

Environmental Insurance Litigation
A State By State Case Law Survey
(Fall 2022 Edition)

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ALABAMA

"As Damages"

The Alabama Supreme Court ruled that Superfund "response costs" are "damages" in Alabama Plating Co. v. USF&G, 690 So.2d 331 (Ala. 1996). More recently, the court also ruled in Certain Underwriters at Lloyd's, London v. Southern Natural Gas Co., No. 1110698 (Ala. June 28, 2013) that costs incurred by a pipeline operator to remediate PCB contamination were "damages" and not merely sums that the insured had voluntarily agreed to pay as a business decision. The court declined to distinguish between clean ups resulting from a court order or governmental directive and those that, as here, were voluntarily performed by the insured.

"Occurrence"

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

Pollution Exclusion

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

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

"Absolute" Pollution Exclusion

In Federated Mut. Ins. Co. v. Abston Petroleum, Inc., 967 So.3d 705 (Ala. 2007), the Alabama Supreme Court ruled that an absolute pollution exclusion clearly precluded coverage for the cost of cleaning up contamination from gasoline leaking out of pipes connecting above-ground storage tanks and gasoline pumps at the insured's service station. The court ruled that the focus of the inquiry under the absolute pollution exclusion was not in the nature of the substance alone, but on the substance in relation to the property damage or bodily injury, rejecting the insured's argument that it should nonetheless be entitled to coverage in light of its claimed "reasonable expectations."

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

The Eleventh Circuit has issued an unpublished affirmance of an Alabama District Court's ruling that a lawsuit brought by a furrier who complained that its products had begun to smell like curry as the result of shared air conditioning ducts with a neighboring Indian restaurant were subject to an absolute pollution exclusion in the restaurant's liability policy. Maxine Furs, Inc. v. Auto-Owners Ins. Co., 2011 WL 1197466 (11th Cir. March 31, 2011), the Court of Appeals held in an unpublished opinion that no person of ordinary intelligence could reasonably conclude that curry aroma is not a contaminant, nor was there any dispute that the aroma had migrated, seeped or escaped from the insured's property contaminating the plaintiff's furs.

Most recently, the Eleventh Circuit issued a short, unpublished opinion in Evanston Ins. Co. v. J&J Cable Co., No. 17-11188 (11th Cir. April 20, 2018), affirming an Alabama District Court's declaration that an absolute pollution exclusion did not apply to damage caused by a release of sewage as the contamination did not occur in an industrial context.

"Personal Injury" Claims

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

"Suit"

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On a certified question from a local District Court, the Alabama Supreme Court has declared in Travelers Cas. & Sur. Co. v. Alabama Gas Corp., 117 So.3d 695 (Ala. 2012) that a U.S. EPA PRP letter is a “suit” triggering a CGL insurer’s duty to defend.

Trigger of Coverage

An “exposure” theory has been adopted by courts construing claims for asbestos bodily injury in Alabama. In Shook and Fletcher Asbestos Settlement Trust v. Safety National Casualty Corp., 909 A.2d 125 (Del. 2006) the Delaware Supreme Court predicted that the Alabama Supreme Court would adopt an “exposure” theory for asbestos BI claims, rejecting the insured’s contention that policies in effect after the date that the claimants’ exposure ceased should also be triggered or that, being the rule that most state courts have adopted, the Alabama Supreme Court would also likely follow it. In fact, the court concluded that based upon its own analysis, exposure was the majority rule. See also Commercial Union Ins. Co. v. Sepco Corp., supra and Safety National Casualty Corp. v. Shook & Fletcher Insulation Co., Jefferson No. CV-93-01574 (Ala. Cir. Ct. March 5, 1999).

The period of exposure is deemed to terminate on the last date of the claimant’s employment in the type of work causing injury. Simmons v. American Mutual Liability Ins. Co., 433 F.Supp. 747 (S.D. Ala. 1976).

ALASKA

"As Damages"

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

"Occurrence"

No pollution cases.

Pollution Exclusion

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

"Absolute" Pollution Exclusion

In Whittier Properties, Inc. v. Alaska National Ins. Co., 185 P.3d 840. (Alaska 2008), the Alaska Supreme Court held that gasoline that leaked from the insured's service station was clearly a "pollutant." Rejecting the insured's reliance on cases such as Kiger and Hocker Oil, the court held that the better-reasoned approach was to preclude coverage for gasoline and other products after they escape into the environment.

"Personal Injury" Claims

In Whittier, the court refused to find that claims by neighboring property owners triggered Coverage B, as such an analysis would render the APE meaningless.

Scope and Allocation Issues

"Horizontal exhaustion" rejected in Mapco Express, Inc. v. American International Specialty Lines Ins. Co., No. 3AN-95-8309 (Alaska Super. July 31, 1998).

Trigger of Coverage

"Exposure" theory adopted in Mapco.

ARIZONA

"As Damages"

No environmental cases.

"Occurrence"

No reported environmental cases.

Pollution Exclusion

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

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

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

"Absolute" Pollution Exclusion

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

Scope and Allocation Issues

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

"Suit"

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

Trigger of Coverage

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

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

ARKANSAS

"As Damages"

U.S. District Courts in Arkansas have ruled that Superfund clean up costs are not "damages." Maryland Cas. Co. v. Grisham (W.D. Ark. January 6, 1989) and Parker Solvents Co., Inc. v. Royal Ins. Companies, No. 89-2293 (W.D. Ark. July 2, 1990). These are very old cases, however, and do not reflect the trend over the past thirty years.

"Occurrence"

No reported environmental cases.

Pollution Exclusion

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

"Absolute" Pollution Exclusion

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

More recently, the Supreme Court ruled in State Auto Property & Cas. Inc. Co. v. The Arkansas DEQ, 258 S.W.3d 736 (Ark. 2007) that Minerva Enterprises was not wrongly decided and that it continues to believe that there was ambiguity with respect to the application of these exclusions, observing that since its rulings several insurers had amended the definition of "pollutant" to expressly include gasoline. The Supreme Court found, however, that the trial court should not have entered summary judgment against the insurer where State Auto had brought forward extrinsic evidence that resolved any ambiguity with respect to the application of these exclusions to gasoline claims. In this case, State Auto had brought forward an affidavit from an insurance agent to the effect that the insured had chosen not to pursue a pollution liability insurance policy that had been offered to it by another insurer because he had new underground tanks that probably would not leak and because the insured was paying a premium to the State Pollution Control Fund and would not need the coverage. Further, State Auto presented material safety data sheets for gasoline describing it as a pollutant or contaminant. In light of these facts, the case was remanded back to the trial court for a determination of whether gasoline was a pollutant or contaminant within the scope of the absolute pollution exclusion.

In Scottsdale Ins. Co v. Universal Crop Protection Alliance, 620 F.3d 926 (8th Cir. 2010), the Eight Circuit ruled that claims by dozens of Arkansas farmers that the insured's 2,4D herbicide damaged their crop production have held to arise out of the discharge of toxic particulate were subject to an absolute pollution exclusion in the product manufacturer's liability policy. Similarly, in Scottsdale Ins. Co. v. Morrow Land Valley Co. LLC, 2012 Ark. 247 (Ark. May 31, 2012), the Arkansas Supreme Court has ruled that an absolute pollution exclusion did not unambiguously apply to the discharge of odors, fumes and particulate from the insured's poultry processing plant, notwithstanding the insurer's argument that the insured in this case was a persistent "industrial polluter."

"Personal Injury" Claims

No reported environmental cases.

Scope and Allocation Issues

No reported environmental cases.

Trigger of Coverage

No reported environmental cases.

CALIFORNIA

“As Damages”

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

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

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

However, a narrowly-divided Supreme Court ruled in County of San Diego v. Ace Property & Cas. Ins. Co., 37 Cal.4th 577, 118 P.3d 589 (2005) that the language in umbrella policies did not extend to administrative clean up directives. In contrast to the Central National policies, the definition of “ultimate net loss” in the Ace policies only included “the sum or sums which the insured shall become legally obligated to pay in settlement or satisfaction of claims, suits or judgments, including all expenses from the investigation, negotiation and settlement of claims and shall include legal costs. Additionally, the court noted that the Ace policy contained a “no action” clause that limited the insurer’s indemnity obligation to sums owed as the result of a judgment unless the insurer otherwise consented.

In Aerojet-General Corp. v. Commercial Union Ins. Co., 155 Cal. App.4th 132, 65 Cal. Rptr. 3d 804 (3d Dist. 2007), the California Court of Appeal ruled that a \$175 million settlement that Aerojet entered into with various water entities to remediate groundwater contamination in the San Gabriel Valley did not result from a final adjudication of the insured’s liabilities, as required by the policy. Even though the settlement arose out of a pending law suit, the court ruled that the policies only covered settlements entered into with the insurers’ consent or damages resulting from a court judgment.

The Second District ruled in Ultra Salon, Cosmetics & Fragrance, Inc. v. Travelers Property Casualty Company of America, 197 Cal. App.4th 424 (2d Dist. 2011) that the civil penalties available for the insured's claimed violations of Proposition 65, the California Safe Drinking Water and Toxic Enforcement Act of 1986 for failing to give clear warnings about the dangers associated with its cosmetic products did not allow recovery of insured "damages." The Court of Appeals observed that Prop 65 penalties "do not grow out of a claim for moneys due and owing for personal harm or property damages that have resulted from discharge of pollutants or other toxic chemicals..."

"Occurrence"

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

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

A federal district court has ruled in AIU Ins. Co. v. McKesson Corp., No. 20-7469 (C.D. Cal. April 5, 2022) that various exemplar cases that sought recovery from a pharmaceutical company for increased costs due to the opioid epidemic failed to allege an "occurrence" under California law. The court was unpersuaded by the Delaware Supreme Court's recent Rite-Aid decision and found that the underlying claims potentially pleaded a claim for damages "for" or "because of" bodily injury. Nevertheless, Judge found that allegations in the underlying suits that McKesson aggressively and illegally marketed its opioid products set forth deliberate and intentional acts outside the meaning of "occurrence." Further, in keeping with the California Court of Appeal's 2017 ruling in Actavis and the state Supreme Court's subsequent ruling in Ledesma, the court declared that "[A]n accident . . . is never present when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage." Although these suits also contained negligence claims, the court observed

that in each instance the allegation of negligence was based on deliberate conduct and that coverage did not arise merely because of the title given to the heading of a cause of action.

Only weeks after a federal district court ruled in McKesson that opioid claims against a product manufacturer alleged only intentional acts for which coverage is barred by Section 533, the California Court of Appeal has now ruled in Certain Underwriters at Lloyd's London v. Conagra Grocery Products Company, A160548 (Cal. App., April 19, 2022) but the same applies to a lead paint manufacturer. In Conagra, the First District rejected Conagra's argument that Section 533 applies to willful acts of "the insured" and should therefore not apply to it as the corporate successor of the original insured W.P. Fuller and Company Paint Manufacturer and not Conagra itself. The Court of Appeal distinguished between instances of vicarious liability, where California courts have declined to give effect to Section 533, and situations involving mergers or corporate acquisitions, where the corporation is unnoticed that it is purchasing the liabilities of the acquired entity. The court therefore declined to accept Conagra's argument that the underlying rationale of Section 533 to deter willful misconduct should not be implicated unless the insured was personally at fault. The court also rejected Conagra's argument that the promotional efforts for which Fuller had been held liable were too attenuated to satisfy the court direct causal relationship" and "close temporal connection" between the willful act and the resulting injury required by Section 533. As had the court in McKesson, the Conagra court further ruled that the California Supreme Court's "occurrence" analysis in Ledesma did not require coverage here, inasmuch as the holding in Ledesma was based upon the employer's commission of an independent negligent conduct (negligent hiring) that did not exist here. The court also rejected Conagra's contention that Section 533 could only apply if it was established at Fuller's management had the required knowledge and expectation of damage. Rather, the court ruled that "the underlying litigation established that Fuller – the corporate entity – had actual knowledge of the harms associated with lead paint when it promoted lead paint for interior residential use. We have already concluded that this actual knowledge finding necessarily means Fuller acted with knowledge that lead paint was "substantially certain" or "highly likely" to resolve in the hazard found to exist in the underlying litigation and, therefore, established the willful act to trigger Section 533 prohibition against insurance coverage.

Pollution Exclusion

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

In a case where the State of California was liable for failing to maintain the integrity of a hazardous waste facility rather than for putting wastes into the facility, the California Supreme Court has ruled that the relevant “release” for the purpose of determining whether the causes of pollution were subject to the “sudden and accidental” exception to the pollution exclusion, was the release *from* the Stringfellow Acid Pits, not the placement of wastes into the pits. The Supreme Court declared in State of California v. Allstate Ins. Co., 201 P.3d 1147 (Cal. 2009) that “the initial deposit of wastes was not a polluting event subject to the policy exclusion (*i.e.*, a “discharge, dispersal, release or escape” of pollutants) and, even if it were, the State’s liability was based not on the initial deposit, but instead on the subsequent escape of chemicals from the Stringfellow ponds into the surrounding soils and groundwater, making that the relevant set of polluting events.”

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

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

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

Regulatory estoppel arguments were rejected by the Court of Appeal in State of California v. Underwriters at Lloyd’s, 2006 Cal. App. LEXIS 2062 (4th Dist. 2006), as modified, 2007 Cal. App. LEXIS 100 (4th Dist. January 25, 2007). Apart from the elements of estoppel that needed to be pleaded, the California Supreme Court distinguished cases such as Morton on the grounds that the State of California had presented no comparable evidence that the insurance industry made representations to California regulators concerning the scope of the “sudden and accidental” exception. Further, the Court of

Appeal took note of evidence presented by the insurers that California regulators had not relied on any such representations. . Further, despite prior California case law that had cited drafting history, the court found that these cases only permitted such history in interpreting an insurance policy and did not support a claim of estoppel. In any event, the court found that this evidence was “inconclusive at best.”

Some controversy persists as to whether "sudden" applies solely to the onset of pollution or also to its duration. The earliest case on this issue, Shell, declared that courts should look to the overall duration of pollution. See also, Service Control, supra (“the duration of the discharge must be considered in addition to the abruptness of its inception in order to prevent the exception from being rendered meaningless”). However, some courts have suggested that it is solely the point of commencement that is crucial. See e.g. Vann v. Travelers Ins. Co., 39 Cal. App. 4th 1610, 46 Cal. Rptr.2d 617 (1st Dist. 1995).

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

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

This analysis was rejected by the Supreme Court in State of California v. Allstate Ins. Co., 201 P.3d 1147 (Cal. 2009). However, the Supreme Court agreed with the Court of Appeal that the State’s inability to differentiate between clean up costs attributable to “sudden and accidental” releases and excluded releases did not preclude its rights to coverage. The Supreme Court disapproved Golden Eagle “insofar as it holds an insured must not only show a covered cause contributed substantially to the damages for which the insured was held liable, but must also show *how much* of an indivisible amount of damages resulted from covered causes.” The court emphasized that the State had shown that

substantial harm had resulted from the “sudden and accidental” spill, declaring that “[O]ur holding does not extend indemnity to situations where the policyholder can do no more than speculate that some polluting events may have occurred suddenly and accidentally, or where sudden and accidental events have contributed only trivially to the property damage from pollution.” Cases have properly held against indemnity where the insured can make only ‘unsubstantiated claims of sudden and accidental discharges in the face of repeated, continuous discharges in the course of business’.”

"Absolute" Pollution Exclusion

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

Despite MacKinnon, recent opinions have not limited the scope of the exclusion to clean up claims. In Garamendi v. Golden Eagle Ins. Co., 127 Cal. App.4th 480 (1st Dist. 2005), review denied, 2005 Cal. LEXIS 6676 (2005), the Court of Appeal upheld the application of the exclusion to claims that workers were exposed to silica particles due to defective respiratory apparatus manufactured by the insured. See also Ortega Rock Quarry v. Golden Eagle Ins. Corp., E037906 (Cal. App. July 27, 2006)(soil run off) and Lewis v. Hartford Casualty Ins. Co., (N.D. Cal. January 31, 2006)(“the discharge, or potential discharge, of perchloroethylene resulting in soil and groundwater pollution at or from plaintiff’s dry cleaning operation constitutes pollution commonly thought of as environmental pollution precluding insurance coverage under the pollution exclusion clause in light of the California Supreme Court’s analysis of similar exclusions in MacKinnon”); Cold Creek Compost, Inc. v. State Farm Fire & Casualty Co., 156 Cal. App. 1429 (1st Dist. 2007)(neighbors’ nuisance claims due to exposure to offensive odors, dust and noise from the insured’s composting operations are subject to an absolute pollution exclusion) and American Cas. Co. of Reading, PA v. Miller, 159 Cal. App.4th 501 (2d Dist. 2008)(injuries suffered by a sewer worker when he became exposed to methylene chloride that furniture stripping business had released into the sewer where he was working were subject to an absolute pollution exclusion).

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

Where an absolute pollution exclusion contained an exception reinstating coverage for pollution losses that are reported to the insurer within 60 days of the inception of the release of pollutants, the Second District has ruled that the time limitation is not subject to the notice/prejudice rule or against public policy. In upholding a lower court's ruling that Gulf did have a duty to defend claims arising out of the Beverly Hills High School pollution, the Court of Appeal also ruled in Venoco, Inc. v. Gulf Ins. Co. of America, 2009 WL 1875640 (2d Dist. July 1, 2009) that allegations that the insured failed to warn the public about pollution risks were subject to the exclusion since the failure to warn claim was "interwoven with and directly related" to the toxic pollution claim.

"Personal Injury" Claims

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

Scope and Allocation Issues

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

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

that the "all sums" language in the insuring agreement would also compel the Year 1 insurer to pay its entire policy limit for any resulting judgment if any part of the damages are attributable to Year 1 damage.

The Supreme Court cited with approval three earlier allocation rulings of the Court of Appeals. In County of San Bernardino v. Pacific Indemnity Co., 56 Cal. App. 4th 666 (4th Dist. 1997), review denied (Cal. 1997) the Court of Appeal had ruled that a polluter who failed to purchase coverage after 1973 had no obligation to contribute to the defense of underlying trespass suits that alleged injuries both before and during the period that it had chosen to go bare. The court ruled that self-insurance does not involve any transfer risk and cannot therefore be considered as "insurance." The Supreme Court agreed in Aerojet, describing "self-insurance" as a misnomer.

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

Subsequently, the Supreme Court ruled in The State of California v. Continental Ins. Co., 281 P.3d 1000 (Cal. 2012) that the Court of Appeal did not err in holding that successive liability insurance policies could be stacked to satisfy the State's legal obligations with respect to the cleanup of the infamous Stringfellow Acid Pits Superfund site. In so holding, the court ruled that the continuous trigger of coverage that it had adopted in Montrose in 1995 should be combined with the "all sums" analysis that it adopted in Aerojet in 1997 to create an "all sums with stacking" allocation rule.

The California Supreme Court has adopted a "vertical exhaustion" rule for insureds seeking excess coverage for "long-tail" losses. In Montrose Chemical Corp. v. Superior Court, 9 Cal.5th 215, 460 P.3d 1201 (2020), the Supreme Court ruled that the Court of Appeal had erred in holding that an insured must exhaust all available insurance in underlying layers before claiming coverage in a higher excess layer. Instead, the court declared that "Reading the insurance policy language in light of background principles of insurance law, and considering the reasonable expectations of the parties, we agree with Montrose: It is entitled to access otherwise available coverage under any excess policy once it has exhausted directly underlying excess policies for the same policy period." The court ruled, however, that any excess insurers who are triggered on this "vertical" basis could pursue claims for equitable contribution against unexhausted insurers that provided lower layer insurance in other years.

The Court of Appeal ruled in Montrose Chemical Corp. v. Superior Court, B272387 (Cal. App. Aug. 31, 2017) that an insurer may not "electively stack" its environmental liability losses to access excess insurance in any year where it has exhausted all of the underlying policies but still has low layer excess coverage available to it in other years.

The Second District rejected Montrose's claim that "elective stacking" was dictated by the California Supreme Court's Continental opinion, declaring that the issue in this case was "not whether an insured can access policies written for different policy years (it can) but the order or sequence in which it may or must do so." Unlike the Superior Court, however, the Court of Appeals declined to adopt "horizontal exhaustion" as a general principle. As the 113 excess policies at issue had various different types of relevant provisions, the court declared that "the sequence in which policies may be accessed must be decided on a policy-by-policy basis, taking into account the relevant provisions of each policy."

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

The Court of Appeal also ruled in OneBeacon America Ins. Co. v. Fireman's Fund Ins. Co., 175 Cal.App.4th 183, 95 Cal.Rptr.3d 808 (2d Dist. 2009) that OneBeacon was entitled to contribution from two other insurers for the defense of an environmental contamination claim between 1999 and 2002 notwithstanding the defendant insurers' contention that they did not receive notice of the claim until 2002 and should not be obligated to pay for "pre-tender" fees. In a lengthy opinion, the Second District declared that the defendant insurers had early notice of the claim and would have discovered their potential exposure in 1999 had they made a diligent inquiry at the time. The court ruled that even though tender ordinarily arises after receipt of an actual tender of defense, a more lenient "constructive notice" standard should apply for equitable contribution disputes between insurers.

At least one California court has ruled that where insurers are required to reimburse another insurer for equitable contribution claims for defense costs, each insurer's share should be calculated on a time on the risk basis. MGA Entertainment, Inc. v. Hartford Ins. Group, No. 08-0457 (C.D. Cal. February 24, 2012).

"Suit"

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

Taking a step back from its 1998 opinion in Foster-Gardner, the California Supreme Court ruled in Ameron Int'd Corp v. Ins. Co. of the State of PA, 50 Cal.4th 1370, 242 P.3d 1020 (2010) that a federal administrative adjudicative proceeding that went on for twenty days was a "suit" for purposes of an insurer's duty to defend. The court contrasted these proceedings—which were commenced with a written complaint and involved the presentation of sworn testimony and evidence before a fact finder with the authority to award money damages—with the Regional Water Quality Control Board order in Foster Gardner, which the court characterized as a mere threat to take legal action. Under the circumstances, the court found that a reasonable insured would, in the absence of a contrary policy definition, assume that such proceedings fell within the insurer's promise to defend "suits." Justice Kennard, who was one of the three dissenters in Foster-Gardner, expressed her view that the better approach would be to overrule Foster-Gardner altogether but that, failing that, this new opinion was at least a "step in the right direction."

In CDM Investors v. American National Fire Ins. Co., 5 Cal.3d 466, 112 Cal.App.4th 791 (2003), the Sixth District of the California Court of Appeal refused to find that post-1986 CGL policies, which defined "suit" as including "civil proceedings" implied an intent to expand the scope of coverage. The court also refused to find that the duty to defend was triggered by affirmative defenses that tenants had raised in opposition to the insured landlord's indemnification action since these defenses, wherein the defendants asked that any liability be apportioned according to the parties' respective degrees of fault, did not set forth a stand-alone claim for damages.

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

The Court of Appeal ruled in Clarendon Nat'l Ins. Co. v. StarNet, Cal. App. 4th 1397 (4th Dist. 2010) that the obligation of liability insurers to defend "suits" extends to pre-suits proceedings under the "Calderon Act" that must be undertaken in California before a contractor can be sued for construction defects by a common interest development association. The Fourth District held that even though these proceedings occur before a suit is filed and cannot, by definition, result in an award of damages, they are an integral part of the litigation process. The court distinguished Foster Gardner, as the policies in that

case did not define “suit,” whereas StarNet’s policy defined “suit” as a “civil proceeding,” which the court concluded should include the pre-suit Calderon Process.

Trigger of Coverage

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

The Supreme Court initially ruled in 2003 in Henkel v. Hartford that an insured could not assign long-tail liabilities but reversed itself in Fluor Corp. v. Superior Court, S205889 (Cal. Aug. 20, 2015) based on a statute that the California legislature had passed an act in 1872 declaring that, “An agreement not to transfer the claim of the insured against the insurer after a loss has happened, is void if made before the loss.” The Supreme Court rejected the Court of Appeal’s conclusion that the legislature had not intended for Section 520 to apply to liability claims, declaring instead that even though “liability insurance” did not exist as a concept when the predecessor to Section 520 was first adopted in 1872, it certain did by the time this provision was reauthorized by the California Legislature in 1935 and codified as Section 520 in 1947. Additionally, the court pointed to the fact that Section 520 exempts life and disability insurance but makes no reference to liability insurance, thus suggesting a general intent to extend Section 520 to most types of insurance unless specifically accepted.

