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# Arguments Advanced By Insureds For Coverage Of Environmental Claims

Mark C. Raskoff\*

## I. INTRODUCTION

Both federal and state governments are undertaking efforts to clean up the environment on a vast scale. Although 1200 sites are currently on the National Priorities List of sites requiring Superfund activity, the number of contaminated sites in need of clean-up may ultimately exceed 30,000.<sup>1</sup> The clean-up of these sites may cost governmental entities and private parties up to \$500 billion and require fifty years of effort.<sup>2</sup> To date, the federal government has appropriated \$8.5 billion to the Superfund program to conduct remedial investigation studies and fund enforcement efforts.<sup>3</sup> With the clean-up of contamination at some sites costing hundreds of millions of dollars, the balance of clean-up funding is expected to come from private sources.

Insurers and businesses view potential responsibility for clean-up costs as posing the threat of an insurance crisis leading to the

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1. ACTON, UNDERSTANDING SUPERFUND: A PROGRESS REPORT 25-26 (Rand Corp. Inst. For Civ. Just. Pub. no. R-3838-ICJ, 1989), (citing Environmental Protection Agency, Superfund Progress Report, Sept. 1988). See Ashley, *Representation of the Insurer's Interests In An Environmental Damage Claim*, 54 DEF. COUNS. J. 11, 11 (1987).

2. See Acton *supra*, note 1; Ashley *supra*, note 1.

3. See 42 U.S.C. § 9611(a) (1988) (setting appropriation covering a five year period when Congress reauthorized CERCLA in 1986).

possibility of financial ruin.<sup>4</sup> Not surprisingly, vigorous dispute has arisen as to whether expenditures to clean up environmental contamination are a regular business expense as insurers argue, or a loss covered by insurance as claimed by businesses.

As mentioned previously, environmental cleanup actions involve potentially huge costs. Coupled with the current conflict in judicial decisions over what events may result in liability, as well as what clean-up related expenses may be covered under insurance policies, both businesses and insurers should attempt to reduce uncertainty by identifying the issues which may arise and taking the appropriate steps to resolve such issues.

Contamination claims may require extensive factual investigation of divergent events which relate either to the cause of contamination or to the insurance obtained by the business. These events, which may have occurred many years before the business received a demand from a governmental entity to respond to actual or possible contamination, may have occurred over a long period of time and may have involved many different individuals.

The best evidence of the cause of contamination and whether coverage may exist under insurance policies may be contained in documents that were contemporaneous with the conduct but which, through the passage of time, have been lost or destroyed. Persons who are knowledgeable as to the events resulting in contamination as well as insurance may be deceased or no longer employed by the business.

This Article intends to provide some insight into the insurance issues that arise when environmental claims are brought against businesses. Part II of the Article considers the origin of an environmental claim against a business and its relation to the issue of insurance coverage.<sup>5</sup> Part III suggests practical responses business insureds may wish to take when faced with a claim by the government.<sup>6</sup> Part IV explores the variety of coverage defenses

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4. Abraham, *Environmental Liability And The Limits of Insurance*, 88 COLUM. L. REV. 942, 942-943 (1988); Insurance Issues and Superfund, Comm. on Environment and Public Works, 99th Cong., 1st Sess. 38 (April 3, 1985) (statement of Wheeler Hess, Vice-President, Travelers Ins. Co.).

5. See *infra* notes 10-16 and accompanying text.

6. See *infra* notes 17-72 and accompanying text.

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asserted by insurers and the reaction of courts to such use.<sup>7</sup> Part V raises tactical considerations a business insured will want to examine when pursuing insurance coverage for environmental claims.<sup>8</sup> Lastly, Part VI examines the possibility for resolving disputes over coverage for environmental cleanup costs.<sup>9</sup>

### II. COMMENCEMENT OF ENVIRONMENTAL CLAIMS AND INSURANCE BACKGROUND

#### A. Commencement Of Proceedings Or Claim

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),<sup>10</sup> the federal government may request information and an investigation into the nature and extent of contamination,<sup>11</sup> or may request initiation of clean-up measures.<sup>12</sup> These measures may be time-consuming and expensive. Thus, the receipt of a letter or notification may require the substantial expenditure of both legal fees to deal with the governmental entity and costs to remedy contamination. Generally, the longer proceedings continue or are delayed, the more expensive clean-up measures may become due to inflation and the continued spread of contamination.

#### B. General Policy Coverage

Most businesses purchased general liability policies that were intended to cover tort liabilities commonly encountered by

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7. See *infra* notes 73-126 and accompanying text.

8. See *infra* notes 127-148 and accompanying text.

9. See *infra* note 148 and accompanying text.

10. 42 U.S.C. 9601-9675 (1988).

11. California similarly authorizes a request for information and investigation of contamination through either the California Regional Water Quality Control Board, the attorney general, or the district attorney. See CAL. HEALTH & SAFETY CODE § 25358.3(a)(1) (West Supp. 1990).

12. See 42 U.S.C. § 9606(a) (1988). Many states, such as California, also have statutes permitting the state to force a responsible party to take appropriate removal or remedial action. See CAL. HEALTH & SAFETY CODE § 25358.3(3)(a)(1) (West Supp. 1990).

businesses.<sup>13</sup> These policies are generally referred to as "Comprehensive General Liability" policies (hereinafter CGL policies).<sup>14</sup> In addition, some businesses purchased specialized insurance policies designed to provide coverage for environmental contamination claims.<sup>15</sup> These policies are commonly referred to as "Environmental Impairment Liability" policies (hereinafter EIL policies).<sup>16</sup> Either policy type may provide some coverage for environmental claims. Any business faced with environmental claims must consider the application of either type of insurance policy to these claims.

### III. THE INSURED'S PRACTICAL RESPONSE TO A CLAIM

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13. Comprehensive general liability policies do not generally cover contractual liabilities *except* tort liability assumed by contract, such as indemnification agreements. *See* Fireman's Fund Ins. Co. v. City of Turlock, 170 Cal. App. 3d 988, 995, 216 Cal. Rptr. 796, 802 (1985) (damages for breach of contract not covered, only tort liability is within the coverage of CGL policy); Int'l Surplus Lines Ins. Co. v. Devonshire Coverage Corp., 93 Cal. App. 3d 601, 611, 155 Cal. Rptr. 870, 875 (1979) (same). *See also* Western Employers Ins. Co. v. Arciero & Sons, Inc., 146 Cal. App. 3d 1027, 1031, 194 Cal. Rptr. 688, 690 (1983) (CGL policy is not work performance bond and thus does not provide coverage for insured's defective work); Fresno Economy Import Used Cars, Inc. v. United States Fid. & Guar. Co., 76 Cal. App. 3d 272, 278-79, 142 Cal. Rptr. 681, 687 (1971) (CGL policy does not cover damage to work on part made by insured); Knutson Constr. Co. v. St. Paul Fire & Marine Ins. Co., 396 N.W.2d 229, 234 (Minn. 1986) (CGL policy does not cover defective work). *See* BARNUM, *Liability Principles in General*, CALIF. INS. LAW §§ 41.05-41.12 (1989 ed.) (generally discussing the reasonable expectation doctrine).

14. It is fundamental to note that any insurance policy is an agreement designed to transfer the risk of accidental loss from one person (the insured) to another (the insurer). Different persons may receive the benefits of such transference. "First party" policies are designed to compensate the insured for losses *the insured* has sustained. "Third party" policies, also referred to as general liability or public liability, policies such as the comprehensive general liability policies, in contrast, are designed to compensate *third parties* for losses occasioned by the insured's conduct. KEETON, *INSURANCE LAW*, § 4.8(a) at 232 (1971); 2 LONG, *THE LAW OF LIABILITY INSURANCE*, § 10.01 at 10-2 (1989); Clifford, *Property Insurance In General*, CALIFORNIA INSURANCE LAW & PRACTICE, § 35.01[3] at 35-6 (1989). This article is necessarily concerned with coverage issues relative to liability policies.

15. For a general discussion of policyholder expectations relative to environmental matters, *see generally* Peters, *Insurance Coverage For Superfund Liability: A Plain Meaning Approach To The Pollution Exclusion Clause*, 27 WASHBURN L.J. 161 (1987); Chesler, Rodburg & Smith, *Patterns of Judicial Interpretation of Insurance Coverage For Hazardous Waste Site Liability*, 18 RUTGERS L.J. 9 (1986).

16. For a general discussion on EIL policies and the risks such policies were intended to cover, *see generally* P. Milvy, *Environmental Impairment Liability and Risk Assessment*, ENVTL. F. 33 (Oct. 1982); *A Report by Committee on Business Management with Committee on Environmental Controls, Liability Insurance Against Environmental Damage: A Status Report—June 1982*, 38 BUS. LAW. 217 (1982).

**A. Obtain Records Of Insurance And Conduct Giving Rise To Claim**

Just as the insured's responsibility to the governmental entity is based on evidence of the insured's conduct, an insurer's responsibility to the insured is based on evidence of the insurance agreement executed between the insurer and the insured business. The starting point in an attempt by a business to establish coverage for environmental claims centers on obtaining copies of insurance policies.

Very commonly, a pollution claim will involve conduct stretching over a multiple year period which commenced many years before the onset of the claim. Pollution that occurred over a course of years may implicate multiple policy periods and multiple insurers.<sup>17</sup> From a practical standpoint, the more insurers that a potentially liable business may ascertain, the greater the potential to create a coverage pool adequate to discharge the claimed liability. Upon receipt of a letter or notification from a governmental entity, the business should work to locate records that not only describe the conduct which allegedly gave rise to the contamination, but also that outline the extent of insurance coverage.

As a first step in locating relevant documents, a business may want to review its policies for retaining records. A review of recordkeeping policies would assist a business in gauging the potential existence of past records.

Second, businesses may attempt to identify the insurance brokers who were responsible for obtaining insurance so that a coverage chronology of potentially responsible insurers may be developed. The persons who acted on behalf of the business to obtain insurance may also want to be ascertained and contacted. In some instances, these individuals might be able to recall the identity of an insurer or broker involved.

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17. See *infra* notes 103-111 and accompanying text.

Third, businesses may want to locate documents evidencing communications made in the course of obtaining the insurance policies. If EIL insurance was obtained or considered, any communications relative to this insurance should also be ascertained.

Once all potentially responsible insurers are ascertained, a business should notify all known insurers about the claim brought by a government entity. The insurance broker should be requested to try and locate responsible claims-handling personnel. Any information possessed by the insured should be sent to the insurer together with a request that the person responsible for handling claims contact the insured as soon as possible so that a meaningful dialogue can begin.

### *B. Inability To Find Policies--Tactical Considerations*

If actual copies of insurance policies cannot be ascertained, the insured should attempt to obtain the information through other means. In some instances, excess policies may list, by insurer, the underlying insurance available to the insured during the excess policy period. Policy numbers may be included on the schedule. The insurance broker's records may reflect the issuance of policies through copies of premium payments, ledger card systems, or other means used to record the issuance of policies.

Generally, the insured has the burden to demonstrate the potential applicability of coverage<sup>18</sup> and the insurer has the burden to prove any exclusions to coverage.<sup>19</sup> Some question exists

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18. See, e.g., *Ins. Co. of N. Am. v. Forty-eight Insulations, Inc.*, 633 F.2d 1212, 1215 (6th Cir. 1980) (where insured unable to prove existence of coverage, insured treated as uninsured for period); CAL. EVID. CODE, § 1500-1505 (West 1966 & Supp. 1990) (best evidence rule, proofs of writing); *Executive Aviation, Inc. v. Nat'l Ins. Underwriters*, 16 Cal. App. 3d 799, 806, 94 Cal. Rptr. 347, 351 (1971) (insured has burden to prove the contract of insurance, its terms, and the loss while insurer must prove exclusions); *State Farm Auto. Ins. Co. v. Spann*, 31 Cal. App. 3d 97, 100, 106 Cal. Rptr. 923, 925 (1973) (insured under burden to prove existence of coverage in declaratory relief action).

19. *Clemmer v. Hartford Ins. Co.*, 22 Cal. 3d 865, 878-880, 587 P.2d 1098, 1105-06, 151 Cal. Rptr. 285, 292-293 (1978); *Ranson v. Penn Mut. Life Ins. Co.*, 43 Cal. 2d 420, 426, 274 P.2d 633, 636 (1954); *Executive Aviation Inc. v. Nat'l Ins. Underwriters*, 16 Cal. App. 3d 799, 806, 94 Cal. Rptr. 347, 351 (1971); *Am. Home Assurance Co. v. Essy*, 179 Cal. App. 2d 19, 23, 3 Cal. Rptr. 586, 588-39 (1960); *GAF Corp. v. Continental Cas. Co.*, 1989 WL 1761 (E.D. La. 1989) (where policy

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whether a policy number, without more, will suffice as evidence of a policy. Policy numbers may not reflect the type of coverage actually provided, and, where policy prefixes do not identify the coverage type, an insurer may contend that the mere policy number is insufficient to prove that a particular type of policy, such as a CGL, was issued.<sup>20</sup>

Preparation of a coverage chronology may aid in resolving questions as to what insurance coverage may have existed during periods for which policies are initially determined to be missing or for which the insured has duplicative coverage.<sup>21</sup> If the insured is shown to have purchased insurance from the same insurer before and after the gap, there may be an argument that coverage was provided during the gap as well. Similarly, if the insured is shown generally not to have had an intention to purchase duplicate coverage, the fact that some coverage within the same coverage layer overlaps may suggest that a policy was terminated prior to the stated term. Policy terms may also be proven by policy forms in use at the time, prior policies, custom and practice, or business records.<sup>22</sup> The insured should consider what measures are needed to prove the existence of insurance policies.

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could not be located insurer was under burden to demonstrate existence of pollution exclusion).

20. *See, e.g.*, *U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1171-72 (W.D.Mich. 1988).

21. The general source for the period wherein the policy is in force and in effect is the declaration page of the policy. The declaration page generally contains provisions stating "this policy is effective from (date) to (date)." Generally, modification of this stated term is by endorsement either renewing, extending, or terminating the stated policy period. As endorsements may have been issued subsequent to the issuance of the policy, these records may not have been kept with the policy and may not be available at the time coverage for contamination is questioned. As a result, coverage gaps or overlapping policy periods may initially be revealed.

22. *See, e.g.*, *Abex Corp. v. Maryland Cas. Co.*, 790 F.2d 119, 130 (D.C. Cir. 1986) (sample policy form insufficient proof); *Keene Corp. v. Ins. Co. of North America* 667 F.2d 1034, 1047 (D.C. Cir. 1981) (duplicate file insufficient proof where appeared many materials missing); *Hartford Fire Ins. Co. v. Tatum*, 5 F.2d 169, 171 (5th Cir. 1925) (parties' course of dealing admissible to prove contract of insurance); *Emons Industries v. Liberty Mut. Ins. Co.*, 545 F. Supp. 185, 189 (S.D. N.Y. 1982) (writing that states coverage policy limits is sufficient proof); *Cleneden v. Benson*, 117 Cal. App. 674, 678, 4 P.2d 616 (1931) (copy of policy admissible after showing diligent search to locate original); *Fraser v. Metropolitan Life Ins. Co.*, 165 Wash. 667, 5 P.2d 978, 979 (1931) (testimony that copy of policy was of same form as original is sufficient proof).



The inability to establish the existence of coverage may create a period for which there is no coverage.<sup>23</sup> Under some decisions, the insured may be held responsible for a proportionate share of the damages caused by conduct during this uninsured period.<sup>24</sup>

### *C. Designation Of Insurers To Defend*

#### *1. Introduction*

To understand issues related to the duty of insurers to defend claims and potentially pay clean-up expenses, the nature of coverage provided by a policy must be examined. Certain insurers duties may be called into play unless and until other insurance has been exhausted.

#### *2. Excess Versus Primary Coverage*

Primary insurance provides coverage up to the limits of a loss without stating that the policy is to apply only subject to the exhaustion of any other policy. Excess insurance refers to a policy of insurance that was issued to cover any loss in excess of another policy, often referred as "underlying insurance." Generally, excess insurance will not be called into play unless the policy limits of the underlying insurance have been exhausted.<sup>25</sup> Many excess

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23. See, e.g., *Ins. Co. of N. Am. v. Forty-eight Insulations*, 633 F.2d 1212, 1224-1225 (6th Cir. 1980).

24. For cases in which the insured was held *not* responsible, see *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1047 (D.C. Cir. 1981) (insurers jointly and severally liable irrespective of coverage gaps); *Owens-Illinois, Inc. v. Aetna Cas. and Sur. Co.*, 597 F. Supp. 1515, 1525 (D.D.C. 1984) (suggesting the same in dicta); *Lac D'Amiante Du Quebec, Ltee. v. Am. Assurance Co.*, 613 F. Supp. 1549, 1562-63 (D.N.J. 1985), *vacated* 864 F.2d 1033 (3rd Cir. 1988); *Dayton Ind. Sch. Dist. v. Nat'l Gypsum Co.*, 682 F. Supp. 1403, 1411 (E.D. Tex. 1988), *vacated*, 896 F.2d 865 (5th Cir. 1989). For cases in which the insured was held responsible, see *Ins. Co. of N. Am. v. Forty-Eight Insulation*, 633 F.2d 1212, 1222 (6th Cir. 1980); *clarified on reh'g.*, 657 F.2d 814 (6th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981); *Budd Co. v. Travelers Ins. Co.*, 820 F.2d 787, 790 (6th Cir. 1987).

25. See, e.g., *Signal Cos. v. Harbor Ins. Co.*, 27 Cal. 3d 359, 367-69, 612 P.2d 889, 894-95, 165 Cal. Rptr. 799, 804-805 (1980) (excess insurer not obligated for defense costs until primary policy exhausted); *McConnell v. Underwriters at Lloyds of London*, 56 Cal. 2d 637, 365 P.2d 418, 424, 16 Cal. Rptr. 362, 368 (1961) (excess insurer not obligated until all primary insurance exhausted)

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insurance policies have a "Schedule of Underlying Insurance" listing primary insurance, underlying insurance, or both. Excess coverage may also be referred to as "following form" insurance because the terms of coverage incorporate by reference the underlying coverage forms and thus "follow the form" of the underlying policies.

A second type of excess insurance is referred to as "umbrella" excess insurance.<sup>26</sup> Typically, this coverage includes two basic coverage parts, following form excess and umbrella coverage. The umbrella coverage includes some risks that are not covered by the underlying coverage. Umbrella coverage is broader than the underlying coverage because additional risks are covered.

Determining whether underlying coverage is sufficiently "exhausted" to call into play excess insurance raises a number of questions.<sup>27</sup> Under some circumstances, an umbrella insurer may

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even if not specifically listed as underlying); *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.*, 126 Cal. App. 3d 593, 598, 178 Cal. Rptr. 908, 912 (1981) (same). *See also* *Hartford Acc. & Indem. Co. v. Continental Nat'l Am. Ins.*, 861 F.2d 1184, 1187 (9th Cir. 1988) (primary insurer's ceding limits not exhausted); *Occidental Fire & Cas. Co. v. Brocius*, 772 F.2d 47, 54 (3rd Cir. 1985) (umbrella policy did not apply until applicable underlying policies exhausted).

