1 of 4 DOCUMENTS

Appleman on Insurance Law and Practice

APL2 HOLMES' APPLEMAN ON INSURANCE 2d
PART XIII ENVIRONMENTAL INSURANCE
CHAPTER 193 ENVIRONMENTAL INSURANCE

33-193 Appleman on Insurance 193.syn

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§ 193.syn Synopsis to Chapter 193: ENVIRONMENTAL INSURANCE

[d] "Sudden" and "Nonsudden" Coverage

[e] Site-Specific Coverage

[f] Retroactive Date

[2] Remediation "Cost Cap" Insurance

[3] Secured Creditor Coverage

[4] Contractor's Insurance

[5] Blended Finite Risk

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FOOTNOTES:
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2 of 4 DOCUMENTS

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CHAPTER 193 ENVIRONMENTAL INSURANCE

33-193 Appleman on Insurance Scope

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Scope

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This chapter examines environmental insurance coverage issues in the context of historical comprehensive general liability (CGL) policies, environmental impairment liability insurance (EIL) policies and various current environmental insurance products or arrangements.

When CERCLA and other environmental legislation were enacted in the late 1970s and early 1980s, policyholders looked to old CGL policies for coverage of their resulting environmental liabilities. After decades of coverage litigation, the framework for analyzing environmental claims remains complicated and nuanced from jurisdiction to jurisdiction.

The first part of this chapter discusses the historical development of the CGL policy and the most commonly raised coverage issues thereunder in the context of environmental claims. Careful consideration must be given not only to the various exclusions for pollution claims, which became prevalent after the early 1970s, but also to the other insuring and exclusionary provisions that can impact coverage for environmental liabilities. Moreover, once the substantive determination of coverage is made, debate and litigation continues over the scope and priority of coverage over a multi-year period of damage or injury. Section one outlines these numerous coverage issues, and others.

The second part of the chapter looks at claims under EIL policies and other various environmental policies and products in the current market, for which the judicial landscape remains relatively untouched. Such policies can be tailored to fund environmental cleanup or otherwise provide needed security in the context of financing real estate transfers and transactions. Understanding the

key terms and their nuances is key to procuring a policy that will meet the expectations of both the policyholder and the insurer.

FOOTNOTES:

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3 of 4 DOCUMENTS

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33-193 Appleman on Insurance § 193.01

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§ 193.01 Environmental Insurance Coverage Under Historic CGL Policies

[A] The CGL Policy's Development and Coverage of Environmental Liabilities

[1] The Creation of Environmental Liabilities

Insurance coverage for environmental liabilities can be properly understood only with an appreciation of the historical context in which the insured liabilities arose.

Hazardous waste disposal in the United States became subject to comprehensive federal regulation only when the 1976 Resource Conservation and Recovery Act (RCRA) n1 was implemented by the United States Environmental Protection Agency's Subtitle C regulations n2 in 1980. Earlier in the 1970s, hazardous waste disposal was regulated by the states, or not at all. Even state waste disposal regulatory programs were fairly new. Most regulation of waste disposal during the 1960s was by county health departments.

Typical disposal practices reflected the lack of regulation. The use of sanitary landfills in the United States began after World War II, and until the late 1960s, open burning dumps remained the primary disposal method for the vast majority of the nation's municipal solid waste. Throughout most of the 1970s, co-disposal of liquid and hazardous wastes, by mixing them with municipal solid waste in landfills, continued to be a practice recommended by state regulatory agencies.

Imagine, therefore, the surprise of both the manufacturing and insurance industries when, a year after RCRA, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), n3 an enormous unfunded federal mandate. CERCLA imposed unexpected legal liability for past,

entirely lawful waste disposal. Liability under CERCLA is designed to be strict, retroactive, joint and several, unlimited and perpetual. CERCLA is, to borrow from Jeremy Bentham, a "dog law"--the method of behavioral training in which one waits for a canine to engage in undesired conduct, and then kicks it. Neither the manufacturing industry nor the insurance industry was well prepared for the legal risk.

[2] The Development of the CGL Policy

Before 1940, third-party liability insurance policies were sold to cover specific hazards, requiring the insured to purchase multiple liability policies--sometimes up to 20 separate policies n4--to cover a myriad of potential exposures. Then, in 1940, the CGL policy was introduced by the insurance industry to cover all third-party liability upon the happening of any covered "accident." Most courts analyzing environmental liability claims under these old accident-based policies have found coverage for environmental liabilities, even if they developed gradually. n5

Then in 1966, the CGL policy began to predicate coverage based on an "occurrence" rather than an "accident." The occurrence-based policy was the standard policy from 1966 through 1985. n6 Although the "occurrence" definition changed over time, it generally included an accident, or injurious (or continuous or repeated) exposure to conditions that result in bodily injury or property damage (and later, personal injury) n7 during the policy period, sometimes with the additional requirement that the injury or damage be neither expected nor intended from the standpoint of the insured. n8 According to certain policyholder advocates, "the 'occurrence' based CGL policy sold between 1966 and 1970 without a 'pollution exclusion' was sold with the express purpose of providing insurance coverage for 'hidden risks' including environmental risks." n9

Yet between 1970 and 1985, domestically issued CGL policies began to expressly exclude coverage for pollution liabilities unless they were caused by a "sudden and accidental" "discharge, dispersal, release or escape" of "irritants, contaminants or pollutants." n10 Similarly, coverage placed through the London market at that time began to exclude pollution liabilities under the NMA (Non-Marine Association) 1685 provision, which excepted coverage only for pollution or contamination caused by a "sudden, unintended or unexpected happening during the period of this insurance." n11

After 1985, the standard CGL policy was again re-written so that the pollution exclusion became arguably "absolute" n12--excluding claims for all pollution liabilities regardless of how they were caused.

Given the historical development of the CGL policy, it is not surprising to find that some of the most valuable coverage for insureds may be the older CGL coverage without any form of pollution exclusion. Even so, policyholders and courts have nonetheless found coverage for certain environmental liabilities in all years of CGL policies.

Environmental liabilities can arise through government requests or mandates for cleanup, as well as through private party actions for negligence, strict liability, trespass or nuisance. n13 Insureds may look to their historic CGL coverage n14 (or to the policies of their predecessor or affiliated entities) n15 for defense and indemnity of such liabilities. Insurance archaeology can

assist insureds in finding old and missing policies, n16 which may ultimately provide valuable coverage for an insured's current environmental liabilities.

[B] Choice of Law Is an Important Threshold Consideration

Coverage decisions vary from jurisdiction to jurisdiction on almost every conceivable issue, and the standard CGL policy does not contain a choice of law provision to identify which state's law will apply. As a result, any effective coverage analysis must initially consider choice of law principles. Although a full discussion of choice of law theories is outside the scope of this environmental insurance chapter, the governing law is usually determined by (1) where the contract was made (which, tends to be where the insured is located if the last act of forming the contract is delivery of the policy to the insured); n17 (2) where the insured risk is located (which usually implicates the law of the site and/or the insured's residence); n18 or (3) a combination approach determined by the issue at hand. n19 Figuring out which state law applies, or which state law arguably applies, can make a significant difference when negotiating or litigating a coverage dispute that likely will raise any one or more of the following coverage issues.

For example, in a lawsuit arising from a petroleum asphalt spill on the Pennsylvania Turnpike, the insurer argued for the application of Pennsylvania law, which interprets a pollution exclusion broadly, while the insured argued for application of coverage-friendly Maryland law. In that case, the court held that the asphalt hauler was entitled to declaratory judgment regarding its excess liability insurer's obligation to defend and potentially indemnify the hauler with respect to all claims resulting from the spill because, under Maryland law, the policy's pollution exclusion clause would only bar coverage in cases of traditional environmental pollution. The reasoning of the Maryland courts supported the conclusion that spilled petroleum asphalt on a roadway did not constitute traditional environmental pollution as defined in CERCLA. n19.1

[C] Dissecting the "Occurrence" Definition--Expectations and Intentions, Timing and Burden of Proof

In almost any environmental coverage claim, the parties will dispute whether the environmental liability satisfies the "occurrence" definition of the policy. The standard definition usually requires, in part, that the "property damage" or "bodily injury" be "neither expected nor intended from the standpoint of the insured." n20 To determine whether the damage or injury was expected or intended, most courts will look to the subjective expectation or intent of the particular insured--and avoid imposing a "reasonable insured" or objective standard to the inquiry. n21 Other courts are more willing to infer intent under an objective standard of what a reasonable insured would have expected or intended. n22 Additionally, many--but not all--courts will impose the burden of proof on the insured on this issue. As a result, the insured is left proving a negative in its *prima facie* case for coverage, *i.e.*, that the injury or damage was neither expected nor intended, either from the objective or subjective standard adopted by the court. n23 At least some courts have made clear that the relevant inquiry is whether the insured expected or intended the ultimate damage, and not merely the underlying act causing the damage. n24

In an Illinois case, homeowners residing near a manufacturing plant brought a class action lawsuit for personal injury and property damage purportedly caused by emissions from the plant. The emissions were authorized under a permit issued

by the Illinois Environmental Protection Agency. The CGL policy defined an occurrence as an accident, including continuous or repeated exposure to substantially the same general harmful conditions. The policy contained exclusions for expected or intended injury and for pollution. The court concluded that the insurer had a duty to defend. Although the emissions were intentionally discharged, the alleged bodily injury and property damage were unexpected results of the emissions and, as such, were accidental. Because the policyholder operated under an emissions permit, it could not have expected or intended to cause injury; thus, the expected or intended injury exclusion did not apply to preclude coverage. The pollution exclusion was arguably ambiguous and therefore had to be construed in favor of the policyholder, as to whether the plant's emission of hazardous materials in levels allowed by the permit constituted pollution. n24.1

Another frequently analyzed requirement of the "occurrence" definition is what injury, damage, occurrence or event must take place during the policy period. Some occurrence definitions do not incorporate a temporal requirement of any event or damage during the policy period, but their corresponding definitions for "bodily injury" and "property damage" tie in the requirement of "injury" or "occurrence" during the policy period. Other policies define "occurrence" to require injury or damage "result[ing] during the policy period." Other policies somewhat confusingly define occurrence in a circular fashion, such that the definition itself requires an "occurrence which occurs during the policy period." Some London policies more pointedly define "occurrence" to require "one event taking place during the term of this contract."

Courts compare and contrast these various "occurrence" definitions when analyzing the proof requirements in any given case. Where the "occurrence" definition specifically requires an "event" during the policy period, courts are sometimes more willing to require the insured to show a specific release or isolated event during the policy period before environmental coverage is triggered. n25 Other courts nonetheless consider such language ambiguous and are willing to find coverage for ongoing gradual damage, even if the occurrence definition purports to require a specific "event" during the contract. n26

[D] Determining the Duty to Defend in the Context of Environmental Claims

The duty to defend is broader than the duty to indemnify, such that an insured enjoys broad defense protection for any potentially covered claim. The typical CGL policy requires an insurer to defend any "suit" seeking "damages" on account of covered property damage or bodily injury, but does not always define the term "suit" or "damages." n27 A commonly litigated coverage issue in environmental claims is whether a Prospective Responsible Party (PRP) letter from the U.S. Environmental Protection Agency (EPA) or similar state compliance order constitutes a "suit" seeking "damages," such that the duty to defend is triggered.

[1] Most Courts Find a PRP Letter or Compliance Request Constitutes a "Suit" Seeking "Damages," Thus Triggering the Duty to Defend

The majority of courts hold that an EPA PRP letter or similar state order constitutes a "suit" that triggers the duty to defend under a CGL policy. These courts seek to protect the reasonable expectations of the insured, which would not necessarily understand "suit" to mean only court proceedings. n28 Although the dictionary definition of the term "suit" includes court proceedings to

enforce or recover rights or claims, not every definition of "suit" requires a court or some other similar proceeding. Thus, courts have held that PRP letters and state compliance orders are also "suits" because they attempt to "gain an end by legal process." n29 Indeed, even under policies in which the term "suit" is specifically defined as "a civil proceeding," courts have found EPA PRP letters and state orders nonetheless trigger defense obligations. n30

Given the coercive nature of PRP letters and similar state orders, many courts determine they are "functional equivalents" of "suits" or "civil proceedings." n31 As noted by one court:

> The existence of a statutory system designed to forgo litigation, while achieving the same relief, minimizes the distinction between administrative claims and formal legal proceedings. Coverage should not depend on whether the EPA may choose to proceed with its administrative remedies or go directly to litigation." n32

In contrast, mere notification letters with no threat of enforcement, may not be considered coercive enough to constitute "suits" triggering the duty to defend. n33

Other courts may find a duty to defend an environmental claim because insurance policies are contracts of adhesion between two parties of unequal bargaining power and, as a result, ambiguities must be resolved against the insurer. n34 Where the meaning of the word "suit" is uncertain or capable of more than one reasonable interpretation, courts typically resolve these doubts against the knowledgeable insurer and in favor of the policyholder in the interest of fairness. n35

A related, and equally commonly litigated issue, is whether remedial cleanup costs constitute "damages" so that the insurer is liable for defense or ultimate indemnity. Most courts answer this question in the affirmative under one of four theories. n36 First, courts may find that the technical meaning of "damages" in CGL policies refers to relief sought through coercion, and thus, damages include remedial costs because an element of coercion is involved. n37 Second, courts may hold that under the plain and ordinary meaning of the word "damages," a reasonable insured would expect coverage for cleanup of hazardous waste unless it was explicitly excluded by the policy. n38 A third approach emphasizes "substance over form," and interprets "damages" to include remedial costs because, in substance, the insurer is only concerned with being reimbursed for injury to property. n39 Finally, some courts interpret "damages" to include remedial costs because "damages" refers to costs remedying injury for "property damage," and EPA and comparable state authorities only send out PRP letters when "property damage" occurs because of hazardous waste contamination. n40

[2] A Minority of Courts Take the Contrary View That PRP Letters Are Not "Suits" Seeking "Damages," Thus the Duty to Defend Is Not Triggered

Despite the foregoing lines of authority, at least some courts hold that a PRP letter or comparable compliance order does not constitute a "suit" triggering any duty to defend. These courts generally conclude the term "suit" clearly and unambiguously n41 refers to some type of legal proceeding in a court of law. n42 These courts may even rely on the fact that there technically is no complaint on file from which the duty to defend can be determined. n43

Alternatively, the court that finds no defense obligation may rationalize that, in order to give effect to each word in the policy, the term "suit" must mean something different from the term "claim." This interpretation stems from CGL policy language stating that the insurer is required to defend a "suit," but has discretion to settle and investigate "claims." n44 Some courts reason "[t]his careful separation indicates that the insurers' differing rights and obligations with respect to 'suits' and 'claims' were deliberately and intentionally articulated in the policies." n45 In essence, because a PRP letter provides notice is more directly analogous to a claim than to a suit, the PRP letter itself does not constitute a "suit" triggering the duty to defend. n46

Other courts decline to find the duty to defend is triggered by focusing on the "voluntary" nature of the participation requested by a PRP letter. n47 These courts accept the insurers' argument that the duty to defend is only triggered when the EPA begins to enforce liability against the unwilling insured by issuing an administrative order which legally obligates the PRP to obey or to otherwise face adverse consequences in court under recovery or injunctive actions. n48

These same courts may also conclude that remedial costs are distinct and separate from "damages," n49 thus negating a defense or indemnity obligation under the policy.

[3] Other Courts Focus on the Basic Concept of "Defense" to Determine Whether an Environmental Claim Triggers the Insurer's Duty to Defend

Finally, at least some courts analyze the insurer's defense obligation following a PRP letter by looking at the fundamental meaning of the word to "defend." As explained in the seminal case of *Ryan v. Royal Insurance Company of America*, "[t]o defend" is to "oppose, repel, or resist" n50 or "to 'take action against attack or challenge.' " n51 The duty to defend, thus, can neither be examined by a "restrictive suit-cum-judgment rule nor by an expansive 'any contact with a government agency' " rule. n52 Instead, the four relevant criteria are the "coerciveness, adversariness, the seriousness of effort with which government hounds an insured, and the gravity of imminent consequences." n53

Under this four-part test, the *Ryan* court held that New York Department of Environmental Conservation's (NYDEC) letters to the PRP for voluntary cooperation did not constitute "suits" because they were not of an adversarial or coercive nature. Nevertheless, at least some courts have found that EPA letters meet the *Ryan* test because of their coercive nature and EPA's broad enforcement powers under CERCLA. n54

[4] Categorization of Cleanup Costs: Determining What Constitutes "Defense" and What Constitutes "Indemnity"

Once the insurer accepts the defense obligation, a dispute may arise as to whether the incurred cleanup costs constitute defense expenses or indemnity payments. This distinction is important because, under old CGL policies, defense payments are usually provided in addition to the policy limits available for indemnity payments, *i.e.,* for settlement or judgment. Thus, the policyholder receiving a defense subject to a reservation of rights with respect to coverage would desire to categorize as many costs as possible as the agreed-upon defense expenses. Similarly, the policyholder (and its excess carriers) would have an interest in treating the incurred expenditures as defense costs to ultimately

preserve the primary policy limits for final judgment or settlement.

In general, insurers contend that costs associated with remedial investigations are defense expenses, while costs associated with feasibility studies and actual remediation are indemnity expenses. The courts have struggled to create any bright-line rules in cases involving large expenditures that are neither clearly investigative nor clearly remedial. For example, some courts create a rebuttable presumption that remedial investigation costs are indemnity, n55 while others treat the same costs as defense, at least in certain situations. n56 Given the flexible and fact-specific nature of the inquiry, policyholders and insurers have room to dispute the proper categorization of their claims, sometimes hindering an efficient resolution where defense is accepted but indemnity is reserved.

[E] Determining Whether CGL Policy Exclusions Bar Coverage for Environmental Claims

[1] Application of the "Owned Property" Exclusion

The CGL policy insures the policyholder's liability to third parties for their property damage, but does not cover damage to its own property. As a result, the standard CGL policy often contains an express exclusion that bars coverage for "property damage" to property that is owned, rented or occupied by the insured, or to property in the insured's care, custody or control. Coverage questions arise when an insured is cleaning up its own property, at least in part to prevent migration of contamination and damage to groundwater or adjacent properties.

Where there is groundwater or off-site contamination, the owned-property exclusion generally will not preclude coverage for the insured, even if remediation of the insured's own property is also involved. n57 Most courts reason that groundwater is not property the insured owns, but is owned by a third-party, the public or the state. n58 However, a small number of jurisdictions hold that the insured owns everything beneath the land, including groundwater, rendering the exclusion still applicable. n59

In the majority of jurisdictions where the insured does not own the groundwater beneath its property, some courts will avoid application of the exclusion as long as there is an "imminent" threat of harm to the groundwater (or adjacent property), even if actual damage has not yet occurred. n60 Other courts look merely to whether there is a possible threat of groundwater contamination or off-site contamination. n61 Both of these approaches further the public policy of encouraging preventative remediation. n62 Yet, not every court will overlook the owned-property exclusion based on the mere potential for migration of the contamination into groundwater or adjacent properties. n63 As with many of these issues, a sound coverage analysis will depend on the strength of the authority under the governing law and the facts and evidence in a particular case.

[2] Application of the "Sudden and Accidental" Exclusion and Similar Pollution Exclusions

Another important CGL exclusion to consider is the "sudden and accidental" or "sudden, unintended and unexpected" exclusion that appeared in policies from approximately 1970 through 1985 (*see* § 193.01[A][2]). n64 Policyholder advocates argue from regulatory and insurance marketing sources that this exclusion's

effect is limited, as it was only intended to bar coverage for policyholders that were intentionally polluting. n65 Courts, on the whole, have not adopted such a narrow interpretation.

Although the interpretation of "sudden and accidental" is greatly contested among jurisdictions, only a small number of courts interpret "sudden and accidental" to be ambiguous. n66 Many jurisdictions hold that the pollution exclusion is unambiguous and must be construed according to its plain meaning. n67 However, in a few jurisdictions, courts have decided that "sudden and accidental" is ambiguous, or there has been disagreement between the state and federal courts applying the same state law. n68

Regardless of where a particular court falls on the ambiguity spectrum, the court must also determine what meaning to assign to the words within the context of each insurance policy and the facts at hand. The majority of courts' discussion focuses on interpreting the meaning of "sudden." n69 Only a few jurisdictions focus their analysis on the separate meaning of "accidental." n70

A number of courts interpret "sudden" favorably for insureds to mean simply "unexpected and unintended," without necessarily incorporating a temporal element to the definition. n71 Some courts similarly interpret "sudden and accidental" to mean "without notice." n72 Under these authorities, the sudden and accidental pollution exclusion clause does not necessarily preclude coverage for gradual releases. n73 As reasoned by the Rhode Island Supreme Court in *Textron* :

> A slim but persuasive majority of other jurisdictions holds that the word "sudden" in this type of clause is ambiguous; that is, it is susceptible to more than one reasonable interpretation ... [The insurer's] proposed reading of the word "sudden" as necessarily including a temporal element breaks with the history of the word as courts have construed it in other standard insurance policies ... Considering the word "sudden" as meaning unexpected in pollution-exclusion clauses ... represents sound public policy. Read this way, the clause rewards manufacturers with coverage if they undertake good-faith efforts to dispose of contaminants safely yet suffer an unexpected discharge despite these efforts, thus providing them with an incentive to arrange for the disposal of toxic waste with great care. n74

In contrast to the foregoing, almost an equal number of courts add to the "unexpected and unintended" interpretation, construing "sudden" to add a temporal element or to require an abrupt event. n75 Under this interpretation, courts often reason that "abrupt" must be added to the understanding of "sudden and accidental" to avoid repetitiveness of words and so that the pollution exclusion adds something unique to the policy that is not already contained in the definition of occurrence as an unexpected and unintended event. n76 Some courts look exclusively to whether the release was abrupt in order to determine whether the exception to the exclusion is satisfied. n77

In addition to the dispute over the meaning of "sudden," courts also disagree whether "sudden and accidental" applies to the commencement of a polluting event, or to its duration. Most courts look solely at whether the initial dispersal or discharge was "sudden and accidental," *i.e*, unexpected and unintended, abrupt or without notice, depending on the jurisdiction. n78 Under

this approach, even gradual releases that continue to occur for several years may trigger coverage as long as the initial leak was unexpected and unintended or abrupt. n79 Conversely, other courts apply the "sudden and accidental" language to the duration of the polluting event. n80 These courts typically hold that gradual pollution over a course of years is not sudden under either the "unexpected and unintended" or the "abrupt" definition, n81 especially if the contaminating event occurred in the regular course of business. n82 At least one court has applied the "sudden and accidental" requirement to both the inception and duration of the polluting event. n83

[3] Application of the "Absolute" Pollution Exclusion

After 1985, the standard form CGL policy was again re-written to include a broader pollution exclusion that purports to disallow coverage for pollution claims, regardless of whether they were caused by sudden, unexpected, unintended, accidental, or abrupt events. n83.1 Again, policyholder advocates, and some courts, point to numerous industry resources to argue that the exclusion was not intended to be "absolute." n84 Some courts have avoided the application of the "absolute" pollution exclusion by limiting the exclusion to traditional industrial pollution, narrowly construing the terms contaminant, irritant or pollutant, and ultimately protecting what they find to be the insured's reasonable expectation of coverage.

Frequently, materials are excluded from coverage under the absolute pollution exclusion when they routinely cause accidents that a reasonable person would expect to occur from the given material. n85 Some courts look at whether the material is a pollutant found in "traditional" cases of environmental liability, *e.g.*, leaching landfills, releases at oil refineries, damages imposed by CERCLA or in other industrial contexts. n86 Other courts take a broader view to enforce the exclusion against any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste (*i.e.*, "non-traditional" environmental pollution). n87

In a growing number of jurisdictions, courts are refusing to construe the breadth of pollution exclusions in insurance liability policies beyond "traditional" environmental pollution. Those courts have found that pollution exclusions do not bar coverage for claims arising from exposure to painting and sealing fumes, toxic chemicals, carbon monoxide, and pesticides. For example, in one 2010 case, an insurer's action for declaratory relief against an insured and the heirs of deceased motel customers, as to whether exclusions of the general liability policy barred coverage for claims of the customers who died of carbon monoxide exposure while inside a motel room on property owned by the insured, the insurer claimed that the pollution and indoor air exclusions unambiguously precluded coverage, but the court found that the total pollution exclusion was ambiguous and did not bar coverage because it was subject to more than one reasonable interpretation. The court also found that the indoor air exclusion was ambiguous and did not preclude coverage. The insurer was not entitled to summary judgment as to the insured's breach of contract counterclaim because the insurer could not argue that it had no duty to defend or indemnify in light of the conclusion that neither exclusion precluded coverage. There were also genuine issues of material fact as to whether the insurer had a reasonable basis to deny the claim so as to preclude summary judgment on the insured's bad faith claim. n87.1

However, on appeal, the Ninth Circuit found that Nevada had not expressly

decided the scope of the pollution exclusion, and the relevant Nevada case law did not indicate whether Nevada would find the exclusion clear and unambiguous when applied to carbon monoxide poisoning (as some jurisdictions had), or if it would limit the exclusion to situations involving traditional environmental pollution (as some other jurisdictions had). Given the magnitude of the hotel industry in Nevada, the question of the ambiguity of the standard insurance exclusion was one of exceptional importance to Nevada insurers and insureds. There did not appear to be any published cases construing the scope of the indoor air quality exclusion. Nevada had not expressly decided the scope of the indoor air quality exclusion, and the relevant Nevada case law did not indicate how the state would deal with the issue. That question was important to Nevada insurers and insureds. Thus, two questions were certified to the Nevada Supreme Court: (1) whether the pollution exclusion excluded coverage of claims arising from carbon monoxide exposure, and (2) whether the indoor air quality exclusion excluded coverage of claims arising from carbon monoxide exposure. n87.2

In another 2010 case, the plaintiffs in the underlying lawsuit alleged that they were injured by exposure to paint fumes, vapor, dust, and/or other residue from the insureds' painting operations. In considering the question of first impression in South Carolina, the court noted that a nationwide split of opinion existed regarding: (1) whether "absolute pollution exclusions" barred coverage for incidents outside of traditional environmental pollution, and (2) whether absolute pollution exclusions were unambiguous. The court cited *Belt Painting Corp. v. TIG Insurance Co.*, 100 N.Y.2d 377, 763 N.Y.S.2d 790, 795 N.E.2d 15 (2003) , which involved an individual alleging injury as a result of inhaling paint fumes. The insurance policy at issue there contained an absolute pollution exclusion almost identical to the insurer's exclusion before the court. The *Belt* court held that reasonable minds could disagree as to whether the exclusion applied. Adopting the analysis of New York's highest court and granting summary judgment to the plaintiffs in the underlying lawsuit, the court noted that if the "absolute pollution exclusion" was subject to more than one reasonable interpretation, the exclusion created an ambiguity, and South Carolina law required that such ambiguities be construed liberally in favor of the insured and strictly against the insurer. n87.3

In a 2012 case applying Georgia law, arising out of the death of the plaintiff's husband due to carbon monoxide poisoning, the plaintiff's personal injury claim was barred from coverage by the total pollution exclusion of the defendant-boat mechanic's CGL policy. n87.4 The appellate court noted that the Georgia Supreme Court, in *Reed v. Auto-Owners Insurance Co.*, had found that a similar pollution exclusion denied coverage in a scenario involving carbon monoxide poisoning. n87.5 In *Reed*, the court rejected the argument that such an exclusion was traditionally aimed at conventional environmental pollution and noted that no language in the policy supported restricting application of the exclusion to traditional environmental pollution. Two justices dissented in *Reed*, stating that the majority's decision made "for neither good law nor good public policy." n87.6 Since *Reed* controlled in the instant case, the exclusion applied.

In a 2011 case not involving any ambiguity, the plaintiffs in the underlying suits alleged that tap water delivered by the village for more than 20 years had been contaminated by chemicals used by a nearby dry cleaner and that this contamination caused, and would continue to cause, death, cancer, and other serious illnesses. The federal district court, applying the analysis of *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 227 Ill. Dec. 149, 687 N.E.2d 72, 79 (1997) , which held that the pollution exclusion applies only to

traditional environmental pollution analysis, determined that the contaminated water was not an isolated, run-of-the-mill result from day-to-day operations and properly covered by the policy, but, instead, arose from "traditional environmental pollution" and thus the claims were barred by the pollution exclusion. n87.7

Courts will rely on the specific language of the policy to determine what is, or is not, a pollutant, n88 and will sometimes turn to the dictionary definition of the words in the insurance contract. n89 Also, some courts will refer to the Clean Air Act to determine what constitutes a pollutant. n90 Finally, courts will consider the source of the pollutant, *i.e.* a "traditional" industrial site or a "non-traditional" source, such as a home. n91

Some materials have been found to be excluded pollutants in every state n92 while other materials have been found to fall outside the scope of the pollution exclusion in each state to address the issue. n93 Of course, some materials are determined to be excluded pollutants in certain states but not in others, and courts sometimes reach different outcomes within one jurisdiction. As one judge writes, "[o]ur review and analysis of the entire body of existing precedent reveals that there exists not just a split of authority, but an absolute fragmentation of authority." n94 For example, courts are split on whether excluded pollutants include asbestos, n95 E. coli, n96 carbon monoxide, n97 carpet glue, n98 floor sealant fumes, n99 gasoline, n100 lead paint, n101 mold, n102 radioactive material, n103 sewage n104 or smoke. n105

In a 2009 case, the insured, who owned a commercial and residential building, sought reimbursement of its cleanup and renovation expenses under its property insurance policy when mercury spilled from an enclosed space into a residential apartment, but the insurer denied coverage, citing certain exclusions under the policy. The policy at issue was an "all-risk" policy, under which losses caused by any fortuitous peril not specifically excluded under the policy would be covered. The insurer denied coverage based on the policy's pollution exclusion clause. The court ruled that the insurer was not entitled to a summary declaration that the pollution exclusion clause negated coverage for damage caused by the offending mercury's pollution within the building's confined indoor spaces. Under Second Circuit case law, it was appropriate to construe a pollution exclusion clause in light of its general purpose, which was to exclude coverage for environmental pollution. Here, the court concluded that the clause in question was ambiguous as applied to the facts of the case. The court held that a reasonable policyholder might not characterize the escape of mercury from an enclosed space between residential apartments as environmental pollution. There were sufficient ambiguities in the policy concerning coverage of the mercury-caused damage to preclude a summary disposition in favor of plaintiff as well. n105.1

Similarly, in *PBM Nutritionals, LLC v. Lexington Insurance Co.*, the pollution exclusions, according to their plain language, were not restricted to traditional environmental pollution. In that case, the insured manufactured infant formula. During a brief period of time, filter elements infiltrated into the formula, resulting in a multi-million dollar loss to the insured. The insured sought coverage for the loss, which was rejected by the insurers under the pollution exclusion endorsements because the infant formula was allegedly "contaminated." The high court affirmed. None of the pollution exclusion endorsements referenced any terms such as "environment," "environmental," "industrial," or any other limiting language suggesting that the exclusions were

limited to "traditional" rather than "indoor" pollution. Furthermore, there was no language in any of the relevant endorsements suggesting that the discharges or dispersals of pollutants or contaminants must be into the environment or atmosphere. n105.2

In a 2012 case, the issue was whether the insured had satisfied the requirements of the pollution buy back provisions of the marine services CGL policies so that the insurer had a duty to defend and indemnify the insured. In order for the pollution exclusion to be inappplicable, the insured had to establish that: (1) the "occurrence" was neither expected nor intended by the insured; (2) the "occurrence" could be identified as commencing at a specific time and date during the term of the policy; (3) the "occurrence" became known to the insured within 72 hours after its commencement; (4) the "occurrence" was reported in writing to the insurer within 30 days after having become known to the insured; and (5) the "occurrence" did not result from the insured's intentional and willful violation of any government statute, rule, or regulation. Here, because the undisputed evidence showed that the insured learned of the exposure more than 72 hours after the occurrence and that it failed to report the incident to the insurer within the next 30 days, the insurer had no duty to defend or indemnify the insured. The court looked beyond the complaint in the underlying action, alleging bodily injury from exposure to carbon monoxide fumes, in order to determine the insurer's duty to defend, under the exception for cases in which the pleading would not be expected to disclose the facts necessary to determine the duty to defend. n105.3

[F] Application of "Late Notice" or "Known Loss" Coverage Defenses

In addition to express coverage exclusions under the CGL policy, insurers often try to rely on common-law defenses to environmental coverage based on "late notice" or "known loss."

[1] Most Courts Reject a "Late Notice" Defense Unless the Insurer Can Show Actual Prejudice

Unlike claims-made policies, historic CGL policies are occurrence-based, and reporting a claim during the policy period is not a condition precedent to coverage. Nonetheless, the typical CGL policy imposes certain reporting requirements on the insured, and the issue of "late notice" is often thrown into the mix of disputed coverage issues. Whether in the context of environmental claims or otherwise, the vast majority of jurisdictions prohibit the insurer from denying a claim based on late notice under an occurrence-based CGL policy unless there is a showing of actual prejudice. n106 New York and a handful of other jurisdictions remain notable exceptions to the general rule. n107

[2] The "Known Loss" Doctrine Bars Coverage for Liability That Is Certain, or Sometimes "A Probable Certainty," at the Time the Policy Issues

Insurance provides a transfer of liability for known risks, not known losses. Thus, the "known loss" doctrine bars coverage when the reality of a loss occurring is a certainty--or in some jurisdictions a "probable certainty"--at the time coverage is placed. n108 The greater the "extent of unknown liabilities," the less likely the "known loss" doctrine will preclude coverage. n109 At least some courts have held that mere receipt of an EPA demand letter before the policy incepts will not bar coverage for the ultimate liability arising out of the notified site. n110

[G] Defining the Scope of Triggered Coverage for Long-Tail Environmental Liabilities

Courts use the term "trigger" as a label for what event or events must occur for an insurer to be obligated to respond to an insured's liability under a particular insurance policy. n111 In general, an insurance policy is treated as a contract and interpreted according to principles of contract law, n112 but courts impose external "trigger" theories to decide which policies cover a liability that involves ongoing injury or damage. n113

Broad categorization of trigger theories is problematic because the theories are not mutually exclusive, the specific language of a policy at issue is paramount, and because the kind of trigger applied may vary depending on what kind of claim the court is attempting to resolve. n114 Despite this inherent imprecision, the following sections illustrate the contours of the four trigger theories that are most commonly applied by the courts: (1) Exposure; (2) Continuous; (3) Injury-in-Fact; and (4) Manifestation. Final mention is also given to Rhode Island's "triple trigger" approach to environmental long-tail liabilities.

