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INSURANCE COVERAGE FOR ENVIRONMENTAL CLEANUP: ARE YOU IN GOOD HANDS?

Sandra A. Toms†

It is as if our civilization has lost a sense of its future. We are so busily engaged in making miracle products for our present enjoyment from substances deposited in the earth over millions of years, we don't stop to consider the environmental burdens we are placing on future generations. We have pillaged the past and pawned the future, telescoping time for the benefit of a fleeting present. Only when the consequences begin to manifest themselves in our own generation do we demand that changes be made.

It is now apparent, however, that industrial society has reached a turning point. The future is no longer an endless, open and empty frontier. Our children and grandchildren will likely face all the problems they can handle even without the environmental ransom we are currently demanding they pay. Our growing numbers and our growing mastery of nature's subtle processes are forcing us to forge a new ethic of "stewardship"—an ethic which insists that we foresee and account for the future consequences of our present actions.

*Vice President Albert Gore, Jr.†

INTRODUCTION

Since the Industrial Revolution, American big business has used technology to become more efficient. One result is the use of toxic substances—chlorine-based chemicals, such as chlorofluorocarbons (CFCs), hydrochlorofluorocarbons (HCFCs) and chloramines—in the

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production of solvents, vinyl plastics, paper (bleaching process), Styrofoam products, aerosol sprays, and refrigerants. Many of these advances have been economically beneficial to big business and their customers; American industry now has the ability to quickly produce more products at a lower price.

However, for far too long the disposal of the byproducts and toxic substances flowing from these breakthroughs has gone unregulated, creating dangerous—possibly deadly—environmental hazards. For instance, the delayed effects of toxic compounds play a significant role in the development of chronic illnesses in humans—including liver, gastro-intestinal tract, and central nervous system problems—and cause irreversible damage—including genetic damage, birth defects, and cancer. The effects of many toxic substances commonly used and recklessly disposed of today may be unknown for many years.

Environmental liability exposure has increased in the past twenty-five years primarily as a result of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Resource Conservation and Recovery Act (RCRA), state and federal administrative “cleanup” orders, private party environmental tort/cleanup suits, and public interest. Public awareness over the environment grew throughout the 1960s, culminating in the first Earth Day in 1970.

The cost of environmental liability is staggering. Estimated environmental cleanup costs vary. The Environmental Protection Agency (EPA) originally estimated the cost of cleaning up a waste site appearing on the National Priorities List at $8 million. By 1986, that estimate soared to between $30 million and $50 million. Others estimate the average cost for a typical site to be around $12 million to $25 million and the average time to complete a clean up to be 7 to 10

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2. Epstein, supra note 1, at 36.
6. Epstein, supra note 1, at 182.
8. Id.
In order to survive, businesses must pursue all available means of minimizing or eliminating their potential liability. Effective risk management programs include comprehensive (or commercial) general liability (CGL) insurance to protect businesses against environmental claims. Hundreds of courts across the country are now determining the extent of environmental liability protection provided by CGL policies. However, in many states, basic coverage issues remain unresolved or are subject to conflicting case law. Adding to the confusion is the fact that state law is used to interpret the terms of insurance contracts and different states have put different interpretations on identical policy language. Nonetheless, CGL insurance remains a critical component of nearly all business risk management programs since liability for environmental cleanup can be imposed not only on those that cause the environmental hazard, but on former or current owners of the contaminated property as well. Few companies can afford to be ignorant of the basic principles and obligations of their insurance policies and the potential environmental coverage they provide.

This paper explores some of the insurance coverage issues involved in environmental cleanup for businesses. Part I presents key provisions of the standard CGL policy and how they have evolved. Part II examines the issues of what property damage is covered and when coverage begins or triggers in environmental claims cases. Finally, Part III identifies other potential avenues of coverage and some limitations of coverage.

PART I: EVOLUTION OF THE STANDARD COMPREHENSIVE GENERAL LIABILITY (CGL) POLICY

A. General Insurance Principles

An insurance contract is to an ordinary contract what humans are to whales: same class, different species. Courts do not employ the same rules of construction for the interpretation of each. Most ordinary contracts are presumed to be freely negotiated between the parties. However, most insurance contracts are contracts of adhesion: an

insurance company drafts the terms of the policy and offers it to the insured on a “take it or leave it” basis. The weaker party has no opportunity to negotiate the terms of the contract and must adhere to the contract or forgo the needed insurance.

One of the most important rules of construction used by courts in interpreting insurance policies is that any doubt or ambiguity as to the meaning of a provision must be resolved in favor of the insured and in favor of coverage. Furthermore, courts will protect the reasonable expectations of an insured when identifying ambiguities and interpret policies as an ordinary policy holder would interpret it.

This rule is applied with particular force to exclusions. Exclusionary clauses have been interpreted to maximize any coverage an insured may have. They are interpreted narrowly against the insurer. If an insurer wishes to narrow or limit coverage, they must do so using clear, unambiguous, and unmistakable language.

Along with the duty to indemnify the insured in case of loss, virtually all CGL policies include provisions for the insurer to arrange

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15. Insurers usually use standardized forms that are employed for all similar transactions. The major benefits of standardization are cost and time savings. With the use of standardized forms, the insurer is not required to customize a policy for every insured, thus making insurance more affordable and minimizing time spent on drafting policies. Robert E. Keeton & Alan I. Widiss, Insurance Law, A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices 119 (student ed. 1988).

Some sophisticated insureds negotiate and jointly draft their policies with their insurer. When this occurs, the courts do not construe the terms of the policy against the insurer. See discussion in part III.B., infra.


19. See, e.g., Sparks v. St. Paul Ins. Co., 495 A.2d 406, 412 (N.J. 1985) (“The recognition that insurance policies are not readily understood has impelled courts to resolve ambiguities in such contracts against the insurance companies . . . and has also led courts to enforce unambiguous insurance contracts in accordance with the reasonable expectations of the insured.”).

