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Résumé de l'article

Nous désirons présenter ici un travail publié par *The John Liner Review*, qui a bien voulu nous autoriser à le faire paraître avec la référence ci-dessous. Le but de cet article américain est de montrer la barrière entre les événements assurables et ceux qui sont inassurables, selon l'assurance de responsabilité civile des entreprises, tel que vu par les tribunaux. Étant donné la grande similitude du nouveau formulaire américain avec le nouveau formulaire canadien, force est de reconnaître l'intérêt de cette étude.

Pollution Liability : Rediscovery of Policy Language[1]

by

Paul E.B. Glad[2] and Thomas L. Forsyth[3]

Nous désirons présenter ici un travail publié par The John Liner Review, *qui a bien voulu nous autoriser à le faire paraître avec la référence ci-dessous. Le but de cet article américain est de montrer la barrière entre les événements assurables et ceux qui sont inassurables, selon l'assurance de responsabilité civile des entreprises, tel que vu par les tribunaux. Étant donné la grande similitude du nouveau formulaire américain avec le nouveau formulaire canadien, force est de reconnaître l'intérêt de cette étude.*

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Liability insurers have struggled for years to distinguish pollution incidents which they intend to cover from those they intend to exclude to the satisfaction of the courts. However, as the authors point out here, a number of recent cases indicate the courts' willingness to recognize the intent of policy language. In this exhaustive study, they examine how these cases have shed new light on the rule of ambiguity *in policy language, on coverage for cleanup costs, on defense limitations, and on the pollution exclusion itself.*

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An inherent risk of our modern, interdependent and technologically-advanced society is the risk of loss associated with exposure to

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[1] This article reflects the thoughts of the authors, but it is not intended to express the opinion of any other party with whom they are affiliated or represent.

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toxic perils. Claims resulting from environmental pollution, DES, radiation injury or exposure to carcinogens were unheard of thirty years ago. Now they occur with such frequency and such catastrophic impact that they have spawned a flourishing industry of specialized publications that report legal developments with regard to toxic substances and pollution.

The insurance industry has handled coverage for such new claims the way it has always dealt with the business of underwriting and assuming risk. Insurance companies have attempted to achieve some degree of certainty by qualifying the risks they assume, by setting forth specific policy limitations on the coverage provided.

For example, in 1973, Insurance Services Office modified the Comprehensive General Liability Policy to exclude gradual and non-accidental pollution damage. This exclusion, along with more traditional exclusions such as those relating to completed operations, owned property and products ; the definition of an occurrence ; and the aggregate and occurrence limits applicable to the obligation to defend and indemnify – all these limitations were thought to provide insurers at least a degree of financial certainty.

Unfortunately, in an effort to find financial compensation for injured victims, the courts often disregard policy language. Utilizing the maxim that *ambiguity* in an insurance policy will be construed against the insurance company, they stripped policy language of its intended meaning. As a consequence, insurers were frequently called upon to pay for huge losses which they neither anticipated nor intended to assume.

These developments have been injurious to both insurance companies and the insurance buying public. Since the insurance industry and the insurance buying public have been required to subsidize coverage provided to insureds beyond that which was contemplated, we have seen both substantial insurance company losses and substantially increased liability insurance premiums in recent years. Such expansive decisions were an important part of the situation now described as the *Insurance Crisis.*

Other aspects of the problem

Another component of this crisis is the uncertainty which has been interjected into the relationship between and among primary

insurance companies, excess insurers, insureds, reinsurers and third party claimants. The failure of the courts to interpret policies pursuant to the language and intent of the contracting parties has been a continuing source of both confusion and litigation.

For example, assume an insured has purchased a Pollution Coverage Policy in addition to a standard Comprehensive General Liability policy. In such case, neither the insurers nor the insureds will know which, if either, of the policies is primary if the pollution exclusion in the Comprehensive General Liability policy is not enforced pursuant to its terms. Responsibility for defense of a claim and the claim's potential impact upon aggregates and layers of coverage will be difficult to predict.

Similarly, such uncertainty will disrupt the insurer's relationship with its reinsurers. On the one hand, reinsurers find it difficult to accept and permit the insurers to enter into a settlement inconsistent with policy language. On the other hand, neither the insurance industry nor the insurance buying public benefits from the expense and delay associated with the protracted litigation often necessary to establish liability under the policy to the satisfaction of reinsurers.

Policy language being reevaluated

Perhaps in recognition of the need for certainty and predictability, there has been a recent judicial rediscovery of policy language and the intention of the parties to the insurance contract to limit the coverage provided by the insurance carriers. These developments have been particularly important in the toxic context. Courts appear to be making a greater effort to learn the intent of the parties to the insurance contract, rather than merely construing policy language against the insurer.