[1] Exposure Trigger

Under the exposure theory, coverage is triggered if mere exposure to a harmful condition occurs during a policy period, n115 regardless of when the actual injury matures or is discovered. The leading case is *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, n116 which cited uncontroverted medical evidence that injury to body tissue from asbestos fibers begins shortly after the fibers are inhaled into the body. n117 In such circumstances, the court held that the exposure trigger fit within the literal meaning of the terms of the policy, provided maximum coverage for the insured, and best implemented the parties' intentions. n118

Courts have viewed exposure as a suitable trigger when it is impossible to determine at which point an injury actually occurs. n119 The exposure trigger has been applied in personal-injury cases, n120 cases involving remediation of environmental contamination, n121 and cases involving property damage. n122 The exposure theory has been applied to cases of bodily injury resulting from inhalation of asbestos even when the same court has used a different trigger to address claims of property damage. n123

Of note, there may be little practical difference between the exposure trigger and the injury-in-fact trigger in environmental contamination cases if the release of a contaminant and actual injury occur simultaneously. n124

[2] Continuous Trigger

Under a theory of continuous trigger, all policies in effect from the time of exposure to the time of an injury's manifestation are triggered, regardless of whether the actual time of injury can be pinpointed. n125 The theory has been applied in cases that involve a gradual process of deterioration that continues beyond the period of initial exposure. n126 The leading case is *Keene Corp. v. Ins. Co. of N.A.*, n127 in which the United States Court of Appeals for the District of Columbia Circuit held "bodily injury" from asbestos inhalation to include "any part of the single injurious process that asbestos-related diseases entail." n128 The continuous trigger may overlap with or complement the injury-in-fact trigger. n129

[3] Injury-in-Fact Trigger

Under the injury-in-fact theory, an injury occurs when it can be proved to have actually occurred, whether at initial exposure, at manifestation of an injury, or at any point in between. n130 It has been applied to a wide range of cases involving property damage, bodily injury and environmental contamination. n131

Injury-in-fact may overlap with the manifestation and exposure triggers and diverges from them "only when injury in fact is not simultaneous with manifestation or exposure." n132 Injury-in-fact is a suitable trigger for any type of injury, but when the injury occurs continuously over a period covered by different policies and actual apportionment cannot be determined, the continuous trigger may be substituted. n133 An insured may suffer multiple injuries in fact. n134 However, in one case an injury-in-fact to property was deemed to occur at the time of asbestos installation but to not continue beyond the point of installation. n135

[4] Manifestation Trigger

The manifestation trigger reflects a minority viewpoint holding that a policy is not triggered until damage to either person or property becomes evident. It has been applied in cases involving bodily injury, n136 environmental contamination, n137 and damage to property caused by allegedly defective equipment, materials or construction. n138 A leading case, *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, n139 rejected the exposure trigger in the context of asbestos inhalation, noting the "fiction" that a bodily injury occurs at the moment asbestos is inhaled. n140

Courts that reject the manifestation trigger often do so after holding that there is no requirement of manifestation based on the plain language of the policy. n141 In some cases the difference between a manifestation theory and an exposure theory may amount only to a difference of opinion about when the actual injury takes place. n142 Manifestation does not necessarily require actual discovery. n143

[5] Triple Trigger

Under Rhode Island law, in particular, environmental property damage coverage may be triggered under at least three different scenarios: when property damage either: (1) manifests itself; (2) is discovered; or (3) in the exercise of reasonable diligence, is discoverable. n144 Under this approach, an insured must demonstrate:

> (1) That it must have been able to discover the contamination in the exercise of reasonable diligence.
>
> (2) That the insured had "some reason" to test for the contamination during the policy period. n145

Thus, once the contamination is discoverable and the insured has some reason to test, then the policy in place at that time and subsequent policies are triggered to cover progressive property damage. The insured can meet this requirement through expert testimony to establish that the contamination probably was present during the policy period, and that there were circumstances during the policy period that would have given the claimant a reason to

investigate and discover the contamination. There is no specific requirement of EPA notification or any restriction imposed limiting the application of the costs to the "discovery year." Rather, the test was satisfied in these cases merely by evidence of work practices and accidental releases during the policy periods that would have contributed to contamination and at least given the company a reason to investigate. Thus, qualifying trigger circumstances are not limited to any one type of event or occurrence, but may include a whole variety of circumstances. n146

[H] Allocation and Related Issues of Exhaustion, Stacking and Settlement Credits

When more than one year of coverage is triggered under one or more of the above trigger theories, a court must decide how to allocate coverage liability among the triggered policies. "Recent CGL coverage litigation has tended to focus less on coverage per se than on the mechanisms for allocating responsibility for damages once coverage is determined." n147 As a result of this litigation and continued debate, courts have developed three primary allocation methods: (1) the "all sums" / vertical / joint and several approach; (2) the "pro rata" / horizontal approach; and (3) the hybrid "modified all sums" / "modified pro rata" approach.

It is difficult to discern which allocation methodology constitutes the majority approach. While "a growing plurality have adopted some form of pro rata allocation, [...] a significant number of courts impose joint and several allocation" n148 and numerous jurisdictions have yet to squarely rule on the issue. n149 Yet, when looking at the issue from the perspective of state supreme court decisions, the majority of state supreme courts have adopted either the pure "all sums" or modified "all sums" approaches. n150 Further, even when courts adopt a "pro rata" allocation approach, at least some of those courts will still use the modified all sums approach with respect to the insurer's payment of defense costs (as opposed to indemnity payments for judgments or settlements). n151

Related to allocation are issues of "exhaustion," "stacking" and "settlement credits," as well as the potential interplay between triggered occurrence-based policies and claims-made policies. n152 These issues are discussed below in the context of the various allocation methodologies.

[1] The "All-Sums" Approach to Allocation

Numerous decisions support the use of the "all sums" or "vertical" approach to allocation, n153 following the lead case of *Keene Corp. v. Ins. Co. of N. Am.* n154 Courts using this allocation method will often point to the "all sums" language in the insuring agreement of the standard CGL policy, and otherwise note that the policy does not expressly provide for a reduction of policy limits based on any other allocation method. n155

Under the "all sums" approach, each policy is liable for the entire environmental liability, subject to each policy's limit of liability. When the all sums approach is employed, the burden shifts to the paying insurer(s) to seek contribution from their co-insurers under other triggered insurance policies. n156

Courts disagree whether the insured can collect "all sums" under more than one

year's set of policies, a method referred to as "stacking." n157 If stacking is allowed, "the insured can turn to any triggered primary policy in a specific year and vertically exhaust the excess policies in that year, then choose another year and vertically exhaust coverage in that year, and then continue that process until the loss is covered." n158 In contrast, under joint and several liability without stacking, the insured collects only one year of coverage, which means "the insured may collect less than it would have under pro rata allocation." n159

Insureds usually prefer the all sums approach (and, in particular, all sums with stacking) because (1) the insured can pick and choose which coverage it wants to pursue; n160 (2) the insured is typically only responsible for one deductible or self insured retention n161 and (3) the paying insurers cannot seek contribution from the insured "for 'uninsured' or 'self insured' periods." n162

Of course, by the time allocation becomes an issue for a court to decide, some insurers likely have settled the litigated claims, or perhaps even negotiated a full policy buy-back. Courts are then left with the question of how to credit a non-settling insurer faced with "all sums" liability after other insurers have settled. When faced with this scenario, courts have given credit to the non-settling insurer (1) for the settled policy limits of the other insurers, without regard to the actual settlement amount n163 (2) based on the actual amount of the other settlements, without regard to their policy limits; n164 or (3) based on pro-rata limits of the settled policies, without regard to the settlement amount or the actual policy limits. n165 Insurers tend to favor credits based on policy limits or pro rata liability, regardless of the settlement amount, arguing "it is fundamentally unfair to place a burden on a party to value a transaction that it had no involvement with, no control over, and no connection with whatsoever." n166

[2] The "Pro Rata" Approach to Allocation

In contrast to the "all sums" approach, a "pro rata" allocation tends to favor insurers because the environmental liability is spread out across the entire triggered period and each policy is only responsible for its pro rata share, while the insured remains responsible for pro rata shares during periods of self-insurance or no insurance.

Different courts employ different methods to determine the pro rata share of liability for each policy. n167 Some courts simply allocate damages based on the relative time each policy was in effect throughout the triggered coverage period, without regard to the limits of each policy. n168 Under this "time on the risk" approach, each insurer is liable based on the proportional number of years the insurer provided coverage, compared to the total number of years in which all policies are triggered.

Illustratively, in a 2011 South Carolina case, in which negligent construction of condominium units resulted in water penetration and progressive damage to the units, the developer, after settling with the homeowners, sued its insurer, seeking a judgment declaring that the CGL policies provided coverage for the progressive property damages sustained by the homeowners. The trial court held that the progressive damage was caused by an "occurrence" and was thus covered by the policies. The high court agreed. As the term "occurrence" as used in the CGL policies was ambiguous, it had to be construed in favor of the developer. However, the trial court erred in allocating all the damages to the insurer. The

high court adopted the "time on risk" framework for determining an insurer's responsibilities under a CGL policy, and therefore overruled *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 355 (2002) , which had mandated a "joint and several" approach. In a progressive property damage case such as the instant action, each triggered insurer was obligated to indemnify the insured only for the portion of the loss attributable to property damage that occurred during its policy period. Therefore, the scope of appellant's liability was limited to the damages accrued during its "time on the risk." n168.1

Other courts vary the "time on the risk" analysis by multiplying the number of years of coverage by the limits of that insurer's policies, and then assigning liability corresponding to the ratio of the total coverage provided by that insurer to the total coverage provided by all the triggered policies. n169 This approach, advocated by the New Jersey Supreme Court in *Owens-Illinois, Inc. v. United Ins. Co.*, takes into consideration "both time on the risk and the degree of risk assumed." n170

The Massachusetts Supreme Court, in *Boston Gas Co. v. Century Indemnity Co.*, likewise applied the pro rata allocation of losses as the most reasonable construction of the policies at issue and adopted the time-on-the-risk method of prorating liability in the absence of evidence more closely approximating the actual distribution of property damage. In that case, the policies provided coverage for that portion of the insured's liability attributable to the environmental contamination that occurred during a given policy period. The phrase "during the policy period" in the definitions of occurrence limited the ultimate net loss coverage. The all sums language could not be emphasized over another part of the policies. The other insurance clauses did not mean that the policies covered losses occurring long before or after the policy period. There were no noncumulation clauses. The policies did not promise to pay 100 percent of the insured's liability for multi-year pollution damage occurring decades before or after the policy period. There was no ambiguity. The time-on-the-risk method of allocating losses was to be used as a more accurate allocation of losses during each policy period could not be made. An unavailability exception was not adopted. The insured had to satisfy only a prorated amount of its per occurrence self-insured retention for each triggered policy period, to be prorated on the same basis as the insurer's liability. n170.1

Yet another line of authority supports an "equal share" allocation among the triggered insurers without respect to their specific time on the risk or the degree of the risk they assumed. A court may follow the "other insurance" provisions of the policies and mandate contribution by equal shares. n171

The California Supreme Court has refused to dictate how pro rata allocations should be calculated, indicating instead that the method should simply be equitable. n172 As such, California courts have adopted various ways of apportioning the burden among multiple insurers, including but not limited to: time on the risk, apportionment based on the limits of each primary policy; combined policy limit time on the risk; apportionment based on premiums paid; apportionment by equal shares up to the policy limits of the policy with the lowest limit, then among each carrier of the next-to-lowest limit and so on until the entire loss has been apportioned (maximum loss); and pure equal share apportionment. n173

Regardless of the method employed, for several reasons the pro rata method of

allocation tends to be less favorable to insureds. For example, the insured may have increased transactional costs if it has to negotiate and/or litigate coverage against multiple carriers to recover each insurer's pro rata share of the loss. Also, if horizontal exhaustion is employed, the insured may have the burden of satisfying the self-insured retention throughout the entire period of triggered coverage, which could make it unlikely that excess policies will ever be reached. n174 Third, the insured will find it is left with the burden of absorbing pro rata shares when insurance was commercially available, but the insured was either self-insured or inadequately insured. n175 As explained by one court, an insured that chooses to self-insure through a given time period must absorb the allocated loss, "otherwise it would be receiving coverage for a period for which it paid no premium." n176

At least some courts will try to maintain the value of excess coverage even under a horizontal allocation by coupling horizontal allocation with "vertical exhaustion." As noted by the New Jersey Supreme Court in *Carter--Wallace, Inc. v. Admiral Ins. Co.*, n177 costs should be vertically allocated for each policy in effect for a given year, beginning first with the primary policy and then going through each layer of additional insurance policies until all are exhausted. n178 The court specifically rejected the horizontal exhaustion approach, stating it would require excess policy provisions to somehow apply to "future policies that had not yet been written or signed at the time [the] second-layer excess policy was issued." n179 The court stated vertical exhaustion "makes efficient use of available resources because it neither minimizes nor maximizes the liability of either primary or excess insurance, thereby promoting cost efficiency by spreading costs." n180 The court also advocated vertical exhaustion because it respects "the distinction between primary and excess insurance while not permitting excess insurers unfairly to avoid coverage in long-term, continuous-trigger cases. n181

[3] The "Modified All Sums" Approach to Allocation

Finally, at least some courts have adopted a hybrid approach to allocation, that allows for a horizontal allocation among insurers based on their time on the risk, but without requiring the insured to absorb pro rata shares during uninsured periods. Thus, the total allocation period looks only at insured periods, as opposed to the otherwise entire triggered period of injury or damage. n182

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGeneral Liability InsuranceCoverageEnvironmental Claims

FOOTNOTES:
(n1)Footnote 1. 42 U.S.C. § 6901 *et seq*.

(n2)Footnote 2. 40 C.F.R. § 260 *et seq* .

(n3)Footnote 3. 42 U.S.C. § 9601 *et seq*.

(n4)Footnote 4. Eugene R. Anderson & John G. Nevius, *Insurance Issues in* Brownfields Law & Practice § 28.01[4][a] (Michael B. Gerrard ed.).

(n5)Footnote 5. Eugene R. Anderson & John G. Nevius, *Insurance Issues in*

Brownfields Law & Practice § 28.01[4][c] (Michael B. Gerrard ed.). "There is no question that there was insurance coverage under insurance policies sold from 1940 to 1970 for pollution liability." *Id.* (citing Morton Int'l, Inc. v. Gen. Accident Ins. Co., 629 A.2d 831 (N.J. 1993) .

(n6)Footnote 6. Eugene R. Anderson & John G. Nevius, *Insurance Issues in* Brownfields Law & Practice § 28.01[4][c] (Michael B. Gerrard ed.).

(n7)Footnote 7. Personal injury coverage (for invasion of the rights of private occupancy of others) was initially added by endorsement in 1976 and then added to the standard-form CGL policy in more recent years. Peter J. Kalis, et al., Policyholder's Guide to the Law of Insurance Coverage § 8.01 (1997).

(n8)Footnote 8. *See, e.g.*, Miller & LeFebvre, 1 Miller's Standard Insurance Policy Annotated 411 (1988); Alfred E. Reichenberger, The General Liability Insurance Policies--Analysis of 1973 Revisions, 8 (reprinted in Defense Research Institute 1974).

(n9)Footnote 9. Eugene R. Anderson & John G. Nevius, *Insurance Issues in* Brownfields Law & Practice § 28.01[4][c] (Michael B. Gerrard., ed.).

(n10)Footnote 10. Alfred E. Reichenberger, The General Liability Insurance Policies--Analysis of 1973 Revisions, 5 (Defense Research Institute 1974).

(n11)Footnote 11. *See, e.g.*, Eugene R. Anderson & John G. Nevius, *Insurance Issues in* Brownfields Law & Practice § 28.01[4][c] (Michael B. Gerrard., ed.).

(n12)Footnote 12. "[T]his exclusion is not truly absolute." Susan Neuman & Robert D. Chesler, *Environmental Insurance Coverage*, *in* Environmental Law & Practice Guide § 8.01[1][B] (Michael B. Gerrard, ed.) (noting coverage remained for pollution arising out of the insured's products or completed operations, or in connection with certain off-premise work, as evidenced by the fact that in 1993, the ISO developed a more restrictive "total pollution exclusion"). *See also* Eugene R. Anderson & John G. Nevius, *Insurance Issues in* Brownfields Law & Practice § 28.01[4][d], n.72 (in 1985, the ISO noted the new form was intended to re-affirm coverage intended under the pre-1985 contract).

(n13)Footnote 13. *See, e.g.*, Eugene R. Anderson & John G. Nevius, *Insurance Issues in* Brownfields Law & Practice § 28.01 (Michael B. Gerrard., ed.).

(n14)Footnote 14. Policyholders may also look to old first-party policies for environmental coverage. *See, e.g.*, Eugene R. Anderson & John G. Nevius, *Insurance Issues in* Brownfields Law & Practice § 28.01[7] (Michael B. Gerrard ed.) (examining coverage issues under first-party property policies, such as timing of the loss, whether there was damage to covered "real property," whether the loss was direct, whether removal of pollutants is "debris removal" and whether contamination, ordinance and law or land exclusions bar coverage). *See also* Todd S. Davis, *Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property* 177-178 (American Bar Association 2d ed. 2002) (examining potential coverage under automobile, garage liability and first-party property policies).

(n15)Footnote 15. **Minnesota--** Gopher Oil Co. v. Am. Hardware Mut. Ins. Co., 588 N.W.2d 756 (Minn. Ct. App. 1999) (refusing to enforce anti-assignment clause against successor corporation).

Ohio-- Pilkington North Am., Inc. v. Travelers Cas. & Sur. Co., 112 Ohio St. 3d 482, 861 N.E.2d 121 (2006) (predecessor corporation may transfer its right to indemnification for tortuous activity to successor corporation by contract, despite anti-assignment clause, when covered loss had already occurred);

Contrast:

Cal.-- Henkel Corp. v. Hartford Accident & Indem. Co., 29 Cal. 4th 934, 62 P.3d 69 (2003) (no assignment of insurance rights to company assuming liabilities without insurer consent);

Haw.-- Del Monte Fresh Produce (Hawaii) Inc. v. Fireman's Fund Ins. Co., 117 Haw. 357, 183 P.3d 734 (2007) (transfer of all assets and liabilities did not automatically assign insurance rights, and insurers did not consent to assignment).

See also Eugene R. Anderson & John G. Nevius, *Insurance Issues in* Brownfields Law & Practice § 28.01[2][d] (Michael B. Gerrard ed.) (advocating transfer of insurance rights to successor entity either by operation or law, or by non-enforcement of insurance policy's anti-assignment clause where pre-transaction liabilities are concerned).

(n16)Footnote 16. Insurance archaeology is oftentimes provided by coverage counsel or brokers. *See, e.g.*, Leslie Scism, *These Archaeologists Help Clients Solve Indemnity Crises*, Wall St. J., Dec. 26, 1997 at A1.

(n17)Footnote 17. *See, e.g.*, Briggs v. Stratton Corp v. Royal Globe Ins. Co., 64 F. Supp. 2d 1340 (M.D. Ga. 1999) (applying *lex loci contractus* analysis to matters involving insurance contracts).

(n18)Footnote 18. *See, e.g.*, Reichhold Chemicals, Inc. v. Hartford Accident & Indem. Co., 252 Conn. 774, 750 A.2d 1051 (2000) (applying law of the site).

(n19)Footnote 19. *See, e.g.*, Pfizer Inc. v. Employers Ins. of Wausau, 154 N.J. 187, 712 A.2d 634 (1998) .

(n20)Footnote 19.1. **US/MD**-- Travelers Indem. Co. v. MTS Transp., LLC, 2012 U.S. Dist. LEXIS 127847 (W.D. Pa. Sept. 7, 2012) .

(n21)Footnote 20. Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1555 (9th Cir. 1991) (standard formulation, which may vary slightly, defines occurrence 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").

(n22)Footnote 21. *See, e.g.*:

Ala.-- Alabama Plating Co. v. United States Fid. & Guar. Co., 690 So. 2d 331 (Ala. 1996) (applying subjective test);

Ky.-- James Graham Brown Found. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273 (Ky. 1991) (occurrence definition satisfied unless insured "specifically and subjectively" intended the injury).

Mich.-- City of Albion v. Guaranty Nat'l Ins. Co., 73 F. Supp. 2d 846 (W.D. Mich. 1999) (applying Michigan law) (analyzing subject expectation and intent of policyholder with respect to occurrence definition, but imposing objective standard when construing "sudden and accidental" language of pollution exclusion);

Wash.-- Queen City Farms, Inc. v. Central Nat'l Ins. Co., 126 Wash. 2d 50, 882 P.2d 703 (1994) (coverage excluded only if policyholder subjectively expected or intended groundwater contamination).

(n23)Footnote 22. *See, e.g.*, Cessna Aircraft Co. v. Hartford Accident & Indem. Co., 900 F. Supp. 1489 (D. Kan. 1995) (adopting a "natural and probable consequences test" to infer intent for a resulting injury); United States v. Conservation Chem. Co., 653 F. Supp. 152 (W.D. Mo. 1996) (objective standard is appropriate).

(n24)Footnote 23. *See, e.g.*:

Mich.-- Aetna Cas. & Sur. Co. v. Dow Chem. Co., 28 F. Supp. 2d 421, 426 (E.D. Mich. 1998) (applying Michigan law) (rejecting argument that "expected or intended" clause should be treated like an exclusionary clause so that insurer would bear initial burden of proof);

N.J.-- Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co., 89 F.3d 976 (3d Cir. 1995) (under New Jersey law, policyholder has burden of providing damage was neither expected nor intended). *But see* Carter-Wallace, Inc. v. Admiral Ins. Co., 154 N.J. 312, 712 A.2d 1116 (1998) (burden of proof is on denying insurer to show, by preponderance of evidence, that insured "expected or intended" environmental damage).

(n25)Footnote 24. *See, e.g.*, State Mut. Life Assurance Co. of Am. v. Lumberman's Mut. Cas. Co., 874 F. Supp. 451, 456 (D. Mass. 1995) (the focus in determining whether there was occurrence is on the "foreseeability of the damages caused by the discharge, not on the foreseeability of the discharge itself").

(n26)Footnote 24.1. **IL**-- Erie Ins. Exch. v. Imperial Marble Corp., 2011 IL App (3d) 100380, 354 Ill. Dec. 421, 957 N.E.2d 1214 (2011) , *appeal denied*, 357 Ill. Dec. 292, 963 N.E.2d 245 (Ill. 2012) .

(n27)Footnote 25. *See, e.g.*:

U.S-- Babcock & Wilcox Co. v. Arkwright-Boston Mfg. Mut. Ins. Co., 53 F.3d 762 (6th Cir. 1995) (continued injury during policy period does not suffice when occurrence definition requires "event during contract").

N.J.-- Public Serv. Elec. and Gas Co. v. Certain Underwriters, No. 88-4811(JCL), 1994 U.S. Dist. LEXIS 21072, at *16 (D.N.J. Sept. 30, 1994) (applying New Jersey law) (to extent "occurrence" definition required "event during contract," no coverage triggered where operations ceased before policy's inception; to extent "occurrence" defined more broadly, coverage is triggered as long as leaching or migration of contamination occurs during policy period);

N.Y.-- Long Island Lighting Company v. Allianz, 301 A.D.2d 23, 749 N.Y.S.2d 488, 490, 495, 2002 N.Y. App. Div. LEXIS 10136 (2002) (no coverage for

operations that ceased before policy period, where "occurrence" requires "event during contract").

(n28)Footnote 26. *See, e.g.*, Pittsburgh Corning Corp. v. Travelers Indem. Co., No. 84-3985, 1988 U.S. Dist. LEXIS 10724 (E.D. Pa. Sept. 12, 1988) ("event during contract" ambiguous, such that coverage was triggered "if any part of the injurious process--from time of exposure to time of manifestation--occurred within a policy period"); Washington Natural Gas Co. v. Aetna Cas. & Surety, Vol. 7, Mealey's Lit. Report: Iss. 44, (examining "event during contract" language and finding coverage triggered because continued injury process during policy period).

(n29)Footnote 27. Paul V. Majkowski, *Triggering The Liability Insurer's Duty to Defend in Environmental Proceedings: Does Potentially Responsible Party Notification Constitute a "Suit"?*, 67 St. John's L. Rev. 383, 384 (1993).

See also:

Haw.-- Pac. Employers Ins. Co. v. Servco Pac., Inc., 273 F. Supp. 2d 1149, 1156 (D. Haw. 2003) ("predicting" Hawaii law);

Ida.-- Aetna Cas. & Sur. Co. v. Pintlar Corp., 948 F.2d 1507, 1516 (9th Cir. Idaho 1991) (applying Idaho law);

Minn.-- SCSC Corp. v. Allied Mut. Ins. Co., 536 N.W.2d 305, 315 (Minn. 1995) .

(n30)Footnote 28. *See, e.g.*, *Aetna Cas. & Sur. Co.*, 948 F.2d at 1517 ("ordinary person" would believe PRP notice is the effective commencement of a "suit" necessitating legal defense).

Accord:

AL-- Travelers Cas. & Sur. Co. v. Ala. Gas Corp., 2012 Ala. LEXIS 174 (Ala. Dec. 28, 2012) (given severe penalties for failure to cooperate and other enforcement tools available to Environmental Protection Agency, its decision to designate an insured as a "potentially responsible party" was the initiation of a "legal action" constituting a "suit" within the contemplation of a CGL insurance contract).

Colo.-- Compass Ins. Co. v. City of Littleton, 984 P.2d 606, 622 (Colo. 1999) (typical layperson might reasonably expect the term "suit" to apply to legal proceedings other than a court action);

Ind.-- Travelers Indem. Co. v. Summit Corp. of Am., 715 N.E.2d 926 (Ind. Ct. App. 1999) (ordinary person expects defense against any proceeding or process that could result in the insured being legally obligated to pay);

Mass.-- Hazen Paper Co. v. United States Fid. & Guar. Co., 407 Mass. 689, 555 N.E.2d 576 (1990) (EPA letter was "substantially equivalent to the commencement of a lawsuit");

N.C.-- C. D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'g Co., 326 N.C. 133, 388 S.E.2d 557, 570 (1990) ("reasonable person in the position of the insured" would not understand "suit" to be limited to a court proceeding).

(n31)Footnote 29. **Conn.--** R.T. Vanderbilt Co. v. Cont'l Cas. Co., 273 Conn. 448, 870 A.2d 1048, 1059 (2004) (referring to dictionary to interpret the term suit to include PRP letters);

Iowa-- A.Y. McDonald Indus. v. Ins. Co. of N. Am., 475 N.W.2d 607, 627-28 (Iowa 1991) (noting the dictionary's alternative, broader definition of suit);

N.H.-- Coakley v. Maine Bonding & Cas. Co., 136 N.H. 402, 618 A.2d 777, 787 (1992) (PRP notifications are suits because they seek to gain an end by legal process).

N.C.-- *C. D. Spangler Constr. Co.*, 388 S.E.2d at 570 (Webster's Third New World International Dictionary 2286 (1976) also defines "suit" as "the attempt to gain an end by legal process").

See also :

Mich.-- Mich. Millers Mut. Ins. Co. v. Bronson Plating Co., 445 Mich. 558, 519 N.W.2d 864, 866 (1994) , *overruled on other grounds by* Wilkie v. Auto-Owners Ins. Co., 469 Mich. 41, 664 N.W.2d 776 (2003) (PRP letters are "suits" because the term is ambiguous);

Ore.-- St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co., 126 Or. App. 689, 701 *modified*, 28 Or. App. 234, 875 P.2d 537 (1994) *aff'd in part, rev'd on other grounds*, 324 Or. 184, 923 P.2d 1200 (1996) ("suit" is sufficiently broad to cover administrative proceedings such as PRP letters).

(n32)Footnote 30. *See, e.g.*, Monarch Greenback, LLC. v. Monticello Ins. Co., 118 F. Supp. 2d 1068, 1074 (D. Idaho 1999) ("Not only have administrative proceedings been found to be suits where suit is undefined in the policy, but an administrative proceeding fits squarely into the Court's construction of a 'civil proceeding,' thus satisfying the first prong of a 'suit' according to the policy.").

(n33)Footnote 31. **U.S.--** Quaker State Minit-Lube v. Fireman's Fund Ins. Co., 868 F. Supp. 1278, 1310 (D. Utah 1994) ("administrative action in this case reflects a tangibly coercive effort to obtain the 'cooperation' of Quaker State in defraying environmental response costs, costs representing a liability ultimately enforceable by [an action] under CERCLA"); St. Johnsbury Trucking Co. v. Liberty Mut. Ins., No. 93 B 4313, 1999 Bankr. LEXIS 403 (Bankr. D. Vt. Apr. 16, 1999) (PRP notice was tantamount to the commencement of a lawsuit);

Ind.-- Hartford Accident & Indem. Co. v. Dana Corp., 690 N.E.2d 285, 297 (Ind. Ct. App. 1997) ("We agree with those courts which have found coercive and adversarial administrative proceedings to be 'suits.' To decide otherwise would encourage insureds to not cooperate with governmental agencies, thus running the risk of huge fines, punitive damages, and delay in remediating environmental pollution."); Travelers Indem. Co. v. Summit Corp. of Am., 715 N.E.2d 926, 933-34 (Ind. Ct. App. 1999) ;

Ky.-- Aetna Cas. & Sur. Co. v. Commonwealth, 179 S.W.3d 830, 837 (Ky. 2005) ;

Mich. -- *Mich. Millers*, 519 N.W.2d at 870 (PRP notice is functional

equivalent of suit);

Wisc.-- Johnson Controls, Inc. v. Employers Ins. of Wausau, 264 Wis. 2d 60, 665 N.W.2d 257 (2003) ("an insured's receipt of a potentially responsible party letter from the Environmental Protection Agency (EPA) or an equivalent state agency seeking remediation or remediation costs is a "suit" which a comprehensive general liability (CGL) insurer has a duty to defend").

(n34)Footnote 32. *Johnson Controls, Inc.*, 665 N.W.2d at 284 (internal citations omitted).

See also :

U.S.-- Aetna Cas. and Sur. Co., Inc. v. Pintlar Corp., 948 F.2d 1507, 1513 (9th Cir. 1991) ; Hutchinson Oil Co. v. Federated Serv. Ins. Co., 851 F. Supp. 1546, 1552 (D. Wyo. 1994) ("It is not reasonable to find that a duty to defend, in the absence of clear, unambiguous policy language to the contrary, will arise only when the EPA has selected a judicial forum and has commenced a civil proceeding and that no duty to defend will arise if the EPA, an entity not within the control of the insured, elects to pursue its administrative options instead."); Pacific Employers Insurance v. Servco, 273 F. Supp. 2d 1149 (D. Haw. 2003) (PRP has no choice but to comply with state regulatory proceedings, and the mere fact that PRP seems to be complying with those proceedings does not mean that proceedings are "not a CERCLA-equivalent of a 'suit.' ");

Ga.-- Boardman Petroleum v. Federated Mut. Ins., 926 F. Supp. 1566, 1582 (S.D. Ga. 1995) , *rev'd on other grounds*, 150 F.3d 1327 (11th Cir. 1998) (applying Georgia Law) ("[S]uch letters from state environmental agencies have risen to a profile at least as prominent as a 'suit' by a private party," and therefore, constitute 'suits.' ");

Mich.-- South Macomb Disposal Auth. v. American Ins. Co., 225 Mich. App. 635, 572 N.W.2d 686 (1997) (state letters to PRP for cleanup also constitute "suits");

Minn.-- SCSC Corp. v. Allied Mut. Ins. Co., 536 N.W.2d 305, 315 (Minn. 1995) (requests for information by state environmental agency constituted suits);

Vt.-- State v. CNA Ins. Cos., 172 Vt. 318, 779 A.2d 662, 667(2001) ("We see no reason to treat compliance with a state environmental regime differently from a federal one."); Town of Windsor v. Hartford Accident & Indem. Co., 885 F. Supp. 666, 670 (D. Vt. 1995) (applying Vermont law) (state communications identifying PRP status were sufficiently adversarial to constitute a "suit" within the meaning of the CGL policy).

(n35)Footnote 33. *See e.g.* :

N.Y.-- Avondale Industries, Inc. v. Travelers Indem. Co., 887 F.2d 1200, 1206 (2d Cir. N.Y. 1989) (applying New York law) ("A request to participate voluntarily in remedial measures is not the same as the adversarial posture assumed in the coercive demand letter that Avondale received in the instant case.");

Vt.-- Carpentier v. Hanover Ins. Co., 248 A.D.2d 579, 581, 670 N.Y.S.2d

540, 1998 N.Y. App. Div. LEXIS 2868 (2d Dep't 1998) (state and EPA letters that merely informed PRP of its potential liability were not "suits," however, EPA's letter asking PRP to pay a large, specified sum of money, advising PRP that interest would start accruing after the date of demand, and threatening to file a notice of a lien were coercive and adversarial enough to constitute "suits.").

(n36)Footnote 34. *See, e.g.*, Broadwell Realty Servs. v. Fid. & Casualty Co., 218 N.J. Super. 516, 528 A.2d 76, 81(App. Div. 1987) , *abrogated on other grounds by* Morton Int'l, Inc. v. General Acc. Ins. Co. of Am., 134 N.J. 1, 629 A.2d 831 (1993) .

(n37)Footnote 35. *See, e.g.*:

Idaho-- N. Pac. v. Mai, 130 Idaho 251, 939 P.2d 570, 572 (1997) ("If [insurer] wanted a more particularized definition of duty to defend they could have written one into their policy, but they didn't. Accordingly, the Plaintiff's duty to defend has been triggered by the EPA actions...");

Iowa-- A.Y. McDonald Indus. v. Ins. Co. of N. Am., 475 N.W.2d 607, 627 (Iowa 1991) ("If any claim alleged against the insurer can rationally be said to fall within such coverage, the insurer must defend the entire action.");

Mich.-- Mich. Millers Mut. Ins. Co. v. Bronson Plating Co., 445 Mich. 558, 519 N.W.2d 864 (1994) (ambiguity construed in manner "most favorable to the insured");

N.H.-- Coakley v. Maine Bonding & Casualty Co., 136 N.H. 402, 618 A.2d 777 (1992) (construing ambiguity against insurer);

N.C.-- C. D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'g Co., 326 N.C. 133, 388 S.E.2d 557, 569 (1990) ("The function of the courts is not to sprinkle sand on ice by strict construction where an insurance company uses 'slippery' words to designate coverage.");

Utah-- Quaker State Minit-Lube v. Fireman's Fund Ins. Co., 868 F. Supp. 1278, 1311 (D. Utah 1994) (applying Utah law) ("Had the defendants desired a narrower, more particularized definition of that duty, they could have written one into their policies. Even after the enactment of CERCLA in 1980, however, the policy language remained unaltered in the defendants' policies. Unless coverage is defeated as a matter of law by the operation of the pollution exclusion ... defendants' duty to defend has been triggered by the EPA actions ... .");

Wash.-- Boeing Co. v. Aetna Cas. & Sur. Co., 1990 U.S. Dist. LEXIS 20231 (W.D. Wash. 1990) (applying Washington law) (interpreting "suit" in insured's favor where multiple definitions exist).

(n38)Footnote 36. *See, e.g.*:

Mass.-- Hazen Paper Co. v. United States Fidelity & Guar., 407 Mass. 689, 555 N.E.2d 576, 582-83 (1990) (cleanup costs are damages within policy language, although damages do not include costs incurred in complying with an injunction directed to damage prevention or costs incurred where there has been no property damage);

Mo.-- Farmland Indus., Inc. v. Republic Ins. Co., 941 S.W.2d 505, 508-12 (Mo. 1997) (environmental response costs are "damages"--overruling prior federal court decisions ruling to the contrary);

Pa.-- Fed. Ins. Co. v. Susquehanna Broadcasting Co., 727 F. Supp. 169, 174 (M.D. Pa. 1989) , *aff'd*, 928 F.2d 1131 (3d Cir. 1991) (applying Pennsylvania law) (CERCLA response costs are damages, but are only recoverable up to the value of the restored property);

Tex.-- SnyderGeneral Corp. v. Century Indem. Co., 113 F.3d 536, 539 (5th Cir. 1997) (applying Texas law) (cleanup costs are covered damages even if voluntarily undertaken to clean up hazardous waste);

Vt.-- Vt. Am. Corp. v. Am. Employers' Ins. Co., No. 330-6-95 (Vt. Super. Ct. Oct. 31, 1997) (remedial costs are included within the meaning of the term "damages").

