

Environmental Coverage Update and the Transition to Pollution Insurance Products

by

Helen A. Boyer, Megan K. Kirk and Laura J. Hawes¹

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I. Recent Developments in Environmental Coverage and Toxic Torts (2007 - 2008)

A. Pollution Exclusions

Pollution Exclusion Precludes Coverage for Bodily Injuries from Restaurant Waste

Mountain States Mut. Cas. Co. v. Kirkpatrick, No. 06-221, 2007 U.S. Dist. LEXIS 67420 (D. Colo., August 30, 2007).

In *Mountain States*, the District of Colorado held that the pollution exclusion precluded coverage for bodily injuries incurred by workers cleaning a sewer. The workers were overcome by hydrogen sulfide gas emitted from kitchen waste “discharged” into the sewer by the restaurant insured. The court found the kitchen waste constituted a contaminant and therefore was a “pollutant” under the policy. The court rejected the argument that toxicity was required for a substance to be considered a “pollutant.”

Pollution Exclusion Bars Coverage for Hydrogen Sulfide Gas Exposure

United Nat’l Ins. Co. v. Hydro Tank, Inc., 497 F.3d 445 (5th Cir. 2007)

The Fifth Circuit ruled in *Hydro Tank* that the pollution exclusion bars coverage for exposure to hydrogen sulfide gas. Workers were injured when they were exposed to hydrogen sulfide gas when removing petroleum-byproduct sludge from a tank. The court rejected the insured’s argument that the underlying injuries were the result of contact with the sludge rather than inhalation of a gas and that the sludge should not be considered a pollutant because petroleum products are not pollutants when they are stored where they belong. The court concluded that because the workers alleged they were injured, in whole or in part, by the release of hydrogen sulfide, a pollutant, the pollution exclusion was invoked.

¹ Helen A. Boyer is a member of Cozen O’Connor, practicing in insurance coverage. Megan K. Kirk and Laura J. Hawes are Cozen O’Connor associates, also practicing in insurance coverage. All three are resident in the Seattle office.

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Pollution Exclusion Applies to Bar Coverage for Workplace Exposure to Noxious Fumes

Apana v. TIG Ins. Co., 504 F. Supp.2d 998 (D. Hawaii 2007)

The District of Hawaii held in *Apana* that the total pollution exclusion precluded an insurer's duty to indemnify a plumber in connection with an individual's inhalation of noxious fumes from chemicals used to unclog a drain. The plaintiff was exposed to chemicals while working at Wal-Mart when a plumber working nearby poured extremely strong cleaner down a drain. Because of the legal ambiguity regarding the exclusion, the court held the insurer had a duty to defend; however, the court predicted that the Hawaii Supreme Court would find the exclusion unambiguous and that it was not limited to traditional environmental pollution. Thus, the exclusion ultimately applied to bar coverage and the insurer had no duty to indemnify its insured.

Injuries Caused by Epoxy Fumes Discharged During Floor Sealant Application Are Excluded from Coverage Under the CGL Total Pollution Exclusion

Firemen's Ins. Co. of Washington D.C. v. Kline & Son Cement Repair, Inc. et al., 474 F.Supp.2d 779 (E.D. Va. Feb. 13, 2007)

In *Kline & Son*, the U.S. District Court for the Eastern District of Virginia held that the absolute pollution exclusion in a floor sealant installer's CGL policy barred coverage for injuries resulting from inhaling fumes from an epoxy sealant. The court applied Virginia law and held that the exclusion must be applied as written: the term "pollutant" included the toxic fumes released from the epoxy sealant when it was applied to the floor, and the broad language of the pollution exclusion was not limited to industrial environmental pollution events but rather included the discharge of fumes in the course of a standard sealant application.

Injuries Caused by a Furniture Stripper's Release of Methylene Chloride into a Public Sewer System Are Excluded from Coverage under an Absolute Pollution Exclusion

American Casualty Co. of Reading, Pa. v. Miller, 159 Cal. App. 4th 501 (Cal. App. April 23, 2008)

In *Miller*, the California Court of Appeals held that an absolute pollution exclusion barred coverage for claims brought by injured sewer worker against insured furniture stripper for injuries sustained due to methylene chloride discharge into sewer system by insured. In so holding, the court distinguished the California Supreme Court's holding in *MacKinnon v. Truck Ins. Exchange*, 73 P.3d 1205 (Cal. 2003), wherein the court limited the application of an absolute pollution exclusion to bar coverage only for injuries arising from events commonly thought of as environmental pollution, and only for irritants and contaminants commonly thought of as "pollution." Because the appellate court concluded that a lay person would reasonably understand that the release of methylene chloride into the public sewer system was an objectionable and unwarranted dispersal of a pollutant and a form of environmental degradation, the court concluded that the pollution exclusion barred coverage for the claimant's injuries.

Carbon Monoxide Is a Pollutant Under the Pollution Exclusion

Auto-Owners Ins. Co. v. Reed, 649 S.E.2d 843 (Ga. Ct. App. 2007)

In *Reed*, the Georgia Court of Appeals, following state precedent that such an exclusion was not limited to traditional environmental pollution, held that carbon monoxide was a “pollutant” within the meaning of the pollution exclusion. The court concluded that application of the exclusion prevented a landlord from receiving coverage for a tenant’s carbon monoxide poisoning.

Pollution Exclusion Not Applicable to Carbon Monoxide Poisoning

Langone v. American Family Mut. Ins. Co., 731 N.W.2d 334 (Wisc. Ct. App. 2007), *rev. den.* 2007 Wisc. LEXIS 855 (Wisc. Sept. 14, 2007)

In *Langone*, the Wisconsin Court of Appeals reached a different result regarding carbon monoxide. According to the *Langone* court, the exposure occurred when a fireplace was used at the same time a fire was burning in the boiler burner when the heat was turned on. The combination led to a flue reversal, allowing carbon monoxide to be emitted into an apartment. The court concluded that the pollution exclusion was not applicable to carbon monoxide poisoning because the unusual concentration of carbon monoxide due to a ventilation defect at a rental property could not be considered a “pollutant.”

Iowa Opts for a Plain Reading of the Pollution Exclusion and Concludes it Bars Coverage for Injuries from Carbon Monoxide Poisoning

Bituminous Cas. Co. v. Sand Livestock Systems, Inc., [No. 135 / 05-1063] (Iowa, February 23, 2007)

In answering a certified question of law from the U.S. District Court for the Northern District of Iowa, the Iowa Supreme Court held that absolute pollution exclusions in CGL and umbrella liability policies barred coverage for carbon monoxide poisoning where the carbon monoxide had accumulated in a washroom at a hog confinement facility. The court concluded that the exclusions were not ambiguous and must be applied as written. The court declined to consider whether the “reasonable expectations” of the parties of the insurance contract would lead to a different result because such a factual inquiry had no place in answering the legal question certified to the state court, but the court indicated the parties could raise that issue in the federal district court.

