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INSURANCE COVERAGE OF ENVIRONMENTAL LIABILITY IN MONTANA

Mark Shelton F. Williams*

I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act¹ (CERCLA) or "Superfund" is creating extensive litigation across the country in the area of environmental liability. Federal and state governments, as well as private property owners, are actively employing CERCLA provisions to compel cleanup of contaminated property and to recover costs for completed cleanup actions. CERCLA is likely to be a major source of future litigation. For entities designated as Potentially Responsible Parties² (PRPs) under CERCLA, insurance coverage of cleanup expenses and defense costs is of paramount concern, and will surely create additional litigation between insurers and insureds.

Insurance companies have attempted to limit their exposure to pollution liability through pollution exclusion clauses. While voluminous (and often contradictory) case law on pollution coverage issues exists nationally, particularly on the interpretation of the pollution exclusion clauses,³ the Montana Supreme Court has yet to address the major issues. "At stake to insurers and insureds are tens, if not hundreds of billions of dollars."⁴ Montana courts and attorneys should prepare to address these issues in the near future.

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1. 42 U.S.C. §§ 9601-75 (1988 & Supp. II 1991). The author hereafter refers to the Comprehensive Environmental Response, Compensation, and Liability Act interchangeably as CERCLA, "Superfund," or "the Act."

2. 42 U.S.C. § 9604 (1988).

3. Courts in different states, and at times even in the same state, have been unable to reach a consensus on a seemingly straightforward issue: Whether the standard liability insurance policies issued to countless insureds over the past forty-five years can cover the cost of compliance with government-mandated cleanup of environmental contamination. At stake to insurers and insureds are tens, if not hundreds, of billions of dollars Indeed, the sheer magnitude of this and other issues has turned insurance coverage litigation from a legal backwater into one of the more exciting legal specialties of the late 1980s and early 1990s.

David B. Goodwin, *Disputing Insurance Coverage Disputes*, 43 STAN. L. REV. 779, 779 (1991) (citations omitted).

4. *Id.*

II. OVERVIEW OF CERCLA

Congress enacted CERCLA "to provide a comprehensive response to the problem of hazardous substance release."⁵ The Act allows the Environmental Protection Agency (EPA) to initiate cleanup procedures at contaminated sites.⁶ It also permits the EPA to seek injunctions to abate threats to public health or welfare from releases of hazardous substances.⁷ Finally, the Act gives private parties a cause of action against parties responsible for an environmental hazard.⁸ CERCLA's liability provisions are a key feature of the Act, because they allow the government or private parties to recover cleanup costs from responsible parties.⁹

CERCLA's liability scheme is harsh; liability is strict, joint and several, and applies to virtually all current and former owners or operators of facilities¹⁰ where there has been a release¹¹ or a threatened release of a hazardous substance¹² into the environment.¹³ Courts have interpreted CERCLA's liability scheme broadly, finding individual officers and directors, sole shareholders, parent corporations and successor corporations liable, without adherence to common law standards of corporate limited liability.¹⁴ The insurer of a liable party cannot be sued directly under CERCLA, although at least one plaintiff has attempted to do so.¹⁵

5. Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 890 (9th Cir. 1986).

6. 42 U.S.C. § 9604 (1988).

7. 42 U.S.C. § 9606 (1988).

8. 42 U.S.C. § 9607(a)(4)(B) (1988).

9. 42 U.S.C. § 9607 (1988). Responsible parties include all current and former owners or operators of the facility without regard to fault, unless the contamination was caused by an act of God, act of war, or act of a third party not in a contractual relationship with the defendant. 42 U.S.C. § 9607(a)-(b) (1988).

10. The term "facility" means:

(A) any building, structure, installation, equipment, pipe or pipeline . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9) (1988).

11. 42 U.S.C. § 9601(22) (1988) (defining release).

12. 42 U.S.C. § 9601(14) (1988) (defining "hazardous substance").

13. 42 U.S.C. § 9607(a) (1988). See generally Lewis M. Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 45 Bus. Law. 923 (1990) (comprehensive overview of CERCLA liability).

14. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985); *United States v. Ward*, 618 F. Supp. 884, 893-97 (E.D.N.C. 1985); *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 22 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991).

15. *Port Allen Marine Services, Inc. v. Chotin*, 765 F. Supp. 887 (M.D. La. 1991). The court held that the insurer of an owner or operator cannot be sued directly because the

CERCLA is aimed at cleaning up hazardous substances,¹⁶ which are defined as any substance designated as hazardous in the Federal Water Pollution, Prevention, and Control Act,¹⁷ CERCLA itself,¹⁸ and other specified statutes.¹⁹ The government need not show any threshold level of a hazardous substance to require action.²⁰

CERCLA authorizes the EPA "to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time . . . to protect the public health or welfare or the environment."²¹ Although the EPA may compel a private party to institute cleanup action,²² the EPA may use Superfund money only for sites listed on the National Priority List.²³ Alternatively, private parties may conduct cleanups on their own and recover the costs from other responsible parties, provided that the cleanup action "results in a CERCLA-quality cleanup."²⁴

After Congress enacted CERCLA, Montana adopted corresponding legislation providing for cooperative cleanup actions with the federal government.²⁵ The Montana Act (or "mini-superfund") provides for independent state actions, and contains a liability provision similar to CERCLA's which holds virtually all current and prior owners jointly and severally liable for contamination.²⁶ The Montana Supreme Court has yet to address these provisions.

III. INSURANCE COVERAGE ISSUES

Government agencies and private parties seeking to fund cleanup actions pursue the current and former owners and operators of the property for the cleanup costs.²⁷ The owners and operators then turn to their insurance companies for indemnification and defense. The insurance industry has attempted to limit coverage of environmental liability through restrictions in the compre-

insurer is not listed as a responsible party under section 9607(a) of CERCLA. *Id.* at 888-89.

16. 42 U.S.C. § 9604(a)(1) (1988).

17. 33 U.S.C. § 1321(b)(2)(A) (1988).

18. 42 U.S.C. § 9602 (1988).

19. 42 U.S.C. § 9601(14) (1988).