This article will examine the current trend toward judicial rediscovery of the importance of policy language. It will first analyze the appropriate standard for the interpretation of commercial insurance contracts, a standard which is substantially different from that applying to a policy issued to an individual consumer. It will note the courts' increasing willingness to recognize the dual requirements of *sudden and accidental* discharge in the pollution exclusion to exclude coverage for gradual pollution ; and it will note the courts' recognition that coverage for cleanup costs imposed pursuant to

CERCLA (Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. Section 9601-9657) is not granted by liability policies which provide only *occurrence* coverage.

Finally, this article will explain the primary insurers are entitled to extricate themselves from expensive defense obligations once the indemnity limits of their policies have actually been exhausted. These developments are discussed separately below, but it is important to recognize that they are all part of a recent trend acknowledging an insurance company's right to limit the obligations it has assumed pursuant to policy language agreed to by the insurer and the insured.

Interpretation of business policies

The rule that ambiguities in an insurance contract should be strictly construed against the insurer is probably the most frequently cited rule of insurance law. It has been the deciding factor in many decisions contrary to insurance companies. This rule developed within the consumer insurance context and is based upon the rationale that insurance contracts are contracts of adhesion between parties of unequal bargaining power(4).

However, this rationale has no applicability within a commercial context where businesses often utilize risk managers, lawyers, insurance brokers and subproducers in obtaining and negotiating the terms of their insurance coverage. Also, it ignores the fundamental rule that insurance contracts, like all contracts, should be construed in a manner which gives effect to the intent of the parties to the contract. Additionally, many business insureds are larger and possess greater bargaining power than the insurance companies with which they deal(5).

As a result, the courts in a number of recent cases have refused to automatically apply the legal maxim construing an insurance policy that appears to be ambiguous against the insurers. Within the commercial context, a number of cases have recognized that a mere

(4) Glad, 'Interpretation of Business Insurance Contracts', 39 *CPCU Journal* 110 (1986) ; Keaton, 'Insurance Law Rights at Variance with Policy Provisions', 83 *Harv. L. Rev.* 961, 966-977 (1970).

(5) Glad, 'Interpretation of Business Insurance Contracts', 39 *CPCU Journal* 110 (1986) ; Ostrager & Ichel, 'Should the Business Insurance Policy be Construed Against the Insurer ?', 33 *Fed. Ins. Counsel Q.* 273 (1983).

rule or legal maxim for interpreting an insurance contract should not be followed when actual evidence of the parties' intent is available[6]. Moreover, a number of other cases have held that the rule construing an insurance contract against the insurance company has no validity in cases where the insured is a large, sophisticated business entity[7].

Two recent cases illustrate trend

Two recent cases provide excellent examples of this trend within the context of toxic claims. *McNeilab, Inc. v. North River Insurance Co.*[8] involved Johnson & Johnson's claim for recovery of the cost of a nationwide recall of its product Tylenol following the much publicized tampering with the product (poison capsules had been substituted for Tylenol capsules). Rather than merely construing policy language against the insurance company, the court admitted extrinsic evidence showing that Johnson & Johnson understood that its insurance coverage failed to include coverage "for recall and recall-related expenses"[9]. The court also went out of its way to emphasize that in cases involving large commercial insureds, the rule automatically construing ambiguous provisions in the policy against the insurance company fails to apply, stating at pages 546 and 547 :

> "In the present case, there is no question but that the parties were of equal bargaining power and that all that preceded and all that followed the execution of the policy at issue here is reminiscent of the entry into and the living under a treaty between two great nations. Plaintiff's protestations about the size and competitiveness of the liability insurance market and the *adhesion contract* prepared without its input, in a phrase, fall flat".

[6] *E.g., Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 10 fn. 2 (2d Cir. 1983). *Keene Corp. v. Insurance Co. of North America*, 597 F. Supp. 946, 953 fn. 6 (D.D.C. 1984) ; *Garcia v. Truck Ins. Exchange*, 36 Cal. 3d 426, 438 (1984).

[7] *First State Underwriters v. Travelers Inc. Co.*, 803 F.2d 1308 (3rd Cir. 1986) ; *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 10, fn. 2 (2d Cir. 1983) ; *Town of Epping v. St. Paul Fire Marine Ins. Co.*, 122 N.H. 248, 44 A.2d 496 (1982) ; *Helprin v. Lexington Insurance Co.*, 715 F.2d 191 (5th Cir. 1979) ; *Eastern Associated Coal Corp. v. Aetna Casualty & Surety Co.*, 632 F.2d 1068, 1075 (3rd Cir. 1980). It should be noted, however, that at least two recent court decisions have refused to apply this rule in the absence of a showing that the insured *participated* 'in the actual drafting of the terms, language, and/or options offered in the insurance policies that were considered'. *Clemco Industries v. Commercial Union Insurance Company*, F. Supp. (N.D. Cal. No. C.85, 1464 WHO, issued April 23, 1987) ; *Coordination Proceeding Special Title : Asbestos Insurance Coverage Cases* (Judicial Council Coordination Proceeding No. 1072, issued May 29, 1987).

