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ESSAY—INSURANCE COVERAGE FOR ENVIRONMENTAL CLEAN-UP COSTS UNDER COMPREHENSIVE GENERAL LIABILITY POLICIES

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Whether it be Times Beach, Missouri or a small spill at the corner gasoline station, the issue of whether environmental clean-up costs are covered by comprehensive general liability ("CGL") insurance policies is a source of continuing—and vigorous—litigation. Under today's federal and state environmental laws, many companies and individuals are saddled with staggering costs of cleaning up hazardous waste sites. This dramatic financial burden has spawned massive litigation with insurance carriers seeking coverage for these enormous expenses.

The purpose of this essay is to provide the reader with a history of the development of CGL policies, the evolution of the so-called "pollution exclusion" endorsement or clause, and a survey of developments in litigation over coverage for environmental clean-up costs.[1] While this essay is geared more to the Arkansas practitioner, the authors believe that much of its content should be useful to attorneys in other jurisdictions who practice in this field.

I. THE HISTORY OF THE COMPREHENSIVE GENERAL LIABILITY POLICY AND THE DEVELOPMENT OF THE POLLUTION EXCLUSION

Prior to 1940, most, if not all, insurance written in the United States was provided on a "named perils" basis. In other words, the types of events for which insurance coverage was provided were specifically enumerated in the policy—fire or flood, for example. Beginning in the 1940s, insurance companies departed from this practice by providing insurance coverage on

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1. The scope of this essay is limited to CGL insurance coverage for costs associated with environmental clean-up and remediation ordered by a state or federal environmental regulatory agency. Among topics not addressed are CGL or other insurance coverage for private personal injury or property damage claims arising from, or associated with, environmental contamination.

an "all-risk" policy coverage form or on a CGL insurance form. Both types of policies were designed to cover all potential perils to which an insured may be subjected, without specific enumeration. The insurance carriers, through endorsements to the policies, would exclude from coverage any particular types of losses or events not covered under the policy. Originally, policies written on an all-risk or CGL basis covered any pollution losses of an insured provided that such losses were neither intentional, expected, nor criminal in character. These policies were generally available from the 1940s through the early 1970s.

The emergence and evolution of "pollution exclusion" endorsements to CGL policies coincide with the enactment and enforcement of federal and state environmental laws. Prior to the 1960s, statutes governing environmental pollution were relatively few and weak. For example, the scope and effect of the Clean Water Act[2] and the Clean Air Act,[3] which originated in 1948 and 1955, respectively, today are nowhere comparable to their original missions. The revolutionary era of the 1960s spawned, among other things, a heightened awareness of our environment and in particular the egregious and often irreparable damage caused by pollution and contamination. From this awareness came action, primarily through legislation that not only strengthened the aforementioned statutes, but also established new laws, such as the Solid Waste Disposal Act,[4] which in its amended form is now the Resource Conservation and Recovery Act ("RCRA"),[5] and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[6] These federal statutes also were supplemented by state statutes, and both federal and state regulatory bodies were created to enforce these laws.

Stronger laws and greater enforcement necessarily meant more claims under CGL policies. Hence, beginning in 1970, the insurance industry introduced a series of pollution exclusions that were engrafted onto CGL policies as endorsements. Through that decade and into the early 1980s, the industry continually modified the pollution exclusion endorsements, moving toward more limited coverage for pollution clean-up costs, both in terms of scope of coverage and monetary limits. Ultimately, due to the extensive amount of exposure relating to polluting events, the industry adopted the "absolute" pollution exclusion in 1986, which is intended to totally eliminate

2. 33 U.S.C. § 1251 (1994).
3. 42 U.S.C. § 7401 (1994).
4. 42 U.S.C. § 3251 (1970) (effective 1965).
5. 42 U.S.C. § 6901 (1994) (effective 1976).
6. 42 U.S.C. § 9601 (1994) (effective 1980).

coverage for pollution-related clean-up costs. It is rare that any CGL policy written after 1986 does not contain an absolute pollution exclusion.[7]

Another historic development germane to the topic is the industry's switch from occurrence CGL policies to "claims made" CGL policies. Prior to the 1980s, most CGL policies were the former. Since then, virtually all CGL policies take the latter form. As discussed later in this essay[8] this distinction is critical to the prospects for recovering on a claim, as establishing an earlier occurrence policy as the applicable policy is more likely to result in coverage than under a later claims made policy.

As the historical perspective implies, claims for coverage against policies issued between 1940 and 1970 have a significant likelihood for success due to the absence of any type of exclusion for pollution losses. After 1970, the battle becomes much more difficult for an insured due to the inclusion of pollution exclusion endorsements.

However, in pursuing claims under older policies issued between the 1940s and the 1970s, the insured confronts two significant threshold problems. The first, and obviously most troublesome, is whether the carrier that issued the policy is still in existence. As with any other industry, insurance companies come and go, as was dramatically demonstrated in the latter 1970s and early 1980s when many financially troubled carriers were forced into liquidation. While the closure of an insurance company is carefully regulated through receivership in order to assure that as many claims as possible are paid, nonetheless policyholders whose claims arise after dissolution are simply out of luck. This scenario frequently arises in the context of an environmental clean-up claim, where the polluting event often manifests itself long after the carrier has closed its doors.

The second threshold hurdle confronting an insured in making a claim under an earlier policy is to prove the existence of the policy, including the specific terms and conditions in the policy. The insured carries the burden of establishing both the existence and the terms of the policies under which it seeks coverage, and hence it will confront an insurmountable burden if neither it nor, through discovery, the insurer can produce the specific policy documentation. This burden is particularly troublesome in claims based on ancient policies, where routine document destruction already may have occurred.

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7. The insurance industry offers coverage for environmental clean-up costs through environment impairment liability policies, which are distinguished from CGL policies. However, the premiums for this type of coverage are substantial, making such coverage feasible only for industries having significant potential for environmental clean-up claims. This essay focuses on the more common CGL policy.

8. *See infra* part II.A-B.