20. See, e.g., Missouri Terrazzo Co. v. Iowa Nat'l Mut. Ins. Co., 740 F.2d 647 (8th Cir. 1984) (exclusions are construed most strongly against the insurance company and in favor of the insured).


for or pay the expenses of certain suits brought against the insured. While the insurer’s duty to indemnify is limited by the amount of coverage the insured purchases, the aggregate limit of the policy is not reduced by the amount spent on defending a suit. Furthermore, an insured’s duty to defend can continue indefinitely without limit.

B. Historical Background of Comprehensive General Liability (CGL) Policies and Standardization

Comprehensive general liability (CGL) insurance policies have traditionally been preferred by businesses because they provide, and were intended to provide, the broadest coverage available. CGL insurance is designed to protect the insured against liabilities to third parties. The coverage is broad, extending to any business liability which is not expressly excluded.

1. Early Liability Policies

Standard CGL policies first appeared in the United States in the 1880s and have since been periodically revised. The first policies were “monoline,” meaning businesses would purchase a separate liability policy for each type of risk insured against. This “separate policy” approach was later abandoned in favor of the “scheduled liability” approach. The scheduled approach allowed businesses to purchase different coverages all in one policy; the coverages selected by the insured were stated on the policy’s “declarations” page. A scheduled insurance package was often extremely complex and confusing to insureds because each type of coverage was governed under separate terms and conditions. These shortcomings emphasized the need for less complex agreements.

24. Id.
25. Id.
27. Ballard, supra note 5, at 19-19.
28. Id.
29. The declarations page typically identifies the persons or entities who are the insureds, insurance coverage purchased, and the coverage amounts. Kerr & Wriess, supra note 15, at 287. Thus, it is an extremely important page in determining whether coverage even exists for an environmental claims case.
In 1941, the standard CGL policy was revised to eliminate the confusion caused by scheduled policies. The new policy was designed to provide coverage for "all business liability exposures known to exist at the inception of the policy and all unforeseen hazards which could arise during the policy period." This policy became popular among businesses that had trouble identifying all potential risks at the beginning of the policy period and those that could arise after.

Since 1941, CGL policies have continued to evolve. The most significant events in its evolution include the development of accident and occurrence policies and the pollution exclusion.

2. Accident Policies

Between 1940 and 1966, CGL policies provided coverage for liability for bodily injury or property damage "caused by accident." These were typically called "accident" policies and generally provided coverage for claims resulting from gradual deterioration and long-term exposure to injurious conditions or substances.

*Lancaster Area Refuse Authority v. Transamerica Insurance Company* involved such a policy. Transamerica issued a policy to the Lancaster Area Refuse Authority (the Authority), a landfill operator, in which they agreed to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury or destruction to property, including loss of use..."

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31. The basic provisions of the CGL policy form were drafted as a combined effort of the National Bureau of Casualty Underwriters (NBCU), later known as the Insurance Rating Board (IRB) in the late 1960s, and the Mutual Insurance Rating Bureau (MIRB), the insurance industry's two trade organizations. These organizations merged in the early 1970s to form the Insurance Services Office (ISO) which continues to draft and revise standard policies today. *Id.* at 19-20 n.15.

32. *Id.* at 19-20.

33. Steuber, supra note 23, at 5.

34. See, e.g., Benedictine Sisters of St. Mary's Hospital of Pierre v. St. Paul Fire & Marine Ins. Co., 815 F.2d 1209 (8th Cir. 1987) (damage from long-term build up of soot was an "accident" because it was unexpected or unintended within the meaning of the policy); White v. Smith, 440 S.W.2d 497 (Mo. Ct. App. 1968) ("accident" within the meaning of the policy can be a process); Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Sur. Co., 817 F. Supp. 1136, 1148 (D.N.J. 1993) ("[B]ecause the common understanding of the term 'accident' does not necessarily exclude long-term happenings, ... the term [is] ambiguous ..." and coverage for long-term soil and water contamination is allowed); McGroarty v. Great American Ins. Co., 329 N.E.2d 172 (N.Y. 1975) (property damage occurring over several months still considered an accident). *But see,* Jeffreyes v. Charles H. Sager Co., 198 A.D. 446 (1921), *aff'd,* 135 N.E. 907 (N.Y. 1922); Berger Bros. Elec. Motors, Inc. v. New Amsterdam Casualty Co., 37 N.Y.S.2d 26 (Sup. Ct. 1942), *aff'd,* 38 N.E.2d 717 (1944).

thereof, caused by accident."36 Refuse dumped by the Authority in a landfill operation near the city of Lancaster polluted the water wells of two neighboring properties.37 The court held that harm caused to property owners by the negligence of the Authority were damages "caused by accident" within the meaning of the policy.38

The term "accident" was not defined by the standard form accident policy. It later became defined as a "sudden," "fortuitous," or "unexpected" event.39

3. "Occurrence" Policies

In 1966, the Insurance Services Office (ISO), a successor organization to the National Bureau of Casualty Underwriters, promulgated a standard form policy that was substantially similar to accident policies.40 However, the new policy provided coverage for injuries caused by an "occurrence" rather than by "accident."41 These policies typically defined "occurrence" as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured."42

In changing from "accident" to "occurrence" policies, the insurance industry intended to increase coverage.43 In fact, the increase in

