CURRENT INSURANCE POLICIES FOR INSURING AGAINST ENVIRONMENTAL RISKS

Ann M. Waeger*
Greenbaum, Rowe, Smith & Davis LLP
Woodbridge, New Jersey

I. Introduction

Before the early 1970's, when insurers added the so called "sudden and accidental" pollution exclusion as a standard provision in general liability insurance policies, coverage was generally available for unexpected and unintended bodily injury and property damage arising out of environmental conditions.

However, once insurance companies started to become concerned about, and actually began to receive costly claims arising out of environmental issues, the insurance industry made a decision to limit coverage of environmental claims. This strategic shift in the thinking of insurance companies as to environmental risks gave birth to the "sudden and accidental" pollution exclusion.

As time passed and environmental disasters such as Love Canal began to emerge, an array of federal and state laws were enacted governing liabilities for environmental ills. As a result, insureds began to make claims under their liability insurance policies (primary, umbrella and excess) for the costs they incurred in connection with environmental events and conditions. Disputes ultimately arose between the insureds and the insurance companies over the meaning of the sudden and accidental pollution exclusion, and the issue of whether insurance companies intended to cover environmental claims.

Insureds proposed that this exclusion was merely a restatement of the typical definition of occurrence in the policy, and was only meant to exclude expected and intended damage or injury relating to environmental harm.

Insurers took a different view of the exclusion and proposed that it went far beyond the occurrence concept. Specifically, it was their position that the policy did not provide coverage for pollution related claims at all unless the discharge of a pollutant was sudden and accidental in the temporal sense of that word; that is, a "boom" type of event, such as a catastrophic tank leak.

Extensive case law generated in courts throughout the United States examines the meaning of this pollution exclusion, not always reaching the same result. For example, New Jersey courts have interpreted this exclusion in a manner most favorable to the insured, and Ohio courts have repeatedly ruled in favor of the insurers, with a number of states falling in between those extremes, although many states do lean toward the insurers' position.

In the early days of this dispute over whether liability insurance policies covered environmental claims; especially during the early to mid-1980's, a number of insurance companies recognized the opportunity to market an insurance policy to fill the gap in general liability coverage created by the sudden and accidental pollution exclusion. The result was the creation of the environmental impairment liability insurance policy. Various insurance companies marketed this product through subsidiaries or new entities separate and apart from their financially successful parent company. The reason for this was obvious; they wanted to protect their profit centers from the dangers of costly environmental claims.

Insurance companies soon found these policies to be far from perfect, and before long ceased issuing most policies. The primary reason for the demise of these types of policies was that most insurance companies issuing these policies, with certain exceptions, were adversely impacted by the number and cost of the claims presented. See the International Insurance case, Item XI, Number 21.

The disastrous experiment with environmental coverage, as well as the passage of numerous environmental laws and the significant growth of environmental claims being made under liability insurance policies, all played a role in the decision of the property and casualty insurance industry to all but cease providing coverage for environmental exposures. This is evidenced by the fact that by 1986, most liability insurance policies were issued with a so-called "absolute" pollution exclusion. Insurance companies maintain this exclusion was designed to totally preclude coverage for environmental claims, with minor exceptions. This type of exclusion can be found in most liability insurance policies issued today, with the result that there is little or no insurance protection for environmental risks for owners or operators of real property under those policies.

In fact, for an extensive period of time, insurers offered virtually no environmental insurance coverage. Furthermore, the coverage provided by those that did was in most cases prohibitively expensive, limited in term to six months or one year, and very limited in scope. Then, in the late 1990's, something happened that caused certain insurance companies to reconsider their position on environmental risks and to again envision a market for limited environmental coverage. A primary impetus for this market appears to have had its origins in the increased interest of federal and state governments, as well as the business community, in the redevelopment of contaminated properties, spurred on by emerging Brownfields initiatives in a number of states encouraging such redevelopment.

The marketing of these policies began slowly. American International Group, which was known as Chartis Specialty Insurance Company for a few years ("AIG") began the process, then Reliance National Insurance Company and Zurich Insurance Company also came into the picture. This process began to speed up more than fifteen years ago when the upstart, Kemper Environmental, (which has now been out of the market for many years) decided to enter the market with a vengeance, creating a groundswell of competition and creative marketing. As the market has progressed and the competition among the insurance companies has increased, we have witnessed an expansion of certain of the coverages offered by the insurance companies to the benefit of insureds. Of particular interest is that over the last few years there has been a significant increase in the number of insurance companies in the market. Presently, over 35 insurers offer certain types of environmental coverage, including the insurers mentioned above, as well as XL Environmental, Chubb Insurance Company, ACE Insurance Company, Liberty Mutual Insurance Company, Seneca Insurance Company, Arch Insurance Company, Great American Insurance Company, American Safety Insurance Company, Ironshore Environmental, CV Starr Insurance Company, Navigators Insurance Company, Philadelphia Insurance Company, and Travelers Insurance Company. The highly competitive nature of today's market can be advantageous to insureds by offering, among other things, the ability to negotiate more favorable policy terms and pricing.

However, caution should be exercised when an insured elects to purchase a policy from one of the newer players in the market, particularly if that policy is for a term of more than one or two years.

The largest and most experienced insurance companies involved in the current environmental insurance market are:

- AIG (American International Specialty Lines, Lexington, Commerce & Industry and Chartis Specialty Insurance Company)
- XL Environmental (Indian Harbor Insurance Company and Greenwich Insurance Company)
- Zurich Insurance Company (Steadfast Insurance Company)
- ACE Insurance Company (Illinois Union Insurance Company)
- Chubb Insurance Company (Federal Insurance Company)

Due to the unique nature of each environmental risk, environmental liability insurance policies are generally underwritten on a custom basis, unless the insurer has chosen to market a policy to potential insureds with minimal environmental risks. As a result, the industry has no consistent ratings structure to determine the precise amount of the premium on a policy-by-policy basis. Rather, in most instances the insurer carefully underwrites each policy and sets the premium on a case–by-case basis.

Insureds that are considering purchasing one of these policies should keep in mind that not all environmental risks are insurable. Insurance companies are for the most part very careful about what they are willing to insure, and if they do not feel comfortable with the risk, they will not insure it. Another factor affecting the risk tolerance of insurance companies are the significant losses suffered under these types of policies. Over the last several years insurance companies received more claims than expected under certain of these environmental risk policies, especially under the cleanup cost cap type policies. In fact, at this time, the cleanup cost cap market is virtually non existent. In addition, the prevalence of large claims made under secured creditor policies (lenders only coverage), was a factor in the withdrawal of AIG from that market a number of years ago. However, Zurich and XL Environmental remain committed to this type of coverage, and some of the newer insurers that are entering the market are willing to provide this coverage as well. Additionally, reinsurers in general have less of a comfort level with the long term risk associated with many environmental policies. As a result, most experienced insurers in the environmental market have acted more conservatively in their underwriting, particularly with insuring known conditions, and have decreased the length of the policy term, and increased premiums for coverage of new conditions, unless they are very comfortable with the risk.

II. Available Types of Insurance Coverage

Types of coverage presently available generally fall into the following categories:

- Pollution Legal Liability Insurance
- Commercial Pollution Legal Liability Insurance
- Site or Premises Pollution Liability Insurance
- Integrated Commercial General and Pollution Liability Insurance
- "Cleanup Cost Cap" or "Stop Loss" or "Cost Containment" Insurance (limited availability)
- Lender Environmental Protection Insurance
- Contractor's Pollution Liability and Errors and Omissions Insurance
- Finite Risk Coverage (limited availability)
- Miscellaneous specialized environmental risk coverage, such as products liability, financial assurances for underground storage tanks and landfills, coverage for specific transactional risks, environmental infrastructure projects and coverage for specific types of industries, such as automobile dealers, marinas, agricultural, healthcare, renewable energy, power generation, higher education, hospitality, municipalities and cities.

III. Claims Made vs. Occurrence Based Coverage

With the exception of contractor's pollution liability coverage, all of the above-noted types of insurance coverage are written on a claims made basis only. However, a number of insurers do offer contractor's pollution liability coverage on an occurrence basis.

For claims made coverage to apply, the insured must make a claim either during the policy period, or during any applicable extended reporting period an insured may be able to purchase. While an average automatic extended reporting period may run for 60 days, insureds may purchase longer periods, up to five years in certain instances. Nevertheless, in order for an insured to be protected for an environmental risk, it should either renew the policy at its expiration, or purchase coverage for a longer term, such as ten years.

To illustrate the difference between the types of coverage, assume that a discharge of a hazardous substance occurred in 2013, during a period in which the insured had a policy in place, but the insured does not discover the discharge until 2016. A 2013 claims made policy would not cover the damages from the 2013 event. Rather, the insured would need to have a policy in effect in 2016 in order for there to be a possibility of coverage, since a claim made and reported during the policy period triggers this type of coverage. Under an occurrence based policy, the year 2013 policy would apply, even if no policy were written in 2016, because the date of the occurrence, not the date of the claim, triggers the coverage under this type of policy.

IV. Possible Transactional Uses for the New Environmental Insurance Products

These policies can be used to insure various environmental risks in connection with the following, which are described in greater depth in Section VI below:

- Sale or Purchase of Real Property
- Ownership of Real Property
- Development of Real Property
- Leasing of Real Property
- Financing of Real Property
- Sale or Purchase of Business
- Mergers or Consolidation of Business
- Ownership and Operation of Business
- Settlement of Claims Under General Liability Policies
- Settlement of "Superfund" Type Liabilities

V. Overview of Available Environmental Insurance Coverage

A. Pollution Legal Liability. This is a generic designation for a type of policy issued by a number of insurance companies, which goes under several different names, such as pollution legal liability insurance, pollution and remediation legal liability insurance and environmental impairment liability insurance. This type of policy is designed to cover claims arising from pollution conditions on, within or under covered locations (that is, locations specifically listed in the policy) or emanating from covered locations. This includes claims for cleanup, as well as claims for bodily injury and property damage, illicit abandonment of a pollutant by a party unrelated to an insured, emergency response costs, and crisis management costs. Also included in the coverage afforded are defense costs, consisting of attorneys fees and other typical defense costs, which in most instances are subject to and deducted from the policy limits. In addition, contractual liability and business interruption coverage and extra expense coverage are available, as well as transportation and non-owned disposal site coverage and in certain instances coverage for microbial matter and legionella. The minimum premium for this type of policy is generally in the range of $10,000-$15,000 per year for $1,000,000 of policy limits, although it may be possible to negotiate a lesser premium where there is a minimal environmental risk. In addition, certain of the insurance companies are offering a premium discount of up to 10% for LEED-certified buildings.

The major elements of this type of coverage are typically:

- **Policy Limits** - $1,000,000 and up to $50,000,000 and in certain instances (such as where an insurance company can obtain reinsurance or insurance companies agree to share limits) $100,000,000.

- **Deductible or Self Insured Retention** - $10,000 and up per incident.

- **Key Exclusions** - Pre-existing conditions known to insured; dishonest, willful, intentional acts or omissions or deliberate, intentional or willful non-compliance with law, directives, notices, etc.; owned-property; contractual liability (unless scheduled in the policy); underground storage tanks (unless scheduled in the policy or unknown); material change in use of or risk related to a covered property; fraud or concealment; war and terrorism; bodily injury arising out of and in the course of employment; specific contaminants such as asbestos, lead paint, radioactive materials and certain naturally occurring pollution conditions, such as radon. Certain policies also contain exclusions for types of indoor air pollution, including mold or other microbial matter. Further, depending upon the property, exclusions may be added for contamination discovered during the course of a capital improvement and failure to comply with engineering or institutional controls.

- **Term** - Generally 1-5 year term, although longer terms are preferred and sought by most insureds, and can obtain a 10 year term, although insurers have pulled back on the longer terms, particularly with respect to coverage of new conditions.

B. Commercial Pollution Legal Liability. This is a form of policy which has been marketed by AIG and differs from the typical menu form of coverage. Several other markets, including, Zurich and ACE have similar types of policies. Coverage is offered for on-site cleanups of pre-existing and new pollution conditions at an insured property that have been discovered and reported by an insured during the policy period. It also offers coverage for third party bodily injury, property damage and cleanup claims arising from pre-existing and new pollution conditions. Further, it includes coverage for "emergency response costs", which covers reasonable and necessary expenses, (including legal fees consented to by the Company), incurred in connection with the remediation of soil, surface water,

groundwater or other contamination to respond to Pollution Conditions that require immediate action, with various time and other limitations. The target market for this policy includes businesses one may not expect, such as light manufacturing facilities, pharmaceutical laboratories, and other research and development facilities, distribution and logistics warehousing, food processing, as well as educational and medical facilities, all industries that could have environmental problems. The minimum premium for this type of policy would be around $10,000-$15,000 for $1,000,000 of coverage for a one year term. The policy may also cover off-site waste disposal from a set date forward (the "retroactive date"). In other words, the policy would not cover past potential liabilities, but only those going forward, unless the insured can negotiate the addition of coverage of past disposal events. These policies also provide defense coverage for certain on-site cleanup costs (arising from a third party claim) and third party claims, subject to the same policy limits as the other coverages. Coverage for pollution arising from an insured's products is available by endorsement.

The major elements of this type of coverage are typically:

- **Policy Limits** - $1,000,000 and up to $50,000,000.

- **Deductible or Self Insured Retention** - $25,000 and up per loss.

- **Key Exclusions** - Pre-existing conditions known to insured prior to policy inception; intentional non-compliance with law; property damage to owned property; contractual liability (unless scheduled in the policy); abandoned property; underground storage tanks (unless scheduled in the policy or unknown); claims arising from property acquired after inception of policy (unless endorsed to policy); claims arising from waste disposal activities prior to retroactive date; specific contaminants such as asbestos, lead paint, radioactive materials, and certain naturally occurring pollution conditions, such as radon. There are also typically exclusions for mold and other microbial matters, material changes in the use of the insured property, failure to comply with engineering or institutional controls and war and terrorism.

- **Term** - Generally 1-5 years.

C. Site or Premises Pollution Liability. This type of environmental liability policy is generally marketed to real estate owners and to buyers and sellers of real estate for use in real estate transactions and overall real estate ownership. It is designed to cover monetary awards or settlements of compensatory damages in connection with bodily injury or property damage to third parties, defense costs and cleanup costs caused by pollution conditions on, under or beyond the boundaries of the insured property, which the insured becomes legally obligated to pay as the result of a claim; and cleanup costs sustained by reason of an insured's discovery of a pollution condition on the insured property during the policy period, provided that the insured is legally obligated for the pollution condition and the pollution condition is reported to the appropriate governmental authorities in accordance with Environmental Laws. Most policies also now provide coverage for emergency response costs, crisis management and illicit abandonment of hazardous substances. This type of policy can also be used to cover a portfolio of properties and can contain provisions to take into account the acquisition of additional properties and the addition of new insureds. The typical minimum premium for this policy is similar to that of the Pollution Legal Liability Policy. This policy can also include business interruption and extra expense coverage, coverage for soft costs, non-owned disposal site coverage and expanded coverage for microbial matters and legionella. Certain insurers will also provide coverage for building related illnesses and for medical and environmental monitoring costs.

The major elements of this type of coverage are typically:

- **Policy Limits** - $1,000,000 and up to $50,000,000 and in certain instances (such as where an insurance company can obtain reinsurance) $100,000,000.

- **Deductible or Self Insured Retention**- $10,000 and up per loss.

- **Key Exclusions** - Pre-existing conditions known to insured; intentional, deliberate or willful non-compliance with law; pollution conditions which commence subsequent to the time the insured property is abandoned or divested; bodily injury arising out of and in the course of employment; property damage to owned property; contractual liability (unless scheduled in policy); underground storage tanks (unless scheduled in policy or are unknown); a claim made by one insured against another insured; specific contaminants such as asbestos, lead paint and radioactive materials, and certain naturally occurring pollution conditions (such as radon); mold and other microbial matters; change in use of or risks at an insured property; capital improvements; failure to comply with engineering or institutional controls; and war and terrorism.

- **Term** – Generally 3, 5 or 10 years.

D. Integrated General Liability and Pollution Liability Coverage. This policy combines commercial general liability and other types of liability coverages, which are provided on an occurrence basis, with pollution liability insurance coverage provided on a claims made basis. It is offered to limited industries which can include certain chemical industries and TSD facilities, as well as environmental and other types of contractors. Together with the typical pollution legal liability coverage for bodily injury, property damage and cleanup costs mentioned above, these policies can also include coverage for liability arising from a sudden pollution event at agreed upon or even unscheduled locations, which are (a) discovered within ten calendar days of the commencement of the event; and (b) reported within thirty days thereafter, non-owned disposal site coverage, emergency response costs, crisis management expense and "green" remediation.

The major elements of the pollution liability portion of this type of coverage are typically:

- **Policy Limits** - $1,000,000-$2,000,000, with excess or umbrella liability coverage of up to $10,000,000.

- **Deductible or Self Insured Retention** - $ 5,000 and up.

- **Key Exclusions** - Pre-existing conditions known to insured; intentional, deliberate or willful non-compliance with law; pollution conditions which commence subsequent to the time the insured property is abandoned or divested; bodily injury arising out of and in the course of employment; property damage to owned property; contractual liability (unless scheduled in policy); underground storage tanks (unless scheduled in policy or are unknown); a claim made by one insured against another insured; specific contaminants such as asbestos, lead paint and radioactive materials, and certain naturally occurring pollution conditions (such as radon); mold and other microbial matters; change in use of the insured property; failure to comply with engineering or institutional controls; and war and terrorism.

- **Term** – Generally 1 year.

For Pollution Legal Liability type policies, where there may be perceived environmental risks, the insurance companies will generally require at a minimum, a typical Phase I Environmental Site Assessment ("Phase I") and possibly a Phase II Environmental Site Assessment in order for the property to be insured in a fashion acceptable to the intended insureds.

E. **"Cleanup Cost Cap" or "Stop Loss" or "Cost Containment" Coverage**. This is not a liability policy. Rather, it was developed as a unique insurance product designed to cover an unanticipated increase in the costs of a known cleanup, as specifically described in the policy and as limited by the policy terms and limits. However, as mentioned previously, there has been a significant retraction by the markets offering this coverage due to the number and size of claims made and the availability of this coverage is close to non-existent. "Dig and haul" soil projects generated some significant claims and insurers have stated that this is a risk that they have no interest in insuring since there is no definitive mechanism to underwrite the risk of overruns. The protocol had been that in order to obtain this type of coverage, an insured needed to have a government-approved cleanup plan in place, or a cleanup plan approved by the insurance company, but not yet approved by the government, and a detailed time and cost estimate to implement the cleanup plan prepared by a reputable environmental cleanup contractor. Since the market has basically shut down, any protocols for obtaining coverage would have to be agreed upon by the insured and an insurer that was willing to provided coverage. Traditionally coverage was triggered under this type of policy when the cost to perform the work approved under the insured cleanup plan exceeded the contractor's estimate, plus, in most instances, a self insured retention which was an additional sum that was between 10%-30% of the estimated cost of the cleanup. However, it is important to note that most policies effectively limited the coverage to cost overruns caused by three identified triggers only: discovery of unidentified pollution during the implementation of the insured cleanup, additional quantities or concentrations of pollution, or a change in regulatory requirements. In addition, this type of insurance did not cover the cost to clean up any contamination discovered either after the completion of the cleanup or during the pendency of the insured cleanup, except if it was discovered during the actual implementation of the insured cleanup. Rather, pollution legal liability insurance would have come into play in connection with the discovery of unknown contamination in those circumstances. Coverage under this type of policy ended - subject to the policy term - when the project was completed and the insured received a No Further Action Letter or similar documentation from the applicable governmental authority having jurisdiction over the cleanup. Note that most insurers specifically excluded from coverage under the cleanup cost cap policy any monitoring activities required after completion of the cleanup. In addition, certain insurance companies limited or did not cover any additional investigation costs associated with the discovery of new or different contamination. If an insurance company did agree to provide this type of coverage the ultimate premium for the policy will be determined by the insurance company, which will likely take into account a number of factors, including the insurer's comfort with the cleanup plan, the contractor retained to implement the cleanup plan, the itemized time and cost estimate for the plan prepared by the contractor and the term of the policy. Also, in all likelihood if an insurance company did agree to provide this type of coverage, particularly in connection with a significant cleanup, it would structure the coverage as a "finite risk" type of policy. See item H. below.

The traditional major elements of this type of coverage was typically:

- **Policy Limits** - $1,000,000 and up to $25,000,000. The average policy limit was one times the estimated cost of the cleanup.

- **Deductible or Self Insured Retention** - Self insured retention, which was usually the amount of the cost estimate for the approved cleanup plus between 10% and 30% of such costs. Also, there could be a co-payment arrangement (where the insured bears a portion

of the risks of an overrun) once the cleanup costs go beyond the self insured retention, which could result in a discount in the premium costs.

- **Key Exclusions** - No coverage other than for the increase in certain costs of the specifically insured approved cleanup. In most instances, this would not include legal costs incurred in negotiating with governmental authorities or government oversight costs. In addition, there were numerous exclusions in a number of these policies, such as professional negligence, faulty workmanship, breach of warranty, default in performance of scope of work, unreasonable contractor delays, bankruptcy, strikes, acts of God, war and terrorism and failure of institutional controls.

- **Term** - Negotiable, depending upon length of time for cleanup, with a typical maximum of ten years. Longer terms were negotiated in certain instances. However, cleanup cost cap coverage generally ended upon the issuance of a regulatory determination that no further action was required, even if the policy term had not yet expired.

F. Lender Environmental Protection Insurance. Insurers market this product solely to lenders and other financial institutions with security interests in real property. It was first introduced in the late 1990's and AIG and Zurich were the primary markets for this coverage. However, due to market factors and large claims made under its policies, AIG ceased offering its Secured Creditor Impaired Property Insurance policy a few years ago. Zurich Insurance Company, though, continues to offer the coverage. In addition, XL Environmental markets this coverage as well.

Below is some additional specific information on the types of coverage offered to lenders by Zurich.

Zurich Insurance Company--"Lender Environmental Protection and Securitization Collateral Protection & Liability Insurance."

The trigger for coverage of a collateral value loss under this policy is a default (as that term is defined in the policy) under the mortgage agreement, and a claim arising from discovery of a pollution event during the policy period. However, any known environmental conditions need to be addressed up front with Zurich if the policy is to provide coverage for such conditions. Under this policy, Zurich agrees to pay the lesser of the outstanding loan balance (which is the unpaid principal as of the date of default, not including any sums to confirm the existence of a pollution event and may or may not include interest); or the estimated cleanup costs.

Zurich advertises its policy as having a "50 percent threshold" on a claim covered by Zurich's "lesser of" policy. Essentially, if the estimated cleanup costs are either equal to or greater than 50% of the outstanding loan balance, the lender can choose a claim payment covering either the estimated cleanup costs or the outstanding loan balance.

This policy also provides first party cleanup coverage to the insured lender (but not as to those matters that were subject to a claim under the collateral value loss coverage) and third party liability coverage (including defense costs).

When evaluating available lender's policies, it is important to remember that there are both subtle and blatant differences in policy definitions, which may have an unanticipated effect on the coverage sought. Therefore, it is vital that these policies be carefully reviewed and analyzed in light of the policy definitions.

Further, an insured does have the ability to make changes to these polices, and if an insurer wants the business, the insured can be certain that the insurer will carefully consider any request.

Because the lender's policy does not insure the borrower, the borrower should consider purchasing its own environmental insurance coverage in connection with these transactions. In some instances, if a borrower purchases its policy from the same insurer its lender utilizes, all parties may realize a cost savings.

Here is some additional general information concerning these types of policies.

- **Policy Limits** - $1,000,000 and up to $50,000,000 (or perhaps greater, subject to underwriting).

- **Deductible or Self Insured Retention** - $5,000 and up and in certain instances none depending on the coverage purchased.

- **Key Exclusions** - No coverage for known contamination; intentional acts or deliberate non-compliance with law; contractual liability; naturally occurring radioactive and other materials; insured vs. insured; fines and penalties; or if loan goes into default outside the policy period. Also, you may find exclusions for asbestos or lead in a structure, contractual liability, owned property and employer's liability.

- **Term** - Up to the maturity of the loan, if acceptable to the insurer.

G. Contractor's Pollution Liability and Errors and Omissions Insurance. This type of insurance is designed to provide coverage: (i) for bodily injury and property damage and cleanup of pollution conditions arising out of covered operations performed by the insured contractor or consultant on a third party's real property; and (ii) for pollution arising out of professional services rendered by the insured contractor or consultant. Almost all of the insurers in the market have structured policies specifically for contractors and consultants.

Unlike the other types of environmental insurance, contractor's pollution liability insurance is available on an occurrence basis from many insurers. This is a very important factor for a client to consider when retaining a contractor or consultant to perform environmentally related services or to perform other invasive work on a property. It is critical that an environmental contractor or consultant (or other contractor performing invasive work on a property, such as grading property, digging utility trenches or installing footings or building piles) have appropriate contractor's pollution liability coverage in place (containing sufficient policy limits and a limited deductible) and that the client scrutinizes this coverage prior to permitting the performance of work on their real property. This type of coverage is designed to protect the property owner if, for example, the contractor accidentally pierces an underground storage tank during a tank removal or other type of excavation, or causes contamination to move from one aquifer to another during the course of drilling a groundwater monitoring well.

Insurers also issue project-specific coverage, where the policy provides dedicated limits of liability for a particular project. This may be crucial when the contractor must deal with a large or complicated cleanup. In such a situation, an insured property owner may not want to share policy limits with the other customers of the contractor or consultant because of the amount of risk on its own project.

The other aspect of the foregoing insurance, specifically, the claims made only errors and omissions coverage, is designed to cover events such as the failure of the consultant to detect contamination during a Phase I or Phase II audit, or the negligent design of a remedial system.

The major elements of this type of coverage are typically:

- **Policy Limits** - $1,000,000 and up to $50,000,000.

- **Deductible or Self Insured Retention** - $5,000 and up for contractor's pollution liability coverage; $25,000 and up for errors and omissions coverage.

- **Key Exclusions** - No coverage for intentional, willful or deliberate non-compliance with law.

- **Term** - Usually one year, but should be renewed during each year work is being performed at a site and, if claims made coverage, for an agreed upon number of years after performance of the work. In addition, under certain circumstances, there are three year policies being written for the business of the environmental consultant or contractor and there are ten year policies available for project sites. Any party that retains an environmental consultant or contractor should be cautious when dealing with multi-year policies, since generally the policy limits will be for the entire multi-year period, and will not be per year limits.

H. **Finite Risk**. This is not traditional insurance coverage. Rather it is a type of self-insurance program fully funded by the insured and administered by an insurance company. This coverage has been used in certain instances in which an insured was dealing with a long term costly cleanup. For example, with certain insurance companies, an insured had been able to use this insurance program to extend the term of the policy beyond 10 years to even 20, or in rare instances, 30 years. In the past, certain insurance companies also marketed policies with a finite risk component as a potential tool to utilize in connection with the settlement of Superfund type liabilities, both from the perspective of the early settlement of de minimis claims, as well as for the settlement of significant long term liabilities of one or many potentially responsible parties. However, with the cleanup cost cap insurance market virtually non-existent, it is unclear whether this insurance concept will come into play in the future. In instances in which these policies were issued, the insurance company generally required the insured to pay a premium equal to a discounted value of the cleanup, based on a formula that included, among other things, the discounted net present value of the estimated cleanup costs. This formula also took into account the expected length of the cleanup and when the insured expected to expend funds. Finite Risk coverage also included in most instances cleanup cost cap coverage and pollution legal liability coverage as components of the insurance structure. This is commonly known as “blended finite” coverage. It could be designed to meet a particular insured's needs or, in certain circumstances, it could be pooled with other insureds. However, this type of policy would need to be carefully created by the insured, with input from both its attorney and tax advisor to review the tax consequences of the substantial upfront cost and the ultimate potential payout. The policy also needed to contain an established definitive claims procedure. Obviously an insured that would be paying a substantial up front sum of money to the insurance company, would want to ensure that the claims trigger and payment mechanism would be precisely what they have defined, to avoid a dispute with the insurance company over payment in the future. Whether this insurance structure will continue to be a viable option in the environmental insurance arena remains to be seen considering the current status of cleanup cost cap insurance.

VI. Description of Uses of Environmental Insurance Coverage

A. Additional Security for Contractual Indemnity. Environmental indemnities have become crucial tools in all types of commercial transactions, including the purchase or sale of real property, the leasing of real property, the financing of real property or the purchase, sale or merger of a business. A critical point to consider when examining the viability of an indemnity is that the indemnity is only as reliable as the financial strength of the person or entity giving the indemnity. Therefore, if the indemnitor does not have significant assets or will be distributing its assets, it may prove worthless when the need for indemnification arises.

Further, many sellers balk at providing an environmental indemnity on the basis that they do not want to leave an open long-term liability in place after completing the transaction. Instead, a seller often will provide a buyer with the opportunity to perform due diligence and resolve any environmental concerns at that time, and/or perhaps offer an indemnity of limited duration, typically for as little as one to three years. Even if a seller agrees to an indemnity, frequently the indemnity will have a threshold before payment is required and a cap on the amount the indemnitor is required to pay. Unfortunately, as decades of experience have shown, environmental problems tend to be insidious and in many instances years pass before damage becomes manifest. Therefore, requiring a buyer to satisfy itself as to environmental issues during due diligence or offering a limited indemnity will likely not be very helpful to a buyer.

An environmental liability policy that both expressly includes contractual liability coverage and specifically insures the indemnity may serve as a vehicle to provide a buyer, landlord, or financial institution more assurance as to the strength of either a full or limited environmental indemnity. However, this resolution will never be perfect in that gaps in protection may still exist since the terms of the policy will govern any contractual liability coverage granted, and these terms may not be as broad as the terms of the indemnity.

B. Security When No Contractual Indemnity Given. In a commercial net lease transaction, a landlord rarely agrees to indemnify a tenant for environmental issues, particularly in a long-term situation, where the landlord retains no presence on the property, and has essentially turned the property over to the tenant. On the other hand, a tenant often does not want to be responsible for the acts of midnight dumpers or unknown environmental problems, whether located on the property or migrating to the property from an off-site location, and certainly does not want to be responsible for known conditions. Environmental liability insurance may provide a compromise in this type of situation to protect the landlord, the tenant, and even the landlord's mortgagee.

C. Security for Ongoing Manufacturing Operations. Landlords have become increasingly reluctant to lease property to manufacturing facilities because of the plethora of environmental laws which may subject them to joint and several liability with their tenant. Many landlords and tenants alike have witnessed the exodus of manufacturing operations from heavily regulated states to more business-friendly states (which may no longer be so business-friendly). A landlord that leases a facility to a manufacturer may be able to protect itself from environmental risks related to the tenant's operations by requiring the tenant to maintain acceptable environmental liability coverage for the term of the lease and for an agreed upon period after the lease's expiration. However, the landlord must always remember that this will only be effective if insurance companies continue to write the coverage and remain willing to continue to insure the tenant's operational risks.

D. Additional Loan Security. Although various federal and state laws offer lenders a certain degree of protection in the available lender liability limitations, it remains difficult to convince a lender to loan against collateral consisting of either real property on which manufacturers operate or pose some other operational environmental risk or on "Brownfields" type property. A lender is always

concerned with preserving the value of its collateral. The lender needs to know that the property value of the property securing its loan will be no less than originally contemplated should foreclosure become necessary, and that in the event of foreclosure it will not have to take over property with an environmental problem which could result in either liability to the lender or the inability of the lender to obtain full value for the collateral securing its loan. Lenders have been adversely affected in the past by environmental liabilities and tend to exercise caution with loans they believe present such a risk. A new insurance product may ultimately make the difference between the granting and denial of a loan. It is therefore something to consider as a means of completing the loan transaction.

E. Development. A property owner that develops a parcel of vacant land, or redevelops property with past or current environmental ills or risks should examine Pollution Legal Liability type coverage in connection with their development activities. Insureds can keep this type of coverage in place for that period of time during which environmental problems typically surface; while the property is being investigated, remediated, or excavated for construction purposes. In addition, a developer can maintain this coverage beyond the completion of remedial activities or beyond the construction phase of a project, in a situation in which contamination is left in place with government authorization, or where there is a substantial area of land which has not been disturbed during the remedial or construction activities. A key aspect of coverage for a development company, which should not be overlooked, is the soft costs/business interruption/extra expense coverage offered under certain policies.

F. Contractor's Work. If an owner, operator, potential owner, or potential operator hires an environmental contractor or consultant to perform any type of services on real property, including a Phase I or Phase II environmental site assessment, removal of an underground storage tank, or investigation or remediation of environmental contamination, or hires a contractor to perform invasive construction activities at a property, such as an excavation or the drilling of piles, it is critical that the contractor or consultant have appropriate insurance coverage in place. Further, depending upon the specific project, it may be prudent to insist that the contractor or consultant purchase contractor's pollution liability coverage that is available on an occurrence basis. An owner or operator should always guard against a situation where an occurrence might take place while work is being performed on property, which is not discovered until a significant period of time has passed. With occurrence based coverage, even if a contractor or consultant that performed work for an owner or operator goes out of business immediately following performance of work, and a problem is not discovered until years later, the owner or operator will still be able to claim against the policy in effect when the work was performed. This would not be the case if the contractor or consultant only had a claims made policy and failed to renew the coverage.

G. Settlement of Claims Under General Liability Policies. Disputes between general liability insurance companies and their insureds over whether general liability policies provide coverage for environmental claims continue to rage. One difficulty faced by an insured when settling these types of claims is that in most instances the insurance company seeks finality when making a settlement payment. This finality is usually achieved either through a total site release or even a total buy back of the policy, leaving the insured with no liability coverage for environmental claims for a particular site or perhaps no coverage at all. In this situation, not only is an insured giving up its rights to a further claim post settlement, if the cleanup costs prove to be more than anticipated, but the insured is also giving up its rights to make a claim should any third parties file suit alleging bodily injury or property damage arising from contamination. Depending upon the cost of the cleanup involved in the general liability claim and the share of the insurer(s) involved, a component of the settlement with the general liability carriers could include the cost of the premium for one of the new environmental insurance policies. In support of this position, the insured can argue that if the insurance company is seeking the foregoing types of broad releases, the insurance company also needs to pay a price in excess of its allocated or negotiated share of the cleanup costs in exchange for such releases. While such a policy may not help the insured with the

cleanup of known contamination, it may be able to provide coverage for bodily injury and property damage claims for both known and unknown contamination and cleanup costs for unknown contamination.

H. Settlement of Superfund Type Liabilities. Some insurance companies that offer the environmental insurance coverage have over the years aggressively lobbied Congress, the Environmental Protection Agency and other federal and state governmental authorities on the use of environmental insurance as a component in the settlement of "Superfund" type claims. For example, a management representative of AIG appeared before the Senate Subcommittee on Superfund a number of years ago to explain that environmental insurance could be used to cap cleanup costs, create a revenue stream for long term cleanups, and reduce de minimis party cleanup costs. The core of the proposal was that in exchange for a lump sum payment for the costs associated with site remediation, the payment of premiums for a cleanup cost cap policy, and perhaps also a pollution liability policy, by a responsible party or a group of responsible parties, the governmental authority would release the party or parties from liability in connection with the site at issue. Needless to say, governmental authorities have little motivation to surrender their broad statutory rights against a responsible party. However, in the right set of circumstances, this may be a tool that a governmental authority will consider, if not in the broad fashion proposed by the insurance companies, then perhaps in some other creative fashion, such as having the governmental authority first look to the insurance company for payment.

Another strategy that was marketed by some of the insurance companies and explored by some responsible parties is to utilize the environmental insurance products in connection with settlements between primary responsible parties and large groups of de minimis or de micromis parties. The concept was similar to that set forth above, with the exception that the primary responsible parties release and indemnify these lower tier groups in exchange for the lump sum payment and the payment of premiums for an environmental insurance policy. The cleanup cost cap coverage in this scenario is triggered if the share of the costs of the cleanup of the settling parties ultimately proves to be more than the settlement amount.

The foregoing strategies however, currently seem less likely to be viable as a result of the retraction in the cleanup cost cap market.

VII. Government Led Brownfield Insurance Programs.

A few states have created incentive programs designed to encourage the use of environmental insurance as a means of protecting against environmental risks and as a means to effectuate Brownfields goals. Some other states, including New Jersey are exploring the necessity for and/or viability of such a program. These programs each have their own special features which may include pre-negotiated policies, subsidies, and access to state consultants. Here is a brief description of the programs in place in Massachusetts, Wisconsin and New York.