II. DETERMINING THE APPLICABLE POLICIES

Among the most important issues in a coverage dispute is determining the comprehensive general liability ("CGL") insurance policies that govern the controversy. As with most insurance contracts, CGL policies are renewed periodically, and thus policy language and endorsements can change frequently. This is particularly true in the context of pollution exclusion clauses and endorsements. As previously noted, earlier CGL policies issued prior to the mid-1970s either have no pollution exclusions at all, or the exclusions are either partial or conditional, both in scope and monetary limits, thereby providing greater opportunity for coverage. However, as the enactment and enforcement of environmental laws grew, and as the concomitant coverage claims grew, the insurance industry responded with much tighter and restrictive pollution exclusion provisions, ultimately coming to today's absolute pollution exclusion.

A. "Claims Made" and "Occurrence" Policies

Determining the applicable policy begins by ascertaining whether the CGL policy is a claims made policy or an occurrence policy. Under a claims made policy, the policy in effect at the time the insured posts its claim with its carrier will control coverage. In contrast, under an occurrence policy, the policy in effect at the time of the event giving rise to the claim will control, regardless of the time at which the insured posts its claim with the carrier.

For example, assume that the insured has had CGL coverage from 1970 to present, with the policies renewed on an annual basis. Also assume that the "event"—a discharge of hazardous substances—occurred in 1970, and assume further that the event did not manifest itself until 1987, and hence the insured did not become liable for clean-up costs until that time (something that indeed happens in the real world). The insured then posts its claim with its CGL carrier. If the insurance policies were occurrence policies, then the policy in effect during 1970—when the event occurred—would control. On the other hand, if the policies were claims made policies, then the policy in effect in 1987—the time at which the claim was made—controls.

This first step of determining the applicable policy can be critical to evaluating the case for coverage. As previously noted, later policies generally have much broader pollution exclusion provisions, and thus the prospects for coverage become correspondingly less likely. Thus, under the foregoing example, the insured most likely will have greater difficulty in

achieving coverage under a 1987 claims made policy containing an absolute pollution exclusion than under a 1970 occurrence policy that may have no pollution exclusion at all.

B. Determining the Time of the "Occurrence"

To determine the applicable policy, one must establish the time(s) at which the event(s) occurred. Again, from the insured's perspective, the earlier the event occurred, the more likely that there will be either no pollution exclusion or a comparatively weaker one. Accordingly, an insured can expect its carrier to contest the time at which the event occurred. The carrier will contend that the event occurred in later years, in an effort to place the occurrence under a policy containing a broader pollution exclusion.

Establishing the time of an occurrence in an environmental case certainly can be problematic. Assuming that the *release* of the hazardous substance constitutes the occurrence, there are any number of situations where (i) the moment of release, and (ii) whether there were a series of releases over a number of years, becomes a factual issue for trial. Moreover, a carrier may contend that the occurrence is not triggered by the release, but by the time at which the insured incurs the environmental clean-up costs, which often is much later than the time of the release.[9]

C. Umbrella Coverage

In the course of determining applicable policies, the insured also should consider any umbrella policies that it may have. An umbrella policy well could provide coverage, even where the primary CGL policy does not. Customarily, umbrella policies are viewed by the insured merely as providing additional *monetary* coverage over and above the limits of the underlying CGL policy. This much certainly is true, but insureds often overlook the second purpose of an umbrella policy—to provide coverage for types of losses that otherwise are outside the scope of the underlying CGL policy's coverage. If the umbrella policy does not include its own pollution exclusion, then when viewed for its second purpose of providing coverage not granted under the primary policy, a strong argument can be made that the umbrella policy provides coverage for environmental clean-up costs.

9. *See infra* part IV.A.3.

III. FORUM SELECTION

Forum selection is of utmost importance in litigating a case turning on coverage for an environmental claim, particularly for Arkansas insureds.

Currently, no Arkansas state court of last resort, the Supreme Court of Arkansas or the Arkansas Court of Appeals, has issued any decisions providing guidance on insurance coverage issues in the context of environmental claims. Thus, both the insured and the carrier are testing uncharted waters by litigating these issues in Arkansas state courts.

Beyond this, there is one issue, commonly known as the "as damages" issue, that absolutely dictates the success or failure of an action seeking CGL insurance policy coverage for environmental clean-up costs. While other issues certainly must be considered in the course of selecting the forum,[10] the as damages issue will control the fate of the litigation at the threshold.

A. "As Damages" and the Eighth Circuit's *NEPACCO*[11] Decision

The kernel of the as damages issue is the coverage language traditionally used in CGL (as well as umbrella) policies, and the interpretation of that language by the United States Court of Appeals for the Eighth Circuit and other courts.[12]

This language, known as the as damages clause, was interpreted by the Eighth Circuit in *Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co.*[13] ("NEPACCO") to exclude coverage for environmental claims.[14]

For purposes of this discussion, the pertinent facts are that, as part of the spate of litigation arising from the dioxin contamination problems that beset Times Beach, Missouri, the CGL carrier for the prime responsible party, NEPACCO, filed a declaratory judgment action seeking a determination whether NEPACCO's various (and substantial) liabilities were covered

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10. *See infra* part IV.

11. Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977 (8th Cir. 1988) (en banc), *cert. denied sub nom.* Missouri v. Continental Ins. Co., 488 U.S. 821 (1988).

12. Virtually all CGL (and umbrella) policies contain some version of the following coverage language: the Carrier will pay on behalf of the Insured all sums the Insured *shall become legally obligated to pay as damages* because of bodily injury or property damage to which this insurance applies, caused by an occurrence.

13. 842 F.2d 977.

14. The factual and procedural history of *NEPACCO* is complicated and reading the entire case is recommended.

under the various CGL policies issued by the carrier to NEPACCO.[15] Among those potential liabilities was NEPACCO's liability to reimburse the state and federal governments for environmental clean-up costs incurred by those governments under RCRA and CERCLA.[16] The carrier posited various theories in arguing that these claims were excluded from coverage, but the argument that ultimately proved to be its savior was advanced by the American Insurance Association ("AIA"), which appeared as *amicus curiae*.[17]

The AIA argued that the as damages language does not encompass environmental clean-up costs, and the Eighth Circuit agreed.[18] The court, sitting en banc, acknowledged that the interpretation of the policy language was governed by applicable principles of Missouri law governing insurance policy construction.[19]

The Eighth Circuit then held that, while the "lay insured" may attach a broader meaning to the term damages to encompass all monetary claims, that term, as used in "the insurance context . . . is not ambiguous and . . . refers to legal damages and does not include equitable monetary relief."[20] From there, the majority concluded that actions by state and federal governments to recover environmental clean-up costs were "essentially equitable actions for monetary relief in the form of restitution or reimbursement of costs."[21]

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15. *NEPACCO*, 842 F.2d at 981.
16. *Id.* at 980.
17. *Id.* at 983.
18. *Id.* at 984-85.
19. *NEPACO*, 842 F.2d at 985. The court stated:

> [T]he rules of construction applicable to insurance contracts require that the language used be given its plain meaning. If the language is unambiguous the policy must be enforced according to such language. If the language is ambiguous it will be construed against the insurer. Language is ambiguous if it is reasonably open to different constructions; and language used will be viewed in light of "the meaning that would ordinarily be understood by the lay [person] who bought and paid for the policy.

