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Hurdles to Coverage: Interpreting Policy Provisions to Obtain Coverage Court Decisions in the Western States

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I. OCCURRENCE

A. Policy Language:

"Occurrence" means 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.

B. Policyholder's Position - The damage was neither intended nor expected. The standard of review should be subjective; that is, the actual intentions and expectations of the particular policyholder should be considered.

C. Insurer's Position - The discharge was expected or intended. The standard of review should be objective; that is, whether a reasonable policyholder would have expected or intended the damage.

D. Selected California Case Law

1. Asbestos Insurance Coverage Cases, Judicial Council Coordination Proceeding No. 1072, Superior Court of the State of California, City and County of San Francisco, Statements of Decision filed January 24, 1990 (affirmed on Appeal — Armstrong World Industries, Inc. v. Aetna Casualty Co., et al., 35 Cal. App. 4th 192 (1993); *review denied* 1996 Cal. LEXIS 4708 (Cal. Aug. 21, 1996).

   - Court held that to defeat coverage "an insurer . . . may show that reason mandates that by the very nature of the act undertaken, coupled with the knowledge actually in possession of the insured, harm must have been intended.

2. Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal. App. 4th 715, 15 Cal. Rptr. 2d 815 (Cal. App. 1 Dist. 1993).

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- Court stated that "subjective expectation test, rather than objective test applied with respect to exception to pollution exclusion in liability policy which defined 'occurrence' as accident, including continuous repeated exposure to conditions, which result in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

- Court also stated that "'expected', for purposes of expected and intended exception to pollution exclusion in liability policy, does not include should have known; rather, word comprehends actual belief and probability of future event."

- The court rejected the objective test.

3. Aerojet-General Corp. v. Transport Indem. Co., 50 Cal. App. 4th 354 (1996).

   - Consistent with previous decisions, the Court affirmed a jury verdict that pollution-exclusion and "expected or intended" clauses in insurance coverage bar coverage for contamination resulting from toxic chemical releases. The insured actually knew or expected that its operations were causing environmental damage.

4. FMC Corp. v. Plaisted & Cos., 61 Cal. App. 4th 1132, review denied 63 Cal. App. 4th 1440 (1998).

   - Occurrence policy requiring damage to have happened "unexpectedly and unintentionally." Under such a policy, burden of proof is on insured to demonstrate that damage was not unexpected.

5. Syntex Corp. v. Lowsley-Williams & Cos., Cal., No. S075573 (6/17/99). In a brief to the California Supreme Court asking that it affirm Syntex Corp., 972 P.2d 150 (1999), the insurers reiterated their arguments, accepted by the Court of Appeals, that

   - A corporation is deemed to have had the collective knowledge and expectations of all its employees concerning environmental contamination, when it entered into the insurance contract, and such imputed knowledge or expectation is a basis for finding an "occurrence" did not take place. Citing Edson & Foulke Co. v. Winsell, 160 Cal. 783 (1911).

   - Damage can be "known or expected" even though the precise extent of the damage is not known or expected, sufficient to find that an "occurrence" did not take place. Citing U.S. Fidelity &

Guar. Co. v. American Employers' Ins. Co., 159 Cal. App. 3d 277 (1984).

6. Aydin Corp. v. First State Ins. Co., 959 P.2d 1213 (Cal. 1998). See also Aydin, infra § III(D)(4&6).

- An insured sued the insurer seeking coverage under a standard comprehensive general liability insurance policy for pollution of groundwater and soil from storage tanks. The trial court accepted jury's finding that insurer had not proven it was not sudden and accidental and found for the insured. Appeals court ruled that the burden to show that the occurrence is sudden and accidental is on the insured and reversed. The California Supreme Court affirmed.

- The burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage; once an insured has made this showing, the burden is on the insurer to prove that an exclusion applies.

- In an action seeking indemnity under a standard comprehensive general liability insurance policy, once the insurer carries its burden of proving that the general pollution exclusion applies, the insured bears the burden of proving that a claim comes within the "sudden and accidental" exception.

E. Selected Washington Case Law

1. Tieton v. General Ins. Co., 61 Wash.2d 716, 380 P.2d 127, 132 (1963).

- Court held there was no coverage for the contamination of a well by a recently constructed sewage lagoon where the possibility of contamination "was not only foreseeable but was predicted in writing by the State Department of Health."

2. Queen City Farms v. Central Nat. Ins., 124 Wash.2d 536, 882 P.2d 703 (1994).

- The Washington Supreme Court adopted the subjective test holding that coverage for environmental contamination was precluded only "if insured subjectively expected and intended to cause groundwater pollution. . ."

3. American Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co., 134 Wash.2d. 413, 951 P.2d 250 (1998).

- Once damage is "expected", occurrence-based policies issued after this date can not be triggered

F. Selected Colorado Case Law

1. Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991).

   - In a case involving contamination caused by mining operations, Court held that comprehensive general liability policies' definition of occurrence as accident that was neither expected or intended by standpoint of the insured would be read to exclude only damages that insured knew would flow directly from its intentional act.

   - Court held that ammonia may constitute a pollutant.

2. Blackhawk-Central City Sanitation Dist. v. American Guarantee & Liab. Ins. Co., 214 F.3d 1183 (10th Cir. 2000).

   - Insured city sanitation district that operated sewage treatment facility brought a state court action against the comprehensive general liability insurer, alleging that the insurer had a duty to defend and indemnify the district against environmental damage claims

   - Under **Colorado law**, an insurance carrier's duty to defend under liability insurance policy arises whenever a complaint alleges any facts that arguably fall under the coverage of a policy.

   - Under Colorado law, where an insurance company seeks to avoid its duty to defend, insured only needs to show that the underlying claim may fall within the policy coverage, while the insurer must prove that it cannot.

   - Under Colorado law, the exception in the sanitation district's comprehensive general liability insurance policy to a pollution exclusion clause for "sudden accidents" at sewage treatment facility was ambiguous, and thus had to be construed in favor of the district to include all unexpected and unintended pollution events, thereby giving the insurer a duty to defend the district in an action alleging environmental damage resulting from the negligent or intentional discharge of effluent into creek that the district alleged was unexpected and unintended from its point of view.

   - Where underlying complaint leaves open possibility that insured did not expect or intend release of pollutants, comprehensive general liability insurer is not excused from its duty to defend under Colorado law.

G. Limits of Liability for Occurrence: If a policy does not explicitly limit the insurer's liability to the portion of damages that occurs during the policy period then the insurer is liable for all the damages that arise from a covered occurrence, even if the damages continue past the duration of the policy. This is an example where apparent "as damages" (see Section VI) and "trigger of coverage" (see Section VII) issues blend with "occurrence" definition arguments.

1. Allstate Ins. Co v. Dana Corp., 2001 Ind. Lexis 1133 (Ind. 2001).

- Dana Corporation dumped hazardous wastes into a strip mine pit at a particular site from August through December 1978. Complaints about the site began in 1979 and investigations revealed that most of the drums had broken and toxic chemicals had been released into the soil and ground water. Contamination continued, causing damage at the site into the 1980s. Allstate had issued Dana Corporation excess liability policies, of differing kinds, annually from 1977 through 1982. Dana Corporation sued Allstate for coverage for the occurrence.

- The court held that Dana Corporation could have recovered damages from any of the policies.

- The court further held that since the language in the policies issued by Allstate did not limit their liability to damages that occurred during the duration of the policy that Dana Corporation could recover the full amount of damages stemming from the occurrence from any single policy.

II. OWNED PROPERTY EXCLUSION

A. Policy Language:

This insurance does not apply: (k) to property damage to

1. Property owned or occupied by or rented to the insured,

2. Property used by the insured, or

3. Property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control.

B. Policyholder's Position - The owned property exclusion should not bar coverage for investigation and cleanup costs incurred by the policyholder if there has been damage to, or the threat of damage to, property of third parties.

C. Insurer's Position - The owned property exclusion excludes coverage for costs incurred to investigate or clean up contamination that occurred on the

policyholder's own property, or for cleanup activities conducted on the policyholder's own property.

D. Selected California Case Law

1. Aerojet-General Corp. v. Superior Court, 209 Cal. App. 3d 973, 257 Cal. Rptr. 621 (1989).

   - In a case involving environmental property damage at rocket manufacturing facilities, the court held that surface and underground waters owned by the government create third-party liability on the part of the insured. Costs for cleanup of such property is covered by the policies.

2. AIU Ins. Co. v. Superior Court (FMC Corp.), 274 Cal. Rptr. 820, 799 P.2d 1253 (1990).

   - The Court recognized that costs for cleaning up damage to surface and groundwater was covered by the policies because the state and federal governments have an interest in such property. Damage to an insured's own property is not covered.

3. Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal. App. 4th 715, 15 Cal. Rptr. 2d 815 (Cal. App. 1 Dist. 1993).

   - In upholding a jury instruction given in a contamination cleanup case, the Court held that, "although private ownership rights in water may be limited by state law, this did not mean that lake waters or groundwater could not be in insured's care, custody or control, for purposes of `care, custody or control' exclusions in liability policy, so as to preclude insured's coverage for CERCLA response costs related to remedying groundwater contamination."

E. Selected Case Law in Other Jurisdictions

1. Kelley-Coppedge, Inc. v. Highlands Ins. Co., 980 S.W.2d 462 (Tex. 1998).

   - Pipe installation and repair contractor ruptured an oil pipeline it was installing, causing a release into the environment. Contractor sued to enforce a claim against its insurer, who had denied the claim on the grounds that the contractor occupied the third party's property when it was performing the repair and caused the release.

   - The Texas Supreme Court rejected the insurer's argument, holding that the term "occupy" requires that the policyholder hold or keep

the property for its own use, for the pollution exclusion clause "occupied by" to apply. The Court stated that to construe "occupied by" to include any presence, no matter how transitory, would render the clause meaningless surplusage.