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

More recently, the Ninth Circuit has taken a different view, ruling that the state appellate court ignored settled principles of contract interpretation by inferring the requirement of a factual nexus between the insured and the damaged property. K.F. Dairies, Inc. v. Fireman’s Fund Ins. Co., 224 F.3d 922 (9th Cir. 2000). Notwithstanding K.F. Dairies, the First Appellate District has declared in Tosco Corp. v. General Ins. Co. of America, 85 Cal. App. 4th 1016 (2000) that a polluter is not entitled to liability coverage for claims involving sites with respect to liabilities arising from property that the insured did not own during the policy period.

The Court of Appeal has also ruled that an insurer may still owe coverage, even if the plaintiff did not exist at the time. Thus, even though the plaintiff condominium owners’ association was not formed until after the water intrusion and mold infiltration that formed the basis for its construction defect claim against the property developer, the Fourth

Appellate District has ruled that the plaintiff suffered property damage during the policy period so as to trigger coverage under the policy of insurance that Standard Fire issued to the property developer. In Standard Fire Ins. Co. v. The Spectrum Community Association, 141 Cal. App.4th 1117, 46 Cal. Rptr.3d 804 (4th Dist. 2006), review denied (Cal. October 18, 2006), the court dismissed the insurer's argument that an entity that does not yet exist cannot have suffered damage, holding that what is relevant is the date that the property damage occurs whether or not the complaining party actually existed at the time or not. The court distinguished cases such as A.C. Label.

COLORADO

"As Damages"

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

"Occurrence"

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

Pollution Exclusion

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

The Supreme Court held in Cotter Corp. v. American Empire Surplus Lines Ins. Co., 900 P.3d 814 (Colo. 2004) that a lower court had erred in focusing on whether the seepage of yellowcake and other mining wastes from unlined tailing ponds was expected. Rather, the court declared that the exclusion only applies if the insured expected or intended that wastes would migrate off its property. The court found that unlined ponds and pits had at the time been believed to serve a useful environmental “filtering” function and should therefore not be treated as a relevant “polluting event.”

"Absolute" Pollution Exclusion

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

The Tenth Circuit ruled in New Salida Ditch Co. v. United Fire & Cas. Ins. Co., 2009 WL 5126498 (D. Colo. December 18, 2009) aff’d No. 10-1010 (10th Cir. October 28, 2010) that the exclusion applied to claims brought against an irrigation ditch company for introducing fill material below the high water line of the Arkansas River while performing repairs on an irrigation ditch. Judge Kane had held that the fill material was plainly a “solid.” Consulting the *Oxford English Dictionary*, he further found that the fill material had introduced impure materials into the River and was therefore acting as a “contaminant.” The court rejected the insured’s argument that even though fill material might sometimes be a contaminant or a pollutant, the exclusion was only meant to apply to substances that under every circumstance must be so treated. The court declined to find that the failure to reference “fill material” in the definition of pollutant required a finding that the exclusion did not apply or was otherwise ambiguous.

"Personal Injury" Claims

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

Scope and Allocation Issues

Colorado Supreme Court ruled in Public Service Company of Colorado v. Wallis, 986 P.2d 924 (Colo. 1999) that the Court of Appeals erred in allowing insured to "pick and choose" the policy that it wanted to obtain coverage under. Instead, the court ruled that the insured’s loss should be pro-rated among the years of injury, taking into account both the insurers’ “time on the risk” and any risk assumed by the insured. In light of the SIR

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component of the coverage, the insured must pay a single SIR per site for each year. However, the insurers will not be entitled to a credit for settlement payments.

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

A right to recoup defense costs was recently recognized by the Tenth Circuit. See Valley Forge Ins. Co. v. Health Care Management Partners, Ltd., 616 F.3d 1086 (10th Cir. 2010)(insurers that defended Medicare fraud claims allowed to recoup 100% of their defense costs in Colorado case).

"Suit"

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

Trigger of Coverage

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

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

In Scott's Liquid Gold Inc. v. Lexington Ins. Co., 97 F.Supp.2d 1226 (D. Colo. 2000), aff'd in part, rev'd in part, 293 F.3d 1180 (10th Cir. 2002), the Tenth Circuit affirmed a lower court's ruling that pollution from the insured's wood treatment plant had resulted in third party contamination during part of Lexington's policy period. The court focused on the fact that an “accident” requires concomitant injury whereas an “occurrence” or “event” can exist

without some form of damage. Reviewing the evidence considered by the District Court, the Tenth Circuit concluded that here contamination of the soil and groundwater had occurred during 1980 regardless of when the TCA plume crossed the Army property. As there was evidence of groundwater contamination beneath Scott's facility prior to 1980 and as the insured had offered expert testimony that the plume would have reached the Army property prior to the expiration of Lexington's policy, it was more likely than not that the contamination had occurred to the plaintiffs during the policy period. As Lexington had not presented contrary evidence, the Tenth Circuit concluded that summary judgment had properly entered for the insured on this issue.

CONNECTICUT

"As Damages"

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

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

"Occurrence"

No environmental coverage cases.

Pollution Exclusion

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

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

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

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

In late 2019, the Connecticut Supreme Court also affirmed an intermediate appellate court's adoption of "unavailability," albeit with little or no analysis. In a surprisingly incomplete opinion, the Connecticut Supreme Court has ruled in R.T. Vanderbilt Company v. Hartford Accident and Indemnity Company, 216 A.3d 629 (Conn. 2019) that the Court of Appeals did not err in adopting a "continuous trigger" for his asbestos/talc bodily injury claims or in declaring that the insured was not required to pay a "pro rata" share of defense costs or indemnity for years after 1993 when it could not purchase insurance for asbestos claims. The Supreme Court declared, without any analysis, that it agreed with the intermediate court's analysis. As a result, the court's opinion was solely devoted to the issue of whether the Court of Appeals had erred in declaring that there was no coverage for these under certain policies containing an "occupational disease" exclusion.

"Absolute" Pollution Exclusion

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

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

In its most recent opinion on the subject, the Supreme Court refused to give effect to the exclusion for smoke inhalation injuries suffered by a child when her mentally deranged father burned down the house. In Allstate Ins. Co. v. Barron, 848 A.2d 1165 (Conn. 2004), the court ruled that deaths from smoke inhalation were not subject to the pollution exclusion in Allstate's policy.

"Personal Injury" Claims

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

excluded. Further, the court found that “personal injury” provisions were intended to provide coverage for “purposeful acts undertaken by the insured.”

Scope and Allocation Issues

The Connecticut Supreme Court adopted a “pro rata” approach to long tail claims in Security Ins. Co. of Hartford v. Lumbermen’s Mutual Cas. Co., 826 A.2d 107 (Conn. 2003). Presented with the choice between joint and several liability on the one hand (Keene v. INA) and pro rata liability on the other (INA v. Forty-Eight Insulations), the court concluded that it would follow the approach of the Sixth Circuit in INA v. Forty-Eight Insulations and the New Jersey Supreme Court in Owens-Illinois. It specifically ruled that the pro rata method of allocation did not violate the reasonable expectations of coverage of the insured as “neither the insurers nor the insured could reasonably have expected that the insurers would be liable for the losses occurring in periods outside of their respective policy coverage periods.” The court ruled that the language in question was not ambiguous nor would it agree to “torture the insurance policy language in order to provide ACMAT with uninterrupted insurance coverage where there was none.” As regards the insured’s specific arguments, the court ruled that (1) its “pro rata” approach was not in conflict with rules governing the duty to defend; (2) insurers were entitled to assert claims for equitable contribution against policyholders where the insured had failed to purchase insurance or could not locate its policies; (3) a time on the risk approach was appropriate to allocating defense costs in cases involving missing policies; and (4) there was no distinction with respect to the issue of allocation between cases in which the insurer had chosen to forego insurance or cases where the insured had merely lost or destroyed policies that it had originally purchased.

In a case now pending before the Connecticut Supreme Court, the state Court of Appeals ruled in R.T. Vanderbilt Companies Co. Inc. v. Hartford Accident and Indemnity Company, AC36749 (Conn. App. Ct. Mar. 7, 2017) that a policyholder is not responsible for paying defense costs in asbestos cases allocable to years when coverage for such claims was unavailable owing to mandatory asbestos exclusions. The court also declined to adopt an equitable exception for the “unavailability” rule in cases such as this where the insured had continued to manufacture asbestos products even after it became uninsurable.

"Suit"

A PRP letter was adjudged to be a “suit” in R.T. Vanderbilt Co. v. Continental Casualty Co., 870 A.2d 1048 (Conn. 2005).

Trigger of Coverage

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

DELAWARE

"As Damages"

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

In a significant win for liability insurers, the Delaware Supreme Court ruled last week in Ace American Insurance Company v. Rite Aid Corp., 270 A.3d 239 (Del. Jan. 10, 2022), that suits by two Ohio counties seeking to recover opioid-related economic damages did not seek damages "for" or "because of" bodily injury. In reversing a lower court's declaration that Ace American had a duty to defend, the Supreme Court ruled that the governmental entities were only seeking their own economic damages and had expressly disclaimed any suggestion that they were seeking to recover damages for personal injuries or any specific treatment damages. The court rejected the Seventh Circuits' analysis of the same issue under Illinois law in H.D. Smith and instead adopted the recently expressed view of a Federal District Court in Kentucky in Richie Enterprises. Instead of H.D. Smith, the Delaware Supreme Court found on the Seventh Circuit's earlier opinion in Medmarc, in which the Seventh Circuit ruled that parents who sought economic injury for the cost of purchasing defective baby products had made a strategic decision to sue only for economic damages and did not claim any bodily injury and, therefore, were not entitled to coverage for their claims. The Court ruled that an objective reasonable third party would have understood at the time that this policy was issued, that it only covered damages suffered by a personal organization for care or death resulting from personal injury damages, providing care to an injured individual. Writing in dissent, Justice Vaughn declared that there were sufficient allegations in the underlying complaint, with respect to the willingness of the counties to provide treatment to trigger a duty to defend.

"Occurrence"

In New Castle County v. Hartford Acc. & Ind. Co., 933 F.2d 1162 (3d Cir. 1991), the Third Circuit held that contamination migrating from the insured's landfill was an "occurrence" and was not intended or "substantially foreseeable" from the standpoint of the insured operator in light of the limited knowledge that existed concerning groundwater problems and pollution before the 1970s. Judge Steele ruled in E.I. DuPont v. Admiral Ins. Morrison Mahoney LLP (Copyright 2022).

Co., 1996 Del. Super. LEXIS 48 (Del. Super. February 22, 1996) that DuPont has the burden of proving by a preponderance of the evidence that it was not reasonably foreseeable to its employees at the time that pollution would result from their intentional dumping of chemical wastes. The court declined to adopt the insurer's proposed "substantial probability" standard or DuPont's suggested "substantial certainty" test.

Pollution Exclusion

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

"Absolute" Pollution Exclusion

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

"Personal Injury" Claims

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

Scope and Allocation Issues

The Delaware Supreme Court adopted an "all sums" approach to allocation issues in Hercules, Inc. v. AIU Ins. Co., 784 A.2d 481 (Del. 2001). As with Monsanto Co. v. C.E. Heath, 652 A.2d 30 (Del. 1994)(Missouri law), the court ruled that equitable considerations

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precluded pro-ration even in the absence of “all sums” language. In particular, the court found that it was not inequitable to preclude allocation merely because the insured had obtained the benefit of a continuous trigger ruling since the insured has not obtained additional insurance coverage as a result.

The Delaware Supreme Court ruled in Stonewall Ins. Co. v. E.I. Du Pont De Nemours & Co., 996 A.2d 1254 (Del. 2010) that Du Pont was only required to contribute a single \$50 million SIR for claims involved alleged defects in polybutylene plumbing systems. The court rejected Stonewall’s contention that the underlying claims had two separate and independent causes namely chemical degradation and the product’s inability to resist mechanical stresses. “Whether the failure resulted from the product’s susceptibility to chemical degradation from the inside of the pipe or from its inability to withstand mechanical stress from the outside, or both, the product itself was the source of the leaking polybutylene systems and the resulting property damage.” Turning to the non-cumulation clause in Stonewall’s policy, the court rejected Du Pont’s claims of ambiguity and ruled that the clause clearly was intended to reduce the available limits by the total amounts paid or due to the insured from earlier excess carriers. However, the court rejected Stonewall’s contention that the word “loss” in this clause referred to the entire loss at issue and not merely those claims involving this policy. The court distinguished those claims that might involve multiple years of damage as opposed to those attributable to only a single year. The court also pointed out that Delaware follows an “all sums” approach wherein the insured is restricted to a single tower of coverage allowing those carriers to seek contribution from insurers in other years. The court ruled that in light of the “in whole or in part” language in the non-cumulation clause, amounts payable to Du Pont that covered the entire loss would reduce Stonewall’s liability but where the amounts paid by prior excess carriers only cover part of the loss than Stonewall’s coverage applies to the remaining portion.

"Suit"

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

Trigger of Coverage

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

In Viking Pump, Inc. v. Century Indemnity Co., 2009 Del. Ch. LEXIS 180 (Del. Ct. Ch. October 14, 2009), the Delaware Chancery Court permitted a successor company to claim coverage for asbestos liabilities arising out of the predecessor’s manufacturing operations. The court ruled that the anti-assignment clauses in the predecessor’s policy

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did not bar assignment of the policies. The court ruled that pursuant to New York law, anti-assignment clauses do not bar the transfer of post-loss claims or claims for losses that have already happened.

In a major victory for Travelers, the Delaware Supreme Court ruled in The Travelers Ind. Co. v. CNH Industrial America, Inc., No. 420, 2017 (Del. July 16, 2018) erred in applying Wisconsin law to the issue of whether the original insured's rights could be validly assigned to a successor entity without the insurer's consent. The policies in question had been assigned to CNH by the insured's parent corporation (Tenneco) as part of a 1994 corporate reorganization. In light of its 2017 holding in Chemtura that policies insuring risks around the country should be interpreted in accordance with Section 188 of the Restatement (Second), Conflicts of Law with an emphasis on consistency and predictability, the Delaware Supreme Court ruled that Texas law should have applied as being the state with the most significant relationship to the policies, as they had been negotiated and procured through Tenneco's offices in Texas. As Texas law does not permit unconsented-to assignments, the Supreme Court set aside a \$17.3 million judgment that the trial court had entered against Travelers for CNH's inherited asbestos liabilities.

FLORIDA

"As Damages"

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

"Occurrence"

No pollution cases.

Pollution Exclusion

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

"Absolute" Pollution Exclusion

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

Such exclusions were also upheld in Auto Owners Ins. Co. v. City of Tampa Housing Authority, 231 F.3d 1298 (11th Cir. 2000)(lead paint poisoning); Technical Coating Applicators, Inc. v. USF&G, 157 F.3d 843 (11th Cir. 1998)(sick building caused by *Morrison Mahoney LLP (Copyright 2022)*).

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

"Personal Injury" Claims

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

Scope and Allocation Issues

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

"Suit"

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

Trigger of Coverage

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

GEORGIA

"As Damages"

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

"Occurrence"

No reported cases.

Pollution Exclusion

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

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

"Absolute" Pollution Exclusion

The Georgia Supreme Court has ruled that an absolute pollution exclusion precludes coverage for carbon monoxide poisoning claims against a landlord. In Reed v. Auto-Owners Ins. Co., 667 S.E.2d 90 (Ga. 2008), the court declared that carbon monoxide is clearly a toxic fume within the exclusion's definition of a "pollutant." The court held that dissenting judges in the Court of Appeals who had attempted to limit the scope of the exclusion based upon its perceived purpose had improperly looked outside the actual wording of the exclusion to find ambiguity. Justices Hunstein and Carley argued in dissent that words in an insurance policy should not be given a literal meaning that would lead to absurd results.

In keeping with the Georgia Supreme Court's 2008 opinion in Reed, the Eleventh Circuit ruled in Scottsdale Ins. Co. v. Pursley, No. 11-12808 (11th Cir. August 20, 2012) (unpublished) that carbon monoxide poisoning suffered by a boat owner due to the insured

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contractor's failure to cover exhaust vents while making repairs on the boat was excluded as involving injuries that would not have occurred in whole or in part but for a discharge of pollutants.

The exclusion was also upheld by the state Court of Appeals in Truitt Oil & Gas Co. v. Ranger Ins. Co., 498 S.E.2d 572 (Ga. App. Ct. 1998), the Court of Appeals held that the absolute pollution exclusion precludes coverage for the cost of cleaning up gasoline and oil that leaked out of the insured's underground tanks. The Court of Appeals ruled that gasoline was clearly a "liquid or gaseous contaminant" within the exclusion's definition of "pollutant." Similarly, smoke from a wood fire that caused car crash held to be a "pollutant" in Perkins Hardwood Lumber Co. v. Bituminous Cas. Corp., 378 S.E.2d 407 (Ga. App. Ct. 1989). See also American States Ins. Co. v. Zippro, 445 S.E.2d 133 (Ge. App. 1995)(asbestos fibers that were released by contractor's improper sanding of flooring tiles deemed excluded). A federal district court ruled in North Georgia Petroleum Co. v. Federated Mutual Ins. Co., 68 F.Supp.2d 1321 (N.D. Ga. 1999) that such exclusions are not against public policy. The court refused to distinguish Zippro on the basis that this claim involved a "completed operation." the court declined to find that there was an ambiguity in the policy with respect to the insurance for completed operations and the application of the exclusion.

On the other hand, the Georgia Court of Appeals ruled in Barrett v. National Union Fire Ins. Co. of Pittsburgh, 696 S.E.2d 326 (Ga. App. 2010) that such exclusions did not preclude coverage for claims against a gas utility by the estate of a contractor who was seriously injured as the result of an explosion that occurred while he was attempting to repair a pipeline leak. The court found that giving effect to an exclusion that vitiated claims involving the insured's main product would be against public policy. Furthermore, regardless of whether natural gas was deemed to be a pollutant for purposes of this exclusion, the court found questions of fact with respect to whether Barrett's injuries arose out of the discharge, dispersal, release or escape of natural gas. In this case, the court found that the underlying allegations did not clearly establish whether Barrett would not have suffered brain injuries but for the release of natural gas and that the actual cause of his injuries may have been the failure of Atlanta Gas employees to properly monitor oxygen levels in the excavation ditch or to have required the use of respirators or other safety devices.

Most recently, however, the Supreme Court reaffirmed its 2009 Auto Owners analysis, ruling in Georgia Farm Bureau Mutual Ins. Co. v. Smith, S15G1177 (Ga. Mar. 21, 2016) that lead poisoning claims were excluded. The court traced the evolution of this exclusion, noting that the insurance industry had successively broadened its scope of the years, eliminating limitations to environmental claims and eliminating the word "toxic" before the word "chemicals." While acknowledging the split of opinion around the country with respect to whether the exclusion should be restricted to "traditional environmental pollution" the court ruled that any such limitation was contrary to Georgia law and that the lead present in paint qualifies as a "pollutant."

"Personal Injury" Claims

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

"Suit"

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

Trigger of Coverage

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

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

The Florida District Court of Appeal, applying Georgia law, ruled in Hardaway Co. v. USF&G, 724 So.2d 588 (Fla. App. 1998) that damage arising out of a ruptured pipeline was triggered as of the date that the pipeline exploded, not early periods of time when the insured contractors may have been negligent in its construction or maintenance. The court rejected the insured's reliance on Eljer (installation trigger).

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

--Scope and Allocation Issues

The Vermont Supreme Court has ruled that a trial court did not err in applying Vermont law with respect to allocation issues concerning asbestos liability claims against a Georgia company. In light of the fact that Georgia courts had yet to adopt a

clear allocation rule, the court ruled in In Re Ambassador Insurance Company, 2022 VT 11 (Vt. Mar. 4 2022) that it was not necessary to effect a choice of law between Georgia and Vermont (where Ambassador is being liquidated). Notwithstanding some lower court opinions that had suggested that Georgia might follow an “all sums” rule, the court instead applied Vermont law and ruled that “time on the risk” would rule.

HAWAII

Pollution Exclusion

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

Absolute Pollution Exclusions

The Hawaii Supreme Court is presently considering a certified question from the Ninth Circuit in Apana v. TIG Ins. Co., No. 08-15639 (9th Cir. July 14, 2009), asking the court to answer "whether a total pollution exclusion provision in a standard commercial general liability insurance policy apply to localized uses of toxic substances in the ordinary course of business, or is it limited to situations that a reasonable layperson would consider traditional environmental pollution." In Apana v. TIG Insurance Co., 2007 U.S. Dist. LEXIS 60319 (D. Haw. August 16, 2007), a federal district court ruled that the exclusion precluded coverage for claims brought against a plumber by a homeowner who was exposed to fumes from chemicals that the insured was using to unclog a drain.

Similar claims were held not to be excluded in Allstate Ins. Co. v. Leong, 2010 U.S. Dist. LEXIS 46277 (D. Haw. May 11, 2010) on the grounds that the plaintiff's loss was caused by pressure from the content of the effluent and not its "hazardous or dangerous nature," the court ruled that the exclusion did not apply. The court also ruled that the exclusion was ambiguous because "it is unclear whether the overflow/leak from the sewage pipe constitutes" waste materials.

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

Trigger of Coverage

In Del Monte Fresh Produce v. Fireman's Fund Ins. Co., 183 P.3d 374 (Haw. 2007), the Hawaii Supreme Court adopted the California Supreme Court's Henkel analysis and refused to find that coverage arose "by operation of law." The court held that this analysis of the rights and obligations of parties under policies was consistent with Hawaii statutes which state that, "A policy may be assignable or not assignable, as provided by its terms." In this case, the court ruled that any purported assignment by contract because Del Monte Corporation did not obtain its insurers' consent.

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

IDAHO

"As Damages"

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

"Occurrence"

No reported environmental cases,

Pollution Exclusion

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

Absolute Pollution Exclusion

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

"Personal Injury" Claims

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

"Suit"

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

Trigger of Coverage

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

ILLINOIS

"As Damages"

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

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

"Occurrence"

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

Pollution Exclusion

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

The Appellate Court ruled that a trial court did not err in declaring that Travelers owed coverage for Superfund contribution claims arising out of environmental contamination claims at two facilities where the insured had cleaned its chemical delivery
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trucks over the years. Even though the insured had intentionally discharged waste materials, the court ruled in Rogers Cartage Co. v. Travelers Ind. Co., 2018 IL App (5th) 160098 (Ill App. April 5, 2018) that Travelers' refusal to make a further counter-offer after the underlying claimants asserted that discharges were accidental because the insured had placed chemical wastes into so-called containment ponds and had not expected or intended that they would be released into the environment.

"Absolute" Pollution Exclusion

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

The Second Division ruled in Pekin Ins. Co. v. Pharmasyn, Inc., 2011 Ill. App. (2d) 101000 (Ill. App. October 19, 2011) that an absolute pollution exclusion applied to claims brought by individuals who suffered injuries after become exposed to fumes emitted from a chemical manufacturing facility. Further, whereas the trial court had declared that underlying allegations that fumes had escaped from open containers into the environment satisfied the Illinois Supreme Court's Koloms standard that such losses involve "traditional environmental pollution," the Appellate Court held that such claims were in the nature of a red herring. The issue was not whether the dispersal of fumes constituted "traditional environmental pollution" but rather whether the "dispersion of pollutant fumes that caused injury to others at or from the premises was the type of accident specifically excluded by the insurance policy purchased by Pharmasyn."

In Scottsdale Ind. Co. v. Village of Crestwood, 673 F.3d 715 (7th Cir. 2012), the Seventh Circuit affirmed an Illinois court's declaration that allegations that the insured allowed a well contaminated with perchloroethylene to be used as a public water supply were excluded as arising out of the "dispersal" of a "contaminant." In an effort to rationalize state and federal case law interpreting the absolute pollution exclusion in Illinois, Judge Posner noted that rather than considering "traditional environmental pollution," a more appropriate formula would be "pollution harms as ordinarily understood." Reviewing the history of the exclusion and the perceived purpose of the insurance industry in adopting it, the Seventh Circuit declared that in this case the exclusion applied even though the Village was not responsible for the original contamination of the well. The court rejected the Village's suggestion that such exclusions should not apply to "core business activities"

which the court rejected as suggesting that “this amounts to saying that there would be no adverse-selection problem because the risk of pollution liability would be obvious to the insurer, allowing the separation of high-risk and low-risk insureds. . . .”