36. Id. at 369.
37. Id.
38. Id.
39. See, e.g., Geddes & Smith Inc. v. Saint Paul Mercury Indem. Co., 334 P.2d 881 (Cal. 1959) (malfunction which took place over the period of a few days to six months constituted "sudden" accidents); Moore v. Fidelity & Casualty Co. of New York, 295 P.2d 154 (Cal. 1956) (water damage which occurred gradually over time found to be an "unexpected" accident); Hyer v. Inter-Ins. Exchange of Automobile Club, 246 P. 1055 (Cal. Ct. App. 1926); Taylor v. Imperial Casualty & Indem. Co., 144 N.W.2d 856 (S.D. 1966) (seepage of gasoline from an underground storage tank was an "undesigned, sudden and unexpected event" or accident); Owens-Illinois, Inc. v. Aetna Casualty & Sur. Co., 990 F.2d 865, 872 (6th Cir. 1993) ("accident" refers to unexpected or unintended events).
40. See, supra note 31.
43. G.L. Bean of Mutual Liberty Insurance Company, who played a key role in drafting the CGL policy, explained at an insurance industry conference that "Smoke, fumes, or other air or stream pollution have caused an endless chain of severe claims for gradual property damage. . . . [Manufacturers] need . . . protection [from these claims] and should legitimately expect to be able to buy it, so we have provided it [under the new CGL policy]." G.L. Bean, Assistant Secretary, Liberty Mutual Ins. Co., New Comprehensive General and Automobile Program, The Effect on Manufacturing Risks, paper presented at Mutual Insurance Technical Conference, Nov. 15-18, 1965, at 6, 10, quoted in Carl A. Salisbury, Pollution Liability Insurance Coverage; the
coverage was accompanied by an increase in CGL insurance premiums.44 This move was made "in response to consumer demands for broader liability protection and in acquiescence to the judicial trend toward a more expansive reading of the term accident."45

An occurrence policy is designed to prohibit coverage where an insured knew or should have known of ongoing pollution.46 In Summit Associates, Incorporated v. Liberty Mutual Fire Insurance Company,47 Summit, a real estate developer, bought property from the Edison Township which had been used as a sewage treatment facility twenty years earlier.48 Edison bought the property from the United States government who had used it as an arsenal and to burn munitions.49 Summit was not informed of any of these past uses of the property.50 While preparing the land for construction, Summit discovered a large underground sludge pit which began leaking "odiferous" liquid.51 Summit was ordered to clean up the property.52

Summit was insured by Liberty Mutual Fire Insurance Company (Liberty).53 Liberty agreed to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies caused by an occurrence."54 Occurrence was defined as an "accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."55

The court found that Liberty incorrectly refused to indemnify Summit for the cost of cleanup because Liberty failed to establish that "Summit knew or should have known of the likelihood that construction on its premises would result in the release of contaminants."56


44. See Werner Pfennigstorf, Environment, Damages, and Compensation, 1979 AM. B. FOUND. RES. J. 347, 438 (change to "occurrence" was "perceived and intended to be a broadening of the coverage compensated by a premium surcharge . . . .")


47. 550 A.2d 1235 (N.J. 1988).

48. Id. at 1237.

49. Id.

50. Id.

51. Id.

52. Summit Associates, 550 A.2d at 1237.

53. Id. at 1238.

54. Id.

55. Id. (emphasis added).

56. Id. at 1239 (emphasis added).
4. Pollution Exclusions

i. The 1973 Pollution Exclusion

The CGL policy was again revised in 1973 to include a new pollution endorsement, commonly referred to as exclusion "f". As modified, the policy excluded coverage for

bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.\(^{57}\)

Litigation regarding the pollution exclusion in environmental claims has pivoted on the meaning of "sudden and accidental." Insurers argue "sudden" bears only a temporal meaning (i.e., abrupt).\(^{58}\) For example, the California Court of Appeal in *Shell Oil Company v. Winterthur Swiss Insurance Company*\(^{59}\) recently took a stand in this hotly contested issue. In *Shell Oil*, the insured, Shell, leased part of an old Army arsenal that had been used to produce chemical munitions.\(^{60}\) Shell used it to produce agricultural chemicals.\(^{61}\) Shell's production generated toxic wastes which were disposed of on-site.\(^{62}\) The waste eventually contaminated the groundwater, and Shell became liable for cleanup.\(^{63}\) Shell filed suit against multiple insurance carriers who provided coverage during the period they leased the property (from 1940

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57. Insurance Services Office ("ISO") Form GL 00 02 (Ed. 01 73), reprinted in DONALD S. MÄLECKI & ARTHUR L. FLITNER, COMMERCIAL GENERAL LIABILITY app. 148 (3d ed. 1990).
60. Id. at 732
61. Id.
62. Id. at 732-33.
63. Id. at 734.
to 1983; approximately 800 insurance policies were involved). The jury found for the insurers and Shell appealed.

On appeal, Shell argued, among other things, that "sudden" was given an improper temporal meaning which limited Shell's coverage. Shell contended that "sudden" can mean "unexpected" or "unintended" and further that the term "sudden," as used in the policy, is ambiguous. In analyzing Shell's contentions, the court used two basic rules of construction: (1) the policy language was given its plain and ordinary meaning, and (2) the insurance contract was interpreted so as to give effect to every part, that is, defining words in such a way so as not to produce redundancy and to give each word significance.

Therefore, as in Shell's policies, where the pollution exclusion covers pollution which results from "a sudden, unintended and unexpected happening" or where "a discharge, dispersal, release or escape is sudden and accidental" each word must be given a distinct meaning.