Pollution Exclusion Bars Coverage for Injuries Caused by Gasoline Exposure

Federated Mut. Ins. Co. v. Abston Petroleum, Inc., 967 So.2d 705 (Ala. 2007)

In *Abston Petroleum*, the Alabama Supreme Court ruled that the absolute pollution exclusion excluded coverage for bodily injury and property damage claims related to gasoline contamination. The court concluded that even though gasoline is not a pollutant when it is put to its intended use, it is clearly a pollutant when it leaks into soil from underground lines or tanks

and that contamination causes bodily injuries and property damage. The court also rejected the insured's argument that any claims involving the gasoline business would be covered pursuant to the reasonable expectations doctrine. The court stated that any such expectations were limited by the unambiguous terms of the policy and thus, could not be "objectively reasonable."

Coverage for Cleanup Expenses and Lost Rents Caused by a Heating Oil Leak Barred by Absolute Pollution Exclusion

McGregor v. Allamerica Ins. Co., 868 N.E.2d 1225 (Mass. July 10, 2007)

In *McGregor*, the Supreme Judicial Court of Massachusetts held an absolute pollution exclusion in a general liability insurance policy issued to a furnace installer barred coverage for the installer's liability for a heating oil leak that developed several years after a residential furnace installation. The court rejected the argument that pollution exclusions are limited to claims arising from improper handling of hazardous waste or other pollution occurring in an "industrial" setting, and held that spilled oil was a "classic example" of pollution and that the location of an oil spill at a residence, rather than at an industrial site, did not alter the classification of the spilled oil as a "pollutant." The court also rejected the insured's contention that interpreting the exclusion to foreclose coverage for a heating oil leak would "effectively eviscerate" the policy because the insured regularly worked with oil as part of his ordinary business activities, reasoning that as long as the policy provides coverage for some acts, it was not illusory simply because it contains a broad pollution exclusion.

Coverage for Remediation and Non-Remediation Damages Caused by Heating Oil Leak Barred by Pollution Exclusion

Nascimento v. Preferred Mutual Ins. Co., 513 F.3d 273 (1st Cir. Jan. 18, 2008) (Massachusetts)

In *Nascimento*, the court concluded that a total pollution exclusion barred coverage for a clean up costs and property damage resulting from home heating oil that had leaked out of an underground storage tank on property the insured previously occupied. In so holding, the court rejected the district court's reliance on policy section f(2)(a), 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, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants." Instead, the court held that section f(1)(a), which excluded "'property damage' arising out of the actual ... discharge, dispersal, seepage, migration, release or escape of pollutants ... at or from any premises, site, or location ... which is or was at any time ... occupied by ... any insured," prevented coverage for the claim for both remediation and non-remediation damages. The court also relied in part on *McGregor v. Allamerica Ins. Co.*, 868 N.E.2d 1225 (Mass. 2007), to conclude that the insurer had no duty to defend or indemnify the insured.

Diesel Fuel Qualifies as a “Pollutant” for Purposes of the Standard Absolute Pollution Exclusion

Montana Petroleum Tank Release Compensation Board v. Crumley’s, Inc., 174 P.3d 948 (Mont. Jan. 3, 2008)

The Montana Supreme Court held that diesel and other motor fuels are included in the standard absolute pollution exclusion clause’s definition of “pollutant.” The court based its decision on the objective viewpoint of a consumer with average intelligence, and concluded that such a consumer would consider diesel a pollutant when it leaks into the ground and contaminates soil and groundwater.

Even “Green” Businesses Can Be Subject to the Absolute Pollution Exclusion

Cold Creek Compost, Inc. v. State Farm Fire & Cas. Co., 156 Cal. App. 4th 1469, 68 Cal. Rptr.3d 216 (Cal. Ct. App. Nov. 30, 2007)

In *Cold Creek Compost*, the California Court of Appeals held that the widespread dissemination of offensive and injurious odors from a commercial compost facility is “environmental pollution” under California law and thus is excluded from coverage by the absolute pollution exclusions in a business policy and a commercial liability umbrella policy. The court specifically rejected the Composting Facility’s argument that the odors did not qualify as a “pollutant” because they do not pose a significant health threat, citing prior California case law indicating that a substance need not be “toxic or particularly harmful” to be considered a “pollutant” for purposes of a pollution exclusion.

Larson v. Composting Concepts, Inc., 2008 Minn. App. Unpub. LEXIS 551 (Minn. Ct. App. May 13, 2008)

In *Larson*, the Court of Appeals of Minnesota agreed with Farm Bureau Mutual Insurance Company’s contention that “living organisms, mold, bacteria, and bioaerosols” allegedly dispersed from the insured’s composting site fell within the policy’s definition of “pollutants.” Because the living organisms, mold, bacteria and bioaerosols were alleged to have infiltrated claimants’ homes and bodies, the court held that they were “contaminants” and “irritants,” and that they therefore triggered application of the pollution exclusion. Thus, coverage for the claims was unavailable under the terms of the policy.

B. Occurrences

Exposures to Asbestos Insulation in Turbines Are Multiple Occurrences

Appalachian Ins. Co. v. General Elec. Co., 863 N.E.2d 994 (N.Y. 2007)

In *General Electric*, the New York Court of Appeals held that asbestos exposure claims constituted multiple occurrences. The policies defined occurrence as “an accident, event, happening or continuous or repeated exposure to conditions which unintentionally results in

injury or damage during the policy period.” The court stated that the parties could have defined “occurrence” in a manner that grouped incidents, but chose not to do so. Then, applying the “unfortunate event” test, the court found that each individual’s repeated or continuous exposure to asbestos was a separate occurrence. The court explained that there were few commonalities among the various exposures as there were differences in terms of when, where and for how long the exposures occurred.

Exposures to Popcorn Flavoring Chemicals Constitute Multiple Occurrences

International Flavors & Fragrances, Inc. v. Royal Ins. Co. of America, 844 N.Y.S.2d 257 (N.Y. App. Div. 2007)

The Appellate Division of the New York Supreme Court affirmed a trial court decision finding that injuries to thirty workers resulting from exposure to chemicals found in popcorn flavoring at the same plant resulted from separate “occurrences” for purposes of applying a deductible under liability policies. Applying the unfortunate event test, the court found that the workers were exposed at different times and for unequal durations. Furthermore, the definition of occurrence did not demonstrate any intention to aggregate claims. Therefore, a separate deductible applied to each employee’s claim.

Single Occurrence Theory For Asbestos Claims Rejected

London Market Insurers v. Superior Court, 146 Cal. App.4th 648 (Cal. App. 2007)

A California appeals court ruled that the relevant “occurrence” with respect to asbestos claims against the insured was not the manufacture and distribution of asbestos-containing products, but rather the injurious exposure to asbestos and that all exposures could not be treated as a single occurrence under various aggregation provisions, including a “lot or batch” clause. While the court held that the “lot or batch” clause applied to both manufacturing defect claims and design defect claims, the court concluded that the claims arose from more than one “lot” of goods.