2. Bauman v. North Pacific Ins. Co., 952 P.2d 1052 (Or. Ct. App. 1998).

   - Owner of UST that leaked causing environmental contamination at his property claimed against his insurer for coverage of the cleanup costs he incurred. When the court denied coverage, citing the policy's exclusion of coverage for damage to property owned by the insured, the owner appealed, arguing (i) the policy includes coverage of costs necessary to prevent the potential for off-site contamination of a third party's property and (ii) damage to Oregon's regulatory interest in maintaining a clean environment constituted third-party damage.

   - The Court of Appeals rejected the owner's clever arguments, holding that (i) actual damage must have occurred to the tangible property of a third party to trigger the insurance coverage and (ii) a regulatory interest is not tangible property.

3. Contrast Arco Industries Corp. v. American Motorists Ins. Co., 594 N.W.2d 74 (Mich. 1998).

   - In this case, the Michigan Supreme Court held that manufacturer whose operations cause contamination at its own property was not barred from coverage under the "owner property" exclusion because (i) the public's interest supersedes such an exclusion and (ii) the cleanup of contaminated soil was necessary to prevent off-site contamination to groundwater and third-party properties.

   - Arguably, practical effect in Michigan is to void "owner property" exclusions.

4. Allstate Ins. Co. v. Dana Corp., 737 N.E.2d 1177 (Ind. Ct. App. 2000). Note: under Indiana law, this opinion has been vacated pending review by the Indiana Supreme Court.

   - An automotive component manufacturer sought coverage for cleanup costs for contaminated groundwater underlying its sites. Insurer denied coverage under the owned property exclusion. The Indiana Court of Appeals concluded that the exclusion only applied if the insured had exercised custody or control over the groundwater, because under Indiana law ownership of groundwater

depends on possession and removing the water from its natural course for use by the landowner.

- The court stated, however, that its ruling did not extend to contaminated soil, because soil, unlike groundwater, is considered a part of the property itself. The court further declared that at the insured's sites where the contamination is limited to the soil, the owned property exclusion would bar indemnification by the insurer for property damage.

5. Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 150 F.3d 1327 (11th Cir. 1998).

- Insurer brought declaratory judgment action seeking determination that general liability policies did not provide coverage for insured's environmental contamination claims for two gasoline stations.

- The Supreme Court of **Georgia** held that where there is no evidence of a reasonable present threat of harm to third-party property, coverage is barred.

- The plain language of the owned or rented property exclusion bars coverage for indemnification for the cost of a state-ordered contamination clean-up when that clean-up involves soil and groundwater contamination to property owned or rented by the insured, and does not involve property of a third party, and poses no immediate or imminent threat of off-site contamination.

III. POLLUTION EXCLUSION AND ABSOLUTE POLLUTION EXCLUSION

A. First Generation Policy Language:

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

B. **Policyholder's Position** - Pollution exclusion is a restatement of the definition of occurrence and does not bar coverage for damage which is unexpected and unintended by the policyholder. The term "sudden and accidental" contained in the exclusion means unexpected and unintended.

In support of their position, policyholders also make reference to the insurance industry's representations to insurance regulators in the 1970's as to the purpose

of the pollution exclusion. The representations made were that the coverage was merely intended to clarify the definition of occurrence and was not intended to limit existing coverage.

C. **Insurer's Position** - Pollution exclusion bars coverage for environmental contamination and is not simply a restatement of the occurrence definition. The exception for "sudden and accidental" discharges has a temporal meaning; that is, an identifiable event that transpires quickly.

D. **Selected California Case Law**

1. ACL Technologies, Inc. v. Northbrook Prop. & Cas. Ins. Co., 17 Cal. App. 4th 1773, 22 Cal. Rptr. 2d 206 (Cal. App. 3 Dist. 1993).

   - In an environmental pollution clean up case, a California appeals court held that "sudden" has a temporal meaning. The court stated that if in "the context of the pollution exclusion, 'sudden' meant merely 'unexpected,' then it would have no independent meaning, as the idea would also be subsumed within the word 'accidental.' The word would be reduced to surplusage. In California, however contracts are construed to avoid rendering terms surplusage."

   - The Court held that drafting history was not relevant in deciding the issue - the phrase "sudden and accidental" unambiguously does not include "gradual."

2. Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal. App. 4th 715, 15 Cal. Rptr. 2d 815 (Cal. App. 1 Dist. 1993).

   - In an environmental pollution clean up case, the Court held that a discharge, dispersal or escape of pollutants that happens gradually and continuously for years is not "sudden" in ordinary and popular sense of the word for purposes of the exception to the pollution exclusion in the policies at issue.

   - However, the Court stated that "'sudden' refers to the pollution's commencement and does not require that the polluting event terminate suddenly or have only a brief duration." Therefore, the Court noted that a "sudden" and "accidental" discharge of a dangerous pollutant "could continue unabated for some period because of negligent failure to discover it, technical problems, or lack of resources that delay containment, or some other circumstance; liability under such event could well be covered under exception to the pollution exclusion in liability policy."

3. Aerojet-General Corp. v. Transport Indem. Co., 50 Cal. App. 4th 354 (1996).

   - Court concluded that the "sudden and accidental" exception in the pollution-exclusion clauses did not include long-term releases.

4. Aydin Corp. v. First State Ins. Co., 54 Cal. App. 4th 416 (1997).

   - The insured has the burden of demonstrating that a release is "sudden and accidental" for purposes of an exclusion. "The 'sudden and accidental' exception creates coverage where it would otherwise not exist and thus the insured's burden of proving coverage extends to proof of this exception. Moreover, if the burden were on the insurer, the property owner would have an incentive to avoid finding out whether pollutants are being gradually discharged, because preservation or ignorance would increase the likelihood of insurance coverage."

5. FMC Corp. v. Plaisted & Cos., 61 Cal. App. 4th 1132, *review denied* 1998 Cal. Lexis 3611 (Cal. May 27, 1998).

   - "Sudden" means "abrupt" and does not apply to gradual releases of pollutants no matter how unexpected. The court refused to analyze drafting and regulatory history of the pollution exclusion.

6. Aydin Corp. v. First State Ins. Co., 18 Cal. 4th 1183 (1998).

   - Under general insurance law, policyholder bears the burden of establishing coverage under the insurance policy. Therefore, policyholder claiming for indemnification on environmental damages bears the burden of proving that a claim falls within the "sudden and accidental" exception to the pollution exclusion.

7. Charles E. Thomas Co. v. Transamerica Ins. Group, 72 Cal. Rptr. 2d 577 (Cal. Ct. App. 1998).

   - UST sensor manufacturer impleaded to compel insurer to defend the manufacturer against a suit seeking recovery of cleanup costs and property damage compensation. Insurer refused to defend, citing its absolute pollution exclusion clause which excluded "any loss, cost or expense arising out of any . . . request, demand or order that any insured or others test for, monitor, clean up, remove, contain . . . or in any way respond to, or assess the affects of pollutants."

- Court held exclusion clause barred coverage only of costs of agency-mandated "requests, demands or orders"; but did not exclude private common law claims for property damage resulting from the contamination.

8. A-H Plating, Inc. v. American Nat'l Fire Ins. Co., 67 Cal. Rptr. 2d 113 (Cal. Ct. App. 1997).

   - Chemical spills at electroplating plant occurred. There were issues as to whether the spills were sudden and accidental and thus within exception to pollution exclusion and whether insurer could avoid its duty to defend on ground that its investigation revealed that insured had done no wrong. Summary judgement was granted for insurer. Appeal Court reversed. saying material issues of fact existed that needed to be resolved and gave guidance on several principles.

   - Polluting event is "accidental" within meaning of sudden and accidental exclusion from pollution exclusion in commercial general liability policy if it was "unexpected" and "unintended"; "unexpected" event is one that insured did not know or believe to be substantially certain or highly likely to occur.

   - A company's adoption of safety measures to prevent, contain and clean up chemical spills did not make spills that eventually did occur "expected" so as to render inapplicable sudden and accidental exception to pollution exclusion clause in commercial general liability policy.

9. Golden Eagle Refinery Co. v. Associated Int'l Ins. Co., 102 Cal. Rptr.2d 834 (Ct. App. 2001).

   - In an indemnity action against its third-party liability insurance carriers, although the refinery company established that some sudden and accidental events occurred and that the events had caused an appreciable amount of damages, this did not overcome the company's admission that those damages were indivisible from any other damages. Thus, the company did not establish a prima facie case for coverage.

E. Selected Arizona Case Law

1. Smith v. Hughes Aircraft Co., 10 F.3d 1448 (9th Cir. 1993)

- "Sudden" means temporarily brief and unexpected; no tort claim indemnity for drinking water contamination arising from repeated releases of TCE.

2. TNT Bestway Transp., Inc. v. Truck Ins. Exch., 1994 Ariz. App. LEXIS 186 (Aug. 30, 1994).

   - Following Smith, "sudden . . . adds a temporal quality that encompasses both a lack of notice and immediacy"; coverage only when the release is "unexpected and abrupt."

   - Petition for rehearing en banc denied; pending petition to Arizona Supreme Court.

   - Republished by Arizona Supreme Court, Feb. 13, 1996; "the grant of review was improvident"

3. Maricopa County v. Arizona Prop. & Cas. Ins. Guar. Fund, CV 95042493, Decided April 27, 2000 (Ariz. Ct. App.).

   - Insured County filed an action for declaratory relief against its insurer. Partial summary judgment was entered for insurer. Insured appealed. Maricopa had sought to be defended by insurer and indemnified for any damages arising from governmental actions against it. The case involved the issue of interpretation and applicability of pollution exclusion in insurance policies. The sites in question were the Hassayampa Landfill and the Materials Warehouse site. Court of appeal ruled that it was error not to consider extrinsic evidence relating to the exclusion. It was reversed and remanded for further proceedings on the evidentiary issues of the admissibility of the extrinsic evidence.

