had no obligation to contribute to the defense of underlying trespass suits that alleged injuries both before and during the period that it had chosen to go bare. The court ruled that self-insurance does not involve any transfer risk and cannot therefore be considered as "insurance." The Supreme Court agreed in Aerojet, describing "self-insurance" as a misnomer.

The Supreme Court also adopted the First District's holding in an asbestos case, Armstrong World Industries, Inc. v. Aetna Cas. & Sur. Co., 45 Cal. App.4th 1, 52 Cal. Rptr.2d 690 (1st Dist. 1996), that any insurer whose policy was triggered must pay its full limits pursuant to the "all sums" language and may not restrict its payment obligation to the amount of injury in the policy period. The court ruled that insureds have no responsibility to self-insure for coverage gaps or orphan shares.

The First District has ruled that an insurer that agreed to defend certain pollution liability claims against a successor entity was entitled to contribution from certain later carriers of the same insured notwithstanding the fact that those carriers had earlier entered into earlier policy buy-back settlement agreements with the insured. In Employers Insurance Company of Wausau v. Travelers Indemnity Co., 141 Cal. App.4th 398, 46 Cal. Rptr.3d 1 (2006), review denied (Cal. October 1, 2006), the Court of Appeal ruled that an insurer that agreed to defend certain pollution liability claims against a successor entity was entitled to contribution from certain later carriers of the same insured notwithstanding the fact that those carriers had earlier entered into earlier policy buy-back settlement agreements with the insured. The court held that the settlements specifically contemplated the possibility of future claims and required Whitman Corporation to indemnify them against such claims. As a result, the court declared that Wausau was entitled to a reallocation of its defense costs in proportion to the parties' "time on the risk." The court rejected arguments by Travelers that a pre-acquisition policy should not have been included in this calculation or that two overlapping policies should not be counted twice.

The California Court of Appeal ruled in Stonelight Tile, Inc. v. California Insurance Guaranty Association, No. 8029043 (Cal. App. April 24, 2007) that the Guaranty Fund had no duty to contribute to the defense of various nuisance law suits where the insured had settled its claims against solvent insurers for less than full policy limits.

"Suit"

Supreme Court ruled 4-3 in Foster-Gardner, Inc. v. National Union Fire Ins. Co. of Pittsburgh, 18 Cal. App. 4th 857, 77 Cal. Rptr.2d 107, 959 P.2d 265 (1998) that PRP letters are not a "suit." Earlier, the court had ruled in Aerojet that any costs incurred prior to the date that an insured's liability is determined should be a cost of defense--the fact that the task is undertaken pursuant to a governmental directive was, in the court's view, irrelevant.

In CDM Investors v. American National Fire Ins. Co., 5 Cal.3d 466, 112 Cal.App.4th 791 (2003), the Sixth District of the California Court of Appeal refused to find that post-1986 CGL policies, which defined "suit" as including "civil proceedings" implied an intent to

expand the scope of coverage. The court also refused to find that the duty to defend was triggered by affirmative defenses that tenants had raised in opposition to the insured landlord's indemnification action since these defenses, wherein the defendants asked that any liability be apportioned according to the parties' respective degrees of fault, did not set forth a stand-alone claim for damages.

Efforts by an insured to distinguish Foster-Gardner based on new policy forms that define "suit" were rejected by the California Court of Appeal in Ortega Rock Quarry v. Golden Eagle Ins. Corp., 46 Cal.Rptr.3d 517 (Cal. App. 2006). The court rejected the insured's contention that the negotiations and exchange of letters between it and EPA concerning the administrative order were a form of ADR within the definition of "suit." In any event, the court noted that Ortega had not made any effort to obtain the insurer's consent to such proceedings, as required by the ADR provision in the definition of "suit."

Trigger of Coverage

The California Supreme Court ruled in Montrose Chemical Corporation v. Admiral Ins. Co., 897 P.2d 1 (Cal. 1995) that a "continuous trigger" must be applied for pollution liability, requiring a defense under any policy in which actual dumping or the persistence of pollution from earlier discharges takes place.

The California Supreme Court ruled that a successor entity cannot claim coverage under policies issued to a predecessor insured absent evidence that the successor entity to a carrier's original insured is being sued as the result of a merger, a continuation of the seller or as the result of a fraudulent asset transfer or unless the insurer gives its express assent to an assignment of rights. The court ruled in Henkel Corporation v. Hartford Acc. & Ind. Co., 62 P.3d 69 (Cal. 2003) that as Henkel did not acquire the liabilities of Amchem by operation of law but assumed those liabilities by contact, any purported assignment was invalid as it had not been assented to by the insurer. The court focused on the fact that as of the date of these transactions, the underlying claims had not been reduced to a sum of money due, nor had the insurer's breached any contractual obligations such that such rights of action could be assigned. Whereas Henkel argued that an assignment under these circumstances had not increased the risk of losses to be imposed on the insurers, the Supreme Court disagreed, noting that such assignments did impose an additional burden since they created a "ubiquitous potential for disputes over the existence and scope of the assignment." Writing in dissent, Justice Moreno contended that the majority's analysis provided an unfair windfall to insurers.

California courts have also reached conflicting conclusions on the issue of "after-acquired liabilities." In several cases, the Court of Appeals has refused to permit coverage for such claims. In the first such case, the court ruled 2-1 in A.C. Label v. Superior Court, 48 Cal. App.4th 1188, 56 Cal. Rptr.2d 207 (1996), review denied (Cal. October 16, 1996) that a liability policy that was in effect before the insured purchased the polluted property in question could not be triggered, even though the pollution may have occurred during the period that the policy was in effect. See also Safety-Kleen Enviro Systems Co. v.

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Continental Casualty Corp., San Francisco No. 952681 (Cal. Super. October 15, 1998)(insured could not obtain coverage under policies issued prior to its involvement at waste sites).

More recently, the Ninth Circuit has taken a different view, ruling that the state appellate court ignored settled principles of contract interpretation by inferring the requirement of a factual nexus between the insured and the damaged property. K.F. Dairies, Inc. v. Fireman's Fund Ins. Co., 224 F.3d 922 (9th Cir. 2000). Notwithstanding K.F. Dairies, the First Appellate District has declared in Tosco Corp. v. General Ins. Co. of America, No. A022765 (Cal. App. December 28, 2000) that a polluter is not entitled to liability coverage for claims involving sites with respect to liabilities arising from property that the insured did not own during the policy period.

The Court of Appeal has also ruled that an insurer may still owe coverage, even if the plaintiff did not exist at the time. Thus, even though the plaintiff condominium owners' association was not formed until after the water intrusion and mold infiltration that formed the basis for its construction defect claim against the property developer, the Fourth Appellate District has ruled that the plaintiff suffered property damage during the policy period so as to trigger coverage under the policy of insurance that Standard Fire issued to the property developer. In Standard Fire Ins. Co. v. The Spectrum Community Association, 141 Cal. App.4th 1117, 46 Cal. Rptr.3d 804 (4th Dist. 2006), review denied (Cal. October 18, 2006), the court dismissed the insurer's argument that an entity that does not yet exist cannot have suffered damage, holding that what is relevant is the date that the property damage occurs whether or not the complaining party actually existed at the time or not. The court distinguished cases such as A.C. Label.

COLORADO

"As Damages"

Colorado Supreme Court ruled in City of Englewood v. Commercial Union Ins. Co., 984 P.2d 606 (Colo. 1999) that Superfund response costs are a claim for "damages." In Public Service Co. of Colorado v. Wallis & Companies, 955 P.2d 564 (Colo. 1997), reversed on other grounds, (Colo. 1999) the Colorado Court of Appeals ruled that clean up costs incurred pursuant to statutes are sums for which insureds are "legally liable," even in the absence of any lawsuits or environmental enforcement actions.

"Occurrence"

Colorado Supreme Court ruled in New Hampshire Ins. Co. v. Hecla Mining Co., 811 P.2d 1083 (Col. 1991) that a subjective standard of proof was required. The Supreme Court overturned a ruling of the Court of Appeals which had found that pollution was "expected" because it was an ordinary and foreseeable consequence of the insured's routine mining operations. See also Broderick Investment Co. v. Hartford Accident & Indemnity Co., 954 F.2d 601 (10th Cir. 1992)(insured's placement of wastes into lagoons and unlined pits is an "occurrence" absent proof of subjective intent to cause pollution) and Gahagen Iron & Metal Co. v. Transportation Ins. Co., 812 F.Supp. 1106 (D. Colo. 1992), opinion withdrawn due to settlement (D. Col. 1992)(insured's sale of recycled batteries did not cause it to expect or intend pollution from end use of product).

Pollution Exclusion

The Supreme Court of Colorado ruled that "sudden" is ambiguous in Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Col. 1991). Further, the court ruled in Compass Ins. Co. v. City of Littleton, 994 P.2d 606 (Colo. 1999) that an insured's intentional disposal of waste materials at a landfill was "accidental" as the insured had not expected or intended for the wastes to leach *from* the landfill. In adopting a "Secondary discharge" analysis of the exclusion, the court expressly rejected the earlier prediction of the federal court of appeals in Broderick Investment Co. v. Hartford Acc. & Ind. Co., 954 F.2d 601 (10th Cir. 1992) that the court would find that leachate and other secondary discharges are excluded as "arising out of" intentional discharges into or upon the land. Finally, the Supreme Court has interpreted the Lloyd's pollution exclusion as applying unless the discharges were "unprepared for, unexpected and unintended." Public Service Company of Colorado v. Wallis, 986 P.2d 924 (Colo. 1999). In view of Public Service and Hecla Mining, the Tenth Circuit has more recently ruled in Blackhawk-Central City Sanitation District v. American Guaranty and Liability Ins. Co., 208 F.3d 1246 (10th Cir. 2000) that St. Paul had a duty to defend pollution liability claims since it had failed to prove that the insured's repeated discharge of sewage in excess of permitted levels failed to describe a "sudden accident."

The Supreme Court held in Cotter Corp. v. American Empire Surplus Lines Ins. Co., No. 02SC707 (Colo. May 17, 2004) that a lower court had erred in focusing on whether the seepage of yellowcake and other mining wastes from unlined tailing ponds was expected. Rather, the court declared that the exclusion only applies if the insured expected or intended that wastes would migrate off its property. The court found that unlined ponds and pits had at the time been believed to serve a useful environmental “filtering” function and should therefore not be treated as a relevant “polluting event.”

"Absolute" Pollution Exclusion

In general, Colorado courts have taken a broad view of such exclusions. The Court of Appeals held that injuries suffered by office workers after inhaling toxic fumes were excluded in TerraMatrix, Inc. v. U.S. Fire Ins. Co., 939 P.2d 483 (Colo. App. 1997). See also Power Engineering Company v. Royal Ins. Co. of America, 105 F.Supp.2d 1196 (D. Colo. 2000)(discharge of chromic acid from insured’s electroplating facility). Earlier, the U.S. Court of Appeals for the Tenth Circuit ruled that the exclusion should only extend to "industrial or environmental" emissions in Regional Bank of Colorado v. St. Paul Fire & Marine Ins. Co., 35 F.3d 494 (10th Cir. 1994)(CO poisoning).

"Personal Injury" Claims

Court of Appeals ruled in TerraMatrix that exposure to toxic fumes did not involve an invasion of the right to private occupancy "of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor."

Scope and Allocation Issues

Colorado Supreme Court ruled in Public Service Company of Colorado v. Wallis, 986 P.2d 924 (Colo. 1999) that the Court of Appeal erred in allowing insured to "pick and choose" the policy that it wanted to obtain coverage under. Instead, the court ruled that the insured’s loss should be pro-rated among the years of injury, taking into account both the insurers’ “time on the risk” and any risk assumed by the insured. In light of the SIR component of the coverage, the insured must pay a single SIR per site for each year. However, the insurers will not be entitled to a credit for settlement payments.

The Supreme Court has since declared in Hoang v. Assurance Co. of America, . 149 P.3d 798 (Colo. 2007). “Where property damage is gradual over some period of time, the trial court may make a reasonable estimate of the portion of the damage that is attributable to each year. The trial court may allocate liability to each policy triggered by the damage.”

"Suit"

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PRP claims letters held to be a "suit" in Compass Ins. Co. v. City of Littleton, 984 P.2d 606 (Colo. 1999).

Trigger of Coverage

A "continuous trigger" adopted in American Employer's Ins. Co. v. Pinkard Construction Co., 806 P.2d 954 (Col. App. 1990)(roof collapse). However, the underlying plaintiff must have a legal interest in the property at the time that it was injured in order to give rise to coverage. Browder v. USF&G, 893 P.2d 132 (Col. 1995). In Union Pacific Railroad Company v. Certain Underwriters at Lloyd's, London, 37 P.3d 524 (Colo. App. 2001), the Colorado Court of Appeals ruled that a liability insurer had no duty to pay indemnity for a settlement that the insured had entered into with the U.S. EPA for a case in which the EPA concluded that no remedial action was necessary to protect human health or the environment.

In Hoang v. Assurance Co. of America, 149 P.3d 798 (Colo. 2007), the Colorado Supreme Court ruled that the CGL insurer of a property developer was liable for construction defect claims brought by the current owners of various homes that the insured had built notwithstanding the fact that some or all of the damage occurred prior to the date that the plaintiffs took title to the properties. The court distinguished its apparently contrary ruling in Browder, declaring that the Browder claims involved property formerly owned by the insured and a claim under a special multi-peril policy that had restricted coverage to losses "arising out of the ownership, maintenance or use of the insured premises" in contrast to the broader language contained in the CGL policies at issue here.

In Scott's Liquid Gold Inc. v. Lexington Ins. Co., 97 F.Supp.2d 1226 (D. Colo. 2000), aff'd in part, rev'd in part, 293 F.3d 1180 (10th Cir. 2002), the Tenth Circuit affirmed a lower court's ruling that pollution from the insured's wood treatment plant had resulted in third party contamination during part of Lexington's policy period. The court focused on the fact that an "accident" requires concomitant injury whereas an "occurrence" or "event" can exist without some form of damage. Reviewing the evidence considered by the District Court, the Tenth Circuit concluded that here contamination of the soil and groundwater had occurred during 1980 regardless of when the TCA plume crossed the Army property. As there was evidence of groundwater contamination beneath Scott's facility prior to 1980 and as the insured had offered expert testimony that the plume would have reached the Army property prior to the expiration of Lexington's policy, it was more likely than not that the contamination had occurred to the plaintiffs during the policy period. As Lexington had not presented contrary evidence, the Tenth Circuit concluded that summary judgment had properly entered for the insured on this issue.

CONNECTICUT

"As Damages"

The Supreme Court declined to accept a certified question on this issue in The Eastern Co. v. Liberty Mut. Ins., No. 3:94CV1283 (D. Conn. 1997).

Otherwise, the cases are mixed. Linemaster Switch v. Aetna, 1995 Conn. Super. LEXIS 2229 (1995)(no coverage) and EDO Corp. v. Newark Ins. Co., 898 F.Supp. 952 (D. Conn. 1995) (coverage required).

“Occurrence”

No environmental coverage cases.

Pollution Exclusion

In Buell Industries v. Greater New York Mutual Ins. Co., 791 A.2d 489 (Conn. 2002), the Supreme Court ruled (1) "the word sudden was included in these policies so that only a temporally abrupt release of pollutants would be covered as an exception to the general pollution exclusion"; (2) inasmuch as the exclusion is unambiguous on its face, there is no need to consider sources of extrinsic evidence, including the purported drafting history presented by the insured; (3) Connecticut would not recognize claims of regulatory estoppel noting, "regulatory estoppel appears to be another attempt to examine extrinsic as there is no factual basis for suggesting that in 1970 insurance regulators in Connecticut were misled by industry misrepresentations regarding the meaning of the exclusion. unambiguous and that "sudden " has a temporal meaning. The court also ruled that the insured has the burden of proving a "sudden and accidental" release. See also Stamford Wallpaper, Inc. v. TIG Insurance Co., 138 F.3d 75 (2d Cir. 1998).

The Supreme Court amplified this analysis in Schilberg Integrated Metals v. Continental Casualty Company, 263 Conn. 45, 819 A.2d 773 (2003), ruling that statements in the underlying suit alleging liability because the insured had "arranged for treatment" at this site were insufficient to trigger a duty to defend. Nor did the court agree that the insurer had the obligation to eliminate all possibility of sudden and accidental discharges in order to avoid a duty to defend:

The relevant inquiry, therefore, is not whether the substance of the department's allegations rule out the possibility of a sudden and accidental discharge...but, rather, whether the plaintiff has demonstrated that a reasonable interpretation of the substance of the department's allegations potentially would bring the claims within the purview of the sudden and accidental discharge exception in the policies. An insured does not satisfy its burden of proving the application of the sudden and

accidental discharge, however, by the assertion of conclusory statements or reliance on mere speculation or conjecture as to the true nature of the facts.

"Absolute" Pollution Exclusion

The Connecticut Supreme Court resoundingly upheld the "absolute" pollution exclusion in Heyman Assoc. No. 1 v. The Insurance Co. of the State of Pennsylvania, 653 A.2d 122 (Conn. 1995)(oil spill) rejecting "latent ambiguity" claims based on drafting history. See also Western World Ins. Co. v. Stack Oil, Inc., 922 F.2d 118 (2d Cir. 1990). Exclusion for "exposure to...lead contained in goods, products or materials" upheld in Peerless Ins. Co. v. Gonzales, 241 Conn. 476 (1997).

The state Supreme Court ruled in Schilberg Integrated Metals v. Continental Casualty Company, 263 Conn. 45, 819 A.2d 773 (2003) that a recycler's shipments of scrap waste were excluded, notwithstanding the insured's contention that it was entitled to coverage for a "central business activity." The Supreme Court also ruled that the trial court had not abused its discretion in refusing to permit discovery with respect to the claimed "drafting history" of these exclusions.

In its most recent opinion on the subject, the Supreme Court refused to give effect to the exclusion for smoke inhalation injuries suffered by a child when her mentally deranged father burned down the house. In Allstate Ins. Co. v. Barron, SC 17111 (Conn. May 24, 2004), the court ruled that deaths from smoke inhalation were not subject to the pollution exclusion in Lactate's policy.

"Personal Injury" Claims

The Connecticut Supreme Court ruled in Buell Industries v. Greater New York Mutual Ins. Co., 791 A.2d 489 (Conn. 2002) that pollution clean up claims do not trigger personal injury coverage for "wrongful entry or eviction, or other invasion of the right of private occupancy." First, the court found that insurers had never intended to provide environmental coverage under this section of the policy when such claims were otherwise excluded. Further, the court found that "personal injury" provisions were intended to provide coverage for "purposeful acts undertaken by the insured."

Scope and Allocation Issues

The Connecticut Supreme Court adopted a "pro rata" approach to long tail claims in Security Ins. Co. of Hartford v. Lumbermen's Mutual Cas. Co. 264 Conn. 688, 826 A.2d 107 (2003). Presented with the choice between joint and several liability on the one hand (Keene v. INA) and pro rata liability on the other (INA v. Forty-Eight Insulations), the court concluded that it would follow the approach of the Sixth Circuit in INA v. Forty-Eight Insulations and the New Jersey Supreme Court in Owens-Illinois. It specifically ruled that the pro rata method of allocation did not violate the reasonable expectations of coverage of

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the insured as “neither the insurers nor the insured could reasonably have expected that the insurers would be liable for the losses occurring in periods outside of their respective policy coverage periods.” The court ruled that the language in question was not ambiguous nor would it agree to “torture the insurance policy language in order to provide ACMAT with uninterrupted insurance coverage where there was none.” As regards the insured’s specific arguments, the court ruled that (1) its “pro rata” approach was not in conflict with rules governing the duty to defend; (2) insurers were entitled to assert claims for equitable contribution against policyholders where the insured had failed to purchase insurance or could not locate its policies; (3) a time on the risk approach was appropriate to allocating defense costs in cases involving missing policies; and (4) there was no distinction with respect to the issue of allocation between cases in which the insurer had chosen to forego insurance or cases where the insured had merely lost or destroyed policies that it had originally purchased.

"Suit"

A PRP letter was adjudged to be a “suit” in R.T. Vanderbilt Co. v. Continental Casualty Co., SC17178 (Conn. April 18, 2005).

Trigger of Coverage

"Actual injury" adopted in Aetna v. Abbott Laboratories, Inc., 636 F.Supp. 546 (D. Conn. 1986) and Carrier Corp. v. Travelers, No. CV-88-0352383 (Conn. Super. 1994).

DELAWARE

"As Damages"

Supreme Court ruled in E.I. du Pont v. Allstate Ins. Co., 686 A.2d 152 (Del. 1996) that there was no coverage for clean up costs incurred on the insured's property unless they are in response to damage to third party property. The court ruled that the mere fact that such remedial measures may prevent future damage to third party property or groundwater is not itself a basis for coverage. Earlier, the court had ruled that policies containing requirements that the insured mitigate damages did not owe coverage for "the cost of measures taken or to be taken to prevent the further release of contaminants." National Union Fire Ins. Co. v. Rhone-Poulenc Basic Chemicals Co., 616 A.2d 1192 (Del. 1992). Accord Hercules, Inc. v. AIU Ins. Co., 784 A.2d 481 (Del. 2001) (costs incurred to re-pack and incinerate drums of waste on insured's property not covered).

"Occurrence"

In New Castle County v. Hartford Acc. & Ind. Co., 933 F.2d 1162 (3d Cir. 1991), the Third Circuit held that contamination migrating from the insured's landfill was an "occurrence" and was not intended or "substantially foreseeable" from the standpoint of the insured operator in light of the limited knowledge that existed concerning groundwater problems and pollution before the 1970s. Judge Steele ruled in E.I. DuPont v. Admiral Ins. Co., 1996 Del. Super. LEXIS 48 (Del. Super. February 22, 1996) that DuPont has the burden of proving by a preponderance of the evidence that it was not reasonably foreseeable to its employees at the time that pollution would result from their intentional dumping of chemical wastes. The court declined to adopt the insurer's proposed "substantial probability" standard or DuPont's suggested "substantial certainty" test.

Pollution Exclusion

The Delaware Supreme Court ruled in E.I. DuPont v. Allstate Ins. Co., 693 A.2d 1059 (Del. 1997) that the pollution exclusion is unambiguous; that a policyholder has the burden of proving an exception to a policy exclusion and that the word "sudden" "clearly and unambiguously includes a temporal element synonymous with abrupt." The court rejected efforts to avoid the exclusion based on alleged drafting history or regulatory estoppel arguments. Earlier, the court had affirmed a lower court ruling that "sudden" has temporal meaning under Missouri law. Monsanto v. ISLIC, 656 A.2d 36 (Del. 1994).

"Absolute" Pollution Exclusion

Exclusion upheld in Sequa Corp. v. Aetna Cas. & Sur. Co., No. 89C-AP-1 (Del. Super. July 16, 1992)(applying New York law). See also Monsanto Co. v. Aetna Cas. & Sur. Co., No. 88C-JA-118 (Del. Super. December 9, 1993)(Missouri law).

"Personal Injury" Claims

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The Third Circuit ruled in New Castle County v. National Union Fire Ins. Co. of Pittsburgh, PA, 174 F.3d 338 (3rd. Cir. 1999) that coverage as not limited to acts committed by or on behalf of an owner, landlord, or lessor, as the U.S. District Court for the District of Delaware had ruled and instead must be deemed ambiguous and interpreted in favor of coverage. The court declared that the exclusion was unclear with respect to whether "its" modified the room, dwelling or premises" that a person occupies or the "person" that occupied said premises. The case was therefore remanded back to the District Court for determination of whether the underlying claims were in the nature of an action for invasion of the right of private occupancy or whether, as National Union contended, this "invasion" coverage was only intended to extend to claim in the landlord-tenant context or that alleged tangible interference with a plaintiff's possessory interest. Earlier, a state trial court had ruled that groundwater contamination did not involve an invasion of the plaintiff's possessory rights or an "invasion of the right of private occupancy" in National Union Fire Ins. Co. of Pittsburgh, PA v. Rhone-Poulenc, Inc., New Castle No. 87-C-SE-11 (Del. Super. May 19, 1993).

Scope and Allocation Issues

The Delaware Supreme Court adopted an "all sums" approach to allocation issues in Hercules, Inc. v. AIU Ins. Co., 784 A.2d 481 (Del. 2001). As with Monsanto Co. v. C.E. Heath, 652 A.2d 30 (Del. 1994)(Missouri law), the court ruled that equitable considerations precluded pro-ration even in the absence of "all sums" language. In particular, the court found that it was not inequitable to preclude allocation merely because the insured had obtained the benefit of a continuous trigger ruling since the insured has not obtained additional insurance coverage as a result.

"Suit"

The Third Circuit ruled that there was no duty to defend a PRP letter in Harleysville Mut. Ins. Co. v. Sussex County, 46 F.3d 1116 (3d Cir. 1994).

Trigger of Coverage

"Continuous trigger" adopted for pollution claims in New Castle County v. Hartford Acc. & Ind. Co., 725 F.Supp. 800 (D. Del. 1989) and National Union v. Rhone-Poulenc, New Castle No. 87C-SE-11 (Del. Super. January 16, 1992). Supreme Court adopted broad view of "injury in fact" in Hoechst Celanese Corp. v. Certain Underwriters at Lloyd's, 673 A.2d 164 (Del. 1996)(defective plumbing products).

FLORIDA

"As Damages"

Split. Compare, Pepper's Steel & Alloys, Inc. v. Florida Power and Light Co., 823 F.Supp. 1574 (S.D. Fla. 1993)(coverage required) and W. C. Hayes v. Maryland Cas. Co., 688 F.Supp. 1513 (N.D. Fla. 1988)(no coverage). Older cases held that the cost of complying with injunctive orders was not covered. Aetna Cas. Ins. Co. v. Hanna, 224 F.2d 499 (5th Cir. 1955) and Garden Sanctuary, Inc. v. Ins. Co. of North America, 292 So.2d 75 (Fla. App. 1974).

"Occurrence"

No pollution cases.

Pollution Exclusion

The Florida Supreme Court ruled 4-3 on July 1, 1993 that the exclusion unambiguously bars coverage for discharges that are not abrupt or which occur intentionally, narrowly rejecting "drafting history" arguments. Dimmitt Chevrolet v. Southeastern Fidelity Ins. Group, 636 So.2d 700 (Fla. 1993), reh'g denied (Fla. March 31, 1994). The Court of Appeals has since rejected a "secondary discharge" challenge in Liberty Mut. Ins. Co. v. Lone Star Industries, Inc., 661 So.2d 1218 (Fla. App. 1995). See also, LaFarge Corp. v. Travelers Ind. Co., 118 F.3d 1551 (11th Cir. 1997)(intentional disposal is not "accidental" even if insured did not intend or foresee later leachate problem). As a consequence, the duration of pollution resulting from an initially "sudden" discharge is irrelevant. Southern Solvents v. Canal Ins. Co., 91 F.3d 102 (11th Cir. 1996).

"Absolute" Pollution Exclusion

The absolute exclusion has been given broad effect by the Florida Supreme Court. In Deni Associates of Florida, Inc. v. State Farm Fire & Casualty Ins. Co., 711 So.2d 1135 (Fla. 1998), the court ruled that the exclusion defeated coverage for personal injury claims that respectively involved a spill of copying fluid inside the insured's offices and the spraying of insecticide by the insured on its fruit grove. Nor would it agree to restrict the scope of the exclusion to "environmental or industrial pollution." The court further rejected any effort to interject ambiguity on the basis of the alleged drafting history of the exclusion. Rather, it concluded that the meaning of the words "irritant" and "contaminant" were plain and clearly extended to "ammonia." Justices Weld and Overton dissented in the Deni case, contending that the court's analysis was overly broad and allowed the exclusion to "swallow the coverage."

Such exclusion were also upheld in Auto Owners Ins. Co. v. City of Tampa Housing Authority, 231 F.3d 1298 (11th Cir. 2000)(lead paint poisoning); Technical Coating Applicators, Inc. v. USF&G, 157 F.3d 843 (11th Cir. 1998)(sick building caused by *Morrison Mahoney LLP (Copyright 2007)*).

contractors" release of fumes); West American Ins. Co. v. Band and Desenberg, 925 F.Supp. 758 (M.D. Fla. 1996), aff'd, 138 F.2d 1425 (11th Cir. 1998)(sick building claims) and City of St. Petersburg v. USF&G, No. 92-1224 (M.D. Fla. August 15, 1994)(former gas site clean up).

"Personal Injury" Claims

Abutters' claim that insured polluted water supply held not covered in City of Del Ray Beach v. Agricultural Ins. Co., 85 F.3d 1527 (11th Cir. 1996).

Scope and Allocation Issues

U.S. District Court adopted a "pick and choose" trigger for pollution claims in CSX Corp. v. Admiral Ins. Co., 1996 U.S. Dist. LEXIS 17125 (M.D. Fla. November 6, 1996).

"Suit"

Deemed to include PRP letters by Bankruptcy Judge in In Re Celotex Corp., No. 90-10016-8B1 (M.D. Fla. January 19, 1993). On the other hand, a court ruled that a PRP letter was not a "suit" in Racal-Datacom, Inc. v. INA, No. 95-1749 (S.D. Fla. February 11, 1998).

Trigger of Coverage

Non-environmental cases suggest that Florida law would adopt an "injury in fact" theory. See e.g. Trizec Properties v. Biltmore Constr. Co., 767 F.2d 810 (11th Cir. 1985)(rejecting "manifestation" as trigger for construction defect claim). Applying Illinois law, Judge Baynes adopted a broad trigger of coverage for asbestos building claims in In Re Celotex Corp., 196 Bkrp. 793 (M.D. Fla. 1996).

GEORGIA

"As Damages"

Coverage found in Atlantic Wood v. Argonaut Ins. Co., 396 S.E.2d 541 (Ga. App. 1990); Briggs & Stratton Corporation v. Royal Globe Ins. Co., 64 F.Supp.2d 1340 (M.D. Ge. 1999) and South Carolina Ins. Co. v. Coody, 813 F.Supp. 1570 (M.D. Ga. 1993).

"Occurrence"

No reported cases.

Pollution Exclusion

Supreme Court ruled in Claussen v. Aetna Cas. & Sur. Co., 380 S.E.2d 686 (Ga. 1989) that "sudden" was ambiguous, thus limiting exclusion to intentional discharges. The Eleventh Circuit ruled, however, that Claussen does not mandate coverage for intentional discharges; the court refused to find that such spills were "accidental" merely because the insured had denied any intent to cause pollution. Virginia Properties, Inc. v. Home Ins. Co., 74 F.3d 878 (11th Cir. 1996).