26. *See generally* *Garmany v. Mission Ins. Co.*, 785 F.2d 941, 948 (11th Cir. 1986) (stating that as purpose of excess coverage is to provide higher coverage limits at low cost, primary insurance must exhaust before insurer's obligations are called into play); *Continental Cas. Co. v. Roper Corp.*, 173 Ill. App. 3d 760, 527 N.E.2d 998, 1001-03 (1988) (stating general rule that excess insurance provides coverage applicable upon exhaustion of primary coverage).

27. In some instances an underlying carrier has sought to claim exhaustion and termination of a defense duty by tendering the policy limits into court. *See* *Chubb/Pacific Indemnity Group. v. Ins. Co. of N. Am.*, 188 Cal. App. 3d 691, 698, 233 Cal. Rptr. 539, 543 (1987) (underlying carrier could not terminate defense obligation and force excess insurer to defend by tendering limits). *See also* *Am. Family Life Assur. Co. v. U.S. Fire Co.*, 885 F.2d 826, 836-837 (11th Cir. 1989) (excess insurer unsuccessfully arguing that primary insurer has primary duty to defend), *reh'g den.*, 892 F.2d 89 (11th Cir. 1989). No justification exists for allowing primary carriers to terminate a defense obligation by tendering limits absent a settlement or payment of a judgment. First, at the time of settlement, the primary carrier should be permitted to compel the excess carrier to pay that percentage of costs attributable to the amount of the settlement or judgment in excess of the primary policy limits. *See* *Signal Cos. v. Harbor Ins. Co.*, 27 Cal. 3d 359, 369, 612 P.2d 889, 895, 165 Cal. Rptr. 799, 805 (1980); *Pac. Indem. Co. v. Fireman's Fund Ins. Co.*, 175 Cal. App. 3d 1191, 1198, 223 Cal. Rptr. 312, 317 (1985). Additionally, the primary carrier has set its premium in recognition of the greater likelihood of defending claims. *See* *Transit Cas. Co. v. Spink Corp.*, 94 Cal. App. 3d 124, 132-33, 156 Cal. Rptr. 360, 365 (1979) (subsequently disproved on other grounds in *Commercial Union Ins. Co. v. Safeway Stores, Inc.*, 26 Cal.3d 912, 921, 164 Cal. Rptr. 709, 714, 610 P.2d 1038, 1043 (1980)); *see also*, *Pacific Indemnity*, 175 Cal. App. 3d at 1201, 223 Cal. Rptr. at 312.

be obligated to provide a defense if a risk is not covered under a primary insurance policy.<sup>28</sup>

### *3. Termination of Primary Insurer's Duties*

Generally, the obligations of an insurer are held to be terminated if the insurer has paid out policy limits in settlement of a claim or satisfaction of a judgment.<sup>29</sup> A number of courts have held that the duty to defend may continue even after exhaustion of policy limits.<sup>30</sup> As the duty to defend is based on a potential duty to indemnify,<sup>31</sup> this Article asserts that the better reasoned view

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28. See, e.g., *U.S. Fire Ins. Co. v. Charter Fin. Group*, 851 F.2d 957, 960-63 (7th Cir. 1988); *Cranford Ins. Co. v. Allwest Ins. Co.*, 645 F. Supp. 1440, 1447 (N.D. Cal. 1986) (umbrella insurer required to drop down to extent primary coverage did not exist); *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 167 (Minn. 1986) (umbrella insurer obligated for defense costs attributable to claims excluded under primary coverage). See also *Reserve Ins. Co. v. Pisciotta*, 30 Cal. 3d 800, 816, 640 P.2d 764, 772-73, 180 Cal. Rptr. 628, 636-637 (1982) (umbrella insurer required to drop down subject to insured's payment of limit stated in umbrella policy as underlying policy).

29. *Hartford Acci. & Indem. Co. v. Continental Nat. Am. Ins. Cos.*, 861 F.2d 1184, 1187 (9th Cir. 1988); *Keene Corp. v. Ins. Co. of N. Am.*, 597 F. Supp. 946 (D.D.C. 1984), *vacated*, 631 F. Supp. 34 (D.C. Cir. 1985); *Signal Cos. v. Harbor Ins. Co.*, 27 Cal. 3d 359, 366-367, 612 P.2d 889, 894, 165 Cal. Rptr. 799, 804 (1980); *Pac. Indem. Co. v. Fireman's Fund Ins. Co.*, 175 Cal. App. 3d 1191, 1198, 223 Cal. Rptr. 312, 317 (1985); *Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's of London*, 56 Cal. App. 3d 791, 129 Cal. Rptr. 47 (1976); *Zurich Ins. Co. v. Raymark Industries* 118 Ill. 2d 23, 514 N.E.2d 150 (1987); *Traveler's Indem. Co. v. New England Box Co.*, 102 N.H. 380, 386, 157 A.2d 765, 769 (1960). See generally Van Vugt, *Termination of the Insurer's Duty to Defend By Exhaustion of Policy Limits*, 44 INS. COUNS. J. 254 (1977); Annotation, *Liability Insurer's Duty To Defend Action Against An Insured After Performance of Its Payment Obligations Under The Policy*, 27 A.L.R.3d 1057 (1969). Some courts have required the absence of prejudice plus actual exhaustion of policy limits before concluding a duty to defend terminated. See, e.g., *Allstate Ins. Co. v. Montgomery Trucking Co.*, 328 F. Supp. 415, 416 (N.D. Ga. 1971); *Lumbermen's Mut. Cas. Co. v. McCarthy*, 90 N.H. 320, 323, 8 A.2d 750, 752 (1939). See also *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.*, 789 F.2d 214, 218-19, 221 (3rd Cir. 1986) (terminates upon exhaustion but orderly withdrawal required); *Aetna Ins. Co. v. Borrell-Bigby Elec. Co.*, 541 So. 2d 139, 141 (Fla. 1989) (good faith in effectuating settlement required); *Liberty Mut. Ins. Co. v. Mead Corp.*, 219 Ga. 6, 131 S.E.2d 534, 537 (1964) (insured's consent required before insurer may terminate defense obligation).

30. *Liberty Mut. Ins. Co. v. Pac. Indem. Co.*, 579 F. Supp. 140, 144 (W.D. Pa. 1984) (policy did not condition duty to defend with respect to indemnity obligation); *ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 576 F. Supp. 936, 942-43 (E.D. Pa. 1983), *rev'd* 764 F.2d 968 (3rd Cir. 1985); *Koese v. Liberty Mut. Ins. Co.*, 159 N.J. Super. 340, 387 A.2d 1259, 1262 (1978); *Delaney v. Vardine Paratransit, Inc.* 132 Misc. 2d 397, 504 N.Y.S.2d 70, 71 (1986); *Exch. Mut. Ins. Co. v. Geiser*, 130 Misc. 2d 959, 498 N.Y.S.2d 291, 293 (1986).

31. *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 275-76, n.15, 419 P.2d 168, 176, n.15, 54 Cal. Rptr. 104, 112, n.15 (1966).

is that the duty to defend terminates upon exhaustion of policy limits by settlement or satisfaction of judgment.

It is presently unclear whether expenses paid by insurers to investigate the nature and extent of contamination at a site may be claimed as indemnity payments that reduce policy limits.<sup>32</sup> If these expenses are viewed as defense costs, no reduction occurs absent any provisions entitling the insurer to deduct defense costs from liability limits.

#### 4. Excess Insurer's Duties

A number of questions have arisen relative to excess coverage. First, an excess insurer may maintain, with considerable legal justification, that excess insurance does not apply until the underlying insurance has been exhausted.<sup>33</sup> Demands that excess insurers participate in sharing defense and indemnity costs if applicable primary insurance exists and has not been exhausted are not consistent with the nature of excess coverage. Second, excess insurers may maintain that excess insurance does not apply until all primary insurance, wherever situated, has been exhausted.<sup>34</sup> Third,

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32. See, e.g., *L.D. Schreiber Cheese Co. v. Standard Milk Co.*, 457 F.2d 962, 967-68 (8th Cir. 1972) (expenses incurred to determine whether cheese was contaminated covered if test determined cheese was uncontaminated); *Aronson Assocs., Inc. v. Pennsylvania National Cas. Ins. Co.*, 14 Pa. D. & C. 3d 1 (1977), *aff'd*, 272 Pa. Super. 606, 422 A.2d 689 (1979) (remediation expenses payable under indemnity provision of policy, to construe otherwise would give insured coverage windfall); *Bolkum v. Staab*, 133 Vt. 467, 346 A.2d 210, 213 (1975) (reasonable costs to retain engineer to evaluate construction defects may be covered). See generally, OSTRANGER & NEWMAN, *HANDLING INSURANCE COVERAGE DISPUTES* 273-74 (3d ed. 1990).

33. See APPELMAN'S *INSURANCE LAW & PRACTICE*, § 4909.85 (revised ed. 1985); A. WINDT, *INSURANCE CLAIMS & DISPUTES*, § 4.11 (2d ed. 1988); OSTRANGER & NEWMAN, *HANDBOOK ON INSURANCE COVERAGE CASES*, § 6.03 (2d ed. 1989).

34. *Compare Assoc. Int'l Ins. Co. v. E.D. Bullard Co.*, No. 530754 (Santa Clara Super. Ct. March 21, 1988) (excess insurance did not apply until all primary insurance exhausted), *reversed*, *Associated Int'l Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 220 Cal. App. 3d 692, 269 Cal. Rptr. 485 (1990), *pet. for rev. den.*, and *decertified from publication*, Aug. 30, 1990 with *Ducre v. Mine Safety Appliances Co.*, 645 F. Supp. 708, 712 n. 2 (E.D. La. 1986) (excess insurance obligation arising on exhaustion of primary insurance within policy year rather than by exhaustion of entire layer of primary insurance); *Dayton Ind. Sch. Dist. v. Nat'l Gypsum Co.*, 682 F. Supp. 1403, 1411 n.23 (E.D. Tex. 1988) (even though all underlying primary insurance has not been exhausted, excess insurance may be called upon if the underlying insurance for the specific policy period in which the insured may designate is exhausted and the excess insurance also applies) *vacated*, 896 F.2d 865 (5th Cir. 1989).

if a primary insurer refuses to defend, some courts have held that an excess insurer's duties are called into play.<sup>35</sup> To the extent that umbrella coverage under an excess policy exists, there is some question whether a mere refusal by the primary insurer triggers umbrella coverage if the refusal by the primary carrier appears to be unreasonable.

### *5. Insolvent Insurers*

In today's business environment, bankrupt insurers are not uncommon. If the bankrupt insurer is a primary insurer, the insolvency may force the excess insurer to cover the loss that the insolvent insurer is unable to cover, depending on pertinent provisions of the excess policy.<sup>36</sup> Thus, if an insurer is insolvent, excess policy provisions should be reviewed to determine potential liability under the excess policy.

Insolvency of an insurer may also necessitate the involvement of a state insurance guaranty association. Typically, these associations maintain that the guaranty association's duties will not arise until all insurance, primary or excess, has been exhausted.

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35. See, e.g., *American Motorists Ins. Co. v. Trane*, 544 F. Supp. 669, 692 (W.D. Wis. 1982); *School Dist. No. 1, Multonnah County v. Mission Ins. Co.*, 58 Or. App. 692, 716-17, 650 P.2d 929, 944 (1982).

36. Many courts have held that an excess insurer is required to drop down because the "amounts recoverable" term in excess policy was ambiguous. See *Reserve Ins. Co. v. Pisciotto*, 30 Cal. 3d 800, 814, 640 P.2d 764, 772, 180 Cal. Rptr. 628, 636 (1982); *Donald B. MacNeal Inc. v. Interstate Fire & Cas. Co.*, 132 Ill. App. 3d 564, 477 N.E. 2d 1322, 1325-26 (1985); *Werner Industries, Inc. v. First State Ins. Co.*, 217 N.J. Super. 436, 526 A.2d 236, 240-41 (1987); *Mass. Insurers Insolvency Fund v. Continental Cas. Co.*, 399 Mass. 598, 506 N.E. 2d 118, 120 (1987). *But see Golden Isles Hosp., Inc. v. Continental Cas. Co., Inc.*, 327 So. 2d 789, 790 (Fla. 1976); *TXO Prod. Corp. v. Twin City Fire Ins. Co.*, 685 F. Supp. 156, 157-158 (E.D. Tex. 1988) (holding drop down not required as matter of public policy); *Radar v. Duke Transp., Inc.*, 492 So. 2d 532, 537 (La. 1986); *Continental Marble & Granite Co., Inc. v. Canal Ins. Co.*, 789 F.2d 1258, 1259 (5th Cir. 1986); *Molina v. U.S. Fire Ins. Co.*, 574 F.2d 1176, 1178 (4th Cir. 1978) (holding drop down not required because of expression of intent in excess policy); *Steve D. Thompson Trucking, Inc. v. Twin City Fire Ins. Co.*, 832 F.2d 309, 311-12 (5th Cir. 1987); *U.S. Fire Ins. Co. v. Capital Ford Truck Sales, Inc.*, 257 Ga. 77, 355 S.E. 2d 428, 433 (1987); *Pergament Distribs., Inc. v. Old Republic Ins. Co.*, 128 A.D.2d 760, 513 N.Y.S.2d 467, 468-69 (1987); *Prince Carpentry, Inc. v. Cosmopolitan Mut. Ins. Co.*, 124 Misc.2d 919, 929-931, 479 N.Y.S.2d 284, 292-93 (1984).

Some jurisdictions have rejected this view.<sup>37</sup> In addition, payment by a guaranty association may be limited to a specified amount which may be less than the policy limits provided by the insolvent insurer.<sup>38</sup>

Insureds may be tempted to seek recovery of expenses from reinsurance proceeds available under the insurance policies obtained by insolvent insurers. However, absent any provisions in the reinsurance policy that specifically entitle the insured to obtain reinsurance proceeds,<sup>39</sup> recovery has been rejected by a number of courts<sup>40</sup> and may be negated by statute.<sup>41</sup>

## 6. Designation of Insurers

Vigorous dispute arises when an insured seeks to compel one insurer rather than all insurers whose policies potentially cover the risk, to defend or indemnify the insured for a clean-up claim.<sup>42</sup> An

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37. *Washington Ins. Guar. Ass'n. v. Guar. Nat'l Ins. Co.*, 685 F. Supp. 1160, 1165 (W.D. Wash. 1988) (state guaranty fund required to pay when layer in which insolvent insurer existed was called into play); *Phoenix Ins. Co. v. United States Fire Ins. Co.*, 189 Cal. App. 3d 1511, 1524-25, 235 Cal. Rptr. 185, 191-92 (1987) (guaranty fund and not excess insurer obligated for settlement costs); *McGuire v. Davis Truck Services, Inc.*, 518 So. 2d 1171, 1173-74 (La. 1988) (excess insurer obligated for amounts not paid by guaranty fund).

38. *See, e.g.*, CAL. INS. CODE § 1063.1 (West 1972 & Supp. 1990) (\$500,000 per claim limit).

39. *See, e.g., id.* at § 922.2 (West 1972) (permissive provisions in reinsurance contract and also provides any right of original insured must be specified in contract).

40. *See, e.g., Excess & Cas. Reins. Ass'n. v. Ins. Comm'r.*, 656 F.2d 491, 495 (9th Cir. 1981) (policyholder had no right to reinsurance proceeds); *Ascherman v. Gen. Reins. Corp.*, 183 Cal. App. 3d 307, 311-12, 228 Cal. Rptr. 1, 3 (1986) (holder of policy not beneficiary under reinsurance contract); *Am. Re-Ins. Co. v. Ins. Comm'n.*, 527 F. Supp. 444, 453-54 (C.D. Cal. 1981) (nonparty not entitled to recover reinsurance proceeds); *Leff v. NAC Agency, Inc.*, 639 F. Supp. 1426, 1428-29 (E.D. Mich. 1986) (applying California law). *See also* *Am. Home Ins. Co. v. Travelers Indem. Co.*, 122 Cal. App. 3d 951, 967, 175 Cal. Rptr. 826, 834 (1981) (express intent to make nonparty to insurance contract beneficiary must be demonstrated before recovery on third party beneficiary theory). The apparent rationale for this rule is that; (1) the original insured is not an incidental beneficiary of the reinsurance contract; and (2) the reinsurance proceeds are recoverable by the trustee for the general benefit of the insolvent insurers estate.

41. *See* CAL. INS. CODE § 623 (West 1972) (insured has no interest in proceeds of reinsurance contract).

42. The leading case supportive of the insured's right to designate carriers is *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034, 1047-48 (D.C. Cir. 1981), *cert denied*, 455 U.S. 1007 (1982). *Accord*, *Dayton Ind. Sch. Dist. v. Nat'l Gypsum Co.*, 682 F. Supp. 1403, 1410-11 (E.D. Tex. 1988), *reversed*, 896 F.2d 865 (5th Cir. 1990); *Lac D'Amiante Du Quebec, Ltee. v. Am. Assurance Co.*, 613 F. Supp. 1549, 1562-63 (E.D. N.J. 1985), *vacated*, 864 F.2d 1033 (3rd Cir.

insured may be motivated to make this designation for tactical reasons such as to avoid payment of multiple retentions or deductibles, or simply because all insurers whose policies are called into play are not willing to participate.

Theoretically, the designation of individual insurers may cause excess insurance to come into play prior to the exhaustion of applicable primary policies. This designation may be the result of either a unilateral allocation by an insurer or a de facto agreement between the insured and an underlying insurer who issued policies over a multiple year period, that payments for a loss may be allocated to a single policy period rather than dividing payments equally between the insurer's policies in effect during the loss period.<sup>43</sup> An excess insurer will contest designation under these circumstances by claiming that the payments should be allocated equally among all involved underlying policies. Excess insurers may argue that this type of allocation unfairly burdens an excess insurer, does not represent the underwriting choice made by the insured, is not equitable, and contravenes the excess nature of excess coverage.

Some courts have held that the insured may designate coverage to a specific insurer and the affected insurer can thereafter bring an

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1988). Whether such a right exists in California is unclear. Currently only trial court resolutions of this issue have been made. In the *Asbestos Insurance Coverage Cases*, Jud. Council Coordin. Proc. 1072, Phase IV, May 29, 1987, a California trial court ruled that the insured had the right to designate insurers. See slip op. at 66-67. However, in *Crane v. Aetna Casualty & Surety Co.*, a trial court sustained an insurer's motion to strike the assertion of such a right from the insured's complaint on the basis that such a right was inconsistent with California law in non-continuous occurrence cases prohibiting arbitrary loss allocation to maximize a loss to an excess insurer. See *Crane v. Aetna Cas. & Sur. Co.*, No. C 736296 (Los Angeles Sup. Ct., February 5, 1990). See also *Kaiser Foundation Hosp. v. North Star Reins. Corp.*, 90 Cal. App. 3d 786, 792, 153 Cal. Rptr. 678, 682 (1979); accord, *Commercial Union Ins. Cos. v. Safeway Stores, Inc.*, 26 Cal. 3d 912, 610 P.2d 1038, 1043, 164 Cal. Rptr. 709, 714 (1980). In the course of the hearing on February 5, 1990, the trial court also concluded that recognition of such a right would encourage "subjective favoritism" by the insured. (Reporter's transcript at 1-15). The insured did not seek appellate review of this determination.