[8] *McNeilab, Inc. v. North River Insurance Co.*, 645 F. Supp. 525 (D.N.J. 1986).

[9] *Id.* at 542.

Similarly, in *Fireman's Fund Ins. Co. v. Fiberboard Corp.*[10], the California court of appeal upheld a summary judgment granted in favor of the insurance company excluding injury "arising from exposure. . . to asbestos dust created during the use of products manufactured by the insured which contained asbestos"[11]. The court rejected the argument that such exclusion was ambiguous and should be construed against the insurance company. Significantly, the court rejected the insured's argument since the claim involved "two large corporate entities, each represented by specialized insurance brokers or risk managers" who "negotiated the terms of the insurance contract"[12]. It held that under such circumstances, the rule requiring strict construction against the insurance company had no application, stating at page 467 :

> "Nor do we believe, as Fiberboard alleges, that ambiguity of the exclusion clause necessarily implicates the general rule of strict construction against the insurer and in favor of the insured. (Citation omitted). The salutary rule of construction is not applicable under the circumstances shown".

The court emphasized that insurance policies should be construed in a common sense manner rather than by straining to create ambiguity where none exists. It underscored the rights of an insurance company "to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected"[13].

In short, the courts recognize that an insurance policy negotiated between large sophisticated commercial entities should *not* automatically be construed against the insurance company. They instead recognize that the policy should be construed to give effect to the actual intention of the parties. The courts have underscored the importance of enforcing coverage limitations which are contained in the policy rather than straining to discover an ambiguity in order to create coverage.

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[10] *Fireman's Fund Ins. Co. v. Fiberboard Corp.*, 182 Cal. App. 3d 462 (1986).

[11] *Id.* at 467.

[12] *Id.* at 468.

[13] *Id.* at 467.

The pollution exclusion – some background

In the hazardous waste context, no portion of the Comprehensive General Liability policy has generated more controversy than the pollution exclusion. In the mid 1960s, insurers began to provide *occurrence* coverage, which unlike prior *accident* policies, explicitly provided some coverage for long-term events. This grant of occurrence coverage, coupled with an increased awareness of the potential exposure from environmental damage, led to the adoption of the pollution exclusion in the early 1970s.

42 The pollution exclusion purports to deny coverage for bodily injury or property damage arising from pollution unless the discharge of the pollutant is sudden and accidental[14]. Little did insurers realize that by placing a limited grant of coverage for sudden and accidental pollution within a complete denial of coverage for pollution, they ran the risk of being required to provide coverage for all manner of polluting events.

Two earlier cases

The seminal case in the history of the courts' interpretation of the pollution exclusion is *Lansco, Inc. v. Department of Environmental Protection*[15]. In that case, vandals apparently broke into Lansco's premises and opened the valves of two oil storage tanks. The court quite properly concluded that since this discharge was both sudden and accidental when viewed from Lansco's position, it was covered despite the pollution exclusion. While the court noted that the word *sudden* implied that the polluting event occurred without notice to the insured, it also equated the sudden concept with unexpected or unintended. It stated that "*sudden* means happening without previous notice or on very brief notice ; unforeseen ; unexpected ; unprepared for"[16]. It is this focus on the expectation of the insured without regard to the temporal nature or *suddenness* of the polluting event which provided courts with the opportunity to create coverage where none was intended.

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[14] This has been recognized in the courts. For example, the California Court of Appeal in *Pepper Industries, Inc. v. Home Ins. Inc.*, 67 Cal. App. 3d 1012, 1019 (1977), explained that '(a) fair reading of the endorsement leads to the conclusion it was intended to exclude insurance coverage resulting from pollution and contamination of the environment, be it land, water or the atmosphere'.

[15] *Lansco, Inc. v. Department of Environmental Protection*, 138 N.J. Super. 275, 350 A.2d 520 (N.J. 1975), *aff'd.* 145 N.J. Super. 433, 368 A.2d 363 (1976).

[16] *Id.* at 524.

Building upon Lansco's focus on the insured's expectation, the court in *Jackson Township Municipal Utilities Authority v. Hartford Accident and Indemnity Co.*[17] went further and effectively deleted the pollution exclusion from the policy. In essence, it concluded that the pollution exclusion was nothing more than a restatement of the occurrence definition's requirement that damage be neither expected nor intended from the standpoint of the insured.