C. Duty to Defend

Primary Carrier Has Duty to Defend Where Complaint is Silent as to How Discharge Occurred

Barrett Paving Materials, Inc. v. Continental Ins. Co., 488 F.3d 59 (1st Cir. May 30, 2007)

Applying Maine law, the First Circuit concluded that a primary insurer was required to defend its insured where the complaint against the insured alleged that pollutants from the insured’s facility were released into the soil or sewers. Although the complaint did not specify how the pollutants were allegedly released, its allegations were not inconsistent with a sudden and accidental discharge. The court rejected the insurer’s argument that no duty to defend was owed because the “true facts” admitted by the insured indicated that there was no sudden and accidental discharge, because such “true facts” were relevant only to the duty to indemnify, not to the duty to defend. The court also concluded that an excess insurer had no duty to defend the insured where the insured was unable to establish that the complaint allegations were not covered by an (insolvent) underlying insurer’s policy.

No Duty to Defend Where Complaint Does Not Specify Sudden and Accidental Discharge

Emerson Enterprises, LLC v. Crosby, et al., No. 03-CV-6530 CJS, 2007 U.S. Dist. LEXIS 13091 (W.D.N.Y. Feb. 26, 2007)

Contrast *Barrett* with *Emerson Enterprises v. Crosby*, in which the federal district court for the Western District of New York held that the underlying complaint did not support finding a duty to defend because it did not “affirmatively suggest a sudden and accidental occurrence.” To the extent the insured contended that it had newly discovered extrinsic evidence that the discharge was, in fact, sudden and accidental, the court found the proffered evidence insufficient but permitted the insured to conduct further discovery before the court would rule on whether the insurer had a duty to indemnify.

D. Scope of Duty to Indemnify

Ninth Circuit Denies Coverage for Diminution in Value of Properties Due to Pollution

Goodstein v. Continental Cas. Co., et al., 509 F.3d 1042 (9th Cir. Dec. 3, 2007)

In *Goodstein*, the former owner of two properties identified as “contaminated” by the Washington Department of Ecology sued its liability insurer seeking to recover the difference between the appraised value of the properties if uncontaminated and the sale price of the sites in their contaminated state. The Ninth Circuit, applying Washington law, held that the claim for diminution in value of the land due to pollution was not a functional approximation of the cost to remediate the properties, and therefore Washington case law recognizing a duty to indemnify an insured for environmental cleanup costs it incurred did not apply. As such, there was no coverage for the diminution in value.

The Cost of Preventing Future Contamination is Not a Covered Indemnity Cost

Precision Castparts Corp. v. Hartford Acc. & Indem. Co., et al., 2007 U.S. Dist. LEXIS 64412, 2007 WL 2590438 (D. Or. Aug. 27, 2007)

In *Precision Castparts*, the U.S. District Court in Oregon, applying Oregon law as set forth in *Schnitzer Investment Corp. v. Certain Underwriters at Lloyd's of London, et al.*, 341 Or. 128 (2006), ruled that an insured was precluded from recovering as indemnity costs \$6.8 million in claimed costs for installation of an effluent pretreatment system that would prevent future contamination of a municipal sewer system. The court noted that thorium oxide was found both in the insured aircraft engine component manufacturer's plants and in the city sewer system, but that only the thorium contamination in the city sewer constituted “property damage” under the insurance policies. Because the only thorium contamination mitigated by the pretreatment system was at the insured's premises, the court concluded such contamination did not constitute third party property damage and therefore the insurers had no duty to indemnify the insured for the costs of the pretreatment system.

Costs to Defend Government Suit Seeking Installation of Equipment to Reduce Future Emissions Were Not Part of “Ultimate Net Loss” Caused by an Occurrence

Cinergy Corp. v. Associated Elec. & Gas Ins. Servs., Ltd., et al., 865 N.E.2d 571 (Ind. May 1, 2007)

Cinergy Corp. v. St. Paul Surplus Lines Ins. Co., et al., 873 N.E.2d 105 (Ind. App. Sept. 5, 2007)

In *Cinergy Corp.*, several insurers filed a declaratory judgment action against their power company insureds arguing that there was no coverage for costs the power companies incurred in defending a federal environmental lawsuit. The Indiana Supreme Court held that the primary thrust of the federal suit was to require the power companies to incur the cost of installing equipment intended to reduce future air emissions and prevent future environmental harm. Thus, the Indiana Supreme Court held the policies at issue before it did not provide coverage because they conditioned the insurer’s responsibility for the “ultimate net loss” on the requirement that the loss be for damages “caused by an occurrence.” Because the installation costs for preventive equipment was not caused by an occurrence, but rather, resulted from the prevention of an occurrence, such damages were not within the scope of coverage provided by the policy. A few months later, in considering other policies at issue in the case, the Indiana Court of Appeals similarly held that, pursuant to the Indiana Supreme Court’s earlier decision, there was no “occurrence” triggering coverage for the insureds’ defense costs to the extent the federal suit sought to recover the costs of installing equipment to reduce future emissions and to prevent resulting future environmental harm.

Remediation Costs Incurred Pursuant to a Settlement Agreement Are Not “Damages” For Which Indemnification is Due

Aerojet-General Corp. v. Commercial Union Ins. Co., 155 Cal. App. 4th 132 (Cal. Ct. App. Sept. 13, 2007)

In *Aerojet-General*, the California Court of Appeals held that settlement costs negotiated within a court suit, without entry of a judgment or a court order to pay, are not “damages” and thus do not trigger an excess insurer’s duty to indemnify. “Damages” are monies ordered by a court to be paid, the court held. The court indicated it was extending the rule established in *Certain Underwriters at Lloyd’s of London v. Superior Court (Powerine I)*, 16 P.3d 94 (Cal. 2001), that settlement costs an insured agrees to outside the context of a court suit are not “damages” for purposes of an insurer’s duty to indemnify.

E. Exhaustion

Michigan Court Applies Time-on-the-Risk Damages Allocation for Landfill Cleanup and Applies “Horizontal” Exhaustion Methodology

Wolverine World Wide, Inc. v. Liberty Mut. Ins. Co., [No. 260330] (Mich. App. March 8, 2007)

In *Wolverine World Wide*, the Michigan Court of Appeals affirmed summary judgment dismissals of claims for coverage from two umbrella insurers for remediation costs allocated to a footwear manufacturer for tannery sludge disposal at two landfills over several years. In an unpublished decision, the court held that a “time-on-the-risk” allocation of damages applied, and the relevant time period was when the contaminants were disposed of until the time of cleanup. Because the insured’s liability for investigation and remediation costs spread out over the time periods applicable at the two sites were less than the primary policy limits of \$50,000 per year, the umbrella policies were not triggered.