43. *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1047-48 (D.C. Cir. 1981); *cert den.*, 455 U.S. 1007 (1982); *Dayton Ind. Sch. Dist. v. Nat'l Gypsum Co.*, 682 F. Supp. 1403, 1410-11 (E.D. Tex. 1988), *reversed*, 896 F.2d 865 (5th Cir. 1989); *Lac D'Amiante Du Quebec, Ltee. v. Am. Assurance Co.*, 613 F. Supp. 1549, 1562-63 (E.D. N.J. 1985), *vacated*, 864 F.2d 1033 (3rd Cir. 1988).

action against other insurers for contribution.<sup>44</sup> In the nonpollution context, this designation has been rejected by some courts because it unfairly maximizes an excess insurer's liability.<sup>45</sup> A court which finds that injuries occurred over an extended period of time might determine that, as all policies are involved during such period, designation of a particular insurer is inequitable.<sup>46</sup>

### 7. EIL Insurance

EIL insurance policies are generally issued on a "claims made" basis which, as a condition of coverage, require the presentation of a claim within a period specified by the policy.<sup>47</sup> Because of this coverage condition, any business which purchased EIL insurance should consider whether the business has met the claims reporting requirement imposed by the policy. If the claim has been made within the reporting period, and if the pollution was caused by conduct that occurred over a period of time, the business may want to consider whether the EIL insurer should be included in any defense funding agreement, on the basis that it marketed a policy specifically designed to cover pollution damage. CGL insurers will clearly attempt to require the participation of the EIL carrier. In cases either where clean-up expenses might not constitute "damages" or "property damage," or may be excluded by the "pollution exclusion," EIL insurance might still be applicable.<sup>48</sup> Thus, the insured should consider whether to compel the EIL insurer to participate in the defense.

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44. See, e.g., *Dayton Ind. Sch. Dist. v. Nat'l Gypsum Co.*, 682 F. Supp. 1403 (E.D. Tex. 1988), *reversed*, 896 F.2d 865 (5th Cir. 1989); *Lac D'Amiante Du Quebec, Ltee. v. Am. Assurance Co.*, 613 F. Supp. 1549, 1562-63 (E.D. N.J. 1985), *vacated*, 864 F.2d 1033 (3rd Cir. 1988).

45. See, e.g., *Kaiser Found. Hosps. v. North Star Reins. Corp.*, 90 Cal. App. 3d 786, 792, 153 Cal. Rptr. 678, 682 (1979) (insured and primary insurer not permitted to allocate losses so as to maximize excess insurer's liability). *Accord Commercial Union Ins. Cos. v. Safeway Stores, Inc.*, 26 Cal.3d 912, 920, 610 P.2d 1038, 1043, 164 Cal. Rptr. 709, 714 (1980).

46. See *Nat'l Services, Inds. Inc. v. Hartford Acc. & Indem. Co.*, 661 F.2d 458, 462 (5th Cir. 1981) (if continuous occurrence followed insured must pay deductible in each period).

47. See generally *infra* note 50 (discussing "claims made" policies).

48. This is so because EIL policies provide coverage for environmental "impairments" rather than damage to property.



#### D. Notification To Insurers

Once all potentially involved insurers have been identified, notice to the insurer should be given for the obvious reason that an insurer cannot be called upon to perform until it has received notice from the insured. Notice to the insurer may also be important for other reasons.

First, insurance policies may require notice to be given as soon as reasonably possible after the insured becomes aware of the pendency of a claim. In some jurisdictions, the failure to give notice as soon as is reasonably possible may be a basis for a denial of coverage under the "late notice" defense.<sup>49</sup>

Second, some insurance policies are denominated as "claims made" policies<sup>50</sup>. As a condition of coverage under these policies,

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49. See, e.g., *Utica Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, 748 F.2d 118, 121 (2d Cir. 1984); *City of Chicago v. U.S. Fire Ins. Co.*, 124 Ill. App. 2d 340, 348, 260 N.E.2d 276, 280 (1970); *State Farm Mut. Auto. Ins. Co. v. Cassinelli*, 67 Nev. 227, 247, 216 P.2d 606, 616 (1950); *New Amsterdam Cas. Co. v. Hamblen*, 144 Tex. 306, 309-10, 190 S.W.2d 56, 58 (1945); *Harmon v. Farm Bureau Mut. Auto. Ins. Co.*, 172 Va. 61, 65-66, 200 S.E. 616, 618 (1939). See generally OSTRANGER & NEWMAN, *HANDBOOK ON INSURANCE COVERAGE DISPUTES* at 81-82 (3d ed. 1990). The majority and California view is that a showing of prejudice is required to support this defense. See *Campbell v. Allstate Ins. Co.*, 60 Cal. 2d 303, 305-07, 384 P.2d 155, 156-57, 32 Cal. Rptr. 827, 828-29 (1963); *Moe v. Transamerica Title Ins. Co.*, 21 Cal. App. 3d 289, 302, 98 Cal. Rptr. 547, 555 (1971); OSTRANGER & NEWMAN, *supra*, at § 4.02[2]; Annotation, *Modern Status Of Rules Requiring Liability Insurer To Show Prejudice To Escape Liability Because Of Insured's Failure Or Delay In Giving Notice Of Accident Or Claim, Or In Forwarding Suit Papers*, 32 A.L.R. 4TH 141 (1984).

50. "Claims made" policies are most typically issued to businesses which provide professional services, or need specialized coverage. A claims made policy is one in which the insurer agrees to assume responsibility for any covered act or omission, so long as a claim is made during the policy period, or such extended reporting period as may be specified in the policy. These policies are in contrast to "occurrence" policies, which provide coverage for acts or omissions which occur during the policy period regardless of when a claim is made against the insured. See, e.g., *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 535, n.3 (1978); *U.S. v. A.C. Strip*, 868 F.2d 181, 185 (6th Cir. 1989); *Card v. Nat'l Life Ins. Co.*, 603 F.2d 828, 833 (10th Cir. 1979); *Gilliam v. Am. Cas. Co., of Reading, Pa.*, 735 F. Supp. 345, 349-50 (N.D.Cal. 1990); *Burns v. Int'l Ins. Co.*, 709 F. Supp. 187, 189 (N.D. Cal. 1989); *Mt. Hawley Ins. Co. v. Fed. Sav & Loan Ins. Corp.*, 695 F. Supp. 469, 479-81 (C.D. Cal. 1987); *Brander v. Nabors*, 443 F. Supp. 764, 767, n.4 (N.D. Miss. 1978); *Pacific Ind. Co. v. Imperial Cas. Co.*, 176 Cal. App. 3d 622, 626, n.1, 222 Cal. Rptr. 115, 117, n.1 (1986); *Chamberlin v. Smith*, 72 Cal. App. 3d 835, 845, n.5, 140 Cal. Rptr. 493, 498, n.5 (1972); *Gulf Ins. Co. v. Dolan, Fertig & Curtis*, 433 So. 2d 512, 515 (Fla. 1983); *Fremont Ind. Co. v. Gierhart*, 560 So. 2d 1223, 1225 (Fla. 1990); *Zuckerman v. Nat'l Union Fire Ins. Co.*, 194 N.J. Super. 206, 214-15, 476 A.2d 820, 824-25 (1984); *Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 495 A.2d 406, 410 (1985); *Yancey v. Floyd West & Co.*, 755 S.W.2d 914, 920 (Tex. 1988) (cases interpreting "occurrence" policies). See generally, Comment, *The Claims Made Dilemma In Professional Liability Insurance*,

notice must be given within a specified period of time, commonly referred to as the reporting period.<sup>51</sup> "Occurrence" policies differ in that coverage is provided for an act or omission occurring within the policy period regardless of when a claim is presented.<sup>52</sup>

Third, if an attorney is retained prior to notification of the insurer, legal fees incurred during such period may be claimed as nonreimbursable by the insurer on the ground the insurer's duty to defend cannot arise until the insurer receives notice, or that counsel retained by the insured prior to notification has prejudiced the insurer's interests. It is unclear whether a showing of the lack of any actual prejudice may be asserted by the insured to obtain reimbursement of fees.<sup>53</sup>

Therefore, notification to all potentially responsible insurers should be given as promptly as possible. To preserve evidence of notice, a business may want to notify an insurer by certified letter.

#### *E. Identify Responsible Insurers And Arrange Meeting With Insurers' Representatives*

Dealing with insurance companies may be frustrating and unrewarding if the insurers' appropriate decisionmakers are unknown and out of contact as developments occur and the government demands responses to requests for action. Similarly, insurers, as with any business operation, do not welcome demands for payment without being afforded needed information to make a reasonable and informed decision. Thus, it is neither in the interest of the insurance company nor the insured to have a relationship

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22 U.C.L.A. L. REV. 925, 925-26 (1975); Kroll, *The Professional Liability Policy "Claims Made,"* 13 FORUM 842, 843 (1978) (discussing claims made policies).

51. See, e.g., *Gulf Ins. Co. v. Dolan, Fertig & Curtis*, 433 So. 2d 512, 515-16 (Fla. 1983).

52. See cases cited *supra* at note 50.

53. See *Crist v. Ins. Co. of N. Am.*, 529 F. Supp. 601, 603-04 (C.D. Ut. 1982) (no duty to defend absent notice); *Gulley & Assocs. v. Wausau Ins. Cos.*, 536 So. 2d 816, 818 (La. 1988) (prejudice to insurer irrelevant); *Cobb v. Empire Fire & Marine Ins. Co.*, 488 So. 2d 349, 350 (La. 1986) (insurer not obligated for fees incurred prior to tender); *Payton v. St. John*, 188 So. 2d 647, 652-53 (La. 1966) (as notice is condition precedent to duty to defend, insurer not obligated for fees incurred prior to tender). *But see Moskau v. Ins. Co. of N. Am.*, 366 So. 2d 1004, 1007 (La. 1978) (prejudice considered).

where needed communications cannot occur. For this reason, a business will want to identify and contact the responsible decisionmaker at each potentially involved insurance company as soon as possible. A number of insurance companies have personnel who specialize in handling environmental claims. To route correspondence properly, the claim number assigned to the matter by the insurer should also be ascertained and included in all correspondence sent to the insurer.

A better dialogue and understanding can be created through face-to-face dealings rather than through impersonal contact. Frequently, the vast amounts of factual data required for consideration in environmental claims favors arranging a meeting with all potentially involved insurers so that questions can be answered without undue delay. Because preparation for meetings is extensive, the most cost effective plan is to arrange a single meeting with all insurers jointly as soon as reasonably possible. As new insurers surface, additional meetings may need to be held.

#### *F. Meeting With Insurance Representatives*

At the meeting with the insurers, the insured's principal purpose should be to provide the insurers with the information to allow a reasoned decision in response to any request by the insured. Thus, the insured should be prepared to explain what events gave rise to the contamination, and what measures, including cost, are required to remedy the contamination.

Because CGL policies usually purchased by businesses are "occurrence" policies that condition the insurer's responsibility on conduct and damage occurring during the policy period, insurers are generally concerned with the date of events.<sup>54</sup> The business should attempt to provide information to the insurers concerning the dates that the business shipped contaminants to the site or used contaminants at the site, the volume and toxicity of contaminants, the extent of contamination, and the process whereby contamination

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54. See Abraham, *supra* note 4 at 964, n. 70; Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 276 n.15, 419 P.2d 168, 176 n.15, 54 Cal. Rptr. 104, 111 n.15 (1966).

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occurred or spread. The business may want to provide all documents describing the cause and the nature and extent of contamination at the site. To meet any claims of late notice, the insured should be prepared to provide documents showing the date that the insured was first informed about the contamination problem.

Consideration should also be given to informing the insurers of the status of environmental proceedings by providing copies of all significant documents arising out of the environmental action. Actual or projected clean-up efforts should be detailed. In addition, if any studies or reports of proposed clean-up alternatives or measures have been conducted these documents should be provided for inspection by insurers. Because the obligation of insurers may be affected by other insurance, a coverage chronology would be of assistance. It should be stated that all information provided in the course of a joint effort to resist a claim is strictly confidential.<sup>55</sup>

### *G. Formulation Of Joint Defense Agreement*

The pendency of ongoing environmental proceedings and the resulting legal expenses will place a substantial financial burden on the business if the business is asked to absorb all legal fees. These expenses may be payable by the insurers whose obligations may be called into play if the potential for coverage is demonstrated.<sup>56</sup> If numerous policy periods are applicable and a business demands costs from only one of several potentially available insurers, the selected insurer may argue that this burden is unreasonable because each insurer whose obligations are called into play may be claimed to be jointly and severally liable for defense costs.<sup>57</sup> To act

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55. *Am. Mut. Ins. Co. v. Superior Court*, 38 Cal. App. 3d 579, 591-93, 113 Cal. Rptr. 561, 572-73 (1974).

56. *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 276-77, 419 P.2d 168, 176, 54 Cal. Rptr. 104, 112 (1966).

57. *See, e.g., Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1034, 1047 (D.C. Cir. 1981) (insurers jointly and severally liable irrespective of coverage gaps); *accord, Budd Company v. Travelers Ind. Co.*, 820 F.2d 787, 791 (6th Cir. 1987); *Dayton Independent School D. v. National Gypsum*, 682 F. Supp. 1403, 1411, n.24 (E.D. Tex. 1988) (dicta), *reversed*, 896 F.2d 865 (5th Cir. 1989); *Lac D'Amiante Du Quebec, Ltee v. American Home Assurance Co.*, 613 F. Supp. 1549, 1562-

reasonably, the insured will want to make efforts to involve all insurers who have coverage obligations<sup>58</sup> and to agree to select a counsel who is acceptable to both the insured and to the insurers to represent the insured in the environmental proceedings. The agreement should include provisions that fees charged by counsel will be paid by the insurers. Because of uncertainties about coverage, self-insured periods, or uninsured coverage periods, the insurers may be unwilling to enter into this type of agreement unless the business agrees to pay some portion of attorney's fees. To facilitate the payment of fees by insurers, the business will want to instruct the attorney to make regular reports to the insurers at intervals acceptable to the insurers.

#### *H. Defense Undertaken Pursuant To Reservation Of Rights*

Presently, no area of the law has more uncertainties regarding the ultimate resolution of issues than environmental coverage litigation<sup>59</sup>. Uncertainty may be based both on factual questions

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63 (D.N.J. 1985), *vacated*, 864 F.2d 1033 (3rd Cir. 1988); *Owens-Illinois, Inc. v. Aetna Cas. and Sur. Co.*, 597 F. Supp. 1515, 1525 (D.D.C. 1984) (*dicta*); *CNA Cas. of Calif. v. Seaboard Sur. Co.*, 176 Cal. App. 3d 598, 222 Cal. Rptr. 276, 288-89 (1986); *Asbestos Ins. Coverage Cases, Phase IV*, S.F. Super. Ct., slip op. Phase V-A, August 28, 1988 at 22-25 (claims predicated on dangerous installation asbestos trigger coverage from date of installation to date of claim or discovery); *Standard Asbestos Mfg. & Insulating Co. v. Royal Ind. Ins. Co.*, No. CV 80-14904, slip op. at 19 (Mo. Cir. Court 1986). *But see* *Insurance Co. of North America v. Forty-Eight Insulations*, 633 F.2d 1212, 1222 (6th Cir. 1980); *clarified at reh'g.* 657 F.2d 814 (6th Cir. 1981), *cert denied*, 454 U.S. 1109 (1981) (insured responsible).

58. If the ultimate expenses may potentially exceed applicable primary limits, notice should also be given to excess insurers.

59. Until recently for example, in California, which is viewed as a litigious state with trend setting precedents, a dispositive decision on whether clean-up expenses constitute damages or "property damage" covered by a CGL did not yet exist. Appellate courts had reached opposite results as to whether clean-up expenses are covered. *Compare* *Aerojet Gen'l Corp. v. Superior Court*, 211 Cal. App. 3d 216, 258 Cal. Rptr. 684 (1989) (response costs covered) *with* *AIU Ins. Co. v. Superior Court*, 213 Cal. App. 3d 1219, 262 Cal. Rptr. 182 (1989) (response costs not covered), *rev. granted*, 782 P.2d 595, 264 Cal. Rptr. 354 (1990). The California Supreme Court, however, rendered a unanimous opinion in *AIU v. Superior Court* finding that cleanup costs may be covered under the CGL policy. *See infra* notes 91-100 and accompanying text (discussing the *AIU* decision). California appellate courts have yet to rule on the standard applicable to "occurrence" issues in the pollution context. No ruling has yet been made as to whether the "sudden and accidental" exception in the pollution exclusion has a temporal connotation. The only decision to consider the issue in California held the pollution exclusion inapplicable to contamination caused by fire and did not reach the issue

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and legal issues relating to coverage. From a factual standpoint, the cause of pollution, the location of the polluting activity on or off the insured's property, or the timing of the pollution to coincide with a particular policy period may not be ascertainable until substantial investigation and hydrogeologic studies have been conducted. The legal resolution of coverage issues is likewise unclear.

As noted later in this Article, many coverage defenses may be asserted by the insurers, including whether a claim has been made calling into play an insurer's duty to defend and indemnify under an insurance policy,<sup>60</sup> whether the costs arising out of clean-up claim constitute "damages" or "property damage"<sup>61</sup> covered by an insurance policy, whether the claims are the result of a covered "occurrence,"<sup>62</sup> and whether the date of loss of a claim is within a particular insurer's policy period.<sup>63</sup> The effect of various exclusions in the policy, including the "pollution" exclusion,<sup>64</sup>

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of the intent of the exclusion. *See* *Pepper Indus., Inc. v. Home Ins. Co.*, 67 Cal. App. 3d 1012, 1019, 134 Cal. Rptr. 904, 908 (1977). Conflicting decisions across the country are further evidence of this uncertainty. For example, a clear conflict exists as to the meaning of the pollution exclusion. *See* cases cited *infra* notes 109-10. There is a clear conflict as to the applicable date of loss theory for contamination claims. *See* cases *infra* notes 97-104. The conflict between the United States Courts of Appeal as to whether clean-up expenses constitute damages or property damage covered by a CGL policy indicates yet another conflict. *Compare* *Avondale Industries, Inc. v. Travelers Ind. Co.*, 887 F.2d 1200, 1207 (2nd Cir. 1989) and *Port of Portland v. Water Qual. Ins. Syndicate*, 796 F.2d 1188, 1194 (9th Cir. 1986) (holding clean-up expenses are within the coverage of a CGL policy) with *Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co.*, 842 F.2d 977, 985-987 (8th Cir. 1988) and *Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979, 981 (4th Cir. 1988) (clean-up expenses denied coverage under a CGL policy). Conflicts within a single jurisdiction are common. For example, conflicting decisions have been reached on whether a duty to defend is created by a letter from a governmental agency. *See* cases *infra* note 79. *Compare* *Central Qual. Serv. Corp. v. Ins. Co. of N. Am.*, No. 87-CV-74473-OT (E.D. Mich. 1990) (Mealy's 8/14/90) (PRP letter not a "suit") with *U.S. Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 589, 336 N.W.2d 838, 843 (1983) (letter requesting action is equivalent to a suit). Still other examples are the conflicting decision on the meaning of the pollution exclusion within the same jurisdiction. *Compare* *Hayes v. Maryland Cas. Co.*, 688 F. Supp. 1513, 1515 (N.D. Fla. 1988) with *Pepper's Steel & Alloys, Inc. v. U.S. Fid. & Guar Co.*, 668 F. Supp. 1541, 1548-49 (S.D. Fla. 1987).