In *Jackson Township*, the Utilities Authority was named as a third-party defendant in a case brought by neighbors of the landfill it operated. In holding that the insurer was required to defend its insured despite the language of the pollution exclusion, the court concluded that the exclusion was ambiguous ; it therefore relied upon the traditional maxim construing policy language against the insurance company. The court held that the pollution exclusion should apply only when the insured *intended* the resulting damage regardless of the nature of the discharge :

> "The clause can be interpreted as simply a restatement of the definition of *occurrence* – that is, that the policy will cover claims where the injury was 'neither expected nor intended'.. . . If the inquiry is, as it should be, whether the pleadings charged the insured with an act resulting in unintended or unexpected damage, then the act or acts are sudden and accidental regardless of how many deposits or dispersals may have occurred, and although the permeation of pollution into the ground water may have been gradual rather than sudden, the behavior of the pollutants as they seeped into the aquifer is irrelevant if the permeation was unexpected" [18].

Subsequent decisions varied

In the years following *Jackson Township*, courts reached a variety of conclusions regarding the meaning and applicability of the pollution exclusion. Several courts followed the rationale of *Jackson Township* that the pollution exclusion is ambiguous and concluded that it only denied coverage for expected or intended damages[19].

[17] *Jackson Township Municipal Utilities Authority v. Hartford Accident and Indemnity Co.*, 186 N.J. Super. 156, 451 A.2d 990 (1982).

[18] *Id.* at 993-994.

[19] *See, e.g., United Pacific Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 664 P2d 1262 (1983) ; *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D. 2d 486, 426 N.Y.S. 2d 603 (1980).

Other courts concluded that it only applied to *actual* polluters[20]. A few courts held that the pollution exclusion was unambiguous and applied the language of the exclusion to deny coverage in instances where the pollution occurred over a long period of time as part of normal business operations[21].

Recent pollution cases

More recent decisions, however, reanalyzed the language of the exclusion and have rediscovered that the clause turns upon the "sudden and accidental" nature of the *discharge* of the pollutants, regardless of the insured's intent to cause damage[22]. These courts have applied the *sudden* language of the "sudden and accidental" nature of the discharge requirement as a temporal requirement and have concluded that the continued discharge of waste is not accidental.

For example, in *Transamerica Insurance Co. v. Sunnes*[23], the insured (Culligan Water Conditioning) discharged acid and caustics into the city sewers over a ten-year period. Culligan's insurers refused to defend or indemnify their insured for claims brought by the City for damages to the sewer lines. The parties to the coverage dispute agreed that while the discharge of pollutants was intended by Culligan, the resulting damage was not.

The Oregon appellate court concluded that the pollution exclusion was not ambiguous and rejected the *active* polluter analysis since the phrase was not found in the policy. Instead, the Court

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[20] *See, e.g., Autotronics Systems, Inc. v. Aetna Life & Cas. Co.*, 89 A.D. 2d 401, 456 N.Y.S. 2d 504 (1982).

[21] *See, e.g., Great Lakes Container Corp. v. National Union Fire Ins. Corp.*, 727 F. 2d 30 (1st Cir. 1984) ; *American States Ins. Co. v. Maryland Cas. Co.*, 587 F. Supp. 1549 (S.D. Mich. 1984) ; *Techalloy Co. v. Reliance Ins. Co.*, 487 A.2d 820 (Pa. Super. 1984).

[22] Of course, not all recent decisions hold that the pollution exclusion is unambiguous and enforce both the sudden and accidental requirements of the exception to the exclusion. For example, in *Jonesville Products, Inc. v. Transamerica Insurance Group* 156 Mich. App. 508, 402 N.W. 2d 46 (1986), an intermediate Michigan appellate court reversed a summary judgment in favor of the insurer and held that Transamerica was required to defend its insured from claims based on allegations of 'continuous' TCE pollution. While the court's decision can be explained by its extremely broad construction of the duty to defend as opposed to the duty to indemnity, the court's analysis focuses solely upon the *insured's intent* at the time it was discharging the TCE. The analysis of the nature of the discharge itself found in the pollution exclusion's sudden and accidental requirement is simply ignored. *See also, National Grange Mutual Ins. Co. v. Continental Cas. Ins. Co.*, 650 F. Supp. 1404 (S.D.N.Y. 1986).

[23] *Transamerica Insurance Co. v. Sunnes*, 711 P.2d 212 (Ore. App. 1985), *cert denied*, 301 Ore. 76, 717 P.2d 631 (Or. 1986).

based its analysis on the specific language of the exclusion and held that the pollution exclusion focused on the nature of the discharge of pollutants, not whether the insured expected or intended any resulting damages :

> "The fact that the damage was not intended means that there was an *occurrence* within the policy definition. That fact has nothing to do with whether the *discharge* was 'sudden and accidental' for the purpose of applying the exception to the exclusion. The trial court correctly ruled that, because Culligan intentionally discharged waste material regularly over a period of many years, the discharge was not 'sudden and accidental' and so the exception did not apply" (24).

