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**SIGNIFICANT ENVIRONMENTAL INSURANCE COVERAGE ISSUES OF THE 1990s:
THE RIVER RUNS WIDE BETWEEN MISSOURI AND ILLINOIS**

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AREAS OF CONCENTRATION

Mr. Reeg co-chairs the Litigation Department and focuses his litigation practice in the fields of insurance law, toxic torts, hazardous waste and environmental litigation. He has represented clients in various matters involving chemical inhalation, ingestion and dermal exposure, landfill, other environmental pollution claims, and mass toxic tort lawsuits. Mr. Reeg has participated in administrative, state and federal proceedings and litigation involving claims for injuries and damages rising from the release of or exposure to allegedly hazardous materials. Because of his experience and expertise, Mr. Reeg is Chairman of the firm's Insurance Law Group, is Coordinating Counsel for a major group of insurance carriers with respect to claims against them in these areas, and handles multiple types of insurance-related and coverage litigation throughout the United States.

A significant portion of Mr. Reeg's practice is also dedicated to the defense of products liability and personal injury litigation. Mr. Reeg has handled claims involving numerous products, including pharmaceuticals, medical devices, chemical substances, ladders, scaffolds, motorcycles, hydraulic presses, and various types of machinery. His practice spans a wide variety of bodily injury claims.

EDUCATION

Mr. Reeg received his B.A. (cum laude) from DePauw University in Greencastle, Indiana, where he was a Rector Honors Scholar. He obtained his J.D. degree from St. Louis University School of Law.

PROFESSIONAL AND CIVIC ACTIVITIES

Following law school, Mr. Reeg served as a law clerk for the Chief Justice of the Illinois Fifth District Appellate Court. He thereafter became an associate and then partner with another major St. Louis law firm for over 10 years, where he was the partner in charge of its Illinois office. Mr. Reeg brings substantial experience as a litigator and advocate to Gallop, Johnson & Neuman, L.C. and its clients.

Mr. Reeg is an active member of the American Bar Association (Sections on Tort and Insurance Law and Litigation), the Missouri Bar Association (Tort Law and Federal Practice and Procedure Committees), Illinois State Bar Association (Chair [1992-1993], Vice-Chair [1991-1992], Section Council, Individual Rights and Responsibilities Section; Tort Law Section; and Section on Civil Practice and Procedure), Defense Research Institute (Pharmaceutical and Medical Device Subcommittee) and Bar Association of Metropolitan St. Louis. Mr. Reeg is also Secretary and a member of the Board of Directors of Life Crisis Services and has served as a Police and Fire Commissioner in the City of Town and Country, Missouri.

SIGNIFICANT ENVIRONMENTAL INSURANCE COVERAGE ISSUES OF THE 1990S:
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by
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I. INTRODUCTION

During the last two decades, liability on the part of American businesses for property damage caused by various forms of pollution generated by business activities has mushroomed to unprecedented levels. The cost of cleaning up the environment is approaching \$160 billion per year. Paul Langer, Environmental Insurance Coverage Issues in Illinois: Moving Toward Resolution, 82 Ill. Bar Journal, at 90 (Feb. 1994) (hereinafter referred to as "Langer") (citing A Need for New Approaches, EPA Journal at 7 (May-June 1992)). That liability is the result of both (a) private actions brought by individuals, businesses and governmental subdivisions whose property is injured and (b) actions brought by or on behalf of various states and federal authorities. The latter claims are typically brought under the state's particular environmental laws administered by a "Department of Natural Resources" or by or on behalf of the federal government under either the Resource Conservation Recovery Act (42 U.S.C. §§6901 et. seq.) ("RCRA") or the "Superfund" legislation, more properly known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") (42 U.S.C. § 9601 et seq.). In fact, in the first 13 years since CERCLA was enacted, "an estimated \$15 billion has been spent on Superfund clean ups." Jerold Oshinsky & Judith Hall Howard, Environmental Insurance Coverage Litigation and the London Market, Coverage, 1 (January/February 1994) (hereinafter referred to as "Oshinsky & Howard").

* This article represents the opinions of the individual authors and does not necessarily represent the views, theories or philosophies of any clients represented by the authors or Gallop, Johnson & Neuman, L.C.

With the explosion of liability against America's businesses has come the corresponding explosion in claims by insureds against their respective primary insurers under their comprehensive general liability ("CGL") policies for defense of these claims and indemnity for liability. Quite frequently, the underlying pollution for which the insured is or may be liable occurred 10, 20, 30 or even 40 or more years before the demand for coverage is made, whereas the injury caused by the pollution may have been only recently discovered. As a result, in many cases a multitude of policies and/or insurance carriers are potentially affected. Moreover, in many instances, because the source, nature, timing and effect of the pollution is often unclear, so it is with an insurance company's perceived duty to defend and indemnify the insured.

In the face of this uncertain factual development, coverage claims necessarily focus upon a myriad of issues. Initial considerations often involve the issues of (1) whether particular policies are "triggered" as determined by the year or years in which the property damage "occurred" under a standard "occurrence" policy; and (2) whether liability for pollution which did "occur" during a particular carrier's period of coverage is otherwise excluded under the standard pollution exclusion. Other coverage issues which often arise, depending upon the nature of the claim, include but are not limited to: (a) whether costs incurred in detecting, evaluating and containing pollution, often described as "response costs," are covered as "damages" under the typical CGL policies; (b) whether notice from the EPA or particular state authority, advising a company of the existence, or probable existence, of pollution and the company's status as a "potentially responsible party" in causing the pollution (typically termed a "PRP letter") constitutes a "suit" under a standard CGL policy, thereby triggering an insurance company's duty to defend; and (c) whether the personal injury coverage in the standard CGL policy (providing coverage arising out of the "wrongful entry or eviction, or other invasion of the right of private occupancy") provides coverage for pollution-caused property damage.

Finally, because insurance coverage claims for environmental pollution liability often involve activities of the policyholders which occurred many years ago, it is not uncommon that the insured, faced with liability for pollution, may have incomplete records respecting both the identity of its former insurance carriers and may not otherwise possess copies of these "ancient" policies. This situation often leads to litigation involving attempts to establish the existence and terms of these "missing policies". Construing identical or very similar fact patterns and policy language, courts among the various states and federal jurisdictions have reached vastly conflicting decisions on these and other related issues spawned by environmental claims.

During the past 15 to 20 years of environmental coverage litigation, some states which have considered the various issues have a consistent and authoritative body of law interpreting these various policy provisions on either side of the issue (usually because the state's highest court has issued a definitive ruling). Other states, both in the state and federal courts, have either not addressed the question or reached inconsistent results on these various issues. Perhaps in no other area of law will the outcome of a litigated dispute, which involves insurance coverage for pollution liability and which is subject to identical terms of coverage, result in differing results solely because of the body of law which is applied to interpreting the particular insurance policies. See e.g., Thomas W. Mallin, et al. Insurance Coverage Litigation: Recent Developments, 27 Tort & Ins. L.J. 286, 303 (Winter 1992) ("Because there is a conflict between the laws of many states with respect to virtually every issue that arises in insurance coverage cases, the outcome of a case will often be determined by the choice of law decision").

The following materials discuss the coverages referred to above and the legal principles applied to those issues, with primary focus on the law of Missouri and Illinois. As shown below, Missouri and Illinois courts often differ in their interpretations of identical language, with **Missouri courts most often siding with the carriers' position and Illinois courts accepting**

the arguments of the policyholders. However, the judicial authority in Missouri has developed principally in the federal courts whereas in Illinois the authorities are primarily state court decisions.

II. DISCUSSION

A. CHOICE OF LAW

While a litigant may often successfully choose a particular forum in which to file suit, there is no such flexibility when it comes to the applicable law which will be applied in construing the terms of the CGL policy. Many states still apply the general common law rule of lex loci contractus, the site of the making of the insurance contract is the state whose law will be applied. Under this approach, the law of the state in which the contract is made, usually meaning the state in which occurred the last act necessary to make a contract, will govern the interpretation of the insurance contract. E.g., Home Ins. Co. v. Service American Corp., 654 F.Supp. 157, 159 (N.D. Ill. 1987) (Illinois law); Interco, Inc. v. Mission Ins. Co., 626 F.Supp. 888, 891 (E.D. Mo. 1986) (Missouri law), aff'd in part, rev'd in part on other grounds, 808 F.2d 682 (8th Cir. 1987). Many other courts apply the principals of the Restatement (Second) Conflict of Laws, §§188 and 193 (1971).¹ Section 193 of the Restatement, specifically applicable to insurance contracts, provides as follows:

§193. Contracts of Fire, Surety or Casualty Insurance.

The validity of a contract of . . . insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant

1/ Of course, if the parties specify in the insurance contract a particular choice of law, that choice will typically be respected. However, standard CGL policies do not contain a choice of law provision and in the past insurance companies and insureds rarely specify a choice of law by endorsement or otherwise. Accordingly, the parties' rights and obligations will be a function of the choice of law imposed by the court.

relationship under the principles stated in §6 to the transaction and the parties, in which event the local law of the other state will be applied.²

Under these basic choice of law principles, the law which will typically be applied will be the law of the state in which the insured maintains its principal place of business because that is typically the state in which most, if not all, of the negotiations for the insurance contract occurred, the policy is delivered, the insured risk is situated, and the insurance company paid claims. Courts in both Missouri and Illinois will apply the law of the state having these most significant contacts.