All Applicable Coverage Must Be Exhausted Before CIGA Will Pay

Stonelight Tile, Inc. v. California Ins. Guar. Ass’n, 150 Cal. App. 4th 19 (Cal. Ct. App. March 29, 2007)

In *Stonelight Tile*, the California Court of Appeals held that the California Insurance Guarantee Association (“CIGA”) was not required to pay any portion of a judgment obtained against an insured recycling company by a neighboring tile-manufacturing business and its owner where those claimants suffered a continuously triggered injury during the insolvent and solvent insurers’ policy periods and settlement agreements with the solvent insurers did not fully exhaust their policies. “Since each of the Solvent Insurers was potentially liable for the full amount of its policy limits and that potential coverage was not exhausted in the settlements, we conclude there was other insurance available to Plaintiffs. Since there was other insurance available to cover the loss, it was not a “covered claim” within the meaning of the [California] Guarantee Act.” In so holding, the court emphasized that CIGA’s payments were intended to protect the public, not to benefit insurance companies.

F. Future Issues for Pollution Claims Coverage

Based on the number of cases decided in 2007 and 2008 to date, the courts have not finished addressing what qualifies as a “pollutant” for purposes of pollution exclusions.

Another likely area for future disputes concerns injuries that result from the release of a “pollutant,” but not from the toxic or irritating properties of the pollutant.

Finally, the law is also likely to continue to develop with respect to what constitutes an “occurrence,” what circumstances trigger a duty to defend a pollution claim, what types of damages may fall within the scope of an insurer’s duty to indemnify, and what constitutes “exhaustion” for purposes of triggering multiple layers of coverage. Given the potential for new

types of claims, such as claims related to greenhouse gases, climate change or emerging methods of waste disposal, further developments in environmental coverage law will follow.

II. The Transition to Pollution Insurance Products: The Advent and Growth of Environmental Risk Transfer Policies

A. Introduction

The law addressing and interpreting environmental risk transfer policies—for example, pollution legal liability, contractor’s pollution legal liability, and cleanup cost cap coverage—is evolving. These types of policies are becoming more common as a means of managing the specific risks stemming from environmental contamination and governmentally mandated remediation. As the use of specific risk transfer products increases, sophistication among insurers, brokers and risk managers also increases with respect to implementing best practices for insuring environmental risks, adjusting environmental claims and remediating contaminated sites. Also, case law is developing that addresses various aspects of environmental risk transfer policies and the interplay between them and other types of policies.

B. Insurance Coverage Disputes – Key Coverage Decisions Addressing Pollution Insurance Products

1. “Damages”

The New York Supreme Court, Appellate Division has prescribed “damages” narrowly and found “damages” did not include lost profits due to the public’s negative perception of oil contamination on the insured’s real property. *Camalloy Wire, Inc. v. Nat’l Union Fire Ins. Co.*, 235 A.D.2d 202 (N.Y. App. Div. 1997), *reh’g*, 264 A.D.2d 667 (N.Y. App. Div. 1999). In early 1989, Camalloy Wire, Inc. (“Camalloy”), hired an environmental contractor, Greylag Technical Services, Inc. (“Greylag”), to decommission one of Camalloy’s manufacturing sites. 235 A.D.2d at 203. Greylag had to remove a 10,000-gallon underground fuel tank and other non-PCB wastes. As a result of its contract with Camalloy, Greylag purchased a pollution insurance policy from defendant National Union Insurance Company of Pittsburgh (“National Union”). *Id.* at 203. While removing the fuel tank, Greylag, or possibly a subcontractor, left a manhole open at the jobsite. *Id.* Shortly thereafter, rain flooded the jobsite causing heating oil to escape from an uncapped tank and spill into a nearby creek. *Id.* The Coast Guard responded to the heating oil spill and creek contamination and sought to recover the cost of doing so from Camalloy. *Id.* Camalloy then filed a breach of contract claim against Greylag and sought recovery for the clean-up costs and other expenses. *Id.* Camalloy prevailed in its case against Greylag, and when the judgment could not be satisfied, Greylag assigned its rights under the insurance policy to Camalloy. Camalloy then filed a lawsuit against National Union for indemnification for the Coast Guard costs and for costs arising from a subsequent oil spill, which was allegedly caused by Greylag’s failure to cap pipes leading to the site of the by then removed oil tank. *Id.*

After addressing issues as to how many “claims” there were under the policy, the court later ruled against the insured by holding lost profits due to a negative perception of a contemplated residential development following the oil spill on the property did not constitute

“property damage” caused by “pollution conditions” to “tangible property” as required by the policy. 264 A.D.2d 667.

2. “Arising From”

The New York Supreme Court, Appellate Division also found the term “arising from” to be clear and unambiguous and dictated the scope of a pollution legal liability policy. *Denihan Ownership Co. v. Commerce & Indus. Ins. Co.*, 37 A.D.3d 314 (N.Y. App. Div. 2007). Denihan Ownership Company (“Denihan”), the insured, owned parcels of low-rise commercial properties that housed a parking garage, automobile repair shop, and dry cleaner. Denihan endeavored to sell the properties but prior to doing so, had to cleanup soil contamination, underground storage tanks, and asbestos on the properties. *Id.* at 314. To that end, Denihan hired an environmental consultant to identify potential hazards and later remediate the property. *Id.* Later, a general contractor retained by the purchaser of the property discovered additional contamination and underground storage tanks that had been overlooked by the insured's environmental consultant. *Id.* at 315.

During this time, Denihan purchased cleanup cost cap (“CCC”) and pollution legal liability select (“PLL”) insurance from Commerce & Industry Insurance Company (“C&I”). *Id.* at 314-15. As a result of the extensive remediation needed, C&I paid its CCC policy limits, and Denihan sought further coverage under its PLL policy for the additional pollution. *Id.* at 315. C&I denied coverage, relying on an exclusion in the PLL policy that stated, “no coverage will be provided for Cleanup Costs, Claims or Loss arising from the Pollution Conditions associated with’ the documents prepared by [the insured's environmental consultant].” *Id.* at 315.

In a decision that relied strictly on the construction of the policy exclusion, the court stated the exclusion was not subject to multiple, reasonable interpretations, and plainly precluded coverage for the additional pollution. *Id.* at 315. The court looked at the phrase “arising from” and concluded it is taken as a broad reference “to events originating from, incident to, or having connection with the subject of the exclusion,” which in this case was the pollution conditions identified by the insured's environmental consultant. *Id.* The court looked at the exclusion as providing clear evidence of the import of the PLL policy: to provide coverage for any “new and different” pollution conditions found at the site. In contrast, the additional pollution discovered by the insured's general contractor arose out of or was related to the original pollution conditions. *Id.*

3. “Bodily Injury” and “Property Damage”

In *Continental Carbon Co., Inc. v. American International Specialty Lines Insurance Co.*, No. Civ. A. H-05-1187, 2006 WL 1442237 (S.D. Tex. May 23, 2006), claims filed by a workers' union and an Indian tribe failed to show “bodily injury” or “property damage” as those terms were defined as party of pollution legal liability coverage from the insured's mishandling of hazardous waste. Continental Carbon Company, Inc. (“Continental Carbon”) was served with three lawsuits relating to its operations at various carbon black plants under Resource Conversation Recovery Act (“RCRA”) and the Clean Water Act (“CWA”) for its alleged failure to handle hazardous waste properly. Continental Carbon had purchased two insurance policies

from American International Specialty Lines Insurance Company (“AISLIC”), which included pollution legal liability coverage as follows:

[AISLIC] will have the right and duty to defend any claim seeking loss to which Coverage D-1 or D-2 applies. However, [AISLIC] will have no duty to defend the insured against any claim for bodily injury, property damage, or clean-up costs to which Coverage D-1 or D-2 does not apply.