   - "Sudden and accidental" is reasonably susceptible to more than one interpretation. In determining the meaning of the terms, extrinsic evidence may be brought in if it is evidence that has any tendency to make the existence of any fact that is of consequence…more or less probable than it would be without the evidence. In using standardized, non-negotiated insurance policies, the parole evidence rule should not be strictly applied in order that the parties' intents might be determined.

4. Keggi v. Northbrook Prop. & Cas. Ins. Co., 199 Ariz. 43 (Ct. App. 2000).

   - Insured was injured by drinking water contaminated by bacteria and sought declaratory judgment that the water company's policies covered her injuries. The insured appealed the trial court ruling

that the pollution exclusion clauses barred coverage. The court of appeals found that the water-borne bacteria did not fit within the definition of either "pollutants" or "contaminant" contained in the standard absolute pollution exclusion.

- Raising *sua sponte* the issue of the purpose underlying the pollution exclusion, the court concluded that the exclusion was intended to exclude coverage for damages from traditional environmental pollution.

- The court also determined that the water company could reasonably expect coverage to apply to an instance of negligent service of water that causes "bodily injury," including "sickness or disease."

F. Selected Washington Case Law

1. Queen City Farms v. Central Nat. Ins. Co., 124 Wash.2d 536, 882 P.2d 703 (1994).

   - The Washington Supreme Court found that the "sudden and accidental" pollution exclusion was ambiguous stating that clause means "sudden and accidental" means unexpected and unintended, and thus, pollution damage resulting from accident, including continuous or repeated exposure to conditions, which is neither intended nor expected is covered under the occurrence clause...."

   - Court held that "pollution exclusions excluding coverage unless seepage, pollution, or contamination is 'sudden' and 'unexpected' are ambiguous, and therefore would be construed against insurer, as drafter, to mean that coverage is provided if polluting event is unexpected and unintended, without having temporal nature."

   - "[Unless explicitly defined, terms within the exclusion] are to be interpreted in accord with the understanding of the average purchaser of insurance, and the terms are to be given their plain, ordinary and popular meaning."

2. United Pacific Ins. Co. v. Van's Westlake Union Inc., 34 Wash. App. 708, 664 P.2d 1262 (1983).

   - The court held that "in construing the pollution exclusion clause, we conclude that it was intended to deprive active polluters from coverage, not to apply where, as here, the damage was neither expected nor intended."

- To reach its decision, the court analyzed the insurance industry's intent when introducing the sudden and accidental exclusion. The court also recognized that many courts find the clause to be ambiguous.

3. Cook v. Evanson, 131 Wash. 2d 1016 (1997).

   - Washington Court of Appeals held that respiratory injuries sustained from exposure to chemical fumes fell within a pollution exclusion clause.

   - The policy held that coverage would be denied for any bodily injury arising from the discharge of pollutants. The Court holds that 'fumes' are a pollutant.

   - The Court takes Queen City one step further. The Court relies on Queen City's reasonable person and plain meaning test to determine reasonableness. The inquiry becomes whether a reasonable person could interpret the exclusion clause in more than one way. The test is also similar to the TerraMatrix, see infra § G, totality of the circumstances standard.

   - One factor which assisted the Court in holding the exclusion to be unambiguous was the fact that the provision defines "pollutant."

G. Selected Colorado Case Law

1. Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991).

   - In a case involving environmental contamination caused by mining operations, the Court, historical and common usage, analyzing held that "sudden" does not necessarily mean "abrupt" or "instantaneous." "Sudden and accidental" could be construed to mean "unexpected and unintended." "Courts should construe sudden in favor of policy holders and hold that gradual as well as instantaneous events are covered."

2. TerraMatrix, Inc. v. U.S. Fire Ins. Co., 939 P.2d 483 (Colo. Ct. App. 1997).

   - Case involves an absolute pollution exclusion clause which specifically refers to claims of bodily injury and property damage and denies coverage for liability from such claims if the claim

arose out of a discharge of a pollutant. Insurance company refused coverage, claiming that the injury was the result of a pollutant. Lower court ruled in favor of the insured. Company brought declaratory judgment action to determine the scope of the coverage.

- Court determined that in applying an absolute pollution exclusion the appropriate inquiry is "whether the pollution exclusion clause is ambiguous when applied to the facts of the particular case." The ruling is in contrast to the view held by the First Circuit. See U.S. Liability Ins. Co. v. Bourleau, 49 F.3d 786 (1st Cir. 1995) (The Court interprets absolute pollution exclusion clauses as unambiguous under *all* circumstances.)

3. Compass Ins. Co. v. City of Littleton, 984 P.2d 606 (Colo. 1999).

   - In case where policyholder had routinely delivered its waste to a disposal facility from which an unexpected release occurred, the Colorado Supreme Court held that the pollution exclusions clause does not bar the policyholder from receiving coverage, despite the fact that the delivery of its wastes to the disposal facility was an ongoing part of its regular business activities, because the policyholder did not expect or intend the release at the disposal facility to occur. Here, the court focused on the nature of the release rather than the nature of the disposal, finding that the release itself was unexpected and unintended.

4. Public Service Co. of Colorado v. Wallis & Cos., 986 P.2d 924 (Colo. 1999.)

   - Insured sued liability insurer for costs of environmental cleanup activities resulting from its contamination of three sites. District Court, on jury verdict, ruled in favor of insured on two sites, and insurer on one. On appeals, the Court of Appeals affirmed in part, reversed in part, and remanded for new trial. The Supreme Court remanded and gave guidance. (1) the term "sudden," within the meaning of the policy's "sudden, unintended and unexpected" exception to a pollution exclusion meant "not prepared for"; (2) resolving a matter of first impression, in applying the "sudden, unintended and unexpected" exception, the relevant perspective is that of the insured; and (3) if insurer were liable for costs of environmental cleanup of pollution that spanned multiple successive policy periods, the damages would have to be allocated according to time-on-the-risk and the relative degree of risk assumed.

- Term "sudden," within the meaning of a liability policy's "sudden, unintended and unexpected" exception to a pollution exclusion, was ambiguous, and therefore had to be construed against the insurer that drafted the contract, so as not to include a temporal connotation; the term would be construed to mean "not prepared for," and thus, the phrase "sudden, unintended and unexpected" meant "unprepared for, unintended and unexpected."

- Triggering occurs when a threshold event implicates an insurance policy's coverage; the fact that a policy has been "triggered" means that there may be liability coverage under that policy, subject to the policy's terms, the application of any exclusions in the policy, and any other defenses the insurer may raise, therefore, a policy that has not been triggered provides no coverage, while a policy that has been triggered may or may not provide coverage, depending on the circumstances of the case.

H. Selected Nevada Case Law

1. Montana Refining Co. v. Nat'l Union Insur. Co. of Pittsburgh, No. CV-N-92-845-ECR (D. Nev. Mar. 20, 1996)

   - The court upheld a pollution exclusion clause against a claim that the clause would apply only if the EPA lawsuit sought cost recovery for a remedial action (including cleanup, monitoring, and prevention/mitigation) and natural resources damages.

   - The court concluded that common sense and the "obvious" contractual intent did not require all elements to be part of the claim; rather, the plaintiff was applying a "tortured reading" of a "minor grammatical quibble."

   - The court also rejected reliance on prior statements to Nevada regulators as creating a "regulatory estoppel," see the 1993 New Jersey Supreme Court decision in Morton Internat'l v. General Accident Insur. Co., 629 A.2d 831, because this would be relevant only if the exclusion language were ambiguous, which it is not.

I. Selected Utah Case Law

1. Sharon Steel Corp. v. Aetna Cas. & Sur. Co., 931 P.2d 127 (Utah 1997).

   - The terms "sudden and accidental" is unambiguous. "[T]he term 'sudden' contains a temporal element, such as being abrupt and quick and the term 'accidental' means something akin to unintended or unexpected."

- When pollution has occurred over a 60 or 70 year period, the pollution is neither sudden or accidental "even if some of the pollution, viewed in isolation, could be deemed to have occurred suddenly."

2. S.W. Energy Corp. v. Continental Ins. Co., 974 P.2d 1239 (Utah 1999).

- Policy excluded coverage for "loss or damage caused by vermin, wear and tear, gradual deterioration or inherent defect, rust, corrosion, freezing, faulty design, mechanical breakdown and faulty workmanship . . ."

- Court held that any environmental damage resulting from a release of oil from corrosion holes in a UST was expressly excluded from coverage and also did not constitute "sudden" pollution.

J. Selected Idaho Case Law

1. North Pacific Ins. Co. v. Mai, 939 P.2d 570 (Idaho 1997).

- Commercial general liability insurer brought declaratory judgment suit seeking determination that it had no duty to defend or indemnify insured for any claims arising out of cleanup of Superfund site, to which insured's used oil was transported for reclaiming or reprocessing. The District Court denied summary judgment to insurer, finding that sudden and accidental language exception was susceptible of more than one meaning, such that insured's liability for cleanup of site was within exception. Insurer appealed. The Supreme Court held that: the term sudden and accidental as used in the exception to the pollution exclusion clause in a policy was not ambiguous. Supreme Court affirmed and remanded.

- Term "sudden" as used in sudden and accidental exception to pollution exclusion clause of commercial general liability policy is not ambiguous; its plain meaning has reference to event that happens in short period of time, and it is not reasonable to interpret sudden to include event that occurs over anything other than short period of time.

K. Selected New Mexico Case Law

1. Mesa Oil, Inc. v. Ins. Co. of North America, 123 F.3d 1333 (10th Cir. 1997).

- Insured oil recycler brought state court action against comprehensive general liability insurer, seeking coverage for settlement with environmental agency and defense to suit brought against insured by other potentially responsible parties related to environmental cleanup at Superfund site. The court held that: (1) policies' pollution exclusion was applicable to insured's liability arising out of the soil and groundwater contamination of Superfund site; (2) pollution was not "sudden and accidental" within meaning of exception to pollution exclusion; and (3) insurer had no duty to defend insured.

