

Chapter 28

Insurance Issues

§ 28.01 by John G. Nevius and the late Eugene R. Anderson
Anderson Kill & Olick, P.C.
New York, New York*

§ 28.02 by Steven I. Werner
Project Navigator-Atlantic
Malvern, Pennsylvania

§ 28.03 by Susan Neuman
Environmental Insurance Agency, Inc.
Larchmont, New York

SCOPE

Older (generally, pre-1985) liability insurance policies can be used to finance brownfields projects. Newer “environmental” insurance products can facilitate property cleanup and redevelopment. Any real estate today—unless it has always been protected wilderness—may have environmental issues. Even “virgin” agricultural land may be contaminated with pesticides, weed-killing herbicides, concentrated animal waste or petroleum products. (See Ch. 32.) Much of this real estate, however, can qualify for redevelopment and special treatment under state and federal “Brownfield” initiatives.

Owners, sellers, buyers and developers of actually or potentially contaminated property can tap recent and historic insurance policies—of all kinds—to finance brownfield redevelopment or simply manage cleanup costs. When contemplating property transactions always:

- Research the existence and terms of any insurance policies which could cover property damage, including those of predecessors in interest;
- Consider rights to historic insurance assets, their value and how to structure property and corporate transfer transactions accordingly; and

* This section originally was prepared by Eugene R. (“Gene”) Anderson and is dedicated to his memory, vision and the contributions he made on behalf of policyholders. The authors of Section 28.01 exclusively represent policyholders in insurance coverage disputes. The authors wish to thank Vianny Pichardo and Christopher Paolino for their contributions to drafts of § 28.01 and Susan Neuman for her comments and assistance with several subsections.

- Do not overlook brownfield incentives (*see* Ch. 27) and the utility of the latest environmental insurance products to solve potential problems by effectively managing risk.

This chapter deals with the significance to brownfields transactions of existing insurance policies that can provide coverage for environmental liabilities. There are two types of such policies. First, there are “older” policies (pre-1985 Comprehensive General Liability or Property insurance policies, etc.) which implicitly cover damage to property; these are addressed in Section 28.01. Second, there are “newer” insurance policies, such as pollution legal liability, finite risk policies and other specialty insurance products, that explicitly provide “environmental” coverage for known or unknown conditions or financial assurance obligations, etc.; these are discussed in Section 28.02. Section 28.01, titled “Insurance Policies Sold in the Past Can Finance Brownfield Cleanups,” explains that historic insurance policies are an important source of potential remediation financing. The problem for the brownfield redeveloper seeking financing is how to recover historic insurance assets. This may require overcoming, and even litigating, corporate assignment, missing or incomplete policy documentation, notice and other potential coverage hurdles. Environmental coverage claims, however, do not necessarily involve litigation and may be settled separately or in conjunction with the acquisition of newer environmental insurance products.

Section 28.02, “New Insurance Policies Can Help Manage the Risks Associated with Brownfields Redevelopment,” addresses the liabilities associated with the redevelopment of contaminated real estate and examines how the new environmental insurance products, among other risk transfer mechanisms, also can facilitate brownfield transactions. There are many risks associated with redeveloping contaminated property, and these risks can be major stumbling blocks to prospective buyers, developers, lenders, sellers and even contractors. Purchasers are concerned that additional environmental problems may be discovered after the closing of the transaction. Sellers are concerned about existing and continuing environmental liabilities. Lenders may be uncomfortable with loans collateralized by contaminated real estate and the possibility of foreclosure and additional liability. Pollution liability insurance policies may be purchased that will alleviate these concerns and discomfort and bring more certainty to the transaction by defining and constraining the extent of remediation costs. Similarly, secured creditor insurance policies can be purchased that will reduce lender risk. Environmental insurance is not a substitute for other types of environmental risk management, such as independent investigation and traditional due diligence, but the opposite is also true. Environmental insurance is a risk management option that should be considered and, in many cases, used in brownfield transactions.

Section 28.03, “Filling the Key Gaps in Brownfields Insurance with Alternative Risk Transfer Products,” addresses three basic gaps in the new environmental insurance policies discussed in Section 28.02: (1) the implementation problem—environmental insurance policies that do not provide intended coverage because they are not properly implemented or integrated into the brownfields risk financing process; (2) the small sites problem—the unavailability of environmental insurance coverage for the risk of cost overruns over small amounts of estimated cleanup costs, i.e., less than \$2 million; this problem can be solved by alternate risk transfer (ART)

products such as pooling arrangements and guaranteed fixed price remediation contracts (GFPRs) that supplement or substitute for cleanup cost cap (CCC) coverage; and (3) the long-term stewardship (LTS) problem—the unavailability of environmental insurance coverage for liabilities associated with institutional/engineering controls (IC/ECs), including their monitoring, maintenance and enforcement; this problem can be solved by a new product, the Continuing Obligations Pollution Policy, which is a manuscripted site pollution liability policy that covers post-remedial risks including reopener and long-term stewardship. Such coverage can be supplemented to create long-term liability assumptions by using structured settlements to fund known remediation and post-remediation (continuing obligations) costs where sources of upfront funding for such costs are available. This coverage in particular requires proper implementation and integration into the brownfield risk management process.

For further discussion of insurance policies' coverage of environmental risks and liabilities, see the following Matthew Bender publications:

- Berz, Spracker and Strochak, *Environmental Law in Real Estate and Business Transactions*, Ch. 4A;
- Gerrard, ed., *Environmental Law in Practice Guide*, Ch. 8 (written by Neuman and Chesler);
- Cooke, *The Law of Hazardous Waste*, Ch. 19; and
- Lathrop, *Insurance Coverage for Environmental Claims*.

SYNOPSIS

§ 28.01

Insurance Sold in the Past Can Finance Brownfield Cleanups

[1] Insurance Coverage Is Available Under Policies Sold in the Past

- [a] Previously Purchased Policies May Provide Coverage for Environmental Costs and Liabilities
- [b] Both First-Party and Third-Party Insurance May Provide Coverage
- [c] Litigation Has Been the Rule
- [d] Be Prepared and Be Informed

[2] Getting Started

- [a] Read and Analyze the Historic Insurance Contracts
- [b] Define the Nature of the Claim
- [c] Understand How the Existence of Insurance Affects the Transaction
- [d] Tapping Historic Insurance—Corporate Succession
 - [i] Evaluate and Memorialize the Parties' Insurance Assets
 - [ii] The Pre-Purchase Insurance Audit
 - [iii] Assigning Rights and Liabilities

[3] Obtaining Insurance Coverage for Environmental Liabilities

- [a] Litigation Can Be Costly and Time-Consuming
- [b] Alternatives to Litigation
- [c] Settlement Negotiations Should Begin Early

- [d] Proceeding with Both Litigation and Settlement Negotiations
- [e] The Bias of Hindsight: Who Expected or Intended What and When?
- [f] Coverage for Natural Resource Damages
- [4] The History of Standard-Form Liability Insurance Demonstrates That There Is Coverage for Environmental Claims
 - [a] As a First Step, Categorize Policies
 - [b] Before 1940, Separate Liability Insurance Policies Were Sold for Specific Hazards; in 1940, the First Standard-Form Comprehensive General Liability (CGL) Insurance Policy Was Introduced
 - [c] From 1966 to 1970 CGL Insurance Was Sold on an "Occurrence" Basis
 - [i] The CGL Insurance Policy Was Designed to Cover Long-term Liabilities and Damages
 - [ii] The CGL Insurance Policy Covered Gradual Pollution Damage
 - [d] The 1970 "Polluters" Exclusions Do Not Apply to Pollution That Is "Sudden and Accidental"
 - [e] In 1986, So-Called "Absolute" or "Total" Pollution Exclusions Were Added
 - [f] Growing Abuse of the Absolute Pollution Exclusion
 - [i] Courts Differ on the Scope of the Absolute Pollution Exclusion
 - [ii] Recent Cases Finding the Pollution Exclusion Applies to Bar Coverage
 - [iii] Recent Cases Finding the Exclusion Inapplicable
 - [g] The Breadth of Pollution Exclusion Is Neither "Absolute" Nor "Total"
 - [h] Owned-Property Exclusions May Bar Coverage for Damage Exclusively to One's Own Property
- [5] There May Be Insurance Coverage for Environmental Claims Under the Personal Injury Provisions of General Liability Insurance Policies
 - [a] Coverage May Exist Under Endorsements or the Personal Injury Provisions of CGL Policies
 - [b] Coverage May Exist Under the Invasion of the Right to Private Occupancy Language
 - [c] Polluters' Exclusions Should Not Preclude Coverage for Personal Injury Claims
- [6] Umbrella and Excess Liability Insurance Policies May Provide Insurance Coverage for Environmental Liabilities
 - [a] Umbrella Insurance Provides the Broadest Liability Coverage Available
 - [b] Umbrella Insurance Is "First Dollar" and/or "Drops Down" When There Is No Underlying Insurance
 - [c] Umbrella Insurance Policies Cover Environmental Damages
 - [i] Generally
 - [ii] Umbrella Coverage in California
 - [d] Excess Insurance "Follows Form" by Incorporating Underlying Insurance Policy Conditions and Exclusions, but Provides Higher Dollar Amounts of Coverage than Primary Insurance

[7] First-Party Property Insurance May Provide Coverage for Environmental Damages

- [a] Property Insurance Pays for Losses or Damages Caused by a "Covered Peril"**
- [b] Numerous Environmental Issues Can Arise Under First-Party Insurance**
 - [i] Introduction**
 - [ii] When Did the Loss or Damage Occur?**
 - [iii] Was There Damage to Covered "Real Property"?**
 - [iv] Was There Covered "Direct Physical Loss" or Damage?**
 - [v] Is Removal of Pollutants Covered "Debris Removal"?**
 - [vi] Does the "Contamination" Exclusion Apply?**
 - [vii] Does the "Ordinance or Law" Exclusion Apply?**
 - [viii] Does the "Land" Exclusion Apply?**

[8] Environmental Impairment Liability (EIL) Insurance Often Does Not Provide the Expected Insurance Coverage and Has Not Always Been Available

- [a] EIL Insurance Policies Were Written on a Claims-Made Basis**
- [b] The General History of EIL Insurance Coverage**
- [c] The Unavailability of Environmental Insurance Coverage**
- [d] Various Policy Exclusions Can Bar Pollution Coverage**

[9] Conclusion

§ 28.02

New Insurance Policies Can Help Manage the Risks Associated with Brownfields Redevelopment

[1] New Insurance Policies Reduce and Transfer Risk and Thus Facilitate Brownfields Transactions

[2] Who Is at Risk in a Brownfields Transaction and Why?

- [a] Purchasers Are Concerned that Additional Environmental Problems May Be Discovered After the Closing of the Transaction**
 - [i] Potential Problems Raise a Number of Concerns**
 - [ii] The Level of Remedy Required Now Often Depends on the Risk Posed by Current and Future Uses of the Property**
 - [iii] Availability of Governmental Statement as to Future Liability Can Provide Some Relief from Uncertainty**
- [b] Sellers Are Concerned as to Continuing Environmental Liabilities After the Transaction**
 - [i] Liabilities Under CERCLA Cannot Be Contracted Away**
 - [ii] Sellers May Contribute to Remediation Costs to Facilitate the Transaction**
 - [iii] Sellers May Also Need to Indemnify the Purchasers**
- [c] Lenders Are Uncomfortable with Loans Collateralized by Contaminated Real Estate**
 - [i] The Prospect of Lender Liability Under CERCLA Has Been Reduced, but Not Eliminated**
 - [ii] Loan Criteria Regarding Contaminated Property Include**

Present Conditions, Future Uses and Remediation Costs and Timing

- [iii] **Risk May Exceed Loan Value**
- [iv] **Lenders Specializing in Contaminated Property**
- [d] **Brownfields Present Environmental Consultants/Contractors with Pitfalls as Well as Opportunities**
 - [i] **Each Service They Provide May Expose Them to Risk**
 - [ii] **The Pricing of Services Is Inexact and May Lead to Perceived Cost Overruns and Disputes**
 - [iii] **Liability May Arise During Actual Investigation and Remediation in Several Situations**
 - [iv] **Various Insurance Policies Can Reduce the Consultant/Contractor's Risk**
- [3] **Insurance Policies May Be Purchased as Part of an Effective Risk Management Plan**
 - [a] **Insurance Reimburses Losses, Reduces the Uncertainty that Accompanies Risk and Helps to Facilitate Transactions**
 - [b] **The Need for a Particular Insurance Policy Should Be Evaluated in Terms of the Extent of Its Coverage versus Its Cost**
 - [c] **The Need for Insurance Should Be Evaluated Early, Especially if an Individually Tailored Policy Is Sought**
- [4] **Insurance Can Be Purchased to Reduce the Risk for Each Party**
 - [a] **Insurance Can Reduce Seller Reluctance**
 - [b] **Insurance Can Also Reduce Purchaser Reluctance**
 - [c] **Insurance Protecting the Lender Can Be Purchased Without a Site Assessment**
 - [d] **Insurance Can Protect the Consultant/Contractor**
- [5] **There Are Now Numerous Kinds of Insurance Applicable to Brownfields Redevelopment**
 - [a] **Cleanup Cost Cap or Remediation Stop-Loss Insurance Limits Financial Exposure of Remediation Projects for Owners and Investors**
 - [b] **Site Liability Environmental Exposure Insurance Is an Increasingly Versatile Form of Pollution Legal Liability Insurance**
 - [i] **It Reduces Post-Remediation Risk for Seller and Purchaser**
 - [ii] **A Variant of This Type of Policy Is Being Used for the Cleanup and Redevelopment of Defense Bases for Other Uses**
 - [c] **"Secured Creditor" or Environmental Site Assessment Insurance Can Reduce the Lender's Risk**
 - [i] **This Type of Insurance Covers Losses Arising from the Borrower's Default**
 - [ii] **This Type of Insurance Covers Liability for Third-Party Bodily Injury, Property Damage and Cleanup Costs**
 - [iii] **This Type of Insurance Is of Benefit to the Lender as Well as the Current or Future Landowner**
 - [iv] **Lenders Often Sell Mortgages in Order to Obtain the Prompt Return of Their Capital**
 - [d] **Various Insurance Products Offer Protection for the Different Phases**

of the Brownfields Work of Contractors or Consultants

- [i] **Contractors Pollution Occurrence Insurance Covers Third-Party Claims Arising from Specified Activities**
 - [ii] **General Contractors Pollution Occurrence Insurance Covers Third-Party Claims Arising from Contractors' or Subcontractors' Specified Activities**
 - [iii] **Errors and Omissions Liability Insurance Covers Professional and Laboratory Services and Opinions**
 - [iv] **The Various Types of Policies Protecting Consultants and Contractors Can Be Packaged**
 - [v] **Underwriters Exiting From This Coverage**
 - [e] **"Owner-Controlled" Insurance Programs Provide Owners and Prime Contractors with Specialized and Adequate Coverage for Their Project**
 - [f] **Underground Storage Tank Pollution Insurance Is Generally Not Purchased for Brownfields Projects**
 - [g] **Environmental Finite Risk Programs Transfer Balance Sheet Environmental Liabilities**
 - [h] **Combining Coverage Forms**
 - [6] **The Relationship Between Insurance and Risk Control**
 - [a] **Environmental Risks Must Be Understood and the Role of Insurance in Risk Management Should Be Considered**
 - [b] **Environmental Due Diligence Is Key to Understanding the Risks**
 - [c] **After the Site Assessment, a Risk Management Plan Can Be Created**
 - [d] **Insurance Cannot Completely Substitute for Risk Control**
 - [e] **Risk Control Cannot Completely Substitute for Insurance**
 - [f] **Evaluating Insurance as a Business Decision**
 - [7] **Environmental Insurance and the Government as a Stakeholder**
 - [a] **Every Level of Government Can Be a Brownfield Stakeholder**
 - [b] **The Government's Risk in Brownfields Remediation and Redevelopment Is Multi-Faceted**
 - [c] **Reducing the Government's Risk**
 - [8] **Case Study**
 - [a] **The Facts**
 - [b] **The Stakeholders and Their Concerns**
 - [i] **The Current Owner**
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 - [iii] **The Industrial Waste Generator**
 - [iv] **The Municipal Government**
 - [v] **The State Environmental Agency**
 - [c] **Reducing Risk for All Stakeholders**
 - [9] **Recent Trends in Environmental Insurance**
- § 28.03 Filling the Key Gaps in Brownfields Insurance with Alternative Risk Transfer Products**
- [1] **Environmental Insurance Should Be Properly Implemented and Integrated into the Brownfields Risk Financing Process**

- [a] First Key Gap and Problem
- [b] The Brownfields Risk Financing Process
- [c] Implementing Brownfields Risk Transfer Techniques
 - [i] The Environmental Insurance Process
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- [2] ART Products That Replace or Supplement Cleanup Cost Cap Insurance Can Solve the Small Sites Problem
 - [a] Defining the Small Sites Problem
 - [b] Guaranteed Fixed Price Remediation Contracts
 - [c] Pooling Arrangements
 - [d] A Reviving Market for Cleanup Cost Cap Coverage
- [3] Tailored Insurance Coverage for Post-Remedial Risks Can Solve the Long-Term Stewardship Problem
 - [a] Defining the Long-Term Stewardship Risk
 - [b] Previously Available Products
 - [i] Liability Assumptions
 - [ii] Insurance Products
 - [c] The Continuing Obligations Pollution Policy

§ 28.01 Insurance Sold in the Past Can Finance Brownfield Cleanups

[1] Insurance Coverage Is Available Under Policies Sold in the Past

[a] Previously Purchased Policies May Provide Coverage for Environmental Costs and Liabilities

The possibility of unanticipated environmental liabilities can be a deal breaker in finalizing and structuring real estate transactions. Current brownfields initiatives attempt to minimize these possibilities. Historic insurance policies may be of particular value in financing brownfield projects, off-setting potential environmental liabilities, and making marginal deals workable.

Stakeholders involved in brownfields redevelopment—property owners, buyers and sellers, consultants and contractors, corporate directors and officers, lenders, municipalities and governmental entities, etc.—are often unaware that insurance policies purchased in the past may provide funds to off-set environmental liabilities and expenses.¹ As Justice Oliver Wendell Holmes said in a different context: “a page of

¹ See Lathrop, *Insurance Coverage for Environmental Claims* (LexisNexis Matthew Bender); *Environmental Law Practice Guide* Ch. 8 (written by Neuman & Chesler) (Michael B. Gerrard ed., LexisNexis Matthew Bender); 2 Anderson *et al.*, *Insurance Coverage Litigation* Ch. 15 (Aspen Law & Business Supp. 2008); Neuman, *Integrated Environmental Risk Financing for Successful Brownfields Redevelopment*, EM (Jan. 2001); Passannante, Ricarte & Bauer, *Environmental Insurance: The Fat Lady Has Not Yet Sung*, Environmental Protection (June 2002); Nevius, *Brownfields and Green Insurance: Developing and Transferring Real Estate in the New Millenium*, Environmental Protection (Mar. 2003) on insurance coverage for environmental liabilities; and Horkovich, Hertzog & Halprin, *Site Pollution Liability Insurance*, Environmental Liability and Insurance Recovery (Am. Bar Ass’n: Tort Trial & Insurance Practice Section, 2012).

history is worth a volume of logic.”²

(Text continued on page 28-9)

² New York Trust Co. v. Eisner, 256 U.S. 345, 349, 41 S. Ct. 506, 507, 65 L. Ed. 963 (1921).

Insurance may help in at least two ways. First, at some point(s) in the past, nearly all brownfields sites were covered by insurance. This “historic” insurance may be available to facilitate redevelopment and pay for today’s environmental costs.^{2.1} The existence of historic insurance such as comprehensive general liability insurance policies (*see* § 28.01[5]), the more specialized environmental impairment liability insurance policies (*see* § 28.01[8]), other types of liability insurance such as umbrella and excess liability insurance policies (*see* § 28.01[6]), and property insurance policies (*see* § 28.01[7]) may cover some or all of the environmental costs to investigate or clean up brownfields property. The existence and terms and conditions of these historic liability insurance policies should be carefully researched and analyzed before undertaking any brownfields transaction. Historic insurance may prove invaluable. Second, more recent environmental insurance products purchased at the time of the brownfields transaction may provide the security needed to bring transactions to fruition, particularly with respect to obtaining financing.^{2.2} (For discussion of the new insurance products available, *see* § 28.02.)

[b] Both First-Party and Third-Party Insurance May Provide Coverage

Automobile insurance illustrates the distinction between the two general types of insurance—first-party and third-party—that may provide coverage to facilitate brownfields projects.

An automobile insurance policy covers loss or damage by collision, fire, or other catastrophe to the owner’s car. In the insurance industry, this is known as “first-party” property insurance. The policyholder is the first party and the insurance company is the second party. Payment for damage to the car is made by the insurance company directly to the first party policyholder/owner.

If the automobile insurance policyholder injures a pedestrian, the policyholder faces legal liability if the pedestrian sues. The automobile insurance policy also provides protection against this potential legal liability. The injured pedestrian is the third party. Because payment for the loss is made by the insurance company to the third party, this type of insurance is called “third-party” liability insurance. Liability insurance may cover environmental liability to third parties, such as those with an interest in the environment (generally the waters of the states and their citizens and/or nearby property owners), in connection with brownfields transactions.

Similarly, homeowners’ insurance provides third-party liability insurance if, for example, a homeowner’s tree damages the neighbor’s roof. If the brownfields transaction involves residential property, even historic homeowners’ insurance policies

^{2.1} *See also* Janice E. Falini, *Using Environmental Insurance to Manage Risk Encountered in Non-Traditional Transactions*, 14 Vill. Envtl. L.J. 95, 110 (2003) (discussing how old insurance policies may cover residual contamination); Julianne Kurdila & Elise Rindfleisch, *Funding Opportunities for Brownfield Redevelopment*, 34 B.C. Envtl. Aff. L. Rev. 479, 498 (2007) (same).

^{2.2} Julianne Kurdila & Elise Rindfleisch, *Funding Opportunities for Brownfield Redevelopment*, 34 B.C. Envtl. Aff. L. Rev. 479, 500 (2007) (discussing new policies available and those that may increase a lender’s willingness to provide financing).

may cover today's environmental problems. Homeowners' insurance also provides first-party property insurance coverage if, for example, the tree damages the homeowner's own roof.

Before embarking on a brownfields project, one should determine whether and to what extent liability insurance (third party) may be available to cover existing environmental damage to neighboring property, the community, land, air or water (generally groundwater), as well as whether property insurance (first party) may be available to cover environmental damage to the policyholder's land, soil, business and property.

[c] Litigation Has Been the Rule

Litigation between policyholders and insurance companies concerning coverage for environmental liabilities under all types of insurance policies has continued unabated from the time such liabilities were first imposed. Why? Because the potential liabilities are so great.^{2,3} The United States, which likely has more environmental liability than any private company, faces an estimated \$343 billion plus in environmental liabilities.³

In addition to liabilities for the obvious type of industrial "pollution," cases involving other types of "environmental" claims involving exposure to alleged pollutants or contaminants, have proliferated. Brownfields participants may face claims for personal injury or property damage due to exposure to, or use of, such diverse products or substances as asbestos, silica dust (sand), lead paint, radiation, pesticides, MTBE (an octane-boosting gasoline additive),⁴ toxic fumes or gases,^{4.1}

^{2,3} David J. Dybdahl, Am. Risk Mgmt. Res. Network, *A User's Guide to Environmental Insurance*, at 15, available at <http://erronline.org/usersguide.pdf> ("Environmental losses are often expensive. Most environmental remediation laws are funded in accordance with a 'let the polluter pay' funding concept. Under these laws, organizations and individuals can be retroactively liable, without fault, to pay for bodily injury, property damage, cleanup expenses, and natural resource damages. There is also a danger that courts will award multiplied damages, fines, and criminal prosecution under these laws. Environmental remediations under these laws tend to be expensive. The average cost to clean up a Superfund National Priority List site is \$30 million. The average cost to clean up a leaking underground storage tank is \$150,000. The Exxon Valdez oil spill in Alaska is reported to have cost in excess of \$3 billion in cleanup costs and \$1 billion in third-party claims.").

³ U.S. Dept. of the Treasury, Financial Report of the United States Government (2008), available at <http://www.gao.gov/financial/fy2008/08frusg.pdf>. Early estimates may have been too low. In 1998, A.M. Best stated that the insurance industry has either paid out or set aside reserves representing 68% of the \$40 billion estimated liability for asbestos claims and reserves representing 52% of the \$56 billion estimated liability for pollution claims. Scism & McDonald, *Insurers Haven't Finished Setting Up Reserves for Asbestos and Pollution, Report Suggests*, Wall St. J., June 11, 1998, at C2. More recent data suggest that a range between \$40 and \$100 billion may have been accurate. For example, approximately \$30 billion was incurred between 2000 and 2006 on asbestos liabilities. However, asbestos liabilities, at least, appear to be dropping. "Incurred asbestos losses dropped to \$1.6 billion in 2006, the lowest level since 2000 when they totaled \$1.5 billion." Insurance Info. Inst., *The Insurance Fact Book 2008*, at 147 (2008).

⁴ Nevius & Ellison, *MTBE: Coverage for the Petroleum Industry's "Spreading" Problem*, *Envtl. Claims J.*, Vol. 16, Nos. 3-4 (2004).

^{4.1} *Barrett v. Nat'l Union Fire Ins. Co.*, 696 S.E.2d 326 (Ga. Ct. App. 2010).

water, soil and sediment,^{4.2} bat guano,^{4.3} and other biological agents such as mold or disease.⁵

When faced with “environmental” or asbestos claims, particularly large claims, the authors have found that insurance companies routinely refuse to provide coverage and seek to litigate. Since the mid-1990s, insurance companies have spent over \$1 billion annually to fund the litigation battle against their policyholders.⁶ As the chairman of Dow Corning wrote, “It has become standard operating procedure for some insurance companies to procrastinate and dispute rather than honor policies with companies that become embroiled in litigation.”⁷ Indeed, a 1992 Rand Corp. study found that 88 percent of the money spent on Superfund-related insurance claims was spent on litigation rather than covering actual environmental cleanup costs.⁸ This trend continues. In 2000, litigation expenses comprised almost 90 percent of the money spent on environmental insurance claims.^{8.1} The insurance industry’s approach to environmental claims has not changed significantly since then. In effect, this forces the policyholder intent on obtaining coverage benefits to fight a two-front war—one against its underlying claimants (*e.g.*, private parties, environmental groups and government regulators, etc.), and another against its insurance company(ies).

[d] Be Prepared and Be Informed

Just as awareness of historic insurance is important to redeveloping environmentally impaired properties, knowledge of the history and development of key terms of standard-form liability insurance policies and seminal coverage cases also is important. A review of old problems highlights the need for new insurance products that address typical legal issues and truly provide a measure of risk transfer for environmental liabilities.

^{4.2} *Hirschhorn v. Auto-Owners Ins. Co.*, 792 N.W.2d 639 (Wis. Ct. App. 2010).

^{4.3} *Hirschhorn v. Auto-Owners Ins. Co.*, 338 Wis. 2d 761, 809 N.W.2d 529 (2012); *Builders Mut. Ins. Co. v. Half Court Press, L.L.C.*, 2010 U.S. Dist. LEXIS 78727 (W.D. Va. Aug. 3, 2010).

⁵ See Anderson, *Insurance Coverage for Lead Paint Claims and Other Sick Building Syndrome Liability Claims*, *Insurance Advocate*, Apr. 29, 1995, at 20; Berringer & Gold, *Insurance Coverage for RSI “Enormously Important” in Helping to Defray Costs*, *Andrews Ins. Coverage Litig. Rep.*, Feb. 20, 1998, at 187; Anderson, *et al.*, *Abate, Don’t Wait; New Lead Paint Disclosure Rules Point to Insurance Coverage*, *Legal Times*, Sept. 20, 1996, at 31.

⁶ *Miller v. Fluharty*, 201 W. Va. 685, 693, 500 S.E.2d 310, 318 (1997) (citing Anderson & Gold, *Recoverability of Corporate Counsel Fees in Insurance Coverage Disputes*, 20 *Am. J. Trial Advoc.* 1 (1996)). See Scism, *Tight-Fisted Insurers Fight Their Customers to Limit Big Awards*, *Wall St. J.*, Oct. 15, 1996, at 1. Moreover, the \$1 billion figure includes only what the insurance industry spends on property and casualty insurance litigation. When life and health insurance litigation expenditures are added, “the legal costs of coverage battles with policyholders may far exceed \$1 billion.” Robert H. Gettlin, *Fighting the Client*, *Best’s Rev.*, P/C, Feb. 1997, at 49, 50.

⁷ See Hazleton, *The Tort Monster That Ate Dow Corning*, *Wall St. J.*, May 17, 1995, at A21.

⁸ Brenner, *The Polluted Open Box*, *Corp. Fin.*, June/July 1995, at 34.

^{8.1} Mark R. Siwik, Lori L. Siwik & Robert C. Mitchell, *Environmental and Toxic Tort Claims: Are You Covered?* (June 2000), available at http://www.riskinternational.com/Articles/articles_acca.htm.

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^{4.2} Hirschhorn v. Auto-Owners Ins. Co., 792 N.W.2d 639 (Wis. Ct. App. 2010).

^{4.3} Hirschhorn v. Auto-Owners Ins. Co., 338 Wis. 2d 761, 809 N.W.2d 529 (2012); Builders Mut. Ins. Co. v. Half Court Press, L.L.C., 2010 U.S. Dist. LEXIS 78727 (W.D. Va. Aug. 3, 2010).

⁵ See Anderson, *Insurance Coverage for Lead Paint Claims and Other Sick Building Syndrome Liability Claims*, Insurance Advocate, Apr. 29, 1995, at 20; Berringer & Gold, *Insurance Coverage for RSI “Enormously Important” in Helping to Defray Costs*, Andrews Ins. Coverage Litig. Rep., Feb. 20, 1998, at 187; Anderson, *et al.*, *Abate, Don’t Wait; New Lead Paint Disclosure Rules Point to Insurance Coverage*, Legal Times, Sept. 20, 1996, at 31.

⁶ Miller v. Fluharty, 201 W. Va. 685, 693, 500 S.E.2d 310, 318 (1997) (citing Anderson & Gold, *Recoverability of Corporate Counsel Fees in Insurance Coverage Disputes*, 20 Am. J. Trial Advoc. 1 (1996)). See Scism, *Tight-Fisted Insurers Fight Their Customers to Limit Big Awards*, Wall St. J., Oct. 15, 1996, at 1. Moreover, the \$1 billion figure includes only what the insurance industry spends on property and casualty insurance litigation. When life and health insurance litigation expenditures are added, “the legal costs of coverage battles with policyholders may far exceed \$1 billion.” Robert H. Gettlin, *Fighting the Client*, Best’s Rev., P/C, Feb. 1997, at 49, 50.

⁷ See Hazleton, *The Tort Monster That Ate Dow Corning*, Wall St. J., May 17, 1995, at A21.

⁸ Brenner, *The Polluted Open Box*, Corp. Fin., June/July 1995, at 34.

^{8.1} Mark R. Siwik, Lori L. Siwik & Robert C. Mitchell, *Environmental and Toxic Tort Claims: Are You Covered?* (June 2000), available at http://www.riskinternational.com/Articles/articles_acca.htm.

Practice Note

In dealing with insurance matters, the first thing anyone involved in brownfields development should do is locate all historic insurance policies purchased by, or on behalf of, owners, prior owners, and tenants of the property. If a particular insurance policy cannot be found, secondary sources may be used to prove that the policy existed and its relevant terms (i.e., period, type of coverage, insurance company and limits). The search for historic insurance policies should include a review of:

- internal accounting records and outside accountants' files for evidence of premium payments;
- legal records and lawyer's files, particularly claims files as well as court records reflecting past claims;
- known insurance policies which may refer to other policies, including renewed or underlying coverage;
- insurance policies of other entities also facing potential liability;
- records of affiliated, predecessor or acquired companies (check acquisition, sales and merger agreements);
- workers compensation records to determine if an insurance company defended a workers compensation claim. Workers compensation and liability insurance are often purchased from the same insurance company;
- records of companies or government agencies (e.g., railroads, the defense department, etc.) which would have required submission of a certificate of insurance from a company before engaging in business with it;
- historic reports to management or risk-management related files or correspondence; and
- insurance agent or broker records, including both domestic and London brokers' records.⁹

—John G. Nevius

There are a number of “insurance archaeology” companies which specialize in locating old or missing insurance policies.¹⁰ While they routinely deny it, insurance companies should have copies or other records of insurance policies purchased from

⁹ Because many U.S. policyholders obtained insurance policies in the London market, insurance brokers in London may have information concerning those insurance policies.

¹⁰ Linn, *Insurance Archaeologists*, J. of Com., Apr. 16, 1998, at 5A; Scism, *These Archaeologists Help Clients Solve Indemnity Crises*, Wall St. J., Dec. 26, 1997, at A1; Zuckerman, Bois, II & Johnson, *Responses to US EPA and State Agency “PRP Letters,”* Env'tl. Liability Allocation L. & Prac. § 2:35 (2012).

them.¹¹ In fact, in federal litigation with the insurance companies, the Federal Rules of Civil Procedures require that an insurance company provide copies of the insurance policies without need for discovery.^{11.1}

Practice Note

In seeking discovery of insurance policies or policy information from an insurance company, be as specific as possible in requesting copies of “missing” insurance policies or information reflecting their existence from the following potential locations:

- insurance company broker or agent files;
- policy storage repositories/warehouses;
- computer systems and indexes reflecting policy, claim, certification-of-insurance-coverage or reinsurance information;
- historic policy-related archives which may vary over time depending on the date of the policy period; the nature of the insurance provided, the site or the type of account; changes in the organization of the insurance company corporate structure or underwriting-function; and the geographic locations involved (i.e., location of the insured risk, policyholder or insurance company headquarters or states of incorporation, etc.);
- claim and underwriting files at the branch, regional and home offices;
- loss-run tracking systems reflecting the nature, timing and scope of prior losses under the insurance policy(ies); and
- records explaining the meaning of policy number and letter series designations.