60. *See infra* notes 76-79 and accompanying text.

61. *See infra* notes 80-100 and accompanying text.

62. *See infra* notes 112-13 and accompanying text.

63. *See infra* notes 103-11 and accompanying text.

64. *See infra* notes 114-18 and accompanying text.

the "premises alienated" exclusion,<sup>65</sup> and "owned property" exclusion,<sup>66</sup> are also a subject of vigorous dispute.

Because of numerous uncertainties about coverage, insurers may wish to participate in the claim under a reservation of rights. An insurer may attempt to reserve rights unilaterally, by the simple issuance of a reservation of rights letter, or bilaterally, by an agreement signed both by the insured and the insurer.<sup>67</sup> Currently, some uncertainty exists whether or not a reservation of rights letter is sufficient to preserve an insurer's claim of non-coverage.<sup>68</sup> The

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65. See *infra* notes 119-21 and accompanying text.

66. See *infra* note 122 and accompanying text.

67. The California Supreme Court has noted that a reservation of rights is effective "if the insurer *adequately* reserves its rights." *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 279, 419 P.2d 168, 178, 54 Cal. Rptr. 104, 114 (1966) (emphasis added). The California Supreme Court notably did not specify what circumstances were "adequate," but left it to the courts to determine what circumstances were to be deemed "adequate." "As noted by other California courts, Courts have in general been fairly liberal in implying reservations." *Insurance Company of the West v. Haralambos Beverage Co.*, 195 Cal. App. 3d 1308, 1319, n.5, 241 Cal. Rptr. 427, 432, n.5 (1987) (citations omitted). Some question exists whether a unilateral reservation of rights letter is "adequate." See *Val's Painting & Drywall, Inc. v. Allstate Ins. Co.*, 53 Cal. App. 3d 576, 583, 126 Cal. Rptr. 267, 272-73 (1975) (noting conflict in authority). See also *St. Paul Mercury Ins. Co. v. Ralee Eng'g Co.*, 804 F.2d 520, 522 (9th Cir. 1986) (applying California law to find that a unilateral reservation of rights is sufficient); *Draft Systems, Inc. v. Alspach*, 756 F.2d 293, 296 n.2 (3rd Cir. 1985) (reservation of right letter treated same as non-waiver agreement where insured informed that insurer would seek reimbursement); *Am. Home Assur. v. Glenn Estess & Assocs.*, 763 F.2d 1237, 1239-40 (11th Cir. 1985) (applying Alabama law to find that where bilateral agreement refused, proper course was to furnish defense pursuant to reservation of rights and seek declaratory relief). However, where a reservation of rights has been executed and the action would involve litigation of factual issues bearing on coverage issues, the insured is generally protected with the right to designate counsel to conduct the defense at the insurer's expense. See CAL. CIV. CODE, § 2860(2) (West Supp. 1991). It is difficult to justify a prohibition on unilateral reservation of rights. Some courts have held that an insurer has the option of either issuing a reservation of rights or instituting an action for declaratory relief. *Sims v. Illinois National Casualty Co.*, 43 Ill. App. 2d 184, 199, 193 N.E.2d 123, 130 (1963); *Underwriters at Lloyds v. Denali Seafoods, Inc.*, 729 F. Supp. 721, 725-26 (W.D. Wash. 1990); *Village Management, Inc. v. Hartford Acc. & Indem. Co.*, 662 F. Supp. 1366, 1373-74 (N.D. Ill. 1987).

68. See *Val's Painting & Drywall, Inc. v. Allstate Ins. Co.*, 53 Cal. App. 3d 576, 583, 126 Cal. Rptr. 267, 273 (1975) (not so holding but noting conflict in authority). Some courts have held that the right to seek reimbursement of attorneys fees must be by bilateral agreement. See *Reliance Ins. Co. v. Alan*, 222 Cal. App. 3d 702, 708-09, 272 Cal. Rptr. 65, 70 (1990). Other courts have indicated unilateral reservations are sufficient. See *St. Paul Mercury Ins. Co. v. Ralee Eng'g Co.*, 804 F.2d 520, 522 (9th Cir. 1986) (must have some expression of intent to reserve right to seek reimbursement of attorneys fees if potential for coverage not found to exist); *Walbrook Ins. Co., Ltd. v. Goshgarian & Goshgarian*, 726 F. Supp. 777, 782-83 (C.D. Cal. 1989) (unilateral reservation of right sufficient); *Omaha Indem. Ins. Co. v. Cardon Oil Co.*, 687 F. Supp. 502, 504-05 (N.D. Cal. 1988) (unilateral reservation of right sufficient); *Draft Systems, Inc. v. Alspach*, 756 F.2d 293, 296 n.2 (3rd Cir. 1985);

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majority view, which this Article asserts is the better reasoned view, recognizes the validity of reservation of rights letters since they are commonly used and are relatively simple to prepare, as soon as basic information bearing on the cause and extent of contamination and on actual or projected clean-up measures has been given. Recognition of reservation of rights letters also facilitates the prompt furnishing of a defense.<sup>69</sup> However, a minority of courts have held that a reservation of rights can be effective only if contained in a bilateral agreement between the insurer and the insured.<sup>70</sup>

If a defense has been undertaken under a reservation of rights and the litigation concerns issues bearing on the coverage defenses, a number of jurisdictions permit the insured to appoint independent counsel at the expense of the insurer.<sup>71</sup> Generally, the insured is entitled to control the litigation. Hopefully, if counsel selected is acceptable to both the insured and the insurer, no need may exist to select independent counsel.

A common problem encountered by insureds and insurers in environmental claims concerns payment of attorney's fees by the insurer, that is, whether the insurer will pay the rates charged by counsel selected by the insured, at rates which are higher than

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Crawford v. Ranger Ins. Co., 653 F.2d 1248, 1251-53 (9th Cir. 1981) (unilateral letter sufficient); Am. Home Assur. v. Glenn Estess & Assocs., 763 F.2d 1237, 1239-40 (11th Cir. 1985) (where bilateral agreement refused, proper course to furnish defense pursuant to reservation of rights and seek declaratory relief). See also *Fulton v. Woodford*, 26 Ariz. App. 17, 20, 545 P.2d 979, 982 (1976) (upheld reservation of right to recover additional attorney's fees occasioned in event of conflict found after insured requested joint representation by single attorney).

69. Because some courts have recognized only a bilateral agreement, if the insured refuses to sign such an agreement some jurisdictions require the insurer to institute a declaratory relief action. This view may therefore occasion hardship to the insured. Although declaratory relief actions are theoretically prompt and quick, where coverage disputes involve multiple insurers or multiple coverage years such actions are likely to develop into complex litigation. While the declaratory relief proceedings are pending, the insured would be faced with the prospect of funding the defense of the environmental proceeding, with right to charge insurers if a potential for coverage is subsequently found to exist.

70. See *supra* note 68.

71. See *Nike, Inc. v. Atlantic Mut. Ins. Co.*, 578 F. Supp. 948, 951 (N.D. Cal. 1983); *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc., Inc.*, 162 Cal. App. 3d 358, 375, 208 Cal. Rptr. 494, 506 (1984); *Executive Aviation, Inc. v. Nat. Ins. Underwriters*, 16 Cal. App. 3d 799, 810, 94 Cal. Rptr. 347, 354 (1971). See generally Annotation, *Duty Of Insurer To Pay For Independent Counsel When Conflict Of Interest Exists Between Insured And Insurer*, 50 A.L.R. 4TH 932 (1986).



those charged by insurance panel counsel. Obviously, environmental litigation is a complex and specialized matter, and rates higher than typical automobile liability defense rates may be warranted. The extent of the increase over normal rates is subject to continued dispute and may be limited by statute.<sup>72</sup> An insurer may be prepared to pay higher rates if the insurer is convinced that the billing is not inflated, represents a fair accounting of services rendered, and is split among all insurers whose policies have been called into play.

#### IV. COVERAGE DEFENSES

##### A. Introduction

Once notification has been given to the insurer, the insurer may assert various defenses to coverage. Fundamental policy considerations are at the center of the controversy whether CGL policies provide coverage for environmental claims. It has been suggested on behalf of businesses that the lack of insurance coverage for environmental claims may discourage productive businesses that have a potential impact on the environment.<sup>73</sup> Insurers have suggested that coverage for environmental claims discourages any incentive to avoid losses and pollution of the environment, and may unjustifiably encourage unduly dangerous businesses.<sup>74</sup> Insurers have also argued that CGL policies were not intended to provide coverage for pollution resulting from business activities incurred in the regular course of the insured's business.<sup>75</sup>

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72. See, e.g., CAL. CIV. CODE § 2860 (West Supp. 1991) (limits rates to those actually paid by the insurer to attorneys retained by the insurer in defense of similar actions). It is presently unclear whether this provision will effect a retroactive limitation on fees.

73. Abraham, *supra* note 4, at 944-46; American States Ins. Co. v. Maryland Cas. Co., 587 F. Supp. 1549, 1553 (E.D. Mich. 1984); Waste Management of the Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374, 386 (1986)

74. See *supra* note 73. See also Autotronic Systems, Inc. v. Aetna Life & Cas. Co., 89 A.D.2d 401, 456 N.Y.S.2d 504, 505-06 (1982).

75. *Insurance Issues and Superfund, Com. on Environment and Public Works*, 99th Cong., 1st Sess. 37-42 (April, 1985) (statement of Wheeler Hess, Vice President, Travelers Ins. Co.); *id.* 154-55 (statement of Richard Schmalz, on behalf of Am. Ins. Ass'n.).

*B. Has A Claim Been Made?*

An insurance policy typically promises that the insurer will defend any "suit."<sup>76</sup> Thus, if a suit has not been brought, an insurer may not be obligated to pay attorney's fees or costs to remedy contamination.<sup>77</sup> Clean-up measures may be undertaken voluntarily in response to a request by a governmental entity for an investigation of possible contamination or in response to a threat of suit by the governmental entity to compel a clean-up<sup>78</sup>, or as the result of actual litigation. Consequently, some dispute exists whether the insured's voluntary efforts to clean up a site prior to actual litigation by the governmental entity is in response to a suit giving rise to the duty to defend.<sup>79</sup> If mitigation of damages and

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76. "[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage . . ." ISO form GL 02 02 (Ed. 1-73). A variety of sources provide a general compilation of commonly used policy forms. See INSURANCE SERVICES OFFICE, INC., PORTFOLIO OF SAMPLE FORMS (1986); INSURANCE SERVICES OFFICE, INC., SPECIAL MULTI-PERIL POLICY--COUNTRYWIDE CATEGORY FORMS INDEX (1982); NATIONAL UNDERWRITER, FC&S, THE FIRE, CASUALTY & SURETY BULLETINS, CASUALTY SURETY VOLUME (1988); MILLER & LEFEBVRE, 1 MILLER'S STANDARD INSURANCE POLICIES ANNOTATED, "POLICIES" (1986); GRIFFIN, THE UMBRELLA BOOK (1987).

77. See generally *Gibbs v. St. Paul Fire and Marine Ins. Co.*, 22 Utah 2d 263, 265, 451 P.2d 776, 778 (1969) (no duty to pay attorney fees incurred by insured where suit never filed); *Fisher v. Hartford Acc. & Indem. Co.*, 329 F.2d 352, 354 (7th Cir. 1964) (no duty to pay attorney fees incurred prior to filing suit); *Solo Cup Co. v. Federal Ins. Co.*, 619 F.2d 1178, 1188, n.7 (7th Cir. 1980) (no duty to defend and no duty to pay attorney fees in redressing administrative proposal); *Lofberg v. Aetna Cas. & Sur. Co.*, 264 Cal. App. 2d 306, 308, 70 Cal. Rptr. 269, 270 (1968) (no duty to defend before service of summons); *Marvel Heat Corp. v. Travelers Indem. Co.*, 325 Mass. 682, 685, 92 N.E.2d 233, 234 (1950) (no breach of duty to defend where insurer declined to defend prior to suit filed).

78. Typically, a government entity may offer inducements for voluntary compliance such as no obligation for pre-response administrative expenses; or in the case of multiple parties responsible for contamination, an offer of percentage responsibility for clean-up costs rather than joint and several liability for all costs.

79. See, e.g., *United States Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 590, 336 N.W.2d 838, 843 (1983) (letter requesting action equivalent to suit since mere fortuity litigation not brought); accord, *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71, 75 (E.D. Mich. 1987). See also *U.S. Fid. & Guar. Co. v. Specialty Coatings Co.*, 180 Ill. App. 3d 378, 388-89, 535 N.E.2d 1071, 1079 (1989) (institution of suit rather than letter merely fortuitous choice). But see *Maryland Cas. Co. v. Armco, Inc.*, 643 F. Supp. 430, 434 (D.Md. 1986), *aff'd*, 822 F.2d 1348, 1353 (rejecting *U.S. Aviex* holding that letter was claim giving rise to duty to defend); *Indus. Steel Container Co. v. Fireman's Fund Ins. Co.*, 399 N.W.2d 156, 160 (Minn. 1987) (summary judgment reversed and trial court directed to consider whether letter constituted claim giving rise to duty to defend); *Technicon Elect. Corp. v. Am. Home Assurance Co.* 141 A.D.2d 124, 146, 533 N.Y.S.2d

prompt funding of clean-up of contamination are viewed as the paramount policy considerations, courts may deem a letter requesting either an investigation of the clean-up, or threatening litigation, equivalent to a "suit" so as to call an insurer's defense obligation into play. Because of the conflicting decisions on this issue, it is unclear which view will ultimately be found to be the majority view.

*C. Do The Claims Represent "Damages" Or "Property Damage?"*

One of the most commonly litigated issues concerns whether clean-up costs and associated expenses constitute "damages" or "property damage" covered by a CGL insurance policy.<sup>80</sup> Insurers have filed summary adjudication motions on the ground that the pleadings filed by governmental entities seeking restitution of payments made to clean up a site or seeking to compel clean-up of the site show a prayer for relief not covered by the policy. Insureds have also filed motions on the ground that, as a matter of

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91, 105 (1988) (letter merely an invitation for voluntary action and was not a "suit").

80. The insuring agreement section of CGL policies typically states:

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

- (A) bodily injury or
- (B) property damage

to which this insurance applies caused by an occurrence.

ISO form GL 00 02 (Ed. 1-73). "Property damage" is typically defined as:

- (1) [P]hysical injury or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom;
- or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

ISO form GL 00 00 (Ed. 1-73). See generally Note, *Liability Coverage For "Damages Because Of Property Damage" Under the Comprehensive General Liability Policy*, 68 MINN. L. REV. 795 (1984) (general discussion of the evolution of the CGL policy and the definitions given to property damage); Raskoff & Zuckerman, *Legal Damages Versus Equitable Relief In California Pollution Cases: What Does the Future Hold?*, 2 CALIF. INS. LAW & REG. RPTR. 3 (1990) (general discussion of whether clean-up costs constitute damages or property damage).

law, clean-up expenses are “damages” or “property damage” covered by a CGL policy.

Insurers premise their argument from the general rule that CGL policies are intended to cover tort liability for destruction of tangible property, and not costs associated with injunctive relief or restitution.<sup>81</sup> Insurers have contended that since CERCLA and comparable state statutes<sup>82</sup> empower the governmental entity to seek to remedy contamination and distinguish between recovery of costs for clean-up of contamination and recovery for damage to natural resources,<sup>83</sup> clean-up measures are equivalent to injunctive or restitutionary relief not covered by a CGL policy.

Insureds, in response to these contentions, maintain that the insurers’ interpretations of the term “damages” rest on a hypertechnical legal interpretation not supported by a plain meaning of the term.<sup>84</sup> Insureds have also argued that clean-up

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81. See, e.g., *Aetna Cas. & Sur. Co. v. Hanna*, 224 F.2d 499, 503-04 (5th Cir. 1955) (no obligation under insurance policy to pay to remedy nuisance in response to court order); *Desrochers v. New York Cas. Co.*, 99 N.H. 129, 131, 106 A.2d 196, 198 (1954) (cost to remedy flooding nuisance not covered); *City of Thief River Falls v. United Fire & Cas. Co.*, 336 N.W.2d 274, 275-76 (Minn. 1983) (mandamus action not covered); *Bd. of Educ. v. Country Mut. Ins. Co.*, 121 Ill. App. 3d 124, 126-127, 459 N.E.2d 273, 275 (1984); *Hackenthal v. Nat'l Cas. Co.*, 189 Cal. App. 3d 1102, 1110, 234 Cal. Rptr. 853, 857 (1987) (restitutionary payments not covered) *Jaffe v. Cranford Ins. Co.*, 168 Cal. App. 3d 930, 934-35, 214 Cal. Rptr. 567, 569-70 (1985) (same); *O'Neill Investigations, Inc. v. Ill. Employers Ins. of Wausau*, 636 P.2d 1170, 1177 (Alaska 1981) *Seaboard Sur. Co. v. Ralph Williams Northwest Chrysler Plymouth, Inc.*, 81 Wash. 2d 740, 504 P.2d 1139, 1143 (1973). See generally 14 COUCH ON INSURANCE 2D at § 51.37 (1982).

82. Recently, a California court held the state may sue for damage to underground water. *Selma Pressure Treating Co. v. Osmose Wood Preserving, Inc.*, 221 Cal. App. 3d 1601, 1616-18, 271 Cal. Rptr. 596, 605-06 (1990). The court based this right either on the government's regulatory right, or on the basis the state was the owner of the waters within the state. This conclusion, which cited California Water Code section 102 as the basis for the state's ownership interest may ignore the scope of section 102, which was limited to waters flowing within watercourses. See CAL. WATER CODE § 102 (West 1971). See also *infra* note 90 (discussing ownership interest in groundwater).

83. 42 U.S.C. § 9607(a)(4)(C) (1988).