1. Missouri Law.

Courts typically apply the law of the state having the most significant relationship to the transaction. See, e.g., Continental Insurance Companies v. Northeastern Pharmaceutical and Chemical Co., Inc., 811 F.2d 1180, 1184 n.10 (8th Cir. 1987) (NEPACCO I) (applying the law of Missouri to interpretation of the various policies because Missouri had "the most significant

2/ Section 188 of the Restatement applicable to contracts generally, provides:

§188. Law Governing in Absence of Effective Choice by the Parties

(1) The rights and duties of the parties with respect to an issue in the contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transactions and the parties under the principles stated in Section 6.

(2) In the absence of an effective choice of law by the parties [], the contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicile residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied . . .

relation with the negotiation and terms of the insurance contract") (citing cases); United States v. Conservation Chemical Co., 653 F.Supp. 152, 176-78 (W.D. Mo. 1986) (applying Missouri law to the interpretation of policies where Missouri was the insured's principal place of business and state of incorporation, the location of the insured risk, the state from which the insured requested insurance (placed through Missouri brokers), the state in which the alleged damage and injury took place and the state in which the United States sought damages).

2. Illinois Law.

Illinois courts also apply the general choice of law rules concerning the most significant contacts when construing an insurance policy. See, e.g., Hofeld v. Nationwide Life Insurance Co., 59 Ill.2d 522, 322 N.E.2d 454, 457-58 (1975) ("With regard to the applicable law in this case, insurance contract provisions may be governed by the location of the subject matter, the place of delivery of the contract, the domicile of the insured or of the insurer, the place of the last act to give rise to a valid contract, the place of performance, or other place bearing a relationship to the general contract"); Continental Casualty Co. v. Armstrong World Indus., Inc., 776 F.Supp. 1296, 1301 (N.D. Ill. 1991); United States Fire Ins. Co. v. CNA Insurance Companies, 213 Ill. App.3d 568, 157 Ill. Dec. 660, 663-64, 572 N.E.2d. 1124, 1127 (1st Dist. 1991).

However, there is a decided split in authority around the country as to which state's law will apply in situations where the site of the property damage is different than the site of the place of contracting. In the environmental claims context, some courts will apply the law of a state other than the state of contracting in those situations where all or most of the injuries occur in a different state, as where the environmental damage is confined primarily to a particular state. E.g., Johnson Matthey, Inc. v. Pennsylvania Manufacturers Insurance Company, 50 N.J. Super. 51, 61, 593 A.2d 367, 373 1991) ("We hold that a casualty insurance policy, wherever

written, which is purchased to cover a New Jersey risk, alone or along with risks in other states, is subject to interpretation of its coverage and exclusion language according to New Jersey local law") National Starch & Chemical Corp. v. Great American Ins. Co., 743 F.Supp. 318, 322-26 (D.N.J. 1990)³. Some courts, however, will continue to apply the law of the state in which the insured is located as governing the interpretation of the policies, notwithstanding the fact that the environmental damage occurred in another state. E.g., Gould, Inc. v. Continental Casualty Co., 822 F.Supp. 1172, 1174-76 (E.D.Pa. 1993) (applying Illinois law to the interpretation of insurance contracts under the most significant relationship test even though the hazardous wastes in question were in Pennsylvania). See also Potomac Electric Power Co. v. California Union Insurance Co., 777 F.Supp. 968, 971-73 (D.D.C. 1991); United Brass Works, Inc. v. American Guarantee & Liability Insurance Co., 819 F.Supp. 465, 469-70 (W.D. Pa. 1992); Continental Insurance Co. v. R. R. Donnelly & Sons Co. No. H89-410 (N.D. Ind. January 7, 1991), reported in 5 Mealey's Lit. Repts., No. 12, §D (January 29, 1991) (holding that the place of contracting was more significant than other factors and applied Illinois law to issues relating to an Indiana waste site).

3/ See also Travelers Indemnity Co. v. Allied-Signal Inc., 718 F.Supp. 1252, 1254-55 (D. Md. 1989) (holding that Maryland law was applicable to the interpretation of an environmental polluter's insurance policy, even if the doctrine of lex loci contractus called for application of law of other states, where an environmental pollution site was located in Maryland and, therefore, Maryland had the most substantial interest in the outcome of the litigation); G. Heieleman Brewing Co. v. Royal Group, Inc. (No. 88 Civ. 1041) (S.D.N.Y. June 21, 1991) reported in 5 Mealey's Lit. Repts., No. 36 at 12-13 (July 30, 1991)) (holding that Michigan law, as the site of the hazardous waste, had a more significant relationship to the coverage issues than did Maryland, the primary place of the insured's business and the place of the contract). Cf., Crown Center Redevelopment Corp. v. Occidental Fire & Casualty Co. of North Carolina, 716 S.W.2d 348, 357-59 (Mo. App. 1986) (holding that §§ 188 and 193 of the Restatement (Second) of Conflict of Laws governed the issues, but applying Missouri law as the state in which the insured risk was located, in interpreting more than 20 insurance policies issued by multiple insureds insuring risks associated with the collapse of the two skywalks at the Hyatt Regency Hotel in Kansas City, notwithstanding the fact that with respect to many of the insureds the contracts would have otherwise been interpreted under the law the state in which the insureds maintained a principal place of business).

B. "TRIGGER" OF COVERAGE.

One of the more intensively litigated issues in insurance coverage cases is the issue of when a policy is triggered for purposes of coverage. Trigger of coverage in a standard CGL occurrence based policy is a function of when an occurrence takes place. Nearly all jurisdictions "recognize that an occurrence takes place when the parties are actually damaged or injured, not when the wrongful act was committed." Langer, supra at 95.

The trigger rubric is the best illustrated in the context of a transaction in which the issue often arises. Assume the existence of a toxic waste dump in which the insured participates in some manner in the disposal of a toxic substance between 1970 and 1975, but the pollution is not discovered until 1985. Assume that the toxic chemicals continuously leaked from the first day into the surrounding soil and groundwater. Some courts hold that the only insurance companies on the risk are those which insured the policyholder in the years in which it discharged/released/disposed of the contaminated material into the landfill. This is typically called the "exposure" trigger. E.g., Buckeye Union Ins. Co. v. Liberty Solvents & Chemicals, Co., 17 Ohio App.3d 127, 477 N.E.2d 1227, 1233 (1984). Other courts hold that the only carrier on the risk is the carrier which insured the responsible party in the year in which the pollution was discovered, or manifested itself. This is called the "manifestation" or "discovery" trigger. E.g., Mraz v. Canadian Universal Ins. Co., Ltd., 804 F.2d 1325, 1328 (4th Cir. 1986). Some courts hold that the responsible carriers are those on the risk in years in which there is an "actual injury" to the property, and this would take place in years in which actual property damage occurred, typically through leaking of pollutants into the surrounding soil and groundwater. This is known as the "injury-in-fact" trigger. E.g., Cortland Pump & Equip. Inc. v. Firemen's Fund Ins. Co. of Newark, N.J., (N.J.Sup.Ct.App.Div., Dec. 2, 1993), slip op. at 3-4. Reported at 8 Mealey's Lit. Repts., No. 7 §B (Dec. 14, 1993). Finally, some courts

hold every insurer responsible which insured the risk from the first year in which the contaminant was released into the soil through the year of discovery or manifestation. This is known as a "continuous" trigger. E.g., New Castle County v. Continental Casualty Co., 725 F.Supp. 800, 809-13 (D.Del. 1989); Industrial Steel Container Co. v. Firemen's Fund Ins. Co., 399 N.W.2d 156, 160 (Minn.App. 1987).

On this most basic of coverage issues, federal courts applying (predicting) Missouri law have favored the exposure trigger. There is apparently no authoritative Illinois decision on trigger in the property damage context, but at least one trial court has applied a continuous trigger in an environmental tort case.

1. Missouri Law.

There is apparently no authoritative state court decision in Missouri on the issue of when property damage occurs in the context of environmental contamination. Federal decisions considering the issue are somewhat equivocal. For example, in United States v. Conservation Chemical Co., 653 F.Supp. 152 (W.D. Mo. 1986), the court, when considering the trigger of coverage for the costs of cleaning up a hazardous waste disposal facility in Missouri, relied upon a Missouri state trial court opinion and concluded that Missouri courts would follow an "injury-in-fact" trigger for purposes of environmental contamination. 653 F.Supp. at 196-97 (relying upon Standard Asbestos Manufacturing & Insulating Co. v. Royal Indemnity Insurance Co., No. CV80-14909 (Mo. Cir. Ct. Jackson Co., April 3, 1986) (an asbestos personal injury case)). Accordingly, this court held "Missouri therefore appears to be in line with the legal position adopted by the Second Circuit in American Home Products v. Liberty Mutual Insurance Co.,

565 F.Supp. 1485 (S.D.N.Y. 1983) aff'd as modified, 748 F.2d 760 (2d Cir. 1984)." Id. at 197 (in which the court adopted an injury-in-fact trigger for bodily injury claims).⁴

More recently, the Eighth Circuit in NEPACCO I considered the question of trigger in the context of property damage caused by dioxin contamination and adopted an exposure trigger.