The court was not persuaded by the fact that not all dictionary meanings of "sudden" include temporal terms, rather the court gathered the meaning of "sudden" from the context in which it was used. The court stated that one aspect of the meaning of "sudden" included "unexpected." But the court felt that to say "sudden" means "unexpected" would strip "sudden" of an important temporal facet of its ordinary meaning and the meaning in the context in which it was used. Likewise, giving "sudden" a temporal meaning avoids redundancy in the phrase "sudden and accidental." "Accident" conveys an unexpected and unintended meaning while sudden conveys a temporal one. Therefore, the court held that if "sudden" was to be given any meaning in the pollution exclusion, only an abrupt discharge or release of pollutants would suffice. However, the court did state that "sudden" only "refers to the pollution's commencement and does not require that the polluting event terminate quickly or have only a brief duration." Thus, coverage could be found under the pollution exclusion for a sudden and accidental discharge of pollutants which contin-

64. Shell Oil, 12 Cal. App. 4th at 735-36.
65. Id. at 736.
66. Id. at 751.
67. Id. at 753.
68. Id.
69. Shell Oil, 12 Cal. App. 4th at 754.
70. Id. at 754.
71. Id. at 755.
72. Id.
73. Id.
74. Shell Oil, 12 Cal. App. 4th at 756. [citations omitted].
ued unabated for a time because of the insured's failure to discover it or lack of resources to stop it.\textsuperscript{75}

However, the court failed to explain in its analysis the apparent redundancy of terms used in other portions of the pollution exclusion (and more generally in the contract of insurance itself) and construed the terms used in the exclusion against the insured. As stated above, the pollution exclusion does not apply to the "discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants" which are not sudden and accidental.\textsuperscript{76} This clause in the insurance contract seems to use terms which were intentionally made to be redundant to cover every imaginable method of contaminant dispersal. In a later decision,\textsuperscript{77} the court explained that the meanings of sudden and accidental overlap. It further stated that the fatal flaw in decisions which give "sudden" an "unexpected or unintended" meaning is that it "renders 'sudden' a mere subset of 'accidental,' making it totally redundant."\textsuperscript{78}

Policy-holders, on the other hand, argue the term "sudden" is ambiguous because it also connotes an unexpected or unintended release of pollutants.\textsuperscript{79} Since sudden is ambiguous, the ambiguity must be resolved in favor of the insured and in favor of coverage. Thus, gradual events can be covered provided the pollution damage was neither expected nor intended by the insured.\textsuperscript{80} This argument was successfully applied in \textit{CPC International Incorporated v. Northbrook Excess & Surplus Insurance Company}.\textsuperscript{81} In 1968, the insured, CPC, a food and chemical manufacturer, acquired a manufacturing facility which

\textsuperscript{75} Id.
\textsuperscript{76} See supra note 57 and accompanying text.
\textsuperscript{78} Id.
\textsuperscript{81} 962 F.2d 77 (1st Cir. 1992) (New Jersey law).
produced flea spray, hair spray, spot remover and oven cleaner. In 1982, a town neighboring the manufacturing facility sued CPC for contamination of its well water caused by activities at the plant. While the exact cause of the contamination was unknown, the evidence suggested that the release of hazardous material into the ground was caused by "several distinct events—occurring at different times—and from different sources at the plant." In determining if the release was "sudden and accidental" and thus covered under the policy, the court looked at the evolution of the phrase "sudden and accidental" in the insurance industry and the judicial interpretations given to the phrase by various jurisdictions.

Upon examining the phrase "sudden and accidental" in context of its use in the insurance industry, the court found that

[For many years, [the phrase] had been used in the standard boiler and machinery policy, and the courts uniformly had construed the phrase to mean unexpected and unintended. . . . We think that it is reasonable to assume that the insurance industry was aware of the construction when it chose to use the phrase "sudden and accidental" in the pollution exclusion clause.]

Furthermore, the court was persuaded by the overwhelming judicial disagreement regarding the interpretation of the phrase. It explained: "[t]hat so many learned jurists throughout the nation differ on the construction of this phrase is, in our view, additional proof that the phrase admits of two reasonable constructions [one with and one without a temporal construction]." Thus, the court found that the phrase was ambiguous.

Courts finding the phrase "sudden and accidental" ambiguous have emphasized the fact that dictionary definitions of "sudden" do not necessarily convey a temporal element. The fact that "sudden" is susceptible to two or more possible meanings (one "unexpected" and one temporal) makes it by definition ambiguous. Therefore, courts following this approach resolve such ambiguity against the insurer.

82. Id. at 79.
83. Id.
84. Id. at 82.
85. Id.
86. CPC International, 962 F.2d at 94.
87. Id. at 95.
88. Id. at 94-95.
89. Id. at 95.
90. See, e.g., New Castle, 933 F.2d at 1193.
91. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY, 2d Vol. (1979) defines ambiguous as "having two or more possible meanings."
Insureds have also attempted to introduce the drafting history of the pollution exclusion to aid the courts in the interpretation of "sudden and accidental." \(^9\) Specifically, the drafting history indicates that when the exclusion was introduced, the insurance executives introduced and marketed it "as a clarification, rather than a restriction of coverage." \(^9\)

Courts rejecting insureds attempts to bring in drafting history have done so for at least two reasons. First, extrinsic evidence is only admissible to shed light on an ambiguity, thus an ambiguity must be shown first. \(^9\) Under the parol evidence rule, extrinsic evidence may not be used to contradict the ordinary meaning of words in a contract. \(^9\) Since "sudden and accidental" is interpreted by many courts as unambiguous, \(^9\) evidence of drafting history to explain the terms of the policy are barred. And secondly, evidence of drafting history is not allowed into evidence because it contradicts the notion that insurance policies are to be interpreted the way an ordinary lay-person would interpret them. \(^9\) Courts allowing drafting history and other insurance industry documents into evidence to explain "sudden and accidental" have ruled in favor of the insured. \(^9\)

**ii. The 1986 Absolute Pollution Exclusion**

In 1986 the pollution exclusion was rewritten so that sudden and accidental releases would no longer be covered; nearly all coverage for pollution was excluded. This version of exclusion "f," commonly referred to as "the absolute pollution exclusion," excluded coverage for:

1. "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:
   (a) At or from premises you own, rent or occupy;

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92. See ACL Technologies, 17 Cal. App. 4th at 1790; New Castle, 933 F.2d at 1197.
93. New Castle, 933 F.2d at 1197-98
95. Id. at 1791.
96. See supra note 58.
(b) At or from any site or location used by or for you or others for the handling, storage, disposal, processing or treatment of waste;

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

(d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:

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

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

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

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.99

The superior court of Delaware applied the absolute pollution exclusion and barred insurance coverage for an environmental hazard case. In Sequa Corporation v. Aetna Casualty and Surety Company,100 the insured, Sequa, sought coverage from fifty insurers for various environmental actions brought against it at nine sites in eight states.101 The CERCLA actions brought against Sequa alleged damages to groundwater and soil from hazardous substances which were used, stored, handled, generated and/or disposed of on the Sequa sites.102 Sequa’s complaint sought coverage for personal injury and/or property damage arising out of the pollution at the sites.103 National Casualty Company, one of the insurers, moved for summary judgment, contending that the absolute pollution exclusion contained in the policy precluded coverage at six sites.104 The court, applying New

99. ISO Form CG 00 01 (Ed. 11 85), reprinted in Malecki & Flitner, supra note 57, at 156.
101. Id. at 2.
102. Id. at 10.
103. Id. at 11.
104. The absolute pollution exclusion was similar to that in supra note 99 and accompanying text. Sequa, No. 89C-AP-1 at 14.
York law, held that the policy language barred the coverage sought by Sequa.\(^{105}\)

Thus, the 1986 pollution exclusion eliminates CGL coverage for all but a very few types of environmental harms occurring after 1986.

**PART II: PROPERTY DAMAGE AND COVERAGE TRIGGERS IN ENVIRONMENTAL CLAIMS CASES**

A. **CERCLA Liability Extends to Many Parties**

Concern over environmental damage to property grew as society realized burying drums of pollutants in abandoned landfills was no longer a safe or effective means of waste disposal. The question then became: who was responsible for cleanup?

As simplistic as that question may seem, it presented many unique legal problems. The polluted site could have had multiple owner-operators each generating and disposing of their own waste. Furthermore, most hazardous waste is dumped over the course of several years. Many years can pass before leakage occurs and the contamination causes injury to the surrounding soil, groundwater and public. These factors created problems in the allocation of blame and liability for polluters.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) was enacted by Congress to confront problems posed by hazardous waste sites.\(^{106}\) CERCLA provisions enacted to address these issues include establishing a fund to help pay for cleanup ("Superfund"), requiring the Environmental Protection Agency (EPA) to work with local and state officials to identify and clean up waste sites, and empowering the EPA to pursue the responsible parties and have them pay for cleanup.\(^{107}\)

CERCLA does not preempt state law regarding the interpretation of insurance contracts, except to the extent clearly stated in CERCLA provisions (such as those regarding purchasing and risk retention group formation).\(^{108}\)

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105. Id.
CERCLA imposes strict, retroactive, and joint and several liability. Former and current owners of property can be held liable under CERCLA. Thus, escaping liability can be difficult and defendants in a CERCLA action can number in the hundreds.

B. Coverage for Cleanup Costs in Comprehensive General Liability (CGL) Policies

A business' Comprehensive General Liability (CGL) policy provides coverage for all sums the business shall become liable to pay as damages for bodily injury and property damage which is caused by an occurrence not excluded by the terms of the policy. In recent years, insurers have argued that this indemnity agreement does not include environmental cleanup costs.

Whether or not CGL policies provide coverage for cleanup costs is presently a hotly contested issue. A study by the RAND Institute for Civil Justice found that 42 percent of the money spent on pollution claims by insurers went towards litigating coverage disputes with their insureds. In these disputes with their insureds, insurers have used the following arguments with varying success: (1) environmental response costs are restitutional in nature, and as such are not compensatory damages covered under the CGL policy; (2) cleanup orders are the insured's injunctive obligation and not a liability to pay damages; and (3) environmental response costs exceed the value of the contaminated property and should therefore not be paid.
1. Environmental Response Costs as "Damages" Under the Standard CGL Policy

Several courts have held that environmental response costs are "damages" within the meaning of the CGL policy. These courts base their decisions on the ordinary, commonly understood meaning of the term "damages," and the reasonable expectations of the insurance purchaser procuring CGL coverage. The court in *Outboard Marine Corporation v. Liberty Mutual Insurance Company*, followed this approach.

*Outboard Marine Corporation* (OMC) is a large manufacturer of outboard motors. OMC has operated a die-casting facility in Waukegan, Illinois since the 1940s. From 1959 to 1972, OMC used a hydraulic fluid containing polychlorinated biphenyls (PCBs) in its die-casting process. During the die-casting process, some of the PCB-laden material leaked and spilled into its wastewater system, which later found its way into Waukegan Harbor and Lake Michigan. The Environmental Protection Agency (EPA) filed an action against OMC seeking an injunction and requiring OMC to clean up the contamination.

OMC was insured by Liberty Mutual. Under the terms of the policy, Liberty Mutual agreed to "pay on behalf of the insured all sums which the insured shall become obligated to pay as damages... caused by an occurrence, and the company shall have the right and duty to defend any suits against the insured seeking damages on account of such property damage...." Liberty Mutual asserted that it was not required to defend OMC in the

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116. Id. at 1213.

117. Id.

118. Id.

119. Id.

120. *Outboard Marine*, 607 N.E.2d at 1213.
actions brought by the EPA. Liberty Mutual argued that the term "damages" has a technical meaning and the phrase "suits seeking damages" as used in the policy provided coverage only for compensatory, legal damages. Further, Liberty Mutual contended that this phrase was unambiguous and did not include coverage for suits seeking equitable or injunctive relief. The courts' decision turned on the definition of the word "damages" as used in the policy. Since the term was not defined by the policy, the court interpreted this term "by affording it its plain, ordinary, and popular meaning." The court found that the definition of the term "damages" "does not distinguish between legal compensatory damages or the costs of complying with a mandatory injunction. It merely indicates that "damages" stands for the money required to be expended in order to right a wrong." The court further reasoned,

"[I]t is of little consequence whether the remedy is in the form of legal or equitable relief is especially true in the context of the broad protective purposes of a CGL insurance policy. Such a policy would be of little utility in protecting its purchaser if its coverage rises or falls upon the whim of the underlying plaintiff and whether the underlying complaint prayed for legal or equitable relief."