Insurance companies are required to maintain policy records for purposes of tax documentation and recovery of reinsurance, etc. Moreover, assertions that insurance policies or information cannot be located should be checked against,

¹¹ See *Princeton Gamma-Tech, Inc. v. Hartford Ins. Group*, No. SOM-L 1289-91 (N.J. Super. Ct. June 5, 1997) (policyholder had proven the existence and material terms and conditions of missing policies and claims handler stated that Hartford’s “longstanding goal has always been to preserve its copies of insurance policy records to the fullest extent necessary to adequately protect the interests of Hartford and its insureds.” Affidavit of Tommy Michaels (dated July 18, 1997) at 2).

See also Reply Brief of Respondent CNA Casualty of California in Reply to Appellant Pacific Indemnity Co. at 27 (filed Oct. 4, 1984), *CNA Cas. Co. v. Seaboard Sur. Co.*, 176 Cal. App. 3d 598, 222 Cal. Rptr. 276 (1986) (“Public policy would certainly dictate that an insurer maintain policies of insurance for a lengthy period of time Since the insurer’s only business is “insurance,” it should have the burden of maintaining the policies.”).

^{11.1} A “party must, without awaiting a discovery request, provide to the other parties . . . any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.” Fed. R. Civ. P. 26(a)(1)(A)(iv).

and be consistent with, an insurance company's internal document retention practices or guidelines.

—John G. Nevius

[2] Getting Started

[a] Read and Analyze the Historic Insurance Contracts

Brownfields redevelopment must successfully reconcile many different interests—those of buyers; sellers; lenders; consultants; engineers; contractors; and federal, state and local government authorities. Exactly what insurance coverage, old or new, is available or necessary will vary.¹² The grant of insurance coverage, the type of insurance provided, exclusions from coverage, and the language of the entire policy contract must be closely examined in order to identify potential opportunities and problems in obtaining insurance coverage. Upon receiving notice of a claim or occurrence involving potential environmental liability, insurance companies often reflexively deny coverage citing numerous potential defenses. Successful pursuit of historic coverage assets requires challenging such reflexive denials.

[b] Define the Nature of the Claim

When considering whether insurance coverage may exist under historic insurance policies, brownfields participants should determine what liabilities may exist and in what capacity they may be liable. For example, under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980¹³ (CERCLA or Superfund), one may be strictly liable for the costs of cleaning up property as an owner, an operator, a generator, an “arranger,” a lender, a trustee, a successor, a transporter, a landlord or a tenant. (For a discussion of all of these types of liability, see Ch. 4.) Superfund-type liability may be imposed under state and local law as well.¹⁴ Cleanup liability may also be imposed under other federal environmental statutes such as the Resource Conservation and Recovery Act (RCRA)¹⁵ and the Toxic

¹² For discussion of environmental liability considerations when buying and selling property, see generally *Lender Liability for Contamination of Property by Hazardous Substances*; Carpenter, *Environmental Dispute Handbook: Liability and Claims* § 10.23 (Wiley 1991); *Environmental Law Practice Guide* Ch. 32 (Michael B. Gerrard ed., LexisNexis Matthew Bender).

¹³ 42 U.S.C. § 9601 *et seq.*

¹⁴ See, e.g., New Jersey Spill Compensation and Control Act, N.J. Stat. Ann. § 58.10-2311, discussed in § NJ.05[2] of this publication. In 1997, New Jersey enacted the Brownfield and Contaminated Site Remediation Act, N.J. Stat. Ann. § 58:10-23 *et seq.* See generally *Brownfield and Contaminated Sited Remediation Act* (BCSRA); Schnapf, *New Jersey Adopts Comprehensive Brownfield Legislation*, N.Y.L.J., Apr. 16, 1998, at 1. For a survey of state environmental liability, see *Environmental Law Practice Guide* Chs. 42 to 93 (Michael B. Gerrard ed., LexisNexis Matthew Bender).

¹⁵ 42 U.S.C. § 6901 *et seq.*; *Environmental Law Practice Guide* Ch. 29 (Michael B. Gerrard ed., LexisNexis Matthew Bender); see also Nevius, *Policyholders' Coverage Rights May Be Affected Under Resource Conservation and Recovery Act*, *Mealey's Ins. Law Weekly*, June 7, 1999.

Substances Control Act (TSCA).¹⁶ Additional liability may arise under coverage for so-called personal injury, such as claims of trespass and nuisance or involving negligence or strict liability (*see* Ch. 5). The environmental liability sought to be imposed, the interest and corporate status of the brownfields participant, and the nature of contamination also are key factors in determining the potential availability of insurance coverage.

[c] Understand How the Existence of Insurance Affects the Transaction

Environmental concerns arise in virtually all transfers of real property. Many transactions fail because of environmental problems. Buyers are concerned that they might be responsible for unpredictable, open-ended, long-term, and substantial cleanup costs. Lenders may refuse to finance projects involving even the slightest potential environmental liability.¹⁷ In fact, with the risk of possible catastrophic environmental liability, more lenders have considered the alternative of all together abandoning their interest in the collateral rather than risk further involvement in the property.^{17.1}

Environmental concerns can lead to good deals for those that manage risk and value property properly. A “steep fear discount” may result in property being sold for much less than what it might be worth.¹⁸ Factors to be considered are the current and projected market value of similarly-situated real estate and the target site once environmental remediation takes place, as well as the projected cash flow of the target site during remediation, and after the redevelopment takes place based upon projected future use.¹⁹ (For further discussion of valuation issues, *see* Ch. 29 of this publication).

Buyers of brownfields property where historic insurance is available may be able to

¹⁶ 15 U.S.C. § 2601 *et seq.*; Environmental Law Practice Guide Ch. 27 (Michael B. Gerrard ed., LexisNexis Matthew Bender).

¹⁷ It has been reported that more than 40 percent of commercial mortgage banks surveyed by an insurance company pulled out of mortgage deals because of fears about contamination, and 87 percent said that such fears delayed transactions. Deutsch, *Fears of Future Liability Scuttle Many a Deal*, N.Y. Times, July 2, 1995, Sec. 9 (Real Estate), at 7.

^{17.1} Forte, *Real Estate Loans: Default and Workout*, Commercial Real Estate Financing: Strategies for Changing Markets and Uncertain Times, ST053 ALI-ABA 1543 (Am. Law Inst.-Am. Bar Ass’n June 2012). *See generally* Arnold & Tracht, *Environmental Risks in Construction Financing: Lender Concerns in Brownfields Redevelopment—The Brownfields Problem and Opportunity*, 2 Construction & Development Financing § 8:53 (West 3d ed. 2012).

¹⁸ Deutsch, *Fears of Future Liability Scuttle Many a Deal*, N.Y. Times, July 2, 1995, § 9 (Real Estate), at 7. The article reported that an asbestos-ridden office building in Atlanta was selling for half of what it would cost if it were “clean.”

For an in-depth look at the types of risks inherent in transactions involving contaminated real estate, including a breakdown of the risks by transaction-type (purchase or sale, mergers and acquisitions, leases, ground leases and sale-leaseback transactions, and balance sheet management transactions), *see* Taylor, *Risk Management Considerations in Transactions Involving Contaminated or Potentially Contaminated Real Estate*, Envtl. Claims J., Winter 1998, at 19.

¹⁹ Margolis & Davis, *Doing the Brownfields Deal*, in Brownfields Transactions: Making the Deals Work 23, 24 (ABA Satellite Seminar Mar. 27, 1997). *See* Ch. 29.

afford to pay more.²⁰ Insurance policy proceeds can offset higher purchase prices. Alternatively, buyers and sellers can agree to split any amounts recovered from insurance companies when claims are paid in the future.²¹

[d] Tapping Historic Insurance—Corporate Succession

[i] Evaluate and Memorialize the Parties' Insurance Assets

The independent rights to coverage under comprehensive general liability insurance should not simply vanish after a merger or corporate restructuring of the "Named" or "Additional Insured(s)" identified in the policy.²² Potential insurance assets should be evaluated and their status or transfer expressly addressed before any acquisition is completed. Memorializing the rights and obligations of the parties to insurance assets, including any transfer thereof, should minimize future disputes with insurance companies and other related corporate entities.

[ii] The Pre-Purchase Insurance Audit

The process of evaluating a company's insurance assets begins with an historic coverage audit. A potential buyer can retain insurance archaeologists as part of its due diligence team and should try to obtain cooperation from the seller.²³ Indeed, the potential seller may want to perform the audit itself, because doing so could augment its saleable assets or finance future cleanup. A comprehensive insurance audit can uncover more coverage assets, preserve policy evidence and ensure greater protection now and for decades to come.

The first step in the audit is to establish a corporate history with respect to the property. Identify former owners and the nature and dates of changes in corporate status, including significant acquisitions and divestitures. Check acquisition documents for references to the transfer of insurance rights and beware of side-letters, memoranda or other agreements purporting to transfer such rights. Also, keep in mind that a parent company's actions can bind its subsidiaries.²⁴ Next, obtain copies of all

²⁰ Taylor, *Brownfields Update: Promises, Problems and Predictions for the Future*, in *Brownfields Transactions: Making the Deals Work* 127, 137 (ABA Satellite Seminar Mar. 27, 1997).

²¹ Motiuk & Pritchard, *Due Diligence and Environmental Negotiations*, *Conducting Due Diligence* 1997, at 761, 774 (PLI Corporate Law & Practice Course Handbook Series No. B-991, 1997).

²² Motiuk & Pritchard, *Due Diligence and Environmental Negotiations*, *Conducting Due Diligence* 1997, at 761, 771 (PLI Corporate Law & Practice Course Handbook Series No. B-991, 1997); *see also generally* Hovermill & Whittaker, *Without Consent: Establishing a Corporate Successor's Rights to the Predecessor's Insurance Coverage*, *Tort & Ins. L.J.*, Vol. 37, No. 1, at 105 (Fall 2001); and Taylor, *Risk Management Considerations in Transactions Involving Contaminated or Potentially Contaminated Real Estate*, *Env'tl. Claims J.*, Winter 1998, at 19.

²³ Berz & Spracker, *Counselling on Environmental Law Matters*, *The Corporate Counsellor's Deskbook* 791, 838 (Block & Epstein co-eds., Aspen, 4th ed. 1992).

²⁴ *See* *Premier Roofing Co. v. Home Ins. Co.*, 1999 Conn. Super. LEXIS 2239 (Conn. Super. Ct. Aug. 13, 1999) (parent's action binds subsidiary in insurance context). *See also* *United States v. Western Elec. Co.*, 797 F.2d 1082, 1087-88 (D.C. Cir. 1986) (concluding that a parent corporation could bind its wholly owned subsidiaries with respect to a consent decree without affording the subsidiaries independent legal

existing liability insurance policies (past and present) for each corporate entity, identify any coverage gaps and investigate and preserve records in storage. The names and descriptions of each entity identified as a “Named” or “Additional Insured” in the policy or any attached endorsements can be crucial factors in establishing post-transaction rights to coverage. “Named Insured” descriptions often track corporate histories when policies with different periods are compared and can be used to establish coverage through a course of dealing.²⁵

[iii] Assigning Rights and Liabilities

In addition to determining the value of insurance assets, an insurance audit can identify problems that may arise when an acquiring company attempts to collect under its acquisition’s insurance. Often, two or more surviving entities may have rights to claims under the same historic insurance policies after a merger or acquisition.^{25.1} Any transaction agreement should clearly spell out the rights and responsibilities of the surviving entities under those policies. If a transaction is structured as a sale of stock, rights to insurance will probably be preserved, but a simple transfer by deed may not suffice.²⁶

Many transactions involve the creation of stand-alone corporate entities or the integration of such entities into other existing corporations as, for example, corporate divisions. Even after a Named Insured is integrated entirely into the post-merger corporate entity’s coverage program, the pre-merger Named Insured should retain its own independent rights and obligations.²⁷ Status as an unincorporated division either

representation); *People Express Pilot Merger Committee v. Texas Air Corp.*, 1987 U.S. Dist. LEXIS 9293, at *12 (D.N.J. Oct. 14, 1987), *aff’d*, 958 F.2d 364 (3d Cir. 1992) (holding that the parent corporations acted with apparent authority to bind their carrier subsidiaries during the negotiation of a labor protection agreement); *Borough of Lansdale v. PP&L, Inc.*, 426 F. Supp. 2d 264, 306 (E.D. Pa. 2006) (in its *res judicata* examination, the court found that a wholly-owned subsidiary was in privity with its parent company and therefore was considered a party in the parent’s prior lawsuit); *Greenberg v. Potomac Health Sys., Inc.*, 869 F. Supp. 328, 330–31 (E.D. Pa. 1994) (litigation against parent barred subsequent claim against wholly-owned subsidiary).

²⁵ See *Justarr Corp. v. Buckeye Union Ins. Co.*, 656 N.E.2d 1345 (Ohio Ct. App. 1995) (evidence regarding course of dealing between corporation established that parties intended corporation to be Named Insured even though corporation was omitted from express Named Insured provision in policy).

^{25.1} For a discussion of successor liability issues and an example of the potential complications, see *Henkel Corp. v. Hartford Acc. and Indem. Co.*, 29 Cal. 4th 934, 129 Cal. Rptr. 2d 828, 62 P.3d 69 (2003). As addressed in further detail below, mergers generally will be sufficient to qualify corporate successors for access to insurance coverage of predecessor entities.

²⁶ See generally *Motiuk & Pritchard, Due Diligence and Environmental Negotiations in Conducting Due Diligence* 1997 at 761, 774 (PLI Corporate Law & Practice Course Handbook Series No. B-991, 1997).

²⁷ See, e.g., *John Deere Ins. Co. v. Shamrock Indus., Inc.*, 929 F.2d 413 (8th Cir. 1991) (company that was incorporated and owned by president and sole owner of Named Insured corporation, was “controlled” and “under the active management” of the Named Insured within the meaning of the policies at issue, and thus insurance company had duty to defend newly incorporated entity); see also *John Deere Ins. Co. v. Shamrock Indus., Inc.*, 696 F. Supp. 434, 436, n.1 (D. Minn. 1988) (finding that newly incorporated entity, which was created in 1987, was covered under policies at issue, one of which was in effect from January

before or after a merger or acquisition should not eliminate insurance coverage rights.²⁸ Independent coverage rights continue to exist.²⁹

Insurance companies generally have the burden of stating policy limitations clearly and unambiguously. Therefore, if an insurance company did not intend to extend independent coverage to any subsequent corporate entity or division, then the policy language should explicitly have said so.^{29.1} To the extent a corporate entity would have been entitled to insurance coverage if it had incurred liability during the policy periods at issue, valuable insurance coverage does not simply vanish upon the happening of some corporate transaction. To conclude otherwise would provide an improper windfall in premiums and avoidance of continuing exposure to insurance companies.

The majority rule generally is that the right to coverage should be freely assignable without the insurance company's consent notwithstanding the insurance policy's supposed "no assignment"³⁰ or "cooperation" clauses.³¹ Application of this rule is

1, 1985 to January 1, 1986), *aff'd*, 929 F.2d 413 (8th Cir. 1991).

²⁸ Corporate divisions should be afforded rights to coverage under their corporation's liability policies. *See* Container Supply Co. v. Fireman's Fund Ins. Co., 712 F. Supp. 871, 873 (D. Kan. 1989) (common sense of corporate liability dictated that the defendant insurance company had a duty to defend the insured's subdivision, despite the subdivision not being specifically named in the policy); *Argonaut Southwest Ins. Co. v. Am. Home Assur. Co.*, 483 F. Supp. 724 (N.D. Tex. 1980), *aff'd*, 636 F.2d 311 (5th Cir. 1981) (although the court found that the policies did not provide coverage to the division, its holding was specifically based on the fact that the corporations' insurance policies explicitly excluded coverage for the division). *See also* Martindale Lumber Co. v. Bituminous Cas. Corp., 625 F.2d 618, 620 n.1 (5th Cir. 1980) (although the Named Insured was an individual, because the policy was issued to individual d/b/a a partnership, the policy covered the unnamed partner as well); *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 2004-Ohio-6922, 2004 Ohio App. LEXIS 6468, ¶ 39 (8th Dist.), *rev'd*, 112 Ohio St. 3d 470, 2006-Ohio-6553, 861 N.E.2d 109 ("In the absence of a policy exclusion, a corporation's insurance policy extends rights to coverage, including the duty to defend, to unincorporated divisions.").

²⁹ *See* Hansen & Rowland, Inc. v. Fidelity & Deposit Co., 72 F.2d 151 (9th Cir. 1934) (where injury occurred while subsidiary still was owned by parent, parent's subsequent sale of subsidiary did not defeat subsidiary's or parent's rights to claim under policy); *see also* Oklahoma Morris Plan Co. v. Security Mut. Cas. Co., 323 F. Supp. 1057 (E.D. Mo. 1970) (bankers blanket bond issued to former owner of plaintiff continued to cover plaintiff for pre-sale injuries even after plaintiff was sold to another entity), *aff'd*, 455 F.2d 1209 (8th Cir. 1972) (noting that because case only dealt with coverage for pre-sale activities, court was not faced with any change in insurer's risk as it pertained to personal characteristics of plaintiff's purchaser).

^{29.1} Caroline Vazquez, *Into the Unknown: The Reach of Environmental Insurance in Cases*, 16 Conn. Ins. L.J. 467, 477-78 (2010) ("[T]he common law doctrine of contra proferentem governs all ambiguities in insurance policies when coverage is litigated, dictating that ambiguous terms should be construed against the insurer, who deals in the subject matter routinely and had the benefit of drafting the terms.").

³⁰ For example, liability insurance policies frequently include a so-called "no assignment" provision stating: "This policy and any and all rights hereunder are not assignable without the written consent of the Insurer." *See* OneBeacon America Ins. Co. v. A.P.I., Inc., 2006 U.S. Dist. LEXIS 34297 (D. Minn. May 25, 2006) (vesting of asbestos insurance policies in bankruptcy trust could take place without regard to their anti-assignment provisions); *Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.*, 588 N.W.2d 756, 761-64 (Minn. Ct. App. 1999) (transfer of "all assets" did not impermissibly change nature of policy's covered activities, but rather provided right to collect insurance for claim arising out of covered activities that occurred during the policy period); *B.S.B. Diversified Co. v. Am. Motorists Ins. Co.*, 947 F. Supp.

based upon the idea that such an assignment does not interfere with the insurance company's right to choose its own indemnitee, or expand liability beyond the scope intended (and purchased), but merely involves the payment of a claim which has already accrued.^{31.1} Therefore, no prejudice to the insurance company exists and the "no assignment" clause should not be implicated. Because events giving rise to liability in cases involving brownfields generally take place before the brownfields transaction, the anti-assignment provisions in the insurance policies should not negate or adversely impact insurance coverage.³²

1476 (W.D. Wash. 1996) (even with anti-assignment clause in insurance policy, law recognizes assignments of insurance rights for events or activities that precede assignment); *see also* Northern Ins. Co. v. Allied Mut. Ins. Co., 955 F.2d 1353, 1358 (9th Cir. 1992); Int'l Rediscout Corp. v. Hartford Acc. & Indem. Co., 425 F. Supp. 669, 675 (D. Del. 1977); Magers v. Nat'l Life & Accident Ins. Co., 329 S.W.2d 752, 756 (Mo. 1959); Combs v. Shrewsbury Mut. Fire Ins. Co., 32 N.J. Eq. 512, 515, 1880 N.J. Ch. LEXIS 69 (N.J. Ch. May 1880); Flint Frozen Foods v. Firemen's Ins. Co., 12 N.J. Super. 396, 79 A.2d 739, 741 (Law Div. 1951), *rev'd on other grounds*, 8 N.J. 606, 86 A.2d 673 (1952) (stating that the majority of federal and state courts agree that a non-assignment clause in an insurance policy does not prohibit assignment of rights after a loss has taken place). *See generally* Couch, 16 Couch on Insurance 2d §§ 63:40-41 (1996) (even insurance policies that specially state that there shall be no assignment without the insurance company's consent *after a loss has occurred* have been held to be unenforceable as being against public policy); Appleman, 6B Insurance Law and Practice § 4269 (1995); Alexander Mfg., Inc. Emp. Stock Ownership Plan & Trust v. Illinois Union Ins. Co., 560 F.3d 984 (9th Cir. 2009) (holding that insurance policy's anti-assignment clause was ambiguous, and thus clause was construed against insurance company); Rumbin v. Utica Mut. Ins. Co., 254 Conn. 259, 268, 757 A.2d 526, 531 (2000) ("antiassignment clauses are construed narrowly whenever possible"). *But see* Henkel Corp. v. Hartford Acc. and Indem. Co., 29 Cal. 4th 934, 129 Cal. Rptr. 2d 828, 62 P.3d 69 (2003); Red Arrow Prods. Co. v. Employers Ins. of Wausau, 607 N.W.2d 294, 301 (Wis. Ct. App. 2000); Del Monte Fresh Produce (Hawaii), Inc. v. Fireman's Fund Ins. Co., 183 P.3d 734 (Haw. 2007).

³¹ *See* Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 571 N.E.2d 357 (1991) (rejecting forfeiture of insurance proceeds on the basis of cooperation clauses and other policy requirements in the absence of actual prejudice, in part, because insurance policies are contracts of adhesion offered by insurance companies more or less on a "take it, or leave it" basis).

^{31.1} *In re Pittsburgh Corning Corp.*, 417 B.R. 289, 313 (Bankr. W.D. Pa. 2006) ("once an event occurs that gives rise to the insurer's liability under the policy, the policy itself can be assigned"), citing *Viola v. Fireman's Fund Insurance Co.*, 965 F. Supp. 654, 658 (E.D. Pa.1997) ("an insurer may not limit an insured's ability to assign . . . rights under a policy after the occurrence of the event which gives rise to the insurer's liability"); *R.L. Vallee, Inc. v. Am. Int'l Specialty Lines Ins. Co.*, 431 F. Supp. 2d 428, 435 (D. Vt. 2006) (holding that the assignment of rights from the Named Insured to assignee was valid, and that the anti-assignment clause of the policy was unenforceable because the Named Insured assigned its rights under the policy to assignee after the covered loss occurred); *OneBeacon Am. Ins. Co. v. A.P.I., Inc.*, 2006 U.S. Dist. LEXIS 34297, at *7 (D. Minn. May 25, 2006) (anti-assignment clauses are to protect insurance companies from increase in the risk they agreed to insure but assignment of loss does not expand risk to insurance company; it simply allows change in identity to "reconnect the policy's coverage to the insured loss"; most courts follow the risk/loss distinction to allow policyholder to assign loss); *National Memorial Services, Inc. v. Metropolitan Life Insurance Co.*, 355 Pa. 155, 49 A.2d 382 (1946) (anti-assignment clause does not preclude beneficiaries of life insurance policy from assigning proceeds of policy after the event giving rise to liability; it applies only to assignments before liability).

³² Janice E. Falini, *Using Environmental Insurance to Manage Risk Encountered in Non-Traditional Transactions*, 14 Vill. Envtl. L.J. 95, 110 (2003) ("With environmental liability arising prior to the brownfields transaction, 'the anti-assignment provisions in the insurance policies should not negate

Similarly, sharing insurance payments due under the policies in accordance with the manner in which liabilities are shared is consistent with the legal rule that a predecessor's insurance rights will transfer to a successor entity, by "operation of law," where the successor is liable for the predecessor's pre-transfer operations.³³ Put simply, the insurance follows the liabilities.³⁴

Where a policyholder has split into two or more corporate entities which may both be liable, many courts hold that there still is only one covered loss to defend for insurance purposes, even if two or more entities incur covered defense costs.³⁵ One of the leading cases articulating how insurance rights survive is *Northern Ins. Co. of New York v. Allied Mut. Ins. Co.*³⁶ In *Northern Insurance*, the United States Court of Appeals for the Ninth Circuit held that in cases where a successor may be held liable, the predecessor's insurance coverage rights should transfer to the successor by operation of law.³⁷

insurance coverage' since the developers may not have actually disposed of contaminants and thus could not have intended to cause damage."). Similarly, post-policy contract liabilities may also give rise to coverage if the property damage at issue was within the ambit of risks initially underwritten.

³³ See Stanzler, *Insurance Coverage for Environmental Contamination Caused by Prior Owners and Users of Property*, The Environmental Corporate Counsel Report (July 1996).

³⁴ *Quemetco Inc. v. Pac. Auto. Ins. Co.*, 24 Cal. App. 4th 494, 509, 29 Cal. Rptr. 2d 627, 636 (1994) ("insurance benefits follow liability in successor liability situations by operation of law"). See, e.g., *Northern Ins. Co. of N.Y. v. Allied Mut. Ins. Co.*, 955 F.2d 1353 (9th Cir. 1992) (although products liability policy of predecessor manufacturer was not transferred to successor along with assets of manufacturer, transfer of assets did transfer benefits of policy, including right to defense with respect to pre-sale occurrences).

³⁵ See, e.g., *Westoil Terminals Co. v. Harbor Ins. Co.*, 86 Cal. Rptr. 2d 636, 640-42 (1999) (although predecessor corporation still could be sued in its own name and thus insurance companies might have to defend both entities, there was only one loss to defend); *B.S.B. Diversified Co. v. Am. Motorists Ins. Co.*, 947 F. Supp. 1476, 1481 (W.D. Wash. 1996) (rejecting insurance companies' argument that their risk was increased in light of fact that predecessor entity continued in existence and still could be sued; the "insurers' risks have not increased when their duty to indemnify and defend relates to events occurring prior to transfer"); see also *Northern Ins. Co. of N.Y. v. Allied Mut. Ins. Co.*, 955 F.2d 1353, 1357-58 (9th Cir. 1992) (successor was entitled to defense under predecessor's policies even though predecessor remained responsible under sale agreement to indemnify successor for liabilities arising out of pre-sale operations); *Hansen & Rowland, Inc. v. Fidelity & Deposit Co.*, 72 F.2d 151 (9th Cir. 1934) (where injury occurred while subsidiary still was owned by parent, parent's subsequent sale of subsidiary did not defeat subsidiary's or parent's rights to claim under policy; subsidiary and parent both had insurable interest at time policy was obtained, and this interest still existed at time of loss; events occurring after policy ended would not eliminate such rights); *Oklahoma Morris Plan Co. v. Security Mut. Cas. Co.*, 323 F. Supp. 1057 (E.D. Mo. 1970) (bankers blanket bond issued to former owner of plaintiff continued to cover plaintiff for pre-sale injuries even after plaintiff was sold to another entity, where both plaintiff and its former owner were named as insureds under bond), *aff'd*, 455 F.2d 1209 (8th Cir. 1972) (case dealt only with coverage for pre-sale activities and court was not faced with any change in risk).

³⁶ 955 F.2d 1353 (9th Cir. 1992).

³⁷ In *Northern Insurance*, two insurance companies appealed the trial court's judgment that they had a duty to defend the policyholder's corporate successor. In the underlying product liability action, the plaintiff sought damages for fetal alcohol syndrome sustained by her child during birth. During the final two weeks of her pregnancy in 1983, the plaintiff consumed an alcoholic beverage manufactured by

When insurance is involved, the usual participants in a brownfields transaction—buyer, seller, lender, environmental consultants, contractors—may also include the insurance companies with actual or potential coverage obligations. Insurance companies today may be more interested in providing funding for brownfields projects because the value of redeveloped property generally is significantly greater once cleanup has been accomplished and this may offset the cost of a claim. As addressed in the next section (§ 28.02), insurance companies today see an opportunity in environmental risk and are more experienced in environmental underwriting. Partnering with insurance companies on brownfields projects is particularly appealing where newer environmental insurance products sold by the same company which provided historic insurance coverage can be used to manage the risks inherent in redevelopment as part of a package deal.

[3] Obtaining Insurance Coverage for Environmental Liabilities

[a] Litigation Can Be Costly and Time-Consuming

There are three problems a policyholder can count on when it sues an insurance company for environmental insurance coverage:

- expense;
- business disruption; and
- time (these cases can take years).

Moreover, the policyholder can expect that the insurance company will fight, that it has been through these fights before, and that it knows how to make the process difficult.

To avoid unpleasant surprises after litigation has begun, policyholders should discuss a potential insurance coverage action with their attorney and obtain a realistic understanding of what the fight for insurance coverage will entail. It also is important to determine the kind of experience the prospective attorney has in representing policyholders in environmental insurance coverage disputes. A policyholder should ask for general information about anticipated legal fees, realistic recovery prospects, and the time it may take to reach a decision or settlement. Little of this information is available with precision. Estimates and budgets, however, enhance decision-making ability.

[b] Alternatives to Litigation

Policyholders should inquire concerning alternatives to litigation. In some circum-

California Coolers, the defendant's corporate predecessor. Brown-Forman Corporation ("Brown-Forman") purchased "substantially all" of the assets of California Coolers through an asset purchase agreement two years after the birth of the plaintiff's injured child. Two years after the purchase, the plaintiffs filed suit against Brown-Forman. The Ninth Circuit found that the asset purchase agreement excluded the predecessor's liability insurance policies from the assets transferred to the successor. 955 F.2d at 1357-58; *but see* EM Indus. Inc. v. Birmingham Fire Ins. Co. of Pa., 141 A.D.2d 494, 529 N.Y.S.2d 121 (1988), and Red Arrow Prods. Co. v. Employers Ins. of Wausau, 607 N.W.2d 294, 302 (Ct. App. 2000), for the minority view contrary to the majority's reasoning set forth in the *Northern Insurance* line of cases.

stances, policyholders and insurance companies may decide to use arbitrators to determine the obligation of the insurance companies to provide coverage or mediators to facilitate compromise.

(Text continued on page 28-21)

Practice Note

The cautious policyholder should be aware of problems associated with ADR, especially arbitration. Some experienced practitioners assert that arbitration is often policyholder unfriendly.³⁸ Several states bar arbitration of coverage disputes for this reason.^{38.1} In most instances, the organizations that appoint arbitrators of disputed insurance claims designate individuals as arbitrators who are currently or formerly employed by insurance companies or their law firms.

Nonbinding mediation can be successful when used as an adjunct to litigation. It can be very useful in narrowing issues and coming to a more realistic assessment of the strength of one's case. Mediators can keep a dialogue proceeding even though they have no power to dictate settlements.³⁹ Many policyholders opt to employ both a carrot and a stick by using more than one approach. Settlement is and always should be considered an option.

[c] Settlement Negotiations Should Begin Early

The purpose of insurance is to offset losses and provide peace of mind. Policyholders usually recover far more in settlements than they spend in litigation costs or attorneys' fees. For example, Champion International Corporation recovered approximately \$45 million in settlements from its insurance companies after only 18 months of litigation.⁴⁰ Over 97 percent of all cases are settled, so the sooner a policyholder can reach settlement the better. Insurance companies know this and may dig in their heels to obtain a better deal and take advantage of the accrual of interest on settlement monies. The process of getting to, and moving for, summary judgment can facilitate settlement by allowing the parties to more accurately evaluate the merits of their positions and by applying pressure on a reluctant insurance company. Once a case has been thoroughly researched, however, going to trial may not increase costs significantly and may significantly increase recovery. Many states allow prevailing policyholders to recoup their costs from insurance companies that lose at trial, especially

³⁸ See Nevius, *Arbitration of Environmental Insurance Claims: It's Not All Bad News for Policyholders*, *Envtl. Claims J.*, Vol. 23, No. 2 (June 2011); Kremer, Letters, *Don't Rush Into ADR*, *Claims*, Feb. 1996, at 6; Ziebarth, *Watch Out for Risks in Arbitration*, *Bus. Ins.*, Apr. 15, 1996, at 19; Masters, *Policies Can Compel Arbitration*, *Legal Times*, Sept. 16, 1996, at S31; Banham, *Arbitration Has Critics Among Reinsurers*, *J. of Com.*, Sept. 8, 1994, at 9A (reinsurance companies find arbitration almost as expensive as litigation and may have "serious reservations about the neutrality of individuals who are picked as umpires").

^{38.1} See Nevius, *Arbitration of Environmental Insurance Claims: It's Not All Bad News for Policyholders*, *Envtl. Claims J.*, Vol. 23, No. 2 (June 2011).

³⁹ *Environmental Law Practice Guide* Ch. 11C (Michael B. Gerrard ed., LexisNexis Matthew Bender).

⁴⁰ Brown, *Environmental Insurance Coverage: The Policyholder's Perspective*, *Toxics L. Rep.*, June 24, 1992, at 118 (Brown was the Vice President and Senior Counsel of Champion).

where the insurance company initiates the litigation.^{40.1} Causes of action for violation of the duty of good faith and fair dealing implied in every contract also can increase a policyholder's recovery and an insurance company's exposure, thereby encouraging settlement.

Practice Notes

1. Settlement discussions between policyholders and insurance companies regarding environmental insurance coverage claims should be held early and often. Talking settlement does not show weakness. The process is frustrating and takes time. Early settlement talks can, in many cases, save a great deal of time, money and headaches. Frequently persistence is rewarded. Nonbinding mediation can be productive. Always try to keep lines of communication open. In any event, mediation is an excellent discovery device for persons who keep their ears open and mouth shut.