The court stated:

We find that the Kissel case clearly indicates that Missouri would follow the majority view of the courts which have ruled that 'property damage,' within the meaning of a CGL policy, generally occurs at the time the hazardous waste are improperly disposed of and that the insurer at that time may be held liable for cleanup costs incurred after the policy expired.

811 F.2d at 1191 (referring to Kissel v. Aetna Casualty & Surety Co., 380 S.W.2d 497, 509 (Mo. App. 1964) wherein the court held that the insurance company on the risk when a foundation was improperly built, causing pressure cracks to adjoining property, covered the risk; the court did not mention or discuss the Western District's opinion in United States v. Conservation Chemical Co., supra). On rehearing, the Eighth Circuit sitting en banc concurred with the panel decision "that Missouri would probably adopt the "exposure" theory of coverage, Continental Insurance Co. v. Northeastern Pharmaceutical & Chemical Co., Inc., 842 F.2d 977, 984 (8th Cir. 1988) cert. denied 488 U.S. 821 (1988) ("NEPACCO II") (citing Hawkeye-Security Insurance Co. v. Iowa National Mutual Insurance Co., 567 S.W.2d 719, 720 (Mo.

4/ The injury-in-fact trigger in the context of property damage claims was described by the district courts as follows:

At any time a finder of fact determines that the effects of exposure to waste or hazardous materials released by the Site Operator Defendants actually resulted in damage to the off-site environment, if the Third Party Defendant Insurers' insurance policies were in effect at such time, then those insurers and only those insurers' duty to indemnify the Site Operator Defendants for the underlying claim of the United States is triggered.

Id., The district court also declined to adopt a multiple or continuous trigger. 653 F.Supp. at 196-97 (citing Continental Insurance Co. v. Northeastern Pharmaceutical & Chemical Co., No. 84-5034-CV-S-4, (W.D. Mo. June 25, 1985).

App. 1978)). The court, however, also observed that in the context of the case, application of either the exposure or injury-in-fact trigger would make little difference. NEPACCO II at 984.

Based upon the Eighth Circuit's decisions in NEPACCO I and II, federal courts considering Missouri law will likely apply the fixed point exposure theory of coverage. However, the en banc decision in NEPACCO II in which the Eighth Circuit equivocated as to the appropriate trigger appears to leave the door slightly open for reconsideration of the trigger argument in favor of an injury-in-fact trigger rather than an exposure trigger. Under the exposure trigger, the insurer on the risk when the contaminated material is released into the environment will have the duty to defend and indemnify. However, under basic choice of law principles, a Missouri state court is not constrained to follow a federal district court or circuit court opinion predicting the Missouri law. E.g., Wimberly v. Labor and Industrial Relations Commission, 688 S.W.2d 344, 347 (Mo. banc 1985), aff'd, 479 U.S. 511 (1987); Rodgers v. Danforth, 486 S.W.2d 258, 259 (Mo. banc 1972). Accordingly, both the policyholder and the insurer are free to urge the application of a different trigger more advantageous to its interest under the particular circumstances.

2. Illinois Law.

There is apparently no reported decision in Illinois specifically addressing the appropriate property damage trigger in the context of environmental claims. However, it appears that Illinois courts will likely adopt a continuous trigger for environmental property damage claims involving the remediation of hazardous wastes. In United States Fidelity & Guaranty Co. v. Wilkin Insulation Co., 144 Ill.2d 64, 161 Ill. Dec. 280, 578 N.E.2d 926 (1991) the Illinois Supreme Court recently "suggested" a continuous trigger with respect to asbestos-rebated property damage claims in buildings. While not specifically addressing "trigger," the Illinois Supreme Court held that because asbestos-containing products continuously release toxic fibers

into the air, the continuous exposure of the building to the released fibers constituted an "accident" under the policies. 86 Ill. Dec. at 286, 578 N.E.2d at 932. See also Chicago Board of Education v. A, C and S, Inc., 171 Ill. App.3d 737, 121 Ill. Dec. 643, 649, 525 N.E.2d 950, 956 (1st Dist. 1988) ("the incorporation of the asbestos physically altered the buildings in a manner which makes the buildings harmful to their occupants") aff'd in part, rev'd in part on other grounds, 131 Ill.2d 428, 137 Ill. Dec. 635, 546 N.E.2d 580 (1989).⁵ In addition to Wilkin, at least one trial court has adopted a continuous trigger for an insured's property damage pollution liabilities. Central Illinois Public Service Company v. Allianz Underwriters Insurance Company (No. 90 L 11094) (Cir. Ct. Cook Co., September 26, 1991, November 18, 1991) (discharge of pollution into groundwater); See also Langer at 95-6.

Wilkin and the trial court opinion in Allianz Underwriters strongly suggest that an Illinois court would adopt something other than a fixed point trigger for environmental contamination property damage cases. This view is also strongly indicated from the Illinois Supreme Court's holding in Zurich Ins. Co. v. Raymark Indus., 118 Ill.2d 23, 112 Ill. Dec. 684, 514 N.E.2d 150 (1987). In Zurich, the Supreme Court held, in the context of asbestos-related bodily injury claims, that multiple policies were triggered in the case of a single claimant - those policies in effect when the claimant was (arguably) exposed to the insured's asbestos products and those on

5/ In a non-environmental context, the Seventh Circuit, relying on the reasoning in Wilkin, reversed the trial court and held that coverage existed for a manufacturer from the time a defective plumbing system was installed up to the time property owners either experienced water leaks or removed the defective system in anticipation of leaks. Elger Manufacturing, Inc. v. Liberty Mutual Insurance Co., 972 F.2d 805 (7th Cir. 1992). The Seventh Circuit stated that while the asbestos "contamination" made Wilkin an easier case it did not follow that the Illinois Supreme Court would decline to follow its own result in a more difficult case. Id. at 813. It should be noted that the district court in Elger, citing Wilkin, had reached the opposite conclusion. 773 F.Supp. at 1110-1111 (N.D. Ill. 1991). Thus, some doubt exists regarding how an Illinois trial or appellate court would interpret Wilkin.

the risk when the condition resulting from that exposure became manifest. 112 Ill.Dec. at 694-95, 514 N.E.2d at 161.

Accordingly, although the issue is certainly open for refinement and/or challenge, the state of the law in Illinois favors a continuous type of trigger for property damage claims. Moreover, as shown by the following discussion, the trend in Illinois is definitely in favor of construing insurance policies against carriers and in such a way as to maximize coverage for the policyholders.

C. POLLUTION EXCLUSION.

During the 1960's, insurance companies recognized the increase in coverage claims arising out of the insureds' pollution activities. In 1970, the industry adopted a pollution exclusion which was incorporated into most CGL policies in 1973. This standard pollution exclusion generally provided as follows:

This insurance does not apply:

. . .

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*.⁶ (emphasis added)

6/ In the typical CGL policy, "occurrence" is defined as follows:

An accident, including continuous or repeated 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.

Accordingly, in contrast to a typical pollution exclusion, the definition of "occurrence" focuses on the *damage* caused by the event, which must be "neither expected nor intended from the standpoint of the insured". This is in contrast with the pollution exclusion which focuses on the *release* or discharge of the pollution-containing material. E.g., Outboard Marine Corp. v. Liberty Mutual Insurance Company, 154 Ill.2d 90, 180 Ill. Dec. 691, 707, 607 N.E.2d 1204, 1220 (1992) ("We recognize that, in the occurrence provision, it is the property damage that must be unexpected or unintended, whereas in the pollution exclusion exception it is the toxic release which must be unexpected or unintended"); Ray Industries, Inc.

This, or very similar language, is contained in almost every CGL policy issued since 1973 (except for policies containing a variant of an "absolute" pollution exclusion which contain no exception for coverage; consequently, it has not been subject of much litigation). The frequently litigated issue is whether the insured has coverage for liability caused by an unintended, but gradual or continuous (i.e., not abrupt) discharge. Despite the virtual identity of language in the pollution exclusions presented to various courts across the country, there is significant disagreement as to the meaning of the exclusion, and in particular, the word "sudden" as used in the exception to the exclusion.