- In **New Mexico**, the word "sudden" clearly expresses a meaning of quickness or abruptness, particularly in light of the fact that it would be entirely redundant when paired with the word "accidental" if it merely meant "unexpected."

- Under **New Mexico law**, whether pollution was "sudden and accidental" within meaning of exception to pollution exclusion of comprehensive general liability insurance policies, would be viewed from perspective of polluter, not perspective of insured.

L. Selected Iowa Case Law

1. Interstate Power Co. v. Insurance Co. of North America, 603 N.W.2d 751 (Iowa 1999).

   - Insured, a power company, brought declaratory judgment action against general comprehensive liability insurer to determine insurer's liability for environmental cleanup costs at several locations. The District Court entered summary judgment for the insurer, and the insured appealed. The Supreme Court held that: there was a genuine issue of material fact as to whether injury by occurrence occurred during a policy period; there was a genuine issue of material fact as to whether environmental damage was expected or intended by insured during the time a policy was in force; and insured's notice to insurer was unreasonably tardy as to three sites, thus establishing a presumption of prejudice. Affirmed in part, reversed in part, and remanded.

   - There was no "accident" for purposes of a general comprehensive liability policy, here the environmental damage at issue was caused by coal tar, coke, and other residues from a manufacturing process being allowed to accumulate on the unprotected earth, and thereafter be dissolved by rain, melting snow, or other sources of moisture; the damage was the result of a deliberate waste disposal policy coupled with the forces of nature.

- Ground contamination occurring over a period of time from a natural seeping process is not "accidental," for purposes of a liability policy, when the sources of the contamination are manufacturing waste allowed to accumulate on or in the earth over a period of several decades.

M. Selected Missouri Case Law

1. Liberty Mut. Ins. Co. v. FAG Bearings Corp., 153 F.3d 919 (8th Cir. 1998).

   - Comprehensive general liability insurer sought declaratory judgment that pollution exclusion applied to the release of trichloroethylene vapor from a machine. The district court: granted summary judgment to insurer, finding that there is no duty of indemnification; granted summary judgment to FAG in part, finding that Liberty had a duty to defend FAG until the issue of indemnification was resolved; and denied Liberty a right to reimbursement of defense costs incurred to date. The Court of Appeals held that: a release recurring every few weeks was not **"sudden and accidental"** within the meaning of the "sudden and accidental" exception to the pollution exclusion; insurer was not entitled to reimbursement of defense costs; and insured was not entitled to new trial. District court's ruling was affirmed.

   - Under **Missouri law**, release of trichloroethylene vapor as a result of a machine malfunction recurring every few weeks was not "sudden and accidental" within the meaning of the "sudden and accidental" exception to the pollution exclusion of comprehensive general liability insurance policies, even if the release was unexpected; the term "sudden" included a temporal element and connoted an unexpected event that did not occur continuously over a significant period of time.

N. Selected Michigan Case Law

1. Meridian Mut. Ins. Co. v. Kellman, 197 F.3d 1178 (6th Cir. 1999).

   - Commercial general liability insurer for construction contractor sued its insured, seeking declaration that it had no duty to defend or indemnify insured in personal injury action arising out of discharge of chemicals used by insured. The District Court granted summary judgment for the insured, and insurer appealed. The Court of Appeals held that movement of fumes from toxic chemical used by the insured was not "discharge, dispersal,

seepage, migration, release or escape" within terms of total pollution exclusion and affirmed the District Court.

- Under **Michigan law** movement of fumes from toxic chemical used by construction contractor to seal floor of school was not "discharge, dispersal, seepage, migration, release or escape" within terms of **total pollution exclusion** of contractor's commercial general liability policy, when those fumes injured a school employee while he was working in a room on the floor immediately below the area where the sealer was being applied; the policy was ambiguous as to whether it covered injuries caused by toxic chemicals in the immediate area of their intended use and would be construed in favor of coverage.

O. Selected Texas Case Law

1. Gulf Metal Indus., Inc. v. Chicago Ins. Co., 993 S.W.2d 800 (Tex. Ct. App. 1999).

   - According to the court, the term "sudden" must be given a different meaning from the term "accidental"; to do so otherwise would "render the terms redundant and violate the rule that each word in a contract be given effect."

   - According to the court, the term "sudden" means "swift or abrupt," whereas the term "accidental" means "unforeseen, unintended, or unexpected." The contamination at issue must satisfy both terms, otherwise the policyholder is excluded from coverage under the pollution exclusion clause.

   - In the instant case, the contamination was unforeseen, unintended, and unexpected, but was not swift or abrupt; therefore, the policyholder was excluded from coverage under the clause.

P. Selected Federal Case Law

1. Broderick Inv. Co. v. Hartford Accident & Indem. Co., 954 F.2d 601 (10th Cir.), cert. denied, 506 U.S. 865, 113 S. Ct. 189 (1992).

   - In case where policyholder had routinely delivered its waste to a disposal facility from which an unexpected release occurred, the Tenth Circuit held that the pollution exclusions clause barred the policyholder from receiving coverage, because the delivery of its wastes to the disposal facility was an ongoing part of its regular business activities rather than unexpected and unintended. Here,

the court focused on the nature of the disposal rather than the nature of the release.

2. Smith v. Hughes Aircraft Co., 10 F.3d 1448 (9th Cir. 1993).

   - In a case involving TCE contamination of a groundwater aquifer, the Ninth Circuit held that the sudden and accidental exception requires that the event not only be unexpected, but happen instantaneously or precipitately.

3. Certain Underwriters at Lloyd's of London v. C.A. Turner Const. Co., 112 F.3d 184 (5th Cir. 1997).

   - The Court ruled that an exclusion unambiguously applies to a personal injury from discharge of chemical fumes.

   - Court gave the term "pollution" a broad reading. The Court determined that the term covered any "contamination of the air by harmful substances."

   - Citing the phrase "excludes liability for property *and/or* personal injury," the Court held that the exclusion applies to contamination that results *only* in personal injury.

4. Bedford Affiliates v. Manheimer, 86 F. Supp 2d 67 (E.D.N.Y. 1999) (affirmed on appeal)

   - Holding policyholder has obligation to show the releases at issue were either (i) unexpected and unintended or (ii) instantaneous

   - Finding the qualified pollution exclusion barred the policyholder's claim for indemnity for cleanup costs incurred because the releases were in the regular course of the policyholder's business and the result of old and improperly maintained equipment.

5. Burt Rigid Box Inc. v. Travelers Prop. Cas. Corp., 126 F. Supp.2d 596 (W.D.N.Y. 2001).

   - Holding that insurer seeking to avoid liability based on a pollution exclusion clause should be required to prove the existence of the clause by at least a preponderance of the evidence, if not by clear and convincing evidence.

Q. Other Jurisdictions: Consistent with Cook, TerraMatrix, Sharon Steel, and Certain Underwriters, several other jurisdictions have held that the terms "sudden and accidental" are unambiguous. The significance being that (i) it is more

difficult for the insured to circumvent the exclusion and (ii) the insured should be wary of trying force an early resolution of the issue by filing a motion for summary judgment on the insurer's duty to defend and indemnify. See:

1. N.Y. v. AMRO Realty Corp., 936 F.2d 1420 (2d Cir. 1991) (N.Y. law);

2. A. Johnson & Co. v. Aetna Cas. & Sur. Co., 933 F.2d 66 (1st Cir. 1991) (Me. law);

3. U.S. Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31 (6th Cir. 1988) (Ky. law);

4. Great Lakes Container Corp. v. Nat'l Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984) (N.H. law);

5. Dimmitt Chevrolet v. S.E. Fidelity Ins. Corp., 636 So.2d 700 (Fla. 1993);

6. Lumbermans Mut. Cas. Co. v. Belleville Ind., 555 N.E.2d 568 (Mass. 1990);

7. Upjohn Co. v. N.H. Ins. Co., 476 N.W.2d 392 (Mich. 1991);

8. Board of Regents v. Royal Ins. Co., 517 N.W.2d 888 (Minn. 1994);

9. Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374 (N.C.1986);

10. Hybud Equip. Corp. v. Sphere Drake Ins. Co., 597 N.E.2d 1096 (Ohio 1992);

11. North Pac. Ins. Co. v. Mai, 939 P.2d 570 (Idaho 1997);

12. Anderson v. Minnesota Ins. Guar. Ass'n, 534 N.W.2d 706 (Minn. 1995);

13. Kerr-McGee Corp. v. Admiral Ins. Co., 905 P.2d 760 (Okla. 1995); and

14. Sinclair Oil Corp. v. Republic Ins. Co., 929 P.2d 535 (Wyo. 1996).

R. **Second Generation Language:** Absolute Pollution Exclusion and Personal Injury Theory

Examples of Absolute Pollution Exclusion Policy Language:

1. Example A - Pollution Exclusion Endorsement

   It is agreed that exclusion (f) is deleted and replaced by the following:

(f) (1) To "bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:

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

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

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

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

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

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

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

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

2. Example B - Hazardous Substances Remedial Action Exclusion

This policy does not apply to the liability of the Insured, or liability of another for which the insured may be liable in whole or in part, resulting from any suit, action, proceeding or order brought or issued by or on behalf of any Federal, State or local governmental authority seeking (a) Remedial Action, or the costs thereof, (b) damages for injury to,

destruction of or loss of natural resources, including the costs of assessing such injury, destruction or loss, of such suit, action, proceeding or order arising from the release of a hazardous substance at any area, whether or not owned by the insured. The company shall not have the obligation to defend any suit, action or proceeding seeking to impose such liability.

Special Definitions

The following definitions apply to this Exclusion:

Release means: any spilling, leaking, pumping, pouring, emitting, emptying, injecting, escaping, leaching, dumping or disposing into the environment.