A. Massachusetts Brownfield Redevelopment Access to Capital Program (MassBRAC).

The MassBRAC program subsidizes an eligible borrower's insurance premiums by fifty percent with a cap of $50,000, through its "Redevelopment Access to Capital Fund". Insureds are permitted to appeal to the Commonwealth for an increase in the cap, which will be considered on a case by case basis. Certain public, quasi-public and non-profit entities may obtain subsidies up to $150,000. The program includes Cleanup Cost Cap, Pollution Legal Liability and Lender's coverage. However, as mentioned previously, it is unlikely that Cleanup Cost Cap insurance will be available. This program qualifies as an eligible borrower any business or governmental subdivision that obtains a qualifying loan for the purchase, environmental site assessment, cleanup and/or development of a site designated by MassBRAC as a Brownfield site located in Massachusetts, where the presence or perception of environmental contamination complicates expansion, redevelopment or reuse. The BRAC program now offers competitive pricing through AIG, ACE, Chubb, XL, Zurich and Great American. In addition, the policies must include any standard BRAC program endorsements. Insurers will determine pricing on a project-by-project basis.

B. Wisconsin Department of Natural Resources Program. Wisconsin has created an interesting and unique insurance program which comes into play in connection with its Voluntary Cleanup Program ("VCP"). Under this program, when a voluntary party (with certain statutory exceptions), including local government, a responsible party, a new purchaser, or a bank, wishes to complete a groundwater cleanup through the use of natural attenuation, the State may relieve it of liability in the event this cleanup method fails. Upon the request of a participant in the VCP for use of this type of remedial mechanism, the State will determine whether it believes the mechanism will be effective. If it does, it will issue a Certificate of Completion to the voluntary party, which will protect the voluntary party, its successors, and its assigns from future liability under the spill law, as long as the party pays a certain pre-determined statutory fee. The State will primarily use this fee to pay the premium required to add the property to a portfolio pollution liability policy which the State has purchased for its own benefit. If natural attenuation fails and the State elects to file an insurance claim for the property, the insurer will pay the remaining amount for site assessments, onsite cleanup, and offsite cleanup in connection with the property up to the policy sublimit of $1,000,000, provided that the State pays a deductible. However, upon its receipt of its Certificate of Completion, the party that conducted the original cleanup would incur no further costs associated with the failure of natural attenuation to remediate the contaminated groundwater.

Wisconsin also instituted its Brownfields Insurance Program (WBIP), which the State hopes will streamline coverage and make it more cost effective, and spur the development of Brownfields. The genesis for WBIP was the concerns voiced by developers, attorneys, and local governments in Wisconsin about protection after site investigation, but before completion of cleanup and the grant of the exemption, when unforeseen problems could arise, such as during demolition, remediation and construction. They also raised concerns about third party lawsuits and providing additional assurances to new buyers of contaminated properties and their lenders.

To bridge these gaps in coverage, WBIP will provide, up to this point via AIG, a flexible pollution liability policy with an endorsement that modifies the terms of the policy for those parties in the program, to cover risks specific to each individual deal, and with a ten (10%) percent premium discount. Basically in order to purchase a policy through the program, the property owner conducts Phase I and Phase II environmental site assessments, and submits the assessments to the Wisconsin Department of Natural Resources ("DNR") for approval. The owner then determines what coverage it needs, and which parties involved require coverage. It is the owner's responsibility to apply to the insurer for coverage directly, after which the insurer provides a quote and an offer of coverage with the WBIP discount and terms. The DNR intends to monitor the insurer's performance under these policies.

C. New York Department of Environmental Conservation Brownfields Cleanup Program.

On October 7, 2003, Governor Pataki signed the Brownfield Cleanup Program ("BCP") into law. Among its many provisions is an environmental remediation insurance tax credit (for certain qualifying Brownfield site taxable years beginning on or after April 1, 2005) for premiums paid for Environmental Remediation Insurance. The credit can apply to insurance coverage for 1) clean up costs for pre-existing pollution conditions on the insured property; 2) third party claims for on-site bodily injury and property damage resulting from the pre-existing condition that are outside the scope of the remediation; 3) cleanup cost cap coverage; or 4) coverage for state re-openers. Credits are available for up to the lesser of $30,000 or 50% of the cost of the premiums paid after the date of a Brownfield Cleanup Agreement. The credit is a one-time credit, to be taken in the same year as the issuance of a certificate of completion. This program applies to clean up projects initiated by March, 2015. While insurance premiums tend to be many times higher than $30,000, this nevertheless remains a significant benefit that should not be ignored.

In 2008, New York State amended the BCP. These amendments placed certain caps on the Brownfield redevelopment tax credit. However, the environmental remediation insurance credit was not altered.

VIII. Select Issues to Consider When Evaluating Coverage

This list, while not all-encompassing, provides some issues to consider when evaluating a proposed policy.

A. Up Front Premium Payment. Premiums are paid up front, not annually as with a typical general liability policy. Therefore, whether an insured is purchasing a five-year policy with a $60,000 premium, or a ten-year policy with a $200,000 premium, the insured must pay the premium in full before the insurer will issue the policy. Generally payments cannot be spread out over the five-year or ten-year period, although they can be financed in certain circumstances, but usually at least one party to a transaction will insist upon the up-front payment of the premiums because they do not want to take the chance that the policy will be cancelled due to a parties failure to make any required payment.

B. Financial Viability of Insurance Company. The policy is only as good as the insurance company that issues it and the insurance company's assets. As mentioned previously, in the mid-1980s, there were numerous insurance companies writing environmental coverage. However once these companies started to pay claims, they also began to disappear from the market. Therefore, there is never any guaranty that the insurance company will be in existence in five or ten years when the time comes for the insured to renew its coverage, or even in three years when the insured presents a claim to be paid. The demise of United Capital Insurance Company, Reliance Insurance Company and Kemper Environmental, as well as the cessation of the environmental insurance program of Quanta US Holdings, Inc., are timely examples of this reality. Therefore, an insured should insist 1) that its broker fully investigate the financial condition of the proposed insurer, its reputation and its claims paying history; and 2) that the insurer it selects has a minimum A.M. Best and Standard and Poor's rating that must be met.

C. Case Law Interpreting Coverage. For many years there was limited case law on these new types of environmental liability policies and little claims experience. That situation has changed drastically over the last five years with an increase in the number of claims disputes that have reached the courts and with a reported significant increase in claims being made under these policies. The foregoing should not be surprising to anyone considering that these policies are specifically marketed to cover environmental risks. While the uptick in reported caselaw is allowing us to gain insight into where claims have gone wrong or disputes have arisen between an insured and its insurer as to the applicability of certain policy terms, obtaining specific information on claims from the insurance companies as to the number of claims paid or the value of claims paid or the reasons claims are denied or only partially covered continues to be difficult. Therefore, it is hard for an insured to anticipate what to expect when a claim is presented, other than the likelihood that a reservations of rights letter or a denial letter will be issued by the insurance company in response to the claim. Nevertheless, insurance company representatives have publicly stated on a number of occasions that numerous claims have been paid under these types of policies and significant dollars have been expended by the insurance companies in connection with these claims.

D. Fact Sensitive Transactions. Whether an insured should purchase environmental insurance coverage depends upon individual facts germane to the potential transaction, including the economics of the transaction, and the availability of other risk management tools to address environmental risks involved in the transaction.

E. Careful Analysis of Terms and Exclusions. An insured must review and analyze proposed policy terms, particularly the insuring agreements and conditions section, in order to ensure that it receives the type and extent of coverage it believes it is purchasing. These policies frequently require negotiation, and, if at all possible, an insured should not purchase a policy in its proposed, pre-printed

form. If an insured has retained an insurance broker with expertise in these specialized environmental insurance policies, then the insured usually will not be presented with a pre-printed form policy, but rather with a policy that has been amended in an effort to reflect the risks sought to be insured. However, even with the assistance of an environmental insurance professional in the negotiations, the insured should consider utilizing a team approach, incorporating the advice and experience of environmental counsel and possibly an environmental consultant. The team approach provides the insured with the benefit of the insight of a number of professionals who can assist the insured to negotiate the best possible policy. Of course, the insured needs to evaluate the amount of negotiation necessary or desirable in the context of the risk sought to be insured and the policy premiums. Generally, if an insured seeks to purchase one of the low cost pollution liability policies with a modest premium, the insurance company will not have much incentive to negotiate the policy and in all likelihood, the insured will not be willing to spend money on its attorney and consultant in an effort to get past this barrier. However, once an insured finds itself faced with a significant premium or a specialized risk, the insured, with the help of its professionals, should consider pushing the insurance company to revise the policy to fit the actual risks the insured seeks to transfer to the insurance company.

F. **Time Frames**. A party interested in purchasing a policy should leave sufficient time to explore the coverage availability, to obtain premium quotes from more than one insurance company and to ultimately negotiate the insurance policy. Depending upon the underwriter, a party may find one insurer unwilling to insure a risk for any premium amount and another insurer willing to insure that same risk for a reasonable premium. Typically, however, parties look to environmental insurance at the last moment as a vehicle to save a transaction, and in many instances time is of the essence. However, current market pressures have made it easier to speed the application process. Insurance companies have discovered that in order to be competitive, they need to respond quickly and price the policy correctly. Keep in mind that if you are going to negotiate a policy, it will generally take a minimum of four weeks to get a satisfactory insurance policy in place, and in most instances, much longer than that.

G. **Admission of Policies in Various States**. An insured should also determine whether the policy it seeks is a policy admitted by that state's insurance department, or whether it is not an admitted policy and must therefore be written through a surplus lines broker. This important issue relates to whether an insured will have any protection if the insurer writing the insurance coverage goes out of business. It also impacts costs in that an insured generally must pay a surplus lines tax when it utilizes a surplus lines broker. This cost will be in addition to the costs of the premium.

IX. Example of Policy Terms That Require Negotiation.

As mentioned previously, the real estate industry in general, and Brownfields redevelopers in particular, appear to have helped generate the interest in and market for environmental insurance coverage. The rise of environmental insurance policies has also triggered an interesting collateral phenomenon; specifically, insureds have begun to rely not only on their insurance broker to analyze the insurance policy being offered, but also have insisted, in a number of instances, that their attorney evaluate the policy terms to determine whether the policy covers the risk the client seeks to insure. An insured's team review of a policy often finds deficiencies in the policy in addressing the risk for which the insured seeks coverage. This leads to negotiations of the terms of the policy, where the insured's representatives may either suggest specific language changes in the policy or sign off on language generated by the insurer.

It is important to recognize that the negotiation process can make a difference in the future if a dispute subsequently arises between the insured and the insurer after the insured makes a claim under the policy. Specifically, there is an established general rule of law which holds that standard form insurance policies are contracts of adhesion and that any ambiguity in the policy must be construed against the insurance company.

But what happens when an insured takes a standard form contract and asks for changes? The insured may be placing itself in a position where it will be unable to rely on the general rule, and in fact risks having the rule reversed, so that any ambiguities in the negotiated changes to the policy are construed against the insured, not the insurance company.

A risk certainly exists when an insured negotiates an insurance policy, but in most instances the insured does not have a choice in the matter. Should the insured spend $100,000 or more in premiums and remain silent, taking its chances on a policy term which its advisors consider ambiguous, but that a court may not--or should the insured attempt to enhance its future position by seeking to clarify as much of the coverage as possible? Only time will tell what the ultimate outcome will be, but currently it seems to make sense to try and clarify the policy to the extent the insurance company permits.

Obviously, the needs of the insured and the requirements of the transaction or the reasons for purchasing the policy dictate which policy terms require negotiation, which in many instances will be numerous. In addition, different insurance companies may have different policy terms, so that an insured may find a provision that appears in a policy issued by one insurer, but not by another insurer. Operating in a constantly evolving and developing marketplace, insurers often seek to take into account the most frequently requested policy modifications or offer some policy enhancements that they believe will favorably influence the insured's decision to acquire a policy. Additionally, insurers will revise the policies for their own benefit when they see a potentially negative change to the nature of an insured risk, such as the mold exclusions we see in most policies. Therefore, for their own protection, an insured and its team need to stay up to date on policy offerings and industry developments.

It is important to take into consideration that negotiated policy revisions may result in an increase in the cost of the policy premium because the insurance company may perceive an increased risk in issuing the coverage on an insured's terms, rather than its own. Recently, an insurer demanded a six (6%) percent premium increase just to add bodily injury and property damage coverage for asbestos and lead to a policy. This, in a situation where there was a recently constructed development on the property and no indication of those contaminants. However, if the insured works with an insurance broker who has significant knowledge of these specialized environmental policies, the broker may resolve some of these issues before the insured even sees the policy. Unfortunately, in many instances insureds simply continue

working with their usual insurance agent, who has no environmental expertise, which can create problems for the insured.

The following list, though not exhaustive, provides some examples of policy terms that should be considered, and depending upon the transaction, negotiated.

A. Known Conditions. This defined term or the exclusion related to "known conditions" needs to be limited to conditions known to specifically identified individuals, such as the environmental manager of a company. An insured does not want to risk an insurance company denying coverage of a claim because an employee, who is not in a position of authority, knows something about an environmental condition which has not been disclosed to upper management. Also, wherever possible, any part of the definition or exclusion that is keyed into the concept of a reasonable expectation of a claim arising from a pollution condition should be deleted, in order to avoid a future dispute over the issue of what constitutes a reasonable expectation of a claim. Additionally, if the policy is intended to guard against known conditions, including contamination below regulatory standards or contamination above regulatory standards left in place with governmental permission, the parties must determine whether the policy will require revisions to specifically address those issues. Further, any known conditions exclusion should be limited, if at all possible, to the specific discharge or area of concern at issue, rather than the contaminant at issue and its degradation products. The specific identification of the contaminant and its degradation products in the exclusion in this broad fashion could result in a truly unknown pollution condition being excluded from coverage, which is obviously not the goal here. Another critical point is that the known conditions exclusion should be removed from the policy once the insured obtains regulatory closure of any such excluded conditions. Finally, an insured should seriously consider listing in an endorsement to the policy all environmental documents disclosed to the insurer so that the insured has written proof that known conditions have been disclosed to the insurers. (See the Goldenberg decision in Section XI for an example of why this should be done).

B. Insured. The defined term "Insured" needs to include all the persons and entities that are intended to be named insureds, as opposed to additional insureds. For example, if the policy is intended to cover a seller for environmental issues that may be its responsibility and a buyer for environmental issues that may be its responsibility, make sure that the policy does just that. Beware of the situation where the policy names a party as an additional insured and is therefore only covered for claims and/or suits for which the named insured is also responsible. Also, carefully analyze the parties that are included as named insureds or insureds in the context of the insured versus insured exclusion.

C. Bodily Injury. It is important that the defined term "Bodily Injury" be expanded (to the extent possible) to include other typical claims arising out of environmental issues or exposures that may be made against an insured, including claims for shock, medical monitoring, fear of disease and mental anguish and emotional distress even in the absence of physical injury. Insurers are usually amenable to the addition of shock to the definition (if it is not already there). However, medical monitoring and fear of disease are more difficult to include, in that insurers often take the position that these types of claims are too nebulous to underwrite. Insurers may, however, under the right circumstances, expand the definition to include one or both of these terms, and certain insurers have stated that they will provide coverage for medical monitoring. Therefore, depending upon the circumstances, one should consider pressing the point in order to provide coverage for these types of claims.

D. Property Damage. Make sure this defined term includes diminution in value of real property. This potential measure of damages should not slip through the cracks, particularly with the potential for third party claims. Please note that certain insurers absolutely refuse to cover this risk when it comes to the insured's property, but there may be circumstances where an insured must have this coverage for business reasons, so plan accordingly and try to work this point through with the insurer.

The biggest issue that the insurance companies have with the coverage of the diminution in value of an insured property is the potential for valuation issues resulting from current market conditions. As to diminution in value of the property of a third party, certain insurers refuse to cover this risk in the absence of actual physical injury to a claimant's property. So, for example, the policy would not cover the claim of a neighbor who sues an insured for diminution in value based on the fact that its property lies next door to the insured's contaminated property, when no contamination has reached that neighbor's property. The insured needs to consider this issue carefully in light of the transaction or the risks that the insured is seeking to cover to determine how far the insured needs to push the insurer on this point. Also see the Natural Resource Damages discussion in item Q below.

E. **Underground Storage Tanks, Asbestos and Lead Paint**. A number of form policies exclude the environmental concerns associated with underground storage tanks, asbestos and lead paint from coverage. However, an insured typically does not want the policy to contain these exclusions, particularly where 1) the insured has no knowledge of an underground storage tank; 2) the insured has knowledge that a storage tank was abandoned in place many years ago; 3) a tank is in use and in compliance with law; 4) asbestos or lead paint is discovered in the environment outside a building or structure; or 5) where the insured needs coverage for bodily injury for any or all of the foregoing contaminants. The insured should therefore attempt to modify these provisions to reflect its actual needs.

F. **Material Change in Use**. This exclusion is designed to protect an insurance company from risks that are different than those originally anticipated when the policy was issued. For example, if the insurance company agreed to insure a light industrial use, and the use is changed to a heavy industrial use, that can result in more risk to the insurer than originally anticipated and than originally contemplated in computing the policy premium. On the other hand, an insured does not want to take the chance of this exclusion applying to a claim merely because the insured described the use as a four story office building and it was really a five story office building. Is that material? Therefore an insured needs to describe the specific use as broadly as possible, be it retail, residential or office or a use permitted under the zoning ordinances or the like.

G. **Intentional Acts**. This broad exclusion presents pitfalls for insureds, in that it may take away coverage for any dishonest, willful, intentional or deliberate act or omission committed by or at the direction of the insured or any deliberate non-compliance with law or notices of violation or the like. At a minimum, an insured will need to limit this provision to the acts of certain specified individuals responsible for environmental affairs or officers of an insured. In addition, the insured should seek to either clarify or delete the first part of this exclusion in its entirety because it is ripe for a dispute. Also, an insured should reserve its right to contest a law or violation and should not be penalized by virtue of its exercise of that right. Further, under a Cleanup Cost Cap policy this exclusion should not apply to the contamination that requires remediation.

H. **Contractual Liability**. The policy generally excludes coverage for liability assumed by an insured in a contract unless the insured otherwise has that liability by law or the insurance company agrees to include the contract as an "insured contract" under the policy. Therefore an insured must be cognizant of this exclusion and where appropriate, add a schedule of insured contracts to the policy. For example, if an insured provides an environmental indemnity to a buyer, a lender or a tenant, the insured wants the policy to support that indemnity to the extent that there is coverage under the policy for the liabilities assumed in the indemnity.

I. **Insured's Property or Owned Property**. While these policies cover the cost to remediate contamination on an insured's property, most policies either have some type of exclusion for property damage to property owned, leased, or operated by or in the care, custody or control of the insured or they do not provide coverage in their insuring agreement for damage to this type of property.

This is problematic in that it may result in a situation in which the policy will pay to clean up a pollution condition, but it will not pay for the costs to replace a parking lot or sidewalk removed as part of the remediation, and more importantly, it may not pay for the cost to rebuild a building or portions of a building that would need to be demolished either in order to conduct a remediation, or as a form of remediation, or the cost to replace damaged personal property. While insurers do not advertise that they may not cover the foregoing, and insureds may argue that they have a reasonable expectation of coverage based on the definition of "Cleanup Costs" or "Remediation Expense," each insured will need to decide how to address this particularly troubling issue with the insurance company. Currently, an insured will find some limited coverage offered by some insurers to cover the cost to repair or replace improvements damaged during the course of a remediation.

J. **Cancellation**. Where a policy names more than one insured, the insurance company takes the position that it will only deal with one insured for items such as premium payments, deductibles and cancellation and non-renewal, and the policy will contain a condition to that effect. In circumstances in which there are unrelated insureds, it is crucial that the policy requires the insurance company to give notice to the other insureds of events such as these, so that the other insureds can continue the coverage if they so desire. It is also vital that the insured limit the ability of the insurer to cancel the policy. For example, an insured may find that an insurer has the ability to cancel the policy upon a change in use of the insured property, or a loss of reinsurance by the insurer or for a breach of a provision of the policy. Be careful of this trap and negotiate as necessary, including by revising the policy to provide that a breach must be material and to provide for notice of a breach and an opportunity to cure.

K. **Choice of Law/Choice of Forum**. Insurance companies attempt to use New York as the law and forum applicable to the policy because New York law heavily favors insurance companies and even affords statutory protections to these companies under certain conditions. Therefore, if the insurance company refuses to apply the law and forum requested by the insured, at a minimum the insured should consider having these conditions deleted from the policy, depending on the applicable state's law that would apply in the absence of such a provision. Certain insurance companies have proven to be extremely difficult when it comes to changing the law and forum, so an insured should prepare itself for pushback on this point. See Section XI, case number 36 for a discussion of Viacom Int'l v. Admiral Insurance Co., and how choice of law can affect the resolution of claims and the allocation of liabilities among insurance companies.

L. **"Other Insurance" Provision.** These policies may contain an "other insurance" provision that states that the policy is excess over any other available coverage. However, this provision can in many instances be revised to make the coverage primary. While there may be certain circumstances in which an insured may want the policy to provide excess insurance rather than primary insurance, in most instances, an insured does not want to battle with its insurance company as to whether the environmental insurance policy it issued or some other insurance policy applies, particularly after the insured has spent a substantial premium purchasing the environmental insurance. Therefore, in many instances the burden should be on the insurance company issuing the environmental insurance policy to pay the claim and it should be the responsibility of that insurance company, not the insured, to pursue subrogation claims against other insurers.

M. **Notice**. Beware of the conditions of the notice provision of the policy. In many instances insurance companies have deleted the "as soon as practicable" requirement for notice common in general liability insurance policies and replaced it with "immediate" notice or even "prompt notice as a condition precedent to coverage". As a result, it is very important that the insured minimizes the ability of an insurance company to deny coverage based on a defense of late notice.

N. **Subrogation**. An insured should carefully evaluate the insurer's right of subrogation, particularly in the context of a Cleanup Cost Cap type policy or under any pollution legal liability policy that has a significant deductible. It may be that the insured needs the retain the right to seek to recover from a third party any significant sums incurred by the insured.

O. **Severability or Separation of Insureds**. This is a very critical policy provision, particularly if the policy covers more than one insured with differing interests. In that situation the policy must contain a severability clause separating those interests, in order to protect one insured from any breach of the policy, misrepresentation, concealment or fraud by another unrelated insured. Not all insurance companies have the same policy language, so an insured must carefully review the language to make sure it is acceptable.

P. **No Assignment**. Be very careful of the condition in the policy that prohibits assignment of the policy, particularly in merger situations. Also, while an insured may want to assign the policy to a new property owner, it may be more prudent to add that new property owner as an insured as well, so that the original insured retains the protection of the policy. Further, at a minimum, have the insurer agree that it will not unreasonably withhold its consent to an assignment, if the policy does not contain an express statement to that effect. Finally exercise caution with endorsements to the policy that allow the automatic assignment of the policy to a lender in the event of a foreclosure on an insured property. This can be problematic to an insured, particularly if the policy insures more than one property.

Q. **Natural Resource Damages**. Insureds need to consider coverage for natural resource damages when reviewing an environmental insurance policy, because certain insurers take the position that there is no coverage for natural resource damages under their policies, unless it is specifically added by endorsement. AIG includes natural resource damage in its definition of property damage; Zurich offers natural resource damage coverage, which appears in the policy as a part of the definition of "Loss;" and XL offers coverage for natural resource damages as an option under its policies. This is a very important risk to address in the policy. However, an insured needs to keep in mind that not all natural resource damages that are actionable under environmental laws will be covered by the insurance companies. Therefore, it is important for the definition of natural resource damages found in applicable environmental laws be compared to the definition contained in the policy to see where the absence of coverage lies.

R. **Mold, Fungus and Microbial Matters**. Claims for bodily injury, property damage and remediation costs arising out of mold have been a hot topic for insurance companies for many years. Stories relating to mold contamination were picked up by the media, and numerous suits were instituted in connection with this type of claim. As a result, first party property insurers and general liability insurers routinely deny these claims on a number of bases, including the "mold" or "microbial matter" exclusion in the property policies and the so-called "absolute" pollution exclusion in general liability policies.

Mold exists in the environment, and individuals live with mold on a daily basis, generally with no adverse affect. Problems with mold may arise, however, particularly when water and construction materials, such as wood or paper, begin to mix with a temperate climate. Texas and other southern and southwestern states have been real "hot-spots" for these types of claims. But they are not alone and allegations of mold problems exist in the northeast as well.

Reacting to the situation, pollution liability insurers began to automatically include mold and/or microbial matter exclusions in their premium indication for each new policy. Insureds may find, however, that depending upon the risk, underwriters may agree to add third party coverage for mold back to the policy, but with a higher deductible or perhaps sublimits (i.e. limits lower than the policy limit) or

perhaps with a higher premium, and in certain circumstances, with the right water intrusion protocols in place, may even provide some coverage to remediate a mold condition. If the coverage is not added back to the policy, the insured must be advised of the risks that it retains by not having a policy that covers mold. In addition, many of the insurance companies have added coverage of legionella back into their policies as a policy enhancement and for certain industries, such as hospitals or educational institutions, they may be willing to cover bacteria and viruses as well.

S. War and Terrorism. The horrific events of September 11th took a toll on the insurance industry in general, and reinsurers in particular. While not directly impacted by the tragedy, the environmental insurance market was affected. For example, many reinsurers insist on war exclusions in their reinsurance treaties, which in turn trickled down to the environmental insurance policies. Further, the Terrorism Risk Insurance Act of 2002 ("TRIA") applies to environmental insurance policies as well as other types of liability coverage. TRIA requires the insurer to offer coverage for what TRIA deems to be "certified acts of terrorism" (which does not include acts of domestic terrorism) for a premium charge. Some insurers permit the insured to reject this coverage. Some also permit the insured to purchase broader terrorism coverage to go beyond that offered in TRIA and that will include domestic acts of terrorism.

Some examples of the effect of a terrorism exclusion in an environmental policy would be a preclusion from coverage for remediation costs or third party bodily injury or property damage costs arising from biological or chemical attacks by terrorists, or for coverage of costs overruns due to an inability of an insured or its environmental contractor to obtain materials, equipment or supplies due to an act of terrorism. While the risk of any one property being subjected to this type of attack is fairly remote, underwriters claim to have a hard time evaluating the risk.

As to the war exclusion, due to the continuing conflicts around the globe, most insurers will not modify or remove the war exclusion, even thought some parts of this exclusion appear to conflict with the terrorism coverage offered. If an insured purchases terrorism coverage, it must keep in mind that it will have to modify other portions of the policy, such as the microbial matters exclusion, to address the intent of the coverage.

T. Site Development/Capital Improvements Exclusion. This is an exclusion that is appearing more frequently in policies in which an insured property will be undergoing redevelopment and there is known contamination on the property or where buildings are being or have been demolished and the insurance companies are concerned at the potential for finding a pollution condition as slabs, foundations and utilities are removed. The primary purpose for the exclusion is to protect the insurance company from the situation where it is faced with a claim by an insured for what it considers to be site development costs. For example, assume that a property has soil contamination left in place with government permission and is being redeveloped. Also assume that some of that known soil contamination will need to be disposed of off-site solely because the insured property owner has no room to return the soil back to the site. In that situation, the insurance company wants to make it clear that this is the insured's site development cost, and not a cost that the insurance company agrees to bear. While this concept is arguably reasonable, the language of the endorsement does not always fit this specific risk and can be read to go far beyond that concept to effectively exclude coverage for unknown contamination. See Section XI, case number 45 and the decision in D.C. USA Operating Company v. Indian Harbor Insurance Company. Another situation in which this exclusion may be used by an insurance company is where it believes that the site has not been thoroughly investigated and that there is a significant risk that contamination will be found on the insured property during the site development process. However, this is a risk that in many instances the insured is looking to transfer to the insurance company. It may be that in this situation, additional investigations or a higher deductible will be required by the insurance company before it will consider insuring the development risk.

U. **Cleanup Cost Cap Policy**. A Cleanup Cost Cap type policy may have its own special definitions, exclusions and conditions, which the insured will need to review and analyze carefully, since they may result in different breadths of coverage. For example, there may not be coverage for costs resulting from a contractor's professional liability or for Acts of God, and there may be specific limited coverage triggers. As mentioned previously, since insurers have had to pay significant claims under Cleanup Cost Cap coverage, if such a policy could be purchased there will likely be limited ability on the part of the insured to negotiate policy terms and there will be more scrutiny of the cleanup plan and its estimated costs. For an interesting discussion related to a cleanup cost cap claim, see Section XI, case number 42 and the decision in Frazer Exton Development, L.P. v. Kemper Environmental, Ltd..

X. Application Process

Each insurance company has its own application form and underwriting process. Many insurance companies employ in-house environmental consultants, engineers and attorneys to evaluate the application, including the technical documents supplied by the insured.

At the commencement of the process, the insured should remember to enter into a confidentiality agreement with its broker, and either require the broker to place those same confidentiality standards on the insurance companies that review the application and its supporting documents, or directly enter into confidentiality agreements with the insurance companies.

At a minimum, the application usually needs to be accompanied by a Phase I environmental site assessment and depending upon the results of the Phase I, a Phase II environmental site assessment may be required. If there are other environmental reports or information available with respect to a property, the insurance company will need access to that data, and to other information pertinent to the environmental condition of the property to be insured. The insured will want to provide that access in order to support its position that all known conditions have been disclosed to the insurer. If the policy does not exclude a disclosed known condition, the policy will generally cover that condition (provided that there is not a pre-existing claim related to that known conditions), although some insurers insist on providing coverage for known conditions through the use of endorsements that list the known conditions and exclude any other known conditions not listed. This can be a dangerous way of providing coverage because a condition may slip through the cracks and inadvertently fail to be listed. Some insurers may even require a site visit by its environmental consultant in connection with the application process. Under a Cleanup Cost Cap, Stop Loss or Cost Containment policy, the insurer will require the insured to provide a work plan, itemization of cleanup tasks, cost estimates for each task, an estimated cleanup timeline and any other pertinent available documentation in connection with the cleanup to be performed. The insurer will also ask the insured to provide its financial information, in order to evaluate whether it feels comfortable the insured will be able to pay any deductible or self insured retention in the policy.

The policy incorporates the application by reference, and any misstatements or omissions on the application can potentially limit or even negate coverage. The application should be reviewed to confirm that its questions are not broader than the policy requirements, and that any statements in the application do not place a broader due diligence obligation on the applicant than expected, for example, the obligation to review public records or the like. Also, as mentioned in Section IX A above, an insured should seriously consider compiling an inventory of all documents provided to the insurance company in connection with the policy application, which could then be attached to the policy by endorsement as a disclosed document list, so that the insured has proof of the disclosures that have been made.

It is therefore crucial that someone in authority carefully reviews and completes the application, giving full consideration to every response. Further, the application should explicitly state that the appropriate individual has completed it based on that individual's knowledge and not based on the knowledge of the company in general.

The time required for an insurer to issue a policy depends upon the number and complexity of the environmental issues involved in a transaction. This process can take as little as one to two days in a situation with minimal environmental risks and documents. However, if negotiation takes place, or if the insurer must review a substantial amount of environmental information, the process obviously will take longer. The timing factor may be vital in a situation where the eleventh hour of a transaction is drawing near.

XI. Selected Case Law.

Although there is an abundance of case law on insurance issues generally, case law related to the specialized environmental insurance policies is slowly developing. However, over the past few years there have been some interesting suits filed and a number of significant decisions rendered in connection with such insurance policies. In addition to the foregoing suits and decisions, there is also some case law that interprets older environmental impairment and underground storage tank policies, which can be helpful in interpreting similar provisions in the current policies. Similarly, there is little documented claims experience, although anecdotally, there are numerous claims being made by insureds and paid by insurance companies (although an insured must keep in mind that it should not be incurring costs in connection with a claim without the consent of the insurance company, unless it is an emergency) as well as a number of claims that are being disputed or denied. Therefore, an insured presently does not have certainty as to what to expect when it presents a claim to an insurance company for payment, particularly since (even in response to claims that will be paid by the insurance companies), most insurance companies issue a reservation of rights letter giving the insurance company the opportunity to withdraw from the claim in the event it is determined that there is no coverage provided.

This section explores the recent decisions, as well as older decisions that may provide assistance in either negotiating a policy or negotiating a claim. For example, in May 2001, we find a very interesting decision from a Pennsylvania federal judge in Goldenberg Development Corp. v. Reliance Ins. Co., 2001 U.S. Dist. LEXIS 12870 (E.D. Penn. May 15, 2001). This case is eye-opening from the perspective of disclosure of material facts relating to known conditions. Also, see the decision of the court in Technology Square (#31 infra) for a description of a dispute between the insured and insurers as to whether there was full disclosure of known conditions by the insured. In addition, a series of high profile complaints were filed in 2006 under these types of policies, two of which had disclosure issues, and the third related to the alleged refusal of an insurance company to pay a significant cleanup cost cap claim. The first, seeking policy rescission was filed by Greenwich Insurance Company against the St. Louis Cardinals organization and others. The second, was filed by the Los Angeles United School District against AIG. Summaries of these complaints can be found at item numbers 34 and 35 infra. The third was filed by Zeneca, Inc. and a summary of this complaint can be found at item number 46. Also, on March 18, 2002, United National Insurance Company filed a complaint against an insured and its broker, seeking among other things, to void an environmental insurance policy it had issued, on the basis of the insured's failure to disclose information relating to environmental matters that the insurer deemed to be material, and in late 2003, an insured filed a complaint against Kemper Indemnity Company in connection with an environmental liability policy and cost containment policy, and Indian Harbor Insurance Company filed a complaint against the Lamson & Sessions Company in connection with a pollution and remediation legal liability policy. Further, in Hudson Envt'l Services v. New Jersey Property – Liability Insurance Guaranty Assoc., 858 A.2d 39 (N.J. 2004), a New Jersey court looked at whether a State Guaranty Fund had any liability to pay claims under a remediation stop loss policy where the insurance company, Reliance National Indemnity Company, was insolvent and payments had previously been made under the policy.

For a fascinating case addressing the extent of the cleanup insured under a cleanup cost cap policy, carefully review Frazer Exton Development, L.P. (#42 infra).

Midwest Envt'l. Consultants Co. (#54 infra), Wells Fargo Bank N.A. (#55 infra), Ispat Inland (#56 infra), Alan Fisher and Dab Three LLC (#64 infra) and Penn Tank Lines (#66 infra), all examine the issue of what constitutes a claim under a policy and whether appropriate notice was given to the insurance company. Further, for a discussion of the distinction between a pre-existing condition and a pre-existing claim and the impact on available coverage see Thomas Steel Strip Corp. (#43 infra).

In addition to the issue of what constitutes a claim mentioned above, Ispat Inland (#56 infra) examines several significant issues including fraudulent inducement, satisfaction of self insured retentions, fines and penalties, subrogation rights and the right of the insured to reimbursement of attorneys fees.

The court in Denihan Ownership Co. LLC (#44 infra), considered the interplay between conditions covered under the cleanup cost cap portion of a policy and those covered under the pollution liability portion of the policy.

An issue of critical importance is examined in D.C. USA Operating Co., LLC (#45 infra), specifically, what is considered to be a known condition for purposes of a site development exclusion. Also, note the Chambliss decision (#48 infra) and its discussion of the insured's response to a policy application, the applicability of the known conditions exclusion and the "claims made and reporting" requirements of the policies at issue and the Jobber decision (#49 infra) also tackling the issue of alleged misrepresentations in a policy application.

A number of interesting decisions examining diverse policy issues have been rendered over the past eighteen months. These include American Int'l Specialty Lines Ins. Co. (#57 infra), which discusses the insurers subrogation rights against the United States; Mears Transportation Group Inc. (#58 infra), which examines whether "cleanup costs" include the cost to relocate employees so that a cleanup could proceed; Picerne Military Housing LLC (#59 infra) and (#67 infra), which describes a dispute between the parties as to whether "benign" waste materials constitute a pollution condition and whether the waste materials were a known condition; Pennzoil-Quaker State Co. (#60 infra) carefully considers whether the losses alleged in the underlying suits against Pennzoil were the "same, related or continuous" and the impact of that determination on the number of deductibles applicable to the claim, as well whether a prejudice standard applied when there was late notice of a suit given under a claims made policy; Milwaukee Metropolitan Sewage District (#61 infra) contains a summary of the trial court and appellate court decisions on the issue of whether the insured was entitled to reformation of a policy when a property that the insured intended to be covered under the policy as an insured property was not; and Cain Petroleum Inc. (#62 infra) addresses whether unscheduled underground storage tanks were covered under an underground storage tank policy.