2006 WL 1442237, at *3.

Coverage under D-1 provided coverage for “bodily injury or property damage [that] results from pollution conditions on or under the insured property and such pollution conditions [commenced] during the policy period.” *Id.* at *3. Coverage D-1 further required “a claim for bodily injury or property damage [must be] made against the insured and reported to [AISLIC] during the policy period” or, if provided, “an extended reporting period.” *Id.*

Coverage under D-2 provided similar coverage but for bodily injury, property damage, or clean-up costs occurring off-site:

[AISLIC] will pay those sums that the insured becomes legally obligated to pay as loss because of claims in the coverage territory for bodily injury, property damage or clean-up costs beyond the boundaries of the insured property. All of the following [requirements] must be satisfied for this Coverage D-2 to apply:

- (1) The bodily injury, property damage, or clean-up costs result from pollution conditions on or under the insured property which have migrated beyond the boundaries of the insured property, and such pollution conditions did not commence before the Retroactive Date, if any, shown in the Declarations or after the end of the policy period; and
- (2) A claim for bodily injury[,], property damage, or clean-up costs is first made against the insured and reported to us, in writing, during the policy period or any extended reporting period we provide under EXTENDED REPORTING PERIODS (Section V).

Id.

The policy defined “bodily injury,” “property damage,” and “clean-up costs” as follows:

Bodily injury means, with respect to Coverages D-1 and D-2, physical injury, or sickness, disease, mental anguish or emotional distress sustained by any person, including death resulting therefrom....

* * *

Clean-up costs means expenses, including reasonable and necessary legal expenses incurred with [AISLIC's] written consent, incurred in the investigation,

removal, remediation or disposal of soil, surfacewater, groundwater or other contamination:

a. Which have been incurred by the government or any political subdivision of the United States of America, any state thereof, or Canada or any province thereof; or by a third party; or

b. To the extent required by environmental laws, or specifically mandated by court order, the government or any political subdivision of the United States of America, any state thereof, or Canada or any province thereof, duly acting under the authority of environmental laws....

* * *

Property damage means, with respect to Coverages D-1 and D-2:

* * *

c. Physical injury to or destruction of a tangible property of parties other than the insured including the resulting loss of use or value thereof; or

d. Loss of use of, but not loss of value [of], tangible property of parties other than the insured that has not been physically injured or destroyed.

Property damage does not include clean-up costs.

AISLIC argued because the claims did not set forth allegations of compensatory damages arising from bodily injury or property damage or claims for clean-costs, the claims were not within the scope of coverage. *Id.* at *7. The court agreed with AISLIC as to the claims for “bodily injury” and “property damage.” Regarding “bodily injury,” the court noted that “bodily injury” can only occur to “those [who] have bodies, i.e., human beings” and the underlying plaintiffs were group entities—an Indian tribe and workers’ union—such that neither had standing to assert claims for damages associated with “bodily injury.” *Id.* at *8. Similarly, while the underlying complaint alleged damage to soil and groundwater near the insured’s plants, the court noted neither underlying plaintiff owned or had a property interest in the land affected by the insured’s alleged conduct. Therefore, the complaints did not trigger a claim for property damage, either. *Id.*

Likewise, the court in *Technology Square, LLC v. United National Insurance Company*, No. 04-10047-GAO, 2007 U.S. Dist. LEXIS 14030 (D. Mass. Jan. 4, 2007), granted summary judgment to the insurer based on an “owned property” exclusion in a PLL policy, which acted to preclude coverage for environmental contamination of the insured’s real property. Technology Square, LLC (“TSL”) purchased and developed a piece of real property. 2007 U.S. Dist. LEXIS 14030, at *3. TSL conducted environmental due diligence on the property and discovered there was a “Phase I Environmental Site Assessment” report disclosing heavy industrial use of the

property. *Id.* at *4. Despite the presence of this report, TSL did not engage in environmental testing prior to purchasing the property. *Id.* United National Insurance Company (“UNIC”) issued a pollution liability insurance policy to TSL providing “third party pollution liability” coverage (i.e., “Coverage A”) as follows:

[UNIC] will pay those sums that the insured becomes legally obligated to pay as damages arising out of ‘claims’ for ‘bodily injury’ or ‘property damage’ that result from ‘pollution conditions’ at, on or emanating from your ‘site(s)’ to which this insurance applies. We will have the right and duty to defend the insured against any ‘suit’ seeking those damages. However, we will have no duty to defend the insured against any ‘suit’ seeking damages arising out of ‘claims’ for ‘bodily injury’ or ‘property damage’ that result from ‘pollution conditions’ at, on or emanating from your ‘site(s)’ for which this insurance does not apply. We may, at our discretion, investigate any ‘pollution condition’ and settle any ‘claim’ or ‘suit’ that may result.

Id. at *16-17.

Coverage A also contained an exclusion for “property damage” to the insured’s property: “the insurance thus does not apply to property damage ‘to property owned, leased, operated by [the insured] . . . even if such ‘property damage’ is incurred to avoid or mitigate further damage or ‘claims’ which may be covered under the policy’.” *Id.* at *17. The UNIC policy also provided coverage (“Coverage B”) for “Onsite Cleanup”: [UNIC] “will pay for ‘cleanup costs’ that result from ‘pollution conditions’ at, on or within your ‘site(s)’ to which this insurance applies.” *Id.* Both Coverage A and Coverage B are subject to a “known conditions” exclusion, which, as modified by endorsement, precluded coverage for:

[k]nown conditions . . . arising from ‘Pollution Conditions’ existing prior to the inception of this Policy, and reported to any officer, director, partner or other employee responsible for environmental affairs of the Named Insured, unless all of the material facts relating to the ‘Pollution Conditions’ were disclosed to the company in materials prior to the inception of this Policy.

Id. at *17-18.

After purchasing the property, TSL submitted soil samples which revealed lead, petroleum hydrocarbons, and polynuclear hydrocarbons in levels exceeding Massachusetts environmental laws. *Id.* at *18-19. After disclosure of the tests results, the Massachusetts Department of Environmental Protection (“DEP”) issued a Notice of Responsibility to TSL and identified it as a “Potentially Responsible Party.” *Id.* at *19. TSL undertook environmental investigation and remediation to clean up the site and sought coverage for those costs under its insurance policy. *Id.* at *20.

In dismissing TSL’s claim for breach of contract, the court stated the “owned property” exclusion applied to preclude coverage under Coverage A, as the insurance did not apply to “property damage”:

[a]rising from ‘property damage’ to property owned, leased, operated by, or in the care, custody or control of you, even if such ‘property damage’ is incurred to avoid or mitigate further damage ‘claims’ which may be covered under th[e] policy.