Remedial Action means:

(a) the cleanup or removal of released hazardous substances from the environment; and,

(b) such actions as may be necessary to monitor, assess and evaluate the release or threat of release of hazardous substances; and,

(c) the disposal of removed material, or the taking of such other actions as may be necessary to temporarily or permanently prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

Hazardous Substance means: smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants.

3. Comment

Courts have held that the absolute pollution exclusion bars coverage for claims arising from environmental contamination. However, policyholders have looked to the personal injury provision of liability policies, which generally afford coverage for certain enumerated offenses.

One offense is wrongful entry or eviction. Another is the invasion of the right of private occupancy. This coverage is separate from the coverage for bodily injury or property damage. Policyholders argue that while the absolute pollution exclusion may preclude coverage for bodily injury and property damage, it does not apply to the personal injury offenses.

4. United States Fid. & Guar. Co. v. Jones Chems., Inc., 1999 U.S. App. Lexis 24306 (6th Cir. 1999).

- An insurance company brought a declaratory judgment action seeking a determination that it was not obligated to defend or indemnify a chemical company in an underlying personal injury action involving an accidental chlorine gas release. The District Court found in favor of insurer basing its decision on an absolute pollution exclusion provision in the policy. Insured appealed and Court of Appeals affirmed the District Court.

- The relevant language in the policy reads as follows:

  Exclusions. This insurance does not apply to: f. (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

  (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to any insured;

- The policy defines "pollutants" as any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

- Under well-settled **Ohio** law, if the terms of an insurance policy are clear and unambiguous, a court must apply their plain and ordinary meaning and may not attempt to construe them in some other way.

S. Meaning of "Pollutant" In Total or Absolute Pollution Exclusion Clause: Previously, the argument between policy holders and the insurer has been focused on whether the discharge was "accidental" or "sudden." Currently, however, the argument has shifted to the effect of "total" or "absolute" pollution exclusions and has focused on how encompassing the term "pollutant" is. While this may seem to be a variant of the "as damages" issue (see Section VI), it provides another way to interpret the restrictive "pollution exclusion."

1. **Policyholder's position** - an absolute pollution exclusion should be interpreted to exclude coverage only for injuries caused by "traditional environmental pollution," not for workplace or industrial injuries that do not relate to environmental contamination and to rule otherwise would violate the insured's reasonable expectations.

2. **Insurer's Position** - the terms of an absolute pollution exclusion are clear and unambiguous and should cover every conceivable manner in which a person could experience exposure to a pollutant.

3. **Selected Current Case Law**

a. Bechtel Petroleum Operations, Inc. v Continental Ins. Co., 96 Cal. App. 4th 571 (2002) cert granted 47 P.3d 224 (Cal. 2002).

- IF the absolute pollution exclusion is clear and unambiguous it bars coverage for anything akin to "traditional environmental contamination."

- Even a total pollution exclusion, however, does not bar coverage for injuries that are a result "of a routine commercial hazard, everyday industrial and residential accidents, or everyday activities gone slightly, but not surprisingly, awry" - i.e. "one who slips and falls on the spilled contents of Drano, and bodily injury caused by an allergic reaction to chlorine in a public pool." Citing Pipefitters Welfare Educ. Fund v. Westchester Fire, 976 F.2d 1037, 1043-44 (7th Cir. 1992).

b. Cincinnati Ins. Co. v. Becker Transp. Inc., 262 Neb. 746 (2001).

- If the terms of the exclusion are absolute and unambiguous then the form of the substance prior to its emission does not render it a non-pollutant

- Just because the pollutant is discharged or released inside of a building or contained space does not mean that is has not been discharged or released into the environment.

c. Carpet Workman v. Auto Owners Ins. Co., Mich. Ct. App., No. 223646 (May 10, 2002).

- "[A] pollutant need not necessarily result in widespread contamination of land, air or other natural resources for the exclusion to apply."

IV. NOTICE REQUIREMENTS

A. Policy Language:

Insured's duties in the event of occurrence, claim or suit: (a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable.

B. **Policyholder's Position** - Late notice should not preclude coverage under the policies unless the insurer has been materially prejudiced.

C. **Insurer's Position** - Policyholder's failure to provide timely notice bars coverage under the policy.

D. **Selected California Case Law**

1. Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal. App. 4th 715, 15 Cal. Rptr.2d 815 (Cal. App. 1 Dist. 1993).

   - In California, a defense based on an insured's failure to give timely notice requires the insurer to prove that it suffered substantial prejudice. The Court stated that "`substantial prejudice' means the insurers must prove that the lack of timely notice had an adverse effect on the ability of the insurer to investigate and prepare a defense in the underlying claim . . ."

2. Providence Washington Ins. Co. v. Container Freight, Inc., No. B111050 (Cal. App. 2 Dist. 1997) (order not published)

   - Shell Oil "notice-prejudice" rule does not apply to actions against an excess coverage insurer; test for excess insurer is whether insured acted reasonably in giving notice, prejudice to insurer is only one factor to consider

E. **Selected Washington Case Law**

1. Safeco Title Ins. Co. v. Gannon, 54 Wash. App. 330, 774 P.2d 30 (1989).

   - In a non-environmental case, the court held that to preclude coverage, Washington State notice-prejudice rule requires insurance carriers to show actual prejudice resulting from lack of notice.

F. **Selected Colorado Case Law**

1. Marez v. Dairyland Insurance Co., 638 P.2d 286 (Colo. 1981).

- In a non-environmental case, the Court held that "inexcused delay in giving notice or forwarding suit papers relieves insurers of its obligations under accident insurance policy, regardless of whether prejudice is suffered by insurer from such delay."

2. Encasco Ins. Co. v. Dover, 678 P.2d 1051 (Colo. App. 1983).

- Court held in a non-environmental case that insureds substantially complied with notice of claim and suit requirements where insureds properly notified insurer of claim following automobile accident, and where insureds' attorney gave written notice of counterclaim brought against insureds some six weeks after counterclaim was filed, but 20 months prior to trial date.

G. Selected Iowa Case Law

1. Interstate Power Co. v. Insurance Co. of North America, 603 N.W.2d 751 (Iowa 1999).

- Insured, a power company, brought declaratory judgment action against general comprehensive liability insurer to determine insurer's liability for environmental cleanup costs at several locations. There was an issue as to insured's notice to insurer being unreasonably tardy as to three of the sites, thereby establishing a presumption of prejudice. The District Court entered summary judgment for the insurer, and the insured appealed. The Supreme Court held that: (1) there was no "accident," for purposes of a general comprehensive liability policies covering accidents; (2) there was a genuine issue of material fact as to whether injury by occurrence occurred during a policy period; (3) there was a genuine issue of material fact as to whether environmental damage was expected or intended by insured during the time a policy was in force; and (4) insured's notice to insurer was unreasonably tardy as to three sites, thus establishing a presumption of prejudice. The Supreme Court therefore affirmed in part the District Court's ruling, reversed it in part, and remanded the case.

- Insured's notice to excess liability insurer, given approximately three and one-half years after insured was advised of the excess policies at issue, was unreasonably tardy, thus establishing a presumption of prejudice which would preclude insured from availing itself of the coverage afforded by the umbrella for environmental damages at three sites; there was a gross disparity between environmental cleanup costs incurred at the sites and other available liability insurance, and the insured had prior knowledge of its potential liability for substantial cleanup costs.

H. Selected Illinois Case Law

1. Montgomery Ward & Co. v. Home Ins. Co., 2001 Ill. App. LEXIS 372 (Ct. App. May 18, 2001).

   - In notice-of-occurrence situation, an insurer does not have to prove that it was prejudiced by an insured's breach of notice clause in order to be relieved of its duty to pay. The court concluded that lack of prejudice to the insurer is a factor for consideration only where the insured has a good excuse for the late notice or where the delay was relatively brief.

I. Selected Ohio Case Law

1. Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 2001 Ohio App. LEXIS 190 (Ct. App. Jan. 24, 2001).

   - In case involving pollution from materials disposed in a landfill, the court held that unlike notice of an occurrence communicated to an insurance agent which constitutes notice to the insurer, an insured's notice to an insurance broker, absent indicia of authority, does not constitute notice to the insurer.

   - The court also determined that in a case such as this, involving a latent environmental occurrence, certain events may signal that the insured knew or should have known of an occurrence, including: (1) notification by state or federal authorities that the insured may be liable for clean up costs; (2) communications between the insured and environmental authorities about the site; (3) cooperation with environmental authorities during their investigation of the site; (4) the insured's act to hire environmental consultants to conduct monitoring or testing or remedial actions at the contaminated site; and (5) promises by the insured to take corrective action, including proposed settlement agreements with EPA.

J. Selected Federal Case Law

2. Bedford Affiliates v. Manheimer, 86 F. Supp. 2d 67 (E.D.N.Y. 1999) (affirmed on appeal)

   - Holding insurance coverage was void because policyholder failed to inform insurer of contamination on the property that predated the policy's effective date.

V. DUTY TO DEFEND

A. Policy Language:

. . . and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily or 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, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

B. Policyholder's Position

- A suit is not required in order to trigger the duty to defend. Government mandated actions are sufficient to trigger the duty to defend.

- In order to establish the insurers' duty to defend the insured must merely show that the complaint in the action brought against the insured alleges facts which come within the coverage of the liability policy.

C. Insurer's Position

- A suit is required in order to trigger the duty to defend. Government mandated actions do not trigger the duty to defend.

- The duty to defend extends only to claims covered by the policy.

D. Selected California Law

1. Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 54 Cal. Rptr. 104, 419 P.2d 168 (1966).

    - In a non-environmental case, the California Supreme Court recognized that the duty to defend is broader than the duty to indemnify. The insurer in the case argued that it did not need to defend an action "in which the complaint reveals on its face that the claimed . . . injury does not fall within the indemnification coverage . . ." The court held that the insurer's duty is not measured by the technical legal cause of action in the underlying third party complaint, but rather by the potential for liability under the policy's coverage as revealed by the facts alleged in the complaint or otherwise known to the insurer.