Id. (quoting Robin v. Blue Cross Hosp. Serv., Inc., 637 S.W.2d 695, 698 (Mo. 1982) (en banc)) (other citations omitted). The authors point out that these same principles are recognized in Arkansas. *E.g.*, Daniels v. Colonial Ins. Co., 314 Ark. 49, 857 S.W.2d 162 (1993) (ruling policies are to be interpreted in plain and ordinary sense); Countryside Casualty Co. v. Grant, 269 Ark. 526, 601 S.W.2d 875 (1980) (construing ambiguities against insurer). The principles also hold true in most, if not all, other states. *See generally* LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE 3D, chs. 21, 22 (C.B.C. 1995).

20. *NEPACCO*, 842 F.2d at 985 (citing Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1352 (4th Cir. 1987)).
21. *NEPACCO*, 842 F.2d at 987.

The United States Supreme Court denied certiorari,[22] and thus *NEPACCO* is the controlling law in the Eighth Circuit, insofar as recovery of environmental clean-up costs under a CGL policy is concerned. Two other circuit courts of appeals have followed the *NEPACCO* rationale in cases turning on laws of states within their circuits.[23]

Other courts have strongly disagreed with, and even openly criticized, the *NEPACCO* decision, and those courts combine to represent the majority view.[24] In *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*[25] the District of Columbia Circuit, also applying Missouri law in a case seeking coverage for environmental clean-up costs, flatly rejected *NEPACCO* as a case that "ignores clear signals from the state courts" and "clearly misreads state law."[26]

B. Avoiding *NEPACCO*

In two subsequent decisions turning on Arkansas law, the Eighth Circuit has applied its *NEPACCO* rationale to deny coverage, finding that there was no controlling Arkansas law on the specific issue.[27] Accordingly, unless and until an Arkansas court of last resort renders a decision to the contrary, *NEPACCO* will be applied by the federal courts in the Eighth Circuit to deny coverage based on the CGL policy's as damages language. Thus, an Arkansas insured must carefully evaluate its options in selecting a forum that will not be governed by *NEPACCO*.

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22. 488 U.S. 821 (1988).

23. A. Johnson & Co. v. Aetna Casualty & Sur. Co., 933 F.2d 66 (1st Cir. 1991) (applying Maine law); Cincinnati Ins. Co. v. Milliken & Co., 857 F.2d 979 (4th Cir. 1988) (applying South Carolina law); Snyder Gen. Corp. v. Century Indem. Co., 907 F. Supp. 991 (N.D. Tex. 1995).

24. *See, e.g.*, Aetna Casualty & Sur. Co. v. Pintlar Corp., 948 F.2d 1507 (9th Cir. 1991); New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162 (3d Cir. 1991); Avondale Indus., Inc. v. Travelers Indem. Co., 887 F.2d 1200 (2d Cir. 1989); Hudson Ins. Co. v. Double D Mgmt. Co., 768 F. Supp. 1542 (M.D. Fla. 1991); Intel Corp. v. Hartford Accident & Indem. Co., 692 F. Supp. 1171 (N.D. Cal. 1988); Nat'l Indem. Co. v. U.S. Pollution Control, Inc., 717 F. Supp. 765 (W.D. Okla. 1989); Village of Morrisville Water & Light Dep't v. USF&G, 775 F. Supp. 718 (D. Vt. 1991).

25. 944 F.2d 940 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 1011 (1992).

26. *Id.* at 945. State courts also reject *NEPACCO*. *See, e.g.*, Outboard Marine Corp. v. Liberty Mut. Ins. Co., 1992 WL 356056 (Ill. 1992); A.Y. McDonald Indus., Inc. v. Insurance Co. of N. Am., 475 N.W.2d 607 (Iowa 1991); Hazen Paper Co. v. USF&G, 555 N.E.2d 576 (Mass. 1990); Minnesota Mining & Mfg. Co. v. Travelers Indem. Co., 457 N.W.2d 175 (Minn. 1990); C.D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'g Co., 388 S.E.2d 557 (N.C. 1990); Boeing Co. v. Aetna Casualty & Sur. Co., 784 P.2d 507 (Wash. 1990).

27. Parker Solvents Co. v. Royal Ins. Cos., 950 F.2d 571 (8th Cir. 1991); Grisham v. Commercial Union Ins. Co., 951 F.2d 872 (8th Cir. 1991).

Successfully maintaining an environmental coverage case in a state court is problematic because the elements for federal diversity jurisdiction—diverse citizenship of the parties and a dispute valued in excess of $50,000—are usually present. One option for the plaintiff insured is to file an action in its home state court that includes a resident defendant, thereby destroying diversity jurisdiction. The insured, however, must have a legitimate, colorable claim against the resident defendant. Otherwise, the law of fraudulent joinder may be applied to effect the dismissal of the "straw" defendant.