(n39)Footnote 37. *See, e.g.*, *C.D. Spangler Constr. Co.*, 388 S.E.2d at 566 ("The expenses were incurred by virtue of the in terrorem and coercive effect of the State directive ... 'Further peril [to state] was both imminent and immediate. Under these circumstances, the abatement and response expenses constitute "damages" which the insured was legally obligated to pay.").

(n40)Footnote 38. **Mo. --** *Farmland Indus.*, 941 S.W.2d at 508-12 (environmental response costs are "damages" covered under liability insurance contracts because plain meaning of "damages" does not distinguish between legal and economic relief);

Okla. -- *C.D. Spangler Constr. Co.*, 388 S.E.2d at 567 (interpreting Nat'l Indem. Co. v. U.S. Pollution Control, 717 F. Supp. 765 (W.D. Okla. 1989)) (applying Oklahoma law) (response costs were covered "because the policy did not affirmatively limit the definition of damages to legal damages only");

Wisc.-- Johnson Controls, Inc. v. Employers Ins. of Wausau, 264 Wis. 2d 60, 665 N.W.2d 257, 278 (2003) ("It makes little sense in determining whether "damages" have occurred under the policy whether the party bringing a legal action for contribution to remediate damaged property is a governmental agency or some other entity. Certainly this distinction was not bargained for, nor is it manifested anywhere in the CGL policies. The nature of the relief sought against an insured for damage that it caused should not change based on the identity of the claimant in a CERCLA cost recovery action.").

(n41)Footnote 39. *See*, *e.g.*, U.S. Aviex v. Travelers Ins. Co., 125 Mich. App. 579, 336 N.W.2d 838, 843 (1983) ("It is merely fortuitous from the standpoint of either plaintiff or defendant [insurer] that the state has chosen to have plaintiff remedy the contamination problem, rather than choosing to incur the costs of cleanup itself and then suing plaintiff to recover those costs."); *see also Hazen*, 555 N.E.2d at 576 ("The important point is that, if Hazen is legally liable to pay certain amounts because of property damage for which the law holds it responsible, and [insurance company] is legally obligated to pay 'damages on account of ... property damage,' Hazen has policy coverage [for such damages.]").

(n42)Footnote 40. *See* Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 983 (8th Cir. 1988) ("environmental contamination caused by

improper disposal of hazardous wastes can constitute 'property damage' "); Aetna Cas. & Sur. Co. v. Kentucky, 179 S.W.3d 830, 838-39 (Ky. 2005) ("We agree with the majority of state appellate courts that hold the ordinary meaning of "damages" is broad enough to, and does include, government mandated response or cleanup costs under CERCLA and similar state environmental protection statutes: as long as the purpose is to rectify, correct, control, lessen or stop ongoing injury of the premises.").

(n43)Footnote 41. *See*, *e.g.*, Harleysville Mut. Ins. Co. v. Sussex County, 831 F. Supp. 1111, 1131-32 (D. Del. 1993) ("suit" is clear and unambiguous and cannot be construed to include an EPA threat to hold the insured liable for cleanup costs "without doing violence to the plain and ordinary meaning of the word"); Racal-Datacom Inc. v. Ins. Co. of N. Am., No. 95-1749- CIV-LENARD, 1998 U.S. Dist. LEXIS 23580, (S.D. Fla. Feb. 11, 1998) ("suit" is unambiguous).

(n44)Footnote 42. **Fla.--** *Racal-Datacom*, 1998 U.S. Dist. LEXIS 23580 (applying Florida law) ("the Court finds ... the term 'suit' as used in the policy is unambiguous in that it refers only to proceedings in a court of law");

Ill.-- Lapham-Hickey Steel Corp. v. Prot. Mut. Ins. Co., 166 Ill. 2d 520, 655 N.E.2d 842, 847 (1995) ("Since nothing has been filed against Lapham-Hickey in a court of law, there is no 'suit' against which Protection can defend.");

La.-- Joslyn Mfg. Co. v. Liberty Mut. Ins. Co., 836 F. Supp. 1273, 1279 (W.D. La. 1993) (applying Louisiana law) (state compliance letters do not constitute a "suit," which generally and traditionally refers to a formal proceeding in a court of law).

(n45)Footnote 43. *Lapham-Hickey Steel Corp.*, 655 N.E.2d at 847 ("Thus, the duty to defend extends only to suits and not to allegations, accusations or claims which have not been embodied within the context of a complaint. In the instant case, a complaint alleging liability for property damage has never been filed against Lapham-Hickey. Without a complaint, there is no 'suit.' And without a 'suit,' Protection's duty to defend Lapham-Hickey is not triggered."); *see also* Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co., 18 Cal. 4th 857, 959 P.2d 265, 281 (1998) ("The parameters of a 'suit'--and therefore the limits of a defense--are defined explicitly by the complaint, the policy, and any other information known to the insurer."); *Racal-Datacom*, 1998 U.S. Dist. LEXIS 23580 ("In this case, the EPA never filed a complaint in a court of law which the Court can consult to evaluate whether the allegations stated therein triggered INA's duty to defend Racal against the EPA.").

(n46)Footnote 44. Paul V. Majkowski, *Triggering The Liability Insurer's Duty to Defend in Environmental Proceedings: Does Potentially Responsible Party Notification Constitute a "Suit"?*, 67 St. John's L. Rev. 383, 384 (1993) (standard CGL policies read "The company shall have the right and duty to defend any suit against the insured seeking damages on account of ... property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient."); *Foster-Gardner*, 959 P.2d at 274 ("While [the insurer] has the power to investigate any claim, it has the duty to defend only suits.").

(n47)Footnote 45. *Foster-Gardner*, 959 P.2d at 280 .

(n48)Footnote 46. **Fla.--** *Racal-Datacom*, 1998 U.S. Dist. LEXIS 23580

(applying Florida law) ("To find that that letter initiated a 'suit' as understood under the policy would render the distinction between claims and suits that is written into the policy superfluous and thereby fail to give effect to all of the language contained within the policy.");

Ill.-- *Lapham-Hickey Steel Corp.*, 655 N.E.2d at 847 ("If the word 'suit' was broadened to include claims, in the face of policy language which distinguishes between the two, any distinction between the two words would become superfluous."); *Foster-Gardner*, 959 P.2d at 274 (same);

La.-- Joslyn Mfg. Co. v. Liberty Mut. Ins. Co., 836 F. Supp. 1273, 1279 (W.D. La. 1993) (applying Louisiana law) (state compliance letters do not constitute a "suit," which generally and traditionally refers to a formal proceeding in a court of law); *Joslyn Mfg. Co.*, 836 F. Supp. at 1279 ("the insurance policies specifically differentiate between the words claim and suit for purposes of the duty to defend.").

(n49)Footnote 47. Prof'l Rental, Inc. v. Shelby Ins. Co., 75 Ohio App. 3d 365, 599 N.E.2d 423, 429 (1991) ("The EPA's initial PRP correspondence typically requests information from the PRP for the purpose of assisting the EPA in determining the need for response action. The EPA further requests that the PRP inform the government of its willingness to 'voluntarily' participate in cleanup plans ...").

(n50)Footnote 48. *Id.*; *see also* Borg-Warner Corp. v. Ins. Co. of N. Am., 174 A.D.2d 24, 36, 577 N.Y.S.2d 953, 1992 N.Y. App. Div. LEXIS 109 (1992) ("We conclude that [PRP notification letters] are not the equivalent of suits because they seek only voluntary participation and negotiation and do not threaten litigation."); *Joslyn Mfg. Co.*, 836 F. Supp. at 1279 (only if the respondent refuses to comply with the order is the respondent then subject to possible civil enforcement or penalties).

(n51)Footnote 49. Cincinnati Ins. Co. v. Milliken & Co., 857 F.2d 979 (4th Cir. 1988) (under South Carolina law, "damages" does not include equitable relief such as restoration and cleanup costs); Maryland Cas. Co. v. Armco Inc., 822 F.2d 1348 (4th Cir. 1987) , *cert. denied*, 484 U.S. 1008 (1988) ; *see also* Patrons Oxford Mut. Ins. Co. v. Marois, 573 A.2d 16, 18 (Me. 1990) ("Such amounts may be substantial and may effectively alleviate or prevent property damage to others, but we do not believe the 'ordinarily intelligent insured,' engaged in a more than casual reading of the policy... would consider them to be sums which the insured [is] legally obligated to pay as damages.") (internal citations and quotations marks omitted).

(n52)Footnote 50. 916 F.2d 731, 741 n.7 (1st Cir. 1990) (citing Black's Law Dictionary 377 (5th ed. 1979).

(n53)Footnote 51. *Id.* (citing Webster's Ninth New Collegiate Dictionary 333 (1989)).

(n54)Footnote 52. *Id.* at 741 .

(n55)Footnote 53. *Id*.

(n56)Footnote 54. Paul V. Majkowski, *Triggering The Liability Insurer's Duty to Defend in Environmental Proceedings: Does Potentially Responsible Party Notification Constitute a "Suit"?*, 67 St. John's L. Rev. 383, 395 (1993)

("Given the scope of the CERCLA scheme and the power of the federal government, it might appear that an EPA PRP letter presumptively meets the *Ryan* test. Predictably, courts applying *Ryan* to an EPA notification have split.")

(n57)Footnote 55. *See*, *e.g.*, Gen. Accident Ins. Co. v. State Dep't of Envtl. Prot., 143 N.J. 462, 477, 672 A.2d 1154 (1997) (presuming costs are indemnity).

(n58)Footnote 56. **Cal.--** Aerojet-General Corp. v. Trans. Indem. Co., 17 Cal. 4th 38, 70 Cal. Rptr. 2d 118, 948 P.2d 909 (1997) (site investigation expenses constitute defense costs if (1) the site investigation was conducted within the temporal limits of the insurer's duty to defend; (2) the site investigation was reasonable and necessary to avoid or minimize liability; and (3) the site investigation expenses were reasonable and necessary for that purpose);

Mich.-- Am. Bumper & Mfg. v. Hartford Fire Ins. Co., 452 Mich. 440, 550 N.W.2d 475, 485-86 (1996) ("costs expended during an RI/FS that go toward remediation, or making a potentially injured party whole, are indemnification, rather than defense costs. ... [but] are defense costs, rather than indemnification costs, if they were expended in order to disprove or limit the scope of liability for cleanup under the CERCLA and if they do not represent an ordinary cost of doing business");

Minn.-- Westling Mfg. Co. v. Westin Nat'l Mut. Ins. Co., 581 N.W.2d 39, 47 (Minn. Ct. App. 1998) (investigation and compliance costs incurred by an insured in response to a Request for Investigation are considered defense costs);

N.Y.-- Endicott Johnson v. Liberty Mut. Ins. Co., 928 F. Supp. 176, 184 (N.D.N.Y. 1996) (applying New York law) ("[t]o the extent that an expense is primarily attributable to remedial investigations ... the expense will be treated as a defense cost. ... [t]o the extent an expense is primarily attributable to feasibility studies ... the expense will be treated as damages to be indemnified").

(n59)Footnote 57. **Alaska--** Mapco Alaska Petroleum, Inc. v. Cent. Nat'l Ins. Co. of Omaha, 795 F. Supp. 941, 949 (D. Alaska 1991) (applying Alaska law) (groundwater cleanup not subject to owned property exclusion);

Ga.-- Claussen v. Aetna Cas. & Sur. Co., 754 F. Supp. 1576, 1580 (S.D. Ga. 1990) (applying Georgia law) (polluted groundwater is not within the scope of the exclusion);

Minn.-- N. States Power Co. v. Fid. & Cas. Co. of N.Y., 504 N.W.2d 240, 246 (Minn. Ct. App. 1993) (where groundwater contamination has occurred, the owned property exclusion does not bar coverage for cleanup expenses);

N.J.-- Fed. Ins. Co. v. Purex Indus., 972 F. Supp. 872, 883-84 (D.N.J. 1997) (owned property exclusions do not apply to groundwater contamination as a matter of law because New Jersey courts have held that groundwater below real property is not owned by the property owner);

N.Y.-- Bankers Trust Co. v. Hartford Accident & Indem. Co., 518 F. Supp. 371 , *vacated*, 621 F. Supp. 685 (S.D.N.Y. 1981) (applying New York law) (allowing coverage where cleanup of property was to prevent damage to

third-party property);

Pa.-- Conrail v. Certain Underwriters at Lloyds, No. 84-2609, 1986 U.S. Dist. LEXIS 24579 (E.D. Pa. June 5, 1986) , *aff'd*, 853 F.2d 917 (3d Cir. 1988) (applying Pennsylvania law) (allowing recovery of cleanup costs even where some expenditures were for cleanup of own property in addition to groundwater);

Wisc.-- Patz v. St. Paul Fire & Marine Ins. Co. 817 F. Supp. 781, 783 (E.D. Wis. 1993) (groundwater contamination is not damage to property owned by the insured).

But see **Mass.--** Boston Gas Co. v. Century Indem. Co., No. 07-1452, 2008 U.S. App. LEXIS 12344, at *21 (1st Cir. June 10, 2008) (under Massachusetts law, "only that remediation necessary to protect against off-site contamination is compensable; further costs, however useful to mitigate on-site contamination, are not").

(n60)Footnote 58. **Cal.--** State v. Superior Court, 78 Cal. App. 4th 1019, 93 Cal. Rptr. 2d 276, 287-88, 93 Cal. Rptr. 2d 276 (2000) (running water, as long as it continues to flow in its natural course, is not and cannot be made the subject of private ownership);

Del.-- North Am. Philips Corp. v. Aetna Cas. & Sur., No. 88C-JA-155, 1995 Del. Super. LEXIS 358, at *6 (Del. Super. Ct. Apr. 7, 1995) (citing Aerojet-General Corp. v. Superior Court, 211 Cal. App. 3d 216, 257 Cal. Rptr. 621, 629, 257 Cal. Rptr. 621 (1st Dist. 1989)) (pollution of groundwater and river waters is damage to public property, as well as a direct injury to public welfare);

Kan.-- Cessna Aircraft Co. v. Hartford Accident & Indem. Co., 900 F. Supp 1489, 1498 (D. Kan. 1995) (applying Kansas law) (groundwater belongs to all people in the state and cannot be owned or controlled by the insured);

Minn.-- Cargill, Inc. v. Evanston Ins. Co., 642 N.W.2d 80, 91 (Minn. Ct. App. 2002) (contamination of groundwater in Minnesota violates the public interest and is not part of the owned property exclusion);

Mo.-- For conflicting authority under Missouri law, see United States v. Conservation Chem. Co., 653 F. Supp. 152 (W.D. Mo. 1986) (psercolating groundwater under the landfill was not owned or controlled by the insured and that the owned property exclusion did not apply) and Trans World Airlines v. Associated Aviation, 58 S.W.3d 609 (Mo. Ct. App. 2001) (owned property exclusion applies to contamination because insured has substantial property interests in the groundwater below the site).

N.Y.-- Savoy Med. Supply Co. v. F&H Mfg. Corp., 776 F. Supp. 703, 706 (E.D.N.Y. 1991) (threat to the public due to the contamination of groundwater places the damage outside the owned property exclusion);

Pa.-- Aronson Assoc., Inc. v. Pa. Nat'l Mut. Cas. Ins. Co., 14 Pa. D. & C.3d 1 (Pa. Ct. Com. Pl. 1977) *, aff'd per curiam*, 272 Pa. Super. 606, 422 A.2d 689 (1979) (owned property exclusion did not apply; the streams and pools under the insured's land constituted waters of the Commonwealth).

(n61)Footnote 59. *See, e.g.*, Boardman Petroleum v. Federated Mut. Ins.

Co., 269 Ga. 326, 498 S.E.2d 492, 494-95 (1998) (Georgia law provides that a property owner owns everything that is above and below his real estate, and contamination of on-site groundwater alone is damage to the insured's own property).

(n62)Footnote 60. **Cal.--** Purdy Co. v. Travelers Ins. Co., No. 97-56106, 1999 U.S. App. LEXIS 2165, at *3-4 (9th Cir. Feb. 11, 1999) (applying California law) (coverage excluded where third-party risk was not imminent);

Del.-- E.I. du Pont de Nemours & Co. v. Admiral Ins. Co., No. 89C-AU-99, 1996 Del. Super. LEXIS 35, at *17-21 (Del. Super. Ct. Jan. 30, 1996) (preventative measures to end actual or imminent damages to third-party property did not bar recovery under the owned property exclusion);

Iowa - Walnut Grove Partners, L.P. v. Am. Family Mut. Ins. Co., No. 04-CV-10168, 2004 U.S. Dist. LEXIS 30518, at *15-16 (S.D. Iowa Oct. 4, 2004) (exclusion does not preclude coverage for work done to the insured's property that was intended to prevent imminent damage to third-party property);

N.J.-- Quincy Mut. Fire Ins. Co. v. Borough of Bellmawr, 172 N.J. 409, 799 A.2d 499, 510 (2001) (citing Aetna Cas. & Sur. Co. v. Dow Chem. Co., 28 F. Supp. 2d 448 (E.D. Mich. 1998)) (insured must establish the need for remediation to prevent imminent harm to a third party).

(n63)Footnote 61. **Cal.--** Vann v. Travelers Cos., 39 Cal. App. 4th 1610, 46 Cal. Rptr. 2d 617, 622 (1995) ("no legitimate purpose is served" by denying coverage before off-site migration occurs);

Mass.-- Rubenstein v. Royal Ins. Co. of America, 44 Mass. App. Ct. 842, 694 N.E.2d 381, 389 (1998) (citing Hakim v. Mass. Insurers' Insolvency Fund, 424 Mass. 275, 675 N.E.2d 1161 (1997) (the owned property exclusion does not exclude coverage if the cleanup is designed to remediate, to prevent, or to abate further migration of contaminates to the off-site property; this is the case even if the contaminating substances are solely on the insured's land); Allstate Ins. Co. v. Quinn Constr. Co., 713 F. Supp. 35, 40-41 (D. Mass. 1989) , *vacated*, 784 F. Supp.927 (costs incurred to remediate damage on the insured's property in an attempt to prevent future damage to third-party property are not excluded under the owned property exclusion);

Or.-- Fireman's Fund Ins. Co. v. Ed Niemi Oil Co., 2005 U.S. Dist. LEXIS 29467, at *24-25 (D. Or. Nov. 9, 2005) (exclusion inapplicable given allegations of possible damage to the groundwater or other publicly owned water sources) (citing Schnitzer Inv. Corp. v. Certain Underwriters at Lloyd's of London, 104 P.3d 1162, 1169 (Or. Ct. App. 2005));

R.I.-- Ins. Co. of N. Am. v. Kayer-Roth Corp., C.A. No. PC 92-5248, 1999 R.I. Super. LEXIS 66 (R.I. Super. Ct. July 29, 1999) ("Generally, courts have not hesitated, in the context of third-party liability insurance, to treat damage to the environment as property damage for the purpose of triggering coverage.").

(n64)Footnote 62. *See, e.g.,* Rubenstein v. Royal Ins. Co. of Am., 44 Mass. App. Ct. 842, 694 N.E.2d 381, 385 (1998) (discouraging cleanups by precluding CGL insurance coverage until contamination has migrated or flowed onto someone else's property runs afoul of the general preference within environmental

statutes toward preventative action); *see also* Schnitzer Inv. Corp. v. Certain Underwriters at Lloyd's of London, 341 Or. 128, 137 P.3d 1282, 1286 (2005) (where soil and groundwater contamination existed, insurer had to indemnify cost of capping soil, even though capping did not remediate groundwater contamination, because it nonetheless prevented the health risks resulting from contact with environmental contamination in the soil).

(n65)Footnote 63. Muralo Co. v. Employers Ins. of Wausau, 334 N.J. Super. 282, 759 A.2d 348, 353 (App. Div. 2000) ("removal of contaminated soil may be a step in the process of groundwater remediation, but removal of contaminated soil only as remediation of soil contamination does not constitute groundwater remediation, even if that soil removal will eliminate a threat of groundwater contamination.").

(n66)Footnote 64. For example, a standard provision states "This insurance does not apply to:

> Bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapor, soot, fumes, acids, alkalis, toxic chemicals, contaminants ..., but this exclusion does not apply if such discharge dispersal, release or escape is sudden and accidental."

(n67)Footnote 65. *See, e.g.*, Eugene R. Anderson and John G. Nevius, *Insurance Issues in*, Brownfields Law and Practice § 28.01[4][c] (Michael B. Gerrard ed.) (citing Sock the Polluters, Bus. Ins., June 8, 1970, at 12).

(n68)Footnote 66. **Ala.--** Ala. Plating Co. v. U.S. Fid. & Guar. Co., 690 So. 2d 331, 335 (Ala. 1996) ("sudden" is ambiguous; coverage exists if gradual release was unexpected and unintended);

Alaska-- Mapco Express, Inc. v. Am. Int'l Specialty Lines Ins. Co., No. 3AN-95-8309 (Alaska Super. Ct. July 31, 1998) ("sudden" is ambiguous);

Ga.-- Claussen v. Aetna Cas. & Sur. Co., 259 Ga. 333, 380 S.E.2d 686, 687-88 (1989) (same);

Haw.-- Pac. Employers Ins. Co. v. Servco Pac., Inc., 273 F. Supp. 2d 1149, 1157-58 (D. Haw. 2003) (predicting Hawaii law) (noting jurisdiction disagreement on meaning of "sudden and accidental" exclusion);

Ind.-- Am. States Ins. Co. v. Kiger, 662 N.E.2d 945, 948 (Ind. 1996) ("sudden and accidental" is ambiguous because the drafters who added the clause said it was a response to coverage for expected and intended events, but this seems to simply "clarify" the occurrence clause);

S.C.-- Greenville County v. Ins. Reserve Fund, 313 S.C. 546, 443 S.E.2d 552, 552 (1994) ("sudden and accidental" is ambiguous because jurisdictions disagree over its meaning). Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha, 126 Wash. 2d 50, 882 P.2d 703 (1994) ("sudden" is ambiguous; coverage exists for unexpected and unintended escape of contaminants).

(n69)Footnote 67. **U.S.--** Transamerica Ins. Co. v. Duro Bag Mfg. Co., 50 F.3d 370, 372-73 (6th Cir. 1995) ("sudden and accidental" plainly means abrupt);

Ala.-- Hicks v. Am. Res. Ins. Co., 544 So. 2d 952, 954 (Ala. 1989) (denying coverage because exclusion is not ambiguous when applied to pollution by industry-related activities and must be construed in favor of insurer);

Cal.-- Aydin Corp. v. First State Ins. Co., 18 Cal. 4th 1183, 77 Cal. Rptr. 2d 537, 959 P.2d 1213 (1998) (exception is not ambiguous and must construe in favor of the insurer if insurer has proven exclusion applies and insured does not prove sudden and accidental exception applies);

Iowa-- Weber v. IMT Ins. Co., 462 N.W.2d 283 (Iowa 1990) ("accidental" is not ambiguous because previously defined as unusual and unexpected, therefore, must construe to favor the insurer);

Me.-- A. Johnson & Co. v. Aetna Cas. & Sur. Co., 933 F.2d 66 (1st Cir. 1991) (applying Maine law) (exception is not ambiguous and must construe in favor of the insurer if insurer has proven exclusion applies and insured does not prove sudden and accidental exception applies).

(n70)Footnote 68. **Ala.--** *Ala. Plating*, 690 So. 2d 331 (Ala. 1996) ("sudden and accidental" is ambiguous and favoring coverage so long as migration of contaminants into groundwater was unexpected and unintended); *Hicks*, 544 So. 2d 952 (Ala. 1989) (no ambiguity exists when exception applied to pollution occurring within the regular course of business of a mining plant);

Del.-- New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1199 (3d Cir. 1991) (under Delaware law, sudden is ambiguous and means unexpected, not abrupt); E.I. du Pont de Nemours & Co. v. Allstate Ins. Co., 693 A.2d 1059, 1061 (Del. 1997) (sudden is not ambiguous and means "abrupt");

Ill.-- Outboard Marine Corp. v. Liberty Mut. Ins. Co., 154 Ill. 2d 90, 607 N.E.2d 1204, 1218 (1992) (sudden and accidental is ambiguous and means unexpected and unintended); Fruit of the Loom, Inc. v. Travelers Indem. Co., 284 Ill. App. 3d 485, 672 N.E.2d 278 (1996) (holding exception is not ambiguous because the Supreme Court had already established the meaning of "sudden" as "unexpected and unintended");

N.Y.-- Cont'l Cas. Co. v. Rapid Am. Corp., 80 N.Y.2d 640, 593 N.Y.S.2d 966, 609 N.E.2d 506 (1993) ("sudden and accidental" is ambiguous in the context of asbestos contamination); *but see* Northville Indus. Corp. v. Nat'l Union Fire Ins. Co., 89 N.Y.2d 621, 657 N.Y.S.2d 564, 679 N.E.2d 1044, 1048 (N.Y. 1997) ("sudden and accidental" is not ambiguous with regard to escape of gasoline from storage);

W. Va.-- Joy Technologies, Inc. v. Liberty Mut. Ins. Co., No. 86-C-94, slip op. at 2 (W. Va. Cir. Ct. Feb. 4, 1994) (sudden is unambiguous and must be interpreted according to ordinary meaning--abrupt--and holding conduct which took place over a long time barred coverage);

But see Patz v. St. Paul Fire & Marine Ins. Co., 15 F.3d 699, 703 (7th Cir. 1994) (sudden and accidental means unexpected and unintended and is not ambiguous because Supreme Court settled the ambiguity) (citing Just v. Land Reclamation, Ltd., 155 Wis. 2d 737, 456 N.W.2d 570 (1990) (holding "sudden" is ambiguous and does not have temporal meaning, but refers to damages that are unintended and unexpected)).

(n71)Footnote 69. *See, e.g.*, Morrow Corp. v. Harleysville Mut. Ins. Co., 101 F. Supp. 2d 422, 430 (E.D. Va. 2000) ("The meaning of "sudden and accidental" in this context has been hotly debated in the courts ... The debate focuses on whether the word "sudden" adds a temporal component to the exception, so that the phrase "sudden and accidental" would mean both "unexpected and unintended" -- synonyms of "accidental" -- and "abrupt or quick," the temporal meaning of "sudden." ").

(n72)Footnote 70. **Iowa--** Iowa Comprehensive Petroleum UST Fund Bd. v. Farmland Mut. Ins. Co., 568 N.W.2d 815, 818-19 (Iowa 1997) ("sudden" must have temporal meaning because "accidental" means unexpected/unintended); Weber v. IMT Ins. Co., 462 N.W.2d 283 (Iowa 1990) (unnecessary to define "sudden" because spill was expected and thus, not accidental, exclusion applied);

N.C.-- Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374, 379 (1986) ("accident" requires "an unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence"; gradual releases may be sudden and accidental);

Okla.-- Kerr-McGee Corp. v. Admiral Ins. Co., 1995 OK 102, 905 P.2d 760, 764 (1995) (ordinary meaning of "sudden" necessarily implies an element of time and "accident" means unexpected or unintended release, regardless of intent of parties to pollute).

(n73)Footnote 71. **Ala.--** Ala. Plating Co. v. United States Fid. & Guar. Co., 690 So. 2d 331 (Ala. 1996) (discharge resulting in migration of contaminants in groundwater was unexpected and unintended when contamination occurred despite insured following instructions for disposal);

Colo.-- Cotter Corp. v. Am. Empire Surplus Line Ins. Co., 90 P.3d 814 (Colo. 2004) ; Pub. Serv. Co. of Colo. v. Wallis & Co., 986 P.2d 924 (Colo. 1999) ;

Del.-- New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162 (3d Cir. 1991) , *rev'd on other grounds*, 970 F.2d 1267 (3d Cir. 1992) , *cert. denied*, 507 U.S. 1030 (1993) (predicting Delaware law);

Ga.-- Virginia Props., Inc. v. Home Ins. Co., 74 F.3d 1131 (11th Cir. 1996) (applying Georgia law); Claussen v. Aetna Cas. & Sur. Co., 259 Ga. 333, 380 S.E.2d 686 (1989) ; Lumbermen's Mut. Cas. Co. v. Plantation Pipeline Co., 214 Ga. App. 23, 447 S.E.2d 89 (1994) ;

Ill.-- Tribune Co. v. Allstate Ins. Co., No. 1-01-1330, 2003 Ill. App. LEXIS 1669 (Ill. App. Ct. Aug. 11, 2003) (pollution is not unexpected when insured knows will result as natural and ordinary consequence); Fruit of the Loom, Inc. v. Travelers Indem. Co., 284 Ill. App. 3d 485, 672 N.E.2d 278 (1996) (expected discharge of pollutants bars coverage);

Ind.-- Am. States Ins. Co. v. Kiger, 662 N.E.2d 945 (Ind. 1996) (sudden and accidental must mean unexpected and unintended because the drafters added the exception to avoid coverage for expected and intended pollution);

Miss.-- U.S. Fid. & Guar. Co. v. B&B Oil Well Serv., Inc., 910 F. Supp. 1172, 1183 (S.D. Miss. 1995) (applying Mississippi law) (barring coverage if

insured knew or should have known its activities were causing pollution because even if unintended, the pollution was clearly expected);

Ore.-- St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co., 324 Or. 184, 923 P.2d 1200, 1217-18 (1996) ("sudden and accidental" means unexpected and unintended, and although "sudden" may have temporal element, it does not necessarily imply "abrupt");

R.I.-- Textron v. Aetna Cas. & Sur. Co., 754 A.2d 742, 750 (R.I. 2000) (barring coverage for intentional and reckless pollution, however, preserving coverage for any party who in good faith attempts to contain pollution despite unexpected and unintended release);

S.C.-- Greenville County v. Ins. Reserve Fund, 313 S.C. 546, 443 S.E.2d 552, 553 (1994) (pollution exclusion refers to an unexpected but not necessarily abrupt event);

S.D.-- Am. Universal Ins. Co. v. Whitewood Custom Treaters, Inc., 707 F. Supp. 1140, 1147 (D.S.D. 1989) (sudden and accidental means unexpected and unintended from the standpoint of the insured);

Wash.-- Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha, 126 Wash. 2d 50, 882 P.2d 703, 725-26 (1994) (sudden means unexpected and unintended and does not have temporal meaning under Washington law; barring coverage for intentional pollution);

Wisc.-- Just v. Land Reclamation, Ltd., 155 Wis. 2d 737, 456 N.W.2d 570, 571-72 (1990) (pollution exclusion has no temporal meaning, but interpreting sudden and accidental to mean unexpected and unintended).

(n74)Footnote 72. **Alaska--** Mapco Petroleum Inc. v. Central Nat'l Ins. Co. of Omaha, 795 F. Supp. 941, 947 (D. Alaska 1991) (interpreting Alaska law) ("sudden and accidental" has temporal meaning, but refers to that which occurs without notice);

Kan.-- Farm Bureau Mut. Ins. Co. v. Laudick, 18 Kan. App. 2d 782, 859 P.2d 410, 412 (1993) ("sudden and accidental" should be given temporal meaning and "sudden" combines both the elements of "without notice or warning" and "quick or brief in time");

Wyo.-- Sinclair Oil Corp. v. Republic Ins. Co., 929 P.2d 535, 543 (Wyo. 1996) (finding "sudden and accidental" has a temporal aspect that requires occurrence to happen abruptly, without any significant notice, and unexpectedly).

(n75)Footnote 73. *See, e.g.* :

R.I.-- Textron, Inc. v. Aetna Casualty and Surety Co., 754 A.2d 742, 749, 750-54 (R.I. 2000) (finding pollution-exclusion clauses in Lloyd's policies to be legally synonymous to U.S. pollution-exclusion clauses and holding that term sudden does not include a temporal element);

Tex.-- Union Pac. Res. Co. v. Continental Ins. Co., No. 249-23-98 (Tex. Dist. Ct., Dec. 17, 1998), reprinted in 13 Mealey's Ins. Litig. Rep. No. 11, Section A (Jan. 19, 1999) ("sudden and accidental" means unexpected and

unintended and does not require that an event be quick or abrupt).

(n76)Footnote 74. *Id*.