20. *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 185 (W.D. Mo. 1985).

21. 42 U.S.C. § 9604(a)(1) (1988).

22. 42 U.S.C. § 9604(a)(1) (1988); 40 C.F.R. § 300.700 (1992).

23. 40 C.F.R. § 300.425(b)(1) (1992). The National Priority List is compiled by the EPA pursuant to 42 U.S.C. § 9605 (1988) and is found at 40 C.F.R. § 300 app. B.

24. 40 C.F.R. § 300.700(c)(3)(i) (1991).

25. See MONT. CODE ANN. §§ 75-10-601 to -628 (1991).

26. MONT. CODE ANN. § 75-10-715 (1991).

27. See 42 U.S.C. § 9607(a) (1988).

hensive general liability (CGL) policy. The industry first implemented the "standard" pollution exclusion clause in 1973, and then switched to the more restrictive "absolute" pollution exclusion clause in 1986.²⁸ Pollution coverage claims often involve insurance policies dating back several decades because CERCLA liability applies retroactively. Although the polluting activities could have occurred many years ago, the pollution may have been discovered only recently.²⁹ Litigation of pollution exclusion provisions has raised both interpretation issues and public policy questions.³⁰

A. History of the Pollution Exclusion

1. The Comprehensive General Liability Policy

Most CGL policies look identical and are based on insurance industry forms.³¹ Current CGL policies often provide that the insurer will indemnify the insured for losses (defined as "occurrences") but exclude coverage for losses related to pollution.³² Prior to 1973, standard form CGL policies did not contain a pollution exclusion.³³ Until 1966, the insurance industry based coverage on the happening of an "accident," defined as "a distinctive event

28. Erwin E. Adler & Steven A. Boiles, *The Pollution Exclusion: Implementing the Social Policy of Preventing Pollution Through the Insurance Policy*, 19 LOY. L.A. L. REV. 1251, 1255 (1986).

29. According to one study of pollution liability insurance claims, "the average claim was not closed until seven years after the end of the policy period and . . . almost 25 percent were not closed for 12 years." Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 965 n.71 (1988) (citing U.S. General Accounting Office, *Hazardous Waste: Issues Surrounding Insurance Availability* 79-80 (1987)).

30. Congress intended CERCLA to place the burden of cleanup costs on those parties responsible for the pollution, or at least on those parties having benefitted from the property and in the best position to have prevented the damage. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 671 (D. Idaho 1986). Arguably, insurance companies issuing CGL policies did not contract to compensate businesses for normal operating expenses, only for accidental or catastrophic losses. If Congress's intent is to place an affirmative duty upon property owners to remedy existing pollution and avoid future pollution, then it is appropriate that property owners, and not their insurers, bear the burden of cleanup. See generally Erwin E. Adler & Steven A. Broiles, *The Pollution Exclusion: Implementing the Social Policy of Preventing Pollution Through the Insurance Policy*, 19 LOY. L.A. L. REV. 1251 (1986).

31. Most common insurance policies are standardized, and drafted by insurance industry organizations. See ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* § 2.8 (1988). See also George Pendygraft et al., *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 IND. L. REV. 117, 140 (1988) [hereinafter Pendygraft et al.].

32. See Abraham, *supra* note 29, at 951. The current CGL policy is discussed more fully in section III of this article.

33. Robert M. Tyler, Jr. & Todd J. Wilcox, *Pollution Exclusion Clauses: Problems in Interpretation and Application Under the Comprehensive General Liability Policy*, 17 IDAHO L. REV. 497, 499-500 (1981).

that takes place by some unexpected happening at a date that can be fixed with reasonable certainty.”³⁴ In 1966, the insurance industry changed the term “accident” to “occurrence,” which the industry’s CGL policies define as “an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended by the insured.”³⁵ Courts have generally found coverage for pollution liability under these policies, by finding that the pollution was neither “expected nor intended” by the insured.³⁶

The Montana Supreme Court has held that the “occurrence” policy excludes coverage of property damage which is expected or intended by the insured.³⁷ The court has interpreted the clause to “preclude[] coverage for . . . damages, though not specifically intended by the insured, if the resulting harm was within the expectation or intention of the insured from his standpoint.”³⁸ Under this interpretation, the court must consider whether pollution, which is the byproduct of intentional activities such as manufacturing, is “expected” by the insured. Under this subjective standard, the insured’s prior knowledge and conduct enters into the factual question of intent.³⁹

2. The “Standard” Pollution Exclusion

In 1973 the insurance industry added a pollution exclusion clause to the CGL policy, now referring to it as the “standard” pollution exclusion. This clause excludes “expected or intended” releases but not “sudden and accidental” releases.⁴⁰ Courts inter-

34. *Id.* at 499.

35. *Id.*

36. *Id.* at 500. *See, e.g., Steyer v. Westvaco Corp.*, 450 F. Supp. 384, 391 (D. Md. 1978).

37. *United States Fidelity & Guar. Co. v. Rae Volunteer Fire Co.*, 212 Mont. 450, 455, 688 P.2d 1246, 1249 (1984) (holding that the insured fire company’s decision to allow a fire to burn was intentional, and the resulting property damage was expected and therefore not an “occurrence”).

38. *Northwestern Nat’l Casualty Co. v. Phalen*, 182 Mont. 448, 459, 597 P.2d 720, 726 (1979). *See also New Hampshire Ins. Group v. Strecker*, 244 Mont. 478, 480, 798 P.2d 130, 131 (1990) (where the court denied coverage for liability resulting from the insured’s sexual molestation, because the *act* (not the damage) was intentional).

39. For example, where an insured knew of the deaths of waterfowl at the polluted site, the jury found that the insured “expected and intended” the pollution, thus precluding insurance coverage. *Shell Oil Co. v. Accident & Casualty Ins. Co. of Witherton*, No. 278953, slip op. (Cal. App. Dep’t Super. Ct. Oct. 6, 1988). *See Nicholas J. Wallwork et al., Liability Insurance in Environmental Litigation: An Overview of Selected Issues in Developing Arizona Law*, 22 ARIZ. ST. L.J. 367, 379 (1990) [hereinafter Wallwork et al.].