A few courts, however, have held that cleanup costs are not damages under the standard CGL policy. These courts rest their decisions on arguments similar to those asserted by Liberty Mutual in the above case: that cleanup costs are equitable in nature and, thus, are excluded from liability because they are not covered "at law damages," discussed below.

2. Cleanup Orders: the Insured's Injunctive Obligation

Insurers argue that claims for cleanup orders are equitable remedies and that the term "damages," as used in the CGL policy, does not cover restitutionary claims under CERCLA because injunctive-relief

121. Id. at 1214.
122. Id.
123. Id. at 1214-1215.
124. Id. at 1215.
125. Outboard Marine, 607 N.E.2d at 1216.
126. Id.
claims are equitable in nature. On the other hand, policy-holders insist that the term is broad enough to include cleanup costs.

The court in *Aetna Casualty and Surety Company v. General Dynamics Corporation* held that the term "damages" in General Dynamics' CGL policy did not cover cleanup costs. General Dynamics was involved in lawsuits for environmental contamination at seven sites and received letters from federal and state agencies, as well as private parties, demanding clean up at nine other sites. General Dynamics had a CGL policy with Aetna, but Aetna refused to defend General Dynamics in the actions because the actions sought reimbursement, restitution or payment of cleanup costs. The court agreed with Aetna stating,

Because these causes of action are "essentially equitable actions for monetary relief in the form of restitution or reimbursement of costs," [citations omitted], CGL coverage is precluded. To hold otherwise would undermine the rationale adopted in [Continental Ins. Cos. v. Northeastern Pharmaceutical & Chemical Co.], which distinguished between legal and equitable damages. The CGL does, however, cover any legal claims asserted against General Dynamics.


130. 968 F.2d 707 (8th Cir.) (Missouri law), reh'g, en banc, denied, 1992 U.S. App. LEXIS 20679 (8th Cir. Sept. 2, 1992).

131. Id. at 712-13.

132. Id. at 709.

133. Id. at 712


135. *Aetna Casualty*, 968 F.2d at 712.
3. Environmental Costs Exceeding the Value of the Property

Insurers have argued that the cost of restoring contaminated property does not constitute damages since the cost or restoration can exceed the value of the land. Most courts have summarily rejected this argument, reasoning that the cost of restoring natural resources is the appropriate measure of damages.136

C. Trigger of Coverage for Environmental Claims Cases

For the purposes of indemnification for cleanup costs under a CGL policy, an event must occur to trigger coverage—that is, there must be some property damage caused by an occurrence during the policy period from the insurance company or companies in which the insured seeks coverage.137 Environmental claims often involve events which have gone unnoticed for many years (i.e., ground water contamination from a landfill of leaking hazardous waste barrels), making the exact date or dates when the injury took place nearly impossible to pinpoint.

In response to the latent property damage claims, courts have developed four major theories regarding the issue of when an event “occurs” for purposes of insurance coverage: (1) the exposure theory; (2) continuous trigger theory; (3) injury-in-fact theory; and (4) the manifestation or first discovery approach.

1. The Exposure Theory

Under the exposure approach, property damage occurs and coverage is triggered when the property is first exposed to the hazardous or harmful substance.138 For example, in Fireman’s Fund Insurance Company v. Ex-Cell-O Corporation,139 where the policies covered occurrences within the policy period, the court held that “each exposure of the environment to a pollutant constitutes an occurrence and triggers coverage.”140

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137. It may be helpful to think of this as the date of occurrence.


140. Id. at 76.
2. The Continuous Trigger Theory

Under the continuous trigger approach, all insurance policies in effect from the time of first exposure of hazardous substances to the time the insured is notified of the damage are liable. "The 'continuous trigger' concept of insurance coverage recognizes that it is probably impossible to ascribe damage to any particular policy year in the damage proliferation process, and thus, the entirety of insurance coverage existent during the years of proliferation, should be available for indemnification."

For example, in *Liberty Mutual Insurance Company v. Triangle Industries, Incorporated*, the insured, Triangle, operated a pickling plant which generated a waste product known as "lime stabilized waste pickle liquor sludge." The sludge was shipped to a landfill for disposal during November 1977 and October 1980. The Environmental Protection Agency (EPA) conducted a test of the landfill in October 1980 and discovered that the sludge was toxic and leaking from the landfill. In December 1984, the EPA notified Triangle that it was a potentially responsible party pursuant to CERCLA in connection with the contamination at the landfill. During this period, Triangle had CGL coverage from three different insurance companies. The coverage period of each was as follows: Company "A", January 1981 to January 1982; Company "B", January 1982 to January 1984; and Company "C", January 1984 to January 1986. The court, applying New Jersey law, found the continuous trigger theory ...
applied. Continuous trigger theory was described as a case "where an injury process is not a definite, discrete event, the date of the occurrence should be the continuous period from exposure to the manifestation of damages." The court went on to hold that the manifestation of harm occurred when the EPA notified Triangle that it was a potentially responsible party. Therefore, property damage occurred from 1978 until December 1984, potentially giving rise to coverage from all three CGL policies involved.

3. The Injury-in-Fact or Actual Injury Theory

Under the injury-in-fact or actual injury approach, coverage is triggered when actual harm is found to have existed. "In other words, when the injury actually occurs, each policy then in effect is triggered. It is of no consequence whether the injury has been discovered or not." The court in Detrex Chemical Industries, Incorporated v. Employers Insurance of Wausau applied this approach. The insured, Detrex, received a notice from the Michigan Department of Natural Resources that it violated Michigan law by allowing a chemical solvent associated with its production process to pollute the environment at its site. In determining whether coverage triggered, the court adopted the injury-in-fact theory. In order for coverage to be triggered, the court reasoned, "an injury—and not merely exposure—must result during the policy period." Therefore, Detrex was required to show an actual injury before coverage would issue.