On the other hand, in Dickies Industrial Services, Inc. v. Liberty Mutual Ins. Co., No. 1:97-CV-1391 (N.D. Ga. March 31, 1999), Judge Hunt declared that the insured's knowledge that perc vapors were escaping from its dry cleaning facility did not compel a finding that the discharges of pollutants were intentional. More recently, Judge Duval ruled in Briggs & Stratton Corp. v. Royal Globe Ins. Co., 64 F.Supp.2d 1346 (M.D. Ga. 1999) that clean up claims against an insured who provided chemicals to an electroplater that intentionally discharged chemical waste were "accidental" as the intentional discharge of waste by the site operator was unintended from the insured's standpoint.

"Absolute" Pollution Exclusion

In general, Georgia courts have upheld the exclusion as regards "environmental" claims but have refused to give it effect in cases involving indoor exposures to toxic substances.

The exclusion was upheld by the state Court of Appeals in Truitt Oil & Gas Co. v. Ranger Ins. Co., 498 S.E.2d 572 (Ga. App. 1998), the Court of Appeals held that the absolute pollution exclusion precludes coverage for the cost of cleaning up gasoline and oil that leaked out of the insured's underground tanks. The Court of Appeals ruled that gasoline was clearly a "liquid or gaseous contaminant" within the exclusion's definition of "pollutant." Similarly, smoke from a wood fire that caused car crash held to be a "pollutant" in Perkins Hardwood Lumber Co. v. Bituminous Cas. Corp., 378 S.E.2d 407 (Ga. App. 1989). See also American States Ins. Co. v. Zippro, 445 S.E.2d 133 (Ge. App. 1995)(asbestos fibers that were released by contractor's improper sanding of flooring tiles

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deemed excluded). A federal district court ruled in North Georgia Petroleum Co. v. Federated Mutual Ins. Co., 68 F.Supp.2d 1321 (N.D. Ga. 1999) that such exclusions are not against public policy. The court refused to distinguish Zippo on the basis that this claim involved a "completed operation." the court declined to find that there was an ambiguity in the policy with respect to the insurance for completed operations and the application of the exclusion.

On the other hand, the Court of Appeals has refused to apply the exclusion to a worker's claim for bodily injury due to his exposure to dangerous materials inside a chemical plant. In Kerr-McGee v. Georgia Cas. & Sur. Co., 256 Ga. App. 458 (2002), the court opined that such exclusions are limited to discharges into the soil, atmosphere or bodies of water and therefore do not apply to indoor exposures. It is unclear, however, whether any such limiting language was actually contained in this particular total exclusion. In any event, the court concluded that "a reasonable insured could believe that the exclusion did not apply when the insured neither caused nor contributed to the pollution, the release did not occur on the insured's property, no environmental contamination occurred or was threatened and the material was an industrial chemical and not waste."

Likewise, the Eleventh Circuit earlier ruled that inhalation of toxic fumes from insured's adhesive product was not excluded since an "emission" of fumes is not a "discharge, dispersal, release or escape." Bituminous Casualty Corp. v. Advanced Adhesive Technology, Inc., 73 F.3d 335 (11th Cir. 1996).

"Personal Injury" Claims

Allegations by abutting property owners that gasoline had leaked from the insured's tanks onto their land was held to be outside the scope of "personal injury" coverage in Truitt Oil & Gas Co. v. Ranger Ins. Co., 498 S.E.2d 572 (Ga. App. 1998). The Court of Appeals ruled that the neighbor's claim was for "loss of use of property" and did not allege any demand based on "wrongful entry or invasion of the right of private occupancy."

"Suit"

PRP letters held to be a "suit" in Atlantic Wood Industries, Inc. v. Argonaut Ins. Co., 396 S.E.2d 541 (Ga. App. 1990); Briggs & Stratton Corporation v. Royal Globe Ins. Co., 64 F.Supp.2d 1340 (M.D. Ge. 1999) and Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 926 F.Supp. 1566 (S.D. Ge. 1995).

Trigger of Coverage

Georgia Supreme Court failed to reach a certified question on trigger" in Boardman Petroleum, Inc. v. Federated Mutual Ins. Co., 269 Ga. 326 (1998), a case in which the federal district court had ruled that GL policies respond as of the date that an injurious exposure results in bodily injury or property damage, rejecting the insurer's "manifestation" argument.

"Exposure" trigger adopted for personal injury claims in Continental Ins. Co. v. Synalloy, 667 F.Supp. 1563 (S.D. Ga. 1986), affirmed per curiam, 826 F.2d 1024 (11th Cir. 1987) and for pollution claims in Briggs & Stratton Corporation v. Royal Globe Ins. Co., 62 F.Supp.2d 1346 (M.D. Ga. 1999)(rejecting contention that coverage for pollution from electroplating discharges was limited to "manifestation").

The Florida District Court of Appeal, applying Georgia law, ruled in Hardaway Co. v. USF&G, No. 97-01848 (Fla. App. November 6, 1998) that damage arising out of a ruptured pipeline was triggered as of the date that the pipeline exploded, not early periods of time when the insured contractors may have been negligent in its construction or maintenance. The court rejected the insured's reliance on Eljer (installation trigger).

"Actual injury" trigger was applied to termite damage claims in Arrow Exterminators, Inc. v. Zurich American Ins. Co., 136 F.Supp. 3d 1340 (N.D. Ga. 2001)(trigger of coverage for latent property damage claims was the point in time when the injury-producing agent first makes contact with the property).

HAWAII

Pollution Exclusion

In Pacific Employer's Ins. Co. v. ServCo. Pacific, Inc., 273 F.Supp.2d 1149 (D. Hawaii 2003), the U.S. District Court ruled that in the absence of a clear interpretation of "sudden and accidental" by the Hawaii Supreme Court, the meaning of the qualified pollution exclusion was ambiguous and did not relieve PEIC of its obligation to provide coverage.

Absolute Pollution Exclusions

A federal district court ruled in Allen v. Scottsdale Ins. Co., 2004 U.S. Dist. LEXIS 3650 (D. Hawaii March 2, 2004) that claims for personal injury and property damage brought by the neighbors of a concrete recycling plant for injuries caused by their exposure to "fugitive dust" are subject to a total pollution exclusion in the policy.

Trigger of Coverage

In Sentinel Ins. Co., Ltd. v. First Ins. Co. of Hawaii, Ltd., 875 P.2d 894 (Hawaii 1994), the court rejected a "post-manifestation" liability insurer's argument that it had no duty to defend or indemnify claims against a building contractor that had commenced prior to its policy period. the court ruled that the claims were not a "known loss" or "loss in progress" since the insured was not aware that a loss had occurred before coverage began. The court distinguished between first and third party policies, holding that the "contingent event" for a CGL policy was the prospect of liability, therefore permitting coverage even where actual damage was already known.

IDAHO

"As Damages"

Deemed covered in Aetna Cas. & Sur. Co. v. Pintlar Corp., 948 F.2d 1507 (9th Cir. 1991)(case since disavowed by the California Supreme Court in Foster-Gardner).

"Occurrence"

No reported environmental cases,

Pollution Exclusion

Supreme Court upheld exclusion in North Pacific Ins. Co. v. Mai, 939 P.2d 570 (Idaho 1997) declaring that "sudden" limits coverage to releases of brief duration.

Absolute Pollution Exclusion

Federal district court ruled in Monarch Greenback, LLC v. Monticello Ins. Co., 1999 WL 33211402 (D. Idaho November 29, 1999)(mine tailing claims) that the exclusion is not ambiguous and is not restricted to "active polluters."

"Personal Injury" Claims

A federal district court ruled that the Insured's oil spill was not intended to "occupy" plaintiff's property and therefore did not give rise to "personal injury" coverage. Goodman Oil Co. v. Federated Service Ins. Co., No. 95-0209 (D. Idaho April 26, 1996).

"Suit"

Split. Compare Aetna Cas. & Sur. Co. v. Gulf Resources Co., 948 F.2d 1507 (9th Cir. 1991)(Idaho law)(finding duty to defend) with Republic Ins. Co. v. Sunshine Mining Co., Ada No. 95239 (Idaho Dist. Ct. April 27, 1993)(rejecting Pintlar).

Trigger of Coverage

"Actual injury" adopted in Unigard Mut. Ins. Co. v. McCartys, No. 83-1441 (D. Idaho June 5, 1987).

ILLINOIS

"As Damages"

Clean up costs held covered in Outboard Marine Corp. v. Liberty Mut. Ins Co., 607 N.E.2d 1204 (Ill. 1992). Coverage also extends to clean up costs that are incurred pursuant to coercive demands from governmental agencies even if the insured has not actually been sued. In Central Illinois Light Co. v. The Home Ins. Co., 81 N.E.2d 206 (Ill. 2004), the Illinois Supreme Court ruled that a gas utility was entitled to coverage under various London Market umbrella policies for costs that the insured had voluntarily incurred to clean up former MGP sites to avoid being sued by the Illinois EPA. The court distinguished the California Supreme Court's contrary holding in Powerine on the grounds that Powerine case involved CGL policies that included a duty to defend, whereas these London excess policies merely required that the insured be "liable" to pay these sums. See also Keystone Consolidated Industries, Inc. v. Employers Ins. Co. of Wausau, 456 F.3d 758 (7th Cir. 2006)(holding that even though Wausau had no duty to defend administrative cleanup actions, its indemnity duties might be triggered since the insured had acted in response to demands or coercive suggestions from the IEPA such that these were probably sums that the insured was "legally obligated" to pay).

In AAA Disposal Systems, Inc. v. Aetna Casualty & Surety Co., 821 N.E. 2d 1278 (Ill. App. 2005), appeal denied, 2005 Ill. LEXIS 296 (Ill. 2005), the Appellate Court ruled that a property owner's insurer was not liable for certain costs attributable to properly closing the landfill, including the removal of leachate, grading and the installation of a cap, since this was an ordinary business cost that the insured failed to undertake when it shut down the landfill and not property damage attributable to an "occurrence" for which an insurer should be liable.

"Occurrence"

Appellate Court ruled years ago in Reliance Ins. Co. v. Martin, 126 Ill. App. 3d 94, 467 N.E.2d 287 (1984) that an "accident" includes the "natural and ordinary consequences of a negligent act", so as to require coverage even where emissions occurred regularly.

Pollution Exclusion

Illinois Supreme Court ruled in Outboard Marine that "sudden" is ambiguous, limiting the exclusion's effect to intentional discharges, so long as the discharge is of the same chemical and in the area giving rise to the insured's liability. In USF&G v. Wilkin Insulation Co., 578 N.E.2d 96 (Ill. 1991), court held that indoor exposures are not a discharge into the "atmosphere".

"Absolute" Pollution Exclusion

The Illinois Supreme Court has limited the scope of the "absolute" pollution exclusion to traditional environmental contamination. In American States Ins. Co. v. Koloms, 687 N.E.2d 72 (Ill. 1997), the Supreme Court affirmed the Appellate Court's finding that such exclusions do not apply to indoor exposures to toxic fumes, such as carbon monoxide. See also Ins. Co. of Illinois v. Stringfield, 685 N.E.2d 980 (1st Dist. 1997)(exclusion does not apply to lead paint) and Pipefitters Welfare Educational Fund v. Westchester Fire Ins. Co., 976 F.2d 1037 (7th Cir. 1992)(warning against an unduly expansive construction of "pollutant"). On the other hand, the Appellate Court ruled that the exclusion did preclude coverage for the cost of cleaning up solvent contamination from a dry cleaning facility notwithstanding the insured's argument that commercially valuable products were not "pollutants." Moon v. State Farm Fire & Casualty Company, 728 N.E.2d 530 (Ill. App. 2000).

The Illinois Supreme Court has also ruled that an insurer that seeks to add a more restrictive exclusion at the time of renewal must keep a record of mailing its insured notice of this material alteration in coverage in a form of proof accepted by the Postal Service. Guillen v. Potomac Ins. Co., 203 Ill.2d 141(2003)(lead paint claims exclusion).

"Personal Injury" Claims

The Appellate Court has found "personal injury" coverage for pollution claims in several recent cases. The Second District ruled in Millers Mutual Ins. Association of Illinois v. Graham Oil Co., 668 N.E.2d 223 (Ill. App. 1996) that a neighboring property owner's trespass claims against a gas station alleged a claim for "wrongful invasion" outside the scope of the policy's "absolute" pollution exclusion. Accord, Country Mutual Ins. Co. v. Cedar Road District, No. 3-96-0217 (Ill. App. March 20, 1997) and Illinois Tool Works, Inc. v. The Home Indemnity Co., 998 F.Supp. 868 (N.D. Ill. 1998).

On the other hand, the Appellate Court has since ruled in National Fire and Indemnity Exchange v. Ali & Sons, 803 N.E.2d 636 (Ill. App. 2004) that a suit in which a property owner sued a dry cleaning tenant seeking recovery for property damage resulting from the discharge of chemicals and other solvents from underground storage tanks and other containers in and about the leased premises did not seek recovery for a "personal injury" based upon "the wrongful entry into, or eviction of a person from, a room, dwelling or premises that the person occupies." The court ruled on January 16, 2004 that whether or not Illinois law would hold in the abstract that trespass claims were recoverable as an action for "personal injury" notwithstanding pollution exclusions, in this particular case the underlying complaint was solely for damage to the leased premises and did not seek recovery for any trespass onto or injury to the property of others.

Scope and Allocation Issues

The Appellate Court ruled in four recent cases that insurers are only responsible for that portion of damages corresponding to injury in their policy periods and that the insured is itself responsible for periods of time for which it self-insured or failed to purchase insurance. The court rejected the insureds' argument that they should be entitled to pick and choose on a "joint and several" basis or that it could recover in full from any single insurer based on the promise to pay "all sums." See Maremont Corp. vs. Continental Cas. Co., 681 N.E.2d 548 (Ill. App. 2001)(pollution claims); Outboard Marine Corp. v. Liberty Mutual Ins. Co., 670 N.E.2d 740 (Ill. App. 1996)(pollution) and Missouri Pacific Railroad Co. v. International Ins. Co., 679 N.E.2d 801 (Ill. App. 1997)(noise-induced hearing loss claims). As the Appellate Court explained in Outboard Marine, 670 N.E.2d at 749-50, "while the insurers agreed to indemnify [the insured] for 'all sums,' it had to be for sums incurred during the policy period."

In 2005, the Appellate Court ruled in AAA Disposal Systems, Inc. v. Aetna Casualty & Surety Co., 821 N.E. 2d 1278 (Ill. App. 2005), appeal denied, 2005 Ill. LEXIS 296 (Ill. 2005), that (1) the trial court had not erred in declaring that the "other insurance" language in American Employers' excess policies required a horizontal exhaustion of all primary policies, not merely those that were underlying insurance; (2) American Employers' indemnity duty was limited to that portion of the loss that occurred during its period of coverage and could not be extended to later damage on an "all sums" theory; (3) the insured itself must bear responsibility for that share of damages allocable to periods of time for which the insurers have later become insolvent.

Several courts have suggested, however, that these rulings are inconsistent with the Illinois Supreme Court's 1987 trigger ruling in Zurich v. Raymark Industries, Inc., 514 N.E.2d 150 (Ill. 1987), which had suggested that pro-rata was not permitted. Thus, the Appellate Court has ruled in Caterpillar, Inc. v. Century Indemnity Co., No. 04-L-119 (Ill. App. February 2, 2007) that a Circuit Court erred in allocating Century Indemnity's share of defending the underlying asbestos claims on a *pro rata* basis. Caterpillar, which had purchased CGL coverage from INA (1952-1981) and Wausau (1981-1985) was self-insured after 1985 for asbestos liabilities. The court held that the portions of the policy triggering coverage were not limitations on the obligation of the insurers to pay "all sums" and that the policies do not state that the insurer will only pay a portion of loss attributable to injury during the policy period. The court took special note of language in policies issued by INA in the 1960s that stated that, "If the insured has any other policy or policies of insurance with the company covering a loss also covered by this policy, the insured shall elect which policy shall apply and the company shall be liable under the policy so elected and the company shall not be liable under any other policy." The court rejected INA's contention that this "other insurance" language was merely intended to avoid stacking. The court also rejected INA's contention that Caterpillar was responsible for a share of defense costs allocated to policies with deductibles or self-insured pursuant to a captive program. Under the circumstances, the Third District agreed with Caterpillar that defense costs should be paid on an "all sums" basis. See also Chicago Bridge & Iron Co. v. Certain Underwriters

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at Lloyds, 59 Mass. App. Ct. 646, 797 N.E.2d 424 (2003), further appellate review denied (Mass. 2004)(applying Illinois law).

"Suit"

Illinois Supreme Court ruled that PRP claims are not "suits" in Lapham-Hickey Steel Corporation v. Protection Mut. Ins. Co., 655 N.E.2d 842 (Ill. 1995). On the other hand, the Supreme Court has since ruled in Employers Ins. of Wausau v. Ehlco Liquidating Trust, 186 Ill.2d 127, 708 N.E.2d 1122 (1999) that any court proceeding is a "suit" whether a "sham suit" or otherwise. The court therefore overturned an intermediate appellate ruling that a legal proceeding that the EPA filed for the sole purpose of effectuating a settlement was not a "suit."

Trigger of Coverage

The Illinois Supreme Court has not yet adopted a clear "trigger" for pollution claims. In Zurich Ins. Co. v. Raymark Industries, Inc., 514 N.E.2d 150 (Ill. 1987) that court ruled that asbestos-related bodily injuries occur at the time of "exposure" and again at "manifestation" but refused to find that the presence of asbestos fibers "in residence" between exposure and manifestation is a separate "trigger."

The Appellate Court ruled in Outboard Marine Corp. v. Liberty Mutual Ins. Co., 670 N.E.2d 740 (Ill. App. 1996) that coverage may be triggered under all policies from date of first discharge until insured became aware that it might be sued for pollution. The Appellate Court has also adopted a continuous trigger for asbestos building claims in Board of Education of Township High School Dist. No. 211 v. International Ins. Co., 720 N.E.2d 622 (Ill. App. 1999) and U.S. Gypsum Company v. Admiral Ins. Co., 643 N.E.2d 1226 (Ill. App. 1994).

A "discovery" trigger was rejected in Eljer Manufacturing Co. v. Liberty Mutual Ins. Co., 773 F.Supp. 1102 (N.D. Ill. 1991, aff'd in part, rev'd in part, 972 F.2d 805 (7th Cir. 1992) which involved defective plumbing installations. There, the U.S. District Court held that coverage was triggered when the pipes first leaked water, not at the earlier date that the defective product was installed or a subsequent date when the problem was first discovered. On appeal, the Seventh Circuit held that all of the claims were triggered as of the date of installation, since the value of the property was damaged from that point forward given the propensity of the products to fail.

The Supreme Court of Illinois has refused to follow the Seventh Circuit's analysis, however. In a later dispute between Eljer and its excess insurers, the court ruled in Travelers Ins. Co. of Illinois v. Eljer Manufacturing, Inc., 197 Ill.2d 278, 757 N.E.2d 481 (2001) that the incorporation of a defective component into a larger whole does not result in "property damage" until the component caused physical injury to the surrounding property. However, the court did find that coverage might be triggered even prior to the malfunction of the product, if buildings, floors and ceilings in the plaintiffs' buildings had been damaged

in the course of removing and replacing the defective Quest plumbing systems (although the cost of replacing the product itself would not be covered).

The Appellate Court has twice refused to find coverage for the torts of subsidiaries acquired after coverage has expired. Caterpillar, Inc. v. The Aetna Casualty & Surety Co., 668 N.E.2d 1152 (Ill. App. 1996) and Emerson Electric Co. v. Aetna Casualty & Surety Co., 667 N.E.2d 581 (Ill. App. 1996).

INDIANA

"As Damages"

"Damages" was held to be ambiguous and therefore deemed to include clean up costs and other CERCLA "response costs" in Travelers Indemnity Company v. Summit Corporation of America, 715 N.E.2d 926 (Ind. App. 1999; Hartford Accident & Ind. Co. v. Dana Corp., , 690 N.E.2d 285 (Ind. App. 1997) and Indiana Gas Co. Aetna Cas. & Sur. Co., 951 F.Supp. 816 (N.D. Ind. 1996), appeal dismissed, 141 F.3d 314 (7th Cir. 1998).

Notwithstanding broad language in its 2001 opinion in Hartford v. Dana that damages covered under a general liability policy might include costs "to prevent further releases of hazardous substances," the Indiana Supreme Court has ruled that such coverage only extends to existing harm and does not insure against costs that a policyholder must undertake to prevent future injuries. In Cinergy Corp. v. AEGIS, No. 32SO5-0604-CV-00151 (Ind. May 1, 2007), the court ruled that a liability insurer has no obligation to pay for the cost of implementing new technology to prevent future environmental harm. In holding that AEGIS did not owe coverage for a lawsuit in which the federal government sought to compel Duke Energy and other utilities to comply with the federal Clean Air Act and implement new clean air technologies to prevent widespread harm to public health and the environment, the Supreme Court agreed with other jurisdictions that a distinction should be drawn between remedial and prophylactic remedies and that coverage was not required here where the federal lawsuit was directed at preventing future harm to the public not obtaining control, mitigation or compensation for past or existing environmentally hazardous emissions.

"Occurrence"

U.S. Court of Appeals for the Seventh Circuit ruled in Huntzinger v. Hastings Mutual Ins. Co., 143 F.3d 302 (7th Cir. 1998) that the intentional nature of an insured's discharges precluded any finding of "accidental" injury. Earlier, the state court of appeal held in Barnet of Indiana, Inc. v. Security Ins. Group, 425 N.E.2d 201 (Ind. App. 1981) that repeated previous breakdown of insured's air pollution controls, causing heavy fogs, made subsequent auto accident "foreseeable and predictable" even if unintended by insured. A state trial judge ruled in Summit Corp. v. The Travelers Companies, Marion No. 49B02-9509-CP-1378 (Ind. Super. July 21, 1997) that pollution will not be deemed to be "expected or intended" unless the insured was consciously aware that a particular release was substantially certain to occur.

In PSI Energy, Inc. v. The Home Ins. Co., No. 32A01-0204-CV-146 (Ind. App. January 6, 2004), the Indiana Court of Appeals ruled that the that requirement of fortuity was present in all policies, not just those that contain "accident" or "occurrence" limitations and that it is the insured who bears the burden of proving that the property damage at issue was not expected or intended. On the other hand, the Appeals Court ruled that the trial court did not err in finding that the nature of the insured's conduct was such that an intent to *Morrison Mahoney LLP (Copyright 2007).*

injure should be inferred as a matter of law and found instead that a subjective standard should be applied. The court declined to follow the recent ruling of the New Hampshire Supreme Court in EnergyNorth in which the court found that injury was certain to occur from the insured's intentional discharges finding that PSI had presented expert testimony and evidence to suggest that the pollution was caused at least in part by non-intentional causes.

On remand, the Court of Appeals sustained a jury's verdict that the operator of a former manufactured gas plant failed to show that discharge of pollutants caused property damage during the period of certain London policies. The court also ruled in PSI Energy, Inc. v. The Home Ins. Co., No. 32A01-0503-CV-130 (Ind. App. April 28, 2006) that the trial judge did not abuse his discretion in admitting various gas industry publications, finding that "evidence of industry standards would be useful in establishing PSI's subjective intent because PSI's operation of the MGP ceased in the 1940's."

Pollution Exclusion

The Indiana Supreme Court limited the exclusion to intended discharges in American States Ins. Co. v. Kiger, 662 N.E.2d 945 (Ind. 1996), declaring "sudden to be ambiguous." Accord Seymour Manuf. Co. Inc. v. Commercial Union Ins. Co., 665 N.E.2d 891 (Ind. 1996). In the first post-Kiger case to focus on the meaning of "accidental," a federal district court ruled in Indiana Gas Co. v. Aetna Cas. & Sur. Co., 951 F.Supp. 797 (N.D. Ind. 1996), appeal dismissed, 141 F.3d 314 (7th Cir. 1998) that pollution resulting from the on-going discharge of tar and other waste by-products of a utility's manufactured gas operations are excluded, whether or not the insured realized at the time that the materials were potentially hazardous. The court refused to adopt a "secondary discharge" analysis. Pre-Kiger cases had applied exclusion to auto accident resulting from fog caused by regular, known emissions from the insured's plant. Barnet of Indiana, Inc. v. Security Ins. Group, 425 N.E.2d 201 (Ind. App. 1981)(not "accidental"). But see Great Lakes Chemical Corporation v. International Surplus Lines Ins. Co., 638 N.E.2d 847 (Ind. App. 1994)(exclusion does not apply to planned sprayings of EDB soil fumigant product) Seventh Circuit rejected "microanalysis" arguments in Cincinnati Ins. Co. v. Flanders Electric Motor Service, Inc., 40 F.3d 146 (7th Cir. 1994).

"Absolute" Pollution Exclusion

The Indiana Supreme Court refused to give effect to the exclusion in Kiger, supra, holding that the meaning of "pollutant" was ambiguous as applied to the clean up of petroleum products that had leaked from the insured's service station spill given the vital role that gasoline played in the insured's business.

Despite the fact that the finding of ambiguity in Kiger hinged on the nature of the insured's business, the Supreme Court's analysis has since been interpreted by Indiana courts as supporting a general ambiguity in the exclusion. See Travelers Indemnity Company v. Summit Corporation of America, 715 N.E.2d 926 (Ind. App. 1999)(coverage required for landfill clean up). See also in Governmental Interinsurance Exchange v. City of Angola, Indiana, 9 F.Supp.2d 1120 (N.D. Ind. 1998)(exclusion did not defeat coverage for cost of cleaning up gasoline that had leaked from 300 gallon underground storage tank on the insured's property). Judge Lee particular note of the fact that the insurance industry had unsuccessfully lobbied the Indiana legislature in 1997 to statutorily amend the scope of coverage to include gasoline as a pollutant but that this bill had been vetoed.

In the most recent case to address these concerns, the Supreme Court ruled in Freidline v. Shelby Ins. Co., 774 N.E.2d 37 (Ind. 2002) that the exclusion was ambiguous as it applied to allegations of bodily injury resulting from a building occupants' exposure to toxic fumes from substances that a contractor was using to install carpeting in the building. On the other hand, the Supreme Court overturned an intermediate appellate court that had found Shelby in bad faith for even asserting the exclusion.

Scope and Allocation Issues

Indiana Supreme Court ruled in Allstate Ins. Co. v. Dana Corporation, 759 N.E.2d 1049 (Ind. 2001) that a waste generator may obtain coverage in full for its pollution liabilities under an "all sums" theory and is not required to pro-rate the claim across the entire period of coverage. The court noted that such claims might be subject to the policies' "other insurance" clauses, however.

The applicability of Dana to cases involving consecutive CGL policies has recently been called into question by the Indiana Court of Appeals, however. In a case where two CGL carriers afforded coverage to a rural electric company whose high-tension power lines were alleged to have caused injury to the plaintiff's dairy herd over the course of several years, implicating both carriers' policies, the Indiana Court of Appeals ruled in Federated Rural Electric Insurance Exchange v. National Farmers Union Property & Cas. Co., 805 N.E.2d 456 (Ind. App. 2004), appeal dismissed (Ind. 2005) that Federated was not entitled to obtain indemnification from National Fire for sums that it paid to settle the case under an "all sums" analysis. Rather, the court concluded that the continuing exposure to electricity resulted in a new "occurrence" in each policy year precluding the insured from electing coverage for its entire liability under any individual policy. Further, the court refused to find that National Fire had "repudiated its policies" by failing to participate in the insured's defense so as to be estopped to raise the issue of its "other insurance" clause or other policy defenses. To the contrary, the court found that although National Fire did not actually participate in the defense it had never denied coverage or asserted that it had no duty to defend.

"Personal Injury" Claims

The Indiana Supreme Court ruled in Allstate Ins. Co. v. Dana Corporation, 759 N.E.2d 1049 (Ind. 2001) that the entry of contaminants onto the property of another does not "disrupt an individual's repose" so as to give rise to a claim for invasion of privacy. While conceding that the meaning of "invasion of the rights of privacy" is "shadowy," the court refused to find coverage on the basis of any claimed ambiguity since "even the outermost reaches of the term's penumbra do not embrace a chemical transgression of the sort giving rise to Dana's environmental liability." The court failed to address the issue of "wrongful entry" since Allstate had not appealed that finding although it seemed to suggest that there would not be coverage on this basis either

Suit"

A PRP letter was held to be a "suit" for "damages" in Travelers Indemnity Company v. Summit Corporation of America, 715 N.E.2d 926 (Ind. App. 1999).

Trigger of Coverage

In Allstate Ins. Co. v. Dana Corporation, 759 N.E.2d 1049 (Ind. 2001), the Supreme Court declared that the continuing presence of pollutants in the ground and groundwater triggers coverage under successive policies. The court held that the fact that the underlying claims concededly involved a single "occurrence" for each of the sites at issue did not necessarily mean that only one policy year was available.

A "triple trigger" was adopted by the Indiana Supreme Court for DES claims in Eli Lilly & Co. v. Home Ins. Co., 482 N.E.2d 467 (Ind. 1985). On the other hand, a federal district court ruled that Eli Lilly does not compel the application of a "continuous trigger" for pollution claims. In Indiana Gas Co. Aetna Cas. & Sur. Co., 951 F.Supp. 806 (N.D. Ind. 1996), appeal dismissed, 141 F.3d 314 (7th Cir. 1998), Judge Lee ruled that the "continuing effect on the groundwater" of earlier discharges was not itself a trigger of coverage under later policies.

IOWA

"As Damages"

Superfund "response costs" were held to be covered in A.Y. McDonald Industries, Inc. v. Ins. Co. of North America, 475 N.W.2d 607 (Iowa 1991). Coverage is not required for prophylactic tasks.

"Occurrence"

In Dico, Inc. v. Employers Ins. of Wausau, 581 N.W.2d 607 (Iowa 1998), the Iowa Supreme Court ruled that the insured's contamination of its production well and soil as the result of manufacturing procedures and dust control occurring over a long period of time were not "occurrences" triggering coverage. Similarly, the Eighth Circuit held in City of Farragut v. Hartford Acc. & Ind. Co., 837 F.2d 480 (8th Cir. 1987) that coverage does not extend to harm that was the reasonably foreseeable consequence of insured's dumping of raw sewage). On the other hand, the Iowa Supreme Court ruled in West Bend Mut. Ins. Co. v. Iowa Iron Works, Inc., 503 N.W.2d 596 (Iowa 1993) that intentional acts alone do not defeat coverage. Even though the insured's dumping of spent foundry waste into a quarry was an "occurrence" as, even though the acts were intended, the resulting pollution was not.