Finally, review the decision in Supreme Tank, Inc. (#41 infra) and its evaluation of whether an insurance company could conditionally renew an insurance policy without directly advising the insured (as opposed to an agent of the insured) of the specific coverage changes, as well as whether a policy required a per claim deductible, as opposed to a per occurrence deductible.

In addition to the foregoing, we find that many policy provisions in the older environmental impairment liability policies and underground storage tank policies are similar to those found in the new pollution legal liability policies. Therefore, the case law set forth below can also provide some guidance on provisions of the new pollution legal liability policies to negotiate, or at a minimum to keep in mind when evaluating a pollution legal liability policy or pursuing a claim.

For example, for case law concerning the extended reporting period for a claim (which can also be found in the new pollution policies) take a look at the Wolf Bros. (#1 infra), Alan Corp. (#4 infra) and Federated v. Germany (#10 infra). Wolf Bros. also contains some interesting insight into the complexity of the policy at issue, which is the same type of concern an insured should have under the new policies.

For a discussion of what constitutes a "claim" under the older polices, see W.R. Grace (#2 infra), Hatco (#3 infra), Central Illinois (#6 infra) and Cargill (#19 infra). Also Morrow Corporation (#16 infra) addresses the issue of when damages come "manifest" and trigger policy coverage.

Rhone-Poulenc (#7 infra), CNA Ins. Co.. (#23 infra), RSR Corp. (#63 infra) and Gemini Ins. Co. (#70 infra) discuss the "other insurance" provision in the respective policies. These types of provisions may also be found in the new pollution liability policies (see Gemini) and need to be negotiated by an insured prior to purchase. Viacom (#36 infra) also weighed in on the subject, and additionally addresses complex choice of law issues raised when an insured has an environmental policy that covers multiple sites in more than one state.

In addition, Camalloy Wire (#13 infra), though short and to the point, alerts us to two very real dangers relating to pollution liability policies. First, the insured must make a claim during the policy period. This is a critical point. It is not enough that some related claim was made during the policy period, this particular claim must be made. Second, the claim must be covered under the policy. In this case, since the definition of the term "property damage" did not include lost profits, on the face of it, there would be no coverage under the policy. However, based on the limited facts presented, it appears that the claimant was in fact seeking coverage for diminution in value of the insured property, not lost profits, which as mentioned previously is a coverage many insurers often refuse to provide.

Antrim Mining (#5 infra), Pritchard (#8 infra), Iowa UST Fund (#12 infra), and Ackley (#72 infra-different interpretation based on definition of pollution conditions in new policy) provide valuable assistance in understanding the effect of a retroactive date in a policy. American Empire (#14 infra) provides an instructive discussion of a "non-compliance with law" exclusion. Golden Eagle Refinery (#17 infra) evaluates the owned property exclusion and the distinction between first party and third party coverage. Boerman (#20 infra) examines "claims made" coverage, International Ins. (#21 infra) looks at a disputed exclusion in an EIL policy, and Zurich (#30 infra) and Mid-Continent (# 51 infra) consider the remedies available when an insured allegedly makes a misrepresentation in connection with the issuance of an underground storage tank policy utilized as a governmental financial assurance, with Mid-Continent also determining whether there has been a "confirmed release", as defined in the policy.

One final complaint of note is that filed in Porter Street (#53 infra), which contains an interesting description of the position of the insured as to the distinction between an unknown covered pollution condition and a known excluded pollution condition in a BRAC policy (see Section VII A above) when the same contaminant is at issue in both matters.

Some additional recent decisions of note related to pollution legal liability insurance policies include Lowry Assumption LLC (#65 infra), which determines whether the arbitration provision in a pollution liability insurance policy was mandatory or permissive, Sierra Recycling and Demolition, Inc. (#68 infra) which evaluates whether a non-owned disposal site exclusion in the policy was applicable to the claim, Sunnyside Development Co. LLC (#71 infra), which addresses the status of an additional insured and tolls a warning bell for insurance companies to pay attention to notices they receive, Great American Fidelity Insurance C. (#73 infra), which analyzes the faulty workmanship and products liability exclusions in a contractor's policy and City of Cleveland (#74 infra), which examines a claim in light of the known conditions exclusion.

1. **Wolf Bros. Oil Co., Inc. v. Int'l Surplus Lines Ins. Co.,** 718 F.Supp. 839 (W.D. Wash. 1989).

   - Insured, Wolf Bros. Oil Company, Inc. ("Wolf Bros.") operated a number of gasoline stations. It purchased a pollution liability insurance policy (the "Policy") from International Surplus Lines Insurance Company ("ISLIC").

   - The Policy was a claims made policy, with an option for an extended reporting period.

- The Policy covered two types of pollution; one for third party bodily injury and property damage claims, and the other for costs incurred in connection with a cleanup mandated by a governmental authority.

- ISLIC elected not to renew the Policy at the end of its term. As a result, Wolf Bros. purchased the extended reporting period.

- After the expiration of the original policy period, but prior to the expiration of the extended reporting period, contamination was discovered at one of the sites of Wolf Bros. and the government mandated a cleanup.

- For five months, ISLIC ignored the many claim notices of Wolf Bros. and then it denied coverage entirely. Wolf Bros. was irate and filed suit.

- Unfortunately for Wolf Bros., all the extended reporting period accomplished was to extend the period within which to report third party bodily injury and property damage claims. It did not extend the reporting period for claims relating to cleanup costs.

- Wolf Bros. argued that the Policy was ambiguous as to the effect of the extended reporting period on coverage for cleanup costs. Wolf Bros. also argued, in the alternative, that the concept of property damage subsumed the coverage of cleanup costs.

- The district court disagreed with Wolf Bros., finding that the Policy was unambiguous in its provision of extended coverage for third party bodily injury and property damage claims only.

- Of particular interest to any insured that seeks to interpret current pollution legal liability policies, was the court's rejection of the claim of Wolf Bros. that there was an inherent structured confusion to the contract, and that it should therefore be deemed to be ambiguous.

- Court was not troubled by the fact that the insured had to read several cross referenced sections in the Policy with respect to the coverage afforded by the Policy. In fact, the court remarked that "[e]ven if plaintiff's characterization of the Policy as a 'scavenger hunt' were apropos, there is no authority to the effect that structural complexity is tantamount to structural ambiguity".

- Court also noted that Wolf Bros. was a sophisticated insured with knowledge of the limited scope of pollution liability policies.

- Further, ISLIC had warned Wolf Bros. in the notice of non-renewal to consult its broker or attorney as to the purchase of the extended reporting period. Therefore, court reasoned that Wolf Bros. should have known that the coverage afforded needed to be carefully analyzed.

- In addition, the fact that the premium for the extended reporting period, which was for the same term as the original policy period, was half that of the price for the original coverage should have alerted Wolf Bros. that it was obtaining less than full coverage.

- Finally, the court rejected the arguments of Wolf Bros. that cleanup costs fall within the coverage for property damage, noting if that were the case, there would be no reason to have separate coverage for cleanup costs. It also rejected the proposal that a notation on the check of Wolf Bros. that this was payment for identical coverage, did nothing to amend the terms of the Policy.

2. **W.R. Grace & Co. v. Maryland Casualty Co.**, 33 Mass. App. Ct. 358, (Middlesex, 1992); review denied, 413 Mass. 1109 (Mass. 1992).

- Insured instituted suit against four of its insurance carriers for declaratory relief and damages, in connection with contamination resulting from operations in Woburn, Massachusetts.

- In May, 1982, the insured had been sued for injury resulting from the contamination and in this declaratory action it was seeking reimbursement of both defense and indemnity costs.

- Defendant, Maryland Casualty Company ("Maryland") moved for summary judgment on a number of points, including that the environmental impairment liability ("EIL") policies at issue fully covered the claims, and that since they specifically addressed environmental risk, they must pay down their limits before Maryland's general liability policies were reached.

- On appeal, court held that under New York law, any difference in specificity between the EIL policies and Maryland's general liability policy would not allow Maryland to take the position that it was not required to respond until the policy limits of all of the EIL policies were exhausted. Instead, Maryland's liability would be prorated on the basis of policy limits with the other insurance carriers that assumed the risk and that were found liable for defense or indemnity.

- Gibraltar issued high-level excess policies to the insured for the period of November 1, 1981 to June 30, 1983. Its policy followed the form of the primary policy.

- One key term of the primary policy was that the claim had to be made against the insured and reported during the policy period.

- On June 23, 1982, approximately one week prior to the policy expiration, the insured sent a 57-page renewal application to Gibraltar and noted the May, 1982 suit on the last page of the application. In addition, on January 31, 1983, the insured instructed its broker to notify Gibraltar of the suit, which it did on March 11, 1983 as to its 1982-1983 policy, and on April 15, 1983 as to its 1981-1982 policy.

- On motion for summary judgment, the trial court held that notice of the suit in a policy renewal application was not in compliance with the policy requirements, and that as a matter of law, notice was not given until March 11, 1983, which was at least 9 months after its policy expired.

- The appellate court also noted that Gibraltar's policy was a "claims made" policy and that two requirements had to be met in order for there to be coverage. First a claim must be made against the insured during the policy period, and second, the insured must report the

claim to the insurance company during the policy period. Neither of those events happened in this case. Therefore, there was no coverage.

- Hartford Accident and Indemnity Company ("Hartford"), the excess level EIL carrier, immediately below Gibraltar, also moved for summary judgment on the basis of lack of notice, since it too had been given notice in the renewal application for its policy and by letters dated March 11, 1983 and April 15, 1983.

- The trial court denied the motion on the basis that there was some indication that Hartford had notice prior to the expiration of the policy period.

- On appeal, court found that there was no such notice, and granted summary judgment to Hartford.

3. **Hatco Corp. v. W.R. Grace & Co.,** 801 F. Supp. 1334 (D.N.J. 1992).

- Defendant was the former owner of a contaminated industrial site in New Jersey, which had been sued by the current owner.

- Defendant filed a third party action against its insurers for coverage of cleanup costs.

- Two of the defendant's excess insurers made a motion on the priority of coverage between defendant's general liability policies and its environmental impairment liability ("EIL") policies.

- The excess insurers maintained that a November 23, 1981 letter sent by the plaintiff's general counsel, which enclosed a New Jersey DEP administrative order and advised the defendant that the plaintiff would look to defendant for indemnity should it incur any liability in connection with the order or contamination, constituted a "claim" under the EIL policies.

- In addition, these excess carriers proposed that since EIL is specific environmental coverage, it should be called on before general liability excess coverage.

- Further, it was the position of the excess insurers that the defendant "voluntarily forfeited" the EIL coverage by not making a timely claim and that defendant could therefore not recover any amount from the general liability excess insurers, which would have otherwise been recovered from the EIL insurers.

- Court rejected this argument and found that the 1981 letter did not constitute a “claim” under the EIL policies.

- In reaching its decision, court noted that only one EIL policy defined the word “claim”, which in effect meant either a suit, arbitration proceedings or a demand for money or services.

- As to the other policies where the term was undefined, court looked to the common meaning of the term “claim”, specifically “a demand for money or property as of right”.

- It was the position of court that the 1981 letter was a threat which notified defendant of a potential future claim. Court held that this threat was not the equivalent of a claim under the EIL policies.

- Of interest to insureds with current pollution liability policies, was court's discussion of the interpretation of the word "claim" in the Zuckerman case, at 100 N.J. page 308. Court distinguished Zuckerman from the case at issue where there was no broad definition of "claim". In Zuckerman, the defined term claim included the insured's knowledge or awareness of an act or omission which could "reasonably be expected to give rise to a claim under this policy..." An insured may see this type of language in new pollution liability policies and should be extremely cautious. It is possible that had language such as this been included in a policy issued to the defendant in this case, the 1981 notice may have been sufficient to meet the defined term "claim".

- Court granted the defendant's motion for summary judgment, finding that the existence of the EIL policies did not effect the coverage obligations of the excess liability insurers.

4. **The Alan Corporation v. Int'l Surplus Lines Ins. Co.,** 823 F.Supp. 33 (D.Mass 1993), aff'd, 22 F3d 339 (1st Cir. 1994).

- In a case very similar to Wolf Bros., the Alan Corporation, a distributor of fuel oil, sought a declaratory judgment that it was entitled to coverage under an environmental impairment liability policy issued by International Surplus Lines Insurance Co. ("ISLIC") in connection with cleanup costs incurred for two sites.

- Just as in Wolf Bros., the policy of Alan Corporation contained two distinct coverages, one for third party bodily injury and property damage claims and one for cleanup costs.

- At the end of the policy period, Alan Corporation purchased the extended reporting period pursuant to the policy.

- The Massachusetts DEP was notified of contamination at one site, about one month prior to the expiration of the extended reporting period and a notice of responsibility as to that site was issued seven months after the expiration of the extended reporting period.

- As to the second site, there is no information as to when the Massachusetts DEP was notified, but the notice of responsibility was issued to the insured almost 3 years after the expiration of the extended reporting period.

- ISLIC denied coverage on the basis that there had been no initiation of government action during the policy period and that the extended reporting period did not apply to coverage for cleanup costs.

- On motion for summary judgment, court held for ISLIC.

- Court noted that it found no ambiguity in the policy as to the coverage provided by the extended reporting period.

- The basis of court's decision was similar to that in Wolf Bros., and in fact, court quoted extensively from the Wolf Bros. decision.

- There is a difference in the facts in this case, however, in that court looked to determine whether governmental action had been "initiated" during the policy period. Since there was no evidence that the Massachusetts DEP had ever been notified of the contamination during the policy period, court rejected this argument of the insured. Court found that notice to a fire department as to one of the sites was not sufficient to give rise to the initiation of governmental action.

- Court also rejected the arguments of Alan Corporation that the extended reporting period extended the coverage for cleanup costs, and that cleanup costs fall within the definition of property damages, for reasons similar to those in Wolf Bros.

- On appeal, Alan Corporation argued that there had been cleanup costs validly imposed through government action, which was initiated during the policy period. Specifically, an Alan Corporation employee had contacted the Leominster Fire Department concerning one of the discharges and was told of its duty to determine whether or not there had been a discharge and to report it to DEP.

- Appellate court noted that even without the advice from the Fire Department, Alan Corporation had an independent duty to do so.

- Further, appellate court rejected the argument of Alan Corporation that the initial phone call with the fire department was the first in a chain of events that ultimately led to a government action.

- Basically, the fire department took no action whatsoever as a result of the phone call, and more importantly, all cleanup costs were imposed as the result of the involvement of DEP, which even Alan Corporation admitted took place well after the expiration of the policy period.

- Appeal was denied by appellate court.

5. Antrim Mining, Inc. v. Pennsylvania Ins. Guaranty Ass'n, 436 Pa. Super. 522 (Penn. Sup. Ct. 1994), appeal denied, 657 A. 2d 487 (Pa. 1995).

- Insured was a surface mining company which allegedly contributed to a pre-existing discharge of underground mining pollutants to a watershed.

- Insured purchased a pollution liability insurance policy ("PLP") for the term January 1, 1988 to January 1, 1989, which was renewed and expired on January 1, 1990. Subsequently, the insurer became insolvent and the Pennsylvania Insurance Guaranty Association ("PIGA") was sued by the insured in connection with a public interest suit filed against the insured with respect to the alleged pollution.

- The trial court dismissed the insured's suit.

- One of the provisions of the PLP policy required that the pollution incident for which coverage was sought must have commenced after the retroactive date of January 1, 1987. In addition, the insured's responsibility to pay damages for either bodily injury or property damage must either be determined in a suit or by settlement.

- The PLP policy also had specific exclusions for bodily injury or property damage that was expected or intended, that resulted, directly or indirectly from or was attributable to the insured's failure to comply with law, or that resulted from a willful or deliberate act or omission of the insured.

- Current insureds, under pollution legal liability policies, should take note of this language, since it is similar in many ways to that found in new pollution legal liability policies.

- In this case the appellate court noted that one must first look to the four corners of the complaint to see if there is a duty to defend on the part of the insurance company.

- The complaint contained an allegation that there was a willful failure of the insured to comply with law, since it had submitted monitoring reports to the Pennsylvania DER which evidenced unpermitted discharges from at least 1983.

- Court accepted the allegation as true and concluded that there was neither a duty to defend or indemnify on the part of PIGA due to the insured's deliberate non-compliance with law.

- In addition, court noted that even if there had not been deliberate non-compliance with law on the part of the insured, there would be no coverage because the pollution incident began in 1983, prior to the retroactive date of the policy. This conclusion should be of concern to any insured with a retroactive date in its policy.

6. Central Illinois Public Service Co. v. American Empire Surplus Lines Ins. Co., 267 Ill. App. 3d 1043 (First Dist., Sixth Div. 1994), appeal denied, 649 N.E. 2d 414 (Ill. 1995).

- Insured, Central Illinois Public Services Company (CIPS"), sought coverage from a number of insurers in connection with contamination at thirteen of its former gas manufacturing facilities, by filing a declaratory judgment action.

- At issue on appeal was a single environmental impairment liability policy purchased by CIPS from American Empire Surplus Lines Insurance Company ("American Empire") for the policy period 9/1/83 - 12/1/84 (the "Policy").

- CIPS exercised an option under the Policy to purchase an "Extended Discovery Period", which ended on 12/1/85.

- The contaminated property at issue, which CIPS sold in 1981, was located in Taylorsville, Illinois (the "Site").

- On October 20, 1985, the current owner of the Site discovered a tank containing oily material and notified CIPS.

- Illinois EPA ("IEPA") was subsequently advised of the situation and contacted CIPS for information on November 27, 1985.

- After the extended reporting period expired, specifically, on July 3, 1986, IEPA notified CIPS that it may be liable for costs incurred in connection with remedial activities at the Site.

- Trial court ruled in favor of CIPS on a motion for summary judgment on several issues, including a finding that a claim under the Policy was timely made.

- Court based its decision on the policy's failure to define the word "claim" which it proposed made the Policy ambiguous. As a result, court concluded that there was a "claim" under the Policy since CIPS had "reasonably concluded" by the end of the extended reporting period that there would be a claim by IEPA in the future.

- Appellate court did not accept this argument. Rather it determined that in the context of the Policy, and based on its plain meaning, the term "claim" required a demand by a third party. Without such a requirement, the Policy would effectively be converted into an occurrence policy, which was not something bargained for by the parties.

- As a result, since there was no third party claim against the insured until well after the expiration of the extended reporting period of the Policy, no coverage existed and summary judgment was granted in favor of American Empire.

7. Rhone-Poulenc Inc. v. Int'l Ins. Co., 71 F.3d 1299 (7th Cir. 1995).

- Between 1981 and 1984, Rhone-Poulenc purchased three identical environmental impairment liability ("EIL") policies (precursors to today's pollution legal liability policies).

- Although Rhone-Poulenc also purchased comprehensive general liability policies, it did not know whether they would cover environmental risks.

- Rhone-Poulenc ultimately submitted claims for reimbursement of cleanup costs at several sites to its EIL insurer.

- The insurer refused to pay the claims on the basis that it issued excess policies and that Rhone-Poulenc failed to prove exhaustion of its primary policies (namely the comprehensive general liability policies).

- Rhone-Poulenc filed suit against its EIL insurer.

- The trial court dismissed the suit, holding that Rhone-Poulenc failed to include its comprehensive general liability carriers in the suit, which court found to be indispensable parties.

- On appeal, the Seventh Circuit sought to determine whether the EIL policies were primary or excess.

- The appeals court found that none of the policies listed any underlying policies, nor did they state on their face that they were excess policies.

- Rather, the policies contained a condition (see Section VIII L above) that the coverage was excess over amounts collectible under any other insurance.

- After a lengthy discussion by court of the condition, and the position of Rhone-Poulenc and the EIL insurer as to its meaning, court remanded the case to the trial court for a determination of the meaning of the condition.

8. **Pritchard v. Federated Mutual Ins. Co.**, No. 93-2765-TUA, 1995 WL 854775 (W.D. Tenn. Oct. 2, 1995).

- Plaintiffs, as principals of dissolved corporation Tri-State Petroleum, Inc. ("Tri-State"), brought an action for a declaratory judgment against its insurer with respect to contamination discovered in December, 1987 at a gas station owned by Tri-State.

- On November 1, 1987, the insurer issued a pollution liability insurance policy to Tri-State, which covered a number of locations, and which had a policy period of November 1, 1987 to November 1, 1988 (the "Policy").

- The Policy also included a "Retroactive Date," which provided that the Policy only covered pollution incidents that commenced on or after a certain date, in this case November 1, 1986. The Policy mentioned this concept at least three times.

- Approximately one month after the commencement of the current policy term, contamination was discovered at the site at issue.

- Plaintiffs argued that the language of the Policy was ambiguous, and that it should be read to provide that the "pollution incident commences when the plaintiff discovered the contamination…"

- Plaintiffs based their argument on two South Carolina decisions involving Federated, Sphinx Oil Co. v. Federated Mut. Ins. Co., 427 S.E. 2d 649 (S.C. 1993) and Odom Oil Co. v. Federated Mut. Ins. Co., Case No. 90-CP-42-2346, (Court of Common Pleas, Spartenberg Co. 1992), each of which held that since the insurer did not require an on-site inspection of the insured property prior to coverage, the property would be deemed to be clean at policy inception.

- This court, however, did not agree with those holdings, instead finding the language of the Policy to be clear and unambiguous, and to mean that the pollution incident had to have begun after the Retroactive Date, in order for there to be any coverage.

- Court took great pains to explain that claims made policies clearly state that a claim must be made during the policy period, and that but for the Retroactive Date in the Policy, it would have covered prior acts.

- Court also remarked that it could not ignore the Retroactive Date, which resulted in the insurer only agreeing to pay claims for new pollution incidents, since to do so would

provide the insured with coverage for which it neither bargained nor paid (noting that underwriters compute premiums based on the nature and extent of the risk covered).

- Further, court placed the burden on Tri-State to prove that the pollution incident commenced after the Retroactive Date.

- Interestingly court rejected the following proofs of the pollution incident offered by Tri-State; 1) there had apparently been a successful tank tightness test four months prior to the discovery of contamination; and 2) that there was no free product found in wells drilled in December 1987, but there was free product found in those wells in February 1988.

- Instead, court explained that in order to defeat a motion for summary judgment here and to create an issue of fact, Tri-State needed to provide evidence as to "how and when the product was released."

- Since Tri-State failed to do so, court granted summary judgment to the insurer.

9. Ken Moorhead Oil Co., Inc. v. Federated Mutual Ins. Co., 476 S.E. 2d 481 (S.C. 1996).

- The insured owned several sites on which underground storage tanks were located.

- In 1988 and 1989 the insured purchased a pollution liability policy from Federated Mutual Insurance Company ("Federated").

- The 1989 policy contained an endorsement that required a coordination of benefits with government funding programs and required the insured to first reap the benefits of this program. If the insured failed to do so, the policy would be void to the extent such funds would have applied to a covered loss.

- Certain of the underground storage tanks leaked in 1989. In accordance with the policy, this was reported to the appropriate governmental authority, as a condition precedent to receiving state funds.

- The insured filed suit against Federated for coverage under the 1988 and 1989 policies.

- Federated then sued the South Carolina Department of Health and Environmental Control ("DHEC") for payment from the fund.

- Federated and the insured settled, but Federated continued to pursue DHEC seeking subrogation under the insured's right to seek payment from the fund.

- Court rendered an extensive analysis of Federated's argument that its contract with the insured would be impaired if it could not collect payment from the fund, ultimately holding that the right to recover from the fund belonged solely to the insured, and that the statute did not create a right for a subrogee to participate in the fund.

10. Federated Mutual Ins. Co. v. Germany, 712 So. 2d 1245 (Fla. App. 1998), review denied, 725 So. 2d 1108 (Fla. 1998).

- Insured leased and operated a service station from 1982 until late 1989 or 1990.

- It purchased a pollution liability policy from Federated Mutual Insurance Company ("Federated"), which it cancelled effective September 12, 1989.

- The policy had a six month extended reporting period, which expired on March 12, 1990.

- The insured transferred control of the station in 1989, and another transfer took place thereafter.

- Contamination was discovered in a monitoring well on the property on March 19, 1990 and the Florida DEP discovered free product on March 29, 1990. Both dates fell outside the policy's reporting period.

- In 1993, the new operators instituted suit against the insured and the insured filed a third party complaint against Federal.

- The insured convinced the lower court that even though it had asked Federated to cancel the policy effective on the specified date, the policy could not be cancelled since it contained a provision that the insurer's cancellation of the policy would not take effect for 60 days.

- This creative argument on the part of the insured would extend the reporting period sixty days, and arguably bring the claim within coverage.

- However, the appellate court did not accept the argument that there was an ambiguity in the policy which mandated that cancellation of the policy by the insured was the equivalent of a cancellation of the policy by the insurer and therefore, the sixty day insurer cancellation period applied.

- Rather, it found that the policy was clear on its face that the sixty day cancellation period only applied to an insurer cancellation.

- As a result, court held that the cancellation of the policy was effective on September 12, 1989 and that the extended reporting period ended on March 12, 1990, with the result that the claims of the insured were outside of the coverage afforded under the policy.

11. **Complaint Filed In California Superior Court in** Owens Financial Group Inc. v. American Int'l Group Inc**.** (Reported in Mealey's Insurance Supplement, October 15, 1998).

- According to the Complaint, Owens Financial Group and Owens Mortgage Investment Fund ("Owens") obtained a Pollution Legal Liability Policy from AIG for the period of January 22, 1997 to July 29, 1997. The policy covered real property on which a tire recycling facility was located.

- In addition, Owens was an insured under a Pollution Legal Liability Policy that was issued by United Capital for the policy period July 29, 1997 to July 29, 1998.

- On June 27, 1997, the California EPA ("Cal EPA") issued a cleanup and abatement order (the "Order") to the operator of the facility, Wenbury Environmental Company, Ltd.

("Wenbury") and Owens Financial Group. This order required the facility operators to "clean up waste tire piles, abate the effects thereof, or otherwise remediate a case of threatened pollution or nuisance".

- On July 28, 1997, Owens provided AIG with a formal notice of loss in connection with the order of Cal EPA.

- On or about September 26, 1997, AIG denied coverage of the claim of Owens, on the basis that "tires are not pollutants, that no claim had been made against the insured, that there are no cleanup costs, and if there was pollution, it commenced before the policy started...".

- Throughout subsequent correspondence, AIG continued to deny coverage.

- On January 6, 1998, Owens notified United Capital of the claim with respect to the Order and requested a defense as well as coverage for cleanup costs.

- On February 11, 1998, United Capital denied coverage on the basis that, among other things, there were no claims for bodily injury or property damage and that the conditions that were the subject matter of the Order were not pollution conditions, but even if there was a pollution condition, it occurred prior to its policy.

- On April 23, 1998, AIG also denied coverage of the claim of Owens under a general liability policy, on the basis that "tires were pollutants" and thus precluded from coverage.
- Owens argued that both AIG and United Capital specifically agreed to insure the risk that Wenbury would leave tires on site and that Owens would be required to clean up the property.

- The Complaint contained a specific cause of action against AIG for breach of the implied covenant of good faith and fair dealing on a number of bases, including AIG's determination under the Pollution Legal Liability policy that tires were not "pollutants"; its determination under its general liability policy that tires were "pollutants"; and its specific advertising campaign directed at tire recycling facilities.

- The Complaint also listed specific causes of action against United Capital and the broker who was involved in the acquisition of the policies.

- Our last information was that the suit had been put on hold.

12. Iowa Comprehensive Petroleum Underground Storage Tank Fund Board v. Federated Mutual Ins. Co., 596 N.W. 2d 546 (Iowa 1999).

- CML Enterprises ("CML"), owner of property on which two underground storage tanks were located, purchased pollution liability coverage from Federated for the policy period March 5, 1990 through September 5, 1990.

- The policy applied to claims "caused by a pollution incident that commenced on or after the retroactive date" of March 5, 1990.

- The policy also excluded coverage for any "environmental damage caused by or contributed to by any pollution incident that commenced prior to the retroactive date" (emphasis added).

- Contamination was discovered on June 28, 1990, and CML subsequently made a claim under the policy.

- Federated denied coverage on the basis of the foregoing exclusion.

- CML also made a claim to the plaintiff pursuant to a tank fund and was paid.

- In consideration of the payment, CML assigned the policy to plaintiff.

- Plaintiff made a claim under the policy which was denied by Federated on the basis that the assignment was invalid.

- Plaintiff filed a declaratory judgment suit against Federated.

- Federated moved for summary judgment on the basis of the foregoing exclusion, which was granted.

- The appellate court affirmed trial court's grant of summary judgment.

- In reaching its conclusion, appellate court examined a number of issues.

- First, it examined the language of the exclusion in order to determine whether it was ambiguous.

- Evidence indicated that there were pre-1990 incidents which could have caused or contributed to contamination, but that the damage could not be segregated by date, since there was simply one large plume.

- Accordingly, based on a plain reading of the exclusion, court found that the issue of whether there were incidents during the policy period to be irrelevant, since there had plainly been incidents that took place prior to 1990 that "contributed to the contamination".

- Court found that the exclusion was not capable of more than one meaning.

- Next, court examined the reasonable expectations doctrine, and concluded that the doctrine did not apply here since Federated did nothing to indicate to its insured that a claim such as that presented would be covered. Further, it found the language of the exclusion to be clearly understandable to a layperson.

- Court also rejected the plaintiff's waiver and estoppel arguments, which were based on the failure of Federated to conduct the site inspection to which it was entitled, primarily because the exclusion at issue in the case was unrelated to the right of inspection.

13. **Camalloy Wire, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.**, 695 N.Y.S. 2d 562 (First Dept. 1999).

- Insured's assignee sought coverage under a pollution liability policy for lost profits allegedly attributable to a "negative perception" created by an oil spill.

- Appellate Division upheld decision of lower court dismissing claim on the basis that the claim was not made within the policy period. (This was a claims made policy).

- In addition, court noted that lost profits do not appear to constitute property damage under the terms of the policy at issue.

14. American Empire Surplus Lines Ins. Co. v. Wightman Envt'l., Inc., 2000 U.S. Dist. LEXIS 1046 (W.D. Mich. Jan. 31, 2000).

- The Berrien County Landfill Authority ("Landfill Authority") retained Wightman Environmental, Inc. ("Wightman"), an environmental engineering and consulting firm, in connection with the construction of new landfill cells.

- The State rejected the Landfill Authority's application with respect to one of the cells, on the basis of improper testing of clay, as well as failure to conduct density testing of clay at appropriate intervals. The Landfill Authority installed a second layer of clay to satisfy the State.

- The Landfill Authority sued Wightman for damages arising out of Wightman's alleged negligence, and Wightman made a claim under its professional liability policy.

- Insurer instituted a declaratory judgment action against Wightman and the Landfill Authority alleging that Wightman was not entitled to coverage under its policy on the basis of the exclusion for non-compliance with law.

- The insurer and the Landfill Authority filed cross motions for summary judgment.

- The exclusion at issue precluded coverage for "[a]ny "claim" arising out of any action of the "insured" if the "insured" was aware of non-compliance with any applicable statute or rule or regulation issued by a competent authority."

- The Landfill Authority argued that the exclusion did not apply because the claim arose out of its regulatory non-compliance, which in turn resulted from its reliance on Wightman's advice.

- The insurer argued that the exclusion applies when the insured is aware of non compliance, and that the identity of the non-compliant party did not affect the exclusion.

- After hearing the arguments, court determined that the exclusion was ambiguous, since both interpretations were possible.

- Further, court construed the exclusion against the insurer (which drafted the policy) and explained that the language of the exclusion "would reasonably lead an insured to expect that the exclusion would not apply unless the insured had knowingly failed to comply with applicable rules and regulations."

- Court granted summary judgment to Wightman and the Landfill Authority because the insurer did not present any evidence that Wightman was subjectively aware of such non-compliance.

- Court also noted that were it to give the exclusion the meaning suggested by the insurer, which would include any technical violation of regulations, regardless of how those regulations were interpreted in the past, would essentially render the insurer "claim proof."

- In addition, court explained that in order to apply this exclusion, it would require evidence that the insured consciously intended to avoid legal requirements, which was not the case here.

- As an aside, court explained that this exclusion was similar to the intentional acts exclusion which requires both an "intentional act" and an "intentionally caused injury," again two elements that were not found here.

15. Camalloy Wire Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 273 A.D. 2d 123 (First Dept. 2000), leave to appeal denied, 95 N.Y. 2d 763 (N.Y. 2000).

- Plaintiff hired contractor to remove an underground storage tank.

- Contractor purchased a pollution liability policy from defendant insurer.

- Due to contractor's negligence, heating oil spilled into a nearby creek.

- Plaintiff sued contractor for cleanup costs and additional expenses.

- Appellate Division previously affirmed summary judgment for insurer dismissing complaint to the extent that damages sought went beyond the amount spent to clean up.

- Plaintiff presented the same issue on appeal, and court rejected again, based on the law of the case doctrine.

- Here court noted that the policy was a "claims made and reported" policy, and that the only claim reported was the cleanup costs, which was less than the self insured retention in the policy.

16. The Morrow Corp. v. Harleysville Mutual Ins. Co., 101 F. Supp. 2d 422 (E.D. Va. 2000), motion to modify denied, 110 F. Supp. 2d 441 (E.D. Va. 2000).

- The insured, as tenant, operated an on-site dry-cleaning business at Store Number 8 in the Virginia Shopping Center (the "Center") from 1986 until 1992, when it moved to and operated at another location at the Center until 1996, when the Center was sold.

- An environmental investigation conducted in connection with the sale of the Center in 1996, revealed PCE and its breakdown products in soil and groundwater at the location of Store Number 8.

- In 1998, the owner of the Center filed suit against the insured seeking either damages or an order that the insured remedy the contamination, on the basis that there had been discharges at Store Number 8 from 1986 to 1992.

- The insured denied responsibly and claimed that the contamination resulted from the operations of the prior drycleaner tenant.

- Nevertheless, the insured sought defense and indemnity from its insurers, both of which denied coverage.

- The insured settled the suit with the owner of the Center and in 1999 brought suit against its insurers.

- Subsequently, the insured moved for summary judgment on the issue of the insurers' duty to defend. At the same time, the insurers cross-moved on both the issue of their duty to defend and their duty to indemnify.

- Court first examined which of the insured's policies were implicated. It noted the allegations of the owner of the Center in the underlying complaint was that there were discharges from 1986 to 1992 and that although there were no new discharges after that time, contamination continued until its discovery in 1996.

- Court divided the policies that were the subject matter of the suit into three categories: 1) those that contained absolute pollution exclusions; 2) those that contained sudden and accidental pollution exclusions; and 3) those that contained a provision entitled "Drycleaners Additional Coverage", issued from 1991-1995 by Sentry Insurance Company (the "Drycleaners Policies"). We will focus on the portion of the decision addressing the Drycleaners Policies.

- The Drycleaners Policies contained a "Pollution Liability Insurance" addition which provided that the pollution exclusion did not apply to bodily injury or property damage arising from the "release of pollutants".

- Sentry argued that notwithstanding the foregoing, the Drycleaners Policies did not provide coverage because the pollution became manifest in 1989, when the PCE was first released, which was prior to the inception of such policies. It based its argument on the language in the Drycleaners Policies which stated that the occurrence takes place when property damage first manifests itself.

- Court found the argument flawed, concluding that although there may have first been a discharge in 1989, subsequent releases also took place, causing more property damage. Court concluded that since the underlying complaint alleged releases from 1991 to 1995, the pollution liability provisions in each of the Drycleaners Policies applied.

- Sentry also argued that the policies' exclusion for "any loss, cost or expense arising from any directive or request that you test… cleanup… pollutants" precluded coverage.

- Court explained that although the complaint requested an order that the insured undertake a remedy, it also sought an order requiring the insured to pay the cost of any investigation

or remediation, and that therefore Sentry clearly had a duty to defend under the Drycleaners Policy. It left open for another day the issue of Sentry's duty to indemnify.

- Sentry did not leave matters here, and instead made a subsequent motion to alter or amend the judgment (namely the foregoing decision).

- The motion alleged that the ruling in Morrow I, that each of the Drycleaners Policies were triggered, was erroneous.

- The pertinent language in the Drycleaner Policies was that "there is a covered pollution occurrence at the time the property damage first manifests itself."

- Interestingly, Sentry changed its position in this motion, arguing that manifestation of damage first occurred in 1996 when contamination was first discovered, not 1989, when it is alleged the insureds were aware of the contamination.