Id. at *43.

TSL conceded Coverage A did not apply to the property damage at issue and summary judgment was appropriate on this issue.

A California appellate court has likewise found an owned property exclusion in an Environmental Impairment Liability endorsement to a liability policy precluded coverage for an environmental contamination claim filed by the insured. *Golden Eagle Refinery Co., Inc. v. Associated Int'l Ins. Co.*, 102 Cal. Rptr. 2d 834 (Cal. Ct. App. 2001). Golden Eagle Refinery Company, Inc. (“Golden Eagle”) filed claims for indemnity stemming from millions of dollars spent to remediate environmental contamination at its refinery site and the attendant economic losses from the inability to market or develop that property. *Id.* at 837. Golden Eagle bought the property and operated it as an oil refinery for almost thirty years; the operations included the processing and storage of crude oil and crude oil products. *Id.* Golden Eagle entered into a consent order with the State of California to remediate the contamination. Various insurers issued third party general liability policies, some containing Environmental Impairment Liability (“EIL”) endorsements. *Id.* The EIL endorsements expanded coverage under the policies for “pollution risks to damages caused by discharges or releases that were unforeseeable ... and broadened the definition of property damage to include pure financial losses arising from environmental pollution.” *Id.* The EIL endorsements precluded coverage for damage to the insured's own property. *Id.*

The precise language of the EIL endorsements was as follows:

1. Notwithstanding anything contained in this Policy to the contrary the cover [sic] provided by this Policy is extended to include legal liability for the consequences of a pollution of the environment (earth air water) provided always that this pollution was unforeseeable from the stand-point of the insured or his representatives who are responsible for environmental protection.

It is understood that pure financial losses arising from an environmental pollution shall be deemed to fall within the property damage definition.

3. No cover [sic] is provided for damage to own property, machinery, etc, arising out of or in connection with Environmental Impairment Liability.

Id. at 838.

The insurers brought motions for summary judgment, arguing the EIL endorsement clearly excluded coverage for any loss or damage to the insured's own property. *Id.* The trial court found the endorsements to be “clear and unambiguous,” and the appellate court affirmed that ruling. In its opinion, the Court of Appeal stated “... section 3 [is a] crystal clear, unequivocal exclusion which states in no uncertain terms that ‘No cover is provided for damage

to own property, machinery, etc., arising out of or in connection with [EIL]’.” *Id.* at 839. The court concluded the exclusion applied to “each and every provision” in the EIL endorsement and affirmed the trial court’s grant of summary judgment to the insurer. *Id.* at 839-40.

4. “Claims Made”

Because many pollution legal liability policies are “claims-made” policies, the question of when an insured becomes obligated to clean up a site or otherwise ordered to pay damage is critical to assessing a policy’s potential applicability. For example, in *Camalloy Wire, Inc. v. National Union Fire Insurance Co.*, 235 A.D.2d 202 (N.Y. App. Div. 1997), *reh’g*, 264 A.D.2d 667 (N.Y. App. Div. 1999), the insured was an environmental contractor who performed a clean up in 1989 for Camalloy Wire, Inc. (“Camalloy”). As a result of the contractor’s negligence, oil spilled from an uncapped tank and spilt into a nearby creek, resulting in clean-up. There was also a subsequent oil spill in 1991. Camalloy, after the insured could not satisfy a judgment against it, was assigned the contractor’s rights under a pollution liability policy and filed suit against the insurer. In assessing Camalloy’s contention the 1991 oil spill and related claims were “subsumable” into the 1989 oil spill such that a “claim” was made during the policy period, the court noted the insurer was given timely notice of the 1989 spill, but “the August 1989 spill caused by the failure to cover a manhole and the June 1991 spill caused by the failure to cap a defunct oil pipe were entirely unrelated and ... a claim for the former could not have constituted fair notice to the insurer of the latter.” *Id.* at 204. Further, “circumstance alone does not render the two temporally distant and otherwise dissimilar occurrences sufficiently related to be covered by a single notification to the insurer.” *Id.*

In a later appeal, the court again denied Camalloy’s claim that its recoverable damages were in excess of the actual costs incurred to clean up the site. *Camalloy Wire, Inc. v. Nat’l Union Fire Ins. Co.*, 273 A.D.2d 123 (N.Y. App. Div. 2000). The court based its rejection of the insured’s argument on the “claims-made” policy language:

The insurer agreed “[t]o indemnify the INSURED against LOSS the INSURED has or will become legally obligated to pay as a result of CLAIMS first made against the INSURED and reported to the Company, in writing, during the POLICY PERIOD ... FOR POLLUTION CONDITIONS.”

Id. at 124.

The court held that only those costs attributable to claims made against the insured and reported during the policy period would be recoverable, and rejected Camalloy’s claim for damages occurring after the clean-up. *Id.*

Similarly, the Ninth Circuit has held that, although an insured found a leak in a fuel pipe during the policy period, later claims for more extensive soil contamination were not covered as those claims occurred outside the policy period. *Paul Oil Co. v. Federated Mut. Ins. Co.*, 154 F.3d 1049 (9th Cir. 1998). Paul Oil Company (“Paul Oil”) leased property which had previously been used as a convenience store and gas station; it had four underground storage tanks for gasoline and diesel. Federated Mutual Insurance Company (“Federated”) insured Paul Oil under a “claims-made” pollution liability policy and provided coverage as follows:

... [F]or bodily injury or property damage provided that “(1) such bodily injury or property damage is caused by a pollution incident which commences subsequent to the retroactive date shown in the declarations of this policy; and (2) the claim for such damages is first made against the insured during the policy period and reported to the company during the policy period or within fifteen days after its termination.” The policy continued: “A claim shall be deemed to have been made only when suit is brought or written notice of such claim is received by the insured.” The “retroactive date” was the same as the date the policy was entered into, May 24, 1986.

Id. at 1050. Federated issued similar policies to Paul Oil for May 24, 1988 - 1989 and for May 24, 1989 - August 1, 1989. *Paul Oil*, 154 F.3d at 1050.

In June 1986, Paul Oil tested the tanks on the property and found a leak in a supply link between a tank and a pump. It replaced the piping and cleaned out the soil (approximately five cubic yards). In 1989 and 1990, the state made an environmental investigation that revealed at least 20,000 gallons of petroleum product in the ground that had apparently come from the Paul Oil site. *Id.* at 1050. In 1992, Paul Oil was sued by an adjacent land owner for contamination of its land. *Id.* In 1994, the California Regional Water Quality Control Board sent Paul Oil a Clean Up and Abatement Order, indicating it believed gasoline contamination dated back to 1978. *Id.* Paul Oil tendered a claim to Federated, which denied any duty to defend or indemnify, noting that the claims had not been made while the policies were in effect. *Id.* at 1050. Paul Oil then filed a lawsuit for breach of contract, breach of implied covenant of good faith, and declaratory relief.