Some courts hold that the word "sudden" has a temporal component, so that a discharge of pollution must be both accidental and abrupt in order to be covered. Other courts hold that the term "sudden" either does not have a temporal element or is otherwise ambiguous in the context used. Therefore, these courts construe the term "sudden and accidental" to mean "unexpected or unintended." Early decisions tended to find the term "sudden" ambiguous and ruled in favor of coverage. Oshinsky & Howard at 6 (stating that "[e]arlier decisions 'have almost unanimously held the [pollution exclusion] to be ambiguous'" (quoting United Pacific Insurance Co. v. Van's Westlake Union, Inc., 34 Wash. App. 708, 664 P.2d 1262 (1983))). However, in recent years, a decided majority of courts have ruled in favor of the insurance companies, concluding that the term "sudden and accidental" requires as a condition of coverage

v. Liberty Mutual Insurance Co., 974 F.2d 754, 767 (6th Cir. 1992) (quoting Firemen's Fund Insurance Co. v. Ex-Cello Corp., 702 F.Supp 1317, 1326-27 (E.D. Mich. 1988) ("The focus of the pollution exclusion is on the discharge or release of pollutants into the environment.") However, when a contaminant is "stored" in a receptacle, such as a steel drum, which later fails, some courts hold that the "discharge" or "release" does not occur until the barrels fail and the contaminant is released into the surrounding soil. E.g., Dakhue Landfill, Inc. v. Employers Ins. of Wasau, 508 N.W.2d 798, 804 (Minn.App. 1993); Patz v. St. Paul Fire & Marine Insur. Co., (No. 93-2135) (7th Cir. February 2, 1994). Reported at 8 Mealey's Lit. Repts., No. 15, §A, slip op. at 5-8 (February 15, 1994) (Wisconsin law) In fact, at least one court has viewed the disposal of wastes into a landfill as storage and the later leaking through the porous bottoms as the discharge. South Macomb Disposal Authority v. Westchester Fire Ins. Co., (No. 84-2686-C2) (Mich. Cir. Ct., Macomb Co.) (January 31, 1994), slip op. at 22-23. Reported at 8 Mealey's Lit. Repts., No. 15, §G (February 15, 1994).

that the discharge of the polluting material, in addition to being accidental and unintended, also be abrupt or something other than gradual or continuous. As recently observed by the Superior Court of Pennsylvania in O'Bryan Energy Systems, Inc. v. American Employers Insurance Co., (Penn. Super. Ct., No. J A 08031/93, August 3, 1993), reported at 7 Mealey's Lit. Repts., No. 38, §B (August 17, 1993):

An ever increasing number of courts have rejected the insured's ambiguity argument and have found that sudden and accidental has a clear plain meaning that excludes coverage not only for intentional pollution but also for any unintentional release or dispersal of pollution that occurs gradually over time; in fact, it has recently been noted that "there is an emerging nationwide judicial consensus that the 'pollution exclusion' clause is unambiguous.

slip op. at 10 (quoting Lower Paxton Township v. USF&G Co., 383 Pa. Super. 558, 557 A.2d 393, appeal den. 523 Pa. 649, 567 A.2d 653 (1989) (numerous other citations omitted). See generally, 7 Mealey's Lit. Repts., No. 35 at 15-33 (July 20, 1993).⁷

The current state of judicial authority shows that if the policy is governed by the law of Missouri, the exclusion will be construed to bar coverage unless the discharge is abrupt. However, if the policy and pollution exclusion is to be construed under Illinois law, the exclusion is not applicable unless the discharge is unexpected or unintended.

1. Missouri Law.

Courts construing policies containing the standard CGL pollution exclusion under Missouri law will likely follow the majority rule and conclude that an insurance company will not have a duty to defend and indemnify the insured unless the discharge or release of the

^{7/} This publication lists, alphabetically, those cases relied upon by insurance companies in arguing against coverage based upon the pollution exclusion and those cases cited by policyholders in urging a pro-coverage construction of the pollution exclusion. Ruling in favor of the insurance industries' interpretation are 164 cases compared to 76 cases which adopt for policyholder's interpretation (only 16 of which have been decided after 1991, and many of the older cases have been overruled by later and more authoritative opinions within the relevant jurisdiction).

pollution was both sudden, meaning "abrupt" or happening quickly, and accidental. There appears to be no reported Missouri state court decision on the issue. However, the United States Court of Appeals for the Eighth Circuit recently held in Aetna Casualty & Surety Co. v. General Dynamics Corp., 968 F.2d 707 (8th Cir. 1992) (applying Missouri law), that the term "sudden" in the standard pollution exclusion "when considered in its plain and easily-understood sense ... is defined with a 'temporal element that joins together conceptionally the immediate and unexpected'." Id. at 710⁸ (quoting the Michigan Supreme Court in The Upjohn Company v. New Hampshire Insurance Co., 438 Mich. 197, 476 N.W.2d 392, 397-98 (1991)). See also Monsanto Co. v. Aetna Casualty & Surety Co. (Del. Super. Ct., New Castle County, No. 88C-JA-118) (April 24, 1992), reported at 8 Mealey's Lit. Repts., No. 7, §F (December 14, 1993) (holding that the pollution exclusion clause in an insurance policy, governed by Missouri law, will relieve the insurer of a duty to defend and indemnify where the discharge and release of the pollutants was not abrupt).

There does not appear to be a reported Missouri state court decision construing the standard pollution exclusion. As with the trigger issue, supra, a Missouri state court, considering this issue, would not be bound by the decision of the Eighth Circuit in Aetna Casualty & Surety Co., although it could certainly look to that decision as persuasive authority.⁹ Accordingly, an insured seeking coverage for pollution-caused liability in state court would still

8/ General Dynamics had been implicated by the EPA at 16 different sites for various forms of contamination. Aetna had four policies it issued, each of which contained a standard pollution exclusion clause barring coverage unless the "discharge/dispersal release or escape is sudden and accidental". Id. at 709.

9/ Significantly, the Eighth Circuit and District Courts within the Eighth Circuit, construing the term "sudden" in the standard pollution exclusion (in cases where a state's highest court has not yet ruled) have generally found that the term "sudden" is not ambiguous in this context and have construed it to mean "abrupt". E.g., Bureau of Engraving, Inc. v. Federal Insurance Co., 5 F.3d 1175 (8th Cir. 1993) (Minn. Law); A.Y. McDonald Industries, Inc. v. Insurance Company of North America (N.D. Ia. 1994) (reported at 8 Mealey's Lit. Repts., No. 10, §A, (January 11, 1994).

argue that the court need not follow Aetna Casualty & Surety Co. but rather, the pro-insured position as adopted in those cases finding the word "sudden" to be ambiguous. However, given the decided trend in favor of construing the term "sudden" to be unambiguous, it is probably more likely that the state court would construe the term "sudden" as unambiguous and meaning "abrupt" in this context. Of course, in a coverage action brought in a federal court within the Eighth Circuit, the court would be constrained to follow the decision in Aetna Casualty & Surety Co.¹⁰

2. Illinois Law.

In contrast, if a particular CGL policy is subject to interpretation under Illinois law, insurance coverage for pollution-caused liability will not be barred under the standard pollution exclusion (there may be other bases to deny coverage) except in circumstances where the discharge of the pollution was either expected or intended from the standpoint of the insured, even if the discharge was gradual or continuous. That issue was decided authoritatively by the Illinois Supreme Court in the recent decision of Outboard Marine Corp. v. Liberty Mutual Insurance Co., 154 Ill.2d 90, 180 Ill. Dec. 691, 607 N.E.2d 1204 (1992). The Supreme Court, after considerable analysis and review of the competing case law, concluded that the term "sudden" in the standard CGL pollution exclusion was ambiguous and, therefore, would be construed in favor of the insured to mean "unexpected or unintended." 180 Ill. Dec. at 705, 607

^{10/} A related issue in which there is also a split in authority concerns the question of who has the burden of proving the applicability of the exclusion. Some courts, relying on the general rule that the carrier must prove the applicability of an exclusion, also hold that the carrier must prove the nonapplicability of the sudden and accidental exception. E.g., New Castle County v. Hartford Accident & Indemnity Co., 933 F.2d 1162, 1181-82 (3d Cir. 1991). Other courts reason that the "sudden and accidental" exception is actually a form of coverage, so that the insured bears the burden of establishing this coverage. E.g., Harrow Products Inc. v. Liberty Mutual Insurance Co., 833 F.Supp. 1239, 1244-45 (W.D. Mich. 1993) (citing authorities for both propositions); Dakhue Landfill, Inc., 508 N.W.2d at 803. One Federal Court predicted that Illinois courts would require the carrier to establish both the exclusion and the sudden and accidental exception to the exclusion. Gould, Inc. v. Continental Casualty Co., 822 F.Supp. 1172, 1180-81 (E.D. Pa. 1993).

N.E.2d at 1217-20;¹¹ Accord, United States Fidelity & Guaranty Co. v. Specialty Coatings Co., 180 Ill. App. 3d 378, 129 Ill. Dec. 306, 310-313, 535 N.E.2d 1071, 1075-78 (1st Dist. 1989).

Accordingly, given this firm authority from the Illinois Supreme Court, both state and federal courts¹² construing insurance policies subject to Illinois law will construe the pollution exclusion to bar coverage for pollution-caused liability only in those situations where the release and discharge of a specific pollution was intended and expected from the standpoint of the insured.

