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INSURANCE COVERAGE FOR ENVIRONMENTAL AND TOXIC TORT CLAIMS

THOMAS C. MIELENHAUSEN†

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INTRODUCTION

Today the business community may be witnessing only the first wave of environmental and toxic tort liabilities. Government studies report as many as 425,000 hazardous waste sites around the country, in addition to the 1,200 sites currently on the National Priority List. This figure does not include an additional 400,000 to 600,000 landfills and waste lagoons, as well as nearly 1.5 million underground fuel storage tanks. According to estimates, fuel from approximately 375,000 storage tanks has escaped and contaminated soil and ground water. Added to these risks are countless products and completed operations incorporating allegedly hazardous substances, such as asbestos. Bodily injury or property damage from these substances may not become manifest until years after initial exposure.

These situations can give rise to a variety of claims alleging bodily injury or property damage. Toxic tort claimants, for example, typically seek damages for physical and mental injury caused by the ingestion of or exposure to hazardous substances. Claimed damages might also include lifetime medical monitoring due to an increased risk of cancer, and compensation for heightened fear of sickness and early death.

Claims for damage to private property might include the cost of cleaning up contamination and restoring the property to its original condition. The claimant may also seek damages for diminution in property value if the property cannot be completely restored. Further, government authorities may pursue similar compensation for damage to property and natural resources in which the public has an interest.

Potential liabilities from these third party injury and damage claims are staggering. Groundwater has been a source of drinking water for one-half of the nation's population. A government report estimates that over forty-seven million persons may have been exposed to toxic substances at the 2,500 most hazardous waste sites. Each claim associated with these expo-

2. Id.
3. Id.
4. Id.
sures could give rise to millions of dollars in liability.\(^5\)

In addition, governmental authorities can be expected to assert an increasing number of claims against businesses for damages resulting from contaminated property. The United States Environmental Protection Agency estimates that damages associated with the 2,500 most hazardous waste sites may range from $30 million to $50 million per site.\(^6\) Any business that contributed waste at the site could be jointly and severally liable for these damages.

Faced with these liabilities, many businesses have turned to their insurance carriers for the financial protection which the carriers promised to provide in exchange for substantial premiums. The insurance industry’s response, however, has been less than exemplary. Rather than cooperate with policyholders and other carriers, many carriers instead have chosen to engage in protracted litigation, denying coverage on grounds that often contradict the drafting intent and historical practices of the insurance industry.\(^7\) As a result, the insurance industry has been unable to develop a collective and more constructive approach to meet its obligations.

I. SUMMARY

Standard liability and property insurance policies purchased by businesses over the past decades afford coverage of the liabilities and losses associated with environmental and toxic tort claims. In particular:

- Standard comprehensive general liability (CGL) insurance policies issued from approximately 1941 through

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5. For example, in one toxic tort case, residents of a Missouri town were exposed to a chemical spill reportedly containing less than one teaspoon of dioxin. After three and a half years of costly litigation, the claimants were awarded $16 million in damages for alleged headaches, fatigue and potential genetic damage. See id.

6. Id.

7. See e.g., In re Asbestos Ins. Coverage Cases, Judicial Council Coordination Proceeding No. 1072 (Cal. Super. Ct., San Francisco County filed Jan. 24, 1990). This case involved five policyholders, more than 70 carriers, and over 34,000 pages of transcript testimony. Over a period of many years, the policyholders discovered extensive evidence regarding the background and drafting history of the comprehensive general liability policy. See also U.S. General Accounting Office, Report to the Chairman, Subcomm. on Policy Research and Insurance, Comm. on Banking, Finance and Urban Affairs, House of Representatives, Hazardous Waste: Pollution Claims Experience of Property/Casualty Insurers 4 (Feb. 1991) (reporting that thirteen major carriers are engaged in nearly 2,000 law suits with policyholders over coverage for environmental liabilities).
1985 should cover liabilities arising from any contamination-related bodily injury or property damage neither expected nor intended from the standpoint of the policyholder;

- Standard CGL policies issued since approximately 1986 should cover the same liabilities when the contamination injury or damage arises from the policyholder's off-premises products, completed operations or (in some circumstances) ongoing operations, from non-environmental and non-industrial contamination, or from causes other than the discharge of pollutants;

- Standard "all risk" property insurance policies issued prior to 1986 should cover the cost of removing contaminants from soil or water at or near the policyholder's premises when the contaminants are from covered property (e.g., commercial grade chemicals in a storage tank) which was lost into the soil or water because of a fortuitous event;

- Typical environmental impairment liability (EIL) insurance policies should cover claims for damages and clean-up costs incurred because of contamination injury or damage occurring away from the policyholder's designated premises (sometimes including waste sites) as a result of conditions at the designated premises.

This article recommends that the insurance industry adopt a constructive group approach toward settling its financial obligations to policyholders. Otherwise, many insurance carriers and their reinsurers face enormous potential liabilities.

II. Comprehensive General Liability Insurance Coverage

The purpose of CGL insurance is to protect the policyholder from liabilities arising from claims of bodily injury or property damage to third parties. The insurance industry developed standard CGL coverage in the 1940s to cover all risks of third party liability under one policy, rather than only specific risks under various separate "schedule" policies. The bedrock principle underlying this new "comprehensive" coverage was, and remains, that any and all risks of liability for third party bodily injury or property damage are covered unless specifi-

cally excluded in the policy.\textsuperscript{9}

The blanket security provided by the CGL policy has been used as a major selling point by the insurance industry over the past decades. As early as 1941, a representative of Travelers Indemnity Company advised sales agents to “‘[e]mphasize ‘peace of mind’ coverage, i.e., [the] feeling of security and sense of protection that goes with Comprehensive Liability.’”\textsuperscript{10}

The transaction between the CGL carrier and policyholder is relatively straightforward. The policyholder agrees to pay a premium calculated by the carrier’s underwriter. The premium is based on the underwriter’s thorough inspection and assessment of the risks associated with the policyholder’s operations and products. In exchange for the premium, the CGL carrier agrees to bear the risk of liabilities arising from third party injury and damage not specifically excluded in the policy. The carrier’s risk encompasses future changes in the law that may redefine and expand theories of bodily injury or property damage liability. Thus, the 1941 Travelers, “sales pointer” explained that “[c]omprehensive policies follow the Common Law in a broader sense than individual policies. The [c]ommon [l]aw deals with liabilities; specific [schedule] policies deal with hazards, hence the need for the broad inclusive insuring clauses of the Comprehensive policies.”\textsuperscript{11}

The “broad inclusive insuring clauses” of the standard CGL policy have not changed materially since the 1940s.\textsuperscript{12} In exchange for a premium, the CGL carrier agrees to indemnify the policyholder for all sums which the policyholder becomes legally obligated to pay as damages because of bodily injury or property damage to which the insurance applies.\textsuperscript{13} The claimed bodily injury or property damage must have happened during the policy period and must have been caused by an occurrence.\textsuperscript{14} “Occurrence” means an accident, “including con-

\textsuperscript{9} Id.
\textsuperscript{11} Id.
\textsuperscript{12} For language used in standard insurance policies from 1941 to the present, see Appendices A-E.
\textsuperscript{13} Id.
\textsuperscript{14} Id. The 1986 “claims-made” CGL policy requires that the occurrence happen during the policy period or a specified “retroactive period” pre-dating issuance of the policy. See Appendix E. Standard pre-1986 “occurrence” policies, however, typically cover liabilities arising from bodily injury or property damage regardless of
continuous or repeated 'exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.' The carrier also agrees to defend any suit against the policyholder seeking damages on account of such bodily injury or property damage.

Over the past decades, the insurance industry has repeatedly acknowledged that its basic insuring agreement covers liabilities arising from pollution and hazardous substances. In the mid-1960s, for example, a representative of Liberty Mutual Insurance Company authored a widely-distributed paper discussing coverage under the standard 1966 CGL policy. The representative explained that the standard policy was intended to provide coverage for bodily injury or property damage "resulting over a period of time from exposure to the insured's waste disposal. Examples would be gradual adverse effect of smoke, fumes, air or stream pollution, contamination of water supply or vegetation."

Today, many CGL carriers are attempting to rewrite history and avoid the obligations which they accepted and acknowledgments when the occurrence causing the injury or damage happened. See, e.g., Appendix C—1966 Policy. Additionally, some courts hold that the terms of the 1973 policy cover "loss-of-use" property damage happening after the policy period, when the occurrence causing the damage happened during the policy period. See, e.g., Western Casualty & Sur. Co. v. Budrus, 112 Wis. 2d 348, 352, 332 N.W.2d 837, 840 (Wis. Ct. App. 1983).

15. See Appendix D—1973 Policy.
16. Id.
17. G. Bean, Summary of Broadened Coverage Under New GL Policies with Necessary Limitations to Make This Broadening Possible, (July 18, 1966) (unpublished paper) (available in William Mitchell Law Review office). The Liberty Mutual representative also explained that the policy covers liabilities arising from gradual injury or damage resulting over a period of time to members of the public from exposure to poisons, or toxic or radioactive substances used by the insured in his operations. Id.
18. Id. (emphasis in original). Historical statements such as these, by knowledgeable insurance industry representatives and organizations, demonstrate that many CGL carriers' recent contrary interpretation of the same policy language is, at a minimum, not the only interpretation. Under universal rules of insurance policy construction, terms which are reasonably subject to more than one interpretation are ambiguous, and must be construed in favor of the policyholder. See Minnesota Mining & Mfg. Co. v. Travelers Indem. Co., 457 N.W.2d 175, 179 (Minn. 1990). Evidence of the insurance industry's past interpretations of the standard CGL policy language is therefore centrally relevant in any coverage litigation over the same language. In many cases, the insurance industry's past interpretations should establish coverage as a matter of law. See Bradbury, Original Intent, Revisionism, and the Meaning of the CGL Policies, 1 Env'tl. Claims J. 279, 282-83 (Spring 1989).
edged over the past decades. As a result, the standard CGL policy has become the focal point of a growing, nationwide dispute between corporate policyholders and CGL carriers. This article discusses the main issues underlying the dispute.

A. All Sums (Scope of Coverage)

The standard CGL insuring agreement requires the carrier to pay all sums which the policyholder becomes legally obligated to pay as damages because of bodily injury or property damage.\(^\text{19}\) When continuous injury or damage occurs over the course of numerous policy periods, an issue often arises as to the scope of coverage afforded by each policy covering those periods.

Most courts hold that "all sums" means any triggered policy must cover all of the policyholder's liabilities arising from the continuous injury or damage, regardless of whether some of the injury or damage occurred outside of the policy period.\(^\text{20}\) The standard "all sums" insuring agreement contains no language limiting the carrier's obligation to only a portion of damages attributable to injury or damage occurring during the

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19. See Appendices A-E.


policy period.\textsuperscript{21} Court decisions enforcing the plain meaning of the "all sums" insuring agreement are consistent with the insurance industry's historical understanding of its standard CGL insuring agreement. For example, in 1977 nearly thirty major carriers attended a meeting of the American Mutual Insurance Alliance and American Insurance Association to discuss coverage of asbestos-related injuries. Minutes of the meeting reported:

\[\text{T}he\ \text{majority\ view\ was\ that\ coverage\ existed\ for\ each\ carrier\ throughout\ the\ period\ of\ time\ the\ asbestosis\ condition\ developed,\ i.e.\ from\ the\ first\ exposure\ through\ the\ discovery\ and\ diagnosis.\ \text{The\ majority\ also\ contended\ that\ each\ carrier\ on\ risk\ during\ any\ part\ of\ that\ period\ could\ be\ fully\ responsible\ for\ the\ cost\ of\ defense\ and\ loss.}\textsuperscript{22}\]

The effect of the "all sums" language is to hold carriers jointly and severally liable to the policyholder for the full amount of the policyholder's liabilities. Although a carrier might seek contribution from other carriers, the policyholder is under no obligation to prorate its recovery under any one policy. The policyholder can tap the limits of and seek full indemnification from one or more of the triggered policies. The "all sums" language enables the policyholder to avoid periods of high deductibles, self-insurance or no insurance, during which the ongoing injury or damage may have continued.

At least one court, however, has held that a policyholder

\textsuperscript{21} See Appendix E. Further, most courts hold that the standard "other insurance" clause, found in the "conditions" section of the policy, may not be used to allocate part of a loss to the policyholder. See Detrex Chem. Indus. v. Employers Ins. of Wausau, 746 F. Supp. 1310, 1326 (N.D. Ohio 1990) (interpreting Michigan law) ("Other insurance" clauses cannot be used to impose additional liabilities on policyholder, by way of deductibles or otherwise.); Broderick Inv. Co. v. Hartford Accident & Indem. Co., 742 F. Supp. 571, 573 (D. Colo. 1989) (interpreting Colorado law) ("Other insurance" clauses are only meant to prevent double recovery and may not be used to allocate part of loss to policyholder.); Air Prod. & Chem., Inc. v. Hartford Accident & Indem. Co., 707 F. Supp. 762, 771 (E.D. Pa. 1989) (interpreting Pennsylvania law) ("Other insurance" provisions apply only to apportionment of carriers' liability and may not be used to allocate liability to policyholder through deductibles, retrospective premiums or side indemnity agreements.); Marotta Scientific Controls, Inc. v. RLI Ins. Co., No. 87-4438 (D.N.J. June 5, 1990) (reprinted in 4 Mealey's Insurance Litigation Reports F-I, F-11 (June 26, 1990)) (interpreting New Jersey law) (Carrier with triggered policy was liable up to policy limits, regardless of possible injury that may have occurred prior to policy period.).