This strategy has been upheld in the face of a non-resident carrier's filing of a separate declaratory judgment action in federal court. In *United States Fidelity & Guaranty Co. v. Murphy Oil USA, Inc.*,[28] the carrier, United States Fidelity & Guaranty Co. ("USF&G"), filed a declaratory judgment action in Alabama seeking a ruling that it was not liable for coverage on an environmental clean-up claim brought by its insured, Murphy Oil.[29] Murphy Oil then filed a state court action in Arkansas against USF&G and other potentially liable insurers, including an Arkansas-resident insurer.[30]

After prevailing upon the Alabama federal court to transfer its case to Arkansas, Murphy Oil then moved the Arkansas federal court to stay the case on abstention grounds, relying on the pending Arkansas state court action.[31] The district court stayed the case on abstention grounds, and the Eighth Circuit affirmed, applying the traditional abstention standards and further noting that, in a declaratory judgment action, a federal district court's jurisdiction is discretionary.[32]

One strategy that has been rejected involves splitting claims, in an effort to bring one claim in state court that seeks less than the federal jurisdictional amount. In *Federated Rural Electric Insurance Corp. v. Arkansas Electric Cooperatives, Inc.*,[33] the insured filed suit against its CGL carrier in an Arkansas state court, narrowing its claim to one of several years, and one of several CGL policies, that arguably applied.[34] The insured also filed another action in a different Arkansas state court for claims relating to the remaining years and policies.[35] The carrier responded by filing a declaratory judgment action encompassing all years and all policies,

28. 21 F.3d 259 (8th Cir. 1994).
29. *Id.* at 260.
30. *Id.*
31. *Id.*
32. *Id.* at 263-64.
33. 48 F.3d 294 (8th Cir. 1995).
34. *Id.* at 296.
35. *Id.*

and also by removing the second suit on diversity grounds.[36] The insured persuaded the federal district court to stay its proceedings on abstention grounds, relying on *USF&G*.[37]

On appeal, however, the Eighth Circuit reversed and remanded with instructions to enter summary judgment in favor of the carrier, applying *NEPACCO*.[38] The Eighth Circuit, with a few choice words about forum-shopping, distinguished *USF&G*, where all policies and all defendant carriers were included in one state court action.[39] In contrast, the insured's splitting of its claims within the state courts would have resulted in piecemeal litigation, a factor that militates against abstention. The panel reasoned that because all claims were before the federal court, the carrier should not be subjected to piecemeal litigation, nor should it be deprived of federal court jurisdiction in order to consider all claims at one time.[40]

Absent the ability to avoid federal diversity jurisdiction, the only alternative is to bring suit in a federal court outside the circuits that embrace the *NEPACCO* rationale. If the carrier is a resident of a forum in which the law is more favorable to the insured, or if the event giving rise to the claim occurred in a more favorable forum, the litigation might be brought there. However, beware of choice-of-law doctrines and motions to transfer. Just as the insured desires to avoid forums that follow *NEPACCO*, the carrier will be seeking ways to get to them.

C. The Prospects for an Arkansas Ruling

As previously stated, Arkansas state courts of last resort have yet to rule on any case involving CGL carrier liability for an insured's environmental clean-up costs. Two state trial courts have reached contrary decisions on the as damages issue. In *Grantors to the Diaz Refinery PRP*

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36. *Id.*
37. *Id.*
38. *Id.* at 300-01.
39. *Id.* at 297-98. The court stated:

> We need not decide whether Federated's choice of a federal forum is motivated by forum-shopping (we suspect that it was), for it is sufficiently clear that AECI's attempts to remain in state court were motivated by a desire to avoid *NEPACCO*. Moreover, it appears that much of the progress that has been made in the state actions has been due to the reactive tactics of AECI. In light of AECI's hands which were soiled during its forum-shopping spree, we are disinclined to view its request for abstention as anything more than a continuation of its forum selection strategy.

Id. at 299.
40. *Id.* at 298-99.

Committee Site Trust v. Ranger Insurance,[41] the Jackson County Circuit Court followed *NEPACCO* in denying coverage. It appears that the Arkansas Supreme Court will never have an opportunity to decide the issue. All of the defendant carriers except one settled; the lone remaining carrier is subject to an Oklahoma receivership and an accompanying stay of litigation that the Arkansas Supreme Court has decided to honor, applying full faith and credit to Oklahoma's insurance and receivership laws.[42]

The Union County Circuit Court in *Murphy Oil USA, Inc. v. United States Fidelity & Guaranty Co.*[43] rejected *NEPACCO* in ruling in favor of the insured on the as damages language. In that case, the insured was awarded a significant jury verdict.[44] No one can accurately gauge whether or when the Arkansas Court of Appeals might decide the case on the merits.[45]

While it is always folly to attempt to predict any court's action on a given issue, Arkansas Supreme Court precedent appears to support a ruling in favor of the insured. In *Home Indemnity Co. v. City of Marianna*[46] the court indicated that the term damages as used in a CGL policy will be broadly interpreted in favor of coverage.[47] In *Home Indemnity*, the carrier refused the tender of defense by its insured, a city that had been sued for injunctive relief, costs and attorneys fees for alleged violation of the federal Voting Rights Act.[48] The city filed a declaratory judgment action, and the lower court ruled in favor of the city, ordering the carrier to provide defense.[49]

On appeal, the carrier argued that under the policy it was only required to provide defense in cases where the city was exposed to damages, and because the complaint did not seek damages it was under no duty to defend.[50] The court affirmed, holding that because damages *can* be awarded

41. 319 Ark. 235, 890 S.W.2d 259 (1995) (per curiam) (order staying proceedings until the parties are free to proceed and intend to do so).

42. *Id.*

43. *Appeal docketed*, No. CA96-843 (Ark. Ct. App. July 19, 1996).

44. *Id.*

45. Murphy Oil USA v. USF&G., *appeal docketed*, No. CA96-843 (Ark. Ct. App. July 19, 1996). This case is presently in active briefing with the appellant's brief due September 27, 1996.

46. 291 Ark. 610, 727 S.W.2d 375 (1987).

47. *Id.* at 616-17, 727 S.W.2d at 378.

48. *Id.* at 611-12, 727 S.W.2d at 375-76. The Voting Rights Act is codified at 42 U.S.C. § 1971 (1996).

49. *Home Indem.*, 219 Ark. at 612, 727 S.W.2d at 376.

50. *Id.* at 612-13, 727 S.W.2d at 376. The city only asked for injunctive relief, costs, and fees. *Id.* at 612, 727 S.W.2d at 376.

under the Voting Rights Act,[51] the duty to defend arose, even though the complaint did not specifically seek damages.[52] In the course of this ruling, the Court also offered its observations on the construction of the phrase "damages" as used in the policy.[53] These remarks indicate that the Arkansas Supreme Court will accord a broader meaning to the term damages than that recognized in legal parlance. Additionally, the court's observations hint that the word damages may be clouded with ambiguity in the absence of defining language. CGL policies commonly do not define that term.