D. PERSONAL INJURY ENDORSEMENT.

1. Standard Personal Injury Coverage.

Prior to 1966, the standard CGL policy only provided coverage for bodily injury and property damage. Beginning in 1966, separate coverage for personal injury was available to policyholders under the Insurance Services Office (ISO) Coverage "P," the predecessor to today's personal injury insuring agreements. In 1973, the insurance industry adopted a standard form CGL policy which included an endorsement known as Coverage P (hereinafter "personal

11/ In Outboard Marine, the insured sued its various primary and excess insurance carriers seeking coverage for defense costs and indemnity incurred by reason of enforcement actions brought against Outboard Marine by both the EPA and the State of Illinois for the containment and cleanup costs associated with the discharge of polychlorinated biphenyls (PCBs) in and around Lake Michigan. The evidence showed that Outboard Marine had been discharging an effluent containing PCBs as far back as the 1950's. The various insurers refused to defend and indemnify Outboard Marine on the basis that their respective pollution exclusions barred coverage. In construing these standard pollution exclusions, the Illinois Supreme Court noted that standard dictionaries contained various definitions of the term "sudden" one of which means "abrupt, rapid or swift" and the other which means "happening unexpectedly, without notice or warning, or unforeseen." 180 Ill. Dec. at 705, 607 N.E.2d at 1218. Accordingly, the Court held the use of the word "sudden" in the standard pollution exclusion clause was ambiguous and would be construed against the insurance companies which drafted the provisions in favor of the insured to mean "unexpected". Id. at 705, 607 N.E.2d at 1217-1220.

12/ Under general choice of law rules, now that the state's highest court has spoken on an issue, federal courts construing Illinois law will be obligated to defer to the Illinois Supreme Court's holding in Outboard Marine when determining whether the standard pollution exclusion is applicable. See e.g. Taylor Canteen Corp., 789 F.Supp. 279, 282 (C.D. Ill. 1992).

injury liability"). A standard form of a personal injury liability endorsement insuring agreement provides as follows:

The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury (hereinafter called "Personal Injury") sustained by any person or organization and arising out of one or more of the following offenses committed in the conduct of the named insured's business:

Group A -- false arrest, detention, or imprisonment, or malicious prosecution.

Group B -- the publication or utterance of libel, or slander, or other defamatory or disparaging material, or a publication or utterance in the violation of an individual's right of privacy

Group C -- wrongful entry or eviction or other invasion of a right of private occupancy

National Bureau of Casualty Underwriters, Standard General Liability Policy (1966). Typically, the personal injury coverage is followed by a set of exclusions. There are four such standard exclusions: first, liability assumed by the insured under any contract or agreement; second, injury arising out of the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of any insured; third, injury arising out of any advertising, broadcasting or telecasting activities by or for the insured; and finally, injury sustained by any person who is an employee of any insured at the time of the offense causing the injury.

2. Coverage under "Group C" of the Personal Injury Liability in Missouri and Illinois.

Coverage for wrongful entry or eviction or other invasion of the right of private occupancy under Group C unquestionably includes possessory torts committed in the context of landlord-tenant relations. Beltway Management Co. v. Lexington-Landmark Ins. Co., 746 F.Supp. 1145 (D.D.C. 1990). However, recent litigation between policyholders and insurance

carriers has focused on whether certain other actions come within the "Group C" coverage for the "wrongful entry or eviction, or other invasion of the right of private occupancy."

The only relatively consistent limitation is that most courts agree that Group C coverage must somehow still relate to an interest in real property. Environmental claims, by definition, involve real property and, therefore, meet the threshold requirement for potential coverage under Group C. However, courts are split on the issue of whether the endorsement provides coverage for environmental claims. Courts which find coverage for environmental claims under the personal injury liability provision determine that the phrase "other invasion of the right of private occupancy" necessarily includes the common law claims for nuisance and trespass or otherwise decide that the term "other invasion of the right of private occupancy" is ambiguous, and that the ambiguity is to be resolved against the insurer.

Those courts which reject coverage under the endorsement reason that the personal injury coverage only applies to the defined risks of the personal injury provisions and coverage for claims of nuisance and trespass are denied because such claims are not enumerated within the personal injury liability provision. In addition, some of these courts reject coverage on a "trespass" theory, reasoning that a trespass requires an intentional entry on land and a typical environmental claim involves only negligent conduct. In addition, courts often reason that an *actual* interference with possessory rights to real property must exist in order for a claim to be brought under the personal injury liability provision. As such, coverage for environmental claims which only allege property damage and not an interference with a possessory right are not deemed to be covered within the personal injury liability provision.

Policyholders argue that the provision "wrongful entry or eviction or other invasion of the right to private occupancy" encompasses trespass and nuisance claims, thereby providing liability coverage for environmental claims brought against them. In Pipefitters Welfare

Education Fund v. Westchester Fire Insurance Co., 976 F.2d 1037 (7th Cir. 1992) the only case which arguably construes Missouri and Illinois law, the insured was sued for the unlawful disposal of a transformer that contained PCBs. Rather than conclusively decide which state's law applied to the policies in question, the court concluded that the result would be the same under the law of each state. Id. at 1039, n.1. The insured sought coverage for the environmental claims under the personal injury liability provisions of the policy. Id. at 1039. The insurer argued that an "other invasion of the right of private occupancy" required a specific intent, like an eviction, and therefore there was no coverage. Id. at 1040-41.

The court, in finding coverage under both Missouri and Illinois law, stated that the term "wrongful entry" was unambiguous, but was substantially similar to the cause of action of trespass because a trespass under both Missouri and Illinois law can be based upon negligent entry upon land. Id. at 1041. Although the court accepted the applicability of the doctrine of ejusdem generis (where general words follow an enumeration of things which are of a particular or specific meaning, the general words are held to apply to the same kind or class specifically mentioned) in construing the meaning of the clause, the doctrine did not limit the applicability of the endorsement to intentional acts of wrongful entry or trespass. Id. The ambiguity was construed against the insurance company, with the result that the carrier had to defend the environmental trespass claim against the insured since it potentially fell within the personal injury provisions for wrongful injury. Id. at 1041-42. See also Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265, 272 (1st Cir. 1990); City of Edgerton v. General Casualty Co. of Wisconsin, 493 N.W.2d 768 (Wis. App. 1992) (contamination of groundwater triggers the personal injury endorsement); Gould Inc. v. Arkwright Mutual Insurance Co., 829 F.Supp. 722, 729 (M.D. Pa. 1993) (holding that the personal injury endorsement provided coverage for environmental waste cleanup, despite the court's belief that the insurer otherwise intended to

exclude coverage for pollution under the pollution exclusion); South Macomb Disposal Authority v. American Ins. Co., No. 90-1995-CK (Mich. Cir. Ct., Macomb Co., January 31, 1994). Reported at 8 Mealeys Lit. Repts, No. 15 §G, Slip op. at 38-41 and §H. slip op. at 8-9 (Feb. 15, 1994) (allegations of pollution of aquifer in which the state and residents have an interest arguably invokes personal injury liability coverage).

3. Authorities Rejecting Coverage for Environmental Claims Based Upon Nuisance or Trespass Theories under the Personal Injury Liability Provisions of a CGL Insurance Policy.

Other courts have held that the personal injury endorsements of CGL insurance policies do not cover nuisance or trespass claims, and this appears to be the dominant trend. See, e.g., Harrow Products, Inc. v. Liberty Mutual Ins. Co., 833 F.Supp. 1239, 1245-46 (W.D. Mich. 1993) (alleged groundwater contamination does not constitute potential liability for interfering with rights of private occupancy and, therefore, does not fall within personal injury coverage); County of Columbia v. Continental Ins. Co., 189 A.D.2d 391, 595 N.Y.S.2d 988, 991 (1993) (no coverage existed under the personal injury provision for the environmental liability based upon a trespass and nuisance claim because the complaint did not allege that the acts were both purposeful and aimed at the disposition of real property by someone asserting an interest in the property); Fibreboard Corp. v. Hartford Accident & Indemnity Co., 1993 W.L. 138707 (Cal. App. 1 Dist., May 4, 1993) (the personal injury endorsement did not cover nuisance-related actions because the underlying discreet offenses are not among the enumerated torts coming within the definition of personal injury and, in particular, do not constitute wrongful eviction, wrongful entry or invasion of privacy); W. H. Breshears, Inc. v. Federated Mutual Ins. Co., 1993 W.L. 376066 (E.D. Calif. 1993).

Given that Pipefitters is the only case which purports to construe Missouri law, it is impossible to predict how a Missouri state court, or federal court, sitting in Missouri would

actually rule if asked to construe the personal injury exclusion to permit coverage for environmental property damage. The pro-carrier decisions rendered with respect to the pollution exclusion as discussed above, and with respect to the meaning of "suit" and "response costs" as discussed below, may indicate to some extent that the Missouri courts, state or federal, would follow what is developing as a clear judicial trend and hold that the personal injury endorsement does not provide an additional basis for coverage under environmental claims. Illinois law is similarly unclear, although the Pipefitters case--a Seventh Circuit opinion--and the pro-policyholder bent of the Illinois courts would appear to make greater the likelihood that a claim may be found to be covered.

E. "PRP" LETTER AS A "SUIT".

Another issue of importance to companies faced with potential liability for environmental claims is at what point the insurance company has a duty to defend the claim. A standard post 1966 CGL policy typically provides that the insurer:

shall have right and duty to defend any *suit* against the insured seeking damages on account of ... bodily injury or property damage even if any of the allegations of the suit are groundless, false or fraudulent.

A major issue which has been litigated in the recent years is whether the insurance company has a duty to defend the insured in response to an administrative notice or proceeding, such as a PRP letter, which merely notifies the insured of the existence of probable pollution or that governmental entity views of the insured as a potentially responsible party. Expenses which may be incurred in the response to a PRP letter and before a suit is filed would include the cost of investigating and confirming the nature, extent, and source of pollution, and the payment of costs containment and cleanup costs.