- Court found the term "manifests" to be ambiguous in the context of the language of the Drycleaners Policies, and conducted a lengthy analysis of the meaning of the word "manifests."

- Sentry maintained that "manifests" meant "discovers" and that coverage was triggered in 1996 when the contamination was discovered.

- Court disagree, explaining that if Sentry meant "discovered" it would have written "discovered" in the policy.

- Since court found the term "manifests" to be ambiguous, it relied on the reasonable expectations of the insured doctrine noting that the term "manifests" must be given "the plain meaning of that term that makes sense in or had some application to, the hazardous chemical pollution context."

- Ultimately, court concluded that the term "manifests" in the Drycleaners Policies meant "discoverable or subject to being discovered by reasonable means, not actually discovered or perceived."

- Applying that conclusion to the facts of the matter, court held that although the owner of the Center did not know of the contamination until 1996, "it may have manifested itself" that is, it may have been discoverable through reasonable testing during the effective terms of each of the Sentry policies."

- As an interesting aside, court also noted that if Sentry wanted to limit its exposure for gradual or latent pollution, it could have utilized a claims made policy, but that since it had chosen to issue an occurrence policy, court would not create a manifestation theory of coverage to permit Sentry to achieve that result in this case.

- Court held that Sentry had a duty to defend the insured because the underlying complaint against the insured contained sufficient allegations to conclude that there may have been a manifestation during the term of the Drycleaners Policies.

- Court found that Sentry's duty to indemnify, depended on an issue of fact to be resolved at trial, namely when did the contamination reach a detectable level in soil.

- Court denied Sentry's motion to alter or amend.

17. Golden Eagle Refinery Co., Inc. v. Associated Int'l Ins. Co., 85 Cal. App. 4th 1300 (Cal. App 2001).

- Golden Eagle and its predecessors operated an oil refinery at a site in Carson, California (the "Site") from 1947 until its closure in 1984.

- During that period, there were frequent discharges of hazardous substances into the environment.

- In 1985, various state agencies ordered Golden Eagle to investigate and remediate contamination relating to the Site.

- Eventually, Golden Eagle conducted remediation activities at the Site and sued its liability insurers under a number of third party general liability policies.

- Some of the policies contained a "sudden and accidental" pollution exclusion and others included an "EIL" endorsement which covered damages relating to unforeseeable releases. These policies all contained an owned property exclusion.

- Golden Eagle's claim against the insurer issuing the EIL coverage was for "pure financial losses" of $150 million, resulting from its inability to market or sell the Site.

- This allegation was critical since the policies contained an EIL endorsement with terms that included the following:

> 1. Notwithstanding anything contained in this Policy to the contrary the cover[age] provided by the Policy is extended to include legal liability for the consequences of a pollution of the environment (earth air water) provided always that this pollution was unforeseeable from the standpoint of the insured or his representatives who are responsible for environmental protection.
>
> 2. It is understood that pure financial losses arising from an environmental pollution shall be deemed to fall within the property damage definition.
>
> 3. No coverage (sic) is provided for damages to own property, machinery, etc arising out of or in connection with an Environmental Impairment Liability."

- The insurers argued that the owned property exclusion in the policies precluded coverage, notwithstanding the financial loss provision, since Golden Eagle owned the contaminated Site.

- Golden Eagle countered that the endorsement was ambiguous and must be construed to find coverage, relying on the testimony of the individual who negotiated the policy and two other risk managers to support its position.

- The policy negotiator testified that "he understood this coverage was third party [coverage] but protecting first party exposure". The risk managers explained that they understood that the pure financial loss language in the policies resulted in the general liability policy being converted to a first party policy as to financial loss.

- Interestingly, none of the witnesses testified that their understandings were conveyed to the insurers.

- The trial court found that the endorsement was clear, and that there was no coverage for damage to the Site, since it was owned property.

- The appellate agreed, finding that "the term "pure financial loss" was not exempt from the overriding exclusion of owned property." Further, it was not at all persuaded by the interpretation of the endorsement propounded by the individual that negotiated the policy. Court found the testimony to be self serving, particularly since the individual admitted that he knew he was negotiating a third party liability policy. The appellate court affirmed the trial court's grant of summary judgment to the insurers on this issue.

18. Goldenberg Development Corp. v. Reliance Ins. Co. of Illinois, No. Civ. A. 00-CV-3055, 2001 U.S. Dist. LEXIS 12870 (E.D.Pa. May 15, 2001), motion for reconsideration denied, 2001 U.S. Dist. LEXIS 10887 (E.D.Pa. June 26, 2001).

- In 1997, Goldenberg Development Corporation ("Goldenberg") purchased a pollution liability policy from Reliance Insurance Company of Illinois ("Reliance") to cover certain property it intended to develop.

- In May 1999, Goldenberg asked Reliance to add an adjacent property known as Pad S-2 to the policy as an insured property.

- In June 1999, during the course of development activities, Goldenberg uncovered a significant amount of solid waste, including tires, telephones poles and appliances, which required a costly remediation.

- Goldenberg presented a claim to Reliance in connection with the solid waste.

- Reliance denied coverage pursuant to the policy's "Known Conditions" exclusion.

- Goldenberg filed suit against Reliance in June 2000, for damages resulting from the alleged breach of the policy by Reliance.

- Both parties moved for summary judgment on the issue of coverage.

- Reliance argued that it was entitled to summary judgment on the basis that the Known Conditions exclusion precluded coverage of losses resulting from "pollution conditions

existing at the inception of the policy and reported to Goldenberg employees with responsibility for environmental affairs unless all material facts relating to the pollution conditions were disclosed to [Reliance] prior to the inception of the Policy."

- Reliance also argued that Goldenberg failed to disclose information relating to solid waste at the Pad S-2 property that was known to Goldenberg and was contained in reports prepared by Earth Engineering, Inc. ("EEI") with respect to this property.

- In response, Goldenberg argued that the EEI reports were mentioned in another report that Goldenberg had supplied and that Reliance should have asked to see the report if it needed to do so.

- Goldenberg also argued that the EEI reports were not material, because they only indicated small items of waste such as woodchips and construction debris, which EEI said could be remediated inexpensively.

- It is interesting to note, as court did, that Reliance did not rely on the contents of the EEI reports in its motion. Rather, it relied on the testimony of the Goldenberg employee who worked with Reliance in connection with purchasing the coverage, which court found was ambiguous as to whether or not the EEI reports contained information on the larger solid waste.

- Court did mention that Goldenberg, as the insured, had the burden of providing material facts relating to a pollution condition, but that there was an issue of fact as to whether Goldenberg's failure to provide information on solid waste at the Pad S-2 property was material, since it was not clear whether the EEI reports only related to smaller items of solid waste (which would not result in a claim under the policy), or larger items of waste (which would and did).

- Court denied both summary judgment motions, finding that there were material issues of fact which a trier of fact needed to resolve.

- Court denied Reliance's subsequent motion for summary judgment, or in the alternative, for reconsideration.

- This decision highlights a critical issue for both insurers and insured: specifically, what constitutes a known condition and how does the responsible party disclose it? Does an insured have to read through every environmental report or other document in its possession and list pollution conditions, or does the insurer bear that burden? There is no easy answer, but from the insured's perspective, at a minimum, it should consider any pollution condition identified in a document delivered to the insurer to be considered a disclosed pollution condition for purposes of the Known Conditions exclusion.

19. Cargill Inc. v. Evanston Ins. Co., 642 N.W. 2d 80 (Minn. App. 2002), review denied, 2002 Minn. App. LEXIS 396 (Minn. June 26, 2002).

- In December 1984, two inspectors from the Georgia Department of Natural Resources ("GDNR"), responding to an anonymous complaint, inspected property in Georgia owned by Cargill Inc. ("Cargill") and discovered pesticide related contamination.

- In certain conversations between a Cargill employee and the GDNR representatives shortly thereafter, GDNR indicated verbally that Cargill would need to clean up any contamination.

- Subsequent letters from GDNR in January and April 1985 indicated that Cargill needed to investigate and/or remediate the contamination.

- Evanston Insurance Company ("Evanston") issued an EIL policy to Cargill for a two year period, including the period from June 1, 1984 to June 1, 1985.

- On June 6, 1985, after the Evanston policy expired, Cargill employees attended a meeting with GDNR.

- Beginning in 1985 and intermittently until 1993 Cargill performed various investigations at the site. Cargill incurred approximately $183,000 in cleanup costs through 1993. However, after 1993 through April 2000 the costs totaled approximately $3.3 million.

- Evanston was placed on notice of the claim on November 24, 1987, well after the expiration of the last policy issued by Evanston. Evanston responded with a reservation of rights letter taking the position that it needed additional information in order to determine whether a "claim" had been made.

- Cargill filed a declaratory judgment action against Evanston in February 2000, with respect to its claim for defense and indemnity under the EIL policy that Evanston issued to cover the period from June 1, 1984 to June 1, 1985. Eventually, each party moved for summary judgment. Evanston won its motion, on a number of bases. A discussion of the three of the most critical points is set forth below.

- The EIL policy was a claims made policy, and the first issue addressed by court was whether GDNR made a claim during the policy period.

    - The policy defined a "claim" as a "demand for money and services" including "the service of a suit or institution of arbitration proceedings against the insured". The new pollution liability policies contain a similar definition of "claim".

- Cargill argued that the conversations between the GDNR site official and a Cargill employee in December, 1984 and the January and April 1985 GDNR letters constituted the "claim".

- Evanston took the position that while there may have been a "potential" claim in December 1984, GDNR did not demand money or services and Cargill took no action until after the expiration of the policy. Unfortunately for Cargill, court agreed.

- While no Minnesota cases addressed the issue, court examined decisions in other states and concluded that there had to be an actual demand for money or services during the policy period.

- The distinction court made here is that both the conversations with GDNR and the letters from GDNR during the policy period indicated the need for future action, but never made an actual demand for Cargill to take action. Court also focused on repeated statements from GDNR officials that their role was not one of enforcement.

- To bolster its position, court noted that Cargill failed to take action during that period, which led court to conclude that Cargill did not view GDNR's acts as a demand.

- The earliest "demand" found by court was made on June 7, 1985, shortly after the policy expired. As a result, court granted summary judgment to Evanston.

- On appeal, court reversed trial court decision and found as a matter of law that the various correspondence from GDNR mentioned above constituted a claim during Evanston's policy period.

- Court next examined whether Cargill gave timely notice of a claim in November 1987, first reviewing the notice provision in the policy, which required notice as soon as practicable as a condition precedent to coverage.

- Cargill argued that it provided timely notice since Cargill did not know until November 1987 that the claim would exceed the $1,000,000 deductible.

- Court failed to be persuaded, indicating that the policy language was clear in its requirement for notice "as soon as practicable", which it found to mean as soon as feasible.

- Court refused to read a requirement into the policy that notice was not required until Cargill become aware that costs may exceed the deductible.

- In addition, court would not entertain a prejudice argument since the policy at issue was a claims made policy and court found some case law that stressed the importance of notice in claims made policies.

- In the new pollution liability policies, an insured will find most policies require the claim to be made and reported to the insurance company during the policy period.

- On appeal, court refused to entertain Cargill's prejudice argument, but reversed the trial court's finding on notice holding that there were issues of fact as to whether notice was late which were to be determined by the trier of fact.

- Evanston also argued for summary judgment on the basis of the "knowledge of executive" exclusion, the form of which had been revised by endorsement to provide an exclusion for claims arising from:

> failure to comply with applicable statute…or instruction issued by competent authority relating to protection of the environment and health…provided that said failure to comply was a willful or deliberate act or omission of any management level employee

with specifically designated responsibility for environmental compliance of the named insured.

- Court found Evanston failed to produce evidence of this willful or deliberate failure and that the fact that employees of Cargill knew there were chemical leaks or operations in disrepair was not sufficient.

- The new pollution liability policies contain similar types of exclusions, and insureds should keep this language in mind.

20. John Boerman v. American Empire Surplus Lines Ins. Co., 2001 U.S. Dist. LEXIS 16270 (W. D. Mich., Oct. 2, 2001), aff'd, 50 Fed. App'x 248 (6th Cir. 2002).

- Plaintiff operated an excavating business and was insured from 1994 to 1998 under four "claims made" policies, issued by American Empire Surplus Lines Insurance Company ("American Empire").

- In 1996, Kalamazoo Oil Company ("Kalamazoo") filed suit against Plaintiff alleging that Plaintiff was negligent in 1994 when it excavated underground storage tanks and failed to remove or cap an active fuel pipe, resulting in a petroleum discharge in 1996.

- Plaintiff failed to notify American Empire of the suit. However, the attorney for Kalamazoo brought the suit to the attention of American Empire in 1997.

- American Empire denied coverage of this claim and Plaintiff instituted this declaratory judgment action.

- On motion for summary judgment, American Empire argued that Plaintiff was not entitled to coverage for a number of reasons.

- First, the insuring agreement of the policies at issue required that the pollution giving rise to the claim take place while Plaintiff was performing its services. Since Plaintiff completed its services in 1994 and the pollution event did not occur until 1996, there was no coverage. Court rejected argument of the Plaintiff that the work was ongoing and had not been completed because the pipeline was never capped or removed.

- Next, the claim was made against Plaintiff in 1996 and Plaintiff failed to notify American Empire of the claim within the 1996 policy period, as required by the terms of the policy.

- Plaintiff argued that it had purchased renewal policies and that this created a "seamless" policy period which ran throughout the term of all four policies.

- American Empire explained that it issued four separate and distinct policies, and the claim had to conform to the terms of the policy at issue.

- Court found the terms of the 1996 policy to be clear on its face. The claim had to arise during the policy period and the pollution event had to arise from work being performed

during the policy period. Also, the claim had to be reported during the policy period. None of these events took place.

- Court rejected the argument of Plaintiff that the American Empire polices were for a continuous term of four years during which a claim could be made at any time.

- Specifically court noted that "claims made" insurance coverage was underwritten in a manner that was intended to limit the risk of a claim to a one year period only and that American Empire did not intend to extend the risk over a four year period. Rather, it intended to have four distinct one year periods of risk.

- Court granted summary judgment to American Empire.

- This decision clearly describes the intended limitation of "claims made" coverage. If an insured reviews a new pollution liability policy, it will likely see a statement in bold that it must make and report any claim during the policy period. Failure to abide by these strict requirements can result in a loss of coverage. As a result, insureds need to be cognizant of the timing of policy periods and their duties under a "claims made" policy.

21. International Ins. Co. v. RSR Corp., 2002 U.S. Dist. LEXIS 5337 (N.D. Tex. Mar. 27, 2002), aff'd, 148 Fed. App'x 226 (5th Cir. 2005).

- In 1981, North River Insurance Company, a predecessor to International Insurance Company ("International") issued four successive EIL policies (one primary and three excess) to the RSR Corporation ("RSR") for a policy period running from September 1981 until November 1982, with an extended reporting period that continued until November, 1983, and with a total policy aggregate limit for all policies combined of $60 million dollars.

- One of the covered sites under the policies was a smelting facility located in West Dallas, Texas.

- Shortly after the inception of the policies, a number of suits were filed against RSR for personal injuries and property damage arising out of lead associated with the smelting operations at the facility, as well as suits and proceedings by various governmental authorities for environmental contamination associated with lead. By 1987, International paid in excess of 24 million dollars in settlement and defense costs in connection with those claims.

- This case is a perfect example of why EIL coverage rapidly evaporated in the market. The risks applicable to RSR do not appear to have been properly taken into account when the insurance policies were underwritten.

- However, 1987 was not the end of the environmental claims for RSR. The instant case had its genesis in a 1993 EPA claim with respect to a battery wrecking facility that was adjacent to the smelting operations.

- As part of the battery operations, rubber chips were created from battery casings which were used as fill material by various local residential homeowners.

- After a number of years of addressing various battery chip related contamination, EPA became involved and discovered soil contamination at a number of residential properties arising from use of the chips as fill material.

- EPA cleaned up these properties and filed suit against RSR for cost recovery in May 2001.

- RSR sought coverage for the foregoing from International, which in turn filed a declaratory judgment action asking court to determine whether coverage existed.

- On motion for summary judgment, RSR maintained that coverage was precluded on the basis of two exclusions in the policy.

- Court found that one exclusion, which related to waste disposal facilities, was not applicable since the sites at issue were not true waste disposal facilities.

- However, court was persuaded that the following exclusion was applicable and granted summary judgment to International. The exclusion provided that there was no coverage for environmental impairment arising from:

  "Any commodity, article or thing supplied, repaired, altered or treated by the insured and happening elsewhere than at the insured's premises after the insured has ceased to own or exercise physical control over that commodity, article or thing supplied, repaired, altered or treated. (emphasis added)."

- RSR argued that this exclusion only related to products liability claims and that it was not applicable to the claim at issue. It also argued that the exclusion was ambiguous and that outside evidence was required in order to determine the true meaning of the exclusion.

- After an extensive analysis, court determined that the exclusion was not ambiguous, and was clear on its face.

- Court found the exclusion to be broader than typical product liability exclusions, since it applied not only to "bodily injury and property damage, but to any environmental impairment and it applied to any commodity, article or thing.

- After focusing on the word "thing" and looking at its broad dictionary definition, court concluded that the battery chips were a "thing".

- Taking the exclusion a step further, and examining the dictionary definition of the word "supplied", court explained that while it was unsure as to how the chips made their way to the various properties, it was undisputed that RSR was the source of the chips and therefore supplied them.

- Court completed its analysis of the balance of the language of the exclusion, which it concluded supported its summary judgment holding that the exclusion applied to the claim and International was not liable under the policies for the costs related to the remediation of contamination resulting from battery chips on the residential properties.

- This is another example of the need for caution when negotiating policy language, since the use of broad language in an exclusion may work in favor of the insurer, not the insured.

- On appeal, the Fifth Circuit Court of Appeals affirmed lower court decision with respect to the battery chips used as filler material specifically, that such by-product fell under an exclusion for "things supplied" to a third person.

22. Complaint Filed in United Nat'l Ins. Co. v. Connell Industries Inc., (Reported in Mealey's Insurance Pleadings, April 9, 2002).

- This is another case that evidences the need for full disclosure when purchasing an environmental insurance policy.

- According to the Complaint, the insured, Connell Industries Inc. ("Connell") purchased a pollution liability policy in 1999 for a site in Illinois.

- As part of the application for the policy, Connell submitted a Phase I Environmental Site Assessment dated October, 1997, which allegedly did not mention prior government investigations of the insured site.

- According to United National, Connell knew at the time of its application for coverage that there had been a series of governmental inspections and reports as early as 1993, relating to actual or threatened contamination at the insured site.

- Based on the 1997 Site Assessment, and allegedly without knowledge of the prior environmental investigations, United National issued a five year policy to Connell for the policy term February 22, 1999 through February 22, 2004.

- Ultimately, Connell sold the insured site to a school district and arranged to have the school district named as an insured under the policy.

- Shortly after the sale, the school district tendered a claim for pollution conditions on the property.

- About one year later, United National cancelled the policy and in November 2001 requested that Connell provide information and documentation in connection with the claim of the school district.

- Instead of responding, Connell directed United National to the school district for information.

- United National then filed suit against Connell seeking a rescission of the policy as to Connell, based on its alleged intentional deception, and seeking damages from both Connell and its broker, Willis of Massachusetts, for damages for material misrepresentations, breach of contract and negligence.

23. CNA Ins. Co. v. Selective Ins. Co., 354 N.J.Super. 369 (App. Div. 2002).

- Selective Insurance Company ("Selective") insured the vehicle of a Coldwell Banker employee. CNA Insurance Company (CNA) provided similar coverage for Coldwell Banker and its employees.

- The CNA policy contained an "other insurance clause" which provided that CNA's coverage would be excess to all other available insurance.

- Following an accident involving the employee, an injured third party sued both the employee and Coldwell Banker.

- Selective, concerned with its potential liability, settled the third party claim within its policy limits and never notified or consulted with CNA or Coldwell Banker before doing so.

- CNA took the position that its policy was excess to Selective's primary policy and that therefore, Selective owed the same duty to CNA that it owed to its insured, specifically to seek to negotiate a settlement within Selective's policy limit, so that CNA's policy limits would not be impacted.

- The trial judge granted summary judgment to CNA holding that CNA's coverage was excess over Selective's policy limits on the basis of "other insurance" clause, and that Selective breached its duty as a primary insurance carrier by excluding CNA from the settlement and its benefits.

- On appeal, court examined the issue of whether the relationship between CNA and Selective was that of co-primary insurers, or whether Selective's coverage was primary and CNA's coverage was excess as the result of the "other insurance" clause.

- Court distinguished a true excess policy (which is specifically designed to provide an insured with coverage in excess of that provided in a primary policy for the same type of risk insured by the primary policy) from a primary policy that simply contains an "other insurance" clause.

- On the other hand, a primary policy with an "other insurance" clause only serves to limit liability where another primary policy is involved. However, this type of provision does not transform the primary policy into an excess policy.

- Court noted that CNA was a primary insurer with an "other insurance" clause and had its own independent duty to represent its insured. Court explained that CNA had the opportunity to independently settle the claim against Coldwell Banker, but chose not to do so. Court went on to hold that CNA was not prejudiced by Selective's settlement and reversed the trial court's grant of summary judgment.

- This case is useful in terms of the new environmental insurance policies for its analysis of the "other insurance" provision in the policy.

24. Kemper Nat'l Ins. Cos. v. Heaven Hill Distilleries, Inc., 82 S.W. 3d 869 (Ky. 2002).

- A fire destroyed seven Heaven Hill warehouses containing bourbon.

- Notwithstanding the fact that Heaven Hill had already sold the bourbon to various customers, it continued to store the bourbon while it aged, and prior to bottling.

- As the direct result of numerous negligence suits filed by its customers, Heaven Hill paid several million dollars in damages. Heaven Hill then demanded coverage from American Motorists Insurance Company, a subsidiary of Kemper Insurance ("Kemper"), under policies insuring Heaven Hill. Kemper denied coverage.

- At issue were two provisions within the Kemper policy.

- Heaven Hill focused on an endorsement to the Kemper policy which provided for an exception to the pollution exclusion for damage to personal property of others.

- Kemper focused on a policy exclusion which precluded coverage of damage to property in the insured's care, custody, or control and argued that this exclusion controlled here and that therefore, the loss of the bourbon was not covered.

- Court interpreted the exclusion as providing that the endorsement restored coverage under the policy for personal property of others not in the care, custody or control of the insured, but concluded that the bourbon was clearly in the custody of the insured, and that therefore the exclusion applied.

- The basis of the court's position was that notwithstanding the fact that Heaven Hill had previously sold the bourbon (which could place it within the parameters of the "property of others" endorsement), it nevertheless physically remained in Heaven Hill's facilities at the time of the fire, ultimately placing the bourbon within the "care, custody, control" exclusion.

- Finding the insured's arguments as to the exception to the pollution exclusion to be non persuasive, court held in favor of Kemper and denied coverage for the damages arising out of the destroyed bourbon.

25. Complaint Filed in Arizona Superior Court in LCRI Investments L.L.C. v. Steadfast Ins. Co., (Reported in Mealey's Litigation Report: Insurance, May 13, 2003).

- Plaintiff, a developer, purchased a large tract of contaminated land in Northern California where it intended to construct a planned community which would include both a residential and a commercial component.

- Before closing title to the property, Plaintiff purchased an environmental insurance policy (the "Policy") from Steadfast Insurance Company ("Steadfast"), which was a Zurich Company ("Zurich").

- According to Plaintiff, the Policy was to provide "first dollar" coverage to Plaintiff for costs incurred in connection with the implementation of a specific remediation plan, as well as for costs incurred as a result of a governmental directive with respect to or for liability stemming from contamination at the site.

- The premise of the "first dollar" coverage was that Plaintiff would not be required to pay any deductible or self insured retention and that the Policy would pay claims for implementing the remediation plan beginning with the first dollar of costs incurred by the insured. Cleanup costs not contemplated by the remediation plan would be subject to a $100,000 deductible.

- As a condition to the issuance of the Policy, Steadfast required that Plaintiff pay a premium and a premium deposit totaling $8,210,000. The balance of the premium, which would be calculated pursuant to a formula set forth in a Retrospective Rating Plan (and which would not exceed $9,035,000) would be paid by Plaintiff at Policy termination.

- After the Policy was issued and during the implementation of the remediation plan, unexpected petroleum contamination was discovered which significantly increased the anticipated costs of remediation.

- Plaintiff alleges that after paying $6.7 million in claims, Steadfast refused to pay any of the additional pending $4.5 million in claims, and demanded that Plaintiff agree to restructure the Policy.

- Plaintiff also alleges that Steadfast and Plaintiff restructured the Policy, and that the premium for the restructured Policy was to be $30,750,000. In addition, Plaintiff maintains that Zurich and Steadfast agreed to guarantee the payment of the restructured deposit.

- Plaintiff further alleges that Steadfast reneged on its agreement to restructure the Policy after demanding that the property serve as collateral for its guaranty of the restructured deposit and then claiming that the collateral was inadequate.

- Plaintiff also maintains that as a result of the actions of Steadfast, it was forced to sell the property at a substantially lower price than anticipated.

- Plaintiff seeks a number of determinations from court, including a ruling that Steadfast pay for losses that qualify as covered cleanup costs under the policy.

- As of February 8, 2006, this case remains on court's inactive calendar.

26. Associated Indemnity Corp. v. Dow Chemical Co., 248 F.Supp. 2d 629 (E.D. Mich. 2003).

- In 1999, Dow Chemical Co. ("Dow") filed suit against certain of its insurers seeking insurance coverage in connection with numerous environmental liabilities associated with Dow manufacturing facilities throughout the world.

- All of the policies at issue required Dow to provide notice to its insurers. The notice provisions were similar and provided:

> Whenever the Manager of the Insurance Department of (Dow) has information from which the Insured may reasonably conclude that an occurrence covered hereunder involves injuries or damages which in the

> event the Insured should be held liable is likely to involve this policy, notice shall be sent to the company as soon as practicable, provided, however, that failure to give notice of any occurrence which at the time of its happening did not appear to involve this policy but which at a later date would appear to give rise to claims hereunder, shall not prejudice such claim.

- Dow argued that this policy provision only obligated it to notify its insurers when its corporate insurance department was actually aware of a claim for which there would be coverage, and that this did not take place until 1998, notwithstanding the fact that remediation activities had begun at a much earlier date.

- The insurers argued that with at least two of the sites at issue, Dow was aware of the damage it inflicted well before 1998, and that the late notice given prejudiced the insurers.

- Court found that the foregoing policy language required Dow to provide notice as soon as Dow could have reasonably concluded that there was a possibility for one of its insurers to be involved in a claim.

- Dow argued that since the various remediation activities took place at a site level, there was little involvement at a corporate level, and that therefore the notice requirement was not triggered.

- Court rejected this argument noting that Dow had attorneys who advised its risk management group on insurance coverage, attorneys who advised the company on environmental and administrative law matters, at least one attorney who dealt solely with the federal pollution remediation statute and an attorney responsible for SEC reporting who had knowledge of remediation costs, and that therefore by 1991 Dow could have reasonably concluded its insurers would be involved in a legal action.

- Based on this evidence, court determined that Dow should have understood that its insurers would be involved in a legal action.

- Court maintained that whenever one of Dow's employees, acting within the scope of his employment, learned that a site required remedial activity, that knowledge was imputed to the rest of the corporation. Therefore, court held that Dow provided late notice.

- Of significant importance here is that the trial court took into account case law in Michigan that imputed the knowledge of an employee to that of the corporation, including the Supreme Court decision in Upjohn. Note: It appears to the author that this conclusion by court flies in the face of the specifically negotiated language of the policy, which for purposes of an insurance claim equates the knowledge of the insurance department to the knowledge of the company, for the purpose of avoiding an inadvertent failure to give notice when individuals that are not in a position of authority know something that those in authority do not know.

- Once court determined that the notice was late, it examined whether the insurers were prejudiced.

- Court agreed with the position of one of the insurers that notice should have been given by 1991. It also noted that Dow kept poor records of its remediation activities between 1991 and the date of notice, that a witness had died, that records had been discarded and that insurers were not given an opportunity to participate in settlement negotiations or remediation activities. These factors all resulted in prejudice to the insurers.

- Based on the foregoing finding of late notice and prejudice, court granted summary judgment to the insurers for the applicable sites at issue in the motion.

27. **Complaint Filed in the Superior Court of New Jersey in** EPEC Polymers, Inc. v. Kemper Indemnity Ins. Co.**,(Reported in Mealey's Litigation Report: Insurance, March 2, 2004)**.

- On or about December 3, 2003, Plaintiff filed suit against Defendant in the Superior Court of New Jersey.

- Plaintiff owned real property in Fords, New Jersey, which was purchased by Raritan Venture I, L.L.C. ("Buyer").

- Plaintiff alleges that Defendant issued a Clean-up Cost Containment Policy (the "Cost Containment Policy") and an Environmental Response Compensation Liability Policy (the "Environmental Liability") to Buyer, pursuant to which Plaintiff was an "additional insured".

- The Cost Containment Policy provided policy limits of $6,000,000, after exhaustion of the self insured retention in the amount of $7,074,564.

- The Environmental Liability Policy provided policy limits of $6,000,000.

- In addition to being an additional insured under the policies, both policies were assigned to Plaintiff by the U.S. Bankruptcy Court.

- The Complaint alleges that the costs to remediate the known contamination at the insured property are expected to exceed the self insured retention under the Cost Containment Policy, that a timely claim has been filed with Defendant and that Defendant refuses to accept the claim.

- The Complaint also alleges that unknown contamination, designed to be covered under the Environmental Liability Policy, has been discovered at the insured property, that a timely claim has been filed with Defendant and that Defendant refuses to accept the claim.

- Unable to locate pending case so suite likely dismissed.

28. Complaint Filed in the United States District Court, Southern District of New York in **Indian Harbor Ins. Co. v. The Lamson & Sessions Co.** (Civ. Action No.: 03CV9861) (reported in Mealey's Pollution Liability Report 23, March 8, 2004)).

- In December, 2003, Plaintiff, Indian Harbor Insurance Company ("Indian Harbor"), filed suit against The Lamson & Sessions Co. ("Lamson") in connection with a Pollution and Remediation Legal Liability Policy it had issued (the "Policy").

- According to Indian Harbor, Lamson purchased a pollution and remediation legal liability policy from Reliance Insurance Company in 1999 for a 10 year term (the "Reliance Policy").

- A few months after Indian Harbor issued the Reliance Policy, Lamson added a site known as the Mogadore Site to the Reliance Policy for an additional premium and with an exclusion for existing pollution conditions.

- Indian Harbor maintains that due to the financial difficulties of Reliance, Lamson asked Indian Harbor to issue the Policy upon the cancellation of the Reliance Policy and that Indian Harbor agreed to do so on the same terms as the Reliance Policy.

- According to Indian Harbor, the Reliance Policy was cancelled in June 2000 (with a return of a portion of the premium to Lamson) at the same time the Policy was issued to Lamson for a premium in an amount equal to the premium returned by Reliance.

- This was not an unusual situation, because Reliance policies were being cancelled and re-written by certain XL Companies, including Indian Harbor, during this time frame. Indian Harbor alleges that the drafter of the Policy inadvertently failed to include the exclusion for existing pollution conditions at the Mogadore Site contained in the Reliance Policy, but that it was the clear intention to exclude these pollution conditions.

- This alleged error was not discovered until almost two years later when Lamson submitted to Indian Harbor a notice of a Remediation Plan and cost estimate for the Mogadore Site.

- Indian Harbor then denied coverage of the pollution conditions identified in the Remediation Plan on the basis that they were known and existing pollution conditions that were to be excluded.

- Indian Harbor advises that it sent endorsements to Lamson to correct the mutual mistake/scriveners errors with respect to the Mogadore Site in order to make the Policy consistent with the Reliance Policy.

- Lamson allegedly refuses to accept the endorsements and continues to seek coverage under the Policy for the cost to remediate the pre-existing pollution conditions, which apparently totals in excess of $5,000,000.

- Indian Harbor requests a reformation of the Policy.

- In addition, Indian Harbor alleges that even without the reformation, the terms of the Policy preclude coverage of the claim.

- On December 31, 2007, Defendant's counsel advised the court that the parties reached a settlement agreement and requested additional time to "attend to the ministerial act of crafting an endorsement to the insurance policy implementing an already agreed to term."

- The latest court documents indicate that the parties are still negotiating endorsement language.

29. **Hudson Envt'l. Services Inc. v. New Jersey Property–Liability Ins. Guaranty Assoc.**, 858 A.2d. 39 (N.J. Super. 2004).

- Reliance Insurance Company ("Reliance"), now insolvent, issued a Remediation Stop Loss Policy to Plaintiff with policy limits of $750,000 (the "Policy"), subject to a $275,000 self insured retention.

- Plaintiff filed suit against Defendant for payment of a claim under the Policy.

- On motion for summary judgment, Plaintiff sought a declaration that Defendant was obligated to pay Plaintiff up to $300,000 in connection with its claim under the Policy.

- The motion alleged that prior to its insolvency, Reliance paid claims equal to the sum of either $302,000 (alleged by Plaintiff) or $370,000 (alleged by Defendant) under the Policy.

- Plaintiff argued that approximately $448,000 of policy limits remained available under the Policy and that Defendant was liable for $300,000 of those limits by statute.

- Defendant maintained that the $275,000 self insured retention in fact reduced the policy limits from $750,000 to $475,000 and that it had paid $370,000 in claims, and that as a result there was only $105,000 of limits remaining under the policy for which Defendant could have liability.

- While Defendant advanced a creative argument, court did not agree with it and noted that notwithstanding who was correct as to the amount paid by Reliance, the Defendant was liable up to the sum of $300,000 for a covered claim.

- In reaching its conclusion, court recited various provisions in the policy that confirmed that the $750,000 in policy limits was in addition to the self insured retention.

- Court also described the industry usage of the term self insured retention and distinguished it from a deductible, which would reduce the total policy limits available under a policy by the amount of the deductible.

- Finally, court reviewed the statute on which Defendant based its argument that the amount of the self insured retention should be deducted from the policy limits and found no support for the argument.

- Court granted summary judgment to Plaintiff on the issue of the amount of the potential claim against Defendant, but denied summary judgment to Plaintiff as to the precise amount to which it is entitled, leaving that issue to the trier of fact.

30. **Zurich American Ins. Co. v. Whittier Properties, Inc.**, 356 F.3d 1132 (9th Cir. 2004).

- The insurance policy in question in this decision covered a ZipMart gas station in Sterling, Alaska.

- In 1993, Whittier replaced the pipes servicing the underground storage tank ("UST") system at the station. At the time, it discovered minimal contamination.

- In 1995, the entire UST system was replaced, and a new 20,000 gallon tank was installed. Despite the discovery of contamination, Whittier removed and replaced the UST system without removing the soil.

- An environmental contractor disclosed the contamination to the Alaska Department of Environmental Conservation ("DEC") in October 1995 and recommended further work. Despite this disclosure and DEC's demands for corrective action, Whittier failed to take any steps to investigate the extent of the contamination.

- In 1999, Whittier applied to Zurich for a "Storage Tank System Third Party Liability and Corrective Action Policy".

- On the application form, Whittier's owner, Yovonne Baker indicated that she was not aware of any prior contamination. Allegedly, she believed the inquiry was only as to contamination from the new tank, as opposed to contamination from previous sources.

- After evaluating Baker's application, Zurich issued the policy for an annual premium of $350. The policy protected Whittier against third-party claims for damages due to contamination.

- In December 2001, an environmental investigation showed significant levels of contamination, in excess of those observed in 1995, and nearly a foot of free floating gasoline in the groundwater.

- Early in 2002, Whittier notified Zurich of the possibility of claims from the resulting contamination. Zurich denied its obligation to indemnify, and filed this suit for rescission of the policy due to Whittier's misrepresentations on the policy application regarding former contamination at the ZipMart site.

- The district court determined that Whittier made a material misrepresentation on its insurance application and granted summary judgment to the defendant, allowing Zurich to rescind the policy.

- Whittier appealed.

- In reaching its decision, the Ninth Circuit assumed that Whittier made a misrepresentation, and examined the issue of whether such a misrepresentation could give rise to a policy rescission.

- The Ninth Circuit reversed, holding that rescission was not an available remedy.

- Court noted that both federal and state regulations govern the operation of USTs in Alaska, and both require proof of "financial responsibility" before opening a gas station. Such responsibility may be demonstrated through the use of insurance coverage.

- The federal regulations specify precisely how a policy may be cancelled, including providing a mechanism for cancellation due to misrepresentation. Alaska has similar regulations.