—Eugene R. Anderson

2. An insurance company will frequently suggest that the most likely cleanup scenario is inexpensive and therefore the insured's claim should be settled inexpensively. In response, insureds should consider retaining a consultant skilled in performing probabilistic analyses. These approaches consider all cleanup scenarios and weight them based upon the likelihood that they will be adopted. Because some scenarios are very expensive, this approach often results in higher settlements.

—Kenneth J. Warren and Steven T. Miano

[d] Proceeding with Both Litigation and Settlement Negotiations

Should a policyholder sue first or talk first? For large dollar claims, there are serious risks in talking settlement before filing a lawsuit against an insurance company. The insurance company may decide to file a "pre-emptive" lawsuit in a state or court considered less policyholder friendly. Insurance companies know which jurisdictions are advantageous for them and comparatively anti-policyholder. An insurance company can file a lawsuit against a policyholder while settlement negotiations are proceeding and vice-versa. Sometimes a policyholder can negotiate a "standstill" agreement with the insurance company specifically stating that neither party will file a lawsuit until after settlement negotiations break down. When in doubt, sue first and talk settlement later. Lawsuits can be filed without being served for a period of time while the parties continue discussions.

The policyholder should consider using the insurance agent or broker to facilitate settlement discussions. The overall results indicate that in many cases having someone

^{40.1} See, e.g., *Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 N.Y.2d 12, 416 N.Y.S.2d 559, 389 N.E.2d 1080 (1979); Or. Rules Civ. Proc. 68.

in the middle can expedite the settlement process.

Insurance coverage disputes usually settle. Settlement discussions and litigation, however, should proceed on two separate tracks. The most effective settlement tool can be aggressive and knowledgeable litigation.

Practice Notes

1. Brownfields participants should remember that if the insurance companies sue them or if they sue the insurance companies, notification of the suit must be sent to the insurance agents, brokers, accountants, and environmental lawyers representing them, as well as current and former employees with a request to keep records they may have concerning the case.

—Eugene R. Anderson

2. An insurance company settling claims will often seek to obtain a broad release covering claims or potential claims and sites not at issue in the claim initially presented to the insurance company by the insured. An insured should evaluate all existing and potential claims before engaging in settlement discussions so that it knows at the inception of negotiations whether the insurer's efforts to expand the scope of the release will be a deal breaker.

—Kenneth J. Warren and Steven T. Miano

3. In order to protect themselves in the event another successful claim is brought involving the same insurance policies and similar liability, insurance companies generally seek open-ended indemnifications from policyholders as part of settling coverage disputes. Open-ended indemnification obligations should be avoided. Policyholders should stay out of the insurance business. Under virtually no circumstances should a policyholder agree to an indemnification obligation greater than the limit(s) of the insurance policy(ies) at issue. Policyholders who agree to indemnify for more than the settlement amount risk losing more than they gain. Buy outs or buy backs of older insurance policies are common as they allow the policies to be taken off the insurance company books. Policyholders should be aware of what they are selling back and may, for example, seek to retain or "carve out" coverage against latent bodily injury claims or unknown environmental liability when agreeing to sell back portions of insurance coverage in order to settle environmental claims.

—John G. Nevius

[e] The Bias of Hindsight: Who Expected or Intended What and When?

One of the most basic insurance principles illustrated by the proposition is that one cannot purchase fire insurance for a building after it has burned down. The notion that there must be some element of what is referred to as "fortuity" is embodied in liability insurance in the definition of the term "occurrence." The nature and timing of the covered "occurrence" can be crucial. The concept is amorphous. Occurrence defini-

tions, however, generally provide that the liability insured against cannot be expected or intended from the policyholder's standpoint. Of course, if there was no concern over future potential liability, there would be no need for insurance.

Insurance companies routinely seek to avoid environmental liability by asserting that the policyholder expected or intended the liability generally or by virtue of intentional conduct. In general, the successful use of this defense seeks to exploit the bias of hindsight arising out of the fact that people's environmental and scientific awareness has increased over the last several decades. Chemicals that historically were used or even recommended as a standard practice may no longer be considered safe.

In a landmark 2012 decision, illustrating the importance of "occurrence" in environmental coverage disputes, *AES Corporation v. Steadfast Insurance Co.*,^{40.2} the Virginia Supreme Court became the first high court to interpret "occurrence" in the context of an underlying lawsuit alleging climate change-related damages. The underlying plaintiffs were villagers from Kivalina, Alaska, who claimed that they were forced to leave their homes in part because of carbon dioxide emitted by AES.^{40.3} Steadfast brought its declaratory judgment action in Virginia, AES' principal place of business and a state whose courts are known to be hostile to policyholders, seeking to be absolved of the duty to defend AES in the underlying action. Ignoring the policy's pollution exclusion (pollution exclusions are addressed later in this chapter at § 28.01[4]), the court's holding relied on the definition of "occurrence." The policy at issue defined "occurrence" as "an accident."^{40.4} The court held that AES intentionally conducted activities that were the cause of the emissions and that such emissions were the natural and probable consequence of those activities, thus coverage was barred.^{40.5} After stating that the consequences of intentional acts could not lead to insurance coverage, the court went further, stating that even the consequences of *negligent*^{40.6} acts could not be grounds for insurance coverage.^{40.7} Other states take a different view, but the question of what is a covered "occurrence" is vague bordering on the ambiguous and policyholders need to analyze this issue carefully.

Another example of insurance companies attempting to benefit from hindsight arising out of increased awareness concerns one of the most common contaminants in groundwater, trichloroethylene (TCE), a widely used inflammable chlorinated cleaning/degreasing solvent. In fact, in the 1980s the United States Environmental Protection Agency asserted that TCE was "ubiquitous" in the environment. TCE

^{40.2} 283 Va. 609, 725 S.E.2d 532 (2012).

^{40.3} See *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009).

^{40.4} *AES Corporation v. Steadfast Insurance Co.*, 283 Va. 609, 617, 725 S.E.2d 532, 536 (2012).

^{40.5} *Steadfast*, 283 Va. at 620–21, 725 S.E.2d at 537–38.

^{40.6} *Steadfast*, 283 Va. at 621, 725 S.E.2d at 538.

^{40.7} *Steadfast*, 283 Va. at 621, 725 S.E.2d at 538. See also John G. Nevius, "Va.'s Steadfast Ruling on What Is (Not) An Occurrence," *Law360* (May 18, 2012); see also *Demaray v. De Smet Farm Mut. Ins. Co.*, 2011 S.D. 39 (S.D. 2011) (construing the meaning of "accidental" within context of exception to pollution exclusion).

historically was used to decaffeinate coffee, among other things, but over time has been recognized as a problem and its use has diminished as explained by the United States Court of Appeals for the Ninth Circuit:

Second, the evidence that [the policyholder] expected or intended injuries caused by TCE contamination is insufficient for summary judgment. In reaching its conclusion that [the policyholder] expected or intended to cause injuries by its disposal of TCE, the district court relied on evidence that TCE was toxic in some concentration if ingested. However, [the policyholder] raised a genuine issue of material fact by arguing that, until recently, exposure to moderate amounts of TCE was not considered harmful. TCE was commonly used as an anesthetic and disinfectant. It was also used to extract hops, decaffeinate coffee, and to prepare fish meal. It was not until 1977 that the FDA first proposed banning TCE as a food additive. The first recommended, nonbinding TCE standard for drinking water was not promulgated by the EPA until 1979. Moreover, [the policyholder] introduced evidence that the common and preferred method of disposing of TCE was to put it on the ground to evaporate. Further, throughout the applicable period, regulatory agencies did not comment on [the policyholder's] TCE disposal practices.

In light of this evidence, we cannot conclude that [the policyholder] "knew or believed its [disposal of TCE] was substantially certain or highly likely to result" in harm^{40.8}

Courts that have considered historic industrial activities, including the management of TCE, and their impact on potential insurance coverage as well as the environment, generally hold that such activities must be considered in the context of the time at which they were undertaken. These courts reject the altered perspective and bias that may develop with the benefit of hindsight:

But even with respect to [the policyholders management of industrial chemicals, including TCE], practices that now seem archaic, we cannot view the insured's conduct which dates back to the 1950's from the vantage point of twenty-twenty hindsight. As noted by the Third Circuit, "for example, it is a matter of historical fact that many insureds, acting in accordance with standard industry practices, intentionally discharged pollutants into unlined containment ponds or other inadequate waste treatment systems, but were unaware that groundwater damage would eventually result."^{40.9}

^{40.8} *Smith v. Hughes Aircraft Co.*, 10 F.3d 1448, 1455 (9th Cir. 1993) (affirming prior reversal of Arizona District Court's grant of summary judgment to the insurance company in a declaratory judgment action seeking coverage for injuries arising out of contamination of drinking water through historic discharge of TCE into unlined ponds). *See also* *Bolinder Real Estate, L.L.C. v. United States*, 2002 U.S. Dist. LEXIS 7376 (D. Utah Apr. 24, 2002) (discharges of TCE into soil pre-1974 are subject to the "standard of care" at the time of discharge).

^{40.9} *CPC Int'l, Inc. v. Hartford Acc. Indem. Co.*, 316 N.J. Super. 351, 376, 720 A.2d 408, 421 (App. Div. 1998) (reversing trial court's grant of summary judgment to insurance companies in environmental coverage case) (citations omitted); *see also* *San Francisco v. United States*, 615 F.2d 498, 502 (9th Cir.

In the process of redeveloping contaminated property, historic events should be viewed in the context of the time in which they took place. Those seeking insurance coverage under historic insurance policies likely will have to address the bias of hindsight. They can argue that no one fully anticipated the impact of industrial chemicals on the environment, including the insurance industry. The real issue is which entity accepted the risk.

[f] Coverage for Natural Resource Damages

Many states have established initiatives to pursue recoveries against businesses deemed liable for Natural Resource Damages (NRDs) over the last five years or so.^{40.10} The issues involved in obtaining coverage for NRDs provide insights into how an environmental insurance claim may be brought to a successful conclusion. Under CERCLA, natural resources are defined as “land, fish, wild life, biota, air, water,” while NRDs are defined as “the dollar value of the appropriate degree of restoration necessary to assess, restore, rehabilitate, replace or otherwise compensate for the injury to natural resources as a result of a discharge.”

Brownfields stakeholders concerned about NRDs should be aware of the potential exposure to significant liabilities—some of them decades old, and inherited from predecessor companies. At the same time, historic liability insurance policies may provide coverage for NRD claims even where environmental coverage actions previously have been brought and resolved. NRDs differ from government “response costs” to address more immediate environmental crises. The semantic distinction between costs and damages has been used by the insurance industry in the past to argue against coverage for “response costs” as opposed to “resource damages.” This distinction, however, may also allow policyholders to argue successfully that prior coverage settlements address only environmental cleanup or response “costs” and do not operate to preclude coverage for NRDs or potentially other environmental liabilities going forward.

In addition to these issues, existing case law involving NRDs suggests that three factors will determine whether historic insurance coverage for NRDs is available in specific instances. First, the timing of the actual coverage-triggering occurrence is crucial. The “occurrence” or events giving rise to environmental property damage likely must have taken place before 1985, when the so-called “absolute pollution exclusion” became standard.

Second, the timing of a policyholder’s notification of a covered “occurrence” under

1980) (rejecting the consideration of environmental issues only identified with the benefit of hindsight and holding that the reasonableness of the consideration of environmental factors is limited by the time at which the decision at issue was made), *aff’d in relevant part*, 207 F.3d 1177 (9th Cir. 2000); *Boeing Co. v. Cascade Corp.*, 920 F. Supp. 1121, 1135 (D. Or. 1996), *aff’d in relevant part*, 207 F.3d 1177 (9th Cir. 2000) (in CERCLA contribution action regarding liability for responding to contamination of ground-water by TCE, the district court held “all of this must be viewed with a historical perspective, and with the understanding that we now have the benefit of hindsight”).

^{40.10} See Nevius & Ellison, *You Should Be Covered for Natural Resource Damages*, N.J.L.J. (Feb. 2004).

liability insurance almost inevitably will be an issue. NRDs are not assessed in every case and, to date, have been the exception rather than the rule. Insurance companies faced with coverage claims for NRDs likely will argue that the policyholder should have foreseen an action for NRDs and that NRDs are directly linked to other environmental response costs already incurred—and possibly covered. This runs counter to the discredited semantic coverage defense attempting to distinguish between response costs and resource damages.^{40.11} The counter-argument to a late notice allegation is that insurance companies likely have not suffered any prejudice. This is true, in part, because NRDs merely reflect an after-the-fact assessment of existing harm to natural resources generally. Nonetheless, late notice allegations are to be expected because insurance companies have denied claims even remotely relating to the environment under virtually all forms of occurrence-based policies. Such reflexive denial, however, actually works to the advantage of policyholders in the context of a late-notice defense because it makes it difficult to legitimately argue prejudice.

Third, the specifics of how NRDs are assessed scientifically and legally will give rise to coverage issues and arguably implicate some sort of policy “fine print.” Policyholders, should not be deterred, however, because even past coverage settlements or judgments generally do not expressly encompass NRDs.

Most CGL insurance requires that covered costs be incurred “as damages.” The term “damages” generally is undefined. The insurance industry has long sought to distinguish cleanup or response “costs” from “damages” to natural resources. This alleged distinction—which largely has been discredited in the cases denying coverage—has been used in the past as a shield by insurance companies.^{40.12} This alleged distinction, however, runs counter to the term Natural Resource Damages. In addition, the fact that environmental resource damages and cleanup or response costs may have been treated differently in the past, may have resulted in beneficial settlement carve outs. Accordingly, coverage for present NRD claims may be available even where settlements or orders exist resolving prior environmental coverage actions for past cleanups.

NRDs are third-party property damage.^{40.13} Accordingly, in states like New Jersey where CGL insurance coverage exists for environmental damage, such as groundwater contamination, obtaining coverage for NRDs should be achievable. Despite the semantics, NRDs are similar to other CERCLA-imposed costs which most states

^{40.11} See, e.g., *Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co.*, 842 F.2d 977 (8th Cir. 1988) (“*NEPACCO*”) (interpreting such alleged distinction to preclude coverage in Missouri for environmental liabilities—prior to a subsequent state supreme court ruling that the federal court in *NEPACCO* had “misconstrue[d] and circumvent[ed]” state law); see *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 510 (Mo. 1997).

^{40.12} See *NEPACCO*, *supra* and its progeny; see also *Certain Underwriters at Lloyd’s of London v. Superior Court*, 24 Cal. 4th 945, 961, 103 Cal. Rptr. 2d 672, 16 P.3d 94, 103 (2001).

^{40.13} See *Aetna Cas. & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507, 1514 (9th Cir. 1991) (the government has a “quasi-sovereign interest in environmental resources”).

consider covered damages under CGL insurance.

In a bizarre procedural twist, a state supreme court that previously analyzed this matter subsequently reversed its own prior holding on coverage for CERCLA damages.^{40.14} In so doing, the court had occasion to consider the extent to which NRDs sufficiently are similar to other CERCLA costs when it comes to coverage.^{40.15} The court held that both NRDs and CERCLA response costs “compensate for loss incurred,” and, therefore, should be covered.^{40.16} The District Court for the District of New Jersey similarly found arguments involving NRDs, CERCLA response costs and “insurance coverage implications” persuasive in upholding the contribution rights of a party that settled CERCLA claims without admitting CERCLA liability.^{40.17}

More than one state court, on the other hand, has held that untimely notice precludes coverage for NRDs.^{40.18} New York law on notice is not in accord with New Jersey or the majority of states. New York’s legislature, however, recently took steps to change this.^{40.19} Nonetheless, a New York court held that coverage was still precluded, in part because the policyholder was held to have had sufficient prior knowledge of the potential assessment of NRDs—notwithstanding that no action seeking NRDs had been commenced and there was no showing of prejudice to the insurance company.^{40.20}

^{40.14} *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 264 Wis. 2d 60, 665 N.W.2d 257 (2003) (rejecting prior arguments against CGL coverage for environmental costs based upon alleged Congressional intent to differentiate between cleanup and response costs and damages for injury to, destruction of, or the loss of natural resources).

^{40.15} *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 264 Wis. 2d 60, 665 N.W.2d 257 (2003).

^{40.16} *Johnson Controls*, 665 N.W.2d at 276 (discussing NRDs in the broader context of overturning, as flawed, the court’s prior decision in *City of Edgerton v. General Cas. Co.*, 184 Wis. 2d 750, 784–87, 517 N.W.2d 463, 478 (1994)).

^{40.17} See *United States v. Compaction Systems Corp.*, 88 F. Supp. 2d 339, 353 (D.N.J. 1999).

^{40.18} See *Reynolds Metal Co. v. Aetna Cas & Sur. Co.*, 259 A.D.2d 195 (3d Dept. 1999); *Dutton-Lainson Co. v. Cont’l Ins. Co.*, 279 Neb. 365, 778 N.W.2d 433, 441 (2010) (first insurance company not responsible for coverage due to prejudicial untimely notice since policyholder had voluntarily entered into agreements acknowledging responsibilities for contamination and remediation efforts began four years prior to notice.)

^{40.19} See *Security Mut. Ins. Co. v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 340 N.Y.S.2d 902, 293 N.E.2d 76 (1972) (unreasonable delay in providing notice generally results in coverage forfeiture); *Cooper v. Gov’t Employees Ins. Co.*, 51 N.J. 86, 93–94, 237 A.2d 870, 873–74 (1968) (an insurance company must demonstrate both unreasonable delay and then “appreciable prejudice” to avoid its coverage obligation when alleging untimely notice as a coverage defense). But see *Marshall Gilinsky*, New York State Legislature and Governor Reform Late Notice Law, *Advisen* (2008), available at https://www.advisen.com/HTTPBroker?action=jsp_request&id=shell (“The New York legislature unanimously passed—and on July 23, 2008, Governor David Paterson signed—an important insurance bill intended to correct a longstanding disadvantage for policyholders under New York Insurance Law, which makes it much harder for insurance companies to deny coverage on grounds that a policyholder failed to provide timely notice of a claim. The new law establishes a ‘material prejudice’ rule in connection with ‘late’ notice under liability insurance policies other than claims-made policies.”).

^{40.20} *Reynolds*, 259 A.D.2d at 204, 696 N.Y.S.2d at 570.

Similarly, in *Montana Refining Co. v. National Union Fire Insurance Co.*,^{40.21} the District Court for the District of Nevada rejected coverage for NRDs, but based on a relatively recent “hazardous substances” exclusion. In so holding, however, the court determined that CERCLA cleanup costs were equivalent to NRDs for purposes of interpreting a post-1985 CGL insurance policy.^{40.22} This decision is of limited application because the exclusion in question expressly referred to NRDs.^{40.23} While this case has limited general relevance, it plausibly can be used to argue that less recent CGL insurance policies (which very likely do not expressly address coverage for NRDs), provide coverage for NRDs. With insurance companies having the burden of establishing limitations upon coverage, the *Montana Refining* case demonstrates that insurance companies are capable of crafting standard-form policy language specifically addressing NRDs. Where insurance companies have not included any such policy language, NRDs should be covered.

While the EPA to date has not pursued recovery of NRDs on a scale anywhere near that of CERCLA response actions, EPA itself has contemplated the recovery of insurance proceeds with respect to NRDs. As far back as 1994, EPA negotiated an environmental settlement agreement with a bankrupt entity that addressed recovery of NRDs and left the door open to related insurance recovery for the benefit of creditors.^{40.24} The settlement involved both CERCLA response costs and NRDs, and included provisions allocating a portion of any subsequent insurance proceeds to a trust fund. The argument that NRDs should be covered is supported by EPA’s similar treatment of CERCLA response costs and NRDs, EPA’s recognition of the potential for insurance coverage for both, and the court’s acceptance of the settlement.

The timing of notice and actions involving NRDs is a significant issue. As discussed above, in states like New York where defenses to coverage involving untimely notice do not require the insurance company to demonstrate prejudice, notice issues may preclude coverage for NRDs. In one of the earlier cases to address insurance recovery for NRDs, *Aetna Cas. & Sur. Co. v. Pintlar Corp.*,^{40.25} however, other coverage defenses involving timing were rejected. In *Pintlar*, the insurance companies argued generally that environmental harm taking place before the enactment of CERCLA does not give rise to recoverable “damages” under CERCLA and, therefore, insurance recovery is precluded for such harm “as damages” under CGL insurance.^{40.26} As discussed above, the term “damages” is not defined in most CGL insurance policies. In response, the *Pintlar* court held that even where the CERCLA definition of “damages,” i.e., “the monetary quantification stemming from an injury” is adopted,

^{40.21} 918 F. Supp. 1395 (D. Nev. 1996).

^{40.22} 918 F. Supp. at 1402.

^{40.23} 918 F. Supp. at 1401 and n.8.

^{40.24} See *In re Energy Co-op., Inc.*, 173 B.R. 363, 366 (N.D. Ill. 1994).

^{40.25} 948 F.2d 1507 (9th Cir. 1991).

^{40.26} 948 F.2d at 1515.

coverage for NRD claims may exist.^{40.27} The court's holding also was based on the lack of any requirement in typical occurrence-based insurance policies that environmental injury take place contemporaneously with the discovery of environmental property damage or the assessment of any resulting damages.^{40.28} Accordingly, the Ninth Circuit overturned the district court's grant of summary judgment and held that insurance coverage may be available for NRDs.

Existing case law on insurance coverage for NRDs is mixed; a great deal depends upon the jurisdiction. If NRDs are an issue, policyholders should always give notice of a potential claim to their brokers and insurance companies, whether or not they have successfully pursued an environmental claim in the matter in the past.

[4] The History of Standard-Form Liability Insurance Demonstrates That There Is Coverage for Environmental Claims

[a] As a First Step, Categorize Policies

Practice Note

When reviewing old insurance policies, it is best to divide the policies into the following categories:

- (1) Comprehensive General Liability (CGL) insurance policies that were purchased prior to 1966;
- (2) CGL insurance policies that were purchased from 1966 to 1970;
- (3) CGL insurance policies that were purchased from 1970 to 1985;
- (4) Post-1985 CGL insurance policies;
- (5) Excess insurance policies;
- (6) Umbrella insurance policies;
- (7) First party property damage insurance policies;
- (8) Specialized insurance policies, including environmental impairment liability (EIL) insurance;
- (9) Insurance policies of predecessor organizations; and
- (10) Other parties' insurance coverage (these are insurance policies issued to others that may provide coverage such as policies in which the brownfields participant or its predecessor is named as an "Additional Insured").

Once the policies have been grouped into these categories, it is easier to evaluate

^{40.27} 948 F.2d at 1515, citing *In re Acushnet River*, 716 F. Supp. 676, 681 (D. Mass. 1989).

^{40.28} 948 F.2d at 1516, citing *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 535 (1978) ("An 'occurrence' policy protects the policyholder from liability for any act done while the policy is in effect, . . .").

the potential insurance coverage available. The discussion that follows in this § 28.01 is designed to assist in that evaluation.

[b] Before 1940, Separate Liability Insurance Policies Were Sold for Specific Hazards; in 1940, the First Standard-Form Comprehensive General Liability (CGL) Insurance Policy Was Introduced

Liability insurance has been available for many years. The terms and conditions under which liabilities are covered, however, have changed significantly over time. Very old insurance policies may still provide substantial amounts of coverage. In order to evaluate the coverage available, brownfields participants must be aware of the historical development of standard-form liability insurance.

Insurance coverage for liabilities incurred as a result of claims by *third parties* traditionally was sold separately for specific hazards or risks, such as the chance of injury or damage from boilers, elevators, or products.⁴¹ (For a discussion of claims for insurance coverage under first party property insurance policies, see § 18.01[7].) Therefore, historically, a policyholder would have to purchase a separate liability policy for each hazard for which it sought insurance.⁴² Sometimes 18 or 20 separate liability insurance policies had to be purchased.

The first standard-form comprehensive general liability (CGL) policy was introduced with great fanfare in 1940 with the words “We cover everything.”⁴³ These policies provide comprehensive general liability insurance coverage upon the happening of an “accident.” At the time, concern about the environment and environmental

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⁴³ In 1941, a Travelers Indemnity Company executive wrote:

The whole concept of merchandising Liability insurance has been changed. If an insurance buyer will pay a premium on every known ratable Liability hazard to be found at inception of the policy and will agree to pay on audit any additional exposures arising during the policy term, the insurance company in return will provide a policy that agrees to defend each and every Bodily Injury or Property Damage liability claim caused by accident, subject to a few simple exclusions. The burden of determining what to insure and what not to insure is removed from the shoulders of the insured and placed squarely on the producer and the carrier. How much better it is to say—

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liabilities was already an issue for many.⁴⁴ Nearly all of the court decisions construing the old accident policies—though not all of them—have held that “everything” included pollution damage resulting from both immediate and gradual causes.⁴⁵

[c] From 1966 to 1970 CGL Insurance Was Sold on an “Occurrence” Basis

[i] The CGL Insurance Policy Was Designed to Cover Long-term Liabilities and Damages

In simpler days, losses, whether liability losses or property losses, generally were caused by an easy-to-recognize event. A machine broke and injured a worker. A fire burned down the homeowner’s house. Such events were covered by an “accident” insurance policy.

The advent of long-term and unseen or undiscoverable accidents or events such as exposure to radium⁴⁶ or slowly progressing property damage⁴⁷ changed the insurance market. The insurance industry recognized the market need and began selling “occurrence” insurance policies to cover long-term liabilities and damages.

While the standard-form liability insurance policy from 1940 to 1966 was an “accident” policy, beginning in 1960 and continuing until 1966, insurance industry trade associations, now combined into and known as the Insurance Services Office,

⁴⁴ Even in the 1940s, smog in Los Angeles was a serious matter. And concerns about pollution were not limited to Los Angeles.

⁴⁵ There is no question that there was insurance coverage under insurance policies sold from 1940 to 1970 for pollution liability. *See* Morton Int’l, Inc. v. General Acc. Ins. Co., 134 N.J. 1, 629 A.2d 831 (1993).

Many cases hold that pre-1970 policies were “tailor-made” to cover most pollution liability. *See, e.g.*, Anchor Cas. Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1949); Aetna Cas. & Sur. Co. v. Martin Bros. Container & Timber Prods. Corp., 256 F. Supp. 145 (D. Or. 1966); Moffat v. Metropolitan Cas. Ins. Co., 238 F. Supp. 165 (M.D. Pa. 1964); City of Myrtle Point v. Pacific Indem. Co., 233 F. Supp. 193 (D. Or. 1963); Employers Ins. Co. v. Rives, 264 Ala. 310, 87 So. 2d 653 (1955); Moore v. Fidelity & Cas. Co., 140 Cal. App. 2d Supp. 967, 295 P.2d 154 (1956); Travelers v. Humming Bird Coal Co., 371 S.W.2d 35 (Ky. 1963); White v. Smith, 440 S.W.2d 497 (Mo. Ct. App. 1969); City of Kimball v. St. Paul Fire & Marine Ins. Co., 190 Neb. 152, 206 N.W.2d 632 (1973); Cosmopolitan Mut. Ins. Co. v. Packer’s Supermarket Inc., 72 Misc. 2d 980, 340 N.Y.S.2d 461 (Sup. Ct. N.Y. Co. 1972); Lancaster Area Refuse Auth. v. Transamerica Ins. Co., 437 Pa. 493, 263 A.2d 368 (1970); Taylor v. Imperial Cas. & Indem. Co., 82 S.D. 298, 144 N.W.2d 856 (1966); Mass. Bonding & Ins. Co. v. Orkin Exterminating Co., 416 S.W.2d 396 (Tex. 1967).

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Inc. (ISO),⁴⁸ created a new standard insurance policy form—the so-called “occurrence” policy.⁴⁹ “Occurrence” policies were the standard-form liability insurance policy from 1966 to 1985.

[ii] The CGL Insurance Policy Covered Gradual Pollution Damage

Brownfields participants with potential claims under 1966 standard-form CGL insurance policies should be aware that these policies were intended to cover pollution damages. At that time, an insurance company representative, G.L. Bean, who played an important role in the drafting process, stated publicly that, under the “new” CGL policy:

[I]t is in the *waste disposal* area that a manufacturer’s basic premises-operations coverage is liberalized most substantially. Smoke, fumes, or other air or streams pol[l]ution have caused an endless chain of severe claims for gradual property damage. These wastes disposal cases have been difficult ones, because when the injury or damage first starts to emerge, no corrective action is taken in many cases, because the manufacturer is reticent to admit his waste disposal is causing it. This is probably an honest doubt. When the cause *is* pinpointed, it may or may not be easy to make a quick elimination of the cause. The cost of an alternative method of waste disposal may be terrifically expensive or might even force the manufacturer out of business, and even if it can be made, it may take months to convert.⁵⁰

⁴⁸ The *Insurance Services Office, Inc. (ISO)* is the insurance industry trade association that drafts standard form insurance policy language for nearly all of the principal property and casualty insurance companies in the United States. For a description of ISO’s activities, see *In re Insurance Antitrust Litig.*, 938 F.2d 919 (9th Cir. 1991), *aff’d in part, rev’d in part, sub nom. Hartford Fire Ins. Co. v. State of California*, 509 U.S. 764, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993). See also *In re Hoechst Celanese Corp.*, 184 A.D.2d 223, 584 N.Y.S.2d 805 (1992).

⁴⁹ In the 1966 standard form, *occurrence* was defined as “an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” See Miller & LeFebvre, 1 Miller’s Standard Insurance Policy Annotated 411 (1988).

The definition was changed slightly in 1973. The word “accident” was retained, but the phrase “injurious exposure” was changed to “continuous or repeated exposure.” The phrase “during the policy period” was dropped and moved into the “bodily injury” and “property damage” definitions. Reichenberger, *The General Liability Insurance Policies—Analysis of 1973 Revisions* 8 (Def. Res. Inst. 1974).

The 1966 policy had defined *bodily injury* as “bodily injury, sickness, or disease sustained by any person.” The 1973 CGL policies defined it as “bodily injury, sickness, or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.” While the 1966 policy defined “damages” as “damages for death and for care and loss of services resulting from bodily injury and damages for loss of use of property resulting from property damages,” the 1973 policy contained no definition of damages. *Reichenberger* at 7–8.

From at least one insurance company’s perspective there was no difference in the “accident” and “occurrence” types of policies. The company stated that “‘[a]ccident’ and ‘occurrence’ are interchangeable terms.” Reply Brief of Appellant at 2 (filed Apr. 1987) *Tews Funeral Home, Inc. v. Ohio Casualty Ins. Co.*, 832 F.2d 1037 (7th Cir. 1987).

⁵⁰ Bean, (Assistant Secretary, Liberty Mutual Insurance Co.), New Comprehensive General and

In another vintage insurance industry paper explaining the then-new CGL policy, Bean recognized that gradual pollution damage was covered. He cited specific examples:

Coverage for gradual BI [bodily injury] or gradual PD [property damage] resulting over a period of time from exposure to the insured's *waste disposal*. Examples would be gradual adverse effect of smoke, fumes, air or stream pollution, contamination of water supply or vegetation. We are all aware of cases such as contamination of oyster beds, lint in the water intake of down-stream industrial sites, the Donora, Pa. atmospheric contamination, and the like.⁵¹

The insurance industry's concerted opinion was summed up by E.R. Woodworth, Resident Manager, Insurance Company of North America:

The new policy period will apply only to bodily injury or property damage which occurs *during the policy period and within the policy territory*. Coverage will no longer attach when the accident occurs, but rather when the injury or damage takes place, and will apply, regardless of when the causing accident took place. This is particularly true, for an example, if the injury or damage is from waste disposal, or similar operations, should continue after the waste disposal ceased or operations completed, as it can happen.⁵²

James A. Dabney of Nationwide Insurance Company wrote in 1966 that:

The inclusion of occurrence coverage in the new forms adds new dimensions to underwriting complexity for many risks. Potential loss from such sources as pollution of water, air and soil, vibration of heavy machinery, damage from

Automobile Program, The Effect on Manufacturing Risks 6, presentation to the Mutual Insurance Technical Conference (Nov. 15-18, 1965) (emphasis added).

⁵¹ Bean, *Summary of Broadened Coverage Under New GL Policies With Necessary Limitations to Make This Broadening Possible* 1 (emphasis added) (Attachment to Memorandum from Getchell, Home Office Business Risks to Underwriting Manager, Business, Commercial, Motor Transport and National Risks Chief Underwriters (July 18, 1966)), quoted in Anderson & Luppi, *Environmental Risk Insurance: You Can Count On It*, Risk Mgmt., Oct. 1987, at 67.

Other insurance industry officials agreed. See Baldwin, Address to the American Society Insurance Management 6 (Oct. 20, 1965), quoted in Anderson & Luppi, *above* this note, at 67 (citing "slow ingestion of foreign substances or inhalation of noxious fumes" as coverage examples in a presentation before the American Society of Insurance Management (now the Risk and Insurance Management Society, Inc. (RIMS)) in New Orleans, Louisiana); Mildrum, Implications Of Coverage For Gradual Injury Or Damage 3, presentation at the Sheraton Boston Hotel (Nov. 11, 1965), quoted in Sayler & Zolensky, *Pollution Coverage and the Intent of the CGL Drafters: The Effect of Living Backwards*, Mealey's Litig. Rep.—Ins., June 9, 1987, at 4425, 4431-32 (also stating that slow ingestion of foreign matter, inhalation of noxious fumes or the discharge of corrosive material into the atmosphere or water courses were examples of the types of exposures that would be covered).