Similarly, in *Waste Management of Carolinas, Inc. v. Peerless Insurance Company*(25), the North Carolina Supreme Court reversed a broad, intermediate appellate decision, regarding the construction of the pollution exclusion. The insured, Trash Removal Sercices, Inc., hauled residential and industrial waste to the Flemington landfill over a six-year period. Trash Removal Services became a defendant in an action brought by the United States alleging that the groundwater beneath the landfill had been contaminated.

The Court found the pollution exclusion unambiguous and, in fact, stated that "it strains logic" to reach a different conclusion(26). While the allegations of the complaint did contemplate an occurrence since it was possible that Trash Removal Services failed to anticipate the resulting groundwater contamination, there was no suggestion that the dumping or contamination was *sudden*. Therefore, the pollution exclusion precluded coverage :

> "Nevertheless, the events alleged in the pleadings and supported by the deposition fit squarely within the language of the exclusion clause. Waste material that has leached into and contaminated groundwater is clearly excluded by the plain terms of the pollution exclusion. And because the *sudden* release or escape of contaminants was neither expressly nor impliedly alleged in the pleadings or deposition, the alleged occurrences remain outside the policy coverage"(27).

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(24) *Id.* at 214.

(25) *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E. 2d 374 (1986).

(26) *Id.* at 383.

(27) *Id.* at 383.

The importance of the temporal requirement of the exclusion can be seen once again in *Fisher & Porter Co. v. Liberty Mutual Insurance Company* (28). Liberty Mutual argued that evidence of poor housekeeping and use of underground tanks after their projected useful life required that the court deny coverage to its insured. The court concluded that the spill of TCE, which was part of the "regular conduct" of the insured's business operations, was not *accidental* and therefore did not form the basis for an occurrence. The court also held that even if the polluting event was accidental, it was not sudden as required by the unambiguous pollution exclusion :

> "The pollution exclusion clause of the Liberty Mutual policy is not ambiguous. . . Contamination that results from continuous dumping of toxic chemicals into drains or into compactors or tanks that would, in turn, spill into drains or onto the ground is not sudden, even if one could argue that the spillage was accidental or the resulting damage unexpected. . . The plain, ordinary meaning of the word sudden signifies an event that occurs abruptly, without warning (citation omitted). Employee practices, attributed to management, of pouring contaminants into floor drains or into other areas which caused leaching into the groundwater are not 'sudden and accidental' events"(29).

In summary, the terms of the pollution exclusion require that the polluting event be *sudden* as well as *accidental* in order to be covered. While the examination of the nature of the discharge of pollutants went unheeded in a number of earlier decisions, recent cases have enforced the requirement and excluded damage arising from pollution as required by the policy language.

Pollution cleanup costs

Liability policies generally state that they will defend and indemnify the insured from claims for bodily injury or property damage caused by an accident or occurrence. Particularly in the asbestos context, courts have taken these grants of coverage and the corresponding definitions and stretched them in order to maximize insurance coverage (30). Recent decisions in the hazardous waste or CER-

(28) *Fischer & Porter Co. v. Liberty Mutual Ins. Co.*, 656 F. Supp. 132 (E.D. Pa. 1986).

(29) Id. at 137. *See also, American Mutual Liability Ins. Co. v. Neville Chemical Co.*, 650 F. Supp. 929 (W.D. Pa. 1987) ; *American Motorists Ins. Co. v. General Host Corporation*, F. Supp. (D.C. Kan. issued July 29, 1987).

(30) *See, e.g., Keene Corp. v. Insurance Co. of North America*, 677 F.2d 1034 (D.C. Cir. 1981).

CLA context, however, have failed to find ambiguity ; they have instead applied these basic insurance agreements to *deny* coverage.

Cost of protective measures not covered

New Jersey has been one of the most difficult jurisdictions in recent years for insurers attempting to litigate environmental coverage issues[31]. Yet, a New Jersey intermediate appellate court recently held in *Atlantic City Municipal Utilities Authority v. CIGNA Companies, et al*[32] that a liability policy failed to provide coverage for protective measures implemented to prevent contamination of a public water supply. Atlantic City's wellfields were located near the Price Pit landfill where, it was alleged, hazardous wastes were illegally dumped prior to 1981.

Federal officials testified that hazardous waste from the landfill would contaminate Atlantic City's water supply. Therefore, the Utilities Authority spent over $900,000 to install granular activated carbon filters at its main treatment plant. It sought reimbursement of these sums from its insurers as costs necessary to prevent imminent harm to third parties, forestalling legal obligations as great as or exceeding the cost of the preventive measures.