84. Insureds have generally contended that, as clean-up expenses are an obligation to pay money, coverage exists. This argument is not entirely persuasive in view of numerous cases holding certain types of damages uninsurable, regardless of the belief or expectation of the insured, and notwithstanding that the damages are a monetary obligation. For example, in California, punitive damages are uninsurable. See *City Products Corp. v. Globe Indem. Co.*, 88 Cal. App. 3d 31, 39-42, 151 Cal. Rptr. 494, 499-500 (1979). Restitutionary or injunctive relief damages are uninsurable. See *Nichols v. Great American Ins. Cos.*, 169 Cal. App. 3d 766, 775, 215 Cal. Rptr. 416, 421 (1985) (injunctive relief not covered); *Jaffe v. Cranford Ins. Co.*, 168 Cal. App. 3d 930, 934-35, 214 Cal. Rptr. 567, 569-571 (1985) (restitutionary damages not covered); *Hackenthal v. Nat'l Cas. Co.*, 189 Cal. App. 3d 1102, 1110, 234 Cal. Rptr. 853, 857 (1987) (in accord with *Jaffe*). Breach of contract

measures are incurred to mitigate damages.<sup>85</sup> A further argument advanced by insureds is that such expenses are equivalent to the cost to repair the environment to its uncontaminated state<sup>86</sup>, and are covered to the same extent that car repair costs are covered.<sup>87</sup>

Judicial decisions in the United States conflict on this issue.<sup>88</sup>

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damages are uninsurable. *See supra* note 14. Damages for mere "economic loss" are also not covered. *See Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co.*, 63 Cal. 2d 602, 606-09, 407 P.2d 868, 71-73, 47 Cal. Rptr. 564, 567-69 (1965); *Giddings v. Indus. Indem. Co.*, 112 Cal. App. 3d 213, 218-20, 169 Cal. Rptr. 278, 280-81 (1980). Additionally, damages for defective work of the insured are not covered *See St. Paul Fire & Marine Ins. Co. v. Coss*, 80 Cal. App. 3d 888, 896, 145 Cal. Rptr. 836, 841 (1978).

85. *See Globe Indem. Co. v. State of Calif.*, 43 Cal. App. 3d 745, 751-52, 118 Cal. Rptr. 75, 79-80 (1974) (expenses incurred to stop the spread of fire, which if not stopped, would have damaged other homes, were held to be covered). *Globe* is the most commonly cited case to support this assertion and it has been applied in the pollution context. *Intel Corp. v. Hartford Acc. & Indem. Co.*, 692 F. Supp. 1171, 1191 (N.D. Cal. 1988), leave to appeal granted, No. 89-15165 (9th Cir. 1989). Proceedings in *Intel* were stayed pending the resolution of the clean-up issue by the California Supreme Court in *AIU Ins. Co. v. Superior Court*.

86. *See e.g. Fed. Ins. Co. v. Susquehanna Broadcasting Co.*, 727 F. Supp. 169, 174 (M.D. Pa. 1989); *Intel Corp. v. Hartford Acc. & Indem. Co.*, 692 F. Supp. 1171, 1184 (N.D. Cal. 1988); *Aerojet-Gen. Corp. v. Superior Court*, 211 Cal. App. 3d 216, 230-31, 257 Cal. Rptr. 621, 629-30 (1989). Paradoxically, some courts have rationalized that the potential disparity between the value for the loss of the contaminated land and the cost to clean up mandates a conclusion that clean-up costs are excluded from coverage. *Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348, 1353 (4th Cir. 1987) (applying Maryland law). Recently, a California court held that the presence of contaminants supported a reduced tax valuation of the property. *Firestone Tire & Rubber Co. v. County of Monterey*, 223 Cal. App. 3d 382, 391-92, 272 Cal. Rptr. 745, 747-48 (1990). This decision will undoubtedly be claimed to support the insured's argument that clean-up costs are "damages" since the diminished value is a measure of damage to tangible property.

87. This argument ignores the fact that costs to repair a car are payments to a private party for loss and that the government might not be the owner of the contaminated property. This assertion therefore does not answer the insurer's contention that the clean-up is an equitable remedy.

88. *See, e.g., Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188, 1194 (9th Cir. 1986); *Intel Corp. v. Hartford Acc. & Indem. Corp.*, 692 F. Supp. 1171, 1187-94 (N.D. Cal. 1988); *Gloucester Tp. v. Maryland Cas. Co.*, 668 F. Supp. 394, 398-99 (D.N.J. 1987); *Aerojet-General Corp. v. Superior Court*, 211 Cal. App. 3d 216, 258 Cal. Rptr. 684 (1989); *Shell Oil Co. v. Acc. & Cas. Ins. Co. of Winterthur (Phase I)*, No. 278953, Memo of Ten. Dec., slip op. at 65-84 (San Mateo Super. Ct. July 13, 1988); *U.S. Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 589-591, 336 N.W.2d 838, 842-43 (1983); *Lansco, Inc. v. State Env. Prot. of N.J.*, 138 N.J. Super. 275, 282-84, 350 A.2d 520, 524-525 (1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (1976); *Kutsher's Country Club v. Lincoln Ins. Co.*, 119 Misc.2d 889, 891-93, 465 N.Y.S.2d 136, 139 (1983); *Evans v. Aetna Cas. & Sur. Co.*, 107 Misc. 2d 710, 712-13, 435 N.Y.S.2d 933, 935 (1981) (clean-up costs covered); *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1329 (4th Cir. 1986) (not covered on basis that cleanup costs not "property damage"); *Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979, 980-81 (4th Cir. 1988); *Continental Ins. Co. v. Northeastern Pharm. Co.*, 842 F.2d 977, 985-986 (8th Cir. 1988); *Maryland Cas. v. Armco, Inc.*, 822 F.2d 1348, 1350 (4th Cir. 1987); *Travelers Ins. Co. v. Ross Elec. of Washington*, 685 F. Supp. 742, 743 (W.D. Wash. 1988); *AIU Ins. Co. v. Superior Court*, 213 Cal. App. 3d 1219, 1234-37, 262 Cal. Rptr. 182, 191-93 (1989) (not covered on the basis

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Some courts have held that clean-up costs are covered if there is damage to property other than that owned by the insured,<sup>89</sup> and have held that, as groundwater is property owned by the state, clean-up actions represent a suit for damage to property.<sup>90</sup>

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that clean-up costs not “damages”).

89. *Broadwell Realty Servs., Inc. v. Fid. & Cas. Co. of New York*, 218 N.J. Super. 516, 525, 528 A.2d 76, 82 (1987); *Aerojet-General Corp. v. Superior Court*, 211 Cal. App. 3d 216, 231, 257 Cal. Rptr. 621, 630 (1989); *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 487, 426 N.Y.S.2d 603, 604 (1980); *Diamond Shamrock Chem. Co. v. Aetna Cas. & Sur. Co.*, 231 N.J. Super. 1, 13-15, 554 A.2d 1342, 1348-49 (1989).

90. The California Supreme Court in *AIU Ins. Co. v. Superior Court* noted that groundwater was not owned by the landowner but by the state of California, citing to California Water Code section 102. *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 817, n.6, 799 P.2d 1253, 1261, n.6, 274 Cal. Rptr. 820, 828, n.6 (1990). Although the first part of this conclusion is entirely consistent with prior judicial decisions, the second part appears to represent a significant expansion of the property of the state of California. Prior California judicial decisions have consistently held that one cannot own groundwater, but only a right to reasonable use. Under English common law, overlying landowners owned everything that lay directly below the surface of their land. Rules that applied to water running in streams were not applied to groundwater adjudication because of the belief that movement of percolating groundwater was unascertainable. In 1903, the California Supreme Court rejected the common law rule. *See Katz v. Walkinshaw*, 141 Cal. 116, 74 P. 766 (1903). The court recognized that, since groundwater was a limited resource, the rule of absolute ownership would threaten water resources of the state. In *Katz*, the California Supreme Court established the doctrine of reasonable use which limited the rights “to such amount of water as may be necessary for some useful purpose in connection with the land from which it is taken.” *Id.* at 134, 74 P. at 771. *Accord*, *Wright v. Goleta Water Dist.*, 174 Cal. App. 3d 74, 83-84, 219 Cal. Rptr. 740, 746-47 (1985). The overlying owner in California has been held to have analogous rights to those of a riparian owner. *See id.* at 85, 219 Cal. Rptr. at 748. The rights of the riparian owner are limited to the ordinary and reasonable use of the water in the stream, and do not include a proprietorship in the *corpus* of the water. *See Gould v. Eaton*, 117 Cal. 539, 542, 49 P. 577, 578 (1897). Therefore, the riparian does not “own” the water of the stream he “owns” a usufructory right, the right of reasonable use of the water on his riparian land when he needs it. *Rancho Santa Margarita v. Vail*, 11 Cal. 2d 501, 555, 81 P.2d 533, 554 (1938). The determination that California owns groundwater seems to conflict with prior decisions. Under the public trust doctrine developed relative to the right of use of navigable streams, a governmental entity was held not to “own” rights in groundwater or non-navigable streams.

There is substantial reason to conclude that the public trust doctrine does not extend to nonnavigable streams to the extent that they do not affect navigable waters. The public trust doctrine is based upon public access and usage of navigable waters and pursuant to that doctrine the public has an easement and servitude upon such waters . . . . But the public has never had a common access and usage of non-navigable waterways . . . . That navigability is the measure of the public trust doctrine is indicated in our Constitution . . . .

*Golden Feather Community Assn. v. Thermalito Irrigation Dist.*, 199 Cal. App. 3d 402, 408, 244 Cal. Rptr. 830, 833 (1988) (citations omitted).

In *National Audubon Society v. Superior Court*, the high court considered the relationship between the public trust doctrine and the appropriative water rights system in California. Although each system has the potential of occupying the entire field to the exclusion of the other, the court held the systems must accommodate each other and operate simultaneously. So construed, the state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters, and this precludes anyone from obtaining a vested right to appropriate water in a manner harmful to the interests protected by the trust.

*Id.* at 406, 244 Cal. Rptr. at 832 (citations omitted). *But see* *Locke v. Yorba Irrigation Co.*, 35 Cal. 2d 205, 211, 217 P.2d 425, 429 (1950) (the right to use water is classified as real property); *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 728, 93 P. 858, 863 (1908) (right to receive water for irrigation of land was appurtenant to the land and was real property); *Fullerton v. State Water Resources Control Bd.* 90 Cal. App. 3d 590, 598, 153 Cal. Rptr. 518, 523 (1979). Based on the decisions above, the supreme court's statement represents a substantial expansion of the state's ownership rights in groundwater. Irrespective of whether a governmental entity "owns" groundwater, groundwater quality can be regulated under the police power. The United States Supreme Court has noted that all property is held subject to the exercise of the police power of the state, which may regulate its use and enjoyment for the public benefit. *Penn. Cent. Transp. Co. v. N.Y. City*, 438 U.S. 104, 124-25 (1978). *See also* *Gin S. Chow v. Santa Barbara*, 217 Cal. 673, 702-703, 22 P.2d 5, 16-17 (1933); *People ex rel. State Water Resources Control Bd. v. Forni*, 54 Cal. App. 3d 743, 753, 126 Cal. Rptr. 851, 857 (1976). There is little doubt that the state may undertake to regulate environmental quality, notwithstanding the resulting limitation imposed on the free use of property rights. In California, the source of the state's power is clearly specified in the California Water Code, which provides, in pertinent part:

The Legislature finds and declares that the people of the state have a primary interest in the conservation, control, and utilization of water resources of the state, and that the quality of all the waters of the state shall be protected for the use and the enjoyment by the people of the state.

The Legislature further finds and declares that the activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all the demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.

The Legislature further finds and declares that the health, safety and welfare of the people of the state requires that there be a statewide program for the control of the quality of all the waters of the state; that the state must be prepared to exercise its full power and jurisdiction to protect the quality of the waters in the state from degradation originating inside or outside the boundaries of the state .

...

CAL. WATER CODE § 13000 (West 1971). Under the Porter-Cologne Water Quality Control Act, the State Regional Water Quality Control Board is designated as the state water pollution control agency. *Id.* § 13160. This board is empowered to institute legal actions to compel a clean-up of contaminated groundwater. *Id.* § 13304 (West Supp. 1991). Therefore, exercise of the right to compel clean-up may in reality be independent of the ownership of the property. As noted in detail below, the assumption of courts that the state necessarily owns groundwater appears inconsistent with the nature of water rights in California.

The California Supreme Court rendered a significant opinion on the issue of insurance coverage for clean-up costs in *AIU Insurance Co. v. Superior Court*.<sup>91</sup> The *AIU* court unanimously ruled that costs to reimburse government entities for investigation and clean-up of contamination and costs arising out of cessation of contamination, represented a suit for "damages" because of "property damage" as those standard terms were used in CGL policies.<sup>92</sup> The court rejected the assertion of insurers that CGL policies intended to cover costs to reimburse the government agencies for expenditures or recover for damage to natural resources but not to cover costs of injunctive relief; the remedies available under CERCLA<sup>93</sup> and other environmental statutes do not rest on the traditional distinction between damages and injunctive, or other equitable relief available at common law.<sup>94</sup> This distinction would exalt form over substance.<sup>95</sup> However, the court stated that injunctive costs which are prophylactic and arise in anticipation of future contamination are not incurred because of property damage and are not covered under the policy language.<sup>96</sup> The *AIU* court also rejected the insurer's assertion that allowance of recovery was not permitted because clean-up costs might exceed actual or diminished value of the property.<sup>97</sup>

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91. 51 Cal. 3d 807, 799 P.2d 1253, 274 Cal. Rptr. 820 (1990).

92. Under CERCLA and similar statutes, injunctive relief and reimbursement of response costs serve substantially the same purpose. For this reason, we find the CGL policy language is ambiguous as applied to remedial and mitigative costs incurred pursuant to injunction under CERCLA and similar statutes, and therefore must be construed in favor of coverage to satisfy the reasonable expectations of the insured.

*Id.* at 841, 799 P.2d at 1278, 274 Cal. Rptr. at 845.

93. See 42 U.S.C. § 9607(a)(4)(A)-(C) (1988) (CERCLA authorizes a suit for recovery of damage to natural resources, as well as a suit to compel clean-up of contamination).

94. *AIU Insurance Co.*, 51 Cal. 3d at 838-40, 799 P.2d at 1276-77, 274 Cal. Rptr. at 843-44.

95. *Id.* at 840, 799 P.2d at 1277, 274 Cal. Rptr. at 844.

96. "We do agree that prophylactic costs-incurred to pay for measures taken in advance of any release of hazardous waste-are not incurred 'because of property damage.' Until such damage has occurred, whether on the waste site itself or elsewhere, there can be no coverage under CGL policies." *Id.* at 843, 799 P.2d at 1279-80, 274 Cal. Rptr. at 846-47 (citations omitted).

97. *Id.* at 834, 799 P.2d at 1273, 274 Cal. Rptr. at 840.



Interpreting the language of the CGL policies, the *AIU* court rejected both the insured's and insurer's contentions that statements made in unrelated transactions or litigation, such as joint industry drafting history, were relevant in determining the meaning of the terms "damages" or "property damage."<sup>98</sup> The court reasoned that, notwithstanding the unquestioned sophistication and equal bargaining position of the insured, a "popular and ordinary" interpretation would be applied to the term "damages" in the absence of evidence that the parties intended a technical meaning to apply.<sup>99</sup> The *AIU* court held that the ordinary and popular meaning of "damages" would include any monetary obligation which the insured would be required to pay.<sup>100</sup>

*D. Are The Claims The Result Of An "Occurrence?"*

Insurance policies after 1966 typically promise to provide coverage for bodily injury or property damage caused by an "occurrence."<sup>101</sup> An occurrence is defined as "an accident, including continuous or repeated exposure to conditions, which results in damage neither expected nor intended from the standpoint of the insured."<sup>102</sup>

Two basic "occurrence" questions are commonly encountered. First, did the contamination damage occur during the insurer's policy period? Second, is the contamination "neither expected nor intended from the standpoint of the insured?"

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98. *Id.* at 823, 799 P.2d at 1265, 274 Cal. Rptr. at 832.

99. *Id.*

100. *Id.* at 825-28, 799 P.2d at 1267-68, 274 Cal. Rptr. at 834-35. The breadth of this statement may be questionable. Prior California decisions have consistently held certain monetary obligations were not covered, notwithstanding that payment would cause economic loss to the insured. *See, e.g.,* *Giddings v. Industrial Indem. Co.*, 112 Cal. App. 3d 213, 218-20, 169 Cal. Rptr. 278, 280-82 (1980) (mere economic loss not covered); *City Products Corp. v. Globe Indem. Co.*, 88 Cal. App. 3d 31, 39-42, 151 Cal. Rptr. 494, 498-506 (1979) (punitive damages not covered); *Fireman's Fund Ins. Co. v. City of Turlock*, 170 Cal. App. 3d 988, 996, 216 Cal. Rptr. 796, 800 (1985) (damages for breach of contract not covered); *St Paul Fire & Marine Ins. Co. v. Coss*, 80 Cal. App. 3d 888, 896, 145 Cal. Rptr. 836, 841 (1978) (damage to insured's own product not covered); *Jaffe v. Cranford Ins. Co.*, 168 Cal. App. 3d 930, 934-35, 214 Cal. Rptr. 567, 570-71 (1985) (restitutionary relief not covered).

101. ISO form GL 00 02 (1-73).

102. *Id.*

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### 1. What Is the Date of the Occurrence?

Considerable controversy exists over determining the date of an occurrence for a claim of contamination causing property damage.<sup>103</sup> Courts have taken various approaches to determine the date of an occurrence. Under one approach, courts look to the date of discovery of contamination or injury to determine the date of occurrence.<sup>104</sup> This theory is known as the “manifestation approach.” Insurers who contend that the date of discovery constitutes the date of loss are referred to as taking a manifestation approach to the date of loss.<sup>105</sup> Because the manifestation

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103. The use of the term “property damage” does not presume a court would find clean-up expenses to constitute “property damage.” See *supra* note 88. The term, however, is used as a rubric for addressing the issue of the date of occurrence for contamination claims involving property, as opposed to personal injury.

104. *Mraz v. Canadian Universal Ins. Co., Ltd.*, 804 F.2d 1325, 1328 (4th Cir. 1986) (contamination to property); *Eagle-Picher Inds. v. Inc. Liberty Mutual Ins. Company* 682 F.2d 12, 24 (1st Cir. 1982), *cert. denied* 460 U.S. 1028 (1983) (bodily injury). See generally *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1500-03 (S.D. N.Y. 1983), *aff’d* 788 F.2d 760 (1984).