The Iowa Supreme Court ruled that soil contamination that occurred as a consequence of coal gas manufacturing by-products (coal tar, coke, etc.) being spread because of rain and snow melt over the years was "The result of a deliberate waste disposal policy coupled with the forces of nature" and therefore was not based upon an "accident" under general liability policies issued by INA prior to 1961. Nevertheless, the court ruled in Interstate Power Co. v. INA, 603 N.W.2d 751 (Iowa 1999) that the trial court had erred in also precluding coverage under "occurrence" policies issued after 1961 as INA had not established as a matter of law that the utility had expected or intended that pollution would occur. The court declined to liken these claims, in which some of the disposal activity had been carried out by third parties and the insured's predecessors, to assault and battery cases where intent may be inferred as a matter of law since both the act and the immediate consequences of the act are foreseeable to the insured.

Pollution Exclusion

In Weber v. IMT Ins. Co., 462 N.W.2d 283 (Iowa 1990), the Iowa Supreme Court ruled that repeated, known discharges were not "accidental" even if resulting pollution was unintended. Accord A.Y. McDonald Industries, Inc. v. INA, 842 F.Supp. 1166 (D. Iowa 1993); Fireman's Fund Ins. Co. v. ACC Chemical Co., Clinton No. CL 14219 (Iowa Dist. Ct. 1992), aff'd on other grounds, 538 N.W.2d 259 (Iowa 1995).

"Absolute" Pollution Exclusion

On a certified question from a federal district court, the Iowa Supreme Court ruled in Bituminous Casualty Corp. v. Sand Livestock Systems, Inc., 728 N.W.2d 216 (Iowa 2007) that carbon monoxide that leaked out of a propane heater than had been installed by the insured was a "pollutant." The court ruled that it was error for courts to try to find ambiguity on the basis of a policy's drafting history. However, the court left open the issue of whether insured's might reasonably expect that such exclusions be limited to "traditional environmental contamination," holding that the facts necessary to assess whether insurers had done anything to instill an expectation of coverage were absent from the record before it.

Earlier, the Supreme Court had ruled in West Bend Mut. Ins. Co. v. Iowa Iron Works, Inc., 503 N.W.2d 596 (Iowa 1993) that insured's disposal of spent foundry sand was not excluded since only "wastes" that are "irritants or contaminants" should be excluded. See also First Realty, Ltd. v. Frontier Ins. Co., No. 00-3930 (8th Cir. August 6, 2004) exclusion for "claims arising out of, relating to or based upon the presence of storage tanks, hazardous materials, radon, gases or other material, irritant, contaminant or pollutant" did not necessarily defeat coverage for malpractice claims that property owners brought against the realtor for failing to disclose the presence of a former municipal solid waste disposal site and hazardous materials on the seller's disclosure statement since the underlying allegations could potentially give rise to liability based upon the insured's failure to disclose a "non-hazardous solid waste disposal site").

Personal Injury" Claims

Rejected in Fireman's Fund Ins. Co. v. ACC Chemical Co., No. CL 14219 (Iowa Dist. Ct. April 19, 1993), aff'd on other grounds, 538 N.W.2d 259 (Iowa 1995).

Scope and Allocation Issues

No reported environmental cases.

"Suit"

Iowa Supreme Court ruled in A.Y. McDonald, supra that the term "suit" is ambiguous and must be interpreted to encompass PRP claims.

Trigger of Coverage

It would appear from the Supreme Court's ruling in Interstate Power Co. v. INA, 603 N.W.2d 751 (Iowa 1999) that Iowa courts will follow an "injury in fact" approach to pollution claims.

KANSAS

"As Damages"

Split. Compare Glickman, Inc. v. Home Ins. Co., No. 93-1421 (D. Kan. June 29, 1994) with U.S.F. & G. v. Morrison Grain Co., 734 F.Supp. 437 (D. Kan. 1990).

"Occurrence"

No environmental coverage cases. In Atchison, Topeka & Santa Fe Railway Co. v. Stonewall Ins. Co., 71 P.3d 1097 (Kan. 2003), the Kansas Supreme Court ruled that the "known loss" doctrine would only preclude coverage if the insured was aware that there was a "probability" that injuries would occur. As a result, the Kansas Supreme Court declared that the railroad's early knowledge of possible problems involving noise levels rose to the level of a "probability" of injury such that the claims could be deemed to have been intended or a "known loss" under Illinois or Kansas law

Pollution Exclusion

Temporal meaning of "sudden" upheld in Farm Bureau Mut. Ins. Co. v. Laudick, 859 P.2d 410 (Kan App. 1993) and Federated Mut. Ins. Co. v. Botkin Grain Co., 64 F.3d 537 (10th Cir. 1995)(rejecting drafting history and regulatory estoppel arguments).

"Absolute" Pollution Exclusion

Kansas Supreme Court has refused to apply exclusion to damage caused by a "hostile fire." Associated Wholesale Grocers, Inc. v. Americold Corp., 934 P.2d 65 (Kan. 1997). Earlier, the exclusion was upheld in Crescent Oil Co. v. Federated Mut. Ins. Co., 888 P.2d 269 (Kan. App. 1995)(LUST clean up) and City of Salina, Kansas v. Maryland Cas. Co., 856 F.Supp. 1467 (D. Kan. 1994)(discharge of alkaline wastewater from ruptured sewer). But see Westchester Fire Ins. Co. v. City of Pittsburgh, Kansas, 768 F.Supp. 1463 (D. Kan. 1991)(pesticide spraying) and Regent Ins. Co. v. Holmes, 835 F.Supp. 579 (D. Kan. 1993)(accidental release of commercial product).

In Atlantic Avenue Associates v. Central Solutions, Inc., 24 P.3d 188 (Kan. App. 2001), the Kansas Court of Appeals ruled that there was no coverage for the cost of cleaning up a spill of liquid cement cleaner from a 55 gallon drum on the insured's premises. The court declared that the cement cleaner in question was plainly a "pollutant" in light of the description of its toxic propensities in the Materials Safety Data Sheet accompanying it, despite the insured's argument that it should not exclude "finished consumer products" or indoor releases.

Scope and Allocation Issues

In Atchison, Topeka & Santa Fe Railway Co. v. Stonewall Ins. Co., 71 P.3d 1097 (Kan. 2003), the Kansas Supreme Court rejected the trial court's conclusion that the insurers were jointly and severally liable. The court declared that the "concept of joint and several liability is not consistent with the term 'all sums' in the policies. It also clearly contradicts the fundamental insurance agreement to indemnify the insured for injuries during a specified policy period. We cannot ignore the stated terms of the policies, nor the reality of SIRs as primary insurance where the expectation and intent is to provide excess coverage." The Supreme Court ruled, therefore, that the case should be remanded to the trial court for a determination with respect to whether the total damages exceeded the underlying self-insured retentions during the triggered period of time.

"Suit"

Trial court ruled that PRP letter was a "suit" in Harpool, Inc. v. Trinity Universal Ins. Co., No. 89 C 702 (Kansas Dist. Ct. November 17, 1989).

Trigger of Coverage

In Atchison, Topeka & Santa Fe Railway Co. v. Stonewall Ins. Co., 71 P.3d 1097 (Kan. 2003), the Kansas Supreme Court declared that a Keene-style "continuous injury" trigger of coverage was appropriate for latent disease claims, including those seeking recovery for noise induced hearing loss. The court also refused to find that the insured was required to establish that injury had actually occurred in each of the underlying cases that it had settled, declaring that it was sufficient that the insured had brought forward believable evidence that this is what the plaintiffs were claiming.

The Eighth Circuit rejected an "installation trigger" in Transcontinental Ins. Co. v. W.G. Samuels Co., Inc., No. 03-2564 (8th Cir. June 4, 2004), ruling instead that the trigger of coverage for property damage resulting from the faulty installation of the insured's carpet in the plaintiff's school was the point in time when the carpet peeled away from the adhesive and concrete slab beneath it. The court distinguished case in which property damage had occurred at the time of installation but remained concealed from property owners for a period of time thereafter, as in the case of asbestos.

KENTUCKY

"As Damages"

In Aetna Cas. & Sur. Co. v. Commonwealth of Kentucky, No. 2002-SC-307 (Ky. September 22, 2005), a divided Kentucky Supreme Court ruled that PRP claims arising out of the Maxey Flats Superfund site are a "suit" for "damages." Two dissenting justices contended that the majority had erred in finding that site improvement measures were covered "damages" and that preliminary claims correspondence from the U.S. EPA was not a "suit."

"Occurrence"

Coverage found in the absence of any subjective intent to cause pollution in James Graham Brown Foundation v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273 (Ky. 1991). This ruling is in apparent conflict with an earlier federal court decision, in which the Sixth Circuit had ruled in USF&G v. Star Fire Coals, 856 F.2d 31 (6th Cir. 1988) that damage to adjoining property owner caused by routine emissions of coal dust from insured's plant was "accidental" since, while the discharges were intended, the resulting damage was not.

More recently, the Supreme Court declared in Aetna Cas. & Sur. Co. v. Commonwealth of Kentucky, No. 2002-SC-307 (Ky. September 22, 2005) that an insured was entitled to a new trial for claims arising out of the Maxey Flats Superfund site due to an improper jury instruction. The court held that a new trial was required on the issue of fortuity since the jury's verdict against the insured reflected an instruction that had improperly focused on whether the damages were expected or intended, not the pollution, in violation of its analysis in James Graham Brown. Two dissenting justices contended that the jury had properly concluded that the pollution was not fortuitous.

Pollution Exclusion

Upheld in Transamerica Ins. Co. v. Duro Bag Mfg. Co., 50 F.3d 370 (6th Cir. 1995) and USF&G v. Star Fire Coals, Inc., 856 F.2d 31 (6th Cir. 1988). In Duro Bag, the Sixth Circuit rejected a waste generator's arguments that Star Fire Coals no longer accurately reflected Kentucky law or that discrete discharges or secondary migrations of earlier releases should be viewed as "sudden." The court also refused to consider evidence of "drafting history."

"Absolute" Pollution Exclusion

Court of Appeals ruled that the exclusion should not be given overbroad effect, holding in Motorists Mutual Ins. Co. v. RSR, Inc., 926 S.W.2d 679 (Ky. App. 1996) that an

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insured would not have reasonably foreseen that carbon monoxide poisoning claims are excluded. In State Auto Mut. Ins. Co. v. Greenrose, 2005-CA-000607 (Ky. App. December 15, 2005), the Kentucky Court of Appeals ruled that the exclusion did not apply to an incident in which the insured slipped on his basement stairs and, in an effort to arrest his fall, pulled loose a pipe that then spilled diesel fuel into the basement. The Court concluded that although the words of the exclusion were unambiguous on their face, they might nonetheless be found ambiguous in the context of the particular facts of a case such as this that held that an ordinary person would not understand this provision to exclude coverage for a broken basement pipe and that such an analysis was inconsistent with the fact that the exclusion was adopted by the insurance industry to deal with intentional industrial pollution.

The U.S. District Court had earlier ruled that the exclusion precludes coverage for damage to customer's facility caused by contractor's negligent release of ammonia fumes. Bituminous Cas. Co. v. RPS Co., 915 F.Supp. 882 (W.D. Ky. 1996). See also West American Ins. Co. v. City of Southgate, Ky., C.A. No. 91-17 (E.D. Ky. January 22, 1992).

"Personal Injury" Claims

No reported environmental cases.

Scope and Allocation Issues

In Aetna Cas. & Sur. Co. v. Commonwealth of Kentucky, 179 S.W.3d 830, 842 (Ky. 2005), the Kentucky Supreme Court rejected an "all sums" argument where the insurer had issued a single year multi-year policy and held instead that the insured's claim should be allocated throughout the period of loss. See also Liberty Mut. Fire Ins. Co. v. Harper Industries, 2007 U.S. Dist. LEXIS 10753 (W.D. Ky. February 12, 2007)(claims involving the insured's defective concrete should be apportioned on a "pro rata" basis, rejecting the insured's joint and several approach).

"Suit"

In Aetna Cas. & Sur. Co. v. Comm. of Kentucky, 179 S.W.3d 830, 842 (Ky. 2005), a divided Kentucky Supreme Court ruled that PRP claims arising out of the Maxey Flats Superfund site are a "suit" for "damages." Two dissenting justices contended that the majority had erred in finding that site improvement measures were covered "damages" and that preliminary claims correspondence from the U.S. EPA was not a "suit."

Trigger of Coverage

No reported environmental cases.

LOUISIANA

"As Damages"

The Louisiana Court of Appeals ruled in Norfolk Southern Corp. v. California Union Insurance Co. 2003 La. App. LEXIS 2459 (La. App. September 12, 2003) that environmental clean up costs should be treated as "damages." Earlier, a federal district court had found that Louisiana "has long treated clean-up costs as part of the general measure of damages" available under its laws. GAF Corp. v. Continental Cas. Co., No. 87-3272 (E.D. La. Jan. 12, 1989).

"Occurrence"

Fifth Circuit ruled in Ashland Oil Co. v. Miller Oil Purchasing Co., 678 F.2d 1293 (5th Cir. 1982) that a corporation was bound by action of corporate officer who knowingly discharged pollutants through pipeline into Ashland's oil refinery, causing intended injury. In Georgia-Pacific Corp. v. Granite State Ins. Co., No. 90-1195 (E.D. La. July 9, 1995), the federal district court ruled that the contamination of drinking water was the highly foreseeable result of insured's intentional pumping of overflowing lagoon into river and therefore not covered.

Pollution Exclusions

On December 19, 2000, the Supreme Court ruled 4-3 that such exclusions are only meant to apply to "active polluters." In Doerr v. Mobil Oil Corporation, 774 So.2d 119 (La. 2000), the court was asked to consider a ruling of the Appeals Court that the pollution exclusion precluded coverage for claims against a municipality whose residents claimed personal injuries as a result of ingesting contaminated water that had entered the municipal water supply due to an oil spill from a Mobil refinery on the Mississippi River. The majority concluded that "there is no history in the development of this exclusion to suggest that it was ever intended to apply to anyone other than an active polluter of the environment." Whereas the court's 1999 opinion in Ducote had declared that there should be no distinction between "active" and negligent polluters, the Doerr court ruled that such a distinction is mandated by the drafting history of the exclusion and the regulatory intent of the Louisiana Insurance Commissioner. The court therefore ruled that "in light of the origin of pollution exclusions, as well as the ambiguous nature and absurd consequences which attend a strict reading of these provisions, we now find that the total pollution exclusion was neither designed nor intended to be read strictly to exclude coverage for all interactions with irritants or contaminants of any kind." Instead, we find that "it is appropriate to construe a pollution exclusion in light of its general purpose, which is to exclude coverage for environmental pollution and, under such interpretation, the clause will not be applied to all contact with substances that may be classified as pollutants."

While Doerr was still pending, the Louisiana Insurance Department announced in *Morrison Mahoney LLP (Copyright 2007)*.

June 2000 that it planned to implement a regulation invoking the restrictions that the Commissioner had sought to impose in June 1997 restricting the scope of the absolute pollution exclusion to environmental damage and cases where the insured was an “intentional active industrial polluter.” Since then, however, the new Louisiana Insurance Commissioner has withdrawn Regulation 73 and has approved ISO pollution forms.

“Personal Injury”

The Fifth Circuit refused to permit pollution liability coverage on this basis in A.J. Gregory v. Tennessee Gas Co. 948 F.2d 202 (5th Cir. 1991).

Scope and Allocation Issues

“Time on the risk” approach was adopted for various pollution claims by the Louisiana Court of Appeals in Norfolk Southern Corp. v. California Union Insurance Co. 2003 La. App. LEXIS 2459 (La. App. September 12, 2003). The Court of Appeals” overturned a trial court ruling that the insured could “pick and choose” among any triggered policy.

Trigger of Coverage

"Exposure" trigger adopted for asbestos personal injury claims. Cole v. Celotex, 588 So.2d 376 (La. App. 1991), aff'd, 599 So.2d 1058 (La. 1992).

On the other hand, several Louisiana cases have used a “manifestation” trigger for latent property damage cases. See Alberti v. Welco Manufacturing Co., 542 So.2d 964 (La. App. 1990)(installation of sheetrock during policy did not trigger coverage since third party injury occurred after policy expired) and James Pest Control, Inc. v. Scottsdale Ins. Co., 765 So.2d 485 (La. App. 2000), review denied, 772 So.2d 657 (La. 2000)(termite damage).

MAINE

"As Damages"

Superfund "response costs" were deemed not to be "damages" in Patrons Oxford Mut. Ins. Co. v. Marois, 573 A.2d 16 (Me. 1990). In 1997, Marois barely survived a policyholder challenge, when the Law Court split 3-3 in Moore v. Central Maine Power Co., 692 A.2d 943 (Me. 1997). Although it found coverage on the basis of an excess policy that covered "all sums which the assured shall by law become legally liable to pay...."

"Occurrence"

No reported environmental cases. Maine generally follows a subjective test for determining whether injuries were expected or intended by the insured.

Pollution Exclusion

The First Circuit has affirmed a Maine court's ruling that a liability insurer had a duty to defend third party complaint alleging that an asphalt batching plant whose property allegedly contaminated to the pollution of the Penobscot River. In Barrett Paving Materials, Inc. v. Continental Cas. Co., No. 06-1951 (1st Cir. May 30, 2007), the court ruled that the underlying suit, which only alleged that pollutants from the Barrett Paving facility had found their way to the Penobscot River via sewers and tidal action but did not say when or how, was not inconsistent with the possibility of "sudden and accidental" discharges.

In A. Johnson & Co., Inc. v. The Aetna Cas. & Sur. Co., 741 F.Supp. 298 (D. Mass. 1990), aff'd, 933 F.2d 66 (1st Cir. 1991) that Maine would bar coverage for on-going planned disposal activity, even where the claim is presented by a waste generator. An earlier state case, Travelers Ind. Co. v. Dingwell, 414 A.2d 220 (Me. 1980), had seemingly adopted a temporal meaning of "sudden" but held that allegations concerning the prolonged migration of pollutants that were already in the environment did not preclude a duty to defend since the complaint was silent as to how the pollutants were originally discharged into the environment.

"Absolute" Pollution Exclusion

Although the First Circuit upheld the absolute pollution exclusion in the context of an oil spill clean up on the insured's own property (Guilford Industries, Inc. v. Liberty Mutual Ins. Co., 682 F.Supp. 792 (D. Maine 1988), aff'd per curiam, 879 F.2d 853 (1st Cir. 1989)), it has refused to extend its scope to "non-environmental" claims. In Nautilus Ins. Co. v. Jabar, 188 F.3d 127 (1st Cir. 1999), the court ruled that the exclusion was ambiguous as applied to claims by office workers who were exposed to toxic fumes from a contractor's operations because "an ordinarily intelligent insured could reasonably interpret the pollution

exclusion clause as only applying to environmental pollution.”

A federal magistrate issued a report in Clark’s Cars & Parts, Inc. v. Monticello Ins. Co., 2005 U.S. Dist. LEXIS 26733 (D. Me. November 4, 2005) recommending that summary judgment enter for various insurers whose policies contained absolute pollution exclusions, holding that these exclusions precluded coverage for allegations by neighboring property owners that their groundwater and well water had been contaminated as the result of gasoline containing MTBE that had spilled out of the insured’s auto salvage and junk yard operation. The court rejected the insured’s contention that issues of fact remained as to whether its premises were a “waste site” or whether said claims fell within an exception to the St. Paul exclusion for damage that results from “your completed work, other than waste products or completed work.”

"Suit"

Claim letters are not a "suit." Patrons Oxford Mut. Ins. Co. v. Marois, 573 A.2d 16 (Me. 1990). See also A. Johnson, *supra*.

Trigger of Coverage

No pollution cases.

MARYLAND

"As Damages"

Clean up costs are covered but only if the claim is presented by the actual owner of the polluted property. In Bausch & Lomb, Inc. v. Unigard Mut. Ins. Co., 625 A.2d 1021 (Md. 1993) the Court of Appeals ruled that neither the United States nor the State of Maryland owned or had a sufficient proprietary interest in the polluted groundwater to support a claim for "damages." Bausch & Lomb rejected an earlier line of authority based on Maryland Cas. Co. v. Armco, Inc., 822 F.2d 1348 (4th Cir. 1987), which had held that Superfund clean-up costs are an equitable form of relief and not "damages." Mitigation expenses held not covered in and Baltimore Gas & Electric Co. v. Certain Underwriters at Lloyd's, London, 113 Md. App. 540, 688 A.2d 496 (1998) and Schlosser v. INA, 600 A.2d 836 (Md. 1992).

"Occurrence"

Federal district court ruled in Alcolac, Inc. v. St. Paul Fire & Marine Ins. Co., 716 F.Supp. 1541 (D. Md. 1989) that on-going discharges from insured's chemical plant were either intended or the result of the insured's conscious disregard for safety and therefore not an "occurrence." On the other hand, the court ruled in Steyer v. Westvaco Corp., 450 F.Supp. 384 (D. Md. 1978) that damage to neighboring crops from the insured factory emissions was an "occurrence" absent proof of intent to harm, even though the emissions continued over a period of three years.

Pollution Exclusion

Held to bar coverage for gradual releases in ARTRA Group, Inc. v. American Motorists Ins. Co., 659 A.2d 1295 (Md. 1995). But see Bentz v. Mutual Fire, Marine & Inland Co., 83 Md. App. 524, 575 A.2d 795 (1990)(exclusion inapplicable to pesticide sprayings as that was the business for which the insurance was purchased). Prior to 1983, the Maryland Insurance Commissioner did not permit the use of the exclusion.

"Absolute" Pollution Exclusion

The Court of Appeals declared in Clendenin Bros. v. U.S. Fire Ins. Co., 390 Md. 449, 889 A.2d 387 (Md. 2006) that a "total" pollution exclusion did not eliminate an insurer's duty to defend personal injuries caused by exposure to manganese fumes from the insured's welding products. The court concluded that such exclusions were not intended to apply to claims involving noxious workplace fumes as, "welding fumes emitted during the normal course of business appears to be the type of harm intended to be included under coverage for routine commercial hazards." See also Sullins v. Allstate Ins. Co., 340 Md. 503, 667 A.2d 617 (1995)(indoor lead exposures not excluded).

"Suit"

EPA claim letter found to be a "suit" by trial court in Bausch & Lomb.

Scope and Allocation Issues

A "time on the risk" approach was approved for lead poisoning claims in Riley v. USAA, 161 Md. App. 573, 871 A.2d 599 (2005), cert. granted 879 A.2d 42 (Md. 2005). In cases involving asbestos, environmental and lead exposures the Court of Special Appeals observed that successive policies are triggered so long as the plaintiffs can prove that additional damage occurred during later policy periods but that the overall amount of loss should be allocated either in proportion to the amount of damages that can be shown to have occurred in each year, if such evidence is available, or in the alternative should be pro-rated among the policies according to the insurer's "time on the risk."

The U.S. Court of Appeals declared in Jones v. Liberty Mut. Ins. Co., No. 02-2389 (4th Cir. October 6, 2004) that a federal district court did not err in following City of Baltimore for asbestos BI claims in In Re The Wallace and Gale Company, 275 B.R. 223 (D. Md. 2002), aff'd 385 F.3d 820 (4th Cir. 2004). The trial court had ruled that Bausch & Lomb had not clearly adopted a "time on the risk" approach nor was there anything in the policy that required allocation of gaps to the policyholder. Further, the court found that an "all sums" approach was more in keeping with the "joint and several" tort liability that Wallace and Gale faced in the underlying asbestos cases.

Trigger of Coverage

Maryland Court of Appeals has adopted an "injury in fact" approach, declaring in Harford County v. Harford Mut. Ins. Co., 610 A.2d 286 (Md. 1992) that pollution claims are not necessarily limited to coverage in the year that pollution is discovered. See also, Maryland Cas. Co. v. Lloyd E. Mitchell, 324 Md. 44, 595 A.2d 469 (1991)(adopting "exposure" trigger for asbestos personal injury cases) and Chantel Associates v. Mt. Vernon Fire Ins. Co., 338 Md. 131, 656 A.2d 779 (1995) (exposure to lead paint during the insurer's policy is a "trigger" of coverage).

MASSACHUSETTS

"As Damages"

Superfund "response costs" were held to be covered in Hazen Paper v. USF&G, 555 N.E.2d 576 (Mass. 1990), so long as they are for pollution that has already occurred.

"Occurrence"

Pollution is not expected or intended just because an insured knowingly contracts to have hazardous materials disposed of at a licensed third party facility. Polaroid Corp. v. The Travelers Ind. Co., 610 N.E.2d 912 (Mass. 1993) and Nashua Corp. v. American Home Assur. Co., 648 N.E.2d 1272 (Mass. 1995). The Appeals Court later ruled in Utica Mutual Ins. Co. v. Printed Circuit Design, Inc., 708 N.E.2d 145 (Mass. App. 1999) that property damage caused by the insured's willful failure to respond to problems were not an "occurrence" because, whether or not the insured intended to cause injury, the damage was plainly "substantially certain" to occur. "Given the continuous and extensive nature of the spills and leaks... the inevitability of harm seems plain."

Pollution Exclusion

The Supreme Judicial Court has variously ruled that the exclusion is (1) unambiguous; (2) focuses on the discharge of pollution, not the resulting harm; (3) precludes coverage for gradual contamination unless it commences abruptly; and (4) does not cover discharges that are caused intentionally, whether by the insured or some third party. Lumbermens Mut. Cas. Co. v. Belleville Ind., Inc., 555 N.E.2d 568 (1990); Hazen Paper, supra; Liberty Mut. Ins. Co. v. SCA Services, Inc., 588 N.E.2d 1346 (Mass. 1992); Goodman v. Aetna Cas. & Sur. Corp., 593 N.E.2d 233 (Mass. 1992); Polaroid Corp. v. The Travelers Ind. Co., 610 N.E.2d 912 (Mass. 1993). However, in Nashua Corp. v. American Home Assur. Co., 648 N.E.2d 1272 (Mass. 1995), the SJC ruled that summary judgment was inappropriate where the insured came forward with evidence of discrete extraordinary releases, such as fires, that might be "sudden." In Highlands Ins. Co. v. Aerovox, Inc., 424 Mass. 226 (1997), the court held that isolated releases will only be considered if they can be shown by the insured to have had more than a *de minimis* effect. The court also ruled that insureds have burden of proving "sudden and accidental" discharge.

"Absolute" Pollution Exclusion

The Supreme Judicial Court is expected to rule in mid-2007 on an insurer's appeal of a lower court's declaration in McGregor v. Allamerica Ins. Co., 2005 Mass. Super. LEXIS 636 (Mass. Super. December 15, 2005) that the exclusion is limited to pollution that occurs in an industrial context and therefore did not apply to the clean up of oil that spilled from a defective oil burner that an insured contractor had serviced years earlier. In light of the *Morrison Mahoney LLP (Copyright 2007)*.

statement in Gill that such exclusions should not be applied reflexively merely because an accident involved pollutants, coverage was required since this loss involved injuries resulting from everyday activities gone slightly awry. The court found damages had not occurred in an industrial context and that a reasonable insured would not have expected the pollution exclusion to apply to damages caused by a broken oil burner.

In earlier opinions, the court has ruled that the exclusion only applies to pollution that occurs in an "industrial" or "environmental" setting and does not bar coverage for releases that inadvertently occur in the routine course of the insured's business activities. Western Alliance Ins. Co. v. Gill, 426 Mass. 115 (1997)(CO fumes inside restaurant). See also Atlantic Mut. Ins. Co. v. McFadden, 595 N.E.2d 762 (Mass. 1992)(lead poisoning claims not excluded). Gill cited two earlier rulings of the First Circuit that, in the SJC's view, properly applied the exclusion to industrial or environmental contamination. See Dryden Oil Co. of New England v. The Travelers Ind. Co., 91 F.3d 1278 (1st Cir. 1996)(landlord's suit against tenant for spill of industrial chemicals); U.S. Liability Ins. Co. v. Bourbeau, 49 F.3d 786 (1st Cir. 1995) (property damage caused by paint deleading operations).

"Personal Injury" Claims

Despite its 1990 holding in Titan, First Circuit recently ruled in Dryden Oil, supra, that "invasion" coverage only extends to suits by tenants against landlords.

Scope and Allocation Issues

For the most part, Massachusetts courts have adopted an "all sums" approach. In Rubenstein v. Royal Ins. Co., 44 Mass. App. Ct. 842, 694 N.E.2d 381 (1998), the Appeals Court ruled that a trial court had not erred in refusing to apportion the insureds' damages among all of the years in which pollution occurred holding that each insurer is jointly and severally liable for the entire claim. As the trial court had concluded that property was continuously being contaminated by the leakage of oil during Royal's 1969-72 policy, the Appeals court ruled that it was this continuous exposure to contaminants that was decisive and that Royal's claim for allocating damage awards among other years of coverage must fail. The Appeals Court ruled in Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyds, 59 Mass. App. Ct. 646, 797 N.E.2d 424 (2003)(Illinois law) that a Superior Court had correctly ruled that a polluter was entitled to recover the entirety of its loss under certain umbrella policies issued before 1970. See also Boston Gas v. Century Ind. Co., No. 01-12062 (D. Mass. June 21, 2006)(opining that there is no reason to believe the Supreme Judicial Court would not follow "all sums" approach).

Massachusetts courts have ruled that even where insurers are deemed to be jointly and severally liable for a continuing loss, the insurer that is ultimately required to accept coverage is entitled to an off-set reflecting sums that the insured has previously received in settlement from other carriers. See Rubenstein, 694 N.E.2d at 381. "Any award of

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damages against the insurer which did not credit the settlement seems to provide cumulative damages for indemnity.” In Liberty Mutual Ins. Co. v. Black & Decker Corp., 383 F.Supp.2d 200 (D. Mass. 2004), a federal district court asked to consider how much of an offset Liberty Mutual, which had denied coverage for the underlying pollution claims, could claim as an offset against its liabilities based on earlier settlements that the insured had negotiated with Aetna. Judge Woodlock ruled that Liberty Mutual’s right to an offset only extended to that portion of sums paid by Aetna that could be allocated to these particular sites. If the settlement itself does not specify the amount allocable to each site, the court suggested that an appropriate method of allocation would be to divide the amount of damages attributable to the sites by the total amount of damages, multiply that ratio by the amount of the Aetna settlement and then subtract that product from the damages attributable to these two sites.

The Supreme Judicial Court ruled in A.W. Chesterton Co. v. Massachusetts Insurers Insolvency Fund, 445 Mass. 802, 838 N.E.2d 1237 (2004) that the MIIF is the insurer of last resort and affirmed a lower court’s determination in an asbestos case that it has no duty to pay so long as any solvent insurance is available in other years. The SJC also ruled, however, that insofar as any of these insolvent policies contained a duty to defend, the Fund would have an independent duty to pay defense costs that would arise once all other conventional policies containing a “duty to defend were exhausted. The court rejected the MIIF’s argument that its defense duties were excess of any policy that provided for the payment of defense costs as part of the insured “loss.”