4. The Manifestation or First Discovery Approach

Under a manifestation approach, coverage for property damage is triggered when damage is discovered or manifests to the injured party or third party plaintiff. This approach can be likened to the chil-

152. Id.
155. Id. at 1315.
156. Id. at 1324.
157. Id.
158. Id. at 1325.
dren's game of "Hot Potato." Although the potato may be held by many hands before it comes to rest, the one holding the potato when the music stops loses. Likewise, an organization may be insured by several different insurance companies over a period of years when contamination is taking place, but only the policy in effect at the time the contamination is discovered is liable to cleanup the entire mess.

The manifestation approach was applied by the court in *Peerless Insurance Company v. Strother.* In this case, the insured, Carolina Transformer Company, was engaged in the business of repairing electrical transformers from 1959 to 1984. As a result of these activities, Carolina Transformer was notified by the EPA that it had contaminated the surrounding soil and the surface water with PCBs. Carolina Transformer had CGL coverage during the years 1970 through 1978. The court, applying the manifestation/first discovery approach, held that no occurrence was alleged to have occurred under the policy because the contamination, which was discovered in 1985, was not discovered during the policy period (i.e., 1970-78).

**PART III: POTENTIAL COVERAGE AND LIMITATIONS OF COVERAGE FOR ENVIRONMENTAL CLAIMS CASES**

**A. Other Avenues of Insurance Coverage in Environmental Claims Cases: Wrongful Entry, Trespass, and Nuisance**

Most CGL policies contain a definition of personal injury which includes wrongful entry or eviction or other invasion of the right of private occupancy. These provisions may give rise to insurer liability in environmental claims cases. For example, in the *City of Egerton v. General Casualty Company of Wisconsin,* chemicals seeping through to groundwater constituted an invasion of another's interest in the private use of land and constituted an actionable negligent trespass, liability for which was covered under the policy.

Furthermore, environmental claims cases asserting a cause of action for trespass or nuisance should be covered under policies with

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161. *Id.* at 867.
162. *Id.* at 868.
163. *Id.*
164. *Id.* at 870.
165. See, e.g., *Tital Holdings Syndicate Inc. v. City of Keene,* 898 F.2d 265 (1st Cir. 1990) (New Hampshire law).
personal injury provisions. The laws in many states provide that a person can be liable for causing a thing to enter the land of another either through an intentional or negligent act.\textsuperscript{167} Similarly, insurers have a duty to defend and indemnify their insureds for claims alleging nuisance or creation of a health hazard. However, the coverage is not triggered by a physical invasion; there must be an allegation of interference with the claimant's use, enjoyment or occupancy of his property.\textsuperscript{168}

B. Sophisticated Insured Limitation

As mentioned before, ambiguities in insurance policies are construed against the insurer. This \textit{contra proferentem} ("against the one proffering") maxim was developed primarily because insurance contracts are usually contracts of adhesion and are not freely negotiated. Recently, this rule has come under attack. Insurance industry pundits are pushing for an exception to this rule, involving sophisticated insurance purchasers.

A sophisticated insured is a purchaser who has satisfied the following three elements: (1) the insured is legally sophisticated or their relative bargaining power is equal to that of the insurance provider, (2) the insurance policy was actually negotiated, and (3) the policy was jointly drafted.\textsuperscript{169}

In recent years, some courts have found that the anti-insurer preference may not be a viable construction norm in the realm of big money commercial insurance.\textsuperscript{170} In \textit{Eagle Leasing Corporation v.}}

\begin{footnotesize}
\footnote{167. See, e.g., Dial v. City of O'Fallon, 411 N.E.2d 217 (Ill. 1980).}
\footnote{170. See, e.g., Schering Corp. v. Home Ins. Co., 712 F.2d 4 (2d Cir. 1983) (In cases involving bargained-for insurance contracts, negotiated by sophisticated parties, the underlying adhesion contract rationale for the doctrine is inapposite.; Eastern Associated Coal Corp. v. Aetna Casualty & Sur. Co., 632 F.2d 1068 (3d Cir. 1980) (The principle that ambiguities should be construed against the insured does not apply in a situation where large corporations, advised by counsel and having equal bargaining power, are the parties to a negotiated policy.; Falmouth Bank v. Ticor Title Ins. Co., 920 F.2d 1058 (1st Cir. 1990) (Policy of interpreting ambiguities against the insurer does not apply strongly where the transaction is between two parties of equal sophistication and equal bargaining power.; AIU Ins. Co. v. Superior Court, 799 P.2d 1253 (Cal. 1990) (Anti-insurer ambiguity norm and the doctrine of reasonable expectations applied less stringently when the insured was sophisticated.).)
Hartford Fire Insurance Company,\textsuperscript{171} for example, the Fifth Circuit elaborated on the place of contra proferentem in such a situation:

We do not feel compelled to apply, or, indeed, justified in applying the general rule that an insurance policy is construed against the insurer in the commercial insurance field when the insured is not an innocent but a corporation of immense size, carrying insurance with annual premiums in six figures, managed by sophisticated businessmen, and represented by counsel on the same professional level as the counsel for insurers. In substance the authorship of the policy is attributable to both parties alike. Significantly, the policy in question is not the usual printed form but is what is known as a “manuscript” policy, containing some standard printed clauses but confected especially for [the insured]. It is true, of course, as the trial judge observed, “scriveners of insurance policies are acutely aware of the meaning and effect of the language”. We comment: So too, are counsel for large companies carrying fleet insurance with annual premiums in six figures. There is no purpose in following the legal platitude that has no realistic application to a contract confected by a large corporation and a large insurance company each advised by competent counsel and informed experts.\textsuperscript{172}

The court went on further to justify its abandonment of the anti-insurer maxim in a footnote, stating, “An insurance [contract] is usually a ‘contract of adhesion’, where the insured has no bargaining power. Only for this reason, is the policy construed against the insurer.”\textsuperscript{173} Therefore, where the insurance contract is negotiated and jointly drafted, and the insured has equal bargaining strength to the insurer, contra proferentem should simply not apply.