40. [T]his policy does not apply . . . to bodily injury or property damage arising out of the discharge, dispersal, release, or escape of smoke, vapors, soot, fumes,

preting this provision are split on whether the CGL policy covers pollution-related damages in spite of the exclusion.⁴¹ At least twelve state courts have addressed the issue. Colorado,⁴² Florida,⁴³ Georgia,⁴⁴ Illinois,⁴⁵ and Wisconsin⁴⁶ have ruled in favor of coverage for the insured, while Alabama,⁴⁷ Iowa,⁴⁸ Massachusetts,⁴⁹ Michigan,⁵⁰ New York,⁵¹ North Carolina,⁵² and Ohio⁵³ have upheld the exclusion. Numerous federal decisions also have interpreted state law.⁵⁴ Litigation surrounding the exclusion usually focuses on two issues: (1) whether the event was "expected or intended" (and does "expected or intended" apply to the *activity* or to the resulting *damage*?);⁵⁵ or (2) whether the event was "sudden and accidental" (e.g., a major spill in the course of one day versus a slow underground leak over several years).⁵⁶ Insurers argue that "expected or intended" excludes coverage for pollution from intentional activities such as manufacturing, and that "sudden and accidental" bars coverage in cases where the pollution took place over a long

acids, alkalis, toxic chemicals, liquids or gases, waste material or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water-course or body of water; but this exclusion shall not apply if such discharge, dispersal, release or escape is sudden and accidental.

William B. Johnson, Annotation, *Construction and Application of Pollution Exclusion Clause in Liability Insurance Policy*, 39 A.L.R.4TH 1047, 1049 n.1 (1985).

41. Pendygraft et al., *supra* note 31, at 152. See generally, Stacy Gordon, *Pollution Exclusion Confusion*, BUS. INS., April 6, 1992, at 1. As one commentator points out, there is no clear majority position, and proponents of both sides claim majority support. Goodwin, *supra* note 3, at 791-92 n.71.

42. Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1092 (Colo. 1991).

43. Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., No. 78-293, 1992 LEXIS 1599 (Fla. 1992).

44. Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686, 688 (Ga. 1989).

45. United States Fidelity and Guar. Co. v. Wilkin Insulation Co., 578 N.E.2d 926, 933 (Ill. 1991).

46. Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 578-79 (Wis. 1990).

47. Hicks v. American Resources Ins. Co., 544 So. 2d 952, 954 (Ala. 1989).

48. Weber v. IMT Ins. Co., 462 N.W.2d 283 (Iowa 1990).

49. Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc., 555 N.E.2d 568, 575 (Mass. 1990).

50. Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392, 402 (Mich. 1991).

51. Powers Chemco, Inc. v. Federal Ins. Co., 548 N.E.2d 1301, 1302 (N.Y. 1989).

52. Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374, 383 (N.C. 1986).

53. Hybud Equip. Corp. v. Sphere Drake Ins. Co., 597 N.E.2d 1096, 1104 (Ohio 1992).

54. This has created additional confusion. In two recent decisions, the First and Fourth Circuits reached opposite results in interpreting the pollution exclusion under New Jersey law. See *CPC Int'l v. Northbrook Excess & Surplus Ins. Co.*, 962 F.2d 77 (1st Cir. 1992); *Liberty Mut. Ins. Co. v. Triangle Indus. Inc.*, 957 F.2d 1153 (4th Cir. 1992).

55. See *Travelers Ins. Co. v. Waltham Indus. Lab. Corp.*, 883 F.2d 1092, 1098-99 (1st Cir. 1989).

56. See *Hybud*, 597 N.E.2d at 1104.

period of time.⁵⁷ Insureds argue either that the exclusion is ambiguous for failing to define "sudden and accidental," or that the exclusion bars coverage only if the resulting damage was actually "intended" by an "active" polluter.⁵⁸

a. Interpretation of "Sudden and Accidental"

Courts upholding the CGL exclusion clause find no ambiguity in the phrase "sudden and accidental" and find that "sudden" has a temporal aspect which differs from "accidental" or "unexpected."⁵⁹ "For the word 'sudden' to have any significant purpose, and not to be surplusage when used generally in conjunction with the word 'accidental,' it must have a temporal aspect to its meaning, and not merely a sense of something unexpected."⁶⁰ These courts also hold that the "language is clear and plain, something only a lawyer's ingenuity could make ambiguous."⁶¹ Some courts and commentators perceive that the current trend is toward finding the exclusion unambiguous. "The emerging majority view is to accept the pollution exclusion as given, and to determine whether the facts of each case evidence a sudden discharge."⁶² The focus, then, is on the timeframe of the pollution, rather than the intent of

57. Goodwin, *supra* note 3, at 791. For example, the exclusion would provide coverage for a "sudden and accidental" event where the pollution was caused by vandals opening an oil storage tank. See *Compass Ins. Co. v. Cravens, Dargan & Co.*, 748 P.2d 724, 726, 730 (Wyo. 1988).

58. See, e.g., *Jackson Township v. Hartford Accident & Indem. Co.*, 451 A.2d 990, 994 (N.J. Super. 1982) (finding coverage for the unintended results of intentional acts). See also Goodwin, *supra* note 3, at 791; Pendencygraft et al., *supra* note 31, at 152. An example of intentional pollution is a county landfill. See *County of Broome v. Aetna Casualty & Sur. Co.*, 540 N.Y.S.2d 620, 623 (1989).

59. *Hybud*, 597 N.E.2d at 1102. See also *Upjohn Co. v. New Hampshire Ins. Co.*, 476 N.W.2d 392, 397 (Mich. 1991); *Lumbermens Mut. Casualty Co. v. Belleville Ind., Inc.*, 555 N.E.2d 568, 572 (Mass. 1990).

60. *Hybud*, 597 N.E.2d at 1102 (citations omitted).

61. *Id.* (citing *United States Fidelity & Guar. Co. v. Star Fire Coals, Inc.*, 856 F.2d 31, 34 (6th Cir. 1988)).