\textsuperscript{22} Memorandum of Meeting of Asbestosis Discussion Group 1 (April 21, 1977) (unpublished paper) (emphasis added) (available in William Mitchell Law Review office).
who is uninsured or self-insured during part of the time in which injury or damage occurs must bear a pro-rata share of the total costs of defending the claims of injury or damage.\textsuperscript{23} The court concluded that the CGL carrier "has not contracted to pay defense costs for occurrences which took place outside the policy period."\textsuperscript{24} The court's reasoning is flawed, however, because the CGL carrier does contract to pay for occurrences happening outside the policy period, as long as the resulting injury or damage happens during the policy period. Further, under the plain terms of the standard CGL policy, the carrier agrees to pay "all" of the policyholder's liabilities arising from injury or damage happening during the policy period, not just "some" of the liabilities.

The Minnesota appellate courts have not addressed the "all sums" issue in the context of environmental and toxic tort claims. At least two Minnesota Supreme Court decisions, however, may influence the outcome if this issue arises.

In \textit{Jostens, Inc. v. CNA Insurance/Continental Casualty Co.},\textsuperscript{25} the court held that a carrier has no obligation for injury occurring outside its policy period where the period of injury can be easily identified.\textsuperscript{26} However, the \textit{Jostens} court said that where damages cannot be specified to within or outside the policy period, the carrier must pay the entire amount.\textsuperscript{27} Environmental and toxic tort claims typically involve continuous and repeated exposures to hazardous substances, and cumulative bodily injuries or property damage occurring over a number of years. Thus, a carrier may have difficulty proving that only an identifiable portion of an injury or damage happened during its policy period.

In \textit{Federated Mutual Insurance Co. v. Concrete Units, Inc.},\textsuperscript{28} the court held that the most sensible reading of the phrase "damages because of property damage" requires the CGL carrier to pay "all damages which are causally related" to property dam-

\textsuperscript{23} See \textit{Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.}, 633 F.2d 1212, 1225 (6th Cir. 1980) (Where costs can be readily apportioned, it is reasonable to have the insured pay its share of defense and indemnification costs.), \textit{reh'g granted in part}, 657 F.2d 814 (6th Cir.), \textit{cert. denied}, 454 U.S. 1109 (1981).
\textsuperscript{24} \textit{Insurance Co. of N. Am.}, 633 F.2d at 1224-25.
\textsuperscript{25} 403 N.W.2d 625 (Minn. 1987).
\textsuperscript{26} \textit{Id.} at 630.
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} 363 N.W.2d 751 (Minn. 1985).
Thus, even if a carrier were able to prove that only an identifiable portion of injury or damage happened during its policy period, virtually all of the claimant’s expenditures in rectifying the injury or damage can be causally related to the injury or damage during the carrier’s policy period. Unallocable consequential damages might include, for example, the costs of pumping out contaminated groundwater or the costs of psychiatric treatment for “cancerphobia.”

B. Legally Obligated to Pay as Damages

A number of courts have held that response costs recoverable under environmental statutes are not “damages” and therefore are not covered under the CGL policy. Generally, these courts conclude that response costs are equitable in nature and that the CGL policy traditionally does not cover in-

29. Id. at 757.
30. Id. See also Minnesota Mining & Mfg. Co. v. Travelers Indem. Co., 457 N.W.2d 175, 182 (Minn. 1990) (Costs associated with cleaning up contamination are “apty characterized as consequential damages flowing from the direct damage caused to the environment.”).
junctive or equitable relief. According to these courts, the CGL term "damages," although undefined in the policy, is restricted to a unique, technical meaning: monetary damages awarded pursuant to causes of action traditionally recognized by courts of law rather than equity.

A majority of courts, however, have ruled to the contrary, finding that response costs are "damages" and are covered under the CGL policy. Following established rules of insur-

32. See, e.g., Milliken & Co., 857 F.2d at 981 ("We have no doubt that . . . a general comprehensive liability policy which obligated the insurer to pay 'all sums which, the insured shall become legally obligated to pay as damages would not cover claims for which the insured is equitably obligated to pay.'").

33. See, e.g., Maryland Cup Corp., 81 Md. App. at 526, 568 A.2d at 1133-34 (Term "damages" has accepted technical meaning in law.).

ance contract construction, these courts recognize that the term “damages” is undefined in the policy and therefore construe the term in accordance with its plain and ordinary meaning—compensation for injury sustained. 

In concluding that the plain meaning of “damages” encompasses response costs, courts also recognize that the remedies available to the government under federal and state environmental statutes reflect the common understanding of the term “damages” in the context of property damage claims. Traditionally, the common law measure of damages for property damage is the cost of restoring property to its former condition. If the damaged property cannot be completely restored to its former condition, the difference in value between the property in its restored condition and the property in its former condition can also be recovered as damages. Consequen-


35. See RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 3654 (2d ed. 1987) (Damages defined as “the estimated money equivalent for detriment or injury sustained.”); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 571 (3d. ed. 1971) (Damages defined as “estimated reparation in money for detriment or injury sustained: compensation or satisfaction imposed by law for a wrong or injury caused by a violation of a legal right.”).


37. See Rinkel v. Lee’s Plumbing & Heating Co., 257 Minn. 14, 20, 99 N.W.2d
quential damages are also recoverable.38
The remedies available under federal and state environmental statutes typically reflect these basic principles of damages. "Response costs" are the costs of restoring property to its former condition.39 Natural resource damages are recoverable if the property is lost or cannot be completely restored.40 Consequential damages also are recoverable.41
Courts concluding that response costs are "damages" reject the assertion that the term implies a distinction between legal and equitable relief. Significantly, the insurance industry's own dictionaries define "damages" in accordance with the term's plain and ordinary meaning—compensation for injuries sustained—and draw no distinction between legal and equitable relief.42
Further, at least one court has reviewed evidence of the insurance industry's representations and practices over the past decades, and found that the industry expressly contemplated that the term "damages" encompassed the costs of cleaning up

38. See Colstrum v. Minneapolis & St. L. Ry., 33 Minn. 516, 517, 24 N.W. 255, 255 (1885) (Landowner can recover any kind of damages resulting from the property damage, whether direct or consequential.).
39. See 42 U.S.C. § 9607(a)(4)(A) (1990) (all costs of removal or remedial action); Minn. Stat. § 115.071, subd. 3(a) (1990) (expenses for reasonable value of cleanup); Minn. Stat. § 115B.04, subd. 1(a),(b) (1990) (response and removal costs). See also Minn. Stat. § 115B.02, subd. 17 (1990) ("Removal" includes cleanup, removal, disposal or processing, preventative actions, and actions necessary to monitor hazardous substances, including disposal.).
40. See 42 U.S.C. § 9607(a)(4)(C) (1990) (damages for injury to, destruction of or loss of natural resources); Minn. Stat. § 115.071, subd. 3(b) (1990) (just compensation for loss or destruction of wildlife); Minn. Stat. § 115B.04, subd. 1(c) (1990) (damages for any injury to natural resources including costs of assessing damage).
41. See 42 U.S.C. § 9607(a)(4)(B) (1990) (any other necessary costs of response incurred); Minn. Stat. § 115.071, subd. 3(a) (1990) (compensation for reasonable value of cleanup and other expenses directly resulting from discharge); Minn. Stat. § 115B.17, subd. 6 (1990) (reasonable and necessary expenses).
42. See W. A. Jennings, GLOSSARY OF INSURANCE TERMS (1969) ("Damages" defined as "a sum of money claimed or awarded as compensation for loss or injury."); H. Rubin, BARRONS DICTIONARY OF INSURANCE TERMS 71 (1987) ("Damages" defined as a "sum the insurance company is legally obligated to pay an insured for losses incurred."); L. Davids, DICTIONARY OF INSURANCE 62 (1983) ("estimated reparation in money for injury sustained"); Merritt, GLOSSARY OF INSURANCE TERMS 53 (4th ed. 1990) (the "amount required to pay for a loss"). See also Boeing Co. v. Aetna Casualty & Sur. Co., 113 Wash. 2d 869, 877, 784 P.2d 507, 511 (1990) (recognizing that insurance industry's dictionaries define "damages" in accordance with its ordinary meaning).
contamination of the environment. For example, in a 1969 document discussing coverage of liabilities for oil spills, Aetna Casualty and Surety Company noted that "damages, including cost to clean up, may be catastrophic . . ." In 1981, Aetna's underwriting guidelines advised field offices that CERCLA "damages" include "all costs of removal or remedial action" and "any other necessary costs of response."

Courts similarly have rejected the insurance industry's assertion, often unsupported by evidence or compelling case law, that equitable relief traditionally has not been covered by the CGL policy. These courts conclude that the relevant inquiry in determining coverage is whether the policyholder is being asked to rectify losses to a third party on account of property damage, not whether the action seeking that relief is legal or equitable. Other courts have noted that a hypertechnical definition of "damages" could frustrate public policy by rewarding policyholders who delay and fail to cooperate with the government until the government brings the precise cause of action to which the CGL policy supposedly is limited.

In Minnesota Mining & Manufacturing Co. v. Travelers Indemnity Co., the Minnesota Supreme Court ruled in favor of coverage on the "damages" issue. The court concluded that the lan-

46. See, e.g., United States Fidelity & Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139, 1168 (W.D. Mich. 1988). "The short answer is that from the standpoint of the insured damages are being sought for injury to property. It is that contractual understanding rather than some artificial and highly technical meaning of damages which ought to control." Id.
47. Id.
48. See, e.g., Intel Corp. v. Hartford Accident & Indem. Co., 692 F. Supp. 1171, 1193 (N.D. Cal. 1988) (Public policy favors coverage of response costs because "there simply is not enough 'horse-power' in the EPA to clean up first and seek PRP reimbursement later.").
49. 457 N.W.2d 175 (Minn. 1990).
50. Id. The "damages" issue was certified to the Minnesota Supreme Court by the United States District Court in the District of Minnesota in three separate coverage actions. The three cases consolidated by the Minnesota Supreme Court for purposes of responding to the certified question were Minnesota Mining &
guage of the standard CGL insuring agreement "can reasonably be interpreted to cover any claim asserted against the insured arising out of property damage, which requires the expenditure of money, regardless of whether the claim can be characterized as legal or equitable in nature." The court found that this interpretation is supported by the dictionary definition of "damages" which makes no distinction between actions seeking purely monetary relief and actions seeking forms of equitable relief.

The court in *Minnesota Mining* found that the ordinary meaning of "damages," as well as the division among courts in interpreting this term, demonstrates that the term is reasonably subject to more than one interpretation. Consequently, pursuant to established principles of insurance contract construction, the court concluded that the term "damages" is inherently ambiguous and must be construed in favor of coverage.

The *Minnesota Mining* court also determined that coverage of environmental clean-up costs is consistent with the reasonable expectations of the CGL policyholder. Recognizing the historical risk-shifting role of CGL insurance, the court noted that policyholders have purchased "comprehensive general liability" policies over the past decades "expecting coverage against most legal liabilities which could arise out of their own acts or omissions, including liabilities which were unknown at the time." The court explained that the utility of the broad CGL insuring agreement "would be seriously called into question" if coverage is permitted to hinge on the fortuity of how the claim against the policyholder is framed. "Clearly," the

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52. *Id.* at 179-80. The court also noted that "Minnesota law places little value on antiquated distinctions between legal and equitable claims which have persisted from the historic separation of courts of law and chancery." *Id.* at 179.
53. *Id.* at 180.
54. *Id.* at 180-81.
55. *Id.* at 181.
56. *Id.*
57. *Id.*
court concluded, "the insureds under these policies contemplated greater certainty when they purchased the policies. They could reasonably expect the policy to provide coverage for any economic outlay compelled by law to rectify or mitigate damage caused by the insured's acts or omissions." 58

The Minnesota Mining court also rejected the notion that carriers which have sold CGL insurance over the past decades never expected a potential obligation to indemnify policyholders for the costs of remedying contamination to the environment. 59 The court determined that the remedies imposed by environmental clean-up statutes were not "novel or unforeseeable" to the policyholder or the carrier. 60 Rather, the remedies have existed "under prior statutes and, moreover, the costs of restoring property to its original condition has been a long-recognized measure of damages in common law pollution cases." 61 Thus, the court concluded, CGL policyholders and carriers "were aware of the potential liability for groundwater contamination at the time they entered the insurance policies..." 62

Significantly, the effect of the Minnesota Supreme Court's analysis in Minnesota Mining reaches well beyond the "damages" issue. The court essentially determined that the broad insuring agreement of the standard CGL policy generally covers liabilities arising from environmental contamination, and that the CGL policyholder's expectation of coverage is quite reasonable. The court's determination is squarely consistent with statements made by the insurance industry over the past decades. 63

58. Id. at 181-82.
59. Id. at 183.
60. Id.
61. Id. The court cited Heath v. Minneapolis, St. P. & S. Ste. M. Ry., 126 Minn. 470, 475, 148 N.W. 311, 312-13 (1914) which affirmed a jury verdict on damages based on the expense of removing the defendant's sand from the plaintiff's land, rather than the diminution in the market value of the land if the sand were allowed to remain, because the removal expenses were less.
62. Id.
63. See supra notes 17-18 and accompanying text.
C. Bodily Injury or Property Damage to which the Insurance Applies

1. Bodily Injury

The standard CGL policy defines "bodily injury" as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." A number of courts have concluded that the term "bodily injury" implies injury of a physical nature, and that claims alleging only mental distress are not covered.