- The EPA filed an amicus brief, stating that the "cancellation" of a policy is the exclusive remedy for a misrepresentation, and that rescission is not permitted.

- The Ninth Circuit held that the federal UST regulations, which have been adopted by Alaska, represent the exclusive remedy available to Zurich of the prospective cancellation of an UST insurance policy in the event of misrepresentation. While Alaska does have a statute that generally permits rescission of insurance policies in the event of misrepresentation, court noted that it does not specifically state that it applies to the statutorily mandated insurance policies covering USTs. In this instance, court found that the specific language of the UST regulations governing insurance cancellation must trump the general language of other statutes.

- As such, the Ninth Circuit vacated the district court's grant of summary judgment on the ground of rescission, noting that Zurich continued to have the right to seek contract or tort damages from Whittier if warranted.

- This decision was a blow to the environmental insurance market since it in effect provided that an insurance company bears the risk of known and undisclosed environmental conditions related to UST insurance policies used as a statutory financial assurance.

31. **Technology Square, L.L.C. v. United National Ins. Co.**, Civ. Action No. 04-10047-GA0, 2007 WL 534450 (D.Mass. February 15, 2007).

- Technology Square, L.L.C. ("TSL") purchased a pollution liability policy from United National Insurance Company ("UNIC") in June 1998 (the "Policy") for the property that it formerly owned in Cambridge, Massachusetts, known as "Technology Square".

- Beacon Capital Partners, LP ("Beacon") was the sole member of TSL and William Bonn ("Bonn") Senior Managing Director and General Counsel of Beacon was responsible for environmental affairs and for making decisions related to the purchase of the Policy.

- During a redevelopment effort at the property, TSL discovered lead, cyanide, petroleum hydrocarbons and polynuclear hydrocarbons, at concentrations exceeding mandatory reporting levels under Massachusetts law, which it reported to the appropriate governmental authorities.

- On April 4, 2000, the DEP issued a Notice of Responsibility (NOR) to TSL. The NOR identified TSL as a "Potentially Responsible Party with strict, joint and several liability

for response action costs, oversight costs, interest and treble damages." According to TSL, the NOR required it to take certain "Necessary Response Actions" such as an "initial site investigation", and to eliminate "all substantial hazards presented by the site" such that "a level of No Significant Risk exists or has been achieved".

- TSL alleged that it submitted a claim to UNIC, which subsequently denied coverage on May 31, 2001.

- UNIC's letter denying coverage stated that no claim or suit precipitated TSL's investigation and removal of soil and that the actions undertaken were voluntary. The letter further stated that since the condition was the result of "background contamination from urban fill", it "did not result from 'pollution conditions' as that term is defined in the Policy.

- After UNIC's refusal to pay a claim under the Policy, TSL filed a complaint against UNIC, on June 15, 2004.

- The complaint alleged that under the terms of the Policy, UNIC agreed to pay claims that TSL "becomes legally obligated to pay" for property damage resulting from pollution conditions "at, on or emanating from" the property, and also to pay for cleanup costs resulting from pollution conditions at, on or within the property, subject to the policy terms and conditions.

- TSL further alleged the Policy contained no pre-existing conditions exclusion, and no retroactive coverage date trigger, which would serve to preclude coverage of its claim.

- TSL claimed to have spent in excess of $750,000 on environmental investigation and remediation measures required by DEP, as well as other costs in dealing with the environmental issues.

- TSL asserted that coverage attached because the DEP Notice of Responsibility is a "claim" under Massachusetts law and that furthermore, it was irrelevant if the contamination involved is "background", as it is covered under the Policy when discovered in excess of DEP's reporting thresholds.

- TSL sought declaratory relief, damages for breach of contract, and damages, costs and attorney's fees resulting from UNIC's deceptive and unfair trade practices.

- UNIC moved for summary judgment in this matter primarily on the basis that TSL failed to disclosure material relevant information related to known conditions to UNIC prior to the purchase of the Policy.

- Court, adopting the Report and Recommendation of the Magistrate Judge (the "Report"), granted the motion in part as to the portion of Count 1 of the Complaint that alleged breach of contract under Coverage A of the Policy and denied the balance of the motion.

- In the motion UNIC alleged that TSL misrepresented material facts in its application for pollution liability insurance and that UNIC had the right to void the Policy under

Massachusetts law. In the alternative, UNIC alleged that the known conditions exclusion and the owned property exclusion in the Policy were applicable to, and precluded coverage of the claim.

- In the Report, the Magistrate Judge recites the factual allegations of the parties and notes that for purpose of summary judgment it must view the facts in a manner most favorable to TSL.

- TSL provided evidence that it conducted environmental due diligence prior to the acquisition of the property.

- This due diligence primarily consisted of the following items (the "Due Diligence Documents"), only one of which was provided to UNIC:

  - obtaining from the broker for the seller a 1997 Phase I Report ("Phase I") prepared for a prior owner, a copy of which was provided to UNIC;

  - conducting an internal due diligence meeting on February 26, 1998, which resulted in meeting minutes, which was not provided to UNIC (the "Minutes");

  - retaining an environmental consultant ("Stimpson") to "estimate environmental cleanup costs" and "evaluate the likely environmental conditions of the property." This included reviewing the Phase I, a collection of historical reports and information referred to in the Phase I that was available to the public and conducting a walk through inspection of the property. Stimpson issued a memorandum dated March 4, 1998 entitled "Ball Park Environmental Costs", which was not provided to UNIC (the "March Memorandum"); and

  - Stimpson drafted a letter to Beacon dated May 13, 1998 (which TSL maintains it never received) and which was not provided to UNIC (the "Draft Letter").

- The Minutes included a section entitled "Environmental", which noted, among other things, that contamination soil from oil and metals were to be expected, that volatile compounds were not suspected, nor was groundwater contamination anticipated. It also noted that excavated soils would require soil characterization thereby triggering a DEP reporting requirement and compliance with the Massachusetts Contingency Plan ("MCP"), and that notwithstanding development issues, the property should be brought into compliance with the MCP in anticipation of a future sale.

- As to the March Memorandum, it also indicated that construction at the property will likely trigger MCP requirements and suggested that the property be brought into compliance with the MCP, since it was likely that a future buyer would want to have MCP issues addressed given the use of the property in the past for heavy industrial use. In addition, the March Memorandum proposes costs for studies in connection with MCP compliance, but not actual cleanup, and construction costs resulting from handling potentially contaminated "urban fill", a small portion of which was anticipated to be hazardous waste.

- Finally, the Draft Letter contained a recitation of existing conditions, which were described in the Phase I, historical uses, including as a gas station and for soap

manufacturing and the results of a site visit (but no sample results because the seller refused to permit sampling). The conclusion, which provides, among other things, no indication of significant environmental impact from the existing uses, notes that releases of oil or other hazardous materials may have resulted from historical use. While the conclusion also indicates that soil excavation at the property will likely result in the need for characterization, which will "probably result in the exceedance of a reputable concentration…", which would in turn trigger the MCP, there was no indication of a significant environmental risk.

- In support of the position of TSL that it was entitled to coverage, Bonn testified that it was the practice of Beacon to obtain environmental insurance policies on its properties and that the reason the Policy was purchased arose out of his concern for potential environmental risks related to the Property based on the historical uses described in the Phase I.

- Bonn advised that he instructed Beacon's brokers to obtain quotes for an environmental insurance policy for the property prior to its purchase.

- The broker stated that she approached three insurance companies for quotes, providing the Phase I to each.

- She also explained that AIG refused to quote coverage due to its concerns about the environmental status of property; Kemper, although indicating it was concerned about the lack of Phase II sampling, did quote at a high premium; and UNIC quoted a more reasonable premium, and according to the broker, did not express a high level of concern about the environmental condition of the property.

- Noting that UNIC had the burden to prove that TSL misrepresented material facts its application and that coverage was precluded by certain exclusions, the Magistrate Judge examined the evidence at hand.

- UNIC propounded the argument that the facts, including the Due Diligence Documents, evidenced that TSL knew, at the time it applied for the Policy, that there was pre-existing contamination at the property that would trigger the MCP.

- UNIC also alleged that both the known conditions exclusion and owned property exclusion applied in this instance.

- As to the owned property exclusion, TSL conceded that it precluded coverage of its claim under Coverage A of the Policy (which covered bodily injury and property damage claims), but that its claim for reimbursement of cleanup costs under Coverage B was not impacted by either the owned property exclusion or the known conditions exclusion.

- TSL also argued that all material facts were contained in the Phase I, and that the conclusions and speculations in the Minutes, the March Memorandum and the Draft Letter (which TSL maintains it never received) were all derived from the Phase I and that UNIC could have reached its own conclusions and opinions as to the environmental status of the property based on the Phase I.

- As to the proofs propounded by UNIC in connection with its allegation of material misrepresentations, court focused in on one particular question in the Policy application (which is similar to questions found in current policy applications). Specifically, "at the time of signing this application are you aware of any circumstances which may reasonably be expected to give rise to a claim under this policy?" TSL, in response to this question, referenced the information previously provided in the Phase I .

- UNIC contends that this reference was insufficient and that TSL should have also supplied the Minutes, the March Memorandum and the Draft Letter (the "Additional Due Diligence Documents"), and that TSL should have told UNIC that TSL would be constructing on the property (TSL maintains that it did) and that the seller would not permit TSL to test soil or groundwater.

- UNIC also maintained that the Additional Due Diligence Documents and the fact that TSL would be constructing on the property and that it was precluded from performing testing on the property prior to purchase evidenced that TSL was "aware" of the fact that a claim might result under the Policy.

- TSL does not dispute that UNIC was not provided with the Additional Due Diligence Documents, but firmly stands by its position that all of the material information was contained in the Phase I (which UNIC had) and that the Additional Due Diligence Documents only contained speculations or opinions as to what might ultimately be discovered at the Property, and further that UNIC could have drawn its own conclusions from the Phase I as to the potential for a claim related to the environmental history of the property.

- The Report then recites the various allegations of the parties, responsive affidavits and other testimony, including the affidavit of the UNIC underwriter, which claimed that if he had all of the Additional Due Diligence Documents and other information, he would have never quoted coverage.

- After examining all of the foregoing, the Magistrate Judge concludes that TSL has propounded sufficient evidence of disputes of fact and denies summary judgment to UNIC (other than partial summary judgment as to Coverage A), and District Court concurs.

- The facts of this case and the arguments of the parties are set forth in the Report and should be carefully reviewed and considered in any case in which an insurer is taking the position that a claim relates to a known, undisclosed condition.

32. **USAA Casualty Ins. Co. v. Duell Fuel Co.,** Docket No. ATL-L-1121-02. (2004).

- Defendant, Everest Indemnity Insurance Co. ("Everest") brought a motion to dismiss a suit filed against it in connection with a discharge of home heating oil.

- Interstate Tank Testing Service, ("Interstate") Everest's insured, tested a heating oil tank at homeowner's property in connection with sale of the property.

- The term of the "claims made" contractor's pollution legal liability coverage issued to Interstate by Everest ran from June 8, 2000–June 8, 2001. The Complaint was filed on March 27, 2002 and Everest was allegedly notified of the suit on May 1, 2002.

- The alleged discharge occurred sometime between December 1995 and January 1996.

- Everest denied coverage of the claim on the basis that the lawsuit was not filed until after the coverage expired.

- Citing the New Jersey Supreme Court's decision in Zuckerman v. National Union Fire Ins. Co., 100 N.J.304 (1985), court explained that the trigger of coverage under this policy was the notice of claim to the insurer and held that since the claim was not made during the policy period, Interstate was not entitled to coverage.

33. **ABO Petroleum, Inc. v. Colony Ins. Co.**, No. 04-CV-72090-DT, 2005 WL 1050220 (E.D. Mich. April 19, 2005).

- The insured plaintiff, ABO Petroleum ("ABO"), owned and operated a gas station in Michigan on which four underground storage tank systems were located.

- The defendant, Colony Insurance Company, issued a claims made Storage Tank Pollution Liability Policy ("Policy") to plaintiff for the term January 14, 2003 to January 14, 2005. The Policy covered the facility and the storage tank systems.

- In order to pay for the Policy premium, ABO entered into a financing arrangement with Premium Financing Specialists, Inc. ("PFS"). PFS agreed to pay the entire policy premium, and ABO agreed to repay the premium monthly. As part of the agreement, PFS reserved the right to cancel the Policy.

- ABO missed at least one payment and as a result PFS cancelled the Policy as of June 9, 2003.

- An environmental consultant working for a potential buyer discovered the presence of gasoline in a monitoring well on June 12, 2003 (three days after the policy was cancelled), and reported it to the Michigan Department of Environmental Quality on June 13, 2003.

- On June 16, 2003 ABO asked the defendant to reinstate its policy, which it apparently did on the same day.

- On July 15, 2003, ABO notified the defendant of the release of pollutants. The defendant issued a reservation of rights letter on July 30, 2003, and later denied coverage because the release occurred before the effective date of the Policy.

- ABO filed suit against the defendant alleging breach of contract for failure to pay for the costs of remediation. Court entertained arguments for cross motions for summary judgment.

- Court first analyzed the argument for restoration of the Policy in terms of the "known risk" and "loss in progress" doctrines, each of which limits the duty of insurers to

indemnify insureds for losses in situations in which the insured knew or should have known of a substantial probability of the loss before the policy began (known loss), or where at least part of a loss began prior to the policy coverage (loss in progress).

- Court rejected ABO's arguments as to these points, because the damage occurred after cancellation of the Policy, but before reinstatement, which court proposed began a new policy period. Specifically court found that there were two policy periods, one that ran from January 14, 2003 through June 9, 2003 and one that ran from the date of reinstatement, June 16, 2003 and ended on the original termination date, January 14, 2004, leaving a 6 day period of no coverage. After reinstatement of the policy, the damage became a "loss in progress" and "known risk," relieving the defendant of responsibility for those damages.

- Court further took issue with ABO's failure to report the damage until after policy reinstatement, despite the fact that the insured clearly had knowledge of the loss for a month before it reported it. Court granted summary judgment to the defendant on this point, because no jury could reasonably find anything but that ABO failed to report the loss as soon as practicable.

- ABO also argued that its claim was covered because the cancellation was not effective until 10 days after the PFS notice of cancellation and cited to language in the Policy that required the insurance company to provide 10 days notice of cancellation.

- Court quickly dismissed this argument noting that an agent of the insured had cancelled the policy, and in that circumstance the cancellation was effective immediately.

- Next court examined whether there was coverage for this claim under the first policy period.

- Defendant argued that coverage was precluded since ABO reported the loss on July 15, which was after the first policy period ended on June 9.

- ABO countered that it was entitled to coverage on the basis that the automatic extended reporting period (180 days) for the first policy period applied and that it therefore had an extended period of time during which it could report a loss.

- Court noted that defendant failed to address the extended reported period in its argument, and proposed that based on its analysis of the facts, it could not find as a matter of law that ABO's notice under the first policy period was late, since it did fall within the 180 day extended reporting period.

- Court, on the basis of supplemental briefs, filed after the summary judgment hearing, then looked at the notice provision in the Policy, which required notice of a claim "as soon as practicable."

- Court found that the notice provision acted to guard against fraud, giving the insurer an opportunity to investigate the incident in question and whether it fits within policy coverage.

- Here, the parties argued over whether a reasonable jury could have determined that ABO gave the insurer notice as soon as practicable, or, as the court defined it, within a reasonable period of time.

- Applying Michigan law, court explained that late notice does not necessarily relieve the insurer of its coverage obligation, rather the insurer has the burden to show that notice was late and that this actually prejudiced the insurer.

- Generally Michigan courts leaves the issue or prejudice to the trier of fact to resolve, but if the judge determines, on a summary judgment motion, that only one reasonable conclusion is possible, it becomes a matter of law for the judge to determine.

- Court concluded that based on the facts of this claim, no reasonable jury could find that the month long delay in providing notice by ABO was reasonable. However, court found an issue of fact to exist as to whether that lack of notice caused material prejudice to the defendant.

- Ultimately, and notwithstanding the issue of fact and the analysis of the issues set forth above, court granted summary judgment to the defendant because ABO did not demonstrate admissible evidence which a reasonable trier of fact could determine that the release of pollutants sprang from a covered storage tank system.

- Under the Policy, it was clear that ABO had the burden to show a release that came from the covered storage tank system.

- Court examined the evidence that ABO presented to support this position, which included the testimony of its environmental consultant and its agent operating the station, and found neither to present sufficient evidence from which a reasonable jury could conclude that the discharge came from the insured underground storage tank system.

34. Complaint Filed in the United States District Court for the Southern District of New York in **Greenwich Ins. Co. v. SLC Holdings, as successor in interest to Gateway Group, Inc., St. Louis Cardinals, L.L.C. f/k/a St. Louis Cardinals, L.P.**, (Civ. Action No. 06-CV-745) (filed January 31, 2006).

- Plaintiff, Greenwich Insurance Company ("Greenwich"), is suing for rescission of a Pollution and Remediation Legal Liability Insurance Policy (the "Greenwich Policy") and a declaratory judgment confirming denial of coverage for claims of defendants' due to their alleged material misrepresentations of fact.

- Plaintiff alleges that in 1996, defendant Gateway, purchased the St. Louis Cardinals Major League Baseball organization, Busch Stadium and its surrounding parking lots from Anheuser Busch with the intention of demolishing Busch Stadium and building another stadium in the then existing bus parking lot ("Bus Lot Site").

- Around the time of the purchase, Plaintiff alleges that a Phase I Environmental audit: (a) was prepared on behalf of Anheuser Busch which examined the then existing Busch Stadium property ("Busch Stadium Phase I"); and (b) was prepared with respect to an adjacent bus lot ("Bus Lot Phase I") on behalf of defendant, Gateway's, lender.

- The Complaint alleges that the Bus Lot Phase I noted environmental concerns at the Bus Lot Site due to historical usage and possible removal of underground storage tanks.

- The Complaint further alleges that the Busch Stadium Phase I also noted environmental concerns at the Busch Stadium site due to historical use, and estimated that the cost to remediate would be between $3.5 million to $4.8 million.

- Subsequently Gateway obtained an environmental insurance policy from Reliance National Indemnity (the "Reliance Policy"). It is alleged that when applying for the Reliance Policy, Gateway indicated the existence of environmental reports regarding the property it sought to insure, but that it merely provided information relative to former underground storage tanks that had been removed and that no Phase I reports nor any of the information contained in the Phase I reports were produced.

- It is alleged that Gateway then sought to obtain a policy from Plaintiff, Greenwich, around March 2000. Plaintiff claims that on its application, Gateway stated that no prior environmental audits or studies had been prepared for the property. Gateway further stated that it was not aware of any circumstances that may reasonably be expected to give rise to a claim under the pollution liability or general liability policy.

- Greenwich maintains that it issued the Greenwich Policy in reliance on the policy application and the information contained therein.

- Greenwich also alleges that it was not notified of Gateway's intention to demolish the old stadium and build a new one during the application process, even though the plans to do so were almost complete at the time of the application.

- Further, Greenwich alleges that in 2002 and 2003, a new Phase I report as well as subsequent Phase II environmental reports and other documents confirmed the results of the earlier Phase I reports and of contamination, but that no notice of claim or of environmental conditions were provided to Plaintiff.

- According to the Complaint, in March 2003, Gateway applied to Missouri's Brownfield Tax Credit Program and provided them with a description of the environmental conditions at the Bus Lot Site, but had yet to inform Greenwich of any claim or of the environmental conditions.

- Greenwich alleges that defendants agreed to perform a cleanup to residential standards (which was much more costly than that required by law) and characterized certain excavation costs that were site improvement costs, as site remediation costs, all in order to get the benefit of tax credits, and to keep the stadium construction schedule on time, and all without notice to Greenwich.

- Further, Greenwich alleges that soil removal commenced at the Bus Lot Site, all without notice to or the consent of Greenwich.

- The Complaint also states that the first notice of claim was submitted by defendant's broker on January 20, 2004 for coverage of cleanup costs associated with petroleum and heavy metals at the Bus Lot Site, which had reportedly been discovered after the

commencement of construction excavation activities. No mention was made of the prior environmental reports and activities related to the Bus Lot Site.

- Further, defendants allegedly continued with and completed the cleanup without the consent of Greenwich and in total incurred costs for the Bus Lot Site in excess of $14,223,755 less the Brownfields Tax credits of $6,657,290.

- Greenwich recites that a second claim was made under the Greenwich Policy by the defendants on March 10, 2005 for cleanup costs arising out of lead, mercury and petroleum at the Busch Stadium site.

- As with the prior claim, Greenwich alleges that the Phase 1 report from 1996, which would have indicated the environmental conditions at the Busch Stadium site, was never disclosed to Greenwich.

- Additionally, Greenwich alleges that defendants failed to provide documentation in support of this second claim and instead defendants take the position the costs will not be fully ascertainable until 2009.

- Greenwich states that it sent a notice of rescission of the Greenwich Policy and a denial of coverage to defendants on January 31, 2006.

- Greenwich seeks policy rescission (on the basis of New York law) due to the material misrepresentations of fact claimed above, specifically Gateway's representation that no prior environmental audits had been done, and its statement that it was not aware of any circumstances which may reasonably be expected to give rise to a claim under the Greenwich Policy.

- Greenwich also seeks (in the alternative) a declaratory judgment that its denial of coverage for the following reasons was appropriate:

    - material misrepresentation in Policy application;

    - late notice;

    - known conditions exclusion;

    - voluntary payments;

    - capital improvements;

    - tax credit offset;

    - no coverage for contractor delay costs;

    - no pollution conditions, rather construction costs.

- Greenwich also claims coverage should be denied to the extent that defendant entered into Missouri's Voluntary Clean Up Program and remediated the property to residential clean up standards, a standard not required at the site.

- This case was promptly settled and dismissed on May 4, 2006.

35. Complaint Filed in the Superior Court of the State of California, Los Angeles County, in **Los Angeles Unified School District v. American Int'l Group** (Case No. BC348165) (filed February 28, 2006).

- After a bidding process with competing insurers, the Los Angeles Unified School District ("LAUSD") purchased a Pollution Legal Liability Policy ("Policy") from American International Specialty Lines Insurance Company, an American International Group company ("AIG") in order to manage environmental liabilities that might arise from its school rehabilitation and construction project.

- AIG issued the Policy in October 1999 to insure against losses stemming from environmental contamination on all existing and as yet unidentified LAUSD locations. The policy covered LAUSD from August 11, 1999 until August 11, 2019, a term of twenty years.

- The Policy had limits of $50 million per incident and $100 million total. LAUSD paid a premium of $7,493,978, in four installments, completing its final payment on May 5, 2000.

- The Policy specifically protected LAUSD against loss arising from two classes of property: 1) all LAUSD sites identified on a schedule as of the date of issuance of the Policy and 2) 100 new, unascertained sites, properly designated during the policy period by LAUSD and approved by AIG pursuant to an underwriting process.

- According to LAUSD, the Policy provided for identical coverage of both existing and new sites, subjecting the new sites to reasonable exclusions applied on the same basis as the existing sites.

- The Policy identified a loss as either monetary awards or settlements stemming from bodily injury or property damage; costs for defense, investigation or claims adjustments for those damages; or costs for clean up as needed.

- The Policy also covered both pre-existing and newly occurring pollution conditions. For both types of coverage, the policy insured against costs for pollution conditions discovered by LAUSD, as well as against losses incurred by LAUSD from third party clean up claims.

- LAUSD filed suit against AIG for damages and declaratory relief, under several causes of action, including breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, and unfair business practices.

- The Complaint states that the Policy specified that AIG bore the burden of identifying any and all known pre-existing pollution conditions and to issue an endorsement to the Policy that definitively listed all of the known excluded pollution conditions, and that two such endorsements were issued. The Policy was allegedly structured in this manner to provide LAUSD the certainty that no disputes would arise in the future over whether a known and excluded condition existed at the time of the issuance of the Policy. LAUSD

claims that in order to assist AIG in performing due diligence, LAUSD afforded AIG open and complete access to documents describing the conditions on each site; to the consulting and legal firms it retained during the project; and to the LAUSD personnel who had knowledge of the conditions on each site, and even provided AIG with a list of sites with known contamination.

- LAUSD alleges that on October 17, 2005, AIG repudiated its agreement to assume the burden to identify known pre-existing pollution conditions after LAUSD filed substantial claims relating to sites not specified in two endorsements that delineated specific sites and the conditions therein.

- The Complaint also alleges that AIG denied coverage of State prescribed remediation costs for contaminants that were not excluded by the Policy at approximately ten sites.

- The Complaint next alleges that AIG unreasonably delayed payment for valid claims stemming from at least fifteen sites, despite LAUSD's proper, timely notice.

- LAUSD also alleges that AIG unreasonably delayed its underwriting processes. The Complaint states that LAUSD provided detailed information regarding the current state of new sites as they were added and timely provided AIG with responses to any questions raised by the submission of information for underwriting of the new sites.

- Further, LAUSD complains that AIG breached a critical Policy term by not affording the same coverage to newly identified sites as it did to the existing sites. LAUSD alleges that when underwriting the new sites, AIG attempted to alter the terms and conditions of the coverage provided to the existing sites as it applied to the new sites, and has also refused to include new sites specifically unless LAUSD accepts the changed coverage. LAUSD claims that this has caused harm by impairing its ability to plan and implement its school rehabilitation and construction project.

- LAUSD similarly alleges that AIG's refusal to grant uniform coverage to its new sites after issuance of NFA letters or other regulatory clearance amounts to a tactic by AIG to make unilateral decisions without consulting proper regulatory or governmental decisions, thereby depriving LAUSD of its reasonable expectations of coverage.

- The Complaint also specifies a number of changes to the coverage for the new sites, including additional exclusions related to capital improvements made or to be made on the site, exclusion for material changes in use of sites, and deletion of the "first party trigger" for sites for clean up of pre-existing pollution discovered by LAUSD.

- LAUSD also alleges that AIG took affirmative steps to shift the burden of identifying known pollution conditions to LAUSD by denying claims related to certain sites, when AIG clearly had access to all LAUSD documentation identifying those sites as containing certain contaminants. AIG subsequently had the opportunity to exclude those contaminants, but chose not to do so. The subsequent denial of coverage, according to LAUSD, amounts to a repudiation of AIG's obligation to classify conditions at the onset of the policy period.

- The Complaint continues with allegations that AIG repudiated its contractual obligation to pay for soil remediation costs by adding terms such as "betterment" and

"apportionment" to the Policy that are neither expressly stated in nor reasonably implied by any other term in the Policy. Essentially, LAUSD alleges that AIG deducted amounts from claims paid for soil removal allegedly equal to the amount attributable to incidental removal of contaminants in soil not covered by the policy, where the remediation was driven by contaminants that were not excluded under the Policy and where the covered contaminants could not be removed without removing all of the impacted soil. LAUSD terms this deduction as the "apportionment" theory. Further, according to LAUSD, AIG also asserted that it was entitled to make deductions from claims payments to the extent the sites were improved by any remedial measures that resulted in a "betterment to LAUSD."

- LAUSD goes on to contend that, without justification, AIG refused to remove exclusions or grant coverage for sites following remediation and determinations of regulatory clearance by the California Department of Toxic Substance Control (DTSC).

- LAUSD also alleges that AIG refused to provide coverage for claims related to unknown underground storage tanks at two of its sites, when the Policy clearly provides coverage for those tanks.

- LAUSD further proposes that AIG denied certain claims under the pretext that LAUSD made voluntary payments with respect to LAUSD's claim for remediation at certain sites, on the basis that it failed to obtain prior written approval of the remedial activities from AIG. LAUSD asserts that those payments were made pursuant to the DTSC's ruling, in accordance with state and federal mandates, not voluntarily, and that AIG's denial of reimbursement for those payments amounts to bad faith.

- The Complaint lists LAUSD's assertions that AIG wrongfully, and without basis, denied payment of claims for allegedly mismanaged remediation, withholding of information, and improper and insufficient notice of claims by LAUSD.

- Finally, LAUSD maintains that AIG threatened to demand a return of payment for claims that AIG already made, in an effort to exert influence over the position of LAUSD with respect to its claims.

- According to at least one published report, the parties are engaging in settlement negotiations, in order to avoid protracted litigation.

36. **Viacom Int'l v. Admiral Ins. Co.**, 2006 WL 1060504 (N.J. Super. A.D. April 21, 2006) (Unpublished).

- This case looks at two important issues: choice of law, when damages stem from pollution at multiple insured sites, and allocation of costs among insurers under an "other insurance" provision in a policy where it is not clear which insurers are primary, excess, or umbrella.

- Viacom purchased the assets and liabilities of Gulf & Western, Inc. ("G&W"), including some 47 sites in a total of seventeen states with known environmental pollution. The instant litigation examined a site in Pennsylvania and a site in Illinois.

- Viacom allegedly owned and/ or had rights to more than 80 insurance policies that consisted of either Commercial General Liability ("CGL") or Environmental Impairment Liability ("EIL") policies and that provided primary, umbrella, or excess coverage.

- Viacom filed a complaint against its insurers, asking for damages for breach of contract, as well as seeking a declaratory judgment to determine which of its insurers were primary, based on an "other insurance clause" in its primary EIL policy.

- Court undertook an explanation of the difference between CGL policies, which tend to afford broad coverage, and EIL policies, which specifically guard against the pollution liability allegedly excluded by CGL policies since the 1970s.

- Court first grappled with the choice of law problem presented by the litigation. Essentially, it could choose from the law of four states: the forum state, New Jersey; the state of one contaminated site, Pennsylvania; the state of another contaminated site, Illinois; or the state where G&W had its headquarters and where Viacom has its principal place of business, New York.

- Court first turned to the choice of law issue, noting that it would follow the Restatement (Second) of Conflicts of Laws, § 6 (1971) seven-pronged test for determining the correct application of state law. These factors form the nucleus of the "dominant significant relationship" test, in that court should apply the law of the state who has the dominant significant relationship to the subject of the litigation.

- Court further whittled down the Restatement factors to four: 1) state interest; 2) interstate commerce; 3) party interest; and 4) judicial administration.

- Court next analyzed the state of the law in each potential state. New Jersey adopted a continuous trigger for pollution cases. Essentially, coverage is triggered for all policies implicated by the claim, not just the primary policy and allocated among the triggered policies pursuant to a formula. In Pennsylvania, one or more policies can cover the entire loss, and their need not be an allocation by the insured. Illinois law has not addressed this issue, and New York law is not clear.

- Court found the laws of the four states to conflict, so it had to resolve the conflict. It went through the four pronged test and determined that each claim would be resolved based on the substantive law of the state in which the pollution occurred.

- This case shows the importance of evaluating whether a choice of law provision should be negotiated into a policy, especially where the insured has sites to cover in multiple states. Obviously, the insured will want to apply the law of the state most favorable to broad coverage, and the insurer will look to apply the law of the state most favorable to the insurer, generally, New York law.

- Court then turned to the issue of allocation among the EIL and CGL insurers, under the "other insurance" provision contained within the EIL policy. Viacom insisted that the court apply the 1984 EIL policies first to cover losses at a particular site and that those EIL insurers were not entitled to contribution from the CGL policies.

- Viacom argued that the "other insurance" provision in the Aetna EIL policy allows Viacom to choose to have that policy provide primary EIL coverage, notwithstanding that the policy term states that it is excess, since the policy specifically provided that it was excess "unless the insured should otherwise agree" and Viacom took the position that it was agreeing it was primary.

- Aetna objected to this position, but court sided with Viacom's interpretation, finding that the only possible construction of the term "otherwise agree" was that Viacom could agree with another insurer that the Aetna policy would afford primary coverage, and the other insurer would contribute excess coverage for the particular claim.

- Court disagreed, however, with Viacom's argument that its EIL policies must fully pay for the damages at the specific site without giving those insurers a right of set-off or contribution against Viacom's CGL policies. Court found that despite Viacom's argument, Viacom could only choose the insurers to whom it would submit a claim; Viacom could not determine which of its insurers were liable to one another.

- Court continued, finding that a broader policy, such as Viacom's CGL policy, could be compelled to contribute a pro rata share of the sums paid to an insured under a narrower policy, such as Viacom's EIL policy.

- Court also found that precedent shows that an EIL policy and a CGL policy can cover the same environmental contamination, the same site, the same interest, and the same risk and liability for remediation. Essentially, an insured can have more than one policy for the same risk, and the right of set-off or contribution can be exercised by any insurer to whom the insured submits a claim.

37. **Konell Construction and Demolition Corp. v. Valiant Ins. Co.**, 2006 WL 1360956 (D. Or. May 15, 2006).

- This case, on remand from the Ninth Circuit which overruled a lower court ruling in favor of defendant, presents a brief but interesting look at how this court construed the meaning of a 72 hour period in a Limited Pollution Coverage policy.

- Plaintiff, Konell, purchased an insurance policy from the defendant, Valiant Insurance Co., which provided that the defendant would indemnify Konell for damages resulting from environmental contamination, provided that the damage occurs from one incident, at an insured work site, and that the incident commences and ends within 72 hours.

- UBEHO Investment Co. ("UBEHO") hired Konell to provide demolition and removal services in connection with a fire-damaged building on a property it owned. As part of its services, Konell provided over 130 truckloads of soil from another site to fill the hole created by the building demolition.

- Work began on a Friday. It restarted the following Monday and continued and was completed by Tuesday. Ultimately it was discovered by UBEHO that the soil bought to the site by Konell and used as fill contained petroleum contamination. Thereafter, UBHEO made a claim against Konell with respect to the contaminated soil and demanded that the soil be removed from the site and replaced with clean fill. Konell notified defendant of the claim and defendant denied coverage.

- Subsequently Konell brought suit against the defendant insurer, arguing that it had failed to defend it in a suit brought by UBEHO for damages stemming from contamination in the soil used as fill by Konell on the UBEHO site. An arbitrator in the underlying matter awarded UBEHO damages against Konell in the amount of $184,883 plus interest, representing UBEHO's costs to remediate the site.

- On remand, court was first required to interpret the meaning of the 72 hour limitation in the policy for pollution claims, and needed to determine whether each individual delivery of soil constituted a separate incident under the policy, or whether all deliveries constituted one incident.

- Konell asked the court to calculate the occurrence's duration by excluding nights and weekends from the 72 hour period. Essentially, it argued that each incident occurred briefly, only lasting as long as it took to dump the soil on the site. In other words, each individual delivery (138) amounted to a separate discharge of pollution. Accordingly, the incidents did not occur at night or on the weekend because the clock stopped upon delivery, and restarted with the next delivery.

- Defendant urged a plain language interpretation, which held that 72 hours meant one continuous period starting with the first load delivered on Friday. Accordingly, the clock would have run continuously until Monday.

- Here, court found each argument reasonably possible, though it admittedly agreed with the defendant. However, because the rule of contractual interpretation in the Circuit held that if a court can reasonably construe more than one interpretation of a policy, the policy must be construed against the drafter. As a result, court entered summary judgment in favor of Konell on this issue.

- Court also touched on the policy's definition of "at the work site." Defendant argued that it did not have to provide coverage to Konell because the pollution incident that resulted in the contaminated soil did not occur on a UBEHO site, but on a separate property. Essentially, the insurer argued that the pollutants were released elsewhere, not on a UBEHO work site, therefore simply placing the contaminated soil at the UBEHO site did not amount to an incident.

- Court struck down that argument, finding it an unreasonable construction of the policy. Court noted that the incident at issue here was not the contamination at another site, but the contamination of previously clean site by delivery of the petroleum contaminated soil to the work site, and again entered summary judgment in favor of Konell.

38. **R.L. Vallee, Inc. v. American Int'l Specialty Lines Ins., Co.**, 2006 WL 1364306 (D.Vt. May 17, 2006).

- R.L. Vallee, Inc., ("Vallee") filed a complaint, on behalf of itself and as assignee of MacIntyre Fuels, Inc. ("MFI"), against Defendant American International Specialty Lines Insurance Co. ("AISLIC"), for breach of an insurance agreement. The complaint alleged that AISLIC breached the policy by failing to defend and indemnify MFI in an underlying action. AISLIC filed a motion to dismiss for failure to state a claim for which relief may be granted, pursuant to Fed. R. Civ. Pro. 12(b)(6).

- AISLIC issued a contractor's pollution liability policy (the "Policy"), naming MFI as an insured, for the policy period from April 30, 1998 to April 30, 1999.

- The Policy provided coverage for loss suffered by the insured arising out of property damage or environmental damage caused by covered operations. Covered operations under the Policy included UST/AST removal and installation performed at a job site.