105. Whether the manifestation approach is determinative of an insurer’s obligation in both first party and third party cases is unclear in California. Respecting first party cases, the California Supreme Court recently adopted a manifestation approach and held that the only carrier obligated to indemnify the insured was the insurer whose policy was effective at the time damage was first discovered. *Prudential LMI Comm. Ins. v. Superior Court*, 51 Cal. 3d 674, 648-700, 798 P.2d 1230, 1246-47, 274 Cal. Rptr. 387, 403-04 (1990) (hereinafter *Prudential LMI*). *Prudential LMI* concerned which of two insurers would be obligated to indemnify the insured for progressive damage to an apartment building which occurred during multiple first party policy periods. The court’s decision in *Prudential LMI* resolved questions as to the reach of an earlier Fourth District Court of Appeals decision in *Home Insurance Company v. Landmark Insurance Company*. (hereinafter *Landmark II*). The Fourth District summarized the issue presented in *Landmark II* as follows:

In *Home*, the sole issue resolved was ‘which of two first party insurers is liable for the loss from continuing property damage manifested during successive policy periods.’ Our holding was that the first insurer in that situation must pay the entire claim. In contrast, here we are presented with a case in which several predecessor insurers are sought to be held liable for progressive loss which allegedly took place in some measure during each of their policy periods. *This court in Home expressly stated that the facts then before us did not allow consideration of ‘the interesting question whether it is possible for the insured to have a covered loss when the loss is not readily observable during the period of the policy under which the insured seeks payment.’* Predictably, this interesting question has materialized in the form of this case.

effective after the date of manifestation of damages was not obligated to the policyholder. Because of these circumstances, a question was presented as to whether *Landmark II* simply stood for the proposition that an insurer was not obligated for a claim after the insured became aware of damage, or for the proposition that as respects all first party claims, the only insurer obligated was the insurer whose policies were effective at the time the damages were manifest. As earlier noted, the California Supreme Court held that the manifestation approach determines the date of loss as respects all first party policies. Whether the manifestation approach applies to third party policies is subject to conflicting decisions. In *California Union Insurance Company v. Landmark Insurance Company* (hereinafter *Landmark I*), the Second District Court of Appeal adopted a continuous occurrence approach. The court held that, with respect to continuous and progressively occurring damages over more than one policy period, both the carrier on the risk at the time the damage was occurring and the carrier on the risk at the time that the damage was discovered, were jointly and severally liable for the damage. 145 Cal. App. 3d 462, 478, 193 Cal. Rptr. 461, 471 (1983). However, in *Fireman's Fund Insurance Company v. Aetna Casualty & Surety*, the Fourth District Court of Appeal adopted the manifestation approach as determinative of an insurer's claim for contribution brought against another insurer. The court held that because the damage did not manifest during the policy period of the insurer from whom contribution was sought, that insurer was not obligated for any portion of the damages. 223 Cal. App. 3d 1621, 1627-28, 273 Cal. Rptr. 431, 433-34 (1990). The Fourth District specifically declined to follow the approach of the Second District in *Landmark I*. See also *Hancock Laboratories, Inc. v. Admiral Ins. Co.*, 777 F.2d 520, 525 (9th Cir. 1985) (declining to follow *Landmark I* because the Second District did not consider whether the damage process was continuous or the result of a single event and because the facts presented in *Hancock* concerned injuries arising from one injury producing event, the implantation of a contaminated heart valve, where the date of loss was the date of implantation). Whether *Fireman's Fund Insurance Company v. Aetna Casualty and Surety Company* authorizes an insurer to deny any obligations to an insured if the date of manifestation is not within the insurer's policy period is unclear. In *Fireman's Fund*, the Fourth District was careful to note that the insured had already been fully compensated. 223 Cal. App. 3d at 1628, 273 Cal. Rptr. at 434. It is unclear if a different result would be obtained were a claim brought by an insured against two carriers. If there is no obligation to contribute to damages as respects a contribution claim brought by an insurer, the other insurer could argue that as respects the claim brought by an insured, the same rule applies. Because of these conflicting decisions, the issue will have to be resolved at some point by the California Supreme Court. The parties in *Fireman's Fund* have not sought further review but the issue will undoubtedly be presented to the court in another proceeding. The resolution of this issue is unclear but *Fireman's Fund* would not appear to be consistent with either prior California law or underwriting intent. Moreover, it is doubtful that the California Supreme Court will be persuaded by its decision in *Prudential LMI*. The court expressly stated in *Prudential LMI* that it was not considering allocation in a toxic tort or continuous exposure context. *Prudential LMI Comm. Ins. v. Superior Court*, 51 Cal. 3d 674, 698, 798 P.2d 1230, 1246, 274 Cal. Rptr. 387, 403 (1990). Previously, the California Supreme Court carefully distinguished first party and third party coverage determination principles. As the court stated in *Garvey v. State Farm Insurance Company*, "Liability and corresponding coverage under a third party insurance policy must be carefully distinguished from the coverage analysis in a first party property contract. Property insurance, unlike liability insurance, is unconcerned with establishing negligence or otherwise assessing tort liability." 48 Cal. 3d 395, 406, 770 P.2d 704, 710, 257 Cal. Rptr. 292, 298 (1989). Moreover, first party policies clearly present a different undertaking by the insurer than third party liability policies. As one commentator has stated, "[t]he all risk policy purports to provide coverage for every physical loss, NO MATTER WHAT THE CAUSE, excepting only those causes specifically excluded under the terms of the policy." RUDY, *Concurrent Causation: Making Sense of the All Risk Policy*, *Tort and Insurance Practice Section*, ABA, *THE ALL-RISK POLICY: ITS SPECIAL PROBLEMS, PERILS, AND PRACTICAL APPLICATION*, 77 (1986). Under an all risk policy,

therefore, the insured has a much more favorable burden of proof, namely, whether a loss covered by the policy was sustained during the period of the policy. The insured is not required to go further and prove the exact nature of the accident or casualty which, in fact, occasioned his loss. See Keeton, *Insurance Law*, § 5.2, at 270-72 (1971); RUDLOFF, *Homeowners and Related Policies, California Insurance Law & Practice*, § 36.41 at 36 (1989). Last, to the extent that joint insurance organization drafting history may be deemed relevant (some carriers participated in such drafting groups but rejected the position taken by the group), it tends to reject the manifestation theory. *American Home Products v. Liberty Mutual Insurance Company* contains the most detailed citation to the Insurance Services Office (hereinafter ISO) drafting history. In rejecting a manifestation approach, the court noted the deposition testimony of members of the forms committee of the ISO's predecessor organization, the Mutual Insurance Rating Bureau. The court stated:

The CGL evolved out of the difficulties faced by courts and parties in dealing with personal injuries and property damage sustained as a result of gradual processes. Prior to 1966, general liability policies covered [injury and damages] caused by accident . . . The word 'accident' suggested an intent to cover only sudden, unexpected, but identifiable events. The courts were left in doubt as to whether, and to what extent, the standard policy was meant to cover liability for injuries that resulted from gradual processes, rather than from sudden events.

The insurance industry responded to the uncertainty created by the 'accident' orientation by establishing a task force to draft what eventually became the CGL. . . . The task force substituted the 'occurrence' approach now in the CGL . . . policies for the 'accident' approach, and it expressly provided that no occurrence included any injury or damage that resulted, not only from an accident, but also from injurious exposure over an extended period. This change adopted the result reached by courts that construed 'accident' to include injuries resulting from long-term exposures.

The new CGL failed, however to resolve definitely the time injury should be found to occur. . . . The CGL, like its predecessor, requires only that injury take place during the coverage period. But, since the injuries expressly covered under the CGL include those resulting from long-term injurious exposure, the difficulty of determining time of injury was certain to be even greater under the CGL than it had been under predecessor policies. The insurance industry task force recognized this problem from the very outset of its labors, just as courts had recognized by then that an injury could occur in scientific fact long before it became manifest. Nevertheless, the task force refused to alter the standard policy language to define precisely the time of injury; in the process, *moreover, they refused to adopt language that would have incorporated into the CGL either the manifestation or the exposure theory.*

*Substantial evidence supports the view that the CGL draftsmen rejected the manifestation theory as a limitation on coverage. One of the first drafts, prepared by the Joint Drafting Committee in 1960, 'would deem all injury to have occurred' at the time of first manifestation of damage. That draft was sent back to the Drafting Committee by the higher level Joint Rating Committee, and Mr. Schmalz [an active participant in the committee] testified without contradiction that this remand was a rejection by the task force leadership of the manifestation approach. The various committees rejected all other drafts that included a manifestation concept, they found the concept unacceptable because, among other reasons, 'it would permit a carrier to cancel following the first notice of injury and leave the insured without coverage for other injuries emerging from the same exposure,' and because in many cases injuries sufficiently serious to trigger coverage could occur prior to manifestation.*

Rejection of the manifestation approach was thus implicit in the drafters [conduct]. [The insurer] contends that the history of the CGL cannot be relied upon . . . , because material issues of fact

approach tends to minimize coverage, a court might be influenced to reject this approach.<sup>106</sup> Other courts, in determining the date of occurrence, have held that the date of conduct giving rise to claims, that is, the date of dumping, will constitute the date of loss.<sup>107</sup>

Other courts have regarded the period during which actual injury to the environment occurred as determinative of the date of loss.<sup>108</sup> This approach is referred to as the "injury in fact" theory.

Still another approach regards the date of loss as including the entire period of time from the date of conduct giving rise to the

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exist as to what the task force intended. But [the insurer] has failed to raise a material issue of fact by offering evidence to contradict the view that the CGL drafters rejected the manifestation approach.

*American Home Products v. Liberty Mutual Ins. Co.*, 565 F. Supp. 1485, 1500-02 (S.D.N.Y. 1983), *aff'd* 748 F.2d 760 (1984) (emphasis added) (citations omitted). It must be emphasized that a number of insurers did not agree with the nonmanifestation approach taken by the Joint Forms Drafting Committee. Thus, if such a position were revealed to insureds, then reliance on joint drafting history would be unwarranted. In addition, as noted by many courts, the joint drafting history is either inconclusive or irrelevant because it did not make up a part of the negotiation process between a particular insured and insurer. *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 823 n.9, 799 P.2d 1253, 1265 n.9, 274 Cal. Rptr. 820, 832 n.9 (1990).

106. See *ACandS, Inc. v. Aetna Cas. & Surety Co.*, 764 F.2d 968, 973-974 (3rd Cir. 1985); *Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1500-03 (S.D.N.Y. 1983), *aff'd*, 748 F.2d 760 (2nd Cir. 1984); *Asbestos Ins. Coverage Cases*, S.F. Super Ct., Jud. Coordin. Proc. 1072 (Phase III) (slip op. May 29, 1987), Phase V (slip op. August 29, 1988).

107. See *Wausau Ins. Co. v. Valspar Corp.*, 594 F. Supp. 269, 272-73 (N.D. Ill. 1984) (where insured could not show dumping during policy period, coverage could not exist); *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1387-90 (E.D. N.Y. 1988) (coverage did not exist where contamination did not occur during policy period because insured had shipped Agent Orange to government for use in Viet Nam and had no control after delivery).

108. See, e.g., *Ins. Co. of North America v. Forty-Eight Insulations*, 633 F.2d 1212, 1223 (6th Cir. 1980), *aff'd on reh'g*, 657 F.2d 814 (1981), *cert. denied*, 455 U.S. 1009 (1982); *Porter v. Amer. Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981) (date of loss in bodily injury cases); *U.S. v. Conservation Chem. Co.*, 653 F. Supp. 152, 197 (W.D. Mo. 1986) (date of actual damage to environment); *Centennial Ins. Co. v. Lumbermen's Mut. Cas. Co.*, 677 F. Supp. 342, 346 (E.D. Pa. 1987) (date of loss in property contamination cases).

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contamination to the date of discovery.<sup>109</sup> This approach is generally referred to as a “continuous occurrence” approach.

Date of loss determinations may also be affected by the applicable statute of limitations. Under this view, if the statute of limitations bars recovery against the insured for damage that arose during a policy period in which the insured was covered, a date of loss will not be found since the insured bears no legal liability for damages during the policy period.<sup>110</sup> Thus, the statute of limitations might play a part in determining which insurers are held liable. However, in other cases, the statute of limitations is not considered, on the basis that a showing of damage occurring during the policy period is sufficient to trigger coverage.<sup>111</sup>

### 2. *Expected or Intended?*

Disputes have arisen whether coverage exists for clean-up and related expenses on the basis that contamination is not occasioned by an “occurrence” as defined in a CGL policy.<sup>112</sup> Insurers have argued that pollution which occurs as the result of intentional dumping or which was the result of operations in the regular course of business over a period of time poses a foreseeable risk of contamination. Under this argument, an occurrence would not be

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109. See, e.g., *Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1034, 1046-47 (D.C. Cir. 1981), *cert. den.*, 455 U.S. 1007, *reh'g. den.*, *Ribotsky v. U.S.*, 456 U.S. 951 (1982) (trigger for bodily damage). *ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 764 F.2d 968, 973 (3rd Cir. 1985); *Continental Ins. Co. v. N.E. Pharm. & Chem. Co.*, 811 F.2d 1180, 1189 (8th Cir. 1987), *rev'd on other grounds*, 842 F.2d 977 (8th Cir. 1988); *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71, 76 (E.D. Mich. 1987); *Dayton Ind. Sch. Dist. v. National Gypsum Co.*, 682 F. Supp. 1402, 1403 (W.D. Tex. 1988), *vacated*, 896 F.2d 865 (5th Cir. 1989); *U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1153-54 (W.D. Mich. 1988); *Ind. Petrochem. Corp. v. Aetna Cas. & Sur. Co.*, 654 F. Supp. 1334, 1346, 1359 (D.D.C. 1986) (injury in fact theory); *Idaho v. Bunker Hill Co.*, 647 F. Supp. 1064, 1071 (Id. 1986); *Asbestos Ins. Cov. Cases*, S.F. Super. Ct., Jud. Coordin. Proc. 1072 (Phase V) (slip op. August 29, 1988); *Indus. Steel Container Co. v. Fireman's Fund Ins. Co.*, 399 N.W.2d 156, 159-160 (Minn. 1987); *Buckeye Union Ins. Co. v. Liberty Solvents and Chemicals Co.*, 17 Oh. App. 3d 127, 477 N.E.2d 1227, 1233 (1984); *Techalloy Co. v. Reliance Ins. Co.*, 338 Pa. Super. 1, 9-11, 487 A.2d 820, 823-26 (1984) (trigger for property contamination).

110. *Idaho v. Bunker Hill*, 647 F. Supp. 1064, 1070 (D. Idaho 1986).

111. See, e.g., *Garriott v. Southern Aviation Ins.*, 221 Cal. App. 3d 783, 796-97, 270 Cal. Rptr. 678, 686 (1990).

112. Some EIL policy forms do not include the term “occurrence” and thus, if an insured purchased such coverage, this concern would be eliminated.

present for such claims because the loss to the insured would be "expected or intended." Judicial decisions conflict on this issue.<sup>113</sup>

### *E. Is The Pollution Exclusion Applicable?*

Perhaps the most frequently litigated exclusion concerns the meaning of the so-called pollution exclusion clause.<sup>114</sup> This clause excludes coverage for damages caused by a wide variety of

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113. *Am. Cas. Co. v. Minn. Farm Bureau Servs. Co.*, 270 F.2d 686, 691 (8th Cir. 1959) (emission in regular course of business were not accident); *Am. States Ins. Co. v. Maryland Cas. Co.*, 587 F. Supp. 1549, 1553 (E.D. Mich. 1984) (repeated, possibly illegal, dumping not accident). *See also*, *Alcolac, Inc. v. St. Paul Fire & Marine Ins. Co.*, 716 F. Supp. 1541, 1544-45 (D. Md. 1989) (punitive damage award demonstrated occurrence not present). Where the insured has knowledge of contamination prior to the inception of policy, courts have held an occurrence is not present. *Tp. of Gloucester v. Maryland Cas. Co.*, 668 F. Supp. 394, 402-03 (D. N.J. 1987); *U.S. v. Conservation Chem. Co.*, 653 F. Supp. 152, 178-83 (W.D. Mo. 1986) (no occurrence after date government implemented clean-up proceedings); *Advanced Micro Devices, Inc. v. Great Am. Surplus Ins. Co.*, 199 Cal. App. 3d 791, 801-02, 245 Cal. Rptr. 45, 49-50 (1988). *But see* *City of Kimball v. St. Paul Fire & Marine Ins. Co.*, 190 Neb. 152, 154-62, 206 N.W.2d 632, 634-41 (1973) (contamination result of leakage in sewage lagoon "accident" where insured's inspection had not revealed holes). *See generally* *City of Aurora v. Trinity Universal Ins. Co.*, 326 F.2d 905, 906-07 (10th Cir. 1964) (back-up of sewage not "accident" where insured aware of problem in sewage system); *City of Carter Lake v. Aetna Cas. & Sur. Co.*, 604 F.2d 1052, 1058-59 (8th Cir. 1979); *Vyn v. Northwest Cas. Co.*, 47 Cal. 2d 89, 94, 301 P.2d 869, 872 (1956) (no coverage for subsidence problem known to exist prior to inception of policy); *Cametal Corp. v. Nat'l Auto. & Cas. Ins. Co.*, 189 Cal. App. 2d Supp. 831, 835-36, 11 Cal. Rptr. 280, 283 (1961) (no coverage for accident known to have occurred prior to inception); *Millard Warehouse, Inc. v. Hartford Fire Ins. Co.*, 204 Neb. 518, 530-33, 283 N.W.2d 56, 63-64 (1979) (warehouse damaged by flooding not unexpected where prior to construction expert indicated flooding possibility). The fact that the insured did not have control of, or may not have owned, the entity allegedly responsible for the contamination at the time the insurance policies were in effect has also been found not to be an occurrence under such policy. *See* *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1382-90 (E.D. N.Y. 1988) (insured did not control); *Idaho v. Bunker Hill Co.*, 647 F. Supp. 1064, 1077 (D. Idaho 1986) (at time policies were in effect, insured did not own polluting entity and did not acquire until after policies expired).

114. This insurance does not apply:

- (f) [T]o bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, 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.

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polluting activities, except those which are sudden and accidental.<sup>115</sup> Insureds who attempt to establish that costs imposed on them by a governmental entity are covered, but who have policies containing the pollution exclusion, have been confronted with addressing this controversy about the meaning of the exclusion.

A number of courts have held that the exception to the pollution exclusion is merely a restatement of the definition given to the term "occurrence," and that the word "sudden" means "unintended."<sup>116</sup> Under this view, coverage exists if the insured

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115. For a general discussion of the drafting process and various versions of the pollution exclusion, see Averback, *Comparing The Old And The New Pollution Exclusion Clauses in General Liability Insurance Policies: New Language--Same Results?*, 14 B.C. ENVTL. AFF. L.R. 601 (1987). Some newer policies include what is referred to as the "absolute" pollution exclusion. This exclusion provides typically:

This insurance does not apply to:

(1) [B]odily injury, property damage or injury or damage of any nature or any kind to persons or property arising out of the actual, alleged threatened emission, discharge, dispersal, seepage, release or escape of pollutants; (2) any loss, cost or expense incurred as a result of clean-up of pollutants; (3) the investigation, settlement or defense of any claim, suit or proceeding against the insured, including any payments, costs or expenses as described in (1) and (2) above.

Fid., Cas. & Sur. Bulletins, Public Liability, § Aa-7 (1990). Courts have upheld this exclusion. *Hydro Systems, Inc. v. Continental Ins. Co.*, 717 F. Supp. 700, 702 (C.D. Cal. 1989); *Alcolac, Inc. v. Ca. Union Ins. Co.*, 716 F. Supp. 1546, 1549 (D. Md. 1989); *Guilford Indus. v. Liberty Mut. Ins. Co.*, 688 F. Supp. 792, 795 (D. Me. 1988).