The court noted that the Utilities Authority was under a duty to provide potable water and that no harm had occurred to third parties at the time of the installation of the filters. While agreeing that the Utilities Authority acted reasonably, the court held that the expenditures were not incurred to respond to liability claims brought by third parties as required by the policies at issue :

> "We agree. . . that plaintiff acted reasonably to avert the contamination of its water supply. Its expenditures were not, however, to discharge any legal obligation to pay damages to a third party, the limit of liability coverage provided under CIGNA's policies, or to prevent what otherwise would have been an unavoidable legal obligation to pay damages to a third party. A major part of its expenditures was to protect its own property, its drinking water

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[31] *See, e.g., Jackson Township Municipal Utilities Authority v. Hartford Accident & Indemnity Co.*, 186 N.J. Super. 156, 451 A.2d 990 (1982).

[32] *Atlantic City Municipal Utilities Authority v. Cigna Co.*, No. A-1320-8477 (N.J.S.D., issued Dec. 19, 1985).

wells, the surrounding Cohansey sands and its underground water supply, against a threat of contamination in the near but indefinite future. Plaintiff's expenditures failed to qualify for the liability coverage provided in defendant CIGNA's policies"[33].

Other decisions involving CERCLA claims

Similarly, while deciding the extent of coverage for claims brought under CERCLA, a federal court in Idaho applied what it called "clear and unambiguous" language to deny coverage under policies issued by Continental Insurance. In the case of *State of Idaho v. Bunker Hill Company*[34], the occurrence definition of the policy at issue specifically stated that the resulting property damage must occur "during the policy period". The court viewed the issue as a matter of determining whether the policies were to be read *literally*; or whether they were to be construed to provide coverage for damages arising from the release of hazardous substances, even though those damages occurred long after the policies expired. Although it examined conflicting decisions in the bodily injury context regarding trigger of coverage theories, the court refused to adopt any specific theory. Instead, it applied its prior decision that the state could only recover for damages occurring after December 9, 1979.

Pursuant to the language of the insurance contract, Continental's policies lapsed on April 15, 1978. Since the *plain* policy language suggested that "the intent of the parties was to provide insurance against damages occurring during the policy period", Continental had no duty to defend or indemnify[35].

The clearest example of the court's willingness to apply policy language, even in the face of what the trial court perceived as an *arbitrary* result, appears in a very recent federal fourth circuit Court of Appeals decision. In *Maryland Casualty v. Armco Inc.*[36], the insured, Armco, sought coverage for its liability arising from a CERCLA cost recovery suit filed by the Environmental Protection Agency. The suit was filed against Armco and other generators at the Conservation Chemical site. A request for a jury trial in the government suit was denied because the suit for response cost was

[33] *Id.* at 4-5.

[34] *State of Idaho v. Bunker Hill Co.*, 647 F. Supp. 1064 (D. Id. 1986).

[35] *Id.* at 1070 ; see also *McNeilab, Inc. v. North River Inc. Co.*, 645 F. Supp. 525 (D.N.J. 1986).

[36] *Maryland Casualty v. Armco, Inc.*, F.2d (4th Cir. No. 86-3125 issued July 6, 1987) ; *see* 643 F. Supp. 430 (D. Md. 1986).

analogous to an equitable claim for restitution. Concluding that insurance policies by their express terms respond only to claims for damages, not equitable relief, the district court refused to grant Armco's coverage request[37]. On appeal, Armco argued that term *damages* in its policy should be construed to include almost all claims for monetary relief. The Court of Appeals rejected this argument because it would render the term *damages* in the contract as *mere surplusage*. Instead, the court expressly declined to extend liability coverage to prophylactic measures required by government directives :

> "Maryland Casualty has contracted with Armco to reimburse only where Armco is obligated to pay damages which result from injury, which in the insurance context means damages in the legal sense. In the absence of clear contract language or specific Congressional authorization in CERCLA, we decline to extend the obligations of insurance carriers beyond the well-illumined area of tangible injury and into the murky and boundless realm of injury prevention. We hold that the cost to Armco of complying with the directives of a regulatory agency are not covered within the terms of the insurance policy".

The first Federal Court of Appeals to consider CERCLA-related coverage issues also concluded that there was no coverage for such costs. The EPA sued Sally and Paul Mraz, the owners of a dumpsite, for the cost of cleaning up the dumpsite. In *Mraz v. Canadian Universal Insurance Co., Ltd.*[38], the Fourth Circuit Court of Appeals reversed a trial court's determination (finding coverage) for two reasons.

Just as in the *Bunker Hill* case, the policy at issue required that the resulting property damage occur during the policy period. The insurer, Canadian Universal, argued that while it insured Mraz only until January 1, 1970, the allegations of the government's complaint

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[37] It is well settled that an insurance policy providing coverage only for claims for damages against the insured does not cover suits for purely equitable relief. *Haines v. St. Paul Fire & Marine Ins. Co.*, 428 F. Supp. 435, 441-442 (D. Md. 1977) ; *Aetna Casualty & Surety Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955) ; *Ladd Construction Co. v. Insurance Co. of North America*, 73 Ill. App. 3d 43, 391 N.E. 2d 568, 572-573 (Ill. App. 1979) ; *O'Neil Investigations, Inc. v. Illinois Employers Insurance of Wausau*, 636 P. 2d 1170 (Alaska 1981).