- In the early 1990's MFI leased real property on which it operated a gasoline station (the "Site"). Sometime in 1992, MFI removed four underground storage tanks ("USTs") at the Site.

- Contamination was discovered, allegedly the result of leaks from piping attaching the USTs to the pump islands.

- After removing the USTs and contaminated soils, MFI installed piping from above ground storage tanks ("ASTs") to service new pump islands. Despite MFI's remedial activities, contamination remained at the Site.

- In June 1995 Vallee purchased the Site, including all improvements (and ASTs), but MFI remained responsible for the contamination.

- On August 17, 1998, Vallee pressure tested the AST system and discovered that the AST underground piping had leaked.

- The leak from the AST piping allegedly took place sometime after August 1992 (when installed) and continued until the leak was repaired on August 19, 1998.

- In the underlying suit, Vallee sued MFI and Mr. and Mrs. MacIntyre (the "MacIntyres") after MFI ceased work in October 2002, alleging that MFI negligently installed the AST piping.

- MFI sought coverage of the suit from AISLIC, which was denied on a number of bases, including AISLIC's interpretation of the definition of "job site" in the Policy.

- Ultimately, parties settled the underlying suit, and judgment was entered in favor of Vallee and against MFI (which was insolvent) for $1,500,000 and Vallee agreed only to execute the judgment against AISLIC.

- Prior to settling MFI notified AISLIC of the proposed settlement and it again denied coverage on August 17, 2004.

- As part of the settlement, MFI assigned its rights against AISLIC to Vallee.

- Vallee filed this suit seeking, among other things, damages for breach of the duty to defend, the duty to indemnify, and breach of contract. AISLIC moved to dismiss for lack of subject matter jurisdiction (based on lack of diversity) and failure to state a claim pursuant to Fed. R. Civ. Pro. 12(b)(6).

- As to AISLIC's failure to state a claim allegation, AISLIC argued that MFI could not assign its rights under the Policy to Vallee without its consent and that since it had not consented, the assignment was not valid. Vallee countered that a post-loss assignment does not violate the anti-assignment clause in the Policy.

- Court examined the anti-assignment provision, forbidding assignment without prior written consent from the insurer and applicable law on this issue. Court found that the rights were assignable in this instance because the transfer took place after the loss occurred and was not a transfer of the Policy itself, but a transfer of a "chose in action" against the insurer. Court reasoned, based on the weight of authority on this topic, that an insurer agrees in an insurance contract to guard against the risk presented by the actual insured. As a result, a pre-loss assignment of the policy changes the nature of the agreed upon insured risk, but in a post-loss assignment, such as here, the presumptive risk has already happened.

- Court then turned to Vallee's allegations that AISLIC has breached both its duty to defend under the Policy. Court noted that AISLIC's duty to defend would only be triggered if the complaint in the underlying state action alleged any claims that could be covered by the policy. Court then examined Vallee's claims against MFI in the underlying complaint.

- AISLIC argued that the policy language precluded coverage for contamination from the UST piping because: (a) it did not occur during the policy period; (b) it fell under an exclusion; (c) the piping at issue related to the service station operation and not a covered operation; and (d) the service station was not a covered job site.

- Addressing each of those concerns, court found that (a) the language of the policy provided that if the date of first exposure occurred before the policy date or was indeterminate, it would be deemed to have occurred on the first day of the policy. Hence, the leak did occur within the policy term; (b) the exclusion of known conditions cited did not bar coverage, because the contamination from the AST piping complained of was not the same as the existing UST contamination; (c) the covered operations clause was broad enough to encompass these claims (UST/AST removal/installation) (d) the term "job site" was not defined in the Policy, so the court used the dictionary definition, finding that although AISLIC might have intended to limit coverage by adding this term into the Policy, the term "job site" was broad enough to encompass this claim.

- Based on the forgoing, the magistrate judge recommended and ruled that AISLIC's motion to dismiss for failure to state a claim (other than a claim for consumer fraud) be denied and the District Court affirmed, adopted an approved the decision.

39. **Continental Carbon Co., Inc. v. American Int'l Specialty Lines Ins. Co.**, 2006 WL 1442237 (S.D. Tex. May 23, 2006).

- Continental Carbon ("Continental") brought suit against American International Specialty Lines Insurance Co. ("AISLIC"), seeking a declaratory judgment that AISLIC had a duty to defend Continental against three connected lawsuits.

- The underlying suits alleged various environmental damages stemming from Continental's carbon black plants in Texas and Oklahoma.

- The various suits alleged, among other things, the improper handling, shipping, management and disposal of hazardous waste, improper discharge of wastewater, and other miscellaneous violations.

- AISLIC insured Continental through two claims made insurance policies covering the period from July 30, 2001 through July 30, 2003, containing pollution legal liability coverage.

- In connection with various motions made by the parties, court analyzed whether or not AISLIC had a duty to defend Continental in the underlying suits. AISLIC claimed that the pleadings in the underlying suits did not allege facts that would trigger that duty, and Continental took a contrary position.

- Under Texas law, the duty of an insurer to defend a suit is broader than the duty to indemnify, and there may be a defense obligation on the part of the insurer, even if it is ultimately found to have no indemnification obligation. As a result, in order to make a determination as to an insurer's duty to defend an insured in connection with a suit, court must analyze the allegations of the complaint to determine whether there is a possibility of coverage.

- Here court analyzed three possible areas where the duty to defend might appear: 1) bodily injury, 2) property damage, and 3) cleanup costs.

- With regard to bodily injury, since the underlying suits were all brought by a group entity, as opposed to a human being, that neither asked for compensatory damages for bodily injury, nor had standing to make such a claim, court determined that AISLIC had no duty to defend against a claim for bodily injury in the underlying suits.

- Similarly, court found that AISLIC had no duty to defend against underlying suits for property damage (not including cleanup costs) because the complaints did not allege that any of the plaintiffs in the underlying cases owned the property involved in the suits.

- Finally, court addressed the clean-up cost issue. Continental argued that the underlying suits expressly addressed the possibility of claims for groundwater remediation, caused by the release of pollutants. As such, on its face the complaints established a claim for clean-up costs under the policy.

- Court noted that the plain policy language clearly addressed AISLIC's affirmative responsibility to indemnify Continental for clean up costs for remediation occurring outside Continental's property, caused by pollution conditions on or under the insured property.

- AISLIC claimed that the complaints did not allege costs for investigation, removal, remediation or disposal. However, AISLIC did admit that the underlying suits did ask the court to create a schedule for complying with certain environmental laws that determine clean-up issues.

- Court turned to the underlying suits to determine whether there was a possibility of coverage for clean-up costs.

- AISLIC argued that in one of the underlying suits, judicial interpretation of the Clean Water Act ("CWA") prohibited the awarding of clean-up costs to the insured for past pollution in a citizen suit. Court found that to be an overly broad interpretation of the particular case cited by AISLIC. Rather, court found precedent that showed that a government ordered cleanup could be a remedy in a CWA suit. Because the plaintiffs in that underlying suit alleged continuous violations of the CWA, a court possibly could have demanded the defendant to pay clean-up costs.

- As to the other two underlying suits, they alleged violations of RCRA and court agreed with Continental that cleanup costs are a potential remedy for a violation of RCRA.

- As a result, court next had to determine whether clean-up costs would qualify for coverage under the policy.

- In analyzing the potential for qualification, court turned to the policy language, which mandated that clean-up costs stem "from pollution conditions on or under the insured property which have migrated beyond the boundaries of the insured property." Because the underlying suits alleged contamination outside the insured's property, the allegations sufficiently triggered AISLIC's duty to defend.

- Overall, court found that the duty to defend is triggered when there is a potential for coverage in an insurance policy. Although the potential might have been slight in the instant case, court found a sufficient possibility of coverage of clean up costs to hold that AISLIC had a duty to defend Continental in each of the underlying suits.

40. **City Fuel Corp. v. Nat'l Fire Ins. Co. of Hartford,** 846 N.E. 2d 775 (Mass. 2006).

- The insured's commercial automobile insurance policy contained both a pollution liability endorsement and a pollution exclusion, covering City Fuel's trucks.

- The endorsement covered damages arising out of pollutants 'being transported'

- The issue in the case stemmed from the leak of 100 gallons of oil from the tank of the truck, which occurred while the truck was parked overnight.

- National Fire Insurance Co. ("National") denied coverage, basing that denial on the pollution exclusion which precluded coverage for the release of pollutants stored upon the covered vehicle.

- City Fuel brought suit for declaratory relief stating that National had breached the insurance policy.

- Trial court previously granted summary judgment to the insurer for declaratory relief and damages. The Supreme Judicial Court of Massachusetts reversed on direct appellate review, granting judgment and declaratory relief for City Fuel.

  - Court found the language of the endorsement to be dispositive, construing the terms of the policy for "transit" and "transported" very broadly, covering "movement by some kind of carriage from one place to another."

- Court looked to Koshland v. Columbia Ins. Co., 130 N.E. 41 (Mass. 1921), which discussed the interpretation of insurance policies. Koshland had held that the custom of the trade or business should be respected in interpreting an insurance policy, and that the insurer is charged with notice of the usual trade or business practices.

- Applying Koshland, court explained that even though the oil was not moving when it was released, it was still in transit because the transporter had picked it up from one point, with the intent of delivering it to another point. The oil remained in transit for purposes of the policy until the truck delivered the oil to City Fuel's customers, even though there may have been ordinary delays and stoppages along the way.

- Court found that even though the delivery trucks typically traveled during business hours, or might stop for periods of time during those hours to make other deliveries or to provide relief to the drivers, the oil still remained in transit, because it had not reached its final destination.

- For the court, this comported with the insured's reasonable objective expectations in reading the terms of the policy, and with the strict construction normally given to exclusionary clauses, especially ambiguous clauses.

41. **Supreme Tank, Inc. v. Evanston Ins. Co.**, (Docket No.: C81-06 [Superior Ct. Chancery Division, Bergen Cty., September 18, 2006] and Docket No.: BER-L-7100-06 [Superior Ct., Law Division, Bergen Cty., November 1, 2006]).

- Plaintiff is an underground storage tank contractor that was hired to remove an underground storage tank in Bergenfield, New Jersey

- In December, 2005, during the course of removal of the tank, an explosion took place that resulted in a number of deaths and injuries, as well as the destruction of a 24 unit apartment building.

- Plaintiff was insured by Evanston Insurance Company ("Evanston") from June 30, 2002 – June 30, 2006.

- Numerous claims were made and lawsuits filed against Plaintiff by third parties and additional claims and lawsuits were anticipated.

- Plaintiff made claims under its applicable 2005 policy with Evanston in connection with the third party claims and lawsuits.

- Plaintiff maintains that its policy had a $2,000,000 per occurrence limit and a $25,000 per occurrence deductible.

- Evanston disputes Plaintiff's position maintaining that the policy limit was reduced to $1,000,000 in Plaintiff's 2004 policy renewal and that there was a $50,000 self-insured retention (not a deductible) that applied to each claim, not each occurrence, and that each of these changes were applicable to the 2005 policy at issue.

- Plaintiff maintains that Evanston's position is without merit because it failed to give Plaintiff the statutorily required notice of the changes in the 2004 policy (which carried over to the 2005 policy at issue) and, on motion for summary judgment, asked the Chancery Court to reform the 2005 policy to reflect the accurate coverage.

- Evanston, on its own motion for summary judgment, argued that it provided the necessary statutory notice and complied with any applicable administrative regulations in changing the policy terms in 2004, and that therefore, its motion for summary judgment should be granted, and Plaintiff's motion denied.

- Court began its decision by noting the disputed differences between the 2003 and 2004 policy, which on their face had a critical impact on the insured.

- It then reviewed the regulatory obligation of an insurance company to provide notice of policy cancellation or non-renewal to an insured and the common law concept of "conditional renewals" (where renewals are being offered with different terms and conditions).

- Court went on to describe the position of Plaintiff that Evanston could not delegate the giving of a mandated notice to a party other than the insured, such as a broker, and that Plaintiff had never been provided with direct notice.

- Further, court recited the position of Evanston that the insured had notice because: the brokers, as agents for Plaintiff were notified; Plaintiff had actual notice because it received a copy of the 2004 policy with the revised terms and conditions; and that Plaintiff specifically agreed to a $50,000 self insured retention in the 2005 policy during its discussion with its broker.

- Court explained that while the policy quotes, binders and policies themselves may have contained all of the revised terms and conditions, there was no specific notice directly to the insured that called to the attention of the insured that changes were made in the 2004 policy.

- Of significant importance here, court proposed that Evanston, as insurer, had a minimum fiduciary duty to send a notice to the insured (Plaintiff) which contained simple terms alerting the insured to the fact that changes were made.

- After examining the information presented in connection with the motion, court found that the 2004 policy was a conditional renewal of the 2003 policy and that the challenged terms in the 2004 policy were perpetuated in the 2005 policy.

- Based on the case law cited by the court, conditional renewals required notice to Plaintiff, as insured, of changes to the terms and conditions of the 2003 policy.

- Evanston's argument that its notice to the wholesale broker, which in turn notified the retail broker, was notice to Plaintiff was rejected by court.

- Rather, court held that "[t]he duty of Evanston to notify [Plaintiff] of the materially different coverage in the 2004 policy (carrying over to the 2005 policy) is not delegable and in any event, was not effectively delegated in the case at hand."

- Court went on to hold that Evanston, as a result of its failure to provide appropriate notice, was obligated to stand by the 2003 policy limits of $2,000,000 and the 2003 policy deductible, notwithstanding the actual changed terms in the 2004 and 2005 policy, and the 2005 policy was so reformed.

- Determination of the issue of whether the applicable deductible was a per claim or per occurrence deductible was transferred to the Law Division for resolution.

- As to the Law Division's consideration of the per claim versus per occurrence deductible, court found the deductible to be per occurrence.

- Specifically, court held that one deductible applied to all claims arising out of the explosion, as opposed to one deductible per claim (which would have been financially devastating to Plaintiff).

- In reaching its conclusion, which granted summary judgment to Plaintiff, court considered the arguments of the parties, the decision of the Chancery Court, the language of the policy, and prior correspondence from Evanston to the insured, which specifically referenced a $25,000 deductible per occurrence.

- One item of particular note is that the policy contained an endorsement, which Evanston maintained was unambiguous, that "provides that it modifies the previous Coverage Parts in the policy" and 'the deductible amount stated in the schedule apply 'per claim …", although no definition of claim was found in the policy.

- On its face, this argument appears to be a powerful one in favor of Evanston. However, after the Law Division court took into account the policy as a whole (which the court found to be "… a cluster of baffling cross references…" which is "bewildering even upon a careful read."), the fact that there was no deductible found in the declarations pages of the 2003 policy (which court described as being a crucial in understanding the policy), the numerous policy ambiguities, the fact that on a prior claim a representative of Evanston clearly stated that the deductible was per occurrence, as well as the reasonable expectations of the parties, court found that"… a fair and reasonable interpretation of the policy is that the deductible applies per occurrence."

- The decisions of both courts are obviously crucial victories for the Plaintiff insured.

42. **Frazer Exton Development, L.P. v. Kemper Envt'l., Ltd.,** 2007 WL 756494 (S.D.N.Y. 2007).

- In 1998, Plaintiff purchased an environmental insurance policy (the "Policy") from Defendant, Kemper Environmental, Ltd. ("Kemper").

- Subsequently, Plaintiff brought a declaratory judgment action against Kemper and others seeking, among other things, a declaration that all the environmental investigation and remediation costs incurred by Plaintiff in excess of the self insured retention are covered under the Policy.

- A bench trial took place, with the court withholding judgment pending the submission of post trial memorandum of law.

- Court ultimately held that the Policy (specifically the cleanup cost cap coverage) provided broad coverage to Plaintiff: "(1) for any remedy that the EPA may issue, not just the remedial actions outlined in Alternative B, and (2) for all investigative costs." (See 2004 WL 1752580).

- On appeal, the Second Circuit affirmed the judgment of the lower court (See 2005 WL 2850247).

- A summary of the trial court and appellate court decisions follows:

Trial Court

- The property insured under the Policy is a Superfund Site in Pennsylvania known as the CFM Site.

- Plaintiff is the owner of the CFM Site and is a limited partnership formed by ERM, an environmental consulting firm, which agreed to purchase the CFM Site and assume the Superfund obligations related to the CFM Site.

- At the time Plaintiff acquired the CFM Site, EPA had not yet approved a remedy for the Site. Therefore, Plaintiff decided to purchase cost cap insurance coverage to provide protection in connection with the investigation and remediation that would be necessary.

- Prior to the purchase of the Policy, ERM sent Kemper two cost estimates related to the CFM Site, which were based on two separate remedial alternatives, Alternative A and Alternative B.

- Alternative A had projected costs of $2,540,000 and Alternative B had projected costs of $3,380,000. Neither of the alternatives included investigation costs, and Plaintiff could not recall whether it ever provided Kemper with a written itemization of investigation costs.

- During the trial, Plaintiff testified that it purchased the cost overruns coverage to protect it against remedy changes, additional investigation costs, discovery of new or additional contaminants and changes in remediation standards.

- Plaintiff's broker testified that a representative of Kemper explained that the Policy would cover such risks.

- Plaintiff also testified that while certain of the coverages under the Policy would not commence at the inception of the Policy, it was always intended that the cost cap coverage would.

- The Policy, which was for a ten (10) year term, was bound on October 26, 1998, and commenced on October 31, 1998 and the binder contained certain conditions, but did not include a description of the "Covered Project."

- Kemper issued the final Policy on November 6, 1998, but did not forward it to the broker until February 17, 1999.

- The broker testified that when he received the Policy, he noted that the definition of Covered Project was different than in the prior proposals and the binder, but the broker believed that it was consistent with the broad coverage purchased and did not discuss the change with either Kemper or the Plaintiff.

- Plaintiff stated that it did not realize that there was a change in the description of the Covered Project because the broker did not point it out to them in his letter of transmittal.

- The final Policy included an endorsement which expanded coverage to include discovery of unidentified pollution conditions, increased levels or quantities of pollution conditions or changes in remediation standards.

- In addition, the cost cap coverage in the Policy included investigation in its definition of cleanup costs.

- In examining the issues presented, court noted that with the exception of the definition of Covered Project, the policy was not ambiguous, and therefore the court did not need to review extrinsic evidence.

- As to the Covered Project, court found it to be undisputed that Kemper knew that Plaintiff wanted to procure coverage of the remediation of the CFM Site and that it did not make sense that Plaintiff would be willing to limit coverage to a remedy that EPA might require, as to what would actually be required.

- After reviewing the prior Policy proposal and correspondence, court held that the Policy was intended to cover any remediation required by EPA, notwithstanding the position of Kemper that it only applied to the remedy in Alternative B.

- As to investigation costs, court found the plain meaning the Policy, as well as communications between the parties and trial testimony, clearly mandated coverage of these costs.

- Court also found that notwithstanding that the Policy delayed the commencement date of certain specific coverages, the cost overruns coverage under the Policy clearly commenced on October 31, 1998. Court also noted that while the January, 1998 policy quote indicated that the coverage for cost overruns would not begin until the EPA approved the cleanup, no such limiting language was found in the policy drafts or the final policies.

- This decision contains many interesting observations on the acquisition of the Policy and in particular the cost cap coverage, and should be carefully reviewed.

Second Circuit

- Kemper appealed from the trial court decision asking that the Second Circuit reverse the holding of the trial court that the cost cap coverage applied to both the costs of investigation and whatever remedy EPA may select.

- The basis for Kemper's appeal was that the Policy only provided cost overruns coverage for the Alternative B remedy and that the Policy did not cover investigative costs incurred prior to the commencement of the remedy.

- The Second Circuit held that the Policy unambiguously covers the Plaintiff's claim. It then went on to state that the Policy applies to Alternative B and any changes to Alternative B that fit within endorsement 2, which expanded the coverage generally provided in the Policy.

- Interestingly, the Second Circuit does not specifically reference investigative costs in its decision.

Trial Court Again

- On March 31, 2006, the EPA finally issued a ROD with respect to the CFM Site.

- Despite requests from the Plaintiff, Kemper refused to pay any of the cost overruns incurred by the Plaintiff.

- As a result, the parties ended up back before the trial court with the Plaintiff seeking to enforce the court's prior decision.

- Kemper took the position that the decision of the Second Circuit limited the trial court's ruling to costs related to Alternative B.

- Trial court noted that the Second Circuit affirmed its decision without limitation, and that Kemper could not ignore the trial court's ruling by citing to the Second Circuit's language concerning Alternative B.

- Further, trial court stated that had the Second Circuit intended to modify the ruling of the trial court, it would have stated so explicitly.

- Plaintiff maintains that as of February 15, 2007, it has incurred and paid $11,262,150.01 of cleanup costs in excess of the $3,500,000 self insured retention and that Kemper must pay that sum to them.

- Kemper maintains that not all of these costs are covered, even under the trial court's interpretation of the Policy.

- Court entered partial judgment in favor of Plaintiff for half the costs and remanded the matter to the magistrate judge for a determination as to any remaining sums owed to Plaintiff.

43. **Thomas Steel Strip Corp. v. American Int'l Specialty Lines Ins. Co.**, 2007 U.S. Dist. LEXIS 94623 (N.D. Ohio 2007).

- Plaintiff, Thomas Steel Strip Corporation ("Thomas"), filed suit against American International Specialty Lines Insurance Company ("AISLIC") for coverage in connection with a pollution legal liability policy it purchased covering the policy period December 8, 2003-2006 (the "Policy").

- Thomas processed specialty steel strips at a facility in Ohio and was subject to the requirements of RCRA as a result of waste generated from its operations.

- Due to violations of law discovered during an inspection of its facility by the USEPA and Ohio EPA in July, 1984, a suit was filed against Thomas by USEPA in December, 1984 ordering Thomas to submit the appropriate closure plans for the facility.

- In June, 1986, Thomas and USEPA entered into a Consent Agreement and Final Order ("Consent Agreement") that required Thomas to provide a closure plan for the facility and to immediately implement the plan upon approval.

- Beginning in 1986 and continuing through 2005, Thomas submitted a closure plan to USEPA, had it rejected, entered into discussions with USEPA, had a series of extensions of time to submit amended closure plans and finally submitted an amended closure plan to USEPA in February 2005 which was approved on April 27, 2005.

- The Policy was issued to Thomas by AISLIC in December 2003, which was prior to the approval of the closure plan. It covered "Claims" made against Thomas by a governmental entity for Cleanup Costs resulting from pollution conditions that commenced prior to December 8, 1997.

- A "Claim" was defined in the Policy as "a written demand received by the Insured seeking a remedy or alleging liability or responsibility on the part of the Insured for Loss…"

- On June 13, 2005, Thomas notified AISLIC of its claim for coverage under the Policy in connection with the costs incurred and to be incurred with respect to the closure plan, including legal fees and engineering costs incurred to mitigate the liability, negotiate with USEPA and seek the most cost effective resolution.

- AISLIC denied coverage on the basis that the Claim was not made against Thomas during the policy period, but rather when the USEPA complaint was filed in 1984.

- On motion for summary judgment, Thomas asked court for a determination as to whether the Claim at issue was first made and reported during the policy period.

- Thomas argued that since Thomas was under no legal obligation to clean up the facility until the April 2005 approval of the closure plan, there was no claim until that point and cited to the Alan Corp. case (see item 4 above) to support its proposition.

- In Alan Corp., court held that a call to the fire department to report an environmental issue did not impose a legal obligation, rather a regulatory agency needed to impose the cleanup obligation.

- Thomas contended that its discussions with USEPA were a series of steps leading up to a legal mandate, but that none was created and that this situation was akin to the notice to the fire department in Alan Corp. and therefore no legal obligation was created.

- Court rejected the arguments of Thomas and concluded that there was no coverage under the Policy.

- Court noted that Thomas had its legal mandate to cleanup by a regulatory agency in 1984 and the fact that it was failed to comply with its legal obligation to do so did not change anything.

- Thomas then proposed that there was a new claim in 2005 because the 1984 claim was based on a different closure plan than that approved in 2005.

- This argument was also dismissed by the court noting that the responsibility of Thomas to clean up arose from the original 1984 claim.

- Finally, Thomas maintained that since the Policy was a "claims made" policy, the Central Illinois case (see item 6 above) supported its claim for coverage on the basis that the risk insured was that a claim would be made by a third party during the policy period as opposed to the risk of an occurrence taking place during the policy period.

- Court found no support for the proposition of Thomas that the Central Illinois case applied to its claim. In fact, court noted that the case supported the position of AISLIC that it is not liable for costs arising from a claim made outside the policy period.

- Further, court accepted the argument of AISLIC that while the Policy covered pre-existing conditions, it did not cover a pre-existing claim. Rather, the claim must both be made and reported during the policy period.

- For all the reasons set forth above, court denied the motion of Thomas for partial summary judgment.

44. **Denihan Ownership Co., LLC v. Commerce & Industry Ins. Co.**, 830 N.Y.S. 2d 128 (N.Y. App. Div. 2007).

- Plaintiff, the former owner of two parcels of real property in New York City (the "Property"), brought suit against Commerce & Industry Insurance Company, an AIG Company, ("C&I") in connection with a pollution legal liability insurance policy it purchased from C&I.

- Former uses of the Property included a dry cleaner, auto repair shops, parking garages and an office building.

- In connection with a contemplated future sale of the Property, Plaintiff retained an environmental consultant, AKRF, to conduct a Phase I and Phase II environmental assessment of the Property.

- The Phase II assessment revealed numerous areas of concern including solvent tanks, underground gasoline and fuel oil tanks, hydraulic oil drums, as well as leakage from those drums.

- As to contaminants, elevated levels of volatile organic compounds, methylene chloride, acetone, tetrachloroethylene, dilapidate, benzene and ethylbenzene were discovered.

- Soil samples taken from the immediate vicinity of the solvent tanks indicated high levels of chlorinated solvent contamination. However it did not appear to AKRF that this contamination was widespread.

- Plaintiff entered into a contract to sell the Property to a third party, who in turn entered into a contract to sell the Property to Lycee Francais de New York ("Lycee Francais"), which intended to construct a school on the Property.

- Pursuant to the contract, Plaintiff was obligated to conduct the remediation required in connection with the underground storage tanks, contaminated soil and asbestos.

- AKRF was retained by Plaintiff to conduct the remediation.

- Plaintiff purchased a cleanup cost cap insurance policy from C&I in 2000 (the "Cost Cap Policy") in connection with the cleanup in October 2000.

- In addition, Plaintiff purchased a pollution legal liability policy (the "PLL Policy") from C&I in December 2000.

- The Cost Cap Policy contained policy limits of $2,000,000, a self-insured retention of approximately $1,100,000 and was purchased for a premium of $100,000. The full policy limits were paid to the Plaintiff in connection with cost overruns associated with the remediation performed by AKRF, which was completed in May 2001.

- The PLL Policy contained policy limits of $5,000,000 and a $25,000 self-insured retention.

- In January 2002, extensive contamination, as well as two underground storage tanks, was discovered at the Property in connection with the construction of the school.

- This contamination extended through a large portion of the Property and into fractured bedrock beneath the Property.

- Plaintiff made a claim under the PLL Policy in the amount of approximately $3,800,000 in connection with the contamination, on the basis that the PLL Policy was required to pay the cost to clean up unknown pre-existing contamination such as this.

- C&I maintains that there is no coverage under the PLL Policy in connection with this claim on the basis of an exclusion contained in an endorsement to the PLL Policy.

- The exclusion provided in pertinent part that there was no coverage for Cleanup Costs, Claims on Losses arising from the Pollution Conditions associated with certain itemized documents (the "Exclusion").

- C&I proposed that the intent of the exclusion was to avoid overlap between the "petroleum contamination" at the Property covered by the Cost Cap Policy and unknown, and different contamination covered by the PLL Policy.

- Each party sought partial summary judgment from the court in connection with whether coverage of Plaintiff's claim was precluded by the Exclusion.

- In reaching its decision, court noted that it could, as a matter of law, interpret an unambiguous contract.

- Court went on to cite a 1995 Appellate Division decision in New Hampshire Ins. Co. v. Jefferson Ins. Co., 213 AD2d 325 (1st Dept, 1995), which interpreted the words "arising out of" as being "broad, general, comprehensive terms ordinarily understood to mean originating from, incident to or having connection with", and noted that common sense dictated that the words arising from in the PLL Policy should be likewise construed.

- Further, court found the words "associated with" should be looked at with the same common sense – and found the dictionary definition of "associated" to be "connected, joined or related", and the definition of "with" to be "in regard to".

- As a result, court found the terms of the exclusion to be unambiguous, and determined that as long as the Pollution Condition found was "associated with" conditions discussed in the listed documents, coverage was precluded.

- As a side note, court proposed that the exclusion could have been crafted to narrow the exclusion to only the "types of contamination which AKRF positively discovered during its 1996 and 2000 inspections of the Property," but that this did not happen and instead a simply crafted expansive exclusion was utilized.

- Court then noted various aspects of the Phase II report, including the discussion of the former drycleaner use and chlorinated solvent contamination in soil, concerns posed by the former presence of buried gasoline and fuel oil tanks and hydraulic oil drums and notes that underground gasoline storage tanks are likely still present within certain of the buildings and that it is possible that soil and perched water contamination may be found in the vicinity of these tanks and that there may be contamination from a buried fuel oil tank.

- Court specifically pointed out an entry in the Report recommending the closure and removal of all underground tanks and a contingency plan for the discovery of additional tanks during excavation activities.

- Court explained that AKRF's actual knowledge of the contamination was not a condition to the applicability of the exclusion. All that was necessary was for the contamination to be associated with the conditions recited in the documents referenced in the exclusion, which it found was clearly demonstrated by the foregoing examples.

- Court also cited several examples from the 2000 Storage Tank and Contaminated Soil Cost Estimate, including that underground conditions are unpredictable and soil volumes may be more than anticipated, various tanks were located at the site and that former dry cleaning solvents at the Property were petroleum based. Court found this to be critical particularly when it considered the fact that AKRF recognized the possible existence of contaminants other than what it found.

- Based on all of the foregoing court granted summary judgment to C&I on the basis that contaminants discovered during excavation were excluded since "...they are associated with the assessment and cost reports specifically described in the endorsement".

- On appeal, the Appellate Division, First Department agreed with the conclusion of the trial court.

- The Appellate Division explained that Plaintiff failed to demonstrate any ambiguity in the known conditions exclusion and concurred that the term "arising from" in the exclusion was intended to be a broad reference to events" originating from, incident to or having connection with the subject of the exclusion".

- In addition, the Appellate Division dismissed the argument of Plaintiff seeking to distinguish this claim, instead finding that the discovery of underground storage tanks and additional contaminants were clearly connected with prior known conditions and that the documents listed in the exclusion contemplated the future discovery of such contamination.

- The decision in this case highlights the importance of clearly crafting any exclusion related to known conditions.

45. **D.C. USA Operating Co., LLC v. Indian Harbor Ins. Co. and XL America, Inc.**, 2007 WL 945016 (S.D.N.Y. 2007).

- Plaintiff, a developer of a retail shopping center and parking facility in Washington D.C., filed suit against Indian Harbor Insurance Company and XL America, Inc. (collectively "XL") in connection with a disclaimer of coverage under a pollution and remediation insurance policy purchased from XL by Plaintiff (the "Policy").

- Plaintiff maintains that prior to the development of the insured property, it purchased the Policy in order to protect against the risk of the discovery of "unknown" contamination during the course of the development of the insured property.

- Prior to the purchase of the insured property by Plaintiff, several environmental investigations were conducted at the insured property, a number of underground storage tanks were removed, contamination from the tanks was remediated and governmental closure letters issued.

- At issue in this case was an endorsement in the Policy containing a Site Development Exclusion (the "Exclusion").

- The Exclusion provided that the Policy did not apply to remediation expenses arising from pollution conditions in soil or groundwater known to the insured, which were those conditions identified in a draft 2005 environmental site assessment and specified in the endorsement as "Known Pollution Conditions: Petroleum Hydrocarbons".

- During excavation activities at the insured property in 2006, Plaintiff discovered eighteen unknown underground storage tanks, which were distributed throughout the insured property, and, in April 2006, Plaintiff was ordered to remediate the contamination resulting therefrom by the applicable governmental authority.

- In May, 2006, Plaintiff notified XL of the claim and XL referred Plaintiff to its environmental consultant, Earth Tech, Inc. ("Earth Tech"). While Plaintiff hired its own environmental consultant to perform the necessary activities, Plaintiff consulted Earth Tech prior to taking any action and Earth Tech advised that it was keeping XL apprised of the situation.

- Plaintiff alleges that the activities conducted in connection with the tank remediation confirmed that the contamination resulted from the unknown tanks and not any of the previously remediated tanks or any off-site tanks.

- The cost of the remediation was approximately $3.4 million, which Plaintiff paid. In addition, the site contractor filed a claim against Plaintiff for damages due to the delay in the construction of the project that resulted from the remediation activities.

- In July, 2006, XL denied coverage on the basis that petroleum hydrocarbons were known conditions and therefore there was no covered claim under the Policy.

- Plaintiff responded by providing documentation confirming that the Policy only precluded coverage of conditions identified in the 2005 environmental site assessment and the 2005 closure letter related to the five known tanks.

- In October 2006, XL reaffirmed its coverage denial and asserted that while it knew Plaintiff wanted coverage for unknown petroleum hydrocarbon contamination, it refused to sell such coverage.

- In December, 2006, Plaintiff filed suit against XL in the Supreme Court of New York for breach of contract, breach of the covenant of good faith and fair dealing and bad faith.

- In January, 2007, the case was moved to the federal district court, southern district of New York and in February, 2007, XL moved to dismiss the matter for failure to state a claim on the basis that the Policy completely and unambiguously excludes coverage of remediation of petroleum hydrocarbon contamination and that New York does not recognize a cause of action for either the breach of the covenant of good faith and fair dealing or bad faith for denying coverage.

- Court first looked at the issue of whether the language of the Policy was ambiguous.

- Court explained that the Exclusion could have more than one reasonable interpretation.

- It concurred with the argument of Plaintiff that the word "known" connotes some specific knowledge, and that it is reasonable to interpret the Exclusion as applying to the petroleum hydrocarbon contamination known when the Policy was purchased, as opposed to future undiscovered contamination.

- To support this conclusion, court noted the definition of Known Conditions in the Known Conditions exclusion in the Policy (i.e. Pollution conditions existing prior to commencement date of the Policy, reported to Plaintiff and not disclosed in writing to XL prior to purchase of the Policy). It also noted the disclosed documents endorsement,

which basically equated the word "known" with "disclosed", which court found indicated prior knowledge.

- Further, court explained that if XL wanted to exclude all petroleum contamination it could have done just that using those words– instead it used the work "Known".

- On the other hand, court explained that the interpretation of the exclusion by XL had its own merit and was reasonable as well, particularly since no one can dispute that petroleum hydrocarbon contamination was a known threat. Also, the exclusion referenced both the report (in which petroleum hydrocarbon contamination is referenced) and the constituent itself and why would the constituent be mentioned separately unless it was intended to be something more than what was in the report.

- Therefore, for purposes of XL's motion to dismiss Plaintiff's breach of contract claim, court held the exclusion to be ambiguous as a matter of law and denied the motion.

- XL also moved to dismiss Plaintiff's claim that XL breached the covenant of good faith and fair dealing.

- Plaintiff alleged this covenant was breached as a result of XL's denial of the claim absent a reasonable basis and XL's failure to conduct an appropriate investigation.

- XL countered that this claim was nothing more than a breach of contact claim and should be dismissed.

- Court concurred.

- Plaintiff's third cause of action against XL was for bad faith.

- Plaintiff based that cause of action on a number of allegations, including that: (a) XL sold expensive insurance policies, even if it believed the coverage was illusory; (b) it is a general practice of XL to give oral assurances to brokers that specified risks are covered under their policies, only to take an opposite position when a claim is presented; and (c) that once a loss reaches a certain dollar amount XL routinely denies coverage, even if the claim is valid.

- Court dismissed this cause of action as well on the basis that New York courts do not recognize such a claim.

46. Complaint filed in California Superior Court, San Francisco County on October 13, 2006 in **Zeneca Inc. v. American Int'l Specialty Lines Ins. Co.,** Case No.: CGC-06-456 935 (Motion filed for arbitration reported in Mealey's Insurance Pleadings, December 19, 2006).

- Zeneca Inc. ("Plaintiff") purchased a Pollution Legal Liability Select/Clean-Up Cost Cap Policy (the "PLL/CCC Policy") from American International Specialty Lines Insurance Company ("AISLIC") in connection with the sale, remediation and development of a property in Richmond, California previously owned by Plaintiff (the "Property") and adjacent properties.