116. *U.S. Fid. & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1156-57 (W.D. Mich. 1988); *New Castle County v. Hartford Acc. & Indem. Co.*, 673 F. Supp. 1359, 1364 (D. Del. 1987); *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 203-04 (W.D. Mo. 1986); *Nat'l Grange Mut. Ins. Co. v. Continental Cas. Co.*, 650 F. Supp. 1404, 1410-12 (S.D. N.Y. 1986); *City of Northglenn v. Chevron U.S.A., Inc.*, 634 F. Supp. 217, 222 (D. Colo. 1986); *Claussen v. Aetna Cas. & Sur. Co.*, 259 Ga. 333, 380 S.E.2d 686, 690 (1989); *Kipin Indus., Inc. v. Am. Universal Ins. Co.*, 41 Oh. App. 3d 228, 231-32, 535 N.E.2d 334, 338-39 (1987); *C.H. Heist Caribe Corp. v. Am. Home Ins. Co.*, 640 F.2d 479, 483 (3d Cir. 1981); *Nat'l Grange Mut. Ins. Co. v. Continental Cas. Ins. Co.*, 650 F. Supp. 1404, 1411 (S.D. N.Y. 1986); *Sellers v. Seligman*, 463 So. 2d 697, 702 (La. App. 1985); *Shapiro v. Pub. Servs. Mut. Ins. Co.*, 19 Mass. App. 648, 650-53, 477 N.E.2d 146, 149-50 (1985); *Jonesville Prods., Inc. v. Transamerica Ins. Group*, 156 Mich. App. 508, 512-513, 402 N.W.2d 46, 48 (1986); *Jackson Tp. v. Hartford Acc. & Indem. Co.*, 186 N.J. Super. 156, 165, 451 A.2d 990, 994 (1982); *CPS Chem. Co. v. Continental Ins. Co.*, 199 N.J. Super. 558, 489 A.2d 1265, 1270 (N.J. 1984), reversed 489 A.2d 886 (1984); *Reliance Ins. Co. of Illinois v. Martin*, 126 Ill. App. 3d 94, 97-98, 467 N.E.2d 287 (1984); *Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co.*, 17 Oh. App. 3d 127, 477 N.E.2d 1227, 1234-1235 (1984); *United Pac. Ins. Co. v. Van's Westlake Union*, 34 Wash. App. 708, 714-715, 664 P.2d 1262, 1266 (Wash. 1983); *Lansco, Inc. v. Dept. of*



does not intend to cause damage. Other courts have reasoned that the word "sudden" has a temporal connotation, and if pollution is shown to have occurred over a period of time, damages are not covered.<sup>117</sup> Some courts have refused to apply the exception in cases where the insured was not an active polluter but was merely a generator of wastes shipped to a site by a third party.<sup>118</sup>

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Envtl. Protection, 138 N.J.Super. 275, 282, 350 A.2d 520, 524 (1975), *aff'd*, 145 N.J. Super. 433, 435, 368 A.2d 363, 364 (1976). *See also* Benedictine Sisters v. St. Paul Marine & Fire Ins. Co., 815 F.2d 1209, 1211 (8th Cir. 1987) (look to insured's intent at time of discharge).

117. U.S. Fid. & Guar. Co. v. Murray Ohio Mfg. Co., 693 F. Supp. 617, 620-21 (N.D. Tenn. 1988), *aff'd*, 875 F.2d 868 (1989); U.S. Fid. & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31, 34-35 (6th Cir. 1988); Great Lakes Container Corp. v. Nat'l Union Fire Ins. Co., 727 F.2d 30, 33-34 (1st Cir. 1984); Hayes v. Maryland Cas. Co., 688 F. Supp. 1513, 1515 (N.D. Fla. 1988); Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 702 F. Supp. 1317, 1325 (E.D. Mich. 1988); Am. Mut. Liab. Ins. Co. v. Neville Chem. Co., 650 F. Supp. 929, 933 (W.D. Pa. 1987); Am. States Ins. Co. v. Maryland Cas. Co., 587 F. Supp. 1549, 1553-54 (E.D. Mich. 1984); Claussen v. Aetna Cas. & Sur. Co., 676 F. Supp. 1571, 1578 (S.D. Ga. 1987), *vacated* and certified question sent to Georgia Supreme Court, 865 F.2d 1217 (11th Cir. 1987), 259 Ga. 333, 380 S.E.2d 686, 690 (Ga. 1989) (Georgia Supreme Court rejected district court determination); Barmet of Indiana, Inc. v. Security Ins. Group, 425 N.E.2d 201, 203 (Ind. App. 1981); Waste Management of the Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 698-701, 340 S.E.2d 374, 389 (1986); Transamerica Ins. Co. v. Sunnes, 77 Or. App. 136, 139-41, 711 P.2d 212, 213-14 (1985); Techalloy Co. v. Reliance Ins. Co., 338 Pa. Super. 1, 12-15, 487 A.2d 820, 826-27 (1984). Currently, resolution of this issue is unclear in California. In one trial court decision, the word "sudden" in a similarly worded exclusion was held to have a temporal connotation. Shell Oil Co. v. Acc. & Cas. Co. of Winterthur (Phase I), No. 278953, slip. op. at 36-43 (San Mateo Sup. Ct. July 28, 1989).

118. City of Northglenn v. Chevron U.S.A., 634 F. Supp. 217, 221 (D. Colo. 1986); Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co., 347 So. 2d 95, 99 (Ala. 1977); U.S. Fid. & Guar. Co. v. Specialty Coatings Co., 180 Ill. App. 3d 378, 384-88, 535 N.E.2d 1071, 1075-76 (1989); Autotronic Systems, Inc. v. Aetna Life & Cas. Co., 89 A.D.2d 401, 403, 456 N.Y.S.2d 504, 506 (1982); Niagara County v. Utica Mut. Ins. Co., 103 Misc. 2d 814, 818, 427 N.Y.S.2d 171, 174 (1980); United Pac. Ins. Co. v. Van's Westlake Union, 34 Wash. App. 708, 714-15, 664 P.2d 1257, 1265-66 (1983). *See also* Am. Universal Ins. Co. v. Whitewood Custom Treaters, Inc., 707 F. Supp. 1140, 1146 (D.S.D. 1989) (*dicta* stating rule); Grand Trunk W. R.R. Co., 683 F. Supp. 1139, 1161 (W.D. Mich. 1988); Pepper's Steel & Alloys, Inc. v. U.S. Fid. & Guar. Co., 668 F. Supp. 1541, 1548-49 (S.D. Fla. 1987); Transamerica Ins. Co. v. Sunnes, 77 Or. App. 136, 711 P.2d 212, 214 (1985). *But see* Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 702 F. Supp. 1317, 1322-25 (E.D. Mich. 1988) (rejecting application of distinction); U.S. Fid. & Guar. Co. v. Murray Ohio Mfg. Co., 693 F. Supp. 617, 621 (M.D. Tenn. 1988) (only lawyer's ingenuity could make term "sudden," ambiguous); Am. Motorists Ins. Co. v. General Host Corp., 667 F. Supp. 1423, 1429-30 (D. Kan. 1987) (common understanding of "sudden" not consistent with event occurring gradually over period of time).

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### F. Is The Premises Alienated Exclusion Applicable?

The premises alienated exclusion<sup>119</sup> was designed to exclude coverage for damage to property sold by the insured.<sup>120</sup> Where contamination has been found on property sold by the insured, the insurer may assert the premises alienated exclusion as a basis for the lack of coverage.<sup>121</sup>

### G. Is The Owned Property Exclusion Applicable?

Generally, a liability policy does not cover damages that the insured sustains to the insured's own property. Thus, where the damage is confined only to property owned by the insured, coverage may not exist. Some courts have stated that the owned property exclusion is evidence of this intent.<sup>122</sup> If the contaminated property was owned by the insured, the insured may wish to consider the application of first party coverage to a claim for property damage.

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119. The premises alienated exclusion provides: "[This insurance does not apply] (l) to property damage to premises alienated by the named insured arising out of such premises or any part thereof." ISO form GL 02 02 (ed. 1-73).

120. *Taylor-Morley-Simon, Inc. v. Michigan Mut. Ins. Co.*, 645 F. Supp. 596, 598-600 (E.D. Mo. 1986) (does not exclude damage for personal injury or for property damage to other premises which arise out of alienated premises); *Wilmington Island Constr. Co. v. Cincinnati Ins. Co.*, 179 Ga. App. 477, 347 S.E.2d 308, 309-10 (1986) (no coverage for property damage occurring after insured sold premises to injured party).

121. See *Borden, Inc. v. Affiliated FM Ins. Co.*, 682 F. Supp. 927, 930 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir. 1989) (exclusion clear and applies to property sold by insured); *Diamond Shamrock Chem. Co. v. Aetna Cas. & Sur. Co.*, 231 N.J. Super. 1, 11-15, 554 A.2d 1342, 1347 (1989) (holding exclusion applies to preclude coverage for claims of contamination to insured's property); *Unigard Mut. Ins. Co. v. McCarty's Inc.*, No. 83-1441 slip op. (D. Idaho July 22, 1988) (quoted in *Mealy's Lit. Reports*) (where contamination to other property, exclusion inapplicable).

122. See *Patrick v. Head of Lakes Coop. Elec. Ass'n*, 98 Wis. 2d 66, 70, 295 N.W.2d 205, 208 (1980) (purpose of exclusion to avoid coverage for claims which should be covered under different lines of insurance, that is, products or first-party coverage); *Aerojet General Corp. v. Superior Court*, 211 Cal. App. 3d 216, 237-38, 258 Cal. Rptr. 684, 685-86 (1989); *Summit Assocs., Inc. v. Liberty Mut. Fire Ins. Co.*, 229 N.J. 56, 66, 550 A.2d 1235, 1239-40 (1988); *Broadwell Realty Servs., Inc. v. Fidel. & Cas. Co.*, 218 N.J. Super. 516, 528-29, 528 A.2d 76, 82 (1988).

## *H. Is The Products Exclusion Applicable?*

CGL policies generally exclude coverage for damage to the insured's work or products.<sup>123</sup> Insurers may contend coverage is excluded because waste is allegedly a product of the insured's business operations. A number of courts have rejected this contention.<sup>124</sup>

### *I. Is The Completed Operations Hazard Exclusion Applicable?*

Certain CGL policies include what is called "broad form" coverage. Two different versions of this coverage part have been drafted, those including completed operations and those excluding liability for completed operations. Basically, completed operations coverage is designed to cover tort liabilities that arise *after* the insured completes operations at a particular location. This coverage is intended to provide the same protection to construction and service companies that products liability coverage provides to companies dealing in goods: Protection against tort liability arising

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123. These policies typically do not apply:

(k) to property damage to

(1) property owned or occupied by or rented to the insured;

(2) property used by the insured;

(3) property in the care, custody, or control of the insured or as to which the insured is exercising physical control . . .

(m) to loss of use of tangible property which has not been physically injured or destroyed resulting from . . .

(2) the failure of the named insured's products or work performed by or on behalf of the named insured to meet the level of performance, quality, fitness, or durability warranted or represented by the named insured.

(n) to property damage to the named insured's products arising out of such products or any part of such products.

(o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof or out of materials, parts or equipment furnished in connection therewith.

ISO form GL 00 02 (Ed. 1-73).

124. *Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co.*, 17 Oh. App. 3d 127, 477 N.E.2d 1227, 1235-36 (1984). *See Steyer v. Westvaco Corp.*, 450 F. Supp. 384, 392-94 (D. Md. 1978) (products coverage did not apply to damage caused by airborne emissions since pollutants were not a product).

from the services, materials, or structures which are placed in the marketplace.<sup>125</sup> The most common example is that of a general contractor who completes work on a structure, and then, after the general contractor's operations have been completed, an injury occurs by reason of defective work.

In the pollution coverage context, if contamination arises after the insured completes operations at a location the completed operations exclusion may be asserted by the insurer. Generally, unless the contamination arose from the nature of the insured's product which was offered for sale, this exclusion has been held inapplicable.<sup>126</sup>

## V. TACTICAL CONSIDERATIONS

### A. Response To Reservation Of Rights

In California, the supreme court has held that a reservation of rights may be accomplished by an "adequate" reservation of rights.<sup>127</sup> Some insureds have successfully maintained that in order to be valid, a reservation of rights must be bilateral.<sup>128</sup> Some question exists whether this contention will be upheld.<sup>129</sup>

Where the insurer reserves the right to seek reimbursement of defense costs, some insureds have maintained that, since the insurer's obligation under most policies is to defend all potentially covered claims whether groundless, false or fraudulent, an insurer

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125. See CALIF. INS. LAW & PRAC., § 47.06 at 47-22 to 47-25 (1989); Fid., Cas. & Sur. Bulletins, Public Liability § Epb 7--9 (8/82); *id.* §§ Pr, Pre (2/89); Annot., 58 A.L.R.3d 12 (1974).

126. See *Kipin Industries, Inc. v. American Universal Ins. Co.*, 41 Ohio App. 3d 228, 535 N.E.2d 334, 338 (1987); *Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co., Inc.* 17 Ohio App. 3d 127, 477 N.E.2d 1227, 1235-37 (1984).

127. *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 279, 419 P.2d 168, 178, 54 Cal. Rptr. 104, 114 (1966).

128. See *supra* note 68.

129. Recently, an insurer was held to be entitled to settle a case over the objection of the insured and still seek reimbursement. *Maryland Cas. Co. v. Imperial Contracting Co.*, 212 Cal. App. 3d 712, 714-22, 260 Cal. Rptr. 797, 803 (1989). *Imperial Contracting* might support an argument that a defense could be furnished pursuant to a unilateral reservation of rights over the objection of the insured. See also *Johansen v. Calif. State Auto. Ass'n Inter-Ins. Bureau*, 15 Cal. 3d 9, 18, 538 P.2d 744, 750, 123 Cal. Rptr. 288, 294 (1975).

may not reserve the right to seek reimbursement of defense costs.<sup>130</sup> The insurers can be expected to argue that the groundless, false or fraudulent clause only applies to claims that might be potentially covered; thus, a reservation of right to seek reimbursement of defense costs does not contravene any right enjoyed under the insurance policy. Judicial decisions conflict on this issue.<sup>131</sup>

### *B. Waiver Of Coverage Defenses*

The issuance of a reservation of rights letter generally limits the insurer to those coverage defenses stated in the original letter.<sup>132</sup>

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130. The majority view appears to be that a reservation of right to seek reimbursement need not be by bilateral agreement, but merely by communication of the insurer's intent to reserve the right to seek reimbursement. *See* Walbrook Ins. Co. v. Goshgarian & Goshgarian, 726 F. Supp. 777, 782-83 (C.D. Cal. 1989); Omaha Indem. Ins. Co. v. Cardon Oil Co., 687 F. Supp. 502, 504-05 (N.D. Cal. 1988). The minority view is that a reservation of rights on this ground must be pursuant to a bilateral agreement. *Reliance Ins. Co. v. Alan*, 222 Cal. App. 3d 702, 708-10, 272 Cal. Rptr. 65, 69-70 (1990).

131. *See generally*, 7C APPELMAN, INS. LAW & PRAC., § 4694, at 336 (1979), at 55 (1990 Supp.) *See also* St. Paul Mercury Ins. Co. v. Ralee Eng'g Co., 804 F.2d 520, 522 (9th Cir. 1987) (applying California law) (an understanding or expression of intent to reserve right is required to preserve right to seek reimbursement of defense costs); *Travelers Ins. Co. v. Leshner*, 187 Cal. App. 3d 169, 203-04, 231 Cal. Rptr. 791, 809-10 (1986) (where letter did not reserve right to seek reimbursement, insurer could not seek reimbursement); *Omaha Indem. Co. v. Cardon*, 687 F. Supp. 502, 504-05 (N.D. Cal. 1988) (reservation of rights letter which indicated intent to seek reimbursement sufficient to preserve right); *Western Employers Ins. Co. v. Arciero & Sons*, 146 Cal. App. 3d 1027, 194 Cal. Rptr. 688, (1983) (right to seek reimbursement of defense costs upheld without question of reservation of right); *Safeco Title Ins. Co. v. Moskopoulos*, 116 Cal. App. 3d 658, 172 Cal. Rptr. 248 (1981). *Compare id with Sneed v. Concord Ins. Co.*, 98 N.J. Super. 306, 237 A.2d 289, 293 (1967) (reservation of rights letter stating intent to seek reimbursement insufficient)

132. A statement of the confusion surrounding the use of terms waiver and estoppel has been succinctly stated by one court:

As pointed out by Professor Langmaid . . . insurance cases have used the terms waiver and estoppel with less distinction than one would expect. He quotes Judge Cuthbert Pound . . . as follows:

The tendency on the part of the courts to treat insurance contracts as standing in a class by themselves and to protect against forfeitures invoked in defense of honest claims has led to much subtlety. As Professor Woodruff says "What do they know about the law of the insurance contract who only the law of contract know? . . .

While estoppel is a slippery enough term under ordinary circumstances, being frequently employed indifferently to cover estoppel by misrepresentation and

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Thus, if an insurer fails to state certain grounds as possible bases for the lack of coverage, and undertakes the defense or causes the insured to detrimentally rely on the insurer, a waiver of such grounds may be found.<sup>133</sup> Consequently, the reservation of rights letter should be reviewed carefully to determine what bases have been asserted and which possible grounds have not been asserted.

### C. Entry Into Defense Funding Agreement

In entering into a defense funding agreement, the insured should consider whether entry into this type of agreement will enable the insured to obtain a prompt defense. Thus, the insured will want to consider whether the insurer's demands that the insured participate

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promissory estoppel, it is found to the insurance cases to take on an even more enlarged meaning and to be inextricably interwoven with waiver. The two terms are frequently used synonymously.

*Grantham v. State Farm Mut. Auto. Ins. Co.*, 126 Cal. App. 2d. Supp. 855, 858-59, 272 P.2d 959, 961 (1954) (citations omitted). Moreover, another court has stated:

To find equitable estoppel, one must show: (1) [t]hat the person to be estopped had knowledge of the true facts; (2) that action on his part intended or reasonably interpreted as intended to be acted upon by the party asserting the estoppel; (3) that the one asserting the estoppel was ignorant of the true facts; and (4) that there was detrimental reliance on the estopped person's conduct.

*Miller v. Elite Insurance Company*, 100 Cal. App. 3d 739, 754, 161 Cal. Rptr. 322, 330 (1980). *Accord*, *Kinnison v. Guaranty Liquidating Corp.*, 18 Cal. 2d 256, 264-265, 115 P.2d 450, 454-55 (1941); *Rheem Mfg. Co. v. United States*, 57 Cal. 2d 621, 626, 371 P.2d 578, 583, 21 Cal. Rptr. 802, 805 (1962). Where detrimental reliance has not been demonstrated, estoppel or waiver cannot be found. *See, e.g.*, *Hartford Fire Ins. Co. v. Spartan Realty International, Inc.*, 196 Cal. App. 3d 1320, 1326-28, 242 Cal. Rptr. 462, 465-66 (1987) (waiver or estoppel not present because no detrimental reliance and excess insurer's obligations had not been called into play).