In the context of toxic torts, however, courts have ruled that the CGL policy covers claims alleging "cancerphobia," increased risk of disease, and other harm which is only potentially physical in nature. The primary issue in many of these cases is whether the carrier has a duty to defend the policyholder against a claim which arguably alleges physical injury. Courts find that the term "bodily injury" must be construed to encompass new theories of injury arising from exposures to...
highly-dangerous substances "capable" of producing latent sickness or disease.\textsuperscript{68}

In one case, for example, the court noted that the definition of "bodily injury" is not specifically limited to an immediate and overt manifestation of physical harm, and found the term ambiguous with respect to "potentially progressive physical ailments."\textsuperscript{69} The court also noted that the issue of actual injury may be relevant to the validity of the underlying tort claim against the policyholder, but should not be relevant to coverage under a policy intended to protect the policyholder from liabilities for third-party injury.\textsuperscript{70}

The Minnesota appellate courts have not addressed the meaning of the policy term "bodily injury" in the context of toxic tort claims alleging cancerphobia or latent disease. In \textit{Clemens v. Wilcox},\textsuperscript{71} an assault case, the Minnesota Supreme Court ruled that the term "bodily injury" means physical injury "and does not include nonphysical harm such as mental suffering and emotional distress."\textsuperscript{72} The court also ruled, however, that coverage is triggered if it is demonstrated that the third-party claimant "sustained some bodily injury."\textsuperscript{73}

In \textit{Clemens}, there was no evidence that the claimant suffered any physical contact.\textsuperscript{74} The usual toxic tort claimant, by contrast, alleges direct physical contact with hazardous substances through ingestion, inhalation, or other exposure.\textsuperscript{75} The physical nature of this contact, and its potential for producing injury, may be sufficient to show "some" bodily injury, even if no immediate injurious effects can be established.\textsuperscript{76}

\textsuperscript{68} See, e.g., \textit{id.} at 9, 487 A.2d at 824 ("[A]t a minimum, personal injury encompasses allegations of exposure to a hazardous substance, increased risk of injury, anxiety, various internal disorders and tissue damage . . . .")

\textsuperscript{69} \textit{id.} at 11, 487 A.2d at 826.

\textsuperscript{70} \textit{id.} at 8, 487 A.2d at 824.

\textsuperscript{71} 392 N.W.2d 863 (Minn. 1986).

\textsuperscript{72} \textit{id.} at 866 (citations omitted).

\textsuperscript{73} \textit{id.} at 867 (emphasis in original). The court further stated that "[t]o extensive medical testimony is necessary to the resolution of this narrow question . . . ." \textit{id.}

\textsuperscript{74} \textit{id.} at 866.


\textsuperscript{76} \textit{id.} at 6-10, 487 A.2d at 823-25.
2. Property Damage

Generally, the standard CGL policy defines "property damage" as (1) physical injury to tangible property which occurs during the policy period, including loss of use of the property at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured, provided the loss of use is caused by an occurrence during the policy period. 77

Courts routinely find that contamination of soil, groundwater, and other environmental resources constitutes physical injury to tangible property. 78 These courts, rejecting the notion that environmental resources are not an identifiable property interest, recognize that governments have a sovereign interest in all property within their domain, on behalf of the public and future generations. 79 Courts also note that the pollution exclusion in the CGL policy expressly recognizes that "property damage" results from environmental pollution. 80 Further, at least one court has left open the possibility of coverage in situations where physical injury to or loss of use of third-party property or environmental resources has not yet

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77. For revisions to the standard definition of "property damage" since the 1940s, see Appendices A-E.


79. See, e.g., United States Fidelity & Guar. Co., 180 Ill. App. 3d at 394, 535 N.E.2d at 1081 (federal interest in earth and air); Lansco, Inc., 138 N.J. Super. at 283, 350 A.2d at 524 (state interest in public resources and environment).

80. See United States Fidelity & Guar. Co., 180 Ill. App. 3d at 394, 535 N.E.2d at 1081.
occurred, but is "imminent."\textsuperscript{81}

In \textit{Minnesota Mining \& Manufacturing Co. v. Travelers Indemnity Co.},\textsuperscript{82} the Minnesota Pollution Control Agency (MPCA) asserted claims against each of the CGL policyholders for contaminated soil and groundwater at waste disposal sites. In ruling on the "damages" issue, the Minnesota Supreme Court specifically determined that "property damage has occurred in these cases" within the meaning and scope of the CGL policy.\textsuperscript{83} The court explained that pollution of environmental resources "is damage to public property":

The state on behalf of its citizens has a proprietary interest in the natural resources of Minnesota. The MPCA as an agency of the state is a named trustee of the waters of the state. Thus, for the purposes of this analysis, the state is the injured third party asserting claims against the insureds.\textsuperscript{84}

An unresolved question under Minnesota law is whether environmental contamination which is "imminent," but has not yet happened, is sufficient to trigger coverage under the CGL policy. In ruling that environmental clean-up costs are "damages because of property damage" under the CGL policy, the court in \textit{Minnesota Mining} limited its holding to those costs which are necessary to effectuate the clean up of contamination "which has already occurred" to the state's resources.\textsuperscript{85} The court stated that "[p]urely preventative measures are not covered in the absence of property damage."\textsuperscript{86} At least in the context of property insurance, however, the Minnesota Supreme Court has found coverage even though actual physi-
cal damage may not have occurred.\textsuperscript{87}

3. During the Policy Period (Trigger of Coverage)

Generally, the standard CGL policy limits the definition of covered "bodily injury" or "property damage" to injury or damage which happens during the policy period. When continuous, repeated injury or damage occurs during the course of numerous policy periods, an issue often arises as to which policies are triggered.

Most courts hold that coverage is triggered under each policy in effect from the date of the initial exposure to the injury-causing substance through the date of the discovery or remediation of the injury.\textsuperscript{88} In some cases, this means that in-

\textsuperscript{87} See Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co., 256 Minn. 404, 421-22, 98 N.W.2d 280, 292-93 (1959) (Fire insurance policy covers loss of egg powder deemed contaminated by government officials even though not actually physically damaged). See also Pillsbury Co. v. Underwriters at Lloyd's, London, 705 F. Supp. 1396, 1399-1400 (D. Minn. 1989) (Property insurance policy covers loss of property believed to be "susceptible" to contamination, even though no actual physical damage is shown.).

Insurance coverage over several decades may be triggered. For example, suppose contamination of a municipality’s groundwater is discovered in 1983, and it is determined that one source of the contamination is a policyholder’s waste, buried in 1948. Under an exposure through discovery theory, each CGL policy from 1948 through 1983 might be triggered.

Other courts have ruled that only the policy periods in which injury or damage actually occurs (regardless of the dates of exposure or discovery) are triggered. Courts adopting this “actual injury” approach, however, typically permit proof of injury from the date of first exposure through the date of discovery or remediation. For purposes of the coverage litigation, therefore, each policy on the risk during this period is effectively triggered.

These “multiple trigger” decisions are consistent with the plain terms of the standard CGL policy, which do not express any limitation on the number of policies which may be trig-

gered in a cumulative injury situation. Further, the "multiple trigger" rulings are consistent with the drafting history of the standard CGL policy. For example, in a 1965 address to risk managers regarding the standard CGL policy, an executive from Insurance Company of North America explained:

In some exposure types of cases involving cumulative injuries, it is possible that more than one policy will afford coverage. Under these circumstances, each policy will afford coverage to the bodily injury or property damage which occurs during the policy period.2

The drafters of the CGL policy considered language that would have restricted coverage to the limited period in which contact with the means of injury occurred, in which both contact and injury occurred, or in which injury became manifest. Instead, the drafters chose language triggering each policy in effect during each period of continuous or repeated exposure to conditions. The drafters' decision to reject more restrictive language reflects an intent not to limit coverage to one policy in continuous injury situations. Some courts nevertheless have adopted a restrictive approach to the trigger of coverage. Several courts have ruled that only the policies in effect during the period of exposure are triggered. These courts generally assume that the period

90. See Appendices A-E.
91. An extensive evidentiary record of the drafting history underlying the trigger of coverage issue was developed in In re Asbestos Ins. Coverage Cases, Judicial Council Coordination Proceeding No. 1072, Phase III (Cal. Super. Ct., San Francisco County filed Jan. 24, 1990). See also American Home Products, 565 F. Supp. at 1500-03; Bradbury, supra note 18, at 290-92.
94. See id.
95. See id.
96. See id.

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of exposure is the only period of injury, without addressing when injury actually occurred. Other courts have held that the only policy triggered is the one in effect on the date the injury or damage becomes manifest.97 These courts fail to address evidence that such a restriction was expressly rejected by the drafters of the standard CGL policy.

The Minnesota Court of Appeals adopted an "actual injury," multiple-trigger approach in Industrial Steel Container v. Fireman's Fund,98 an environmental contamination case. The court in Industrial Steel viewed the "actual injury" rule to be "sufficiently broad to recognize that in cases involving long exposure to a toxic substance there can be damage with more than one manifestation and more than one insurance policy can afford coverage."99 The court rejected the argument "that there can be only one occurrence in a case where property damage results from continuous or repeated conditions of exposure."100 The court also held that policies in effect even after the date of initial manifestation were triggered because the contamination and its manifestation was an ongoing process occurring during the periods covered by these policies.101

Policies in effect during the period of initial exposure to injury-causing substances were not at issue in Industrial Steel and were not addressed. Nevertheless, the court's emphasis on "conditions of exposure" suggests that such policies will be triggered absent affirmative proof by the carrier that the exposure did not result in actual injury.102

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98. 399 N.W.2d 156 (Minn. Ct. App. 1987).
99. Id. at 159.
100. Id.
101. Id. at 159-60.
102. See also Pillsbury Co. v. Underwriters at Lloyd's, London, 705 F. Supp. 1396, 1399 (D. Minn. 1989) (indicating that burden is on property insurer to establish absence of damage to insured property).
4. Owned Property Exclusion

The standard CGL policy excludes property damage to property owned, occupied, or rented by the policyholder. Most courts hold that the exclusion does not preclude coverage of costs expended to clean up contaminants on the policyholder's own property in order to remedy damage, or prevent further damage, to third-party property. One court explained that "[i]t would be folly to argue, under such circumstances, that the insured would be required to delay taking preventative measures, thereby permitting the accumulation of mountainous claims at the expense of the insurance carrier. Stated another way, the policy does not require the parties to calmly await further catastrophe." In subsequent decisions, the same court left open the possibility that "imminent" damage to third-party property may also be sufficient to render the owned property exclusion inapplicable.

Minnesota law indicates that the owned property exclusion does not preclude coverage of costs expended to remove contaminants from the policyholder's own property in order to remedy or prevent damage to the environment. The law recognizes that the general public, as well as a landowner, has a property interest in subsurface soil and groundwater, and is harmed by contamination of these environmental resources.


104. Broadwell Realty Servs., Inc., 218 N.J. Super. at 528, 528 A.2d at 81.


106. See, e.g., Minnesota Mining & Mfg. Co. v. Traveler: Indem. Co., 457 N.W.2d 175, 182 (Minn. 1990) ("[P]ollution of the groundwater is damage to public prop-

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A claim alleging damage to the environment is therefore a claim for third-party property damage.\(^{107}\)

Minnesota law also indicates that the costs of removing contaminants from owned property should be covered to the extent they are causally related to alleged third-party property damage. According to the Minnesota Supreme Court, the most sensible reading of the phrase “damages because of property damage” requires the CGL carrier to pay “all damages which are causally related” to covered property damage.\(^{108}\) The costs associated with cleaning up contamination are aptly characterized as “consequential damages flowing from the direct damage caused to the environment.”\(^{109}\) The carrier must pay the entire amount of damages when covered and uncovered sums are indistinguishable.\(^{110}\) Thus, the entire cost of clean-up should be covered if the carrier fails to establish a valid basis for distinguishing those costs which it alleges are not causally related to the alleged third-party property damage.\(^{111}\)

5. Pollution Exclusion (1973)

The insurance industry developed a pollution exclusion endorsement in the early 1970s and in 1973 added the exclusion to the standard CGL policy as part of the overall revision of the

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\(^{107}\) See also Minn. Stat. §§ 116B.01, 116B.02 subd. 4 (1990) (Each person is entitled by right to protection and preservation of natural resources located within state, including all air, water, land, and soil resources.); Minn. Stat. § 116D.02, subd. 2(a) (1990) (State protects environment as a trustee for future citizens.); Minn. Stat. § 116D.02, subd. 1 (1990) (recognizing “interrelations of all components of the natural environment”); Stillwater Water Co. v. Farmer, 89 Minn. 58, 93 N.W. 907 (1903) (General public has identifiable interest in environmental resources, and is harmed by damage to this property.).


\(^{110}\) Jostens, Inc. v. CNA Insurance/Continental Casualty Co., 403 N.W.2d 625, 631 (Minn. 1987) (Entire amount of fee award to claimant covered because award not calculated by precise formula to fall within or outside policy period.).