Similarly in Village of Crestwood v. Ironshore Specialty Ins. Co., 2012 IL App 120112 (5th Div. February 22, 2013), the Appellate Court ruled that the Illinois Supreme Court’s opinion in Koloms and subsequent opinions analyzing the application of Koloms to such exclusions “make clear that the Village’s knowing contamination of the Crestwood water supply with chemical-laden groundwater and subsequent distribution of that contaminated combination to the community is a textbook example of “traditional environmental pollution.” Further, while conceding that such exclusions may have been drafted in response to insurer concerns about the scope of liability under environmental statutes such as CERCLA, the Appellate Division refused to limit the exclusion’s effect to statutory claims.

On the other hand, the Appellate Court ruled in Erie Ins. Exchange v. Imperial Marble Corp., 957 N.E.2d 1214 (3d Dist. 2011) that an absolute pollution exclusion did not preclude coverage for injuries that neighboring property owners claimed to have suffered due to chemical emissions from a facility where the insured manufactured marble vanities. Whereas the trial court had upheld the exclusion, finding that the underlying claims were for “traditional environmental pollution,” the Third District was persuaded that the exclusion was ambiguous in its application to discharges pursuant to an IEPA permit.

Similarly, a federal court has ruled that a pollution exclusion does not eliminate a CGL insurer’s duty to defend allegations that the insured’s laboratory emitted carcinogenic emissions of ethylene oxide from its sterilization facility. Judge Rowland ruled in Sterigenics, U.S. LLC v. National Union Fire Ins. of Pittsburgh, PA, No. 21-5481 (N.D. Ill. Aug. 3, 2022) that under Illinois law, pollution exclusions only apply to “hazards traditionally associated with environmental pollution.” Despite National Union’s argument that ethylene oxide is registered as a “priority pollutant,” the court held that the exclusion was ambiguous as to whether it applies to “permitted emissions.”

"Personal Injury" Claims

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

On the other hand, the Appellate Court ruled in National Fire and Indemnity Exchange v. Ali & Sons, 803 N.E.2d 636 (Ill. App. 2004) that a suit in which a property owner sued a dry cleaning tenant seeking recovery for property damage resulting from the discharge of chemicals and other solvents from underground storage tanks and other

containers in and about the leased premises did not seek recovery for a “personal injury” based upon “the wrongful entry into, or eviction of a person from, a room, dwelling or premises that the person occupies.” The court ruled on January 16, 2004 that whether or not Illinois law would hold in the abstract that trespass claims were recoverable as an action for “personal injury” notwithstanding pollution exclusions, in this particular case the underlying complaint was solely for damage to the leased premises and did not seek recovery for any trespass onto or injury to the property of others.

Scope and Allocation Issues

Illinois law remains unsettled on the issue of allocation long-tail liability claims, although recent cases have tendered to favor policyholders.

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

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

In several recent cases, however, the Illinois Appeals Court has found that these rulings are inconsistent with the Supreme Court’s 1987 trigger ruling in Zurich v. Raymark Industries, Inc., 514 N.E.2d 150 (Ill. 1987), which had suggested that pro-ratio was not permitted. See Caterpillar, Inc. v. Century Indemnity Co., No. 04-L-119 (Ill. App. February 2, 2007) and John Crane, Inc. v. Admiral Ins. Co., 1-09-3240 (Ill. App. March 5, 2013) (adopting all sums). See also Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyds, 797 N.E.2d 424 (Mass. App. Ct. 2003), further appellate review denied (Mass. 2004)(applying Illinois law).

In its most recent ruling, the Appellate Court declared in Illinois Tool Works v. Travelers Cas. & Sur. Co., 2015 IL App. (1st) 132530 (Ill. App. Jan. 13, 2015) that a trial court did not err in ruling that various liability insurers had a duty to pay 100% of the costs of defending asbestos suits against an insured, even when the suits were silent with respect to when the injuries occurred. While holding that the insurers did not owe a defense in cases where the named insured was solely named as a successor in liability to earlier, non-insured predecessor companies, the court did rule that the insurers were required to provide a full defense to suits that combined such claims with covered claims. Further, the Appellate Court agreed that the insurers could not require the insured to pay a *pro rata* share of defense costs reflecting the period after 1987 when ITW had agreed to self-insure for such risks.

"Suit"

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

Trigger of Coverage

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

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

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

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

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

INDIANA

"As Damages"

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

Notwithstanding broad language in its 2001 opinion in Hartford v. Dana that damages covered under a general liability policy might include costs "to prevent further releases of hazardous substances," the Indiana Supreme Court has ruled that such coverage only extends to existing harm and does not insure against costs that a policyholder must undertake to prevent future injuries. In Cinergy Corp. v. AEGIS, 865 N.E.2d 571 (Ind. 2007), the court ruled that a liability insurer has no obligation to pay for the cost of implementing new technology to prevent future environmental harm. In holding that AEGIS did not owe coverage for a lawsuit in which the federal government sought to compel Duke Energy and other utilities to comply with the federal Clean Air Act and implement new clean air technologies to prevent widespread harm to public health and the environment, the Supreme Court agreed with other jurisdictions that a distinction should be drawn between remedial and prophylactic remedies and that coverage was not required here where the federal lawsuit was directed at preventing future harm to the public not obtaining control, mitigation or compensation for past or existing environmentally hazardous emissions.

Despite Cinergy, a federal judge has more recently ruled in Great American Excess & Surplus Ins. Co. v. Coupled Products, LLC, 2018 U.S. Dist. LEXIS 120662 (N.D. Ind. July 19, 2018) that costs incurred by the owner of an electroplating facility pursuant to RCRA to deal with contamination resulting from a tenant's prior operations are covered "damages" because they are on account of existing property damage. The court left open the issue of whether coverage might be excluded as involving damage to the insured's own property.

"Occurrence"

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

or intended" unless the insured was consciously aware that a particular release was substantially certain to occur.

In PSI Energy, Inc. v. The Home Ins. Co., No. 32A01-0204-CV-146 (Ind. App. January 6, 2004), the Indiana Court of Appeals ruled that the that requirement of fortuity was present in all policies, not just those that contain "accident" or "occurrence" limitations and that it is the insured who bears the burden of proving that the property damage at issue was not expected or intended. On the other hand, the Appeals Court ruled that the trial court did not err in finding that the nature of the insured's conduct was such that an intent to injure should be inferred as a matter of law and found instead that a subjective standard should be applied. The court declined to follow the recent ruling of the New Hampshire Supreme Court in EnergyNorth in which the court found that injury was certain to occur from the insured's intentional discharges finding that PSI had presented expert testimony and evidence to suggest that the pollution was caused at least in part by non-intentional causes.

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

Pollution Exclusion

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

"Absolute" Pollution Exclusion

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

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

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

The Supreme Court avoided any reconsideration of Kiger in National Union Ins. Co. of Pittsburgh, PA v. Standard Fusee Corp., 940 N.E.2d 810 (Ind. 2010), a case in which the Court of Appeals ruled that absolute pollution exclusions did not apply to groundwater contamination caused by perchlorate from the insured's manufacture of flares. The Court of Appeals had rejected the insurer's argument that their absolute pollution exclusions were unambiguous and that the facts of this case were distinguishable from those considered by the Indiana Supreme Court in Kiger. Although the insurers asked the Supreme Court to reverse Kiger, the Court held instead that these issues should be resolved in accordance with Maryland law.

Kiger was distinguished by the Seventh Circuit in West Bend Mut. Ins. Co. v. USF&G, No. 09-2519 (7th Cir. March 25, 2010). The Seventh Circuit declared that the ambiguities that Indiana courts had previously identified with respect to absolute pollution exclusions in cases such as Kiger and Seymour did not apply with respect to the Federated policy in light of the fact that it contained an express exclusion for "motor fuels" which were defined as including "petroleum or a petroleum-based substance" as well as the fact that the policy included an "Indiana Changes Endorsement" which made clear that the absolute pollution exclusion applied whether or not "such irritant or contaminant has any function in your business operations, premises site or location."

Despite hopes that 2012 would be the year in which Indiana backed away from Kiger, the Indiana Supreme Court has reaffirmed its eccentric view of the absolute pollution

exclusion, declaring in State Automobile Mut. Liability Ins. Co. v. Flexdar Corp., No. 49SO2-1104-PL-199 (Ind. March 22, 2012) that demands that the insured remediate contamination due to discharges of TCE at its manufacturing facility were not excluded owing to ambiguity with respect to what constitutes a “pollutant.” The court declined to follow jurisdictions that have restricted the scope of such exclusions to “traditional environmental contamination,” as even this limiting approach might “vary over time and has no inherent defining characteristics.” Despite State Farm’s argument that any reasonable policyholder would understand that the release of solvents into the environment is “pollution,” the court noted that a reasonable policyholder would likely have a different view of its rights in light of the numerous Indiana opinions declining to give effect to such exclusions over the years. The court also emphasized that State Auto had chosen not to include in this policy a 2005 endorsement form that had been promulgated for the express purpose of addressing Kiger. Justices Sullivan and Shepard argued in dissent that the court should have followed the Seventh Circuit’s better-reasoned analysis of such exclusions in the recent Village of Crestwood case.

Scope and Allocation Issues

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

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

"Personal Injury" Claims

The Indiana Supreme Court ruled in Allstate Ins. Co. v. Dana Corporation, 759 N.E.2d 1049 (Ind. 2001) that the entry of contaminants onto the property of another does

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not “disrupt an individual’s repose” so as to give rise to a claim for invasion of privacy. While conceding that the meaning of “invasion of the rights of privacy” is “shadowy,” the court refused to find coverage on the basis of any claimed ambiguity since “even the outermost reaches of the term’s penumbra do not embrace a chemical transgression of the sort giving rise to Dana’s environmental liability.” The court failed to address the issue of “wrongful entry” since Allstate had not appealed that finding although it seemed to suggest that there would not be coverage on this basis either.

By contrast, the Court of Appeals ruled in FLM, LLC v. The Cincinnati Ins. Co., 49 A02-0902-CV-127 (Ind. App. August 28, 2012) that drifting foundry sand from the insured’s facility triggered “personal injury” coverage as involving a “wrongful entry” or “invasion of the right of private occupancy.” The court took note of the Indiana Supreme Court’s 2001 opinion in Dana, which had ruled that environmental contamination claims did not trigger personal injury coverage for wrongful eviction or invasion of privacy but found that Dana had not overruled Summit or addressed the issue of “wrongful entry” or “invasion of the right of private occupancy.” The court rejected Cincinnati’s contention that such claims fell outside the offense’s limitation to invasions that occur “by or on behalf of its owner, landlord or lessor.” While this language had not been contained in the “personal injury” provision that the court had earlier construed in Summit, the Court of Appeals nonetheless held that it was ambiguously drafted and did not clearly limit coverage to situations where the entry was committed by or on behalf of the property’s owner, landlord or lessor. Rather, the court ruled that applying elementary rules of grammatical construction, it should be clear that “by or on the behalf of” modifies “that a person occupies,” the language directly preceding it, not “wrongful eviction from, wrongful entry into or invasion of the right of private occupancy.”

Suit"

PRP letters were held to be a "suit" for "damages" in Travelers Indemnity Company v. Summit Corporation of America, 715 N.E.2d 926 (Ind. App. 1999) and National Union Ins. Co. of Pittsburgh, PA v. Standard Fusee Corp., No. 49A04-0811-CV-665 (Ind. App. December 3, 2009), reversed on other grounds, 940 N.E.2d 810 (Ind. 2010).

Trigger of Coverage

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

A "triple trigger" was adopted by the Indiana Supreme Court for DES claims in Eli Lilly & Co. v. Home Ins. Co., 482 N.E.2d 467 (Ind. 1985). On the other hand, a federal district court ruled that Eli Lilly does not compel the application of a "continuous trigger" for pollution claims. In Indiana Gas Co. Aetna Cas. & Sur. Co., 951 F.Supp. 806 (N.D. Ind.

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1996), appeal dismissed, 141 F.3d 314 (7th Cir. 1998), Judge Lee ruled that the “continuing effect on the groundwater” of earlier discharges was not itself a trigger of coverage under later policies

More recently, the Indiana Supreme Court ruled in Travelers Cas. & Sur. Co. v. U.S. Filter Corp., 895 N.E.2d 114 (Ind. 2008) that judgment should enter for several insurers of a predecessor entity on the basis that the successor entity (U.S.) Filter had neither obtained the insurer’s consent to any pre-loss assignment of the insured’s rights, nor obtained a post-loss assignment (for which consent would not be required). The court ruled that consent is required for any assignment of policy rights unless the assignment occurs after an identifiable loss, in which case the right to receive payment may be transferred without consent. In the context of long-tail claims, the Indiana Supreme Court ruled that incurred but not yet reported losses were not a “chose in action” that U.S. Filter and Waste Management could say were transferred to them by the original insureds. The court distinguished holdings that have declared that the insurer’s obligations are fixed as of the date of injury suffered by a third party, adopting instead the Henkel analysis of the California Supreme Court that in order for a loss to be assignable it must be identifiable with some precision and must be fixed, not speculative. In cases of this sort, the court ruled that, “a chose in action only transfers if it is assigned in a moment when the policyholder could have brought its own action against the insurer for coverage.” As a result, the court ruled that losses were not assignable until a claim had actually been made against the insured. As a result, the court found that to the extent that various injuries allegedly attributable to Wheelabrator machines had occurred but had not yet been reported at the time of the relevant transactions, they did not constitute an assignable chose in action. Further, the court refused to find that Travelers’ prior defense of certain of these cases estopped it from now disputing coverage particularly where, as was apparently the case here, the insurers’ participation had been subject to valid reservations of rights.

The Seventh Circuit has ruled in Atlantic Cas. Ins. Co. v. Garcia, 878 F.3d 566 (7th Cir. 2017) that an Indiana District Court did not err in granting summary judgment to a CGL insurer for the cost of investigating and remediating oil and solvent contamination due to dry cleaning operations prior to the time that the insured had acquired the property in 2004.

Notwithstanding the insured’s argument that the *Montrose* “claims in process” language in the CGL insuring agreement did not apply because they were unaware of earlier pollution and pre-2004 state environmental claims investigations, the Seventh Circuit found that the language turned on whether property damage had begun before the policy and not whether the insured knew that a claim was pending against it.

IOWA

"As Damages"

Superfund "response costs" were held to be covered in A.Y. McDonald Industries, Inc. v. Ins. Co. of North America, 475 N.W.2d 607 (Iowa 1991).

"Occurrence"

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

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

Pollution Exclusion

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

"Absolute" Pollution Exclusion

On a certified question from a federal district court, the Iowa Supreme Court ruled in Bituminous Casualty Corp. v. Sand Livestock Systems, Inc., 728 N.W.2d 216 (Iowa 2007) *Morrison Mahoney LLP (Copyright 2022)*.

that carbon monoxide that leaked out of a propane heater than had been installed by the insured was a “pollutant.” The court ruled that it was error for courts to try to find ambiguity on the basis of a policy’s drafting history. However, the court left open the issue of whether insureds might reasonably expect that such exclusions be limited to “traditional environmental contamination,” holding that the facts necessary to assess whether insurers had done anything to instill an expectation of coverage were absent from the record.

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

Personal Injury" Claims

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

Scope and Allocation Issues

No reported environmental cases.

"Suit"

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

Trigger of Coverage

It would appear from the Supreme Court’s ruling in Interstate Power Co. v. INA, 603 N.W.2d 751 (Iowa 1999) that Iowa courts will follow an “injury in fact” approach to pollution claims. A federal district court ruled in Pella Corp. v. Liberty Mut. Ins. Co., No. 11-273 (S.D. Iowa Jan. 16, 2018) that water intrusion claims against a window manufacturer triggered all policies from the date that the windows were first installed, despite the insurer’s claimed evidence that water damage had not occurred until years later.

KANSAS

"As Damages"

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

"Occurrence"

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

Pollution Exclusion

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

"Absolute" Pollution Exclusion

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

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

The Tenth Circuit ruled in Union Ins. Co. v. Mendoza, 2010 U.S. App. LEXIS 25461 (10th Cir. December 13, 2010) that a Kansas District Court was correct in ruling that an absolute pollution exclusion precluded coverage for injuries allegedly suffered by a *Morrison Mahoney LLP (Copyright 2022)*.

workman as the result of inhaling anhydrous ammonia fertilizer spray that had been discharged near a road construction project on which she was working.

A federal district court ruled in Judd Ranch, Inc. v. Glazer Trucking Service, Inc., 2007 U.S. DIST. LEXIS 37628 (D. Kan. May 22, 2007) that the absolute pollution exclusion applied to claims against insured for losses to cattle herds that became sick after ingesting feed that was contaminated with scrap aluminum that had mixed with their feed while being transported in delivery trucks that the insured hadn't cleaned out from prior scrap metal deliveries. Despite the insured's argument that such exclusions should be restricted to "environmental" pollution or that the scrap metal was not "waste," the court held that the scrap metal was a contaminant that caused pollution when it was "dispersed" into the feed pellets.

Scope and Allocation Issues

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

"Suit"

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

Trigger of Coverage

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

The Eighth Circuit rejected an "installation trigger" in Transcontinental Ins. Co. v. W.G. Samuels Co., Inc., 370 F.3d 755 (8th Cir. 2004), ruling instead that the trigger of coverage for property damage resulting from the faulty installation of the insured's carpet in the plaintiff's school was the point in time when the carpet peeled away from the adhesive

and concrete slab beneath it. The court distinguished case in which property damage had occurred at the time of installation but remained concealed from property owners for a period of time thereafter, as in the case of asbestos.

KENTUCKY

"As Damages"

In Aetna Cas. & Sur. Co. v. Commonwealth of Kentucky, 179 S.W.2d 830 (Ky. 2005), a divided Kentucky Supreme Court ruled that PRP claims arising out of the Maxey Flats Superfund site are a "suit" for "damages." Two dissenting justices contended that the majority had erred in finding that site improvement measures were covered "damages" and that preliminary claims correspondence from the U.S. EPA was not a "suit."

"Occurrence"

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

More recently, the Supreme Court declared in Aetna Cas. & Sur. Co. v. Commonwealth of Kentucky, 179 S.W.2d 830 (Ky. 2005) that an insured was entitled to a new trial for claims arising out of the Maxey Flats Superfund site due to an improper jury instruction. The court held that a new trial was required on the issue of fortuity since the jury's verdict against the insured reflected an instruction that had improperly focused on whether the damages were expected or intended, not the pollution, in violation of its analysis in James Graham Brown. Two dissenting justices contended that the jury had properly concluded that the pollution was not fortuitous.

Pollution Exclusion

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

"Absolute" Pollution Exclusion

The Sixth Circuit ruled in Barber v. Arch Ins. Co., 2021 WL 2828021 (6th Cir. July 7, 2021) that a pollution exclusion in a D&O policy precluded coverage for allegations that the insured criminally concealed high levels of coal dust in its mines that caused Black Lung disease. The court rejected the insured's argument that the criminal

proceedings did not arise out of the discharge or release of coal dust. While acknowledging that there might be other causes, such as the insured's criminal conduct, the court held that "arising from... does not require a direct proximate causal connection but instead merely requires some causal relation or a connection." In the proceedings below, a federal district court has ruled in Barber v. Arch Ins. Co., 494 F. Supp.3d 850 (W.D. Ky. 2020) that criminal proceedings brought against a mining company for violations of the Federal Mine Safety and Health Act of 1977 fell outside the scope of a Directors and Officers policy issued by Arch. Notwithstanding Barber's argument that the underlying criminal charges were for a fraudulent reporting of dust monitoring and sampling requirements of the mine act and did not arise out of an actual or threatened discharge of coal dust, Judge McKinley declared that the underlying claims clearly arose out of an actual or threatened release of pollutants and furthermore contained separate language for losses involving testing or monitoring for pollution. The court also rejected the insured's argument that coal dust inside a coal mine is not itself a "pollutant." The court distinguished the Kentucky Court of Appeals' 2011 ruling in Abundance Coal, which had declared that terms such as "discharge" and "dispersal" were terms of art that indicated an intention to limit the scope of absolute pollution exclusions to environmental contamination claims, noting that the exclusion in question also contained language with respect to investigations, monitoring and cleanup claims. In this case, the court found that the relevant provisions of the federal Mine Act required the insured to test for and monitor coal dust and therefore fell within Subsection B of the absolute pollution exclusion.

The Sixth Circuit issued an unpublished opinion in Certain Underwriters at Lloyd's of London v. NFC Mining, No. 10-5232 (6th Cir. June 9, 2011), declaring that a Kentucky District Court did not err in holding that an absolute pollution exclusion preclude coverage for law suits that local residents had brought against a coal mining company for coal dust emanating from the insured's mining operations. The Court of Appeals declined to find that a certificate of insurance filed with the State of Kentucky, which stated that this coverage was consistent with state law, could have engendered a reasonable expectation of coverage, as the insured did not sign or approve the certificate, nor did the certificate concern this issue. In any event, the court held that the unambiguous language of the exclusion would have defeated any expectation of coverage. The court also rejected the insured's argument that the exclusion never became a part of the policy itself, as this issue was not raised below. Notably, the court did not reach the Kentucky District Court's independent finding that "noise" claims were not excluded, as Lloyd's had not cross-appealed on this issue.

Court of Appeals ruled that the exclusion should not be given overbroad effect, holding in Motorists Mutual Ins. Co. v. RSR, Inc., 926 S.W.2d 679 (Ky. App. 1996) that an insured would not have reasonably foreseen that carbon monoxide poisoning claims are excluded. In State Auto Mut. Ins. Co. v. Greenrose, 2005 WL 3444543 (Ky. App. December 15, 2005), the Kentucky Court of Appeals ruled that the exclusion did not apply to an incident in which the insured slipped on his basement stairs and, in an effort to arrest his fall, pulled loose a pipe that then spilled diesel fuel into the basement. The Court

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concluded that although the words of the exclusion were unambiguous on their face, they might nonetheless be found ambiguous in the context of the particular facts of a case such as this that held that an ordinary person would not understand this provision to exclude coverage for a broken basement pipe and that such an analysis was inconsistent with the fact that the exclusion was adopted by the insurance industry to deal with intentional industrial pollution.

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

"Personal Injury" Claims

No reported environmental cases.

Scope and Allocation Issues

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

A right to recoup defense costs was recently recognized by the Sixth Circuit. See Travelers Property & Cas. Co. v. Hillerich & Bradsby Co., 598 F.3d 257 (6th Cir. 2010)(allowing Travelers to recoup \$250,000 that it had contributed at the insured's request to settle a Kentucky intellectual property claim even though insured did not assent to insurer's claimed right of recoupment).

"Suit"

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

Trigger of Coverage

No reported environmental cases.

LOUISIANA

"As Damages"

The Louisiana Court of Appeals ruled in Norfolk Southern Corp. v. California Union Insurance Co., 853 So.2d 1141 (La. App. 2003) that environmental clean up costs should be treated as "damages." Earlier, a federal district court had found that Louisiana "has long treated clean-up costs as part of the general measure of damages" available under its laws. GAF Corp. v. Continental Cas. Co., No. 87-3272 (E.D. La. Jan. 12, 1989).

"Occurrence"

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

Pollution Exclusion

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

While Doerr was still pending, the Louisiana Insurance Department announced in June 2000 that it planned to implement a regulation invoking the restrictions that the *Morrison Mahoney LLP (Copyright 2022)*.

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

Absolute Pollution Exclusion

Despite Doerr and subsequent case law, state courts and regulators have occasionally allowed insurers to use such exclusions to preclude coverage for environmental losses.

On December 28, 2001, the new Louisiana Insurance Commissioner issued Advisory Letter No. 01-01 approving a new absolute pollution exclusion (Form CG 21 65 09 09) for use in Louisiana. The letter expressly stated that it was not superseding the 1997 communication, as well as the various forms (Form CG 04 28 07 98, CG 04 29 07 98 and CG 04 30 07 98) that had been approved for use in the 1997 communication.