    - The court stated that "even if we. . . define the duty to defend by measuring the allegations against carrier's liability to indemnify, . . . the carrier must defend a suit which potentially seeks damages

within the coverage of the policy. . . [ ] Defendant cannot construct a formal fortress of the third party's pleading and retreat behind its walls. The pleadings are malleable, changeable and amendable. . ."

2. Montrose Chemical Corp. of California v. Superior Court, 6 Cal. 4th 287, 861 P.2d 1153 (Nov. 22, 1993).

   - To prevail on the duty to defend, the insured must prove the existence of a potential for coverage, while the insurer must establish the absence of any such potential. In other words, the insured need only show that the underlying claim may fall within the policy coverage; but the insurer must prove that it cannot.

   - Once the defense duty attaches, the insurer is obligated to defend the insured against all claims involved in the actions, both those covered and uncovered, until the insurer produces undeniable evidence supporting an allocation of a specific portion of defense costs to an uncovered claim. Any doubt as to whether the facts give rise to a duty to defend is resolved in the insured's favor.

3. Montrose v. Superior Court, 6 Cal. 4th 287 (Cal. Sup. Ct., Mar. 1995)

   - Duty to defend triggered at time of first tender, and insurer may not refuse to defend while it conducts discovery to justify its decision.

4. BMC Indus. Inc. v. Federal Ins. Co., No. 94-5923 (WDK) (C.D. Cal. Oct. 12, 1995)

   - When complaint is silent on whether pollution release is sudden or gradual, duty to defend is triggered based upon information available to insured at the time the claim was tendered in response to a third-party action for cleanup of adjacent lands.

   - Pollution exclusion clause can not bar duty to defend based upon extrinsic evidence; insurer must respond based upon insured's tender.

5. Reese v. Traveler's Ins. Co., 129 F.3d 1056 (9th Cir. 1997) (applying California law)

   - Owned-property and pollution exclusions in policy do not preclude insurance company's duty to defend if allegations in complaint create the potential for liability within the meaning of the insurance policy.

- Insurer must defend until it can demonstrate by reference to undisputed facts that claim can not be covered.

6. Aerojet-General Corp. v. Transport Indem., 948 P.2d 909 (Cal. 1997)

   - Addressed issue of duty to defend claim with covered and not covered components.

   - Insurer does not have duty to defend claim in its entirety; however, insurer does have "prophylactic duty" to defend the entire mixed claim.

   - Insured can seek reimbursement from insured for defense costs that can be allocated solely to part of a claim that is not even potentially covered; such costs can be allocated to the insured.

   - Implicit in the duty to defend an insured is the obligation to pay the expenses an insured incurs in investigating the extent and cause of pollution.

   - Response costs can be considered covered defense costs if costs were incurred to minimize liability (e.g., to demonstrate that the insured was not a source of a release).

7. Foster-Gardner, Inc. v. National Union Fire Ins. Co., 959 P.2d 265 (Cal. 1998)

   - Order issued by EPA pursuant to state Superfund law directing insured to remediate pollution did not constitute a "suit" within meaning of CGL insurance policy so as to give rise to duty to defend. Word "suit" means a "civil action" commenced by filing a complaint; anything short of that is a "claim".

   - The California Supreme Court thus joins a minority of jurisdictions in ruling that insurers do not have to defend against mere administrative claims unless the policy expressly requires it.

8. A-H Plating, Inc. v. American Nat'l Fire Ins. Co., 67 Cal. Rptr. 2d 113 (Cal. Ct. App. 1997).

   - Chemical spills at electroplating plant occurred. There were issues as to whether the spills were sudden and accidental and thus within exception to pollution exclusion and whether insurer could avoid its duty to defend on ground that its investigation revealed that insured had done no wrong.

- Commercial general liability insurer's determination that insured was not responsible for pollution of groundwater and thus not liable on third-party claim did not provide basis for escaping **duty to defend**; insurer's duty extended to insured whom it believed to be innocent of conduct alleged in third-party complaint.

9. Certain Underwriters at Lloyd's of London v. Superior Court, 75 Cal. App. 4th 1038 (Cal. Ct. App. 1999).

   - An oil refinery brought an action against its liability insurers asserting that the insurers owed the insured a duty to indemnify it for its costs and expenses incurred in complying with various coercive orders issued during administrative environmental proceedings.

   - Under the literal meaning approach to insurance policy interpretation, a liability insurer's promise to defend a "suit" cannot be construed to mean anything other than a civil action commenced by the filing of a complaint. An insurer's act of limiting its defense commitment to a suit, and not extending it to include as well a claim, constitutes an *unambiguous effort to define and limit its contractual obligation*. Although insureds certainly deserve no less than the benefit of their bargain, insurers should be held liable for no more.

   - An *insurer's* duty to indemnify, like its duty to defend, is triggered by a lawsuit against the insured, and *in the absence of a suit, no such duty exists.* In this case, the insurers' promise in their primary policy to indemnify the insured for all sums it became legally obligated to pay as damages because of property damage resulting from covered acts necessarily *referred to an obligation established by the judgment of a court of law*. Since no suit was brought against the insured, the insurers had no duty to indemnify. An insured could not have an objectively reasonable expectation that such coverage promise extended to coercive administrative environmental orders issued against the insured that were not reduced to a legal judgment or equitable decree.

   - The duty to indemnify consists of three elements, all of which must be satisfied, in order for the insurer's duty to exist. The insured must become (1) legally obligated to pay a sum (2) as damages incurred because of (3) property damage.

10. Certain Underwriters at Lloyd's of London v. Superior Court, 103 Cal. Rptr.2d 672 (2001).

- The California Supreme Court affirmed the court of appeals decision in this action (see above). Following the reasoning of *Foster-Gardner*, the court determined that because the duty to defend is broader than the duty to indemnify, there can be no duty to indemnify where there is no duty to defend. Having found in *Foster-Gardner* that the duty to defend is limited to civil actions, the court concluded it would logically follow that the duty to indemnify is also limited to a money judgment ordered by a court.

- Emphasizing that its decision applied to standard comprehensive general liability policies, the court speculated that "under some possible comprehensive general liability insurance policy" the absence of a duty to defend may not always mean an absence of a duty to indemnify.

11. Bullock v. Maryland Cas. Co., 85 Cal. App. 4th 1435 (1st App. Dist. Div. 4 2001).

- Concluding that correspondence outside the pleadings that merely hints at a possible litigation strategy – but one that was never pursued – is not sufficient to establish a duty to defend an otherwise non-covered lawsuit.

E. Selected Washington Case Law

1. R.A. Hansen Co. Inc. v. Aetna Ins. Co., 26 Wash. App. 290, 612 P.2d 456 (1980).

- The court held that as a general rule, an insurer's duty to defend "arises when the complaint is filed and is to be determined from the allegations of the complaint. . . "

- However, "a duty to defend arises from facts known or reasonably ascertainable by the insurer, and the insurer may not rely on the pleadings alone. An insurer must defend if the claim is potentially within the policy."

- Also, if the allegations of the complaint are ambiguous or inadequate, facts which might give rise to potential liability must be investigated.

2. Kitsap County v. Allstate Ins. Co., 964 P.2d 1173 (Wash. 1998).

- County brought action against liability insurers to recover indemnity for settlement of claims by landowners and residents

alleging trespass, nuisance, and interference with use and enjoyment of property as a result of odors and pollution emanating from landfill and waste disposal facility.

- The theory underlying the claim against the insured, rather than the nature of the alleged injury, determined whether liability policy's personal injury coverage or its coverage for bodily injury and property damage applied to claims to recover for damage to health and property as a result of pollution; thus, if the alleged trespass, nuisance, and interference with use and enjoyment of property were wrongful entry, wrongful eviction, or other invasion of the right of private occupancy then personal injury coverage existed.

- The alleged nuisance arising out of pollution was "wrongful entry" and "other invasion of the right of private occupancy" within personal injury coverage of liability insurance policy.

- Odors and pollution allegedly emanating from waste disposal facility once owned by county and landfill where it had disposed of waste did not cause "wrongful eviction" of landowners and residents, and, thus, county's liability insurance provided no personal injury coverage for alleged nuisance, trespass, and interference with use and enjoyment of property; county was not in landlord-tenant relationship with the landowners and residents.

F. Selected Colorado Case Law

1. Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991).

   - In a contamination case involving mining operations the court recognized that an insurer's duty to defend arises when the underlying complaint against the insurer alleges any facts that might fall within the coverage of the policy. As the court stated "the obligation to defend arises from allegations in the complaint, which if sustained, would impose a liability covered by the policy . . . Since the duty to defend is broader than the duty to indemnify, the insurer must defend the insured if the pollution could have occurred suddenly and accidentally. Whether coverage is ultimately available under the contract is a question of fact to be decided by the trier of fact."

2. Leadville Corp. v. U.S.F. & G. Co., No. 94-1386 (10th Cir., May 23, 1995).

- Colorado sued ASARCO 12/83, who filed third-party complaint against Leadville 1/85.

- Leadville notified its carrier 6/89 and requested defense; carrier denied liability, but, after Hecla, supra, advanced costs.

- Leadville settled with EPA 8/93 and filed action against U.S.F. & G.

- Court concluded that Leadville did not act with "reasonable prudence" in notifying carrier and ordered Leadville to repay the insurer's advance of defense costs.

3. Englewood v. Commercial Union Assurance Cos., 940 P.2d 948 (Colo. Ct. App. 1996).

   - In determining whether there is a duty to defend, a court must look to the allegations in the complaint. "If those allegations potentially or arguably come within the policy coverage or there is some doubt whether a theory of recovery within the policy coverage has been stated, then the insurer must accept the defense of the claim.