The First Circuit ruled in One Beacon Ins. Co. v. Georgia Pacific Corp., 06-1993 (1st Cir. January 18, 2007) that even though a policy was issued after only a few months, the limits of coverage were owed in full and could not be pro-rated to reflect the shortened period of coverage.). Despite One Beacon’s argument that the limit should be pro rated since it was described as being “in the aggregate for each annual period during the currency of this policy, the Court refused to find that the “each annual period” language required that the limits be mechanically pro rated to reflect the days, weeks or months of the actual coverage. The Court ruled that the full policy limit was owed whether or not the liabilities giving rise to that obligation were limited to a specific event during the stub period or, as here, straddled the periods before, during and after the policy in question the Court ruled that “the problem of allocating a continuing loss among the many insurers who were on the risk for the loss is not peculiar to short term policies, nor is it an excuse for a Court to alter express policy limits.” Rather, the Court suggested that such issues be resolved by reference to “other insurance” clauses or prior insurance and non cumulation clauses or rules for allocation.

"Suit"

PRP letter deemed to be a suit in Hazen Paper. However, a private claim under the Massachusetts Superfund statute was held not to involve a "suit" in Zecco, Inc. v. Travelers Indemnity Co., 938 F.Supp. 65 (D. Mass. 1996).

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Trigger of Coverage

"Manifestation" rejected as sole trigger in Tufts University v. Commercial Union, 616 N.E.2d 68 (Mass. 1993)(pollution), holding instead that successive insurers had duty to defend based on allegations of continuing pollution. Although not explicitly set forth in Tufts, the facts of the case imply that even pollution that continues after actual disposal activities cease will trigger coverage under later policies. However, the court will not permit coverage past the date that loss becomes known to insured. See SCA Services, Inc. v. Transportation Ins. Co., 646 N.E.2d 394 (Mass. 1995). *But see* U.S. Liability Ins. Co. v. Selman, 70 F.3d 684 (1st Cir. 1995)(imposing requirement of subjective intent).

MICHIGAN

"As Damages"

Superfund response costs were held covered by Court of Appeals in Polkow v. Citizens Ins. Co., 447 N.W.2d 569 (Mich. App. 1989); Upjohn Co. v. New Hampshire Ins. Co., 444 N.W.2d 813 (Mich. App. 1989); and U.S. Aviex Co. v. Travelers Ins. Co., 336 N.W.2d 838 (Mich. App. 1983). But see Timothy Jones v. Farm Bureau Mut. Ins. Co., 431 N.W.2d 242 (Mich. App. 1988)(abatement of pig farm nuisance not "damages"). On the other hand, the Michigan Supreme Court has suggested that normal costs of doing business, including costs of complying with environmental regulations, are not covered. American Bumper and Manufacturing Co. v. Hartford Fire Ins. Co., 550 N.W.2d 475 (Mich. 1996).

"Occurrence"

The Michigan Supreme Court ruled in Arco Industries Corp. v. American Motorists Ins. Co., 448 Mich. 395, 531 N.W.2d 168 (1995) that evidence that insured intentionally flushed known pollutant through plant's drainage system did not establish subjective intent to injure the environment). See also South Macomb Disposal Authority v. American Ins. Co., 22 Mich. App. 635, 572 N.W.2d 686 (1997)(finding "occurrence" in the absence of subjective intent to pollute by landfill operator). But see City of Bronson v. American States Ins. Co., 215 Mich. App. 612, 546 N.W.2d 702 (1996)(pollution resulting from the long-term disposal of wastes materials at municipal landfill was not an "occurrence"). Earlier cases had sometimes barred coverage where pollution occurred as a routine concomitant of the insured's industrial production or waste disposal operations. See American States Ins. Co. v. Maryland Cas. Co., 587 F.Supp. 1549 (E.D. Mich. 1984)

Pollution Exclusion

Since the landmark Supreme Court rulings in 1991, Michigan courts have consistently ruled that the exclusion bars coverage for gradual or intentional releases. However, in American Bumper, supra, the Supreme Court ruled that insurers must defend if the facts are not clear that the discharges were "sudden and accidental" or not. At the same time, however, the court declined to grant review of Traverse City Light and Power Board v. The Home Ins. Co., 530 N.W.2d 150 (Mich. App. 1995), in which the Court of Appeals had ruled that an insurer had no duty to defend since evidence that the insured had discharges wastes twice a week over a twelve year period precluded any suggestion that the discharges were "sudden." Accord, City of Bronson v. American States Ins. Co., 546 N.W.2d 702 (Mich. App. 1996)(intentional releases into lagoon).

Apart from questions as to the requisite burden of proof, the Supreme Court has left

open the issue of whether the focus of the exclusion is on the "initial discharge" or the subsequent release from the landfill. Auto Owners Ins. Co. v. City of Clare, 521 N.W.2d 480 (Mich. 1994). "Secondary discharge" theory has seemingly been adopted by Michigan courts. County of Kent v. Home Ins. Co., , 219 Mich. App. 250, 551 N.W.2d 424 (1996), vacated on other grounds, 1997 Mich. LEXIS 2121 (Mich. August 29, 1997) and South Macomb Disposal Authority v. American Ins. Co., 572 N.W.2d 686 (Mich. App. 1997). But see South Macomb Disposal Authority v. Westchester Fire Ins. Co., 239 Mich. App. 344, 608 N.W.2d 814 (2000)("secondary discharge" analysis limited to locations where the pollutants were meant to be contained or collected).

The Court of Appeals ruled that an abrupt discharge does not cease to be "sudden" merely because the resulting pollution is not discovered for a period of time afterwards. Federated Mut. Ins. Co. v. Auto-Owners Ins. Co., 1995 WL 855426 (Mich. App. September 8, 1995), leave to appeal denied, 550 N.W.2d 790 (Mich. 1996).

"Absolute" Pollution Exclusion

The exclusion has been given broad effect in a few cases. See, e.g. McGuire Sand and Gravel, Inc. v. Meridian Mutual Ins. Co., 559 N.W.2d 93 (Mich. App. 1996)(exclusion is just as described--"absolute"); Aetna Casualty & Surety Co. v. Dow Chemical Co., 933 F.Supp. 675 (E.D. Mich. 1996) and South Macomb Disposal Authority v. Michigan Municipal Risk Mgt. Authority, 526 N.W.2d 3 (Mich. App. 1994).

In Meridian Mutual Ins. Co. v. Kellman, 197 F.3d 1178 (6th Cir. 1999), the Sixth Circuit held that there has not been a "discharge" if the plaintiff's injuries occur in the immediate vicinity of the area where a commercial product is being applied. In such circumstances, the Sixth Circuit ruled that there had not been any " But see Gulf Ins. Co. v. City of Holland, 2000 U.S. Dist. LEXIS 19602 (W.D. Mich. April 3, 2000)(emission of chlorine gas from insured's treatment plant clearly involved the "discharge" of a pollutant). An exclusion that expressly extended to products liability claims was upheld by the Michigan Court of Appeals in McKusick v. Travelers Ind. Co., 2001 WL 637676 (Mich. App. June 8, 2001)(distinguishing Kellman). Relying on McKusick, the Court of Appeals declared in Carpet Workroom v. Auto Owners Ins. Co., No. 223646 (Mich. App. May 10, 2002)(unpublished) that the exclusion barred suits by office workers who inhaled various chemicals that were used by the insured's subcontractor to install carpeting.

However, the exclusion has been held not to defeat coverage for claims brought by a service station operator against the contractor that installed gasoline containment systems.

In Oscar W. Larson Co. v. United Capitol Ins. Co., 64 F.3d 1010 (6th Cir. 1995), the Court ruled that the exclusion for any "governmental direction or request" only applied to governmental claims and could not be parsed into (1) a "governmental direction" and (2) a request by any party. The court also ruled that the "operations" portion of the first part of the exclusion did not apply.

"Personal Injury" Claims

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Efforts by policyholders to obtain “personal injury” coverage for environmental claims were rejected in South Macomb Disposal Authority v. American Ins. Co., 572 N.W.2d 686 (Mich. App. 1997); Harrow Products, Inc. v. Liberty Mut. Ins. Co., 64 F.3d 1015 (6th Cir. 1995)(governmental claims) and Aetna Casualty & Surety Co. v. Dow Chemical Co., 933 F.Supp. 675 (E.D. Mich. 1996)(private claims).

Scope and Allocation Issues

The Michigan Court of Appeals has reached contradictory conclusions with respect to whether long-tail losses may be pro-rated or not. In Arco Industries Corp. v. American Motorists Ins. Co., 232 Mich. App. 146, 594 N.W.2d 61 (1998), the court adopted a “time on the risk” analysis in a pollution case and rejected the policyholder’s contention that each insurer was jointly liable for “all sums,” declaring instead that Supreme Court’s “injury in fact” trigger ruling in Gelman made clear that insurers are only liable for that portion of damage occurring during their policy period. The Arco analysis was rejected a year later in Dow Corning v. Continental Cas. Co., No. 200143 (Mich. App. October 12, 1999), however. In an unpublished opinion, the Court of Appeals ruled that the “all sums” language in the defendants’ policies imposed an independent obligation to pay in full without regard to “time on the risk” or any other sort of pro-ration (although the court declined to adopt the specific terminology of “joint and several” liability since that is a tort concept).

Most recently, however, the Court of Appeals has reaffirmed a “time on the risk” approach, holding in Wolverine Worldwide, Inc. v. Liberty Mutual Ins. Co., No. 260330 (Mich. App. March 8, 2007). that loss should be allocated from the date of first disposal activity through the dates that the sites were remediated. As a result, the loss was fully absorbed by insured’s SIRs and did not trigger any of the umbrella policies.

“Suit”

By a vote of 4-3, the Michigan Supreme Court ruled that PRP letters are a “suit” in Michigan Millers Ins. Co. v. Bronson Plating, 519 N.W.2d 864 (Mich. 1994).

Trigger of Coverage

The Michigan Supreme Court ruled that “manifestation” is not the sole trigger for pollution liability claims, adopting instead a broad “injury in fact” analysis. In Gelman Sciences, Inc. v. Fidelity & Cas. Co., 572 N.W.2d 617 (Mich. 1998), the court set forth the following test: “where a plaintiff can show that property damage occurred sometime within one or several of the relevant policy periods, and the plaintiff presents credible evidence (such as expert testimony) that fairly supports that plaintiff’s claims regarding when property damage occurred, courts should accept such evidence as dispositive.”

MINNESOTA

"As Damages"

Clean up costs held covered by Minnesota Supreme Court in Minnesota Mining & Manufacturing Corp. v. The Travelers Indemnity Corp., 457 N.W.2d 175 (Minn. 1990). In SCSC v. Allied Mut. Ins. Co., 533 N.W.2d 603 (Minn. 1995), the court also ruled that costs incurred in response to governmental clean up orders are *per se* "damages."

"Occurrence"

Minnesota Supreme Court ruled in Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724 (Minn. 1997) that a trial court did not err in refusing to give an instruction of "expected" pollution in the absence of evidence that the insured subjectively expected, to a high degree of certainty, that pollution of the same general sort would occur. Earlier cases had suggested that objective factors might be controlling. See Bituminous Cas. Co. v. Tonka Corp., 9 F.3d 51 (8th Cir. 1993)(insured's on-going and routine disposal of waste chemicals that it knew were toxic was not an "accident" or "occurrence" whether or not it was fully aware of environmental harm that would result) and Dakhue Landfill, Inc. v. Employers Ins. of Wausau, 508 N.W.2d 798 (Minn. App. 1993)(no "occurrence" where the insured knew as early as 1972 that its on going operation of the landfill was causing groundwater contamination and pollution).

The state Court of Appeals ruled in Gopher Oil Co. v. American Hardware Mutual Ins. Co., 588 N.W.2d 756 (Minn. App. 1999) that an insured's contemporaneous awareness that the surface disposal of certain substances could result in odor and visual problems or could cause surface runoff did not mandate a finding that the insured had expected or intended that groundwater contamination would also occur.

Pollution Exclusion

"Sudden" has a temporal meaning. Board of Regents of the University of Minnesota v. Royal Ins. Co., 517 N.W.2d 888 (Minn. 1994). In Anderson v. Minn. Ins. Guarantee Assoc., 534 N.W.2d 706 (Minn. 1995), the Minnesota Supreme Court rejected a "regulatory estoppel" challenge as being inconsistent with the ordinary meaning of "sudden."

The burden of proving a "sudden and accidental" discharge is on the insured. SCSC v. Allied Mut. Ins. Co., 533 N.W.2d 603 (Minn. 1995).

In landfill cases, the focus of the exclusion is on time when pollutants leach out. However, this rule does not apply in non-"container" cases. SCSC v. Allied Mut., 515 N.W.2d 588 (Minn. App. 1994); Bell Lumber & Pole Co. v. U.S. Fire Ins. Co., 60 F.3d 437 (8th Cir. 1995). Court ruled in Regents that the exclusion encompasses even products *Morrison Mahoney LLP (Copyright 2007)*.

claims but refused to find that indoor releases are a discharge "into the atmosphere."

"Absolute" Pollution Exclusion

As the Eighth Circuit declared in Continental Casualty Co. v. Advanced Terrazo & Tile Co., No. 05-3594 (8th Cir. August 31, 2006) there is "consistent and long-standing precedent" from the Minnesota Court of Appeals that makes clear that the absolute pollution exclusion is unambiguous and applies to pollutants that are emitted, even in the normal course of an insured's operation. See Auto-Owners Ins. Co. v. Hanson, 588 N.W.2d 777 (Minn. Ct. App. 1999) (lead paint claims); Lyman v. Travelers Ins. Co., 1996 Minn. App. LEXIS 459 (Minn. App. May 7, 1996)(sick building claims); League of Minnesota Cities Ins. Trust v. City of Coon Rapids, 446 N.W.2d 419 (Minn. App. 1989)(hockey spectators/fumes) and American States Ins. Co. v. Technical Surfacing, Inc., 50 F.Supp.2d 888 (D. Minn. 1999)(fumes from contractor).

Most recently, the Court of Appeals ruled in Wakefield Pork, Inc. v. RAM Mut. Ins. Co., A06-847 (Minn. App. May 15, 2007) that the exclusion barred coverage for allegations by neighboring property owners that the insured's pig farm had created "extremely noxious and offensive odors and gases" that caused or exacerbated their health problems, diminished their quality of life and curtailed the use and enjoyment of their property.

On the other hand, the Eighth Circuit has refused to give effect to endorsements to such exclusions that eliminated coverage for hostile fires where said endorsements had not been approved by the Insurance Commissioner and had been added on without proper notice to the insured at the time of renewal. Hawkins Chemical, Inc. v. Westchester Fire Ins. Co., 159 F.3d 348 (8th Cir. 1998). See also Schmid v. Fireman 's Fund Ins. Co., 97 F.Supp.2d 967 (D. Minn. 2000).

"Personal Injury" Claims

Rejected in Hawkins Chemical, Inc. v. Westchester Fire Ins. Co., CV 4-95-422 (D. Minn. June 27, 1996) and Hauenstein & Burmeister, Inc. v. Employers Ins. of Wausau, No. C6-93-7630 (Minn. Dist. Ct. August 30, 1995).

Scope and Allocation Issues

Supreme Court ruled in Northern States Power Co. v. Fidelity & Cas. Co., 517 N.W.2d 918 (Minn. 1994) that courts should use a "time on the risk" approach, including share to insured for gaps, where pollution progresses over a period of year. The Supreme Court further ruled in Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724 (Minn. 1997) that the insured's obligation to pay indemnity for "orphan shares" extended to early years for which the insured could not locate policies as well as years after 1970 for which coverage was unavailable due to pollution exclusions. In Gopher Oil Co. v. American Hardware Mutual Ins. Co., 588 N.W.2d 756 (Minn. App. 1999), the Minnesota Court of

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Appeals ruled that a loss need only be allocated to the years in which an insured had shipped waste substances to a landfill, rejecting an insurer's contention that later years might also be implicated.

This analysis was adopted by the Supreme Court a few years later in In Re Silicone Implant Insurance Coverage Litigation, 667 N.W.2d 405 (Minn. 2003). The Supreme Court held that even though the bodily injuries allegedly attributable to silicone breast implants persist for months or years after the date of initial implantation, the losses attributable to implant claims need not be allocated over the total period of injury. In overturning the broad "time on the risk" approach that the Court of Appeals had applied, the Supreme Court declared that, unlike its rulings in past pollution cases such as Domtar and Northern States Power, allocation was not required here because the injuries while progressive in nature, were attributable to a specific identifiable event. The Supreme Court thereby avoided addressing the more difficult allocation issues that had been struggled with by the trial court and the Court of Appeals, namely whether injuries occurring after 1985, when 3M was insured under "claims made" policies should be subject to allocation in the same manner as if conventional "occurrence"-based GL policies had been in effect.

More recently, however, the Minnesota Supreme Court ruled in Wooddale Builders, Inc. v. Maryland Cas. Co., 722 N.W.2d 283 (Minn. 2006) from construction defects claims should be allocated on a "time on the risk" basis from the start of the policy in which the closing date occurred through the end of the policy year in which the insured received notice of claim. The court declared that the insured need not bear responsibility for any period of time for which insurance was unavailable for claims of this sort, so that the period of allocation period ends as of the year in which the insured received notice of claim or with the end of the last period of insurance coverage, whichever is earlier. The Supreme Court held that "strict application" of its NSP "actual injury" rule appropriate because any other result (1) would leave the policyholder uninsured with respect to damages allocated to the period between notice of the claim and the end of remediation and (2) would put a burden on insureds to prove not only that damage was the result of a single discrete occurrence, but during which particular policy period the occurrence took place, thus further increasing the costs of coverage litigation. The Supreme Court rejected various insurers' argument that the allocation period should be co-extensive with the period of injury, thus extending up until the property damage from water intrusion in the homes had been fully remediated, despite the fact that Wooddale has apparently been unable to buy coverage for water intrusion exclusions after 2002. Also, in light of the "known loss" doctrine, the court ruled that coverage cannot be triggered under policies issued after the insured has received a claim, even if remediation is not yet complete. The court also ruled that if a policy is triggered, an entire policy year applies, even if the closing date or date of notice occurred midway through the policy. Finally, the Supreme Court held that the Appeals Court had erred in allocating defense costs in the same percentages as applied to indemnity, holding instead that in light of precedents such as Jostens, each insurer should pay an equal share of defense costs and that an "equal shares" approach would minimize or avoid inter-carrier squabbling over how to apportion defense costs. In a cryptic footnote, the court questioned whether such losses should be apportioned to multiple policies at all, but didn't

pursue the question further since all parties to this case had stipulated that water intrusion claims were subject to a “time on the risk” analysis.

"Suit"

Held to encompass PRP claims in SCSC, supra. Supreme Court ruled in Domtar that costs of investigation and site studies, while not exclusively defense-related, were beneficial to the overall defense effort such that they should be characterized as costs of defense and not indemnity. In Jostens, Inc. v. Federated Mutual Ins. Co., 612 N.W.2d 878 (Minn. 2000) the Supreme Court declared that its earlier rulings in SCSC and Domtar clearly extended to private property claims against an insured who also faced a governmental investigation (but no PRP letter yet).

Trigger of Coverage

In Northern States and Domtar, the Supreme Court established a rebuttable presumption that injury would be deemed to occur continuously from the date of first exposure or dumping through manifestation. Any party seeking a contrary finding has the burden of proving that loss did not occur during its period. However, the mere persistence of earlier discharges will not trigger later periods of coverage if it can be shown to have been attributable to specific polluting incidents, as in SCSC Corporation v. Allied Mutual Ins. Co., 533 N.W.2d 603 (Minn. 1995)(insured allowed to spike claim into excess layers based on single 1977 spill that was predominant source of pollution on its property).

MISSISSIPPI

"As Damages"

Asbestos abatement measures were found to be "damages" in Moore v. W.R. Grace, Jackson Circuit Court No. 89-5138 (1) (Miss. December 23, 1991).

"Occurrence"

Court ruled in Great American Ins. Co. v. Wood Treating, Inc., No. 1:95CV48GR (S.D. Miss. March 28, 2000) that contamination resulting from insured's wood treatment operations was not an "occurrence" as damage was the foreseeable result of the insured's direct discharges into the cooling pond from a pipe as well as drippings from treated poles.

Pollution Exclusion

Exclusion held unambiguous and to defeat coverage for intentional spills in USF&G v. T.K. Stanley, Inc., 764 F.Supp. 81 (S.D. Miss. 1991). More recently, federal court ruled in USF&G v. B&B Oil Well Service, Inc., 910 F.Supp. 1172 (S.D. Miss. 1995) that, whereas controversy persisted concerning meaning of "sudden," exclusion plainly barred coverage for intentional releases of pollutants even if insured had not meant to cause damage. See also Great American Ins. Co. v. Wood Treating, Inc., No. 1:95CV48GR (S.D. Miss. November 21, 2000)(routine releases at insured's plant were not "accidental").

"Absolute" Pollution Exclusion

Exclusion was upheld in American States Ins. Co. v. Nethery, 79 F.3d 473 (5th Cir. 1996) (homeowner's exposure to fumes from contractor's paints and glues); American States Ins. Co. v. F.H.S., Inc., 843 F.Supp. 187 (S.D. Miss. 1994)(release of ammonia fumes at insured's facility) and USF&G v. B&B Oil Well Service, Inc., 910 F.Supp. 1172 (S.D. Miss. 1995)(oil and gas well drilling by contractor).

Applying Mississippi law, the Louisiana Appeals Court ruled in Harrison v. R.R. Morrison & Son, Inc., 37-992 (La. App. December 10, 2003) that the absolute pollution exclusion precluded coverage for claim by Louisiana property owners whose land became contaminated as the result of gasoline leaking from an underground storage tank at a convenience store operated by a Mississippi corporation. While suggesting in a footnote that Louisiana law would also have upheld the pollution exclusion in such circumstances, the Court declared that such case law as existed in Mississippi with respect to the absolute pollution exclusion clearly required that these claims be treated as arising out of the discharge or release of a pollutant on or from the insured's premises for which no coverage was afforded under the policy.

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"Personal Injury" Claims

Conflicting rulings. Compare, USF&G v. B&B Oil Well Service, Inc., 910 F.Supp. 1172 (S.D. Miss. 1995)(no coverage) with Great Northern Nekoosa Corp. v. Aetna Casualty & Surety Co., 921 F.Supp. 401 (N.D. Miss. 1996)(trespass claims covered).

Trigger of Coverage

"Continuous trigger" in Moore (asbestos building claims).

MISSOURI

"As Damages"

The Missouri Supreme Court ruled that the plain and ordinary meaning of "damages" includes both legal damages and the cost of undertaking equitable relief. Farmland Industries, Inc. v. Republic Ins. Co., 941 S.W.2d 505 (Mo. 1997). The court ruled that neither the common and ordinary nor legal meaning of "damages" permits a distinction between legal damages and equitable relief that would preclude coverage for sums that an insured is forced to pay to clean up the environment or to reimburse others for clean up measures. In so holding, the court swept aside a decade's jurisprudence in which federal courts had refused to find coverage for Superfund "response costs" on this basis. See Continental Ins. Co. v. NEPACCO, 842 F.2d 977 (8th Cir. 1988); Aetna Cas. & Surety Co. v. General Dynamics Corp., 968 F.2d 707 (8th Cir. 1992) and Becker Metals Corp. v. Transportation Ins. Co., 802 F.Supp. 235 (E.D. Mo. 1992).

"Occurrence"

A federal court ruled in an early pollution case that the question of an insured's intent to cause pollution in operating waste site must be measured by both subjective and objective factors. U.S. v. Conservation Chemical Co., 653 F.Supp. 152 (W.D. Mo. 1986).

Pollution Exclusion

Upheld in Aetna Cas. & Sur. Co. v. General Dynamics Corp., 968 F.2d 707 (8th Cir. 1992) and Independent Petrochemical Co. v. Aetna, 69 F.3d 1160 (D.C. Cir. 1995). These courts have ruled (1) that the individual waste sprayings could not be considered separately to make them "sudden" as this sort of micro-analysis would render the exclusion "toothless" and (2) that the discharges were not "accidental," even if performed by a third party and not the insured.

The Eighth Circuit declared in Liberty Mut. Ins. Co. v. Fag Bearings Corp., 153 F.3d 919 (8th Cir. 1998) that an insurer might nonetheless have a duty to defend until the cause and origin of the pollution could clearly be shown not to be "sudden and accidental." Nevertheless, the court affirmed that Liberty Mutual had no indemnity obligation where the plaintiffs' well water contamination was shown to have been caused by the weekly malfunction of the insured's degreasing system, causing discharges of TCE vapor. The court declared that the insured's failure to take steps to remedy the problem precluded any finding that the discharges were "accidental."

Consistent with this sort of approach, the state Court of Appeals ruled in Superior Equipment Co., Inc. v. Maryland Cas. Co., 986 S.W.2d 477 (Mo. App. 1998) that insurers had a duty to defend a Superfund claim where the underlying action only generally

described how pollution had occurred. The court did not comment on the scope of the exclusion, nor did it find that the exclusion was ambiguous.

In Trans World Airlines, Inc. v. Associated Aviation Underwriters, No. 942-01848 (Mo. Cir. Ct. August 29, 1997), a Missouri trial court adopted a temporal meaning of "sudden." Using the analogy of a baseball pitcher, Judge Bush pointed out that one could appropriately say that "the loss of the zip on his fast ball was gradual" or that the "loss of the zip on his fast ball was "sudden" but one cannot sensibly and without contradiction say "the loss of the zip on his fast ball was gradual and sudden." This ruling was affirmed on appeal but on an alternative basis. On appeal, the Court of Appeals ruled in Trans-World Airlines v. Associated Aviation Underwriters, 58 S.W.3d 609 (Mo. App. 2001) that whether or not "sudden" had a temporal meaning, the insured had failed to show that the discharges were "accidental."

In Emerson Electric Co. v. Aetna Casualty & Surety Co., No. 1-02-3661 (Ill. App. August 30, 2004), the Appellate Court of Illinois, interpreting Missouri law, rejected TWA as an accurate source of Missouri law, declaring instead that earlier Missouri cases required a "secondary discharge" analysis, in contrast to TWA, in which the court had ruled that the migration of pollutants was not the focus.

"Absolute" Pollution Exclusion

The exclusion has met with mixed success in Missouri. In 1994, the Eighth Circuit declared in Sargent Construction Co., Inc. v. State Auto Ins. Co., 23 F.3d 1324 (8th Cir. 1994) that the exclusion did not apply to claims against a contractor for property damage resulting from acid fumes released in the course of the insured's application of muriatic acid in the course of re-troweling a concrete floor. The court ruled that the exclusion was ambiguous since, when applied properly, an acid would not commonly be understood as being a "liquid irritant or contaminant." The state Court of Appeals also adopted an analysis of the exclusion based on the insured's reasonable expectations of coverage in Hocker Oil Co. v. Barker-Phillips-Jackson, Inc., 997 S.W.2d 510 (Mo. App. 1999), declaring that the exclusion could not be interpreted to defeat coverage for a LUST claim as "it would be an oddity for an Ins. Co. to sell a liability policy to a gas station that would specifically exclude the insured's major liability."

Nevertheless, other Missouri courts have taken a broader view of the exclusion. In Casualty Indemnity Exchange v. City of Sparta, 997 S.W.2d 5459 (Mo. App. 1999), the Court of Appeals ruled that the exclusion precluded coverage for claims by property owners who complained that hazardous materials contained in sludge from the insureds waste water treatment plant, which had been applied as a fertilizer or soil supplement on adjoining farm properties. The court declared that the waste was plainly a pollutant since its high pH made it an "irritant or contaminant." The court expressly disagreed with the 8th Circuit's construction of the exclusion in Sargent Construction, in which the federal Court of Appeals had declared that Muriatic Acid was not an irritant or contaminant." Since, in this case, there was little doubt that the plaintiffs exposure to the sludge materials had caused injury

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thus precluding any dispute as to whether the substances involved were an irritant or contaminant.” Finally, the court rejected the insured’s argument that the exclusion should only apply to “persistent polluter engaged in general polluting activities.” “To hold the absolute pollution exclusion does not bar coverage for damage caused by toxic substances from sludge removed from sewage by Sparta’s Waste Water Treatment Facility would leave one wondering what kind of activity would be excluded by the absolute pollution exclusion.”

The Missouri Court of Appeals ruled that the release of asbestos fibers inside the insured’s orphanage caused by a contractor’s mobile scraping unit was covered under the insured’s first party policy. In Cincinnati Ins. Co. v. German St. Vincent Orphan Association, Inc., 54 S.W.3d 661 (Mo. App. 2001), the Eastern District ruled that although the asbestos dust was a “pollutant” within the meaning of the pollution exclusion, the claim fell within the exclusion’s exception for certain “Specified Causes of Loss” since the scraping unit was at least arguably a “vehicle.”

In view of specific language in a contractor’s liability policy including “lead” within the definition of “pollutant” and extending the exclusion’s scope to “the ingestion, inhalation or absorption of pollutants from any source,” the Missouri Court of Appeals ruled in Heringer v. American Family Mutual Ins. Co., WD62995 (Mo. App. May 4, 2004) that the exclusions was not limited to traditional environmental contamination and precluded coverage for a suit against a painting contractor by a family who allegedly suffered bodily injuries as a consequence of being exposed to lead dust and paint chips.

"Personal Injury"

The Eighth Circuit declared in Liberty Mutual Ins. Co. v. FAG Bearings Corp., 153 F.3d 919 (8th Cir. 1998) that suits by abutting property owners claiming that they had been exposed to polluted well water because of the insured’s TCE discharges did not give rise to coverage on this basis. While conceding that such claims could be understood as describing a covered offense, the court ruled that the claims could not give rise to coverage on this basis since they were actually for “bodily injury” and “property damage.”

A year later, the Eighth Circuit ruled in Royal Ins. Co. of America v. Kirksville College of Osteopathic Medicine, 191 F.3d 159 (8th Cir. 1999) that environmental pollution claims that arise in the context of an actual trespass upon the plaintiff’s property may give rise to coverage under a policy’s “personal injury” coverage. The court ruled that even though the absolute pollution exclusion would preclude coverage for property damage resulting from the rupture of a tank in which MGP wastes had once been stored, it did not apply to claims of trespass. The court carefully distinguished cases in which it was the discharge of pollutants that was found to be the trespass, holding that although the absolute pollution exclusion would preclude coverage under such circumstances, it should not apply to cases in which a trespass had occurred independently of the discharge of contaminants onto the plaintiff’s property.