[38] *Mraz v. Canadian Universal Insurance Co., Ltd.*, 804 F.2d 1325 (4th Cir. 1986).

did not specify any damage to the government plaintiffs before 1981. The court resolved the timing questions by adopting a *manifestation* or *date of discovery* theory for determining the date of the occurrence. Since the release of pollutants was not discovered until 1981, no coverage was provided by the Canadian Universal policy which expired over 11 years earlier(39).

More important than its trigger decision is the *Mraz* court's conclusion that response costs incurred under CERCLA fail to constitute "injury to or destruction of tangible property", or "property damage", as the term was defined in Canadian Universal's policy. 50
The court agreed that the government's complaint, by alleging contamination of soil and water, did include allegations of property damage, but stated that these allegations were merely a *factual predicate* to the government's claims (40). The government's claims were not based upon property damage suffered by it ; instead, they arose from a statutory grant of power to protect the environment. The Court concluded that costs arising from this statutory power were not synonymous with the insurance contract's agreement to respond to claims for property damage :

> "Response costs are not themselves property damages. An examination of CERCLA's provisions defining response, Section 9601(23)-(25), and authorizing the President to take response action, Section 9604, makes it clear that property damage and response are independent ; for example, the government may take response action in cases of a substantial threat of a release of hazardous substance before any damage ever occurs. One cannot equate response costs with 'injury to or destruction of tangible property', this policy's definition of property damage. Instead, response costs are an economic loss. Therefore, the *Bissell* complaint does not allege a loss of property damage"(41).

In summary, in each of these cases, the court resisted the temptation to provide broad grants of coverage. Instead of straining to find ambiguity in policy terms or otherwise stretching the intent of the parties to find an immediate funding mechanism for clean-up costs, each court interpreted the insurance contract in accord with the actual policy language. When viewed in the light of contractual

(39) *Id.* at 1328.

(40) *Id.* at 1330.

(41) *Id.* at 1329.

language requiring an *occurrence* and third-party liability, demands for CERCLA coverage simply failed.

Limitations upon the duty to defend

Prior to 1966, the CGL policy stated that a defense would be provided to the insured "with respect to such insurance as provided by this policy" and "subject to the limits of liability, exclusions, conditions and other terms of this policy. . . "(42). Within the insurance industry, it was thought that such language unambiguously indicated that an insurance company's duty to defend terminates upon the exhaustion of its policy limits.

However, certain cases held that such language was ambiguous. These courts held that since the duty to defend is separate from the duty to indemnify, an insurer was required to continue to defend cases against the insured although the policies' indemnity limits had been exhausted.(43).

Recent cases in favor of insurers

Recent cases have rejected the *continuing* duty to defend and have recognized that the policy language expressly links the duty to defend to the duty to indemnify. Therefore, they have held that an insurer is not bound to defend when it cannot be bound to indemnify(44).

For example, in *Commercial Union Ins. Co. v. Pittsburg Corning Corp.* (45), the insured once again argued that the policy language regarding the duty to defend was ambiguous and therefore should be construed against the insurance company. This argument was accepted by the district court, but it was soundly rejected by the Court of Appeals. Fundamental to the court's conclusion was the principle

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(42) *E.g., Commercial Union Ins. Co. v. Pittsburg Corning Corp.*, 789 F.2d 214, 217 (3rd Cir. 1986).

(43) *See, e.g., Kosce v. Liberty Mutual Ins. Co.*, 387 A.2d 1259 (N.J. Super. 1978) ; *National Casualty Co. v. INA*, 230 F. Supp. 617, 622 (N.D. Ohio 1964) ; *St. Paul Fire & Marine Ins. Co. v. Thompson*, 150 Mont. 182, 433 P. 2d 795 (1967) ; *Anchor Casualty Co. v. McCaleb*, 178 F.2d 322 (5th Cir. 1949).

(44) *AC&S, Inc. v. Aetna Casualty & Surety Co.*, 764 F.2d 968, 975 (3rd Cir. 1985) ; *Keene Corp. v. Insurance Company of North America*, 597 F. Supp. 946, 953 (D.D.C. 1984) ; *Aetna Casualty & Surety Co. v. Certain Underwriters at Lloyds of London*, 56 Cal. App. 3d 791 (1976).

(45) *Commercial Union Ins. Co. v. Pittsburg Corning Corp.*, 789 F.2d 214 (3rd Cir. 1986).

that the duty to defend is linked to the duty to indemnify. As the court explained at page 218 :

> "The principle that the duty to defend is linked to the duty to indemnify, and consequently that, absent other considerations, the insurer is not bound to defend where it cannot be bound to indemnify, applies regardless of when the duty to indemnify comes to an end".