   - In order to avoid the duty to defend, an insurer must establish that a policy exclusion applies in the particular case and that it is not subject to any other reasonable interpretation. "In other words, an insurer has a duty to defend unless it can establish that (1) the allegations in the complaint against its insured are such that they solely and exclusively describe a situation within the exclusions in the insurance policy, and (2) there is no factual or legal basis upon which the insurer eventually might be held liable to indemnify the insured.

   - Insurer must defend against all claims if some potentially covered claims are alleged.

4. Horace Mann Ins. Co. v. Peters, 948 P.2d 80 (Colo. 1997), cert. revoked 987 P.2d 232 (Colo. 1998)

   - If Complaint raises more than one claim, duty to defend extends to all claims if any one claim is "arguably" covered by the pertinent policy; duty to defend is much broader than duty to indemnify

5. Compass Ins. Co. v. City of Littleton, 1999 Colo. LEXIS 618, No. 96SC852 (Colo. 6/28/99).

- EPA had sent PRP notices to the policyholder. The Court found that the PRP notices constituted a "suit against the insured seeking damages on account of . . . property damage," triggering the obligation of the insurer to respond and defend against the PRP notices on behalf of the policyholder.

G. Selected Arizona Case Law

1. Kepner v. Western Fire Ins. Co., 109 Ariz. 329, 509 P.2d 222 (1973).

   - If the complaint in the action brought against the insured alleges facts which come within the coverage of the liability policy, the insurer is obligated to assume the defense of the action. But, if the alleged facts fail to bring the case within the policy coverage, the insurer is free of such obligation unless an investigation of the actual facts demonstrate that the claims raise the potential for liability under the policy.

H. Selected Utah Case Law

1. Sharon Steel Corp. v. Aetna Cas. & Sur. Co., 931 P.2d 127 (Utah 1997).

   - "[A]n insurer's duty to defend is broader than its duty to indemnify. Its defense duty arises when the insurer ascertains facts giving rise to potential liability under the insurance policy. [Citations omitted] This potential liability is determined by referring to the allegations in the underlying complaint. When those allegations, if proved, could result in liability under the policy, then the insurer has a duty to defend."

I. Selected Case Law in Other Jurisdictions

1. Samuels Recycling Co. v. CNA Ins. Cos., 588 N.W.2d 385 (Wis. Ct. App. 1998)

   - Court held that question of whether policy's duty to indemnify included payment of government-ordered environmental cleanup costs depended on the intent of the parties when they entered into the insurance contract.

   - Court affirmed that policyholder bears the burden of proving coverage exists. In this case, the policyholder failed to show that the parties intended government-ordered cleanup costs to be covered under the insurance policy, therefore summary judgement against policyholder's claim was affirmed.

2. Arco Indus. Corp. v. American Motorists Ins. Co., 594 N.W.2d 74 (Mich. 1998).

- Holding the policyholder was entitled to defense costs incurred in dealing with agency responsible party notice letter before the suit was filed in federal court because the notice letter itself triggered the insurer's duty to defend.

3. Zurich Ins. Co. v. Carus Corp., 689 N.E.2d 130 (Ill. App. Ct. 1997).

- A general liability insurer sought a declaratory judgment ruling that it had no duty to defend or indemnify an insured in absence of a lawsuit being filed as a result of possible pollution. The Circuit Court entered summary judgment in favor of insurers and insured appealed. The Appellate Court held that insurers had no duty to defend or indemnify insured in absence of lawsuit and affirmed the circuit court.

- The Illinois Environmental Protection Agency (IEPA) conducted a preliminary assessment of the insured's chemical facility. The preliminary assessment report recommended that a "Screening Site Inspection" (SSI) be conducted to determine if there was any environmental contamination on the site. The IEPA conducted the SSI. and found hazardous substances in the soil and groundwater in and around the facility. Insured notified its insurers of the SSI results. Coverage was denied. The final SSI report indicated that contaminants in the soil and groundwater were sufficient to put Carus on the USEPA's "National Priorities List" of sites targeted for cleanup. Insured wanted to avoid being placed on the list. After making a payment of $5,000, insured was accepted into a program for expeditious review. The program required insured to conduct a remedial investigation and feasibility study under the supervision of the IEPA who would then use the results of those studies to determine the remedial action necessary for the site to comply with CERCLA and other applicable laws.

- General liability insurers had no duty to defend or reimburse an insured for the cost of hiring consultants and voluntarily conducting its own investigation where no lawsuit was ever brought against insured.

- Liability insurers had no duty to indemnify insureds since they had no duty to defend it.

- Liability insurer's duty to defend and indemnify is triggered by suit against insured, and, in absence of lawsuit, no such duty exists.

4. Liberty Mut. Ins. Co. v. FAG Bearings Corp., 153 F.3d 919 (8th Cir. 1998).

   - Comprehensive general liability insurer sought declaratory judgment that pollution exclusion applied to the release of trichloroethylene vapor from a machine. The district court: granted summary judgment to insurer, finding that there is no duty of indemnification; granted summary judgment to FAG in part, finding that Liberty had a duty to defend FAG until the issue of indemnification was resolved; and denied Liberty a right to reimbursement of defense costs incurred to date. The Court of Appeals held that: a release recurring every few weeks was not **"sudden and accidental"** within the meaning of the "sudden and accidental" exception to the pollution exclusion; insurer was not entitled to reimbursement of defense costs; and insured was not entitled to new trial. District court's ruling was affirmed.

   - Under Missouri law, a comprehensive general liability insurer that had a duty to defend the insured until the court determined that the pollution exclusion barred the insured from coverage was not entitled to reimbursement of defense costs.

   - Under Missouri law, liability insurer *remained obligated* to defend insured *so long as* there remained any question as to whether the underlying claims were covered by the policies.

5. Gopher Oil Co. v. American Hardware Mut. Ins. Co., 588 N.W.2d 756 (Minn. Ct. App. 1999).

   - A successor oil-distributing corporation brought a declaratory judgment action, seeking indemnification and defense from its predecessor's comprehensive general liability insurer for environmental liabilities stemming from predecessor's activities at four waste disposal sites.

   - Comprehensive general liability insurer's defense of other insureds for pollution-related activities during insured's policy period was not relevant to its duty to defend insured's successor for environmental liabilities stemming from insured's activities at waste disposal site during policy period, even if all policies contained endorsements limiting coverage for pollution-related property damage to sudden and accidental occurrences.

   - A nonassignment-without-consent clause in a predecessor's comprehensive general liability insurance policy was not enforceable against the successor corporation that acquired the

predecessor's assets and liabilities for an oil-distributing corporation in the successor's declaratory judgment action in which the successor sought indemnification and defense for environmental liabilities stemming from the predecessor's activities at four waste disposal sites during the predecessor's policy period.

- The purpose of a non-assignment clause is to protect the insurer from an increase to the risk it has agreed to insure; but when events giving rise to an insurer's liability have already occurred, the insurer's risk is not increased by a change in the insured's identity.

J. Selected Federal Case Law

1. Boeing Co. v. Aetna Cas. & Sur., C 86-352WD (W.D. Wash. Oral Decision April 16, 1990).

   - Court held that a PRP letter marked the commencement of a "suit" for purposes of the insurers' duty to defend. See also, Time Oil Co. v. Cigna Property & Cas. Ins. Co., 743 F. Supp. 1400 (W.D. Wash. 1990) (federal district court cites to the Boeing oral decision for a similar proposition).

2. Irvine Co. v. Great Am. Ins. Co., 1996 U.S. App. LEXIS 18828 (9th Cir. July 29, 1996).

   - An insurer has a duty to defend its insured against legal claims for which the insured may potentially be liable. When there is no potential liability under a policy, the insurer has no duty to defend.

   - Insured has the burden to establish that a loss comes within the basic scope of coverage.

K. A Push for Compliance: A new wrinkle has arisen whereby carriers can refuse to cover the liability of a recalcitrant RPR. In an apparent effort to get companies to comply with governmental orders to clean up contaminated sites, the Wisconsin courts have ruled that an insured, which has been ordered by a governmental entity to clean up a contaminated site and has not done so, will not be covered by its insurance when sued by the party that actually undertook the expense of the cleanup.

1. City of Edgerton v. General Cas. Co., 184 Wis. 2d 750 (1994).

   - The Supreme Court of Wisconsin held that there was no coverage provided for an insured who cleans up an environmentally contaminated site which it either owns or does not own, pursuant

to a government directive or request under CERCLA, or its state counterparts.

2. Johnson Controls, Inc. v. Employers Ins. of Wausau, 250 Wis. 2d 319 (App. 2001).

- Pursuant to the Edgerton ruling the court of appeals in Johnson Controls clarified when insurance coverage would be available to an insured for a government mandated cleanup.

- The court divided the possible scenarios into four categories.

  1. The insured who is responsible for cleaning up the contamination at a site pursuant to a directive issued by a government under CERCLA, or its state counterparts.

  2. An insured who is responsible for at least part of the contamination of a site that it does not own, but has not been directed by the government to remediate the site. A government agency has , however, directed others responsible for the contamination-either the site's owner or those who also polluted the property- to clean it up and they, in turn, sue the insured to recover cleanup costs attributable to the insured.

  3. The insured is responsible for part of the contamination of a site that it does not own, and has been directed by the government to remediate the site, but has not done so. The insured is sued by the government to recover money it spent to clean up the site.

  4. The insured is responsible for at least part of the contamination of a site that it does not own, and has been directed by a government entity to remediate the site, but has not done so. The insured is sued by the site's owner or others responsible for the contamination who cleaned up the site at the governments direction.

- The court held that only the insured in category two has incurred damages and is able to be covered by its insurance.

VI. DEFINING COVERED DAMAGES: THE "AS DAMAGES" ISSUE

A. Policy Language:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

Coverage A, bodily injury or
Coverage B, property damage

to which this insurance applies, caused by an occurrence . . .