Scope and Allocation Issues

Having ruled that damage to the plaintiff's dairy herd triggered an earlier carrier's policies, the Eighth Circuit ruled in Nationwide Ins. Co. v. Central Missouri Electric Cooperative, 278 F.3d 742 (8th Cir. 2001) that Federated Mutual, which had insured CMEC between 1985 and 1990, must pay a proportionate share of the loss, rejecting Federated's argument that the "occurrence" causing the injuries had pre-dated its policy period. Further, while expressing some doubts as to whether a "time on the risk" approach to allocation necessarily reflected the amount of injury occurring in each year, the 8th Circuit affirmed the trial court's allocation of the cost of settlement on this basis.

On the other hand, in a case applying Pennsylvania law, the Missouri Supreme Court ruled that an "all sums" approach should be applied to the issue of allocation under insolvent liability policies issued by Transit Casualty to Westinghouse. Viacom, Inc., as Successor in Interest to Westinghouse Electric Corp. v. Transit Casualty Co. in Receivership, (Mo. 2004), the court concluded that even though Transit was insolvent, the law of Pennsylvania should apply. In light of the Pennsylvania Supreme Court's adoption of "all sums" in J.H. France, the Court of Appeals concluded that the lower court had erred in adopting a "time on the risk" approach based on Missouri law.

"Suit"

Eighth Circuit ruled that PRP claims were not a suit in General Dynamics, supra.

Trigger of Coverage

Coverage triggered by actual release of pollutants. NEPACCO, 811 F.2d 1180 (8th Cir. 1987) and Monsanto Co. v. Aetna Cas. & Sur. Co., New Castle No. 88-JA-118 (Del. Super. April 15, 1994)(Missouri law). In Trans-World Airlines v. Associated Aviation Underwriters, 58 S.W.3d 609 (Mo. App. 2001), the Missouri Court of Appeals ruled that TWA had failed to show that the U.S. EPA claims involved polluting activity under policies issued prior to 1970.

Allegations that an electrical transformer supplied by the insured periodically malfunctioned between 1982 and 1991, causing damage to the plaintiff's dairy herd, have been held to trigger all of the policies in between whether on the basis of an "exposure" or "actual injury" trigger. Nationwide Ins. Co. v. Central Missouri Electric Cooperative, 278 F.3d 742 (8th Cir. 2001).

MONTANA

"As Damages"

No reported environmental cases.

"Occurrence"

No reported environmental cases.

Pollution Exclusion

The Montana Supreme Court ruled that gradual, cumulative contamination is not "sudden." In Sokoloski v. American West Ins. Co., 980 P.2d 1043 (Mont. 1999), the court held that the cumulative effect of smoke and soot damage from scented candles that have been burned over a period of five weeks was not "sudden." While noting the split in opinion in courts around the country concerning the meaning of "sudden and accidental," the court ruled that such terms must be given an independent meaning. Further, the court ruled that the smoke damage plainly involved pollution, rejecting the insured's contention that this was an "environmental term of art which applies only to discharges of pollution into the environment from sources outside the home."

In light of Sokolowski, the Montana Supreme Court ruled in Travelers Property & Cas. Co. v. Ribl Immunochem Research, Inc., 108 P.3d 469 (Mont. 2005) that a policyholder's intentional disposal of toxic laboratory wastes into unlined pits at a sanitary landfill were neither "sudden" nor accidental." While leaving open the issue of whether the claims were an "occurrence" (although noting that it was the insured's burden to prove the existence of accidental property damage in order to bring the claim within the policy's insuring agreement, the court held that the insured had not met its burden of proving that the underlying private property and governmental cost recovery actions were on account of any "sudden and accidental" discharge of pollutants. Rather, the court found that the focus of the exclusion was the discharge or disposal of pollutants into or upon the ground, not the allegedly unexpected leaching of the surface discharges into the groundwater (which the court pointed out were not "sudden" either). The court also ruled that the alleged drafting history of the exclusion was irrelevant to the interpretation of unambiguous policy terms, although the court did sustain the lower court's award of attorney's fees against Travelers for seeking a protective order to avoid turning over these documents.

"Absolute" Pollution Exclusion

An insurer's failure to give clear notice to its insured of the addition of a "total" pollution exclusion at the time that policy was renewed has been held to preclude the

insurer from relying on it. Thomas v. Northwestern National Ins. Co., 973 P.2d 804 (Mt. 1998)(fuel loss claim against contractor). An exclusion for "contamination" was held inapplicable to allegations that insured adulterated product, holding that this is an environmental term of art that should be limited to a discharge of pollutants into the environment. Enron Oil Trading and Transportation Co. v. Underwriters of Lloyd's of London, No. CV-90-122 (D. Mt. April 16, 1996), aff'd, 132 F.3d 526 (9th Cir. 1997). U.S. District Court ruled in Grindheim, that abutting property owners' complaints that insured's use of animal sewage as a fertilizer did not allege the discharge of a "pollutant."

"Personal Injury" Claims

Trespass claim held to allege a claim for wrongful entry in Grindheim, supra.

Scope and Allocation Issues

No reported cases.

Trigger of Coverage

No "trigger" cases. Federal court ruled that an insured cannot obtain coverage for a pollution loss under policies issued after it became aware of its claimed liability. Bank of Montana v. Travelers Ind. Co., CV 91-085 (D. Mont. June 30, 1994).

NEBRASKA

"As Damages"

Superfund "response costs" held covered in Lindsay Manufacturing Co. v. Hartford Acc. & Ind. Co., 118 F.3d 1264 (8th Cir. 1997).

"Occurrence"

No reported environmental cases.

Pollution Exclusion

The Nebraska Supreme Court upheld the exclusion in Dutton-Lainson Co. v. Continental Ins. Co., 716 N.W.2d 787 (Neb. 2006), holding that the mere existence of a disagreement among the courts in other states is not a basis for finding ambiguity and held that a reasonable person would have understood "sudden" to refer to "the objectively temporally abrupt release of pollutants into the environment." The court also ruled that a policyholder has the burden of proof with respect to the "sudden and accidental" exception.

Absolute Pollution Exclusion

The Nebraska Supreme Court adopted a broad view of pollution exclusions in Cincinnati Ins. Co. v. Becker Warehouse, Inc., 262 Neb. 746, 635 N.W.2d 112 (2001), ruling 6-0 that a liability insurer had no duty to defend suits filed by lessees for damage to stored foodstuffs from a release of xylene fumes by a contractor who was building an addition to the insured's warehouse. The Supreme Court ruled that such exclusions are not restricted to "traditional environmental contamination."

"Personal Injury" Claims

Rejected in Kruger, supra.

Scope and Allocation

No reported environmental cases.

Trigger of Coverage

No reported environmental cases.

NEVADA

"As Damages"

No reported environmental cases.

"Occurrence"

No reported environmental cases.

Pollution Exclusion

Crystal Bay General Improvement District v. Aetna Cas. & Sur. Co., 713 F.Supp. 1371 (D. Nev. 1989) suggests that gradual contamination would be excluded.

Scope and Allocation Issues

No reported environmental cases.

"Absolute" Pollution Exclusion

Upheld in Aerolite Chrome Corp. v. Hartford Ins. Co., No. 25G41 (Nev. May 26, 1995) and Montana Refining Co. v. National Union Fire Ins. Co. of Pittsburgh, 918 F.Supp. 1395 (D. Nev. 1996).

Trigger of Coverage

Supreme Court adopted a "manifestation" trigger for first party claims. Jackson v. State Farm Fire & Cas. Co., 835 P.2d 786 (Nev. 1992).

NEW HAMPSHIRE

"As Damages"

Supreme Court ruled 3-2 in 1992 that the cost of remediating existing pollution should be covered. Coakley v. Maine Bonding & Cas. Co., 618 A.2d 777 (N.H. 1992). However, costs incurred to prevent the spread of contaminants are not. Courts have generally overlooked this distinction in subsequent cases, however. See, e.g. EnergyNorth Natural Gas, Inc. v. Century Ind. Co., No. 05-2149 (1st Cir. June 28, 2006)(holding that all of the costs incurred at a former manufactured gas plant were related to the overall site remedy designed to address existing pollution and were not mere prophylactic measures to prevent future releases.

"Occurrence"

In March 2001, the Supreme Court of New Hampshire ruled that soil and water contamination resulting from a gas utility's discharge of coal tar waste over a period of decades was not an "accident" or "occurrence." In EnergyNorth Natural Gas, Inc. v. Continental Ins. Co., 781 A.2d 969 (N.H. 2001), the court ruled that although a subjective analysis was relevant to the separate issue of whether bodily injury or property damage was expected or intended from the standpoint of the insured, the Superior Court had not erred in relying upon evidence of the custom and practice of the manufactured gas industry during the period of time that this plant was in operation in concluding that a reasonable company in the insured's position would have known that its intentional dumping of tar and other by-products contained in its waste stream was certain to result in some injury to property, even if not the particular injury to groundwater, surface water and sediment. The court concluded that "although ENGI's acts may well have been lawful and socially acceptable at the time they were taken, they were not accidents as our cases have defined that term, and that term is the one on which coverage hinges." See also Mottolo v. Fireman's Fund Ins. Co., 43 F.3d 723 (1st Cir. 1995)(affirming finding that site operator's intentional dumping was not an "accident" based on objective standard of whether a reasonable person in the shoes of the insured would foresee that his dumping of waste was certain to cause some degree of injury to property) and New Hampshire Ball Bearings v. Aetna Cas. & Sur. Co., 43 F.3d 749 (1st Cir. 1995)(insured's pollution of groundwater was not an accident where insured had intentionally disposed of pollutants on soil but denied any intent to pollute groundwater).

Pollution Exclusion

The Supreme Court ruled in Hudson v. Farm Family Mutual Ins. Co., 697 A.2d 501 (N.H. 1997) that a first party policy that insured against "sudden and accidental damage from artificially generated electrical current" was ambiguous and could not be limited to discharges of brief duration.

For the most part, pollution exclusions were excluded by endorsement from policies issued in New Hampshire between 1970 and 1985. Where not deleted, such exclusions have typically been upheld. K.J. Quinn v. Continental Cas. Co., 806 F.Supp. 1037 (D.N.H. 1992); Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984)(pollution that occurs as a concomitant of routine disposal operations is not "sudden and accidental).

"Absolute" Pollution Exclusion

Upheld with respect to pollution clean up claims in Union Mut. Fire Ins. Co. v. Hatch, 853 F.Supp. 59 (D.N.H. 1993)(LUST claim). However, the Supreme Court ruled that a child's secondary exposure to lead dust from her painter father's clothing did not result from any "discharge." Weaver v. Royal Ins. Co., 674 A.2d 975 (N.H. 1996).

"Personal Injury" Claims

Trespass claims held to allege an "invasion of the right of private occupancy" in Titan Holdings Syndicate, Inc. v. The City of Keene, 898 F.2d 265 (1st Cir. 1990).

Scope and Allocation Issues

The New Hampshire Supreme Court heard oral argument on May 9 in EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's. At issue is whether an excess insurer may insist that damages attributable to the pollution of a former MGP facility be allocated throughout the period of property damage or some smaller sub-set of policy years.

"Time on the risk" adopted by state trial court in Conductron Corp. v. American Employers Ins. Co., Hillsborough No. 93-E-149 (N.H. Super. March 4, 1997). Further, Judge Arnold ruled that the insured must itself pay a share of such costs for uninsured periods, rejecting the insured's claim that it could pick and choose on a theory of "joint and several" liability or "vertically stack" its claim to recover from an excess insurer.

"Suit"

PRP letters were held to be a "suit" in Coakley.

Trigger of Coverage

On a certified question from the U.S. District Court in two manufactured gas plant coverage cases, the Supreme Court of New Hampshire declared in EnergyNorth Natural Gas, Inc. v. Underwriters at Lloyd's, 848 A.2d 715, 150 N.H. 828 (2004) that conventional CGL "occurrence" policies are subject to an "injury in fact" trigger. The court ruled that this "injury in fact" approach was mandated by the terms of the policy but was also confirmed by the drafting history of the "occurrence" form. As to earlier "accident" policies, the court *Morrison Mahoney LLP (Copyright 2007)*.

rejected insurer contentions that only “discreet causative events” could trigger coverage. Rather, the court adopted an “exposure” trigger and found that “where the alleged migration of toxic waste is continuing, multiple exposures triggering exposures are also continuing.” The court declined to reach the issue of allocation, finding it to be outside the scope of the certified question.

Likewise, in a related case, Judge Paul Barbadoro had predicted that New Hampshire would use a “continuous injury in fact” trigger. In EnergyNorth Natural Gas, Inc. v. AEGIS, 21 F.Supp.2d 89 (D.N.H. 1998), the federal district court declared that where damage occurs in multiple policy periods, coverage is triggered under every policy active when the damage occurs, as long as new damage occurs during each relevant policy period. The court declined to enter judgment for the insured, however, owing to the need for further briefing and the development of a better factual record as to whether additional “property damage” had occurred in the years after the MGP plant had ceased operation. The court also deferred ruling as to certain “event” policies. Although he found that the “event” language could also reasonably be interpreted as only including fortuitous injury during the policy and did not necessarily require that both the polluting discharge and injury occur during the policy period, the court declined to find coverage on the basis of this potential ambiguity until further discovery could establish whether the insured had been involved in drafting the “event language.”

NEW JERSEY

"As Damages"

Held covered in Morton Int., Inc. v. General Accident Ins. Co., 629 A.2d 831 (N.J. 1993). Statutory clean up liabilities also held covered, even if no third party claim, under primary policies (but not under "ultimate net loss" language in excess policies). Metex Corp. v. Federal Ins. Co., 675 A.2d 220 (App. Div. 1996).

"Occurrence"

In general, the insured must prove a subjective intent to injure. Carter-Wallace, Inc. v. Admiral Ins. Co., 154 N.J. 312, 712 A.2d 1116 (1998). Intent may be inferred, however, in egregious cases, as where the insured persisted in pollution-causing activity even after being warned by environmental authorities that it was a source of contamination. Morton International, Inc. v. General 134 N.J. 1, 629 A.2d 831 (1993)(chronic pollution of insured's factory from on-going discharge of known pollutants, even after insured was made aware of resulting pollution was intended" even if insured claimed no foresight of injury.

New Jersey courts have tended to limit the scope of this rule to cases in which the insured deliberately "stonewalled" efforts to curb pollution. Thus, in INA v. Amadei Sand & Gravel, Inc., 742 A.2d 550 (N.J. 1999), the Supreme Court sustained a lower court's finding that a landfill operator had not expected or intended to cause pollution where there had been evidence at trial that the insured was not sophisticated with respect to issues of hydrology or landfill management, had never concealed the fact that he was disposing of the chemical waste on his property, and had indeed received approval from state and local authorities to dispose of such wastes at the GEMS landfill. See also Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co., 89 F.3d 976 (3d Cir. 1996) (court rescinds earlier opinion adopting "objective" standard based on Morton, ruling instead that insured's deliberate dumping of known pollutants did not meet subjective standard, nor did insured's conduct rise to egregious level of stonewalling conduct needed to meet Morton standard).

The Appellate Division ruled in CPC International, Inc. v. Hartford Accident & Indemnity Co., 316 N.J. Super. 351 (App. Div. 1998), review denied (N.J. March 1999) that the pollution that the insured intended must be "qualitatively comparable" in severity and type to that which it is being forced to clean up.

Pollution Exclusion

Supreme Court ruled in Morton that "sudden," if given its literal meaning, would limit coverage to "big boom" type polluting events. However, the Court ruled that statements made to state regulators in 1970 that the exclusion was no more than a clarification of existing coverage should estop insurers from taking a broader view of the exclusion. The Third Circuit has since ruled that this "regulatory estoppel" analysis applies to all insurers doing business in New Jersey then or since, unless they filed something contrary. Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co., 89 F.3d 976 (3d Cir. 1996).

The Morton standard (knowing discharge of a known pollutant by the insured or an agent authorized for that purpose) has rarely been used to bar coverage, partly due to holdings that discharges are "accidental" unless the insured knew at the time that they would cause environmental damage. For instance, in Universal-Rundle Corp. v. Commercial Union Ins. Co., 319 N.J. Super. 223, 725 A.2d 76 (App. Div. 1999), the Appellate Division ruled that the insured's knowing discharge of waste materials containing small amounts of lead oxide, which the insured knew could be hazardous to health if inhaled, was not the discharge of a "known pollutant" because the insured had no knowledge at the time that discharges into the environment could cause injury (the insured testified that it believed that its waste was good fill because it was "inert." See also, J. Josephson, Inc. v. Crum & Forster, 293 N.J. Super. 170, 679 A.2d 1206 (App. Div. 1996) and Astro Pak Corporation v. Fireman's Fund Ins. Co., 665 A.2d 1113 (App. Div. 1995).

"Absolute" Pollution Exclusion

The New Jersey Supreme Court ruled in Nav-lts, Inc. v. Selective Ins. Co. of America, 183 N.J. 110, 869 A.2d 829 (2005) that an absolute pollution exclusion did not preclude coverage for personal injury claims against a painting subcontractor arising out of claims for nausea, vomiting and headaches suffered by a tenant who was exposed to fumes in the course of the insured's work. The court declared that the history of such exclusions makes clear that their intent is to only preclude coverage for traditional environmentally-related damages, such as CERCLA claims. In keeping with the analysis of the original pollution exclusion that it adopted in Morton, the court looked to industry statements made to state regulators in the mid-1980's when absolute pollution exclusions were first proposed for approval and concluded that there was no compelling evidence that the exclusion was intended to have the broad effect proposed by Selective in this case adding that, "The insurance industry may not seek approval of a cause restricting coverage for the asserted reason of avoiding catastrophic environmental pollution claims and then use that same clause to exclude coverage for claims that a reasonable policyholder would believe were covered by the insurance policy." As a final caution, the court observed that, "Industry-wide determinations to restrict coverage of risks, particularly those that affect the public interest, such as the risk of damage from pollution, environmental or otherwise, must be fully and unambiguously disclosed to regulators and the public."

"Personal Injury" Claims

Held not to extend to pollution claims in J. Josephson, Inc. v. Crum & Forster, 293 N.J. Super. 170, 679 A.2d 1206 (App. Div. 1996) and U.S. Bronze Powders, Inc. v. Commerce & Industry Co., 293 N.J. Super. 12, 679 A.2d 674 (App. Div. 1996). But see, Harvard Industries v. Aetna Casualty Ins. Co., 273 N.J. Super. 467, 642 A.2d 438 (1993)(private claims for trespass and nuisance not subject to pollution exclusion, as it only applies to claims for bodily injury and property damage).

Scope and Allocation Issues

Supreme Court's 1994 ruling in Owens-Illinois requires allocation of "risk" (limits times years) between insurers and policyholder. See also, SL Industries, Inc. v. American Motorist Ins. Co., 607 A.2d 1266 (N.J. 1992)(allocation allowed even where costs cannot be separated with scientific certainty).

The Supreme Court expressed affirmed the application of Owens-Illinois to pollution claims in its 1998 ruling in Carter-Wallace, Inc. v. Admiral Ins. Co., 712 A.2d 1116 (N.J. 1998). The court ruled that damages should be apportioned in proportion to the total limits of primary and excess insurance available in each policy year stack of coverage. The court expressly rejected Commercial Union's argument that coverage should be proportionately exhausted by layer as well as the insured's contention that it should be entitled to apply its entire claim against any individual year and then only divide the resulting number by the total years within which injury had occurred.

Third Circuit has left the door open to requiring insureds to assume responsibility for years containing pollution exclusions. It is the insurer's responsibility in such cases to show that insurance was otherwise available, however. Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Co., 177 F.3d 210 (3d Cir. 1999).

In Benjamin Moore & Co. v. Aetna Casualty & Surety Co., 179 N.J. 87, 843 A.2d 1094 (2004), the New Jersey Supreme Court ruled that an insured must satisfy all deductibles or SIRs before it can compel insurers to provide coverage for long-tail claims. Benjamin Moore had argued that, in light of the court's analysis in Owens-Illinois and Spaulding, it should not be obligated to pay a full deductible amount for each policy triggered by the underlying lead paint claims. The Supreme Court ruled that its analysis in Owens-Illinois was never intended to displace the basic provisions of the insurance contract so long as those provisions are not inconsistent with the underlying methodology specifically adopted in that case. Thus, whereas the court had refused to give effect to a non-cumulation clause in Spaulding as being inconsistent with its Owens-Illinois analysis, here it concluded that the policy deductibles were a basic part of the policy and not inconsistent with Owens-Illinois. The court criticized the insured for failing to understand the basic notion "that progressive environmental injuries are multiple occurrences...." The court concluded that the purpose of Owens-Illinois is solely to assign a loss to a triggered

policy period and that after that the extent of coverage is dependent on the provisions of the policy so long as they are not inconsistent with Owens-Illinois. "Put another way, once the amount of loss allocable to the policy period is determined, it is to be treated exactly as any actual loss during that period would be treated – in accordance with the policy provisions, including limits and exclusions." As the deductible did not in any way affect the available limits of coverage, the court ruled that it was not inconsistent with Owens-Illinois.

The Appellate Division has ruled that a trial court erred in allocating a long tail loss to periods of time after 1986 for which the insured had failed to buy pollution insurance. In Champion Dyeing & Finishing Co. v. Centennial Ins. Co., 810 A.2d 68 (N.J. App. 2002), the court ruled that although allocation would have been appropriate if insurers could prove that EIL coverage could have been purchased by a business of this sort in the year that its claims were received (1997), the evidence presented by the insurer had, in fact, not shown that coverage was available by then to small business with old leaking tanks. Even if "claims made" EIL coverage was shown to have been available, the court ruled that it was error to use the insured's 1986-97 CGL limits as a proxy measure of what the limits would have been under Owens-Illinois analysis since, under a "claims made" policy, only one year's limits would apply.

"Suit"

In general, it appears that New Jersey courts will treat PRP claims as suits, to the extent that they are the "functional equivalent" of law suits. Broadwell Realty Services, Inc. v. Fidelity & Cas. Co., 528 A.2d 76 (App. Div. 1987).

Trigger of Coverage

"Continuous trigger" adopted for asbestos claims in Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974 (N.J. 1994) and has since been applied to pollution in Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Co., 89 F.3d 976 (3d Cir. 1996) and Astro Pak Corporation v. Fireman's Fund Ins. Co., 665 A.2d 1113 (N.J. App. 1995). The Appellate Division also ruled in Astro Pak that the persistence of damage from earlier discharges of pollutants would also trigger coverage.

In order for the continuous trigger to apply, the nature of the insured act or product must be such that it immediately results in injury and thereafter causes some sort of continuous or progressive bodily injury or property damage. New Jersey courts have thus distinguished between environmental cases and those involving toxic torts where there is immediate tissue damage, insult to tissue or immediate building damage inflicted by asbestos as contrasted with situations where the insured's liability does not result until sometime after the date of original conduct. Aetna Casualty & Surety Company v. Ply Gem Industries, Inc., 343 N.J. Super., 430, 778 A.2d 1132 (2001), review denied, 170 N.J. 390, 788 A.2d 774 (2001).

On the other hand, the Supreme Court ruled in Quincy Mutual Fire Ins. Co. v. Morrison Mahoney LLP (Copyright 2007).

Borough of Bellmawr, 799 A.2d 499 (N.J. 2002) that the Appellate Division had erred in finding that the starting point for a continuous trigger was the point in time when the insured's legal disposal of waste in a landfill caused third party property. In a lengthy opinion that traced the development of trigger of coverage case law in New Jersey and cases from other jurisdictions construing the meaning of a "continuous trigger," the Court ruled that the starting point should be the date that the insured dumped waste at the Helen Kramer Landfill, not the point in time when those wastes escaped from the landfill thus triggering the insured's liability. The Supreme Court justified its position on various grounds including the fact that, as a practical matter, it is easier to pinpoint the time when dumping began than to estimate when leachate first escaped the landfill. The court also pointed to various "owned property" cases in the environmental context in which coverage had been found for damage to the insured's own property in the light of the threat of injury to third-party property. Without addressing the issue of whether the initial dumping of waste into the landfill was itself "property damage," the Supreme Court pointed out that the placement of waste into the landfill set in motion the "injurious process" that ultimately resulted in groundwater contamination.

Two dissenting justices questioned this approach, asking if "inevitability of injury" was the focus of a trigger of coverage analysis, why coverage should only start at the time of dumping as it was equally inevitable that discarded waste would end up at the landfill at the time that the insured contracted to receive the waste. "The open-ended approach of the majority mistakenly has severed the notion of injury and damage to a third party from the accrual-of-liability analysis."

NEW MEXICO

"As Damages"

Held to include clean up costs. City of Farmington v. L.R. Foy Construction Co., No. CV 87-271-1 (N.M. Dist. Ct. December 21, 1988).

"Occurrence"

No reported environmental coverage cases.

Pollution Exclusion

"Sudden" held to have a temporal meaning in Mesa Oil Co. v. INA, 123 F.3d 1333 (10th Cir. 1997)(New Mexico law) and Ever Ready Oil Co., Inc. v. Ranger Ins. Co., No. 90-1190 JP (D.N.M. August 21, 1992)("sudden and accidental" only extends coverage to "abrupt and unintended discharges"). The Mesa court also ruled that whether a discharge is "accidental" must be considered from the standpoint of the polluter, not the insured.

"Absolute" Pollution Exclusion

Clean up of water pollution caused by insured's discharge of benzene-contaminated waste water held excluded in Bituminous Cas. Corp. v. Basin Disposal, C.A. No. 87-1019 (D.N.M. April 20, 1989) despite insured's arguments that discharges were of such small quantities as not to constitute a "pollutant."

"Personal Injury" Claims

No reported environmental cases.

Scope and Allocation Issues

No reported environmental cases.

Trigger of Coverage

New Mexico Supreme Court ruled in Leafland Group II v. INA, 881 P.2d 26 (N.M. 1994) that property insurer did not owe coverage for cost of removing asbestos that was installed in buildings prior to inception of policies as such claims were a "known loss."

NEW YORK

"As Damages"

Most state and federal courts have required coverage. Avondale Industries v. The Travelers Indemnity Co., 697 F.Supp. 1314 (S.D. N.Y. 1988), affirmed, 887 F.2d 1200 (2d Cir. 1989); Texaco A/S v. Commercial Ins. Co. of Newark, 160 F.3d 124 (2nd Cir. 1998)(insured may recover costs incurred under governmental compulsion) and Colonial Tanning Corp. v. Home Indemnity Co., 780 F.Supp. 906 (E.D.N.Y. 1991)(clean up costs covered but not civil fines). But see County of Broome v. Aetna, 146 A.D.2d 3370 (3rd Dept. 1989)(no coverage).

"Occurrence"

As yet, the Appeals Court has not directly addressed what constitutes an "occurrence" in the context of a pollution claim. Illegal waste disposal activity was held to be outside the scope of coverage in Town of Moreau v. Orkin Exterminating Co., 568 N.Y.S.2d 2d 466 (3d Dept. 1991). The Appellate Division ruled in Borg-Warner Corp. v. INA, 174 A.D.2d 24, 577 N.Y.S.2d 953 (3d Dept. 1992), leave to appeal denied, 600 N.E.2d 632 (N.Y. 1992) that purposeful discharges involving insured's waste at various sites could not be an "accident" under older policies.

Similarly, the Appellate Division ruled that the continuation of discharge activity after the insured learns that damage is resulting from its conduct precluded coverage under later policies in County of Broome v. Aetna Cas. & Surety Co., 146 A.D.2d 337, 540 N.Y.S.2d 620 (3d Dept. 1989), appeal denied, 74 N.Y.2d 614, 547 N.Y.S.2d 848, 547 N.E.2d 103 (1989)(no "occurrence" where dump site operator became aware of polluting from dumping but failed to take steps to prevent further contamination). However, the Second Circuit took issue with Broome in City of Johnstown v. Bankers Standard Ins. Co., 877 F.2d 1146 (2d Cir. 1989), declaring that the mere foreseeability of pollution did not make it expected or intended. See also Stonewall Ins. Co. v. Asbestos Claims Mgt. Corp., 73 F.3d 1178 (2d Cir. 1995)(asbestos manufacturer's foreknowledge of risk of suits was not sufficient to establish subjective intent to injure specific individuals).

In Consolidated Edison Company of New York v. Allstate Ins. Co., 724 N.Y.S.2d 853 (App. Div. 2001), the Appellate Division recently affirmed a jury's verdict that contamination at Con Ed's manufactured gas facility was not "caused by accident." The First Department's brief order also declared that Judge Gammerman had properly ruled that Con Ed had the burden of proving that the damage was "caused by accident."

Pollution Exclusion

The Court of Appeals ruled in Northville Industries Corp. v. National Union Fire Ins. Co. of Pittsburgh, 89 N.Y.2d 621, 679 N.E.2d 1044 (1997) that "sudden" had a temporal meaning and that the insured has the burden of proving a claiming within the "sudden and accidental" exception. In light of Northville, a federal district court reversed a 1995 ruling finding a duty to defend where the evidence as to "sudden and accidental" discharges had been "inconclusive" and ruled instead in Employers Insurance of Wausau v. Duplan Corporation, 1999 U.S. Dist. LEXIS 15368 (S.D.N.Y. September 30, 1999) that the insured's failure to come forward with clear evidence precluded any defense obligation. In prior rulings, the Court of Appeals had also declared that knowing discharges are not "accidental," even if performed by a third party. Technicon Electronics Corp. v. American Home Assur. Corp., 542 N.E.2d 1042 (N.Y. 1989) and Powers Chemco v. Federal Ins. Co., 548 N.E.2d 1301 (N.Y. 1989).

In Rheem Manufacturing Co. v. Home Indemnity Co., 723 N.Y.S.2d 354 (1st Dept. 2001), the First Department applied New York law to claims against a Delaware corporation with its principal place of business in New York for environmental liabilities arising out of the Stringfellow site in California, holding that the insured had failed to sustain its burden of proof that the causes of contamination at the Stringfellow site were "sudden and accidental."

"Absolute" Pollution Exclusion

Court of Appeals ruled in Town of Harrison v. National Union Fire Ins. Co., 675 N.E.2d 829 (N.Y. 1996) that the exclusion is not limited to "actual polluters" and plainly precluded any duty to defend claims that the insured had negligently permitted third parties to dump wastes on its property. Consistent with its 1989 ruling in Powers Chemco, the Court of Appeals declared that "coverage is unambiguously excluded for claims generated by the dumping of waste materials on to complainants' properties has asserted in all of the underlying complaint, irrespective of who was responsible for these acts."

A divided court took a more restrictive view of the exclusion in Village of Cedarhurst v. Hanover Ins. Co., 675 N.E.2d 822 (N.Y. 1996), declaring that damage from a spill of raw sewage from a municipal facility should not be excluded since the damage was caused by the "flooding" effect of the discharges and not because of any contaminating or toxic characteristic of the liquids. Three dissenters argued that raw sewage is a pollutant and that the damage, however caused or characterized, should be excluded as "arising out of" the discharge of pollutants.