(n77)Footnote 75. **Del.--** E.I. du Pont de Nemours & Co. v. Allstate Ins. Co., 693 A.2d 1059, 1061 (Del. 1997) ("sudden" means abrupt and applies to initial discharge of pollutants); but *See* New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1199 (3d Cir. 1991) (predicting Delaware law) ("sudden and accidental" means unexpected and unintentional and thus the exception does not apply to intentional discharge);

Iowa-- Iowa Comprehensive Petroleum UST Fund Bd. v. Farmland Mut. Ins. Co., 568 N.W.2d 815, 818-19 (Iowa 1997) ("sudden" must have temporal meaning to give unique meaning to each word because "accidental" means unexpected and unintended);

La.-- Thompson v. Temple, 580 So. 2d 1133, 1134 (La. Ct. App. 1991) (pollution exclusion clauses are intended to exclude coverage for active industrial polluters who knowingly pollute over extended periods of time);

Mich.-- Upjohn v. New Hampshire Ins. Co., 438 Mich. 197, 476 N.W.2d 392, 397-98 (1991) ("sudden" has temporal element as well as a sense of the unexpected);

Minn.-- Board of Regents of Univ. of Minn. v. Royal Ins. Co. of Am., 517 N.W.2d 888, 891-92 (Minn. 1994) (coverage barred for any discharge that was not "sudden," meaning abrupt, and accidental, meaning unexpected and unintended);

Mo.-- Trans World Airlines, Inc. v. Associated Aviation Underwriters, 58 S.W.3d 609, 622 (Mo. Ct. App. 2001) (deliberate is not accidental); *see also* Aetna v. General Dynamics Corp., 968 F.2d 707, 710 (8th Cir. 1992) (applying Missouri Law) (because "accidental" includes unexpected, "sudden" must mean abrupt, otherwise the word sudden would be rendered superfluous);

Mont.-- Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc., 326 Mont. 174, 2005 MT 50, 108 P.3d 469, 476 (2005) (exclusion applies to unintentional pollution because sudden has temporal meaning); Sokolowski v. American W. Ins. Co., 1999 MT 93 , 294 Mont. 210, 980 P.2d 1043, 1046-47 (1999) ("sudden" must have temporal element because accidental already expresses unexpected part of exclusion);

N.J.-- Morton Int'l Inc. v. General Accidents Ins. Co. of Am., 134 N.J. 1, 629 A.2d 831, 847 (1993) ("sudden" has temporal element, however exclusion applies only to intentional discharges);

N.Y.-- Northville Indus. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 89 N.Y.2d 621, 657 N.Y.S.2d 564, 679 N.E.2d 1044, 1047-48 (1997) ("sudden" has temporal meaning); Technicon Elecs. Corp. v. American Home Assurance Co., 74 N.Y.2d 66, 544 N.Y.S.2d 531, 542 N.E.2d 1048, 1050 (1989) (excluding coverage for intentional discharges);

N.C.-- Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374, 379 (1986) ("accident" is "an unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence" allowing for gradual releases to

be sudden and accidental, but denying coverage for contamination leakage over a period of years);

Ohio-- Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 95 Ohio St. 3d 512, 2002 Ohio 2842, 769 N.E.2d 835, 843-44 (2002) (exclusion is triggered by insured's expectation that contamination would migrate); Hybud Equip. Corp. v. Sphere Drake Ins. Co., 64 Ohio St. 3d 657, 597 N.E.2d 1096, 1103 (Ohio 1993) ("sudden" means abrupt), *cert. denied*, 507 U.S. 987 (1993) ;

Okla.-- Kerr-McGee Corp. v. Admiral Ins. Co., 1995 OK 102, 905 P.2d 760, 763-64 (Okla. 1995) (ordinary meaning of "sudden" necessarily implies an element of time and "accident" means unexpected or unintended release, regardless of intent of parties to pollute);

Tenn.-- Drexel Chem. Co. v. Bituminous Ins. Co., 933 S.W.2d 471, 477 (Tenn. Ct. App. 1996) (sudden has a temporal meaning and cannot be sudden when occurring over long period of time in the regular course of business); Terminix Int'l Co. Ltd. P'ship v. Maryland Cas. Co., 956 F.2d 270 (6th Cir. 1992) (under Tennessee law, "sudden and accidental" is unambiguous since sudden means unexpected and unintended);

Tex.-- Union Pac. Res. Co. v. Continental Ins. Co., No. 249-23-98 (Tex. Dist. Ct. Dec. 17, 1998) reprinted in 13 Mealey's Ins. Litig. Rep. No. 11, Section A (Jan. 19, 1999) (sudden means unexpected and unintended and does not require a quick or abrupt event); *but see* Mustang Tractor & Equip. Co. v. Liberty Mut. Ins. Co., 76 F.3d 89, 91-92 (5th Cir. 1996) (applying Texas law) ("sudden" may only reasonably be construed to mean quick or brief);

Utah-- Sharon Steel Corp. v. Aetna Cas. & Sur. Co., 931 P.2d 127, 133 (Utah 1997) (sudden means abrupt and accidental means unexpected and unintended);

Va.-- Morrow Corp. v. Harleysville Mut. Ins. Co., 101 F. Supp. 2d 422, 431 (E.D. Va. 2000) (applying Virginia law) (exception is only triggered if discharge is both unexpected and quick or abrupt);

Wyo.-- Sinclair Oil Corp. v. Republic Ins. Co., 929 P.2d 535, 543 (Wyo. 1996) (finding "sudden and accidental" has a temporal aspect that requires occurrence to happen abruptly, without any significant notice and unexpectedly).

(n78)Footnote 76. *See, e.g.*:

Cal.-- Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal. App. 4th 715, 15 Cal. Rptr. 2d 815 (1993) ;

Iowa-- Iowa Comprehensive Petroleum UST Fund Bd. v. Farmland Mut. Ins. Co., 568 N.W.2d 815, 818-19 (Iowa 1997) ("sudden" must have temporal meaning to give unique meaning to each word because "accidental" means unexpected and unintended);

Minn.-- Board of Regents of Univ. of Minn. v. Royal Ins. Co. of Am., 517 N.W.2d 888, 892 (Minn. 1994) (coverage barred for any discharge that was not "sudden," meaning abrupt, and accidental, meaning unexpected and unintended, to define otherwise would create redundancy);

Mont.-- Sokolowski v. American W. Ins. Co., 294 Mont. 210, 1999 MT 93,

980 P.2d 1043 (1999) ("sudden" must have temporal element because accidental already expresses unexpected part of exclusion);

N.J.-- Morton Int'l Inc. v. General Accidents Ins. Co. of Am., 134 N.J. 1, 629 A.2d 831, 847 (1993) (overruling precedent which merely reiterated "occurrence" by defining "sudden" as unexpected and unintended).

N.M.-- United Nuclear Corp. v. Allstate Ins. Co., 2011 NMCA 39, 2011 N.M. App. LEXIS 10 (N.M. Ct. App. Mar. 9, 2011) , *cert granted* (May 4, 2011) (in suit against mining company for discharging pollutants, company's CGL policies excluded coverage for injury caused by pollution, unless pollution was "sudden and accidental;" because meaning of term "sudden" was unambiguous, district court correctly held that it meant quick, abrupt, or otherwise a temporarily short period of time, and, thus, complaint's allegations clearly fell outside scope of policy, because its pollution discharges were not "sudden and accidental"). A lengthy dissent would have found the term ambiguous.

(n79)Footnote 77. **Alaska--** Mapco Petroleum Inc. v. Central Nat'l Ins. Co. of Omaha, 795 F. Supp. 941, 947 (D. Alaska 1991) (applying Alaska law) ("sudden and accidental" has temporal meaning and refers to that which occurs without notice);

Cal.-- FMC Corp. v. Plaisted & Cos., 61 Cal. App. 4th 1132, 72 Cal. Rptr. 2d 467, 475 (1998) (sudden means abrupt and does not apply to gradual releases even if they are unexpected);

Conn.-- Buell Indus., Inc. v. Greater N.Y. Mut. Ins. Co., 259 Conn. 527, 791 A.2d 489, 498-99 (2002) (release of pollutants must be rapid or abrupt);

Fla.-- Dimmitt Chevrolet, Inc. v. Southeastern Fid. Ins. Corp., 636 So. 2d 700, 704 (Fla. 1993) (common usage of "sudden" requires temporal element of immediacy or abruptness);

Idaho-- North Pac. Ins. Co. v. Mai, 130 Idaho 251, 939 P.2d 570, 572 (1997) (sudden means "short period of time");

Kan.-- Farm Bureau Mut. Ins. Co. v. Laudick, 18 Kan. App. 2d 782, 859 P.2d 410, 412 (1993) ("sudden and accidental" should be given temporal meaning and "sudden" combines both the elements of without notice or warning and quick or brief in time);

Ky.-- Transamerica Ins. Co. v. Duro Bag Mfg. Co., 50 F.3d 370, 372-73 (6th Cir. 1995) (applying Kentucky law) (sudden is temporal and applies to the pollution exclusion);

Me.-- A. Johnson & Co. v. Aetna Cas. & Sur. Co., 933 F.2d 66, 72 (1st Cir. 1991) (sudden means temporally abrupt and exclusion applies to pollution as regular part of business);

Md.-- American Motorists Ins. Co. v. ARTRA Group, Inc., 338 Md. 560, 659 A.2d 1295, 1309 (1995) (sudden has temporal aspect and long-standing business practices are not sudden or accidental);

Mass.-- Lumbermens Mut. Casualty Co. v. Belleville Indus., 407 Mass. 675, 555 N.E.2d 568, 572 (1990) (sudden has a temporal quality), *cert. denied*, 502

U.S. 1073 (1992) ;

Neb.-- Dutton-Lainson Co. v. Continental Ins. Co., 271 Neb. 810, 716 N.W.2d 87, 99 (2006) (reasonable person would understand sudden as referring to the temporally abrupt release of pollutants);

N.M.-- Mesa Oil, Inc. v. Insurance Co. of N. Am., 123 F.3d 1333, 1339-40 (10th Cir. 1997) (predicting New Mexico law) (sudden has a temporal aspect);

Pa.-- Redevelopment Auth. of the City of Philadelphia v. Insurance Co. of N. Am., 450 Pa. Super. 256, 675 A.2d 1256 (1996) (coverage is barred by gradual release that is not sudden).

(n80)Footnote 78. **Ala.--** Alabama Plating Co. v. United States Fid. & Guar. Co., 690 So. 2d 331 (Ala. 1996) (discharge resulting in migration of contaminants in groundwater was unexpected and unintended when contamination occurred despite insured following instructions for disposal);

Ark.-- Murphy Oil USA, Inc. v. Unigard Sec. Ins. Co., 347 Ark. 167, 61 S.W.3d 807, 814 (2001) (sudden and accidental refers to initial discharge of pollutant);

Cal.-- FMC Corp. v. Plaisted & Cos., 61 Cal. App. 4th 1132, 72 Cal. Rptr. 2d 467, 475 (1998) (sudden and accidental applies only to abrupt releases of pollutants); Shell Oil v. Winterthur Swiss Ins. Co., 12 Cal. App. 4th 715, 15 Cal. Rptr. 2d 815, 841-42 (1993) (the "abruptness of the commencement of the release or discharge of the pollutant is the essential element" and that polluting event is not required to terminate quickly or have brief duration);

Colo.-- Compass Ins. Co. v. City of Littleton, 984 P.2d 606, 617-18 (Colo. 1999) (relevant polluting event was discharge, dispersal, release or escape is from containment area into the air, land, or groundwater);

Del.-- E.I. du Pont de Nemours & Co. v. Allstate Ins. Co., 693 A.2d 1059, 1062 (Del. 1997) (sudden means abrupt and applies to initial discharge of pollutants);

Ga.-- Claussen v. Aetna Cas. & Sur. Co., 259 Ga. 333, 380 S.E.2d 686, 688-89 (1989) ("sudden" does not describe the duration of an event, but rather its unexpected release so that each portion has meaning);

Mich.-- South Macomb Disposal Auth. v. Westchester Fire Ins. Co., 239 Mich. App. 344, 608 N.W.2d 814, 817 (2000) (behavior of migration pattern after release is irrelevant to determining whether "sudden and accidental;" relevant discharge is initial release of pollutants);

N.J.-- Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 134 N.J. 1, 629 A.2d 831, 847 (1993) ("sudden and accidental" must be narrowly limited to initial release of pollutant), *cert. denied*, 512 U.S. 1245 (1994) ;

N.Y.-- Northville Indus. Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 89 N.Y.2d 621, 657 N.Y.S.2d 564, 679 N.E.2d 1044, 1047-48 (1997) ("sudden" has temporal meaning and focuses on the initial release of pollutants);

Wash.-- Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha, 126 Wash. 2d 50, 882 P.2d 703, 723-24 (1994) (focus on damages is unacceptable for "sudden and accidental" evaluation, rather must focus on the polluting event).

(n81)Footnote 79. **Ala.--** Alabama Plating Co. v. United States Fid. & Guar. Co., 690 So. 2d 331 (Ala. 1996) (gradual pollution covered because release and subsequent migration into groundwater was unexpected and unintended);

Cal.-- Shell Oil v. Winterthur Swiss Ins. Co., 12 Cal. App. 4th 715, 15 Cal. Rptr. 2d 815, 841-42 (1993) ("abruptness of the commencement of the release or discharge of the pollutant is the essential element" and that polluting event is not required to terminate quickly or have brief duration);

Ill.-- Outboard Marine Corp. v. Liberty Mut. Ins. Co., 154 Ill. 2d 90, 607 N.E.2d 1204, 1219 (1992) (release or discharge may be sudden and accidental even when it leads to gradual release).

(n82)Footnote 80. **Conn.--** Buell Indus., Inc. v. Greater N.Y. Mut. Ins. Co., 259 Conn. 527, 791 A.2d 489, 498-99 (2002) (release of pollutants must be rapid or abrupt);

Iowa-- Iowa Comprehensive Petroleum UST Fund Bd. v. Farmland Mut. Ins. Co., 568 N.W.2d 815 (Iowa 1997) (coverage is barred for soil and groundwater contamination by gasoline released from underground tanks over a period of many years);

Ky.-- Transamerica Ins. Co. v. Duro Bag Mfg. Co., 50 F.3d 370 (6th Cir. 1995) (applying Kentucky law) (deliberate discharge from landfill over period of years bars coverage);

La.-- Thompson v. Temple, 580 So. 2d 1133 (La. Ct. App. 1991) (exclusion applies to known pollution over a substantial period of time; coverage allowed where injuries from discharge of carbon monoxide from bathroom heater caused "sudden and accidental" pollution);

Pa.-- Redevelopment Auth. of the City of Philadelphia v. Insurance Co. of N. Am., 450 Pa. Super. 256, 675 A.2d 1256 (1996) (coverage is barred by gradual release of petroleum products over 11-year period).

(n83)Footnote 81. *See, e.g.*, Maryland Cas. Co. v. Continental Cas. Co., 332 F.3d 145 (2d Cir. 2003) (pollution exclusions preclude coverage for gradual pollution unless the pollutant discharge is sudden and accidental).

(n84)Footnote 82. **Ala.--** Hicks v. American Res. Ins. Co., 544 So. 2d 952 (Ala. 1989) (no coverage for contamination which occurs in industry-related activities of a strip-mining plant);

Cal.-- Golden Eagle Refinery Co. v. Associated Int'l Ins. Co., 85 Cal. App. 4th 1300, 102 Cal. Rptr. 2d 834 (2001) (coverage must be denied because sudden and non-sudden events which occurred in course of business at oil refinery must be allocated to recover under insurance policy);

Conn.-- Stamford Wallpaper Co. v. TIG Ins., 138 F.3d 75 (2d Cir. 1998) (applying Connecticut law) (no coverage when there is no evidence suggesting damage resulted from anything other than waste disposal in the ordinary course

of business over an extended period of time);

Ga.-- Virginia Props., Inc. v. Home Ins. Co., 74 F.3d 1131 (11th Cir. 1996) (applying Georgia law) (no coverage when overwhelming evidence that insured intentionally discharged hazardous chemicals onto and into the soil over a long period of time as a by-product of its ordinary operations);

Ill.-- Fruit of the Loom, Inc. v. Travelers Indem. Co., 284 Ill. App. 3d 485, 672 N.E.2d 278 (1996) (no coverage where the insured expected the discharge of pollutants in the ordinary course of business);

Me.-- A. Johnson & Co. v. Aetna Cas. & Sur. Co., 933 F.2d 66 (1st Cir. 1991) (applying Maine law) (no coverage because pollution from waste disposal was part of regular business activities);

Md.-- American Motorists Ins. Co. v. ARTRA Group, Inc., 338 Md. 560, 659 A.2d 1295, 1309-10 (1995) (where longstanding continuous pollution occurred as part of business activity, it is not necessary to evaluate individual releases; exclusion precludes coverage);

N.H.-- Great Lakes Container Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 727 F.2d 30 (1st Cir. 1984) (applying New Hampshire law) (no coverage for groundwater pollution from drum waste that results from regular business activity);

N.C.-- Home Indem. Co. v. Hoechst Celanese Corp., 128 N.C. App. 189, 494 S.E.2d 774 (1998) (no coverage for pollution from day-to-day operations of polyester manufacturing plant);

S.D.-- American Universal Ins. Co. v. Whitewood Custom Treaters, Inc., 707 F. Supp. 1140 (applying South Dakota law) (D.S.D. 1989) (coverage is precluded because release of chemicals from burst frozen pipes occurred on continuous basis);

Tenn.-- Drexel Chem. Co. v. Bituminous Ins. Co., 933 S.W.2d 471 (Tenn. Ct. App. 1996) ("sudden" has a temporal meaning and cannot apply to pollution from delivery of chemicals into formulation facility because pollution is regular and ongoing as part of normal operations);

Utah-- Sharon Steel Corp. v. Aetna Cas. & Sur. Co., 931 P.2d 127 (Utah 1997) (pollution exclusion precludes coverage if residues from copper, lead and zinc refining is released as part of insured's normal course of business over a sixty-year period).

(n85)Footnote 83. Federated Mut. Ins. Co. v. Botkin Grain Co., 64 F.3d 537 (10th Cir. 1995) (applying Kansas law) ("sudden" has a temporal meaning and applies to both inception and duration of the polluting event).

(n86)Footnote 83.1. *See* **U.S./Colo.**-- Allstate Ins. Co. v. Von Metzger, 774 F. Supp. 2d 1157, 1161 (D. Colo. 2011) (in Colorado, a pollution exclusion is not absolute if it contains an exception for " 'sudden and accidental' releases of pollutants").

(n87)Footnote 84. *See, e.g.*, Susan Neuman and Robert D. Chesler, *Environmental Insurance Coverage*, *in* Environmental Law Practice Guide §

8.01[1][B] (Michael B. Gerrard ed.), (coverage remained for pollution arising out of the insured's products or completed operations, or in connection with certain off-premise work, as evidenced by the fact that in 1993, the ISO developed a more restrictive "total pollution exclusion"). *See also* Eugene R. Anderson and John G. Nevius, *Insurance Issues in* Brownfields Law and Practice § 28.01[4][d], n. 72 (Michael B. Gerrard ed.), (in 1985, the ISO noted the new form was intended to re-affirm coverage intended under the pre-1985 contract); Doerr v. Mobil Oil Corp., 774 So. 2d 119, 135 (La. 2000) (conducting comprehensive review of drafting history and concluding "absolute" and "total" pollution exclusions must be limited to typical, long-term environmental pollution because the "exclusion was neither designed nor intended to be read strictly to exclude coverage for all interactions with irritants or contaminants of any kind").

(n88)Footnote 85. *See* Ann Alexander, *How "Absolute" is an Absolute Exclusion: Insurance Coverage for Indoor Pollution*, Real Estate Weekly, 1 July 1998, 29 May 2008, < http://www.thefreelibrary.com/_/print/ PrintArticle.aspx?id=20949782>.

(n89)Footnote 86. Randy J. Maniloff, *Absolute Pollution Exclusion--New Jersey Supreme Court Finally Ends Its Silence, High Court Limits the Exclusion to the Swamps of Jersey*, [Online] 29 May 2008, http://www.whiteandwilliams.com/CM/Publications/ Publications406.asp.

See also **US/MD**-- Travelers Indem. Co. v. MTS Transp., LLC, 2012 U.S. Dist. LEXIS 127847 (W.D. Pa. Sept. 7, 2012) . In a lawsuit arising from a petroleum asphalt spill, the asphalt hauler was entitled to declaratory judgment regarding its excess liability insurer's obligation to defend and potentially indemnify the hauler with respect to all claims resulting from the spill because, under Maryland law, the policy's pollution exclusion clause would only bar coverage in cases of traditional environmental pollution. The reasoning of the Maryland courts supported the conclusion that spilled petroleum asphalt on a roadway did not constitute traditional environmental pollution as defined in CERCLA.

(n90)Footnote 87. *Id*.

(n91)Footnote 87.1. **U.S./Nev.**-- Century Sur. Co. v. Casino West, Inc., 2010 U.S. Dist. LEXIS 19807 (D. Nev. Mar. 4, 2010) .

(n92)Footnote 87.2. **US/NV**-- Century Sur. Co. v. Casino West, Inc., 677 F.3d 903 (9th Cir. 2012) .

(n93)Footnote 87.3. **U.S./S.C.**-- Ngm Ins. Co. v. Carolina's Power Wash & Painting, LLC, 2010 U.S. Dist. LEXIS 2362 (D.S.C. Jan. 12, 2010) , *aff'd sub nom.* Ngm v. Kuras, 407 Fed. Appx. 653 (4th Cir. 2011) . But see **US/VA**-- Evanston Ins. Co. v. Harbor Walk Dev., LLC, 814 F. Supp. 2d 635 (E.D. Va. 2011) (pollution exclusions clearly and unambiguously applied to injuries caused by both traditional and non-traditional pollution; court cited City of Chesapeake v. States Self-Insurers Risk Retention Group, Inc., 271 Va. 574, 628 S.E.2d 539 (2006)) ; Dragas Mgmt. Corp. v. Hanover Ins. Co., 798 F. Supp. 2d 766 (E.D. Va. 2011) (in case involving installation of Chinese drywall, which contained levels of elemental sulfur approximately 375 times greater than representative samples of domestic drywall, court granted insurers' motion for summary judgment because pollution exclusion was not ambiguous and sulfur gases in this case were a pollutant that dispersed into atmosphere, causing the property damage at issue).

(n94)Footnote 87.4. **US/GA**-- Scottsdale Ins. Co. v. Pursley, 487 Fed. Appx. 508 (11th Cir. 2012) .

(n95)Footnote 87.5. **GA**-- Reed v. Auto-Owners Ins. Co., 284 Ga. 286, 667 S.E.2d 90 (2008) .

(n96)Footnote 87.6. 667 S.E.2d at 93 .

(n97)Footnote 87.7. **US/IL**-- Scottsdale Indem. Co. v. Vill. of Crestwood, 784 F. Supp. 2d 988 (N.D. Ill. 2011) , *aff'd*, 673 F.3d 715 (7th Cir. 2012) .

(n98)Footnote 88. *See* **Ohio--** Longaberger Co. v. U.S. Fidelity & Guar. Co., 31 F. Supp. 2d 595, 599 (S.D. Ohio 1998) (holding"under Ohio law, where a provision excluding coverage in an insurance policy is clear and unambiguous, the plain language of the exclusion provision applies") (citing Moorman v. Prudential Ins. Co. of Am., 4 Ohio St. 3d 20, 445 N.E.2d 1122, 1124 (1983) (per curiam);

Kan.-- United States v. A.C. Strip, 868 F.2d 181, 185 (6th Cir. 1989) (applying Kansas law).

(n99)Footnote 89. Danbury Ins. Co. v. Novella, 727 A.2d 279, 283, 45 Conn. Supp. 551 (1998) (holding lead is not a pollutant within the pollution exclusion clause, relying on the policy's definition of a pollutant as a "contaminant" or "irritant," but also using the dictionary definitions of the words, "contaminant," "contaminate," "pollutant," and "pollute.").

(n100)Footnote 90. Matcon Diamond, Inc. v. Penn Nat'l Ins. Co., 815 A.2d 1109, 1113 (Pa. Super. Ct. 2003) (stating the Clean Air Act considers carbon monoxide a pollutant).

(n101)Footnote 91. Regional Bank of Colo., N.A. v. St. Paul Fire & Marine Ins. Co., 35 F.3d 494, 498 (10th Cir. 1994) (applying Colorado law) ("[w]hile a reasonable person of ordinary intelligence might well understand carbon monoxide is a pollutant when it is emitted in an industrial or environmental setting, an ordinary policyholder would not reasonably characterize carbon monoxide emitted from a residential heater which malfunctioned as "pollution." It seems far more reasonable that a policyholder would understand the exclusion as being limited to irritants and contaminants commonly thought of as pollution and not as applying to every possible irritant or contaminant imaginable").

(n102)Footnote 92. Acid Vapor; Ammonia; Bacteria--Legionella Pneumophila; Bacteria--Listeria; Benzene; Chemically Treated Wood Chips; Chromium; Cleaning Solvent; Coal Tar; Cooking Grease; Crude Oil; DDT; Deck Sealant; Defoliant; Diesel Fuel; Dioxin; Dust--Cement; Dust--Coal; Dust--Concrete; Dust--Construction; Dust--PVC; Fill Material (Dirt & Rocks); Foundry Sand; Fumes--Asphalt & Paper Production; Fumes--Chemical; Fumes--Concrete Curing Agent; Fumes--Furnace Exhaust; Fumes--Gasoline; Fumes--Paint; Fumes--Slaughterhouse; Hydrogen Sulfide Gas; Industrial Plant Emissions; Insecticide; Kidney Dialysis Waste (Lead); Kitchen Grease; Lead; Liquid Cement Cleaner; Liquid Chlorine; Manure; Mercury; Methane Gas; Methanol, Lubrizol; Methyl Parathion; Mine Tailings; Mining Waste; Naturally Occurring Radioactive Material; Nitrogen Dioxide; Nuclear Waste; PCB; PCE; Petroleum; Phenol Gas; Radioactive Waste; Salt Cake (Aluminum Smelting Residue); Salt Water; Sedimentation; Sewer Gas; Silica; Skunk Spray; Sludge; Smoke and Odor Eliminator Spray; Soot; Styrene Vapors; Sulfuric Acid; TCE; Vegetable Brine; Xylene.

Heating oil is considered a pollutant by all states having case law on the issue. The only exception is that a jurisdiction in Canada does not include heating oil as a pollutant. *See* Harvey Oil Ltd. v. Lombard Gen. Ins. Co. of Can., [2003] N.J. No. 273 (T.D.) (QL), *aff'd*, [2004] N.J. No. 47 (C.A.) (QL).

(n103)Footnote 93. Carbon Dioxide; Excavated Fill; Flood Water; Formic Acid; Fumes--Manganese Welding; Fumes--Roofing Product; Mastic Remover; Mosqui to Abatement Fogging; Muriatic Acid; Mustard Gas Agents; Natural Gas; Soil Fumigant; Titanium Tetrachloride.

(n104)Footnote 94. Porterfield v. Audubon Indem. Co., 856 So. 2d 789, 800 (Ala. 2002) .

(n105)Footnote 95. *See, e.g.*:

Cal.-- California courts have reached mixed results. Flintkote Co. v. Am. Mut. Liab. Ins., No. 808-594 (Cal. Super. Ct. Aug. 17, 1993), reprinted in 7 Mealey's Ins. Litig. Rep. No. 45, Sec. A (Oct. 5, 1993) (declining to consider asbestos as a pollutant); Sunset-Vine Tower, Ltd. v. Committee & Indus. Ins. Co., No. C738874 (Cal. Super. Ct. Apr. 12, 1993), reprinted in 7 Mealey's Ins. Litig. Rep. No. 29, Sec. G (June 1, 1993) (considering asbestos as a pollutant subject to the pollution exclusion). *See also* http://library.findlaw.com/2003/Jan/29/132510.html.

Ga.-- Am. States Ins. Co. v. Zippro Constr. Co., 216 Ga. App. 499, 455 S.E.2d 133, 135 (1995) (little question that asbestos is a pollutant);

Ind.-- Employers Mut. Cas. Co. v. DFX Enters, Inc., No. 20D03-9505 (Ind. Super. Ct. Apr. 24, 1997) reprinted in 11 Mealey's Ins. Litig. Rep. No. 36, Sec. G (July 22, 1997) (excluded pollutant);

N.J.-- Edwards & Caldwell LLC v. Gulf Ins. Co., No. 05-2231, 2005 U.S. Dist. LEXIS 27506 (D.N.J. Aug. 29, 2005) (asbestos is an excluded pollutant);

N.Y.-- Kosich v. Metropolitan Prop. & Cas. Ins. Co., 626 N.Y.S.2d 618, 618-19, 1995 N.Y. App. Div. LEXIS 6735 (N.Y. App. Div. 1995) (applying New Jersey law) (excluded pollutant);

Or.-- Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n, 953 F.2d 1387 (9th Cir. 1992) (excluded pollutant under Oregon law);

Ohio-- Owens-Corning Fiberglas Corp. v. Allstate Ins. Co., 74 Ohio Misc. 2d 144, 660 N.E.2d 746, 751 (Ohio Com. Pl. Ct. 1993) ("it is far from certain whether asbestos constitutes an 'irritant,' 'contaminant,' or 'pollutant' within the meaning of the exclusion, as a matter of law");

Pa.-- Westchester Fire Ins. Co. v. Treesdale Inc., No. 05CV1523, 2008 U.S. Dist. LEXIS 37232 (W.D. Pa. May 2, 2008) (refusing to apply the pollution exclusion to asbestos).

(n106)Footnote 96. **Cal.--** East Quincy Servs. Dist. v. Cont'l Ins. Co., 864 F. Supp. 976 (E.D. Cal. 1994) (exclusion specifically applies to biological materials and waste, and it applies to the seepage of bacteria in the soil);

N.Y.-- Eastern Mut. Ins. Co. v. Kleinke, 293 A.D.2d 801, 739 N.Y.S.2d 657, 2002 N.Y. App. Div. LEXIS 3410 (2002) (plaintiff was obligated to defend against certain defendants because E. coli was not listed as a pollutant).

(n107)Footnote 97. **Colo.--** Regional Bank of Colo., N.A. v. St. Paul Fire & Marine Ins. Co., 35 F.3d 494, 498 (10th Cir. 1994) (applying Colorado law and holding "[w]hile a reasonable person of ordinary intelligence might well understand carbon monoxide is a pollutant when it is emitted in an industrial or environmental setting, an ordinary policyholder would not reasonably characterize carbon monoxide emitted from a residential heater which malfunctioned as 'pollution.' ");

Ill.-- American States Ins. Co. v. Koloms, 177 Ill. 2d 473, 687 N.E.2d 72, 82 (1997) ("[g]iven the historical background of the absolute pollution exclusion and the drafters' continued use of environmental terms of art, we hold that the exclusion applies only to those injuries caused by traditional environmental pollution. The accidental release of carbon monoxide in this case, due to a broken furnace, does not constitute the type of environmental pollution contemplated by the clause");

Iowa-- Bituminous Cas. Corp. v. Sand Livestock Sys., Inc., 728 N.W.2d 216 (Iowa 2007) (plain language of the pollution exclusion clause, which includes carbon monoxide, clearly protects the insurance company from liability; declining to decide "whether a reasonable policy holder would expect the exclusion to only pertain to "traditional environmental pollution");

La.-- Thompson v. Temple, 580 So. 2d 1133, 1135 (La. Ct. App. 1991) (pollution exclusion clause in a homeowner's insurance policy does not operate to exclude injuries caused by a leaking gas heater);

Mass.-- Western Alliance Ins. Co. v. Gill, 426 Mass. 115, 686 N.E.2d 997 (1997) (rejecting prior holding of Essex Ins. Co. v. Tri-Town Corp, 863 F. Supp. 38 (D. Mass. 1994) and concluding carbon monoxide is not a pollutant);

Md.-- Assicurazioni Generali, S.p.A. v. Neil, 160 F.3d 997, 1000 (4th Cir. 1998) (carbon monoxide is a pollutant under Maryland law because the provision "excludes from coverage '[t]he contamination of any environment by pollutants that are introduced at any time, anywhere, in any way.' ");

Minn.-- Cont'l Cas. Co. v. Advance Terazzo & Tile Co., 462 F.3d 1002 (D. Minn. 2005) (applying Minnesota law) (citing other jurisdictions and stating carbon monoxide is a pollutant);

N.Y.-- Stoney Run Co. v. Prudential-LMI Commercial Ins. Co., 47 F.3d 34 (2d Cir. 1995) ; Ruth v. Excelsior Ins. Co., No. 124474 (N.Y. Sup. Ct., 1994), reprinted in 8 Mealey's Ins. Litig. Rep. No. 44, Sec. B. (Sept. 27, 1994) (absolute pollution exclusion does not bar coverage for injuries sustained as a result of carbon monoxide);

Ohio-- Anderson v. Highland House Co., 93 Ohio St. 3d 547, 757 N.E.2d 329, 334 (2001) (carbon monoxide is not a pollutant);

Pa.-- Reliance Ins. Co. v. Moessner, 121 F.3d 895, 902 (3d Cir. 1997) (carbon monoxide is a pollutant) (applying Pennsylvania law) (citing Madison Const. v. Harleysville Mut. Ins., 451 Pa. Super. 136, 678 A.2d 802, 806 (1996))

; Matcon Diamond, Inc. v. Penn Nat'l Ins. Co., 815 A.2d 1109, 1113 (Pa. Super. Ct. 2003) (carbon monoxide is a pollutant within the meaning of "irritant" or "contaminant" and stating the Clean Air Act considers carbon monoxide a pollutant);

Wisc.-- Langone v. Am. Family Mut. Ins. Co., 300 Wis. 2d 742, 731 N.W.2d 334, 336 (Ct. App. 2007) (carbon monoxide is not a pollutant within meaning of pollution exclusion clause).

(n108)Footnote 98. **Ind.--** Freidline v. Shelby Ins. Co., 774 N.E.2d 37, 40 (Ind. 2002) (pollution exclusion inapplicable to bodily injury claim arising out of carpet glue fumes);

Mich.-- Carpet Workroom v. Auto Owners Ins. Co., No. 223646, 2002 Mich. App. LEXIS 1133 (Mich. Ct. App. July 30, 2002) (carpet glue is included as a pollutant) (citing McKusick v. Travelers Indem. Co., 246 Mich. App. 329, 632 N.W.2d 525 (2001)) .

(n109)Footnote 99. **N.J.--** Nav-Its, Inc. v. Selective Ins. Co. of Am., 183 N.J. 110, 869 A.2d 929, 930 (2005) (pollution exclusion applies to traditional environmental pollution and is not a bar to coverage where the occurrence of the pollutant sealing fumes was within a single 48-hour period);

Va.-- Firemen's Fund Ins. Co. of Wash., D.C. v. Kline & Son Cement Repair, Inc., 474 F. Supp. 2d 779 (applying Virginia law) (E.D. Va. 2007) (fumes emanating from epoxy/eurathane sealant were excluded "pollutants" even though not traditional environmental pollution).

(n110)Footnote 100. **Ark.--** Anderson Gas & Propane, Inc. v. Westport Ins. Corp., 84 Ark. App. 310, 140 S.W.3d 504, 509 (2004) (holding that gasoline in a policy's definition of pollutant could fall under irritant or contaminant, therefore a genuine issue of material fact existed, and summary judgment was inappropriate);

Cal.-- Legarra v. Federated Mut. Ins. Co., 35 Cal. App. 4th 1472 , 42 Cal. Rtpr. 2d 101, 106 (1995) ("[The insured's] contention that petroleum is not a pollutant within this definition is belied both by science and common sense.");

Ga.-- Truitt Oil & Gas Co. v. Ranger Ins. Co., 231 Ga. App. 89, 498 S.E.2d 572, 573 (1998) (disagreeing with plaintiff's contention that gasoline is not a pollutant);

Ill.-- Millers Mut. Ins. Ass'n of Ill. v. Graham Oil Co., 282 Ill. App. 3d 129, 668 N.E.2d 223, 226 (1996) (gasoline is a pollutant within meaning of pollution exclusion);

Kan.-- Crescent Oil Co., Ins. v. Federated Mut. Ins. Co., 20 Kan. App. 2d 428, 888 P.2d 869, 870 (1995) (gasoline leaking from an underground storage tank was a pollutant);

Miss.-- Harrison v. R.R. Morrison & Son, Inc., 862 So. 2d 1065, 1072 (La. Ct. App. 2003) (applying Mississippi law, the pollution exclusion absolutely bars gasoline as a liquid);

Mo.-- Hocker Oil Co. v. Baker-Phillips-Jackson, Inc., 997 S.W.2d 510 (Mo.

Ct. App. 1999) (holding "as a matter of first impression, gasoline is not a 'pollutant' within the meaning of pollution exclusion");

Pa.-- Wagner v. Erie Ins. Co., 801 A.2d 1226, 1229, 2002 PA Super 166 (Pa. Super. Ct. 2002) , *aff'd*, 577 Pa. 563, 847 A.2d 1274 (2004) (gasoline is a pollutant under pollution exclusion);

Tex.-- Williams v. Brown's Dairy, No. 02-2062, 2003 U.S. Dist. LEXIS 20684 (E.D. La. Nov. 13, 2003) (applying Texas law and excluding coverage for gasoline under the pollution exclusion) (citing Scottsdale Ins. Co. v. Certain Underwriters Subscribing to Policy LPK 0762, 882 So. 2d 805, 807 (La. Ct. App. 2002).