- The policy period for the PLL/CCC Policy was June 13, 2002 to June 13, 2022. However, according to Plaintiff, the coverage provided under Coverage K of the CCC portion of the PLL/CCC Policy terminated on June 13, 2006.

- In the Complaint, Plaintiff alleges, among other things, that it paid millions of dollars in premium to AISLIC for the PLL/CCC Policy, and that AISLIC has breached its obligations under the PLL/CCC Policy for the reasons described in the Complaint.

- Plaintiff also includes several causes of action in the Complaint against AISLIC's claims handling agents, AIG Technical Services, Inc. ("AIGTS") and AIG Domestic Claims, Inc. ("AIGDC").

- The remediation at issue arose from pyrite cinders (which resulted from prior manufacturing operations at the Property) which were used as fill material at the Property, as well as on adjacent property (the "UC Property") owned by the Regents of the University of California ("UC"), and on a strip of adjacent land on property owned by the East Bay Regional Park District (the "EBRPD Property").

- In 2001, the California Regional Water Quality Control Board – San Francisco Bay Region ("CRWQCB") issued an order to Plaintiff and UC to investigate and remediate soil, sediment and groundwater contamination at the UC Property.

- The CRWQCB designated the Property, the UC Property and the EBRPD Property as the Meade Street Operable Unit ("MSOU").

- In addition, the sub-designation of MSOU Subunit 1(solely the responsibility of Plaintiff) was given to the Property and the adjacent portion of the EBRPD Property and the sub-designation of MSOU Subunit 2 was given to the UC Property and the portion of the EBRPD Property adjacent to it. Subunit 2 was further divided into 2A (consisting of the portion of Subunit 2 containing the pyrite cinders from the Property for which the Plaintiff and UC were designated severally responsible and 2B (consisting of the balance of Subunit 2).

- Zeneca alleges that it then proceeded with the required work and received No Further Action letters in November 2001 and June 2002 for portions of Subunit 1 (the "NFA") and continued with its responsibilities for the balance of Subunit 1.

- Zeneca states that in September, 2002 it entered into an agreement with UC dividing responsibility for the portions of Subunit 2 impacted by the pyrite cinders, and in October, 2002, both Zeneca and UC entered into, and then amended a Memorandum of Agreement. These agreements were all designated as Insured Contracts under the CCC/PLL Policy.

- In December 2002, Plaintiff sold the Property to a developer.

- Plaintiff recites that in November, 2004, the California EPA changed the lead regulatory agency for Subunit 1 to the California Department of Toxic Substance Control ("DTSC"), which in February, 2005 ordered a further investigation of the Subunit 1, notwithstanding the previously issued NFAs, and issued an order in September, 2006 to various parties requiring additional investigation and remediation of the Property.

- Plaintiff maintains it is funding certain of the costs as to the Property, with the developer-buyer funding the balance.

- According to the Complaint, in May 2005, DTSC took over as lead agency for Subunit 2 and in September, 2006, an investigation order was issued to Plaintiff and UC as to Subunit 2.

- Plaintiff maintains that it purchased the PLL/CCC Policy after the issuance of the 2001 order by the CRWQCB in order to protect itself from various environmental risks, including cost overruns related to the known cleanup, unknown contamination and third party bodily injury and property damage claims.

- The Complaint describes Plaintiff's position as to the vigorous underwriting procedures that were utilized by AISLIC in connection with the CCC/PLL Policy, and the work that Plaintiff maintains was subject to the insured Remedial Plan.

- Plaintiff also alleges that the self insured retention (similar to a deductible) in the CCC/PLL Policy was based on the total cost of remediating the applicable insured properties (plus a "multiplier"), not just the share of Plaintiff, and that AISLIC concurred with this concept in an e-mail sent to Plaintiff shortly after issuance of the CCC/PLL Policy.

- The Complaint also sets forth in detail Plaintiff's position as to its submission of information and documentation to AISLIC and/or AIGTS and/or AIGDC in connection with the CCC portion of the CCC/PLL Policy, its request for payment, the responses or lack thereof from AISLIC et. al., and Plaintiff's frustration with AISLIC et. al., and the reasons for filing the Complaint.

- Further, the Complaint enumerates Plaintiff's causes of action against AISLIC, AIGTS and AIGDC under CCC/PLL Policy, which include breach of contract, breach of the covenant of good faith and fair dealing, and a request for specific performance against AISLIC and intentional inducement to breach contact and intentional interference with contractual relations against AIGTS and AIGDC.

- AISLIC subsequently moved to compel arbitration under the terms of the CCC/PLL Policy, maintaining that the arbitration provision in the CCC/PLL Policy was mandatory.

- In response, Plaintiff counters that the language in the arbitration provision is permissive, describing the use of the word "may" as opposed to must or shall.

- On February 7, 2007, an order was entered granting AISLIC's petition to compel arbitration.

- On June 15, 2007 the entire action was dismissed without prejudice.

47. **Ispat Inland, Inc. v. Kemper Envt'l., Ltd.**, 2007 WL 2197837 (S.D.N.Y. 2007).

- Plaintiff purchased an Environmental Response, Compensation and Liability Insurance Policy from Defendant on or about March 6, 1998 (the "Policy").

- Plaintiff filed suit against Defendant in June, 2005, for breach of contract, and for specific performance, due to Defendant's refusal to pay a claim related to the settlement of a Natural Resource Damage Assessment ("NRDA") against Plaintiff, which, according to Plaintiff is covered under the Policy.

- Defendant alleges that there is no coverage under the Policy because of misrepresentations allegedly made by or on behalf of Plaintiff in connection with the underwriting of the Policy.

- After completion of discovery, Defendant moved for leave to file a second amended answer which would address a number of points. The first would be to delete its affirmative defense that Plaintiff's claims are barred by the equitable doctrine of rescission (which court granted since it did not require further discovery or prejudice Plaintiff).

- In addition, Defendant proposed to amend its answer by including a counterclaim seeking a declaration that the Policy did not cover NRDA or, in the alternative, that Defendant can reform the Policy to exclude Plaintiff's liabilities for NRDA.

- Court granted motion of Defendant finding that no prejudice would result to Plaintiff by Defendant so doing.

- See case number 56 below.

48. **Chambliss, Ltd. v. Commerce and Industry Ins. Co.**, No. 06-61202-Civ,, 2007 U.S. Dist. LEXIS 77664 (S.D. Fla. Oct. 18, 2007).

- Commerce & Industry Insurance Company ("C&I") issued an underground storage tank policy to Plaintiff for a one year term, which commenced on November 23, 2001 and expired on November 23, 2002 (the "2002 Policy").

- Based on a policy questionnaire completed by Plaintiff in connection with its October 18, 2002 application (the "Application") for a policy renewal, C&I renewed the policy for a one year term, which commenced on November 23, 2002 and expired on November 23, 2003 (the "2003 Policy").

- Plaintiff responded "no" to the question in the Application asking whether it knew of "any fact or circumstances which may reasonably be expected to result in a claim or claims being asserted against [it] for environmental cleanup or response…arising from the release of pollutants into the environment." [Note: This is a dangerous question that should be carefully considered before responding.]

Background of Claim

- On February 5, 2002, a government inspector alleged that there was petroleum product in a monitoring well at Plaintiff's facility.

- As a result of that allegation, Plaintiff filed a report of the discharge, and noted to a representative of the applicable governmental agency during a telephone call the next day that there was no confirmed discharge.

- Further, in its correspondence to the agency on February 7, 2002, Plaintiff stated that its leak detection system gave no indication of a release from its underground storage tank system.

- On August 6, 2002, the agency demanded that Plaintiff arrange for an environmental site assessment at the facility. Testing was performed by Handex of Florida, Inc. ("Handex") in early January 2003 and a report finding contamination was issued in early February 2003.

- Plaintiff made a claim with C&I, dated January 14, 2003, which was ultimately denied on April 13, 2005.

- As a result of the coverage denial, Plaintiff filed suit against C&I.

Summary Judgment Motions

- Plaintiff filed a motion for summary judgment on its declaratory judgment and breach of contract claims maintaining that it was entitled to coverage under Coverage B of the 2003 Policy.

- C&I filed its own motion alleging that Plaintiff was not entitled to coverage for a number of reasons, including on the basis that the "claim" was not reported during the term of the policy, as well as the known conditions exclusion in the policy.

- The argument advanced by Plaintiff as to why it is entitled to coverage under the 2003 Policy is that it had no knowledge of a confirmed release at the time of the Application and that an investigation that confirmed the release was necessary.

- Plaintiff also maintained that the exclusion in the 2003 Policy on which C&I relies to preclude coverage, mandates that Plaintiff must know of a confirmed discharge before it can be aware of a pollution condition, and that there was no such knowledge on the date of the Application.

- Defendant maintains that Exclusion A, the "so-called" known conditions exclusion in the 2003 Policy, which is stated in pertinent part below, applies. Specifically, there is an exclusion for "…claims arising from Pollution Conditions existing prior to the inception of the Policy and not disclosed in the application for the Policy <u>if the Insured knew or reasonably could have expected that such Pollution Condition could give rise to a Claim</u>… ." [emphasis added]

- Court declined to grant summary judgment on the issue of knowledge to either party.

- As to C&I's motion for summary judgment under the 2002 Policy, on the basis that Plaintiff failed to report the claim during the policy period, court granted the motion.

- In reaching its conclusion, court noted that the 2002 Policy was a claims made policy that required that the claim be reported during the policy period or extended reporting period.

- The 2002 Policy ended on November 23, 2002. The claim was received by C&I on January 21, 2003, approximately 2 months late.

- Plaintiff maintained that under federal law governing underground storage tanks there is a 6 month extended reporting period and that this period applies in this instance.

- Court found that this statutory extended reporting period only applied when there was a cancellation or non renewal of the policy, which was not the case in this situation.

- In addition, the 2 month extended reporting in the 2002 Policy clearly did not apply since there was a renewal of the 2002 Policy.

- Plaintiff also attempted to argue that the Zurich v Whittier case (see case number 30) applied here, on the basis that the known conditions exclusion in the 2003 Policy arguably cancelled or rescinded the 2003 Policy thereby resulting in a coverage gap that EPA was seeking to avoid.

- Court disagreed and distinguished the cases noting that the 2003 Policy would not be void, but rather a policy exclusion would apply to a claim.

- Note: This case evidences a very dangerous potential for a gap in coverage. Arguably if the Plaintiff here had provided notice of a "confirmed release" during the term of the 2002 Policy, it would have coverage. However, by waiting two months to confirm the discharge, the Plaintiff placed itself in a difficult position, particularly if the court ultimately rules against it on the issue of whether the known conditions exclusion applies.]

49. **John R. MacKenzie Jobber, Inc. v. Mid – Continent Casualty Co.**, No. 8:07-CV-214-T-30MAP, 2007 WL 3379884 (M.D. Fla. Nov. 14, 2007).

- Plaintiff, a service station owner and operator purchased a pollution liability and environmental damage policy from defendant (the "Policy") for property located in Florida.

- The term of the Policy commenced on January 18, 2004 and expired February 17, 2005 and contained a retroactive date of March 1, 1990.

- The Policy also included a six month extended reporting period.

- The coverage set forth in the Policy included claims for third party bodily injury and property damage, as well as cleanup costs resulting from confirmed releases from the

insured underground tanks system that commenced after the policy retroactive date and before the expiration date.

- The term "Confirmed Release" was defined in the Policy as "a release that has been investigated and confirmed by or on behalf of an insured utilizing a system tightness test, site check or other procedure…"

- In 2004, Plaintiff hired an environmental contractor to perform a closure assessment with respect to two underground storage tanks.

- As a result of work performed by the contractor, a report was submitted to the applicable governmental agency that indicated, among other things, contaminants at the property in excess of governmental standards as well as "strong petroleum odors".

- On or about March 28, 2005 the Florida Department of Environmental Protection ("FDEP") sent a letter to Plaintiff mandating the performance of a site assessment.

- Plaintiff notified Defendant of its claim in connection with the contamination on or about April 7, 2005.

- The claim was denied by Defendant on or about December 19, 2005 on the basis that:

    (i) Plaintiff's Discharge Report form was not properly completed.

    (ii) There was no evidence of leakage in county inspection records or inventory records and the leak detection system had no indication of leaks.

    (iii) Plaintiff did not timely comply with requirements to remove the tanks.

- The Site Assessment Report subsequently prepared by the environmental contractor of Plaintiff indicated contamination in soil and groundwater and concluded that the suspected source of the contamination was underground storage tank No. 4 (not the tanks that had originally been removed), which had a leak in the spill bucket for this tank, apparently resulting from a broken flange.

- As a result of the denial of coverage, Plaintiff filed suit against Defendant, seeking a declaratory judgment of coverage and damages for breach of contract, and subsequently filed a summary judgment motion.

- Defendant's position was that there was an issue of fact as to the cause of the contamination, there was no confirmed release and Plaintiff made material misrepresentations in the Policy application and therefore the Policy was void.

- Included in Defendant's motion in opposition was an affidavit of its environmental consultant concluding that UST4 was not the source of the contamination.

- In reaching its conclusion denying Plaintiff's summary judgment motion, court explained that while Plaintiff had the burden to prove coverage, Defendant has the burden to prove a coverage exclusion.

- Court stated that the affidavit of Defendant's environmental consultant created a material issue of fact as to the source of the contamination and that it was the responsibility of a jury to determine whether there was a leak from the spill bucket during the policy period.

- Defendant also argued that Plaintiff made material misrepresentations in the Policy application and cited to the specific policy application question as to whether Plaintiff was "aware of any circumstances that could give rise to a pollution incident with regard to any sites."

- It noted that Plaintiff failed to disclose the results of certain high Organic Vapor Analyzer/Flame Ionization Detector ("OVA/FID") readings in soil samples taken from dispenser islands in 2000.

- Defendant argued that if those OVA/FID readings had been disclosed, it would not have issued the Policy.

- In addition, Defendant proposed that Plaintiff misrepresented when it answered "yes" to the question on the Policy application as to whether the tanks were in compliance with applicable law.

- Defendant maintained that since FDEP, by letter dated January 26, 2004, warned Plaintiff that the property, might be in violation of law because the tanks failed a cathodic protection survey conducted on October 21, 2003, USTs 1 and 2 had been out of service for a time period greater than that permitted by law and that Plaintiff failed to produce certain records concerning financial responsibility to the applicable agency, it knew that its response to the foregoing question in the Policy application was inaccurate.

- Defendant specifically claimed that had it known of the failed cathodic protection survey and that Plaintiff was not in compliance with law, it would not have issued the Policy.

- As to the OVA/FID readings in 2000, court noted that the environmental assessment that contained the OVA/FID readings explained that those readings…"does not by itself indicate significant contamination."

- As to the January 26, 2004 FDEP letter containing the alleged violations of law, including the failed cathodic protection survey, court noted that Plaintiff did not receive the letter until after it submitted its Policy application and there is no indication when Plaintiff was made aware of the cathodic survey or if it was aware it was in violation of law at the time of the Policy application, but advised Defendant that if it could produce additional evidence on the issue, it could raise it on a new summary judgment motion.

50. **American Int'l Specialty Lines Ins. Co. v. NWI-1 Inc. [f/k/n Fruit of the Loom]**, No. 05-6386, N.D. Ill. (Settlement Agreement reported in Mealey's Litigation Report: Insurance, January 10, 2008).

- On or about November 8, 2005, American International Specialty Lines Insurance Company ("AISLIC") filed suit against NWI-I Inc. (formerly Fruit of Loom ["FTL"]).

- AISLIC issued a combination pollution legal liability and cleanup cost cap policy to FTL on October 30, 1998 for a term commencing on October 30, 1998 and ending on October 30, 2008 (the "FTL CCC/PLL Policy").

- The limits of the FTL CCC/PLL Policy was $100,000,000.

- The environmental liabilities that were the subject of the FTL CCC/PLL Policy arose from the operations of Velsicol Chemical Corp. ("VCC").

- On or about December 29, 1999, FTL, NWI-1 and other related entities filed for protection under Chapter 11 of the Bankruptcy Code.

- As part of the bankruptcy and the reorganization plan (and allegedly without the consent of AISLIC), FTL, NWI and others entered into a settlement agreement related to certain environmental liabilities (the "Bankruptcy Settlement Agreement").

- As part of the Bankruptcy Settlement Agreement, a Successor Trust (which was the successor to FTL and NWI) was created, which was to use the proceeds of the assets it liquidated to fund a Custodial Trust. Payments to the creditors of FTL and NWI would come from the Custodial Trust.

- Among the assets to be transferred to the Successor Trust was certain rights under FTL CCC/PLL Policy as well as a separate AISLIC policy issued to VCC (the "VCC Policy").

- This structure provided that the beneficiaries of the Successor Trust included the United States Government and various States.

- Further, the environmental liabilities assumed by the Successor Trust were limited to the proceeds of the claims recovered under the policies.

- While the United States Government and the various states gave FTL and NWI covenants not to sue, they reserved the right to sue them for purposes of obtaining recovery under the FTL CCC/PLL Policy.

- The Bankruptcy Settlement Agreement also encompassed various other liabilities and other payment structures.

- The Successor Trustee sent a letter to AISLIC on January 11, 2005 demanding the full limits of the FTL CCC/PLL Policy in the amount of $100,000,000.

- The letter stated that: "[T]he SIR of $44,500,000 had been …ultimately satisfied as a result of the governmental claims described hereunder with respect to the seven properties. Further, as shown on Exhibit A and B, the total policy limit of $100,000,000 has been exhausted based on the amount of the allowed general unsecured claims in favor of various states and the United States in the FTL Bankruptcy and the assertion of liability by the states of Tennessee, Michigan and New Jersey for the costs of remediation at several of the seven properties."

- The foregoing assertions were rejected on behalf of AISLIC by its claims representative AIGDC, by letter of May 25, 2005, and AIGDC reiterated a prior reservation of rights that it issued on behalf of AISLIC.

- Between June 7, 2005 and August 17, 2005, there were a series of letters back and forth between AIGDC and the Successor Trustee concerning the claim.

- The lengthy allegations of the Complaint filed by AISLIC citing all of the reasons that there is no coverage under the FTL CCC/PLL Policy can be found at 2005 WL 3613344. The allegations include, among other things, one of the properties at issue is not an insured property, the insured had no right to enter into the settlement agreement without the consent of AISLIC, FTL had no right to assign the FTL CCC/PLL Policy to the Successor Trust and the CCC coverage only applied to the "…cost of services actually performed prior to October 30, 2008…"

- The lengthy Answer and Counterclaim filed on behalf of NWI and others can be found at 2006 WL 428485.

- The Counterclaim contains interesting factual allegations that are not contained in the Complaint and should be reviewed for context.

- Various other pleadings were filed in connection with the suit filed by AISLIC, including by certain intervenors.

- On or about January, 2008, the plaintiff and defendants in the suit filed by AISLIC, as well as certain environmental agencies and non-governmental intervenors entered into a settlement agreement (the "January 2008 Settlement Agreement").

- The January 2008 Settlement Agreement primarily related to the FTL CCC/PLL Policy, but a portion related to the VCC Policy.

- The 2008 Settlement Agreement is conditioned upon the signature of all parties and the issuance of an order by the court approving the Settlement Agreement.

- Pursuant to the 2008 Settlement Agreement, AISLIC is obligated to make the following payments to the Successor Trustee:

    - $30,000,000 within 60 days of the effective date of the 2008 Settlement Agreement (plus certain interest that began to accrue on May 15, 2007).

    - $1,250,000 per year for 10 consecutive years commencing March 1, 2008 and payable on March 1, each applicable year thereafter.

- In return for the foregoing payments, the principal of which totaled $42,500,000, (slightly less than fifty percent of the sums originally demanded by the Successor Trustee), AISLIC and various related entities, were released by the parties to the 2008 Settlement Agreement from any and all obligations under the FTL CCC/PLL Policy and were give a complete buyback and extinguishment of the FTL CCC/PLL Policy, which was also terminated.

- In addition to the foregoing, there were various other releases and covenants not to sue given to AISLIC by certain parties to the 2008 Settlement Agreement.

- The Government Releasees and the AISLIC Releasees reserved their rights under the VCC Policy as to sites that were not the subject matter of the 2008 Settlement Agreement.

- To gain some insight into the dispute over the FTL CCC/PLL Policy, the pleadings and the 2008 Settlement Agreement should be reviewed to note the issues raised by both parties and the ultimate resolution of those issues.

51. **Mid-Continent Casualty Co. v. L.B. King d/b/a King Oil and Tires**, 552 F.Supp. 2d 1309 (N.D. Fla. 2008).

- L.B. King ("King") operated a service station from the 1960's in Cross City Florida, and in conjunction with that activity operated several underground storage tanks since 1978.

- In 1997, King hired a contractor to renovate several tanks. The contractor then retained a consultant to perform testing in accordance with law, and apparently diesel fuel contamination was discovered (of which King allegedly had no knowledge at the time).

- Plaintiff, Mid-Continent, issued a policy to King for the policy period April 3, 2003-April 3, 2004, which was designed to cover liability arising from possible leaks from underground storage tanks, and which had a retroactive date of 1998 (the "Policy).

- At the time King applied for the Policy, there was no disclosure of the 1997 diesel contamination. As mentioned above, there is an issue as to whether King knew of this 1997 contamination.

- In September, 2003, King notified Mid-Continent of a claim under the Policy. Mid-Continent issued a reservation of rights letter in response, and in November, 2003 denied coverage on the basis of the Policy retroactive date.

- In 2004, King retained the same contractor to remove two underground storage tanks. Subsequent testing revealed gasoline, kerosene and diesel contamination. On April 1, 2004, King filed a claim under the Policy with respect to this contamination.

- Mid-Continent issued a reservation of rights letter the next day and issued a denial of coverage on December 15, 2005.

- In June 2006, Mid-Continent filed suit against King, seeking that the court declare: (a) the Policy void ab initio on the basis of an alleged material misrepresentation by King: and (b) there is no coverage under the Policy for the release reported on April 1, 2004 on the basis that there is no "confirmed release" (as defined in the Policy) and the alleged discharge took place prior to the retroactive date in the Policy.

- King's answer, affirmative defenses and counterclaim all alleged that there was coverage under the Policy.

- After discovery was conducted by the parties, each filed motions for summary judgment.

- The issues raised here are similar to those in the Jobber case described in case number 49 above.

- One of the judgments sought by King in its motion was that EPA's regulations (as adopted by Florida) prohibited the policy rescission sought by Mid-Continent and cited to Whittier (case number 30) for support. Mid-Continent argued that any such prohibition against rescission in a misrepresentation scenario would be against public policy. Court, rejected the argument of Mid-Continent and agreed with the Whittier decision finding that absent a waiver of this issue by King (for failing to raise the issue earlier in the proceeding), Mid-Continent could not rescind the policy.

- Court also examined whether Mid-Continent waived coverage defenses by not including them in its initial reservation of rights letter.

- As the court explained, Florida has a statute limiting the time period within which a coverage defense can be raised. King argued that Mid-Continent waived all coverage defenses that were not recited in the reservation of rights letter.

- In reaching its conclusion that there was a waiver involved as to certain issues, court made the distinction between "an assertion of a lack of coverage and a coverage defense under Florida law."

- Specifically court explained that an assertion by an insurance company that a loss is not covered under a policy at all is alleging a lack of coverage, and that a defense to coverage is when the loss falls within the coverage scope – but for various reasons, coverage does not apply.

- Court went on to review each of the affirmative defenses of the insurer and if they alleged a defense to coverage and were not raised in the reservation of rights letter, court found that they were waived by Mid-Continent.

- Mid-Continent, in its summary judgment motion, argued that the expert witness of King failed to provide evidence of a "confirmed release" under the policy, and that therefore, judgment should be granted in its favor.

- Court rejected the argument, finding that even though the expert had not been able to identify the precise location of the discharge from either a tank or tank system, he was able to provide sufficient information to place the issue before a trier of fact, including his testimony separating the alleged 2004 discharge from a 1997 discharge through the use of groundwater quality tests and his position that there was no evidence of an off-site source or an on-site surface spill.

52. Complaint filed in **Velsicol Chemical Corp ("Velsicol") v. American Int'l Specialty Lines Ins. Co.,** Civ. Act. No. 08-2822, U.S. Dist Ct. (N.D. Ill. 2008) [See case number 50 for related information].

- Velsicol purchased a pollution legal liability insurance policy from AISLIC for the policy period of December 22, 1999 – December 22, 2009 (the "Policy").

- In April 2007, the City of St. Louis, Michigan filed suit (the "Underlying Suit") against Velsicol and others in connection with groundwater contamination allegedly arising from a plant in St. Louis, Michigan owned and operated by Velsicol (the "St. Louis Plant").

- The St. Louis Plant is an "Insured Property" under the Policy.

- Velsicol alleges that it notified ASLIC of the Underlying Suit in May 2007 and demanded coverage under the Policy, that AISLIC failed to provide a response until February, 2008, and that, among other things, AISLIC is attempting to evade its responsibilities under the Policy.

- Velsicol also alleges that it was forced to retain its own defense counsel in connection with the Underlying Suit due to the failure of AISLIC to undertake its defense.

- As a result, Velsicol has filed suit seeking a declaration of its rights under the Policy as well as damages.

- Velsicol maintains that Coverage D of the Policy (claims for cleanup of pollution conditions that have migrated beyond the boundaries of the Insured Property) and Coverage F of the Policy (claims for Bodily Injury and Property Damage arising from pollution conditions that have migrated beyond the boundaries of the Insured Property) apply to the underlying claims.

- The complaint recites the various notices given by Velsicol to AISLIC concerning the Underlying Suit and the lack of response.

- The complaint also contains allegations relating to the settlement referenced in paragraph 50 above.

- According to Velsicol, AISLIC finally responded to its various notices concerning the Underlying Suit on February 5, 2008, by accepting defense of the Underlying Suit without a reservation of rights.

- Shortly thereafter, AISLIC advised Velsicol that it would either require that new defense counsel be assigned to defend the Underlying Suit or that Velsicol must accept contribution from AISLIC towards its defense costs at lower rates than those currently being charged by its defense counsel. [Insureds should note the terms of their policies concerning payment of defense costs.]

- For a variety of reasons, including the settlement proposed by the plaintiff in the Underlying Suit to accept the limits of the Policy in the amount of $50,000,000. Velsicol sought a clarification of AISLIC's position as to coverage, including the specific coverage parts pursuant to which AISLIC was providing a defense.

- On May 6, 2008, AISLIC provided a response which, among other things, accepted coverage under coverage D (cleanup) and denied coverage under coverage F (property damage).

- Further, the May 6, 2008 response also raised potential coverage exclusions for fines, penalties and punitive damages, pollution conditions resulting from willful acts or

omissions or a willful illegal act or omission or from a responsible insured's intentional, willful or deliberate non compliance with law, etc. if he or she know or could have reasonably expected that a Claim or Loss would result.

- Velsicol also alleges that AISLIC is seeking to control the defense of the underlying suit in a manner that will prejudice Velsicol.

- The complaint sets forth that Velsicol is seeking a judgment from the court declaring that it is entitled to both defense and indemnity under coverages D and F of the Policy, that AISLIC has waived all defenses under the Policy as to the Underlying Suit, that AISLIC has no right to control the defense of the Underlying Suit, but must pay defense costs; that AISLIC has acted in bad faith and has breached the Policy and that Velsicol is entitled to damages.

- This is another interesting case to watch.

53. Complaint filed in **24 Porter Street Realty, LLC v. American Int'l Specialty Lines Ins. Co.**, Civ. Act. No. 1:07-CV 12178-RWZ, U.S. Dist. Ct. (Mass. Dist. Ct. 2007).

- Plaintiff, 24 Porter Street Realty, LLC ("Porter Street") is the owner of certain property in Boston, Massachusetts on which dry cleaning operations have taken place for many years (the "Insured Property").

- Porter Street purchased a Commonwealth of Massachusetts Brownfields Redevelopment Access to Capital PLL/CCC policy from AISLIC for the policy period February 2, 2004 – February 2, 2009 (the "BRAC Policy).

- The BRAC Policy included a $25,000 deductible and policy limits of $500,000, and covered cleanup costs associated with oil and hazardous materials, which were not specifically excluded from the Policy.

- Prior to the purchase of the Insured Property by Porter Street, there were two reported releases of chlorinated solvent contamination, allegedly from the drycleaner operations, both of which were excluded from the BRAC Policy.

- The complaint alleges that during the course of addressing the known and excluded releases, Porter Street discovered an unknown release of chlorinated solvent contamination that was distinct in location in soil and groundwater from the excluded releases (the "Unknown Release").

- The complaint also alleges that Porter Street is entitled to coverage under Coverages A & B of the BRAC Policy for both On and Off-site Cleanup, Bodily Injury and Property Damage, related for the Unknown Release, up to the $500,000 aggregate limits.

- According to Porter Street, AISLIC was notified of its claim in connection with the Unknown Release on January 9, 2007.

- Porter Street also alleges that notwithstanding that the plume of contamination associated with the Unknown Release may have commingled with one of the excluded releases, the Unknown Release was driving the required activities taking place.

- The complaint also recites that AISLIC denied coverage of the claim on March 29, 2007 on the basis that the "Pollution Conditions" present are associated with the pre-existing dry cleaning contamination and the prior two releases.

- Specifically, the endorsement at issue precludes coverage of "Pollution Conditions associated with or arising out of (emphasis added)… [Case Numbers] RTN3-210010 and RTN 3-21883."

- There is also a description in the complaint of the written explanation provided by Porter Street to AISLIC as to the reasons the Unknown Release is covered under the BRAC Policy, and why AISLIC should not deny coverage.

- After receipt of this information, AISLIC withdrew its disclaimer of coverage on July 12, 2007, and issued a reservation of rights letter in which it requested further information supporting the position of Porter Street that the Unknown Release was a "new" release.

- On August 23, 2007, Porter Street responded to AISLIC providing additional information.

- Not hearing back from AISLIC, on October 18, 2007 Porter Street submitted a "Final Notice of Claim and Demand Letter." Subsequently, Porter Street filed suit.

- As part of the relief requested in the complaint, Porter Street seeks: (a) a declaration that it is entitled to coverage under the BRAC Policy, including for prompt reimbursement of costs; and (b) damages for AISLIC's breach of the BRAC Policy, as well as triple damages for bad faith and unfair and deceptive insurance claims practices.

54. **Midwest Environmental Consultants, Co. et al v. Greenwich Insurance Company**, No. 08-4099 CV-C-NKL, 2009 WL 702214 (W.D. Mo. Mar. 16, 2009).

- Greenwich Insurance Company ("Greenwich") issued two consecutive consultant's environmental insurance policies to Midwest Environmental Consultants ("Midwest Co.), one effective from October 1, 2004 through October 1, 2005 (the "2004-2005 Policy" and one effective from October 1, 2005 through October 1, 2006 (the "2005-2006" Policy).

- Midwest Co. was the named insured in each of the policies and Midwest Environmental Consultants P.C. ("Midwest P.C.") [the entity from which Midwest Co. purchased all of its assets, but not its liabilities in February 2000] was an additional named insured under the policies. In addition, certain individual former employees of Midwest P.C., Stober and Starns, were also insured under the policies.

- In 1997 the Rhode Island Resource Recovery Corporation ("Rhode Island RCC") employed Greeley and Hansen LLC ("Greeley") to perform engineering services in connection with the design and construction of a leachate pre-treatment facility for a landfill in Cranston, Rhode Island.

- Greeley then entered into an agreement with Midwest P.C. to provide engineering services, on a subconsultant basis, in connection with the landfill project. The agreement obligated Midwest P.C. to indemnify Greeley for any liability arising out of the

negligence of Midwest P.C. or third parties that it retained. Stober signed the agreement as project manager for Midwest P.C. and Starns signed as Director of Operations for Midwest P.C.

- In November, 2004 Rhode Island RCC sued Greeley alleging that it negligently designed the leachate pre-treatment facility (the "Suit"). In July, 2005, the attorney for Greeley sent a letter addressed to Stober at Midwest P.C. (at the former address of Midwest P.C. and current address of Midwest Co.) demanding that Midwest P.C. indemnify it in connection with the Suit pursuant to the terms of their agreement (the "2005 Letter"). Stober, who was employed by Midwest Co. when he received the letter, provided the letter to Tharp Inc. (formerly Midwest P.C.). Starns had no knowledge of the letter and was not employed by either company.

- On March 20, 2006, Greeley filed a Third Party Complaint against Midwest P.C., Midwest Co., Stober and Starns, which was served in April 2006. Stober instructed the agent for Midwest Co. to report the lawsuit and tender a claim to Greenwich on behalf of all of the third party defendants, which the agent did on April 5, 2006.

- Greenwich provided a defense to the Suit to Midwest P.C. until August 1, 2007, at which time it sent a letter denying coverage.

- On November 29, 2007, Greenwich sent a letter to Midwest Co., Stober and Starns denying coverage on the basis that Midwest P.C. failed to notify Greenwich of the 2005 Letter sent to Midwest P.C. and received by Midwest Co.

- Midwest Co., Stober and Starns then brought an action against Greenwich seeking a declaration that Greenwich is obligated to defend them in connection with the Suit. Greeley intervened in this action and Greenwich counterclaimed for a declaration that it has no such defense or indemnification obligation.

- On Plaintiffs' and Greeley's motion for summary judgment, the key issue presented was whether the 2005 Letter constituted a claim made against the Plaintiffs under the 2004-2005 Policy. If it was, there would be no duty of Greenwich to defend Plaintiffs under either policy in connection with Suit, since the applicable coverage was triggered by a claim "first made and reported during a policy period." If it was not, then there would be a duty to defend because the Plaintiffs notified Greenwich of the Suit in a timely manner.

- In order to make a determination, the court examined two crucial policy provisions.

- First, the definition of a claim, which was defined in the policies as "a demand received by the Insured for money or services" and is not "limited to lawsuits, petitions, arbitrations or other alternative dispute resolution requests…".

- Next, the severability provision in the policies, which stated that the provisions of the policies were to be applied "separately to each Insured against whom a claim is made or suit is brought."

- Court found that the severability provisions in the policies required that the issue of whether a claim was made had to be applied separately to each insured.

- Therefore, since the claim in the 2005 Letter was only made against Midwest P.C., there was no claim against any of the Plaintiffs.

- As a result, court held that the first claim against the Plaintiffs was the serving of the Suit in 2006, notice of which was promptly given to Greenwich, and therefore Greenwich had a duty to defend Plaintiffs in connection with the Suit.

- Court noted that Plaintiffs were only obligated to report actual claims to Greenwich and that it did not matter that there might be legal theories pursuant to which a claim against Midwest P.C. might someday lead to a claim against one or more of the Plaintiffs.

55. **Wells Fargo Bank N.A. v. Zurich American Ins. Co.**, 874 N.Y.S.2d 68 (First Dept. 2009), appeal denied, 910 N.E. 2d 431 (N.Y. 2009).

- Plaintiff, Wells Fargo Bank N.A. ("Wells Fargo") brought suit against Zurich American Insurance Company in connection with a Creditor Reimbursement for Environmental Damages Insurance policy issued by Lumbermens Mutual Casualty Company ("Lumbermens) in 1998 (the "Policy").

- In 2006, trial court granted summary judgment to Wells Fargo as to the liability of Lumbermens to Wells Fargo on a breach of contract claim in connection with the Policy.

- However, the court, at trial, sua sponte reversed its earlier grant of summary judgment to Wells Fargo and, after trial, dismissed Wells Fargo's complaint.
- Wells Fargo appealed trial court's dismissal of the complaint.

- Appellate court unanimously affirmed trial court's decision.

- The Policy was issued to Convenience Mortgage Corp. and eventually assigned to Wells Fargo.

- The Policy covered a loan that was secured by sixteen properties, which consisted of gas stations/convenience stores in the Tampa, Florida area ("mortgaged properties").

- The borrowers defaulted under the loan by failing to make the payments in May, June, July and August 2002.

- The term "default" was defined in the Policy as "any occurrence which legally permits the Insured to take exclusive possession of any real estate pledged by mortgagor as collateral for a Covered Loan."

- The Mortgage provided that the lender had the right to foreclose on the mortgaged properties based on the failure of the borrower to make payment within five calendar days of its due date.

- Appellate court explained that the papers submitted by Wells Fargo in connection with the original summary judgment motion, in which the trial court ruled in its favor, did not establish the notice required by the Policy and therefore summary judgment could not be granted as to the liability of Lumbermens under the Policy.

- The Policy provided coverage in the event of a default by a borrower under a loan covered under the Policy, for loss of collateral value due to an environmental incident.