More recently, the Court of Appeals has declared that such exclusions are restricted to "environmental" claims and may not be relied on to defeat coverage for bodily injuries involving indoor exposures. In Belt Painting Corp. v. TIG Ins. Co., 2003 N.Y. Int. 93 (N.Y. July 1, 2003), the Court of Appeals ruled that a total pollution exclusion did not apply to

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claims by an office workers that he suffered severe respiratory injuries after inhaling fumes from the insured's painting operations. The court declared that even though the underlying complaint alleged injuries resulting from a "release" of "fumes," the wording of the exclusion was plainly intended to limit its scope to environmental injuries.

The Belt Painting opinion relied on the court's earlier rulings in Rapid-American and Westview Associates. In Westview Associates v. Guaranty National Ins. Co., 95 N.Y. 334, 740 N.E.2d 220, 717 N.Y.S.2d 75 (2000), the New York Court of Appeals ruled that an umbrella liability insurer had a duty to provide coverage for lead paint claims filed against a property manager, notwithstanding a total pollution exclusion in its policy. The court found that there was not only no evidence that the Ins. Co. had intended such a broad interpretation of the exclusion but that such an interpretation was illogical since the insurer would not have added a lead paint exclusion to its primary policy had such claims already been excluded under the terms of the pollution clause.

"Personal Injury" Claims

Abutters' trespass claims held not covered in County of Columbia v. Continental Ins. Co., 83 N.Y.2d 618, 612 N.Y.S.2d 345, 634 N.E.2d 946 (1994).

Scope and Allocation Issues

In a landmark victory for insurers, the New York Court of Appeals declared in May 2002 that a trial court did not err in adopting a "time on the risk" approach to long-tail pollution cleanup claims. In Consolidated Edison Co. of New York v. Allstate Ins. Co., 98 N.Y.2d 208, 774 N.E.2d 687, 746 N.Y.S.2d (2002), the Court of Appeals ruled that an "all sums" or joint and several approach that would have permitted the policyholder to allocate its entire loss to any single year of coverage was inconsistent with the provisions of such policies limiting coverage to property damage during each year, particularly in cases where the amount of damage in any given year is uncertain. The court declined to adopt a specific theory of pro-ratio, however, noting that its ruling was not the "last word" with respect to questions such as whether allocation should be based on the total period of injury, the limits of available insurance coverage or the amount of injury in each year much less as to how allocation should apply to diverse factual circumstances, such as those involving self-insured period, periods when the insured failed to purchase insurance, or periods for which insurance was unavailable for such losses.

Although Consolidated Edison did not specify what rule courts should apply in allocating long-tail losses, a subsequent ruling of the Appellate Division in Serio v. Public Service Mutual Ins. Co., 759 N.Y.S.2d 110 (2d Dept. 2003) concluded that the cost of a lead paint settlement should be apportioned between two insurers based on their respective "time on the risk." The court declared that a "time on the risk" approach was "the least arbitrary, most equitable method, fostering foreseeability in underwriting in providing for uniformity of results." Accord USF&G v. Treadwell Corporation, 58 F.Supp.2d

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77 (S.D.N.Y. 1999)(coverage for claims should be pro-rated on a "time on the risk" basis including a share to the insured for early years for which coverage could not be documented).

"Suit"

In the absence of clear guidance from the Court of Appeals, lower courts have generally ruled that adversarial claims by governmental agencies are a "suit." Avondale Industries v. Travelers Ind. Co., 887 F.2d 1200 (2d Cir. 1991). Accord Maryland Cas. Co. v. W.R. Grace & Co., 88 Civ. 4337 (S.D.N.Y. April 29, 1994) (distinguishing between types of claim letters based on adversarial content) and Carpentier v. Hanover Ins. Co., 670 N.Y.S.2d 540 (2d Dept. 1998). See also Ryan, Klimek Ryan Partnership v. Royal Ins. Co., 728 F.Supp. 862 (D.R.I. 1990), aff'd, 916 F.2d 731 (1st Cir. 1990)(New York law)(invitation to participate in meetings not a "suit"). But see, Technicon Elect. Corp. v. American Home Assur. Corp., 141 A.D.2d 124 (2d Dept. 1988)(PRP claim not a "suit").

Trigger of Coverage

For the most part, it appears that New York courts will follow an "injury in fact" trigger. See American Home Products Corporation, 748 F.2d 760 (2d Cir. 1984). But see Maryland Cas. Co. v. W.R. Grace & Co., 4 F.3d 185 (2nd Cir. 1993)(adopting installation trigger for asbestos building claims) and In Re Liquidation of Midland Ins. Co., 709 N.Y.S.2d 24 (1st Dept. 2000)(coverage for asbestos bodily injury claims is limited to those policies in effect during the period of actual inhalation or exposure. In Midland, the Appellate Division ruled that New York courts would not follow Keene in also requiring coverage during the period of "exposure in residence" or "manifestation."

In Olin Corp. v. Certain Underwriters at Lloyd's, London, 468 F.3d 120 (2nd Cir. 2006), the Second Circuit declared that additional property damage caused by the passive migration or spread of contaminants that had already been discharged into the environment constituted "property damage" under New York law and that such years must be taken into account in determining the denominator for purposes of allocating the manner in which such losses are spread or assigned to policy years. On the other hand, the Second Circuit criticized London Insurer's arguments view that contamination continues at a constant rate for an indefinite period of time. Further the court was troubled by the prospect that the continuation of property damage in later years would change the amount of coverage under each policy up to that point thus making coverage dependent on events occurring after the policy period. As a result, the court adopted an intermediate approach, holding that property damage occurs as long as contamination continues to spread, whether or not the contamination is based on active pollution or the passive migration of contamination into the soil and groundwater.

In E. R. Squibb & Sons, Inc. v. Acc. & Cas. Ins. Co., 251 F.3d 154 (2nd Cir. 2001), the Second Circuit ruled that "second generation" DES claimants' injuries occur

continuously from the date of birth, rejecting the insurers' argument that the onset of disease for squamous cell cancer and the ovarian, breast and testicular cancers did not result in any bodily injury until puberty and that "no physical evidence associated with exposure to DES *in utero* had any bearing on the subsequent development of the cancer." The court ruled that "injury in fact can also include, in appropriate circumstances, the inevitable pre-disposition to illness or disability as a result of cell mutation caused by DES."

NORTH CAROLINA

"As Damages"

Superfund "response costs" were held to be covered in C.D. Spangler v. Industrial Crankshaft & Engineering Co., 388 S.E.2d 557 (N.C. 1990).

"Occurrence"

No reported environmental cases.

Pollution Exclusion

Upheld by landmark ruling of North Carolina Supreme Court in Waste Mgt. of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374 (N.C. 1986)(on-going waste disposal over a period of years not "sudden"). The Court of Appeals ruled that an insured has the burden of proving that waste discharges were "sudden and accidental." Home Indemnity Co. v. Hoechst Celanese Corp., 494 S.E.2d 774 (N.C. App. 1998). Regulatory estoppel arguments were rejected by a U.S. District Court in Wysong & Miles Co. v. Employers Ins. Co. of Wausau, 4 F.Supp.2d 421 (M.D.N.C. 1998).

"Absolute" Pollution Exclusion

Despite the narrow view initially stated in West American Ins. Co. v. Tufco Flooring East, Inc., 409 S.E.2d 692 (N.C. App. 1991)(exclusion did not apply to poultry contamination caused by fumes emitted by chemicals used during the insured's flooring operations) the exclusion has since been broad effect by federal courts. See, Pennsylvania National Mutual Casualty Ins. Co. v. Triangle Paving, Inc., 5:95-CV-892 (E.D.N.C. December 30, 1996), aff'd per curiam, 121 F.3d 699 (4th Cir. 1997)(Unpublished--full text at 1997 U.S. App. LEXIS 19274)(stream sedimentation caused by soil run-off from construction site); Whiteville Oil Co. v. Federated Mut. Ins. Co., 889 F.Supp. 241 (E.D.N.C. 1995), aff'd, 87 F.3d 1310 (4th Cir. 1996)(Unpublished)(fumes from gas station) and Auto Owners Ins. Co. v. Potter, No. 03-1457 (4th Cir. July 27, 2004)(no coverage for erosion and sedimentation run off from job site).

"Personal Injury" Claims

Rejected in Whiteville Oil Co. v. Federated Mut. Ins. Co., 889 F.Supp. 241 (E.D.N.C. 1995), aff'd, 87 F.3d 1310 (4th Cir. 1996)(Unpublished)(fumes from gas station).

Scope and Allocation Issues

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No reported environmental cases.

"Suit"

PRP letters deemed to be a "suit" in C.D. Spangler.

Trigger of Coverage

Despite earlier intermediate appellate authority adopting a "manifestation" trigger, the North Carolina Supreme Court recently ruled in Gaston County Dyeing Machine Company v. Northfield Ins. Co., 524 N.E.2d 558 (N.C. 2000) that "where the date of the injury-in-fact can be known with certainty, the insurance policy or policies on the risk on that date are triggered."

NORTH DAKOTA

"As Damages"

No pollution cases. The cost of complying with an action seeking only a mandatory injunction was held not to seek "damages" in National Farmers Union Property & Cas. Co. v. Kovash, 452 N.W.2d 307 (N.D. 1990).

"Occurrence"

No reported environmental cases.

Pollution Exclusion

No reported environmental cases.

"Absolute" Pollution Exclusion

No reported environmental cases.

"Personal Injury" Claims

No reported environmental cases.

Scope and Allocation Issues

No reported environmental cases.

"Suit"

No reported environmental cases.

Trigger of Coverage

"Manifestation" trigger rejected in Kief Farmers Cooperative Elevator Co. v. Farmland Mut. Ins. Co., 534 N.W.2d 28 (N.D. 1995). The North Dakota Supreme Court ruled that first-party coverage for damage to a grain operator's property was not limited to the policy year in which the damage was discovered, but rather triggered coverage under all policies in effect while the damage was continuing.

OHIO

"As Damages"

Although the Ohio Supreme Court has to date not ruled on this issue, the trend in lower court decisions has favored coverage for clean-up costs. Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co., 609 N.E.2d 1234 (Ohio App. 1992) and Morton Int, Inc., American Cyanamid and Thiokol Corp. v. Harbor Ins. Co., 607 N.E.2d 28 (Ohio App. 1992).

"Occurrence"

Ohio courts have taken a narrow view of this coverage defense in pollution cases. See Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co., 616 N.E.2d 988 (Ohio App. 1993)(waste generator did not intend third party pollution); Grand River Lime Co. v. Ohio Cas. Ins. Co., 32 Ohio App. 178, 289 N.E.2d 360 (1972) (court required coverage for neighbor's suit against manufacturer, even though air pollution emissions and other problems had continued with insured's knowledge for seven years) and Buckeye Union Ins. Co. v. Liberty Solvents & Chemical Co., 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984) (insured's knowledge of industrial activity causing pollution did not bar coverage, since resulting harm was not intended). But see Morton International, Inc. v. Aetna Cas. & Sur. Co., 666 N.E.2d 1163 (Ohio App. 1995)(reversing trial court's finding of coverage, court of appeal finds question of fact as to whether waste generator's failure to ensure the safe disposal of known pollutants (boron sludge) precluded the possibility of there being any "occurrence").

Pollution Exclusion

Reversing years of adverse case law from the Ohio Court of Appeals, the Ohio Supreme Court ruled in September 1992 that the pollution exclusion is unambiguous and precludes coverage for waste discharges that occur over an extended period of time. Hybud Equipment Corp. v. Sphere Drake Ins. Co., 597 N.E.2d 1096 (Ohio 1992). See also Seegott v. Great American Ins. Co., 1996 Ohio App. LEXIS 3179 (8th Dist. July 25, 1996).

Recently, however, the Supreme Court has made it more difficult for insurers to prevail on the basis of this exclusion. In Aetna Cas. & Sur. Co. v. Goodyear Tire & Rubber Co., 769 N.E.2d 835 (Ohio 2002), the court ruled that the determination of whether pollution resulting from the insured's disposal of wastes at a licensed landfill must be judged based on whether the escape of pollutant from the landfill was intended, rather than from the standpoint of the initial placement of wastes into the landfill itself. The Ohio Supreme Court ruled that the mere placement of contaminants in a landfill is not necessarily subject to the pollution exclusion as the exclusion's reference to "discharge, dispersal, release, or escape" all "evoke a transition from the state of confinement to movement." Accordingly, the court ruled that the relevant event invoking the pollution exclusion is the intentional movement of contaminants away from the landfill, rather than the act of initially placing *Morrison Mahoney LLP (Copyright 2007).*

pollutants there.

Insured has burden of demonstrating that discharges are "sudden and accidental." U.S. Industries, Inc. v. INA, 674 N.E.2d 414 (Ohio App. 1996) and Plasticolors, Inc. v. Cincinnati Ins. Co., 620 N.E.2d 856 (Ohio. App. 1992).

"Absolute" Pollution Exclusion

In Andersen v. Highland House Company, 757 N.E.2d 329, 93 Ohio St. 3d 547 (2001), the Ohio Supreme Court declared that indoor fume claims were not excluded, holding that the true purpose of such exclusions was to limit the "enormous expense and exposure resulting from the explosion of *environmental* litigation." Having concluded that the exclusion should be restricted to traditional environmental contamination, it held that it plainly could not apply to claims for carbon monoxide emitted from a malfunctioning residential heater. Writing in dissent, Justices Cook and Moyer disputed the majorities "strained" reasoning and held that the exclusion should apply since "fumes" are specifically included within the exclusions definition of a "pollutant" and that nothing in the wording of the exclusion itself limited its application to "environmental-type pollution."

The Ohio Court of Appeals has also ruled that fire damage to a home that occurred after gasoline that the insured had poured into a sewer caught fire several miles away arose out of a discharge of pollutants from the insured's premises was within the scope of the "absolute" pollution exclusion. In West American Ins. Co. v. Hopkins, C.A. 3108 (Ohio App. October 14, 1994), the court ruled that the "hostile fire" exception did not apply, both because the fire did not occur on the insured's premises and because the property damage resulted from the fire itself, rather than from heat, smoke or fumes. See also Owners Ins. Co. v. Singh, 1999 Ohio App. LEXIS 4734 (Ohio App. September 21, 1999)(in order for the exception to apply, the fire itself must have become uncontrollable by "breaking out" from its place of origin).

In Cincinnati Ins. Co. v. Harry Thomas, CA 2005-12-518 (Ohio App. December 11, 2006), the Ohio Court of Appeals refused to find coverage for private party claims arising out of discovery of property that had formerly been used as a skeet shooting range had lead contamination in the soil. The court held that the factual bases for the insured's claimed liability, namely its decision to hire a consulting firm to test for and treat the lead pollution in the soil, clearly triggered the exclusion as involving claims for bodily injury or property damage arising out of a discharge of pollutants "at or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to or assess the effects of pollutants." The Ohio Court of Appeals held that the absolute pollution exclusion unambiguously applied to these claims and that the insurer had not waived its right to assert the exclusion in this case as it had both issued a reservation of rights and entered into a bilateral non-waiver agreement with its policyholder.

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"Personal Injury" Claims

Rejected by Ohio Court of Appeals in Morton Int., Inc. v. Aetna Cas. & Sur. Co., 666 N.E.2d 1163 (Ohio App. 1995)(Washington law).

Scope and Allocation Issues

The Ohio Supreme Court has adopted an "all sums" approach to long-tail allocation issues. Aetna Cas. & Sur. Co. v. Goodyear Tire & Rubber Co., 769 N.E.2d 835 (Ohio 2002). Earlier cases had suggested that Ohio might permit pro rata allocation. See Lincoln Electric Company v. St. Paul Fire & Marine Ins. Co., 210 F.3d 672 (6th Cir. 2000)(toxic fume claims) and GenCorp., Inc. v. AIU Ins. Co., 104 F.Supp.2d 740 (N.D. Ohio 2000)(pollution clean up claims).

"Suit"

A PRP letter was held not to be a "suit" in Professional Rental Inc. v. Shelby Ins. Co., 599 N.E.2d 423 (Ohio App. 1991) and Detrex Chemical v. Employers Ins. of Wausau, 681 F.Supp. 438 (N.D. Ohio 1987).

Trigger of Coverage

Although the Ohio Court of Appeals initially appeared to favor a "manifestation" approach in Board of Education of Cleveland v. R. J. Stickle Int., 602 N.E.2d 353 (Ohio App. 1991), Ohio courts have since largely adopted an "injury in fact" or "continuous injury" approach to long tail claims. See Westfield Ins. Co. v Milwaukee Ins. Co., CA2004-12-98 (Ohio App. September 12, 2005)(rejecting "manifestation" trigger in construction defect case in favor continuous trigger); Morton Int., Inc. v. Aetna Cas. & Sur. Co., C 94 0407 (Ohio App. September 29, 1995)(applying continuous trigger to environmental liability claims); B.F. Goodrich Co. v. American Motorists Ins. Co., No. CB4-1224A (N.D. Ohio May 22, 1986)(adopting exposure-type trigger" for toxic tort claims against tire manufacturer); Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London, 813 F.Supp. 576 (N.D. Ohio 1993)("continuous trigger" adopted for lead paint claims). See also Owens-Corning Fiberglass Corporation v. American Centennial Ins. Co., Lucas No. 90-2521 (Ohio Ct. Common Pleas February 22, 1995)(asbestos/"continuous trigger").

The Ohio Supreme Court issued a pair of opinions on December 20, 2006 that appear to reflect a deep division within the court with respect to whether and when corporate successors are entitled to claim coverage under a predecessor's policies for long-tail liabilities arising out of the manufacture, sale or distribution of the predecessor's products. In Pilkington North American, Inc. v. Travelers Cas. Ins. Co., 2006 Ohio 6551 (Ohio December 20, 2006), a plurality of the court seemed to hold that, although the terms of a policy might allow a successor to obtain rights to indemnification, coverage was not transferred by "operation of law." The court also held, however, that any such rights were

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not barred by the policies' anti-assignment clause, as the "chose in action" was fixed as of the date of the underlying injuries triggering coverage. A concurring opinion by Chief Justice Moyer and Justice O'Connor argued that an insurer's defense obligation was not assignable, particularly where, as here, multiple parties might be seeking a defense such that the assignment had materially changed or increased the risk faced by the insurer. A different view was taken by Justices Pfeiffer and Resnick, who concurred in part and dissented in part, arguing that defense costs were likewise assignable. Finally, Justice Lanzinger filed his own concurring and dissenting opinion declaring that Pilkington's demand for a defense and indemnification was not a chose in action and therefore should not have been assignable at all. On the same date, the court ruled in Glidden Co. v. Lumbermen's Mut. Cas. Co., No. 2005-0293 (Ohio December 20, 2006) that Glidden was not entitled to coverage by "operation of law" for lead paint claims involving policies issued between the 1960s and 1974 to a predecessor entity that manufactured the leaded paint giving rise to Glidden's present tort liabilities. Four of the justices found that the underlying corporate transactions that ultimately resulted in the creation of Glidden in 1986 had explicitly excluded insurance policies from the liquidation and distribution of assets of certain entities. Nor did the corporate transactions in any way suggest an intent to convey rights under the policies. However, Judge Lanzinger concurred in the judgment. Justices Resnick and Pfeiffer dissented, arguing that even though the corporate history in this case was more "tangled" than was the case in Pilkington, the successor entity should still be entitled to obtain the benefits of the predecessor's policies.

OKLAHOMA

"As Damages"

Clean up costs" were held to be covered in National Indemnity Co. v. United States Pollution Control, Inc., 717 F.Supp. 765 (W.D. Okl. 1989).

"Occurrence"

No reported environmental cases.

Pollution Exclusion

Oklahoma Supreme Court ruled 6-3 on October 3, 1995 that the exclusion unambiguously precludes coverage for gradual or intentional releases. Kerr-McGee Corp. v. Aetna Cas. & Sur. Co., 905 P.2d 760 (Okl. 1995). The Supreme Court refused to consider extrinsic evidence of drafting history. Accord Macklandburg-Duncan v. Aetna Cas. & Sur. Co., 71 F.3d 1526 (10th Cir. 1995); Oklahoma Publishing Co. v. Kansas City Fire & Marine Ins. Co., 805 F.Supp. 905 (W.D. Okl. 1992).

"Absolute" Pollution Exclusion

"Total" exclusion applied to Lone Star toxic tort claims against manufacturer in Bituminous Casualty Corporation v. St. Clair Lime Co., 69 F.3d 547 (10th Cir. 1995) (underlying suits alleged a "discharge of chemicals in an industrial activity." But see, Red Panther Chemical Co. v. Ins. Co. of the State of Pennsylvania, 43 F.3d 514 (10th Cir. 1994)(Mississippi law).

"Personal Injury" Claims

No reported environmental cases.

"Suit"

No reported environmental cases.

Trigger of Coverage

No reported environmental cases.

OREGON

"As Damages"

The Cleanup Assistance Act of 1999 (ORS 465.475-.480) requires that clean up costs incurred pursuant to written agreements are to be treated as sums which the insured was legally obligated to pay as damages. Earlier, the Oregon Court of Appeals had ruled in St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co., 126 Ore App. 689, 870 P.2d 260 (1994), aff'd on other grounds, 324 Ore. 184, 923 P.2d 1200 (1996) that costs incurred by a wood treatment plant operator in cleaning up pollution on its sites were "damages" because of "property damage." But see, Unified Sewerage Agency of Washington County v. Northland Cas. Co., 81 F.3d 171 (9th Cir. 1996)(Oregon law)(Unpublished)(no coverage for environmental fund paid to public interest group pursuant to settlement that avoided statutory civil penalties).

"Occurrence"

Objective factors, such as the foreseeability that an old tank will rust, are not enough to preclude coverage. Lane Electric Cooperative v. Federated Rural Ins., 114 Ore. App. 156, 834 P.2d 502 (1992)(Court of Appeals reversed a trial court's finding that the insured should have expected that its underground storage tank would begin to leak when it was left in the ground well after the tank's normal life expectancy). Earlier, court ruled in A-1 Sandblasting & Steamcleaning v. Baiden, 53 Or. App. 890 632 P.2d 1377 (Or. 1981), aff'd, 293 Or. 17, 643 P.2d 1260 (1982) that coverage was required despite fact that insured knew that passing vehicles were "substantially certain" to be splattered with paint from spraying operation; harm itself must be intended.

"Personal Injury" Claims

The Oregon Supreme Court ruled in Groshong v. Mutual of Enumclaw Ins. Co., 329 Ore. 303, 985 P.2d 1284 (1999) that coverage for "wrongful entry or eviction or other invasion of the right of private occupancy" only extends to situations in which the underlying claimant has a possessory interest in the premises.

Pollution Exclusion

"Sudden" was held to be ambiguous in St. Paul Fire & Marine v. McCormick & Baxter, 923 P.2d 1200 (Ore. 1996). Court of Appeals has consistently ruled that intentional releases are not "accidental" whether or not the insured intends injury. Transamerica Ins. Co. v. Sunnes, 711 P.2d 212 (Ore. App. 1985); Mays v. Transamerica Ins. Co., 799 P.2d 653 (Ore. App. 1990). A duty to defend may exist if pollution results even in part from "sudden" spills (North Pacific Ins. Co. v. United Chrome Products, Inc., 122 Ore. App. 77 *Morrison Mahoney LLP (Copyright 2007)*).

(1993)) or where complaint does not preclude possibility of "sudden" spills (Northwest Pump & Equipment v. American States Ins. Co., 917 P.2d 1025 (Ore. App. 1996)).

A "secondary discharge" approach to "accidental" has since been adopted by the Court of Appeals. In Employers Ins. of Wausau v. Tektronix, Inc., A123664 (Ore. App. March 28, 2007), the court rejected Wausau's effort to interpret McCormick & Baxter as distinguishing between property damage caused by leaching from surface impoundments and damage caused by leaks, ruptures and spills such that property damage caused by leaching from unlined pits did not constitute a "sudden and accidental" release. The Court of Appeals concluded that a jury might find that leaching from unlined pits was a sudden and accidental event. The Court of Appeals held, however, that the trial court had erred in assigning the "sudden and accidental" burden to Wausau holding that it was reasonable to require the policyholder to assume this burden since it is more likely to be in possession of evidence and benefits from proof in this regard.

"Absolute" Pollution Exclusion

Upheld by Supreme Court in McCormick & Baxter (clean up of wood treatment plant) and by Court of Appeals in Martin v. St. Farm Fire & Cas. Co., 932 P.2d 1207 (Ore. App. 1997)(clean up not restricted to pollution occurring during insured's occupancy). The Ninth Circuit has also upheld it in two unpublished cases. See, Larsen Oil Co. v. Federated Service Ins. Co., 859 F.Supp. 434 (D. Ore. 1994), aff'd, 70 F.3d 1279 (9th Cir. 1995)(exclusion applied to spill caused by party other than insured); Great Northern Ins. Co. v. Benjamin Franklin Savings & Loan Association, 793 F.Supp. 259 (D. Ore. 1990), affirmed, 953 F.2d 1387 (9th Cir. 1992)(asbestos abatement expenses).

The Oregon Supreme Court ruled in Fleming v. USAA, CC 9312-08128 (Ore. November 4, 1999), however, that a pollution exclusion language in the "perils insured against" portion of a property policy could not be given effect owing to the fact that it was not clearly labeled as an "exclusion" in keeping with ORS 742.246(2) which requires that any provision "restricting or abridging the rights of the insured" must be preceded by a sufficiently explanatory title printed in eight-point type capital letters.

"Hostile fire" arguments were rejected in Indiana Lumbermens Mutual Ins. Co. v. West Oregon Productions, Inc., No. 99-1013 (D. Ore. March 1, 2000) aff'd 268 F.3d 639 (9th Cir. 2001). Judge Redden ruled that the underlying claims were in the nature of an action for a continuing nuisance and that even though the underlying plaintiffs had amended their complaint at some point to include allegations that they had suffered damage due to discharges of "gases, smoke, fires and other pollutants" any claim that they had suffered injury because of "uncontrolled and unintended fires over a period of many years is simply fanciful." On appeal, the Ninth Circuit agreed, declaring that the fact that gas, smoke or fumes was emitted by reason of the insured's "dirty" operation of its factory did not place the claims within the "hostile fire" exception since there was no allegation or suggestion that the fire causing these emissions had become "uncontrollable" or had otherwise broken out from where it was intended to be. To the contrary, it appeared from ***Morrison Mahoney LLP (Copyright 2007).***

the other allegations in the plaintiff's complaint, which sought injunctive relief to require the installation of better emissions controls, that the source of the pollutants was indeed "controllable."

Scope and Allocation Issues

Senate Bill 297, which took effect on January 1, 2004, amends and clarifies Oregon law with respect to the issue of allocation in several respects. First, an insured will only be required to bear responsibility for an uninsured period of time if it failed to purchase commercially available (e.g., CGL) coverage. Otherwise, the insured is entitled to recover its entire loss from any insurer and the insurer may not pro rate its obligations merely by reason of the fact that other insurance is available, although the insured is obligated to provide information about other insurance to its insurers, presumably to assist them in obtaining contribution and cooperation. The insured is obligated to give notice of its claim to all insurers but, if the claim is unsatisfied, it is entitled to pursue a claim against the insurer that was on the risk for the longest period of time, had the largest limits or that provided the most appropriate type of coverage corresponding to the type of environmental harm for which the insured is deemed liable. Likewise, where contribution is appropriate, courts may consider the period of coverage, limits and type of coverage as being an appropriate basis for allocating risk.

In a case that is now pending before the Oregon Supreme Court, the Court of Appeals ruled that a polluter is entitled to recover all of its unreimbursed clean up costs from the sole non-settled excess carrier, reversing a trial court's determination that the excess carrier's obligation should be measured by comparing the total limits of its coverage with the total limits of all of the primary and excess policies under which the claim had originally been pursued. In Cascade Corp. v. American Home Assurance Co., 135 P.3d 450 (Or. App. 2006), petition for review allowed, 146 P.3d 884 (Or. 2006), the Court of Appeals declared that the Lamb-Weston doctrine is intended to make insured's whole and has no application to a claim here where the insurer has settled with all but one defendant.

"Suit"

Senate Bill 297 requires that PRP letters be deemed to be a "suit." A similar analysis was earlier adopted by the Court of Appeals in McCormick & Baxter.

Trigger of Coverage

Supreme Court adopted "injury in fact" in McCormick & Baxter, rejecting insurer's argument that "manifestation" is the appropriate trigger for pollution claims.

PENNSYLVANIA

"As Damages"

Lower court rulings appear to favor coverage for clean up costs. Federal Ins. Co. v. Susquehanna Broadcasting, 727 F.Supp. 169 (M.D. Pa. 1989), aff'd, 928 F.2d 1131 (3d Cir. 1991) and Centennial Ins. v. Lumbermens Mut. Cas. Co., 677 F.Supp. 342 (E.D. Pa. 1987).

"Occurrence"

Federal district court ruled in Fischer & Porter Co. v. Liberty Mutual Ins. Co., 656 F.Supp. 132 (E.D. Pa. 1986) that regular improper discharges of solvents by insured's employees were not "accidental." See also Riehl v. Travelers Ins. Co., 772 F.2d 19 (3d Cir. 1985) (Pennsylvania law) (court overturns summary judgment for insured, due to disputed facts as to whether insured owner of dump site learned of polluting activity prior to policy period). In USF&G v. Korman, 693 F.Supp. 253 (E.D. Pa. 1988) the court ruled that a real estate developer's intentional misrepresentations about past pollution were not an "occurrence").

A court has further found that an intent to injure may be inferred from the conduct of a corporation's employees. In Re Texas Eastern Transmission Corporation PCB Contamination Insurance Coverage Litigation, 870 F.Supp. 1293 (E.D. Pa. 1992) aff'd on other grounds, 15 F.3d 1249 (3d Cir. 1993)(knowledge of utility employees that PCBs were entering utility pipelines, causing pollution, was imputed to insured and barred any finding of "occurrence").

The state Supreme Court applied the "known loss" doctrine to liability claims in Rohm & Haas Co. v. Continental Casualty Co., 781 A.2d 1172 (Pa. 2001) that the "known loss" doctrine applies to all claims for which the insured "was, or should be, aware of a likely exposure to losses which would reach the level of coverage" and is not limited to liabilities that are actually adjudicated. By a vote of 5-4, the court held that the "known loss" doctrine should defeat coverage in any case where "the evidence shows that the insured was charged with knowledge that reasonably shows that it was, or should have been, aware of a likely exposure to losses which would reach the level of coverage." One justice distanced himself from this aspect of the court's holding, whereas three others argued that "known loss" should only apply in cases of fraud or, as in Montrose, where the insured's liability had been actually adjudicated.