C. CERCLA Reauthorization

CERCLA is up for reauthorization this year. While a significant departure from CERCLA’s current liability system is not predicted, several changes may occur.\textsuperscript{174}

During the reauthorization process, Congress will have to determine the effectiveness of the statute thus far. After 13 years of enactment, a total of roughly 1300 sites are on the National Priorities List (NPL).\textsuperscript{175} Only 51 of these sites have been cleaned up and removed

\textsuperscript{171} 540 F.2d 1257 (5th Cir. 1976), cert. denied, 431 U.S. 967 (1977).
\textsuperscript{172} Id. at 1261.
\textsuperscript{173} Id. at 1261, n. 4.
\textsuperscript{175} Id. at 5.
Clearly, something must be done to make the cleanup process more efficient. The delay in cleaning up sites is attributable to the morass of lawsuits prevalent in CERCLA actions.\textsuperscript{177}

Part of the problem centers around CERCLA’s retroactive, strict, joint and several liability scheme.\textsuperscript{178} The current scheme holds a party liable for the entire cost of clean up even if they were not directly or minimally responsible for the contamination.\textsuperscript{179} Further, a party can be liable even if they followed all applicable laws at the time they disposed of their waste.\textsuperscript{180} Although the Environmental Protection Agency (EPA) does have the ability to enter into de minimus settlement or create mixed funding agreements (i.e., pay for cleanup costs on behalf of unidentified or insolvent parties), they rarely use these tools.\textsuperscript{181} As a result of the liability scheme, CERCLA has created a huge amount of litigation, especially in the insurance industry where coverage disputes abound. The RAND Institute estimates that insurers spent $1.3 billion on Superfund during 1986 and 1989—$1 billion of this went to defending their insureds or defending against their insureds in coverage disputes.\textsuperscript{182}

The American International Group (AIG) and several other insurance companies have come up with a solution to Superfund liability problems which they believe will decrease the number of suits filed.\textsuperscript{183} Their solution involves the creation of a broad-based trust fund which would be used to pay for cleanup of waste disposed of before 1987.\textsuperscript{184} The fund, called the National Environmental Trust Fund (NETF), is not without its skeptics. Critics claim it would only limit litigation for insurance companies who have already limited their liability for post-1986 policies through the absolute pollution exclusion.\textsuperscript{185}

D. Technology Improvements in Pollution Identification

Technology improvements in pollution identification can help identify industrial polluters and apportion liability more accurately. The traditional method of identifying pollutants to its source has been

\begin{itemize}
  \item \textsuperscript{176} Id.
  \item \textsuperscript{177} Williams, supra note 10, at 36.
  \item \textsuperscript{178} Glickman, supra note 174, at 4.
  \item \textsuperscript{179} Id.
  \item \textsuperscript{180} Id.
  \item \textsuperscript{181} Id.
  \item \textsuperscript{182} Williams, supra note 10, at 36.
  \item \textsuperscript{183} Glickman, supra note 174, at 7.
  \item \textsuperscript{184} Id.
  \item \textsuperscript{185} Id. at 8.
\end{itemize}
to match the pattern of chemical components found in a sample to that of its suspected source. This method is incapable of discerning where the pollution came from if two or more companies are engaged in the same sort of industry. However, a new technique utilizing gas chromatography and mass spectrometry is allowing investigators to create a unique "chemical fingerprint" of the pollutant. This technique can be especially useful in cases that involve more than one pollutant, more than one source of pollution, and when the pollutant entered the environment several years ago.

CONCLUSION

Americans are demanding clean up of environmental contamination and realize ignoring the problem will only make it more difficult and costly to eradicate. Courts are walking a delicate edge when interpreting insurance policies. The high cost of environmental cleanup can destroy a business. The courts have to decide which one: the insured's or the insurer's.

The CGL insurance policy was designed to give insureds broad protection for business liabilities. Since its introduction many years ago, the CGL policy has continuously evolved. Major steps in its development include creation of accidental and occurrence policies and the pollution exclusion. It is important for an insured to understand what kind of policy they have when seeking coverage for an environmental claim. Some policies have been interpreted by the courts more liberally and could provide the needed protection.

It is also imperative for an insured to understand when coverage "triggers." Policies in effect years or decades ago may provide coverage for an environmental liability discovered today.

The savvy insured may also find coverage for pollution claims under their personal injury endorsement. However, a sophisticated insured who helps draft their policy provision may find that they lose the protection of the contra proferentem maxim.

186. Fingerprinted Pollution, Economist, Nov. 27, 1993, at 91.
187. Id.
188. Id.
189. Id.
190. Cleanup estimates range from $200 billion to $500 billion. However, at the end of 1990, property and casualty insurers only had $160 billion in financial reserves. Terri Thompson, Premium Priced Controversies, U.S. News & World Report, Aug. 5, 1992, at 46, 48. Over the next 50 years it is estimated that insurers will pay more than $1 trillion in Superfund claims (which is equivalent to 60 Hurricane Andrews). Chris Roush, The Hurricane Called Superfund, Business Week, Aug. 2, 1993, at 74.
New technology developments and CERCLA reauthorization can change liability schemes in the future. As pollution identification technology advances, pollution fingerprinting can help eliminate or reduce an insured's CERCLA liability. CERCLA reauthorization will most likely be geared to make the cleanup process more efficient and reduce the amount of CERCLA litigation.

Understanding what protection is included in an insurance policy can help an insured assess the liabilities and make wise business decisions in regards to real estate transfers, mergers and asset acquisitions. Environmental insurance and regulation will play an increasingly significant role in the development of new product technology and the means chosen for waste disposal.