Again, despite the identical, or nearly identical, language in policies, courts are split on whether the receipt by the insured of a PRP letter triggers a duty to defend. It appears that the majority of courts construe the provision broadly in the context of environmental claims and, accordingly, hold that "the formal institution of a lawsuit is not necessary to trigger the carriers' duty to defend (but) [r]ather, the receipt of a demand or communication from the EPA or state regulatory agency, which states that the policyholder is or may be responsible for certain environmental problems is sufficient to trigger the duty to defend because it begins an adjudicatory process." Oshinsky & Howard, (citing, *inter alia*, Avondale Industries v. Travelers Indemnity Co., 697 F.Supp. 1314 (S.D.N.Y. 1988), *aff'd* 887 F.2d 1200 (2d Cir. 1989)).¹³ Generally, Ryan v. Royal Insurance Company of America, 916 F.2d 731, 738-39 (1st Cir. 1990) (compiling cases on each side of the issue).

Missouri and Illinois courts once again differ in their interpretation of this identical language.

1. Missouri Law.

The Eighth Circuit, in Aetna Casualty & Surety Co., *supra*, in addition to considering the meaning of the pollution exclusion, also considered the issue of whether the EPA demand letters were "suits" which triggered Aetna's duty to defend. The court agreed with Aetna that PRP letters soliciting the insured's voluntary participation in cleanup efforts were not "suits" under the applicable policies. 968 F.2d at 713-14. The court noted the split in authority, but relying on the familiar principle of insurance contract interpretation that "the terms of an

^{13/} Michigan provides a good example of a state in which the identical language is construed differently by the federal courts and intermediate state courts. In Michigan, the majority view among the state courts is that an administrative "PRP" letter from the EPA and the state Department of Natural Resources is a "suit" under the standard CGL policy, triggering the duty to defend. *See, e.g., Michigan Millers Mutual Ins. Co. v. Bronson Plating Co.*, 197 Mich. App. 482, 491, 496 N.W.2d 373, 377 (1993). In contrast, federal courts applying Michigan law have held that a PRP letter is not a "suit" under the CGL policy. *E.g., Ray Industries, Inc. v. Liberty Mutual Ins. Co.*, 974 F.2d 754, 761 (6th Cir. 1992); Harrow Products, Inc., 833 F.Supp. at 1247.

insurance contract" are to be given "their plain and ordinary meaning," the Eighth Circuit concluded that "although it is a close question," Missouri courts would hold that "the demand letters did not constitute suits for damages within the meaning of Missouri law." *Id.*

As noted by the Eighth Circuit, there is apparently still no reported Missouri decision on this issue. Accordingly, this decision construing Missouri law would be binding on Missouri federal courts considering the issue, but a state court would be free to adopt an alternative approach. Accordingly, an insured would certainly argue that a Missouri state court would follow the approach which has apparently been accepted by a majority of courts considering this issue and hold that the receipt by the insured of an administrative notice triggers of the carrier's duty to defend.

2. Illinois Law.

In contrast, the Illinois Court of Appeals in United States Fidelity & Guaranty Co. v. Specialty Coatings Co., 180 Ill. App. 3d 378, 129 Ill. Dec. 306, 535 N.E.2d 1071, 1075-78 (1st Dist. 1989), held that upon receipt by the insured of a PRP letter, the carrier has a duty to defend. 129 Ill. Dec. at 313-14, 535 N.E.2d at 1078-79.

Once again, the issue of whether the insured will have the benefit of insurance coverage upon receipt of a PRP letter or similar notice will depend upon which side of the Mississippi River the identical policy terms are construed. In any event, in most jurisdictions, regardless of whether an insurance company has a duty to defend and indemnify the insured following the issuance of a PRP letter or similar notice, most courts will still hold that the receipt of such notice creates a duty upon the insured to notify the carrier. *See, e.g. Cannadyne-Georgia Corp. v. Continental Insurance Co.*, 999 F.2d 1547, 1556-57 (11th Cir. 1993) (holding that the carrier was not obligated to defend the insured because of late notice, received in 1989, where the insured had received a PRP letter in 1984 and other EPA notices in 1986); Monsanto Co. v.

Aetna Casualty & Surety Co., No. 88C-JA-118 (Del. Super. Ct., New Castle Co., Dec. 21, 1993). Reported at 8 Mealey's Lit. Repts., No. 9 §A, slip op. at 57-58 (Jan 4, 1994) (applying Missouri law, requiring notice of an occurrence as soon as practicable as a condition on precedent to recovery under the policy, slip op. at 40-41); CPC International, Inc. v. Aerojet General Corp., 825 F.Supp. 795, 814 (W.D. Mich. 1993) (holding that prejudice to the insurer was presumed when the insured waited four years after the EPA had identified it as a potentially responsible party for environmental damages before notifying the insurer).

F. "CLEANUP COSTS" (RESPONSE COST AND ABATEMENT COST) AS DAMAGES.

There also exists a split in authority, both nationwide and between Illinois and Missouri courts, on whether cleanup costs, consisting of abatement and response costs required/requested under CERCLA or RCRA, are "damages" under the standard CGL policy. This issue arises from the language in the policies requiring the carrier "to defend any suit against the insured *seeking damages* on account of ... property damage."

Many courts will construe the language of the policy broadly and hold that cleanup costs are in fact "damages" under the policy, so that the carrier will have a duty to defend and indemnify the insured from such costs if the policy is otherwise triggered. See Generally, Avondale Industries, 887 F.2d at 1206-07. Other courts consider such cleanup costs to be in the nature of equitable relief and will, therefore, construe the term "damages" literally as not including cleanup costs. These courts deem such costs to be in the nature of specific equitable relief. See e.g., Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1352-55 (4th Cir. 1987), cert. denied, 484 U.S. 1008 (1988); Mraz, 804 F.2d at 1329.

As with the issues of trigger, the pollution exclusion, and "suit," federal courts applying Missouri law have adopted a pro-insurer view of the term, holding that cleanup costs in this

context are not damages. In contrast, Illinois state courts have construed such costs to be damages within the meaning of the CGL policy.

1. Missouri law.

A leading case for the proposition that cleanup costs are not damages is the Eighth Circuit's en banc opinion in NEPACCO II which involved dioxin contamination at Times Beach, Missouri and other sites. The court, predicting and applying Missouri law, held that the term "damages" in the insurance context is not ambiguous but "refers to legal damages and does not include equitable monetary relief." 842 F.2d at 985. In its analysis, the court compared the authorities holding that "damages" do not cover cleanup costs, citing Maryland Casualty Co. v. Armco, Inc., supra, and authorities holding that "damages" do include cleanup costs. 842 F.2d at 985. (citing New Castle County v. Hartford Accident & Indemnity Co., 673 F.Supp. 1359, 1365-67 (D. Del. 1987)). More recently, the Eighth Circuit in Aetna Casualty & Surety Co., supra, again applying Missouri law, reaffirmed its holding in NEPACCO II that environmental response costs do not constitute "damages" under Missouri law. 968 F.2d at 711.¹⁴ Of

14/ In so holding, the court disregarded the decision in Independent Petrochemical Corp. v. Aetna, 944 F.2d 940, 944 (D.C. Cir. 1991) cert. denied 112 S.Ct. 1777 (1992) in which the Court of Appeals for the District of Columbia, purportedly interpreting Missouri law, held that the term "damages" in an insurance contract does include response costs. 968 F.2d at 711. The Eighth Circuit further distinguished two post NEPACCO II Missouri state court cases which arguably placed the earlier NEPACCO II holding in question. Id. at 712. In the first of these cases, Hyatt Corp. v. Occidental Fire & Casualty Co., 801 S.W.2d 382 (Mo. App. 1990) the court, in a personal injury case, stated that the term "damages" would be understood to "provide coverage for all forms of civil liability," so that attorneys' fees incurred would be considered damages. Id. at 394. However, as was pointed out by the Eighth Circuit, that opinion makes no reference to NEPACCO II. 968 F.2d at 712. In the second case, Cooper Indus. v. American Mutual Liability Ins. Co., (Mo. Cir. Ct., 1989) an unreported trial court decision, the court rejected NEPACCO II's analysis of Missouri law, but nonetheless ruled that the term "damages" does not include a suit by the EPA for equitable relief by way of injunction. 968 F.2d at 712. Conceding that Missouri intermediate appellate opinions were not binding, but would be "persuasive authority," the Eighth Circuit nonetheless concluded that neither Hyatt nor Cooper were persuasive evidence of the law of Missouri sufficient to convince the court to reconsider its earlier decision in NEPACCO II. 968 F.2d at 712-13. Accordingly, the NEPACCO II decision remains the most authoritative statement of Missouri law on the issue of whether response and abatement costs i.e., cleanup costs, constitute damages under the standard CGL policy.

course, an insured is still free to argue that cleanup costs in the administrative law context are in fact "damages" and that a Missouri court would not follow the reason in NEPACCO II.¹⁵