\(^{111}\) For a discussion of claims of “imminent” environmental contamination, see supra notes 81, 85-87 and accompanying text.
The exclusion precludes coverage of: bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

The 1973 pollution exclusion plainly does not apply to pollution-related injury caused by an abrupt, unexpected event. In other pollution-related situations, however, the applicability of the exclusion typically turns on three main issues: (1) whether the “sudden and accidental” exception to the exclusion applies; (2) whether the exclusion pertains to the policy holder and the pollution in question; and (3) whether the injury or damage “arose out of” pollution.

a. Does the “Sudden and Accidental” Exception to the Exclusion Apply?

Courts are split on the meaning of the exception to the pollution exclusion: “[T]his exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.” The disagreement arises over two questions: (1) whether the phrase “sudden and accidental” has a temporal meaning; and (2) whether the phrase refers to the contamination injury, the actual discharge or release directly causing the injury, or the act which eventually led to the injury.

A number of courts have ruled that the phrase “sudden and accidental” to
"accidental" includes only those pollution events that occur with very brief notice. These decisions, however, are incon-

sistent with both the drafting history and the plain meaning of these terms.

The insurance industry used the phrase "sudden and accidental" in standard boiler and machinery policies for at least twenty years prior to incorporating the phrase into the pollution exclusion. During that time, courts and several commentators interpreted the phrase as having no requirement of immediacy or abruptness. The industry's decision to continue using the phrase "sudden and accidental" in the early 1970s demonstrates its intent that the phrase continue to be applied in accordance with these legal precedents.

The boiler and machinery decisions are consistent with the plain meaning of the terms "sudden" and "accidental." "Accident" (which is undefined in the standard policy) means a fortuitous event. In defining the term "occurrence," the standard CGL policy associates the term "accident" with continuous or repeated exposure to conditions. Thus, "accident" does not necessarily entail immediacy or abruptness.

The plain meaning of "sudden" (also undefined in the policy) similarly has no requirement of immediacy. The primary dictionary definition of the term is: "[H]appening without previous notice or with very brief notice; coming or occurring unexpectedly; not foreseen or prepared for." In ruling that the term "sudden" does not necessarily require an instantaneous event, one court explained:

[T]he secondary meaning [of "sudden" as "abrupt"] is so common in the vernacular that it is, indeed, difficult to think of "sudden" without a temporal connotation: a sudden


115. See Anderson & Middleton Lumber Co. v. Lumbermen's Mut. Casualty Co., 53 Wash. 2d 404, 408-09, 333 P.2d 938, 941 (1959) (Breakage over period of one day to three weeks was within coverage of policy because "sudden" does not mean instantaneous.); New England Gas & Elec. Ass'n v. Ocean Accident & Guar. Corp., 330 Mass. 640, 654, 116 N.E.2d 671, 680-81 (1953) (Cracking of spindle of turbine was "unexpected and unforeseen and consequently sudden."). See also 10A COUCH, CYCLOPEDIA OF INSURANCE LAW § 42:396 (2d ed. 1982) (Sudden is without previous notice and is not synonymous with instantaneous.).

116. See, e.g., Bituminous Casualty Corp. v. Bartlett, 307 Minn. 72, 77, 240 N.W.2d 310, 312-13 (1976) (Accident is an unexpected, unforeseen happening.), overruled on other grounds, 277 N.W.2d 389 (Minn. 1979).

117. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2284 (3d ed. 1986). See also AMERICAN HERITAGE DICTIONARY 1215 (2d College ed. 1982) (Primary meaning of "sudden" is "happening without warning; unforeseen.").

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flash, a sudden burst of speed, a sudden bang. But, on re-
fection one realizes that, even in its popular usage, "sud-
den" does not usually describe the duration of an event, but
rather its unexpectedness: a sudden storm, a sudden turn
in the road, sudden death. Even when used to describe the
onset of an event, the word has an elastic temporal connota-
tion that varies with expectations: Suddenly, it's spring. See
also, Oxford English Dictionary, at 96 (1933) (giving usage
examples dating back to 1340, e.g., "She heard a sudden
step behind her"; and, "A sudden little river crossed my
path As unexpected as a serpent comes.") Thus, it appears
that "sudden" has more than one reasonable meaning.
And, under the pertinent rule of construction the meaning
favoring the insured must be applied, that is, "unexpected."

Other courts similarly have ruled that the phrase "sudden
and accidental" encompasses unexpected and fortuitous
events occurring over time. These courts find that the

ded" because such a definition meets the expectations of the insured.); Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co., 186 N.J. Super. 156, 164, 451 A.2d 990, 994 (1982) ("Sudden and accidental" is simply a reaffirmation of principle that coverage will be provided for unintended results of intentional acts.); Allstate Ins. Co. v. Klock Oil Co., 73 A.D.2d 486, 488, 426 N.Y.S.2d 603, 605 (N.Y. App. Div. 1980) (if unintended then within coverage since that is the "construction
phrase is reasonably subject to this meaning,\textsuperscript{120} that the split among courts establishes the inherent ambiguity of the phrase,\textsuperscript{121} or that the drafting history of the pollution exclusion compels this conclusion.\textsuperscript{122}

Courts also are split as to what event the phrase "sudden and accidental" pertains. Courts have ruled that the phrase "sudden and accidental" unambiguously refers to the "discharge, dispersal, release or escape" of pollutants, not the resulting injury or damage.\textsuperscript{123} Many of these decisions, however, do not address the distinction between the intentional dispers-
sal of contaminants within an area of containment and the unexpected dispersal of the contaminants from the intended containment into third-party property.

Suppose, for example, in 1961 a sealed, steel drum of waste material is buried in an approved landfill with a clay lining. Sometime thereafter, unbeknownst to anyone, the drum cracks and releases contaminants which eventually burst through the lining of the landfill and contaminate third-party soil and groundwater. Does the phrase “sudden and accidental” pertain to the initial dispersal of contaminants into the drum, to the dispersal of the drum into the landfill, to the escape of contaminants from the drum, or to the escape of contaminants from the clay lining of the landfill?

Because the subject of the CGL policy is third-party property damage, one might reasonably assume that the dispersal of contaminants into third-party property is the event to which “sudden and accidental” pertains. This view of the “sudden and accidental” exception to the pollution exclusion would be consistent with the definition of occurrence—a fortuitous event resulting in third-party property damage neither expected nor intended from the standpoint of the policyholder.

In fact, this view of the “sudden and accidental” exception is supported by the drafting history of the 1973 pollution exclusion. The insurance industry’s statements and practices in the early 1970s demonstrate that it did not intend the pollution exclusion to add new restrictions to the standard CGL coverage for liabilities arising from third-party injury or damage. Rather, the purpose of the pollution exclusion was merely to restate the “occurrence” definition and reaffirm that expected or intended injury or damage arising from pollution was not covered.124

In the early 1970s the insurance industry gained approval of the new exclusion from state insurance departments and commissioners based on its representations that the exclusion did not change existing coverage.125 Insurance industry publica-

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124. See 3 R. Long, Law of Liability ins. app. at 58 (1974) (The exclusion “eliminates coverage for damages arising out of pollution or contamination, where such damages appear to be expected or intended on the part of the insured and hence are excluded by the definition of ‘occurrence.’”).

125. See Just, 456 N.W.2d at 575 (Exclusion approved by state insurance commis-
tions also emphasized that the pollution exclusion was no more than a restatement of the "occurrence" definition:

In one important respect, the exclusion simply reinforces the definition of occurrence. That is, the policy states that it will not cover claims where the "damage was expected or intended" by the insured and the exclusion states, in effect, that the policy will cover incidents which are sudden and accidental—unexpected and not intended. 126

Similarly, the American Insurance Association reassured policyholders that they "would generally be considered covered [for damage arising from pollution] if they could show continuing efforts to maintain compliance with local, state and federal pollution codes and standards." 127

A number of court decisions, consistent with the drafting history of the pollution exclusion and the definition of "occurrence," indicate that "sudden and accidental" pertains to the injury or damage resulting from pollution, not the act which eventually gives rise to the pollution. 128 Thus, coverage may

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be provided for damage to third-party property from intentional waste disposal, where the damage was neither expected nor intended from the policyholder's standpoint.\textsuperscript{129}

The Minnesota Court of Appeals ruled in favor of the policyholder on these issues in \textit{Grinnell Mutual Reinsurance Co. v. Wasmuth}.\textsuperscript{130} In that case, third-party injury and damage arose from continuous and repeated exposure to formaldehyde fumes emanating from deteriorating insulation.\textsuperscript{131} The appellate court ruled that the pollution exclusion was inapplicable, in part because the release of pollutants was "sudden and accidental."\textsuperscript{132}

The \textit{Grinnell} court first determined that the contamination injury was caused by an "accident."\textsuperscript{133} The court then declined to accept the carrier's argument that the term "sudden" necessarily means "abrupt" or "quickly."\textsuperscript{134} The court found the term "sudden" to be reasonably subject to more than one meaning and thus ambiguous.\textsuperscript{135}

Further, the court in \textit{Grinnell} indicated that, even under the carrier's restrictive definition of "sudden," the pollution exclusion often might be inapplicable.\textsuperscript{136} The court explained how each actual escape of the contaminant (formaldehyde fumes) from its intended means of containment (the insulation), and the initial contact with the person or property of third parties, might be an abrupt event.\textsuperscript{137}

The Minnesota Supreme Court adopted the same analysis of the word "sudden" as early as 1937. In \textit{City of Detroit Lakes v. Travelers Indemnity Co.},\textsuperscript{138} the court found that a boiler and ma-


\textsuperscript{130} \textit{Id.} at 499-500.

\textsuperscript{131} "It is undisputed that damages alleged here were caused by an accident—an event, including continuous exposure, where [the policyholder] neither intended nor expected to cause harm." \textit{Id.} at 499.

\textsuperscript{132} \textit{Id.} at 499-500.

\textsuperscript{133} "Especially when used in conjunction with 'accidental,' suddenness may be interpreted reasonably to include the unexpected release of formaldehyde into [the third-party claimant's] home, causing unanticipated damage." \textit{Id.} at 499.

\textsuperscript{134} \textit{Id.} at 500.

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{201 Minn. 26, 275 N.W. 371 (1937).}
chinery insurance policy covered an engine breakdown even though "the factors of causation may have been gradual and even slow in operation . . . ."\textsuperscript{139} The court distinguished this gradual process from the moment when the engine casting ruptured, which "doubtless was sudden."\textsuperscript{140} A similar distinction, between the factors of causation and the moment of injury or damage, could be applied in many cases of contamination injury.

In \textit{Grinnell}, the court of appeals also indicated that the phrase "sudden and accidental" applies to the contamination injury, rather than the act eventually giving rise to that injury.\textsuperscript{141} The court focused on whether the policyholder expected or intended the harm, or the release directly causing the harm, rather than on the intentional act (installation of insulation) which led to the harm.\textsuperscript{142}

\textit{b. Does the Exclusion Pertain to the Policyholder and the Pollution?}

A number of courts have held that the 1973 pollution exclusion is inapplicable to injury or damage arising from non-environmental pollution.\textsuperscript{143} These courts conclude that the phrase, "into or upon land, the atmosphere or any water course or body of water" demonstrates an intent to limit the exclusion to releases into the general environment at large. Thus, for example, the exclusion would not apply to injury or damage arising from toxic fumes which do not escape the workplace or other confined area.\textsuperscript{144}

Other courts have held that the pollution exclusion is inapplicable to injury or damage arising from non-industrial pollutants. These courts conclude that the terms “soot, fumes, acids, alkalis, toxic chemicals, liquids or gases” demonstrate an intent to limit the exclusion to industrial-type emissions, irritants, contaminants and pollutants.

Similarly, courts have held that the pollution exclusion is inapplicable to policyholders which are not industrial or “active” polluters. These decisions often are based on the reasonable expectations of the policyholder, given the nature and size of its business activities and the type of contamination injury alleged. Other courts have concluded that the pollution exclusion is inapplicable when the alleged polluter is a third party, rather than the policyholder.

N.Y.S.2d 698, 701 (N.Y. App. Div. 1986) (Groundwater is not watercourse or body of water.).


146. Armstrong, 479 So. 2d at 1168 (Phrase demonstrates intent “to protect the environment by eliminating coverage for industry-related pollution damages.”); Molton, Allen & Williams, Inc., 347 So. 2d at 99 (Intent of clause “was to eliminate coverage for damages arising out of pollution or contamination by industry-related activities.”).

147. Molton, Allen & Williams, Inc., 347 So. 2d at 99 (Real estate developer would not reasonably expect its construction activities to be included within scope of pollution exclusion.).


In *Grinnell Mutual Reinsurance Co. v. Wasmuth*, the Minnesota Court of Appeals held that the pollution exclusion did not apply to the non-industrial polluter and the type of pollution involved in the case. *Grinnell* involved the release of formaldehyde fumes within a single-family dwelling due to the deterioration of insulation installed by the policyholder, a small business.

The court in *Grinnell* considered "the nature and purpose of the [1973] pollution exclusion," and found that "[f]ew elements of the typical pollution claim are present in this case." The court concluded that, under "the broad coverage afforded," the policyholder would reasonably expect coverage from the insurance he purchased "to protect himself from damage resulting from the installation of insulation." The court noted that the policyholder "did not generate or produce a known hazardous substance, nor did he dispose of toxic waste as part of his business." The *Grinnell* court declined to decide if the phrase "upon land, the atmosphere or any water course or body of water" limited the pollution exclusion to contamination of the environment at large, although the court did note that the damage was confined to the interior of a home.

c. Did the Injury or Damage "Arise Out Of" Pollution?