(n111)Footnote 101. **Ala.--** Porterfield v. Audubon Indem. Co., 856 So. 2d 789, 801 (Ala. 2002) (lead paint was a pollutant, but recovery was not barred for lead paint pealing off of the walls, which did not constitute a discharge, dispersal, release, or escape for purposes of a pollution-exclusion clause);

Conn.-- Danbury Ins. Co. v. Novella, 727 A.2d 279, 283, 45 Conn. Supp. 551 (1998) (lead is not a pollutant within the pollution exclusion clause, relying on the policy's definition of a pollutant as a "contaminant" or "irritant," but also using the dictionary definitions of the words, "contaminant," "contaminate," "pollutant," and "pollute");

Ill.-- Ins. Co. of Ill. v. Stringfield, 292 Ill. App. 3d 471, 685 N.E.2d 980, 984 (1997) (lead paint is not a pollutant);

Md.-- Sullins v. Allstate Ins. Co., 340 Md. 503, 667 A.2d 617, 619 (1995) (lead paint is not a pollutant);

Mass.-- For contrasting Massachusetts' authority, see United States Liab. Ins. Co. v. Bourbeau, 49 F.3d 786 (1st Cir. 1995) (applying Massachusetts law and excluding lead paint as a pollutant) and Atlantic Mut. Ins. Co. v. McFadden, 413 Mass. 90, 595 N.E.2d 762, 763-64 (1992) (excluding lead paint as a pollutant and finding the language ambiguous);

Miss.-- Heringer v. Am. Fam. Mut. Ins. Co., 140 S.W.3d 100, 106 (Miss. Ct. App. 2004) (lead paint clearly excluded);

Mo.-- Hartford Underwriter's Ins. Co. v. Estate of Turks, 206 F. Supp. 2d 968 (E.D. Mo. 2002) (predicting Missouri law) (lead paint excluded as a pollutant);

N.J.-- Byrd v. Blumenreich, 317 N.J. Super. 496, 722 A.2d 598, 601-02 (App. Div. 1999) (lead paint is not included in the understanding of a reasonable person reading the clause);

N.Y.-- Westview Assocs. v. Guaranty Nat'l Ins. Co., 95 N.Y.2d 334, 717 N.Y.S.2d 75, 740 N.E.2d 220 (2000) (lead paint not an excluded contaminant); Sphere Drake Ins. Co. v. Y.L. Realty Co., 990 F. Supp. 240 (S.D.N.Y.1997) (applying New York law) (pollution exclusion inapplicable to residential lead-base paint exposure).

Ohio-- Wood v. Auto-Owners Mut. Ins. Co., No. 99-06-068 (Ohio Com. Pl. Ct. Oct. 18, 2000), reprinted in 15 Mealey's Ins. Litig. Rep. No. 1, Sec. E (Nov. 1,

2000) (pollution exclusion clause does not apply to lead paint injury);

Pa.-- Lititz Mut. Ins. Co. v. Steely, 567 Pa. 98, 785 A.2d 975, 977 (2001) (rejecting "majority approach" and holding lead paint is a pollutant and excluded from coverage with pollution exclusion clause);

Va.-- Unison Ins. Co. v. Schulwolf, 53 Va. Cir. 220 (Va. Cir. Ct. City of Norfolk 2000) (lead paint is not included as a pollutant); Monticello Ins. Co. v. Baecher, 857 F. Supp. 1145, 1148 (E.D. Va. 1994) (lead paint is not a pollutant);

Wisc.-- Peace v. Northwestern Nat'l Ins. Co., 228 Wis. 2d 106, 596 N.W.2d 429, 431 (1999) (lead paint is a pollutant).

(n112)Footnote 102. Lewis v. Hartford Cas. Ins. Co., No. C-05-2969, 2006 U.S. Dist. LEXIS 3754 (N.D. Cal. Jan. 30, 2006) (applying California law) (excluding coverage for pesticide under the pollution exclusion).

(n113)Footnote 103. **Ky.--** Sunny Ridge Enters., Inc. v. Fireman's Fund Ins. Co., 132 F. Supp. 2d 525, 527 (E.D. Ky. 2001) (applying Kentucky law) (citing the 5th Circuit as persuasive authority concluded radioactive material is a pollutant);

Minn.-- Minnesota Mining & Mfg. Co. v. Walbrook Ins. Co., No. C1- 95-1775, 1996 Minn. App. LEXIS 36 (Minn. Ct. App. Jan. 9, 1996) (using Black's Law Dictionary and the American Heritage Dictionary to discuss the term "pollutant" and concluding radioactive material is not excluded).

(n114)Footnote 104. **Ala.--** United States Fid. & Guar. Co. v. Armstrong, 479 So. 2d 1164, 1168 (Ala. 1985) (sewage was not a pollutant in this case, but "[w]e should not be understood to hold that raw sewage could never be such a 'pollutant' ");

Ark.-- Minerva Enters., Inc. v. Bituminous Cas. Corp., 312 Ark. 128, 851 S.W.2d 403, 405-07 (1993) (reversing and remanding to allow parol evidence on issue of fact as to whether sewage is a pollutant);

Colo.-- Blackhawk-Central City Sanitation Dist. v. American Guarantee & Liab. Ins. Co., 214 F.3d 1183, 1189 (10th Cir. 2000) (applying Colorado law and holding "pollutant" is a broad term that includes effluent);

Kan.-- City of Salina, Kansas v. Maryland Cas. Co., 856 F. Supp. 1467 (D. Kan. 1994) (excluding coverage under Kansas law);

Mich.-- City of Grosse Pointe Park v. Michigan Mun. Liab. & Prop. Pool, 473 Mich. 188, 702 N.W.2d 106, 112 (2005) (holding sewage was a pollutant); *see also* Michigan Mun. Risk Mgmt. Auth. v. Seaboard Sur. Co., No. 235310, 2003 Mich. App. LEXIS 1869 (Mich. Ct. App. Aug. 7, 2003) (sewage is a pollutant);

N.H.-- Titan Holdings Syndicate, Inc. v. City of Keene, N.H., 898 F.2d 265, 269 (1st Cir. 1990) (applying New Hampshire law and holding sewage falls under the definition of "pollutant" as an "irritant" or "contaminant");

Or.-- Pacific Corp. v. Wausau, No. 93-1569, 8 Mealey's Ins. Litig. Rep. No. 35, Sec. F (July 19, 1994) (Or. Dist. Ct. July 5, 1994) (raw sewage is included

in the definition of waste).

(n115)Footnote 105. **Ga.--** Perkins Hardwood Lumber Co. v. Bituminous Cas. Corp., 190 Ga. App. 231, 378 S.E.2d 407, 409 (1989) (smoke is unambiguously a pollutant), *distinguished by* Kerr-McGee Corp. v. Georgia Cas. & Sur. Co., 256 Ga. App. 458, 568 S.E.2d 484, 488 (2002) (looking at whether insured or other party caused release of pollutant);

Kan.-- Associated Wholesale Grocers, Inc. v. Americold Corp., 261 Kan. 806, 934 P.2d 65, 76 (1997) (smoke is not a pollutant where the National Union policy contained a "hostile fire" endorsement entitled "Amendment of Pollution Exclusion" that stated, "[The pollution exclusion provisions] do not apply to 'bodily injury' or 'property damage' caused by heat, smoke or fumes from a hostile fire. As used in this exclusion, a hostile fire means one which becomes uncontrollable or breaks out from where it was intended to be.").

(n116)Footnote 105.1. **U.S./N.Y.**--Janart 55 West 8th L.L.C. v. Greenwich Ins. Co., 614 F. Supp. 2d 473 (S.D.N.Y. 2009) .

Accord State Auto. Ins. Co. v. DMY Realty Co., LLP, 977 N.E.2d 411 (Ind. Ct. App. 2012) (summary judgment was properly awarded to an insured in its action against an insurer for coverage for expenses incurred in performing environmental site investigation and cleanup because the pollution exclusions and endorsements contained in the insurance policies were ambiguous; hence, the insurer could not deny coverage based on that language).

See also **OH**-- Bosserman Aviation Equip., Inc. v. U.S. Liab. Ins. Co., 183 Ohio App. 3d 29, 2009-Ohio-2526, 915 N.E.2d 687 (Ohio Ct. App. 2009) (in case in which employee alleged he was injured by exposure to aircraft fuel during course of his employment, employer was entitled to summary judgment because pollution exclusion clause in insurer's commercial general liability policy did not clearly and unambiguously exclude coverage). First, while aircraft fuel was a pollutant for purposes of the exclusion, the employee's exposure to it within the normal course of his job duties in the confines of his workplace was outside the exclusion's reasonable expectation, as it was not analogous to the traditional environmental contamination to which the clause was intended to apply. Second, a pollution exclusion clause of this nature did not apply to an exposure to chemicals confined within the employee's work area, as there was no discharge, dispersal, release, or escape of pollutants. Occasions where the employee was exposed to fuel from spills were not a regular occurrence and did not rise to the level of a discharge, dispersal, seepage, migration, release, or escape.

(n117)Footnote 105.2. **VA**-- PBM Nutritionals, LLC v. Lexington Ins. Co., 283 Va. 624, 724 S.E.2d 707 (2012) .

(n118)Footnote 105.3. **US/FL**-- Composite Structures, Inc. v. Cont'l Ins. Co., 903 F. Supp. 2d 1284 (M.D. Fla. 2012) .

(n119)Footnote 106. **Ark.--** Weaver Bros., Inc. v. Chappel, 684 P.2d 123 (Alaska 1984) ;

Ariz.-- Globe Indem. Co. v. Blomfield, 115 Ariz. 5, 562 P.2d 1372 (1977) ;

Cal.-- Clemmer v. Hartford Ins. Co., 22 Cal. 3d 865, 151 Cal. Rptr. 285,

587 P.2d 1098 (1978) ;

Colo.-- Friedland v. Travelers Indem. Co., 105 P.3d 639 (Colo. 2005) (overruling prior authority);

Del.-- Falcon Steel Co. v. Maryland Cas. Co., 366 A.2d 512 (Del. 1976) ;

Haw.-- Standard Oil Co. v. Hawaiian Ins. & Guar. Co., 65 Haw. 521, 654 P.2d 1345 (1982) ;

Idaho-- Leach v. Farmers Auto. Inter-Ins. Exch., 70 Idaho 156, 213 P.2d 920 (1950) ;

Kan.-- Travelers Ins. Co. v. Feld Car & Truck Leasing Corp., 517 F. Supp. 1132 (D. Kan. 1981) (applying Kansas law);

La.-- Jackson v. State Farm Mut. Auto. Ins. Co., 29 So. 2d 177, 211 La. 19 (1946) ; Barnes v. Lumbermen's Mut. Cas. Co., 308 So. 2d 326 (La. Ct. App. 1975) ; Miller v. Marcantel, 221 So. 2d 557 (La. Ct. App. 1969) ;

Me.-- Ouellette v. Maine Bonding & Cas. Co., 495 A.2d 1232 (Me. 1935) ;

Md.-- Md. Ins. Code, art. 48a, § 482;

Mass.-- Johnson Controls, Inc. v. Bowes, 381 Mass. 278, 409 N.E.2d 185 (1980) ;

Mich.-- Wendel v. Swanberg, 384 Mich. 468, 185 N.W.2d 348 (Mich. 1971) ; West Bay Exploration Co. v. AIG Specialty Agencies of Tex., Inc., 915 F.2d 1030 (6th Cir. 1990) (under Michigan law, delay of up to three years in reporting environmental cleanup materially prejudiced insurers);

Minn.-- Reliance Ins. Co. v. St. Paul Ins. Cos., 307 Minn. 338, 239 N.W.2d 922 (1976) ;

Miss.-- Rampy v. State Farm Mut. Auto. Ins. Co., 278 So. 2d 428 (Miss. 1973) ;

Neb.-- M.F.A. Mut. Ins. Co. v. Sailors, 180 Neb. 201, 141 N.W.2d 846 (1966) ;

N.J.-- Cooper v. Government Employees Ins. Co., 51 N.J. 86, 237 A.2d 870 (1968) ;

N.M.-- Foundation Reserve Ins. Co. v. Esquibel, 94 N.M. 132, 607 P.2d 1150 (1980) ;

N.D.-- Finstad v. Steiger Tractor, Inc., 301 N.W.2d 392 (N.D. 1981) ;

Okla.-- Fox v. National Sav. Ins. Co., 1967 OK 27, 424 P.2d 19 (1967) ;

Or.-- Lusch v. Aetna Cas. & Sur. Co., 272 Or. 593, 538 P.2d 902 (1975) ;

Pa.-- Brakeman v. Potomac Ins. Co., 472 Pa. 66, 371 A.2d 193 (1977) ;

R.I.-- Pickering v. American Employers Ins. Co., 109 R.I. 143, 282 A.2d 584 (1971) ;

S.C.-- Squires v. National Grange Mut. Ins. Co., 247 S.C. 58, 145 S.E.2d 673 (1965) ;

Tex.-- Trevino v. Allstate Ins. Co., 651 S.W.2d 8 (Tex. Ct. App. 1983) ;

Wash.-- Pulse v. Northwest Farm Bureau Ins. Co., 18 Wash. App. 59, 566 P.2d 577 (1977) ;

W. Va.-- State Farm Mut. Auto. Ins. Co. v. Milam, 438 F. Supp. 227 (S.D. W. Va. 1977) (applying West Virginia law);

Wisc.-- Wis. Stat. § 631.81 (rebuttable presumption of prejudice to the insurer if notice of a loss is given more than one year late); Gerrard Realty Corp. v. American States Ins. Co., 89 Wis. 2d 130, 277 N.W.2d 863 (1979) ; Ehlers v. Colonial Penn Ins. Co., 81 Wis. 2d 64, 259 N.W.2d 718 (1977) (insured bears burden of proving no prejudice).

(n120)Footnote 107. *See, e.g.*:

Ark.-- Hartford Accident & Indem. Co. v. Loyd, 173 F. Supp. 7 (W.D. Ark. 1959) (applying Arkansas law);

D.C.-- Greenway v. Selected Risks Ins. Co., 307 A.2d 753 (D.C. 1973) ;

Ga.-- Allstate Industrial Properties, Inc. v. Georgia Underwriting Association, 149 Ga. App. 701, 256 S.E.2d 472 (1979) ;

Nev.-- State Farm Mut. Auto. Ins. Co. v. Cassinelli, 67 Nev. 227, 216 P.2d 606 (1950) ;

N.Y.-- Argo Corp. v. Greater N.Y. Mut. Ins. Co., 4 N.Y.3d 332, 794 N.Y.S.2d 704, 827 N.E.2d 762 (2005) ; York Specialty Food, Inc. v. Tower Ins. Co., 47 A.D.3d 589, 850 N.Y.S.2d 409 (2008) (insured's non-compliance with notice requirement vitiates insurance contract, even without a showing of prejudice to the insurer).

(n121)Footnote 108. *Compare* :

U.S.-- Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1214 (2d Cir. 1995) (producer of asbestos products was not sufficiently certain of liability to have "known loss");

Ill.-- Outboard Marine Corp. v. Liberty Mut. Ins. Co., 154 Ill. 2d 90, 607 N.E.2d 1204, 1210 (1992) (doctrine applicable if insured has reason to know when it purchases policy that there is a substantial probability of a loss);

Mass.-- SCA Servs., Inc. v. Transportation Ins. Co., 419 Mass. 528, 646 N.E.2d 394, 397 (1995) (known loss doctrine bars coverage where there is a "substantial probability" that insured will suffer, or has already suffered a loss, at the time the policy incepts);

Pa.-- Rohm & Haas Co. v. Continental Cas. Co., 566 Pa. 464, 781 A.2d 1172

(2001) , *aff'g* 732 A.2d 1236, 1999 PA Super 102 (Pa. Super. Ct. 1999) ("when a sophisticated insured ... is faced with mounting evidence that it will likely incur responsibilities to the extent of the insurance which is sought, the known loss defense should intervene");

R.I.-- Insurance Co. of North America v. Kayser-Roth Corp., 770 A.2d 403, 415 (R.I. 2001) (the known loss doctrine "applies only where the insured is aware of a threat of loss so immediate that it might be stated that the loss was already in progress and such was known at the time of application or issuance of the policy since this doctrine is designed to prevent fraud when coverage is sought to be issued to insure a certainty rather than a fortuity").

(n122)Footnote 109. *Stonewall*, 73 F.3d at 1216 . *See also* National Grange Mut. Ins. Co. v. Udar Corp., No. 98 CV 4650, 2000 U.S. Dist. LEXIS 10646 (S.D.N.Y. July 31, 2000) (prior order to abate a lead-based paint hazard in the landlord/insured's building did not sufficiently specify an injury/loss so as to create a "known loss" even though the order identified a tenant with high blood-lead levels).

(n123)Footnote 110. *See, e.g.*, Montrose Chemical Corp. v. Admiral Ins. Co., 10 Cal. 4th 645, 42 Cal. Rptr. 2d 324, 913 P.2d 878 (1995) (still an insurable "occurrence" even though the insured had already received demand letters from the U.S. EPA seeking to impose liability, until such time as the fact and amount of the insured's liability became final).

(n124)Footnote 111. Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437, 650 A.2d 974, 979 (1994) (citation omitted).

(n125)Footnote 112. *See, e.g.*, Montrose Chem. Corp. v. Admiral Ins. Co., 10 Cal. 4th 645, 42 Cal. Rptr. 2d 324, 913 P.2d 878, 888 (1995) .

(n126)Footnote 113. *See Montrose Chem. Corp.*, 913 P.2d at 893-896 .

(n127)Footnote 114. *See, e.g.*, Dow Chem. Co. v. Assoc. Indem. Corp., 724 F. Supp. 474, 479 (E.D. Mich. 1989) (applying Michigan law) ("trigger rulings are most appropriately derived by reference to the operative policy language, as opposed to the judicial gloss placed upon similar language in ostensibly analogous cases").

(n128)Footnote 115. Cole v. Celotex Corp., 599 So. 2d 1058, 1075 n. 51 (La. 1992) .

(n129)Footnote 116. 633 F.2d 1212 (6th Cir. 1980) .

(n130)Footnote 117. *Id.* at 1222 .

(n131)Footnote 118. *Id.* at 1223 .

(n132)Footnote 119. *See, e.g.*, Commercial Union Ins. Co. v. Sepco Corp., 765 F.2d 1543, 1546 (11th Cir. 1985) (asbestos case interpreting Alabama law); Norfolk Southern Corp. v. Cal. Union Ins. Co., 859 So. 2d 167, 193 (La. Ct. App. 2003) (environmental contamination).

(n133)Footnote 120. **U.S.--** Commercial Union Ins. Co. v. Sepco Corp., 765 F.2d 1543, 1546 (11th Cir. 1985) (victim of asbestos-related illness suffered bodily injury when exposure to asbestos occurred); Insurance Co. of N. Amer. v.

Forty-Eight Insulations, Inc., 633 F.2d 1212, 1222 (6th Cir. 1980) (bodily injury from asbestos includes tissue damage upon inhalation of asbestos);

Cal.-- Clemco Indus. v. Commercial Union Ins. Co., 665 F. Supp. 816, 817 (N.D. Cal. 1987) (California courts likely to hold that silicosis occurs under policy when victim exposed to silica dust);

La.-- Cole v. Celotex Corp., 599 So. 2d 1058, 1076 (La. 1992) (asbestos exposure); Johnson v. Orleans Parish Sch. Bd., 975 So. 2d 698, 714 (La. Ct. App. 2008) (exposure to toxic chemicals from landfill site);

Md.-- Chantel Assocs. v. Mount Vernon Fire Ins. Co., 338 Md. 131, 656 A.2d 779, 786 (1995) (ingestion of lead paint chips);

Mass.-- U.S. Liab. Ins. Co. v. Selman, 70 F.3d 684, 689-90 (1st Cir. 1995) (each exposure to lead-paint chips could be seen as a separate injury-producing occurrence);

N.C.-- Imperial Cas. & Indem. Co. v. Radiator Specialty Co., 862 F. Supp. 1437, 1443 (E.D.N.C. 1994) , *aff'd*, 67 F.3d 534 (4th Cir. 1995) (predicting that N.C. would adopt exposure theory in case of asbestos inhalation);

Tenn.-- State Farm Fire & Cas. Co. v. McGowan, 421 F.3d 433, 437-440 (6th Cir. 2005) (applying Tennessee law) (former building owner's alleged negligence in failing to take care of rotting tree constituted "occurrence");

Tex.-- Guaranty Nat'l Ins. Co. v. Azrock Indus., Inc., 211 F.3d 239, 250-52 (5th Cir. 2000) (asbestos inhalation);

Wisc.-- Kremers-Urban Co. v. American Employers Ins. Co., 119 Wis. 2d 722, 351 N.W.2d 156, 166 (1984) (DES exposure).

(n134)Footnote 121. **Alaska--** MAPCO Alaska Petroleum, Inc. v. Central Nat'l Ins. Co. of Omaha, 795 F. Supp. 941, 948 (D. Alaska 1991) (applying Alaska law) (groundwater contamination, not discovery, triggered coverage; analogy to silicosis);

Colo.-- Scott's Liquid Gold, Inc. v. Lexington Ins. Co., 293 F.3d 1180, 1184 (10th Cir. 2002) (applying Colorado law) (groundwater contamination; event that later results in property damage is "occurrence," regardless of when damage manifests);

Ga.-- Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 926 F. Supp. 1566, 1578 (S.D. Ga. 1995) , *rev'd* on other grounds, 150 F.3d 1327 (11th Cir. 1998) (applying Georgia law);

La.-- Norfolk Southern Corp. v. Cal. Union Ins. Co., 859 So. 2d 167, 191-93 (La. Ct. App. 2003) (plants' wood-preserving operations constituted exposure and triggered policy; parallel drawn to asbestos injuries);

Mo.-- Cont'l Ins. Cos. v. Northeastern Pharm. & Chem. Co., Inc., 842 F.2d 977, 984 (8th Cir. 1998) (en banc) (predicting Missouri law in case involving dioxin contamination); Trans World Airlines, Inc. v. Associated Aviation Underwriters, No. 942-01848 (Mo. Cir. Ct. Oct. 20, 1998) (every release of hazardous waste triggers coverage under exposure theory);

Tex.-- Pilgrim Enters., Inc. v. Maryland Cas. Co., 24 S.W.3d 488, 499 (Tex. App. 2000) (underground contamination from dry cleaner).

(n135)Footnote 122. **Colo.--** American Employer's Ins. Co. v. Pinkard Constr. Co., 806 P.2d 954, 956 (Colo. Ct. App. 1990) (roofing fill material caused gradual corrosion; damages sustained during any period in which there was exposure to material);

Wisc.-- Lund v. American Motorists Ins. Co., 797 F.2d 544, 546 (7th Cir. 1986) (applying Wisconsin law) (collapse of allegedly faulty roof after expiration of policy).

(n136)Footnote 123. *See* Guaranty Nat'l Ins. Co. v. Azrock Indus., Inc., 211 F.3d 239 (5th Cir. 2000) (applying Texas law) (applying exposure trigger to bodily-injury claim but manifestation trigger to property damage claim).

(n137)Footnote 124. Quaker State Minit-Lube Inc. v. Fireman's Fund Ins. Co., 868 F. Supp. 1278, 1304 (D. Utah 1994) (applying Utah law), *aff'd*, 52 F.3d 1522 (10th Cir. 1995) .

(n138)Footnote 125. "What the 'continuous trigger' cases have in common is an injury which begins with some exposure to a harmful substance or condition, which is followed by some period of latency or 'exposure in residence,' and finally terminates in some manifestation of injury." Prolerized Schiabo Neu Co. v. Hartford Acc. & Indem. Co., 990 F. Supp. 356, 363 (D.N.J. 1997) .

(n139)Footnote 126. **Cal.--** Montrose Chem. Corp. v. Admiral Ins. Co., 10 Cal. 4th 645, 42 Cal. Rptr. 2d 324, 913 P.2d 878, 888 (1995) (in case involving disposal of toxic waste, continuous injury trigger should be applied to third party claims of continuous or progressively deteriorating damage or injury alleged to have occurred during policy periods); Stonelight Tile, Inc. v. California Ins. Guarantee Ass'n, 150 Cal. App. 4th 19, 35-36, 58 Cal. Rptr. 3d 74 (2007) (nuisance and air-quality claims related to dust generated by recycling operation); Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co., 45 Cal. App. 4th 1, 52 Cal. Rptr. 2d 690 (1996) (continuous trigger to be applied in cases of progressively deteriorating damage or injury; injury-in-fact trigger establishes onset);

Colo.-- Public Serv. Co. of Colo. v. Wallis and Cos., 986 P.2d 924, 939 (Colo. 1999) (en banc) (continuous theory makes sense in environmental contamination case when property damage is "continuous and gradual and results from many events happening over a long period of time");

Del.-- New Castle County v. Cont'l Cas. Co., 725 F. Supp. 800, 813 (D. Del. 1989) (applying Delaware law), *rev'd on other grounds*, 933 F.2d 1162 (3d Cir. 1991) (gradual leaking from landfill akin to "development of an insidious disease"; every policy from start of injurious process triggered);

D.C.-- Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1045 (D.C. Cir. 1981) (inhalation of asbestos, development of asbestos-related disease and manifestation of disease all constituted injury);

Ga.-- Arrow Exterminators, Inc. v. Zurich Am. Ins. Co., 136 F. Supp. 2d 1340, 1349 (N.D. Ga. 2001) (court will not rewrite occurrence policy to make it

claims-based; continuous is appropriate trigger when occurrence is defined as including "continuous or repeated exposure");

Ill.-- Benoy Motor Sales, Inc. v. Universal Underwriters Ins. Co., 287 Ill. App. 3d 942, 679 N.E.2d 414, 418 (1997) (in case involving release of used crank case oil into groundwater, coverage triggered under all policies in effect while pollution process was occurring); U.S. Gypsum Co. v. Admiral Ins. Co., 268 Ill. App. 3d 598, 643 N.E.2d 1226, 1256 (1994) (property damage by release of asbestos fibers occurred over span of time and could not be linked or confined to different policy periods); Maremont Corp. v. Cont'l Cas. Co., 326 Ill. App. 3d 272, 760 N.E.2d 550, 554 (2001) (landfill pollution); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 283 Ill. App. 3d 630, 670 N.E.2d 740, 748 (1996) (contamination of harbor by PCBs);

Ind.-- Eli Lilly & Co. v. Home Ins. Co., 482 N.E.2d 467, 471 (Ind. 1985) (coverage triggered at any point between ingestion of DES and manifestation of disease); Allstate Ins. Co. v. Dana Corp., 759 N.E.2d 1049, 1060 (Ind. 2001) (groundwater contamination);

Kan.-- Atchison Topeka & Santa Fe Ry. v. Stonewall Ins. Co., 275 Kan. 698, 71 P.3d 1097, 1126 (2003) (employer's continued failure to protect employees from exposure to excessive noise was occurrence that triggered policy);

Md.-- Riley v. United Servs. Auto Ass'n, 161 Md. App. 573, 871 A.2d 599, 609 (2005) (lead paint ingestion); Mayor & City Council of Baltimore v. Utica Mut. Ins. Co., 145 Md. App. 256, 802 A.2d 1070, 1098-1100 (2002) (continuous presence of asbestos constituted property damage within policy meaning; overlap with injury-in-fact trigger noted);

Mass.-- Rubenstein v. Royal Ins. Co. of Am., 44 Mass. App. Ct. 842, 694 N.E.2d 381, 388 , *aff'd*, 429 Mass. 355, 708 N.E.2d 639 (1999) (leaking underground oil tank);

Mo.-- Stark Liquidation Co. v. Florists' Mut. Ins. Co., 243 S.W.3d 385, 394 (Mo. Ct. App. 2007) (continuing damage to orchard caused by infected trees); Emerson Elec. Co. v. Aetna Cas. & Sur. Co., 319 Ill. App. 3d 218, 743 N.E.2d 629, 655-56 (2001) (predicting Missouri law in case involving environmental contamination);

N.J.-- Carter-Wallace, Inc. v. Admiral Ins. Co., 154 N.J. 312, 712 A.2d 1116 (1998) (environmental contamination); Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437, 650 A.2d 974, 995 (N.J. 1994) (asbestos bodily injury and property damage);

Ohio-- Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co., 74 Ohio Misc. 2d 183, 660 N.E.2d 770, 790-91 (Ohio Ct. Com. Pl. 1995) (rejecting exposure and injury-in-fact triggers in context of asbestos inhalation);

Pa.-- Koppers Co. v. Aetna Cas. & Sur. Co., 98 F.3d 1440, 1450 (3d Cir. 1996) (predicting Pennsylvania law) (discussing theory that environmental damage is continuous); J.H. France Refractories Co. v. Allstate Ins. Co., 534 Pa. 29, 626 A.2d 502, 507 (1993) (all stages of asbestos-related disease process sufficient to trigger policy);

Wash.-- American Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co., 134

Wash. 2d 413, 951 P.2d 250, 255 (1998) (arsenic contamination); Skinner Corp. v. Fireman's Fund Ins. Co., No. C95-995WD, 1996 U.S. Dist. LEXIS 9321 (W.D. Wash. Apr. 3, 1996) (asbestos-related illness); Time Oil Co. v. Cigna Prop. & Cas. Ins. Co., 743 F. Supp. 1400, 1417 (W.D. Wash. 1990) (groundwater contamination);

Wisc.-- Society Ins. v. Town of Franklin, 233 Wis. 2d 207, 607 N.W.2d 342, 346 (Ct. App. 2000) (contamination resulting from operation of municipal dump); Wisconsin Elec. Power Co. v. California Union Ins. Co., 142 Wis. 2d 673, 419 N.W.2d 255, 258 (Ct. App. 1987) (injuries to cows caused by stray voltage from faulty power supply).

(n140)Footnote 127. 667 F.2d 1034 (D.C. Cir. 1981) .

(n141)Footnote 128. 667 F.2d at 1047 .

(n142)Footnote 129. *See, e.g.*:

Colo.-- Public Serv. Co. of Colo. v. Wallis & Cos., 986 P.2d 924, 939 n.12 (Colo. 1999) ;

Ohio-- GenCorp, Inc. v. AIU Ins. Co., 104 F. Supp. 2d 740, 748 (N.D. Ohio 2000) (applying Ohio law) (noting that the continuous trigger "closely tracks the injury-in-fact trigger");

Ill.-- U.S. Gypsum Co. v. Admiral Ins. Co., 268 Ill. App. 3d 598, 643 N.E.2d 1226, 1257 (1994) (describing rationale of continuous trigger as substitute for injury-in-fact when actual continuous injury would be impossible to prove).

(n143)Footnote 130. *See, e.g.*, American Home Prods. Corp. v. Liberty Mut. Ins. Co., 748 F.2d 760, 764-65 (2d Cir. 1984) (applying New York law) (insured may establish injury in fact any time from exposure to manifestation; rejecting viewpoint that injury must be diagnosable during policy period).

(n144)Footnote 131. **Cal.--** U.S.F. Ins. Co. v. Clarendon Am. Ins. Co., 452 F. Supp. 2d 972, 990 (C.D. Cal. 2006) (applying California law) (no trigger of coverage for continuing property damage where policy explicitly required first instance of damage to occur in policy period); Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co., 45 Cal. App. 4th 1, 98-99, 52 Cal. Rptr. 2d 690 (1996) (in claim for property damage, injury occurred at installation of asbestos and at each subsequent release into the air);

Colo.-- Hoang v. Assurance Co. of Am., 149 P.3d 798, 802 (Colo. 2007) (occurrence-based policy covers injury or damage that occurs during policy period, regardless of when claim presented);

Conn.-- Aetna Cas. & Sur. Co. v. Abbott Labs, Inc., 636 F. Supp. 546, 550 (D. Conn. 1986) (rejecting both manifestation and exposure theories in case involving multiple claims of DES exposure; when injury occurred must be determined on case-by-case basis); United Techs. Corp. v. Amer. Home Assur. Co., 989 F. Supp. 128, 153 (D. Conn. 1997) (multiple injury-in-fact possible in case of gradual environmental contamination);

Del.-- Hercules, Inc. v. AIU Ins. Co., 784 A.2d 481, 493 (Del. 2001) (fact that insured had been required to prove property damage in each year of its

policy weighed in favor of imposing joint and several liability);

Fla.-- Trizec Props., Inc. v. Biltmore Constr. Co., 767 F.2d 810, 813 (11th Cir. 1985) (applying Florida law) (policy did not require that damages manifest during policy period; allegation that damage to roof began immediately after installation created possibility of coverage);

Haw.-- Sentinel Ins. Co. v. First Ins. Co. of Hawaii, Ltd., 76 Haw. 277, 875 P.2d 894, 918 (1994) (water damage from alleged defective design; injury-in-fact adopted for all standard CGL policies; injury-in-fact approach may be harmonious with continuous trigger if injury is continuous);

Ill.-- Travelers Ins. Co. v. Eljer Mfg., Inc., 197 Ill. 2d 278, 757 N.E.2d 481, 503 (2001) (property damage took place under CGL when claimant suffered water damage from leaks in plumbing system, not when system installed; potential for product's failure does not trigger policy); Zurich Ins. Co. v. Raymark Indus., Inc., 118 Ill. 2d 23, 514 N.E.2d 150, 160 (1987) (injury from inhalation of asbestos fibers occurs at exposure, at sickness preceding medical manifestation, and at manifestation);

Ind.-- PSI Energy, Inc. v. Home Ins. Co., 801 N.E.2d 705, 733 (Ind. Ct. App. 2004) (in environmental contamination case, court adopted injury-in-fact rule based on other Indiana cases that arguably had adopted "continuous" trigger);

Kan.-- Cessna Aircraft Co. v. Hartford Accident & Indem. Co., 900 F. Supp. 1489, 1501-05 (D. Kan. 1995) (Kansas Supreme Court likely to reject manifestation trigger and adopt injury-in-fact approach in groundwater contamination case);

Md.-- Maryland Cas. Co. v. Hanson, 169 Md. App. 484, 902 A.2d 152, 172 (2006) (each elevated blood-lead level in child constituted bodily injury; overlap with continuous trigger noted); Harford County v. Harford Mut. Ins. Co., 327 Md. 418, 610 A.2d 286, 295 (1992) (rejecting manifestation trigger in case involving soil and groundwater contamination from landfill);

Mich.-- Western World Ins. Co. v. Lula Belle Stewart Center, Inc., 473 F. Supp. 2d 776, 785 (E.D. Mich. 2007) (applying Michigan law) (sexual molestation); Dow Chemical Co. v. Fireman's Fund Ins. Co., 217 F. Supp. 2d 816, 820 (E.D. Mich. 2002) (applying Michigan law) (groundwater contamination by pesticides); Gelman Sciences, Inc. v. Fidelity & Cas. Co. of N.Y., 456 Mich. 305, 572 N.W.2d 617 (1998) (seepage from wastewater pond);

Minn.-- Wooddale Builders, Inc. v. Maryland Cas. Co., 722 N.W.2d 283, 292 (Minn. 2006) (defective home construction); *In re* Silicone Implant Ins. Coverage Litig., 667 N.W.2d 405, 414 (Minn. 2006) (breast implants);

Mo.-- Independent Petrochemical Corp. v. Aetna Cas. & Surety Co., 672 F. Supp. 1, 2-3 (D.D.C. 1986) (predicting Missouri law with regard to environmental contamination coverage);

Mont.-- Swank Enters., Inc. v. All Purpose Svcs., Ltd., 336 Mont. 197, 2007 MT 57, 154 P.3d 52, 55-56 (2007) (application of improper paint to water-treatment tanks constituted injury);

N.H.-- EnergyNorth Natural Gas, Inc. v. Underwriters at Lloyd's, 150 N.H. 828, 848 A.2d 715 (2004) (applying injury-in-fact trigger to occurrence-based CGL policies and exposure trigger to accident-based policies);

N.J.-- Diamond Shamrock Chems. Co. v. Aetna Cas. & Sur. Co., 258 N.J. Super. 167, 609 A.2d 440, 469-72 (App. Div. 1992) (Agent Orange);

N.Y.-- E.R. Squibb & Sons, Inc. v. Lloyd's & Cos., 241 F.3d 154, 168-69 (2d Cir. 2001) (applying New York law) (DES injuries); *In re* Prudential Lines, Inc., 158 F.3d 65, 83 (2d Cir. 1998) (applying New York law) (asbestos inhalation); Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1194-95 (2d Cir. 1995) (applying New York law) (continuous injury-in-fact may be shown in claims involving progressive disease); Maryland Cas. Co. v. W.R. Grace & Co., 23 F.3d 617, 628 (2d Cir. 1993) (applying New York law) (installation of asbestos products constitutes injury; only policy in effect at time of installation triggered); American Home Prods. Corp. v. Liberty Mut. Ins. Co., 748 F.2d 760, 764-65 (2d Cir. 1984) (applying New York law);

N.C.-- Gaston County Dyeing Mach. Co. v. Northfield Ins. Co., 351 N.C. 293, 524 S.E.2d 558, 565 (2000) (rupture of allegedly defective equipment leading to contamination of diagnostic medical dye);

N.D.-- Kief Farmers Co-Op Elevator Co. v. Farmland Mut. Ins. Co., 534 N.W.2d 28, 35 (N.D. 1995) (gradual damage to grain-storage bin);

Ohio-- GenCorp, Inc. v. AIU Ins. Co., 104 F. Supp. 2d 740, 748 (N.D. Ohio 2000) (continuous trigger may be applied if environmental contamination can be proved continuous, but injury-in-fact is starting point);

Ore.-- St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co., 324 Or. 184, 923 P.2d 1200, 1210-11 (Or. 1996) (environmental contamination from wood-treatment plants);

S.C.-- Spartan Petroleum Co. v. Federated Mut. Ins. Co., 162 F.3d 805, 810-11 (4th Cir. 1998) (applying South Carolina law) (leak from underground gasoline storage); Joe Harden Builders, Inc. v. Aetna Cas. & Sur. Co., 326 S.C. 231, 486 S.E.2d 89, 91 (1997) (alleged construction defects);

Utah-- Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co., 868 F. Supp. 1278, 1304 (D. Utah 1994) , *aff'd*, 52 F.3d 1522 (10th Cir. 1995) (applying Utah law) (waste oil contamination);

Vt.-- State of Vermont v. CNA Ins. Cos., 172 Vt. 318, 779 A.2d 662, 673 (2001) (declining to adopt continuous trigger and suggesting that incidents of contamination from wood-treatment facility would need to be established to trigger coverage).