B. **Policyholder's Position** - The term "as damages" includes all costs incurred by the policyholder in undertaking government mandated cleanup actions.

C. **Insurer's Position** - Costs incurred by the policyholder to respond to governmental cleanup demands are equitable in nature, not legal, and therefore not damages covered under the policy.

D. **Selected California Case Law**

1. AIU Ins. Co. v. Superior Court, 274 Cal. Rptr. 820, 799 P.2d 1253 (1990).

   - In a major environmental case, the California Supreme Court held that costs for clean-up incurred under environmental statutes are covered by liability insurance policies.

   - The Court noted that "nearly every state appellate decision has concluded that clean-up costs incurred under environmental statutes" are covered by insurance policies.

   - The Court concluded that, based on the language of the policies, the definition of "damages," and general insurance principles, the liability policies covered the costs of reimbursing government agencies and complying with injunctions ordering clean-up under CERCLA and similar statutes.

   - The Court also held that the ordinary meaning of the word "damages" includes "response costs." The court noted that CERCLA did not intend that "reimbursement of `response costs' be treated as definitionally or conceptually distinct from the recovery of `damages'." The Court recognized, therefore, that all out-of-pocket expenditures, including costs for cleaning up existing contamination on and off the disposal site, investigating the extent of contamination, investigating the viability of clean-up options, monitoring the spread of waste from the site and so on, are "damages," as that expression was used in the various liability policies.

2. Aerojet-General Corp. v. Mateo County Superior Ct., 211 Cal. App. 3d 216 (1989)..

   - Court held that "response costs for cleanup of pollution were 'damages' within meaning of coverage clause of comprehensive

general liability policy, whether or not costs were equitable relief or damages. . ."

3. Martin Marietta Corp. v. Insurance Co. of North America, 47 Cal. Rptr. 2d 670 (Cal. Ct. App. Dec. 5, 1995).

- Plaintiff had a personal injury policy from 1968 to 1972, and no pollution exclusion provision was involved. Plaintiff sued for duty to defend and coverage against EPA consent decrees and cleanup order for seven hazardous waste sites.

- The trial court granted insurer's motion for summary judgment, arguing that "wrongful entry" did not include property damage claims.

- Division 5 of the Second Appellate District reversed and concluded that "wrongful entry" covered nuisance and trespass; EPA's claims included allegations of wrongful entry and invasion of the right to privacy, and these similarly were covered.

- Insureds declined to assert ambiguity of "wrongful entry," see Legarra v. Federated Mut. Ins. Co., 42 Cal. Rptr. 2d 101 (Cal. Ct. App. 1995), and the court agreed that the phrase can include simple trespass without an intent to dispossess. Groundwater in California is the property of the state, and this argument will help insurers.

E. Selected Washington Case Law

1. Weyerhaeuser Co. v. Aetna Cas. & Sur. Co., 123 Wash.2d 891, 874 P.2d 142 (Wash. 1994).

- "Damages" under comprehensive general liability policy include environmental cleanup costs.

2. Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wash. 869, 784 P.2d 507 (Wash. 1990).

- The Court held that Environmental response costs required to be paid under CERCLA for cleanup of hazardous waste sites were "damages" covered by comprehensive general liability policies issued by insurers, where substance of the claim concerned compensation for restoration of water and real property contaminated by hazardous waste.

- The Court reviewed the policy wording in four of the policies which provided that the insurer " . . . will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this policy applies . . ."

- The court made the following statement: "the reported decisions across the country, the lay dictionary, the insurance dictionary, the failure of the insurance industry to write down what it meant, each of these facts lays waste to insurers' argument" that cleanup costs are not covered damages.

F. Selected Colorado Case Law

1. Compass Ins. Co. v. City of Littleton, 1999 Colo. LEXIS 618, No. 96SC852 (Colo. 6/28/99).

   - EPA had incurred environmental response costs, and sent PRP notice to policyholder toward recovery of those costs. The Court cited several other jurisdictions in support of its holding that the response costs constitute "damages" as that term was used in the insurance policy, triggering obligation of the insurer to indemnify the policyholder for those costs.

G. Selected Federal Case Law

1. Snydergeneral Corp. v. Century Indem. Co., 113 F.3d 536 (5th Cir. 1997).

   - The Court held that environmental cleanup costs, whether incurred by the federal government under CERCLA or by an individual who voluntarily cleans up hazardous wastes, constitute 'damages' and are covered by an insurance policy which provides indemnity for "all sums" which the policy holder is obligated to pay "by reason of liability...imposed upon" the policyholder by law "for damages."

2. Chemical Leamn Tank Lines, Inc. v. Aetna Cas. & Sur. Co., 177 F.3d 210 (3d Cir. 1999).

   - The Third Circuit affirmed the presumption that EPA-mandated RI/FS costs are covered by the indemnity provision of insurance policies.

   - The court held, however, that the presumption is rebuttable by either the policyholder or insurer.

- In situations where there is only an indemnity provision or a defense provision, policy holder usually attempts to show the remediation costs fall within the class of costs for which there is a provision. The argument usually is that failing to find the costs are provided for in the policy will result in a "windfall" to the insurer and be inequitable.

- In situations where there is only an indemnity provision or a defense provision, insurer usually attempts to show the remediation costs fall within the class of costs for which there is no provision. The argument usually is based on the contractual intent of the parties.

VII. TRIGGER OF COVERAGE

A. Policy Language:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

Coverage A, bodily injury or
Coverage B, property damage

to which this insurance applies, caused by an occurrence . . .

B. **Policyholder's Position** - Coverage is afforded under all policies issued to the policyholder from the date of release until full manifestation of damage or until the death of the plaintiff or the filing of a claim.

C. **Insurer's Position** - The only policy triggered is the one in effect at the time of the manifestation of the damage. A number of insurers apply the "exposure theory" asserting that only the policy in effect at the time of initial exposure to the injury is triggered.

D. Selected California Case Law

1. Asbestos Insurance Coverage Cases, Judicial Council Coordination Proceeding No. 1072, Superior Court of the State of California, City and County of San Francisco, Statements of Decision filed January 24, 1990 (Affirmed on Appeal — Armstrong World Industries, Inc. v. Aetna Casualty Co., et al., 35 Cal. App. 4th 192 (1993) review granted 1-27-94.

   - Judge Ira Brown held that "all the policyholders' policies in effect from first exposure to asbestos or asbestos containing products until date of death [of claimant] or date of claim, whichever occurs first . . ." were activated. This is known as the "continuous trigger."

2. Montrose Chem. Corp. v. Admiral Ins., 5 Cal. Rptr. 2d 358, 3 Cal. App. 4th 1511 (1992) (petition for review granted).

- The Court ruled that the allegations made against the insured in an environmental matter triggered all policies from the date of first exposure to the date a claim is filed for purposes of the duty to defend.

3. Montrose Chem. Corp. v. Admiral Ins., 10 Cal. 4th 645 (1995)

- "Continuous trigger" upheld; injury is covered if it occurred within policy period.

- Coverage included "loss in progress"; although EPA had notified insured of its PRP status, it was only "potentially" liable.

4. FMC Corp. v. Plaisted & Cos., 61 Cal. App. 4th 1132, *review denied* 63 Cal. App. 4th 1440 (1998).

- Gradual release of pollutants invokes the "continuous injury trigger" theory

- However, if insured does not have involvement with contaminated site until after applicable policies expire and liability is not triggered until after expiration of policies (in this case, the enactment of CERCLA), there is no coverage:

  "A general liability insurer can realistically be said to be in the business of understanding and taking into account the legislative and judicial dynamics that produce changes in legal theories but cannot be required to be clairvoyant as to the infinite possible future permutations of facts, fundamental to the very existence of coverage but not in existence during the policy period, once the policy period has expired."

E. Selected Washington Case Law

1. Gruol Construction Co. v. Insurance Co. of North America, 11 Wash. App. 632, 524 P.2d 427 (1974).

- In a non-environmental case, the Court adopted the continuous trigger theory. The case involved property damage due to dry rot caused by improper backfilling during construction of an apartment building. See also, Time Oil v. Cigna Prop. & Cas. Co., 743 F. Supp. 1400 (W.D. Wash. 1990) (recognizing in an environmental matter in Federal District Court that Washington State recognizes the continuous trigger theory).

2. American Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co., 951 P.2d 250 (Wash. 1998)

- Once coverage triggered during a policy period, absent clear language to the contrary, insured obligated to pay "all sums" for continuing damage, up to policy limits, without any allocation between insurer and insured.

F. Selected Colorado Case Law

1. American Employer's Ins. v. Pinkard Constr., 806 P.2d 954 (Colo. App. 1990), cert. dismissed, 831 P.2d 887 (November 14, 1991).

- In a nonenvironmental case the Colorado Court of Appeals adopted a continuous trigger theory holding that "because corrosion of roof installed by insured was a progressive and continuous condition and occurred during each of successive general liability policies, coverage was triggered under each such policy."

G. Selected Federal Case Law

1. Alcan Aluminum Corp. v. Prudential Assurance Co. Ltd., et al., 173 F.3d 859 (9th Cir. 1999).

- The court rejected the policyholder's claim against the insurer for cleanup costs that arose from a triggering injury that took place after the policy period had ended. Even though the injuries were the same as those that the insurer was required to indemnify and occurred at the same site, because the injuries happened after the policy had ended, they were not covered.

VIII. PREEMPTION

A. Although CERCLA's Limits when a direct right of action can be undertaken against a guarantor, a recent Minnesota case held that there was no Supremacy Clause conflict between CERCLA and Minnesota's Landfill act that allowed more extensive direct action lawsuits.

1. State v. Employers Ins. of Wausau, Minn. Ct. App., No. C5-01-1904 (May 21, 2002).

- The court held that although CERCLA does limit direct action lawsuits against guarantors, that insurance companies are not always guarantors under CERCLA.