In addition to the implications of *Home Indemnity*, the Arkansas General Assembly's 1989 amendment to the Remedial Action Trust Fund Act[54] ("RATFA") demonstrates legislative intent that environmental clean-up costs are "legal damages" under Arkansas law.[55] This statute plainly classifies environmental clean-up costs as damages and thus provides legislative guidance to the Court—if and when it meets the issue.[56]

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51. *See* 42 U.S.C. § 1983 (1996).

52. *Home Indem.*, 291 Ark. at 619, 727 S.W.2d at 379-80.

53. *Id.* at 613, 727 S.W.2d at 376. The court stated:

> We do not agree that issues basic to insurance coverage can properly turn on what "ordinarily" pertains. Certainly the coverage itself was never intended to stand or fall on the terms which are subject to differing interpretation. Moreover, we find some elasticity in the word "damages." . . . Furthermore, Home could easily have eliminated the uncertainty by defining "damages" in its policy. It chose not to do so and we are unwilling to deny coverage on that equivocal ground.

Id. at 613, 727 S.W.2d 376-77 (citations omitted).

54. ARK. CODE ANN. § 8-7-501 (Michie 1993).

55. ARK. CODE ANN. § 8-7-501(c), as follows:

> (c) A further purpose of this subchapter is to clarify the General Assembly's intent to provide the department with the necessary funds for remedial action at a hazardous substance site, recognizing that both public and private funds must be expended to implement remedial action at the hazardous substance sites which exist in this state. Costs and expenses for remedial action, whether expended by the department or by any person liable for the hazardous substance site *are legal damages* to persons liable to the state and to persons liable to any other person for contribution, whether such liability arises by voluntary compliance with this subchapter pursuant to an order from or settlement with the department, or by suit for injunctive relief, declaratory judgment, contribution, damages or restitution, and whether such suit is brought by the state or by any party authorized to bring a suit for relief under this subchapter.

ARK. CODE ANN. § 8-7-502(c) (emphasis added).

56. It should be noted that in *Grisham* and *Parker Solvents*, the Eighth Circuit declined to interpret *Home Indem.* and the RATFA amendment to provide coverage. Thus, an Arkansas state court of last resort must rule on these issues as well.

D. Other Forum Selection Considerations

Aside from the as damages clause, there are other terms within the comprehensive general liability ("CGL") insurance policy and the pollution exclusion endorsements that have been subject to varying interpretations by federal and state courts across the country.[57] Thus, those terms and the courts' interpretations of them also should be considered in determining forum selection. However, unlike the as damages clause, the interpretation of these other terms often is governed by the particular factual circumstances. Accordingly, a decision from a particular forum that facially may seem either adverse or supportive might be distinguishable on the facts, and hence caution must be employed in either selecting or rejecting that forum.

IV. THE TERMS OF THE POLICIES AND ENDORSEMENTS

Generally, the carrier's primary defenses will turn on language contained in the CGL policies and pollution exclusion endorsements. The insurer may raise other defenses common to coverage disputes, such as failure to cooperate, failure to disclose facts material to coverage and risk, failure to give timely notice, as well as traditional defenses based on waiver, estoppel, or statutes of limitations. The focus of this essay is limited to the policy and endorsement language that is central to the environmental coverage claim.

A. General Policy Provisions

As with other types of insurance policies, CGL policies commonly use the same language and terminologies, such as the as damages language discussed above. The term of a CGL policy that is central to any claim is the term that triggers coverage. In CGLs and accompanying umbrella policies, this term traditionally is the word occurrence.[58]

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57. *See infra* part IV and cases cited therein.

58. "Occurrence" is usually defined in the policy to mean: an event or 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*. *See* Diamond Shamrock Chem. Co. v. Aetna Casualty & Sur. Co., 609 A.2d 440, 462 (N.J. Super. Ct. App. Div. 1992).

1. "Continuous or repeated exposure to conditions"

This term is most advantageous to an insured seeking coverage on an environmental claim. This language encompasses the long-term, repeated release of hazardous substances; indeed it is the language that provides for coverage of environmental clean-up costs under pre-1970s policies containing no pollution exclusion endorsements.

2. *"Neither expected nor intended from the standpoint of the insured"*

This term is the stuff of which fact issues are made, particularly in the context of environmental claims. However, to the benefit of the insured, the carrier generally has the burden of proving that the occurrence was either expected or intended by the insured, as that language is exclusionary in nature. This is the law in Arkansas. In *U.S. Fire Insurance Co. v. Reynolds*,[59] the insured fired a warning shot at an intruder which ricocheted and struck the intruder. The intruder filed suit against the insured, who then made a claim under his homeowner's policy.[60] The carrier denied coverage, claiming that the insured's actions had the expected or intended result of injuring the intruder. The lower court ruled that the evidence demonstrated that the insured only meant to warn the intruder and thus did not expect or intend to harm him.[61] In the course of affirming the lower court's decision in favor of the insured, the Court of Appeals noted that the carrier had the burden of proof on the expected or intended issue, as the language was exclusionary.[62]

A significant amount of litigation has taken place with regard to the portion of the occurrence definition dealing with whether or not the property damage was expected or intended by the insured. The general rule is that coverage exists for the unintended results of an intentional act, but not for the damages assessed because of injury which was intended to be inflicted.[63] By far, the largest group of cases where insurers have prevailed on occurrence arguments involve site operators or other active polluters. Generally, courts have been reluctant to find coverage where pollution occurs in the ordinary course of the insured's business or as a routine aspect of its operations.[64] In a significant New Jersey decision, the court held that

59. 11 Ark. App. 141, 667 S.W.2d 664 (1984).
60. *Id.* at 144, 667 S.W.2d at 665.
61. *Id.* at 144-45, 667 S.W.2d at 665.
62. *Id.* at 145, 667 S.W.2d at 667.
63. Lyons v. Hartford Ins. Group, 310 A.2d 485 (N.J. Super. Ct. App. Div. 1973).
64. *See* USF&G v. Star Fire Coals, Inc., 856 F.2d 31 (6th Cir. 1988); Millipore Corp.

the conduct of an insured giving rise to the release of pollutants at its manufacturing facilities was so chronic as to preclude any possibility that the resulting pollution was not expected or intended.[65]

Although insurers have had a fair degree of success in establishing the absence of any occurrence in claims involving active polluters, most courts have been reluctant to find that waste generators expected or intended to cause pollution where they had no direct involvement in the disposal of waste at a site.[66] This is particularly true at licensed waste disposal facilities where, unknown to the insured, the site operator was illegally dumping waste in violation of its operation permit.[67]

A crucial aspect of the occurrence issue is the extent of the insured's knowledge about the events giving rise to the claimed liability. The outcome of occurrence issues may also turn on whether the jurisdiction in question measures the insured's expectation or intent based upon a subjective standard (actual intent) or an objective standard (what would a reasonable person have foreseen under the same circumstances).