The exclusion was held to bar any duty to defend or indemnify the operator of a natural gas drilling platform for claims arising out of an explosion that killed a pipeline worker. Travelers Ins. Group, Inc. v. O.C.S., Inc., 914 F.Supp. 126 (E.D. La. 1996). Similarly, two federal courts have upheld the exclusion in cases involving personal injuries resulting from a chemical explosion, ruling that its scope is not limited to contamination that is the direct result of the insured’s conduct. Resure, Inc. v. Chemical Distributors, Inc., 927 F.Supp. 190 (M.D. La. 1996) and Uniroyal Chemical Co. v. Deltech Corp., No. 93-998 (M.D. La. December 27, 1995).

The Fifth Circuit of the Louisiana Court of Appeal ruled in Grefer v. Travelers Ins. Co., 919 So.2d 758 (La. App. 2005) that the total pollution exclusion precluded coverage for a direct action against Travelers and other insurers of Exxon Mobil and a pipeline operator seeking recovery for environmental contamination resulting from discharges from the insured’s oil field, pipeline and trucking operations. The court found that a clear reading of the policies would have put a reasonable person on notice that there was no coverage for pollution coverage and that Doerr did not require that the insured know that the substance that it was dispersing into the environment would “threaten the environment” such that mere negligence would be required to be covered

“Personal Injury”

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

Scope and Allocation Issues

“Time on the risk” approach was by the Louisiana Supreme Court in Arceneaux v. Amstar Corp., 66 So.3d 438 (La. 2011). Accord Southern Silica v. Louisiana Ins. Guarantee Assoc., 979 So.2d 469 (La. 2008) and Norfolk Southern Corp. v. California Union Insurance Co. 2003 La. App. LEXIS 2459 (La. App. September 12, 2003).

Trigger of Coverage

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

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

MAINE

"As Damages"

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

"Occurrence"

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

Pollution Exclusion

The First Circuit has affirmed a Maine court's ruling that a liability insurer had a duty to defend third party complaint alleging that an asphalt batching plant whose property allegedly contaminated to the pollution of the Penobscot River. In Barrett Paving Materials, Inc. v. Continental Cas. Co., 488 F.3d 59 (1st Cir. 2007), the court ruled that the underlying suit, which only alleged that pollutants from the Barrett Paving facility had found their way to the Penobscot River via sewers and tidal action but did not say when or how, was not inconsistent with the possibility of "sudden and accidental" discharges.

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

"Absolute" Pollution Exclusion

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

exclusion clause as only applying to environmental pollution.”

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

"Suit"

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

Trigger of Coverage

No pollution cases.

MARYLAND

"As Damages"

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

More recently, a divided panel of the Fourth Circuit held in Industrial Risk Enterprises, Inc. v. Penn American Ins. Co., 637 F.3d 481 (4th Cir. 2011) that Bausch & Lomb compels it to conclude that costs incurred in responding to a U.S. EPA demand that it remediate pollution from the insured's own property are regulatory expenses and not sums paid for "property damage." The majority declined to distinguish Bausch & Lomb on the purported basis that while the State of Maryland had had no property interest in groundwater, the federal government does have a property interest in surface water. Writing in dissent, Judge King argued that Bausch & Lomb did not apply because the pollution from the insured's own property was draining into the Chesapeake Bay and was not restricted to the insured's own property.

"Occurrence"

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

Pollution Exclusion

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

"Absolute" Pollution Exclusion

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

On a certified question from a federal district court, the Maryland Court of Appeals ruled in Brownlee v. Liberty Mut. Ins. Co., 175 A.3d 697 (Md. 2017) that the public policy of Maryland would not be violated by applying Georgia law to the issue of whether an absolute pollution exclusion in a policy issued in Georgia to the Salvation Army precludes coverage for lead paint claims involving property owned by the insured in Baltimore. The court ruled that Maryland's principle of *lex loci contractus* required the application of Georgia law and that the mere fact that the Georgia Supreme Court had adopted a broader view of such exclusions than Maryland courts was not a basis for overthrowing this contractual principle on the grounds of public policy.

A federal district court ruled in Clipper Mill Federal, LLC v. Cincinnati Ins. Co., 2010 U.S. Dist. LEXIS 1127172 (D. Md. October 20, 2010) that allegations by a former tenant that it had been forced to abandon an office suite due to the discharge of toxic airborne pollutants that had caused an employee to become ill involved the discharge of a pollutant "at or from any premises, site or location which is or was at any time owned or occupied by or rented or leased to any insured."

"Suit"

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

Scope and Allocation Issues

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

A time on the risk model of allocation was also approved by the Fourth Circuit in Pennsylvania Nat. Mut. Cas. Ins. Co. v. Roberts, 668 F.3d 106 (4th Cir. 2012), declaring *Morrison Mahoney LLP (Copyright 2022)*.

that the denominator in a lead poisoning case should run from the date of the plaintiff's birth rather than a period months later when poisoning was first diagnosed.

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

The Maryland Court of Appeals has rejected arguments that a general liability insurer should be jointly and severally liable for a judgment in an asbestos personal injury lawsuit. In Rossello v. Zurich American Ins. Co., 226 A.3d 444 (Md. 2020), the court affirmed that a "time of the risk" pro rata approach to allocation was consistent with the language in the policy as well as abundant precedent from the Maryland Court of Special Appeals since its decision in Utica Mutual in 2002. The court also took note of the fact that since 2002, nine of the ten Supreme Court allocation decisions outside of Maryland have rejected "joint and several" liability and adopted proration based upon time of the risk. The court also clarified its "trigger of coverage" analysis, holding that coverage in "long-tail" cases is not limited to be year of "manifestation" and that in cases of continuing injury, an "injury in fact" approach may trigger coverage in all years when injury occurred. Finally, without explicitly addressing whether there should be an "unavailability" exception for allocation omitting years in which insurance was commercially available, the court ruled in this case that the insured in this case could not evade its responsibility for loss occurring between 1977 and 1985 since it had failed to prove that it could not buy general liability insurance covering asbestos liability claims during this period.

Trigger of Coverage

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

MASSACHUSETTS

"As Damages"

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

The First Circuit has asked the Supreme Judicial Court of Massachusetts to clarify whether there is a common law obligation on the part of an insurer to reimburse an insured for the cost of preventing an imminent loss that would otherwise be covered.

The court disagreed with Judge Sorokin that Massachusetts follows a strict rule that would preclude reliance on common law principles to create coverage that is not otherwise explicitly set forth in the insurance contract itself. The court observed in Ken's Food, Inc. v. Steadfast Ins. Co., No. 21-1649 (1st Cir. June 8, 2022) that it might not make sense to create a rule that encouraged policyholders to defer mitigative efforts in the hope of thereby securing coverage for an insured loss that might exceed the costs of preventing and further noted that the Supreme Courts of Pennsylvania (Leebov) and Maryland (Schlosser) have adopted diametrically opposed positions on this question. .The case is scheduled to be argued on November 4.

"Occurrence"

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

Pollution Exclusion

The Supreme Judicial Court has variously ruled that the exclusion is (1) unambiguous; (2) focuses on the discharge of pollution, not the resulting harm; (3) precludes coverage for gradual contamination unless it commences abruptly; and (4) does not cover discharges that are caused intentionally, whether by the insured or some third party. Lumbermens Mut. Cas. Co. v. Belleville Ind., Inc., 555 N.E.2d 568 (1990); Hazen Paper, supra; Liberty Mut. Ins. Co. v. SCA Services, Inc., 588 N.E.2d 1346 (Mass. 1992); Goodman v. Aetna Cas. & Sur. Corp., 593 N.E.2d 233 (Mass. 1992); Polaroid Corp. v. The Travelers Ind. Co., 610 N.E.2d 912 (Mass. 1993). However, in Nashua Corp. v. American

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Home Assur. Co., 648 N.E.2d 1272 (Mass. 1995), the SJC ruled that summary judgment was inappropriate where the insured came forward with evidence of discrete extraordinary releases, such as fires, that might be "sudden." In Highlands Ins. Co. v. Aerovox, Inc., 424 Mass. 226 (1997), the court held that isolated releases will only be considered if they can be shown by the insured to have had more than a *de minimis* effect. The court also ruled that insureds have burden of proving "sudden and accidental" discharge.

"Absolute" Pollution Exclusion

In McGregor v. Allmerica Ins. Co., 449 Mass. 400, 868 N.E.2d 1125 (2007), the SJC held that a trial court erred in refusing to give effect to claims against a contractor for a spill of oil inside a customer's residence. The court distinguished its earlier opinions in McFadden and Gill as involving situations in which the discharged substance was not a "pollutant," whereas no reasonable insured would have understood oil leaking into the ground not to involve pollution. The fact that the location of the oil spill was a residence rather than an industrial or manufacturing site did not, in the court's view, "automatically alter the classification of spilled oil as a pollutant." The court cautioned that not every claim involving oil, soot or smoke would be excluded particularly if they were incidentally discharged in the course of an otherwise covered event. On the other hand, the court refused to find that giving effect to the exclusion in this case vitiated the value of McGregor's policy or made its coverage illusory. "Costs associated with spilled oil are no less excluded by pollution exclusions merely because the insured regularly works with oil as part of his ordinary business activities."

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

Arguments that such exclusions should not apply to commercially valuable product were rejected by the Appeals Court in Feinberg v. Commercial Union Ins. Co., 766 N.E.2d 888 (Mass. App. 2002). The Court ruled that "it is irrelevant that the stockpiled rubber materials might be useful products, because BRT's liability arises out of the release of specific chemicals into the soil and groundwater, not the storage of rubber feed stock." Under the circumstances, the court found that a reasonable policyholder would understand that a claim arising out of the leaching of chemical substances into the ground and groundwater was a "classic case of pollution" for which no coverage was afforded under the policy.

The First Circuit suggested in Utica Mutual Ins. Co. v. Weathermark Investments, Inc., 292 F.3d 77 (1st Cir. 2002) that Section 2 of the exclusion did not apply to “non-remedial” damages, such as claims for lost rent or diminution in value. This distinction between remedial and non-remedial damages was also explored in Nascimento v. Preferred Mut. Ins. Co., 513 F.3d 273 (1st Cir. 2008). However, whereas the U.S. District Court had relied on the fact that the plaintiff’s claim was solely for remedial damages, the First Circuit affirmed on the alternative basis that the leaking tank in question had been used by the insured during the period in question and was therefore “occupied” by the insured so as to fall within Section 1(a) of the exclusion.

Notwithstanding the apparent intent of this common law exception, the Massachusetts Appeals Court ruled in Clean Harbors Environmental Services, Inc. v. Boston Basement Technologies, 75 Mass. App. Ct. 709 (2009) that an insurer might also be liable for remedial costs, at least to the extent that clean up costs did not exceed the diminished value of the property resulting from the pollution. The court declined to accept Admiral’s proposed distinction between cleanup costs (which would be excluded) and long-term damage to the property itself, such as diminution in the value as the result of the oil spill. The court declared that diminution in property value resulting from an oil spill clearly fell within the exception to this exclusion for statutory cleanup costs. However, the court ruled that diminution in value is not the sole measure of damages for harm negligently caused to property. In cases involving common law recovery for damage caused to property by pollution, the court concluded that the cost of restoring the property may be the more appropriate measure of damages since remediation essentially results in the restoration of the property to its pre-damaged value. Further, the court found that this analysis was consistent with the intent of the underwriters since an insurer was able to assess risk when considering common law liabilities in a manner that might not exist with respect to statutory claims that could far exceed the diminution in value of the contaminated property. The court concluded, therefore, that it could discern no rationale in the policy language or case precedents “for excluding common law restoration costs from coverage when their recovery is a more appropriate remedy than recovery for diminution in property value.”

"Personal Injury" Claims

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

Scope and Allocation Issues

The Supreme Judicial Court ruled in Boston Gas Company v. Century Indemnity Company, 910 N.E.2d 290 (Mass. 2009) that a federal district court erred in assigning the cost of cleaning up pollution from a former MGP to a single policy issued in the 1960s. On the threshold question of “all sums v. pro rata,” the court held that allocation was consistent with the policy wordings and public policy considerations. Further, in considering what type of allocation formula should be applied, the court adopted a pure “time on the risk” *Morrison Mahoney LLP (Copyright 2022)*.

approach, rejecting suggestions that it should use an Owens-Illinois approach that would take total limits into account, or an “unavailability” analysis that eliminated certain years from the denominator for calculating these percentages. Finally, in cases such as this where the first layer of coverage was written through policies with self-insured retentions, the court declared that the insured need only pay a proportional share of the SIR for each triggered policy. Accord New England Insulation Co. v. Liberty Mut’l Ins. Co., No. 11-P-1617 (Mass. App. Ct. May 22, 2013)(requiring insured to pay a share of asbestos claims).

The SJC declared in Boston Gas that pro rata is a default solution and that courts may use the actual facts if the amount of injury in each year can be proven to the court’s satisfaction, as was the case in Peabody Essex Museum v. U.S. Fire Ins.Co., No. 13-1528 (1st Cir. Sept. 4, 2015).

Prior to Boston Gas, Massachusetts courts had generally adopted an “all sums” approach in long-tail cases. In Rubenstein v. Royal Ins. Co., 694 N.E.2d 381 (Mass. App. Ct. 1998), the Appeals Court ruled that a trial court had not erred in refusing to apportion the insureds’ damages among all of the years in which pollution occurred holding that each insurer is jointly and severally liable for the entire claim. As the trial court had concluded that property was continuously being contaminated by the leakage of oil during Royal’s 1969-72 policy, the Appeals court ruled that it was this continuous exposure to contaminants that was decisive and that Royal’s claim for allocating damage awards among other years of coverage must fail. The Appeals Court ruled in Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyds, 797 N.E.2d 424 (Mass. App. Ct. 2003)(Illinois law) that a Superior Court had correctly ruled that a polluter was entitled to recover the entirety of its loss under certain umbrella policies issued before 1970.

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

The First Circuit ruled in One Beacon Ins. Co. v. Georgia Pacific Corp., 474 F.3d 6 (1st Cir. 2007) that even though a policy was issued after only a few months, the limits of coverage were owed in full and could not be pro-rated to reflect the shortened period of coverage). Despite One Beacon’s argument that the limit should be pro rated since it was described as being “in the aggregate for each annual period during the currency of this policy, the Court refused to find that the “each annual period” language required that the limits be mechanically pro rated to reflect the days, weeks or months of the actual coverage. The Court ruled that the full policy limit was owed whether or not the liabilities giving rise to that obligation were limited to a specific event during the stub period or, as

here, straddled the periods before, during and after the policy in question the Court ruled that “the problem of allocating a continuing loss among the many insurers who were on the risk for the loss is not peculiar to short term policies, nor is it an excuse for a Court to alter express policy limits.” Rather, the Court suggested that such issues be resolved by reference to “other insurance” clauses or prior insurance and non cumulation clauses or rules for allocation.

The obligation of policyholders to bear responsibility for “orphan shares” was reaffirmed In New England Insulation Co. v. Liberty Mut’l Ins. Co., No. 11-P-1617 (Mass. App. Ct. May 22, 2013). The Appeals Court affirmed the dismissal of an insured’s suit that alleged that Liberty Mutual was improperly seeking to apply a “time on the risk” approach to asbestos settlements and demanding that the insured contribute the “orphan shares” for periods for which it had no available insurance. The court ruled that Liberty Mutual did not breach its duty to indemnify when it sought to pro rate its settlement duties following the Supreme Judicial Court’s 2009 ruling in Boston Gas. The court declined to find that Boston Gas was distinguishable because, unlike the INA policies at issue there, the Liberty Mutual policies incorporated the “during the policy period” language within the definition of “bodily injury.” The Appeals Court declared that “Like the policies analyzed in Boston Gas, the Liberty policies unambiguously limit the promised “all sums” coverage to injuries that occur “during the policy period,” thus supporting the use of pro rata allocation. Furthermore, the public policy considerations relied upon in Boston Gas are equally relevant here.” Accord Graphic Arts Mut. Ins. Co. v. D.N. Lukens, Inc., No. 11-10460 (D. Mass. May 29, 2013).

Boston Gas was held not to permit the allocation of defense costs in Peabody Essex Museum v. U.S. Fire Ins.Co., 802 F.3d 39 (1st Cir. 2015). Similarly, a judge in the Business Litigation Session, having initially declared that although policyholders might face contribution claims from insurers who have paid costs attributable to uninsured periods reversed himself a few months later and held in Crosby Valve LLC v. OneBeacon Ins. Co., 1284CV02705 (Mass. Super. July 19, 2022) that Boston Gas has no applicability to defense costs for various reasons, including that years of coverage do not correlate with the cost of defense.

"Suit"

A PRP letter issued by the U.S. EPA was deemed to be a suit in Hazen Paper. However, a private claim under the Massachusetts Superfund statute was held not to involve a "suit" in Zecco, Inc. v. Travelers Indemnity Co., 938 F.Supp. 65 (D. Mass. 1996) as it did not trigger the same legal consequences as a governmental demand.

Trigger of Coverage

"Manifestation" rejected as sole trigger in Tufts University v. Commercial Union, 616 N.E.2d 68 (Mass. 1993)(pollution), holding instead that successive insurers had duty to defend based on allegations of continuing pollution. Although not explicitly set forth in Tufts, the facts of the case imply that even pollution that continues after actual disposal *Morrison Mahoney LLP (Copyright 2022)*.

activities cease will trigger coverage under later policies. However, the court will not permit coverage past the date that loss becomes known to insured. See SCA Services, Inc. v. Transportation Ins. Co., 646 N.E.2d 394 (Mass. 1995). But see Allmerica Financial Corp. v. Certain Underwriters at Lloyd's, 489 Mass. 621 (2007) U.S. Liability Ins. Co. v. Selman, 70 F.3d 684 (1st Cir. 1995)(imposing requirement of subjective intent).

A continuous trigger of coverage (exposure through manifestation) was adopted by Judge Hillman in an asbestos allocation dispute in Graphic Arts Mut. Ins. Co. v. D.N. Lukens, Inc., No. 11-10460 (D. Mass. May 29, 2013).

In Presidents and Fellows of Harvard College v. Westchester Fire Ins. Co., 2011 WL 679846 (Mass. Super. February 2011) held that a liability insurer's duty to defend was triggered by environmental contamination during its policy period even though the land in question was purchased by the insured after the policies had expired. The Superior Court ruled that it was no more unfair for insurers to be required to pay for such claims than it was for insureds in the first instance to bear liability pursuant to a joint and several liability regime.

MICHIGAN

"As Damages"

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

"Occurrence"

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

Pollution Exclusion

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

Apart from questions as to the requisite burden of proof, the Supreme Court has left open the issue of whether the focus of the exclusion is on the "initial discharge" or the

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

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

"Absolute" Pollution Exclusion

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

In 2016, the Michigan Supreme Court declined to accept review of Hobson v. Indian Harbor Insurance Company, No. 316714 (Mich. App. Mar. 10, 2015), in which the Court of Appeals ruled that smoke inhalation injuries suffered by the insured's tenants were not subject to a total pollution exclusion in a CGL policy. The Appeals court emphasized that the allegations and liability with respect to the insured were due to its negligence in allowing a fire to occur and not due to any discharge of a "pollutant."

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

However, the exclusion has been held not to defeat coverage for claims brought by a service station operator against the contractor that installed gasoline containment systems. In Oscar W. Larson Co. v. United Capitol Ins. Co., 64 F.3d 1010 (6th Cir. 1995), ***Morrison Mahoney LLP (Copyright 2022).***

the Court ruled that the exclusion for any "governmental direction or request" only applied to governmental claims and could not be parsed into (1) a "governmental direction" and (2) a request by any party. The court also ruled that the "operations" portion of the first part of the exclusion did not apply.

"Personal Injury" Claims

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

Scope and Allocation Issues

Although the Michigan Supreme Court has yet to address this issue, the predominant view of lower courts is the allocation issues involving "long-tail" claims should be resolved on a *pro rata* basis. In Continental Cas Co. v. Indian Head Industries, Inc., No. 16-680 (6th Cir. Dec. 16, 2016), the Sixth Circuit affirmed a Michigan District Court's declaration that a CGL insurer was only obligated to pay a *pro rata* share of defense and indemnity with respect to a gasket manufacturer's asbestos liabilities. In an unpublished disposition, the Court of Appeals ruled that the intermediate appellate authority presented by Continental Casualty was persuasive and that no basis existed for suggesting that the Michigan Supreme Court would adopt an "all sums" approach to allocation issues in long-tail cases. Accord Arco Industries Corp. v. American Motorists Ins. Co., 594 N.W.2d 61 (Mich. App. Ct. 1998) (adopting "time on the risk" analysis in a pollution case). But see Dow Corning v. Continental Cas. Co., No. 200143 (Mich. App. October 12, 1999)(unpublished) (ruling that the "all sums" language in the defendants' policies imposed an independent obligation to pay in full without regard to "time on the risk" or any other sort of pro-ration)

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

"Suit"

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

Trigger of Coverage

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

MINNESOTA

"As Damages"

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

"Occurrence"

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

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

Pollution Exclusion

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

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

In landfill cases, the focus of the exclusion is on time when pollutants leach out. However, this rule does not apply in non-"container" cases. SCSC v. Allied Mut., 515 N.W.2d 588 (Minn. App. 1994); Bell Lumber & Pole Co. v. U.S. Fire Ins. Co., 60 F.3d 437 (8th Cir. 1995). Court ruled in Regents that the exclusion encompasses even products
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claims but refused to find that indoor releases are a discharge "into the atmosphere."

"Absolute" Pollution Exclusion

The Minnesota Supreme Court ruled in Midwest Family Mut. Ins. Co. v. Wolters, A-11-0181 (Minn. May 31, 2013) that a release of carbon monoxide inside a house was excluded from coverage notwithstanding the contractor's contention that pollution exclusions should be limited to "environmental releases." Consistent with its "plain meaning" approach to interpreting insurance policies, the majority declared that just as it had ruled years ago in Board of Regents that asbestos fibers are an "irritant," carbon monoxide was clearly a pollutant.

Earlier, the Court of Appeals ruled in Wakefield Pork, Inc. v. RAM Mut. Ins. Co., 731 N.W.2d 454 (Minn. App. Ct. 2007) that the exclusion barred coverage for allegations by neighboring property owners that the insured's pig farm had created "extremely noxious and offensive odors and gases" that caused or exacerbated their health problems, diminished their quality of life and curtailed the use and enjoyment of their property.

The Eight Circuit has ruled that an early iteration of the absolute pollution exclusion precluded coverage for claims brought by an individual who suffered carbon monoxide poisoning while fishing on one of the insured's boats. In contrast to the Minnesota Supreme Court's 1991 analysis of this language in Board of Regents v. Royal Ins. Co., the Court of Appeals ruled in Travelers Property Cas. Co. of America v. Klick, No. 16-4000 (8th Cir. Aug. 14, 2017) that the release of poisonous fumes inside the boat's engine compartment was a discharge "into the atmosphere."

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

"Personal Injury" Claims

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

Scope and Allocation Issues

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

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

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

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erred in allocating defense costs in the same percentages as applied to indemnity, holding instead that in light of precedents such as Jostens, each insurer should pay an equal share of defense costs and that an “equal shares” approach would minimize or avoid inter-carrier squabbling over how to apportion defense costs. In a cryptic footnote, the court questioned whether such losses should be apportioned to multiple policies at all, but didn’t pursue the question further since all parties to this case had stipulated that water intrusion claims were subject to a “time on the risk” analysis.

Judge Tunheim subsequently ruled in H.B. Fuller Co. v. U.S. Fire Ins. Co., 2011 WL 2884711 (D. Minn. July 18, 2011) that the Wooddale exception was limited to cases in which insureds could not buy coverage for particular risks in the marketplace as a whole and did not apply to cases such as this where coverage had been purchased but later became “unavailable” due to the insurer’s insolvency.

Where an insurer undertakes the defense of its insured alone, it is allowed to seek contribution from other insurers whose policies are also involved. In Cargill, Inc. v. Ace American Ins. Co., 784 N.W.2d 341 (Minn. 2010), Liberty Mutual was faced with the dilemma of being forced to defend mass tort claims that neither the insured nor its other insurers wanted to help it with. Under existing law, primary insurers had no right to seek contribution from each other in the absence of a loan receipt agreement. Given the apparent unfairness of the situation, the Court of Appeals ruled in 2008 that a court could, in effect, impose a constructive agreement on the parties if the insured refused to cooperate. The Supreme Court reversed this finding on appeal but instead simplified the situation, reversing its 1967 Iowa National bar on contribution and holding instead that Liberty Mutual had equitable rights of contribution to recover defense costs from other carriers, notwithstanding Cargill’s refusal to enter into a loan receipt agreement owing to its concerns that it would become personally liable for some share of defense costs owing to various fronting arrangements and retro-rated policies. The court also held that in such circumstances each insurer is liable for an equal share of defense costs.