⁵² Woodworth (Resident Manager, Insurance Company of North America), *New Comprehensive General Liability Policy—The Effect on Contracting Risks* 9, presentation given in Cleveland, Ohio (Apr. 14, 1966), quoted in Anderson & Luppi, *Government Officials Are Calming The Environmental Insurance Coverage Frenzy*, Mealey's Litig. Rep.—Ins., Apr. 24, 1990, at 16 (second emphasis added).

various industrial wastes and damage from product use over time will present new underwriting problems for most primary underwriters and I suspect that often the problem won't appear until the claim is presented. Then it should be stunning. Coverage will now apply to bodily injury or property damage occurring during the policy period rather than to accidents as in the present contracts. This clause is especially significant in the product area. The underwriter will, as always, have to make himself aware of situations existing prior to the current policy period, situations which might result in claims under the current policy, even though the accident or occurrence which gave rise to the claim occurred months or even years ago.⁵³

In 1966, Liberty Mutual was marketing and selling CGL policies to cover "hidden" exposure for environmental liabilities, and this fact was conveyed in the instructions Liberty Mutual disseminated to its sales force. Under the heading "*Sales Point*," Liberty Mutual's salespersons were directed to sell the new policy on the basis of its broadened coverage for pollution. The instructions also stated "[w]ith the current emphasis on air and water pollution, many risks have a hidden exposure too often not recognized."⁵⁴ The point of Liberty Mutual's emphasis was to make certain that its salespersons told their policyholders that the new policy covered this "hidden exposure."

Practice Note

The "occurrence" based CGL policy sold between 1966 and 1970 without a "pollution exclusion" was sold with the express purpose of providing insurance coverage for "hidden risks" including environmental risks. Brownfields participants covered under CGL policies sold between 1966 and 1970 are entitled to indemnification insurance coverage for environmental damages.

[d] The 1970 "Polluters" Exclusions Do Not Apply to Pollution That Is "Sudden and Accidental"

An exclusion was added as a mandatory endorsement to domestic standard-form CGL insurance policies in 1970 and became part of the standard-form policy in 1973. That exclusion provides that the policy does not apply to:

bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any watercourse or body

⁵³ Dabney, *Problem Solving with the New CGL* 1-2 (Mar. 8, 1966).

⁵⁴ Flora, Home Office Administration, Liberty Mutual, Broadened Coverages—1966 Comprehensive General Liability Policy 1 (July 1, 1966).

of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.⁵⁵

There are several important points to be made about this exclusion. First, in 1970 the insurance industry represented to state insurance regulators⁵⁶ and others⁵⁷ that the exclusion was a “mere clarification” of existing coverage. Second, the phrase “sudden and accidental” in the exception to the exclusion was an insurance industry term of art which did not mean “quick” or “abrupt,” but rather was intended to mean “unexpected and unintended.”⁵⁸ Third, in the authors’ view, the polluters exclusion was added to the

⁵⁵ Reichenberger, *The General Liability Insurance Policies—Analysis of 1973 Revisions* 5 (DRI 1974) (emphasis added).

⁵⁶ E.g., on July 30, 1970, the Mutual Insurance Rating Bureau, a predecessor of ISO—an insurance industry association which petitioned the state insurance regulators to accept the new “pollution exclusion”—told the West Virginia Commissioner of Insurance:

This endorsement [polluters exclusion] is actually a clarification of the original intent, in that the definition of occurrence excludes damages that can be said to be expected or intended. Letter on file with the State of West Virginia Insurance Department.

Travelers Indemnity Company used a slight variant of the exclusion. It wrote to the West Virginia Commissioner on August 3, 1970, and stated:

The idea behind these endorsements is that the insurance industry does not consider *intentional pollution* to be insurable, and the industry wishes to make its position clear to the insured. Saylor & Zolensky, *Pollution Coverage and the Intent of the CGL Drafters: The Effect of Living Backwards*, Mealey’s Litig. Rep.—Ins., June 9, 1987 at 4425, 4431–34 (emphasis added) (quoting response of Travelers Indemnity Co. to the West Virginia Commissioner’s concerns about the polluters exclusion).

West Virginia agreed to the use of the exclusion. Similar letters from the Mutual Insurance Rating Bureau and another insurance industry association, the Insurance Rating Board, also a predecessor of ISO, were filed in many states.

⁵⁷ See Stempel, *The Insurance as Thing*, Tort Trial & Ins. Prac. L.J., Vol. 44, No. 3 (Spring 2009); Abraham, *The Rise and Fall of Commercial Liability Insurance*, 87 Va. L. Rev. 85 (Mar. 2001); Nevius & Dolmanisth, *The Pollution-Exclusion Conspiracy: A Newly Recognized Basis for Recovery*, Pace Envtl. L. Rev., Vol. 13, No. 2 (Spring 1996); MacDonald, *Decades of Deceit: The Insurance Industry Incursion into the Regulatory and Judicial Systems*, Coverage, Vol. 7, No. 6 (Nov./Dec. 1997).

Every insurance commentator writing in the 1970 period stated that the polluters exclusion was a mere clarification of occurrence coverage. Professor Long stated, for example:

[The exclusion] eliminates coverage for damages arising out of pollution or contamination, where such damages appear to be expected or intended on the part of the insured and hence are excluded by the definition of occurrence. Coverage is afforded for damages caused by pollution or contamination if the discharge, dispersal, release, or escape is sudden and accidental. Long, 3 Law of Liability Insurance App. C at App. 65 (1973) (explaining 1973 revision). See also Stamos, *Pollution and Its Insurance Implications*, The Aetna-izer, July–Aug. 1971, at 6.

See also Mayerson, Letter to Editor, Bus. Ins., Oct. 23, 1989, at 8 and Bus. Ins. articles cited in letter: June 9, 1969, at 1; June 8, 1970, at 12, 22 and 46; May 11, 1970, at 1. (The articles indicate that the exclusion excluded coverage *only* for “willful polluters” or those who “knowingly polluted” and “clarifie[d] the situation.”).

⁵⁸ The litigation concerning the phrase “sudden and accidental” has been prodigious and tomes have been written on it.

(Text continued on page 28-38)

The genesis of the term "sudden and accidental" is essential to an understanding of the phrase. The "sudden and accidental" phrase had been used in boiler and machinery insurance policies for many years prior to 1970. In boiler and machinery policies, the insurance industry defined the word "accident" to mean a "sudden and accidental breakdown" or a "sudden and accidental tearing asunder." Hoey, *The Meaning of "Accident" In Boiler And Machinery Insurance And New Developments In Underwriting*, 19 Forum 467 (1983-1984); Huebner, *et al.*, *Property and Liability Insurance* 274 (1984). *Contra* Daenzer & Zampino, *Environmental Liability and the Pollution Exclusion: Why Some Courts Find Coverage*, 46 *Chartered Prop. and Casualty Underwriters (CPCU) J.* 84, 88 (June 1993).

See Cozen, *Insuring Real Property* § 5.03[2][b] (LexisNexis Matthew Bender):

In order for the insured to recover under a boiler and machinery policy it must demonstrate that the occurrence was "sudden and accidental." Although the terms "sudden" and "accidental" seem to imply that an immediate or instantaneous event must occur, courts have construed these terms more broadly. Utilizing the "common meaning" doctrine, the courts have *uniformly* held that the dictionary definition of the terms as "unforeseen, *unexpected and unintentional*" is controlling. (Emphasis added.)

In a letter to the New York Insurance Department, Travelers Insurance Company pointed out that dictionary definitions of the terms "sudden" and "accidental" do not prohibit gradual events from their scope. The letter stated:

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

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

- 1.a: happening or coming unexpectedly
- b. changing angle or character all at once
2. marked by or manifesting abruptness or haste
3. made or brought about in a short time

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

1. arising from extrinsic causes
- 2.a: occurring unexpectedly or
- b. happening without intent or through carelessness and often with unfortunate results

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

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

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

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

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

Letter from Thomas A. Jackson, Secretary (Product Management Division), The Travelers, to Mark Presser, Associate Insurance Examiner, State of New York Insurance Dept. (Jan. 13, 1982) (responding to objections to the Traveler's Environmental Hazard Policy raised by Mark Presser in a letter dated Dec. 11, 1981). (The Travelers stated that "sudden and accidental" as a term standing by itself is capable of many interpretations.)

standard-form insurance policy, at least in part, for public relations purposes⁵⁹ and was not intended to apply to products and completed operations.

Thus, even after the so-called “polluters” exclusion was added to the standard-form CGL policy, coverage existed for damages caused by waste disposal, smoke fumes, air or stream pollution and contamination of water supply or vegetation except where the policyholder intended or expected the specific environmental damage that resulted. The insurance industry has not agreed with this assessment.⁶⁰

An equivalent “polluters” exclusion was introduced by British insurance companies at about the same time. Most people think of “Lloyd’s of London” as an insurance company. The sale of insurance at Lloyd’s, London involves underwriters working in conjunction with and on behalf of “lead” and “following” underwriting syndicates and other London insurance companies to fully insure a risk by enrolling subscribers who

For the view of the insurance industry, see Ostrager & Newman, *Handbook on Insurance Coverage Disputes* § 10.02 (Aspen 11th ed. 2002).

⁵⁹ The evidence that the polluters exclusion was a public relations ploy that succeeded is dramatic. As stated by the Wall Street Journal in an editorial on April 14, 1970:

INSURING AGAINST POLLUTION

INA Corp., a large insurance holding company, has announced that it no longer will exclude most pollution coverage from its general liability policies. For the most part this seems a sensible step, not only for INA but for the rest of the insurance industry.

There may be reason to question the action on oil spillages, which will not be covered even if entirely accidental. If a company takes thorough and sensible precautions against such damage, it should be possible to find some way to work out insurance protection.

In other types of contamination, however, INA will deny coverage only if the company or municipality acts deliberately. “We will no longer insure the company which knowingly dumps its wastes,” said Charles K. Cox, INA president.

Insurance, after all, is supposed to guard against uncertainties. In the case of intentional pollution, the only uncertainty is whether the company involved will be called to account for its actions.

With an increasing number of anti-pollution laws, and with an aroused public, that sort of contingency hardly qualifies as an insurable risk.

Insuring Against Pollution, Wall St. J., Apr. 14, 1970, at 22. *Contra* Daenzer & Zampino, *Environmental Liability and the Pollution Exclusion: Why Some Courts Find Coverage*, 46 CPCU J. 84 (June 1993) (emphasis added).

See also *Is Pollution Insurable?*, *Envtl. Sci. & Tech.*, Dec. 1970, at 1103 (quoting former INA president Cox: “. . . We will no longer insure the company which knowingly dumps its wastes.”).

⁶⁰ For the details of the position taken by the insurance industry, see Ostrager & Newman, *Handbook on Insurance Coverage Disputes* § 10.02 (Aspen 11th ed. 2002). See also Zampino & Harwood, *The Pollution Exclusion: Debunking the Policyholder’s Regulatory Estoppel Myth*, *For the Defense*, July 1995, at 2; Richard C. Cavo *et al.*, *The Polluter’s Web: The Pollution Exclusion and the Question of Deception*, CPCU J., June 1994, at 77; Zampino *et al.*, *Morton International: The Fiction of Regulatory Estoppel*, 24 Seton Hall L. Rev. 847 (1993); Harwood *et al.*, *The Occurrence Definition and Extrinsic Evidence: The Diogenes Search for the Reasonable Man*, *Mealey’s Litig. Rep.—Ins.*, June 16, 1992, at 22; Harwood *et al.*, *The Emperor’s Illusionist: Policyholders Retreat from Pollution Exclusion Extrinsic Evidence*, *Mealey’s Litig. Rep.—Ins.*, May 5, 1992, at 17; Nevius *et al.*, *Climate Change and the Pollution Exclusion—Are You in Jeopardy of Losing Your D&O and E&O Insurance?*, *Anderson Kill & Olick P.C. Policyholder Advisor*, March/April 2012.

agree to cover a percentage of the risk in question. Underwriters at Lloyd's, London and London Market insurance companies (the "London Market") added an exclusion to their insurance policies at approximately the same time as the "polluters" exclusion was added to insurance policies sold by American insurance companies. The exclusion, known as NMA⁶¹ 1685 states that insurance coverage does not apply to:

- (1) Personal Injury or Bodily Injury or loss of or damage to, or loss of use of, property directly or indirectly caused by seepage, pollution or contamination, provided always that this paragraph shall not apply to liability . . . where such seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the policy period of this insurance.
- (2) The cost of removing, nullifying or cleaning up seeping, polluting or contaminating substances unless the seepage pollution or contamination is caused by a *sudden, unintended and unexpected happening* during the period of this insurance.⁶²

At the time the exclusion was introduced, the London Market represented that NMA 1685 does not bar insurance coverage for gradual pollution. The London Market was required to submit NMA 1685 to insurance regulators, including in 1970, the Illinois Director of Insurance. In letters accompanying the filing, the London Market explained that NMA 1685 did not exclude a "seepage" loss on an "accident basis."⁶³ At the time of the filing, Illinois courts had already held that the policy term "accident" encompassed insurance coverage for gradual injury.⁶⁴ Contemporaneous regulatory filings, case law and the fact that "sudden" can be defined solely to mean unexpected demonstrate that NMA 1685 was not intended to bar insurance coverage for gradual injury.⁶⁵

⁶¹ "NMA" refers to the Lloyd's of London Non-Marine Association. The association drafts policy terms and conditions and is made up of Lloyd's underwriters subscribing to risks that do not include marine shipping.

⁶² See 2 Anderson *et al.*, Insurance Coverage Litigation § 15.06[H] (Aspen 2d ed. 2001) (emphasis added).

⁶³ See Letter to Hon. James Baylor, Illinois Director of Insurance from Herbert C. Brook, Attorney-in-Fact (Feb. 27, 1970) (Brook was an attorney empowered to make U.S. regulatory submissions for London). See also Breene, *et al.*, *No Place to Run, No Place to Hide: The New Jersey Surplus Lines Law Binds London to Morton International's Estoppel Decision*, Mealey's Litig. Rep.—Ins., Sept. 5, 1995, at 16.

⁶⁴ See Canadian Radium & Uranium Corp. v. Indemnity Ins. Co., 411 Ill. 325, 104 N.E.2d 250 (1952) (bodily injury caused by gradual exposure to radium constituted an "accident").

⁶⁵ Some courts have held that the language in the NMA exclusions may be read in a nontemporal sense, that is, interpreting the word "sudden" in the exclusion to mean "unexpected" rather than "instantaneous." See *Textron, Inc. v. Aetna Cas. & Sur. Co.*, 754 A.2d 742 (R.I. 2000); *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 64 Wash. App. 838, 827 P.2d 1024, 827 P.2d 1024 (1992), *aff'd in part and remanded in part*, 126 Wash. 2d 50, 882 P.2d 703 (1994). However, other courts have held that "sudden" as used in the NMA exclusion does include a temporal element and means "abrupt." See *Dutton-Lainson Co. v. Cont'l Ins. Co.*, 716 N.W.2d 87, 99 (Neb. 2006); *Buell Indus., Inc. v. Greater New York Mut.*, 791 A.2d 489, 496–497 (Conn. 2002); *E.I. Du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059

In addition to the regulatory filings, articles written at the time reflect the fact that NMA 1685 merely was intended to bar coverage for deliberate pollution. For example, an editorial in *Business Insurance*, an insurance trade magazine, noted that the purpose of the pollution exclusion was to bar coverage to policyholders that intentionally pollute.⁶⁶

Practice Notes

1. Many brownfields participants may have purchased or have rights under standard-form CGL policies that contain the “sudden and accidental” exception or London Market policies that contain the “sudden, unintended and unexpected” polluters exclusion exception. Because these older policies may still provide coverage, the participant in a transaction should assess existing or potential future property damage with an understanding of the coverage available. For example, the damage may have been gradual, or its existence may have been unknown for years. Abrupt events should be identified even though they may have been interspersed with gradual pollution. Left unaddressed, abrupt events may result in gradual pollution, but the fact that such gradual pollution may be tied back to an abrupt event or events provides a solid basis for arguing that the exception to the exclusion applies and, thus, coverage should exist. It is important to review all of the facts. For example, the policyholder may not have actually disposed of the hazardous materials, or the materials may have been placed on the property by another. The policyholder may have leased the land to another. The activities causing property damage may have been undertaken on behalf of another who may be liable, such as the federal government. Brownfields participants also must keep in mind the history of the nature and timing of events leading to the existence of property damage as well as the meaning of the “sudden and accidental” exception and other policy terms and conditions when evaluating any standard-form general liability insurance policy and the potential coverage available.⁶⁷

(Del. 1997). The issue has spawned a tremendous amount of litigation. At least one court has held that the fact that various courts have reached different conclusions when interpreting insurance policy terms is evidence of ambiguity. See *McCormick & Baxter Creosoting Co. v. St. Paul Fire & Marine Ins. Co.*, 324 Or. 184, 215, 923 P.2d 1200, 1218 (1996).

⁶⁶ “Liability insurers here and in England have made the right move by opting to exclude pollution coverage from the policies to bar coverage for those companies that knowingly pollute the environment.” *Sock the Polluters*, *Bus. Ins.*, June 8, 1970, at 12.

⁶⁷ Scores of law review articles have considered the issues surrounding interpretation of this exclusion. See, e.g., Kozik, *Allstate in Brief*, 37 *Ecology L.Q.* 781 (2010) (discussing California case law); Gebhart, A “Timeless” Interpretation of the “Sudden and Accidental” Exception to the Pollution Exclusion?, 41 *S.D. L. Rev.* 314 (1996) (discussing South Dakota case law); Reiter & Baillie, *Better Late Than Never: Holding Liability Insurers to Their Bargain Regarding Coverage for Unforeseen, Gradual Pollution Under Pennsylvania Law*, 5 *Dick. J. of Envtl. L. & Pol’y* 1, 3 (1996); Nevius & Dolmanisth, *The Pollution Exclusion Conspiracy: A Newly Recognized Basis for Recovery*, 13 *Pace Envtl. L. Rev.* 1103 (1996); Anderson et al., *Environmental Insurance Coverage in New Jersey: A Tale of Two Stories*, 24 *Rutgers L.J.* 783 (1992); Antognini, *The Coming Guerilla War Over the Pollution Exclusion*, 6 *Envtl.*

—Douglas A. Cipriano and John G. Nevius

2. The interpretation of “sudden and accidental” varies among jurisdictions. Likewise, the rules governing choice of law vary among jurisdictions. The insured should determine the jurisdiction with substantive law most favorable to it and consider instituting litigation in a forum with choice of law rules that would select the favorable jurisdiction’s substantive law. An insurance company may similarly seek to file a declaratory judgment action in a jurisdiction favorable to it. Choice of law rules may counsel in favor of filing the action in a jurisdiction whose own substantive rules are not favorable because that jurisdiction would apply the favorable substantive law of another jurisdiction.

—Kenneth J. Warren and Steven T. Miano

[e] In 1986, So-Called “Absolute” or “Total” Pollution Exclusions Were Added

Beginning in 1984 until 1986, the heretofore standard-form comprehensive general liability insurance policy was effectively withdrawn from the United States market and replaced, for most policyholders, by the 1986 commercial general liability policy promulgated by the Insurance Services Office, Inc. (ISO).⁶⁸ Standard-form liability insurance policies were revised, in part, to insert so-called “absolute” pollution exclusions.⁶⁹

Claims J. 521 (1994); Gaudioso, *A Matter of Interpretation: The Judicial Quagmire Concerning the Sudden and Accidental Exception to the Pollution Exclusion Clause*, 2 Vill. Envtl. L.J. 373 (1991); Mulholland, *The Saga of the Pollution Exclusion Clause: How a “Sudden” Change Occurred Gradually*, 2 Mo. Envtl. L. & Pol’y Rev. 265 (1993); Reiter et al., *The Pollution Exclusion Under Ohio Law: Staying the Course*, 59 U. Cin. L. Rev. 1165 (1991) (authors regularly represent policyholders).

See also Zampino & Harwood, *The Pollution Exclusion: Debunking the Policyholder’s Regulatory Estoppel Myth*, For the Defense, July 1995, at 2; Cavo et al., *The Polluter’s Web: The Pollution Exclusion and the Question of Deception*, CPCU J., June 1994, at 77; Zampino et al., *Morton International: The Fiction of Regulatory Estoppel*, 24 Seton Hall L. Rev. 847 (1993); Harwood et al., *The Occurrence Definition and Extrinsic Evidence: The Diogenes Search for the Reasonable Man*, Mealey’s Litig. Rep.—Ins., June 16, 1992, at 22; Harwood et al., *The Emperor’s Illusionist: Policyholders Retreat From Pollution Exclusion Extrinsic Evidence*, Mealey’s Litig. Rep.—Ins., May 5, 1992, at 17 (authors regularly represent insurance companies); Stempel, *Unreason in Action: A Case Study of the Wrong Approach to Construing the Liability Insurance Pollution Exclusion*, 50 Fla. L. Rev. 463 (1998); Murphy, “Sudden and Accidental” Exception to the Pollution Exclusion Clause in Comprehensive General Liability Insurance Policies: The Gordian Knot of Environmental Liability, 45 Vand. L. Rev. 161, 176 (1992); Guiliano, *Sudden and Accidental Exception to the Pollution Exclusion*, 13 Temp. Envtl. L. & Tech J. 261, 301–307 (1994).

⁶⁸ See *In re Insurance Antitrust Litig.*, 938 F.2d 919 (9th Cir. 1991), *aff’d in part and rev’d in part, sub nom.* Hartford Fire Ins. Co. v. State of California, 509 U.S. 764, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993). See also *In re Hoechst Celanese Corp.*, 184 A.D.2d 223, 584 N.Y.S.2d 805 (1992); David J. Dybdahl, Am. Risk Mgmt. Res. Network, *A User’s Guide to Environmental Insurance*, at 50, available at <http://erraonline.org/usersguide.pdf> (“In response to the adverse environmental claims experience on the Comprehensive General Liability policy, ISO introduced a new Commercial General Liability form in 1986.”).

⁶⁹ David J. Dybdahl, Am. Risk Mgmt. Res. Network, *A User’s Guide to Environmental Insurance*, at

Practice Note

Not all insurance companies use the standard ISO drafted “absolute” pollution exclusion. Policyholders should be careful when reviewing their post-1985 policies and should not assume that their policy contains the “standard” wording or that insurance coverage for environmental liabilities is unavailable because of the “absolute” label. Moreover, it is often difficult to predict whether a court will find coverage. It may depend on the wording of the exclusion and the cause of the damages. Consequently, brownfields participants and their counsel should be extremely careful when examining the actual language of any “pollution” exclusions and should do so in the light of the relevant facts and pertinent case decisions.

50, available at <http://erraonline.org/usersguide.pdf> (“The Commercial General Liability policy contained an ‘Absolute Pollution Exclusion’ in the standard form and gave underwriters the ability to utilize a ‘Total’ pollution exclusion by endorsement.”). One such exclusion, drafted by ISO in 1985, reads as follows:

It is agreed that the exclusion relating to the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials, or other irritants, contaminants or pollutants is replaced by the following:

(1) to bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants;

(a) at or from premises owned, rented or occupied by the named insured;

(b) at or from any site or location used by or for the named insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) which are at any time transported, handled, stored, treated, disposed of or processed as waste by or for the named insured or any person or organization for whom the named insured may be legally responsible; or

(d) at or from any site or location on which the named insured or any contractors or subcontractors working directly or indirectly on behalf of the named insured are performing operations:

(i) if the pollutants are brought on or to the site or location in connection with such operations; or

(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

(2) to any loss, cost or expense arising out of any governmental direction or request that the named insured test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Certain subsequent amendments added the following exception for “hostile fire”:

Subparagraphs (a) and (b)(i) of paragraph (1) of this exclusion do not apply to bodily injury or property damage caused by heat, smoke or fumes from a hostile fire. As used in this exclusion, a hostile fire means one which becomes uncontrollable or breaks out from where it was intended to be.

The ISO-drafted exclusion is more properly referred to as “the broad-form pollution exclusion” because Part (1) is limited to four specific sources of pollutant discharge, dispersal, release, or escape.

Brownfields participants should investigate any insurance policy with a variation of the “absolute” pollution exclusion and should scrutinize environmental endorsements closely to see if what one exclusion purports to bar was added back into the grant of coverage. While there have been a number of cases in which a type of “absolute” pollution exclusion was found not to bar insurance coverage,⁷⁰ there have also been a

⁷⁰ See, e.g.:

Federal: Doe Run Res. Corp. v. Lexington Ins. Co., 2013 U.S. App. LEXIS 11880 (8th Cir. June 13, 2013) (holding that bodily injury and property damage when insured left its waste pile open and available for public use did not involve inadvertent release of hazardous wastes or toxic substances, as would preclude coverage under absolute pollution exclusion in commercial general liability (CGL) insurance policy); Barney Greengrass, Inc. v. Lumbermens Mutual Casualty Co., 2011 U.S. App. LEXIS 22442 (2d Cir. Nov. 4, 2011) (holding that smoke, exhaust, and odor emitted by delicatessen are not pollutants); Parks Real Estate Purchasing Group v. St. Paul Fire & Marine Ins. Co., 472 F.3d 33, 46 (2d Cir. 2006) (holding that under New York Law, “the term ‘contamination’ is ambiguous under the [relevant liability insurance] policy because the common definition of the term that the District Court employed . . . would allow the contamination exclusion in the policy to be applied in a limitless variety of situations”); Manus v. Ranger Ins. Co., 2005 U.S. App. LEXIS 13524 (9th Cir. 2005) (holding that dumping of waste materials at illegal dump site, which included “dirt, brush, weeds, grapevines, leaves, tree stumps, tree branches, ice plants, sod, concrete, and tires,” was not unambiguously excluded by pollution exclusion); Cooper v. Travelers Indem. Co., 2004 U.S. App. LEXIS 21324 (9th Cir. Oct. 13, 2004) (holding that pollution exclusion did not bar coverage for losses sustained after health officials closed policyholder’s restaurant because its well water tested positive for E. Coli contamination); Amerada Hess Corp. v. Zurich Ins. Co., 2002 U.S. App. LEXIS 3517 (3d Cir. Mar. 6, 2002) (different compelling interpretations of the “absolute” pollution exclusion and the policyholder’s reasonable expectations render exclusion ambiguous and coverage available); Reliance Ins. Co. v. Moessner, 121 F.3d 895 (3d Cir. 1997) (standard “absolute” pollution exclusion does not bar coverage for injuries caused by carbon monoxide emissions from machinery sold and serviced by policyholder), *on remand sub nom.* Reliance Ins. Co. v. VE Corp., 2000 U.S. Dist. LEXIS 1819 (E.D. Pa. Feb. 10, 2000) (insurer’s unilateral change of policy terms on renewal of policy that was contrary to insured’s reasonable expectation of continued coverage would not be given effect under Pennsylvania law); United Fire & Cas. Co. v. Titan Contractors Serv., Inc., 2013 U.S. Dist. LEXIS 10716 (E.D. Mo. Jan. 28, 2013) (vapors from a concrete sealant used by contractors at a construction site were not specified as “pollutants” and therefore bodily injury resulting from them was a covered occurrence); LSG Techs., Inc. v. United States Fire Ins. Co., 2010 U.S. Dist. LEXIS 140879 (E.D. Tex. Sept. 2, 2010) (holding asbestos not necessarily a pollutant, and also possibly qualified for “sudden and accidental” exception to pollution exclusion); Jones v. Francis Drilling Fluids, Ltd., 642 F. Supp. 2d 643, 668 (S.D. Tex. 2009) (holding that chemical incidents that are “one time, discreet, sudden accident[s]” do not trigger total pollution exclusion clauses); Herald Square Loft Corp. v. Merrimack Mut. Fire Ins. Co., 344 F. Supp. 2d 915 (S.D.N.Y. 2004) (holding under New York law that pollution exclusion did not preclude coverage for lead paint dust contamination caused by repair work of contractor); Governmental Interinsurance Exch. v. City of Angola, Ind., 8 F. Supp. 2d 1120 (N.D. Ind. 1998); Sphere Drake Ins. Co. v. Y.L. Realty Co., 990 F. Supp. 240 (S.D.N.Y. 1997); Lefrak Org., Inc. v. Chubb Custom Ins. Co., 942 F. Supp. 949 (S.D.N.Y. 1996).

Alabama: Porterfield v. Audubon Indem. Co., 856 So. 2d 789 (Ala. 2003) (liability for lead poisoning from flaking and peeling lead paint in a residential apartment held not barred by pollution exclusion despite being considered a pollutant, because the operative terms “discharge,” “dispersal,” “release,” or “escape” in the exclusion are ambiguous).

Arkansas: State Auto Prop. & Cas. Ins. Co. v. Ark. Dep’t of Env’tl. Quality, 258 S.W.3d 736, 741 (Ark. 2007) (upholding the precedent in *Minerva*, “In short, this court continues to believe that the pollution-exclusion language is subject to different interpretations.”); *Minerva Enters. v. Bituminous Cas.*

growing number of cases in which courts have found that such exclusions bar

Corp., 851 S.W.2d 403, 406 (Ark. 1993) (pollution exclusion is ambiguous whether it applies only to industrial polluters, therefore septic system backup is not excluded in CGL policy).

California: MacKinnon v. Truck Ins. Exchange, 31 Cal. 4th 635 (Cal. 2003) (holding that pollution exclusion applies only to “environmental pollution,” thus damage caused by negligent spraying of pesticides at policyholder’s apartment complex was not barred); Charles E. Thomas Co. v. Transamerica Ins. Group, 62 Cal. App. 4th 379 (1998) (exclusion for cleanup costs only applies to government-mandated cleanups); C.O.D. Gas & Oil Co. v. Ace Am. Ins. Co., 2004 Cal. App. Unpub. LEXIS 5419 (Cal. Ct. App. June 8, 2004) (holding that loss of sales relating to leak in underground storage tanks was not excluded under absolute pollution exclusion; “purpose of the absolute pollution exclusion is to protect insurers against environmental losses and not to exclude coverage for insured’s ordinary negligence”); SEMX Corp. v. Federal Ins. Co., 398 F. Supp. 2d 1103 (S.D. Cal. 2005) (holding that insurance company had duty to defend third-party claims arising from one-time release of ammonia into the atmosphere and “not a long term, or repeated, release of an item into the environment”).

Connecticut: Danbury Ins. Co. v. Novella, 45 Conn. Supp. 551, 727 A.2d 279 (1998) (lead paint); Nat’l Grange Mut. Ins. Co. v. Caraker, 2006 Conn. Super. LEXIS 815 (Conn. Super. Ct. Feb. 28, 2006) (coverage exists because “the exclusion clause is . . . ambiguous with respect to whether asbestos released as described in the complaint can be properly classified as a pollutant . . . [and because ambiguity exists where] one could conclude that the terms ‘discharge, dispersal, seepage, migration, release or escape’ apply to outdoor environmental pollution only”).

Illinois: American States Ins. Co. v. Koloms, 177 Ill. 2d 473, 227 Ill. Dec. 149, 687 N.E.2d 72 (1997).

Indiana: State Auto. Mut. Ins. Co. v. Flexdar, Inc., 964 N.E.2d 845 (Ind. 2012) (groundwater contamination from trichloroethylene emitted by rubber manufacturing plant; pollution exclusion deemed ambiguous); American States Ins. Co. v. Kiger, 662 N.E.2d 945 (Ind. 1996) (groundwater contamination from gasoline leaks; giving effect to exclusion would eviscerate coverage sold to gasoline station operator); Freidline v. Shelby Ins. Co., 774 N.E.2d 37 (Ind. 2002) (finding the pollution exclusion ambiguous and construing it against the insurance company so as not to exclude coverage for injuries resulting from release of carpet glue fumes).

Kansas: Associated Wholesale Grocers, Inc. v. Americold Corp., 261 Kan. 806, 934 P.2d 65 (1997) (did not apply to damages to food products as result of hostile fire).

Kentucky: Motorists Mut. Ins. Co. v. RSJ, Inc., 926 S.W.2d 679, 682 (Ky. Ct. App. 1996) (absolute pollution exclusion ambiguous in regards to unexpected leak of carbon monoxide from a vent pipe).

Louisiana: Doerr v. Mobil Oil Corp., 774 So. 2d 119, 135 (La. 2000) (“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”); State Farm Fire & Cas. Co. v. M.L.T. Constr. Co., 849 So. 2d 762, 770–71 (La. Ct. App. 2003) (illustrating insurance company attempts to improperly extend the scope of pollution exclusions and holding that coverage exists because “rainwater is not a substance that is usually viewed as a pollutant . . . [and] the clear purposes of the pollution exclusion clauses are to prevent businesses from escaping responsibility for polluting behavior by procuring insurance to cover such losses and further to encourage businesses to curb polluting activities”).

Maryland: Sullins v. Allstate Ins. Co., 340 Md. 503, 667 A.2d 617 (1995); Clendenin Bros., Inc. v. United States Fire Ins. Co., 390 Md. 449, 889 A.2d 387 (Md. 2006) (holding that, under policies containing total pollution exclusion, insurance company had duty to defend claims for alleged injuries arising from manganese welding fumes because claims were for localized, workplace injuries, and not for environmental pollution).