62. See Robert M. Chemers & Robert J. Franco, *The Contemporary View of the Pollution Exclusion—A Provincial Approach*, in *SELECTED ISSUES IN INSURANCE COVERAGE AND PRACTICE* 103 (Defense Research Institute ed. 1990) (citing *International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co.*, 522 N.E.2d 758, 766 (Ill. App. 1988)). New York authority now recognizes:

[A]n emerging nationwide judicial consensus that the pollution exclusion is unambiguous and that an insured who was accused of causing injury or property damage by the intentional discharge of pollutants over an extended period of time is bound by the terms of the exclusion and is not entitled to be defended or indemnified by his insurer.

Id. at 100 (citing *Colonie Motors, Inc. v. Hartford Accident and Indem. Co.*, 538 N.E.2d 630, 635 (N.Y. App. Div. 1989)).

the polluter.⁶³ "The 'sudden and accidental' language, unlike the 'occurrence' definition, does not by its terms take account of an insured's status as a passive polluter."⁶⁴ Under this reasoning, the proper inquiry is whether the discharge was sudden, not whether the insured anticipated or expected the discharge.⁶⁵ If the pollution occurred regularly over several years, coverage is denied.⁶⁶ Furthermore, some courts place the burden on the insured to show that the occurrence comes within the sudden and accidental exception.⁶⁷

When finding for the insured, however, courts interpret "sudden and accidental" as being ambiguous, reasoning that (1) sudden could mean either abrupt, immediate, or unexpected and unintended,⁶⁸ and (2) the "extreme divergence among the numerous jurisdictions considering this issue" suggests ambiguity.⁶⁹ By one count, "over fifty cases have found the term 'sudden and accidental' ambiguous and over fifty cases have found the term clear and unambiguous."⁷⁰ These courts, therefore, interpret the provision in favor of the insureds⁷¹ and focus solely on the intent of the insured, rather than on the timeframe of the pollution.⁷²

b. Interpretation of "Expected or Intended"

Courts that find the "sudden and accidental" term ambiguous focus on the intent of the insured in determining coverage. Colorado and Illinois have held that "intended" means the intent to pollute, and that the intent to manufacture or mine does not con-

63. See *A. Johnson & Co. v. Aetna Casualty & Sur. Co.*, 933 F.2d 66, 73 (1st Cir. 1991) (applying Maine law); *Powers Chemco, Inc. v. Federal Ins. Co.*, 548 N.E.2d 1301, 1302 (N.Y. 1989).

64. *A. Johnson*, 933 F.2d at 72 n.9 (citations omitted).

65. *Chemers & Franco*, *supra* note 62, at 101.

66. See, e.g., *Travelers Ins. Co. v. Waltham Indus. Lab. Corp.*, 883 F.2d 1092, 1098-99 (1st Cir. 1989).

67. See, e.g., *Covenant Ins. Co. v. Friday Eng'g, Inc.*, 742 F. Supp. 708, 711 (D. Mass. 1990).

68. *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1092 (Colo. 1991); *Claussen v. Aetna Casualty & Sur. Co.*, 380 S.E.2d 686, 688 (Ga. 1989); *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570, 573 (Wis. 1990).

69. *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, No. 78-293, 1992 LEXIS 1599, at *13. See also *Hecla*, 811 P.2d at 1091; *Claussen*, 380 S.E.2d at 688; *Just*, 456 N.W.2d at 573.

70. *Dimmitt*, 1992 LEXIS 1599, at *10.

71. *But see Weber v. IMT Ins. Co.*, 462 N.W.2d 283, 287 (Iowa 1990) (in Iowa, manure regularly spilled on the road by a pig farmer was expected, and therefore not accidental, regardless of whether it was pollution).

72. *Dimmitt*, 1992 LEXIS 1599, at *21.

stitute the intent to pollute.⁷³ "Recovery will be barred only if the insured intended the damages, or . . . knew that the damages would flow directly and immediately from its intentional act. . . ."⁷⁴

Other courts considering the "intent" issue have denied coverage to industrial polluters by focusing on "active" versus "passive" polluters, and awarding indemnification only for "passive" (or unintentional) polluters.⁷⁵ "Active" pollution is the byproduct of an ongoing, intentional activity, such as manufacturing.⁷⁶ "Passive" pollution is unknown, unintended, and often the result of underground tank leakage.⁷⁷ Applemans' *Insurance Law and Practice* defines intent as follows: "The word 'intent' for purposes of tort law and for purposes of exclusionary clauses in insurance policies denotes that the actor desires to cause the consequences of his act or believes that consequences are substantially certain to result from it."⁷⁸

c. *Insurance Contract Interpretation in Montana*

Insurance contracts are subject to the general rules of contract law, and are strictly construed against the insurer and in favor of the insured.⁷⁹ Montana follows the general rule that ambiguous policy exclusions are construed against the insurer.⁸⁰ "A clause is ambiguous when different persons looking at it in the light of its purpose cannot agree upon its meaning."⁸¹ Unambiguous insurance provisions, however, are construed according to the plain and ordinary meaning of the terms.⁸² If the language is unambiguous,

73. *Hecla*, 811 P.2d at 1088; *United States Fidelity and Guar. Co. v. Wilkin Insulation Co.*, 578 N.E.2d 926, 932 (Ill. 1991). See also *Jackson Township Mun. Utilities Auth. v. Hartford Accident & Indem. Co.*, 451 A.2d 990, 993-95 (N.J. Super. Ct. Law Div. 1982) (finding coverage for the unintended results of intentional acts).

74. *Hecla*, 811 P.2d at 1088 (citing *City of Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1150 (2d Cir. 1989)).

75. See *Chemers & Franco*, *supra* note 62, at 100. See, e.g., *Grant-S. Iron & Metal Co. v. CNA Ins. Co.*, 905 F.2d 954, 957 (6th Cir. 1990) (applying Michigan law); *Hicks v. American Resources Ins. Co.*, 544 So. 2d 952, 954 (Ala. 1989).