Pollution Exclusion

After nearly two decades of pro-insurer rulings from state and federal courts, the future of the pollution exclusion was cast into doubt by the Pennsylvania Supreme Court in

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Sunbeam Corporation v. Liberty Mutual Ins. Co., 781 A.2d 1189 (Pa. 2001). Sunbeam's argument that the exclusion was ambiguous or that coverage was mandated on a Morton-style theory of regulatory estoppel by the trial court and, on appeal, by the Superior Court. The Supreme Court ruled 5-2 that the lower courts had erred in granting the insurers' demurrer and dismissing a policyholder's complaint with prejudice where, in the majority's view, the insurer had properly pleaded the elements of a claim for estoppel based upon representations concerning the scope of the exclusion that the insurance industry had made to the Pennsylvania Insurance Department in 1970. While not going so far as to formerly adopt Morton-style regulatory estoppel, the Supreme Court remanded the question back to the trial court for further finding and further suggested that such evidence might be relevant to establish a "custom and usage" within the insurance industry that mandates an interpretation of "sudden and accidental" that is contrary to the understanding of the general public.

"Absolute" Pollution Exclusion

In Madison Construction Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100 (Pa. 1999), the Pennsylvania Supreme Court ruled 4-3 that the pollution exclusion was unambiguous and precluded coverage for injuries suffered by a construction worker who had collapsed after inhaling toxic fumes from a sealant product a job site. Noting that the MSDS sheet for the substances in question treated them as a hazardous substance, the court ruled that there had plainly been a "discharge" of a "pollutant." Three dissenting judges argued that the exclusion should not be given so broad a scope. Accord, Brown v. American Motorist Ins. Co., 930 F.Supp. 207 (E.D. Pa. 1996)(indoor fumes from waterproofing sealant). See also Antrim Mining, Inc. v. PIGA, 648 A.2d 532 (Pa. App. 1994)(mine operator held to "own, rent or occupy" premises from which pollution occurred) and Reliance Ins. Co. v. Moessner, 121 F.3d 895 (3d Cir. 1997)(rejecting argument that such exclusions are limited to "environmental catastrophes").

Despite having the broad construction that it had given the exclusion in Madison Construction, the Supreme Court ruled in Lititz Mut. Ins. Co. v. Steely, 2001 WL 1523849 (Pa. November 30, 2001) that lead poisoning claims are not excluded. While conceding that lead is a "pollutant," the court held that the process of injury did not involve a "discharge, dispersal, release or escape" of a pollutant since all of those terms connote events that occur quickly whereas the process by which lead-based paint deteriorates and exfoliates leaded dust occurs gradually over a long period of time.

A divided Pennsylvania Supreme Court issued a *per curiam* opinion in Wagner v. Erie Ins. Co., J-118-2003 (Pa. April 29, 2004) affirming a lower court's ruling that the absolute pollution exclusion defeated coverage for claims arising out of the cost of cleaning up gasoline that had spilled from underground piping at the insured's gas station. Justice Nigro, joined by Justice Newman, issued a dissenting opinion arguing that a service station operator would reasonably have expected to be covered for spills involving a product so closely identified with its principal business operation.

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Several recent Pennsylvania cases have also suggested that an insurer may not obtain summary judgment on the basis of such exclusions where questions of fact exist with respect to any representations that an insurer may have made to its policyholder concerning the scope of the exclusion. See Reliance Ins. Co. v. Moessner, 121 F.3d 895 (3d Cir. 1997) and West American Ins. Co. v. Bucci, 98-CV-1220 (E.D. Pa. September 3, 1999).

"Personal Injury" Claims

Rejected in O'Brien Energy Systems, Inc. v. American Employer's Ins. Co., 629 A.2d 957 (Pa. Super. 1993). But see, Gould, Inc. v. Arkwright Mutual Ins. Co., 829 F.Supp. 722 (M.D. Pa. 1993)(finding coverage for trespass claims).

Scope and Allocation Issues

The Pennsylvania Supreme Court ruled that insurers whose policies are triggered by multi-year asbestos claims have a joint coverage obligation and may not allocate any share to the policyholder for "orphan shares." J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502 (Pa. 1993).

"Suit"

No reported environmental coverage cases.

Trigger of Coverage

The Pennsylvania Supreme Court adopted a Keene-style trigger for asbestos personal claims in its 1994 ruling in J.H. France. The Third Circuit ruled that J.H. France mandates the use of a "continuous trigger" for pollution liability cases. Koppers Co., Inc. v. The Aetna Casualty & Surety Co., 98 F.3d 1440 (3d Cir. 1996).

A federal district court ruled in Henkel Corp. v. The Hartford Accident & Indemnity Co., 2005 U.S. Dist. LEXIS 26228 (E.D. Pa. November 1, 2005) that liability insurers had no obligation to provide a defense to asbestos personal injury lawsuits that had been brought against the successor entity where the named insured/predecessor was not named in the lawsuits. Despite Henkel's argument that the plaintiffs had mistakenly sued the wrong corporation, Judge Robreno held that an insurer's duty to defend could not be triggered by a "mistaken omission."

RHODE ISLAND

"As Damages"

Reduction in property value due to insured's voluntary "market" decision to clean up property held not "damages in Ryan v. Royal Ins. Co., 728 F.Supp. 862 (D.R.I. 1990), aff'd, 916 F.2d 731 (1st Cir. 1990).

"Occurrence"

An insurer was held liable for the cost of cleaning up the insured's site despite First State's known loss arguments. In INA v. Kayser-Roth Corporation, 770 A.2d 403 (R.I. 2001), the court held that the insured's knowledge of the existence of pollution in and around the property did not preclude coverage, particularly inasmuch as the Stamina Mills site was not directly owned by the insured but by a second tier subsidiary. As a result, the court found that Kayser-Roth, while aware that it potentially could be subjected to suits for property damage, had no knowledge or reason to know until 1984 that it could be subjected to a suit from the government for cleanup costs.

While ruling that an insured had the burden of proving that pollution was unexpected or unintended, a federal district court has declared in Emhart Corp. v. North River Ins. Co., 02-053S (D.R.I. August 3, 2006) that such claims are subject to a subjective standard, whether declared under New York or Rhode Island law.

Pollution Exclusion

The Rhode Island Supreme Court ruled in Textron Corp. v. Aetna Cas. & Sur. Co., 754 A.2d 1138 (R.I. 2000) that the "sudden and accidental"-type exclusion is ambiguous and, in light of its claimed drafting history, should only bar coverage for "intentional or reckless polluters" and "provides coverage to the insured that makes a good faith effort to contain and to neutralize toxic waste but, nonetheless, still experiences unexpected and unintended releases of toxic chemicals that cause damage." The court found that this interpretation of "sudden" was consistent with the drafting history of the exclusion which suggested that its original purpose was only to deny coverage for reckless or intentional polluters. Furthermore, it seemingly adopted a "secondary discharge" analysis finding that the intentional placement of wastes into a holding or containment pond should not be the subject of the exclusion if the subsequent spills from the pond were unexpected or intended. The court found that Textron had at least created questions of fact as to whether its placement of wastes "into the neutralization pond amounted to indiscriminate dumping of toxic chemicals conducted as part of its regular business activity . . . or whether its regular practice was to contain the waste, neutralize it and thereby try to prevent it from contaminating the environment..." Finally, the Rhode Island Supreme Court declared that the insured could avoid the exclusion so long as it established that the pollution resulted

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from both excluded and non-excluded causes.

"Absolute" Pollution Exclusion

A federal district court in Rhode Island interpreting New Jersey law ruled in John Toledo v. Van Waters & Rogers, Inc., 92 F.Supp.2d 44 (D.R.I. 2000) that a total pollution exclusion precluded coverage for severe burns and injuries that a worker suffered when nitric and sulfuric acid spilled onto him from drums belonging to the insured.

"Personal Injury" Claims

No reported environmental cases. In other contexts, courts have interpreted this coverage narrowly. See, Allstate Ins. Co. v. Russo, 641 A.2d 1304 (R.I. 1994)("misrepresentation" doesn't extend to all claims).

Scope and Allocation Issues

A non-settling insurer was left "holding the bag" in INA v. Kayser-Roth Corporation, 770 A.2d 403 (R.I. 2001). In view of the insurer's failure to engage in good faith settlement discussions earlier, the court refused to permit First State to claim a set off to reflect the sums that the insured had obtained from other insurers.

"Suit"

In Ryan v. Royal Ins. Co., 728 F.Supp. 862 (D.R.I. 1990), aff'd, 916 F.2d 731 (1st Cir. 1990), the First Circuit ruled that a voluntary market decision by a property owner to clean up pollution at the urging of federal authorities did not result from a "suit." Relying on Ryan, a federal district court has since ruled that a PRP letter is a "suit." Emhart Corp. v. North River Ins. Co., 02-053S (D.R.I. August 3, 2006). Further, the court ruled that any duty to defend should encompass the cost of pursuing contribution claims against other PRPs since the work was "defensive" in nature.

Trigger of Coverage

The Rhode Island Supreme Court ruled in CPC Int., Inc. v. Northbrook Excess & Surplus Ins. Co., 668 A.2d 647 (R.I. 1995) that coverage should arise in the policy year in which property damage was discovered, became manifest or, in the exercise of reasonable diligence, could have been discovered. In Textron-Gastonia, Inc. v. Aetna Cas. & Sur. Co., 723 A.2d 1138 (R.I. 1999) the court explained that "discoverable in the underlying exercise of reasonable diligence" meant that "(1) the property damage occurred during the policy period, (2) the property damage was capable of being detected and (3) the insured had reason to test for the property damage." See also Textron, Inc. v. Aetna Cas. & Sur. Co., 754 A.2d 1138 (R.I. 2000)(trial court erred in granting summary judgment where evidence

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of earlier spills suggested that the insured not only could have found contamination but had reason to test of it. The court found that the evidence presented by Textron concerning intermittent discharges for decades prior to the discovery of pollution not only created a question of fact as to whether damage had been discoverable during the policy period but suggested that the insured had reason to test for it).

SOUTH CAROLINA

"As Damages"

The South Carolina Supreme Court ruled that environmental clean up costs are "damages." In Helena Chemical Company v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004), the insured sought seeking coverage for the cost of responding to governmental directives that it clean up environmental contamination at three pesticide manufacturing facilities that it had formerly operated in South Carolina. The Supreme Court declared that investigative and remedial costs that the insured had incurred pursuant to consent agreements with state and federal environmental authorities concerning three sites where the insured had formerly manufactured pesticides fell within the scope of the policies" insuring agreement. The court rejected various Fourth Circuit precedents that the trial court had relied on as applying an overly technical or narrow meaning to the word "damages."

"Occurrence"

No reported environmental cases.

Pollution Exclusion

Supreme Court of South Carolina ruled in Greenville County v. The Ins. Reserve Fund, 443 S.E.2d 552 (S.C. 1994) that "sudden" is ambiguous. In a decision that is short on length and logic, the court ruled that the exclusion only applies to pollution that is "expected." Earlier, the Court of Appeals had upheld the application of the exclusion to gradual pollution in a case arising under North Carolina law. Harleysville Mut. Ins. Co. v. R.W. Harp and Sons, Inc., 409 S.E.2d 418 (S.C. App. 1991).

Notwithstanding this limited construction of the exclusion, the Supreme Court ruled in Helena Chemical Co. v. Allianz Underwriters Ins. Co., 594 S.E.2d 455 (2004) that the exclusion precluded coverage for claims involving the insured's sites. The court found that the evidence at trial was that the pollution resulted from routine business operations and therefore was not "sudden and accidental." In a footnote, the court also ruled for the first time that insureds bear the burden of proof on the issue of "sudden and accidental" discharges.

"Absolute" Pollution Exclusion

No reported environmental cases.

"Personal Injury" Claims

No reported environmental cases.

Scope and Allocation Issues

"Time on the risk" allocation adopted by the Fourth Circuit in Spartan Petroleum Co., Inc. v. Federated Mut. Ins. Co., 162 F.3d 805 (4th Cir. 1998) including a share to policyholders for periods for which insurance is unavailable for whatever reason.

"Suit"

A trial court ruled in F.W. Scheper v. USF&G, Beaufort No. 90-CP-07-879 (S.C. Ct. Common Pleas October 29, 1991) that PRP claims are not a "suit."

Trigger of Coverage

Despite earlier "manifestation" rulings (in cases where "discovery" created coverage), court has recently adopted a "continuous trigger" approach. Joe Harden Builders, Inc. v. Aetna Cas. & Sur. Co., 486 S.E.2d 89 (S.C. 1997). The Fourth Circuit subsequently declared in Spartan Petroleum Co., Inc. v. Federated Mut. Ins. Co., 162 F.3d 805 (4th Cir. 1998) that the trigger of coverage for an abutting property owner's property damage claim was the point in time when pollutants migrated onto the plaintiff's property, not the date of the original discharge on the insured's land.

SOUTH DAKOTA

"As Damages"

A private tort claimant's demand for injunctive relief against a polluter was held not covered in Headley v. St. Paul Fire & Marine Ins. Co., 712 F.Supp. 745 (D.S.D. 1989).

"Occurrence"

U.S. District Court ruled in American Universal Ins. Co. v. Whitewood Custom Theaters, Inc., 707 F.Supp. 1140 (D.S.D. 1989) that damage resulting from the migration of pollution away from insured's property was substantially foreseeable and therefore not covered.

Pollution Exclusion

In Benedictine Sisters v. St. Paul Fire & Marine, 815 F.2d 1209 (8th Cir. 1987), a divided court ruled that deliberate discharges of soot that occurred in the course of the insured's good faith efforts to clean out its emissions system were "accidental" since they were not "expected or intended." However, later cases have found that the exclusion bars coverage for gradual pollution, particularly where the cause was within the insured's control. American Universal Ins. Co. v. Whitewood Custom Theaters, Inc., 707 F.Supp. 1140 (D.S.D. 1989) and Headley v. St. Paul Fire & Marine, 712 F.Supp. 745 (D.S.D. 1989).

"Absolute" Pollution Exclusion

The South Dakota Supreme Court ruled that a trial court erred in holding that claims for trespass and nuisance arising out of a concrete plant's emissions of cement dust are not subject to the absolute pollution exclusion. In State Cement Plant Commission v. Wausau Underwriters Ins. Co., 616 N.W.2d 397 (S.D. 2000), the court ruled that whether or not cement dust is a "contaminant" or "pollutant," the exclusion plainly applies as the neighboring property owners were all claiming that they had suffered "contamination" because of discharges from the insured's facility. Two dissenting justices argued that Wausau had failed to show that cement dust is a "pollutant."

Scope and Allocation Issues

No reported environmental cases.

Trigger of Coverage

No reported environmental cases.

TENNESSEE

"As Damages"

U.S. District Court has twice ruled that clean up costs are not "damages." Cedar Chemical Corp. v. American Universal Ins. Co., No. 87-2838-4B (W.D. Tenn. September 13, 1989) and Terminix Int. v. Maryland Cas. Co., No. 88-2186-4B (W.D. Tenn. March 7, 1991), aff'd on other grounds, 956 F.2d 270 (6th Cir. 1992).

"Occurrence"

No reported environmental coverage cases.

Pollution Exclusion

The Tennessee Court of Appeals ruled that "sudden" has a temporal meaning and precludes coverage for gradual discharges of pollutants. Drexel Chemical Co. v. Bituminous Ins. Co., 933 S.W.2d 471 (Tenn. App. 1996), review denied (Tenn. 1996). See also Oscro, Inc. v. St. Paul Fire & Marine Ins. Co., 656 N.E.2d 548 (Ind. App. 1995)(Tennessee law); Terminix, supra, and USF&G v. The Murray Ohio Manufacturing Co., 693 F.Supp. 617 (M.D. Tenn. 1988), aff'd, 875 F.2d 868 (6th Cir. 1989). The Drexel opinion left open the possibility that discrete "sudden" discharges could give rise to coverage if each was short in duration and not part of the site's normal operations.

"Absolute" Pollution Exclusion

The Tennessee Court of Appeals has ruled in Sulphuric Acid Trading Co. Inc. v. Greenwich Insurance Co., 2006 Tenn. App. LEXIS 514 (Tenn. App. July 31, 2006) that the absolute pollution exclusion bars coverage for a personal injury claim arising from the accidental spraying of sulfuric acid during a cargo transfer. Despite the insured's argument that the claim, which involved an accidental spill of nearly 2000 gallons of sulfuric acid while being transferred from rail cars to to tanker trucks was not "environmental" in character, the Court declared that "it would defy logic to hold that the discharge of 1,800 gallons of sulphuric acid into the environment was anything other than environmental pollution. We hold that these facts demonstrate the type of 'classic environmental pollution' that would trigger the Absolute Pollution Exclusion under either of the two lines of reasoning adopted by the various states. While the facts before us do involve an employee injured in the course and scope of his employment, we must look at the big picture and cannot ignore the fact that the injury occurred during an event resulting in substantial environmental pollution."

"Personal Injury" Claims

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Indiana Court of Appeals predicted that Tennessee Supreme Court would refuse to find that pollution claims are covered. Oscro, Inc. v. St. Paul Fire & Marine Ins. Co., 656 N.E.2d 548 (Ind. App. 1995), review denied (Ind. 1996).

Scope and Allocation Rulings

The Sixth Circuit has affirmed a District Court's ruling in U.S. Fire Ins. Co. v. Vanderbilt University, 82 F.Supp.2d 788 (M.D. Tenn. 2000), aff'd, 267 F.3d 465 (6th Cir. 2001) that an insured could not claim coverage on the basis of a Keene "all sums" theory under policies issued in the 1960s for injuries resulting from exposures decades earlier, holding that there was no continuity of injury or conduct between the earlier exposures and allegations that the insured failed to conduct follow up tests in the 1960s.

TEXAS

"As Damages"

Superfund "response costs" were held to be "damages" in Bituminous Cas. Corp. v. Vacuum Tanks, Inc., 75 F.3d 1048 (5th Cir. 1996) and Snydergeneral Corp. v. Century Indemnity Co., 113 F.3d 536 (5th Cir. 1997). But see Mustang Tractor and Equipment Co. v. Liberty Mut. Ins. Co., 1993 WL 566032 (S.D. Tex. October 8, 1993), aff'd on other grounds, 76 F.3d 89 (5th Cir. 1996)(clean up costs are only an injunctive remedy). Cf. The Feed Store v. Reliance Ins. Co., 774 S.W.2d 73 (Tex. App. 1989)(suit to enjoin further infringement of plaintiff's trademark did not seek "damages").

"Occurrence"

Texas courts have generally not permitted coverage for pollution that occurs as a predictable by-product of industrial operations. See Meridian Oil Production, Inc. v. Hartford Accident and Indemnity Company, 27 F.3d 150 (5th Cir. 1994)(groundwater contamination was natural and foreseeable result of insured's intentional spillage of pollutants in the course of oil and gas drilling operations) and Bituminous Casualty Corp. v. Kenworthy Oil Co., 912 F.Supp. 238 (W.D. Tex. 1996), aff'd mem., 105 F.3d 656(5th Cir. 1996)(pollution for insured's oil drilling operations was the natural and probable consequences of oil and gas production activities and not the result of any "accident"). But see Bituminous Casualty Corp. v. Vacuum Tubes, Inc., 75 F.3d 1048 (5th Cir. 1996)(insured's intentional transportation of known wastes to dump sites did not create inference that resulting pollution was also intended).

The Fifth Circuit ruled that claims by neighboring ranchers that their property had been contaminated by saline releases from a gas operator's facility were an "occurrence." In Harken Exploration Company v. Sphere Drake Insurance, PLC, 261 F.3d 466 (5th Cir. 2001), the court refused to find that such contamination was the "natural and probable consequence" of the insured's natural gas operations.

Pollution Exclusion

As yet, the Texas Supreme Court has not ruled on the "sudden and accidental" -type exclusion. However, the state Court of Appeals ruled in Mesa Operating Co v. California Union Ins. Co., 986 S.W.2d 749 (5th Dist. Dallas 1999) and Gulf Metals Industries, Inc. v. Chicago Ins. Co., 993 S.W.2d 800 (3rd Dist. Austin 1999), review denied (Tex. April 18, 2000) that "sudden" was not ambiguous and that gradual pollution was not covered.

The Fifth Circuit has also predicted that the Texas Supreme Court would give "sudden" a temporal meaning in several cases. See Guaranty National Ins. Co. v. Vic Manufacturing Co., 143 F.3d 192 (5th Cir. 1998) ; Mustang Tractor and Equipment Co. v.

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Liberty Mut. Ins. Co., 76 F.3d 1996 (5th Cir. 1996); Snydergeneral Corp. v. Century Ind. Co., 907 F.Supp. 991 (N.D. Tex. 1995), aff'd in part, rev'd in part, 112 F.3d 536 (5th Cir. 1997)(dicta). The applicability of such exclusions depends on whether the claimed injuries are alleged to have been caused by pollutants, rather than the specific theory of liability alleged. Bituminous Cas. Corp. v. Kenworthy Oil Co., 912 F.Supp. 238 (W.D. Tex. 1996), aff'd mem., 105 F.3d 656 (5th Cir. 1996).

Allegations that discharges of salt water, oil and other fluids from the insured's oil and natural gas drilling operations polluted a neighboring ranch have been held to fall outside the scope of a pollution exclusion. Applying Texas law, the Fifth Circuit ruled in Primrose Operating Co. v. National American Ins. Co., No. 03-10861 (5th Cir. August 23, 2004) that the underlying complaint did not preclude the possibility that the discharges occurred suddenly and accidentally. The court noted that there was evidence that flow lines carry their contents under extreme pressure and that when burst, the event occurs suddenly. The fact that the breaks causing the leaks and spills were caused by conditions that had been created over a number of years did not change the fact that the actual break occurred suddenly and accidentally.

Several Texas courts have recently adopted a secondary discharge analysis of the exclusion. Snydergeneral, supra and E&L Chipping Co., Inc. v. Hanover Ins. Co., 962 S.W.2d 272 (Tex. App. 1998). See also Union Pacific Resources Co. v. Aetna Cas. & Sur. Co., 894 S.W.2d 401 (Tex. App. 1994), writ denied No. 95-0473 (Tex. September 18, 1995) holding that the "triggering event" for the exclusion was the escape of pollutants from the landfill, not the initial dumping of wastes into the landfill.

Regulatory estoppel arguments were dismissed in Chickasaw Cotton Oil Company v. Houston General Ins. Co., 2002 WL 1792467 (Tex. App. May 2, 2002).

"Absolute" Pollution Exclusion

In CBI Industries, Inc. v. National Union Fire Ins. Co. of Pittsburgh, 907 S.W.2d 517 (Tex. 1995), the Supreme Court of Texas reinstated summary judgment for an insurer in a personal injury case arising out of a release of hydrofluoric acid gas from a site where the insured was performing operations, holding that extrinsic evidence of drafting history and statements made by insurers to state regulators may not be considered in construing the scope of the "absolute" pollution exclusion. The Texas Supreme Court has also ruled that a contractor was not "occupying" a job site where a spill occurred. Kelley-Coppedge, Inc. v. Highlands Ins. Co., 980 S.W.2d 462 (Tex. 1998).

Texas courts have sustained the exclusion in a number of cases. See Constitution State Ins. Co. v. Isotex, Inc., 61 F.3d 405 (5th Cir. 1995)(personal injuries allegedly caused by exposure to insured's radioactive medical waste held excluded); Certain Underwriters at Lloyd's, London v. CA Turner Construction Co., Inc., 112 F.3d 184 (5th Cir. 1997)(exclusion defeats coverage for personal injuries suffered by construction worker who inhaled phenol

fumes at job site) and E&L Chipping Co., Inc. v. The Hanover Ins. Co., 962 S.W.2d 272 (Tex. App. 1998)(contamination of abutting property owner's water supplies by run off from firefighting efforts at wood chipping plant). But see Round Rock Plaza Joint Venture v. Maryland Cas. Co., 1996 Tex. App. LEXIS 581 (Tex. App. January 17, 1996)(unpublished)(sewerage that spilled out of toilets was not "waste") and Mid-Continent Casualty Company v. Safe Tire Disposal Corporation, 16 S.W.3d 418 (Tex. App. 2000), petition for review denied (Tex. 2000)(shredded rubber not "waste").

In Allen v. St. Paul Fire & Marine Ins. Co., 960 S.W.2d 909 (Tex. App. 1998), the Court of Appeals held that the exclusion barred coverage for a settlement arising out of the insured's contamination of the plaintiff's drinking water supply. The court refused to find a duty to defend merely because there were separate assertions that the drinking water was "not potable" or "not of good quality," holding that these were merely restatements of a claim based upon contamination.

On the other hand, the Court of Appeals ruled in Urethane International Products v. Mid-Continent Casualty Co., 187 S.W.3d 172 (Tex. App. 2006) that an absolute pollution exclusion did not apply to personal injury claims arising out of the plaintiff's exposure to a toxic chemical that was spilled from the insured's truck as the result of a worn lid or gasket on the container in which the chemicals were being transported. The Court of Appeals held that the trial court had erred in finding that the claims were excluded as involving the transportation of "waste." While concurring that the interpretation proposed by the insurer was reasonable, the court held that as the proposed interpretation submitted by the insured was also not unreasonable, coverage must be applied in favor of the policyholder.

"Personal Injury" Claims

Texas courts have relied on this language in finding that claims of trespass by neighboring property owners against polluters are not covered. Bituminous Casualty Corp. v. Kenworthy Oil Co., 912 F.Supp. 238 (W.D. Tex. 1996), aff'd mem., 105 F.3d 656 (5th Cir. 1996)(oil drilling) and Northbrook Indemnity Ins. Co. v. Water District Management Co., Inc., 892 F.Supp. 170 (S.D. Tex. 1995).

Scope and Allocation Issues

The Texas Court of Appeals has declared that an insurer must provide a "full defense" to any case in which any part of the underlying process of injury occurs during the insurer's policy period. In Texas Property and Casualty Insurance Guaranty Association v. Southwest Aggregates, Inc., 982 S.W.2d 600 (Tex. App. 3d Dist-Austin 1998), the court expressly rejected the insurer's contention that its defense obligation should be pro-rated to reflect its overall "time on the risk."

Earlier, a federal court has predicted that Texas Supreme Court would adopt a "time on the risk" analysis for long-tail injuries. LaFarge Corp. v. National Union Fire Ins. Co. of

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Pittsburgh, PA, 935 F.Supp. 675 (D. Md. 1996), aff'd per curiam (4th Cir. 1997). Fifth Circuit ruled that in such cases defense costs should be apportioned between policyholder and successive insurers in proportion to (1) the allegations in the underlying suits; (2) the time period during which the plaintiffs allege exposure for which the insured is liable; and (3) the amount of effort required to defend the insured against the claims. Pending the determination of these factors, the insured and each implicated carrier should each pay an "equal share." Gulf Chemical Corp. v. Associated Metals & Minerals Co., 1 F.3d 365 (5th Cir. 1993)(Lone Star Steel products liability claims).

The Supreme Court ruled 7-2 in Texas Association of Counties v. Matagorda County, 52 S.W.3d 128 (Tex. 2000) that a liability insurer does not have a contractual or implied right to obtain reimbursements for liability settlements that it pays on behalf of its insured even if later determined not to be covered.

Trigger of Coverage

There is no consensus on the appropriate trigger for latent injury claims in Texas. In the absence of controlling state law, the Fifth Circuit ruled in Guarantee National Ins. Co. v. Azrock Industries, Inc., 205 F.3d 253 (5th Cir. 2000) that a "manifestation" trigger should be used for property damage claims but that an "exposure" trigger is appropriate for bodily injuries arising out of long-tail exposures such as asbestos. Contrariwise, the Texas Court of Appeals has more recently ruled that "exposure" should apply to both BI and PD claims. See Pilgrim Enterprises v. Maryland Cas. Co., 24 S.W.2d 488 (Tex. App. 2000).

UTAH

"As Damages"

Held covered in Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co., No. 91-C-461J (D. Utah March 21, 1994), aff'd on other grounds, 52 F.3d 1522 (10th Cir. 1995).

"Occurrence"

No reported environmental cases.

Pollution Exclusion

Utah Supreme Court ruled in Sharon Steel Corp. v. Aetna Cas. & Sur. Co., 931 P.2d 127 (Utah 1997) that (1) pollution exclusion is unambiguous; (2) "sudden" precludes coverage unless the cause of contamination was immediate, abrupt and quick; (3) "suddenness" may not be microanalyzed by focusing on isolated polluting events and (4) insured has the burden of proving a "sudden and accidental" discharge. . See also Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co., 52 F.3d 1522 (10th Cir. 1995); Anaconda Minerals v. Fireman's Fund Ins. Co., 990 F.2d 1175 (10th Cir. 1993).

"Absolute" Pollution Exclusion

No reported environmental cases.

"Personal Injury" Claims

No reported environmental cases.

Scope and Allocation Issues

Utah Supreme Court ruled in Sharon Steel that coverage should be pro-rated on the basis of each party's share of the total coverage (years times limits), including insured.

"Suit"

Held to extend to PRP letter in Quaker State, supra. But see Sharon Steel Corp. v. Aetna Cas. & Sur. Co., Salt Lake C-87-2306 (Utah Cir. Ct. March 9, 1989).

Trigger of Coverage

No reported environmental cases.

VERMONT

"As Damages"

In Hardwick Recycling and Salvage, Inc. v. Acadia Ins. Co., 2004 VT 124 (Vt. December 17, 2004), the Vermont Supreme Court adopted a broad view of "damages" in the context of environmental claims, holding that certain administrative inquiries and enforcement proceedings commenced by the State against a recycling company under Act 250 and the Vermont Hazardous Waste Act were a suit seeking "damages." , the Supreme Court held that an insured in the business of the recycling business would have had an objectively reasonable expectation that its policy would respond to an enforcement action of the sort brought by the State of Vermont.

"Occurrences"

A federal district court ruled in Village of Morrisville Water and Light Department v. USF&G, 775 F.Supp. 718 (D. Vt. 1991) that pollution resulting from the insured's disposal of waste transformers was not expected or intended, even though the insured utility knew that the transformers contained PCBs, where it did not expect or intend that site operator would improperly dispose of them.

In State of Vermont v. CNA Insurance, 779 A.2d 662 (Vt. 2001) the Supreme Court ruled that insurers have the burden of proving the lack of an "occurrence" and that CNA had failed to sustain its burden of proving that the intentional disposal of these materials by past property owners was not an "occurrence" under 1963-1990 policies.

Pollution Exclusions

Until 1983, state insurance regulators mandated the inclusion of an endorsement (Form GL 01 11 or CA 01 13) deleting the exclusion. Since 1994, however, the VDBI permitted the inclusion of absolute exclusions for certain designated risks that have a "high probability of a pollution claim" if agreed to in writing by the named insured.