Most courts have adopted a subjective standard for measuring whether harm was expected or intended.[68] In general, these courts are less likely to rule out coverage on this basis unless pollution results from egregious and chronic conditions at the insured's plant. An objective standard was upheld under Texas law in *In re: Texas Eastern Transmission Corp. PCB Contamination Insurance Coverage Litigation*.[69] There the court held that Texas Eastern was not entitled to general liability coverage under policies issued after 1972 for the cost of cleaning up PCB contamination in its nationwide network of natural gas pipelines where its employees were aware that PCB contamination was occurring at the time.[70] Further, under Mississippi law, a result cannot be an accident if it was the foreseeable result of a sequence of events that the insured set in motion.[71]

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v. Travelers Indem. Co., 1995 U.S. Dist. Lexis 4306 (D. Mass. Mar. 31, 1995).

65. *Diamond Shamrock*, 609 A.2d at 440.

66. *See* Village of Morrisville Water & Light Dep't v. USF&G, 775 F. Supp. 718 (D. Vt. 1991).

67. *See* Aetna Casualty & Sur. Co. v. General Dynamics Corp., 783 F. Supp. 1199 (E.D. Mo. 1991), *reversed on other grounds*, 968 F.2d 707 (8th Cir. 1992).

68. *See* Broderick Inv. Co. v. Hartford Accident & Indem. Co., 954 F.2d 601 (10th Cir. 1992).

69. 870 F. Supp. 1293 (E.D. Pa. 1992).

70. *Id.*

71. Allstate Ins. Co. v. Moulton, 464 So. 2d 507 (Miss. 1985).

3. *The timing issue*

A third issue associated with interpreting "occurrence" is timing. In a case seeking CGL policy coverage for environmental clean-up costs, when does the occurrence take place? This question presents a critical battle-ground in coverage litigation: determining the applicable policy depends squarely upon determining the time of the occurrence. In order to establish coverage under a more liberal policy, the insured will advocate a position supporting an earlier occurrence date, while the carrier will argue for a later occurrence date to take advantage of the greater limitations of pollution exclusion language contained in later policies.

Most courts find that the presence of pollutants in the ambient environment fits within the definition of property damage.[72] A distinction still may be drawn between liability under CERCLA, which may be triggered by the mere *threat* of a release and actual releases that might involve property damage.[73] However, where pollutants actually have been discharged into the environment, the presence of those pollutants has been found to constitute property damage.[74]

Because courts typically will find the actual release of contaminants into the environment tantamount to physical injury to tangible property, the issue that must be addressed is the trigger of coverage that will apply to the claim. There are four main trigger theories which have developed in the toxic tort context of asbestos exposure cases and other bodily injury claims. They are:

"Exposure"—all policies during dates of actual contact with injurious substance are triggered;

"Manifestation"—policy in effect when injury was discovered or reasonably could have been discovered is triggered;

"Continuous Trigger"—all policies from the date of first exposure through manifestation of injury are triggered; and

"Actual Injury"—policy in effect when injury actually occurred, even if not discovered then, is triggered.

A review of the decisions involving the trigger of coverage reveals that there is little consensus among the various jurisdictions in the United States as to the most appropriate trigger for property damage claims.[75] No

72. *See, e.g.*, Hays v. Mobil Oil Corp., 930 F.2d 96 (1st Cir. 1991); Aetna Casualty & Sur. Co. v. Pintlar Corp., 948 F.2d 1507 (9th Cir. 1991).

73. *Allstate Ins.*, 464 So. 2d at 509-10.

74. Hays v. Mobile Oil Corp., 930 F.2d 96 (1st Cir. 1991).

75. *See, e.g.*, Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981) (continuous trigger), *cert. denied*, 455 U.S. 1007 (1982); Fireman's Fund Ins. Co. v. Ex-Cell-

Arkansas case law exists on the issue. The view adopted by the Eighth Circuit in *NEPACCO*, albeit dictum, follows the exposure theory.[76]

The manifestation trigger and the actual injury trigger usually are single-year triggers, whereas, the exposure trigger and the continuous trigger are multi-year triggers. In general, manifestation triggers have not found favor with the courts, particularly in cases where the dates of discharge activity are readily identifiable. The Michigan courts and the Court of Appeals for the Fourth Circuit appear to have a stronghold on manifestation case law.[77] Routinely, other jurisdictions are rejecting this trigger of coverage.[78]

Rather than triggering coverage when pollution is discovered, the actual injury trigger theory asks when the undiscovered injury resulted. When pollution results from discrete, identifiable causes or when the causes of contamination cease prior to the inception of an insurer's policies, courts applying actual injury triggers limit coverage to the policy in effect when pollutants were first released into the environment. Harm which may persist into subsequent policy years as a result of this initial occurrence is treated as a loss in progress, and relates back to the initial policy year. This approach is adopted in a number of courts, including Pennsylvania, Oregon, and New Jersey.[79]

The discharge of pollutants into the environment generally triggers coverage under both an injury in fact and exposure analysis under the policy in effect at the time of the initial release of pollutants. The expiration of that policy does not cut off that insurer's obligation to pay damages for pollution that continues thereafter. When pollution results from discrete discharges that occur during multiple policy periods, courts applying an exposure analysis have triggered multiple policies.[80]

O-Corp., 662 F. Supp. 71 (E.D. Mich. 1987) (exposure trigger); Dow Chem. Co. v. Associated Indem. Corp., 727 F. Supp. 1524 (E.D. Mich. 1989) (actual injury trigger); Transamerica Ins. Co. v. Safeco Ins. Co., 472 N.W.2d 5 (Mich. Ct. App. 1991) (manifestation trigger).

76. Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977 (8th Cir. 1988) (en banc), *cert. denied sub nom.* Missouri v. Continental Ins. Co., 488 U.S. 821 (1988). The occurrence takes place at the time of the discharge of the materials and the consequent damage to the property, not at the time the clean-up costs are incurred. *Id.* at 984.

77. *See, e.g.*, Mraz v. American Universal Ins. Co., 804 F.2d 1325 (4th Cir. 1986); Transamerica Ins. Co. v. Safeco Ins. Co., 472 N.W.2d 5 (Mich. Ct. App. 1991).

78. *See, e.g.*, Montrose Chem. Corp. v. Admiral Ins. Co., 913 P.2d 878 (Cal. 1995) (en banc).

79. *See* Inland Waters Pollution Control, Inc. v. National Union Fire Ins. Co., 997 F.2d 172, 175 (6th Cir. 1993).

80. *Village of Morrisville*, 775 F. Supp. at 730-31.

The decisions employing the continuous trigger of coverage basically trigger all policies from the date of the very first exposure of a pollutant to the environment through the manifestation of the injury and acknowledgment of the problem by the potentially responsible parties. This trigger of coverage results in a battle among the various insurance carriers over responsibility for the polluting events. A number of courts, particularly those in New Jersey and Delaware, continue to adhere to this concept.[81]

B. "Pollution Exclusion" Clauses

Separate and apart from the general terms of the policy are the terms specifically pertaining to pollution exclusion, meaning those provisions that work to limit or exclude from coverage pollution-based or environmental-based claims. In later CGL policies, these exclusions may be found in the body of the general policy, along with other common exclusions. In earlier CGL policies, the pollution exclusion appears as an endorsement to the policy.

Whether contained in the general policy or in an endorsement, a pollution exclusion provision is just that—an *exclusion* from coverage. This is of prime importance to the insured from a burden-of-proof standpoint under Arkansas law because, if the carrier contends that a particular claim falls under an exclusion, the carrier has the burden of proof on that issue.[82]

Pollution exclusion clauses are evolutionary. Beginning in the mid-1970s, limited, conditional pollution exclusion endorsements began to appear. These types of endorsements usually limit both the amount of coverage and the conditions under which coverage will apply. Beginning in the mid-1980s, CGL carriers moved to absolute pollution exclusion endorsements, in which no pollution-related loss is covered under any circumstance.

81. Reliance Ins. Co. v. Armstrong World Indus., Inc., 614 A.2d 642 (N.J. Super. Ct. Law Div. 1992), *rev'd by* 678 A.2d 1152 (N.J. Super. Ct. App. Div. 1996); Harleysville Mut. Ins. Co. v. Sussex County, 831 F. Supp. 1111 (D. Del. 1993).

82. *See, e.g.*, United States Fire Ins. Co. v. Reynolds, 11 Ark. App. 141, 667 S.W.2d 664 (1984).

1. *"Sudden and Accidental"*

Most pollution exclusion clauses that provide limited coverage condition such coverage on an event that was sudden and accidental.[83] The common question that arises in litigation over this type of clause is the meaning of sudden and accidental. One of the commonly accepted rules of interpretation of insurance contracts is that if the policy language is ambiguous, the language will be construed in favor of coverage. This is the law in Arkansas.[84]

The meaning of sudden and accidental has been the source of a good deal of litigation. Some courts have ruled that the term is ambiguous, and thus coverage applies.[85]

Other courts have considered the sudden and accidental clause in the context of the expected or intended language of the general policy and have concluded that the sudden and accidental clause is ambiguous and a mere extension of the expected or intended language contained in the policy. Thus, when the pollution event is neither expected nor intended by the insured, necessarily the event also is considered sudden and accidental.[86]

However, other courts have determined that the term sudden and accidental is neither ambiguous nor an extension of the expected and intended language.[87] These courts assert the term sudden must be given meaning in the temporal sense, requiring the event to be abrupt and unanticipated.[88] This is the view adopted by the Eighth Circuit. In *Aetna*

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83. An example of such a clause is as follows:

> In consideration for the premium charged it is agreed that the policy does not apply to personal injury or property damage arising out of or contributed by 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.*

84. *See, e.g.*, Home Indem. Co. v. City of Marianna, 291 Ark. 610, 616, 727 S.W.2d 375, 378 (1987); Southern Title Ins. Co. v. Oller, 268 Ark. 300, 304, 595 S.W.2d 681, 683 (1980); Sovereign Camp, W.O.W. v. Hardee, 188 Ark. 542, 548, 66 S.W.2d 648, 651 (1934).

85. *See, e.g.*, Lansco, Inc. v. Department of Envtl. Protection, 350 A.2d 520, 524-25 (N.J. Super. Ch. Div. 1975); Allstate Ins. Co. v. Klock Oil Co., 426 N.Y.S.2d 603, 604 (N.Y. App. Div. 1980).

86. *See, e.g.*, Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1219-20 (Ill. 1992); Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co., 451 A.2d 990, 993-94 (N.J. Super. Ct. Law Div. 1992).

87. *E.g.*, Hartford Accident & Indem. Co. v. USF&G, 962 F.2d 1484 (10th Cir.), *cert. denied*, 506 U.S. 955 (1992); Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392 (Mich. 1991); Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374 (N.C. 1986), *reh'd denied*, 346 S.E.2d 134.

88. *See supra* note 87.

Casualty & Surety Co. v. General Dynamics Corp.,[89] the United States District Court for the Eastern District of Missouri ruled in favor of the insured, applying the second approach discussed above.[90] The Eighth Circuit reversed.[91] This is the interpretation accorded by several state courts and by the majority of federal circuit courts of appeals.[92]

2. *"Regulatory Estoppel"*

Another challenge to both conditional and absolute pollution exclusion clauses focuses on a new theory known as regulatory estoppel. This theory is a significant development because it has the potential to nullify the decisions cited above which apply the sudden and accidental language to deny coverage. The regulatory estoppel theory is most prominently explained in *Morton International, Inc. v. General Accident Insurance Co.*[93]

The thrust of the regulatory estoppel theory is that carriers should be estopped from enforcing pollution exclusion clauses where they have misrepresented to state insurance regulatory bodies the scope and effect of the clauses. In *Morton*, the New Jersey Supreme Court undertook an exhaustive review of the state's regulatory history relating to the development of CGL policies, including the development in the early 1970s, when the insurance industry introduced pollution exclusion language.[94] The court concluded that when the industry sought approval of the pollution exclusion

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89. 783 F. Supp. 1199 (E.D. Mo. 1991).