"Suit"

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

Trigger of Coverage

In Northern States and Domtar, the Supreme Court established a rebuttable presumption that injury would be deemed to occur continuously from the date of first exposure or dumping through manifestation. Any party seeking a contrary finding has the *Morrison Mahoney LLP (Copyright 2022)*.

burden of proving that loss did not occur during its period. However, the mere persistence of earlier discharges will not trigger later periods of coverage if it can be shown to have been attributable to specific polluting incidents, as in SCSC Corporation v. Allied Mutual Ins. Co., 533 N.W.2d 603 (Minn. 1995)(insured allowed to spike claim into excess layers based on single 1977 spill that was predominant source of pollution on its property).

MISSISSIPPI

"As Damages"

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

"Occurrence"

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

Pollution Exclusion

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

"Absolute" Pollution Exclusion

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

The Mississippi Supreme Court ruled in Omega Protein, Inc. v. Evanston Ins. Co., No. 2020-CA-01097-SCT (Miss. Jan. 20, 2022) that an absolute pollution exclusion was ambiguous and did not clearly preclude coverage for personal injury claims arising out of operations that resulted in an explosion of a "stickwater" tank that contained potentially explosive fumes, including methane. The court ruled that the exclusion's reference to "irritant or contaminant" was ambiguous since it was susceptible of more than one reasonable meaning. Whereas a substance may always be an irritant, in other instances, such as crude oil that is safely contained, it is not a contaminant until it actually contaminates something.

Applying Mississippi law, the Louisiana Appeals Court ruled in Harrison v. R.R. Morrison & Son, Inc., 862 So.2d 1065 (La. App. 2003) that the absolute pollution exclusion precluded coverage for claim by Louisiana property owners whose land became contaminated as the result of gasoline leaking from an underground storage tank at a convenience store operated by a Mississippi corporation. While suggesting in a footnote that Louisiana law would also have upheld the pollution exclusion in such circumstances, the Court declared that such case law as existed in Mississippi with respect to the absolute pollution exclusion clearly required that these claims be treated as arising out of the discharge or release of a pollutant on or from the insured's premises for which no coverage was afforded under the policy.

"Personal Injury" Claims

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

Trigger of Coverage

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

MISSOURI

"As Damages"

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

"Occurrence"

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

Pollution Exclusion

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

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

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

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

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

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

"Absolute" Pollution Exclusion

The Missouri Supreme Court, which heretofore had never considered the scope and effect of a pollution exclusion, has ruled that a trial court erred in declaring that an absolute pollution exclusion was ambiguous as applied to suits by neighboring property owners who alleged injuries due to toxic emissions from the insured’s lead smelting operations. In Doe Run Resources Corp. v. American Guarantee & Liability Ins. Co., No. SC96107 (Mo. October 31, 2017), the Supreme Court declined to follow the Court of Appeal’s analysis in Hocker Oil, in which gasoline was held not to be a pollutant because it had commercial value and was not specifically identified in the exclusion. Instead, the Supreme Court followed the view of the Eighth Circuit in a related case involving Doe Run, declaring that materials that irritate or contaminate are clearly “pollutants” whether they are specifically enumerated in the exclusion or are an essential part of the insured’s business.

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

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In Casualty Indemnity Exchange v. City of Sparta, 997 S.W.2d 5459 (Mo. App. 1999), the Court of Appeals ruled that the exclusion precluded coverage for claims by property owners who complained that hazardous materials contained in sludge from the insureds waste water treatment plant, which had been applied as a fertilizer or soil supplement on adjoining farm properties. The court declared that the waste was plainly a pollutant since its high pH made it an “irritant or contaminant.” The court expressly disagreed with the 8th Circuit’s construction of the exclusion in Sargent Construction, in which the federal Court of Appeals had declared that Muriatic Acid was not an irritant or contaminant.” Since, in this case, there was little doubt that the plaintiffs exposure to the sludge materials had caused injury thus precluding any dispute as to whether the substances involved were an irritant or contaminant.” Finally, the court rejected the insured’s argument that the exclusion should only apply to “persistent polluter engaged in general polluting activities.” “To hold the absolute pollution exclusion does not bar coverage for damage caused by toxic substances from sludge removed from sewage by Sparta’s Waste Water Treatment Facility would leave one wondering what kind of activity would be excluded by the absolute pollution exclusion.”

In The Doe Run Resources Corp. v. Lexington Ins. Co., No. 12-2215 (8th Cir. June 13, 2013), the Eighth Circuit ruled that pollution claims arising out of the insured’s lead smelting operations were excluded. Despite the insured’s argument that lead ore concentrate was a valuable product and therefore not a “pollutant” in light of the Missouri Court of Appeals’ analysis in Hocker Oil, the Eighth Circuit declared that the fact “that its toxic or hazardous materials are valuable products if Doe Run properly contains them does not make them any less “pollutants” when they are abandoned and released into the environment.” The court noted that few courts have followed Hocker Oil since it was released in 1999 and expressed skepticism that it would be adopted by the Missouri Supreme Court. Finally, the court declined to find that an ambiguity was introduced into the absolute pollution exclusion by the fact that certain of the Lexington policies had originally contained a lead liability exclusion that was deleted in light of the nature of the insured’s business. On the other hand, the Eighth Circuit held that Lexington had a duty to defend a different claim in The Doe Run Resources Corp. v. Lexington Ins. Co., No. 12-3498 (8th Cir. June 13, 2013) based on allegations that the insured had “distributed” waste materials that were used throughout the local community for sandbox fill and other applications. The court observed that the word “distribute” not included in the exclusion’s operative verbs (e.g. “discharge,” “dispersal,” “release,” etc.). Furthermore, it found that “the distribution of material from the Leadwood Pile for use as a product is markedly different than the inadvertent “discharge, dispersal, seepage, migration, release or escape” of those waste materials.” The court also found that the exclusion did not preclude coverage for allegations the insured failed to take steps to prevent public access to the site.

The Eighth Circuit has ruled in Williams. v. Employers Cas. Co., No. 15-3573 (8th Cir. Jan. 12, 2017) has affirmed a Missouri District Court’s finding that the claims against the insured were subject to absolute pollution exclusions in the policies. Notwithstanding the claimant’s argument that there was no “discharge” of a radioactive
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pollutant, the court ruled that the radioactivity clearly “arose out of” earlier discharges of pollutants and that both radium and coliform bacteria are “pollutants.”

In view of specific language in a contractor’s liability policy including “lead” within the definition of “pollutant” and extending the exclusion’s scope to “the ingestion, inhalation or absorption of pollutants from any source,” the Missouri Court of Appeals ruled in Heringer v. American Family Mutual Ins. Co., 140 S.W.3d 100 (Mo. App. 2004) that the exclusions was not limited to traditional environmental contamination and precluded coverage for a suit against a painting contractor by a family who allegedly suffered bodily injuries as a consequence of being exposed to lead dust and paint chips.

"Personal Injury"

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

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

Scope and Allocation Issues

In Zurich American Ins. Co. v. Insurance Company of North America, No. 14-1112 (E.D. Mo. Nov. 15, 2016), a federal district court ruled that INA is not obliged to reimburse Zurich for half of a \$1.5 million settlement of an asbestos liability suit against Anheuser-Busch. While agreeing that the INA policy years were triggered by the claim, the court found that the settlement must be allocated pro rata on a “time on the risk” basis and that the resulting shares of loss allocated to INA’s policy years were less in each instance than the policies’ deductibles.

The Missouri Court of Appeals has ruled that a trial court did not err in applying an “all sums” approach to the insured’s asbestos liabilities or in holding that it might

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employ a theory of “vertical exhaustion” to access excess coverage. However, ruled in Nooter Corp. v. Allianz Underwriters Ins. Co., No. ED103835 (Mo. App. Ct. Oct. 3, 2017), the Eastern District ruled that the excess insurers were not obliged to pay defense costs as such costs were only covered under their policies insofar as no primary insurer had such a duty, which was not the case here.

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

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

"Suit"

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

Trigger of Coverage

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

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

MONTANA

"As Damages"

No reported environmental cases.

"Occurrence"

No reported environmental cases.

Pollution Exclusion

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

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

Despite these rulings, the Montana Supreme Court ruled in National Indemnity Company v. State of Montana, 2021 MT 300 (Mont. Nov. 23, 2021) that the exclusion did not apply to claims against the State of Montana for failing to warn the public about discharges from the Libby asbestos mine.

"Absolute" Pollution Exclusion

Leaking gasoline was held to be an excluded "pollutant" in Montana Petroleum Tank Release Compensation Board v. Crumleys, Inc., 2008 MT 2 (Mont. January 3, 2008). However, the court ruled that language in a separate pollution endorsement that required notice within 120 days of the inception of pollution was invalid as failing to comply with state law.

Earlier, the court ruled that an insurer's failure to give clear notice to its insured of the addition of a "total" pollution exclusion at the time that policy was renewed has been held to preclude the insurer from relying on it. Thomas v. Northwestern National Ins. Co., 973 P.2d 804 (Mt. 1998)(fuel loss claim against contractor).

An exclusion for "contamination" was held inapplicable to allegations that insured adulterated product, holding that this is an environmental term of art that should be limited to a discharge of pollutants into the environment. Enron Oil Trading and Transportation Co. v. Underwriters of Lloyd's No. CV-90-122 (D. Mt. April 16, 1996), aff'd, 132 F.3d 526 (9th Cir. 1997). Court ruled in Grindheim, that abutting property owners' complaints that insured's use of animal sewage as a fertilizer did not allege the discharge of a "pollutant."

"Personal Injury" Claims

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

Scope and Allocation Issues

"All sums" adopted in National Indemnity Company v. State of Montana, 2021 MT 300 (Mont. Nov. 23, 2021)

Trigger of Coverage

On certified questions from the Fifth Circuit, the Texas Supreme Court ruled in U.S. Metals, Inc. v. Liberty Mutual Group, No. 14-0753 (Tex. Dec. 2, 2015) that the cost of removing and replacing defective flanges from an oil refinery were, for the most part, not covered under a CGL policy. In a lengthy and wide-ranging opinion, the court refused to adopt an "incorporation" theory, aligning itself with a majority of states that have ruled that the incorporation of a defective product does not necessarily result in "physical injury to tangible property" to the assembly of which it is a component.

Trigger of coverage for asbestos claims was ruled in National Indemnity Company v. State of Montana, 2021 MT 300 (Mont. Nov. 23, 2021) to include "exposure in residence."

Federal court ruled that an insured cannot obtain coverage for a pollution loss under policies issued after it became aware of its claimed liability. Bank of Montana v. Travelers Ind. Co., CV 91-085 (D. Mont. June 30, 1994).

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NEBRASKA

"As Damages"

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

"Occurrence"

No reported environmental cases.

Pollution Exclusion

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

Absolute Pollution Exclusion

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

"Personal Injury" Claims

Rejected in Kruger, supra.

Scope and Allocation

A time on the risk approach was adopted by the Supreme Court in Dutton-Lainson Company v. Continental Ins. Co., 716 N.W.2d 87 (Neb. 2010). In rejecting the insured's theory of joint and several liability, the court concluded that Dutton could not assert such a theory without first proving the amount of damages that resulted during the periods of coverage provided by each insurer. "Dutton's argument for joint and several liability would equate liability for the entire occurrence even though the coverage under each policy was for a limited time." The court ruled that this did not appear to be a reasonable assertion. In keeping with similar opinions from the New York Court of Appeals (Consolidated Edison)

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and the Minnesota Supreme Court (Northern States Power), the court concluded that as the policies were intended to provide coverage for property damage occurring during the policy period a *pro rata* time on the risk allocation was appropriate. The court also affirmed the lower court's refusal to include the period from 1987 to 2017 in the denominator for calculating each insurers' allocated loss period. The court ruled that the appropriate period of allocation was time when the contaminants were deposited as opposed to the estimated time for the cleanup.

“Suit”

A governmental Notice of Responsibility was deemed to be the functional equivalent of a law suit in Dutton-Lainson Company v. Continental Ins. Co., 279 Neb. 365 (2010).

Trigger of Coverage

No reported environmental cases.

NEVADA

"As Damages"

No reported environmental cases.

"Occurrence"

No reported environmental cases.

Pollution Exclusion

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

Scope and Allocation Issues

No reported environmental cases.

"Absolute" Pollution Exclusion

The Ninth Circuit has asked the Nevada Supreme Court to answer whether wrongful death claims brought against a motel operator due to carbon monoxide fumes from a malfunctioning pool heater are subject to a total pollution exclusion or a separate "indoor air quality" exclusion. In Century Surety Co. v. Casino West, Inc., 2012 WL 1139074 (9th Cir. April 6, 2012), a Nevada District Court had concluded that a motel operator would not reasonably have understood that such claims would constitute "pollution" and would reasonably have expected that an indoor air exclusion was only meant to apply to air quality issues involving biological organisms or asbestos. In referring the matter to the Nevada Supreme Court, the Ninth Circuit noted the welter of conflicting opinions from around the country concerning the absolute pollution exclusion and the complete lack of authority with respect to indoor air exclusions.

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

Trigger of Coverage

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

In Terrible Herbst, Inc. v. Fireman's Fund Ins. Co., 2007 U.S. Dist. LEXIS 73381 (D. Nev. September 28, 2007), a federal district court held that Fireman's Fund had an obligation to provide a defense to a gas station owner owing to the possibility that gasoline had leaked out of an underground tank during the period of its 1976-77 policy.

NEW HAMPSHIRE

"As Damages"

Supreme Court ruled 3-2 in 1992 that the cost of remediating existing pollution should be covered. Coakley v. Maine Bonding & Cas. Co., 618 A.2d 777 (N.H. 1992). However, costs incurred to prevent the spread of contaminants are not. Courts have generally overlooked this distinction in subsequent cases, however. See, e.g. EnergyNorth Natural Gas, Inc. v. Century Ind. Co., 454 F.3d 44 (1st Cir. 2006)(holding that all of the costs incurred at a former manufactured gas plant were related to the overall site remedy designed to address existing pollution and were not mere prophylactic measures to prevent future releases.

"Occurrence"

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

Pollution Exclusion

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

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

"Absolute" Pollution Exclusion

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

In 2015, a divided state Supreme Court of New Hampshire ruled that a pollution exclusion in a first party policy did not preclude coverage for lost value to a unit due to residual urine odor from a prior tenant's cat. In Mellin v. Northern Security Ins. Co., No. 2014-020 (N.H. April 24, 2015, three of the five justices found that the policy's pollution exclusion was ambiguous. The court declared that "an insured may have reasonably understood that the pollution exclusion clause precluded coverage for damages resulting from odors emanating from large-scale farms, waste-processing facilities, or other industrial settings, these circumstances are distinguishable from those before us, which involve an odor created in a private residence by common domestic animals." Justices Lynn and Dalianis dissented, arguing that cat urine is clearly an excluded "contaminant." The case will revisit this issue later this year in Schleicher, a COVID-19 case.

"Personal Injury" Claims

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

Scope and Allocation Issues

In EnergyNorth Natural Gas, Inc., v. Certain Underwriters at Lloyd's, 934 A.2d 517 (N.H. 2007), the Supreme Court rejected a gas utility's effort to spike coverage into a third layer excess policy on an "all sums" basis. Writing for the three member court, Justice Duggan declared that as between joint several liability or pro rata allocation, it was persuaded by the reasoning of the New Jersey Supreme Court in Owens-Illinois as being more consistent with the continuous trigger of coverage model that it had earlier adopted in EnergyNorth. The court observed that joint and several liability treats a long tail environmental exposure injury as one continuous occurrence, with the policyholder choosing which year's policy will pay all the damages that occurred over several years, up to the limits of that policy. Although it observed that in future cases trial courts should, where applicable, apply the pro ration by years and limits described in Owens Illinois. On

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the other hand, if pro rating liability by years and limits is not feasible, trial courts should pro rate by years.

"Suit"

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

Trigger of Coverage

On a certified question from the U.S. District Court in two manufactured gas plant coverage cases, the Supreme Court of New Hampshire declared in In EnergyNorth Natural Gas, Inc. v. Underwriters at Lloyd's, 848 A.2d 715 (N.H. 2004) that conventional CGL “occurrence” policies are subject to an “injury in fact” trigger. The court ruled that this “injury in fact” approach was mandated by the terms of the policy but was also confirmed by the drafting history of the “occurrence” form. As to earlier “accident” policies, the court rejected insurer contentions that only “discreet causative events” could trigger coverage. Rather, the court adopted an “exposure” trigger and found that “where the alleged migration of toxic waste is continuing, multiple exposures triggering exposures are also continuing.” The court declined to reach the issue of allocation, finding it to be outside the scope of the certified question.

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

NEW JERSEY

"As Damages"

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

On the other hand, the Supreme Court ruled in Passaic Valley Sewerage Commissioners v. St. Paul Fire & Marine Ins. Co., 21 A.3d 1511 (N.J. 2011) that where a wastewater utility agreed to settle claims brought against it by a waste hauler by agreeing to treat and dispose of sludge for a customer of the plaintiff for a period of five years, the settlement was not a "loss" for "money damages."

"Occurrence"

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

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

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

Pollution Exclusion

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

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

"Absolute" Pollution Exclusion

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

"Personal Injury" Claims

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

Scope and Allocation Issues

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

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

Applying New Jersey law to a dispute involving the allocation of responsibility for asbestos claims, the Supreme Court ruled in Continental Ins. Co. v. Honeywell International, Inc., 2108 WL 3130638 (N.J. June 27, 2018) that insureds are not required to bear responsibility for years in which insurance was "unavailable." years of coverage to the insured. Furthermore, the court rejected arguments by Travelers that it should recognize an equitable exception to the "unavailability doctrine" in cases where corporations continued to manufacture and distribute dangerous products even after insurance became unavailable owing to the known risks associated with such operations and products. Judge Albin dissented from this latter aspect of the court's ruling, declaring that the majority's ruling gives insureds a "free pass" to market known dangerous products and still obtain insurance coverage for any resulting liabilities.

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

Spaulding as being inconsistent with its Owens-Illinois analysis, here it concluded that the policy deductibles were a basic part of the policy and not inconsistent with Owens-Illinois. The court criticized the insured for failing to understand the basic notion “that progressive environmental injuries are multiple occurrences....” The court concluded that the purpose of Owens-Illinois is solely to assign a loss to a triggered policy period and that after that the extent of coverage is dependent on the provisions of the policy so long as they are not inconsistent with Owens-Illinois. “Put another way, once the amount of loss allocable to the policy period is determined, it is to be treated exactly as any actual loss during that period would be treated – in accordance with the policy provisions, including limits and exclusions.” As the deductible did not in any way affect the available limits of coverage, the court ruled that it was not inconsistent with Owens-Illinois.

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

The relevant period for allocation appears to be the pollution caused by the insured and not pollution caused by others for which the insured is legally liable. Thus, in Franklin Mut. Ins. Co. v. Metropolitan Property & Cas. Ins. Co., 968 A.2d 1191 (App. Div. 2009), where a parcel of contaminated property was successively owned by two different people, the Appellate Division ruled that the allocation principles set forth in Owens Illinois apply separately to each individual insured not, as the defendant had argued, collectively to all other triggered policies for all the insureds who owned the property during the period of contamination. The court noted that whereas allocation among insurers is *pro rata*, the New Jersey Spill Act provides that allocation among the polluting insureds is joint and several. Accordingly, the court concluded that each insurer’s obligation to share cleanup costs is computed based upon the period that its policyholder owned the property without regard to any liability insurance coverage that other property owners may have had during the period of contamination.

"Suit"

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

Trigger of Coverage

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

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

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

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

The Appellate Division has ruled in Air Master & Cooling, Inc. v. Selective Insurance Company of America, No. A-5415-15T3 (App. Div. Oct. 10, 2017) that a trial court did not err in applying a continuous trigger of coverage to water intrusion that allegedly resulted

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from the insured contractor's negligent construction of a condo building. The court ruled that although the use of the continuous trigger doctrine is "most readily justified" in the context of progressive bodily injury claims such as mesothelioma, New Jersey law clearly supports its application to cases of progressively developing property damage. The Appellate Division ruled, however, that the end date for a continuous trigger is the point in time when the particular damage at issue becomes known to the parties, rejecting the insured's argument that coverage should continue until such time as it becomes known that the damage is attributable to the conduct of the insured. The court ruled that this sort of tolling argument made sense in the context of the statute of limitations but had no application to the applicable trigger of coverage for such claims.

The New Jersey Supreme Court has ruled in Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co., No. A-16 (N.J. Feb. 1, 2017) that the successor entity to a polluter was entitled to obtain coverage pursuant to an express assignment of rights from the original insured after the pollution had already occurred. In aligning itself with what it perceived to be the majority position, the state Supreme Court declared that anti-assignment clauses are inapplicable to post-loss claim assignments.

NEW MEXICO

"As Damages"

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

"Occurrence"

No reported environmental coverage cases.

Pollution Exclusion

A very restrictive view of the exclusion was adopted by the New Mexico Supreme Court in United Nuclear Corp. v. Allstate Ins. Co., No. 32, 939 (N.M. August 23, 2012). The court held that the absence of a definition of "sudden" in the policies taken together with the diverging definitions in standard dictionaries and the lack of any consensus of courts around the country required a finding that "sudden" is ambiguous.

"Absolute" Pollution Exclusion

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

"Personal Injury" Claims

No reported environmental cases.

Scope and Allocation Issues

No reported environmental cases.

Trigger of Coverage

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

NEW YORK

"As Damages"

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

"Occurrence"

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

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

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

Pollution Exclusion

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

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

"Absolute" Pollution Exclusion

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

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

More recently, the Court of Appeals has declared that such exclusions are restricted to "environmental" claims and may not be relied on to defeat coverage for bodily injuries involving indoor exposures. In Belt Painting Corp. v. TIG Ins. Co., 100 N.Y.2d 377, 795 N.E.2d 15 (2003), the Court of Appeals ruled that a total pollution exclusion did not apply to

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

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

In a case that settled while pending before the New York Court of Appeals, the Appellate Division ruled 3-2 in Griffith Oil Company v. National Union Fire Insurance Company of Pittsburgh, PA, 15 A.D.3d 982, 984 (4th Dept. Dec. 30, 2009) appeal dismissed, (N.Y. 2011), that a spill of pollutants that occurred while fuel oil was being transported through a pipeline to the insured's premises fell within the products/completed operations hazard. Three of the justices concluded that at the time of the release, the property damage occurred away from the insured's premises and arose as a result of fuel purchased by plaintiffs that had leaked either while it was being transported to the plaintiff's facility or stored in the spur awaiting transportation. The Appellate Division ruled that the trial court had erred in holding that language in the exclusion for property "still in your physical possession" required that the product had been sent into the stream of commerce from the insured's facility so as to only reinstate coverage for damage resulting from pollution that occurred while plaintiffs were in the process of transporting fuel from the facility, after having received it. While the Appellate Division ruled that the phrase "still in you physical possession" excludes coverage for property damage for pollution that occurs on the insured's premises or was, at a minimum, ambiguous. Two of the five judges dissented, arguing that the trial court had correctly concluded that the oil in question had not yet come into the insured's possession and therefore, did not involve the "product's hazard."

The First Department has ruled in Matter of Midland Ins. Co., 2017 N.Y. App. Div. LEXIS 5065 (1st Dep't June 22, 2017) that an absolute pollution exclusion precluded coverage for the cost of remediating a Superfund site whose contamination was due in part to the chipping of leaded paint from nearby homes. While conceding that New York courts have ruled that lead paint may not be a "pollutant" in some circumstances, the Appellate Division ruled in this case that it clearly was excluded as its disposal had caused soil contamination.