133. *See, e.g.*, *Miller v. Elite Ins. Co.*, 100 Cal. App. 3d 739, 755, 161 Cal. Rptr. 322, 331 (1980). *See also* *Intel Corp. v. Hartford Acc. & Indem. Co.* 692 F. Supp. 1171, 1179-80 (N.D. Cal. 1988); *Maryland Cas. Co. v. Peppers*, 64 Ill. 2d 187, 195, 355 N.E.2d 24, 29 (1976). An insurer may also be found to have waived the right to seek reimbursement of defense costs if such is not stated in the reservation of rights letter. *See* *St. Paul Mercury Ins. Co. v. Ralee Engineering Co.*, 804 F.2d 520, 522 (9th Cir. 1986); *Johansen v. California State Automobile Association Inter-Insurance Bureau*, 15 Cal. 3d 9, 19, 538 P.2d 744, 750, 123 Cal. Rptr. 288, 294 (1975) (reservation of right to seek reimbursement of settlement amounts); *but cf.* *Maryland Cas. Co. v. Imperial Contracting Co.*, 212 Cal. App. 3d 712, 721-22, 260 Cal. Rptr. 797, 804 (1989) (insurer who effected settlement under reservation of right over insured's objection and brought claim for reimbursement was subject to defense by insured that no liability or damages exist).

by paying a share of defense costs will enable the majority of the costs to be paid. If payments are made under these circumstances, the funding agreement should reserve the right to seek reimbursement in the event any party is found to be not obligated to pay defense costs.<sup>134</sup> If an agreement between the insured and insurers cannot be obtained and a potential for coverage has been clearly demonstrated or is clearly absent, declaratory relief actions may be instituted. Both insurers and insureds have attempted to resolve these issues by motions for summary adjudication.

#### *D. Appointment Of Counsel*

Because of the insurer's potential objections to coverage, particular attention should be devoted to selecting counsel who is both competent and a specialist in environmental matters. Because of the complexity of environmental coverage issues, in cases of substantial magnitude, the insured should also consider appointing counsel who specializes in environmental matters. If counsel has been designated pursuant to agreement, or has been provided by the insurer, the insured may be required to retain separate counsel to address coverage issues on its behalf.

#### *E. Interpretation Of Policy Provisions*

An initial question arises as to the presumptions to be applied when interpreting ambiguous insurance policy provisions. As a general rule, insurance policies are referred to as contracts of adhesion and are interpreted against the insurer and in favor of coverage.<sup>135</sup> Insurers often contend that this presumption is inapplicable if an insured is sophisticated and employs specialized brokers or insurance consultants, or if the insured participates in the

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134. This position would seem to preserve all parties' rights and comports with those decisions holding the right to seek reimbursement must be by bilateral agreement. *See supra* note 130.

135. *See Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 270, 419 P.2d 168, 171, 54 Cal. Rptr. 104, 107 (1966).

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drafting of insurance policy provisions.<sup>136</sup> Insureds respond that their sophistication or size is no reason to afford them less coverage than would otherwise be provided.

The standardization of policy provisions may be urged as a basis to hold insurers to the views expressed by joint insurer drafting organizations such as the Insurance Services Office (hereinafter ISO). It should be emphasized that the ISO drafted forms for numerous types of coverage, that acceptance of such forms was voluntary, and the records kept by this organization are extremely voluminous.

Insurers can be expected to argue that absent a showing of actual participation in drafting, ISO documents are irrelevant because of their merely advisory function. Insureds contend that evidence of the intent of the drafters when formulating provisions identical to those contained in a particular insurer's policy may be relevant in determining the intent of the provision contained in the insurance policy. Some trial courts, faced with these voluminous ISO materials, have simply referred to them as "inconclusive."<sup>137</sup>

### F. Carriers Without Pollution Exclusions

Insurance policies issued prior to the early 1970s may not include a pollution exclusion. If contamination-producing events

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136. In *AIU*, the California Supreme Court rejected the insurer's assertions that, absent evidence that the insured did negotiate any policy terms, the policy should be interpreted in view of normal interpretational rules, notwithstanding the insured's unquestioned sophistication and equal bargaining power. *AIU v. Superior Court*, 51 Cal. 3d 807, 823, n.9, 799 P.2d 1253, 1265, n.9, 274 Cal. Rptr. 820, 832, n.9 (1990). Furthermore, the court held that absent evidence that the parties intended specialized meaning to apply, the "popular and ordinary" meaning of the terms at issue would apply. *Id.* at 822-23, 799 P.2d at 1264-65, 274 Cal. Rptr. at 831-32. See, e.g., *Schering Corp. v. Home Ins. Co.*, 714 F.2d 4, 9 n.2 (2nd Cir. 1983); *Garcia v. Truck Ins. Exch.*, 36 Cal.3d 426, 438, 682 P.2d 1100, 1105-06, 204 Cal. Rptr. 435, 440-41 (1984); *Fireman's Fund Ins. Co. v. Fibreboard Corp.*, 182 Cal. App. 3d 462, 467, 227 Cal. Rptr. 203, 206 (1986); *Town of Epping v. St. Paul Fire & Marine Ins. Co.*, 444 A.2d 496, 499 (N.H. 1982); *Sturgis Nat'l Bank v. Maryland Cas. Co.*, 252 Mich. 426, 233 N.W. 367, 369 (1930).

137. See e.g. *Asbestos Ins. Cov. Cases*, Jud. Coordin. Proc. 1072 (Phase IV), slip op. at 33-40 (S.F. Super. Ct. May 29, 1990); *Purex Industries, Inc. v. Leslie Walpole Proctor*, No. 446 935 (L.A. Super. Ct.) (op. on vacating prior summary adjudication); *Protective Nat'l v. Union Oil Co.*, (no. C 514 463) (L.A. Super. Ct.) (order denying motion for reconsideration).



occurred prior to the introduction of the pollution exclusion, these policies may ultimately cover environmental claims in the absence of other coverage defenses.<sup>138</sup> Some courts have reasoned that if events resulting in damage start during one policy period, the insurer of this policy is liable for all damage ultimately sustained as the result of this process, even if the damage is not finalized until after the expiration of the insurance policy.<sup>139</sup> As such, if the insured acted to cause contamination during a policy that subsequently expired, coverage may be found to exist under that policy. Consequently, an insured may wish to determine whether contamination-producing events occurred in periods when insurance policies did not have pollution exclusions.

### *G. Is Damage During The Policy Period Necessary?*

As noted above, insurers may contend that, in the absence of evidence of conduct by the insured and contamination occurring during the policy period, the insurer's duties to defend and indemnify cannot arise.<sup>140</sup> Therefore, the insured should make every effort to determine which conduct occurred during a particular policy period when making demands against insurers.

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138. This is under the principle of joint and several liability. See *Fed. Ins. Co. v. Susquehanna Broadcasting Co.*, 727 F. Supp. 169, 174 (M.D. Pa. 1989) (policies without pollution exclusion jointly and severally liable for entirety of contamination related expenses). Some courts have held that holding an insurer responsible for damages which occurred outside the insurer's policy period is inconsistent with the insuring agreement which conditions payment, through the definition of property damage, on damage occurring within the policy period. See *Ins. Co. of North America v. Forty-Eight Insulations, Inc.*, 451 F. Supp. 1230 (E.D.Mich. 1978), *aff'd in part*, 633 F.2d 1212, 1224-25 (6th Cir. 1980) (liability is individual and proportionate for that damage demonstrated to have occurred during policy period), modified, 657 F.2d 814, *cert. denied*, 455 U.S. 1009 (1981); *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71, 75-76 (E.D.Mich. 1987) (same); *Gruol Construction v. Ins. Co. of North America*, 11 Wash.App. 632, 524 P.2d 427, 430-31 (1974) (insurer not liable for damage proven to have occurred in other policy periods).

139. See, e.g. *Sylla v. United States Fid. & Guar. Co.*, 54 Cal. App. 3d 895, 900-01, 127 Cal. Rptr. 38, 40 (1976); *Snapp v. State Farm Fire & Cas. Co.*, 206 Cal. App. 2d 827, 831, 24 Cal. Rptr. 44, 46 (1962).

140. *Wausau Ins. Co. v. Valspar Corp.*, 594 F. Supp. 269, 272 (N.D. Ill. 1988); *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1387-90 (E.D. N.Y. 1988).

### H. Number Of Occurrences

If aggregate provisions are not included, most CGL policies determine the limits available by the number of occurrences.<sup>141</sup> Insurance policies typically provide that continuous exposure to ongoing or similar conditions shall constitute one occurrence. Thus, if more than one occurrence is present, more than one set of limits may be available. However, CGL policies generally provide that damages arising out of continuous or repeated exposure to substantially the same conditions shall be considered as arising out of one occurrence.<sup>142</sup>

Dumping of contaminants over a period of time presents an issue as to the number of occurrences represented by such conduct. Where contamination is the result of a single instantaneous event, courts have little difficulty concluding that this event constitutes a single occurrence. In view of the occurrence definition, contamination caused by repeated conditions over a period of time may also be argued to constitute only a single occurrence. However, where contamination is the result of business practices over a period of time, or shipments on various dates, and a combination of other events, an insured may wish to contend multiple occurrences are present because doing so may increase the

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141. The CGL policy typically provides:

[T]he total liability of the company for all damages because of all property damages sustained by one or more persons or organizations as the result of any one occurrence shall not exceed the limit of property damage liability stated in the declarations as applicable to each occurrence.

ISO form GL 00 02 (1-73).

142. The CGL language provides:

[F]or the purpose of determining the limit of the company's liability, all bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence.

ISO form GL 00 02 (1-73).

policy limits applicable to the claim.<sup>143</sup> Contentions regarding the number of occurrences may have the consequence of requiring multiple payments under primary insurance policies before excess insurance is called into play. The insured may want to establish a position on what constitutes the date of loss, since taking a position would have the consequence of specifying the involved insurers in the coverage dispute.

### *I. Stacking Of Policy Limits*

Closely allied to determining the number of occurrences, the issue of computing policy limits when an insurer issues policies in effect for a multiple year period, involves resolving whether the limits are computed on the basis of number of years of coverage, or only on the basis of the number of occurrences presented.<sup>144</sup> Obviously, it is in the insurer's best interest to contend that only a single policy limit is applicable.

### *J. Applicability Of Personal Injury Or Broad Form Coverage*

Another possible argument for coverage can be made if the insurance policy contains what is referred as "broad form" or "personal injury"<sup>145</sup> coverage parts. This coverage provision may

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143. See generally *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1501-03 (S.D. N.Y. 1983), *aff'd*, 748 F.2d 760 (2nd Cir. 1984) (court held intent of ISO drafters was not to follow manifestation approach and therefore possible where damage occurred in multiple policy periods all periods would be involved); *Am. Motorists Ins. Co. v. Levelor Lorentzen, Inc.*, 57 U.S.L.W. 2270, 1988 WL 112142 (D.N.J. 1988) (rejected application to property damage claims).

144. See generally *Asbestos Ins. Coverage Cases*, Jud. Coordin. Proc., 1072 (Phase IV), slip op. at 21-22 (S.F. Super. Ct. Aug 28, 1988). Compare *Am. Home Prods. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1510-11 (1983) (holding ISO CGL underwriters intent was to permit stacking where injury occurred in multiple periods) and *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1049 (D.C. Cir. 1981) (only one policy could apply per claim) with *Chicago Ins. Co. v. Pac. Indem. Co.*, 566 F. Supp. 954, 956 (E.D. Pa. 1982) (where single injury, limits would not be stacked).

145. The term "personal injury" is a term of art, and has a specialized meaning defined by the insurance policy which is different than the term "[B]odily injury." This term is specified in the Broad Form General Liability Endorsement. The insuring agreement section provides: "The company will pay on behalf of the *Insured* all sums which the insured shall become legally obligated to pay as damages because of *personal injury* or *advertising injury* to which this insurance applies." ISO form GL 04 04 (5-81) A typical provision defining "personal injury" states that:

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be potentially applicable when damages are claimed on the basis of trespass, or where contamination interferes with the right of occupancy of premises. One major distinction between “personal injury” and the standard liability provision covering damages because of property damage or bodily injury is that damages need not be caused by an “occurrence.” In addition, some insureds have maintained that the policy exclusions for pollution contained in the general liability coverage provision do not apply to the provision for personal injury coverage. However, a number of courts have rejected this contention.<sup>146</sup>

### K. Settlement Of Environmental Claims

Generally, the longer that environmental proceedings are drawn out and the more that clean-up measures are delayed, the more expensive clean-up measures may become. Because of these factors, the business should consider the feasibility of essentially fixing the loss, by agreeing to fund the clean-up at a specified figure or percentage of projected exposure and then litigating the coverage issues at a subsequent date.

The extent to which the business may be ultimately liable, either because of uncertainties as to liability or ultimate clean-up cost, may make this type of funding agreement impossible. Under such circumstances, some insureds have contended that ongoing declaratory relief proceedings should be stayed. Insureds have also

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*personal injury* means injury which arises out of one or more of the following offenses committed in the conduct of the *named insured's* business:

- (a) false arrest, detention or imprisonment, or malicious prosecution;
- (b) the publication or utterance of a libel or slander or of other defamatory or disparaging material, or a publication or utterance in violation of an individual's right of privacy, except publications or utterances in the course of or related to advertising, broadcasting or telecasting activities conducted by or on behalf of the *named insured*;
- (c) wrongful entry or eviction, or other invasion of the right of private occupancy

*Id.* In contrast the definition of “bodily injury” states that: “*bodily injury* means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.” *Id.*

146. See *American Universal Ins. Co. v. Whitewood Custom Theaters, Inc.*, 707 F. Supp. 1140, 1147-48 (D.S.D. 1989); *Jones v. Farm Bureau Mut. Ins. Co.*, 172 Mich. App. 24, 431 N.W.2d 242, 244-45 (1988).

contended that a declaratory relief action should be stayed if continuing discovery in the proceeding might establish facts that give rise to further liability on the part of the governmental entities. Parties who favor disclosure can be expected to argue for protective limitations on information rather than outright stays of declaratory relief proceedings, particularly when an insurer is asked to defend during the pendency of a stay and is thereby precluded from obtaining a resolution of the coverage controversy. Under these circumstances, some insureds have been asked to absorb the defense costs during this interim period, or have caused insurers to bear such costs without the ability to litigate whether the claim is in fact excluded from coverage. Other insureds have worked out a new funding agreement to cover responsibilities for fees during the stay period.

Insureds have agreed to accept payment of either all or a portion of policy limits on a loan receipt<sup>147</sup> or a "buy-back" of the insurer's responsibilities. Factors considered when reaching this agreement include the likelihood of other claims, the presence of aggregate limits, and the probability of successfully obtaining coverage under the policy. Where a loan receipt agreement is reached, the insured will generally still preserve claims against nonparticipating insurers. Where coverage disputes exist and the insurer has a uniform position on issues that relate to all environmental claims,<sup>148</sup> an insurer may be able to make a settlement without compromising its position.

## VI. CURRENT PROSPECTS FOR DISPUTE RESOLUTION

Because of the numerous issues arising over coverage for environmental claims, litigation of these issues is likely to be costly

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147. Under a loan receipt agreement, an insurer will typically loan the insured needed funds. The necessity for such an agreement may arise when certain insurers refuse to participate in a defense or funding of a settlement of clean-up actions. The agreement can provide that the insurer will participate in the prosecution of an action against other insurers, or payment of the funds loaned will occur out of proceeds of actions brought against nonparticipating insurers.

148. For example, an insurer may have a position as to date of occurrence or whether coverage exists for clean-up claims. In such instances, an insurer may not be willing to participate in any settlement because any payment made may be conflicting with such position.

and complex, involving multiple parties, voluminous documents, numerous witnesses, and complicated legal issues for resolution. As this Article has discussed, many of the issues await resolution by the courts, and a definite prediction as to whether coverage exists for a particular contamination caused injury often cannot be made. Because many of the coverage issues are likely to involve factual issues regarding the cause, nature, and extent of contamination and the mechanism which caused damages, coverage litigation will likely involve a repetition of the issues which allegedly rendered the insured liable for contamination-related injury, as well as new litigation into the intent of the parties as expressed in the insurance policies.

Discovery proceedings are likely to be time-consuming and expensive because of the numerous parties and voluminous documents involved. It is probable that insurers will have offices with potentially involved personnel in many locations within the United States as well as abroad, and thus discovery proceedings will involve many depositions in many jurisdictions, with associated travel expenses. Both the insured and the insurer can be expected to file numerous motions on discovery issues, as well as so called "dispositive motions" on issues as to whether a duty to defend exists, whether the claim is the result of an "occurrence," and whether the claims are foreclosed by various exclusions, particularly the pollution exclusion.

Because of the complexity of the legal issues and the likelihood that factual issues remain to be decided by the trier of fact, trial proceedings are also likely to be time-consuming and expensive. Trial proceedings present the parties with substantial uncertainties because of possible jury confusion,<sup>149</sup> unexpected rulings either

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149. For example, in the recently concluded *Boeing v. Aetna Cas. & Sur. Co.* litigation, the jury was presented with a complex questionnaire to answer. The jury rendered a verdict seemingly holding that only half the potential policy periods were obligated to pay for the clean-up at the Western Processors site, which Boeing estimated to be in the \$100,000,000 range. Apparently, the jury, who had been asked to determine whether the claims were expected and intended, and hence excluded, had reached a Solomonic decision to "split the baby" and affix responsibility for clean-up on both sides. However, the jury did not, apparently, know of joint and several liability, which arguably made the insurers in the periods selected potentially responsible for the entirety of clean-up costs.

as to discovery, the evidence which may be offered at trial, or the ultimate verdict.

Because of the current uncertainties created by litigation and the time and expense involved, litigation is obviously not an alternative that either side would voluntarily select to resolve their disputes. However, because of the high stakes, and the "all or nothing" position taken by the parties, frequently no alternative other than litigation may be possible for dispute resolution. Costly and lengthy proceedings to resolve coverage disputes do not generally afford a prompt means to remedy contamination. A realistic evaluation of the nature and purpose of insurance, and flexibility by both sides, to arrive at interim solutions to enable funding without posturing would better facilitate dispute resolution.

To favor the public interest in dispute resolution, decisions accepted as reasonable by both parties must be made and a speedy dispute resolution process must be created. The starting point for any resolution to be perceived as "fair" requires communication of needed information by both insureds and insurers. Both insurers and insureds have, on occasion, objected to alternative dispute resolution.

## VII. CONCLUSION

Whether coverage exists for environmental clean-up claims is subject to considerable uncertainty. Resolution of coverage issues will often turn on very technical legal arguments. Because of potential bases for non-coverage, both the insured and the insurers should recognize pragmatic considerations that favor resolving any coverage disputes to enable the clean-up proceedings to be concluded at the earliest opportunity. A fair and reasonable approach by both insureds and insurers toward establishing meaningful communication, coverage positions, and a prompt resolution of disputes may well reduce uncertainty as to environmental issues.