The pollution exclusion provides that the injury or damage at issue must arise out of the discharge of pollutants. Courts have ruled that the exclusion does not preclude coverage of injury or damage which was solely or concurrently caused by an event other than the discharge of pollutants.

(Exclusion historically read not to include unintentional acts involving third parties.).

See *Niagara County*, 103 Misc. 2d at 817, 427 N.Y.S.2d at 174 (Exclusion inapplicable to policyholder which did not dump any contaminants); *Van's Westlake Union*, 34 Wash. App. at 710, 664 P.2d at 1264 (Exclusion only intended to deprive actual polluter of coverage.).

150. 432 N.W.2d 495 (Minn. Ct. App. 1988).
151. Id. at 501.
152. Id. at 497.
153. Id. at 499.
154. Id. at 498.
155. Id. at 499.
156. Id.
157. Id. at 500.
158. Id.
159. See *Clement v. Taylor*, 382 So. 2d 291, 234 (La. Ct. App. 1980) (Release of
The Minnesota Court of Appeals declined to adopt this position, at least in the context of the revised 1986 pollution exclusion. In *League of Minnesota Cities Insurance Trust v. City of Coon Rapids*, the policyholder argued that the release of toxic pollutants was only one of many proximate causes of the alleged contamination injuries. The court ruled that the expanded 1986 pollution exclusion clause precluded a duty to defend or indemnify, reasoning that a policyholder could always contend that some intervening factor caused the harm, "which would be "tantamount to reading the [pollution exclusion clause] out of the policy altogether." The court concluded that the policyholder's claim was properly denied "once the pollutant was introduced into the occurrence."

The court of appeals' holding in *Coon Rapids* may be inconsistent with several established principles of insurance law. A CGL insurer is obligated to defend its policyholder if the claim brought against the policyholder arises from facts suggesting that coverage potentially or arguably exists. Thus, allegations that injury or damage arose from causes other than the release of pollutants should trigger at least a duty to defend.

The *Coon Rapids* decision also is inconsistent with the insuring intent of the CGL policy. Traditionally, the purpose of CGL coverage has been to afford comprehensive, blanket protection from all risks and causes of loss not specifically excluded in the policy. Injury and damage arising from causes independent of the release of pollutants should be covered.

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160. 446 N.W.2d 419 (Minn. Ct. App. 1989).
161. *Id.* at 421. In *Coon Rapids*, claimants allegedly sustained lung injuries from the fumes of a mechanized ice cleaning machine while inside an ice arena owned by the policyholder. *Id.* at 420.
162. *Id.* at 421 (quoting Healy v. Tibbits Constr. Co. v. Foremost Ins. Co., 482 F. Supp. 830, 837 (N.D. Cal. 1979)).
163. *Id.* at 421-22.
164. See *Atlantic Mut. Ins. Co. v. Judd Co.*, 380 N.W.2d 122, 126 (Minn. 1986) (holding that if any part of claim against insured arguably falls within coverage, insurer must defend); *Prahm v. Rupp Constr. Co.*, 277 N.W.2d 389, 390 (Minn. 1979) (Ambiguity is resolved in favor of insured and, unless claim is clearly outside the coverage, insurer has a duty to defend.).
In a similar vein, the *Coon Rapids* decision is contrary to the "contributing cause" rule adopted in cases involving the comprehensive "all risks" property insurance policy. The Minnesota Supreme Court has ruled that the "all risks" policy covers a loss when any one of the contributing causes of the loss is not specifically excluded under the policy, even though an excluded cause may have contributed to the loss.  

The court of appeals' contrary reasoning in *Coon Rapids* may have been influenced by two factors. First, the facts of the case indicate that the discharge of pollutants was not merely a contributing cause of the injuries. Rather, the discharge appeared to be the primary and immediate cause of the contamination injuries, superseding all other causes. Second, the court may have been swayed by the seeming breadth of the new, expanded pollution exclusion which, unlike the 1973 exclusion, appears to exclude any injury or damage remotely associated with pollution. As discussed below, however, this was not the intent of the insurance industry, and policyholders can and should reasonably expect coverage of contamination injury or damage not specifically excluded by the new provision.

6. *Revised Pollution Exclusion (1986)*

In the mid-1980s the insurance industry expanded the pollution exclusion as part of the overall revisions to the standard CGL policy. The 1986 standard policy excludes from coverage:

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

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166. *See* Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co., 383 N.W.2d 645, 653 (Minn. 1986) ("This court has held that an insured is entitled to recover from an insurer where a cause of the loss is not excluded under the policy."); Campbell v. Insurance Serv. Agency, 424 N.W.2d 785, 789 (Minn. Ct. App. 1988) ("[E]vidence indicated that there were eight possible causes of the damage to the Campbell home, any of which could have contributed to the damage.").

167. *Coon Rapids*, 446 N.W.2d at 421.

168. *Id.* The policyholder argued that injuries resulted not only from the Zamboni machine emission, but also from the build-up of pollutants due to the failure of the defendant to adequately ventilate the ice arena. The court rejected this argument stating: "Under appellant's reasoning the pollution exclusion could never apply in a closed space because the build-up, rather than the emission, causes harm in a closed space." *Id.*

169. *Id.* at 422.

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(a) At or from premises you own, rent or occupy;
(b) At or from any site or location used by or for you or others for the handling, storage, disposal, processing or treatment of waste;
(c) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or
(d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:
   (i) if the pollutants are brought on or to the site or location in connection with such operations; or
   (ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

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

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

In sum, the revised provision excludes coverage of injury or damage arising from an actual or threatened release of "pollutants" (a) at or from the policyholder's owned premises or site of ongoing operations using the pollutants, or (b) from the policyholder's "waste" (wherever it is located). The exclusion also precludes coverage of any expenses arising out of governmental requests to monitor or clean-up "pollutants."

Although the 1986 standard pollution exclusion appears "absolute" in scope, this was not the insurance industry's intent. Many instances of contamination-related injury or damage remain covered by the standard CGL policy, regardless of whether the pollution at issue was gradual or abrupt.

The standard 1986 policy should cover contamination injury or damage arising from:

1. the policyholder's products when off-premises;
2. the policyholder's off-premises completed operations;
3. the policyholder's off-premises ongoing operations, if the pollutants at issue were not introduced or used as part of the operations;
4. causes other than the actual or threatened release of pollutants;
5. non-environmental pollution;
6. non-industrial pollutants or wastes, or pollutants or wastes from a non-industrial polluter.

The Insurance Services Office, which drafted the revised pollution, has indicated that the exclusion does not preclude coverage of the first three situations listed above. Coverage of the situations remaining, however, awaits judicial refinement.

In particular, the phrase "arising out of" was carried over to the 1986 exclusion without clarification, suggesting that the new exclusion (like the 1973 exclusion) may not apply when the injury or damage at issue was solely or concurrently caused by an event other than the release of pollutants. So far, however, courts interpreting the 1986 exclusion have concluded that it bars coverage if pollution is a cause of the injury or damage, regardless of other causes.

At least one commentator suggests that the 1986 pollution exclusion may not apply to non-environmental pollution. The phrase "into or upon land, the atmosphere or any water course or body of water" in the 1973 pollution exclusion was not used in the revised exclusion. Nevertheless, the phrase "discharge, dispersal, release or escape of pollutants" in the

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171. See id. (citing the Insurance Services Office Workbook on the 1986 policy forms, endorsements and rules).
172. See Averback, supra, note 112, at 639-42.
173. See, e.g., Guilford Indus. Inc. v. Liberty Mut. Ins. Co., 688 F. Supp. 792, 795-96 (D. Me. 1988) (rejecting policyholder's argument that proximate cause of damage was flooding and not oil leak resulting from flood). Decisions such as this one may be inconsistent with case law defining the CGL carrier's broad duty to defend, the comprehensive insuring intent underlying CGL coverage, and the "contributing cause" rule governing comprehensive "all risks" policies. See supra notes 164-66 and accompanying text.
174. See Averback, supra, note 112, at 643-44.
1986 exclusion suggests that only contamination of the environment-at-large is excluded.

Another open question is whether the definition of pollutants\textsuperscript{175} demonstrates an intent (as in the 1973 exclusion) to limit the exclusion to industrial contaminants and industrial polluters. One court found the term "waste" to be ambiguous, and declined to rule as a matter of law that recycled waste material (including construction debris, rock, brick, wood, glass, and aluminum) is an "irritant or contaminant."\textsuperscript{176} Another court has indicated that virtually any substance might fall within the exclusion once it becomes an irritant or contaminant, and that environmental statutes are "an excellent source of information concerning what constitutes a pollutant."\textsuperscript{177}

The Minnesota Court of Appeals analyzed the 1986 revised pollution exclusion in \textit{League of Minnesota Cities Insurance Trust v. City of Coon Rapids}.\textsuperscript{178} The case involved a claim against the city of Coon Rapids for injuries arising out of the release of nitrogen dioxide gases, within an enclosed ice arena, from a Zamboni ice cleaning machine.\textsuperscript{179} The environment outside of the ice arena was not contaminated; the city was not an industrial (or actual) polluter; and the nitrogen dioxide was not necessarily an industrial pollutant.\textsuperscript{180} The court of appeals concluded that the 1986 pollution exclusion barred coverage, without specifically addressing whether the exclusion applies to non-environmental contamination within a confined space, or to non-industrial polluters and pollutants.\textsuperscript{181} In view of the seeming breadth of the 1986 pollution exclusion, the court in \textit{Coon Rapids} may have been reluctant to conclude that the city reasonably expected coverage.

\textsuperscript{175} Pollutants are defined as any "solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." Appendix E—1986 Policy.
\textsuperscript{177} \textit{Guilford Indus. Inc.}, 688 F. Supp. at 793-94.
\textsuperscript{178} 446 N.W.2d 419 (Minn. Ct. App. 1989).
\textsuperscript{179} Id. at 420.
\textsuperscript{180} Id.
\textsuperscript{181} Id. at 422. Cf. \textit{Grinnell Mut. Reinsurance Co. v. Wasmuth}, 432 N.W.2d 495, 499 (Minn. Ct. App. 1988) (1973 pollution exclusion inapplicable to policyholder which did not generate or dispose of known hazardous substance as part of business.).
D. Caused by an Occurrence

The standard CGL policy provides that the bodily injury or property damage at issue must have been caused by an occurrence.182 "Occurrence" is defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."183 The term "accident," undefined in the policy, typically is construed by courts to mean an unexpected happening.184

Insurance carriers frequently allege that liabilities arising from contamination injury are not covered because the injury, or the event causing the injury, was expected or intended by the policyholder. This ground for denying coverage often is extensively fact-oriented, and substantially increases the scope and expense of coverage litigation. The carriers' allegations may implicate scores of witnesses and countless documents pertaining to the policyholder's operations and knowledge over several decades.

Courts are split over the extent to which the carriers can use this exclusionary phrase to deny coverage. The debate focuses primarily on two issues: (1) the degree of knowledge or purpose the carrier must establish to exclude coverage; and (2) whether an objective standard can be used to exclude coverage.

In determining whether a contamination injury was "expected or intended," a number of courts have adopted a threshold only slightly higher than a "foreseeability" or negligence standard, and have evaluated expectations from the objective standpoint of a reasonably prudent person, rather than the policyholder.185 Typically, these courts rule that coverage

182. See Appendix C—1966 Policy. Prior to 1966, the standard policy used the phrase "caused by accident." See Appendices A and B.

183. Id.


185. See City of Carter Lake v. Aetna Casualty & Sur. Co., 604 F.2d 1052, 1059 n.4 (8th Cir. 1979) (interpreting Iowa law) ("[I]ndications must be strong enough to alert a reasonably prudent man not only to the possibility of the results occurring but the indications also must be sufficient to forewarn him that the results are highly likely to occur."); Township of Gloucester v. Maryland Casualty Co., 668 F. Supp. 394, 401 (D.N.J. 1987) (interpreting New Jersey law) (Occurrence clause excludes coverage where policyholder knew or should have known of ongoing pollution).
is excluded if the policyholder knew or should have known there was a "substantial probability" that the contamination injury in question would result from the policyholder's actions.\textsuperscript{186} The injury is considered substantially probable when indications are strong enough to forewarn a "reasonably prudent person" that the injury is "highly likely" to occur.\textsuperscript{187}

Other courts require a higher degree of certainty, ruling that the policyholder must have intended the injury, or must have known that the injury would flow directly and imminently from its intentional act, and nevertheless acted with the purpose of causing the injury.\textsuperscript{188} These courts recognize that a lesser standard could frustrate the purpose of liability insurance. One court explained:

[T]o exclude all losses or damages which might in some way

\begin{itemize}
\item See City of Carter Lake, 604 F.2d at 1058-59; Township of Gloucester, 668 F. Supp. at 401; Neville Chem. Co., 650 F. Supp. at 932.
\item See City of Carter Lake, 604 F.2d at 1059 n.4.
\end{itemize}
have been expected by the insured, could expand the field of exclusion until virtually no recovery could be had on insurance. This is so since it is mishaps that are "expected"—taken in its broadest sense—that are insured against.\(^{189}\)

Several courts also emphasize that the "occurrence" definition expressly provides that the expectation of the injury in question must be evaluated "from the standpoint of the insured."\(^{190}\) Accordingly, these courts decline to apply an objective standard and evaluate coverage based on the policyholder's actual knowledge, purpose, expectations or intent.\(^{191}\)