(n145)Footnote 132. Sentinel Ins. v. First Ins. Co. of Hawaii, 76 Haw. 277, 875 P.2d 894, 917 (1994) .

(n146)Footnote 133. *Id*.

(n147)Footnote 134. United Techs. Corp. v. Amer. Home Assur. Co., 989 F. Supp. 128, 153 (D. Conn. 1997) ("Interpreting the injury-in-fact approach as having multiple triggers reflects the reality that one contaminating event can

result in several different losses after the date of its occurrence.").

(n148)Footnote 135. Maryland Cas. Co. v. W.R. Grace & Co., 23 F.3d 617, 628 (2d Cir. 1993) (applying New York law).

(n149)Footnote 136. Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12, 19 (1st Cir. 1982) (injury from asbestos inhalation occurs when disease becomes reasonably capable of clinical diagnosis); Babcock & Wilcox Co. v. American Nuclear Insurers, 823 A.2d 1020, 2002 Pa. Super. LEXIS 3784 (2002) (date of manifestation of injuries from exposure to radioactive material triggers coverage).

(n150)Footnote 137. **Fla.--** Fla. Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co., 227 F. Supp. 2d 1248, 1266 (M.D. Fla. 2002) (contamination from leak of underground acetone line; trigger under CGL policy is when damage occurs; if damage is continuous, trigger is time of manifestation); Harris Spec. Chems., Inc. v. U.S. Fire Ins. Co., No. 3:98-cv-351-J-20B, 2000 U.S. Dist. LEXIS 22596 (M.D. Fla. July 7, 2000) (occurrence happened under CGL when damage from product's application to building became manifest, not when it was applied to building);

N.C.-- Home Indem. Co. v. Hoechst Celanese Corp., 128 N.C. App. 189, 494 S.E.2d 774, 779 (1998) (environmental contamination from operation of polyester plant);

R.I.-- Truk-Away of R.I., Inc. v. Aetna Cas. & Sur. Co., 723 A.2d 309, 313 (R.I. 1999) (hazardous waste in landfill); CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co., 668 A.2d 647, 650 (R.I. 1995) (land and water contamination);

Va.-- Morrow Corp. v. Harleysville Mut. Ins. Co., 110 F. Supp. 2d 441, 450 (E.D. Va. 2000) (applying Virginia law) (PCE contamination manifested itself when it became discoverable, not when actually discovered).

(n151)Footnote 138. **Fla.--** Essex Builders Group, Inc. v. Amerisure Ins. Co., 485 F. Supp. 2d 1302, 1310 (M.D. Fla. 2006) (applying Florida law) (water damage to apartment buildings);

La.-- St. Paul Fire & Marine Ins. Co. v. Valentine, 665 So. 2d 43, 46 (La. Ct. App. 1995) (fire caused by defective wiring in air-conditioning system);

Me.-- Honeycomb Sys., Inc. v. Admiral Ins. Co., 567 F. Supp. 1400, 1405-06 (D. Me. 1983) (applying Maine law) (failure of commercial dryer);

Tex.-- OneBeacon Ins. Co. v. Don's Bldg. Supply, Inc., 516 F. Supp. 2d 615, 624 (N.D. Tex. 2006) (applying Texas law) (allegedly defective home construction); American Home Assurance Co. v. Unitramp Ltd., 146 F.3d 311, 313 (5th Cir. 1998) (applying Texas law) (delivery of watered fuel).

(n152)Footnote 139. 682 F.2d 12 (1st Cir. 1982) (applying Ohio law).

(n153)Footnote 140. 682 F.2d at 19 n.3 .

(n154)Footnote 141. Joe Harden Builders, Inc. v. Aetna Cas. and Sur. Co., 326 S.C. 231, 486 S.E.2d 89, 90-91 (1997) .

(n155)Footnote 142. *See* Guaranty Nat'l Ins. Co. v. Azrock Indus., Inc., 211 F.3d 239, 246 (5th Cir. 2000) (applying Texas law) (injury must occur within policy period, but "occurrence" does not mean manifestation of disease).

(n156)Footnote 143. Morrow Corp. v. Harleysville Mut. Ins. Co., 110 F. Supp. 2d 441, 450 (E.D. Va. 2000) (applying Virginai law) (defining "manifest" to mean "discoverable or subject to being discovered by reasonable means, not actually discovered or perceived") (emphasis in original).

(n157)Footnote 144. Textron, Inc. v. Aetna Casualty Indemnity Co., 754 A.2d 742 (R.I. 2000) ("Textron-Wheatfield"); Textron, Inc. v. Aetna Casualty Indemnity Co., 723 A.2d 1138 (R.I. 1999) ("Textron-Gastonia"); CPC International, Inc. v. Northbrook Excess & Surplus Insurance Co., 668 A.2d 647 (R.I. 1995) .

(n158)Footnote 145. *See* *Textron-Gastonia*, 723 A.2d at 1144 .

(n159)Footnote 146. *See* American Home Assurance Company v. Libbey-Owens-Ford Co., 786 F.2d 22, 30 (1st Cir. 1986) (cited with approval in the *CPC* and *Textron* cases cited in note 144 *above*).

(n160)Footnote 147. Susan Neuman and Robert D. Chesler, *Environmental Insurance Coverage*, *in* Environmental Law Practice Guide § 8.03[10][a] (Michael B. Gerrard ed.).

(n161)Footnote 148. Boston Gas Co. v. Century Indem. Co., No. 07-1452, 2008 U.S. App. LEXIS 12344, at *10 (1st Cir. June 10, 2008) .

(n162)Footnote 149. At the time of publication in 2008, authorities were not found for Alaska, Arkansas, Florida, Georgia, Idaho, Iowa, Maine, Mississippi, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Tennessee, Virginia, Wisconsin and Wyoming.

(n163)Footnote 150. John E. Heintz, Richard D. Milone and Elissa O. Tomanda, *Insurance Coverage for Lead Paint Claims: A Policyholder's Perspective*, LexisNexis Mealey's Litigation Report Ins., Vol. 22, Issue 29 (June 5, 2008). *See also* James R. Murray, *Trial of Allocation Issues in Coverage Cases*, Mealey's Insurance Allocation Conference Handbook (2003) (appellate courts attribute "majority" approach to all sums allocation).

(n164)Footnote 151. John E. Heintz, Richard D. Milone and Elissa O. Tomanda, *Insurance Coverage for Lead Paint Claims: A Policyholder's Perspective*, LexisNexis Mealey's Litigation Report Ins., Vol. 22, Issue 29 (June 5, 2008).

(n165)Footnote 152. *See, e.g.*, Champion Dyeing & Finishing Co., Inc. v. Centennial Ins. Co., 355 N.J. Super. 262, 810 A.2d 68 (App. Div. 2002) (applicable claims-made policy should be included in the allocation process as if it were any other applicable occurrence-based policy). *Contrast* Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co., 210 F.3d 672 (6th Cir. 2000) (under Ohio law, insured can pick and choose the most favorable policy to which allocate damages when both claims-made and occurrence-based policies are triggered).

(n166)Footnote 153. **Cal.--** FMC Corp. v. Plaisted & Cos., 61 Cal. App. 4th 1132, 72 Cal. Rptr. 2d 467, 502 (1998) ("no windfall for [...] receiving the 'all sums' coverage for which it bargained and paid.");

Del.-- Hercules Inc. v. AIU Ins. Co., 784 A.2d 481 (Del. 2001) (refusing to read a pro rata distribution clause into an insurance contract where one did not exist);

D.C.-- Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981) (promises insured the "security" bargained for in an insurance policy); Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co., 597 F. Supp. 1515, 1524 (D.D.C. 1984) (once triggered, policy "provides coverage for [the insured's] full liability ... without any proration of that liability to [the insured]");

Ill.-- Chicago Bridge v. Certain Underwriters, 59 Mass. App. Ct. 646, 797 N.E.2d 434 (2003) (applying Illinois law, insurer liable for all defense and property damage even though it insured only a portion of the covered risk); Zurich Ins. Co. v. Raymark Indus., Inc., 118 Ill. 2d 23, 514 N.E.2d 150, 165 (1987) (no error in refusing to apply pro rata allocation);

Ind.-- Allstate Ins. Co. v. Dana Corp., 759 N.E.2d 1049 (Ind. 2001) (based on "all sums" language in insurance policy);

Mass.-- Rubenstein v. Royal Ins. Co. of Am., 44 Mass. App. Ct. 842, 694 N.E.2d 381 (1998) (based on language in policy);

Mo.-- Viacom, Inc. v. Transit Casualty Co. & Receivership, No. W.D. 62864, 2004 Mo. App. LEXIS 292 (Mo. Ct. App. Mar. 2, 2004) (opining "all sums" would apply under Missouri law as it does under Pennsylvania law), *aff'd*, 138 S.W.3d 723 (Mo. 2004) (affirmed under Pennsylvania law without comment on Missouri law); Monsanto Co. v. C.E. Heath Comp. & Liab. Ins. Co., 652 A.2d 30 (Del. 1994) (applying Missouri law, each insurer whose coverage is triggered must pay all sums then can seek contribution);

Ohio-- Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 95 Ohio St. 3d 512, 769 N.E.2d 835 (2002) (applying language of policy);

Ore.-- Cascade Corp. v. Am. Home Assurance Co., 206 Or. App. 1, 135 P.3d 450, 458 (2006) ("an insurer must pay up to the limits of its policy.");

Pa.-- Koppers Co. v. Aetna Cas. & Sur. Co., 98 F.3d 1440 (3d Cir. 1996) (applying Pennsylvania law, decision based on "all sums" language in policy); J.H. France Refractories Co. v. Allstate Ins. Co., 534 Pa. 29, 626 A.2d 502, 507-09 (1993) ("all sums" requires each triggered insurer to be liable for entire claim subject to policy limit);

R.I.-- Insurance Co. of N. Amer. v. Kayser-Roth Co., 770 A.2d 403 (R.I. 2001) (relying on all sums contract language and declining to deduct settlement payments from outside insurers from the amount owned by the litigating insurer);

Tex.-- CNA Lloyds of Tex. v. St. Paul Ins. Co., 902 S.W.2d 657, 661 (Tex. Ct. App. 1995) (joint and several liability based on "all sums" language); Texas Property & Cas. Ins. Guar. Ass'n v. Southwest Aggregates Inc., 982 S.W.2d 600, 605 (Tex. Ct. App. 1998) (extending joint and several liability to duty to defend cases);

Wash.-- American Nat'l Fire Ins. Co. v. B&L Trucking & Const. Co., 134 Wash. 2d 413, 951 P.2d 250 (1998) ("We hold that once a policy is triggered, the

policy language requires insurer to pay all sums for which the insured becomes legally obligated, up to the policy limits.").

(n167)Footnote 154. 667 F.2d 1034 (D.C. Cir. 1981) . *See* Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437, 650 A.2d 974 (1994) .

(n168)Footnote 155. *See, e.g.*:

Cal.-- FMC Corp. v. Plaisted & Cos., 61 Cal. App. 4th 1132, 72 Cal. Rptr. 2d 467, 502 (1998) ("no windfall for [...] receiving the 'all sums' coverage for which it bargained and paid.");

Del.-- Hercules Inc. v. AIU Ins. Co., 784 A.2d 481 (Del. 2001) (following Monsanto Co. v. C.E. Heath Comp. & Liab. Ins. Co., 652 A.2d 30 (Del. 1994) and refusing to read a pro rata distribution clause into an insurance contract where one did not exist);

Ind.-- Allstate Ins. Co. v. Dana Corp., 759 N.E.2d 1049 (Ind. 2001) (based on "all sums" language in insurance policy);

Mass.-- Rubenstein v. Royal Ins. Co. of Am., 44 Mass. App. Ct. 842, 694 N.E.2d 381 (1998) (based on language in policy);

Ohio-- Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 95 Ohio St. 3d 512, 769 N.E.2d 835 (2002) (applying language of policy);

Pa.-- Koppers Co. v. Aetna Cas. & Sur. Co., 98 F.3d 1440 (3d. Cir. 1996) (applying Pennsylvania law, decision based on "all sums" language in policy).

(n169)Footnote 156. *See, e.g.,* Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co., 45 Cal. App. 4th 1, 52 Cal. Rptr. 2d 690, 711 (1996) ; Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, n. 36 (D.C. Cir. 1981) .

(n170)Footnote 157. *See, e.g.*:

D.C.-- Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981) (employing "all sums" without stacking);

Tex.-- CNA Lloyds of Tex. v. St. Paul Ins. Co., 902 S.W.2d 657, 661 (Tex. Ct. App. 1995) (following Keene to allow all sums, but no stacking).

Contrast **Pa.--** J.H. France Refractories Co. v. Allstate Ins. Co., 534 Pa. 29, 626 A.2d 502, 507-09 (1993) (using "all sums" and stacking, so that effectively all insurers become primary insurers).

(n171)Footnote 158. Christopher L. LaFon and Marc S. Mayerson, *Allocation of Insured Loss Between Claims-Made and Occurrence Coverage*, Mealey's Insurance Allocation Conference Handbook (2003).

(n172)Footnote 159. Boston Gas Co. v. Century Indem. Co., No. 07-1452, 2008 U.S. App. LEXIS 12344, at *13 (1st Cir. June 10, 2008) (applying Massachusetts law).

(n173)Footnote 160. *Id*.

(n174)Footnote 161. *Id.* at *14 .

(n175)Footnote 162. John E. Heintz, Richard D. Milone and Elissa O. Tomanda, *Insurance Coverage for Lead Paint Claims: A Policyholder's Perspective*, LexisNexis Mealey's Litigation Report Insurance, Vol. 22, Issue 29 (June 5, 2008).

(n176)Footnote 163. *See, e.g.*:

N.Y.-- E.R. Squibb & Sons, Inc. v. Lloyd's & Companies, 241 F.3d 154, 173 (2d Cir. 2001) (applying New York law, "the settling parties are the ones who took the risk of the settlement, and the non-settling parties are left precisely as they would have been had no settlement occurred");

Ohio-- GenCorp, Inc. v. AIU Ins. Co., 297 F. Supp. 2d 995, 1007 (N.D. Ohio 2003) (giving credit for full policy limits where insured settled with all primary carriers and then sought coverage from excess carriers; "It is not possible for GenCorp now to decide to allocate its liability to one policy or to one policy year because this would be contrary to the settlements it has reached.").

(n177)Footnote 164. *See, e.g.*, Rubenstein v. Royal Ins. Co. of Am., 44 Mass. App. Ct. 842, 694 N.E.2d 381 (1998) (non-settling insurer was entitled to an off-set for the amounts actually paid by the other insurers); Liberty Mut. Ins. Co. v. The Black & Decker Corp., 383 F. Supp. 2d 200 (D. Mass. 2004) (applying Massachusetts law) (allowing credit based on other settlements, which may be disclosed pursuant to protective order, and further allowing a post-hoc allocation of the settlement amount attributable to the release of liability for the litigated sites). *See also* Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wash. 2d 654, 15 P.3d 115 (2000) (refusing to put burden on insured to prove it has not received a double recovery based on prior settlements).

(n178)Footnote 165. *See, e.g.*, Koppers Co. v. Aetna Cas. & Sur. Co., 98 F.3d 1440 (3d Cir. 1996) (applying Pennsylvania law where all sums and stacking are allowed, and reducing the "all sums" judgment against the non-settling insurer to account for the settled insurers' apportioned share of liability--primary policies' apportioned share could be full policy limits, while excess policies could have apportioned shares based on their limits in comparison to the total limits of triggered coverage).

(n179)Footnote 166. Maria G. Enriquez, Michael C. Baird and George A. Cavell, *Settlement Credits in "All Sums" Jurisdictions*, Mealey's All Sums: Reallocation and Settlement Credits Conference (2004).

(n180)Footnote 167. **Ala.--** Commercial Union Ins. Co. v Sepco Corp., 918 F.2d 920 (11th Cir. 1990) (applying Alabama law; determined costs should be allocated pro rata by number of months coverage was provided during asbestos exposure, however, insured must share in costs during years when self-insured);

Ariz.-- Nucor Corp. v. Hartford Acc. & Indem. Co., No. CV-97-08308 (Ariz. Super. Ct., Sept. 29, 1997) (applying loss horizontally across all primary policies before allowing excess insurance to be reached);

Colo.-- Public Serv. Co. v. Wallis & Companies, 986 P.2d 924, 940 (Colo. 1999) ("where property damage is gradual, long-term, and indivisible, the trial court should make a reasonable estimate of the portion of the 'occurrence' that is fairly attributable to each year by dividing the total amount of liability by

the number of years at issue. The trial court should then allocate liability accordingly to each policy-year, taking into account primary and excess coverage, self-insured retentions, policy limits, and other insurance on the risk);

Conn.-- Security Ins. Co. of Hartford v. Lumbermen's Mut. Cas. Co., 264 Conn. 688, 826 A.2d 107 (2003) (noting the substantial periods uninsurance, the court determined it was most equitable to place the burden of determining which insurer was responsible for coverage on the insured);

Haw.-- Sentinel Ins. Co. v. First Ins. Co. of Hawaii, Ltd., 76 Haw. 277, 875 P.2d 894 (1994) (liability must be equitably apportioned in proportion to the time periods of their policies);

Ill.-- Missouri Pac. R. R. v. International Ins. Co., 288 Ill. App. 3d 69, 679 N.E.2d 801 (1997) (the best method of damage allocation is time-on-the-risk pro rata);

Kan.-- Atchison Topeka & Santa Fe Ry. v. Stonewall Ins. Co., 275 Kan. 698, 71 P.3d 1097 (2003) (hearing loss claim, based on language in policy);

Ky.-- Aetna Cas. & Sur. Co. v. Commonwealth of Ky., 179 S.W.3d 830 (Ky. 2005) (property damage was continuous and indivisible therefore damages should be allocated over all triggered periods based on policy limits);

La.-- Norfolk Southern v. California Union, 861 So. 2d 578 (La. Ct. App. 2003) (pro rata allocation during entire period of contaminating activities, including years with no insurance); Ducre v. Mine Safety Appliances Co., 645 F. Supp. 708 (E.D. La. 1986) (applying Louisiana law) (pro rata allocation based on annual basis is equitable);

Md.-- *In re* Wallace & Gale Co., 385 F.3d 820 (4th Cir. 2004) (applying Maryland law); Riley v. United Services Auto. Assoc., 161 Md. App. 573, 871 A.2d 599 (2005) (pro rata distribution based on time on the risk); Mayor and City Council of Baltimore v. Utica Mut. Ins. Co., 145 Md. App. 256, 802 A.2d 1070 (2002) ;

Mich.-- Wolverine World Wide, Inc. v. Liberty Mut. Ins. Co., No. 260330, 2007 Mich. App. LEXIS 657, at *7 (Mich. Ct. App. Mar. 8, 2007) ("Insurers on the risk when 'incremental environmental degradation' continues may be liable on a pro-rata basis.");

Minn.-- Domtar, Inc. v. Niagara Fire Ins. Co., No. A03-630, 2004 Minn. App. LEXIS 203 (Minn. Ct. App. Mar. 2, 2004) (pro rata time on the risk not necessarily best for all environmental contamination cases but is proper where damage is "indivisible");

Mo.-- Nationwide Ins. Co. v. Cent. Mo. Elec. Co-op., Inc., 278 F.3d 742 (8th Cir. 2001) (applying Missouri law, property damage case applying time-on-the-risk allocation); *but see* Viacom, Inc. v. Transit Casualty Co. & Receivership, No. W.D. 62864, 2004 Mo. App. LEXIS 292 (Mo. Ct. App. Mar. 2, 2004) (opining "all sums" would apply under Missouri law as it does under Pennsylvania law), *aff'd*, 138 S.W.3d 723 (Mo. 2004) (under Pennsylvania law without comment on Missouri law);

Mont. and Neb.-- American Simmental Ass'n v. Coregis Ins. Co., 282 F.3d 582 (8th Cir. 2002) (applying Montana and Nebraska law and allocating defense among two insurers based on pro rata share of the risk);

N.H.-- EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's, 156 N.H. 333, 934 A.2d 517 (2007) (pro-rata by years and limits method, loss allocated among policies based both on the number of years a policy is on the risk as well as the policy limits);

N.J.-- Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437, 650 A.2d 974, 996 (1994) ("A fair method of allocation appears to be one that is related to both the time on the risk and the degree of risk assumed. When periods of no insurance reflect a decision by an actor to assume or retain a risk, as opposed to periods when coverage for a risk is not available, to expect the risk-bearer to share in the allocation is reasonable.");

N.Y.-- Consolidated Edison Co. v. Allstate Ins. Co., 98 N.Y.2d 208, 746 N.Y.S.2d 622, 774 N.E.2d 687 (2002) ; Serio v. Pub. Serv. Mut. Ins. Co., 304 A.D.2d 167, 759 N.Y.S.2d 110, 2003 N.Y. App. Div. LEXIS 4431 (2003) (following time-on-the-risk method of pro-rata allocation);

S.C.-- Spartan Petroleum Co. v. Federated Mut. Ins. Co., 162 F.3d 805 (4th Cir. 1998) (applying South Carolina law) (pro-rata allocation based on time-on-the-risk);

Tex.-- Gulf Chem. & Metallurgical Corp. v. Associated Metals & Minerals Corp., 1 F.3d 365 (5th Cir. 1993) (applying Texas law, initially applied all sums but then adjusted defense costs based on pro rata allocation);

Utah-- Sharon Steel Corp. v. Aetna Cas. & Surety Co., 931 P.2d 127 (Utah 1997) (allocation of defense costs in hazardous waste case by years on the risk, taking into account policy limits);

Vt.-- Agency of Natural Resources v. Glens Falls Ins. Co., 169 Vt. 426, 736 A.2d 768 (1999) (pro rata allocation based on time on the risk).

(n181)Footnote 168. *See, e.g.*, Mayor & City Council of Baltimore v. Utica Mut. Ins. Co., 145 Md. App. 256, 802 A.2d 1070 (2002) .

(n182)Footnote 168.1. **SC**-- Crossmann Cmtys. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 717 S.E.2d 589, 603 (2011) .

(n183)Footnote 169. *See, e.g.*:

Colo.-- Public Serv. Co. v. Wallis & Co., 986 P.2d 924 (Colo. 1999) (en banc).

Mich.-- Arco Indus. Corp. v. American Motorists Ins. Co., 232 Mich. App. 146, 594 N.W.2d 61, 68 (1998) ;

N.J.-- Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437, 650 A.2d 974 (1994) .

(n184)Footnote 170. 138 N.J. 437, 650 A.2d 974 (1994) .

SC-- Crossmann Cmtys. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 717 S.E.2d 589, 602 (2011) (court adopted this approach as default position when it is impossible to know the exact measure of damages attributable to the injury that triggered each policy.

(n185)Footnote 170.1. **Mass.**-- Boston Gas Co. v. Century Indem. Co., 454 Mass. 337, 910 N.E.2d 290 (2009) .

See also **Del./N.Y.**-- Deutsche Bank Trust Co. Ams. v. Royal Surplus Lines Ins. Co., 2011 Del. Super. LEXIS 89 (Del. Super. Ct. Feb. 25, 2011) (in declaratory judgment action involving insurance coverage disputes with multiple insurers, the time-on-the-risk approach was deemed an easily applied and fair method for determining a pro rata allocation of defense costs, arising from underlying actions by injured workers who were exposed to toxins during a clean-up of collapsed buildings).

(n186)Footnote 171. IMCERA Group v. Liberty Mut. Ins. Co., No. B079031, 44 Cal. App. 4th 1344A, 1996 Cal. App. LEXIS 284 (Cal. Ct. App. Mar. 29, 1996) .

(n187)Footnote 172. Signal Co. v Harbor Ins. Co., 27 Cal. 3d 359, 165 Cal. Rptr. 799, 612 P.2d 889, 895 (Cal. 1980) ("We expressly decline to formulate a definitive rule applicable in every case in light of varying equitable considerations which may arise and which affect the insured and the primary and excess carriers, and which depend upon the particular policies of insurance, the nature of the claim made, and the relation of the insured to the insurers.")

(n188)Footnote 173. Centennial Ins. Co. v. U. S. Fire Ins. Co., 88 Cal. App. 4th 105, 105 Cal. Rptr. 2d 559 (2001) .

(n189)Footnote 174. "For example, under pro rata allocation, the insured will seek coverage from each insurance policy in effect during the contamination period and is likely to absorb the self-insurance retentions of each policy." Boston Gas Co. v. Century Indem. Co., No. 07-1452, 2008 U.S. App. LEXIS 12344, at *14 (1st Cir. June 10, 2008) (citing Public Serv. Co. of Colo. v. Wallis & Cos., 986 P.2d 924, 941 (Colo. 1999)) .

See:

Ga.-- Liberty Mut. Ins. Co. v. Wheelwright Trucking Co., 851 So. 2d 466 (Ala. 2002) (applying Georgia law);

Ill.-- Missouri Pac. R.R. v. International Ins. Co., 288 Ill. App. 3d 69, 223 Ill. Dec. 350, 679 N.E.2d 801 (1997) .

Kan.-- Atchison Topeka & Santa Fe Ry. v. Stonewall Ins. Co., 275 Kan. 698, 71 P.3d 1097 (2003) (policyholder must satisfy all self-insured retentions for multi-policy, multi-triggered period);

N.Y.-- Olin Corp. v. Insurance Co. of N. Am., 221 F.3d 307 (2d Cir. 2000) (applying New York law);

Ill.-- Missouri Pac. R.R. v. International Ins. Co., 288 Ill. App. 3d 69, 223 Ill. Dec. 350, 679 N.E.2d 801 (1997) .

But see **Cal.--** Southern Pacific Rail Corp v. Certain Underwriters at Lloyds, London, No. B133099 (Cal. Ct. App. Sept. 18, 2000) (policyholder must pay single self-insured retention for multi-policy, multi-triggered period).

(n190)Footnote 175. **Ala.--** Commercial Union Ins. Co. v Sepco Corp., 918 F.2d 920 (11th Cir. 1990) (applying Alabama law);

Md.-- Mayor & City Council of Baltimore v. Utica Mut. Ins. Co., 145 Md. App. 256, 802 A.2d 1070 (2002) ;

N.Y.-- Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1203 (2d Cir. 1995) (applying New York law) ("proration-to-the-insured is a sensible way to adjust the competing contentions of the parties in the context of continuous triggering of multiple policies over an extended span of years.").

See also Gita F. Rothschild, *The Resolution of Environmental Insurance Claims: Key Issues from the Policyholder's Perspective*, ALI ABA Course of Study Environmental Insurance: Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery.

(n191)Footnote 176. Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1392 (E.D.N.Y. 1988) .

(n192)Footnote 177. 154 N.J. 312, 712 A.2d 1116 (1998) (following reasoning in Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co., 978 F. Supp. 589 (D.N.J. 1997)) .

(n193)Footnote 178. *Id*.

(n194)Footnote 179. *Id.* at 1123 .

(n195)Footnote 180. *Id.* at 1124 .

(n196)Footnote 181. *Id*.

(n197)Footnote 182. *See, e.g.,* Aerojet-General Corp. v. Transport Indem. Ins. Co., 17 Cal. 4th 38, 70 Cal. Rptr. 2d 118, 948 P.2d 909 (1997) (refusing to allocate defense to policyholder during period of self insurance).