"Personal Injury" Claims

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

Scope and Allocation Issues

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

Although Consolidated Edison did not specify what rule courts should apply in allocating long-tail losses, a subsequent ruling of the Appellate Division in Serio v. Public Service Mutual Ins. Co., 759 N.Y.S.2d 110 (2d Dept. 2003) concluded that the cost of a lead paint settlement should be apportioned between two insurers based on their respective “time on the risk.” The court declared that a “time on the risk” approach was “the least arbitrary, most equitable method, fostering foreseeability in underwriting in providing for uniformity of results.” Accord USF&G v. Treadwell Corporation, 58 F.Supp.2d 77 (S.D.N.Y. 1999)(coverage for claims should be pro-rated on a “time on the risk” basis including a share to the insured for early years for which coverage could not be documented)

In contrast to its ruling in Consolidated Edison, the Court of Appeals ruled in 2016 that *pro rata* was only a default answer and should not be followed if the policies explicitly provided rules for allocation. In In re Viking Pump Insurance Appeals, 27 N.Y.3d 244 (2016), the Court of Appeals ruled that a *pro rata* approach was not appropriate for excess policies containing “non-cumulation” and “prior insurance provisions and that in such instances policyholders could obtain coverage on an “all sums” basis. The court observed that using a *pro rata* approach would render such policy terms “superfluous.” The court also observed that the inclusion of such wording destroyed the “legal fiction” underlying the use of a *pro rata* approach—namely, that distinct injury could be assigned to each policy’s coverage. Finally, the court ruled that “other insurance” clauses in excess policies only apply to policies insuring the same time period. As a result, insureds may vertically exhaust coverage and can not be required by an excess insurer to horizontally exhaust all policies in the underlying layer before triggering the excess insurer’s coverage.

In Olin Corp v. OneBeacon American Insurance Company, No. 15-2047 (2nd Cir. July 18, 2017), the Second Circuit ruled that a New York District Court had not erred in requiring coverage for environmental liability claims under a 1970 umbrella policy. In light of the non-cumulation clause in the Commercial Union umbrella policy, the court ruled that the insured could seek coverage under an "all sums" approach in keeping with the New York Court of Appeals 2015 ruling in Viking Pump. Surprisingly, the court further declared that the issue of whether the underlying \$300,000 primary policy had been exhausted was similarly subject to Viking Pump even though that policy lacked a non-cumulation clause and would ordinarily have been subject to a standard "time of the risk" allocation analysis. The Second Circuit ruled, however, that the District Court had erred in interpreting the non-cumulation clause as only applying where similar prior policies have been issued by the same insurer. On the other hand, the court ruled that this clause only had the effect of reducing the policy's limits insofar as it could be shown that Olin had received payments for these specific sites from the earlier excess insurers.

Notwithstanding concerns that its ruling in Viking Pump might reflect second thoughts with respect to the advisability of *pro rata* allocation, the New York Court of Appeals has reaffirmed the conclusion that it earlier adopted in Consolidated Edison that *pro rata* allocation is required in the absence of express policy provisions to the contrary. Furthermore, the court ruled in KeySpan - East Corp v. Munich Reinsurance Co., 2018 WL 1472365 (N.Y. Mar 27, 2018) that there is no "unavailability" exception exempting periods of time when insured's allegedly could not purchase insurance coverage for environmental liabilities. The Court of Appeals declared that the cases recognizing an "unavailability" exception have generally done so on public policy grounds, whereas its adoption of *pro rata* allocation in Consolidated Edison was based on policy provisions limiting coverage to loss occurring "during the policy period."

"Suit"

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

Trigger of Coverage

For the most part, it appears that New York courts will follow an "injury in fact" trigger. See American Home Products Corporation, 748 F.2d 760 (2d Cir. 1984). But see Maryland Cas. Co. v. W.R. Grace & Co., 4 F.3d 185 (2nd Cir. 1993)(adopting installation trigger for asbestos building claims) and In Re Liquidation of Midland Ins. Co., 709 *Morrison Mahoney LLP (Copyright 2022)*.

N.Y.S.2d 24 (1st Dept. 2000)(coverage for asbestos bodily injury claims is limited to those policies in effect during the period of actual inhalation or exposure. In Midland, the Appellate Division ruled that New York courts would not follow Keene in also requiring coverage during the period of “exposure in residence” or “manifestation.”

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

On the other hand, the Second Circuit summarily ruled in Olin Corp. v. Century Ind. Co., No. 11-4579 (2d Cir. June 18, 2013) that INA owed 100% of the cost of defending pollution claims by various California citizens even though the plaintiff’s homes were constructed after its policies expired. In a brief unpublished opinion, the court ruled that the claims potentially involved INA’s 1956-70 policies as the suits did not allege when the homeowners’ were injured whereas it was claimed that the insured’s use of potassium perchlorate had polluted groundwater during the subject period. Further, while leaving open the issue of whether allocation to periods of “unavailable” insurance is allowed under New York law, the Second Circuit agreed with Judge Griesa that it was inappropriate in this case as no reasonable basis existed for calculating the insured’s share. The court pointed out that the litigation between Olin and the California homeowners and residents did not establish when injury occurred to the properties at issue given the absence of any jury determinations as to when—if ever—negligent waste disposal occurred, as well as indefinite expert testimony as to the pace of perchlorate migration or the dates of initial contamination.

In Carrier Corp. v. Allstate Ins. Co., 2020 NY Slip Op 05620 (App. Div. Oct. 9, 2020), the Appellate Division of the New York Supreme Court has vacated a trial court’s declaration that “as a matter of law, injury-in-fact in an asbestos action occurs from the date of first claimed exposure through death or the filing of suit, thereby triggering each policy in effect from the date of first claimed exposure. The Fourth District ruled that summary judgment should not have been granted in light of contradictory affidavits with respect to whether asbestos injuries occur immediately after initial exposure and averring instead that harm occurs only when a threshold level of asbestos fiber or particle burden is reached that overtakes the body’s defense mechanisms.

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NORTH CAROLINA

"As Damages"

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

"Occurrence"

No reported environmental cases.

Pollution Exclusion

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

"Absolute" Pollution Exclusion

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

"Personal Injury" Claims

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

Scope and Allocation Issues

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No reported environmental cases.

"Suit"

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

Trigger of Coverage

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

A federal district court ruled in Peace College of Raleigh, Inc. v. American International Specialty Lines Ins. Co., 2010 WL 3743539 (E.D.N.C. September 15, 2010) that in a case where a contribution suit arising out of the Ward Superfund site did not expressly allege when the parties had shipped waste transformers to the site, a pollution legal liability insurer could not avoid its defense obligations on the basis of an exclusion for disposal activity ceasing prior to the issuance of the policy.

In Radiator Specialty Co. v. Arrowood Ind. Co., 850 S.E.2d 624 (N.C. App. 2020), the North Carolina Court of Appeals has refused to adopt a continuing "injury in fact" trigger of coverage for asbestos liability claims. The court conceded that the state's Supreme Court had approved the use of an "injury in fact" trigger in Gaston County Dyeing Machine Company v. Northfield Ins. Co., 524 N.E.2d 558 (N.C. 2000) but had stated at the time that this was only appropriate where an injury in fact occurs on a date certain and all subsequent damages flowed from that single event. The Court of Appeals contrasted that type of case with claims for exposure to asbestos and benzene where it is impossible to determine with certainty when injury actually occurs and it results from exposures over a period of time that is not attributable to a single event. As a result, the Court of Appeals held that the trial court had properly adopted an "exposure" trigger. The Court of Appeals also criticized the trial judge's initial adoption of a "time on the risk" allocation model but held that this ruling was harmless since the final judgement had assigned loss based on the requirements of each policy. Finally, the Court of Appeals sustained the trial court's declaration that excess coverage should only arise after horizontal exhaustion of all available primary insurance.

NORTH DAKOTA

"As Damages"

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

"Occurrence"

No reported environmental cases.

Pollution Exclusion

No reported environmental cases.

"Absolute" Pollution Exclusion

The Eighth Circuit has affirmed a North Dakota District Court's ruling that personal injuries due to a natural gas explosion at the insured's energy processing facility are subject to an absolute pollution exclusion. In Hiland Partners GP Holdings, LLC v. National Union Fire Ins. Co. of Pittsburgh, PA, No. 15-3936 (8th Cir. Jan. 31, 2017), the court ruled that natural gas "condensate" was an excluded "pollutant," notwithstanding the fact that condensate was a "saleable" byproduct of the processing of gas and hydrocarbon products. Further, the court rejected the insured's argument that condensing was not a "pollutant" but because it had caused harm in a manner other than by "contamination." Finally, the Eighth Circuit ruled that the District Court had not erred in ruling that the insured had the burden of showing that this loss had begun and ended within seven days of its discovery.

"Personal Injury" Claims

No reported environmental cases.

Scope and Allocation Issues

No reported environmental cases.

"Suit"

No reported environmental cases.

Trigger of Coverage

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

OHIO

"As Damages"

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

That is the issue that was argued to the Ohio Supreme Court on September 18, 2021 in Acuity Insurance v. Masters Pharmaceutical Inc., No. 2020-1134 on appeal from the intermediate appellate court's ruling that a liability insurer must provide a defense to allegations that a pharmaceutical wholesaler and distributor caused or contributed to the opioid pandemic. In Acuity v. Masters Pharmaceutical, Inc., 2020–Ohio–3440 (Ohio App. Ct. June 24, 2020), the Court of Appeals had ruled that a liability insurer was obliged to provide a defense to claims that a pharmaceutical distributor improperly prescribed opioids.

Whereas the trial court had ruled that Acuity had no duty to defend because this suit was for economic loss and not did not seek "damages" on account of bodily injury. Instead, the Ohio Court of Appeals adopted the Seventh Circuit's recent analysis in *H.D. Smith*, finding that coverage extended to losses to organizations and were not limited to bodily injury suffered by the original victim. The Ohio Court of Appeals also set aside the trial court's conclusion that these claims were subject to a "loss of progress" exclusion in light of the fact that MPI was aware of the opioid epidemic before it purchased insurance from Acuity. While agreeing with Acuity that this language in the insurance agreement was part of the insured's burden of proof, the Court of Appeals nonetheless ruled that although MPI was clearly on notice of illegal prescriptions and had even received demand letters from the DEA, mere knowledge that injuries might be occurring was not enough to bar coverage under the "loss in progress" provision.

"Occurrence"

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

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Pollution Exclusion

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

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

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

The Court of Appeals ruled in M&M Metals International v. Continental Cas., 2008 Ohio App. LEXIS 973 (Ohio App. March 14, 2008) events preceding the insured's shipment of wastes could not be relied on by the insured's to satisfy its burden of proving a "sudden and accidental" discharge. The court also refused to find that various rainstorms or incidences of soil erosion were gradual or "sudden." The Court of Appeals also rejected regulatory estoppel arguments.

"Absolute" Pollution Exclusion

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

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

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

"Personal Injury" Claims

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

Scope and Allocation Issues

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

The targeted insurer may sue other carriers for contribution, however. Further, the insured has a duty to cooperate with the targeted insurer in identifying those other carriers. In Pennsylvania General Ins. Co. v. Park-Ohio Industries, 126 Ohio St.3d 98, 2010-Ohio-2745 (2010), an insured stonewalled Penn General's repeated requests for information

about its other insurers. When Penn General finally did assert claims for contribution against CNA and Nationwide, they claimed that the intervening delay precluded recovery due to the insured's late notice. The Supreme Court ruled where a single insurer is targeted to defend, the insured has a duty to cooperate in involving other carriers. If the targeted insurer requests information regarding other policies that may cover the claim, the insured has a duty to cooperate by identifying any such policies. "In keeping with the equitable nature of the all sums approach to allocation, we clarify Goodyear by stating that the insured has a duty to cooperate with the targeted insurer. While Goodyear allows the insured to choose a targeted insurer for which it may recover a full amount of indemnification, this does not mean that the insured may engage in tactics to delay or obstruct the targeted insurer in the process of obtaining contribution from non-targeted insurers."

The Ohio Court of Appeals has ruled in Chiquita Brands Int'l, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA, 2015-Ohio-5477 (Ohio App. Ct. Dec. 30 2015) that a trial court did not err if declaring that National Union was entitled to recover \$11.7 million in defense costs that it had paid to defend various lawsuits in which plaintiffs claimed that they were injured as a result of Chiquita's financing of terrorist groups in Columbia between 1989 and 2004. Despite the fact that the policies made no provision for reimbursement and Chiquita had never agreed to National Union's unilateral assertion of a right to recoup them, the Court of Appeals ruled that restitution was appropriate in the specific narrow circumstances of this case where the insurer had only agreed to defend after being ordered to by a court order that was overturned on appeal years later. Justice Stautberg dissented, declaring that National Union's rights were controlled by its insurance policy and that National Uninsured could, had it so chose, have refused to pay defense costs until a final judgment entered affirming the lower court's declaration of coverage.

The Ohio Court of Appeals has ruled that a trial court did not err in concluding that National Union owed contribution to other insurers that had provided coverage for a defendant in numerous asbestos bodily injury claims. The court ruled in Resco Holdings, LLC v. AIU Insurance Co., 2018-Ohio-2844 (Ohio. App. July 19, 2018) that it was appropriate to assign National Union the same percentage as Travelers was paying under the negotiated cost share agreement since both carriers were on the risk for two years. National Union had argued that it had not been a party to the agreement and should not be bound by what other parties had negotiated. The court also rejected National Union's argument that the trial court had failed to account for the longer period of time that The Hartford and Wausau had been on the risk, observing their earlier policies pre-dated most of the asbestos injuries alleged in the underlying litigation. Finally, the Court of Appeals agreed with the trial court that The Hartford and Wausau could collectively obtain contribution as there is no Ohio law prohibiting a court from allowing multiple insurers from jointly prosecuting a claim for equitable contribution.

"Suit"

A PRP letter was held not to be a "suit" in Professional Rental Inc. v. Shelby Ins. Morrison Mahoney LLP (Copyright 2022).

Co., 599 N.E.2d 423 (Ohio App. 1991) and Detrex Chemical v. Employers Ins. of Wausau, 681 F.Supp. 438 (N.D. Ohio 1987).

Trigger of Coverage

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

The Ohio Supreme Court issued a pair of opinions on December 20, 2006 that appear to reflect a deep division within the court with respect to whether and when corporate successors are entitled to claim coverage under a predecessor’s policies for long-tail liabilities arising out of the manufacture, sale or distribution of the predecessor’s products. In Pilkington North American, Inc. v. Travelers Cas. Ins. Co., 861 N.E.2d 121 (Ohio 2006), a plurality of the court seemed to hold that, although the terms of a policy might allow a successor to obtain rights to indemnification, coverage was not transferred by “operation of law.” The court also held, however, that any such rights were not barred by the policies’ anti-assignment clause, as the “chose in action” was fixed as of the date of the underlying injuries triggering coverage. A concurring opinion by Chief Justice Moyer and Justice O’Connor argued that an insurer’s defense obligation was not assignable, particularly where, as here, multiple parties might be seeking a defense such that the assignment had materially changed or increased the risk faced by the insurer. A different view was taken by Justices Pfeiffer and Resnick, who concurred in part and dissented in part, arguing that defense costs were likewise assignable. Finally, Justice Lanzinger filed his own concurring and dissenting opinion declaring that Pilkington’s demand for a defense and indemnification was not a chose in action and therefore should not have been assignable at all.

On the same date, the court ruled in Glidden Co. v. Lumbermen’s Mut. Cas. Co., 861 N.E.2d 109 (Ohio 2006) that Glidden was not entitled to coverage by “operation of law” for lead paint claims involving policies issued between the 1960s and 1974 to a predecessor entity that manufactured the leaded paint giving rise to Glidden’s present tort liabilities. Four of the justices found that the underlying corporate transactions that ultimately resulted in the creation of Glidden in 1986 had explicitly excluded insurance policies from the liquidation and distribution of assets of certain entities. Nor did the corporate transactions

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in any way suggest an intent to convey rights under the policies. However, Judge Lanzinger concurred in the judgment. Justices Resnick and Pfeiffer dissented, arguing that even though the corporate history in this case was more “tangled” than was the case in Pilkington, the successor entity should still be entitled to obtain the benefits of the predecessor’s policies.

OKLAHOMA

"As Damages"

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

"Occurrence"

No reported environmental cases.

Pollution Exclusion

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

"Absolute" Pollution Exclusion

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

On a certified question from the local District Court, the Oklahoma Supreme Court has ruled that applying an Indoor Air Exclusion to carbon monoxide poisoning claims does not violate public policy. In Siloam Springs Hotel v. Century Sur. Co., 2017 OK 14 (Okla. Feb. 22, 2017), the court declared that no public policy articulated by the Oklahoma legislature bore on these issues or conflicted with this exclusion.

In National American Ins. Co. v. New Dominion LLC, 2021 OK 62 (Okla. Nov. 23, 2021), the Supreme Court found that a lower court had erred in ruling that the insured's discharge of wastewater into the group, which allegedly triggered seismic activity, the release of an "irritant or contaminant." The court distinguished its 2002 ruling in Cowen Construction, in which it had declared that pollution exclusions are not restricted to "environmental claims," as it did not involve any issues as to the meaning of "irritant or contaminant" and that the parties had stipulated in that case that high levels of lead in the insured's kidney dialysis operations involved a "pollutant." Given the ambiguity in the meaning of "irritant or contaminant", the court ruled the insured utility had a reasonable expectation of coverage for these earthquake-related incidents.

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"Personal Injury" Claims

No reported environmental cases.

"Suit"

No reported environmental cases.

Trigger of Coverage

No reported environmental cases.

OREGON

"As Damages"

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

"Occurrence"

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

Addressing an issue of first impression in Oregon, the Oregon Supreme Court ruled in ZRZ Realty Co. v. Beneficial Fire & Cas. Ins. Co., 241 P.3d 710 (Or. 2010) that the burden of proof with respect to issues of fortuity should depend on the placement of policy terms in an insurance policy. Insofar as the later policies set forth the requirement of intent in the insuring agreement, the court ruled that Zidell had the burden to prove that the damages were neither expected nor intended. The Court ruled that this "not only permits the parties to structure their agreements in a way that allocates the burden of proof, but it also avoids putting courts in the difficult position of divining the 'essence' of contractual provisions that logically may serve either as a grant of limited coverage or an exclusion from a broad grant of coverage." Consistent with this analysis, the court held that it was the insurers that had the burden of proof with respect to earlier policies where the Court had merely implied a requirement of fortuity. Further, with respect to certain Protection and Indemnity policies issued by the London Market, the Supreme Court held that the trial court did not err in holding that materials released onto the river from its vessels would not constitute liability arising by reason of the insured's interests in these marine vessels.

"Personal Injury" Claims

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

Pollution Exclusion

"Sudden" was held to be ambiguous in St. Paul Fire & Marine v. McCormick & Baxter, 923 P.2d 1200 (Or. 1996). Court of Appeals has consistently ruled that intentional releases are not "accidental" whether or not the insured intends injury. Transamerica Ins. Co. v. Sunnes, 711 P.2d 212 (Or. App. 1985); Mays v. Transamerica Ins. Co., 799 P.2d 653 (Or. App. 1990). A duty to defend may exist if pollution results even in part from "sudden" spills (North Pacific Ins. Co. v. United Chrome Products, Inc., 122 Or. App. 77 (1993)) or where complaint does not preclude possibility of "sudden" spills (Northwest Pump & Equipment v. American States Ins. Co., 917 P.2d 1025 (Or. App. 1996)).

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

"Absolute" Pollution Exclusion

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

The Oregon Supreme Court ruled in Fleming v. USAA, CC 9312-08128 (Ore. November 4, 1999), however, that a pollution exclusion language in the "perils insured against" portion of a property policy could not be given effect owing to the fact that it was

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not clearly labeled as an “exclusion” in keeping with ORS 742.246(2) which requires that any provision “restricting or abridging the rights of the insured” must be preceded by a sufficiently explanatory title printed in eight-point type capital letters.

The Oregon Court of Appeals ruled in 2020 that a tenant’s suit against his landlord for exposures to unsafe levels of carbon monoxide due to a clogged chimney has been held to trigger a duty to defend, notwithstanding an absolute pollution exclusion in the landlord’s liability policy that expressly identified carbon monoxide as an excluded “pollutant.” In Rogowski v. Safeco Ins. Co. of Oregon, A169063 (Or. App. Sept. 6, 2020), the Court of Appeals ruled that the tenant’s suit could reasonably be read as seeking recovery for damages due to “degraded air quality” generally and was not solely dependent on the presence of carbon monoxide fumes. Although Safeco also argued that “degraded air quality” is simply the condition of air when it is mixed with irritants and contaminants, the court found that it could also mean air that has a reduced level of oxygen.

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

Scope and Allocation Issues

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

The Court of Appeals has ruled that a polluter is entitled to recover all of its unreimbursed clean up costs from the sole non-settled carrier, reversing a trial court's determination that the carrier's obligation should be measured by comparing the total limits of its coverage with the total limits of all of the primary and excess policies under which the claim had originally been pursued. In Cascade Corp. v. American Home Assurance Co., 135 P.3d 450 (Or. App. 2006), review dismissed, 342 Or. 645 (2007), the Court of Appeals declared that the Lamb-Weston doctrine is intended to make insureds whole and has no application to a claim here where the insurer has settled with all but one defendant.

Further, in Certain Underwriters at Lloyd's, London v. Massachusetts Bonding & Insurance Co., 341 Or. 128 (2010), the Court of Appeals ruled that a trial court had erred in holding that an insured's settlements precluded a carrier's contribution rights against the settled insurers. The court took note of the fact that the doctrine of equitable contribution is not based on subrogation or contract theory but rather is grounded in principles of equity and is a right that inures to the benefit of the insurer, not the policyholder. The court ruled that Zidell was able to release its own claims against insurers through settlements but could not release other insurers' contribution rights.

"Suit"

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

Trigger of Coverage

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

PENNSYLVANIA

"As Damages"

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

"Occurrence"

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

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

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

Pollution Exclusion

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

Sunbeam Corporation v. Liberty Mutual Ins. Co., 781 A.2d 1189 (Pa. 2001). Sunbeam's argument that the exclusion was ambiguous or that coverage was mandated on a Morton-style theory of regulatory estoppel by the trial court and, on appeal, by the Superior Court. The Supreme Court ruled 5-2 that the lower courts had erred in granting the insurers' demurrer and dismissing a policyholder's complaint with prejudice where, in the majority's view, the insurer had properly pleaded the elements of a claim for estoppel based upon representations concerning the scope of the exclusion that the insurance industry had made to the Pennsylvania Insurance Department in 1970. While not going so far as to formerly adopt Morton-style regulatory estoppel, the Supreme Court remanded the question back to the trial court for further finding and further suggested that such evidence might be relevant to establish a "custom and usage" within the insurance industry that mandates an interpretation of "sudden and accidental" that is contrary to the understanding of the general public. See also Simon Wrecking Co., Inc. v. AIU Ins. Co., 541 F.Supp.2d 714 (E.D. Pa. 2008)(declining to grant summary judgment to insurer due to fact questions presented by regulatory estoppel issue).

"Absolute" Pollution Exclusion

In Madison Construction Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100 (Pa. 1999), the Pennsylvania Supreme Court ruled 4-3 that the pollution exclusion was unambiguous and precluded coverage for injuries suffered by a construction worker who had collapsed after inhaling toxic fumes from a sealant product a job site. Noting that the MSDS sheet for the substances in question treated them as a hazardous substance, the court ruled that there had plainly been a "discharge" of a "pollutant." Three dissenting judges argued that the exclusion should not be given so broad a scope. Accord, Brown v. American Motorist Ins. Co., 930 F.Supp. 207 (E.D. Pa. 1996)(indoor fumes from waterproofing sealant). See also Antrim Mining, Inc. v. PIGA, 648 A.2d 532 (Pa. App. 1994)(mine operator held to "own, rent or occupy" premises from which pollution occurred) and Reliance Ins. Co. v. Moessner, 121 F.3d 895 (3d Cir. 1997)(rejecting argument that such exclusions are limited to "environmental catastrophes") and Travelers Prop. Cas. Co. v. Chubb Custom Ins. Co., 2012 U.S. Dist. LEXIS 44756 (E.D. Pa. March 30, 2012)(exclusion barred coverage for claims arising out of insured's pig farming operations around the United States that allegedly generated "harmful and ill-smelling odors, hazardous substances and contaminated waste water").