Decisions applying a "virtual certainty" standard are consistent with the plain meaning of "expected or intended," as well as the insurance industry's historical understanding of that clause. One dictionary, for example, defines "expect" as "to look forward to the probable occurrence or appearance of, to consider likely or certain."\(^{192}\) Consistent with this common definition, in 1966 a representative of The Hartford Insurance Group, echoing the understanding of other carriers, assured a major insurance broker that "expected" means "expected for a certainty."\(^{193}\)

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189. City of Johnstown, 877 F.2d at 1150 (emphasis in original).
191. Benedictine Sisters of St. Mary's Hosp. v. St. Paul Fire & Marine Ins. Co., 815 F.2d 1209, 1211 (8th Cir. 1987) (interpreting South Dakota law) (Property damage resulting from continuing condition is accidental where policyholder was unaware of the dangerous condition and took good faith steps to remedie the situation after the initial occurrence.); CPS Chem. Co., 199 N.J. Super. at 564, 489 A.2d at 1269 ("The intentional acts of a third party ... [may be] unforeseen, unexpected, and unintended by the insured."); Marotta Scientific Controls, Inc., No. 87-4438 (D.N.J. June 5, 1990) (reprinted in Mealey's Insurance Litigation Reports F1, F13 (June 26, 1990)) (Testimony demonstrated spills were not "routine, intended, predictable or egregious."); Du-Wel Prod., Inc. v. United States Fire Ins. Co., No. A-4457-87T2 (N.J. Super. App. Div. Oct. 26, 1989) (reprinted in Mealey's Insurance Litigation Reports C1, C7 (Dec. 28, 1989)), (interpreting Michigan law) (Long-term, repeated polluting activity and policyholder's intentional generation of hazardous waste are not determinative, so long as policyholder reasonably believed "treated waste was being handled in a way which would not cause property damage.").
193. Letter from H. Schaffner, The Hartford Insurance Group, to R. Bauer, John-
The subjective "virtual certainty" standard also comports with the aleatory nature of insurance contracts. An aleatory contract is an agreement conditioned on the occurrence of a fortuitous event "or an event supposed by the parties to be fortuitous." The Second Restatement of Contracts defines an aleatory contract as one in which at least one party is under a duty that is conditional on the occurrence of an event that, so far as the parties to the contract are aware, is dependent on chance. Its occurrence may be within the control of third persons or beyond the control of any person. The event may have already occurred, as long as that fact is unknown to the parties. It may be the failure of something to happen as well as its happening. Common examples are contracts of insurance and suretyship, as well as gambling contracts.

The CGL carrier's aleatory promise is that it will pay the policyholder's liabilities for third-party injury or damage neither expected nor intended by the policyholder. Whether the injury or damage was "substantially probable" and whether a reasonably prudent person would have expected the injury or damage should be irrelevant as a matter of contract law. As long as the policyholder is not certain that injury or damage will occur, fortuity exists. As long as there is any chance, risk or probability that injury or damage might not occur, fortuity exists. The essence of the aleatory insuring agreement is a "bet" that third-party injury or damage will not occur. If the policyholder does not act with the purpose of causing the third-party injury or damage, the bet should be enforced.

In Auto-Owners Insurance Co. v. Jensen, the Eighth Circuit Court of Appeals ruled that Minnesota courts would likely adopt a "substantial probability" standard to evaluate whether coverage would be excluded by the "expected or intended"
The parties in *Jensen* stipulated that the standard should be an objective one based on whether a reasonable person in the insured’s position would have expected the damage to occur. Thus, the Eighth Circuit incorporated this objective test into its “substantial probability” standard. The Eighth Circuit ruled that damages are “expected or intended” under Minnesota law if indications are strong enough for a prudent person to conclude that the damage is “highly likely to occur.”

The Eighth Circuit’s decision in *Jensen* contradicts decisions of the Minnesota appellate courts. The Minnesota Supreme Court has expressed concern that the “expected or intended” clause not be allowed to frustrate the purpose of liability insurance. In *Continental Western Insurance Co. v. Toal*, the court held that an “expected injury” cannot be equated with a “foreseeable” injury. The court reasoned that, otherwise, coverage would be unduly limited “since foreseeability is generally an essential element in establishing liability.” The *Toal* court was concerned that the misuse of the “expected or intended” clause might defeat the very purpose for which liability insurance is purchased. The court noted that other courts have interpreted the term “expected” to require that a policyholder act with a “high degree of certainty.”

Thus, the *Jensen* “substantial probability” test does not meet the Minnesota Supreme Court’s requirements. In effect, the *Jensen* test permits a carrier to pursue, through discovery and trial, what amounts to a negligence case against its policyholder. Rejecting this tactic, the Minnesota Supreme Court has adopted a more stringent test requiring a higher degree of “certainty.” Further, Minnesota appellate court decisions ap-

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198. *Id.* at 720.
199. *Id.* at 717 n.2.
200. *Id.* at 720.
201. *Id.*
202. *See* *Continental W. Ins. Co. v. Toal*, 309 Minn. 169, 244 N.W.2d 121 (1976).
203. *Id.*
204. *Id.* at 176, 244 N.W.2d at 125.
205. *Id.*
206. *Id.*
207. *Id.* at 176 n.3, 244 N.W.2d at 125 n.3 (emphasis added). Significantly, in support of this proposition the Minnesota Supreme Court cited State Farm Fire & Casualty Co. v. *Muth*, 207 N.W.2d 364 (Neb. 1973). *See supra* note 193 and accompanying text.
plying the "expected or intended" clause have focused on the actual knowledge of the policyholder in question. Accordingly, if directly confronted with the issue, Minnesota courts would likely adopt a subjective standard consistent with the phrase "from the standpoint of the insured."

E. Defend Any Suit

The standard CGL policy obligates the carrier to defend any suit against the policyholder seeking damages on account of bodily injury or property damage to which the policy applies. The duty to defend is triggered by the allegations of the claim made against the policyholder. If any part of the allegations arguably falls within the scope of coverage, the duty to defend is triggered. Any doubts as to coverage must be resolved in favor of the policyholder. Thus, a CGL carrier's duty to defend is considered broader than its duty to indemnify.

Typically a governmental agency's first formal claim of liability for environmental contamination is made in correspondence identifying a person or entity as a potentially responsible party (PRP). The PRP letter usually "requests," under the threat of subsequent legal proceedings, that the party provide information as to its involvement at the site in question, and cooperate in an investigation of the nature and extent of contamination. At some point in the investigation, the agency may also issue a Request for Response Action...


209. See, e.g., Appendix D—1973 Policy.

210. See, e.g., Economy Fire & Casualty Co. v. Iverson, 445 N.W.2d 824, 826 (Minn. 1989).

211. See, e.g., Jostens, Inc. v. Mission Ins. Co., 387 N.W.2d 161, 165-66 (Minn. 1986); Prahm, 277 N.W.2d at 390.

212. See, e.g., Crum v. Anchor Casualty Co., 264 Minn. 378, 390, 119 N.W.2d 703, 711 (1963).


(RFRA) letter, which demands that the party continue its investigation and submit a response plan to remedy the contamination. The RFRA letter typically advises that the party’s failure to cooperate will result in the agency implementing a response plan of the agency’s choosing, after which the agency will commence a court action against the party to recover its costs.

The allegations in the typical PRP and RFRA letters arguably fall within the scope of standard CGL insurance coverage because the allegations claim that the policyholder is legally liable for third-party property damage. Further, the letters typically do not include allegations which might raise questions as to coverage (e.g., that the party expected or intended the property damage or that the contamination began on a certain date). Thus, resolving all doubts in favor of coverage, the allegations in the PRP and RFRA letters should trigger the carrier’s duty to defend.

The costs of defending against and investigating the allegations in PRP and RFRA letters can be quite significant. Typical expenditures might include the costs of numerous monitoring wells and soil borings, as well as engineer and hydrologist fees, which are usually necessary to determine the nature and extent of the policyholder’s liabilities. Added to these costs can be the fees, including attorney’s fees, expended in formulating and negotiating a remedial plan that the government agency might accept in settlement of its claims.

Further, the CGL carrier’s obligation to pay these defense costs may, in some circumstances, be unlimited. The standard form CGL policies, prior to the 1986 revision, obligate the carrier to continue paying defense costs until indemnity payments exhaust the policy limits. Thus, CGL carriers with low coverage limits conceivably could end up paying defense costs far above the limits of the policy.

Carriers have attempted to side-step this result by arguing that the CGL insuring agreement requires them to defend only “suits,” and that PRP and RFRA letters do not constitute

215. Id. § 115B.17, subd. 1(a)(1) and subd. 3.
216. Id. § 115B.17, subd. 2.
218. For standard CGL policies prior to the 1986 revision, see Appendices A-D.
“suits.” Some courts agree with this position, reasoning that the term “suit,” although undefined in the policy, plainly refers to formal legal proceedings, such as civil litigation or formal administrative adjudications, and not to informal proceedings by government agencies.219

Other courts, however, conclude that the term “suit” encompasses any effort by a claimant to impose liability on a policyholder that is ultimately enforceable by a court.220

Generally, these courts focus on the adversarial and coercive nature of PRP and RFRA letters, and the adverse consequences that may befall a policyholder who does not promptly and adequately defend against the allegations in those letters.221 One court explained that defending the policyholder


220. See Ryan v. Royal Ins. Co. of Am., 916 F.2d 731, 741 (1st Cir. 1990) (interpreting New York law) (Duty to defend arises when government assumes adversarial posture, making clear that its force “will be brought promptly to bear in a way that threatens the insured with probable and imminent financial consequences.”); Avondale Indus., Inc., 887 F.2d at 1206 (adopting a broad construction of the word “suit” to include administrative proceedings); Liberty Mut. Ins. Co. v. Continental Casualty Co., 771 F.2d 579, 586 (1st Cir. 1985) (interpreting Massachusetts law) (Pre-complaint defense costs are recoverable where defense activities would have been performed after complaint, which was almost certain to be filed, and policyholder had little choice but to retain counsel and prepare defense.); Higgins Indus., Inc. v. Fireman’s Fund Ins. Co., 730 F. Supp. 774, 776 (E.D. Mich. 1989) (Until facts establish that insurance policy in question does not apply, insurance companies must defend governmental claims and demands.); Fireman’s Fund Ins. Cos. v. Ex-Cell-O Corp., 685 F. Supp. 621, 628 (E.D. Mich. 1987) (Federal agency actions against policyholders are suits because the action is an effort to ultimately impose liability enforceable by the court.); United States Fidelity & Guar. Co. v. Specialty Coatings Co., 180 Ill. App. 3d 378, 389, 535 N.E.2d 1071, 1078-79 (1989) (Letter from EPA notifying policyholder of potential liability for cleaning up hazardous waste constitutes “suit.”); Hazen Paper Co. v. United States Fidelity & Guar. Co., 407 Mass. 689, 696, 555 N.E.2d 576, 581 (1990) (Consequences of receiving EPA demand letter are “substantially equivalent to the commencement of a lawsuit.”); Polkow v. Citizens Ins. Co. of Am., 180 Mich. App. 651, 657, 447 N.W.2d 853, 856 (1989) (“Administrative mechanisms mandating an environmental investigation and cleanup, backed by the power to expose the insured to a money judgment in a court of law, amounts to ‘suit.’”); C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng’g Co., 326 N.C. 133, 154-55, 388 S.E.2d 557, 569-70 (1990) (State orders to clean up toxic wastes are “suits.”).

only after a court action is commenced effectively "shuts the barn door after the horses have gotten out".222

The adverse consequence to the insured occurs when the government chooses a remedial plan more expensive than an otherwise acceptable plan. Thus, the need for representation is greatest before the remedial plan is formulated, when the government is accepting input from the responsible parties.

. . . . Since damages may be determined before the parties arrive in court, the administrative process is part of a "litigious process" that triggers the obligation to defend.223

Some courts find that the term "suit" is reasonably subject to more than one meaning, and therefore must be construed in favor of the policyholder.224 One dictionary, for example, defines "suit" as "the attempt to gain an end by legal process."225 Assuming that PRP and RFRA letters are attempts by government agencies to gain an end by legal process, the letters might reasonably fall within the broad definition of "suit."

A restrictive interpretation of the term "suit" may be inconsistent with the principle that the duty to defend is broader than the duty to indemnify.226 A potentially responsible party often avoids court proceedings by negotiating a settlement agreement or "consent order" with the government agency after a thorough investigation of the extent of the party's liability and the appropriate remediation. In most jurisdictions, the party's CGL carrier would be obligated to indemnify the policyholder for all sums paid pursuant to the settlement. If the carrier had no obligation to pay defense and investigation costs because the agency had not commenced court proceedings, the resulting duty to defend would be narrower than the duty to indemnify.