2. Illinois Law.

In Outboard Marine v. Liberty Mutual Ins. Co., *supra*, the Illinois Supreme Court settled the question of whether EPA directed cleanup costs constitute "damages" under the standard CGL policy. 180 Ill. Dec. at 702-703, 607 N.E.2d at 1215-16. In its pro-policyholder ruling, the Court resolved a prior split within the intermediate appellate courts. In one, the court had held that the term "damages" is confined to compensatory or legal damages. Ladd Construction Co. v. Insurance Co. of North America, 73 Ill. App. 3d 43, 29 Ill. Dec. 305, 308-9, 391 N.E.2d 568, 571-73 (3d Dist. 1979). In the other, the court held that "damages" was ambiguous and therefore construed the term in favor of the insured to find coverage for the costs of complying with mandatory injunctions. U.S.F.&G. Co. v. Specialty Coatings Co., 129 Ill. Dec. at 314-17, 535 N.E.2d at 1079-1082. The Supreme Court reasoned that "[t]o the popular mind, to most people, to ordinary lay persons, 'damages' connotes money one must expend to remedy an injury for which he or she is responsible, irrespective of whether that expenditure is compelled by a court of law in the form of compensatory damages or by a court of equity in the form of compliance with mandatory injunctions." 180 Ill. Dec. at 703, 607 N.E.2d at 1216. Accordingly, the Court held that the term "damages" in the CGL policy is covered "regardless of whether that liability is equitable or legal in nature." *Id.* (Both the decisions in Outboard Marine and Specialty Coatings set forth considerable authorities on each point of view.) *See*

15/ The Eighth Circuit has followed its lead in NEPACCO II to hold that response costs likewise do not constitute damages under the CGL policy under the law of Arkansas. Grisham v. Commercial Union Ins. Co., 951 F.2d 872, 875 (8th Cir. 1991); Parker Solvents Co., Inc. v. Royal Ins. Cos. of America, 950 F.2d 571, 572 (8th Cir. 1991).

also, Gould, Inc. v. Continental Casualty Co., 822 F.Supp. 1172, 1178 (holding that costs associated with the EPA mandated cleanup of the [waste dump] are damages under Illinois law).

Accordingly, the law is settled in Illinois. The insured will have coverage for cleanup costs, regardless of whether the underlying claims is legal or equitable.

G. MISSING POLICIES

1. Introduction

Recently there has been increased litigation over missing CGL policies, primarily because of the evolution of environmental coverage and trigger theories placing the starting point of liability back into earlier years. Many courts in the United States have found companies liable for bodily injury or property damage that occurred over an extended period of years, which in turn has triggered coverage under CGL policies which were in effect during the dates of liability. In turn, many policyholders who have older CGL policies, which are either lost or forgotten, are trying to prove the existence of the missing policy because they are potential gold mines for the policyholder. For example, many older policies were not written with aggregate limits of liability, the policy may have had small deductibles, or the policy may not have contained a pollution exclusion clause.

Policyholders and insurance carriers did not anticipate the evolution of coverage theories; therefore, most insurance companies and policyholders did not retain their insurance policies past short document retention time schedules. The increase in liability coverage by courts has led to the increased litigation over "missing policies," with the policyholders trying to establish the existence and material terms of coverage by using secondary evidence.

2. Where to Search and What to Use as Secondary Evidence.

If both the policyholder and insurance carrier have searched their files and are unable to locate the policy in question, then the burden is upon the policyholder to prove the existence and

material terms of the policy in order to obtain coverage. The original policy itself will always be the best evidence to prove coverage existed. Even though an original cannot be found, a copy of the original will usually be satisfactory to prove the existence of coverage. However, in most missing policy litigation, the original and any copies cannot be obtained. Therefore, the policyholder must resort to the use of secondary evidence to prove the existence and the material terms of coverage.

There are many different types of secondary evidence which have been utilized in efforts to prove the existence and material terms of the insurance policy. The list includes: binders, partial policy wording; endorsements; insurance applications; cover notes; declaration pages with reference to earlier policies; letters regarding policy renewals; certificates of insurance; letters between the policyholder and its insurance brokers; records of loss experiences; records of claims made under the policies; significant corporate documents, such as annual reports and minutes of directors meetings; accounting records, including ledgers and canceled checks, showing premium payments; contracts or agreements that include proof of insurance; and proof of insurance retained in government agency files. In addition, the past recollection of both present and former employees, brokers, attorneys, or the insurance carrier's employees who were familiar with the alleged missing policies, can be extremely helpful in discovering additional secondary evidence.

The search for secondary evidence to prove the existence of coverage should begin with the internal corporate records of the policyholder. In general, the search should encompass at least all of the following avenues: the insurance department files; the corporate treasury records; the corporate legal records; the general corporate files; the corporate accounting files; and all audit files. In addition, the oral testimony of every person who had any contact or knowledge of such policies should be taken. The oral testimony usually helps to identify new sources of

insurance related documents or leads to establishing the existence and material terms of coverage.

In addition to the internal search, the policyholder should also make a diligent search of external sources. The list of external areas are as follows: the present and former broker's files; the insurance carrier's files; the London insurance market for old "placing slips" made by London brokers for excess liability insurance; any present and former insurance consultant's files; governmental agency's files that require proof of insurance; present and former outside counsel files; and the files of any third parties who required the proof of insurance prior to engaging in business. The policyholder should interview and, if need be, depose all outside parties who may have knowledge of or information leading to the discovery of additional secondary evidence to prove the existence and material terms of the missing policy.

After the policyholder has made its diligent search of all internal and external sources, it should bring together all evidence and try to reconstruct the missing policy and its material terms. The policyholder must document its search for the original policy and all relevant secondary evidence because showing that a reasonable and diligent search was made is a condition precedent to admitting secondary evidence of the missing policy in a court of law.

3. Proving the Existence and Material Terms of Missing Policies.

The admissibility of the secondary evidence, which was discovered in the policyholder's diligent search, will depend upon the policyholder's ability to satisfy: (1) the best evidence rule; (2) the burden of proof and standard of proof; and (3) authenticating the evidence and satisfying the hearsay rule.

a. The Best Evidence Rule.

Almost every jurisdiction has a best evidence rule which tracks Federal Rule of Evidence 1002, which provides: "[t]o prove the content of a writing, recording, or photograph, the

original writing, recording, or photograph is required, except as otherwise provided in these rules or by act of Congress." Fed. R. Evid. 1002. However, Fed. R. Evid. 1004, the exception to the best evidence rule, allows the admissibility of secondary evidence to prove the context of a writing if "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith" Fed. R. Evid. 1004(1). See also Fed. R. Evid. 1003 (allowing the admissibility of a duplicate or copy to the same extent as the original unless a question is raised to the authenticity of the original or under the circumstances it would be unfair to admit the duplicate instead of the original).

In order for a policyholder to have secondary evidence of coverage admitted, the policyholder has the burden of proving that the original insurance policy is missing and that it was lost or destroyed without bad faith. Bituminous Casualty Corp. v. Vacuum Tanks Incorporated, No. 91-2709 (5th Cir. October 22, 1992); Burroughs Wellcome Co. v. Commercial Union Ins. Co., 632 F.Supp. 1213, 1223 (S.D.N.Y. 1986); Seiler v. Lucasfilm Ltd., 613 F.Supp. 1253, 1260 (N.D.Cal. 1984); Walsh v. St. Louis National Baseball Club, Inc., 822 S.W.2d 559 565 (Mo. App. 1992). See generally Robin C. Lerner, Federal Rules of Evidence: Admissibility, Pursuant to Rule 1004(1) of Other Evidence of Contents of Writing, Recording or Photograph, Where Originals Were Allegedly Lost or Destroyed. 83 A.L.R. Fed. 554 § 7 (1987). The purpose of the best evidence rule is to allow evidence in lieu of the original writing when needed and to keep out secondary evidence when its admission would be contrary to the furtherance of justice. See Seiler, supra, at 1261.

In order for the policyholder to satisfy its burden under Fed. R. Evid. 1004, it must be shown that a reasonable and diligent search has been made for the original without success. See U.S. v. McGaughey, 977 F.2d 1067, 1071 (7th Cir. 1992); Bituminous. There is no set rule that determines the sufficiency of the evidence which is offered to show that a reasonable or

diligent search has been made by the policyholder. Each case is governed on an ad hoc basis taking into account the totality of the circumstances. See, e.g., Burroughs, supra. Thus, conducting an exhaustive search will probably be deemed sufficient to lay the proper foundation for the admission of secondary evidence. The question of whether the policyholder has met this burden is a preliminary question of law for the court. See, e.g., United States v. Gerhart, 538 F.2d 807, 809-10 (8th Cir. 1976); Seiler v. Lucasfilm, 613 F.Supp. at 1261.

b. Burden of Proof.