Massachusetts: Andrew Robinson Int’l, Inc. v. Hartford Fire Ins. Co., 2006 Mass. Super. LEXIS 236 (Mass. Super. Ct. 2006) (holding that “[w]hen presented with the aforementioned ambiguities in the [policy], a policyholder could reasonably believe that (and justifiably rely on) property damage caused by a cloud of fine particulate matter, i.e. dust or smoke, containing lead qualifies as a ‘Specified Cause[] of

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Connecticut: Danbury Ins. Co. v. Novella, 45 Conn. Supp. 551, 727 A.2d 279 (1998) (lead paint); Nat’l Grange Mut. Ins. Co. v. Caraker, 2006 Conn. Super. LEXIS 815 (Conn. Super. Ct. Feb. 28, 2006) (coverage exists because “the exclusion clause is . . . ambiguous with respect to whether asbestos released as described in the complaint can be properly classified as a pollutant . . . [and because ambiguity exists where] one could conclude that the terms ‘discharge, dispersal, seepage, migration, release or escape’ apply to outdoor environmental pollution only”).

Illinois: American States Ins. Co. v. Koloms, 177 Ill. 2d 473, 227 Ill. Dec. 149, 687 N.E.2d 72 (1997).

Indiana: State Auto. Mut. Ins. Co. v. Flexdar, Inc., 964 N.E.2d 845 (Ind. 2012) (groundwater contamination from trichloroethylene emitted by rubber manufacturing plant; pollution exclusion deemed ambiguous); American States Ins. Co. v. Kiger, 662 N.E.2d 945 (Ind. 1996) (groundwater contamination from gasoline leaks; giving effect to exclusion would eviscerate coverage sold to gasoline station operator); Freidline v. Shelby Ins. Co., 774 N.E.2d 37 (Ind. 2002) (finding the pollution exclusion ambiguous and construing it against the insurance company so as not to exclude coverage for injuries resulting from release of carpet glue fumes).

Kansas: Associated Wholesale Grocers, Inc. v. Americold Corp., 261 Kan. 806, 934 P.2d 65 (1997) (did not apply to damages to food products as result of hostile fire).

Kentucky: Motorists Mut. Ins. Co. v. RSJ, Inc., 926 S.W.2d 679, 682 (Ky. Ct. App. 1996) (absolute pollution exclusion ambiguous in regards to unexpected leak of carbon monoxide from a vent pipe).

Louisiana: Doerr v. Mobil Oil Corp., 774 So. 2d 119, 135 (La. 2000) (“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”); State Farm Fire & Cas. Co. v. M.L.T. Constr. Co., 849 So. 2d 762, 770–71 (La. Ct. App. 2003) (illustrating insurance company attempts to improperly extend the scope of pollution exclusions and holding that coverage exists because “rainwater is not a substance that is usually viewed as a pollutant . . . [and] the clear purposes of the pollution exclusion clauses are to prevent businesses from escaping responsibility for polluting behavior by procuring insurance to cover such losses and further to encourage businesses to curb polluting activities”).

Maryland: Sullins v. Allstate Ins. Co., 340 Md. 503, 667 A.2d 617 (1995); Clendenin Bros., Inc. v. United States Fire Ins. Co., 390 Md. 449, 889 A.2d 387 (Md. 2006) (holding that, under policies containing total pollution exclusion, insurance company had duty to defend claims for alleged injuries arising from manganese welding fumes because claims were for localized, workplace injuries, and not for environmental pollution).

Massachusetts: Andrew Robinson Int’l, Inc. v. Hartford Fire Ins. Co., 2006 Mass. Super. LEXIS 236 (Mass. Super. Ct. 2006) (holding that “[w]hen presented with the aforementioned ambiguities in the [policy], a policyholder could reasonably believe that (and justifiably rely on) property damage caused by a cloud of fine particulate matter, i.e. dust or smoke, containing lead qualifies as a ‘Specified Cause[]’ of

environmental claims.⁷¹ Many of these courts are persuaded that “absolute” pollution

Loss,’ for which coverage is allowed under the pollution exclusion clause”); *Western Alliance Ins. Co. v. Gill*, 426 Mass. 115, 686 N.E.2d 997 (1997); *Atlantic Mut. Ins. Co. v. McFadden*, 413 Mass. 90, 595 N.E.2d 762 (1992).

New Hampshire: *Weaver v. Royal Ins. Co. of Am.*, 140 N.H. 780, 674 A.2d 975 (1996).

New Jersey: *Byrd v. Blumenreich*, 317 N.J. Super. 496, 722 A.2d 598 (App. Div. 1999) (exclusion held ambiguous with respect to lead paint injuries in a residential setting).

New York: *Great American Restoration Services, Inc. v. Scottsdale Ins. Co.*, 78 A.D.3d 773 (2d Dept. 2010) (holding coverage not barred by pollution exclusion where exclusion did not explicitly list asbestos); *Tower Insurance Co. of New York v. Breyer*, 37 A.D.3d 309 (1st Dept. 2007) (ambiguity in pollution exclusion rendered exclusion inapplicable); *Roofers’ Joint Trading, Apprentice & Educ. Comm. v. General Acc. Ins. Co.*, 275 A.D.2d 90, 713 N.Y.S.2d 615 (4th Dept. 2000) (finding that total pollution exclusion did not bar coverage for injuries caused when fumes were released when a roofing membrane was applied with hot air during a classroom demonstration); *Eastern Mut. Ins. Co. v. Kleinke*, 293 A.D.2d 801, 739 N.Y.S.2d 657 (3d Dept. 2002) (refusing to extend policy wording to encompass activity beyond the scope of “absolute” pollution exclusion’s historical purpose in holding that the definitions of waste in the policy implies a limitation “intended to exclude only environmental contamination as a result of industrial waste” and not arising out of the presence of bacteria); *GA Ins. Co. v. Naimberg Realty Assocs.*, 233 A.D.2d 363, 650 N.Y.S.2d 246 (2d Dept. 1996); *General Accident Ins. Co. of Am. v. Idbar Realty Corp.*, 163 Misc. 2d 809, 622 N.Y.S.2d 417 (Sup. Ct. 1994), *aff’d in part & modified in part*, 229 A.D.2d 515 (2d Dept. 1996); *Generali-U.S. Branch v. Caribe Realty Corp.*, 160 Misc. 2d 1056, 612 N.Y.S.2d 296 (Sup. Ct. 1994).

Ohio: *Andersen v. Highland House Co.*, 93 Ohio St. 3d 547, 757 N.E.2d 329, 334 (2001) (holding pollution exclusion does not apply since a policyholder would not normally expect carbon monoxide leaking from a residential heater to be “pollution”).

Texas: *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462 (Tex. 1998) (property damage caused by rupture of oil pipeline along easement).

Washington: *Kent Farms, Inc. v. Zurich Ins. Co.*, 140 Wn.2d 396, 998 P.2d 292 (2000), *aff’g* 969 P.2d 109 (1998) (exclusion does not bar coverage for injuries caused by ingestion of diesel fuel caused by overfilling of tank).

Wisconsin: *Donaldson v. Urban Land Interests, Inc.*, 211 Wis. 2d 224, 564 N.W.2d 728 (1997); *Langone v. Am. Family Mut. Ins. Co.*, 300 Wis. 2d 742, 731 N.W.2d 334 (Wis. Ct. App. 2007) (coverage granted because “the policy and dictionary definitions of the term ‘pollutant’ do not suffice to unambiguously categorize carbon monoxide as pollution under the facts of this case”).

Wyoming: *Gainsco Ins. Co. v. Amoco Prod. Co.*, 2002 WY 122, 53 P.3d 1051, 1066 (2002) (pollution exclusion does not apply to death resulting from accidental leak of hydrogen sulfide since normal interpretation on “pollution” is limited to traditional environmental pollution).

For the viewpoint of a policyholder, see John A. MacDonald, *Decades of Deceit: The Insurance Industry Incursion into the Regulatory and Judicial Systems*, Coverage (Nov./Dec. 1997). For the viewpoint of an academic that agrees with the policyholder viewpoint on the “absolute” pollution exclusion, see Jeffrey W. Stempel, *Reason and Pollution: Correctly Construing the “Absolute” Exclusion in Context and in Accord With Its Purpose and Party Expectations*, Tort & Ins. Law J. (Fall 1998).

⁷¹ See, e.g.:

Federal: *Maxine Furs, Inc. v. Auto-Owners Ins. Co.*, 2011 U.S. App. LEXIS 6706 (11th Cir. Mar. 31, 2011) (holding that aroma coming from Indian restaurant and causing policyholder’s furs to smell like curry was pollutant, barring coverage based on pollution exclusion); *Racetrac Petroleum, Inc. v. Ace Am. Ins. Co.*, 2011 U.S. App. LEXIS 22455 (11th Cir. Nov. 3, 2011) (gasoline fumes that caused injury were pollutants subject to pollution exclusion that “have the effect of making the [air] impure . . .”); *Markel*

exclusions were intended to be much more restrictive than the prior “sudden and

Int'l Ins. Co. Ltd. v. Florida West Covered RV & Boat Storage, LLC, 2011 U.S. App. LEXIS 16552 (11th Cir. Aug. 11, 2011) (holding that injury caused by wading through water contaminated by roadwork millings was barred from coverage by pollution exclusion); *Housing Auth. Risk Retention Group, Inc. v. Chicago Housing Auth.*, 378 F.3d 596 (7th Cir. 2004) (holding that pollution exclusion precluded coverage for defense of city housing authority against class action alleging exposure to environmental contaminants, including nontraditional claims such as environmental discrimination); *Admiral Ins. Co. v. Feit Mgmt. Co.*, 321 F.3d 1326 (11th Cir. 2003) (holding death and injury caused to apartment residents by carbon monoxide fumes from building's hot water heater were excluded by absolute pollution exclusion); *Auto Owners Ins. Co. v. City of Tampa Housing Auth.*, 231 F.3d 1298 (11th Cir. 2000) (finding that absolute pollution exclusion barred coverage for injuries to child caused by ingestion of lead paint); *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1000 (4th Cir. 1998) (“carbon monoxide—whether considered a ‘fume,’ ‘vapor,’ or ‘gas’—plainly falls within this policy definition of ‘pollutant’”); *St. Leger v. Am. Fire & Cas. Co.*, 61 F.3d 896 (3d Cir. 1995); *U.S. Liab. Ins. Co. v. Bourbeau*, 49 F.3d 786 (1st Cir. 1995); *Doe Run Resources Corp. v. Lexington Ins. Co.*, 2012 U.S. Dist. LEXIS 56412 (E.D. Mo. Apr. 23, 2012) (holding that despite its commercial value, lead is nonetheless a pollutant subject to pollution exclusion); *Travelers Prop. Cas. Co. of Am. v. Chubb Custom Ins. Co.*, 864 F. Supp. 2d 301 (E.D. Pa. 2012) (odors from pig farm, despite being common in rural area, were pollutants for which coverage is barred under pollution exclusion); *Markel Ins. Co. v. Burns*, 2011 U.S. Dist. LEXIS 39188 (E.D. Okla. Apr. 8, 2011) (holding pollution exclusion barred coverage where policyholder contaminated town water supply when filling a chemical tank and the town water main ruptured); *CDC Builders, Inc. v. Amerisure Mut. Ins. Co.*, 2011 U.S. Dist. LEXIS 114509 (S.D. Fla. Aug. 16, 2011) (Chinese drywall used in homes constitutes contaminant subject to pollution exclusion); *General Fiduciary Ins. Co. v. Foster*, 2011 U.S. Dist. LEXIS 103618 (S.D. Fla. Mar. 24, 2011) (same); *Phila. Indem. Ins. Co. v. Yachtman's Inn Condo Ass'n*, 595 F. Supp. 2d 1319 (S.D. Fla. 2009) (pollution exclusion terms of “irritant or contaminant” unambiguous in definition of “pollutant” when applied to battery acid and raw sewage); *Firemen's Ins. Co. of Washington, D.C. v. Kline & Son Cement Repair, Inc.*, 474 F. Supp. 2d 779 (E.D. Va. 2007) (finding fumes from epoxy/urethane sealant are pollutants); *Nova Cas. Co. v. Wasserstein*, 424 F. Supp. 2d 1325 (S.D. Fla. 2006) (While “‘living organisms,’ ‘microbial populations,’ ‘microbial contaminants,’ and ‘indoor allergens,’ fit the ordinary definition of ‘contaminant,’ . . . to interpret the pollution exclusion clause [differently] would re-write the definition of ‘pollutant.’” Summary judgment on coverage was denied as factual questions existed over coverage representations.); *Yale Univ. v. Cigna Ins. Co.*, 224 F. Supp. 2d 402, 423 (D. Conn. 2002) (Connecticut law bars coverage for property loss or damage in the form of asbestos contamination in this case because policyholder “has not pointed to any language within the Contaminant Exclusion, or the policies generally, that renders the exclusion ambiguous.”); *Hartford Underwriter's Ins. Co. v. Estate of Turks*, 206 F. Supp. 2d 968 (E.D. Mo. 2002) (under Missouri law, lead paint considered a “pollutant” within meaning of policy's pollution exclusion, thus barring coverage for alleged bodily injury); *Coal Heat, Inc. v. United States Fid. & Guar. Co.*, 2000 U.S. Dist. LEXIS 16059 (E.D. Pa. Nov. 2, 2000) (pollution exclusions are to be interpreted broadly under Pennsylvania law; recovery for the release of home heating oil onto property was unambiguously barred “in accord with [the relevant exclusion's] natural, plain and ordinary meaning”); *West Am. Ins. Co. v. Band & Desenberg*, 925 F. Supp. 758 (M.D. Fla. 1996), *aff'd*, 138 F.3d 1428 (11th Cir. 1998). *See also* *Narragansett Elec. Co. v. Am. Home Assur. Co.*, 921 F. Supp. 2d 166 (S.D.N.Y. 2013) (release of decades-old pollution by residential contractor in 1984 qualifies as “sudden and accidental” event as exception to pollution exclusion); *Wiseman Oil Co. v. TIG Insurance Co.*, 2013 U.S. Dist. LEXIS 14747 (W.D. Pa. Jan. 22, 2013) (pollution exclusion not applicable given that releases were sudden and accidental).

Alabama: Federated Mut. Ins. Co. v. Abston Petroleum, Inc., 967 So. 2d 705 (Ala. 2007) (gasoline considered a “pollutant” within the meaning of absolute pollution exclusion).

Alaska: Whittier Properties, Inc. v. Alaska Nat'l Ins. Co., 185 P.3d 84, 90–91 (Alaska 2008) (holding that gasoline that “escapes” from its tank is an unambiguous pollutant).

(Text continued on page 28-48)

California: *Villa Los Alamos Homeowners Ass'n v. State Farm General Ins. Co.*, 198 Cal. App. 4th 522 (Cal. Ct. App. 2011) (holding asbestos was pollutant); *Lewis v. Hartford Cas. Ins. Co.*, 2006 U.S. Dist. LEXIS 3754 (N.D. Cal. Jan. 31, 2006) (holding that absolute pollution exclusion precluded coverage for discharge of perchloroethylene from dry cleaning operation into soil and groundwater because such discharges constituted "pollution 'commonly thought of as environmental pollution'"); *Insurance Comm'r v. Golden Eagle Ins. Co.*, No. A087172 (Cal. 1st Dist. Ct. App. May 8, 2000) (finding that total pollution exclusion barred coverage for bodily injury to employees caused by carbon monoxide from gas engine not properly vented and used inside by contractor).

Colorado: *Figuli v. State Farm Mut. Fire & Casualty*, 2012 Colo. App. LEXIS 459 (Colo Ct. App. Mar. 29, 2012) (injuries caused by contact with raw sewage barred from coverage by pollution exclusion in rental liability policy); *New Salida Ditch Co. v. United Fire & Cas. Ins. Co.*, 2009 U.S. Dist. LEXIS 118377 (D. Colo. Dec. 18, 2009) (fill material dumped into Arkansas River falls within the plain meaning of the total pollution exclusion in the CGL even though fill material is not "always" a pollutant); *TerraMatrix, Inc. v. U.S. Fire Ins. Co.*, 939 P.2d 483 (Colo. Ct. App. 1997); *Blackhawk-Central City Sanitation Dist. v. Am. Guar. & Liab. Ins. Co.*, 214 F.3d 1183 (10th Cir. 2000) (finding that coverage for sewage and effluent, including suspended solids, fecal coliform bacteria, ammonia, residual chlorine and other chemicals discharged by sanitation district was barred by absolute pollution exclusion).

Connecticut: *Heyman Assocs. No. 1 v. Ins. Co. of State of Pa.*, 231 Conn. 756, 771, 653 A.2d 122 (1995) (fuel oil spilled into Stamford Harbor unambiguously a "pollutant").

Florida: *State Farm Fire & Cas. Ins. Co. v. Deni Assocs of Fla., Inc.*, 678 So. 2d 397 (Fla. 4th Dist. Ct. App. 1996), *aff'd*, 711 So. 2d 1135 (Fla. 1998).

Georgia: *Reed v. Auto-Owners Ins. Co.*, 284 Ga. 286, 288, 667 S.E.2d 90 (2008) (holding carbon monoxide fumes fall within the plain language of "irritant or contaminate" when they directly cause physical harms such as dizziness, vomiting, insomnia, etc.).

Illinois: *Connecticut Specialty Ins. Co. v. Loop Paper Recycling, Inc.*, 356 Ill. App. 3d 67, 291 Ill. Dec. 875, 824 N.E.2d 1125 (2005) (holding that absolute pollution exclusion barred coverage for injuries sustained by neighbors of paper recycling company from fire set to cardboard by vandals).

Iowa: *Bituminous Cas. Corp. v. Sand Livestock Sys., Inc.*, 728 N.W.2d 216, 221 (Iowa 2007) (carbon monoxide poisoning from a propane power-washer fits with the policy's broad definition of "pollutants" and there is "no distinction between "traditional environmental pollution" and injuries arising from normal business operations").

Louisiana: *Grefer v. Travelers Ins. Co.*, 919 So. 2d 758, 771 (La. Ct. App. 2005) (chemicals released during pipe cleaning deemed pollutants because "the most important consideration in the insured's status as a polluter are the first two factors, the nature of the insured's business and whether it presents a risk of pollution").

Michigan: *Nugent Sand Co. v. Century Indem. Co.*, 2006 U.S. Dist. LEXIS 83463 (W.D. Mich. Nov. 16, 2006) (holding pollution exclusion applies because "pollutant" is unambiguous even when the "fatty acid" released was not an "irritant" or "contaminant" until a "chain reaction" occurred in the environment causing an increase in iron and magnesium in the groundwater); *Mckusick v. Travelers Indem. Co.*, 632 N.W.2d 525, 531 (Mich. Ct. App. 2001) (terms "discharge," "dispersal," "release," and "escape" are not "environmental terms of art," therefore a broken hose that spewed toxic gases which injured individuals falls within pollution exclusion even though the area affected was "localized").

Minnesota: *Larson v. Composting Concepts, Inc.*, 2008 Minn. App. Unpub. LEXIS 551, at *1 (Minn. Ct. App. May 13, 2008) (barring coverage "[b]ecause the terms of the pollution exclusion are ambiguous and the plain [non-technical] meaning of 'pollutants' includes the dispersal of living organisms from the composting site").

Missouri: *Heringer v. Am. Family Mut. Ins. Co.*, 140 S.W.3d 100, 106 (Mo. Ct. App. 2004) (The definition of pollutant in the policy includes lead paint. "The language in the . . . policy applies the

accidental” exclusion. In actuality, the drafters of one form of the “absolute” pollution

pollution exclusion to the ‘ingestion, inhalation or absorption of pollutants from any source.’ It does not limit the pollution exclusion to environmental pollution.”); *Cas. Indem. Exch. v. City of Sparta*, 997 S.W.2d 545 (Mo. Ct. App. 1999); *Heringer v. Am. Family Mut. Ins. Co.*, 140 S.W.3d 100, 106 (Mo. Ct. App. 2004).

Montana: *Mont. Petroleum Tank Release Comp. Bd. v. Crumleys Inc.*, 2008 MT 2, 341 Mont. 33, 45, 174 P.3d 948 (2008) (diesel fuel that leaked from underground tank was an unambiguous “pollutant” within the meaning of absolute pollution exclusion).

Nebraska: *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (Neb. 2001) (rejecting urged limitation of excluded claims to traditional environmental damage and the term pollutants to those that cause traditional environmental damage).

New Jersey: *Woodcliff Lake Board of Education v. Zurich American Insurance Co.*, 2013 N.J. Super. Unpub. LEXIS 2041 (App. Div. Aug. 14, 2013) (exclusion barred coverage for claims associated with asbestos cleanup).

New York: *A-One Oil, Inc. v. Mass. Bay Ins. Co.*, 250 A.D.2d 633, 672 N.Y.S.2d 423 (2d Dept. 1998) (exclusion barred coverage for residential exposure to asbestos); *abrogated by Belt Painting Corp. v. TIG Ins. Co.*, 742 N.Y.S.2d 332 (App. Div. 2002) (holding that “the better view was that this type of exclusion ‘applies only to environmental pollution, and not to all contact with substances that can be classified as pollutants’”), *aff’d*, 795 N.E.2d 15 (N.Y. 2003).

Oklahoma: *Bituminous Cas. Corp. v. Cowen Constr., Inc.*, 55 P.3d 1030, 1035 (Okla. 2002) (holding that construction of pollution exclusion “does not contain an environmental limitation but rather excludes from coverage any property damage or bodily injury caused by the discharge or release of pollutants”).

Pennsylvania: *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 451 Pa. Super. 136, 144, 678 A.2d 802, 806 (1996), *aff’d*, 557 Pa. 595, 735 A.2d 100 (1999) (fumes released from concrete curing agent); *Matcon Diamond, Inc. v. Penn Nat’l Ins. Co.*, 815 A.2d 1109 (Pa. Super. Ct. 2003) (carbon monoxide is unambiguously a “contaminant” under the language of the policy using the dictionary definition of pollutant and because “the federal Clean Air Act designates carbon monoxide as a pollutant”).

South Dakota: *Demaray v. De Smet Farm Mut. Ins. Co.*, 2011 S.D. 39 (S.D. 2011) (discharge of animal wastes was not “sudden and accidental,” therefore did not fit within exception to pollution exclusion); *S.D. State Cement Plant Comm’n v. Wausau Underwriters Ins. Co.*, 616 N.W.2d 397, 406 (S.D. 2000) (complaint by SDCP listed allegations of cement dust “contamination,” therefore the action clearly falls under the terms of the pollution exclusion in the policy and coverage is barred).

Texas: *United Nat’l Ins. Co. v. Hydro Tank, Inc.*, 525 F.3d 400, 401–402 (5th Cir. 2008) (where claim states that injury was caused by a pollutant “and/or” a non-pollutant, coverage is [barred based upon a complicated contract interpretation analysis, including] the construction that “when general terms like ‘chemicals’ and ‘vapors’ follow specific terms like ‘hydrogen sulfide’ there is a presumption that the general terms are to be construed to belong to the same class or category as the more specific term”).

Virginia: *PBM Nutritionals, LLC v. Lexington Ins. Co.*, 724 S.E.2d 707 (Va. 2012) (holding that melamine that entered policyholder’s baby formula operations during cleaning is subject to pollution exclusion); *Dragas Management Corp. v. Hanover Ins. Co.*, 798 F. Supp. 2d 766 (E.D. Va. 2011) (coverage barred with respect to sulfur gases released during installation of defective Chinese drywall under subcontractor’s CGL policy); *City of Chesapeake v. States Self-Insurers Risk Retention Group, Inc.*, 271 Va. 574, 578, 628 S.E.2d 539 (2006) (trihalomethanes (THMs) in the municipal water system are by definition “contaminants” and therefore coverage is barred by the pollution exclusion).

Washington: *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wash. 2d 165, 110 P.3d 733 (2005) (injuries caused by fumes from waterproofing material were excluded from coverage because “[w]here the exclusion specifically includes releases or discharges occurring on the owner’s property or as the result of materials brought onto the property at the behest of the insured, and a reasonable person would

exclusion publicly represented that it was not intended to reduce prior insurance coverage.⁷² A number of courts have concluded that the definition of pollutants in “absolute” pollution exclusions is overbroad and, hence, ambiguous.⁷³ Some courts

recognize the offending substance as a pollutant, the policy is subject to only one reasonable interpretation and the exclusion must not be limited”).

Wisconsin: Hirschhorn v. Auto-Owners Ins. Co., 338 Wis. 2d 761, 809 N.W.2d 529 (Wis. 2012) (broad reading of pollution exclusion in homeowner liability policy includes bat guano as pollutant); *Watertown Tire Recyclers, LLC v. Nortman*, 331 Wis. 2d 730 (Wis. Ct. App. 2011) (coverage properly denied based on pollution exclusion for damage to water source stemming from fire at tire recycling facility); *State Farm Fire & Cas. Co. v. Acuity*, 280 Wis. 2d 624, 695 N.W. 2d 883 (Wis. Ct. App. 2005) (court applies broad definition of the term “arising out of” in pollution exclusion, therefore barring coverage for loss of property value due to odors from fuel oil); *Peace ex rel. Lerner v. Northwestern Nat’l Ins. Co.*, 596 N.W.2d 429 (Wis. 1999) (lead present in paint considered a “pollutant” within the meaning of a pollution exclusion clause in landlord’s commercial general liability insurance policy using the ordinary meaning of the words found in a non-legal dictionary).

For the viewpoint of lawyers who regularly represent the insurance industry, see *Zampino et al., The Sophist Maze: The Polluter’s Revision of the History of the “Total” Pollution Exclusion*, *Mealey’s Litig. Rep.—Ins.*, Sept. 27, 1994, at 14.

In the case of lead, some insurance companies have developed a specific lead exclusion for “exposure to, or contact with . . . lead contained in goods, products or materials.” *See Peerless Ins. Co. v. Gonzalez*, 241 Conn. 476, 697 A.2d 680 (1997) (finding lead exclusion barred coverage for exposure to lead paint). *See also Unionamerica Ins. Co. Ltd. v. Kaufman*, 1998 U.S. Dist. LEXIS 4290 (E.D. Pa. Mar. 31, 1998) (“lead contamination clause” barred insurance coverage); *Mount Vernon Fire Ins. Co. v. Jones*, 1997 U.S. Dist. LEXIS 19454 (E.D.N.Y. Jan. 14, 1997) (“lead contamination clause” barred insurance coverage).

⁷² In 1985, the Insurance Services Office noted that:

The pollution exclusion is completely rewritten in a new format designed to reinforce the limitation of coverage. In the current contract coverage is excluded if the introduction of pollutants was other than “sudden and accidental.”

Because of the broadening of coverage through court interpretations of current language there was considerable discussion of whether or not pollution should be completely excluded under the new Coverage Forms. This would have been a cut-back in coverage and would have meant that an insured with even minimal exposure to pollution loss would have had to purchase a separate pollution liability policy to obtain protection. Thus *it was decided that the new forms should provide the coverage that insurers generally intend under the current contract, though in a new format designed to reinforce the limitation of coverage.*

ISO, Seminar on Commercial Lines Policy and Rating Simplification, Including The New Commercial General Liability Policies, at 4 (Spring/Summer 1985) (emphasis added).

⁷³ *See, e.g., Sargent Constr. Co. v. State Auto. Ins. Co.*, 23 F.3d 1324, 1327 (8th Cir. 1994) (“we hold that the policy’s definition of ‘pollutants’ is ambiguous”); *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043 (7th Cir. 1992) (citation omitted); *Island Assocs., Inc. v. Eric Group, Inc.*, 894 F. Supp. 200, 203 (W.D. Pa. 1995); *Center for Creative Studies v. Aetna Life & Cas. Co.*, 871 F. Supp. 941, 947 (E.D. Mich. 1994) (finding “discharge, dispersal, release or escape of pollutants” to be ambiguous); *Lefrak Org., Inc. v. Chubb Custom Ins. Co.*, 942 F. Supp. 949, 956 (S.D.N.Y. 1996) (“the policy’s definition of ‘pollutants’ is susceptible of [more than one] equally reasonable meaning”); *State Auto. Mut. Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845 (Ind. 2012) (if read literally, pollution exclusion “would negate virtually all coverage”); *Tower Insurance Co. of New York v. Breyter*, 37 A.D.3d 309, 830 N.Y.S.2d 122 (1st Dept. 2007); *Bosserman Aviation Equip., Inc. v. U.S. Liab. Ins. Co.*, 183 Ohio App. 3d 29, 2009-Ohio-2526, 915 N.E.2d 687 (2009) (absolute pollution exclusion did not unambiguously exclude coverage for injuries which employee allegedly sustained as the result of prolonged exposure to

have also held that “absolute” or “total” pollution exclusions are only intended to apply to traditional environmental damages or injuries and not to ordinary commercial mishaps.⁷⁴ This view is borne out by the history of the insurance industry’s 1980s presentations to the National Association of Insurance Commissioners. These presentations focused on hazardous waste issues and the need for the insurance industry to address the liability scheme under the then new Superfund statute.⁷⁵ In fact, the

aircraft fuel within the normal course of employee’s performance of his job duties and within the limited confines of employee’s work area); *Ekleberry, Inc. v. Motorists Mut. Ins. Co.*, 1992 Ohio App. LEXIS 3778 (Ohio Ct. App. July 17, 1992) (definition of “pollutant” raises “issue as to whether the exclusion is so general as to be meaningless”); *Donaldson v. Urban Land Interests*, 564 N.W.2d 728, 732 (Wis. 1997) (“pollutant” ambiguous when applied to “exhaled carbon monoxide” within a building).

But cf. *Cas. Indem. Exch. v. City of Sparta*, 997 S.W.2d 545, 551 (Mo. Ct. App. 1999) (“[T]he Absolute Pollution Exclusion bars coverage for damage arising from exposure to toxic substances . . .”).

⁷⁴ *See, e.g.*, *Nautilus Ins. Co. v. Jabar*, 188 F.3d 27, 30 (1st Cir. 1999) (absolute pollution exclusion does not bar coverage for injury sustained from roofing products used at injured person’s place of employment); *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 3 Cal. Rptr. 3d 228, 73 P.3d 1205 (2003) (finding that absolute pollution exclusion did not apply to injuries from fumes from application of pesticide); *Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 227 Ill. Dec. 149, 687 N.E.2d 72, 82 (1997) (“[T]he exclusion applies only to those injuries caused by traditional environmental pollution.”); *Nav-Its, Inc. v. Selective Ins. Co. of America*, 183 N.J. 110, 869 A.2d 929, 939 (2005) (pollution exclusion does not apply to fumes from a floor coating since the exclusion is limited to traditional environmental pollution claims); *Roofers’ Joint Training, Apprentice & Educ. Comm. of W. New York v. Gen. Acc. Ins. Co. of Am.*, 275 A.D.2d 90, 92, 713 N.Y.S.2d 615, 617 (2000) (an ordinary policy holder would conclude that the pollution exclusion is applicable only to bodily injuries caused by traditional environmental pollution); *Pepsico, Inc. v. Winterthur Int’l Ins. Co.*, 13 A.D.3d 599, 788 N.Y.S.2d 142 (2d Dept. 2004) (denying insurance company’s summary judgment motion that losses associated with destruction of off-tasting soft drinks, caused by faulty ingredients, were excluded under pollution exclusion; exclusion was “unmistakably directed to environmental pollution, and not product contamination”); *Janart 55 West 8th L.L.C. v. Greenwich Ins. Co.*, 614 F. Supp. 2d 473, 478–79 (S.D.N.Y. 2009) (emphasizing that for exclusion to apply pollution must be “environmental” in nature); *Garfield Slope Housing Corp. v. Public Service Mut. Ins. Co.*, 973 F. Supp. 326, 336–37 (E.D.N.Y. 1997) (emphasizing that pollution must be “environmental” in nature); *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 388, 763 N.Y.S.2d 790, 795, 795 N.E.2d 15, 20 (2003) (“It cannot be said that this [‘total’ pollution exclusion] language unambiguously applies to ordinary paint or solvent fumes that drifted a short distance from the area of the insured’s intended use” allegedly causing bodily injury); *Western Alliance Ins. Co. v. Gill*, 426 Mass. 115, 686 N.E.2d 997 (1997); *Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 227 Ill. Dec. 149, 687 N.E.2d 72 (1997); *Keggi v. Northbrook Prop. and Cas. Ins. Co.*, 199 Ariz. 43, 49, 13 P.3d 785, 791 (Ct. App. 2000) (“the pollution exclusion clause was intended to exclude coverage for causes of action arising from traditional environmental pollution”); *see also Travco Insurance Co. v. Ward*, 2012 U.S. App. LEXIS 4397 (4th Cir. Va. Mar. 1, 2012) (certifying question to Virginia Supreme Court of whether damage caused inside residence by Chinese drywall is covered by homeowner’s policy with pollution exclusion); *Lefrak Org., Inc. v. Chubb Custom Ins. Co.*, 942 F. Supp. 949, 956 (S.D.N.Y. 1996) (definition of pollutants is suggestive of industrial and environmental pollution). *But cf.* *Kim v. State Farm Fire & Cas. Co.*, 312 Ill. App. 3d 770, 728 N.E.2d 530 (2000) (the release of tetrachloroethane from a policyholder’s dry cleaning machines constituted traditional environmental pollution excluded from coverage by the absolute pollution exclusion).