A restrictive application of the term "suit" may also contravene public policy, as well as common sense.227 The public interest favors prompt clean-up of hazardous waste, and a cooperative, private remedial effort is quicker and less expensive

222. Id. at 1321.
223. Id. at 1321-22.
225. WEBSTER'S THIRD NEW WORLD INTERNATIONAL DICTIONARY 2286 (3d ed. 1971).
than a government sponsored program. A restrictive application of the term "suit" would provide an incentive for policyholders to ignore agency requests and wait for court proceedings to commence. One court concluded that this result would "sharply escalate" the policyholder's (and the carrier's) liabilities and costs. In addition, "[f]undamental issues involved in the administrative proceeding will obviously affect the extent of contribution of the various generators of the waste." The Minnesota Supreme Court has not specifically addressed the "suit" issue in the context of environmental claims. However, in *Minnesota Mining & Manufacturing Co. v. Travelers Indemnity Co.*, the court did indicate that a CGL carrier's duty to defend may not be limited to formal court proceedings. The court stated that "[t]he issue of coverage does not depend merely on the form of action taken against the insured. Surely the legal proceedings commenced by MPCA against the insureds is equally coercive as a civil judgment against the insured." The court also noted that policyholders contemplate "greater certainty" when they purchase CGL policies, and could reasonably anticipate coverage of "any claim asserted against the insured arising out of property damage, which requires the expenditure of money . . . ." The court in *Minnesota Mining* also recognized that "[i]t is obviously the better public policy to encourage responsible parties to take immediate action themselves to mitigate and remedy groundwater contamination rather than await a state operated cleanup effort at a later date." As noted above, a restrictive application of the term "suit" could contravene this objective by encouraging policyholders to ignore the orders of a government agency until it commences formal court proceedings.

228. *Id.*
230. *See* Avondale Indus., Inc., 887 F.2d at 1206.
231. *Id.*
232. 457 N.W.2d 175 (Minn. 1990).
233. *Id.* at 183.
234. *Id.* The MPCA had not served a formal civil complaint against any of the policyholders in *Minnesota Mining*. *Id.* at 177. The MPCA had served RFRA letters on two of the policyholders. *Id.*
235. *Id.* at 179 (emphasis added).
236. *Id.* at 182.
Finally, the court in *Minnesota Mining* also ruled that ambiguities of insurance terms which are undefined in a policy may be demonstrated by the "sharp division in case authority from other jurisdictions .. . ."237 Consistent with this ruling, the term "suit" is ambiguous under Minnesota law and must be construed in favor of the policyholder.

In view of the court's reasoning in *Minnesota Mining*, the duty to defend under Minnesota law should not turn on whether the claim against the policyholder is made in a formal court pleading or in a PRP letter. Rather, the term "suit" can reasonably be interpreted to encompass any claim against the policyholder arising out of property damage and requiring the expenditure of defense costs.

IV. Property Insurance Coverage

Under certain circumstances, the standard "all risks" property insurance policy may cover the costs of cleaning up soil or water which has been contaminated by property covered under the policy (e.g., chemical products used in the policyholder's operations).238 Typically, the terms of the standard "all risks" policy obligate the property insurer to pay the costs of removing insured property which has been "lost" and transformed into "debris" due to a fortuitous or non-excluded cause. Further, under many policies, the monetary obligation of the carrier might extend up to the blanket limit of coverage for property loss, and beyond the limit at a set amount for each occurrence.

For example, where a negligent act causes an insured batch of chemical solvent used in the policyholder's operations to be lost into the soil, the property insurance carrier may be obligated to pay for the removal of insured "property-turned-debris" from the soil and groundwater. Depending on the terms

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237. *Id.* at 180.

of the policy, the carrier may be obligated to pay all or a sub-
stantial portion of the clean-up costs.

The carrier's agreement to cover clean-up costs in this type
of situation is expressed in the debris removal clause of the
standard property insurance policy. The agreement in the
1977 standard Special Multi-Peril policy, for example, states:

Debris Removal. This policy covers expense incurred in the
removal of debris of the property covered which may be oc-
casioned by loss by any of the perils insured against in this
policy. The total amount recoverable under this policy for
both loss to property and debris removal expense shall not
exceed the limit of liability applying to the property. Cost
of removal of debris shall not be considered in the determi-
nation of actual cash value when applying the Coinsurance
Clause. 239

By its terms, the typical debris removal agreement restricts
coverage to debris of insured property which was lost because of
an insured peril. Under the standard blanket policy, insured
property broadly includes any personal property owned by or
in the care of the insured while on or near premises designated
in the policy. Thus, insured property might include the policy-
holder's supply of solvents and other raw materials used in its
operations, its inventory of finished products, and possibly by-
products of the policyholder's operation if they have some re-
covery value.

The scope of insured perils is also comprehensive. The
standard "all risks" policy covers all risks of direct physical loss
not specifically excluded in the policy. The policy normally
covers any and all fortuitous losses not resulting solely from an
excluded cause of loss or from fraudulent acts of the policy-
holder. 240 Many courts have determined that a loss is fortui-
tous, and thus covered, if it results from the acts or omissions
of third parties or from the negligence of the policyholder or
its employees. 241 Neither of these causes of loss is specifically

239. INSURANCE SERVICES OFFICE, Special Multi-Peril Policy Conditions and Definitions,
240. See C.H. Leavell & Co. v. Fireman's Fund Ins. Co., 372 F.2d 784, 787 (9th
Cir. 1967); Raybestos-Manhattan, Inc. v. Industrial Risk Insurers, 289 Pa. Super. 479,
579 F.2d 561, 565 (10th Cir. 1978) (Negligence of contractor's employees is not ex-
cluded under policy.); Redna Marine Corp. v. Poland, 46 F.R.D. 81, 87 (S.D.N.Y.
excluded in the standard “all risks” policy, at least prior to 1983.

The standard policy typically excludes loss of covered property caused by contamination, deterioration, inherent vice, latent defect, wear and tear, marring or scratching. A number of courts have interpreted this exclusion to preclude coverage of lost property merely because the property is in a contaminated condition, even though the condition may have resulted from an external, covered cause of loss.

Other courts conclude that the contamination exclusion applies only when the contaminated condition of the lost property arises from the property itself, not when the condition resulted from an external cause. These decisions are consistent with the drafting intent of the contamination exclusion. One insurance industry publication explained:

Within the context of the exclusion, the drafters of the form seem to be talking about loss to physical property that will happen given a sufficient period of time. Physical property

1969) (Negligence of insured, or of employees of insured, which causes fortuitous loss is within coverage of “all risk” insurance.).


243. See American Casualty Co. of Reading, Pennsylvania v. A.L. Myrick, 304 F.2d 179, 184 (5th Cir. 1962) (Goods contaminated by ammonia gas excluded from coverage even though cause was external to goods.); Hi-G, Inc. v. St. Paul Fire & Marine Ins. Co., 283 F. Supp. 211, 213 (D. Mass. 1967) (No recovery where “relays” were contaminated by oil vapor.).

244. See Central Cold Storage v. Lexington Ins. Co., 452 So. 2d 1014, 1015 (Fla. Dist. Ct. App. 1984) (“All risks” policy which insured property against “external” causes held to extend coverage for damage to stored goods resulting from an ammonia leak where ammonia was external to the goods in storage.). See also Raybestos-Manhattan, Inc. v. Industrial Risk Insurers, 289 Pa. Super. 479, 484, 433 A.2d 906, 908-09 (1981). In Raybestos-Manhattan, the court held that an “all risk” policy which insured property against “external” causes extended coverage where the proximate or direct cause of appellee’s loss was the unintentional pouring of fuel oil into a tank intended for heptane. Because this was a non-excluded, external cause, the court held that the policy provided coverage even though an external cause brought about the loss by contaminating the internal contents of the heptane tank. That internal damage was brought about by an external cause was largely irrelevant, the court said, since “[i]ndemnity was provided for such a loss to the same extent as if oil had been poured directly upon the work [itself].” Id. at 909.

In reaching its decision, the Raybestos-Manhattan court relied on Dubuque Fire & Marine Ins. Co. v. Caylor, 249 F.2d 162 (10th Cir. 1957). In Dubuque, the court stated it “is concerned with the outward source or origin of an instigating agent. A cause which has an external source or origin is not rendered internal by the fact that its effect is internal, since it is the means and not the injury itself to which the phrase refers.” Id. at 165.
will wear out, it will become mildewed or rotten if subject to enough humidity for sufficiently long, things mechanical will break down, latent defects will eventually reveal themselves, etc. Losses like these must be distinguished, however, from the sudden and accidental damage that property is heir to; set fire to a sofa and it clearly becomes marred, but just as clearly that is not what the homeowners . . . exclusion refers to. . . . "[C]ontamination" is another of those instances of property damage that, like wear and tear or marring and scratching, will happen. There is in such instances no risk of loss against which to insure. But such instances are quite unlike accidental damage to carpeting that may result in its "contamination." 245

Decisions limiting the scope of the contamination exclusion also are consistent with the "contributing cause" rule governing standard "all risks" policies. Under this rule, lost property is covered where any one of the causes of the loss is not specifically excluded under the policy, even though an excluded cause may have also contributed to the loss. 246 Thus, even if contamination was considered to be a cause of the loss of property, the loss would be covered if it also was caused by a non-excluded, fortuitous event, such as a negligent act.

In 1983, the insurance industry amended the standard "all risks" policy, adding a new exclusion pertaining to losses caused by "acts," omissions and faulty workmanship. 247 The exclusion appears to nullify itself, however, by excepting any "ensuing loss" not specifically excluded in the policy. The exclusion provides:

This policy does not insure against loss caused by any of the following. However, any ensuing loss not excluded or excepted in this policy is covered . . .

(a) Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body;
(b) Faulty, inadequate or defective:

246. See, e.g., Henning Nelson Constr. Co. v. Fireman’s Fund Am. Life Ins. Co., 383 N.W.2d 645, 653 (Minn. 1986). See also Texas E. Transmission Corp. v. Marine Office-Appleton & Cox Corp., 579 F.2d 561, 565 (10th Cir. 1978) ("If there is a concurrence of negligence and an excluded peril such as an inherent defect, then coverage applies under an 'all risks' policy.").
At least one court, in examining a similar exclusion, has noted that the "ensuing loss" exception to this type of exclusion appears to be "self-contradictory gibberish."\(^{249}\)

The Insurance Services Office has attempted to explain the "ensuing loss" exception as follows:

For these exclusions, any ensuing loss not excluded or excepted is covered. This means that there is no coverage for a claim to repair an improperly built window; however, there is coverage, for example, if a fire or other covered cause of loss ensues from improperly placed electrical wiring or the act of carelessly smoking in bed.\(^{250}\)

This analysis may be effective in the context of the standard "named peril" policy, which limits coverage to a definite list of specifically described causes of loss (such as fire). The standard "all risks" policy, however, covers any and all fortuitous causes of loss which are not specifically excluded.

In many instances, property losses directly ensue from fortuitous events caused by acts, omissions or faulty workmanship. For example, the loss of insured solvents from an underground storage tank might ensue from the fortuitous release of the solvents from the tank, which in turn ensued from the fortuitous rupture of the tank, which in turn was caused by faulty workmanship in manufacturing the tank walls, or the negligent act of sideswiping the tank with a bulldozer during excavation. In this situation, under the "ensuing loss" exception and the "contributing cause" rule, the policy should cover the loss of solvents, as well as the cost of removing this covered-property-turned-debris from the soil.

In 1986 the insurance industry changed the standard "all

\(^{248}\) Id. (emphasis added).


risks" policy to exclude coverage of any loss caused by the release of "pollutants," unless the release was caused by one of fifteen specified causes of loss.\(^{251}\) In effect, the insurance industry converted "all risks" coverage to "named peril" coverage with respect to contamination-related property loss. The debris removal agreement also was changed to exclude coverage for extracting pollutants from land or water, and removing, restoring or replacing polluted land or water.\(^{252}\) Depending on the circumstances of a case, these provisions may limit or defeat coverage for cleaning up covered-property-turned-debris due to a post-1986 loss.

Cases interpreting pre-1986 "all risks" policies indicate that Minnesota courts would enforce the debris removal agreement and require the carrier to pay the cost of cleaning up covered property lost into soil or water because of any non-excluded fortuitous cause. In *Pillsbury Co. v. Underwriters at Lloyds, London,*\(^{253}\) the United States District Court for the District of Minnesota ruled that "[t]he insured's burden under an all risks policy is limited. The insured need only show that a loss occurred and that the loss was fortuitous."\(^{254}\) Further, "[t]he insured is not required to prove the precise cause of the loss or damage or to demonstrate that it was occasioned by an external cause."\(^{255}\) The court in *Pillsbury* also held that a loss may be fortuitous and covered "[e]ven if the loss resulted from the policyholder's negligence."\(^{256}\) In *Wyatt v. Northwestern Mutual Insurance Co. of Seattle,*\(^{257}\) the federal district court found that the negligent acts of third parties similarly constituted a fortuitous and covered cause of loss under an "all risks" policy.\(^{258}\)

Under Minnesota law, the contamination exclusion should not defeat debris removal coverage where any fortuitous cause (such as negligence) contributes to the loss. The Minnesota Supreme Court, in *Henning Nelson Construction Co. v. Fireman's*

\(^{251}\) *Id.* at 95-108.

\(^{252}\) *Id.*


\(^{254}\) *Id.* at 1399.

\(^{255}\) *Id.*

\(^{256}\) *Id.* at 1400.