76. *Travelers Ins. Co. v. Waltham Indus. Lab. Corp.*, 883 F.2d 1092, 1098-99 (1st Cir. 1989) (applying Massachusetts law).

77. See *United Pac. Ins. Co. v. Van's Westlake Union, Inc.*, 664 P.2d 1262, 1266 (Wash. App. 1983).

78. JOHN A. APPLEMAN & JEAN APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4492.02 (rev. ed. 1981).

79. *Id.* §§ 7401, 7405.

80. *Aetna Ins. Co. v. Cameron*, 194 Mont. 219, 221, 633 P.2d 1212, 1214 (1981).

81. *Bauer Ranch v. Mountain W. Farm Bureau Mut. Ins. Co.*, 215 Mont. 153, 156, 695 P.2d 1307, 1309 (1985).

82. *Johnson v. Equitable Fire & Marine Ins. Co.*, 142 Mont. 128, 131, 381 P.2d 778, 779 (1963).

“there is no basis for the interpretation of coverage under the guise of ambiguity.”⁸³ Although these maxims of interpretation will be important when the Montana Supreme Court addresses the pollution exclusion issue, public policy considerations (discussed in Section V) may also be a significant factor due to the substantial split in authority nationally.

3. The “Absolute” Pollution Exclusion

In 1986 the insurance industry revised the pollution exclusion, attempting to make it iron-clad. The current standard form CGL policy contains an “absolute” pollution exclusion which excludes coverage for:

- (1) “Bodily injury” or “property damage” arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:
 - (a) At or from premises you own, rent or occupy;
 - * * *
- (2) Any loss, cost, or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.⁸⁴

The policy defines “pollutants” as any “solid, liquid, gaseous . . . contaminant, including . . . chemicals and waste.”⁸⁵ The exclusion is “absolute” because it no longer provides coverage, even for sudden and accidental discharges. The insurance industry apparently grew tired of the judicial contract drafting that occurred under the standard exclusion.

The First, Sixth, and Eleventh Circuits have found “absolute” exclusion clauses to be unambiguous.⁸⁶ In *Titan Holdings Syndicate, Inc. v. City of Keene*, the insured city argued that the provision was vague and could be applied broadly to include coverage for almost any type of damages related to the city’s sewage treatment plant. The First Circuit upheld the provision as unambigu-

83. *Erickson v. Dairyland Ins. Co.*, 241 Mont. 119, 123, 785 P.2d 705, 707-08 (1990) (citing *Bauer Ranch*, 215 Mont. at 156, 695 P.2d at 1309). Montana courts, when construing insurance contracts, “are not authorized to seize upon certain and definite covenants expressed in plain English with violent hands, and distort them so as to include a risk clearly excluded by the insurance contract.” *Johnson*, 142 Mont. at 131, 381 P.2d at 779.

84. See *Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265, 267 n.2 (1st Cir. 1990).

85. See *id.* 898 F.2d at 267-68.

86. *Id.* 898 F.2d at 265 (applying New Hampshire law, specifically addressing the definition of “pollutants”); *Park-Ohio Indus., Inc. v. Home Indem. Co.*, 975 F.2d 1215 (6th Cir. 1992) (applying Ohio law); *Reliance Ins. Co. v. Kent Corp.*, 896 F.2d 501 (11th Cir.) *vacated as moot*, 909 F.2d 424 (11th Cir. 1990) (applying Alabama law).

ous, noting that a dispute over the scope of coverage does not mean the policy is ambiguous.⁸⁷ In *Reliance Insurance Co. v. Kent Corp.*, fire fighters who were injured during a dumpster fire sued the insured corporation.⁸⁸ The fire fighters alleged that the fire involved hazardous chemicals.⁸⁹ The insurance carrier denied coverage because the claim was based on a polluting event.⁹⁰ The Eleventh Circuit held that if it were proven that hazardous chemicals caused the fire fighters' injuries, the pollution exclusion would preclude coverage.⁹¹ In *Park-Ohio Industries, Inc. v. Home Indemnity Co.*, the insured corporation was sued by its customers' employees who were injured by pollution from the defective furnaces.⁹² The insured corporation argued for coverage in spite of the exclusion, because the damages were caused by a defective product.⁹³ The Sixth Circuit denied coverage, reasoning that the exclusion precluded coverage for any damages caused by a discharge of pollution.⁹⁴

Judging from these initial circuit court decisions, it appears that the insurance industry has successfully created an iron-clad exclusion. The courts' broad acceptance and application of the provision suggests that the absolute pollution exclusion will have a significant effect on future commercial insurance coverage. The provision might preclude coverage of any damages related to chemicals, petroleum products, or any of the other innumerable "pollutants" related to manufacturing and production, or arising from an industrial accident. Some courts and commentators, however, have found coverage even under the absolute exclusion for unexpected pollution damages.⁹⁵ At least one state appellate court has found coverage under the absolute exclusion based on a "passive polluter" analysis.⁹⁶ That court, however, mistakenly relied on authority which discussed the standard pollution exclusion, not the absolute exclusion.⁹⁷

87. *Titan Holdings*, 898 F.2d at 269.

88. *Reliance*, 896 F.2d at 502.

89. *Id.*

90. *Id.*

91. *Id.* at 503.

92. *Park-Ohio Indus.*, 975 F.2d at 1217.

93. *Id.* at 1223.

94. *Id.*

95. Abraham, *supra* note 29, at 951 n.29.

96. *Thompson v. Temple*, 580 So. 2d 1133 (La. 1991).