Despite the broad construction that it had given the exclusion in Madison Construction, the Supreme Court ruled in Lititz Mut. Ins. Co. v. Steely, 785 A.2d 975 (Pa. 2001) that lead poisoning claims are not excluded. While conceding that lead is a "pollutant," the court held that the process of injury did not involve a "discharge, dispersal, release or escape" of a pollutant since all of those terms connote events that occur quickly whereas the process by which lead-based paint deteriorates and exfoliates leaded dust occurs gradually over a long period of time.

A divided Pennsylvania Supreme Court issued a *per curiam* opinion in Wagner v. Erie Ins. Co., 847 A.2d 1274 (Pa. 2004) affirming a lower court's ruling that the absolute pollution exclusion defeated coverage for claims arising out of the cost of cleaning up gasoline that had spilled from underground piping at the insured's gas station. Justice Nigro, joined by Justice Newman, issued a dissenting opinion arguing that a service station operator would reasonably have expected to be covered for spills involving a product so closely identified with its principal business operation.

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

Despite an insured's argument that representations made by ISO to Pennsylvania insurance regulators should estop Royal from asserting the application of an absolute pollution exclusion to claims arising out of the insured's installation of defective copper roofing that eroded, causing contamination that had to be cleaned up in a nearby retention pond, the Third Circuit ruled in Hussey Copper, Ltd. v. Arrowood Indemnity Co., No. 09-4037 (3rd Cir. August 23, 2010) that the underlying action fell squarely within the language of the exclusion as involving "any loss, cost or expense arising out of any request, demand or order that any insured or others in any way respond to or assess the effects of pollutants. The court declined to find that "industry custom and usage" demonstrated that insurers did not consider Section 2(a) as applying to "product-based claims" such as those asserted against Hussey Copper. Finally, the court rejected the insured's regulatory estoppel argument based upon alleged representations by ISO to the effect that this exclusion did not apply to product-based claims. While acknowledging that the Pennsylvania Supreme Court had adopted the doctrine of regulatory estoppel in Sunbeam Electric, the Third Circuit found that the District Court had properly rejected the application of this doctrine to the facts in this case where the insured's claimed evidence of industry representations pertained to a different pollution exclusion in a different contract and were simply not relevant to a claim for estoppel involving the Royal language. In any event, the court found that the ISO statements, when read in context, showed that ISO consistently represented to regulators that the pollution exclusion would apply to cleanup costs like those the Building Commission incurred and were not contrary to Arrowood's position in this litigation.

In a major victory for casualty insurers, the Third Circuit reversed a Pennsylvania District Court's ruling that early asbestos exclusions were ambiguous and/or limited to the specific disease of "asbestosis." Instead, the Court of Appeals ruled in General Refractories Co. v. First State Ins. Co., No. 15-3409 (3d Cir. April 21, 2017) that an exclusion for excess net loss "arising out of asbestos, including but not limited to bodily injury arising out of asbestosis or related diseases or to property damage" extended to all claims for bodily injury that would not have occurred "but for" the claimant's exposure

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to the insured's asbestos products. The court rejected GRC's contention that this exclusion was also only intended to apply to the exposure to mineral asbestos in its raw, unprocessed form and therefore did not apply to the insured's finished products.

"Personal Injury" Claims

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

Scope and Allocation Issues

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

Insurers have no right to sue insureds to recoup costs of defense for cases that are later held not to be covered. See American & Foreign Ins. Co. v. Jerry Sport's Center., 2 A.3d 526 (Pa. 2010)(holding that insurer had a duty to defend NAACP "nuisance" against a gun dealer and therefore had no right of recoupment).

"Suit"

No reported environmental coverage cases.

Trigger of Coverage

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

However, the state Supreme Court has since declined to apply the J.H. France "triple trigger" to property losses resulting from the continuous and progressive contamination of the water supply for the plaintiff's dairy herd. In holding that a liability insurer only owed coverage under the policy when the property damage first became manifest, the court ruled in Pennsylvania National Mut. Ins. Co. v. St. John, 106 A.3d 1 (Pa. 2014) that its earlier analysis in J.H. France was restricted to asbestos and similar types of toxic tort claims. The court emphasized that, unlike asbestos, the damage in this case had not lain "dormant for decades." The court also took note of the fact that current GL forms contain language barring coverage under later policies for the continuation or resumption of damage from earlier "occurrences." Further, in determining the time of "manifestation," the court ruled in this case that damage became manifest when the water supplies became

cloudy, not two years later when the cause of the contamination became suspected. The court ruled that manifestation happens when the injury, not the cause of injury, manifests in a way that can be ascertained by reasonable diligence.

Notwithstanding St. John's holding that the trigger of coverage for latent property damage claims is the date of "first manifestation," the Commonwealth Court has ruled that claims arising out of long-tail environmental contamination are subject to the continuous trigger that the Supreme Court adopted for asbestos bodily injury claims in J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502 (Pa. 1993). In Pennsylvania Manufacturers Ins. Co. v. Johnson-Matthey, Inc., 2017 WL 1418401 (Pa. Super. April 21, 2017), review denied (Pa. July 18, 2018), the Commonwealth Court (which hears appeals involving governmental agencies such as the PADEP) distinguished St. John as involving the negotiation of coverage under policies issued *after* manifestation and in a case where the manifestation occurred relatively soon after the insured's misfeasance, as opposed to this case, where the policies were issued in the years prior to manifestation and the pollution arose out of discharges dating back decades earlier. In 2018, the Supreme Court declined to hear the insurer's appeal, declaring that further appellate review was premature pending the disposition of the insured's counter-claim against PMI.

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

RHODE ISLAND

"As Damages"

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

"Occurrence"

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

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

Pollution Exclusion

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

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from both excluded and non-excluded causes.

Applying New York law, the First Circuit ruled in Emhart Industries v. Century Indemnity Co., 559 F.3d 37 (1st Cir. 2009) that floods and other events occurring after pollutants were released into the environment are irrelevant to the question of “sudden and accidental.”

A state court in Massachusetts applying Rhode Island law ruled that allegations that wastes belonging to the insured were intentionally disposed of at the J.M. Mills Superfund site were excluded from CGL coverage as not involving a “sudden and accidental” release.

In OneBeacon America Ins. Co. v. Narragansett Electric Co. (Mass. Super. February 1, 2012), the Superior Court held that the insured utility had established the possibility that this pollution “manifested” during the period of OneBeacon and Century’s policies but that any obligation on the part of these insurers was negated by operation of the “sudden and accidental”-type pollution exclusion. Unlike the facts in Textron where the insured had sought to contain and treat waste by placing it in an artificial holding pond, the court noted that at J.M. Mills a third party had dumped creosote-covered utility poles in a landfill and that the insured could point to no intervening event as suggesting that these discharges were unintended or unexpected from its standpoint. Rather, in keeping with the First Circuit’s opinion in Warwick Dyeing, the court ruled that these discharges were clearly not sudden and accidental.

"Absolute" Pollution Exclusion

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

"Personal Injury" Claims

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

Scope and Allocation Issues

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

"Suit"

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In Ryan v. Royal Ins. Co., 728 F.Supp. 862 (D.R.I. 1990), aff'd, 916 F.2d 731 (1st Cir. 1990), the First Circuit ruled that a voluntary market decision by a property owner to clean up pollution at the urging of federal authorities did not result from a "suit." Relying on Ryan, a federal district court has since ruled that a PRP letter is a "suit." Emhart Corp. v. North River Ins. Co., 02-053S (D.R.I. August 3, 2006), aff'd on other grounds (1st Cir. 2009). Further, the court ruled that any duty to defend should encompass the cost of pursuing contribution claims against other PRPs since the work was "defensive" in nature.

Trigger of Coverage

The Rhode Island Supreme Court ruled in CPC Int., Inc. v. Northbrook Excess & Surplus Ins. Co., 668 A.2d 647 (R.I. 1995) that coverage should arise in the policy year in which property damage was discovered, became manifest or, in the exercise of reasonable diligence, could have been discovered. In Textron-Gastonia, Inc. v. Aetna Cas. & Sur. Co., 723 A.2d 1138 (R.I. 1999) the court explained that "discoverable in the underlying exercise of reasonable diligence" meant that "(1) the property damage occurred during the policy period, (2) the property damage was capable of being detected and (3) the insured had reason to test for the property damage." See also Textron, Inc. v. Aetna Cas. & Sur. Co., 754 A.2d 1138 (R.I. 2000)(trial court erred in granting summary judgment where evidence of earlier spills suggested that the insured not only could have found contamination but had reason to test of it. The court found that the evidence presented by Textron concerning intermittent discharges for decades prior to the discovery of pollution not only created a question of fact as to whether damage had been discoverable during the policy period but suggested that the insured had reason to test for it).

The First Circuit has treated the Textron definition as presenting different events that may each serve as an independent trigger. In allowing one insurer to obtain contribution from another, the First Circuit; ruled in Travelers Cas. & Sur. Co. v. Providence Washington Ins. Co., No. 11-2193 (1st Cir. July 11, 2012) that a Rhode Island district court erred in holding that a liability insurer whose policy incepted after the insured ceased operations at a facility did not have a duty to defend environmental liability claims arising out of past disposal practices. The court ruled that "discoverable in the exercise of reasonable diligence" does not require a temporal overlap between the policy period and the insured's active business operations during which the allegedly damaging polluting activity took place." As the underlying facts alleged that pollution had migrated over a period of decades leading up to its discovery in 1999, the court found that the absence of specific allegations with respect to when property damage became detectable did not preclude the potential of a manifestation trigger during the Providence Washington coverage period. The court rejected Providence Washington's suggestion that this construction of the manifestation trigger transformed it into a continuous injury trigger.

SOUTH CAROLINA

"As Damages"

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

"Occurrence"

No reported environmental cases.

Pollution Exclusion

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

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

In Southern Carolina Insurance Reserve Fund v. East Richland County Public Service District No. 2014-000728 (S.C. App. Mar. 23, 2016), the state's intermediate appellate court held that the exclusion precluded coverage for allegations that a local water district caused "rotten egg" smells to be released when it vented sewage lines.. Despite the fact that South Carolina courts have ruled that the exception to the exclusion only applies if a discharge is unexpected or unintended, the Court of Appeals has ruled that these discharges were part of the insured's "routine business operations" and therefore not *Morrison Mahoney LLP (Copyright 2022)*.

“sudden.” Further, the court refused to find that the exclusion was void as being in conflict with the South Carolina Tort Claims Act. Despite the District's argument that coverage is required for all risks for which governmental immunity is waived pursuant to the Act, the Court took note of the fact that regulations promulgated by the South Carolina Insurance Department in S.C. Code Ann. Regs 19-415.3 (2011) concerning the nature, terms, and scope of insurance afforded to governmental entities pursuant to this statute contained a model policy with a nearly identical pollution exclusion.

In 2003, the Fourth Circuit ruled in Ross Development Corp. v. Fireman's Fund Ins. Co., No. 12-2059 (4th Cir. June 6, 2013) that liability insurers did not owe coverage for the clean up of a former fertilizer manufacturing plant as the claims were subject to pollution exclusions in policies issued between 1972 and 1987. In an unpublished opinion, the court declared that the insured's proposed interpretation of “sudden and accidental” as limiting the scope of the exclusion to intended contamination ignored the fact that “accidental” referred to the “discharge” and not the resulting damage and would make the exclusion superfluous since intended harm is already excluded from coverage. The court declined to find coverage based on a 1963 fire at the site as the insured had failed to present any evidence that the fire had caused property damage, much less pollution after 1972.

Most recently, the state Court of Appeals has ruled that allegations that a local water district caused “rotten egg” smells to be released when it vented its sewage lines are subject to a “sudden and accidental”-type pollution exclusion. Despite the fact that South Carolina courts have ruled that the exception to the exclusion only applies if a discharge is unexpected or unintended, the Court of Appeals has ruled in Southern Carolina Insurance Reserve Fund v. East Richland County Public Service District No. 2014-000728 (S.C. App. Mar. 23, 2016) that these discharges were part of the insured's “routine business operations” and therefore not “sudden.”

"Absolute" Pollution Exclusion

No reported environmental cases.

"Personal Injury" Claims

No reported environmental cases.

Scope and Allocation Issues

The South Carolina Supreme Court adopted a “time on the risk” approach to allocation in a construction defect case, ruling in Crossman Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co., 2011 WL 3667589 (S.C. August 22, 2011) that it would assign an insurer's responsibility in proportion to the period of time over which property damage is found to have occurred. In cases where it is impossible to know the exact
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measure of damages attributable to the injury that triggered each policy, the court found that it was appropriate to divide that loss in a manner that reasonably approximates the loss attributable to each policy period calculating each insurer's responsibility by dividing its years of coverage by the total years in which the loss occurred. The court acknowledged that this formula is not a perfect estimate of the loss attributable and is rather a default rule.

Accordingly, "If proof is available showing that the damage progressed in a different way, then the allocation of losses would need to conform to that proof." In this particular case, the court noted that a strict application of "time on the risk" might not be appropriate in light of the fact that different buildings were completed at different times with different certificates of occupancy. See also Spartan Petroleum Co., Inc. v. Federated Mut. Ins. Co., 162 F.3d 805 (4th Cir. 1998).

A District Court has ruled that an insured is responsible for a full \$500,000 "per occurrence" deductible for each year in which its defective windows allegedly allowed water intrusion and other construction defect problems. In Liberty Mut. Fire Ins. Co. v. J.T. Walker Industries, Inc., No. 08-2043 (D.S.C. September 22, 2011), Judge Seymour declined to hold that the insured was only responsible for a pro-rated deductible reflecting the "time on the risk" analysis recently adopted by the South Carolina Supreme Court in Crossman Communities. Further, the District Court ruled that each Liberty Mutual policy in effect during the period of progressive damage covers only the damage that occurred during the policy period and not the full settlement of the claim.

"Suit"

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

Trigger of Coverage

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

SOUTH DAKOTA

"As Damages"

The South Dakota Supreme Court ruled in Sapienza v. Liberty Mutual Fire Ins. Co., 2021 S.D. 35 (S.D. June 2, 2021) that a liability insurer's coverage for damages extends to all payments to satisfy the insured's liability and are not limited to sums paid in compensation to third parties. As a result, the court ruled that Liberty Mutual was obliged to pay for the cost of complying with an injunctive remedy in rebuilding the insured's home.

The court ruled that this broader conception of damages was consistent with the common and ordinary meaning of that term, as confirmed by numerous dictionary definitions. The court ruled that its interpretation also reflected the fact that these costs were predicated on the insured's legal liability for what would otherwise had to be assessed as money damages had the court determined that a monetary payment to the neighbors would have been adequate to remedy the harm suffered by the insured's conduct. The court also distinguished between the injunctive remedies that restrict action and those that compel it, as in this case. Two dissenting justices argued that the majority's reliance on environmental cases interpreting whether clean-up costs are "damages" was misplaced and that there should not have been coverage in this case.

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

"Occurrence"

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

Pollution Exclusion

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

"Absolute" Pollution Exclusion

The South Dakota Supreme Court ruled that a trial court erred in holding that claims *Morrison Mahoney LLP (Copyright 2022).*

for trespass and nuisance arising out of a concrete plant's emissions of cement dust are not subject to the absolute pollution exclusion. In State Cement Plant Commission v. Wausau Underwriters Ins. Co., 616 N.W.2d 397 (S.D. 2000), the court ruled that whether or not cement dust is a "contaminant" or "pollutant," the exclusion plainly applies as the neighboring property owners were all claiming that they had suffered "contamination" because of discharges from the insured's facility. A dissent question whether this was a "pollutant."

Scope and Allocation Issues

No reported environmental cases.

Trigger of Coverage

No reported environmental cases.

TENNESSEE

"As Damages"

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

"Occurrence"

No reported environmental coverage cases.

Pollution Exclusion

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

"Absolute" Pollution Exclusion

The Tennessee Court of Appeals has ruled in Sulphuric Acid Trading Co. Inc. v. Greenwich Insurance Co., 211 S.W.3d 243 (Tenn. App. 2006) that the absolute pollution exclusion bars coverage for a personal injury claim arising from the accidental spraying of sulfuric acid during a cargo transfer. Despite the insured's argument that the claim, which involved an accidental spill of nearly 2000 gallons of sulfuric acid while being transferred from rail cars to tanker trucks was not "environmental" in character, the Court declared that "it would defy logic to hold that the discharge of 1,800 gallons of sulphuric acid into the environment was anything other than environmental pollution. We hold that these facts demonstrate the type of 'classic environmental pollution' that would trigger the Absolute Pollution Exclusion under either of the two lines of reasoning adopted by the various states. While the facts before us do involve an employee injured in the course and scope of his employment, we must look at the big picture and cannot ignore the fact that the injury occurred during an event resulting in substantial environmental pollution."

"Personal Injury" Claims

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

Scope and Allocation Rulings

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

In The Travelers Ind. Co. v. W.M. Barr & Co., Inc., No. 08-02649 (W.D. Tenn. November 28, 2011), a federal district court ruled in a benzene case that the insurers could not compel the insured to contribute to defense costs for years when its policies were insolvent or otherwise unavailable. Judge Donald declared that nothing in the defendants' policies gave them the right to pro-rate their defense obligations. The court held that "[so] long as a lawsuit brought against Barr alleges benzene exposure during a period in which such a policy was in force, the relevant insurer must indemnify and defend such claims in their entirety, even if the injury at issue was in part suffered outside of the insurer's policy coverage period. While the insurer may seek appropriate contribution from other insurers, it has no such right against the policyholder as so-called 'self-insurer.'

TEXAS

"As Damages"

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

"Occurrence"

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

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

In Dallas National Ins. Co. v. Sabic Americas, Inc., No. 01-08-00758 (Tex. App. March 10, 2011), the Court of Appeals ruled that the "known loss" doctrine did not preclude coverage for suits in which municipalities alleged that the insured had contributed to MTBE contamination of their groundwater supplies evidence that Sabic had foreknowledge of the harmful prospect of MTBE prior to the issuance of these policies. The court ruled that the doctrine was limited to cases in which the underlying lawsuits only alleged intentional conduct whereas here Sabic had demonstrated allegations of negligence against it.

Pollution Exclusion

As yet, the Texas Supreme Court has not ruled on the "sudden and accidental"-type

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

The Fifth Circuit has also predicted that the Texas Supreme Court would give "sudden" a temporal meaning in several cases. See Guaranty National Ins. Co. v. Vic Manufacturing Co., 143 F.3d 192 (5th Cir. 1998) ; Mustang Tractor and Equipment Co. v. Liberty Mut. Ins. Co., 76 F.3d 1996 (5th Cir. 1996); Snydergeneral Corp. v. Century Ind. Co., 907 F.Supp. 991 (N.D. Tex. 1995), aff'd in part, rev'd in part, 112 F.3d 536 (5th Cir. 1997)(dicta). The applicability of such exclusions depends on whether the claimed injuries are alleged to have been caused by pollutants, rather than the specific theory of liability alleged. Bituminous Cas. Corp. v. Kenworthy Oil Co., 912 F.Supp. 238 (W.D. Tex. 1996), aff'd mem., 105 F.3d 656 (5th Cir. 1996).

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

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

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

"Absolute" Pollution Exclusion

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

contractor was not "occupying" a job site where a spill occurred. Kelley-Coppedge, Inc. v. Highlands Ins. Co., 980 S.W.2d 462 (Tex. 1998).

Texas courts have sustained the exclusion in a number of cases. See United National Ins. Co. v. Hydro Tank, Inc., No. 06-20335 (5th Cir. August 15, 2007)(absolute pollution exclusion precludes coverage for injuries suffered by workers who inhaled hydrogen sulfide fumes while removing petroleum sludge from a mixing tank); Constitution State Ins. Co. v. Isotex, Inc., 61 F.3d 405 (5th Cir. 1995)(personal injuries allegedly caused by exposure to insured's radioactive medical waste held excluded); Certain Underwriters at Lloyd's, London v. CA Turner Construction Co., Inc., 112 F.3d 184 (5th Cir. 1997)(exclusion defeats coverage for personal injuries suffered by construction worker who inhaled phenol fumes at job site) and E&L Chipping Co., Inc. v. The Hanover Ins. Co., 962 S.W.2d 272 (Tex. App. 1998)(contamination of abutting property owner's water supplies by run off from firefighting efforts at wood chipping plant). But see Round Rock Plaza Joint Venture v. Maryland Cas. Co., 1996 Tex. App. LEXIS 581 (Tex. App. January 17, 1996)(unpublished)(sewerage that spilled out of toilets was not "waste") and Mid-Continent Casualty Company v. Safe Tire Disposal Corporation, 16 S.W.3d 418 (Tex. App. 2000), petition for review denied (Tex. 2000)(shredded rubber not "waste").

In United National Ins. Co. v. Hydro Tank, Inc., No. 06-20335 (5th Cir. August 15, 2007), the Fifth Circuit ruled that sludge in a holding tank, even though properly stored, was still a "pollutant," declaring that substances need not be released into the surrounding environment to qualify as pollutants." The court concluded that "the fortuity that the locus of storage and injury happen to coincide does not negate the pollution exclusion in this instance."

The Fifth Circuit has sustained a lower court's declaration that liability claims arising out of an unplanned discharge of "rock fines" from the insured's quarry operations were subject to an absolute pollution exclusion in an umbrella policy. The dispute in Eastern Concrete Materials Inc. v. ACE American Ins. Co., No. 18-11043 (5th Cir. Jan. 17, 2020) arose out of an incident in which mineral debris from blasting operations at the insured's stone quarry in New Jersey had inadvertently been discharged into adjoining creeks as a result of the insured's effort to avoid flooding in the face of severe rainstorms, resulting in clean up directives from the New Jersey Department of Environmental Protection. Despite the insured's argument that the Fifth Circuit in Texas courts lacked jurisdiction over it, the Court of Appeals concluded that it did, citing the fact that the policy had been procured in Texas and that Eastern Concrete had sufficient juridical contacts with Texas to sustain a claim of jurisdiction. The Fifth Circuit further concluded that Texas law had the more significant relationship to the case and should control the availability of coverage. Applying Texas law, the Fifth Circuit ruled that rock fines are a "contaminant" subject to this exclusion notwithstanding Eastern Concrete's contention that rock fines are simply small particles of rock that are neither inherently dangerous or contaminants. While conceding that the New Jersey DEP was not claiming that the release of rock fines caused any threat of harm to drinking water or local water supplies, the Fifth Circuit concluded that their release nonetheless constituted a discharge of "contaminants" since their presence in

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water supplies might change the flow and contours of the stream including areas used for trout spawning and would affect the available food sources for fish and other species.

The court also ruled in Burroughs Diesel, Inc. v. The Travelers Indemnity Company of America, No. 19-60875 (5th Cir. July 31, 2020) that a commercial property insurer did owe coverage for damage to the insured's factory equipment as a result of a cloud of toxic gas emanating from an off-premises spill of hydrochloric acid. The court agreed with Travelers that the damage did not result from a "covered cause of loss" in light of a policy exclusion for losses due to the "discharge, dispersal, seepage, migration, release or escape of 'pollutants.'" Due to the fact that "pollutants" was expressly defined in the policy as including "acids.", the court rejected BDI's argument that the damage was, in fact, due to "smoke" which the insured sought to characterize, based on a secondary dictionary definition, as a "suspension of particles in a gas." Rather, the court focused on the primary definition in the dictionary cited by BDI which stated that "smoke" was "gaseous products of burning materials" which clearly did not apply under these circumstances.

In Noble Energy, Inc. v. Bituminous Cas. Co., 529 F.3d 642 (5th Cir. 2008), the Fifth Circuit held that an absolute pollution exclusion precluded coverage for injuries that occurred when gas condensate caused the diesel engines in the insured's trucks to race out of control, causing an explosion and fire that injured several individuals. The court rejected the insured's contention that the combustible vapors had acted not as a pollutant but as an "accelerant." The court also rejected the insured's argument that enforcing the pollution exclusion in cases of this sort would ignore the reasonable objective expectations of the insured. Further, the court ruled that the exclusion's hostile fire exception did not apply as the claims in question had not resulted from a pre-existing fire that caused pollution but rather involved a case where the discharge of the pollutant had itself caused a fire.

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

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

Suits by various municipalities to recover damages due to MTBE contamination of their groundwater supplies were held not to be subject to Part 2 of the exclusion. In Dallas National Ins. Co. v. Sabc Americas, Inc., No. 01-08-00758 (Tex. App. March 10, 2011), the District Court held that the term “governmental authority” was ambiguous as it could include all municipalities or agencies or only those that have the authority to issue and enforce environmental clean up demands.