⁷⁵ *See e.g.*, Kimble, Counsel, AIA, *The Need For A Post-Closure Liability Fund For Waste Disposal Sites* (July 25, 1980), NAIC Proceedings, 1982 Vol. II at 633 (opining that “the member companies of [the American Insurance Association] will be asked to be the principal domestic source of post-closure

language of the exclusion borrows directly from CERCLA, the Superfund statute. Some courts have held in favor of insurance coverage for bodily injury or property damage claims under the separate personal injury provision of the CGL insurance policy because “absolute” pollution exclusions do not apply to personal injury coverage.⁷⁶ As a note of caution, in reviewing the case law in this area, one should be careful not to be misled by the labels attached to exclusions. Very often what is described by the court as an “absolute” pollution exclusion is actually a much more restrictive, so-called, “total” pollution exclusion.⁷⁷ “Absolute” pollution exclusions, however, were not intended to apply to claims arising out of “products” and “completed operations.”⁷⁸

liability insurance for hazardous waste disposal sites”). Kimble stressed the implications of Superfund liability on insurance coverage. *Id.* at 634–35. An attorney representing insurance industry interests also expressed the industry’s concern over Superfund liability. Robert S. Faron, *Superfund Liability: A Super Headache to Insure*, NAIC Proceedings, 1982 Vol. II at 636, 639. *See also* American Insurance Association, *Comments on Environmental Pollution, Legislation & Regulation* (Dec. 28, 1981), NAIC Proceedings, 1982 Vol. II at 683; *Report of the Advisory Committee on Environmental Liability Insurance* (Dec. 9, 1986), NAIC Proceedings, 1987 Vol. I at 869.

⁷⁶ *See, e.g.*, *Great Am. Ins. Co. of N.Y. v. Helwig*, 419 F. Supp. 2d 1017 (N.D. Ill. Mar. 9, 2006) (holding that absolute pollution exclusion did not exclude coverage for personal injuries allegedly caused by pollutants because exclusion, by its own terms, only encompassed bodily injury and property damage, and not personal injuries such as private nuisance and trespass); *Republic Franklin Ins. Co. v. L&J Realty Corp.*, 280 A.D.2d 351, 720 N.Y.S.2d 473 (1st Dept. 2001) (finding that pollution exclusion did not bar coverage for underlying claims of personal injury from fumes in a building); *Westview Assocs. v. Guar. Nat’l Ins. Co.*, 95 N.Y.2d 334, 717 N.Y.S.2d 75, 740 N.E.2d 220 (2000) (pollution exclusion in umbrella policy did not bar coverage for personal injury claim involving ingestion of lead paint even though express lead paint exclusion barred underlying primary coverage); *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043 (7th Cir. 1992).

⁷⁷ *See, e.g.*, *Nat’l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517 (Tex. 1995). In *CBI*, the Texas Supreme Court concluded that several non-standard “total” pollution exclusion clauses barred insurance coverage for injuries from a pipeline rupture. The Supreme Court incorrectly termed these exclusions “absolute” pollution exclusions. Numerous briefs and decisions have incorrectly cited the *CBI* decision as holding that the “absolute” pollution exclusion is unambiguous. In a decision construing a standard “absolute” pollution exclusion, the Texas Supreme Court held that the exclusion did not bar coverage for contamination caused by a pipeline rupture. *See Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462 (Tex. 1998).

⁷⁸ *Kimber Petroleum Corp. v. Travelers Indem. Co.*, 298 N.J. Super. 286, 689 A.2d 747 (App. Div. 1997). *See* Superfund and the Insurance Issues Surrounding Abandoned Hazardous Waste Sites at 28 (Insurance Services Office, Inc. Dec. 1995) (ISO reaffirmed that insurance companies that refer to the ISO-drafted exclusions as “total or absolute” are using an “unfortunate misnomer”); *Robert E. Lee & Assocs., Inc. v. Peters*, 557 N.W.2d 457 (Ct. App. 1996) (“absolute” pollution exclusion not applicable to products/completed operations); David J. Dybdahl, Am. Risk Mgmt. Res. Network, *A User’s Guide to Environmental Insurance*, at 50, available at <http://erraonline.org/usersguide.pdf> (discussing products and completed operations hazards and whether “absolute” pollution exclusions eliminate these hazards). When the “absolute” pollution exclusion was submitted for approval some state regulators required that the exclusion be accompanied with an advisory notice. *See* ISO, Commercial General Liability Program Instructions (1986) at 1 (“the use of policyholder notices . . . has been suggested, and in fact required in some states”). ISO drafted such a standard-form notice which informed policyholders that:

Pollution Liability—The new policies do not cover this liability if the pollutants escape from your

Brownfields participants should be aware of recent developments concerning application of “absolute” pollution exclusions, particularly in situations in which the environmental damage was not the result of “intentional active” pollution.⁷⁹

Most “absolute” pollution exclusions have been mislabeled. In *Village of Cedarhurst v. Hanover Insurance Co.*,⁸⁰ the New York Court of Appeals, in a 4-3 decision, held that an “absolute” pollution exclusion barred coverage only when a complaint alleges a “pollution-related injury.” In that case, residents sued their village when their basements were flooded by raw sewage. New York’s highest court held that the insurance company must defend the village at trial because the suits alleged an injury from a “flood-like” event, and not from the “polluting” nature of the sewage. The impact of the decision is limited, however, because the Court of Appeals did not decide the indemnification issue on the basis that the trial might reveal evidence of “pollution-related” injuries.⁸¹

Brownfields participants involved in transactions in Louisiana and elsewhere should be aware that Louisiana’s insurance commissioner told insurance companies to reduce their use of the standard pollution exclusions or to develop their own exclusions to address the pollution risks that are actually posed by the particular policyholder.⁸²

premises or a waste disposal or treatment facility. . . . Certain pollution exposures away from your premises—including many that arise out of your products or work—are covered regardless of whether the emission was “sudden” or not. See exclusion f. under Coverage A for details.

Id. at 3 (emphasis added). In hearings held on the approval of the “absolute” pollution exclusion, Robert J. Sullivan, Vice President for Government Affairs, Crum & Forster Insurance Companies, similarly told New Jersey regulators that “these are not total, absolute pollution exclusions, it does have significant coverage for completed operations and product liability in [and] certain off-site discharges.” See Department of Insurance, Commissioner’s Staff, Testimony of Robert J. Sullivan, Vice President for Government Affairs, Crum & Forster Insurance Companies, Transcript of Proceedings before the New Jersey Department of Insurance (Dec. 18, 1985), at 31 (emphasis added).

⁷⁹ See Lenckus, *Regulator Attempts to Curb Pollution Exclusion Abuses*, Bus. Ins., June 9, 1997, at 2; *Louisiana Curtailing Pollution Exclusion*, Ins. Regulator, June 9, 1997, at 12.

⁸⁰ 89 N.Y.2d 293, 653 N.Y.S.2d 68, 675 N.E.2d 822 (1996).

⁸¹ See *Steuben Contracting, Inc. v. Employers Ins. of Wausau*, 975 F. Supp. 479 (W.D.N.Y. 1997).

⁸² The Louisiana Insurance Commissioner, James H. “Jim” Brown, undertook a three-year investigation into the use of “absolute” pollution exclusions by insurance companies. In an advisory letter (State of Louisiana Advisory Letter No. 97-01 (June 4, 1997)), the Commissioner warned insurance companies that a denial of insurance coverage under “absolute” pollution exclusions or similar such pollution exclusions in four instances could result in administrative action:

- (1) If the claim does not “involve an incident which caused an environmentally significant discharge of pollutants resulting in environmental damage”;
- (2) If “the policyholder’s regular business activities [did not] place it in the category of an ‘intentional active industrial polluter’ ”;
- (3) If the “claim involve[s] an injury alleged to be caused by a product, including exposure to fumes, which was being used in accordance with its intended purpose”; and
- (4) If the “claim involve[s] an injury alleged to have been caused by exposure to asbestos or lead.”

(State of Louisiana Advisory Letter No. 97-01 (June 4, 1997), at 4.) Commissioner Brown stated that his office was concerned about the broad definition given to the term “pollutant,” and noted that this was of

Policyholders were encouraged by the Department of Insurance to seek the Department's help if their claims were not handled in compliance with the advisory.⁸³ Insurance companies that interpret "absolute" pollution exclusions broadly, extending them to non-industrial polluters in Louisiana, may face administrative or court action.⁸⁴ In its ruling for the policyholder, the Louisiana Supreme Court overruled its prior opinion in *Ducote v. Koch Pipeline Co.*⁸⁵ and found that a "total" pollution exclusion will exclude coverage for environmental pollution only.⁸⁶ Although the Court wrote that "it is the job of the courts to resolve disputes over insurance coverage[.]" it also noted that the commissioner's opinion in such matters is persuasive.⁸⁷

[f] Growing Abuse of the Absolute Pollution Exclusion

[i] Courts Differ on the Scope of the Absolute Pollution Exclusion

Courts have struggled with the scope of the so-called absolute or total pollution exclusion: Some courts limit application to traditional industrial pollution consistent with the exclusion's terms and the language of CERCLA/Superfund upon which the exclusion is based, while others apply it much more broadly, to apply to substances that may be considered hazardous or toxic under various circumstances. In addition to the implications for potential Brownfield funding, the misuse of the exclusion to deny claims involving substances used for their intended purpose during routine business operations provides an unintended windfall to the insurance industry while leaving policyholders exposed to business risks for which, generally speaking, they reasonably expected to be covered. In other words, courts that favor expansion of the application of the exclusion have held that its plain language applies not only to toxic waste materials in the environment, but also to alleged "pollutants" including herbicides, fertilizers, and other substances used in or released during a policyholder's business activities. Policyholders may reasonably believe that they do not need to purchase pollution coverage because their business activities do not involve hazardous waste. However, any company that uses a substance that may be considered toxic under any circumstances now needs to at least consider the issue. The implications are profound

particular concern to "commercial enterprises whose ongoing business activities do not present a risk to the environment." (*Id.* at 2.)

⁸³ Lenckus, *Regulator Attempts to Curb Pollution Exclusion Abuses*, Bus. Ins., June 9, 1997, at 2 (quoting C. Noel Wertz, a senior attorney at the Louisiana Insurance Department). See Lonkevich, *RM's Find Scant Pollution Cover Under CGL*, Nat'l Underwriter, Apr. 27, 1998, at 10; Russell, *State to Clamp Down on Use of Pollution Exclusion*, New Orleans CityBusiness, July 7, 1997, at 17; Zinkewicz, *Pollution/Exclusions/Delusions*, Ins. Advoc., June 14, 1997, at 38.

⁸⁴ *Louisiana Insurance Commissioner Restricts Use of Standard Pollution Exclusions*, Louisiana Envtl. Compliance Update, July 1997.

⁸⁵ *Ducote v. Koch Pipeline Co., L.P.*, 730 So. 2d 432 (La. 1999) (an "absolute" pollution exclusion barred coverage for bodily injuries from ammonia pipeline leak).

⁸⁶ *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 135 (La. 2000).

⁸⁷ *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 134 (La. 2000).

when one also considers that even substances such as water and carbon dioxide may be hazardous in large quantities.

[ii] Recent Cases Finding the Pollution Exclusion Applies to Bar Coverage

In *Scottsdale Indemnity Co. v. Village of Crestwood*,^{87.1} the eminent federal Judge Richard Posner addressed a typical pollution exclusion. The underlying plaintiffs filed suit against the village of Crestwood, Illinois, alleging that Crestwood had provided them with drinking water containing perchloroethylene or PCE, a solvent used by a nearby dry cleaning business.^{87.2} Scottsdale Indemnity Co., the insurance company, brought suit seeking a declaration that the pollution exclusion in the relevant policy barred coverage. After acknowledging that Illinois is among the states who do not apply the pollution exclusion literally, Judge Posner nonetheless held that the PCE represented “traditional environmental pollution” subject to the pollution exclusion.^{87.3} Judge Posner went on to reject Crestwood’s argument that it could not be liable since it was not the original producer of the PCE.^{87.4}

The underlying plaintiff in *Union Insurance Co. v. Mendoza*^{87.5} sued the policyholder, Irsik Farms. She alleged that, while working on a road construction project near Irsik’s property, an Irsik employee released anhydrous ammonia fertilizer vapors and medical attention was required. The underlying case was resolved with the entry of a \$1 million consent judgment. The insurance company that sold Irsik’s Farm owners-Ranch owners insurance policy then sought a declaratory judgment that the pollution exclusion barred coverage for the consent judgment. The federal district court, the Kansas Supreme Court, and the U.S. Court of Appeals for the Tenth Circuit all agreed that the pollution exclusion applied. They found that anhydrous ammonia, despite its intended use as a fertilizer in farming operations, was a “pollutant.”

The Tenth Circuit also applied the exclusion in *New Salida Ditch Co. v. United Fire & Casualty Insurance Co.*^{87.6} In that case, the alleged “pollutants” consisted of soil, rock, dirt and fill materials. In 2005, the policyholder had repaired an irrigation ditch along the Arkansas River, apparently causing dirt, rock, soil and fill material to enter the river. Federal and state agencies ordered corrective action and assessed civil penalties on the basis that the soil, fill and other materials were “pollutants” under the federal Clean Water Act and Colorado’s equivalent. New Salida’s claim for defense and indemnity costs was denied and the district court held that the definition of the term “pollutant,” for purposes of the total pollution exclusion, unambiguously included the soil and fill materials, even though “fill material” was not specifically listed in the policy. The court also held that because the policy language was clear, the

^{87.1} 673 F.3d 715 (7th Cir. 2012).

^{87.2} 673 F.3d at 716.

^{87.3} 673 F.3d at 717.

^{87.4} 673 F.3d at 720–21.

^{87.5} 2010 U.S. App. LEXIS 25461 (10th Cir. Kan. Dec. 13, 2010).

^{87.6} 2010 U.S. App. LEXIS 22345 (10th Cir. Oct. 28, 2010).

reasonable expectations of the policyholder were irrelevant.

The underlying claim in *Devcon International Corp. v. Reliance Insurance Co.*^{87.7} was a nuisance suit brought by residents of a neighborhood around an airport, alleging that large quantities of construction dust drifted over the plaintiffs' property causing breathing problems and contamination of drinking water. The U.S. Virgin Islands Department of Planning and Natural Resources ordered the airport operator to undertake dust control and provide alternative drinking water to residents. The Third Circuit held the pollution exclusion applied to releases of airborne solids or fumes such as dust clouds.

In the underlying suit in *Scottsdale Insurance Co. v. Universal Crop Protection Alliance LLC*,^{87.8} Arkansas cotton farmers alleged that an herbicide damaged cotton fields when applied off-target or when it "relofted" after it was applied nearby. The CGL insurance company sought a declaration that it had no duty to defend or indemnify. The district court granted summary judgment for the insurance company, and the Eighth Circuit affirmed on the basis that the pollution exclusion was sufficiently broad.

Nationwide Mutual Insurance Co. v. Lang Management Inc.^{87.9} also involved an herbicide. The underlying plaintiff owned the golf course and alleged that a maintenance subcontractor contaminated the golf course's lakes with an herbicide, Diuron, which is toxic to humans, animals and plants. When lake water was used to irrigate the course, herbicide was spread all around and litigation ensued. The CGL and commercial umbrella insurance companies brought a declaratory judgment action and the court held that the herbicide, used for its intended purpose, was a "pollutant" and that the pollution exclusion applied to bar coverage for costs to monitor, respond to or assess its effects on the golf course.

In *Prime Tanning Co. v. Liberty Mutual Insurance Co.*,^{87.10} a leather tannery produced a sludge byproduct, which was spread on farms in Missouri as a fertilizer with the approval of environmental agencies for more than a quarter century. Several farmers then sued alleging that the sludge contained hexavalent chromium that had damaged their property. The court held that under both Maine and Missouri law, the pollution exclusion barred coverage for the farmers' suit.

In *Avalon Wellness LLC, the plaintiff in the underlying suit in Clipper Mill Federal LLC v. Cincinnati Insurance Co.*^{87.11} was a former tenant that alleged it had to abandon property it had rented for its psychotherapy, counseling and massage business, because (1) temperatures in the rooms were not effectively controlled by the HVAC system; (2) sound traveled between rooms in a way that threatened the confidentiality of therapy

^{87.7} 2010 U.S. App. LEXIS 11619 (3d Cir. June 8, 2010).

^{87.8} 620 F.3d 926 (8th Cir. 2010).

^{87.9} 2010 U.S. Dist. LEXIS 107264 (S.D. Fla. Oct. 6, 2010).

^{87.10} 750 F. Supp. 2d 198 (D. Me. 2010).

^{87.11} 2010 U.S. Dist. LEXIS 112172 (D. Md. Oct. 20, 2010).

sessions; and (3) toxic airborne pollutants made one of Avalon's principals sick. Clipper Mill in turn sought a declaratory judgment that its CGL insurance company had a duty to defend and indemnify based, in part, on the prior case, *Clendenin Bros. Inc. v. United States Fire Insurance Co.*^{87.12} In *Clendenin Bros.*, a Maryland state court had held that historically, the insurance industry intended the pollution exclusion to apply only to environmental pollution and environmental exposures. The court in the coverage litigation then sent mixed signals by noting the fact that the insurance policy at issue specified that "[p]ollutants" include but are not limited to substances which are generally recognized in industry or government to be harmful or toxic to persons, property or the environment," but denying summary judgment.

In *Emerson Enters. LLC v. Hartford Accident & Indemn. Co.*,^{87.12.1} the Second Circuit held that three insurers had no duty to defend and indemnify a property owner in environmental proceedings brought by the State of New York because the pollutants at issue were intentionally dumped into a dry well and thus were not accidental as that term is used in pollution exclusion provisions.

In *Doe Run Resources Corp. v. Lexington Insurance Co.*,^{87.12.2} the Eighth Circuit held that absolute pollution exclusions preclude insurance coverage for claims for bodily injury and property damage explicitly premised on an alleged release of hazardous waste or toxic substances under Missouri law. However, in a related case, *Doe Run Resources Corp. v. Lexington Insurance Co.*,^{87.12.3} the Eighth Circuit held that this pollution exclusion did not apply to claims based on distribution of these substances as a product and the insurer's duty to defend may be potentially triggered.

[iii] Recent Cases Finding the Exclusion Inapplicable

Policyholders did have some victories in addressing insurance industry attempts to expand the boundaries of the exclusion based upon revisionist history.

In *State Auto. Mut. Ins. Co. v. Flexdar, Inc.*,^{87.13} the Indiana Supreme Court determined that a typical pollution exclusion, of the type the court had considered three times previously, was ambiguous and should be construed in the policyholder's favor. In the underlying case, Flexdar discovered that its rubber manufacturing operations had been emitting trichloroethylene or TCE into the nearby soil and groundwater. The Indiana Department of Environmental Management instituted a cleanup action and informed Flexdar that it would be liable for costs.^{87.14} State Auto, the insurance company, agreed to defend Flexdar but reserved its rights to deny coverage, and subsequently filed suit seeking a declaration of non-coverage. Analogizing with recent precedents, the Indiana Supreme Court found that pollution exclusions as typically

^{87.12} 889 A.2d 387 (Md. 2006).

^{87.12.1} 2013 U.S. App. LEXIS 18436 (2d Cir. Sept. 5, 2013).

^{87.12.2} 719 F.3d 868 (8th Cir. 2013).

^{87.12.3} 719 F.3d 876 (8th Cir. 2013).

^{87.13} 964 N.E.2d 845, 848 (Ind. 2012).

^{87.14} 964 N.E.2d at 847.

written were essentially always going to be deemed ambiguous.^{87.15} Citing its past requirement that pollution exclusion language be “explicit,” the court found in the policyholder’s favor, despite the insurance company’s argument that TCE emitted during manufacturing was intended to fall within the pollution exclusion.^{87.16}

In *Builders Mutual Insurance Co. v. Half Court Press, LLC*,^{87.17} the pollution exclusion was held not to bar coverage for claims that water, soil and sediment damaged adjacent property. The underlying plaintiff alleged that inappropriate erosion and sediment control measures allowed soil, water, debris and sediment to flow downhill thereby damaging a lake. The contractor’s CGL insurance policy contained a pollution exclusion barring coverage for claims “which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, disposal, seepage, migration, release or escape of ‘pollutants’ at any time.” The court held that despite the fact that under some circumstances, sediment could be a pollutant, the water damage at issue did not involve a pollutant and a possibility of coverage existed and, therefore, a duty to defend.

In *Hirschhorn v. Auto-Owners Insurance Co.*,^{87.18} a vacation home had to be demolished because of insuperable bat-guano odors. The homeowners’ insurance company denied coverage, asserting that the guano accumulation was not sufficiently

(Text continued on page 28-54.3)

^{87.15} 964 N.E.2d at 848–51.

^{87.16} 964 N.E.2d at 852.

^{87.17} 2010 U.S. Dist. LEXIS 78727 (W.D. Va. Aug. 3, 2010).

^{87.18} 792 N.W.2d 639 (Wis. Ct. App. 2010).

abrupt and resulted from poor home maintenance. The appeals court reversed, holding that bat guano was not clearly and unambiguously a “pollutant.”

The policyholder in *Barrett v. National Union Fire Insurance Co. of Pittsburgh*^{87.19} was Atlanta Gas Light Company (AGL). AGL retained contractors to install natural gas pipelines. The underlying plaintiff, a contractor employee, suffered permanent and disabling brain damage from natural gas accumulated under his rain poncho over a period of several hours allegedly because of the negligent and reckless conduct of AGL’s employees. A \$2 million underlying settlement was entered and the primary paid \$1 million, but AGL’s excess insurance company, National Union, denied coverage, and AGL assigned the pursuit of its coverage rights to the plaintiff’s estate. National Union asserted that natural gas was a “pollutant,” relying upon the Georgia Supreme Court’s decision in *Reed v. Auto Owners Insurance Co.*^{87.20} The *Reed* court had held that carbon monoxide was not covered by a landlord’s insurance policy because the gas was an excluded fume, irritant or contaminant. The appeals court, however, held that the pollution exclusion did not apply to bar coverage because the dead plaintiff was not alleged to have been “poisoned” by the natural gas, nor was he harmed by the mere release of gas from the tap. Rather, the complaint alleged the negligence in supervising the worksite and it was the resulting lack of oxygen that harmed the dead plaintiff.

The underlying plaintiffs in *Minkoff v. Action Remediation*^{87.21} sued the insured mold remediation contractor, alleging that its negligent mixing of a disinfecting and sterilizing product, Sporidicin, and bleach, caused harmful chemicals and odors to infiltrate the home. The defendant contractor sought a declaratory judgment on the duty to defend and indemnify. Although the policy’s pollution exclusion barred coverage, the contractor’s pollution liability endorsement reinstated it and saved the policy from being void for public policy reasons. The policy included a special “contractor’s pollution liability coverage endorsement” covering “pollution incidents” caused by the performance of “covered contracting operations.” The policyholder’s primary business was mold remediation, and a reasonable policyholder would expect that the chemical releases and toxic odors created in the course of its business would be covered.

These cases demonstrate that insurance companies continue to try to expand the reach of the absolute pollution exclusion clause beyond hazardous waste and into the operation of the policyholder’s businesses. Few substances, under some circumstances, are not considered toxic or hazardous, but the insurance industry has taken to citing the exclusion practically whenever any sort of allegedly hazardous material is involved.

Policyholders are now at risk of not having coverage for spills and releases of products in the ordinary course of doing business and are faced with litigating claim

^{87.19} 696 S.E.2d 326 (Ga. Ct. App. 2010).

^{87.20} 667 S.E.2d 90 (Ga. 2008).

^{87.21} Index No. 559/06 (N.Y. Sup. Ct. July 1, 2010).

denials or either negotiating up front for clear language on the issue or purchasing specialty pollution liability insurance. As these cases show, however, policyholders and brownfields participants seeking coverage should not simply accept a coverage denial as the last word.

[g] The Breadth of Pollution Exclusion Is Neither “Absolute” Nor “Total”

In examining an underlying injury or damage to be insured against, courts generally consider whether the facts giving rise to potential liability involved the type of event contemplated by the “pollution” exclusion at issue by looking at (1) the historical purpose of pollution exclusion clauses, (2) the definition of “pollutants” as provided in the insurance policy, (3) other policy language addressing the movement of the alleged pollutant, and (4) whether the clause was ambiguous in its application to the event for which the policyholder seeks coverage. Following this basic analysis, courts have held pollution exclusion clauses inapplicable for personal injury claims such as lead paint poisoning, carbon monoxide poisoning, and sewage floods.

Exclusionary language is often broad and vague. Accordingly, while an alleged injury may involve an exclusion’s description of “pollutants,” this alone should not preclude coverage, as a court may still find ambiguity in whether the alleged injury was caused by an “emission, discharge, dispersal, seepage, release or escape” of that pollutant based on the understood meaning of those terms in environmental law and as applied to the facts.^{87.22} For example, New York federal courts have followed the lead of New York state courts (New York is not generally considered a policyholder friendly jurisdiction) in considering the general purpose of a standard pollution clause, which is “to exclude coverage for environmental pollution.”^{87.23}

These cases have also concentrated their analysis on the use of terms of art of environmental law—such as “discharge” and “release”—as evidence of the limited applicability of exclusion clauses to environmental pollution. In *Sphere Drake Ins. Co., P.L.C. v. Y.L. Realty Co.*,^{87.24} for example, the district court said that such terms are used generally to describe “improper disposal or containment of hazardous waste”

^{87.22} Amanda Cohen Leiter, *Environmental Insurance: Does It Defy the Rules?*, 25 Harv. Envtl. L. Rev. 259, 296 (2001) (discussing how the terms used in the exclusion clause are terms of art in environmental law that impact judicial analysis).

^{87.23} See *Stoney Run Co. v. Prudential-LMI Commercial Ins. Co.*, 47 F.3d 34, 37, 38 (2d Cir. 1995) (holding that carbon monoxide released into an apartment is not the type of pollution meant to fall within the pollution exclusion clause, and the clause could not be reasonably interpreted to apply to “all contact with substances that can be classified as pollutants”); *Janart 55 West 8th L.L.C. v. Greenwich Ins. Co.*, 614 F. Supp. 2d 473, 478–79 (S.D.N.Y. 2009) (emphasizing that pollution must be “environmental” in nature); *Garfield Slope Housing Corp. v. Public Service Mut. Ins. Co.*, 973 F. Supp. 326, 336–37 (E.D.N.Y. 1997) (citing *Stoney Run*, 47 F.3d 34 (2d Cir. 1995)); *Sphere Drake Ins. Co., P.L.C. v. Y.L. Realty Co.*, 990 F. Supp. 240, 243 (S.D.N.Y. 1997) (the district court agreed with other courts in holding that the clauses “refer only to industrial and environmental pollution” and that to extend the clause to encompass lead paint poisoning was too broad an interpretation).

^{87.24} 990 F. Supp. 240, 243 (S.D.N.Y. 1997).

and not the type of movement characteristic of lead paint poisoning. The court then said that extending the meaning to cover lead paint poisoning resulting from ingestion or inhalation of paint would be too broad an interpretation of the clause and make it “inconsistent with accepted usage and the expectations of the contracting parties.”^{87.25}

This analysis was further supported by the almost universal rule that coverage exclusions are construed narrowly with any ambiguity resolved against the insurance company. Many courts have not precluded coverage under a pollution exclusion where it is ambiguous as to whether the clause applies to the event for which a policyholder seeks coverage.^{87.26} The New York Court of Appeals has also issued several opinions favorable to policyholders in disputes for coverage under pollution exclusions. In so doing, it has focused first on several basic principles: that a policy should be read in light of common speech and expectations of a businessperson and that the burden is on the insurance company to prove that the exclusion is framed in clear language that has no other reasonable interpretation.^{87.27}

In *Continental Casualty Co. v. Rapid-American Corp.*,^{87.28} examined whether a pollution exclusion precluded coverage for personal injury claims resulting from inhalation of asbestos. The court found for the policyholder on the grounds that the exclusion was ambiguous. First, the court determined that while asbestos could be considered an irritant, contaminant or pollutant covered by the exclusion, there was ambiguity about whether the asbestos fibers inhaled by the claimants were “discharged into the ‘atmosphere’ ” within the meaning of the clause.^{87.29} Second, the court found that the purpose of the clause was to exclude coverage for environmental pollution,

^{87.25} 990 F. Supp. at 243.

^{87.26} See *Sphere Drake Ins. Co., P.L.C. v. Y.L. Realty Co.*, 990 F. Supp. 240, 244 (S.D.N.Y. 1997) (finding the policy’s separate asbestos exclusion clause suggestive of lead paint being beyond the scope of the clause); *Stoney Run Co. v. Prudential-LMI Commercial Ins. Co.*, 47 F.3d 34, 39 (2d Cir. 1995) (stating that “[a] reasonable policyholder might not characterize the escape of carbon monoxide from a faulty residential heating and ventilation system as environmental pollution”); *Herald Square Loft Corp. v. Merrimack Mutual Fire Ins. Co.*, 344 F. Supp. 2d 915, 920 (S.D.N.Y. 2004) (“The question is not whether lead dust is a ‘pollutant’ for purposes of a pollution exclusion clause; it is whether a ‘reasonable policyholder’ would consider lead dust removed from exterior windows and fire escapes during routine repairs to be environmental pollution.”).

^{87.27} See, e.g., *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 383, 763 N.Y.S.2d 790, 795 N.E.2d 15 (2003); *Great American Restoration Services, Inc. v. Scottsdale Ins. Co.*, 78 A.D.3d 773, 911 N.Y.S.2d 142 (2d Dept. 2010); *Tower Ins. Co. of New York v. Breyter*, 37 A.D.3d 309, 830 N.Y.S.2d 122 (1st Dept. 2007).

^{87.28} 80 N.Y.2d 640, 593 N.Y.S.2d 966, 609 N.E.2d 506 (1993).

^{87.29} 80 N.Y.2d at 653. The exclusion clause at issue contained language specifying the three places for discharge as “into or upon land, the atmosphere, or any water course or body of water.” 80 N.Y.2d at 654. The court held that read together, this supported a conclusion that the clause was meant to apply to “broadly dispersed environmental pollution” and “not the possibly confined environs of the present complaints.” *Id.* The court also considered the fact that the insurance company had not proven that the personal injuries occurred solely from asbestos-contaminated air, as it was possible that the fibers could have been transmitted by contact with hands or clothing. *Id.*

evidenced by the policy's use of terms of art of environmental law such as "discharge" and "dispersal."^{87.30}

As discussed above, subsequent decisions by the New York Court of Appeals, such as *Incorporated Village of Cedarhurst v. Hanover Ins. Co.*,^{87.31} have sometimes focused on the nature of the injury alleged in the complaint and not solely on the nature of the substance at issue.^{87.32} In its holding, the court focused on the nature of the complaints, saying that "pollution exclusions do not apply when the complaint does not allege that the discharge complained of actually results in pollution" and that the complaints alleged only injury from a flood-like event, and not from the "'polluting,' irritating or contaminating nature of the sewage."^{87.33}

Even where a specific substance has been defined as a pollutant, this does not mean that the pollution exclusion will necessarily apply. In *Belt Painting Corp. v. TIG Ins. Co.*,^{87.34} the insurance company relied on the inclusion of the word "fumes" as a defined pollutant to preclude coverage for injuries caused by inhalation of paint and solvent fumes. The court disagreed with this argument, saying that even if the word "fumes" fell within the definition, the exclusion would only apply if the injury was "caused by 'discharge, dispersal, seepage, migration, release or escape' of the fumes."^{87.35} The court held that this language did not unambiguously apply to the injuries caused to a bystander when the paint, used for its intended purpose, generated fumes that drifted from the area where the policyholder was working allegedly causing harm.^{87.36}

[h] Owned-Property Exclusions May Bar Coverage for Damage Exclusively to One's Own Property

One insurance policy exclusion that is often used to deny liability insurance coverage in cases involving environmental problems is the so-called owned-property exclusion. This exclusion typically states that insurance coverage is not available for

^{87.30} 80 N.Y.2d at 654.

^{87.31} 89 N.Y.2d 293, 653 N.Y.S.2d 68, 675 N.E.2d 822 (1996).

^{87.32} 89 N.Y.2d at 297 (holding that the pollution exclusion clause did not preclude the insurance company's duty to defend where allegations of negligence were brought against the village after its sewage system flooded several residents' homes).

^{87.33} 89 N.Y.2d at 298-99 (citing *Technicon Electronics Corp. v. American Home Assurance Co.*, 74 N.Y.2d 66, 74, 542 N.E.2d 1048 (1989)); see also *Barrett v. National Union Fire Ins. Co.*, 696 S.E.2d 326 (Ga. Ct. App. 2010) (complaint alleged negligence, not pollution, and the mere fact that a harmful substance was involved was insufficient to trigger application of the exclusion).

^{87.34} 100 N.Y.2d 377, 384, 763 N.Y.S.2d 790, 795 N.E.2d 15 (2003).

^{87.35} 100 N.Y.2d at 387. The court was reluctant to accept this, saying that this would overly broaden the scope of pollutants away from both "'common speech' understanding" and the "reasonable expectations of a businessperson."

^{87.36} 100 N.Y.2d at 388. See also *Roofers' Joint Training, Apprentice & Educ. Comm. v. Gen. Accident Ins. Co. of Am.*, 275 A.D.2d 90, 92, 713 N.Y.S.2d 615 (N.Y. App. Div. 2000) (pollution exclusion did not apply to injuries sustained "from the use of a product for its intended use" where the injury-causing fumes were released from a hot air gun during a demonstration).

property damage to “property owned or occupied by or rented to the insured, or property used by the insured, or property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control.”⁸⁸ The exclusion does not bar coverage when there has been damage to the property of others.⁸⁹

Brownfields participants will most likely face the owned-property exclusion in one of two situations: either when there is actual property damage to their own property (e.g., surface soil) as well as to a third party’s property (e.g., groundwater which in most states is owned by the people), or when there is actual property damage to their own property and the threat of damage to a third party’s property.⁹⁰ In these situations,

⁸⁸ This example is the standard Insurance Services Office 1973 CGL exclusion (k) (quoted in Eisenstein & Reilly, *The Death of the “Owned Property” Exclusion?*, *Envtl. Claims J.*, Winter 1995/96, at 153, 159).