97. *Id.* at 1134. The Louisiana appellate court cites John A. Appleman, *INSURANCE LAW AND PRACTICE* § 4499.05 (Supp. 1992), for the proposition that the pollution exclusion clause is "intended to exclude coverage for active industrial polluters." *Thompson*, 580 So. 2d at 1134. That section of Appleman, however, specifically addresses the sudden and acci-

B. Cleanup Costs as "Damages" and the "Owned Property" Exclusion

Insurance carriers often argue, and a few courts have accepted, that environmental cleanup costs are not "damages" and therefore are not covered by the CGL policy. The policy provides coverage for "sums which the insured shall become legally obligated to pay as *damages* because of . . . property damage."⁹⁸ The minority reasoning is that the CGL policy covers only legal damages and not equitable relief,⁹⁹ while CERCLA actions against landowners are in the form of equitable relief and therefore are not covered. An increasing number of jurisdictions,¹⁰⁰ however, hold otherwise, as more courts liberally construe "damages" to include cleanup costs, based on the reasonable expectations of the insured.¹⁰¹ State and federal court decisions from Idaho,¹⁰² Washington,¹⁰³ California,¹⁰⁴ and Oregon¹⁰⁵ interpret "damages" to include cleanup costs.

Insurance carriers further argue that the CGL policy excludes coverage for pollution damages to the insured's own property. The CGL policy usually excludes "damages to 'property owned or occupied by . . . the insured,'" and the policy only provides coverage for sums that the insured "shall become legally obligated to pay as damages" to a third party.¹⁰⁶ Although these provisions appear to deny coverage for cleanup instituted by the insureds on their own property, courts often do award coverage for these cleanup costs because cleanup is required by the government.¹⁰⁷ A few courts

dental exception to the standard pollution exclusion, and is irrelevant to the absolute exclusion. The Louisiana court then proceeds to speculate that "[i]t is unlikely that the insurance industry intended such an exclusion clause to apply to [carbon monoxide leaking from a heater in a home]." *Id.* at 1135.

98. Goodwin, *supra* note 3, at 788-89 (citing *Underlying Coverage*, 1 THE ATTORNEY'S UMBRELLA BOOK 79 (P. Ligeros rev. ed. 1986)) (emphasis in original).

99. See *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352-54 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988) (applying Maryland law).

100. See *Chesapeake Utilities Corp. v. American Home Assurance Co.*, 704 F. Supp. 551, 560 (D. Del. 1989); Carol A. Crocca, Annotation, *Liability Insurance Coverage for Violations of Antipollution Laws*, 87 A.L.R.4TH 444, 459-62 (1991).

101. See *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1207 (2d Cir. 1989), *cert. denied*, 496 U.S. 906 (1990) (applying New York law).

102. *Aetna Casualty & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507, 1515 (9th Cir. 1991) (applying Idaho law).

103. *Boeing Co. v. Aetna Casualty & Sur. Co.*, 784 P.2d 507, 516 (Wash. 1990).

104. *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171, 1193-94 (N.D. Cal. 1988).

105. *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188, 1194 (9th Cir. 1986) (applying Oregon law).

106. Abraham, *supra* note 29, at 966.

107. See *Intel Corp.*, 692 F. Supp. at 1192.

have strictly upheld this exclusion¹⁰⁸ while others have broadly interpreted "owned" property to extend coverage.¹⁰⁹

C. *The Pollution as a "Product"*

Some insureds have argued that the exclusion does not apply because the contaminant in question is a "product" and not actually "pollution."¹¹⁰ For example, one court held that whether paint is a pollutant for purposes of the exclusion is a question of fact.¹¹¹

The Sixth Circuit, however, held in *Park-Ohio Industries* that the pollution exclusion applies where the pollution is created by a "product" in a product liability case.¹¹² This litigation stemmed from personal injuries caused by polluting furnaces manufactured by the insured corporation.¹¹³ The corporation argued that the exclusion was inapplicable because the loss resulted from a defective product, not a pollution discharge.¹¹⁴ Applying Ohio law, the court held that the absolute pollution exclusion in plaintiff's policy applied to any discharge of pollutants, and refused to "inject a defect versus discharge distinction into the pollution exclusion."¹¹⁵

D. *Interpreting the Time of the "Occurrence"*

Most CGL policies since 1966 provide that the carrier is obligated to pay for damage caused by an "occurrence" during the policy period. Nevertheless, claims may be filed after the policy period.¹¹⁶ Pollution often takes place over several years, or decades; during this time several different companies may have insured the property owner or operator. The question becomes one of defining what event triggers coverage which, in turn, determines the applicable policies.¹¹⁷ Some courts hold that the "occurrence" provision triggers coverage at the time of discovery, or when the damage manifests itself. These courts usually determine that the most re-

108. Abraham, *supra* note 29, at 966 (citing *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30, 33-34 (1st Cir. 1984) and other cases as examples).

109. *Id.* (citing *United States Aviax Co. v. Travelers Ins. Co.*, 336 N.W.2d 838, 843 (Mich. App. 1983)).

110. *See, e.g.*, *A-1 Sandblasting & Steamcleaning Co. v. Baiden*, 643 P.2d 1260, 1262 (Or. 1982).

111. *Id.*

112. *Park-Ohio Indus., Inc. v. Home Indem. Co.*, 975 F.2d 1215, 1223 (6th Cir. 1992).

113. *Id.* at 1217.

114. *Id.* at 1223.

115. *Id.* *See also* *Weber v. IMT Ins. Co.*, 462 N.W.2d 283, 287 (Iowa 1990) (finding manure spilled on road is a pollutant).

116. *See* *Adler and Broiles, supra* note 30, at 1253.

117. *See* *Pendygraft et al., supra* note 31, at 145-47.

cent insurance policy will provide coverage.¹¹⁸ Other courts hold that coverage is triggered at the time of exposure to the damage, such as the duration of a tank leak,¹¹⁹ or, under the "continuous trigger" theory, that the damage is a single, continuous harm.¹²⁰ Under the continuous trigger theory, each insurer who issued policies during the exposure period is jointly and severally liable.¹²¹

Courts must also consider whether the pollution results from one occurrence or multiple occurrences. For example, soil and groundwater pollution may be caused by a series of tank leaks over several years. CGL policies usually provide for a maximum amount of coverage per occurrence, with a deductible requirement for each occurrence. If a court deems the resulting pollution to be one occurrence, the insured pays one deductible, and the insurer is liable up to the single occurrence limits. If the court determines, however, that a measurable number of tank leaks existed and deems each leak an occurrence, the insured pays several deductibles, while the insurer is liable for policy limits on each occurrence.¹²²

E. *The Insurer's Duty to Defend*

The insurer's duty to defend is slightly different in CERCLA cases than in traditional tort cases. An insurance company's duty to defend the insured is always separate and distinct from its duty to reimburse the insured. The duty to defend is generally broader than the duty to indemnify because the insurer is required to defend an action in which any possibility of coverage exists.¹²³ Generally, the insurer must decide whether to defend at the outset of litigation based on allegations in the complaint.¹²⁴ The Ninth Circuit has held, however, that governmental notification of potentially responsible parties ("PRP") status gives rise to this duty to

118. This is known as the "discovery" trigger. *See, e.g., Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1327-28 (4th Cir. 1986).