Prior to 1999, several courts had ruled that this "practice" of the VDBI was binding on insurers, even those whose policies had been issued outside of Vermont.

In Maska U.S., Inc. v. Kansa General Ins. Co., 198 F.3d 74 (2nd Cir. 1999), however, the Second Circuit ruled that the VDBI had not followed the Vermont Administrative Procedures Act that would have required it to publish a proposed rule, hold a public hearing, receive public comments, file a final proposed rule and adopt a final rule with respect to such exclusions. While agreeing that the State of Vermont is, of course, free to establish a public policy prohibiting pollution exclusions in Vermont insurance policies, in the absence of any such statute, binding precedent or valid administrative rule expressing such a policy, the court refused to find that the clear exclusion in the Zurich policy, to which *Morrison Mahoney LLP (Copyright 2007)*.

Maska had agreed, and for which it had probably paid lesser premiums as a consequence, was so "injurious to the interests of the public" as to bar its application.

In Agency of Natural Resources v. U.S. Fire Ins. Co., 796 A.2d 746 (Vt. 2001), the Vermont Supreme Court ruled that language in a special pollution endorsement that was negotiated between the Vermont Department of Banking and Insurance and ISO in the mid-1980's only precludes coverage for costs that an insured incurs in response to cleanup directives involving its own property. The Supreme Court refused to adopt an interpretation of this exclusion that would have extended to all governmentally-mandated cleanup costs although it did remand the case to the trial court for an allocation of such costs between those involving the remediation of pollution on the insured's own property (for which coverage was excluded) and those involving the contamination of wells on the land of abutting property owners (not excluded).

"Personal Injury" Claims

No reported environmental cases.

Scope and Allocation Issues

The Vermont Supreme Court ruled that a trial court did not err in allocating responsibility for clean up costs of the amount of gasoline that had leaked out of the insured's underground tanks during the insurers' respective policy periods. In Agency of Natural Resources v. Glens Falls Ins. Co., 1169 Vt. 426, 736 A.2d 768 (1999), the court declared that the trial court's analysis was logical and supported by the evidence.

"Suit"

The Vermont Supreme Court ruled that clean up demands by a governmental agency were sufficiently adversarial as to constitute a "suit." State of Vermont v. CNA Insurance Companies, 779 A.2d 662 (Vt. 2001) and Hardwick Recycling and Salvage, Inc. v. Acadia Ins. Co., 2004 VT 124 (Vt. December 17, 2004).

The federal district court has also found, however, that not all claims are treated equally and, in particular, that claims by private entities are not a "suit." In Northern Security Ins. Co. v. Mitec Telecom, Inc., 38 F.Supp.2d 345 (D. Vt. 1999). See also In Re St. Johnsbury Trucking Company, Inc., Bankruptcy No. 93B 4313 (D. Vt. April 19, 1999).

Trigger of Coverage

"Exposure" trigger adopted for pollution claims in Village of Morrisville based on American Protective Ins. Co. v. McMahan, 562 A.2d 462 (Vt. 1989)(UFFI claims).

The state Supreme Court has since ruled in State of Vermont v. CNA Insurance Companies, 779 A.2d 662 (Vt. 2001) that a trial court erred in applying a “continuous trigger” to a hazardous waste claim where the only evidence was the wastes had been spilled onto the ground during the 1940s and 1950s and that the contamination had been discovered in the 1990s. In the absence of evidence that the resulting property damage was continuous or progressive, the Supreme Court ruled that the trial court had ruled prematurely that the policies that CNA had issued in the 1960s and 1970s were triggered.

The Vermont Supreme also Court ruled in Towns v. Vermont Mutual Ins. Co., 726 A.2d 75 (Vt. 1999) that a homeowner’s insurer had no duty to accept coverage for claims involving a landfill that the insured had owned and operated prior to the issuance of its policy but which were not listed as an insured location under the policy.

VIRGINIA

"As Damages"

Superfund clean up costs were held not covered in Argonaut Ins. Co. v. Wood Ind., Inc., No. 87-0323-R (E.D. Va. June 20, 1988) and Lumberman's Underwriting Alliance v. Atlantic Wood Ind., Inc., Henrico No. 86L350 (Va. Cir. Ct. October 7, 1988).

Pollution Exclusion

Dumping over a 6 year period in the routine course of the insured's business was determined not to be "sudden and accidental" in Asbestos Removal Corp. v. Guaranty National Ins. Co., 846 F.Supp. 33 (E.D. Va. 1994), aff'd 48 F.3d 1215 (4th Cir. 1995)(applying New York law). Insured also deemed to have burden of proof.

In The Morrow Corporation v. Harleysville Mutual Ins. Co., 101 F.Supp.2d 422 (E.D. Va. 2000), aff'd mem. (4th Cir. 2001) Judge Ellis ruled that "sudden" has a temporal meaning that precluded coverage for gradually-occurring contamination but nonetheless ruled that Sentry owed a defense to a law suit by a landlord against a dry cleaner that alleged discharges and spills of perc owing to the fact that the vague description of how pollution occurred "describe a broad continuum of pollution events that include abrupt or quick, unintentional spills or discharges as well as those that are otherwise." The court refused to find that the underlying complaint could be characterized as alleging a continuous pattern of discharges.

"Absolute" Pollution Exclusion

The Virginia Supreme Court upheld the exclusion in City of Chesapeake v. States Self-Insurers Risk Retention Group, 628 S.E.2d 739 (Va. 2006), declaring that allegations by hundreds of women that exposure to trihalomethanes (THMs) in the City of Chesapeake's water system between 1984 and 2000 that caused them to miscarry were subject to an absolute pollution exclusion in the City's policies. On a certified question from the federal District Court for the Eastern District of Virginia, the Supreme Court ruled that the City was not entitled to recover \$2.4 million in defense costs under a public entity excess liability insurance policy due to the Court's conclusion that the underlying claims involve a discharge of "contaminants" or "pollutants." The Court declared that the THMs were clearly "contaminants" as they have been regulated as contaminants under the Federal Safe Drinking Water Act and its implementing regulations since 1979. Further, the Court found that these pollutants were clearly "released" by the City when a customer turned on the faucet in a residence of business. The Court also observed that in the underlying plaintiffs' Motion for Summary Judgment, it had been alleged that THMs are a poisonous by-product of disinfection that are "released into the domestic water at or about the City's water treatment facility...." The Supreme Court stated that it was unnecessary to consider how other jurisdictions have resolved similar disputes, holding that coverage was *Morrison Mahoney LLP (Copyright 2007)*.

plainly excluded under the plain language of the insurance policy as interpreted in accordance with Virginia law.

Earlier, the Supreme Court ruled in Monticello Ins. Co. v. Baecher, 477 S.E.2d 490 (Va. 1996) that an exclusion for claims arising out of "any substance where the Insured is or may be liable as a result of the manufacture, production, extraction, sale, handling, utilization, distribution, disposal or creation by or on behalf of the Insured of such substance" defeated coverage for lead paint exposures.

The U.S. Court of Appeals for the Fourth Circuit ruled that such exclusions apply to allegations by welders that the insured had been negligent in developing standards for the use of manganese in welding rods. In National Electrical Manufacturers Association v. Gulf Underwriters Ins. Co., 162 F.3d 821 (4th Cir. 1998), the court held that the underlying claims plainly involved injuries resulting from the discharge of a "pollutant" whatever the theory of liability. The court refused to limit the scope of the exclusion to "environmental pollution," holding that the insured's reasonable expectations of coverage are irrelevant where the terms of the policy are plain and unambiguous.

"Personal Injury" Claims

No reported environmental cases.

Scope and Allocation Issues

A federal district court ruled from the bench in C.E. Thurston & Sons, Inc. v. Chicago Ins. Co., No. 2:97cv1034 (E.D. Va. October 2, 1998) that allocation issues involving the underlying asbestos claims should be resolved based upon an "all sums" approach. In contrast, a Virginia District Court stated *in dicta* that long-tail claims should be allocated pro rata, allocating an equal share to all affected years as well as a share to policyholders for periods of "self-insurance" or "no insurance." The Morrow Corporation v. Harleysville Mutual Ins. Co., 101 F.Supp.2d 422 (E.D. Va. 2000), aff'd on other grounds (4th Cir. 2001). In Morrow, Judge Ellis declared that an insurer should provide a full defense to a suit where no reasonable means of pro ration existed, but that where defense costs can be readily apportioned, the insured must pay its fair share for the defense of the non-covered risk.

Trigger of Coverage

"Manifestation" trigger adopted in a products case involving defective security system. Sting Security, Inc. v. First Mercury Syndicate, Inc., 791 F.Supp. 555 (D. Md. 1992)(Virginia law). But see C.E. Thurston & Sons, Inc. v. Chicago Ins. Co., No. 2:97cv1034 (E.D. Va. October 2, 1998)(adopting "continuous trigger" for asbestos suits).

WASHINGTON

"As Damages"

Clean up costs are covered (Boeing Corp. v. Aetna Cas. & Sur. Co., 784 P.2d 507 (Wash. 1990)) even if they are voluntarily incurred by the insured pursuant to its legal obligations under state and federal environmental statutes. Weyerhaeuser Corp. v. Aetna Cas. & Sur. Co., 874 P.2d 142 (Wash. 1994). In Weyerhaeuser and Olds-Olympic, Inc. v. Commercial Union Ins. Co., 918 P.2d 923 (Wash. 1996), the Supreme Court ruled that the availability of coverage did not depend on whether the insured had received a clean up directive. However, the Olds-Olympic court left open the issue of whether an insured could recover the cost of cleaning up trace amounts of contamination below state action levels, merely holding that a jury had not been properly instructed about "legally obligated."

"Occurrence"

Supreme Court applied subjective standard in Queen City Farms, Inc. v. Aetna Cas. & Sur. Co., 882 P.2d 703 (Wash. 1994)(despite jury finding that landfill operator should have foreseen that pollution would inevitably result from surface dumping of wastes on its property, Supreme Court remands for re-trial on issue of whether insured subjectively "expected or intended" pollution to result).

In City of Redmond v. Hartford Acc. & Ind. Co., 943 P.2d 665 (Wash. App. 1997), however, the Court of Appeals ruled that damage to a municipal sewer system from insured's discharges of acid waste was not accidental where insured had received repeated warnings that its waste discharges were far in excess of what was permitted.

In an opinion that blends "known loss" and "occurrence" analysis, the Washington Supreme Court ruled that an insured was not entitled to coverage for a suit by a subsequent property owner for the cost of remediating PCB contamination on land that had been occupied by the insured where, prior to the issuance of the policies, the insured was alerted to the presence of PCBs by the U.S. EPA. Whereas the Court of Appeals had ruled that the subsequent claims were not a "known loss" because the insured had not believed itself to be liable and because the WDOE had never pursued a claim against the insured, the Supreme Court ruled in Overton v. Consolidated Ins. Co., 38 P.3d 322 (Wash. 2002) that it was the foreknowledge of "damage," not "damages" that was relevant to whether the claims were an "occurrence." The Supreme Court also rejected the insured's argument that an awareness of pollution on its own property did not preclude coverage since it must be third party property damage that is unexpected or unintended by the insured.

Pollution Exclusion

In its landmark rulings in Queen City Farms, Inc. v. Aetna Cas. & Sur. Co., 882 P.2d 703 (Wash. 1994) and Key Tronic Corporation v. Aetna, 881 P.2d 201 (Wash. 1994), the Washington Supreme Court declared that the focus of the exclusion is on the discharge of pollutants, not the resulting property damage, thus rejecting the earlier Van's Westlake "active polluter" analysis. However, the Court proceeded to find that (1) "sudden" is ambiguous and would be interpreted as "expected" absent evidence that the insured had contemporaneously understood it to have a temporal meaning and (2) that, while an intentional discharge into a stream would be excluded, the placement of wastes into a landfill or other area where they were meant to remain in confinement is still "accidental" unless the insured foresaw the likelihood of subsequent leaching from the landfill.

"Absolute" Pollution Exclusion

The Washington Supreme Court ruled in Kent Farms, Inc. v. Zurich Ins. Co., 985 P.2d 292 (Wash. 2000), that absolute and total exclusions are only meant to apply to environmental injuries and do not preclude coverage merely because a "pollutant" is involved if the substance in question has not caused "pollution." The court therefore affirmed the Court of Appeals, which had ruled 2-1 that the exclusion did not preclude coverage for personal injuries suffered by a fuel oil delivery man when he was doused with fuel that flowed back from the underground tank into which the diesel fuel was being pumped.

Five years later, however, the Supreme Court ruled 5-4 that an absolute pollution exclusion precludes coverage for injuries suffered by a building occupant who was overcome by fumes from a sealant that the insured contractor was applying nearby. The court ruled in Quadrant Corp. v. American States Ins. Co., 110 P.2d 733 (Wash. 2005) that the exclusion was not restricted to "traditional" environmental contamination and that where, as here, the plaintiff's injuries were due to the toxic properties of the "pollutants," the exclusion should apply. Even though this interpretation significantly limited the policy's scope of coverage, it did not render it illusory. The court agreed with the Court of Appeals opinion that, unlike the facts in Kent Farms, the injuries in this case were caused by a "pollutant acting as a pollutants, not by the negligent act of a third person." Four dissenters argued that the court's earlier opinion in Kent Farms compelled coverage and that the majority had confused "a non-polluting event covered by the policy with the resulting damages, which were caused by pollutants." The minority opinion suggested that a reasonable policyholder would not have viewed the application of sealant as a "polluting event." See also Cook v. American States Ins. Co., 89 Wash. App. 149, 920 P.2d 1223 (1st Div. 1996)(exclusion applies to sick building claims resulting from contractor's negligent use of a sealant too near the building's HVAC system).

In an earlier opinion, the court had also ruled that private tort claims resulting from a chemical fire on the insured's property were held to be covered, notwithstanding the exclusion, due to a claimed ambiguity between the exclusion for sites used for waste disposal and the grant back of coverage for hostile fires on owned sites. American Star

Ins. Co. v. Grice, 854 P.2d 622 (Wash. 1993).

"Personal Injury" Claims

On October 1, 1998, the Washington Supreme Court became the first state supreme court in the country to find that claims for trespass and nuisance arising out of pollution discharges are covered under the "personal injury" portions of a CGL policy. In Kitsap County v. Allstate Ins. Co., 136 Wash.2d 567, 964 P.2d 1173 (1998) the court held that trespass and nuisance claims by the residents of a mobile home park adjacent to the insured's landfill were an action for "wrongful entry" as well as for "other invasion of the right of private occupancy."

Scope and Allocation Issues

The Washington Supreme Court ruled in B & L Trucking & Construction Co. v. Northern Ins. Co., 951 P. 2d 250 (Wash. 1998) that a trial court erred in pro-rating defense costs, holding instead that the insured was entitled to recover "all sums" from Chubb under a Gruol theory of joint liability. Three dissenting judges criticized the ruling, noting that it was unfair to permit a policyholder to obtain seven years of benefits when it had only paid for two years of coverage. In Alcoa v. Accident & Casualty Ins. Co., 140 Wash.2d 517, 998 P.2d 856 (2000)(Pennsylvania law) the Washington Supreme Court ruled that a first party insured could recover in full under DIC property policies, even though the DIC policies lacked "all sums" language.

The Court of Appeals ruled in Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co., 922 P.2d 126 (Wash. App. 1996), review denied (Wash. 1997) that a non-settling insurer was not entitled to a credit for settlement payments that the insured had received from other insurers where it could not prove what portion of the payments related to the same damages that the insured was attempting to recover from it.

Relying on Pederson's, the Washington Supreme Court later ruled in Weyerhaeuser Company v. Commercial Union Ins. Co., 15 P.3d 115 (Wash. 2000) that an excess carrier was not entitled to an off-set for settlements that the insured had obtained from other insurers in connection with environmental liabilities as it had failed to prove any double recovery by the insured. The Washington Supreme Court ruled that the sole remaining insurer could not obtain an offset for monies that the insured received pursuant to numerous settlements of the same claims with other insurers unless it can prove that the insured will otherwise receive a double recovery. In rejecting CU's claim that the insured had already been made whole by the earlier settlements, the court pointed out that the consideration for the earlier settlements was broader than merely paying clean up costs (e.g. release of defense costs; policy buy-backs, etc

In the most recent case to address such issues, the Supreme Court ruled in Puget Sound Energy, Inc. v. Alba General Ins. Co., 149 Wash.2d 135, 68 P.3d 106 (2003) that a
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non-settling insurer had the burden of proving that the insured would obtain a double recovery if they were required to make payment notwithstanding past settlement payments that the insured had already received from other insurers. Whereas, the Court of Appeals had ruled that the insured has the initial burden of showing that the settlement proceeds it had already received were not solely allocable to the sites at issue, at which point the burden would shift to the non-settling insurers to show that the policyholder had already received adequate compensation, the Supreme Court ruled that the non-settling insurers had the burden of proof even as to the threshold issue of what the earlier settlements were for. "If the insured were forced to disclose how every dollar was spent, there would be no incentive for any Ins. Co. to settle claims of this magnitude. That is why the burden is placed squarely on the shoulders of the non-settling insurers; if they wish to avoid paying on a claim, they must show the insured has been made whole."

"Suit"

The Washington Supreme Court avoided ruling on this issue in Olds Olympic, supra. Lower court rulings have often found that a PRP letter is a "suit" for insurance purposes. See e.g. Cascade Pole Co. v. Reliance Ins. Co., Thurston No. 88-2-2136-3 (Wash. Super. February 20, 1992) and Boeing Corp. v. Aetna Cas. & Sur. Co., No. C86-352WD (W.D. Wash. April 16, 1990).

Trigger of Coverage

Washington Court of Appeals adopted a continuous trigger for latent property damage claims in Gruol Constr. Co. v. INA, 524 P.2d 427 (Wash. App. 1974)(dry rot claims against contractor). In Villella v. Public Employers Mut. Ins. Co., 725 P.2d 957 (Wash. App. 1986), the court that the insured must show that some damage occurred during each policy in order to trigger coverage. Absent any evidence that the earth movement, which subsequently damaged the insured home, had begun during the policy period, the coverage claim was dismissed. See also, Fujii v. State Farm, 857 P.2d 1011 (Wash. App. 1993). Judge Dwyer ruled that dumping triggers each policy in which pollution occurs. Northwest Steel Rolling Mills, Inc. v. Fireman's Fund Ins. Co., C86-376C (W.D. Wash. December 5, 1991).

The Washington Supreme Court ruled in Weyerhaeuser Company v. Commercial Union Ins. Co., 15 P.3d 115 (Wash. 2000) that an insurer's coverage obligations should be coextensive with the joint and several liability under CERCLA and therefore must extend to property damage pre-dating the insured's first involvement at a waste site.

WEST VIRGINIA

"As Damages"

Supreme Court avoided ruling on meaning of "as damages" in Triangle Industries v. Liberty Mut. Ins. Co., 390 S.E.2d 562 (W. Va. 1990).

Pollution Exclusion

State Supreme Court ruled in Joy Technologies, Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 393 (W. Va. 1992) that the drafting history of the exclusion and, in particular, statements made to its Insurance Commissioner in 1970 preclude application of the exclusion in any case in which the insured did not intend to cause pollution. See also, Supertane Gas Corp. v. Perry, No. 3:90CV33 (N.D. W. Va. April 16, 1996)(exclusion did not apply in the absence of evidence that pollution was caused intentionally).

"Absolute" Pollution Exclusion

Held to defeat coverage for clean up of insured's former coal gas site in Supertane Gas Corp. v. Aetna Cas. & Sur. Co., No. 92-0014 (N.D. W. Va. September 27, 1994). The West Virginia Supreme Court has since reversed a lower court's ruling that an absolute pollution exclusion in a policy of liability insurance issued to the state Department of Environmental Protection precluded coverage for a negligence action against the DEP by a property owner who complained that his property had been damaged by run off from an abandoned mine being cleaned up by the DEP. In Ayersman v. West Virginia DEP, 2000 W. Va. LEXIS 131 (W. Va. November 22, 2000), the court remanded the case on technical grounds for further fact finding but noted in footnotes that it was "skeptical of any policy language that purports to exclude a primary function of an insured" and that the inclusion of an exclusion for clean up costs incurred at "governmental request" might create an ambiguity in a policy issued to a governmental entity.

WISCONSIN

"As Damages"

Although the Wisconsin Supreme Court ruled 4-3 in City of Edgerton v. General Cas. Co., 184 Wis.2d 750, 517 N.W.2d 463 (1994) that clean up costs are not "damages," the Supreme Court abandoned City of Edgerton in 2003, ruling in Johnson Controls, Inc. v. Employers Insurance of Wausau, 665 N.W.2d 257 (Wis. 2003) that it had made a mistake in adopting a narrow and technical interpretation of the words "suit" and "damages" in City of Edgerton. The court rejected the various distinctions that had arisen from its earlier rulings and declared instead that "We hold that an insured's costs of restoring and remediating damaged property, where the costs are based on restoration efforts by a third party (including the government) or incurred directly by the insured, are covered damages under CGL policies, provided that other policy exclusions do not apply."

"Occurrence"

Wisconsin Court of Appeals ruled in Tecumseh Products Co. v. American Employers Ins. Co., 577 N.W.2d 386 (Wis. App. 1998), review denied, 580 N.W.2d 690 (Wis. 1998) that on-going and intentional discharge of PCBs and waste from insured's factory proved subjective intent to cause pollution.

The Wisconsin Court of Appeals declared in State of Wisconsin v. Hydrite Chemical, No. 00-3344 (Wis. App. March 17, 2005) that a trial court erred in applying the "known loss" doctrine to pollution claims involving an excess insurer where disputed issues of fact existed with respect to whether the insured knew at the time that there was a substantial probability that its cleanup liabilities would exceed the limits of the primary insurance. Additionally, two of the three judges on the panel joined a concurring opinion questioning the need for the "known loss" doctrine in insurance cases and noting that if it was required by public policy for reasons above and beyond existing policy wordings, this was likely a matter that the Supreme Court should address further beyond its preliminary analysis in American Family Mutual Ins. Co. v. American Girl, Inc., 673 N.W.2d 65 (Wis. 2004). The court left open the issue of whether the doctrine depended on proof according to an objective or subjective standard.

Pollution Exclusion

The state Supreme Court ruled in Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wis. 1990) that the exclusion was ambiguous and did not bar coverage for gradual pollution. Further, in Patz v. St. Paul Fire & Marine Ins. Co., 15 F.3d 699 (7th Cir. 1994), the Seventh Circuit held that even intentional dumping is "accidental" so long as the insured did not expect pollutants to escape from the landfill.

"Absolute" Pollution Exclusion

In general, Wisconsin courts have given a broad application to absolute exclusions. In Peace v. Northwestern National Ins. Co., 596 N.W.2d 429 (Wis. 1999), the court extended the exclusion to lead poisoning claims, declaring that lead was a "solid irritant or contaminant" and therefore a "pollutant." Further, the court declared there had plainly been a "discharge" of the lead chips or dust since the child would otherwise not have been injured. Justice Abrahamson dissented, claiming that the conflicting case law around the country was a sufficient basis for finding ambiguity.

Earlier, the court had ruled in Donaldson v. Urban Land Interest, Inc., 564 N.W.2d 728 (Wis. 1997) that exclusion did not apply to "sick building" claims caused by the build-up of unsafe level of carbon dioxide due to poor ventilation as a reasonable policyholder would not have understood exhaled carbon dioxide from ordinary respiratory processes as falling within the scope of the exclusion. The Supreme Court also ruled in early 1997 that an early form of the exclusion does not bar coverage for a contribution action by PRPs since such claims did not arise out of a clean up directive issued to the insured. Wisconsin Public Service Corp. v. Heritage Mut. Ins. Co., 561 N.W.2d 726 (Wis. 1997).

In light of Peace, the Wisconsin Court of Appeals ruled in Hale v. American Family Mutual Ins. Co., 01-1270 (Wis. App. December 11, 2001) that an absolute pollution exclusion precluded coverage for a tenant's lead paint poisoning claim as involving a discharge of "pollutants at or from premises owned, rented or occupied by the insured."

The Court of Appeals has also upheld the exclusion in cases involving outdoor contamination. See, e.g., Norks v. American Family Mutual Ins. Co., 1996 Wis. App. LEXIS 613 (4th Dist. May 9, 1996)(unpublished)(spill of manure onto plaintiff's land by defectively designed holding tank); American States Ins. Co. v. Skrobis Painting, 513 N.W.2d 695 (Wis. App. 1994)(clean up of contractor's oil spill). But see Beahm v. Pautsch, 510 N.W.2d 702 (Wis. App. 1993)(wood smoke not a "pollutant").

"Personal Injury" Claims

State Court of Appeals ruled in 1996 in Production Stamping that such arguments could not be used to "trump" an absolute pollution exclusion. Similarly, the court ruled in Robert E. Lee & Associates, Inc. v. Peter's Service Center, 557 N.W.2d 457 (Wis. App. 1996) that groundwater contamination resulting from overfilling of a tank at the insured's service station did not allege a claim for "wrongful entry." Earlier, the Seventh Circuit had predicted in Scottish Guarantee Ins. Co. v. Dwyer, 19 F.3d 699 (7th Cir. 1994) that Wisconsin courts would find coverage on this basis.

Scope and Allocation Issues

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In 2005, the state Senate Committee on Agriculture and Insurance rejected a bill (SB 137) that would have legislatively mandated “all sums” for long-tail losses.

In the meantime, recent decisions have favored a “time on the risk” approach to long tail claims. Applying New York law, the Seventh Circuit ruled in Sybron Transition Corp. v. Security Ins. Co. of Hartford, 258 F.3d 595 (7th Cir. 2001) that asbestos claims should be allocated on a “time on the risk” basis using the number of months that the insurer’s policy was in effect as the numerator and the entire period of injury, including years for which Sybron had large SIRs, as the denominator. The court also ruled that the insured had no right to stack successive “occurrence” limits both because stacking is antithetical to a “time on the risk” approach. See also, Sauk County v. Employers Ins. of Wausau, 550 N.W.2d 439 (Wis. App. 1996)(affirming insurer’s pro-ration between cost of defending counter-claim and prosecuting the insured’s main suit).

"Suit"

In 2003, the Wisconsin Supreme Court abandoned its 1995 City of Edgerton ruling and declared on July 11, 2003 in Johnson Controls, Inc. v. Employers Insurance of Wausau, (Wis. July 11, 2003) that it had made a mistake in adopting a narrow and technical interpretation of “suit” in City of Edgerton. To the contrary, the court concluded that PRP letters should be treated as a suit since an insured’s receipt of a PRP letter from the EPA or an equivalent state agency, in the CERCLA context, “marks the beginning of adversarial administrative legal proceedings that seek to impose liability upon an insured.

Trigger of Coverage

The Wisconsin Supreme Court ruled in American Family Mutual Ins. Co. v. American Girl, Inc., 673 N.W.2d 65 (Wis. 2004) that a “continuous trigger” was appropriate in cases where injury or damage occurs over more than one policy period.

In Society Ins. Co., A Mutual Company v. Town of Franklin, 607 N.W.2d 342 (Wis. App. 2000), the Wisconsin Court of Appeals ruled that a municipality could stack the limits of each policy in effect during the period that wastes had been disposed of at a landfill. The court rejected the insurer’s contention that coverage was limited to the year of “manifestation,” declaring that Wisconsin follows the continuous trigger theory of coverage. “It is the time of the injury, not the time of the occurrence, that determines which policies are triggered.”

WYOMING

"As Damages"

The Supreme Court of Wyoming held in Compass Ins. Co. v. Cravens, Dargan and Co., 748 P.2d 724, 729-30 (1988) that clean-up costs were an appropriate measure of the "damages" resulting from the pollution of the affected property.

Compass was distinguished by the U.S. Court of Appeals for the Tenth Circuit in State of Wyoming v. Federated Service Ins. Co., 211 F.3d 1279 (10th Cir. 2000)(Unpublished--full text at 2000 U.S. App. LEXIS 15174). The federal court concluded that the State of Wyoming had no subrogation rights against a service station operator for the cost of cleaning up a gasoline leak inasmuch as the policy's "no action" clause precluded any claim against the insurer until such time as the insured's liability had actually been adjudicated, through trial or by written agreement of the parties, including the insurer.

"Occurrence"

No reported environmental cases.

Pollution Exclusion

On December 30, 1996, the Wyoming Supreme Court ruled in Sinclair Oil Corp. v. Republic Ins. Co., 929 P.2d 535 (Wyo. 1996) that the exclusion was unambiguous and would only afford coverage for pollution liability claims if the insured could "identify and establish an event that occurred abruptly or was made or brought about in a short period of time" in order to claim coverage. Regulatory estoppel and drafting history arguments were rejected in Sinclair Oil Corp. v. Republic Ins. Co., 967 F.Supp. 462 (D. Wyo. 1997).

"Absolute" Pollution Exclusion

The Wyoming Supreme Court has declared that the total pollution exclusion should be limited to "environmental pollution" claims. In Gainsco Ins. Co. v. Amaco Production Company, 53 P.3d 1051 (Wyo. 2002), the court refused to find that the exclusion precluded coverage for an accident in which a well field worker fatally inhaled poisonous hydrogen sulfide gas while emptying a vacuum truck in the Elk Basin oil field, which was being operated by Amaco at the time. As with other recent state supreme courts, the court found that its conclusion was consistent with the general motivation of the insurance industry in adopting such exclusions in the 1970's in response to federal and state legislation mandating responsibility for the cleanup costs of environmental pollution. In such circumstances, it concluded that "we cannot believe that any person in the position of the

insured would understand the word 'pollution' in this exclusion to mean anything other than environmental pollution."

"Personal Injury" Claims

No reported environmental cases.

Scope and Allocation Issues

No reported environmental cases. The Wyoming Supreme Court declared in Shoshone Trust Bank v. Pacific Employers Ins. Co., 2 P.3d 510 (Wyo. 2000) that it would not follow a Buss approach to the allocation of defense costs in "mixed" cases. Therefore, if there are "mixed" covered and non-covered claims, the insurer must pay the full cost of defense and may not later seek reimbursement from the policyholder for that portion of the costs that is solely attributable to non-covered claims. On the other hand, the court declared that the insurer was not obligated to prosecute counterclaims that the insured had brought on its own behalf. The Wyoming Supreme Court, citing an unpublished federal district court decision, concluded that an insurer has no right to recoup defense costs if some of the claims presented against its policyholder trigger a contractual duty to defend

"Suit"

PRP letter held to be a "suit" in Hutchinson Oil Co. v. Federated Service Ins. Co., 851 F.Supp. 1546 (D. Wyo. 1994).

Trigger of Coverage

No reported environmental cases.

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