⁸⁹ See *Patz v. St. Paul Fire & Marine Ins. Co.*, 15 F.3d 699 (7th Cir. 1994) (rejecting argument that owned property exclusion barred coverage for environmental remediation when policyholders sought recovery of money spent to comply with a government order that they abate a nuisance); *Intel Corp. v. Hartford Acc. & Indem. Co.*, 952 F.2d 1551 (9th Cir. 1991) (owned property exclusion did not bar insurance coverage for costs of preventing future harm to groundwater or to adjacent property); *Hakim v. Mass. Insurers’ Insolvency Fund*, 424 Mass. 275, 675 N.E.2d 1161 (1997) (owned property exclusion did not bar coverage for remediation when there was contamination of adjacent property).

See also Berz, Spracker & Stochak, *Environmental Law in Real Estate and Business Transactions* Ch. 4A (LexisNexis Matthew Bender); O’Donnell, *Environmental Insurance Coverage: Limiting the Owned Property Exclusion*, *Boston Bar J.*, Jan. 1998, at 12; Eisenstein & Reilly, *The Death of the “Owned Property” Exclusion*, *Envtl. Claims J.*, Winter 1995/96, at 153; Anderson *et al.*, 2 *Insurance Coverage Litigation* § 15.11 (Aspen 2d ed. 2001).

But cf. *Boardman Petroleum, Inc. v. Federated Mut. Ins. Co.*, 269 Ga. 326, 498 S.E.2d 492 (1998) (owned property exclusion barred coverage for state-ordered onsite cleanup that neither involved third-party property nor an immediate or imminent threat of offsite contamination).

⁹⁰ Some insurance companies have recognized that standard-form general liability insurance policies cover the costs incurred to mitigate losses that have already taken place and the costs incurred to prevent further damage that would result if no remedial actions were taken. For example, *National Union Fire Insurance Company of Pittsburgh, Pa.* (“National Union”), an AIG company, and *Century Indemnity Company* (“Century”), a Cigna company and INA run-off vehicle, represented to the court in *Federal Ins. Co. v. Emery Mining Corp.*, No. 86C-0676-G (D. Utah Aug. 31, 1989), that “most, if not all, jurisdictions strongly favors [sic] a finding of insurance coverage of mitigation expenses incurred to prevent potential or increased property damage.” *Emery Mining Corp.’s, Defendants-In-Intervention’s Brief In Support of Motion for Summary Judgment or, In the Alternative, Partial Summary Judgment* [Fed. R. Civ. P. 56] at 12–13 (filed Apr. 29, 1988), *Federal Ins. Co. v. Emery Mining Corp.*, No. 86C-0696-G (D. Utah Aug. 31, 1989), reprinted in Mealey’s *Litig. Rep. Ins.*, Sept. 26, 1989, at F-1 (citing *Goodyear Rubber & Supply Co. v. Great Am. Ins. Co.*, 545 F.2d 95 (9th Cir. 1976); *Slay Warehousing Co. v. Reliance Ins. Co.*, 471 F.2d 1364 (8th Cir. 1973); *Broadwell Realty v. Fid. & Cas. Co. of N.Y.*, 218 N.J. Super. 516, 528 A.2d 76 (App. Div. 1987), overruled on other grounds by *Morton Int’l v. General Acc. Ins. Co.*, 134 N.J. 1, 629 A.2d 831 (1993); *U.S. Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838 (1983); *Southern Cal. Edison Co. v. Harbor Ins. Co.*, 83 Cal. App. 3d 747, 148 Cal. Rptr. 106 (1978); *Globe Indem. Co. v. State of California*, 43 Cal. App. 3d 745, 118 Cal. Rptr. 75 (1974); *Albers v. Los Angeles County*, 62 Cal. 2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965); *Leebov v. USF&G Co.*, 401 Pa. 477, 165 A.2d 82 (1960). The *Emery Mining* court agreed, holding that there was coverage for the costs incurred by the policyholder “to mitigate . . . damages.” *Federal Ins. Co. v. Emery Mining Corp.*, No.

the issue often becomes a factual one, that is, to what extent has a third party's property been damaged or is likely to become damaged and what are the physical conditions involving soil and groundwater? For example, liquid petroleum in sandy soil over a shallow water table in a rainy area may pose a more imminent risk requiring mitigation than say a less mobile contaminant in clay rich soil in an arid region. Moreover, there are important public policy implications. Strict application of the "owned property" exclusion in certain jurisdictions may discourage immediate remediation of "owned property" which if left unaddressed will result in covered third-party property damage.

Facts regarding the actual history of property ownership and the existence of contamination which tends to migrate causing new and additional property damage during subsequent policy periods are crucial to a determination as to whether the "owned property" exclusion actually applies and, if so, to what liabilities. For example, in *Domtar, Inc. v. Niagara Fire Insurance Co.*,⁹¹ the policyholder, Domtar, Inc. (Domtar), brought an action against its primary and excess liability insurance companies, seeking insurance coverage for liabilities arising out of its pre-1948 operation of a tar refining plant. The plant was closed in 1948, dismantled in 1954 or 1955, and the property was sold in 1955. Pollution was detected at the site in 1979. The insurance policies provided coverage for the period from 1956 until 1970. In 1990, the state Pollution Control Agency sent a notice to Domtar identifying it as a potentially responsible party (PRP) because hazardous substances allegedly had been released into the soil and groundwater. The Minnesota Supreme Court held that insurance coverage was not barred by the "owned property" exclusion because Domtar did not own the property at the time the insurance policies were in effect.⁹²

Practice Note

In some jurisdictions, courts will not apply the owned property exclusion if there is an imminent threat of offsite contamination. These jurisdictions have concluded that public policy requires that an insured not lose coverage by taking prompt

(Text continued on page 28-54.5)

86-06966, slip op. at 18 (D. Utah Aug. 31, 1989) (citation omitted).

⁹¹ 563 N.W.2d 724 (Minn. 1997).

⁹² 563 N.W.2d at 734 ("[t]he policies in this case exclude damage to or destruction of property owned by the insured; the language of these exclusions is not so easily extended to include sold-and-then-damaged property"); see also *State of California v. Superior Court*, 78 Cal. App. 4th 1019, 1033-34, 93 Cal. Rptr. 2d 276 (2000) (distinguishing forms of "ownership" and holding exclusion inapplicable to groundwater pollution arising from state's operation of a toxic waste facility, even though the state is the owner of groundwater in a regulatory sense).

steps to prevent the contamination. Similarly, if offsite contamination has occurred, remediation onsite may be required to eliminate a continuing source of pollution and, in the view of some courts, should be covered by the insurance policy. Consequently, for insurance purposes, proof of actual or imminent third-party damage is important. However, the benefit of increasing the likelihood of obtaining insurance coverage must be balanced against the risk that documenting contamination will increase cleanup obligations and encourage third-party claims.

—Kenneth J. Warren and Steven T. Miano

[5] There May Be Insurance Coverage for Environmental Claims Under the Personal Injury Provisions of General Liability Insurance Policies

[a] Coverage May Exist Under Endorsements or the Personal Injury Provisions of CGL Policies

Practice Note

Brownfields participants should not overlook the possibility that there may be insurance coverage available under the personal injury provisions of their general liability insurance policies. This insurance coverage may be found either under a broad form endorsement attached to the comprehensive general liability insurance policy, or in the standard-form general liability insurance policy itself. The insurance industry has responded by modifying more recent policy language, but ambiguity may still exist.^{92.1}

Environmental property damage may invade the rights of individuals thereby triggering personal injury coverage under certain liability insurance policies. Such coverage generally is not barred by any “polluters” exclusion. Depending on the nature of the claim, policyholders have had notable success in securing insurance coverage for environmental claims under the personal injury provisions of their liability insurance policies. In the past, insurance coverage for personal injury was provided under the broad form personal injury endorsement to comprehensive general liability (CGL) policies.⁹³ The standard-form general liability insurance policy of more recent

^{92.1} See, e.g., *Lakeland Village Homeowners Ass’n v. Great Am. Ins. Group*, 727 F. Supp. 2d 887, 893–94 (E.D. Cal. 2010) (finding modified personal injury language ambiguous).

⁹³ See Kalis *et al.*, *Policyholder’s Guide to the Law of Insurance Coverage* § 8.01 (Aspen 1997) (personal injury coverage was initially a supplement to the standard CGL policy with ISO publishing a Broad Form Comprehensive General Liability Endorsement in 1976).

See generally Yuen, *Personal Injury Provisions in Liability Insurance Policies*, 5 *Envtl. Claims J.* 255 (Winter 1992/93) (explaining that drafting history of personal injury provisions of CGL policies indicates that they were designed and included to provide coverage for environmental liabilities); 2 Anderson *et al.*,

years includes personal injury coverage in the policy. Both the older broad form endorsement and the newer personal injury provision provide coverage for damages arising from *personal injury*, which is defined in part as “wrongful entry or eviction or other invasion of the right of private occupancy” which is considered to include allegations of trespass and nuisance.⁹⁴ Significantly, in older policies neither the broad form personal injury endorsement nor the personal injury provisions contain a “polluters” exclusion.

[b] Coverage May Exist Under the Invasion of the Right to Private Occupancy Language

Some courts have held that environmental claims are covered under the “wrongful entry or other invasion of the right to private occupancy” language.⁹⁵ In *City of Edgerton v. General Casualty Co.*,⁹⁶ the policyholders, a municipality and the owner of a landfill, sought insurance coverage for environmental liabilities stemming from contamination of groundwater beneath a municipal landfill. The Wisconsin Court of Appeals held that insurance coverage for contamination of the groundwater was available under the personal injury provisions of one policyholder’s CGL policy, and another insurance policy’s broad-form liability coverage endorsement. The court held that contamination of an underground water supply was an invasion of a right of private occupancy. Similarly, the “wrongful entry” language of the personal injury provisions of the standard-form liability insurance policy have been found to cover liability for the release of chemicals into the soil and water supplies of neighboring

Insurance Coverage Litigation § 15.12 (Aspen 2d ed. 2001).

⁹⁴ This language was later altered, narrowing the insurance coverage provided, so that insurance coverage would be provided only for “wrongful entry into, or eviction of a person from a room, dwelling or premises that the person occupies.” See, e.g., *Blackhawk-Central City Sanitation Dist. v. Am. Guar. & Liab. Ins. Co.*, 856 F. Supp. 584, 590 (D. Colo. 1994), *rev’d on other grounds and remanded*, 214 F.3d 1183 (10th Cir. 2000).

⁹⁵ See, e.g., *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir. 1992) (finding insurance coverage for damages resulting from discharge of PCBs since “wrongful entry” was similar to trespass); *Great Northern Nekoosa v. Aetna Cas. & Sur. Co.*, 921 F. Supp. 401 (N.D. Miss. 1996) (insurance coverage for claims of trespass, nuisance and emotional distress arising out of release of dioxin into a river); *Martin Marietta Corp. v. Ins. Co. of N. Am.*, 40 Cal. App. 4th 1113, 47 Cal. Rptr. 2d 670 (1995).

But see *Vt. Mut. Ins. Co. v. Parsons Hill P’ship*, 2010 VT 44, ¶ 17, 1 A.3d 1016, 1022 (2010) (holding that PCE contamination in an apartment building’s water supply was not covered by the “wrongful entry into, or invasion of the right of private occupancy” clause in a breach of implied warranty of habitability case); *Dryden Oil Co. v. Travelers Indem. Co.*, 91 F.3d 278 (1st Cir. 1996); *Harrow Prods., Inc. v. Liberty Mut. Ins. Co.*, 64 F.3d 1015 (6th Cir. 1995) (applying Michigan law); *Gregory v. Tenn. Gas Pipeline*, 948 F.2d 203 (5th Cir. 1991); *County of Columbia v. Continental Ins. Co.*, 83 N.Y.2d 618, 612 N.Y.S.2d 345, 634 N.E.2d 946 (1994).

See generally Ostrager & Newman, *Handbook on Insurance Coverage Disputes* § 10.05 (Aspen 11th ed. 2002).

⁹⁶ 172 Wis. 2d 518, 548–50, 493 N.W.2d 768, 780–81 (Ct. App. 1992), *rev’d on other grounds*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994).

properties after a fire,⁹⁷ damage to neighboring property caused by a policyholder's leaking underground storage tanks,⁹⁸ and the duty to defend a policyholder sued for failure to inspect and disclose hazardous substance contamination at a commercial property site.⁹⁹

Allegations of nuisance issues may trigger personal injury coverage. In *Titan Holdings Syndicate, Inc. v. City of Keene*,¹⁰⁰ the policyholder-city was sued as a result of its operation of a sewage treatment plant allegedly exposing residents to "noxious, fetid and putrid odors, gases and particulates." The United States Court of Appeals for the First Circuit held in favor of personal injury coverage for the interference with a neighboring landowner's quiet enjoyment and use of his property.¹⁰¹

[c] Polluters' Exclusions Should Not Preclude Coverage for Personal Injury Claims

Even the presence of a pollution exclusion in a general liability insurance policy does not necessarily preclude insurance coverage for environmental claims under personal injury coverage provisions.¹⁰² For example, in *Great American Ins. Co. of N.Y. v. Helwig*,¹⁰³ the United States District Court in Illinois upheld the duty to defend private nuisance and trespass cases relating to alleged solvent contamination. The pollution exclusion in the policy, by its terms, applied only to claims for "property damage" and "bodily injury" and did not purport to exclude coverage for "personal

⁹⁷ *Scottish Guar. Ins. Co. v. Dwyer*, 19 F.3d 307 (7th Cir. 1994).

⁹⁸ *Millers Mut. Ins. Ass'n v. Graham Oil Co.*, 282 Ill. App. 3d 129, 668 N.E.2d 223 (1996).

But see *City of Delray Beach v. Agricultural Ins. Co.*, 85 F.3d 1527 (11th Cir. 1996) (applying Florida law) (no coverage under personal injury provisions for groundwater contamination since city's claim of pollution of water supplies was violation of public rights and the covered enumerated offenses involved violation of private rights).

⁹⁹ *Brucia v. Hartford Accident & Indem.*, 307 F. Supp. 2d 1079, 1083 (N.D. Cal. 2003).

¹⁰⁰ 898 F.2d 265 (1st Cir. 1990).

¹⁰¹ No insurance coverage under the personal injury provisions was available, however, for a county that operated a municipal landfill in Michigan because the claims did not involve "possessory interest in real property." *Kent County v. Home Ins. Co.*, 217 Mich. App. 250, 551 N.W.2d 424 (1996), *vacated in part on other grounds and remanded*, 456 Mich. 858, 568 N.W.2d 671 (1997). *See also* *Sherwin-Williams Co. v. Travelers Cas. & Surety Co.*, 2003 Ohio 6039, 2003 Ohio App. LEXIS 5357 (Ohio Ct. App. Nov. 13, 2003); *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) (applying North Carolina law) (trespass and nuisance claims arising from discharge of gasoline fumes were not enumerated torts within the personal injury coverage provisions and neither involved a possessory right in property); *TerraMatrix, Inc. v. U.S. Fire Ins. Co.*, 939 P.2d 483 (Colo. Ct. App. 1997) (no personal injury coverage for damages resulting from emission of ammonia gas by machine operated by policyholder because entry, eviction, and invasion must be committed by, or on behalf of the owner, landlord or lessor of building); *but see* *Lakeland Village Homeowners Ass'n v. Great Am. Ins. Group*, 727 F. Supp. 2d 887, 893-94 (E.D. Cal. 2020) (holding similar policy language ambiguous).

¹⁰² *See* Skoch, *Personal Injury Liability Coverage for Environmental Contamination Under the Comprehensive General Liability Policy: Is Migrating Pollution a "Wrongful Entry or Eviction or Other Invasion of the Right of Private Occupancy"?*, 9 Tul. Envtl. L.J. 37, 69-73 (1995).

¹⁰³ 419 F. Supp. 2d 1017 (N.D. Ill. 2006).

injury.”¹⁰⁴ In *City of Delray Beach v. Agricultural Ins. Co.*,¹⁰⁵ the United States Court of Appeals for the Eleventh Circuit affirmed that even though the policyholder had no personal injury coverage for a claim, “[b]y its terms, the pollution exclusion clause does not apply to coverage under the personal injury endorsement.”¹⁰⁶ In 1997, an Indiana trial court held that there was personal injury insurance coverage for trespass and nuisance liabilities based on environmental conditions, because “pollution exclusions do not apply to ‘personal injury’ coverage, absent an express provision to the contrary (which is not present in standard form policies like Travelers’ and Northbrook’s which expressly apply to only the separate “bodily injury” and “property damage” sections of the policies).”¹⁰⁷

[6] Umbrella and Excess Liability Insurance Policies May Provide Insurance Coverage for Environmental Liabilities

[a] Umbrella Insurance Provides the Broadest Liability Coverage Available

One type of liability insurance that brownfields participants may encounter is what is known as “umbrella liability insurance.”¹⁰⁸ As the name suggests, umbrella liability insurance provides the broadest coverage available. Umbrella liability insurance may independently provide coverage when primary and excess liability insurance policies do not.¹⁰⁹ One insurance company has stated that umbrella insurance policies are insurance policies “whose purpose is to provide coverage where primary coverages

¹⁰⁴ 419 F. Supp. 2d at 1019. *See also* Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037 (7th Cir. 1992) (upheld coverage for costs associated with liability for groundwater pollution); Great Northern Nekoosa v. Aetna Cas. & Sur. Co., 921 F. Supp. 401 (N.D. Miss. 1996) (pollution exclusion does not apply to liabilities enumerated within the personal injury endorsement); City of Edgerton v. General Casualty Co., 172 Wis. 2d 518, 548-50, 493 N.W.2d 768, 780-81 (Ct. App. 1992), *rev'd on other grounds*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994).

Contra Legarra v. Federated Mut. Ins. Co., 35 Cal. App. 4th 1472, 1485, 42 Cal. Rptr. 2d 101, 109 (1995) (in context of entire policy it was evident that personal injury coverage was not available for pollution claim).

¹⁰⁵ 85 F.3d 1527 (11th Cir. 1996).

¹⁰⁶ 85 F.3d at 1533. *See also* Royal Ins. Co. of America v. Kirksville College of Osteopathic Med., 191 F.3d 959, 964 (8th Cir. 1999) (clean-up costs for a punctured underground storage tank are covered because “personal injury” coverage not impacted by the “pollution exclusion” portion of the policy).

¹⁰⁷ *See* Mealey’s Litig. Rep. Ins., Aug. 19, 1997 at Sec. H; Summit Corp. of Am. v. Travelers Cos., No. 49D02-9509-CP-138 (Ind. Super. Ct. Marion Co. July 21, 1997), *aff’d*, 715 N.E.2d 926 (Ind. Ct. App. 1999).

¹⁰⁸ Liability insurance typically is purchased in layers. Different companies often provide additional limits of “excess” or “umbrella” insurance coverage over and above the primary or first layer of coverage depending on how much potential liability a policyholder believes it may face.

¹⁰⁹ Umbrella liability insurance policies are sometimes confused with “excess” liability insurance policies. Excess general liability insurance policies provide insurance coverage that “attaches” after the underlying insurance policy has paid out, or exhausted, its coverage limits. (The point at which the excess insurance policy “attaches” is specifically noted in the excess insurance policy’s declarations or endorsements in a “Schedule of Underlying Insurance.” Anderson, *et al.*, *Distinctions Between Umbrella and Excess Insurance*, Insurance Coverage Litigation § 13.04, at 13-10 (Wiley 2008)). Regardless of the

end.”¹¹⁰ Umbrella insurance policies typically “follow form” to primary policies by identifying the underlying coverage and purporting to adopt the primary insurance policies’ terms and conditions. Whether umbrella insurance policies expressly or implicitly incorporate polluter’s exclusions must be determined by scrutinizing the terms and conditions of the insurance policies involved.

The typical umbrella policy obligates an insurance company to pay for nearly every conceivable liability (sometimes called the policyholder’s “ultimate net loss”) above either the limits of the policyholder’s underlying insurance, or, if the underlying insurance does not cover the loss, above a “self-insured retention.”¹¹¹ When it was first created, the main selling point of umbrella insurance was that it gave the policyholder “kitchen sink” coverage.¹¹²

[b] Umbrella Insurance Is “First Dollar” and/or “Drops Down” When There Is No Underlying Insurance

Umbrella insurance is so valuable because of its “first dollar” or “drop down” feature. True umbrella insurance takes the place of the underlying insurance policy when underlying coverage is unavailable or exhausted by the payment of losses or does not cover a particular claim or loss.¹¹³ Umbrella insurance may also “drop down” and cover defense costs or provide a defense in the event underlying coverage is not

label the insurance company puts on an insurance policy, the policyholder must examine the policy carefully to determine whether it merely provides additional limits—as an excess insurance policy does—or if it provides additional breadth of coverage along with additional limits—like an umbrella insurance policy.

¹¹⁰ Brief of Defendant-Appellant General Reinsurance Corporation at 9–10 (filed June 3, 1991), *United States Fire Ins. Co. v. General Reinsurance Corp.*, No. 91-7394 (2d Cir.) (quoting Glatt, *Umbrella and Excess Liability Insurance* in *Business Insurance Law and Practice* § 4.03[a], at 4-22 (1990)); see also Lee R. Russ, *Liability Insurance*, Couch on Insurance (3d ed., updated Nov. 2010).

¹¹¹ See *The Umbrella Book: Analysis of Commercial General, Umbrella and Excess Liability Forms*, “Introduction” at 9 (Griffin Communications 1994). Self-insured retentions operate like deductibles requiring the policyholder to share in a loss. Insurance companies often argue that proof must exist that covered expenses in excess of any self-insured retention have been incurred or paid out before insurance coverage obligations commence. Excess/umbrella liability policies, obligating the insurer to indemnify the insured against liability for “damages” and “expenses,” and defining those terms by reference to “ultimate net loss,” which was described as total sum that refiner became “obligated to pay . . . either through adjudication or compromise,” including “costs . . . for litigation, settlement, adjustment and investigation of claims and suits,” provided coverage for costs the insured incurred in complying with cleanup and abatement orders issued by administrative agency, although no lawsuit had been filed. John K. DiMugno & Paul E. B. Glad, *Liability Insurance, Environmental Claims*, California Insurance Law Handbook § 53:3.1 (March 2010).

¹¹² Hawley, *Umbrella, “Kitchen Sink” All Risk: Special Risk Underwriting*, National Insurance Buyer (Mar. 1957).

¹¹³ 8A Appleman and Appleman, *Insurance Law and Practice* § 4909 (Berdal ed. 1981 & Supp. 1995); *The Umbrella Book: Analysis of Commercial General, Umbrella and Excess Liability Forms*, “Introduction” at 9–10 (Griffin Communications 1994); see also *Powerine Oil Co. v. Superior Court*, 37 Cal. 4th 377, 118 P.3d 589, 603–604 (2005) (umbrella coverage is broader than primary coverage and serves to fill gaps left by the underlying coverage); *Westview Assocs. v. Guaranty Nat’l Ins. Co.*, 95 N.Y.2d 334, 717 N.Y.S.2d 75, 740 N.E.2d 220 (2000) (finding that pollution exclusion in umbrella policy

available.^{113.1} One insurance company has noted:

An umbrella policy provides complete protection to the insured because it affords excess coverage for claims that are covered by the underlying carrier and also “drops down” over what is known as “self-insured retention” to afford underlying coverage of its own with respect to claims that are not. As explained by one commentator, an umbrella policy accomplishes three purposes, one of which is:

[C]overage of liability exposures for which there is no primary insurance or where the primary policy contains an exclusion which is not similarly excluded under the Umbrella policy—subject to a deductible or “net retention.”¹¹⁴

Great American Insurance Company has said this about umbrella insurance policies:

[T]hese policies often provide a primary coverage in areas which might not be included in the basic coverage, since it is the intent of the company to afford a comprehensive protection in order that such peace of mind may truly be enjoyed. In those areas, such coverage will, in fact, be primary.¹¹⁵

This “drop down” feature is set forth in the umbrella liability insurance policy’s limits of liability section which typically states:

II. LIMIT OF LIABILITY

In the event of reduction or exhaustion of the aggregate limits of liability under said Underlying Insurance by reason of losses paid thereunder, this Policy subject to all the terms, conditions and definitions hereof shall:

- (1) in the event of reduction pay the excess of the reduced underlying limit
- (2) in the event of exhaustion continue in force as underlying insurance.

The inclusion or addition hereunder of more than one Assured shall not operate to increase Underwriters’ limits of liability beyond those set forth in the Declarations.¹¹⁶

did not relieve umbrella insurance company of duty to defend policyholder in action alleging injury from lead paint).

^{113.1} “Umbrella policies may be required to ‘drop down’ and become primary insurance for claims falling within the scope of such coverage . . . if the underlying insurance coverages are exhausted by payment of losses and/or defense costs.” Kevin R. Sido, Martin M. Ween & Wendy Finkelstein, Chapter 14: *Reducing Damages*, § 14.05: *Recovery from Insurers*, Architect and Engineer Liability: Claims Against Design Professionals (Aspen Publishers 2010).

¹¹⁴ Brief of Appellant [Commercial Union Insurance Co.] at 32–33 (dated Apr. 6, 1993), *Commercial Union Ins. Co. v. Walbrook Ins. Co.*, 7 F.3d 1047 (1st Cir. 1993) (quoting F.C. & S. Bulletins, Companies and Coverages: Specialty Lines at U-1 (Dec. 1980)).

¹¹⁵ Brief of Appellees Great American Ins. Co. and the Cincinnati Ins. Co. at 13 (filed Aug. 17, 1987), *Aetna Cas. & Sur. Co. v. Great Am. Ins. Co.*, No. 86-6740 (9th Cir.).

¹¹⁶ Lloyd’s Umbrella Policy Form (London 1971) (L.P.O. 354B (8/76) at 1 (quoted in Anderson *et al.*, *Insurance Coverage Litigation* § 13.5 (Aspen 2010)).

[c] Umbrella Insurance Policies Cover Environmental Damages

[i] Generally

Because it is designed, in part, to fill gaps in underlying coverage, umbrella liability insurance often covers environmental damages, particularly if it does not contain a “polluters” exclusion. In *A.Y. McDonald Indus. Inc. v. Insurance Co. of North America*,¹¹⁷ the insurance policies at issue contained the following two insuring agreements:

COVERAGES: To indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability imposed upon him by law or liability assumed by him under contract or agreement for damages, and expenses, all as included in the definition of “ultimate net loss.”

COVERAGE. The Corporation hereby agrees to indemnify the insured against such ultimate net loss in excess of the insured’s primary liability as the insured sustains by reason of liability, imposed upon the insured by law or assumed by the insured under contract, for damages because of personal injury or property damage to which this policy applies, caused by an occurrence anywhere in the world.¹¹⁸

The Iowa Supreme Court, in answering certified questions posed by the United States District Court for the Northern District of Iowa, first held that environmental cleanup and loss-mitigation expenses were not excluded by the terms of the primary CGL insurance policies.^{118.1} The court then held that the broader language of the umbrella insuring agreements set out above also covered such damages.¹¹⁹

¹¹⁷ 475 N.W.2d 607 (Iowa 1991). See also *Cessna Aircraft Co. v. Hartford Accident & Indem. Co.*, 900 F. Supp. 1489 (D. Kan. 1995); *United States v. Pepper’s Steel & Alloys Inc.*, 823 F. Supp. 1574 (S.D. Fla. 1993), *aff’d in part, rev’d in part*, 87 F.3d 1329 (11th Cir. 1996); *Maryland Casualty Co. v. Wausau Chem Corp.*, 809 F. Supp. 680, 690–92 (W.D. Wis. 1992). But see *United States v. Pepper’s Steel & Alloys Inc.*, 823 F. Supp. 1574 (S.D. Fla. 1993); *Hydrite Chem. Co. v. Auganic Indus. Inc.*, No. 91CV1633, slip op. (Wis. Cir. Ct. Aug. 24, 1995).

¹¹⁸ *A.Y. McDonald v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 611–12 (Iowa 1991).

^{118.1} Of special note to any policyholder rebutting a defense from its primary insurance company that property damage was “expected or intended,” many umbrella policies expressly define “occurrence” to include “happenings” and “events” in addition to “accidents.” At least three courts have found similar language to provide coverage for liability arising out of *intentional* conduct. See, e.g., *Public Serv. Co. v. Continental Cas. Co.*, 26 F.3d 1508 (10th Cir. 1994); *Save Mart Supermarkets v. Underwriters at Lloyd’s, London*, 843 F. Supp. 597 (N.D. Cal. 1994); *United Pac. Ins. Co. v. McGuire Co.*, 229 Cal. App. 3d 1560, 281 Cal. Rptr. 375 (1991).

¹¹⁹ “We interpret ambiguous policy provisions in favor of the insured because insurance policies are in the nature of adhesion contracts.” *Penford Corp. v. Nat’l Union Fire Ins. Co.*, 2010 U.S. Dist. LEXIS 3737, at *22 (N.D. Iowa Jan. 19, 2010) (citing *A.Y. McDonald Indus., Inc. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 610 (Iowa 1991)). “In addition, when an insurer has affirmatively expressed coverage through broad promises, it assumes a duty to define any limitations or exclusionary clauses in clear and explicit terms.” *Penford Corp. v. Nat’l Union Fire Ins. Co.*, 2010 U.S. Dist. LEXIS 3737, at *22 (N.D. Iowa Jan. 19, 2010) (citing *Amco Ins. Co. v. Haht*, 490 N.W.2d 843, 845 (Iowa 1992)).

Of special note to any policyholder rebutting a defense from its primary insurance company that

[ii] Umbrella Coverage in California

In 2001, the Supreme Court of California analyzed the application of the undefined terms “suit” and “damages” as they relate to coverage for alleged environmental property damage and held that administrative actions by environmental regulators were not in the way of “suits” seeking “damages” for coverage purposes (“*Powerine I*”).^{119.1} This holding is inconsistent with the majority of jurisdictions which have held that when a policyholder spends money under government compulsion, general liability coverage is triggered.^{119.2}

In a subsequent August 2005 holding, however, involving some of the same litigants (“*Powerine II*”), the same court analyzed the broader *umbrella* language in certain excess/umbrella liability insurance policies to determine whether those policies

property damage was “expected or intended,” many umbrella policies expressly define “occurrence” to include “happenings” and “events” in addition to “accidents.” At least three courts have found similar language to provide coverage for liability arising out of *intentional* conduct. *See, e.g.,* Public Serv. Co. v. Continental Cas. Co., 26 F.3d 1508 (10th Cir. 1994); Save Mart Supermarkets v. Underwriters at Lloyd’s, London, 843 F. Supp. 597 (N.D. Cal. 1994); United Pac. Ins. Co. v. McGuire Co., 229 Cal. App. 3d 1560, 281 Cal. Rptr. 375 (1991).

^{119.1} Certain Underwriters at Lloyd’s of London v. Superior Court, 24 Cal. 4th 945, 961, 103 Cal. Rptr. 2d 672, 16 P.3d 94, 103 (2001) (“*Powerine I*”) (The court held that “[t]he duty to defend is not broad enough to extend beyond a ‘suit,’ i.e., a civil action prosecuted in a court, but rather is limited thereto. A fortiori, the duty to indemnify is not broad enough to extend beyond ‘damages,’ i.e., money ordered by a court, but rather is limited thereto.”); *see also* Foster-Gardner, Inc. v. National Union Fire Ins. Co., 18 Cal. 4th 857, 77 Cal. Rptr. 2d 107, 959 P.2d 265 (1998); Thane Int’l Inc. v. Hartford Fire Ins. Co., EDCV 06-1244 VAP(OPx) (C.D. Cal. 2008).