119. This is known as the "exposure" theory or "actual damage" approach. *See, e.g., Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1217 (6th Cir.), *aff'd on reh'g*, 657 F.2d 814 (6th Cir. 1980), *cert. denied*, 455 U.S. 1009 (1981); *Centennial Ins. Co. v. Lumbermens Mut. Casualty Co.*, 677 F. Supp. 342, 345-47 (E.D. Pa. 1987).

120. *See, e.g., Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1042-47 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); *Broderick Inv. Co. v. Hartford Accident and Indem. Co.*, 742 F. Supp. 571, 573 (Colo. 1989).

121. *See Pendency et al., supra note 31, at 146.*

122. *See Wallwork et al., supra note 39, at 384-86.*

123. *Reliance Ins. Co. v. Kent Corp.*, 896 F.2d 501, 503 (11th Cir.), *vacated as moot*, 909 F.2d 424 (11th Cir. 1990).

124. *Graber v. State Farm Fire & Casualty Co.*, 244 Mont. 265, 270, 797 P.2d 214, 217 (1990).

defend in CERCLA cases even before a complaint is filed.¹²⁵ Following notification, CERCLA's administrative mechanism provides "a powerful pre-litigation procedure designed to prompt private cleanup activities"¹²⁶ and is tantamount to a lawsuit for purposes of duty-to-defend coverage.¹²⁷ A PRP notification letter, as opposed to a traditional demand letter, carries "immediate and severe implications" that an "ordinary person" would consider the "commencement of a 'suit' necessitating a legal defense."¹²⁸ Therefore, the insured can reasonably expect the insurer to begin defending after notification of the insured's PRP status.¹²⁹

Since the Montana Supreme Court has yet to rule on the pollution exclusion, carriers faced with CERCLA cases in Montana may agree to defend, possibly under a reservation of rights.¹³⁰ Some courts have held that insurers have no duty to defend when the pollution results from a long-term, intentional activity.¹³¹ Likewise, Montana follows the general rule that no duty to defend exists if the facts supporting the complaint show that the policy excludes coverage.¹³² In interpreting coverage for "occurrences," the Montana Supreme Court has found no duty to defend when the damage was expected by the insured.¹³³

125. *Aetna Casualty & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507, 1517 (9th Cir. 1991).

126. *See* Wallwork et al., *supra* note 39, at 372.

127. *Aetna Casualty & Sur. Co.*, 948 F.2d at 1516.

128. *Id.* at 1516-17.

129. At least one circuit court, however, has held otherwise. In *Ray Indus. Inc. v. Liberty Mut. Ins. Co.*, 974 F.2d 754 (6th Cir. 1992), the Sixth Circuit held that a PRP letter does *not* constitute a suit which would trigger the duty to defend. "We believe that 'suit' has a plain and unambiguous meaning that excludes the PRP letter in this case. . . . We reject any attempt to allow phrases that appear in the definitions of 'suit,' such as 'legal process,' to expand this term." *Id.* at 761.

130. The insurer uses a reservation of rights letter to inform the insured that the insurer believes potential grounds exist to deny coverage. 14 GEORGE J. COUCH ET AL., *CYCLOPEDIA OF INSURANCE LAW* § 51:88 (2d rev. ed. 1982).

131. *See, e.g., International Surplus Lines Ins. Co. v. Anderson Dev. Co.*, 901 F.2d 1368, 1369 (6th Cir. 1990) (holding no duty to defend under "sudden and accidental" exclusion where pollution was a byproduct of manufacturing process); *Liberty Mut. Ins. Co. v. SCA Services, Inc.*, 588 N.E.2d 1346, 1349-50 (Mass. 1992) (holding no duty to defend when underlying suit alleges pollution as a result of a "routine business activity lasting over several months").

132. *Burns v. Underwriters Adjusting Co.*, 234 Mont. 508, 511, 765 P.2d 712, 713 (1988).

133. *United States Fidelity & Guar. Co. v. Rae Volunteer Fire Co.*, 212 Mont. 450, 456, 688 P.2d 1246, 1250 (1984). *See also* *Daly Ditches Irrigation Dist. v. National Sur. Corp.*, 234 Mont. 537, 542, 764 P.2d 1276, 1279 (1988) (holding no duty to defend employer for intentional act of wrongful discharge).

IV. MONTANA CASE LAW

The Montana Supreme Court has yet to rule on any of the major environmental liability coverage issues. *General Insurance Co. v. Town Pump, Inc.*¹³⁴ suggests the possible direction of the court. Town Pump's underground petroleum tanks leaked for two years before discovery. The insurer conceded, and the court found, that coverage applied in spite of the standard pollution exclusion because the pollution was "sudden, unexpected and unintentional."¹³⁵ General Insurance initially defended Town Pump under a reservation of rights agreement.¹³⁶ The insurer then sought a declaratory judgment in state district court, contending that the CGL policy did not cover the gas leak because leakage was not "sudden."¹³⁷ The lower court held that leakage was "sudden, unexpected and unintentional 'as far as Town Pump was concerned'" and apportioned liability equally between General Insurance and Town Pump.¹³⁸ The insurer was liable for the first year of the leak; Town Pump was negligent in failing to discover the leak during the second year.¹³⁹ On appeal, General Insurance changed its position and conceded that the pollution exclusion clause did not apply to the leak.¹⁴⁰ The Montana Supreme Court awarded Town Pump full coverage for both years of the leak, reasoning that, although Town Pump was negligent in failing to discover the leak, "[m]ere negligence will not defeat recovery on an insurance policy."¹⁴¹

In a 1990 Montana Federal District Court case, the court ruled that an insurer acted in good faith in denying coverage for a tank leak because the denial was based on an absolute pollution exclusion in the insured's policy.¹⁴² The insurance carrier was equitably estopped, however, from relying on the new policy containing the absolute pollution exclusion because the carrier failed to disclose the exclusion change to the insured upon issuing the new policy.¹⁴³

134. 214 Mont. 27, 692 P.2d 427 (1984).