\(^{258}\) *Id.* at 783. See also *Hogs Unlimited v. Farm Bureau Mut. Ins. Co.*, 401 N.W.2d 381, 386 (Minn. 1987) (Innocent insured partner's loss covered when caused by fortuitous, intentional act of coinsured.).
Fund American Life Insurance Co.,\textsuperscript{259} ruled that the “all risks” policy covers a loss when any one of the contributing causes of the loss is not specifically excluded under the policy, even though an excluded cause may have contributed to the loss.\textsuperscript{260}

In \textit{Twin City Hide v. Transamerica Insurance Co.},\textsuperscript{261} the Minnesota Court of Appeals indicated that property in a rotted condition might be excluded merely because of the condition, regardless of whether the condition resulted from external causes.\textsuperscript{262} This decision, however, may be inconsistent with the drafting intent of the contamination and deterioration exclusion, as well as with the “contributing cause” rule.\textsuperscript{263} The court of appeals’ decision in \textit{Twin City Hide} might have been influenced by compelling evidence refuting the policyholder’s assertion that the rotted condition of the property resulted from the alleged external cause.\textsuperscript{264}

It is likely that, in many circumstances, Minnesota law also would limit applicability of the 1983 acts, omissions, and faulty workmanship exclusion. In \textit{Pillsbury}, the court ruled that a faulty workmanship exclusion “applies only to the losses related to ‘making good’ the defect and not to losses caused by the defect.”\textsuperscript{265} Thus, the policy might not cover the cost of replacing a storage tank which ruptures due to faulty workmanship. The ensuing loss of insured solvents from the tank, however, would fall outside the faulty workmanship exclusion. Further, consistent with the “contributing cause” rule, the Minnesota Supreme Court, in \textit{Caledonia Community Hospital v. Saint Paul Fire & Marine Insurance Co.},\textsuperscript{266} determined that an “ensuing loss” exception includes any covered cause contributing to the loss of property, even if the covered cause flowed

\textsuperscript{259} 383 N.W.2d 645 (Minn. 1986).
\textsuperscript{260} Id. at 653.
\textsuperscript{261} 358 N.W.2d 90 (Minn. Ct. App. 1984).
\textsuperscript{262} Id. at 92.
\textsuperscript{264} 358 N.W.2d at 92.
\textsuperscript{265} Pillsbury Co. v. Underwriters at Lloyds, London, 705 F. Supp. 1396, 1400-01 (D. Minn. 1989). The court in \textit{Pillsbury} did not clarify whether it was ruling on this issue as a matter of Minnesota law. See id. The Eighth Circuit, however, has indicated that the phrase “external cause” in an “all risks” insurance agreement excludes coverage of losses resulting from negligence of a policyholder. See N-Ren Corp. v. American Home Assurance Co., 619 F.2d 784, 787-88 (8th Cir. 1980) (interpreting Minnesota law).
\textsuperscript{266} 239 N.W.2d 768 (Minn. 1976).
directly from the excluded cause of loss.267

V. ENVIRONMENTAL IMPAIRMENT LIABILITY INSURANCE COVERAGE

In the early 1980s, the insurance industry began to offer a new type of coverage for environmental claims, often referred to as environmental impairment liability (EIL) insurance. The EIL market has been volatile over the past decade. By 1983, the EIL market reached a peak with over fifty insurance companies or risk retention groups offering various types of EIL coverage. Thereafter, the market rapidly declined to a point where only a handful of carriers offered EIL coverage.

Recently, however, carriers have been reentering the market. EIL coverage for underground storage tanks, in particular, is increasingly available from a variety of sources. Financial responsibility laws pertaining to tanks have strengthened the demand for this coverage. Also, carriers are finding that the risks associated with storage tanks are relatively predictable and avoidable.

The terms of EIL coverage can differ significantly from policy to policy, although standard features are typically included in most policies. Generally, EIL policies cover claims for damages and clean-up costs incurred because of contamination-related injury or damage occurring away from the policyholder’s premises (as designated in the policy declarations) due to conditions at the designated premises. Some policies allow off-premises waste sites to be included in the list of designated premises. Costs of cleaning-up the policyholder’s own or designated premises typically are not covered.268

For a number of reasons, EIL policies may afford nominal protection even for the limited risks covered. Many policies broadly exclude damages and costs associated with governmental requests for clean up or other response action. This exclusion might be asserted to avoid reimbursement for off-premises damages or clean-up costs that would otherwise fall within coverage, simply because of government involvement or intervention.

Most policies also exclude coverage of pre-existing condi-

267. Id. at 770.
tions which the policyholder knew or should have known prior to the issuance of the policy. EIL carriers frequently have attempted to defeat coverage by alleging that the policyholder should have foreseen the environmental impairment in question. In effect, the EIL insurer pursues a negligence claim (and sometimes an intentional tort claim) against its policyholder in order to avoid coverage. This practice eases the task of toxic tort plaintiffs who might be waiting in the wings.

Further, EIL policies invariably are written for one year at a time on a claims-made basis. This means that, when environmental impairment occurs during that year (or during the specified retroactive period), there is no coverage unless claims arising from the impairment are made within the annual policy period. In a situation where environmental impairment does not result in immediate claims, the carrier may invoke the cancellation or renegotiation provisions of the policy. Generally, these provisions allow the carrier to terminate or renegotiate coverage on short notice and before the end of the policy period.

Typically, the carrier’s cancellation in this situation is subject to an “extended discovery” clause. This provision entitles the policyholder to purchase “tail” insurance covering a specified period after cancellation or expiration of the policy. Claims arising from impairment during the original policy period but made during the “extended discovery” period would therefore be covered, regardless of the carrier’s cancellation.

As a practical matter, however, a tight EIL market may force the policyholder to renegotiate the policy when an environmental impairment occurs. Under the threat of cancellation, and the possibility of finding no replacement coverage, the policyholder may feel compelled to agree to an endorsement excluding any claims arising from the environmental impairment at issue. Thus, by purchasing EIL coverage in a tight market the policyholder may have purchased, in effect, no more than one bite of the apple. When environmental impairment occurs, the policyholder must decide whether potential claims that might arise from the incident justify taking that one bite.

**Conclusion**

The foregoing analysis demonstrates that, in many jurisdic-
tions, the insurance industry is facing enormous financial obligations for liabilities arising from environmental and toxic tort claims. While many carriers have so far avoided their obligations through protracted litigation, others have proposed constructive and far-sighted alternatives.

Under one proposal, for example, primary and excess insurers of past waste generators, as well as the carriers' reinsurers, would contribute to a fund, administered by the United States Environmental Protection Agency, for clean-up of waste sites and settlement of private claims. For these carriers, the creation of an Insurance Superfund might be more economical than engaging in expensive, acrimonious and unpredictable coverage litigation with their valued customers, and ultimately with each other. To date the insurance industry has not pushed for this type of group approach to meeting its obligations. In the meantime, the litigation continues.

269. Thomas, supra note 1; see also Gastel, Environmental Pollution: Insurance Issues, Insurance Information Institute, Mar. 1990 (LEXIS, NEXIS).
APPENDIX A—1941 POLICY

The following provisions from the Insurance Services Office's 1941 standard policy are relevant to the discussion in this article:

[The carrier agrees:]

I. COVERAGE A—BODILY INJURY LIABILITY

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed by him under contract as defined herein, for damages, including damages for care and loss of services, because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or persons and caused by the accident.

II. DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENTS

As respects such insurance as is afforded by the other terms of this policy the company shall

(a) defend in his name and behalf any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false, or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company[.]

EXCLUSIONS

This policy does not apply:
(f) under coverage C, to injury to or destruction of (1) property owned, occupied or used by or rented to the insured, or except with respect to liability assumed under sidetrack agreements and the use of elevators or escalators, property in the care, custody or control of the insured, or (2) any goods or products manufactured, sold, handled or distributed or premises alienated by the named insured, or work completed by or for the named insured, out of which the accident arises.
Appendix B—1955 Policy

The following provisions from the Insurance Services Office's 1955 standard policy are relevant to the discussion in this article:

Insuring Agreements

[The carrier agrees:]

Coverage A — Bodily Injury Liability

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident.

Coverage B — Property Damage Liability

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident.

Defense, Settlement, Supplementary Payments

With respect to such insurance as is afforded by this policy, the company shall:

(a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient[.]

Exclusions

This policy does not apply:

(h) under coverage B, to injury to or destruction of (1) property owned or occupied by or rented to the insured, or (2) except with respect to liability under sidetrack agreements covered by this policy, property used by the insured, or (3) except with respect to liability under such sidetrack agreements or the use of elevators or escalators on premises owned by, rented to or controlled by the named insured, property in the care, cus-
tody or control of the insured or property as to which the insured for any purpose is exercising physical control, or any goods, products or containers thereof manufactured, sold, handled or distributed or premises alienated by the named insured, or work completed by or for the named insured, out of which the accident arises[.]
The following provisions from the Insurance Services Office’s 1966 standard policy are relevant to the discussion in this article:

**COVERAGE A — BODILY INJURY LIABILITY**

**COVERAGE B — PROPERTY DAMAGE LIABILITY**

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, and the 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, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company’s liability has been exhausted by payment of judgments or settlements.

**EXCLUSIONS**

This insurance does not apply:

. . . .

(i) to property damage to

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

(2) property used by the insured, or

(3) property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control;

but parts (2) and (3) of this exclusion do not apply with respect to liability under a written sidetrack agreement and part (3) of this exclusion does not apply with respect to property damage (other than to elevators) arising out of the use of an elevator at premises owned by, rented to or controlled by the named insured;
(j) to property damage to premises alienated by the named insured arising out of such premises or any part thereof.

DEFINITIONS

When used in this policy (including endorsements forming a part hereof):

“bodily injury” means bodily injury, sickness or disease sustained by any person;

“damages” includes damages for death and for care and loss of services resulting from bodily injury and damages for loss of use of property resulting from property damage;

“occurrence” means an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.
APPENDIX D—1973 POLICY

The following provisions from the Insurance Services Office’s 1973 standard policy are relevant to the discussion in this article:

**COVERAGE A — BODILY INJURY LIABILITY**

**COVERAGE B — PROPERTY DAMAGE LIABILITY**

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, and the 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, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company’s liability has been exhausted by payment of judgments or settlements.

**EXCLUSIONS**

This insurance does not apply:

. . . .

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

. . . .

(k) to property damage to

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

(2) property used by the insured, or

(3) property in the care, custody or control of the in-
sured or as to which the insured is for any purpose exercising physical control,

but parts (2) and (3) of this exclusion do not apply with respect to liability under a written sidetrack agreement and part (3) of this exclusion does not apply with respect to property damage (other than to elevators) arising out of the use of an elevator at premises owned by, rented to or controlled by the named insured;

(1) to property damage to premises alienated by the named insured arising out of such premises or any part thereof.

DEFINITIONS

When used in this policy (including endorsements forming a part hereof):

“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;

“occurrence” means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured;

“property damage” means (1) physical injury to 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.
APPENDIX E—1986 POLICY

The following provisions from the Insurances Services Office's 1986 standard "claims-made" policy are relevant to the discussion in this article:

SECTION 1 — COVERAGES

COVERAGE A — BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement.
   a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS — COVERAGES A AND B. This insurance does not apply to "bodily injury" or "property damage" which occurred before the Retroactive Date, if any, shown in the Declarations or which occurs after the policy period. The "bodily injury" or "property damage" must be caused by an "occurrence."

   . . . .

   b. This insurance applies to "bodily injury" and "property damage" only if a claim for damages because of the "bodily injury" or "property damage" is first made against any insured during the policy period.

   . . . .

2. Exclusions.

This insurance does not apply to:

a. "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

   . . . .

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

   (a) At or from premises you own, rent or occupy;
   (b) At or from any site or location used by or for
you or others for the handling, storage, dispos-
sal, processing or treatment of waste;

(c) Which are at any time transported, handled,
stored, treated, disposed of, or processed as
waste by or for you or any person or organiza-
tion for whom you may be legally responsible;
or

(d) At or from any site or location on which you or
any contractors or subcontractors working di-
rectly or indirectly on your behalf are perform-
ing operations:

(i) if the pollutants are brought on or to the
site or location in connection with such op-
erations; or

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

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

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

(j) “Property damage” to:

(1) Property you own, rent, or occupy;

(2) Premises you sell, give away or abandon, if
the “property damage” arises out of any
part of those premises;

(3) Property loaned to you;

(4) Personal property in your care, custody or
control;

(5) That particular part of real property on
which you or any contractors or subcontra-
tors working directly or indirectly on your
behalf are performing operations, if the
“property damage” arises out of those oper-
ations; or
(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5), and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard."

SECTION VI — DEFINITIONS

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

9. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

11. a. "Products-completed operations hazard" includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

   (1) Products that are still in your physical possession; or

   (2) Work that has not yet been completed or abandoned.

b. "Your work" will be deemed completed at the earliest of the following times:

   (1) When all of the work called for in your contract has been completed.

   (2) When all of the work to be done at the site has been completed if your contract calls for work at more than one site.
(3) When that part of the work done at a job site had been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

c. This hazard does not include "bodily injury" or "property damage" arising out of:

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle created by the "loading or unloading" of it;

(2) The existence of tools, uninstalled equipment or abandoned or unused materials;

(3) Products or operations for which the classification in this Coverage Part or in our manual of rules includes products or completed operations.

12. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property; or

b. Loss of use of tangible property that is not physically injured.

13. "Suit" means a civil proceeding in which damages because of "bodily injury," "property damage," "personal injury" or "advertising injury" to which this insurance applies are alleged. "Suit" includes an arbitration proceeding alleging such damages to which you must submit or submit with our consent.

14. "Your product" means:

a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(1) You;

(2) Others trading under your name; or
(3) A person or organization whose business or assets you have acquired; and
b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

"Your product" includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in a. and b. above.

"Your product" does not include vending machines or other property rented to or located for the use of others but not sold.

15. "Your work" means:
   a. Work or operations performed by you or on your behalf; and
   b. Materials, parts or equipment furnished in connection with such work or operations.

"Your work" includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in a. or b. above.