In affirming an order for summary judgment granted to the insurer, the Ninth Circuit noted Federated was only liable for claims made during the policy period. The claims made in 1990, 1992, and 1994 were well outside the policy period, and Paul Oil had no basis on which to bring its suit. *Id.* at 1052.

In *Alan Corp. v. International Surplus Lines Insurance Co.*, 22 F.3d 339 (1st Cir. 1994), the First Circuit likewise held that an insurer had no duty to indemnify its insured when the insured failed to contact the proper regulatory authorities after discovering contamination until after the policy period lapsed. Alan Corporation (“Alan Corp.”) was the seller of fuel to retail customers and, as part of its business practices, stored oil in large tanks on its properties. International Surplus Lines Insurance Company (“ISLIC”) provided Alan Corp. with a pollution liability policy to insure against potential liability arising from storage tank leaks. *Id.* at 340. The policy was a one-year “claims made” policy in which ISLIC would reimburse Alan Corp. for clean-up costs incurred as a result of government agency orders as follows:

The company will reimburse the insured for reasonable and necessary clean-up costs incurred by the insured in the discharge of a legal obligation validly imposed through governmental action *which is initiated during the policy period*[.]

Id.

The policy was effective from August 28, 1986 to August 28, 1987. On August 25, 1987, Alan Corp. became aware of potential contamination at two of its facilities. An Alan Corp. employee contacted the local fire department about the contamination but failed to contact the Massachusetts Department of Environmental Protection (“DEP”) or other governmental authority. *Id.* at 340-41. Alan Corp. also submitted “Loss Notice” forms to ISLIC on August 28, 1987, stating a “preliminary survey shows a pollution problem” at two of the sites. *Id.* at 341. Alan Corp. alleged that after submitting the loss notice, an ISLIC instructed Alan Corp. to “lay low” with respect to the two sites and assured Alan Corp. ISLIC would provide coverage for the clean-up of the two sites. *Id.*

In the interim, Alan Corp. hired an environmental company to investigate both sites and the investigation revealed contamination at both sites. Eleven months after the policy expired, Alan Corp. reported the contamination to the DEP, who then issued a “notice of responsibility” to Alan Corp. Alan Corp. then endeavored to remediate the sites and sought reimbursement from ISLIC for clean-up costs incurred. ISLIC denied coverage and later, in the lawsuit filed by Alan Corp., moved for summary judgment arguing no governmental action had been initiated within the policy period. *Id.* at 341.

The court agreed and found Alan Corp.’s call to the fire department was insufficient to impose any legal obligation on Alan Corp. The court rejected the insured’s argument that the call to the fire department was the “first of many steps that lead to DEP’s clean-up mandate, and that, because this first step was taken within the policy period, timely ‘governmental action’ had therefore been ‘initiated’.” *Id.* at 342. Moreover, the call to the fire department did not “initiate” any further governmental or DEP action. *Id.* The court explained:

The Fire Department made no record of the phone call; it sent no representatives to the site; it made no attempt to determine whether Alan Corp. had investigated the spill; it made no attempt to determine whether Alan Corp. had reported any contamination to DEP; and it never communicated with DEP, directly or otherwise, about the spill in any manner. Rather, all clean-up costs in this case were imposed solely and independently by DEP, whose involvement, by Alan Corp.’s own admission, began well after the policy had expired.

In sum, the phone call to the Leominster Fire Department neither amounted to, nor did it “initiate,” governmental action for purposes of the policy. Rather, all governmental action resulting in the imposition of clean-up costs was initiated by and through DEP. Because DEP’s actions were initiated well after the expiration date of the policy, Alan Corp. was afforded no coverage for its incurred clean-up costs.

Id. at 342.

The court in *Thomas Steel Strip Corp. v. American International Specialty Lines Insurance Co.*, No. 4:06 CV 0658, 2006 U.S. Dist. LEXIS 94623 (N.D. Ohio Jan. 11, 2006), distinguished *Alan Corp.* to find the date of approval of an insured’s “written closure plan” was not the date of the “claim” for purposes of a claims-made policy. Thomas Steel Strip Corporation (“Thomas Steel”) processed specialty steel strips at its plant in Ohio; as a result of

its steel plating and wastewater treatment, Thomas Steel generates hazardous waste as defined by the United States Environmental Protection Agency (“EPA”). Pursuant to Resource Conservation and Recovery Act (“RCRA”), Thomas Steel was required to have a “written closure plan” for its facility because it generated hazardous waste and stored hazardous waste at the facility. 2006 U.S. Dist. LEXIS 94623, at *3. The plan must be submitted to the regional EPA administrator and state EPA director. The state and federal EPA agencies conducted an inspection at the Thomas Steel facility in Ohio and found it was not in compliance with certain RCRA requirements. As a result, the EPA filed a complaint against Thomas Steel ordering it to develop closure plans. *Id.* at *4. In 1986, Thomas Steel and the EPA subsequently entered into a Consent Agreement and Final Order requiring Thomas Steel to provide closure plans and, once approved, implement closure activities related to the surface impoundments. *Id.* at *5. Nineteen years later, in 2005, Thomas Steel submitted an amended closure plan which was approved shortly thereafter by the state EPA. *Id.* at *6.

American International Specialty Lines Insurance Company (“AISLIC”) provided Thomas Steel a “claims-made” policy which covered environmental risks from December 8, 2003 to December 8, 2006. Coverage A provided coverage for on-site cleanup of pre-existing environmental pollution as follows:

To pay on behalf of the Insured (Thomas), Loss that the Insured is legally obligated to pay as a result of Claims initiated by a governmental entity for Clean-Up Costs resulting from Pollution Conditions on or under the Insured Property that commenced prior to the Continuity Date (which was December 8, 1997), provided such Claims are first made against the Insured and reported to (American Insurance) in writing during the Policy Period.

* * *

“Claim” is defined in the Policy as follows:

Claim means a written demand received by the Insured seeking a remedy or alleging liability or responsibility on the part of the Insured for Loss under Coverage A.

Id. at *6-7.

Thomas Steel tendered a claim for the closure plans on June 13, 2005, stating it had been in negotiations with the Ohio EPA for years. *Id.* at *8. AISLIC denied indemnification for the claim as it was not first made by a governmental agency during the policy period. *Id.*

Thomas Steel argued it was not legally obligated to clean-up the facility until the closure plans were approved in 2005 and cited the insuring agreement that provided coverage for “loss that the Insured is *legally obligated* to pay as a result of Claims initiated by a governmental entity.” *Id.* at *13. Additionally, Thomas Steel relied on *Alan Corp., supra*, for the proposition that it was not legally obligated to pay the clean-up costs until the state EPA approved the closure plans. *Id.*

The court rejected Thomas Steel's characterization of its initial discussions with the EPA as "the first of many steps" leading to the clean-up mandate, because Thomas Steel, unlike Alan Corp., had been notified of its clean-up duties by the appropriate regulatory agency. *Id.* at *14. Thomas Steel's legal obligation, though it was initially unable to comply, was instituted in the 1980s, well before the AISLIC policy periods. The court cautioned that to adopt the insured's interpretation of the policy would be to encourage insureds to delay clean-up activities until it could obtain insurance. *Id.*

The court likewise rejected the insured's arguments that the 1986 Consent Order and 2005 approved plan were separate "claims" under the policy. The court noted "each closure plan prepared and proposed by Thomas relates to the same demand initiated by the OEPA in 1984." *Id.* at *16. As a result, the insured's claim that the approval constituted a new claim failed.