135. *Id.* at 31, 692 P.2d at 429-30.

136. *Id.* at 29, 692 P.2d at 429.

137. *Id.* at 30, 692 P.2d at 429.

138. *Id.*

139. *Id.*

140. *Id.* at 31, 692 P.2d at 429.

141. *Id.* at 34, 692 P.2d at 431.

142. *United States Fidelity & Guar. Co. v. Quisel*, 7 Mont. Fed. Rep. 483 (D. Mont. November 5, 1990).

143. *Id.* at 500. The federal court certified to the Montana Supreme Court the coverage question under the standard pollution exclusion clause. The case settled, however, prior to the supreme court hearing.

V. PUBLIC POLICY CONSIDERATIONS

Apart from the contract interpretation questions, the Montana Supreme Court will face public policy considerations in ruling on the coverage issue. As one state court noted:

The policy reasons for the pollution exclusion are obvious: if an insured knows that liability incurred by all manner of negligent or careless spills and releases is covered by his liability policy, he is tempted to diminish his precautions and relax his vigilance.

* * *

[P]utting the financial responsibility for pollution . . . upon the insured places the responsibility to guard against such occurrences upon the party with the most control over the circumstances and most likely to cause the pollution.¹⁴⁴

Under this argument, the CGL policy should exclude coverage for quasi-intentional acts, such as damages from pollution which are a natural byproduct of an intentional activity, just as the policy excludes coverage for intentional acts such as assault and battery. Gradual pollution from a business activity is discoverable and, once discovered, "its continuation is certainly expected, and in some sense, 'intended.'"¹⁴⁵ Releasing businesses from what are essentially "predictable costs of doing business" discourages safe practices.¹⁴⁶ Businesses should be encouraged to take an active role in monitoring for gradual pollution and to take action to remedy existing pollution.

Nationally, courts have construed CERCLA liability broadly, placing the burden of cleanup on those who benefitted from the property.¹⁴⁷ Broader liability "creates incentives for safer practices; and it encourages defendants to locate and implead other responsible parties."¹⁴⁸ Providing insurance coverage for industrial pollution (from which the insured profited) defeats the incentive. In fact, for this reason New York State enacted legislation twenty years ago which prohibited insurance coverage for any pollution damage.¹⁴⁹

However, this argument urging strict interpretation for "in-

144. *Waste Management of the Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374, 381 (N.C. 1986). See Adler & Broiles, *supra* note 30, at 1260-61.

145. Abraham, *supra* note 29, at 953.

146. Abraham, *supra* note 29, at 953.

147. See generally Allen Kezsbom et al., "Successor" and "Parent" Liability for Superfund Cleanup Costs: The Evolving State of the Law, 10 VA. ENVTL. L.J. 45 (1990).

148. *Kelley v. Thomas Solvent Co.*, 725 F. Supp. 1446, 1459 (W.D. Mich. 1988).

149. Adler & Broiles, *supra* note 30, at 1251 (citing N.Y. INSURANCE LAW § 1113 (McKinney 1985)).

centive" reasons may be nullified by the current absolute pollution exclusion. Under the absolute exclusion, insureds are virtually guaranteed that they, and not their insurers, will be liable for pollution damages. Therefore, the incentive for responsible behavior is now in place. Judicial interpretation of prior policies will not affect future landowner behavior.

There are additional competing public policy concerns which conflict with the "incentive" argument. The first concern involves protecting the interests of the insured. Insurance law jurisprudence traditionally favors the insured in order to protect against the larger insurer responsible for drafting the policy. Second is the "deep pockets" argument which states that someone must pay for environmental cleanup costs, be it the property owner, the insurance carrier, or the taxpayer. The costs of restoring contaminated property can be enormous, and occasionally may exceed the resources of the property owner or operator. In those cases, if the courts do not find the insurance carrier liable and the PRP becomes insolvent, the burden will fall on the government and taxpayers. Who should bare the burden?

VI. CONCLUSION

Montana is on the verge of entering the CERCLA-related litigation explosion which is sweeping the country. This litigation involves complex issues and has produced a wide variety of judicial opinions and scholarly commentary. CERCLA liability is broad and continues to expand under judicial interpretation. The Montana bench and bar should prepare to address the increasingly complex insurance coverage issues in environmental liability litigation.

Both insurance contract interpretation and environmental policy questions loom ahead. The court most likely will find the following: unexpected property damage from pollution satisfies the definition of "occurrence"; that an insurance policy not containing a pollution exclusion clause will cover such damages; that cleanup costs are "damages" under the CGL policy; and that the "absolute" pollution exclusion is unambiguous and clearly excludes all pollution-related damages. The court, however, should carefully consider its interpretation of the standard pollution exclusion when the pollution arises as a natural byproduct of industrial activity. The standard pollution exclusion covers only "sudden and accidental" pollution damage. Arguably, insurers and insureds did not contract to provide coverage for pollution resulting from long-term industrial activity.

Finally, the court will be bound by contract interpretation principles, but it is also likely to consider both the congressional intent underlying CERCLA's severe liability provisions and the public policy implications surrounding the pollution exclusion interpretation issues. Congress intended CERCLA to place the burden of cleanup on the parties who caused the pollution or benefited from the property. CERCLA's strict liability should encourage property owners to remedy existing pollution and avoid future polluting practices. The absolute pollution exclusion is consistent with this goal and therefore, will likely be upheld. The standard pollution exclusion, however, presents the court with a more difficult task.