^{119.2} For example, “most jurisdictions that have addressed [the issue of whether a potentially responsible party (PRP) letter from an administrative agency consists of a ‘suit’] have held that a PRP letter activates the insurance company’s duty to defend and pay defense costs.” Eugene R. Anderson, Jordan S. Stanzler & Lorelie S. Masters, *Insurance Coverage Litigation* § 15.05[A] (2d ed. Supp. 2001–2002). *See also, e.g.,* Compass Ins. Co. v. City of Littleton, 984 P.2d 606, 622 (Colo. 1999) (“the term ‘suit’ is ambiguous, and . . . an EPA action [involving a PRP letter] under CERCLA is sufficiently coercive to constitute a ‘suit’ ”); Adolph Coors Co. v. Truck Ins. Exchange, 960 A.2d 617, 623 (D.C. 2008) (“We decline to rest our decision on the type of remedies sought through the underlying suits, because that may not be dispositive under Colorado’s duty-to-defend case law,” *quoting* Compass Ins. Co. City of Littleton, 984 P.2d 606, 622–23 (Colo. 1999) (en banc) (declining to draw a bright-line distinction between legal and equitable remedies)); A.Y. McDonald Indus., Inc. v. Insurance Co. of N. Am., 475 N.W.2d 607, 629 (Iowa 1991) (the administrative process pursued by the EPA, which culminated in a consent order, rises to the level of a lawsuit since it represents an attempt by the government to “gain an end by legal process”); Coakley v. Maine Bonding & Casualty Co., 618 A.2d 777 (N.H. 1992) (both a PRP notice and an administrative order fit the definition of suit); Boeing Co. v. Aetna Casualty & Sur. Co., 1990 U.S. Dist. LEXIS 20231 (W.D. Wash. Apr. 17, 1990) (the duty to defend arises where the allegations of the PRP letter, if proven, could impose liability within coverage of the policy); Johnson Controls v. Employers Ins. of Wausau, 665 N.W.2d 257 (Wis. 2003) (the receipt of a PRP letter from the EPA or equivalent state agency marks the beginning of adversarial administrative legal proceedings that seek to impose liability upon an insured and significantly affects the legal interest of the insured; therefore, a reasonable insured would expect this letter to trigger its CGL insurer’s duty to defend). *But see* Foster-Gardner, Inc. v. National Union Fire Ins. Co., 18 Cal. 4th 857, 77 Cal. Rptr. 2d 107, 959 P.2d 265 (1998) (a “suit” that triggers a duty to defend requires a court proceeding since the reasonable construction of the word “suit” is a lawsuit).

provided coverage for costs incurred by environmental cleanups ordered by administrative agencies. The court analyzed the text of certain umbrella insurance policies and determined that certain umbrella policies' use of *alternative* terms such as "claims" and "expenses," rather than "suits" and "damages," opened the door to so-called first-dollar umbrella coverage for environmental administrative actions.^{119.3} California case law illustrates the broad utility of umbrella insurance in obtaining coverage for environmental liabilities.^{119.4}

[d] Excess Insurance "Follows Form" by Incorporating Underlying Insurance Policy Conditions and Exclusions, but Provides Higher Dollar Amounts of Coverage than Primary Insurance

Umbrella liability insurance should not be confused with excess insurance. In general, insurance coverage above the initial or primary insurance policy is referred to as "excess" insurance. An excess liability insurance policy, however, is a specific type of insurance policy. A true excess liability insurance policy

track[s] the primary insurance in coverage, conditions, definitions, and exclusions. The excess carrier relies on the primary carrier for coverage interpretations. The excess contract will not pick up coverages that are left out of the primary policy. It is and should be used as a means of layering limits of liability to the level needed by the insured.¹²⁰

Excess liability insurance is designed to increase the limits of coverage above primary insurance¹²¹ and does not, ordinarily, increase the scope of the insurance coverage provided unless the excess policy "follows form" to, because its limits are said to rest above, an umbrella policy. True "excess" liability insurance, unlike umbrella insurance generally does not provide broader insurance coverage than the primary insurance policies¹²² and excess policies generally do not have a "drop-down" feature whereby

^{119.3} *Powerine Oil Co. v. Superior Court*, 37 Cal. 4th 377, 382, 33 Cal. Rptr. 3d 562, 118 P.3d 589 (2005) (agreeing with the court of appeal's reasoning that "the insuring language of the excess/umbrella policies here in question is broader than that of the standard primary insurance policies at issue in *Powerine I* [Certain Underwriters at Lloyd's of London v. Superior Court, 24 Cal. 4th 945, 16 P.3d 94 (2001)], and covers costs that the policy holder must expend in complying with an administrative agency's pollution cleanup and abatement orders").

^{119.4} *Reserve Ins. Co. v. Pisciotto*, 30 Cal. 3d 800, 640 P.2d 764, 771 (1982) (an umbrella policy normally "would fill any gaps in coverage left open by the primary coverage in addition to increasing the total possible recovery by the insured"); *Powerine Oil Co. v. Superior Court*, 37 Cal. 4th 377, 33 Cal. Rptr. 3d 562, 118 P.3d 589 (2005) (reading the umbrella policy as "more expansive than the primary insurance . . . gives effect to the mutual intent of the parties as evinced by the mechanism of umbrella insurance").

¹²⁰ Flanigan & Turner, *Rounding Out the Insurance Program in The Business Insurance Handbook* 456 (Cushman & Castle, ed. 1981), quoted in Pre-Trial Memorandum of Plaintiff Aetna Casualty & Surety Co. at 11 (dated May 5, 1993); *Aetna Cas. & Sur. Co. v. Home Ins. Co.*, No. 89 Civ. 7043 (JFK) (S.D.N.Y.).

¹²¹ Rupp, *Rupp's Insurance & Risk Management Glossary* 125 (1991).

¹²² See generally *The Umbrella Book: Analysis of Commercial General, Umbrella and Excess Liability Forms*, "Introduction" at 11 (Griffin Communications 1994); Masters, *Ambiguities in Follow-*

the policy will act as a primary insurance policy under certain circumstances.¹²³

Umbrella liability insurance policies purchased in the past should not be overlooked as a potential source of financing for brownfields participants faced with environmental liabilities.

Practice Note

As with all insurance policies, never rely on the title of the policy. An “umbrella” insurance policy may not be a true “umbrella” policy; a policy titled “excess” liability insurance policy may actually be an umbrella policy. Labels can be misleading. What counts is the language of the policy contract itself and the intention of the parties to the contract. Most courts interpret insurance policies in favor of policyholders who generally must accept whatever standard-form terms and conditions are proffered by the insurance company.

—John G. Nevius

[7] First-Party Property Insurance May Provide Coverage for Environmental Damages

[a] Property Insurance Pays for Losses or Damages Caused by a “Covered Peril”

First-party property insurance may provide coverage for property involved in brownfields development.¹²⁴ First-party property insurance, unlike liability insurance (see § 28.01[4]), is intended to provide insurance coverage for loss or damage to the policyholder’s own property. Also unlike general liability insurance policies, property insurance typically provides coverage for losses or damages caused by a “covered peril.” There are two types of first-party property insurance policies: (1) named peril

Form Provisions: A Careful Review May Yield Additional Coverage in Excess General Liability Insurance Policies, Mealey’s Ins. Litig. Rep., May 29, 1996.

¹²³ The Umbrella Book: Analysis of Commercial General, Umbrella and Excess Liability Forms, “Introduction” at 11 (Griffin Communications 1994).

¹²⁴ See Thomas W. Mallin, *Pollution and Contamination—How Will Property Insurers Respond?* (American Bar Ass’n 1987) and Dianne K. Dailey, *Environmental Damage Claims and Property Insurance Coverage* (American Bar Ass’n 1997). See also *Probate and Property: Environmental Law Update* (American Bar Ass’n 1998) (“First party or environmental remediation coverage indemnifies property owners for the cost of performing government ordered remediation. . . . Depending on the policy, the insured may be covered for any preexisting contamination that later gives rise to a cleanup obligation.”); Thomas R. Wood, *Environmental Issues in Real Estate Transactions*, National Business Institute (2004) (“Environmental remediation insurance (‘ERI’) is a first party policy protecting purchasers of real property and lenders. ERI covers damage from contamination not discovered in a Phase I site assessment of the acquired property. ERI policies are claims-made policies triggered either by the discovery of the contamination or, more narrowly, by a government action against the insured. . . . [T]hese policies provide coverage for unexpected and unanticipated cost increases incurred during an approved site cleanup.”).

and (2) all risk. Named perils typically include fire, lightning, explosions, windstorms or hail, smoke, riot or civil commotion, vandalism, sprinkler leakage, sinkhole collapse, breakage of glass, falling objects, weight of snow, ice or sleet, and water damage. All risk property insurance is very broad and, much like occurrence-based CGL insurance, unless the peril giving rise to liability is specifically excluded, there is insurance coverage for a loss.¹²⁵

[b] Numerous Environmental Issues Can Arise Under First-Party Insurance

[i] Introduction

Litigation involving first-party property insurance coverage for environmental liabilities has been relatively sparse. Some of the points of dispute have been:

- did the loss or damage occur during the policy period?;
- was there damage to covered “real property”?;
- was there covered “direct or physical loss or damage”?;
- is removal of pollutants covered “debris removal”?; and
- is insurance coverage excluded by the contamination, ordinance and law, or land exclusions?

[ii] When Did the Loss or Damage Occur?

Determining when the loss or damage occurred can be difficult in cases involving environmental claims. As with insurance coverage under general liability insurance policies, the issue of the “trigger” of coverage¹²⁶ can arise. In one of the cases addressing the issue, *Aluminum Co. of America v. Accident & Casualty Ins. Co.*,¹²⁷ the court applied a “continuous trigger,” holding that property insurance policies continuously were triggered by exposure to contaminants, the addition of contaminants to already contaminated property, the migration of contaminants, and the discovery of injury to property. However, other cases have applied different standards, including “actual injury/injury in fact,”^{127.1} “manifestation,”^{127.2} and “exposure.”^{127.3}

¹²⁵ See generally Kalis *et al.*, Policyholder’s Guide to the Law of Insurance Coverage § 13.02[B] (Aspen 1997) (quoting *Texas Eastern Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 564 (10th Cir. 1978)).

¹²⁶ For extensive discussion of the trigger of coverage for environmental claims under general liability insurance policies, see 1 Anderson *et al.*, Insurance Coverage Litigation Ch. 4 (Aspen 2d ed. 2001).

¹²⁷ No. 92-2-28065 (Wash. Super. Ct. Mar. 8, 1996), reported in Mealey’s Litig. Rep.-Ins., Apr. 2, 1996 (applying Pennsylvania law); see also *Montrose Chemical Corp. v. Admiral Ins. Co.*, 897 P.2d 1 (Cal. 1995) (holding that a “continuous trigger” must be applied for pollution liability)

^{127.1} See generally *Carrier Corp. v. Travelers*, No. CV-88-0352383 (Conn. Super. Ct. 1994). See also *Aetna v. Abbott Laboratories, Inc.*, 636 F. Supp. 546 (D. Conn. 1986).

^{127.2} See generally *Jackson v. State Farm Fire & Cas. Co.*, 835 P.2d 786 (Nev. 1992); *Prudential-LMI Com. Insurance v. Superior Court*, 51 Cal. 3d 674, 798 P.2d 1230 (Cal. 1990).

^{127.3} *Mapco Express, Inc. v. American Int’l Specialty Lines Ins. Co.*, No. 3AN-95-8309 (Alaska Super. Ct. July 31, 1998).

[iii] Was There Damage to Covered “Real Property”?

First-party property insurance policies specifically identify the property insured, usually designating the buildings, business personal property and the property of others to be covered. All risk policies frequently state that they cover “real property,” but “real property” is often not defined. Thus, issues often arise concerning whether or not damage to soil or groundwater onsite is damage to real property. Many property insurance policies now contain specific “land” and groundwater exclusions to address this issue. The standard “land” exclusion bars coverage for damage to land, water, growing crops, lawns and standing timber.¹²⁸

[iv] Was There Covered “Direct Physical Loss” or Damage?

Is environmental damage covered “direct physical loss?” Liability insurance companies routinely argue that the undefined term “damages,” does not include governmentally required response costs.¹²⁹ Similarly, first-party-property insurance companies often argue that cleanup costs do not constitute “direct physical loss.”

[v] Is Removal of Pollutants Covered “Debris Removal”?

Most property insurance policies contain provisions covering “debris removal.” Prior to 1986, no exclusion for removal of pollutants and no definition of covered “debris” existed.¹³⁰ Debris removal may include costs to clean-up contamination depending on the wording of the particular insurance policy.¹³¹ For example, in *Lexington Insurance Co. v. Ryder System, Inc.*,¹³² the policyholder had an all risk property insurance policy which covered all personal property, including “oil and pipelines.” After an oil leak, the policyholder sought to recover the cost of removing soil contaminated by oil leaking from underground storage tanks. The insurance company argued that coverage under the debris removal clause was not triggered. The court disagreed, however, holding that the insurance company was liable for the removal costs because “escaped oil which has contaminated the surrounding earth is

¹²⁸ See Berz, Spracker & Stochak, *Environmental Law in Real Estate and Business Transactions* Ch. 4A (LexisNexis Matthew Bender).

¹²⁹ For discussion of “damages” under general liability insurance policies, see 2 Anderson *et al.*, *Insurance Coverage Litigation* § 15.04 (Aspen 2d ed. 2001).

¹³⁰ See, e.g., *Industrial Enterprises Inc. v. Penn America Ins. Co.*, 637 F.3d 481 (4th Cir. 2011) (CERCLA cleanup costs for damage to wetlands underlying policyholder’s property did not constitute property damage, thus policy was not triggered); *Schnitzer v. South Carolina Ins. Co.*, 62 Or. App. 300, 661 P.2d 550, 554 (1983) (This insurance covers expenses incurred in the removal of debris of the property covered hereunder, which may be occasioned by the loss caused by the perils insured against this policy.).

¹³¹ Russ, *Amounts of Loss and Recovery: Debris Removal*, Couch on Insurance 3d Edition, at § 178.22 (June 2010) (“the policy language will initially determine whether such consequential damages are covered”); see also Pasich, *Inherent Ambiguity: Pollution Exclusions in Property Insurance Policies*, Mealey’s Litig. Rep. Ins., May 21, 1991, at 20; Beller, *Debris Cleanup Clause: What it Really Means*, J. of Com., Sept. 22, 1997, at 16A; Knoll & Arthur, *Property Insurance: No Solution for Pollution*, 17 B.C. Envtl. Affairs L. Rev. 231 (1990).

¹³² 234 S.E.2d 839 (Ga. Ct. App. 1977).

debris, and its removal is compensable because as oil in storage it was insured.”¹³³ In *St. Paul Fire & Marine Ins. Co. v. Protection Mut. Ins. Co.*,¹³⁴ St. Paul Fire argued that Protection Mutual was responsible for PCB cleanup under a debris removal clause, and Protection Mutual argued the same regarding St. Paul. The court accepted that PCBs could be covered by insurance policies, although it did not actually construe the definition of debris to include contamination because both parties had assumed that PCB contamination was covered by the debris removal clause.^{134.1}

[vi] Does the “Contamination” Exclusion Apply?

Property insurance policies today frequently contain specific pollution exclusions similar to those included in more recent general liability insurance policies. Historically, however, property insurance policies contained what is known as a “contamination” exclusion. “Contamination” is not defined in the insurance policies. Some courts define “contamination.”¹³⁵ Other courts have found the term ambiguous and have allowed the parties to introduce evidence of what was intended by the use of the term “contamination.”^{135.1} While some courts have read the contamination exclusion very broadly,¹³⁶ others have refused to apply the exclusion when a cause of the loss is something other than “contamination” alone.¹³⁷

[vii] Does the “Ordinance or Law” Exclusion Apply?

The “ordinance or law” exclusion in first-party property insurance policies may be at issue in cases involving environmental claims. The exclusion usually bars coverage for “loss occasioned directly or indirectly by enforcement of any local or state ordinance or law regulating construction, repair, or demolition of buildings or

¹³³ 234 S.E.2d at 840.

¹³⁴ 664 F. Supp. 328 (N.D. Ill. 1987).

^{134.1} 664 F. Supp. at 333 n.7.

¹³⁵ See *J.L. French Auto. Castings, Inc. v. Factory Mut. Ins. Co.*, 2003 U.S. Dist. LEXIS 13060, at *6 (N.D. Ill. 2003) (“The presence of human remains in the die lubricant plainly rendered it . . . unfit for their regular function and as such meets the ordinary definition of ‘contamination.’ ”); *Hi-G, Inc. v. St. Paul Fire & Marine Ins. Co.*, 391 F.2d 924, 925 (1st Cir. 1968) (a foreign substance injures a product’s usefulness without affecting its original physical characteristics); *American Casualty Co. v. Myrick*, 304 F.2d 179, 184 (5th Cir. 1962) (“a condition of impurity resulting from the mixture or contact with a foreign substance”); *Duensing v. Traveler’s Cos.*, 257 Mont. 376, 849 P.2d 203 (1993) (introduction of a foreign substance that injures the usefulness of the object); *Auten v. Employers Nat’l Ins. Co.*, 722 S.W.2d 468, 469 (Tex. Ct. App. 1986) (“condition of impairment or impurity results from mixture or contact with a foreign substance”).

^{135.1} *Parks Real Estate Purchasing Group v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 47 (2d Cir. 2006); *Herald Square Loft Corp. v. Merrimack Mut. Fire Ins. Co.*, 344 F. Supp. 2d 915 (S.D.N.Y. 2004); *Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co.*, 132 F.3d 526, 530 (9th Cir. 1997); *Cantrell v. Farm Bureau Town & Country Ins. Co.*, 876 S.W.2d 660 (Mo. Ct. App. 1994); *McConnell Constr. Co. v. Insurance Co. of St. Louis*, 428 S.W.2d 659, 661 (Tex. 1968).

¹³⁶ *Duensing v. Traveler’s Cos.*, 257 Mont. 376, 849 P.2d 203, 206 (1993).

¹³⁷ See, e.g., *Raybestos-Manhattan Inc. v. Indus. Risk Insurers*, 289 Pa. Super. 479, 433 A.2d 906 (1981) (contamination exclusion did not bar coverage when oil was improperly mixed with heptane due to negligence of an employee since negligence was a covered peril).

structures.”¹³⁸ Insurance companies may argue that any costs associated with cleaning up contaminated property are costs incurred as a result of compliance with federal or state laws.¹³⁹ Policyholders successfully have argued that a first-party claim should be covered despite the exclusion because a loss was not caused by enforcement of a law, but rather by release of contaminants.¹⁴⁰ Some insurance companies sell endorsements specifically providing insurance coverage for costs incurred by reason of enforcement of building laws.¹⁴¹

[viii] Does the “Land” Exclusion Apply?

The “land” exclusion purports to bar coverage for damage to land, water, growing crops, lawns and standing timber.¹⁴² Many property insurance policies do not contain land exclusions, but even in cases in which the insurance policy did not contain an explicit land exclusion, insurance companies have argued that land is not insured property.¹⁴³ Some courts have barred insurance coverage for costs incurred in cleaning up contaminated soil based upon the land exclusion.¹⁴⁴

Practice Notes

1. Just like personal injury and umbrella liability coverage, first-party property insurance should not be overlooked as a potential source of financing for brownfields projects. Taking the time to read and analyze the insurance coverage

¹³⁸ *Regency Baptist Temple v. Ins. Co. of N. Am.*, 352 So. 2d 1242 (Fla. Dist. Ct. App. 1977); see also *Koziol v. Peerless Ins. Co.*, 41 A.3d 647 (R.I. 2012); Gilbert, *Carriers Fine-Tune Ordinance, Law Coverage*, Nat’l Underwriter, Mar. 25, 1996, at 9.

¹³⁹ See, e.g., *Farrell v. Royal Ins. Co. of Am.*, 989 F. Supp. 159 (D. Conn. 1997) (cost of removing oil tank excluded by ordinance or law provision because removal of tank was mandated by local ordinance).

¹⁴⁰ See, e.g., *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997) (damage due to asbestos contamination not excluded by ordinance exclusion in all risk property insurance policy just because someday the policyholder might be required by law to remove the released asbestos). But see *Townsend of Arkansas, Inc. v. Millers Mut. Ins. Co.*, 823 F. Supp. 233 (D. Del. 1993) (ordinance exclusion held inapplicable but pollution exclusion nonetheless bars coverage).

¹⁴¹ See, e.g., *City of Elmira v. Selective Ins. Co. of New York*, 83 A.D.3d 1262, 921 N.Y.S.2d 662 (3d Dept. 2011); *Cabana Club Apartments Associates, Ltd.*, 2010 U.S. App. LEXIS 20957 (11th Cir. Oct. 8, 2010); *Cohen Furniture Co. v. St. Paul Ins. Co.*, 214 Ill. App. 3d 408, 573 N.E.2d 851, 854 (1991); Cozen, 1 *Insuring Real Property* § 1.06[7][b][ii][A] (LexisNexis Matthew Bender); Robinson & Gibson, 2 *Commercial Property Insurance* II.D.15 (Int’l Risk Mgmt. Inst. 1991).

¹⁴² See Berz, Spracker & Stochak, *Environmental Law in Real Estate and Business Transactions* Ch. 4A (LexisNexis Matthew Bender).

¹⁴³ See, e.g., *Aluminum Co. of Am. v. Acc. & Cas. Ins. Co.*, No. 92-2-28065 (Wash. Super. Ct. Mar. 8, 1996), reported in Mealey’s Litig. Rep.-Ins., Apr. 2, 1996.

¹⁴⁴ See *Horning Wire Corp. v. Home Indem. Co.*, 8 F.3d 587 (7th Cir. 1993) (land exclusion precluded coverage for costs of cleaning up soil contaminated with cresylic acid); *W.H. Breshears, Inc. v. Federated Mut. Ins. Co.*, 832 F. Supp. 288 (E.D. Cal. 1993), *aff’d in part, rev’d in part*, 38 F.3d 1219 (9th Cir. 1994); *Royal Ins. Co. v. Bithell*, 868 F. Supp. 878 (E.D. Mich. 1993).

available in light of the facts on (or in) the ground can lead to surprisingly positive results. Insurance professionals usually respond reflexively to “environmental” claims by asserting that coverage cannot be had. As the above discussion demonstrates, this is not always true. For every reported legal decision addressing what some might consider creative legal arguments in support of “environmental” claims, there are numerous situations where a compromise settlement is reached before a dispute must be resolved in court. The sooner thorough coverage analyses

(Text continued on page 28-54.16(3))

are undertaken, the less likely a potentially viable claim will be denied on a technicality.

—John G. Nevius

2. First-party property insurance policies have strict notice provisions. Beware of time periods. Many policies provide that the policyholder must file a sworn proof of loss within 30, 60, or 90 days of the date of loss. Insurance companies will argue that failure to file a proof of loss results in a forfeiture of insurance coverage; therefore, the policyholder should, if necessary, ask for an extension in writing.

3. First-party property insurance policies also contain a contractual suit limitation which provides that any insurance coverage lawsuit must be filed within a short period of time, usually one or two years, after the loss. Although the conduct of the insurance company may give rise to a waiver or estoppel argument, the policyholder should get any extensions of the time to file suit in writing.

—Eugene R. Anderson

[8] Environmental Impairment Liability (EIL) Insurance Often Does Not Provide the Expected Insurance Coverage and Has Not Always Been Available

[a] EIL Insurance Policies Were Written on a Claims-Made Basis

The insurance industry introduced Environmental Impairment Liability (EIL) insurance in the mid-1970s.¹⁴⁵ Unlike the typical standard-form general liability insurance policy, EIL policy provisions were not uniform, and the policy was sold on a “claims-made” basis.¹⁴⁶ “Claims-made” insurance only provides coverage for limited time and, therefore, for events with relatively immediate consequences. A “claims-made” policy generally requires that one or more liability-inducing events take place during the policy period, the claim be made against the policyholder during the policy period, and that the claim be reported by the policyholder during the “reporting period.” For this and other reasons, coverage was not often litigated under early EIL policies and a limited body of case law exists.^{146.1}

[b] The General History of EIL Insurance Coverage

There have been three general periods of environmental coverage under insurance policies explicitly addressing environmental risk: 1980–1985, when EIL coverage

¹⁴⁵ EIL insurance was first introduced in the United States market in 1973 by Lloyd’s of London. See *Making Sense of the Environmental Insurance Marketplace*, The Risk Rep., Feb. 1993, at 2 (International Risk Management Institute, Inc.).

¹⁴⁶ See Kalis *et al.*, *Policyholder’s Guide to the Law of Insurance Coverage* § 12.03[C][1] (Aspen 1997).

^{146.1} See Zuckerman & Roskoff, 3 *Env’tl. Ins. Litig. L. and Prac.* § 28:2 (2010); *Monsonite Corp. v. Great Am. Surplus Lines Ins. Co.*, 224 Cal. App. 3d 912, 916 (1990) (EIL insurance “is fairly uncommon and rarely discussed in case law”).

generally was available; a period after 1985 when coverage was extremely restricted and prohibitively expensive;¹⁴⁷ and during the late 1990s when new environmental insurance products that are still available today were developed.^{147.1}

After CERCLA and the financial responsibility provisions of the Resource Conservation and Recovery Act were enacted in 1980, a glut of pollution insurance policies were offered by the insurance industry—and sold. In the mid-1980s, approximately 56 insurance companies were writing some form of pollution insurance coverage.¹⁴⁸ However, in 1986, 55 of those insurance companies withdrew from the pollution insurance market, due to the combined forces of severe losses and a general reduction in the availability of reinsurance to spread the risk.¹⁴⁹ Other factors cited in the withdrawal of insurance companies from this market are the tendency of some risk managers to rely on coverage provided under CGL policies to pay environmental claims, and the perception that future losses had catastrophic potential.¹⁵⁰

In 1985, at the beginning of the second period of environmental coverage, only one insurance company remained in the environmental insurance market.¹⁵¹ The resulting standard-form EIL insurance policies, which until approximately 1990 were the only type of specifically environmental insurance available, were more cautiously underwritten and more restrictively drafted.¹⁵² EIL insurance policies could be purchased only after an expensive and elaborate “environmental audit” of historical conditions and ongoing operations at the property to be insured. Environmental insurance coverage expanded in the period from approximately 1990 to 1995 as other insurance companies got back in the market and in the sense that new types of “niche” insurance products such as so-called “monoline” UST policies exclusively for gas stations and petroleum marketers became available. However, the underwriting and wording of these policies continued to be very restrictive until approximately 1995.¹⁵³

Since the 1990s there has been a significant expansion of environmental coverage,

¹⁴⁷ See Neuman, *New Environmental Insurance Products: When Does It Make Sense to Buy Them?*, 1999 Cal. Envtl. L. Rep. 27 (Matthew Bender Feb. 1999).

^{147.1} Mark Plumer, Alex Lathrop & Kirt Suomelo, Appleman: Current Critical Issues in Insurance Law III (Matthew Bender, Spring 2010).

¹⁴⁸ Snow, *Insurers Who Willingly Assume Pollution Risk*, paper presented at the 1994 Environmental Law Conference by the Law Education Institute, Vol. 2 at 2 (Lake Buena Vista, Fla., Mar. 2–6, 1994).

¹⁴⁹ Snow, *Insurers Who Willingly Assume Pollution Risk*, paper presented at the 1994 Environmental Law Conference by the Law Education Institute, Vol. 2 at 2 (Lake Buena Vista, Fla., Mar. 2–6, 1994).

¹⁵⁰ Dybdahl, *EIL Coverage: Action and Reaction*, Risk Mgmt., at 54 (Sept. 1985).

This reluctance by risk managers to purchase specialized environmental insurance coverage has waned. Milligan, Spotlight Report: Mergers Can Bring New Environmental Liabilities: Concern About Acquired Risks Sparks EIL Buys, Bus. Ins., May 25, 1998, at 3.

¹⁵¹ See generally Neuman, *New Environmental Insurance Products: When Does It Make Sense to Buy Them?*, 1999 Cal. Envtl. L. Rep. 27, 30 (Matthew Bender Feb. 1999).

¹⁵² An example of restrictive wording was the total exclusion of coverage for underground-storage-tank (“UST”) liabilities under these policies until approximately 1990.

¹⁵³ For example, although EIL policies would now cover existing, operational USTs if they were specifically identified in endorsements to the insurance policies, the coverage (as with the monoline UST

largely in response to the brownfields movement. Policy wording has become less restrictive and more flexible, and as discussed in the next section, several types of new products and insurance companies joined the mix. Underwriting also has become more expansive in the sense that a broader category of risks, such as even the risk of known pollution, may be covered.¹⁵⁴ However, underwriting has also become more sophisticated—site assessments continued to be required (Phase I assessments generally are required at a minimum and Phase II assessments also may be required where necessary) for all sites with environmental exposure.

[c] The Unavailability of Environmental Insurance Coverage

Insurance coverage was not available for historic contamination risks after occurrence-based general liability insurance no longer was available in approximately 1985. This fact can be crucial in coverage disputes over allocation of liability. In *Champion Dyeing & Finishing Co. v. Centennial Insurance Co.*,^{154.1} the court held that the insurance company defendants failed to prove the availability and affordability of EIL insurance coverage for the risk of leakage from known USTs that were over 20 years old.^{154.2} Relying in part on New Jersey's rules for fairly allocating liability between and among multiple insurance companies, the court emphasized the necessity of demonstrating that insurance could have been purchased that covered the precise risk that manifested; and of demonstrating that conditions of coverage, i.e., policy terms, did not preclude indemnification. The court also stressed that the insurance companies have the burden of making these demonstrations.^{154.3}

[d] Various Policy Exclusions Can Bar Pollution Coverage

The EIL policies that were sold during the late 1980s and early 1990s often did not provide the insurance coverage that was expected by policyholders. One surprised policyholder was a semiconductor manufacturer, Advanced Micro Devices, Inc. (AMD). AMD bought an insurance policy that contained an exclusion which stated that it did not apply to a loss arising out of "the correction of any known pre-existing conditions . . ." After AMD obtained the federally required insurance, AMD also was required to submit an application form which asked "at the time of signature, are you aware of any circumstance which could give rise to a claim under this policy?"

policies) was limited to new conditions, and liability from known historic and unknown USTs continued to be excluded.

¹⁵⁴ An example of broadened wording was the removal of an automatic exclusion for unknown USTs, which occurred in approximately 1996. See also Neuman, *The Known Pre-Existing Pollution Condition in the New Pollution Liability Policy*, J. of Ins. Coverage (Winter 2002); Susan Neuman & Robert D. Chesler, *Environmental Law Practice Guide* § 8.04 (Michael B. Gerrard ed., LexisNexis Matthew Bender) (on environmental insurance coverage).

^{154.1} 355 N.J. Super. 262, 810 A.2d 68 (App. Div. 2002), *appeal withdrawn*.

^{154.2} 355 N.J. Super. at 271, 810 A.2d at 73. See also Neuman, *A Willing Self-Insurer? The Availability of Environmental Impairment Liability Insurance After 1985*, J. of Ins. Coverage, Vol. 5, No. 4 (Fall 2002).

^{154.3} See, e.g., *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 177 F.3d 210, 231 (3d Cir. 1999) (discussing burden of proof).

and AMD answered “no.” The next year AMD was compelled to clean up contamination in soil and groundwater. When AMD submitted its claim for the \$1.5 million in cleanup costs, the claim was denied and litigation ensued.^{154.4} Before it acquired the EIL insurance policy, a waste disposal firm notified AMD that acid waste containing small amounts of a toxic substance had escaped a tank at AMD’s plant. Coverage was excluded because AMD had actual pre-existing knowledge of the contamination before the inception date of the policy. AMD’s explanations that it did not believe that there was a major problem and that the waste disposal firm’s report was disproved by another, later analysis, were unavailing.

The Alan Corporation (“Alan”) operated a fuel distribution and bulk UST oil storage facility. Alan purchased an EIL insurance policy which would pay damages because of “bodily injury” or “property damage” and would pay cleanup costs “imposed through governmental action which is initiated during the policy period, provided that: . . . such clean-up costs are incurred because of environmental damage to which this insurance applies.” During the policy period, an Alan employee was told on the telephone by the town fire department to determine the extent of potential contamination and to alert the state. After the policy period expired, Alan officially reported the contamination to the state which ordered a cleanup. The District Court for the District of Massachusetts held in a declaratory judgment action that there was no government action during the policy period.^{154.5} The fact that notice was given to the state within the extended reporting period was not sufficient, according to the court, because the extended reporting period option applied only to bodily injury and property damage claims and not to cleanup costs. The court held that the claim was not one for “property damage,” because the policy structure clearly bifurcated the treatment of bodily injury and property damage claims versus claims for cleanup costs.

Other problems that have faced policyholders purchasing specialized EIL policies arise from the fact that the policies are “claims made.”^{154.6} Policyholders also should be aware that EIL policies, like general liability insurance policies, contain versions of the owned property exclusion.^{154.7} These cases demonstrate that the development of specialized environmental liability insurance policies has not resolved the age-old problems that policyholders encounter when seeking coverage under standard-form general liability insurance.

^{154.4} *Advanced Micro Devices, Inc. v. Great Am. Surplus Lines Ins. Co.*, 199 Cal. App. 3d 791, 794, 245 Cal. Rptr. 44–45 (1988).

^{154.5} *Alan Corp. v. Int’l Surplus Lines Ins. Co.*, 823 F. Supp. 33 (D. Mass. 1993), *aff’d*, 22 F.3d 339 (1st Cir. 1994).

^{154.6} *See, e.g., Rhone-Poulenc, Inc. v. Int’l Ins. Co.*, 1997 U.S. Dist. LEXIS 5330 (N.D. Ill. 1997), *magistrate’s recommendation*, 1997 U.S. Dist. LEXIS 6881 (N.D. Ill. May 8, 1997); *Central Ill. Pub. Serv. Co. v. Am. Empire Surplus Lines Ins. Co.*, 267 Ill. App. 3d 1043, 642 N.E.2d 723 (1994); *A.J. Hall, Inc. v. Federated Mut. Ins. Co.*, 1996 Tenn. App. LEXIS 40 (Tenn. Ct. App. Jan. 24, 1996).

^{154.7} *See Kalis et al., Policyholder’s Guide to the Law of Insurance Coverage* § 12.03[D][2] (Aspen 1997).

[9] Conclusion

As the above discussion demonstrates, insurance coverage for environmental liabilities can be difficult to obtain. Anyone involved in brownfields development—e.g., an individual, corporation, or municipality—needs to know about past and present insurance coverage for environmental liabilities. Old insurance policies can be worth more than their weight in gold—even when they were purchased by another entity. It is important to be an informed and knowledgeable insurance consumer whether making a claim or purchasing new environmental insurance products.

What should brownfields participants do when faced with insurance coverage problems? Good advice comes from lawyers who regularly represent insurance companies: “[G]iven existing case law, one would be foolish not to seek coverage under almost all old general liability policies.”^{154.8} To that add: seek coverage for environmental liabilities under *all* old policies—including general liability, EIL, umbrella liability, excess liability, and property insurance policies.