4 of 4 DOCUMENTS

Appleman on Insurance Law and Practice

APL2 HOLMES' APPLEMAN ON INSURANCE 2d
PART XIII ENVIRONMENTAL INSURANCE
CHAPTER 193 ENVIRONMENTAL INSURANCE

33-193 Appleman on Insurance § 193.02

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§ 193.02 Specialized Environmental Coverage

[A] The Origins and Evolution of Environmental Impairment Liability (EIL) Insurance

Specialty insurance for pollution liability, known as "environmental impairment" liability (EIL) insurance, was first introduced in the United States on a limited, experimental basis beginning in the mid-1970s. n183 A group of London-based insurers originally developed this form of coverage in 1973, around the same time qualified pollution exclusions were first being incorporated in CGL policies. n184 EIL coverage was not actively marketed in this country, however, until the late 1970s and early 1980s, in response to financial responsibility regulations the United States Environmental Protection Agency (EPA) adopted under the Resource Conservation and Recovery Act of 1976 (RCRA). n185

Unlike CGL insurance, old EIL policies were not "standardized" in the insurance industry. n186 Although there may be significant differences in the scope of particular EIL insurance forms, early EIL policies typically provided "claims-made" liability coverage for off-site bodily injury and property damage caused by gradual releases of contaminants. n187 Several courts and commentators have noted that EIL insurance was designed to fill a coverage gap created by the "sudden and accidental" pollution exclusion in the 1973 CGL policy form. n188 Insurers have argued that the very existence of EIL coverage for "nonsudden" contamination demonstrates that CGL policies with "sudden and accidental" pollution exclusions do not cover gradual releases at all. n189

In *New Castle County v. Hartford Accident & Indemnity Co* ., n190 the United States District Court for the District of Delaware determined that CGL and EIL policies are not necessarily mutually exclusive. The court stated:

> The insurers point to the development and marketing of "environmental impairment liability" (EIL) policies which provide coverage for non-sudden pollution. The insurers argue that if the word "sudden" means the same thing as "occurrence," there would be no commercial niche for EIL policies to fill. The Court finds that there is a different reason that an EIL policy would have its own niche. As the insurers admit, EIL policies are issued on a "claims made" basis. Such policies provide coverage for only those claims presented during the policy period. The claims may be based on occurrences which predate the policy period. The comprehensive general liability ("CGL") policies at issue here are different in that claims may be presented at any time... . However, under CGL policies the occurrence triggering the claim must have occurred within the policy period. n191

At the time domestic insurers began marketing EIL policies in the late 1970s and early 1980s, the reported cases interpreting the "sudden and accidental" exception to the pollution exclusion in CGL policies generally favored policyholders. Each court that had addressed the issue had held that the exclusion did not bar coverage for gradual contamination as long as the release of contaminants was unexpected and unintended. n192 Thus, at least from the policyholders' perspective, the market for EIL coverage in the early 1980s appears to have been driven more by financial responsibility requirements under RCRA than by a perceived gap in CGL coverage for gradual pollution. n193

The EPA first proposed including an EIL insurance requirement in RCRA financial responsibility regulations in 1978. n194 The proposal, which ultimately was adopted in revised form almost three and a half years later, n195 called for owners or operators of permitted hazardous waste treatment, storage, and disposal facilities to maintain certain levels of financial responsibility through insurance or self-insurance for both "sudden and accidental" and "nonsudden and accidental" occurrences. n196 As initially proposed, "nonsudden" coverage was defined to apply with respect to "claims arising out of injury to persons or property from the gradual or steady state release or escape of hazardous waste to the environment ... ." n197

In proposing these regulatory requirements, the EPA stated that it had conferred with several insurance industry representatives and concluded that "[b]oth types of insurance coverage ... are now available from the private sector." n198 The agency further stated that it "reviewed ranges of premium costs for such liability insurance being written today, and ... concluded that insurance costs are not unreasonable." n199 In fact, although insurers apparently believed they could fulfill the financial responsibility goals of the proposed regulations, n200 specialized coverage for environmental liabilities was virtually nonexistent at the time. n201

There is some controversy regarding the date EIL coverage first became generally available in the United States. n202 It appears, however, that very few American insurers were offering EIL coverage before Congress enacted the federal Superfund law n203 in 1980. n204 Earlier that same year, the EPA revised and reissued its proposed RCRA financial responsibility regulations, including the EIL insurance provisions applicable to permitted RCRA facilities. n205 This time, however, the EPA noted that most insurers were not offering "nonsudden and accidental" coverage and that "most that do provide coverage restrict it to their clients who are large and well-managed." n206

In January 1981, the EPA issued "interim final" financial responsibility regulations that, among other things, limited the requirements for "nonsudden" coverage to facilities operating impoundments, landfills, and land treatment facilities. n207 The "interim final" regulations also provided for a three-year phase-in period to enable the regulated community to obtain the mandated insurance, which was not then widely available. n208 The EPA explained its changed approach as follows:

> Many of these changes reflect EPA's commitment to rely to the extent possible on the insurance industry to provide liability coverage for hazardous waste management facilities. EPA believes that liability insurance is the most appropriate mechanism for assuring the public that there will be a pool of funds available from which third parties can seek compensation for claims arising from the operations of hazardous waste management facilities. On the other hand, EPA recognizes that liability coverage for these facilities, particularly for nonsudden occurrences, poses special problems to the insurance industry because of the lack of experience with a regulated waste management industry and the potential hazards associated with managing hazardous wastes. These problems may jeopardize the wide availability of liability insurance to the regulated community. n209

A few months later, the EPA delayed implementation of the regulations, announcing that it was considering whether to forego the insurance requirements altogether. n210 In the meantime, additional insurers entered the EIL market. n211 The insurance industry, through its principal rating organization, the Insurance Services Office (ISO), also introduced a "Pollution Liability" policy for use beginning in late 1981. n212 By the middle of 1982, there were at least a dozen insurers offering primary coverage specifically tailored for environmental risks. n213 In addition, approximately 40 insurers were participating in a reinsurance pool formed in 1982 to spread the risk of environmental coverage among its members. n214

In light of the rapidly expanding supply of EIL insurance products on the market, the EPA's financial responsibility regulations re-emerged in final form on April 16, 1982. n215 Specifically, the EPA required that (1) all treatment, storage, or disposal facility owners or operators must "maintain liability insurance of at least $1 million per occurrence, with an annual total of at least $2 million, exclusive of legal defense costs" for "sudden occurrences" and (2) "surface impoundments, landfills, or land treatment facilities ... [must] maintain liability insurance of at least $3 million per occurrence, with an annual total of at least $6 million, exclusive of legal defense costs" for "nonsudden accidental occurrences." n216

The financial responsibility regulations, as adopted, define "nonsudden accidental occurrence" to mean "an occurrence which takes place over time and involves continuous or repeated exposure." n217 The regulations further provide, however, that:

> The Agency intends the meanings of ... terms used in the liability insurance requirements to be consistent with their common meanings within the insurance industry. The definitions given ... of several of the terms are intended to assist in the understanding of these regulations and are not intended to limit their meanings in a way that conflicts with general insurance industry usage. n218

In particular, the EPA noted in the preamble to the final rule that despite the use of the word "occurrence," insurance written on a claims-made basis could be used to satisfy the coverage requirement for "nonsudden accidental occurrences." n219

The agency also observed that "[t]he insurance market for coverage of nonsudden accidental occurrences has recently responded to the increasing demand and there are good indications that this market can be expected to expand considerably in the near-future." n220 As the EPA predicted, additional insurers joined the EIL market in 1983, n221 increasing the total number of carriers offering this type of coverage to more than 50. n222

The early EIL policies often were "loosely drafted" and "carelessly underwritten." n223 In adopting the RCRA financial responsibility regulations, the EPA reported that "several insurance companies have stated that policies covering nonsudden accidental occurrences are presently being written in only 4 to 8 weeks." n224 Insurers, of course, knew that companies required by regulation to purchase EIL coverage had to maintain that insurance just to stay in business. As a result, many policyholders initially were hesitant to pursue coverage claims under their EIL policies for fear that the insurance would be terminated, resulting in a loss of their operating permit or "interim status" standing. n225

The EIL market did not, however, prove to be as lucrative as insurers had hoped in the early 1980s. For the most part, facilities purchasing EIL insurance were not heavily capitalized and presented significant underwriting risks that insurers may not have fully recognized at the time. n226 Moreover, those risks were not being offset in the marketplace, since most lower-risk facilities were not purchasing the coverage. n227 As a result, insurers experienced "very unfavorable loss ratios" as claims and coverage payouts far exceeded premium income. n228

Although the insurance industry was quick to plunge into the EIL coverage market when the EPA made such coverage mandatory for certain facilities, insurers had all but abandoned the market a few years later. n229 In November 1984, Congress enacted legislation amending RCRA to require, among other things, closure of all "interim status" land disposal facilities that were unable to certify compliance with financial responsibility provisions by November 8, 1985. n230 Many such facilities reportedly were forced to close, even though there were no known environmental issues associated with their operations, because the required insurance simply was not available. n231

By 1986, only one insurance company, the American International Group, was still writing any EIL coverage. n232 That same year, the qualified pollution exclusion in standard CGL policies was replaced by an "absolute" exclusion, removing all coverage for discharges of pollution, whether "sudden and accidental" or not. n233

For almost a decade after pollution exclusions in CGL policies became "absolute," there was no meaningful outlet for most businesses to obtain pollution coverage of any value. n234 To the extent coverage was available at all, it was offered only after an expensive and thorough environmental assessment of the applicant's operations. n235 Policy exclusions were tailored specifically to preclude coverage for any potential environmental condition

identified during the assessment. n236 In addition, there were exclusions in most policies for commonly encountered environmental issues, such as liabilities associated with asbestos or underground storage tanks. n237

Along with restrictions in the scope of coverage came reductions in available limits and increases in premiums and deductibles. n238 As the EPA noted in a 1988 rulemaking:

> In 1984-1985, the availability of pollution liability insurance policies began to decline. A number of insurers who previously had offered coverage ceased to write pollution liability policies. Those still offering coverage raised their premiums substantially while reducing the coverage provided. As a consequence, some owners and operators of hazardous waste TSDFs [treatment, storage and disposal facilities] began to experience difficulties in obtaining necessary coverage and/or paying the increased cost of such coverage. n239

The EPA further observed that:

> Although commentary concerning the insurance industry in the Insurance Trade Press and in other sources suggests that underwriting losses in property-casualty insurance peaked around the end of 1985 and that the outlook for the future is more favorable, the market for Environmental Impairment Liability (EIL) insurance has remained constrained. n240

Notwithstanding the "constrained" market, the EPA declined to reduce or eliminate the EIL insurance provisions in its RCRA financial responsibility regulations. n241

After several more sluggish years, the EIL insurance market slowly recovered in the mid-1990s as insurers gained more experience underwriting environmental exposures. Today, risk-based corrective action standards and advances in remediation technologies have made environmental risks more manageable and cleanup costs more predictable. In recent years, the market has seen flexible and varied environmental coverage, lower premiums, longer policy terms, and increased limits capacity. n242 Particularly in the context of corporate and real estate transactions, environmental insurance has re-emerged as a potentially viable risk-management tool. n243

[B] Claims-Made Trigger of Coverage

As researchers from the United States Department of the Treasury observed in a 1982 report regarding hazardous substance liability insurance:

> The conceptual change introduced by the EIL policies of the late 1970s was that of shifting insurance coverage from that of "occurrences" to that of "claims." In essence, subject to the terms and conditions of the "claims-made" policy, the insurer "provides coverage for claims presented during each policy period, regardless of when the incident or occurrence giving rise to the claims took place." n244

Heightened environmental regulations and greater sophistication in underwriting reportedly have made some insurers more willing today to offer environmental

coverages on an occurrence basis. n245 Other than contractor's pollution liability insurance, however, all specialized environmental insurance on the market today is written exclusively using claims-made policy forms. n246

After the EIL insurance crisis of the mid-1980s, a number of EIL insurers restricted coverage by, among other things, changing their insurance policies from claims-made insurance to claims-made-and-reported insurance. n247 This meant that not only did a covered "claim" have to be asserted against the insured by a third party during the policy period, but also that the insured must report that claim to the insurance company during that same policy period for coverage to apply. n248

Many of the environmental-specialty policies issued today retain the requirement that claims must be both made and reported during the policy period. n249 Nevertheless, insurers are generally willing to provide longer coverage periods in all forms of environmental policies now being issued. Contemporary environmental policies have been issued with coverage periods of five, ten, or even twenty years in some cases. n250 In addition, policyholders may have the option under certain limited circumstances of obtaining an extension of the reporting period beyond the policy term for an additional premium payment. n251

Although there are few reported cases interpreting coverage under environmental policies, most of the cases to date have centered on what constitutes a "claim" and when it was "made" for purposes of triggering the insurer's obligations. These cases do not present a rule of uniform applicability, however, as they turn on very specific facts and widely varying language in different policies. n252

[C] Types of Specialized Coverage Currently Available

Most specialized environmental insurance is carefully engineered and issued by non-admitted insurers on an excess or surplus-lines basis. n253 Because such insurance does not require pre-approval of policy forms or rates by state insurance regulators, there can be significant variation in policy language, making generalizations difficult and ill-advised. n254

Brokers report that there are over 100 non-standardized environmental policy forms and at least 1,000 customized endorsements in use by various insurance carriers today. The current market affords significant flexibility for policyholders and insurers to negotiate site-specific terms and tailor the coverage to the environmental risks involved.

Among other things, currently available products insure against unknown contamination, remediation cost overruns, property value impairment, environmental damage caused by continuing operations, and third-party bodily injury and property damage liabilities. Without attempting to be exhaustive, the following sections provide an overview of the most common types of specialized environmental insurance now available, as well as coverage issues that may arise.

[1] Pollution Legal Liability Insurance

Pollution Legal Liability (PLL) insurance--also sometimes known (among other names) as Pollution and Remediation Legal Liability, Premises Pollution Liability, Pollution Legal Liability, Pollution Liability Limited, Environmental

Site Liability, and Environmental Cleanup and Liability insurance--is the modern descendant of EIL coverage. Although there is wide disparity in policy language among different insurers, most PLL insurance consists of some combination of three basic coverage components:

> (1) Third-party coverage for bodily injury, cleanup costs, and property damage arising out of pollution conditions "on, at, under, or migrating from" an insured site;
>
> (2) Defense cost reimbursement for covered third-party claims; and
>
> (3) First-party claims for government-mandated cleanup related to pre-existing environmental conditions first discovered during the coverage period. n255

Like EIL coverage before it, PLL insurance is almost always written on a "claims made" and site-specific basis. PLL coverage generally applies, however, with respect to both "sudden" and "nonsudden" pollution events--a departure from early EIL coverage. The general characteristics of PLL coverage (and EIL coverage before it) are discussed further below.

[a] Bodily Injury and Property Damage Liability

Depending on the specific language in the insuring clause of a particular policy, many of the same concepts applicable to CGL insurance may be relevant with respect to third-party liability coverage for bodily injury and property damage under a PLL or EIL policy. n256 The potential coverage issues are as varied as the policies themselves.

Some policies, for example, expressly cover "damages" imposed as a result of "bodily injury," "personal injury," or "property damage" caused by a "pollution incident," "pollution condition," or "environmental impairment." n257 Among other issues, there could be disputes under such policies regarding whether administratively ordered cleanup costs or claims for injunctive relief can give rise to covered "damages." n258 Alternatively, a PLL policy may explicitly exclude coverage for injunctive relief, thus limiting or precluding potential coverage for cleanup costs in many situations. n259

Many policies expressly cover a "loss," defined as "a monetary judgment, award or settlement of compensatory damages ... ." The use of the phrase "compensatory damages" in policies, both old and new, may preclude recovery for civil penalties or fines. n260 Other policies expressly exclude coverage for civil penalties or punitive damages. Courts in different jurisdictions have reached inconsistent conclusions, in any event, about whether punitive damages are insurable in the first place. n261

There is a "suit" limitation in many EIL and PLL policies, providing that the insurer's obligation must arise from a "suit" or a settlement approved by the insurer. In some policies, "suit" may be defined to include alternative dispute resolution proceedings. In any event, there may be issues similar to those arising under CGL policies regarding whether an administrative demand qualifies as a "suit" sufficient to trigger coverage in policies that contain suit-based coverage or defense obligations. n262

Though not yet widely analyzed in reported cases or commentary, PLL of more recent vintage policies frequently define covered "property damage" liabilities in terms of:

> (1) physical injury to or destruction of tangible property, including the resulting loss of use;
>
> (2) loss of use of property that has not been physically injured or destroyed, and
>
> (3) diminished third-party property value. n263

Some PLL policies also cover natural resource damages, including physical injury to wildlife, flora, air, land, and groundwater or surface water on properties held or controlled by a public natural resource trustee. n264 A PLL policy might, in some cases, be purchased specifically because of natural resource damage issues. n265

There generally is no PLL coverage available for diminution in the value of the insured's own property. Nevertheless, coverage for diminution of a third-party's property value might be provided, depending on the carrier and policy language used. n266 Most, but not all, of the available PLL policies that cover diminished value require that the third-party's property be physically damaged, thus avoiding coverage for perceptive, or "stigma," damages resulting from potential or threatened contamination. n267

Business interruption losses may be covered as part of the "resulting loss of use" language in the "property damage" definition used in several PLL policies. First-party business interruption coverage is available from a few insurers, usually by special endorsement. n268

Third-party "bodily injury" may be defined to include some combination of the following: physical injury, sickness, or disease; mental or emotional distress; shock; building-related illnesses; and death. n269 Some policies have a more circular definition of "bodily injury" that includes the term "bodily injury" in the definition itself. n270 Under certain circumstances, carriers may be willing to include fear of disease and medical monitoring in the scope of "bodily injury" coverage, although such claims present greater challenges from an underwriting standpoint. n271

The PLL or EIL policy, which affords coverage for bodily injury and property damage, may also contain an "other insurance" clause. In a 2009 case, the other insurance clause provided as follows:

> This Policy shall not be called upon in contribution and no liability shall attach hereunder for any injury, loss, damage, costs or expenses recoverable under any other insurance insuring to the benefit of the Insured except as regards any excess over and above the amounts collectible under such other insurance; provided always that this clause shall not apply to any policy that is specifically arranged by the Insured to cover limits in excess of those stated in this Policy. Nothing herein shall be construed to make this Policy subject to the terms, conditions and limitations of any other insurance.

In that case, the parties primarily disputed whether the insurer was entitled to a credit or offset of its liability for settlement funds received by the plaintiff from its CGL insurers in a second action, in which the insured asserted claims against the CGL insurers for, inter alia, failing to comply with their obligations in connection with environmental cleanup costs incurred at, and personal injury lawsuits asserted in connection with, more than 26 environmental sites across the United States. The court concluded that the settlements constituted "other insurance" under the condition of the EIL policies. Judicial estoppel barred the insured from taking the position that the EIL policies covered different risks than the CGL policies based on their temporal limitations or lack of limitations. In effect, the insured had on multiple occasions admitted that the damages at issue in the present case would have been covered by the CGL policies. Under the relevant condition of the EIL policies, the insured could only recover from the insurer any excess over and above the amounts collectible under its CGL policies. n271.1

[b] Defense Costs

Although PLL policies typically provide coverage for legal defense costs related to third-party claims, it is important to note that such costs usually apply toward the limits of liability under the policy. n272 Under CGL policies, by contrast, defense costs ordinarily do not erode policy limits. n273

Because of the high cost of defending an environmental matter, the EPA was concerned at the time it adopted insurance regulations for RCRA facilities that inclusion of defense costs in the limits of liability "could absorb a major portion of the required coverage, leaving an inadequate amount to cover actual damages." n274 Accordingly, the EPA's financial responsibility regulations expressly require that policy limits for both "sudden" and "nonsudden" occurrences be "exclusive of legal defense costs." n275

The EPA has been unmoved by appeals for regulatory change based on arguments that unlimited defense cost coverage is generally unavailable or cost-prohibitive for "nonsudden" pollution claims. n276 Although most PLL policies still make defense costs subject to the coverage limits, a few carriers now expressly cover defense costs without any reduction in limits to enable policyholders to meet their financial responsibility burden under RCRA. n277

[c] On-Site and Off-Site Cleanup Costs

Early EIL polices often contained "owned property" exclusions that precluded coverage for costs the policyholder incurred in remediating contamination at its own facility, even if the remediation was required by regulation or government order. n278 There were also exclusions in many policies for costs incurred in cleaning up pre-existing contamination at a site that was "owned or leased by the insured." n279 There may be similar restrictions in some pollution liability policies issued today, n280 but such provisions are no longer common.

In response to the Brownfields movement that began in the early 1990s to encourage redevelopment of abandoned and deteriorating commercial facilities, insurers started covering both "on-site" and "off-site" remediation to the extent the cleanup was mandated by government action. n281 Many PLL policies issued today have relaxed the requirements further by adopting a discovery trigger for coverage of "on-site," first-party cleanup costs. Under the discovery trigger, coverage may be available even in the absence of any

government demand if the conditions requiring remediation on the insured's property are first discovered and reported to the insurer during the policy period. n282 In some cases, however, an insurer's pre-approval of a voluntary cleanup plan for on-site remediation may still be necessary for PLL coverage to apply. n283

Modern PLL policies also generally allow coverage for pre-existing and continuing contamination, if the pollution conditions at issue were unknown prior to the inception of the policy. n284 Some PLL policies today even allow coverage with respect to *known*, pre-existing contamination, as long as the conditions were disclosed to the insurance company before the policy took effect. n285 These policies may, for example, cover expenses incurred if the government invokes a "reopener" to require additional remediation after a "no further action letter" or similar certification of completion has been issued. n286

The test for determining whether the insured had knowledge of pre-existing conditions may be based on objective ("knew or should have known") or subjective ("actual knowledge") criteria, depending on the policy language at issue and applicable law. n287 Some policies specifically list or describe the individuals whose knowledge is relevant in determining whether the policyholder knew (or, in some cases, should have known) of pre-existing contamination. n288 For example, many policies limit the relevant knowledge to that held by "any officer, director, partner, or employee responsible for environmental affairs" at a facility. n289 To avoid the potential for dispute over whether a pre-existing condition was disclosed to the insurer prior to policy inception, many PLL policies require that all such disclosures be listed specifically on a policy schedule. n290

In a 2009 case, the PPL policy provided coverage for cleanup costs resulting from pollution conditions on or under the insured property that commenced on or after the continuity date, if the pollution conditions were discovered by the insured during the policy period, provided that the insured reported the discovery of pollution conditions to the insurer in writing as soon as possible after discovery and during the policy period. According to the policy, discovery of pollution conditions happened when a responsible insured became aware of pollution conditions. Furthermore, the pollution conditions must have been reported to the appropriate governmental agency in substantial compliance with applicable environmental laws in effect as of the date of discovery. The policy did not apply to cleanup costs for pollution conditions based on or attributable to any responsible insured's intentional, willful, or deliberate noncompliance with any statute, regulation, ordinance, administrative complaint, notice of violation, notice letter, executive order, or instruction of any governmental agency or body.

The North Carolina Department of Environmental and Natural Resources issued a notice of violation, alleging that the insureds operated a nonconforming solid waste disposal site at a construction site. What was uncovered from beneath the site included large pieces of concrete, broken wood, rebar, metal, vegetation, a crushed refrigerator, compressors, and a crushed underground storage tank. The insureds contended that, without their knowledge, a subcontractor dug large pits, dumped waste materials from its demolition and land clearing activities into the pits, and buried the waste material with soil. The insurer alleged that the construction and demolition (C&D) debris was discarded with the insureds' knowledge and consent. The court held that it was not clear whether the insureds

satisfied the condition of coverage requiring the insureds to provide timely notice of the debris because evidence indicating that the insureds' management personnel witnessed or directed the debris burial created a factual dispute as to when the insureds discovered the debris. There were also factual disputes concerning whether the C&D debris constituted an irritant or contaminant as required for coverage under the policy. The court denied the insureds' motion for partial summary judgment. n290.1

[d] "Sudden" and "Nonsudden" Coverage

Unlike its EIL ancestors, PLL insurance generally does not draw coverage distinctions between "sudden and accidental" and "nonsudden and accidental" pollution. n291 Even before the adoption of "absolute" pollution exclusions in CGL policies in 1986, insurers began removing old EIL exclusions for "sudden and accidental" discharges in pollution liability policies to enable policyholders to meet financial responsibility requirements under RCRA. n292 Whether a release of pollutants is "sudden" or "nonsudden" simply is not an issue in policies being sold today. The EPA has stated, in any event, that:

> The Agency believes that maintaining distinct coverage requirements is still appropriate... . EPA recognizes, however, that in some cases, courts have interpreted coverage for sudden events broadly to include damage from a gradual release occurring over long periods of time. As a result, some insurers do not distinguish between sudden and nonsudden events, but offer "combined coverage": coverage for both sudden and nonsudden events on the same policy with single aggregate and per-occurrence limits. n293

In *EPA v. Environmental Waste Control, Inc.,* n294 the Seventh Circuit concluded that a RCRA facility could not meet the financial responsibility test simply by maintaining the higher limits required for "nonsudden and accidental" coverage in a single policy that did not distinguish between "sudden" and "nonsudden" discharges. As they still do today, the RCRA regulations specified that "interim status" facilities must maintain limits of $1 million per occurrence and $2 million in the aggregate for "sudden and accidental" releases, and $3 million per occurrence and $6 million annual aggregate for "nonsudden and accidental" pollution. n295

The policy at issue in *Environmental Waste Control* had single limits of $3 million per claim and $6 million annual aggregate. n296 The EPA sued, claiming that the regulations required total, combined limits of at least $4 million per occurrence and $8 million in the aggregate. n297 Although the regulations did not directly address whether limits must be aggregated in a "combined" policy, the Seventh Circuit upheld the lower court's order closing the facility and imposing civil penalties of almost $3 million against the owner. n298

Notably, the Seventh Circuit reached its conclusion in *Environmental Waste Control* even though (a) the state environmental regulatory agency had approved the insurance policy, (b) the insurance company had provided a required endorsement indicating that the policy complied with RCRA requirements, and (c) the policyholder had called the EPA's RCRA "hot line" to confirm that the policy limits satisfied the requirements. n299 The court held, however, that:

> The fact that EWC attempted to comply with the insurance regulations and that no harm resulted from EWC's under-insurance is

> simply irrelevant. The fact remains that EWC failed to meet the federal standards, a failure which deprived EWC of its interim status. Given the environmental problems facing the world today and the federal laws in question, we think that it would be counterproductive to read a "good faith" defense where none exists. n300

While the *Environmental Waste Control* case was still pending, the EPA amended its regulations to provide explicitly that "[o]wners or operators who combine coverage levels for sudden and nonsudden accidental occurrences must maintain liability coverage in the amount of at least $4 million per occurrence and $8 million annual aggregate." Thus, it is now clear that a "combined" PLL policy that does not differentiate between "sudden and accidental" and "nonsudden and accidental" releases can satisfy RCRA regulations, but that the limits specified in the regulations must be aggregated to avoid potentially devastating consequences.

[e] Site-Specific Coverage

In the early days of EIL coverage, insurers and policyholders did not have sufficient experience with the Superfund law and its scheme of strict liability to recognize the enormous liability potential associated with non-owned waste disposal sites. n301 Accordingly, some EIL polices issued in the late 1970s and early 1980s were not carefully drafted to preclude coverage with respect to unknown disposal sites or, for that matter, facilities previously owned by the insured that were not evaluated in the underwriting process. n302

More recent pollution liability policies are very explicit in allowing coverage only for pollution incidents or conditions "on, at, under, or migrating from" an "insured site" or location specifically identified in the declarations or in an endorsement to the policy, sometimes by reference to an attached application. n303 This limitation is in sharp contrast to coverage available under broad-form CGL policies, which ordinarily insure liabilities originating anywhere in the world. n304

Some insurance companies are now willing, for a premium increase, to provide coverage for pollution incidents arising from off-site waste disposal. n305 In most cases, however, the waste disposal site must be properly licensed, approved by the underwriter, and listed on a policy schedule for coverage to apply. n306

[f] Retroactive Date

Many PLL policies have a "retroactive date," limiting coverage for pre-existing contamination to that which occurred or commenced after a date specified on the declarations page of the policy.

In many cases, the "retroactive date" will be defined as the policy inception date or the date the insured first purchased PLL or EIL coverage, thus effectively nullifying any coverage for pre-existing contamination. n307 Furthermore, as the party seeking coverage, the insured generally will bear the burden of establishing that the contamination occurred after the "retroactive date"--a difficult proposition even in the best of cases. n308

"Retroactive date" provisions may be particularly problematic to policyholders in connection with Brownfields projects involving redevelopment of long-abandoned commercial or industrial facilities. In such situations, there

may be little information available about the past operations at the site. Further, it may be difficult, if not impossible, after the acquisition of the property for the developer to determine when previously unknown contamination first commenced. These same considerations, however, may make a "retroactive date" provision all the more important to an insurance underwriter.

[2] Remediation "Cost Cap" Insurance

Remediation "cost cap" insurance is a risk management tool developed in 1994 allowing investors, property owners, developers, and secured lenders a method of avoiding significant cost overruns associated with ongoing remediation projects. This type of coverage is generally available to help guarantee that actual cleanup costs will not exceed estimates by more than a certain agreed amount, subject to the total limits of coverage purchased.

"Cost cap" insurance essentially provides "stop loss" protection. The insured will be responsible for the estimated remediation costs plus some additional amount beyond the estimated costs before the insurance will apply. For example, if the insured purchases a "cost cap" policy with limits of $2 million for a cleanup estimated at $1 million, the insurance company may require a self-insured retention of $250,000. Under that scenario, the insurance will pay up to $2 million over the first $1.25 million in cleanup costs incurred. To reduce the premium costs, some "cost cap" policies provide that the insured will pay a negotiated co-insurance percentage of amounts incurred above the self-insured retention.

The actual limits, retentions, and premiums for this type of coverage will vary on a case-by-case basis depending on the nature of the contamination and perceived risks involved. The coverage is highly engineered and carefully underwritten by insurance companies. At a minimum, the insurance company will require an approved remediation plan with cost estimates from reputable environmental consulting firms. Many insurance companies have their own environmental engineering staff to help evaluate and underwrite the risks involved.

To help facilitate the transfer and productive redevelopment of abandoned industrial sites, a potential buyer, seller, and lending institution can each be named as insureds under a "cost cap" policy. In addition, consultants and contractors can use this type of insurance to propose fixed price contracts for remediation work. In light of the relatively high premiums and self-retention buffer required under most of these policies, remediation "cost cap" coverage is used primarily in larger commercial transactions. Furthermore, insurance companies are more willing to offer this type of coverage in jurisdictions with risk-based corrective action standards and states with voluntary cleanup programs.

[3] Secured Creditor Coverage

Many insurance companies now offer a policy dedicated to secured creditors exposed to economic loss through the credit risk assocated with the devaluing effects of pollution at property held as collateral for a loan, and through the risk of foreclosure. One form of lender's coverage pays the lender the principal balance due on a mortgage loan when (i) contamination is present at the insured property; (ii) the loan is in default; and (iii) the lender's interest in the collateral is transferred to the insurance company. Most of the lenders'

policies available, however, are structured to pay the lesser of the default amount, the cleanup costs, or third-party claims for bodily injury, property damage, and legal defense costs.

[4] Contractor's Insurance

In the past, most environmental contractors elected to self-insure their exposure to environmental liabilities because insurance coverage for contractors and consultants was very expensive and difficult to obtain. Today, there are a number of insurers offering liability insurance to environmental contractors on either a claims-made or occurrence basis. Blanket insurance may also be available to cover liabilities associated with remediation work at all sites with which the cleanup contractor is involved.

A contractor's pollution liability policy helps protect contractors against claims of third parties for bodily injury or property damage. Such a policy may cover legal defense costs as well as costs of cleaning up both on-site and off-site contamination caused when working at the site. Contractor's pollution liability coverage applies to a variety of contracting operations, including mobile waste treatment units; emergency spill response; site restoration; storage tank cleaning, removal, and installation; transformer removal; and asbestos abatement. Property owners, who generally are not themselves covered during the period of remediation, often require the consultants and contractors they hire to purchase this coverage.

Professional liability coverage is also available for consultants, risk assessment firms, laboratories, architects, and engineers. This coverage, which is offered on a claims-made or occurrence basis from some insurers, applies to pollution damages resulting from negligent acts, errors, or omissions committed in rendering professional environmental services. Prior acts coverage is generally available for risks previously insured, so that there will be continuity of coverage under the claims-made forms. The professional services covered must be itemized in the policy. An errors and omissions policy typically will pay for third-party personal injury and property damage, including cleanup costs and loss of use. Combined coverage for contractor's pollution liability and errors and omissions is available when, for example, the same firm doing the design work also performs the hands-on remediation.

[5] Blended Finite Risk

A finite risk insurance program essentially combines elements of PLL and "cost cap" insurance to support a structured settlement of environmental liabilities and cleanup costs for known and unknown contamination at a particular site. This type of arrangement often is used to facilitate very large Brownfields projects or the resolution of substantial Superfund liabilities. Under a finite risk program, the insured makes a one-time, lump-sum payment of the estimated future remediation costs plus a premium to the insurer. The portion of the funds representing the net present value of the anticipated remediation expenses are deposited in an interest-bearing commutation trust account managed by the insurer. The insurer assumes responsibility for managing and paying the bills of the remediation contractor and provides "cost cap" and, in some cases, PLL coverage to the contractor and primary insured. When the remediation work is completed, the insurer will be entitled to any funds that remain the trust account. If there is a cost overrun, the insurance will pay any deficit up to the limits of coverage. In many cases, the contractor will agree to assume all

liabilities associated with the site, provide an indemnity backed by the insurance, and perform the work.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGeneral Liability InsuranceCoverageEnvironmental Claims

FOOTNOTES:
(n1)Footnote 183. *See* Susan M. Cooke, *Insurance Coverage for Environmental Losses and Liabilities,* The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation § 19.07[1]; Eugene R. Anderson & John G. Nevius *Insurance Issues, in* Brownfields Law and Practice § 28.01[8][a] (Michael B. Gerrard ed.); Tollin & Taylor, *Pro Rata Allocation: Determining Whether Environmental Insurance Was Available*, 5 J. Ins. Coverage 25, 29-30 (Spring 2002).

(n2)Footnote 184. *See* Mitchell Lathrop, Insurance Coverage for Environmental Claims § 5.02[1]; Susan M. Cooke, *Insurance Coverage for Environmental Losses and Liabilities,* The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation § 19.07[1]; Eugene R. Anderson & John G. Nevius *Insurance Issues, in* Brownfields Law and Practice § 28.01[8][a] & n.145 (Michael B. Gerrard ed.); Martin T. Katzman, *Environmental Risk Management Through Insurance,* 6 Cato J. 775 (1987). Although the so-called "sudden and accidental" pollution exclusion became a fixture in CGL policies issued after 1973, insurers began adding the exclusion to CGL policies by endorsement as early as 1970. *See, e.g.,* Jeffrey W. Stempel, Interpretation of Insurance Contracts: Law and Strategy for Insurers and Policyholders § T1.1, at 826-27 (1994).

(n3)Footnote 185. 42 U.S.C. § 6901, *et seq.*; *see also* Mitchell Lathrop, Insurance Coverage for Environmental Claims § 5.02[1] ("Environmental impairment liability (EIL) insurance, also known as pollution liability, is a creature of the post-RCRA era.").

(n4)Footnote 186. *See, e.g.,* Mitchell Lathrop, Insurance Coverage for Environmental Claims § 5.02[2]; Kenneth S. Abraham, Environmental Liability Insurance Law: An Analysis of Toxic Tort and Hazardous Waste Insurance Coverage Issues, at 196 (1991); Eugene R. Anderson & John G. Nevius, *Insurance Issues, in* Brownfields Law and Practice § 28.01[8][a]. *See generally* Turner T. Smith, Jr., *Environmental Damage Liability Insurance--A Primer,* 39 Bus. Law. 333, 335 (1983). Because EIL policy language often varies from policy to policy, it is especially important to review the specific language contained in EIL policies as issued in evaluating the potential for coverage. The discussion that follows is, by necessity, general in nature.

(n5)Footnote 187. *See, e.g., id.*; Susan M. Cooke, *Insurance Coverage for Environmental Losses and Liabilities,* The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation § 19.07[1] & n. 4; United States Dep't of the Treasury, *Hazardous Substance Liability Insurance*, Mar. 1982, at 72-74.

(n6)Footnote 188. *See, e.g.,* Olin Corp. v. Insurance Co. of N. Am., 221 F.3d 307, 325 (2d Cir. 2000) ; Michael Dore, 4 Law of Toxic Torts § 31:66 (2008); Committee on Business Management Liability Insurance, *Liability Insurance Against Environmental Damange: A Stats Report June 1982*, 38 Bus. Law. 217, 221 (1982); Martin T. Katzman, *Environmental Risk Management Through*

Insurance, 6 Cato J. 775, 788-89 (1987); Tollin & Taylor, *Pro Rata Allocation: Determining Whether Environmental Insurance Was Available*, 5 J. Ins. Coverage 25, 29 (Spring 2002); Henry & Russek, *Insurance Response to Pollution: Past, Present, and Future,* John Liner Rev., Spring 2004, at 1, 7; Waeger, *Current Insurance Policies for Insuring Against Environmental Risks*, *in* Environmental Insurance: Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, at 339, 342 (ALI-ABA Course of Study Materials No. CN050, May 8-9, 2008); *see also* Mitchell Lathrop, Insurance Coverage for Environmental Claims § 5.02[2] (noting that "virtually all commercial insurance programs are designed to form a sort of mosaic which completely protects the insured, provided that all the pieces of the mosaic have been filled in."); Gallozzi & Stevens, *Transactional Uses of Environmental Risk Policies, in* New Solutions to Environmental Problems in Business & Real Estate Deals, at 301, 312 (PLI Real Estate L. & Practice Course Handbook Series No. N0-005R, 2000) (The EIL policy "was one of a group of '[s]pecialty environmental insurance products' that were 'designed to cover exposures ... otherwise subject to disputes and litigation in relation to the comprehensive general liability (CGL) policy.' ") (quoting Keefe, Technical Report, *Environment: The Brownfield Boom*, Reinsurance, July 1, 1998, at 20).

(n7)Footnote 189. *See, e.g.,* Mitchell Lathrop, Insurance Coverage for Environmental Claims § 5.02[2]; Peter J. Kalis, *et al.*, Policyholder's Guide to the Law of Insurance § 12.03 (2005).

(n8)Footnote 190. 673 F. Supp. 1359 (D. Del. 1987) , *aff'd,* 933 F.2d 1162 (3d Cir. 1991) .

(n9)Footnote 191. *Id.* at 1363-64 (citations omitted). If there is overlapping occurrence-based CGL and claims-made EIL coverage, there may be an issue concerning which policy must answer first or how the coverage obligation should be apportioned. *See, e.g.,* W.R. Grace & Co. v. Maryland Cas. Co., 33 Mass. App. Ct. 358, 600 N.E.2d 176, 180 (1992) (applying New York law); *see also* Susan M. Cooke, *Insurance Coverage for Environmental Losses and Liabilities,* The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation § 19.07[3][f]; Peter J. Kalis, *et al.*, Policyholder's Guide to the Law of Insurance § 12.03[F] (2005). In some cases, it may be necessary to look to the "other insurance" clauses in the policies as interpreted in the relevant jurisdiction to determine how coverage should be applied. *See* Kenneth S. Abraham, Environmental Liability Insurance Law: An Analysis of Toxic Tort and Hazardous Waste Insurance Coverage Issues, at 214-15 & n.27 (1991); O'Brien, *Environmental Impairment Liability Insurance*, *in* Pollution Liability: Managing the Challenges of Coverage and Defense in 1991, Q205 ALI-ABA 165, 181 (ALI-ABA Course Materials Jan. 17, 1991). The issue of concurrent coverage under two or more policies and application of "other insurance" provisions is discussed in greater detail in Chapter 140 *above*.