After the policyholder has established that a reasonable and diligent search has been made for the missing policy, and that the policy was lost or destroyed without bad faith, secondary evidence regarding the existence and material terms of the policy is admissible. Remington Arms Co. v. Liberty Mutual Insurance Co., 810 F.Supp. 1420, 1426-27 (D. Del. 1992); see 21 J. Appleman, Insurance Law and Practice, § 12094 (Rev. Ed. 1981). In most states, the policyholder has the burden of proving that a loss is within an insurance policy by proving the existence, execution, and material terms of the insurance policy. See, e.g., Fibreboard Corp. v. Commercial Union Ins. Co., No. 844903 (Calif. Super. Ct., San Francisco Co., April 1, 1992) (holding that an insured had to prove the following: the terms of the policy; that it was an insured party; the period of the policy; that the policy was for property damage; the amount of coverage provided for each occurrence; and that the policy provided for defense coverage); Boyce Thompson Institute v. Insurance Company of North America, 751 F.Supp. 1137, 1140 (S.D.N.Y. 1990); U.S. Fidelity & Guaranty Co. v. Thomas Solvent Co., 683 F.Supp. 1139, 1172 (W.D. Mich. 1988). See also Martin v. Prier Brass Manufacturing Co., 710 S.W.2d 466, 470 n. 4 (Mo. App. 1986). The insurance carrier, however, has the burden of proving the existence and material terms of any exclusions or limitations relied upon by the insurance carrier. See Suburban Construction Co., Incorporated v. Sentry Insurance, 809

F.Supp. 168, 170-71 (D.N.H. 1993); Continental Casualty Co. v. St. Clair Rubber Co., No. 2:89-CB-73768 DT (E.D. Mich., May 18, 1992); Fibreboard Corp. v. Commercial Union Ins. Co.; Burroughs, 632 F.Supp. at 1223; Emons Industries v. Liberty Mutual Fire Ins. Co., 545 F.Supp. 185, 188 (S.D.N.Y. 1982); Martin v. Prier Brass Manufacturing Co., 710 S.W.2d at 470.

c. Standard of Proof.

There appears to be a split of authority as to whether the policyholder must prove the policies' existence and material terms by a preponderance of the evidence or by clear and convincing evidence. The majority of states, including, for a change, both Missouri and Illinois, require the policyholder to prove the existence, execution, delivery and material terms by clear and convincing evidence. Chicago, Wilmington & Franklin Coal Co. v. Menhall, 131 F.2d 117 (7th Cir. 1942) (involving a deed/title); Boyce Thompson Institute v. Insurance Company of North America, 751 F.Supp. at 1140; Emons Industries v. Liberty Mutual Fire Ins. Co., 545 F.Supp. at 188; Zurich Ins. Co. v. Raymond Indus., No. 78 L 8760 (Ill. Cir. Ct., June 17, 1983), aff'd, 118 Ill.2d 23, 514 N.E.2d, 150, 112 Ill. Dec. 684 (1987) (involving a lost insurance policy); Whitenton v. Whitenton, 659 S.W.2d 542, 547 (Mo. Ct. App. 1983) (holding that where the Statute of Frauds requires a contract to be in writing and the written document has been lost, secondary evidence as to the provisions of the written document must be clear and convincing) Monsanto Co. v. Aetna Casualty & Surety Co., 1993 WL 563244 (Del. Super., Dec. 21, 1993) slip op. at 8 (holding that an insured seeking coverage for lost or missing policies, subject to Missouri law, must prove the existence and terms of the policies by clear and convincing evidence) (citing Whitenton, supra); Brunswick Corp. v. Briscoe, 523 S.W.2d 115, 123 (Mo. App. 1975) (involving a note). Still, a minority of courts apply a "preponderance of the evidence" standard. See, e.g., Remington, 810 F.Supp. at 1425-26 (holding that the

appropriate standard of proof is a preponderance of the evidence because of the inherent safeguard of veracity of the typical evidence offered in missing policy litigation); Turner v. Ewing, 255 La. 659, 232 So.2d 468 (1970); see generally Mapco Alaska Petroleum, Inc. v. Central National Insurance Co., 784 F.Supp. 1454, 1461 (D.Alaska 1991); Mission Ins. Co. v. General Steel & Wire Co., No. C. 532184, slip op. at 2 (Cal. Super. Ct., Feb. 10, 1992).

4. Other Evidentiary Requirements for the Admission of Secondary Evidence.

Even if the policyholder establishes that the original policy has been lost or destroyed without bad faith and the policyholder has made a reasonable and diligent search for the missing policy, the policyholder must still satisfy general evidentiary requirements to get secondary evidence admitted into evidence. The three most relevant and common evidentiary requirements are as follows: (1) establishing the existence, execution and genuineness of the missing original policy; (2) establishing the authenticity of the secondary evidence; and (3) coming within the requirements of an exception to the hearsay rule since such evidence will be offered to prove the truth of the matter asserted.

Before the policyholder can introduce secondary evidence to prove the existence and material terms of the missing policy, it must prove the existence, execution and genuineness of the original missing policy by direct, circumstantial, or parole evidence. See, e.g., Fed. R. Evid. 901; McCormick on Evidence, § 218-28 (3rd ed. 1984). In other words, the policyholder must prove the "authenticity" of the missing policy. The question of whether enough evidence has been introduced to establish the missing policy's authenticity is a preliminary question for the court to decide. See Fed. R. Evid. 104. The policyholder can use different types of evidence to prove the authenticity of the original missing policy. See, e.g., Emons, supra (testimony of president); Burroughs, supra (offering evidence that the insurance carrier defended

a prior claim on behalf of the policyholder). This requirement can usually be satisfied without any substantive problems by the insured's personal testimony.

Just as the original missing policy has to be authenticated, so must the secondary evidence. See Fed. R. Evid. 901 & 902. Authenticity is achieved by introducing evidence sufficient to prove that the purported evidence is what the proponent claims it to be. 7 Wigmore on Evidence, §§ 2129-35 (3d ed. 1978 and Supp. 1993).

Under the Federal Rule of Evidence 901(8), the ancient document illustration, the requirement of authentication is satisfied by evidence that a document "is in such condition as to create no suspicion concerning its authenticity, . . . was in a place where it, if authentic, would likely be, . . . and has been in existence for 20 years or more at a time it is offered." Therefore, a policyholder can authenticate secondary evidence by establishing the requirements of the "ancient documents" illustration under Fed. R. Evid. 901(8). Likewise, there exist other examples of authentication that satisfy the rule of authenticity under the Federal Rule of Evidence. See, e.g., Fed. R. Evid. 901(b)(2). (authenticity by non-expert opinion on handwriting); Fed. R. Evid. 901(b)(4) (authenticity by distinctive characteristics); Fed. R. Evid. 901(b)(7) (authenticity satisfied by public records or reports). See also, Fed. R. Evid. 902 (listing ten examples of self-authenticating evidence).

The last hurdle for the policyholder is satisfying the hearsay rule. If a policyholder wants to offer the secondary evidence, assuming it is an out-of-court statement, to prove the truth of the matter asserted, the evidence must come within an exception to the hearsay rule. However, the hearsay rule has been whittled away and a number of exceptions exist for the policyholder.

Probably the most useful exception available to the policyholder is the ancient documents exception under the Federal Rule of Evidence 803(16). Other available exceptions to the hearsay rule are as follows: business records (Fed. R. Evid. 803(6)); public records (Fed. R. Evid.

803(8)); and admissions of party opponents (Fed. R. Evid. 801(d)(2) (a statement satisfying Fed. R. Evid. 801(d)(2) is deemed not to be hearsay)). Even if the policyholder cannot establish or meet the requirements of one of the hearsay enumerated exceptions, the policyholder may still get the document or statement into evidence under the "catch all exception which allows certain out-of-court statements offered to prove the truth of the matter asserted, but only if the document or statement contains certain indicia of reliability." See Fed. R. Evid. 803(24).

5. Conclusion.

Without the original insurance policy or copies thereof, policyholders face a difficult task trying to prove the existence, execution, and material terms of the alleged missing policy. However, policyholders go to great lengths and expense to prove that the missing policy existed because of the potential financial benefit of placing the burden of providing coverage onto an insurance carrier. Exhaustive, missing policy archaeology is difficult and time-consuming, but experienced counsel can be of tremendous assistance in exhuming either the policies or sufficient secondary evidence thereof. To date, courts have required reasonable and prudent secondary evidence in establishing the existence and material terms of missing policies, as courts are reluctant to find coverage under alleged missing policies because of the threat of fraudulent and ill-founded claims. An investment in a successful search may pay off big dividends in the form of reimbursement of loss payments and/or defense costs incurred by the corporate insured.

III. CONCLUSION

Environmental insurance litigation in the 1990s is state of the art, "high tech" and often overwhelming, given the tremendous time, energy and paper warfare involved and the millions of dollars of potential liability and insurance benefits at stake. The theories of, and holdings regarding, multiple coverage issues change daily and are closely monitored by the active insurance coverage bar. Coverage and litigation strategies for both carrier and policyholder

turn, often like tidal waves, on every addition to the extant myriad of cases construing every insurance policy term and coverage theory. Prophylaxis in the form of archiving every insurance policy is an absolute must for every business and individual in America today. For policies which cannot be found there should be a diligent and exhaustive search. Thereafter, immediate presentation of any claim or even potential claim should be given to each potential carrier - the earlier the notice, the better. Carriers are required to investigate claims presented to them and most will work and negotiate with a policyholder to resolve claims as early as possible. If negotiations do not bear fruit, then suit may be instituted by either side. Then it is "off to the races" on the whole host of issues, only some of which are described above. The law of all states continues to evolve and will continue to do so in the environmental coverage field into the 21st century. All American industry, both business and insurance, should be informed and prepared.