Lastly, the court rejected the insured's argument that the AISLIC policy covered pre-existing pollution conditions. The court noted that Thomas Steel failed to distinguish between a pre-existing "condition" and a pre-existing "claim." *Id.* at *18. While the policy covered the former, it did not cover the latter as it explicitly and unambiguously covered claims "first made against the Insured and reported ... in writing during the policy period." *Id.*

5. "Covered Operations"

Insurer and insured should closely attend to the policy schedule, both at the time of drafting and when a claim arises, to determine what operations or events may potentially be covered and how a court may or may not connect those operations to resulting contamination sources.

6. Number of "Claims"

In *Devillier v. Alpine Exploration Cos., Inc.*, 946 So.2d 738 (La. App. 2006), *writ denied*, 951 So.2d 1105 (La. 2007), the court interpreted policy language in a contractor's pollution liability coverage part to hold that the policy's SIR would apply only once, to the pollution condition (oil well hydrocarbon blowout resulting in various suits involving several hundred plaintiffs), rather than to each individual claim.

C. Relationships Between Pollution Liability, General Liability and Property Policies

Essential to assessing coverage for the investigation, remediation, and monitoring of contamination is careful review of all applicable policies, including pollution legal liability ("PLL"), cleanup cost cap ("CCC"), general commercial liability, and property policies. Generally, it will be important to discern the purpose of a policy, which includes looking at two aspects of the policy: (1) the insurable interest addressed by the policy and (2) the subject matter of the policy (i.e., the risk insured). *See, e.g., Mission Nat'l Ins. Co. v. Hartford Fire Ins. Co.*, 702 F. Supp. 543, 545 (E.D. Pa. 1989) (citing *Reliance Ins. Co. v. Allstate Indem. Co.*, 514 F. Supp. 486, 487 (E.D. Pa. 1981)); 15 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 218.3 (3d ed. 1999).

1. *Priority of Coverage – Allocation and Exhaustion*

For true concurrent or overlapping coverage between or among policies as to a specific loss, the policies must insure the same person or entity, property, risk, and interest. *See* William H. Howard, *New Issues in Environmental Risk Insurance*, 40:3 TORT TRIAL & INS. PRAC. L.J. 957, 979 (2005). If multiple policies cover the same risk, there will likely be issues related to priority of coverage, exhaustion, allocation, settlements, and subrogation. All potentially applicable policies should be reviewed to ascertain the risks insured and insurable interests at play. However, if the policies do not insure the same person or entity, property, risk, or interest, there is no "other insurance" allocation situation. *See* Howard, *supra*, at 980. If there is overlapping coverage, some courts determine priority of coverage based on the policies "other insurance" provisions while other courts apply the "total policy insuring intent" approach. *Id.*; *see also* *Cargill, Inc. v. Evanston Ins. Co.*, 642 N.W.2d 80, 88 (Minn. Ct. App. 2002) (applying "total-policy-insuring-intent" test means examining the "primary policy risks and primary function of each policy"); *but see* *W.R. Grace & Co. v. Maryland Cas. Co.*, 600 N.E.2d 176 (Mass. Ct. App. 1992), *review denied*, 604 N.E.2d 35 (1992) (policies that insure for the same risk will be contributing prorated to the payment of the claim unless such a rule would disturb the meaning of the policies' terms). Deciding priority of coverage based on "other insurance" provisions depends largely on the language of the policies' "other insurance" provisions and applicable case law.

Issues of allocation and exhaustion may also arise if the environmental property damage occurs across policy periods. If the contamination is extensive and limits of liability are exceeded, the court may have to address whether the insured must exhaust all of the applicable primary policies before excess policies may be required to respond (i.e., "horizontal exhaustion"), or whether an excess policy must respond before other primary policies once the primary policy underlying that particular excess policy has been exhausted (i.e., "vertical exhaustion"). *See* Howard, *supra*, at 985-86. Courts may impose various allocation methods, including joint and several liability for the entire loss up to policy limits, apportioning liability by "time on the risk" or combining time of the risk along with policy limits. *Id.* at 987 (citations omitted).

2. *Property Coverage and PLL Coverage*

Fire and explosion events resulting in property damage otherwise addressed under an insured's first party property coverage may lead to pollution impacts. If that occurs, careful attention should be paid to the potential coverage under each type of policy.

3. *Interplay Between Types of Environmental Risk Policies*

The court in *Denihan Ownership Co. v. Commerce & Industry Insurance Co.*, 37 A.D.3d 314 (NY. App. Div. 2007) noted the purpose and intent of cost cap policies and pollution legal liability policies is to provide coverage for different potential exposures. The insureds in *Denihan Ownership* had purchased CCC and PLL coverage through its insurer in anticipation of incurring remediation costs due to soil contamination. The insured exhausted its CCC coverage

and sought additional coverage from its PLL policy. In denying the insured coverage under the PLL policy, the court looked to an exclusion in the PLL policy that excluded coverage for ““Cleanup Costs, Claims or Loss arising from the Pollution Conditions associated with’ the remediation documents prepared by [the insured’s environmental consultant].” 37 A.D.3d at 315. In light of the PLL exclusion, the court illustrated the distinction between the two policies:

Here, the exclusion was clearly intended to ensure no overlap between the underlying CCC policy, which provided coverage for petroleum contamination on the site, and any new and different pollution conditions covered by the PLLS policy. Certainly, nothing in the exclusion renders coverage under the PLLS policy dependent on any lack of knowledge of a pollution condition on the part of [the insured’s environmental consultant]. Rather, the clause precludes coverage for any cleanup costs or claims that arise out of or are related to the pollution conditions discussed in the documents drawn up by [the insured’s environmental consultant]. The discovery by the purchaser’s contractor of additional contamination and underground storage tanks was certainly connected with the prior known condition.

Id. at 315. As a result, the court determined the explicit language of the policies expressed the intent of the parties and the PLL policy was not implicated to cover costs for remediating pre-existing contamination.

Along with the careful review of all applicable policies to determine the policies’ scope and applicability, the insurers should attempt to work together to ensure payments to the insured are not duplicated. The *Denihan Ownership* case provides an excellent example of an insurer, providing coverage to its insured under two different policies, using an endorsement to illustrate the policies were never intended to overlap or otherwise provide coverage for the same risk.

D. Conclusion

The courts have just begun addressing and interpreting environmental risk transfer policies. Since the absolute pollution exclusion was introduced into CGL policies in 1985-86, pollution legal liability coverage has become an essential component of a well-rounded insurance program for persons and entities with potential pollution exposure. The fact that a relatively small number of suits has emerged based on such policies attests to their acceptance and effectiveness in the market.