(n10)Footnote 192. *See, e.g.*:

Ind.-- Barmet, Inc. v. Security Ins. Group, 425 N.E.2d 201, 202-03 (Ind. Ct. App. 1981) ;

N.J.-- Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co., 186 N.J. Super. 156, 451 A.2d 990 (Law Div. 1982) ; Lansco, Inc. v. Department of Envtl. Protection, 138 N.J. Super. 275, 350 A.2d 520 (Ch. Div. 1975) , *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976) , *cert.*

denied, 73 N.J. 57, 372 A.2d 322 (1977) ;

N.Y.-- Allstate Ins. Co. v. Klock Oil Co., 73 A.D.2d 486, 426 N.Y.S.2d 603, 605, 1980 N.Y. App. Div. LEXIS 10072 (1980) ; *see also* Evans v. Aetna Cas. & Sur. Co., 107 Misc. 2d 710, 435 N.Y.S.2d 933, 935-36, 1981 N.Y. Misc. LEXIS 2087 (Sup. Ct. Erie County 1981) (holding that gasoline release by vandals was "sudden and accidental").

See generally Susan M. Cooke, *Insurance Coverage for Environmental Losses and Liabilities,* The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation § 19.05[3][d] & n. 206; Peter J. Kalis, *et al.*, Policyholder's Guide to the Law of Insurance § 12.03 (2005). The first reported court decision to adopt a temporal interpretation of the word "sudden" in the "sudden and accidental" pollution exclusion did not appear until 1986. *See* Waste Management v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374, 382 (1986) .

(n11)Footnote 193. *See* Peter J. Kalis, *et al.*, Policyholder's Guide to the Law of Insurance § 12.03 (2005); Susan Neuman & Robert D. Chesler, *Environmental Insurance Coverage*, *in* Environmental Law & Practice Guide § 8.01[2][a] (noting that the EIL "policy first emerged as a response to the RCRA Subtitle C financial assurance requirements").

(n12)Footnote 194. *See* 43 Fed. Reg. 58,946 (Dec. 18, 1978) .

(n13)Footnote 195. *See* 47 Fed. Reg. 16,544 (Apr. 16, 1982) ; *see also* 40 C.F.R. §§ 264.141, 264.147-264.151.

(n14)Footnote 196. 43 Fed. Reg. 58,946, 59,007 (Dec. 18, 1978) (originally proposed for codification at 40 C.F.R. § 250.43-9(b)).

(n15)Footnote 197. *Id.*

(n16)Footnote 198. 43 Fed. Reg. 58,946, 58,987 .

(n17)Footnote 199. *Id.*

(n18)Footnote 200. *See* Judith M. Nixon, Comment, *The Problem with RCRA--Do the Financial Responsibility Provisions Really Work?*, 36 Am. U. L. Rev. 133, 139 (Fall 1986).

(n19)Footnote 201. *See, e.g.,* Olin Corp. v. Insurance Co. of N. Am., 221 F.3d 307, 325 (2d Cir. 2000) (discussing finding that EIL coverage was "available to large companies in the United States beginning at least as early as 1980"); Martin T. Katzman, *Environmental Risk Management Through Insurance,* 6 Cato J. 775, 776 (1987); *see also* Banham, *Hazards of the Deal*, CFO, May 2000, 91, at 96 (noting that "stand-alone EIL insurance" was "introduced by American International Group (AIG), in 1979" but that "the underwriting requirements were so restrictive few gave it serious consideration").

(n20)Footnote 202. *See, e.g.,* Olin Corp. v. Insurance Co. of N. Am., 986 F. Supp. 841, 844 (S.D.N.Y. 1997) , *aff'd,* 221 F.3d 307 (2d Cir. 2000) . The issue generally arises in jurisdictions that adopt a *pro rata* allocation approach and allow allocation to the insured for uncovered periods of continuing loss for which EIL insurance was available but not purchased. *See, e.g., id.*; *see also* Tollin & Taylor, *Pro Rata Allocation: Determining Whether Environmental Insurance Was Available*, 5 J. Ins. Coverage 25 (Spring 2002); Susan Neuman, *A*

Willing Self-Insurer? The Availability of Environmental Impairment Liability Insurance After 1985, 5 J. Ins. Coverage 32 (Autumn 2002).

(n21)Footnote 203. Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601, *et seq*.

(n22)Footnote 204. *See, e.g.,* Banham, *Hazards of the Deal*, CFO, May 2000, 91, at 96; Martin T. Katzman, *Environmental Risk Management Through Insurance,* 6 Cato J. 775, 776 (1987); Tollin & Taylor, *Pro Rata Allocation: Determining Whether Environmental Insurance Was Available*, 5 J. Ins. Coverage 25, 29-30 (Spring 2002).

(n23)Footnote 205. 45 Fed. Reg. 33,260 (May 19, 1980) . Although the regulations as originally proposed in 1978 did not contemplate any insurance requirement for older facilities operating under "interim status" provisions, the reissued proposal was expanded to require a lesser amount of coverage for "sudden and accidental" events at such facilities. *Id* The reissued proposal still did not require "interim status" operators to obtain "nonsudden" EIL coverage based on a concern that insurers would not issue EIL policies to facility operators that had not been subjected to the rigorous review process involved in obtaining a RCRA permit. 45 Fed. Reg. at 33,263.

(n24)Footnote 206. *Id*.

(n25)Footnote 207. 46 Fed. Reg. 2802, 2821 (Jan. 12, 1981) . Although these "interim final" regulations limited the types of facilities required to demonstrate financial responsibility for "nonsudden" releases, they expanded the "nonsudden" insurance requirements to apply to both permitted and interim status facilities. *Id*.

(n26)Footnote 208. *Id*.

(n27)Footnote 209. 46 Fed. Reg. at 2827 .

(n28)Footnote 210. 64 Fed. Reg. 48,197 (Oct. 1, 1981) .

(n29)Footnote 211. *See* Tollin & Taylor, *Pro Rata Allocation: Determining Whether Environmental Insurance Was Available*, 5 J. Ins. Coverage 25, 30 (Spring 2002). Beginning in 1981, Pacific Insurance Company, through Swett & Crawford, and Great American Surplus Lines Insurance Company, through Stewart Smith & Co., entered the EIL market. *Id.* They joined other domestic insurers already providing EIL coverage, including the market pioneer, American International Group. *Id.* Evanston Insurance Company, writing through Shand Morahan & Co., Inc., had also entered the EIL market, along with several London insurers. *Id.* Notably, the London market effectively doubled available EIL limits in 1981, to $20 million per claim. *Id*.

(n30)Footnote 212. United States Dep't of the Treasury, *Hazardous Substance Liability Insurance*, Mar. 1982, at 74-77; Kenneth S. Abraham, Environmental Liability Insurance Law: An Analysis of Toxic Tort and Hazardous Waste Insurance Coverage Issues, at 196 (1991).

(n31)Footnote 213. Martin T. Katzman, *Environmental Risk Management Through Insurance,* 6 Cato J. 775, 776 (1987) (citing United States Dep't of the Treasury, *Hazardous Substance Liability Insurance*, Mar. 1982); Turner T. Smith, Jr., *Environmental Damage Liability Insurance--A Primer,* 39 Bus. Law. 333, 339

(1983); *see also* Susan M. Cooke, *Insurance Coverage for Environmental Losses and Liabilities,* The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation § 19.07[1] n.3. Insurers entering the market in 1982 reportedly included Aetna Casualty & Surety Insurance Company, Travelers Insurance Company, and the Hartford Insurance Company. *See* Tollin & Taylor, *Pro Rata Allocation: Determining Whether Environmental Insurance Was Available*, 5 J. Ins. Coverage 25, 30 (Spring 2002). Furthermore, former Crum & Forster affiliate, International Insurance Company, "became the fronting company for London EIL program policies issued in the United States in 1982." *Id*.

(n32)Footnote 214. *Id.*; *see also* Martin T. Katzman, *Environmental Risk Management Through Insurance,* 6 Cato J. 775, 776 (1987).

(n33)Footnote 215. *See* 47 Fed. Reg. 16,544 (Apr. 16, 1982) (codified at 40 C.F.R. Parts 123, 264, and 265).

(n34)Footnote 216. *Id.*; *see also* United States Dep't of the Treasury, *Hazardous Substance Liability Insurance*, Mar. 1982, at 31; *see generally* Committee on Business Management Liability Insurance, *Liability Insurance Against Environmental Damage: A Status Report June 1982*, 38 Bus. Law. 217, 224-31 (1982).

(n35)Footnote 217. 40 C.F.R. §§ 264.141(g) (permitted facilities), 265.141(g) (interim status facilities).

(n36)Footnote 218. *Id*.

(n37)Footnote 219. 47 Fed. Reg. 16,544, 16,551 (Apr. 16, 1982) .

(n38)Footnote 220. 47 Fed. Reg. at 16,549 .

(n39)Footnote 221. These carriers included the Hartford Steam Boiler Inspection and Insurance Company, the Home Insurance Company, and St. Paul Surplus Lines Insurance Company. Tollin & Taylor, *Pro Rata Allocation: Determining Whether Environmental Insurance Was Available*, 5 J. Ins. Coverage 25, 30-31 (Spring 2002).

(n40)Footnote 222. *See* Susan Neuman & Robert D. Chesler, *Environmental Insurance Coverage*, Environmental Law Practice Guide: State and Federal Law § 8.01[2][a] (Michael B. Gerrard ed.); Eugene R. Anderson & John G. Nevius, *Insurance Issues in* Brownfields Law & Practice § 28.01[8][b] (Michael B. Gerrard ed.); Dybdahl, *Risk Managers and EIL: Chaos Reigns*, Nat'l Underwriter, Apr. 10, 1989, at 16 ("By 1983, the market had expanded to at least 55 insurance companies with aggregate market capacity of $270 million.").

(n41)Footnote 223. Susan Neuman & Robert D. Chesler, *Environmental Insurance Coverage*, Environmental Law Practice Guide: State and Federal Law § 8.01[2][a] (Michael B. Gerrard ed.); *see also* Susan Neuman, *A Willing Self-Insurer? The Availability of Environmental Impairment Liability Insurance After 1985,* 5 J. Ins. Coverage 32, 38-39 (Autumn 2002) (noting that "EIL policies were not as appropriately underwritten or as carefully worded as they might have been").

(n42)Footnote 224. 47 Fed. Reg. 16,544, 16,550 (Apr. 16, 1982) .

(n43)Footnote 225. Mitchell Lathrop, Insurance Coverage for Environmental Claims § 5.02[1].

(n44)Footnote 226. *See id.*; Peter J. Kalis, *et al.*, Policyholder's Guide to the Law of Insurance § 12.03[A] (2005). Significantly, the RCRA regulations made EIL coverage mandatory only for operators of hazardous waste landfills, surface impoundments, and land treatment facilities--the most high-risk operations governed by RCRA. *See* 40 C.F.R. §§ 264.147(b)(2), 265.147(b)(2). Furthermore, many of the largest and better-managed facilities were exempt from the EIL insurance requirements based on the strength of their corporate balance sheets. *Id*.

(n45)Footnote 227. Reasons commonly cited for the lack of widespread acceptance of EIL insurance by the business community in the early- to mid-1980s include: (a) the limited scope of coverage being offered; (b) the relatively high price of the insurance; (c) a misconception on the part of regulated entities about the potential environmental exposures they faced; and (d) the general belief by risk managers in many companies that CGL insurance was sufficient to cover environmental liabilities. *See* Peter J. Kalis, *et al.*, Policyholder's Guide to the Law of Insurance § 12.03[A] (2005).

(n46)Footnote 228. *Id.*; *see also* Mitchell Lathrop, Insurance Coverage for Environmental Claims § 5.02[1] (2006); Waeger, *Current Insurance Policies for Insuring Against Environmental Risks*, *in* Environmental Insurance: Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, at 339, 342 (ALI-ABA Course of Study Materials No. CN050, May 8-9, 2008).

(n47)Footnote 229. *See id.*; Kenneth S. Abraham, Environmental Liability Insurance Law: An Analysis of Toxic Tort and Hazardous Waste Insurance Coverage Issues, at 196 (1991); Susan Neuman & Robert D. Chesler, *Environmental Insurance Coverage*, Environmental Law Practice Guide: State and Federal Law § 8.01[2][a] (Michael B. Gerrard ed.); Eugene R. Anderson & John G. Nevius, *Insurance Issues in* Brownfields Law & Practice § 28.01[8][b] (Michael B. Gerrard ed.); Peter J. Kalis, *et al.*, Policyholder's Guide to the Law of Insurance § 12.03[A] (2005); Martin T. Katzman, *Environmental Risk Management Through Insurance,* 6 Cato J. 775, 776 (1987); Susan Neuman, *A Willing Self-Insurer? The Availability of Environmental Impairment Liability Insurance After 1985,* 5 J. Ins. Coverage 32, 39 (Autumn 2002); Tollin & Taylor, *Pro Rata Allocation: Determining Whether Environmental Insurance Was Available*, 5 J. Ins. Coverage 25, 31 (Spring 2002); H. Kunreuther, *Gridlock in Environmental Insurance*, Env't, Jan./Feb. 1987, at 18; Parker, *The Insurance Crisis and Environmental Protection*, Env't, Apr. 1986, at 14, 15.

(n48)Footnote 230. *See* The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616 , § 213, 98 Stat. 3221 (codified as amended at 42 U.S.C. § 6925).

(n49)Footnote 231. *See, e.g.,* Judith M. Nixon, Comment, *The Problem with RCRA--Do the Financial Responsibility Provisions Really Work?*, 36 Am. U. L. Rev. 133, 135 n.16 (1986); Parker, *The Insurance Crisis and Environmental Protection*, Env't, Apr. 1986, at 14, 15; *see also* EPA v. Environmental Waste Control, Inc., 917 F.2d 327, 333-34 (7th Cir. 1990) (holding the "good faith" was not a defense to facility that automatically lost its "interim status" standing based on non-compliance with insurance requirements), *cert. denied,* 499 U.S. 975 (1991) .

(n50)Footnote 232. *See* Susan Neuman & Robert D. Chesler, *Environmental Insurance Coverage*, Environmental Law Practice Guide: State and Federal Law §

8.01[2][a] (Michael B. Gerrard ed.); Eugene R. Anderson & John G. Nevius, *Insurance Issues in* Brownfields Law & Practice § 28.01[8][b] (Michael B. Gerrard ed.). EIL coverage was also available on a more limited basis through the Pollution Liability Insurance Association, a pooling association formed to write pollution coverage for member companies. *See* Susan Neuman, *A Willing Self-Insurer? The Availability of Environmental Impairment Liability Insurance After 1985,* 5 J. Ins. Coverage 32, 39 (Autumn 2002); Tollin & Taylor, *Pro Rata Allocation: Determining Whether Environmental Insurance Was Available*, 5 J. Ins. Coverage 25, 30-31 (Spring 2002).

(n51)Footnote 233. *See, e.g.,* Kenneth S. Abraham, Environmental Liability Insurance Law: An Analysis of Toxic Tort and Hazardous Waste Insurance Coverage Issues, at 160-61 (1991).

(n52)Footnote 234. *See, e.g.,* Susan Neuman & Robert D. Chesler, *Environmental Insurance Coverage*, Environmental Law Practice Guide: State and Federal Law § 8.01[2][a] (Michael B. Gerrard ed.); Eugene R. Anderson & John G. Nevius, *Insurance Issues,* Brownfields Law and Practice §§ 28.01[8][b], [c] (Michael B. Gerrard ed.); Susan Neuman, *A Willing Self-Insurer? The Availability of Environmental Impairment Liability Insurance After 1985,* 5 J. Ins. Coverage 32, 38-39 (Autumn 2002).

(n53)Footnote 235. *See, e.g.,* Eugene R. Anderson & John G. Nevius, *Insurance Issues,* Brownfields Law and Practice § 28.01[8][b] (Michael B. Gerrard ed.); Peter J. Kalis, *et al.*, Policyholder's Guide to the Law of Insurance § 12.03[A] (2005); Susan Neuman, *A Willing Self-Insurer? The Availability of Environmental Impairment Liability Insurance After 1985,* 5 J. Ins. Coverage 32, 39 (Autumn 2002); *see also* Banham, *Hazards of the Deal*, CFO, May 2000, at 91, 96 (noting that "[h]undreds of forms had to be filled out, and applicants had to pay for an audit of the pollution exposures by environmental engineers before insurers would even pick up the phone").

(n54)Footnote 236. *See* Peter J. Kalis, *et al.*, Policyholder's Guide to the Law of Insurance § 12.03[A] (2005).

(n55)Footnote 237. *See, e.g.,* Eugene R. Anderson & John G. Nevius, *Insurance Issues,* Brownfields Law and Practice § 28.01[8][b] n.152 (Michael B. Gerrard ed.).

(n56)Footnote 238. *See, e.g.,* Banham, *Hazards of the Deal*, CFO, May 2000, at 91, 96.

(n57)Footnote 239. 53 Fed. Reg. 33,938, 33,939 (Sept. 1, 1988) .

(n58)Footnote 240. *Id.* (citations omitted).

(n59)Footnote 241. *See* 53 Fed. Reg. at 33,947 .

(n60)Footnote 242. *See, e.g.,* Susan Neuman, *A Willing Self-Insurer? The Availability of Environmental Impairment Liability Insurance After 1985,* 5 J. Ins. Coverage 32, 38-39 (Autumn 2002); Northern Kentucky University, *Environmental Insurance Products Available for Brownfields Redevelopment, 2005*, Feb. 2006, at 51, *available at* http://www.epa.gov/brownfields/pubs/enviro_insurance_2006.pdf.

(n61)Footnote 243. *See, e.g.,* Susan M. Cooke, *Insurance Coverage for*

Environmental Losses and Liabilities, The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation § 19.07[3][g]; Susan Neuman & Robert D. Chesler, *Insurance Issues in* Brownfields Law and Practice, at § 8.01 (Michael B. Gerrard ed.); Waeger, *Current Insurance Policies for Insuring Against Environmental Risks*, *in* Environmental Insurance: Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, at 339, 343 (ALI-ABA Course of Study Materials No. CN050, May 8-9, 2008).

(n62)Footnote 244. United States Dep't of the Treasury, *Hazardous Substance Liability Insurance*, Mar. 1982, at 71 (citations omitted).

(n63)Footnote 245. *See, e.g.,* Benjamin J. Richardson, *Mandating Environmental Liability Insurance*, 12 Duke Envtl. L. & Pol'y F. 293, 300 (2002).

(n64)Footnote 246. *See* Ann M. Waeger, *Current Insurance Policies for Insuring Against Environmental Risks*, *in* Environmental Insurance: Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, at 339, 347 (ALI-ABA Course of Study Materials No. CN050, May 8-9, 2008); *see also* Peter J. Kalis, *et al.*, Policyholder's Guide to the Law of Insurance § 12.03[C][1] (2005) ("EIL coverage is invariably written only on a 'claims-made' basis.").

(n65)Footnote 247. *See, e.g.,* Susan Neuman, *A Willing Self-Insurer? The Availability of Environmental Impairment Liability Insurance After 1985,* 5 J. Ins. Coverage 32, 40 (Autumn 2002).

(n66)Footnote 248. Susan Neuman, *A Willing Self-Insurer? The Availability of Environmental Impairment Liability Insurance After 1985,* 5 J. Ins. Coverage 32, 40 (Autumn 2002). Notably, the coverage periods in most EIL policies issued around that time were for no more than one year each, making it difficult in many cases for insureds to report claims that were made against them in time to secure coverage benefits. *Id.*; Turner T. Smith, Jr., *Environmental Damage Liability Insurance--A Primer*, 39 Bus. Law. 333, 341 (1983).

(n67)Footnote 249. *See, e.g.,* Susan Neuman & Robert D. Chesler, *Environmental Insurance Coverage*, Environmental Law Practice Guide: State and Federal Law § 8.14 (Michael B. Gerrard ed.) (attaching specimen "claims-made and reported policy" from Greenwich Insurance Company).

(n68)Footnote 250. *See* Northern Kentucky University, *Environmental Insurance Products Available for Brownfields Redevelopment, 2005*, Feb. 2006, *available at* http://www.epa.gov/brownfields/ pubs/enviro_insurance_2006.pdf.

(n69)Footnote 251. *See, e.g.,* Susan Neuman & Robert D. Chesler, *Environmental Insurance Coverage*, Environmental Law Practice Guide: State and Federal Law § 8.14 (Michael B. Gerrard ed.) (Greenwich Insurance Company Specimen Policy, § V).

(n70)Footnote 252. *See, e.g.*:

Ill.-- Central Ill. Pub. Serv. Co. v. American Empire Surplus Lines Ins. Co., 267 Ill. App. 3d 1043, 204 Ill. Dec. 822, 642 N.E.2d 723 (1994) ;

Mass.-- Alan Corp. v. International Surplus Lines Ins. Co., 823 F. Supp. 33 (D. Mass. 1993) , *aff'd,* 22 F.3d 339 (1st Cir. 1994) ; W.R. Grace & Co. v.

Maryland Cas. Co., 33 Mass. App. Ct. 358, 600 N.E.2d 176 (1992) ;

Minn.-- Cargill, Inc. v. Evanston Ins. Co., 642 N.W.2d 80 (Minn. Ct. App. 2002) ;

Mo.-- United States v. Conservation Chem. Co., 653 F. Supp. 152, 182 (W.D. Mo. 1986) ;

N.J.-- Hatco Corp. v. W.R. Grace & Co., 801 F. Supp. 1334 (D.N.J. 1992) ;

Ohio-- Thomas Steel Strip Corp. v. Am. Int'l Speciality Lines Ins. Co., No. 4:06 CV 0658, 2007 U.S. Dist. LEXIS 94623 (N.D. Ohio Jan. 11, 2007);

S.C.-- Dilmar Oil Co. v. Federated Mut. Ins. Co., 986 F. Supp. 959, 963 (D.S.C. 1997) ;

Wash.-- Wolf Bros. Oil Co. v. International Surplus Lines Ins. Co., 718 F. Supp. 839 (W.D. Wash. 1989) .

(n71)Footnote 253. *See, e.g.,* Northern Kentucky University, *Environmental Insurance Products Available for Brownfields Redevelopment, 2005*, Feb. 2006, at 8, *available at* http://www.epa.gov/ brownfields/pubs/enviro_insurance_2006.pdf.

(n72)Footnote 254. It is always important to review the specific language of the policy at issue in evaluating coverage issues under specialized environmental policies (or any policy, for that matter), as even slight variations in policy language could be outcome determinative. *See, e.g.,* Susan M. Cooke, *Insurance Coverage for Environmental Losses and Liabilities,* The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation § 19.07[2][a] n.10 (noting cases addressing markedly different EIL policy language).

(n73)Footnote 255. *See, e.g.,* Northern Kentucky University, *Environmental Insurance Products Available for Brownfields Redevelopment, 2005*, Feb. 2006, at 11, *available at* http://www.epa.gov/ brownfields/pubs/enviro_insurance_2006.pdf.

(n74)Footnote 256. *See, e.g.,* Kenneth S. Abraham, Environmental Liability Insurance Law: An Analysis of Toxic Tort and Hazardous Waste Insurance Coverage Issues, at 197-98 (1991).

(n75)Footnote 257. *See, e.g., id.*; Susan M. Cooke, *Insurance Coverage for Environmental Losses and Liabilities,* The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation § 19.07[2][a][i]; Peter J. Kalis, *et al.*, Policyholder's Guide to the Law of Insurance § 12.03[B][1] (2005); Turner T. Smith, Jr., *Environmental Damage Liability Insurance--A Primer,* 39 Bus. Law. 333, 343-49 (1983).

(n76)Footnote 258. *See, e.g.,* Kenneth S. Abraham, Environmental Liability Insurance Law: An Analysis of Toxic Tort and Hazardous Waste Insurance Coverage Issues, at 51-89, 197 (1991).

(n77)Footnote 259. *See* Gilbert, *Environmental Impact Insurance: Practical Considerations*, Environmental Aspects of Real Estate Transactions (James B. Witkin ed. 1995).

(n78)Footnote 260. *See* Peter S. Kalis, *et al.*, Policyholder's Guide to the Law of Insurance § 12.03[B][1] (2005).

(n79)Footnote 261. *See generally* Linda L. Schlueter, Punitive Damages §§ 17.0-17.2(D) (5th ed. 2005); Robert Jerry & Douglas Richmond, Understanding Insurance Law § 65[e] (4th ed. 2007).

(n80)Footnote 262. *See* Peter J. Kalis, *et al*., Policyholder's Guide to the Law of Insurance § 12.03[B][1] (2005).

(n81)Footnote 263. *See, e.g.,* Northern Kentucky University, *Environmental Insurance Products Available for Brownfields Redevelopment, 2005*, Feb. 2006, at 13, *available at* http://www.epa.gov/ brownfields/pubs/enviro_insurance_2006.pdf.

(n82)Footnote 264. *See, e.g.,* Northern Kentucky University, *Environmental Insurance Products Available for Brownfields Redevelopment, 2005*, Feb. 2006, at 13, *available at* http://www.epa.gov/ brownfields/pubs/enviro_insurance_2006.pdf.

(n83)Footnote 265. *See* Waeger, *Current Insurance Policies for Insuring Against Environmental Risks*, *in* Environmental Insurance: Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, at 339, 379 (ALI-ABA Course of Study Materials No. CN050, May 8-9, 2008).

(n84)Footnote 266. *See* Waeger, *Current Insurance Policies for Insuring Against Environmental Risks*, *in* Environmental Insurance: Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, 339, 375 (ALI-ABA Course of Study Materials No. CN050, May 8-9, 2008); Northern Kentucky University, *Environmental Insurance Products Available for Brownfields Redevelopment, 2005*, Feb. 2006, at 13, *available at* http://www.epa.gov/brownfields/pubs/enviro_insurance_2006.pdf.

(n85)Footnote 267. *Id*.

(n86)Footnote 268. *Id*.

(n87)Footnote 269. *See* Waeger, *Current Insurance Policies for Insuring Against Environmental Risks*, *in* Environmental Insurance: Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, at 339, 375 (ALI-ABA Course of Study Materials No. CN050, May 8-9, 2008).

(n88)Footnote 270. *See* Peter J. Kalis, *et al*., Policyholder's Guide to the Law of Insurance § 12.03[B][1] (2005).

(n89)Footnote 271. *See* Ann M. Waeger, *Current Insurance Policies for Insuring Against Environmental Risks*, *in* Environmental Insurance: Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, at 339, 375 (ALI-ABA Course of Study Materials No. CN050, May 8-9, 2008).

(n90)Footnote 271.1. **Tex.**-- RSR Corp. v. Int'l Ins. Co., 2009 U.S. Dist. LEXIS 27745 (N.D. Tex. Mar. 23, 2009) , *aff'd*, 612 F.3d 851 (5th Cir. 2010) .

(n91)Footnote 272. *See, e.g.,* United States Dep't of the Treasury, *Hazardous Substance Liability Insurance*, Mar. 1982, at 72; Susan M. Cooke, *Insurance Coverage for Environmental Losses and Liabilities,* The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation § 19.07[2][a][i]; Waeger, *Current Insurance Policies for Insuring Against Environmental Risks*, *in* Environmental Insurance: Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, at 339, 349 (ALI-ABA Course of Study Materials No. CN050, May 8-9, 2008).

(n92)Footnote 273. *See, e.g.,* Susan M. Cooke, *Insurance Coverage for Environmental Losses and Liabilities,* The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation § 19.07[2][a][i].

(n93)Footnote 274. *See* 53 Fed. Reg. 33,938, 33,947 (Sept. 1, 1988) ; *see also* United States Dep't of the Treasury, *Hazardous Substance Liability Insurance*, Mar. 1982, at 72 n.4.

(n94)Footnote 275. 40 C.F.R. §§ 264.147(a), (b); 40 C.F.R. §§ 265.147(a), (b).

(n95)Footnote 276. *See* 53 Fed. Reg. 33,938, 33,947-48 (Sept. 1, 1988) .

(n96)Footnote 277. *See* Susan M. Cooke, *Insurance Coverage for Environmental Losses and Liabilities,* The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation § 19.07[2][a][i] n.14 (identifying carriers that allow defense costs to be exclusive of policy limits).

(n97)Footnote 278. *See, e.g.,* United States Dep't of the Treasury, *Hazardous Substance Liability Insurance*, Mar. 1982, at 73, 76, 219 (EIL Form 1080, § II.10), 237-38 (ISO Form CG 00 29 10 81, Excl. (e)).

(n98)Footnote 279. *See, e.g.,* United States Dep't of the Treasury, *Hazardous Substance Liability Insurance*, Mar. 1982, at 73; Kenneth S. Abraham, Environmental Liability Insurance Law: An Analysis of Toxic Tort and Hazardous Waste Insurance Coverage Issues, at 209 (1991).

(n99)Footnote 280. *See* Waeger, *Current Insurance Policies for Insuring Against Environmental Risks*, *in* Environmental Insurance: Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, at 339, 377 (ALI-ABA Course of Study Materials No. CN050, May 8-9, 2008).

(n100)Footnote 281. *See, e.g.,* Susan Neuman & Robert D. Chesler, *Environmental Insurance Coverage*, Environmental Law Practice Guide: State and Federal Law § 8.01[2][a]; Susan Neuman, *A Willing Self-Insurer? The Availability of Environmental Impairment Liability Insurance After 1985,* 5 J. Ins. Coverage 32, 39-40 (Autumn 2002).

(n101)Footnote 282. *See, e.g.,* Northern Kentucky University, *Environmental Insurance Products Available for Brownfields Redevelopment, 2005*, Feb. 2006, at 15-16, *available at* http://www.epa.gov/ brownfields/pubs/enviro_insurance_2006.pdf.

(n102)Footnote 283. *See* Susan M. Cooke, *Insurance Coverage for Environmental Losses and Liabilities,* The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation § 19.07[2][a][iii].

(n103)Footnote 284. *See, e.g.,* Northern Kentucky University, *Environmental Insurance Products Available for Brownfields Redevelopment, 2005*, Feb. 2006, at 15-16, *available at* http://www.epa.gov/ brownfields/pubs/enviro_insurance_2006.pdf.

(n104)Footnote 285. *See, e.g.,* Northern Kentucky University, *Environmental Insurance Products Available for Brownfields Redevelopment, 2005*, Feb. 2006, at 14-15, *available at* http://www.epa.gov/ brownfields/pubs/enviro_insurance_2006.pdf.

(n105)Footnote 286. Northern Kentucky University, *Environmental Insurance Products Available for Brownfields Redevelopment, 2005*, Feb. 2006, at 14, *available at* http://www.epa.gov/ brownfields/pubs/enviro_insurance_2006.pdf. For the most part, however, coverage for remediation of known contamination is the province of "cost cap" polices, which are discussed in § 193.02[B][2] *below*.

(n106)Footnote 287. *Cf.* Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal. App. 4th 715, 15 Cal. Rptr. 2d 815, 834 (1993) (applying a subjective standard in determining whether the insured "expected or intended" property damage under a CGL policy); *see* Susan Neuman & Robert D. Chesler, *Environmental Insurance Coverage*, Environmental Law Practice Guide: State and Federal Law § 8.04[1] (Michael B. Gerrard ed.) (discussing various forms of "Known Pollution Conditions" exclusions).

(n107)Footnote 288. *See id.*; *see also* Ann M. Waeger, *Current Insurance Policies for Insuring Against Environmental Risks*, *in* Environmental Insurance: Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, at 339, 374 (ALI-ABA Course of Study Materials No. CN050, May 8-9, 2008).

(n108)Footnote 289. *See* Susan Neuman & Robert D. Chesler, *Environmental Insurance Coverage*, Environmental Law Practice Guide: State and Federal Law § 8.04[1] (Michael B. Gerrard ed.).

(n109)Footnote 290. *See, e.g.,* Susan Neuman & Robert D. Chesler, *Environmental Insurance Coverage*, Environmental Law Practice Guide: State and Federal Law § 8.04[1] (Michael B. Gerrard ed.).

(n110)Footnote 290.1. **U.S.**-- Picerne-Military Hous., LLC v. Am. Int'l Specialty Lines Ins. Co., 650 F. Supp. 2d 135 (D.R.I. 2009) .

(n111)Footnote 291. *See* Kenneth S. Abraham, Environmental Liability Insurance Law: An Analysis of Toxic Tort and Hazardous Waste Insurance Coverage Issues, at 211-215 (1991).

(n112)Footnote 292. *See* 53 Fed. Reg. 33,938, 33,947 (Sept. 1, 1988) ; United States Dep't of the Treasury, *Hazardous Substance Liability Insurance*, Mar. 1982, at 74-75.

(n113)Footnote 293. 53 Fed. Reg. 33,938, 33,947 (Sept. 1, 1988) .

(n114)Footnote 294. 917 F.2d 327 (7th Cir. 1990) , *cert. denied,* 499 U.S. 975 (1991) .

(n115)Footnote 295. *See* 917 F.2d at 333 (citing 40 C.F.R. § 265.147).

(n116)Footnote 296. *Id*.

(n117)Footnote 297. *Id*.

(n118)Footnote 298. 917 F.2d at 330 , 333.

(n119)Footnote 299. 917 F.2d at 333 .

(n120)Footnote 300. 917 F.2d at 334 n.4 .

(n121)Footnote 301. *See* Tollin & Taylor, *Pro Rata Allocation: Determining*

Whether Environmental Insurance Was Available, 5 J. Ins. Coverage 25, 34 (Spring 2002).

(n122)Footnote 302. *See* Susan Neuman, *A Willing Self-Insurer? The Availability of Environmental Impairment Liability Insurance After 1985,* 5 J. Ins. Coverage 32, 39 (Autumn 2002).

(n123)Footnote 303. *See, e.g.,* Peter J. Kalis, *et al*., Policyholder's Guide to the Law of Insurance § 12.03[B][3] (2005); Tollin & Taylor, *Pro Rata Allocation: Determining Whether Environmental Insurance Was Available*, 5 J. Ins. Coverage 25, 34 (Spring 2002); Northern Kentucky University, *Environmental Insurance Products Available for Brownfields Redevelopment, 2005*, Feb. 2006, at 11, *available at* http://www.epa.gov/brownfields/pubs/ enviro_insurance_2006.pdf.

(n124)Footnote 304. *See* Peter J. Kalis, *et al*., Policyholder's Guide to the Law of Insurance § 12.03[B][3] & n.152 (2005).

(n125)Footnote 305. *See, e.g.,* Waeger, *Current Insurance Policies for Insuring Against Environmental Risks*, *in* Environmental Insurance: Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, at 339, 349 (ALI-ABA Course of Study Materials No. CN050, May 8-9, 2008).

(n126)Footnote 306. *See* Peter J. Kalis, *et al*., Policyholder's Guide to the Law of Insurance § 12.03[B][3] (2005); Tollin & Taylor, *Pro Rata Allocation: Determining Whether Environmental Insurance Was Available*, 5 J. Ins. Coverage 25, 34 (Spring 2002).

(n127)Footnote 307. *See* Peter J. Kalis, *et al*., Policyholder's Guide to the Law of Insurance § 12.03[C][2] (2005).

(n128)Footnote 308. *See* Harvey Oil Co. v. Federated Mut. Ins. Co., 837 F. Supp. 242, 244 (W.D. Mich. 1993) .