Most recently, the Fifth Circuit ruled in Evanston Ins. Co. v. Lapolla Industries, Inc., No. 15-20213 (5th Cir. Dec. 23, 2015) (per curiam) that allegations that the release of vapors and gas from the insured’s spray polyurethane foam product caused respiratory distress to the occupants of homes in which SPF was installed were excluded as involving “pollution.”

Applying Texas law, Judge McBride has ruled in Great American Ins. Co. v. Ace American Ins. Co., 2018 WL 3370620 (N.D. Tex. July 10, 2018) that a quarry operator’s discharge of rock “fines” into a nearby stream in violation of the New Jersey Water Pollution Control Act and similar statutes arose out of the discharge of “waste materials and are therefore subject to absolute pollution exclusions. While questioning whether there was any conflict between the law of New Jersey and Texas in this case, the ruled that Texas law should apply as that was the location where the policy was issued to the insured’s parent company (U.S. Concrete). The court ruled that the fact that rock fines had commercial value did not change the fact they had been discharged as “waste.”

"Personal Injury" Claims

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

Scope and Allocation Issues

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

Earlier, a federal court has predicted that Texas Supreme Court would adopt a “time on the risk” analysis for long-tail injuries. LaFarge Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA, 935 F.Supp. 675 (D. Md. 1996), aff’d per curiam (4th Cir. 1997). Fifth Circuit ruled that in such cases defense costs should be apportioned between policyholder and successive insurers in proportion to (1) the allegations in the underlying suits; (2) the *Morrison Mahoney LLP (Copyright 2022)*.

time period during which the plaintiffs allege exposure for which the insured is liable; and (3) the amount of effort required to defend the insured against the claims. Pending the determination of these factors, the insured and each implicated carrier should each pay an "equal share." Gulf Chemical Corp. v. Associated Metals & Minerals Co., 1 F.3d 365 (5th Cir. 1993)(Lone Star Steel products liability claims).

The Supreme Court ruled 7-2 in Texas Association of Counties v. Matagorda County, 52 S.W.3d 128 (Tex. 2000) that a liability insurer does not have a contractual or implied right to obtain reimbursements for liability settlements that it pays on behalf of its insured even if later determined not to be covered. The court reaffirmed this view in Excess Underwriters at Lloyd's, London v. Frank's Casing Crew and Rental Tools, 246 S.W.3d 42 (Tex. 2008), holding that an excess insurer was not entitled to recoup sums it had paid at the insured's urging to settle claims that were later held not to be covered. Writing in dissent, Justices Hecht and Green argued that insurers should be entitled to the same relief for unjust enrichment as other parties and that the majority allowed insureds to leverage the risk of *Stowers* bad faith to manufacture coverage for non-covered losses. In a separate dissent, Justice Wainwright argued that it was unfair to allow the insured to renege on an express term in the agreement whereby its excess insurer had funded the settlement on condition that it would be allowed to recoup this payment if the underlying claims were later held not to be covered. The dissent pointed out that, as a matter of basic contract law, a party cannot accept the benefits of an agreement and then renounce its obligations.

"Suit"

A narrowly divided Texas Supreme Court ruled 5-4 in McGinnes Industrial Maintenance Corp. v. The Phoenix Ins. Co., No. 14 - 0465 (Tex. June 26, 2015) that governmental environmental claims constitute a "suit." On a certified question from the Fifth Circuit, the court ruled 5 – 4 that even though the common and ordinary meaning of "suit" was that of a proceeding in a court of law, "suit" be given a more expansive meaning when applied to enforcement claims under CERCLA as such actions are almost invariably resolved through administrative proceedings without recourse to conventional litigation. The majority also observed that as uniformity is an important goal of insurance, Texas should side with the great majority of courts in other states that have imposed a duty to defend in such cases. Writing in dissent, Justice Boyd savaged the majority opinion for abandoning established rules of contract interpretation, declaring that the majority had adopted a meaning of "suit" that was concededly unsupported by its ordinary meaning and that went beyond what the contracting parties had actually contemplated.

Trigger of Coverage

The issue of when "property damage" occurs in a construction defect case was decided by the Texas Supreme Court on a certified question in Don's Building Supply, Inc. v. OneBeacon Ins. Co., 267 S.W.3d 30 (Tex, 2008), a case in which the Fifth Circuit has departed from its earlier holding in UniTramp, wherein it had predicted that Texas would

adopt a “discovery” rule for latent property damage claims, us court declared in Don’s Building Supply v. OneBeacon Ins. Co., 267 S.W.3d 30 (Tex. 2008). Despite the fact that numerous lower Texas courts had adopted a manifestation approach to such claims over the years, such a theory was not reflected in the actual wording of the policy. The court observed that “the policy in straightforward wording provides coverage if the property damage “occurs during the policy period,” and further provides that property damage means “[p]hysical injury to tangible property.” Whatever practical advantages a manifestation rule would offer to the insured or the insurer, the controlling policy language does not provide that the insurer’s duty is triggered only when the injury manifests itself during the policy term, or that coverage is limited to claims where the damage was discovered or discoverable during the policy period.”

Since it’s issuance, Don’s Building has been given broad scope by the Court of Appeals. In Union Ins. Co. v. Don’s Building Supply, No. 05-06-00884-CV (Tex. App. September 23, 2008), the Court of Appeals ruled that the Supreme Court’s “injury in fact” analysis gave rise to a duty to defend even though the homeowners in question had not purchased the property until 2003, five years after the policies in question had expired. The court ruled that under the “eight corners” rule, all that was required was property damage during the policy period.

Shortly thereafter, the Court of Appeals ruled in Thos. S. Byrne, Ltd. v. Trinity Universal Insurance Co., 2008 WL 5095161 (Tex.App. – Dallas, December 4, 2008) that water intrusion could have begun from the date of the insured’s contractors work forward, notwithstanding an allegation in the underlying law suit that “problems arose well after [Byrne] completed its operations at the property” and “the building façade experienced leaks after completion due to improper construction” which indicated that the damages claimed either occurred outside the policy period or fell within applicable exclusions. Based on Don’s Building, the court declared that that “problems” “appears to mean only visible problems requiring repair, not latent property damage that could have been occurring for a long time.” The court concluded that “it requires no speculation to recognize that the first instances of water infiltration and resulting property damage potentially occurred the first time it rained after these subcontractors started performing their work.” Thus, based on the mere “potential, generated by the open ended allegations” that some leaks and other problems *could have* generated damage before completion; the court held the insurers had a duty to defend.

The Texas Court of Appeals ruled in Vines-Herrin Custom Homes, LLC v. Great American Lloyd’s Ins. Co., 2011 WL 6396473 (Tex. App. December 21, 2011) that a liability insurer had an obligation to defend in a construction defect case even where the underlying suit did not specifically allege that property damage occurred during its policy period. The Dallas court ruled that a potential for coverage existed as the policy in question was in effect while the home was under construction even though the underlying complaint was silent with respect to when property damage commenced.

Likewise, Don's Building has been held to have broad effect in first party cases. In Central Mut. Ins. Co. v. KPE Firstplace Land LLC (Tex. App. November 26, 2008), the Court of Appeals rejected a property insurer's argument that its policy did not cover the theft of copper coils from the air conditioning equipment located on the roof of a building owned by the policyholder. The date of the theft was unknown, but at the time the theft was discovered the building was vacant within the meaning of the policy. The insurer denied coverage under the policy's vacancy exclusion, asserting the damage "occurred" when the building was vacant. The court concluded that damage "occurs" when it takes place, not when it is discovered.

Prior to Don's Building, Texas courts had reached conflicting conclusions with respect to the appropriate trigger of coverage for latent injury and long-tail cases. See Guarantee National Ins. Co. v. Azrock Industries, Inc., 205 F.3d 253 (5th Cir. 2000)(holding that a "manifestation" trigger should be used for property damage claims but that an "exposure" trigger is appropriate for bodily injuries arising out of long-tail exposures such as asbestos) and Pilgrim Enterprises v. Maryland Cas. Co., 24 S.W.2d 488 (Tex. App. 2000)(adopting "exposure" analysis).

UTAH

"As Damages"

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

"Occurrence"

No reported environmental cases.

Pollution Exclusion

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

"Absolute" Pollution Exclusion

No reported environmental cases.

"Personal Injury" Claims

No reported environmental cases.

Scope and Allocation Issues

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

The court has since ruled that defense costs should be apportioned between insurers on the basis of their respective years of coverage rather than on the basis of "other insurance" clauses. Having previously adopted a "time on the risk" approach to allocation years ago in Sharon Steel, the Court ruled in The Ohio Cas. Ins. Co. v. Unigard Ins. Co., 2012 UT 1 (Utah January 6, 2012) that similar principles apply to the division of defense costs among successive carriers with respect to intellectual property claims triggering Coverage B. In rejecting Unigard's contention that it should only owe half of these costs of defense in light of the identical "other insurance" clauses in these policies, the Court held that other insurance clauses apply to concurrent coverage, not policies issued by *Morrison Mahoney LLP (Copyright 2022)*.

successive insurers. However, the Court declined to apply a pure time on the risk approach to the apportionment of defense costs, declaring that that portion of defense costs attributable to a period of time for which the insured was uninsured should be divided between the carriers in proportion to their overall coverage periods. Two justices dissented from the majority's analysis, arguing that the Court should abandon Sharon Steel and hold instead that as insurers have equal obligations to defend, the costs of defense should be shared equally.

"Suit"

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

VERMONT

"As Damages"

In Hardwick Recycling and Salvage, Inc. v. Acadia Ins. Co., 869 A.2d 82 (Vt. 2004), the Vermont Supreme Court adopted a broad view of "damages" in the context of environmental claims, holding that certain administrative inquiries and enforcement proceedings commenced by the State against a recycling company under Act 250 and the Vermont Hazardous Waste Act were a suit seeking "damages." , the Supreme Court held that an insured in the business of the recycling business would have had an objectively reasonable expectation that its policy would respond to an enforcement action of the sort brought by the State of Vermont.

"Occurrences"

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

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

Pollution Exclusions

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

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

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

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

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

The Vermont Supreme Court has issued three recent rulings upholding absolute pollution exclusions and rejecting arguments that they should be restricted to “traditional” environmental contamination. See Cincinnati Specialty Underwriters Ins. Co. v. Energy Wise Homes, 2015 VT 52 (Vt. April 3, 2015) (respiratory injuries due to exposure to gases from foam insulation that the insured had installed); Cincinnati Specialty Underwriters Ins. Co. v. Energy Wise Homes, 120 A.3d 1160 (Vt. 2015) (that the plain meaning of the exclusion barred coverage for the plaintiff's allegation of injuries due to exposure to “airborne chemicals,” nor did this interpretation render the exclusion illusory) and Whitney v. Vermont Mut. Ins. Co., 2015 VT 140 (Vt. Dec. 12, 2015) (homeowners' inability to inhabit their home for the past 2 years due to high concentrations of pesticide that had been sprayed inside the property were excluded from coverage). The Supreme court has emphasized, however, that these rulings are specific to surplus lines policies with such exclusions, as admitted insurers must use the more limited form permitted by state regulators.

"Personal Injury" Claims

No reported environmental cases.

Scope and Allocation Issues

In Towns v. Northern Security Ins. Co., A.2d 1150 (Vt. 2008), the Vermont Supreme Court sustained a lower court's decision to limit the insurer's obligation to that portion of defense and indemnity during its “time on the risk.” The court noted that a “time on the risk” method offers several policy advantages including spreading the risk to the maximum number of carriers, providing a ready means of identifying each insurer's liability through a relatively simple calculation and avoiding the necessity for subsequent indemnification actions between or among insurers. In cases of this sort, the court held that as the policy was self-insured, it was fair and reasonable to require the insured to bear responsibility for that portion of total defense and indemnity for which he or she chose to assume the risk.

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Notwithstanding the State of Vermont's assertion that Towns should not apply to an "all sums" CGL policy, the court ruled in Bradford Oil Co. v. Stonington Ins. Co., 2011 WL 3962914 (Vt. September 9, 2011) that a trial court did not err in applying a "time on the risk" analysis to determine a liability insurer's obligation to pay for the cost of cleaning up oil that leaked from the insured's storage tanks. In particular, the court rejected the State's argument that insurers should be liable for all costs except those allocable to periods for which the insured deliberately self-insured. The court also rejected the State's argument that Towns does not apply to CGL policies or to claims brought by the State pursuant to the Petroleum Cleanup Fund, nor should the supposed reasonable expectations of the insured trump unambiguous policy wordings.

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

"Suit"

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

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

Trigger of Coverage

The Vermont Supreme Court rejected a "manifestation" trigger in Towns v. Northern Security Ins. Co., 2008 VT 98 (Vt. August 1, 2008), holding that on-going disposal of debris on the insured's property and the resulting contamination from these discharges triggered a homeowner's insurers policies pursuant to a "continuous trigger."

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

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

VIRGINIA

"As Damages"

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

"Occurrence"

The Virginia Supreme Court ruled in AES Corp. v. Steadfast Ins. Co., 715 S.E.2d 28 (Va. 2011) that a CGL insurer had no duty to defend climate change claims made by a Native American community in Alaska. In holding a trial court did not err in holding that the insurer had no duty to defend the Village of Kivalina law suit, the Supreme Court held that the electric utility's intentional release of thousands of tons of carbon dioxide into the atmosphere pursuant to its routine operations were not the result of an accidental "occurrence." Even though the Kivalina Complaint alleged negligence on the part of AES and alleged that it both "knew" and "should have known" that its conduct would cause global warming, "the gravamen of Kivalina's nuisance claim is that the damages it sustained were the natural and probable consequence of AES' intentional emissions." Two justices issued a concurring opinion agreeing in the result but emphasizing that it was specific to the allegations and policy wordings in this case. The Supreme Court subsequently withdrew its opinion but reissued the same essential holding on April 25, 2012.

Pollution Exclusion

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

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

"Absolute" Pollution Exclusion

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

More recently, the Supreme Court ruled in a first party case involving contaminated infant formula that pollution exclusions are not limited to "traditional environmental contamination losses." PBM Nutritionals, LLC v. Lexington Ins. Co., No. 110669 (Va. April 20, 2012).

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

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

Virginia courts have also been at the center of disputes with respect to coverage for Chinese Drywall claims. Compare Evanston Ins. Co. v. Harbor Walk Devlpmnt LLC, No. 10-312 (E.D. Va. September 9, 2011)(release of corrosive gases was clearly a "discharge" of a "pollutant") and Nationwide Mut. Ins. Co. v. The Overlook, 2011 WL 1988396 (E.D. Va. May 13, 2011) with Builder's Mut. Ins. Co. v. Parallel Design & Development, LLC, No. 4:10CV68 (E.D. Va. May 13, 2011)(where the term "pollutant" was not defined in the policy and was therefore deemed to be ambiguous and restricted to traditional environmental pollution).

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Despite these rulings, Virginia courts have put some limitations on the scope of such exclusions, particularly in the context of erosion and run off claims. In Nationwide Mut. Ins. Co. v. Boyd Corp., 2010 WL 331757 (E.D. Va. January 25, 2010), Judge Hudson ruled that water was not a “pollutant.” Notwithstanding references to “polluted storm water” in the underlying allegations, the district court declared that Nationwide nonetheless had an obligation to defend as the underlying complaint also made references to other types of excess water flow and storm water runoff which could not be characterized as involving a discharge of “pollutants.” Accord, Builders Mut. Ins. Co. v. Half Court Press L.L.C. et al., 2010 U.S. Dist. LEXIS 78727 (D. Va. August 3, 2010)(total pollution exclusion did not relieve an insurer of its duty to defend allegations that a property developer had allowed discharges of silt and sediment to run off its property, damaging the plaintiff’s pond).

"Personal Injury" Claims

No reported environmental cases.

Scope and Allocation Issues

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

Trigger of Coverage

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

WASHINGTON

"As Damages"

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

Washington courts have generally ruled that the costs of performing an RI/FS is "damages" and not a cost of defense. See Teck Metals Ltd. v. Certain Underwriters at Lloyds, 735 F. Supp. 2d. 1260, 1266 (E.D. Wash. 2010) and Travelers Ind. Co. v. City of Richland. (E.D. Wash. 2018).

"Occurrence"

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

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

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

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In an unpublished opinion, the state Court of Appeals held in Indemnity Ins. Co. of North America v. City of Tacoma, 2010 Wash. App. LEXIS 2427 (Wash. App. November 1, 2010) that there was no coverage under a CGL policy for property damage that had been anticipated by the insured at the time that it purchased the policies in question.

Pollution Exclusion

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

"Absolute" Pollution Exclusion

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

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

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event.” See also Cook v. American States Ins. Co., 89 Wash. App. 149, 920 P.2d 1223 (1st Div. 1996)(exclusion applies to sick building claims resulting from contractor's negligent use of a sealant too near the building's HVAC system).

In an earlier opinion, the court had also ruled that private tort claims resulting from a chemical fire on the insured's property were held to be covered, notwithstanding the exclusion, due to a claimed ambiguity between the exclusion for sites used for waste disposal and the grant back of coverage for hostile fires on owned sites. American Star Ins. Co. v. Grice, 854 P.2d 622 (Wash. 1993).

Most recently, the state Supreme Court ruled in Xia v. Probuilders Specialty Ins. Co., No. 92436-8 (Wash. April 27, 2017), a divided court issued an *en banc* opinion declaring that even though indoor exposures to carbon monoxide fumes fell within the scope of the policy's absolute pollution exclusion, the loss was nonetheless covered because its efficient proximate cause was a covered occurrence, namely the negligent installation of the home's hot water heater. In a lengthy opinion that surveyed the convoluted history of pollution exclusion jurisprudence in Washington, the court observed that the general theme in its past opinions was whether the loss involved “traditional environmental contamination” and whether the pollutant was “acting as a pollutant” or whether its toxic characteristic were incidental to the injury. In this case, the court found that excluded cause (the release of toxic fumes) had been set in motion by a covered cause (the negligently-constructed hot water heater that allowed the fumes to escape due to incomplete combustion) and further ruled that the anti-concurrent causation language in ProBuilder's exclusion was unenforceable as being against Washington public policy. Justice Madsen (joined in a concurrence by Justice McCloud) argued that the majority was abandoning *stare decisis* as the court's earlier opinion in Quadrant had rejected any application of “efficient proximate cause” to such exclusions.

"Personal Injury" Claims

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

Scope and Allocation Issues

The Washington Supreme Court ruled in B & L Trucking & Construction Co. v. Northern Ins. Co., 951 P. 2d 250 (Wash. 1998) that a trial court erred in pro-rating defense costs, holding instead that the insured was entitled to recover "all sums" from Chubb under a Gruol theory of joint liability. Three dissenting judges criticized the ruling, noting that it

was unfair to permit a policyholder to obtain seven years of benefits when it had only paid for two years of coverage. In Alcoa v. Accident & Casualty Ins. Co., 140 Wash.2d 517, 998 P.2d 856 (2000)(Pennsylvania law) the Washington Supreme Court ruled that a first party insured could recover in full under DIC property policies, even though the DIC policies lacked “all sums” language.

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

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

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

"Suit"

The Washington Supreme Court avoided ruling on this issue in Olds Olympic, supra. Lower court rulings have often found that a PRP letter is a "suit" for insurance purposes. See e.g. Cascade Pole Co. v. Reliance Ins. Co., Thurston No. 88-2-2136-3 (Wash. Super.

February 20, 1992) and Boeing Corp. v. Aetna Cas. & Sur. Co., No. C86-352WD (W.D. Wash. April 16, 1990).

Trigger of Coverage

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

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

The Washington Supreme Court has ruled that "claims made and reported" provisions in a CGL policy issued to a building contractor would undermine the viability of the financial responsibility regime established for contractors and is therefore void as being against public policy. On a certified question from the U.S. District Court, the court ruled in Preferred Contractors Ins. Co. v. Baker & Son Construction, Inc., No. 100466-4 (Wash. Aug. 11, 2022) "[t]hrough RCW 18.27.050 and RCW 18.27.140, the legislature has created a public policy wherein contractors must be financially responsible for the injuries they negligently inflict on the public. With such a public policy established, a contractor's CGL policy that requires the loss to occur and be reported to the insurer in the same policy year and fails to provide prospective or retroactive coverage is unenforceable.

WEST VIRGINIA

"As Damages"

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

Pollution Exclusion

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

"Absolute" Pollution Exclusion

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

WISCONSIN

"As Damages"

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

"Occurrence"

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

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

Pollution Exclusion

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

"Absolute" Pollution Exclusion

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

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

The Wisconsin Supreme Court ruled in Hirschhorn v. Auto-Owners Ins. Co., 2012 WI 20 (Wis. March 6, 2012) that damage to the insured’s home for an infestation of bats was excluded from coverage because “bat guano, composed of bat feces and urine, is or threatens to be a solid, liquid, or gaseous irritant or contaminant” and therefore a “pollutant” as the court had earlier interpreted that term in cases such as Peace and Donaldson.

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

"Personal Injury" Claims

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

Scope and Allocation Issues

On a certified question from the Seventh Circuit, the Wisconsin Supreme Court declared in Plastics Engineering Co. v. Liberty Mut. Ins. Co., 759 N.W.2d 613 (Wis. 2009) that it would apply an “all sums” approach to long tail claims. A single justice dissented, arguing for pro rata allocation. The majority opined that, even if it had agreed that allocation was permitted on indemnity, it could have no application to duty to defend issues, since an insurer must defend an entire case if any part of it is covered. On the other hand, the court agreed with Liberty Mutual that its “non-cumulation” clause was not in violation of Wisconsin Statute Section 631.43(1) as it is not an “other insurance” clause and as the disputed question involves successive policies rather than the concurrent coverages to which the statute applies. The court declared that “other insurance” clauses do not apply to successive policies. As to the issue of allocation, the Supreme Court declined to find that anything in the policy limited coverage to a “*pro rata*” share. The court found this noteworthy given the fact that Liberty Mutual allegedly contemplated a long-lasting occurrence that could give rise to injury over an extended period of time yet failed to include language pro-rating its obligation with respect to such claims. In any event, the court ruled that a *pro rata* approach could not have application to an insurer’s duty to defend owing to the fact that, once coverage exists, an insurer must defend the entire suit even if some of the allegations fall outside the scope of coverage. Justice Gableman dissented from this aspect of the majority opinion, arguing that the policy itself limited coverage to losses occurring during the policy period and therefore required *pro rata* allocation on a “time on the risk” basis. He also disagreed with the majority’s conclusion that the duty to defend could not be pro-rated, arguing instead that Plenco had chosen to be self-insured for certain periods and must bear a proportional share of its own defense costs. He also argued that joint and several liability had no application in these circumstances since there were no other insurers for Liberty Mutual to be jointly liable with or seek contribution from.

Earlier decisions had favored a “time on the risk” approach to long tail claims. See Sybron Transition Corp. v. Security Ins. Co. of Hartford, 258 F.3d 595 (7th Cir. 2001)(New York law). See also, Sauk County v. Employers Ins. of Wausau, 550 N.W.2d 439 (Wis. App. 1996)(affirming insurer’s pro-ration between cost of defending counter-claim and prosecuting the insured’s main suit).

"Suit"

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

Trigger of Coverage

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

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

The Wisconsin Court of Appeals ruled in Obermeier v. Toonen, 2008 AP 2103 (Wis. App. August 18, 2009) that a suit by a neighboring property owner alleging that construction activity on the insured’s property was excluded from the policy’s insuring agreement as involving the “continuation, change or resumption” of property damage that had begun before the policy was issued and of which the insured had knowledge before the policy was issued. In this instance, the court found that the insured had received prior complaints from the property owner and had in fact taken steps to dig a ditch on the plaintiff’s property in an unsuccessful effort to remediate the problem. The Court of Appeals rejected the insured’s contention that the “property damage”

WYOMING

"As Damages"

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

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

"Occurrence"

No reported environmental cases.

Pollution Exclusion

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

"Absolute" Pollution Exclusion

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

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

"Personal Injury" Claims

No reported environmental cases.

Scope and Allocation Issues

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

"Suit"

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

Trigger of Coverage

No reported environmental cases.

THE MORRISON MAHONEY INSURANCE COVERAGE TEAM

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