The court held that an insurer need not continue to defend after it has actually exhausted its policy limits by paying settlements or
52 judgments, so long as the insurance company provides for an orderly withdrawal from the insured's defense. As the court explained at page 220 :

> "We conclude, therefore, that the pre-1966 Travelers policies do not oblige Travelers to assume the costs of defending actions against its insured after its duty to indemnify has terminated by the payment of judgments or settlements and it has made an orderly withdrawal from the insured's defense".

This holding is important not only to pre-1966 policy language ; it has even greater relevance to post-1966 standard CGL policy language. The post-1966 CGL policy form expressly states that the insurer is not liable to defend any claims "after the applicable limit of the company's liability has been exhausted by payment of judgments or settlement". As the court explained in *Commercial Union*, "this amendment merely makes even more explicit the extent of an insurer's obligation in the context of its contractual duty to defend(46).

Recent authority confirms limitations

The holding was confirmed recently in one of the largest and most protracted judicial proceedings in United States history. In a phase of consolidated proceedings involving hundreds of lawyers and 183 trial days, the court addressed the duty to defend as part of its determinations in the consolidated asbestos coverage litigation. In *Coordination Proceeding Special Title, Asbestos Insurance Coverage Cases*(47), the asbestos manufacturers argued that their insurance companies were required to defend even after policy limits had been

(46) *Id.* at 220.

(47) *Coordination Proceeding Special Title, Asbestos Coverage Cases*, Judicial Coordination Proceeding No. 1072 issued May 29, 1987.

exhausted. The manufacturers argued, as expected, that a defense was required due to policy ambiguity :

> "The policyholders assert that the language on which the insurers rely is ambiguous. According to their reading, 'such insurance as is afforded by this police' might refer to the type of coverage (bodily injury liability) or to the amount of coverage (the dollar amount specified in the policy limit). Because of this policy language should be construed in their favor, that is, not to refer to the amount"(48).

In rejecting this conclusion, the court first was careful to explain that it should seek to interpret the policies pursuant to their plain language rather than straining to find coverage in favor of the insured. Indeed, the court emphasized that even where ambiguity is found, it is required to utilize other tools to resolve such ambiguity prior to merely construing the policy against the insurance company :

> "The court is obligated to attempt to resolve uncertainty by considering the policy language and extrinsic evidence of intent, before the Court simply gives up, declares the meaning uncertain or ambiguous, and construes it against the party or parties who caused the uncertainty to exist". (Citation omitted)(49).

However, it was unnecessary for the court to utilize such extrinsic evidence since it held that the language governing the duty to defend was unambiguous. The court held that the policy language clearly and unambiguously limited the insurers obligation to defend to claims brought prior to the exhaustion of policy limits :

> "The policy language at issue here clearly and unambiguously limits the insurers' defense obligations to claims brought prior to the exhaustion of applicable policy limits. The policy language restricting the duty to defend to 'such insurance as is afforded by this policy' ties the defense obligation to policy limits as well as to the type of claim covered"(50).

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(48) *Id.* at 92-93.

(49) *Id.* at 20-21.

(50) *Id.* at 94.

In short, like other areas under our consideration in this article, the courts have concluded that the policy language governing the duty to defend is clear and should be given effect. There is no duty to defend after the exhaustion of policy limits.

Conclusion

It appears that an element of certainty has been restored to the interpretation of insurance policies. The courts have rediscovered that an insurance policy is a contract between the insurer and the insured and that it should be construed to give effect to the language of the contract. The courts are less likely to strain to find ambiguity and more likely to construe insurance policies as intended both by the insurance company and the insured. This is good news not only to insurance companies, but also to the insurance buying public.

Sarah Bernhardt, par Françoise Sagan, chez Flammarion, Paris

Sarah Bernhardt paraît chez Flammarion. C'est du meilleur Françoise Sagan. Comme semble loin *Bonjour, Tristesse* qui, à l'époque, nous avait paru si plaisant, même s'il était bien mélancolique. C'était une oeuvre de jeunesse écrite avec une maturité qui nous étonna, à l'époque.

Cette fois, l'auteur a imaginé un dialogue entre elle et la grande artiste du début du siècle, avec quel esprit, de part et d'autre. On sent que Françoise Sagan est prise par son sujet - cette extraordinaire artiste, fantasque, jetant l'argent par les fenêtres, adorée par un public fidèle, aussi bien en Europe qu'en Amérique du Sud et du Nord.

Et puis, vient le moment où on lui ampute la jambe, ce qui la force à porter un pilon. Malgré cela, prise par ses charges familiales et sa réputation de géniale actrice, elle tient le coup, travaille, peine, paie les dettes de son fils, joue, puis meurt. C'est tout cela que présente François Sagan de façon assez extraordinaire.