90. *Id.* at 1209 (finding that the term "sudden and accidental" is ambiguous and a mere extension of the "expected or intended" language).

91. Aetna Casualty & Sur. Co. v. General Dynamics Corp., 968 F.2d 707 (8th Cir. 1992). The court stated:

> The term "sudden," we believe, "when considered in its plain and easily understood sense, . . . is defined with a 'temporal element that joins together conceptually the immediate and the unexpected.'" . . . Indeed, assigning meaning to both "sudden" and "accidental" eliminates any perceived ambiguity. The district court found "sudden" to be ambiguous because it could mean abrupt or unexpected. Because "accidental" includes the unexpected, however, "sudden" must mean abrupt. To hold otherwise would render the word "sudden" superfluous. . . .

Id. at 710 (citations omitted).

92. *See, e.g.*, Ogden Corp. v. Travelers Indem. Co., 924 F.2d 39 (2d Cir. 1991); Waste Management of the Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374, 381-82 (N.C. 1986); Transamerican Ins. Co. v. Sunnes, 711 P.2d 212, 214 (Or. Ct. App. 1985).

93. 629 A.2d 831 (N.J. 1993). The *Morton* decision is quite lengthy and defies condensation; accordingly, it is recommended as further reading. *See* E. C. Laird & E. I. Medoway, *Morton's Binding Legacy on the Pollution Exclusion—Regulatory Estoppel*, 7 ENVTL. CLAIMS J. 25 (1994) (providing an excellent explanation of the regulatory estoppel theory).

94. *Morton*, 629 A.2d at 843-48.

clause from the New Jersey Department of Insurance, the industry had misled that agency.[95] Specifically, the court found that the industry had portrayed the pollution exclusion clause as a mere clarification of pre-existing CGL policy language.[96] In fact, however—as counsel for the carriers had argued in *Morton*—the true purpose of the pollution exclusion was to deny coverage for pollution-caused damages, *regardless* of whether they were expected or intended, unless the event was sudden and accidental, "a so-called 'boom' event."[97]

Moreover, the court found the above quoted sentence in the industry's memorandum to the Department to be "simply untrue."[98] The court looked to the 1966 version of the CGL policy approved by the Department and concluded that it encompassed gradual pollution, even when the discharge of pollutants was intentional, so long as the ultimate loss itself was neither expected nor intended.[99] Thus, the court ruled that by virtue of their representations, the carriers were estopped from asserting before the courts their much broader interpretation of the clause.[100] Particularly noteworthy to the court was that if the industry did in fact intend to eliminate coverage where it had existed before, a corresponding rate reduction would have been in order.[101]

Other courts have found coverage based, in part, on state regulatory history relating to the approval of pollution exclusion clauses.[102]

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95. *Id.* at 847-48, 851-52.

96. *Id.* at 851. The court quoted from a memorandum that the industry filed with the New Jersey Department of Insurance:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above [pollution] exclusion clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination-caused injuries when the pollution or contamination results from an accident . . . .

Morton, 629 A.2d at 851.

97. *Id.* at 852.

98. *Id.*

99. *Id.*

100. *Id.* at 874.

101. *Morton*, 629 A.2d at 872. The court stated:

> The material and substantial reduction in coverage proposed by the pollution-exclusion clause, if disclosed to regulators in New Jersey and elsewhere, undoubtedly would have affected adversely the industry's rates for CGL coverage. Instead, because of the industry's failure, in its presentation to regulators, to acknowledge and emphasize the sharp reduction in coverage, insureds in New Jersey, and perhaps throughout the country, apparently have paid rates for CGL policies incorporating the pollution-exclusion clause comparable to those paid for the prior "occurrence"-based policies that afforded substantially greater coverage.

Id.

102. *See* Montrose Chem. Corp. v. Admiral Ins. Co., 897 P.2d 1 (Cal. 1995) (en banc);

3. *Types of Pollution Excluded*

Another area of litigation focuses on the specific types of pollution excluded from coverage. This issue may arise, regardless of whether the pollution exclusion clause is limited or absolute. The industry goes to great lengths to encompass every conceivable type of pollution, and every conceivable type of pollution event.[103] Nonetheless, carriers and insureds constantly litigate whether the type of pollution or the manner in which it occurred is encompassed by the exclusionary language.[104] The insured must carefully review the terms of its own pollution exclusion to determine whether the type of pollution or the nature of the event falls outside the exclusion.

4. *The "Owned Property" Exclusion*

The owned property exclusion is typically used as an affirmative defense in situations where a manufacturer or other entity has been found to have polluted the environment in and around its manufacturing facility. Under this affirmative defense, insurers assert that the policy does not provide coverage to property owned or leased by the named insured. Although there was some early success by the insurance companies in asserting this exclusion as a defense to coverage, by and large, the owned property exclusion has not been an effective bar to coverage. Primarily, courts have found that when there is evidence that groundwater has been contaminated, there is property damage to property not owned or occupied by the insured.[105] This proposition applies with even greater force in states that follow the reasonable use doctrine and hold that one's use of subterranean waters are qualified.[106]

IV. CONCLUSION

This essay by no means covers the entire waterfront of issues relating to insurance coverage for environmental claims. Beyond this, in light of the

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Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686 (Ga. 1989); Joy Technologies v. Liberty Mut. Ins. Co., 421 S.E.2d 493 (W. Va. 1992); Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wis. 1990).

103. *See supra* notes 76-82 and accompanying text.

104. The numerous cases on this type of issue defy categorization.

105. *See* United States Aviex Co. v. Travelers Ins. Co., 336 N.W.2d 838 (Mich. Ct. App. 1983).

106. Arkansas is one such jurisdiction, *see* Jones v. Oz-Ark-Val Poultry Co., 228 Ark. 76, 306 S.W.2d 111 (1957).

continued, vigorous litigation on the subject, it is likely that new issues and trends may develop. From the perspective of Arkansas practitioners in the field, perhaps the future will hold decisions from the Supreme Court of Arkansas or Arkansas Court of Appeals on the as damages and sudden and accidental issues, as well as the regulatory estoppel theory.