- The notice dated August 22, 2002, provided, without any particulars, that the properties at issue "may have been impacted by releases of petroleum hydrocarbons into the soil and groundwater from underground storage tanks."

- Interestingly, according to appellate court, the evidence presented by Lumbermens at trial established that Wells Fargo had in its possession a detailed spread sheet with particulars as to the contamination related to six of the seven properties in August, 2002 and that by October, 2003, it had sufficient particulars as to the seventh property.

- It is difficult to understand why Wells Fargo waited until after suit was commenced to provide the particulars of the environmental incident at issue and the appellate court's finding of late notice only highlights the critical need for compliance with policy terms to avoid such a result.

- Appellate court then examined the issue of damages.

- On the issue of whether there was an "environmental incident" as defined in the Policy, appellate court agreed with the conclusion of the trial court that there had not been an "environmental incident" on the basis that the pollution conditions at issue were known prior to the policy period and remained unchanged throughout the policy period. [Another instance in which the definitions in the policy are critical to a coverage determination].

- Also, appellate court agreed with the trial court that Wells Fargo failed to produce the necessary evidence to establish the loss allegedly created by the relevant cleanup costs, and that the expert testimony proffered by Wells Fargo was speculative.

56. **Ispat Inland, Inc., v. Kemper Envt'l., Ltd.**, No. 05 Civ. 5401 (85J), 2009 U.S. Dist. LEXIS 108634 (S.D.N.Y. Nov. 20, 2009).

- On July 16, 1998, Ispat Inland, Inc. ("Ispat") purchased an environmental liability policy with a policy term of five years from Kemper Environmental, Ltd. ("Kemper") (the "Policy").

- Acquisition of the Policy was mandated by the terms of a sale agreement between Ispat's corporate parent, Ryerson Tull, Inc. ("Ryerson"), and Ispat International, N.V. ("Ispat International").

- Ispat, Ryerson and Ispat International were all named insured under the policy.

- In 2005, Ispat sued Kemper under the Policy seeking damages and declaratory relief in connection with "…a settlement that Plaintiff entered into with various governmental bodies regarding assorted environmental damage claims."

- Subsequently, Ispat moved for summary judgment on the issue of coverage under the Policy and Kemper cross moved alleging that there was no coverage.

- Court's ruling in favor of Ispat's motion analyzes a number of key policy provisions, which are described below.

- Background

    - Ispat operated a steel making facility in Indiana on the shores of Lake Michigan and the Indiana Harbor Ship Canal since the early 1900's.

    - Ispat entered into a Consent Decree with the USEPA in 1993 (the "Consent Decree") in connection with the release of hazardous substances in the area, pursuant to which it established a $19,000,000 reserve fund (the "SEP Reserve") to be used to dredge the ship canal.

    - In October 1996, Ispat received a letter from a group of government agencies that were natural resource trustees (the "PRP Letter").

    - The critical terms of the PRP Letter were:

        (a) Trustees identified Ispat as a PRP for "environmental damage of the river and harbor due to the release of hazardous substances…"

        (b) Trustees intend to "perform a Natural Resource Damage Assessment ("NRDA")…" and …" invited Ispat to participate in the assessment, and also requested that Ispat fund all phases of the NRDA."

    - Eight other PRP's were involved with the NRDA and Ispat joined with them to form a group known as the G9.

    - The G9 reached a settlement with the Trustees in 2005, pursuant to which Ispat was obligated to pay in excess of $8 million to the Trustees with no credit for the SEP Reserve, (the "NRDA Settlement").

- Summary Judgment Motion

    - Ispat maintains that the Policy covers the NRDA Settlement, Kemper maintains it does not for various reasons. Some critical issues addressed by the court are described below.

    - Fraudulent Inducement – Kemper alleges that: (a) Ispat represented that it would definitely receive credit against the NRDA "for the SEP Reserve; and (b) the known conditions exclusion in the Policy applies to the claim because Ispat failed to disclose to Kemper material facts related to the uncertainty of the credit for the SEP Reserve. Ispat responded that it never told Kemper that it would definitely receive such a credit and that documents that were either reviewed by Kemper or made available to Kemper would not have supported such a conclusion. Court agreed with Ispat. It stated that in order to sustain a fraud claim, Kemper would have to show that it reasonably relied on the alleged misrepresentations, within the context of the transaction, after taking into account all of the facts presented. Those facts included that prior

to the issuance of the Policy, Kemper employees met with representatives of Ispat and its environmental experts and discussed a wide range of issues including the Consent Decree and the SEP reserve and that Kemper reviewed the Consent Decree and the PRP Letter as well as Ispat's 10 K filing and other documents, which contained pertinent information. On the basis of the foregoing, court concluded that Kemper should have conducted its own independent inquiries as to the credit for the SEP Reserve and that "Kemper's reliance was unreasonable and resulted from its own lack of reasonable care." Note: The facts of this case should be carefully reviewed in connection with both the fraud argument and the failure to disclose argument. For example, court noted that even if the insurance application for the Policy contained a statement that Kemper could rely on the representations of Ispat without further inquiry, there would be no change in its decision explaining that "a party cannot reasonably rely on representations that it had reason to know are false or that it accepted with knowing blindness."

- No Coverage for Claim Made Prior to Policy Period. Kemper maintains that the Policy only covers claims made during the policy period and that the PRP Letter was a claim made prior to the inception of the Policy. The definition of "claim" set forth in the Policy was "the written assertion of a legal right alleging liability or responsibility on the part of the Insured arising out of Pollution Conditions, and shall include, but not necessarily be limited to lawsuits or petitions filed against the Insured." In reviewing the PRP Letter, court found that it did not "explicitly state that Ispat is liable or responsible for environmental damage," and determined that the defined term "claim" in the Policy was therefore ambiguous as to the PRP Letter. In addition, since the parties were unable to produce evidence as to the intended meaning of the term, court made a decision as a matter of law as to the meaning. Based on its analysis of various case law, court found that a "claim" was more than just an assertion of potential liability. Rather, there had to be an affirmative assertion by a party that another party was liable. In this instance, court found that the PRP Letter was an invitation to participate in and fund the process but did not mandate that Ispat perform a cleanup or pay damages and therefore the PRP Letter was not a "claim". To further support its conclusion court noted that "NRDA trustees may not present a demand for damages to a PRP until after the conclusion of the actual assessment," which had not taken place at the time the PRP Letter was sent.

- Satisfaction of Self Insured Retention. As opposed to deductibles, self insured retentions ("SIRs") in policies require an insured to spend the stated retention amount before a policy is triggered. In this instance, the Policy contained several SIRs. Under coverage A, which applied to bodily injury and property damage claims, there was a $250,000 SIR. Under Coverage C, which applied to cleanup costs, there were four different SIRs for four specific types of claims, one of which was an SIR of $19 million "relating to the [SEP] required under the 1993 Consent Decree." Ispat argued that it was entitled to coverage under both coverages A and C, and the court agreed, finding that the NRDA Settlement constituted both property damage (because it concerned physical injury and loss of use of a natural resource) and cleanup costs (because it was a payment to remedy the discharge of

hazardous substances). Court also found that the SIR under Coverage A was satisfied and that the NRDA Settlement was not subject to the $19 million SIR described above because the "NRDA Settlement resulted from different proceedings with different purposes involving different government entities" (but that even if it was, court explained that Ispat's SEP liability satisfied the SIR). Note: As to coverage of natural resource damage claims, most policies issued include natural resource damages as a part of the definition of property damage or loss in their policies.

- Damages, Administrative Fines and Penalties. Continuing on with its various arguments against coverage for the NRDA Settlement, Kemper proposed that Coverage C only applied to cleanup costs and that the settlement did not relate to cleanup costs and that in fact since the Trustees have the ability to decide how to utilize the settlement payment, the NRDA Settlement was in reality a penalty or an assessment. Court quickly rejected this argument noting that the Policy did not exclude coverage for damages and that the exclusion in the Policy for fines, penalties, assessments, etc. was removed by endorsement.

- Right to Subrogation. Kemper also made various other arguments as to why it should not reimburse Ispat for the NRDA Settlement. One argument of interest related to whether its right of subrogation under the Policy was prejudiced by the fact that Ispat had settled claims with respect to the NRDA Settlement with one of its other insurers, without Kemper's consent. Court rejected Kemper's summary judgment motion on this issue and found that Kemper failed to produce any evidence that it was prejudiced by any settlement by Ispat with another insurer or that its payment to Ispat under the Policy with respect to the NRD settlement should be reduced by any such settlement amount.

- Attorneys Fees. Ispat also seeks to recover the attorneys fees it incurred in connection with the NRDA Settlement under Coverage D of the Policy. Kemper argued the coverage was not applicable. Court rejected Kemper's argument and ruled that Ispat was entitled to attorney fees. Court also found that there was not a separate SIR for attorneys fees since the fees arose from the same environmental incident as the NRDA Settlement and the SIR had already been satisfied for that incident.

- To summarize, court found that there were no issues of fact as to whether any terms of the Policy set forth above precluded coverage and granted summary judgment to Ispat.

57. **American Int'l Specialty Lines Ins. Co. v. United States of America**, No. CV 09-01734 AHM (RZX), 2010 U.S. Dist. LEXIS 65590 (C.D. Calif. June 30, 2010).

- American International Specialty Lines Insurance Company ("AISLIC") issued a Pollution Legal Liability Select/Cleanup Cost Cap Policy to Whittaker Corporation ("Whittaker") in connection with a 996 acre site in Santa Clarita, California (the "Site").

- The Bermite Powder Company ("Bermite") acquired the Site in the 1940's and Whittaker acquired Bermite in 1967 and assumed its operations at the Site, with Bermite being a division of Whittaker.

- Bermite and Whittaker utilized various types of chlorinated solvents ("VOCs"), including PCE, TCE and TCA, as well as perchlorates, in connection with its operations at the Site, a majority of which operations related to the manufacture of rocket motors for the United States military and the testing of projectiles.

- As a result of the foregoing operations, discharges of hazardous substances took place at the Site resulting in significant contamination.

- In connection with its obligations to Whittaker under the Policy, AISLIC alleges it incurred response costs with respect to the remediation of the VOC's and perchlorate related to the Site.

- According to AISLIC, it made more than $12 million dollars in payments on behalf of Whittaker under the Policy.

- AISLIC sued the United States seeking cost recovery and contribution under CERCLA §107 (a) and 113 (f).

- Court divided the trial of the suit into two phases, the first of which determined the liability of the United States under CERCLA and the second phase of which would determine the allocation issues.

- After a trial on the issue of liability, court concluded that the United States was liable under CERCLA as an "owner of facilities at which disposal of hazardous substances took place and as a person that arranged for the disposal of hazardous substances."

- This suit by AISLIC evidences its pursuit of its subrogation rights under the Policy for payments made on behalf of Whittaker and that is the reason why this case is noted under this paper.

- Separate and apart from the insurance claim payment by AISLIC on behalf of Whittaker that led to the suit, we recommend that the Court's findings of facts and conclusions of law be reviewed for its interesting analysis of and conclusions related to the CERCLA liability of the United States.

58. **Mears Transportation Group Inc. v. Zurich American Ins. Co.**, 660 F.Supp. 2d 1297 (M.D. Fla. 2009).

- Mears Transportation Group Inc. ("Mears") is the owner of a transportation business that operated at a site in Orlando, Florida (the "Site").

- In connection with its operations, Mears utilized underground storage tank systems at the Site.

- Mears purchased a Storage Tank System Third Party Liability Policy from Zurich American Insurance Company ("Zurich"), which was issued on or about August 15, 2001 (the "Policy") in connection with the underground storage tank system at the Site.

- It appears that at some point during the policy period Mears discovered a petroleum discharge and made a claim under the Policy in connection with the discharge.

- While the decision does not explain the reason for the delay, apparently the remediation of the contamination did not begin until March 2007.

- In order to conduct the necessary soil excavation and remediation, local health and safety laws required the temporary cessation of Mear's operations at the Site and the evacuation of its 550 employees that worked in a building at the Site that would be impacted by the remediation.

- Since Mears had no alternative, it relocated the employees and set up business operations at an alternative location until the soil excavation and remediation could be completed.

- In connection with its claim under the Policy, Mears submitted an itemization of the costs it incurred in connection with the cleanup.

- While Zurich paid in excess of $431,000 in connection with the claim, it refused to pay the $153,501.79 in expenses incurred by Mears to evacuate and relocate its employees.

- As a result, Mears filed a declaratory judgment action against Zurich and subsequently both parties filed a summary judgment motion on the issue of whether or not the policy provided coverage for relocation costs.

- The critical issue to be decided by the court was whether the relocation costs incurred by Mears constituted "cleanup costs" as that term was defined in the Policy.

- The Policy defined cleanup costs as "1. the necessary expenses incurred in the investigation removal, remediation,…of contaminated soil."

- Zurich maintained that the term "cleanup costs" was unambiguous and only applied to the necessary expenses incurred by Mears in the actual physical remediation of contaminated soil. It also proposed (citing a New York decision) that the word "incurred" narrowly limited the covered costs to those costs of actual physical remediation.

- Mears too maintained that the definition of "cleanup costs" was unambiguous and that the relocation costs were clearly covered since they were incurred in connection with the excavation and remediation of the soil.

- Court sided with Mears and agreed that Mears was entitled to be reimbursed for its relocation expenses because they were incurred as the result of the remediation of the contaminated soil from an area adjacent to the impacted building.

- In explaining its conclusion, court noted that had Mears not relocated its employees, it would not have been able to perform the remediation in accordance with law. Therefore Mears proved "a direct causal relationship between the cleanup process and the expenses incurred."

- Zurich then argued that even if the relocation expenses were cleanup costs, they would not be covered because they were not required by a "government authority," as that term was defined in the Policy.

- According to Zurich's argument, when a cleanup cost is incurred as the result of an insured's discovery of contamination, as opposed to in connection with the claim of a third party, a federal or state statute must mandate that these type of costs be incurred pursuant to a voluntary cleanup program.

- The Policy defined "governmental authority" as "applicable federal, state or local statutes…, including remedial action plans which (i) meet the requirements of a voluntary cleanup program…(ii) are validly executed…and (iii) are negotiated with restrictions no stricter than those necessary for the current use set forth in your application."

- Court quickly rejected this argument (and criticized Zurich's misquote of the definition of "governmental authority" in its motion papers by adding a comma after the words "remedial action plan," when no such comma was present in the Policy, noting that the cost only need to be required by a federal, state or local law (which was the case here) and that the requirement in the definition with respect to a voluntary cleanup program solely related to a remedial action plan and nothing more.

- Court held that the relocation expenses were covered under the Policy since they fit the definition of cleanup costs that were required by a government authority.

- Zurich's last argument was that even if the relocation costs were cleanup costs required by a government authority, they were excluded from coverage under Exclusion L of the Policy.

- Exclusion L provided that there was no coverage for any "cleanup costs…arising out of…the reconstruction, repair, removal, maintenance, upgrading, or rebuilding of any…buildings… ."

- Zurich argued that since the Policy did not cover the permanent replacement of the impacted building, it would also not cover the temporary replacement.

- Court found the argument of Zurich to be without merit – stating that the exclusion did not mention relocation expenses as an item for which there was no coverage and it could have if that was what Zurich intended. In fact, court found that the exclusion most likely applied to the permanent rebuilding of a building, not relocation expenses.

- Court therefore granted summary judgment in favor of Mears and ordered the payment of the relocation expenses as well as the attorney fees incurred by Mears permitted to be recovered pursuant to federal law.

59. **Picerne-Military Housing, LLC v. American Int'l Specialty Lines Ins. Co.**, 650 F.Supp. 2d 135 (Dist. Ct. RI 2009).

- Plaintiffs purchased a Pollution Legal Liability Select Policy from Defendant with a ten year term that commenced on August 1, 2003 (the "Policy").

- The limits of the Policy were $30,000,000 and the deductible was $250,000 per incident, $500,000 aggregate.

- All Plaintiffs were Named Insureds under the Policy.

- According to the Complaint filed by Plaintiffs, they retained PBG of North Carolina Inc. ("PBG") to perform work at Fort Bragg, North Carolina, the Insured Property under the Policy, which included building demolition and land clearing and grading services. (Note: unclear whether one or more of Plaintiffs entered into the applicable subcontracts with PBG.)

- It was alleged that the services performed by PBG took place during the period from September 14, 2004 through December 21, 2007.

- It was also alleged that PBG was obligated under the contract to dispose of waste material related to the demolition services.

- This waste material (the "Waste Material") consisted of "concrete, broken wood, painted wood, rebar, metal piping, white goods and vegetation (including tree trunks, tree limbs, tree stumps and mulch created from chipped trees)."

- Plaintiffs maintain that PBG excavated large pits at the Insured Property and, without their knowledge or consent, dumped the Waste Materials into the pits in violation of law and then covered the pits with soil.

- A notice of violation was issued by the North Carolina Department of Environmental and Natural Resources ("DENR") to Picerne Military Housing (one of the Plaintiffs) on June 12, 2007 (the "NOV").

- The NOV alleged that Picerne Military Housing was "operating a non-conforming solid waste disposal site/open dump…" (emphasis added) on property located at Fort Bragg in violation of law.

- The NOV also required Picerne Military Housing to, within thirty days of receipt of the notice, cease dumping operations and remove all waste from the site and bring it to a proper disposal facility.

- The NOV noted that a penalty of $5,000 per day could be assessed for each violation of the Solid Waste Management Law and Regulations (emphasis added), but that if the violation was corrected within the applicable time period no additional legal action would be pursued.

- PBG and others (but not the other two Plaintiffs) were copied on the notice.

- According to the Complaint, Plaintiffs performed an investigation of the extent of the illegal dumpling activities of PBG (which was apparently extensive), commenced the cleanup required by DENR and incurred costs in excess of $250,000 in connection with its compliance with the NOV.

- Plaintiffs allege that Defendant was placed on notice of the NOV.

- Plaintiffs maintain that at first Defendant acknowledged its defense obligation, while reserving its rights as to indemnification of Plaintiffs, with respect to the investigation and cleanup.

- On April 25, 2008, Defendant denied coverage of the cost of investigation and cleanup pursuant to the NOV, allegedly on the basis that the waste that PBG dumped was not a Pollution Condition (as defined in the Policy) because it was not a "solid…waste material" as that phrase was used in the Policy.

- Plaintiffs allege that they have spent in excess of $11,000,000 to comply with their obligations under the NOV.

- Plaintiffs also maintain that all of the costs should be paid by Defendant.

- As a result, Plaintiffs filed suit against Defendant seeking.

    - damages resulting from Defendant's breach of its obligations under the Policy.

    - a judgment declaring that Plaintiffs are entitled to defense and indemnity coverage under the Policy in connection with Plaintiffs' compliance with the NOV.

    - damages, punitive damages and attorney's fees.

- On the other hand, Defendant has produced evidence that the Waste Material may have been disposed of at the Insured Property with the consent of Plaintiffs.

- Plaintiffs moved for partial summary judgment seeking a declaratory judgment that Defendant is obligated to indemnify Plaintiffs for and pay all costs associated with the investigation and remediation related to the Waste Materials and for a finding of breach of contract on the part of the Defendant.

- Court denied Plaintiffs' motion for summary judgment for the reasons described below.

- The first argument raised by Plaintiffs was that the Waste Material was a Pollution Condition and that therefore, Defendant was obligated to pay Clean-up Costs (as defined in the Policy).

- The Policy defines a Pollution Condition as the "…discharge… release,… of any solid… irritant or contaminant, including but not limited to…waste materials…into or upon the land… ."

- Defendant argued that Plaintiffs failed to give the written notice required under the Policy when the debris was discovered (since they allegedly knew about it all along) and that there was no Pollution Condition since the Waste Material was "environmentally benign" and as a result did not meet the definitional requirement that the discharge be of an "irritant or contaminant."

- As to the notice issue, court explained that providing timely notice is a condition to coverage under the Policy and found issues of fact as to whether appropriate notice was given by Plaintiffs.

- As mentioned previously, Plaintiffs argued, that no "Responsible Insured" (as defined in the Policy) consented to the burial of the Waste Material. Defendant counters with affidavits from PBG personnel, as well as correspondence between PBG, Plaintiff(s) and DENR that certain of Plaintiffs' management personnel "witnessed or directed the debris burial on any number of occasions, in various locations." Plaintiffs' dismiss this argument on several bases, including that the evidence only implicates individuals that are "low level employees."

- Court found that the issues of whether the Plaintiffs employees met the definition of Responsible Insured under the Policy and whether they knew of or even directed the burial of the Waste Material were issues of fact for resolution at trial.

- Next court examined whether the Waste Materials were a Pollution Condition. Plaintiffs sought a broad reading of the definition (the mere fact that the Waste Materials were waste materials was sufficient to trigger coverage) and Defendant sought a narrow reading (the trigger of coverage was an "irritant or contaminant" that could consist of waste materials).

- Court agreed with the argument of Defendant that Plaintiffs could not use the "including without limitation" language in the definition of Pollution Condition as the sole focal point of the definition and that the definition had to be read in context—in other words that there had to be a discharge of an irritant or contaminant in the first instance.

- Plaintiffs argued that the test of whether something is an irritant or contaminant is whether it belongs where it is found buried underground and if it does not, then it is a contaminant because it made the soil in which the Waste Materials were buried "impure and unfit for use."

- Defendant proposed several counter-arguments to that position, including the numerous cases that view pollution as "involving hazards traditionally recognized to harm the public or the environment" and that the facts Defendant presented in this case indicate that the Waste Materials were " non-hazardous and posed no substantial risk of harm to human health or the soil or surrounding environment."

- While court appeared to be leaning towards the position of Defendant that the Waste Materials were not a Pollution Condition, it stopped short of accepting Defendant's argument that seemingly "innocuous" waste such as the Waste Materials can never be irritants or contaminants (and therefore meet the definition of a Pollution Condition).

- Court also rejected the argument of the parties that the issue of whether there was a Pollution Condition in this instance was a legal one and ripe for summary judgment. Court explained that at this juncture of the case, particularly since there was fact discovery remaining and investigation and remediation continuing, the issue presented was a fact intensive one—and included issues raised by Plaintiffs as to whether sink holes have formed at the Insured Property that could pose a health hazard or whether methane gases were being released as a result of some decaying Waste Materials, as well as the

possibility that some of the Waste Materials could meet the definition of Pollution Conditions while others may not, which could result in the eventual need for an allocation of the Clean-up Costs. Court therefore held summary judgment would not be granted.

60. **Pennzoil–Quaker State Co. v. American Int'l Specialty Lines Ins. Co.**, 653 F.Supp. 2d 690 (S.D. Tex. 2009).

- Pennzoil-Quaker State Co. ("Pennzoil") purchased a Pollution Legal Liability Select Policy from American International Specialty Lines Insurance Co. ("AISLIC"), the term of which commenced on October 1, 1999 and ended on October 1, 2002 (the "Policy").

- The Policy included various coverages, including Coverage F which applied to third party claims for bodily injury and property damage arising from Pollution Conditions that had an Insured Property as its source, but which had migrated off-site.

- The Policy limits for coverages D, E and F were $25,000,000 per incident $25,000,000 aggregate and the deductible under these coverages was $2,000,000 per incident.

- The deductible under the Policy applied to all clean-up costs, or loss arising from the "...same, related or continuous Pollution Conditions."

- During a five month period from January to May 2001, which was during the term of the Policy, five lawsuits were filed against Pennzoil on behalf of residents living in the vicinity of a refinery located on Louisiana, each of which alleged personal injury and property damage suffered by those individuals.

- The foregoing lawsuits were consolidated in June 2003.

- The White suit, was a class action suit brought on behalf of individuals that lived near the refinery who allegedly suffered "anguish", "physical, mental and emotional damage" and "property damage" as a result of the discharge of hazardous substances from the refinery during a January 18, 2000 fire and explosion as well as another release of pollutants on November 4, 2001.

- The Justice suit was brought on behalf of in excess of 240 residents of Caddo Parish who allegedly suffered "physical and mental injury as well as property damage" as a result of the release of air pollutants, as well as the release of pollutants into the groundwater. One of the alleged releases was from the January 18, 2000 fire and explosion mentioned in the White suit.

- The Daughtry class action suit contained allegations that Pennzoil continuously released pollutants into the air and environment which caused plaintiffs to suffer various health problems. There was no mention of the January 18, 2000 fire and explosion.

- The Worsham class action suit also alleged continuous releases of pollutants into the air and groundwater by Pennzoil which resulted in "physical injury," "property damage" and "personal injuries" to the plaintiffs. Again, no mention was made of the January 18, 2000 fire and explosion.

- Finally in the Shepard suit, plaintiffs alleged releases of specific contaminants, including benzene, into air and groundwater near the refinery, resulting in "physical injuries, mental distress and property damage."

- While Pennzoil gave timely notice of the White, Justice, Daughtry and Worsham suits to AISLIC, for some unknown reason, it failed to give notice of the Shepard suit until 2007.

- Pennzoil argued that AISLIC was not prejudiced by the late notice and that since the Daughtry allegations were so similar to those in Shepard, AISLIC had "de facto" notice of the Shepard suit.

- AISLIC accepted its duty to defend all of the suits but for Shepard; subject, however, to Pennzoil's payment of a $2,000,000 per incident deductible.

- Initially AISLIC believed there were three incidents, but ultimately concluded there were four.

- According to AISLIC, the incidents were:

  - The January 18, 2000 fire and explosion (White, Daughtry and Justice).

  - The November 4, 2001 release (White).

  - The continuous long term air emissions (Worsham, Daughtry, Justice).

  - The long term groundwater contamination (Daughtry and Justice).

- Pennzoil argued that all five of the suits arose from the "same, related or continuous Pollution Conditions" and that therefore only one $2,000,000 deductible was applicable.

- Pennzoil filed suit against AISLIC alleging breach of contract and violation of the Texas Insurance Code.

- Pennzoil moved for summary judgment on the issue of the deductible, taking the position that only one $2,000,000 deductible applied to the suits and maintaining that it had satisfied the deductible.

- AISLIC countered that four deductibles applied and that it had no obligation to defend the Shepard suit on the basis of late notice.

- The first issue addressed by court was whether AISLIC had a duty to defend Pennzoil in the Shepard suit.

- In reaching its conclusion, court focused on the fact that the Policy was a claims made policy, as opposed to an occurrence based policy.

- As stated previously, the Policy expired on October 1, 2002, and written notice of the Shepard suit, which was filed on May 10, 2001, was provided to AISLIC on November 28, 2007.

- Pennzoil argued that since AISLIC had timely notice of the Daughtry suit, which was a class action suit on behalf of the same plaintiffs as Shepard, it was not prejudiced by the failure to give notice and that the duty to defend was applicable.

- Court explained that with occurrence based policies, the trigger of coverage was the occurrence, but that with claims made policies, such as the Policy, the trigger of coverage was notice during the policy period of a claim made during the policy period.

- Court reviewed applicable case law on the topic and noted that courts rejected the prejudice argument advanced by Pennzoil when it came to claims made policies since that would expand coverage beyond the bargained for time period in the Policy.

- In other words, since the Policy was a claims made policy, Pennzoil should have provided notice of the Shepard suit during the policy period, not five years later.

- In denying Pennzoil's motion for summary judgment seeking a declaration that AISLIC must defend Pennzoil in the Shepard suit, court concluded that timely notice was not given by Pennzoil, prejudice was not a factor, and notice of the Daughtry suit was not the equivalent of notice of the Shepard suit.

- Next, court addressed Pennzoil's summary judgment motion on the issue of the number of deductibles application to the suits.

- Court noted that the resolution of the issue was dependant upon whether the losses that are alleged to have arisen from the Pollution Conditions are the "same, related or continuous."

- Court went through an extensive analysis of whether it needed to look at extrinsic evidence that went beyond the four corners of the policy in order to make a determination of the issue and concluded that was not necessary.

- Instead, court concluded that the issue would be determined based on the terms of the Policy and the allegations in the underlying suits and that "the amount of Pennzoil's deductible obligation was an independent and discrete coverage issue, not touching on the merits of the underlying third party claims."

- In reaching its decision, court explained that neither it nor the parties found cases analyzing the issue of what constitutes "the same, related or continuous Pollution Conditions" under a pollution liability policy that would warrant the finding of a single deductible in connection with the suits.

- As a result, court examined the issue in the context of decisions related to property and liability insurance policies.

- Court found cases under liability policies that defined "occurrence" to include "continuous or repeated exposure to substantially the same conditions" or "related conditions" to provide the best guidance on the issue in this case.

- The decisions cited leaned toward a determination of the number of occurrences or accidents that were applicable to the claim made.

- In the end, court sided with AISLIC and denied Pennzoil's summary judgment motion.

- Court concluded that the language of the Policy concerning the deductible was unambiguous, noting that it applied to costs or losses arising from the "same, related or continuous" Pollution Conditions.

- Since the term "related" was not defined in the Policy, court gave it its ordinary meaning, specifically "having a logical or casual connection."

- Court determined that the suits did not allege one related Pollution Condition, but rather, alleged separate discrete types of pollution events with distinct causes, specifically:

  - The release(s) resulting from the fire and explosion of January 18, 2000 in a specific area of the refinery.

  - The release at the refinery that allegedly occurred on November 4, 2001.

  - Continuous releases of different pollutants from the refinery into two types of media, air and groundwater.

- As a result, court denied Pennzoil's summary judgment motion that only one deductible applied and that AISLIC breached Texas Insurance Law.

- Interestingly, this case was subsequently settled by the parties as reported in Mealey's Litigation Report: Insurance, Vol. 24 #3, November 18, 2009.

61. **Milwaukee Metropolitan Sewage District v. American Int'l Specialty Lines Ins. Co.**, 2009 WL 142328 Case No. 05-CV-1352 (E.D.Wis. 2009), rev'd and remanded, 598 F. 3d 311 (7th Cir. 2010).

- Plaintiff brought suit to reform a pollution liability insurance policy (the "Policy") that it purchased from American International Specialty Lines Insurance Company ("AISLIC") (the "Policy") to include a parcel of land known as the "Lincoln Creek parcel" as an insured property under the Policy.

- After trial by jury, court made various findings of fact and conclusions of law.

- The conclusions of law were that:

  - Plaintiff was entitled to a reformation of the Policy to include the Lincoln Creek parcel as an insured property.

  - AISLIC was entitled to be indemnified by its agent, Crump.

- Court also made a determination as to the amount of costs incurred by Plaintiff that were covered under the Policy, which is described below.

- Court explained that the Wisconsin Supreme Court in Trible v. Tower Ins. Co., 43 Wis. 2d 172 (1969) set forth the circumstances pursuant to which an insured would be entitled

to reformation of an insurance policy, including unilateral error by an insurance agent and mutual mistake.

- It then analyzed whether Plaintiff proved, by the necessary evidentiary standards, all of the components of a reformation claim.

- First, court determined that prior to issuance of the Policy, Plaintiff requested the coverage it now seeks be included in the reformed policy, namely the addition of the Lincoln Creek parcel as an insured property. Interestingly, court did not find the fact that the parties referred to the parcel in a generic sense to be fatal to the claim.

- Next, court found that Plaintiff met its burden to prove by clear and convincing evidence that Crump understood that Plaintiff desired coverage for the Lincoln Creek parcel, notwithstanding that it did not know the metes and bounds description of the parcel. One particularly significant piece of evidence was that Crump unilaterally added to the Policy binder the words "Lincoln Creek."

- Court also found, based again on a clear and convincing standard, that Plaintiff proved that its agent, Sedgwick/Marsh ("Marsh") reasonably relied on Crump to obtain environmental coverage for the Lincoln Creek parcel, particularly since Crump, not Marsh, had the expertise in this type of coverage and since Marsh received repeated assurances from Crump that the Policy included the Lincoln Creek parcel.

- As to the final element of the reformation claim, court concluded that Plaintiff "proved by clear and convincing evidence that the failure to obtain environmental hazard coverage for the Lincoln Creek parcel was the result of a mistake by Crump."

- Court explained that at an earlier stage of the case it appeared that AISLIC's guidelines, rather that Crump's mistake was the reason that the Lincoln Creek parcel was not included in the Policy. However, during the course of the trial, evidence was produced to show that the guidelines were discretionary, rather than absolute, and that the guidelines alone would not have prohibited coverage of the Lincoln Creek parcel. Court provided a specific example of the underwriter unilaterally adding another parcel to the Policy without requiring the typical underwriting information for the parcel, such as an "on-site inspection or telephone survey." In fact, according to court, the underwriter "never even sought to confirm that the building [on the parcel added unilaterally]…was a wastewater treatment facility."

- Court noted that AISLIC repeatedly asked Crump for information on the Lincoln Creek parcel, and specifically told Crump that the Policy did not cover the Lincoln Creek parcel, but rather a separate location. Crump's response, was simply to ask Marsh for the address of the parcel, without conveying the critical need for the information required by AISLIC in order to obtain the required coverage.

- An analysis was also conducted by court as to whether Plaintiff was entitled to reformation of the Policy on the basis of mutual mistake, noting however, that it did not have to discuss this issue since it had already concluded that Plaintiff was entitled to reformation. The interesting aspect of the mutual mistake discussion are the facts recited which led court to conclude that mutual mistake did not apply in this instance, including a letter from the underwriter to Crump which states in no uncertain terms that AISLIC will

not be insuring Lincoln Creek, and which states that coverage for the parcel would have to be pursuant to a "CPL project policy."

- AISLIC's claim for indemnification and contribution from Crump should reformation be granted to Plaintiff was the next issue addressed by court.

- While there was no contract between the parties providing for such indemnification and contribution, court found that AISLIC had an equitable right to be indemnified for the costs it expends to compensate Plaintiff.

- Finally, court examined the remaining legal claims that were related to coverage issues and the amount of loss to which Plaintiff was entitled under the Policy.

- As to the amount of loss claimed by Plaintiff, jury concluded and court agreed that certain costs were not remediation costs covered under the Policy, but were instead costs inherent in the flood plain project that Plaintiff was conducting on the Lincoln Creek parcel, and that therefore, the amount incurred by Plaintiff for cleanup costs was $404,148.51.

- Court reduced that sum by the $100,000 deductible in the Policy leaving costs of $304,148.51 recoverable under the Policy.

- AISLIC and Crump argued that the known conditions exclusion in the Policy (which precluded coverage of pollution conditions known by the insured prior to policy inception and not disclosed to the insurance company) totally precluded coverage of the claim. However, court found no evidence was presented to support that allegation. In fact, court described how Plaintiff answered "Yes" to the question in the application in the Policy as to whether it was aware of any pollution conditions on any of the properties Plaintiff sought to insure, and specifically directed AISLIC to a Phase I study for Lincoln Creek. Additionally court noted that there was no evidence presented to indicate Plaintiff knew of any potential contamination beyond that described in the Phase I.

- Finally AISLIC contended that it should be entitled to a set off equal to any sums recovered by Plaintiff from Marsh in connection with the Lincoln Creek property.

- Court agreed noting that "it is clear under Wisconsin law that a party is entitled to but one recovery for a loss" and found that the judgment against AISLIC in the amount of $304,148.51 must be reduced by any sums received from Marsh. Ultimately, judgment was entered in the amount of $226,468.51.

- AISLIC and Crump appealed and the 7th Circuit reversed the holding of the district court for the reasons described below and ordered that judgment be entered in favor of AISLIC vacating the trial court judgment on the reformation claim and that the indemnity claim of AISLIC against Crump be dismissed as moot.

- In examining the decision on appeal, 7th Circuit had a much different view of the facts presented to support the reformation claim of Plaintiff and of the law that applied.

- In reciting the facts that was the basis of its decision, appellate court described the following:

- Plaintiff developed a plan in the late 1990s to reduce flooding along a 9 mile portion of Lincoln Creek, which plan was divided into ten segments called reaches.

- In order to implement its plan, Plaintiff needed to purchase some land owned by Milwaukee County, which was part of reach 3 (the "County Parcel"), but the County would not permit Plaintiff to perform a soil investigation to check for pollution.

- An employee of Plaintiff suggested that the Plaintiff purchase an environmental liability policy to protect it in the event that there was contamination discovered on the County Parcel and Plaintiff then met with representatives in Marsh in 1998 to discuss obtaining the necessary coverage.

- In December 1998, Glinda Loving, risk management coordinator for Plaintiff ("Loving"), provided Marsh with information in connection with Plaintiff's request for pollution coverage, including excerpts from Phase I Study that covered reaches 1-6.

- Loving believed that the Phase I applied only to the County Parcel, which was a mistake on her part. Marsh did not independently determine the precise identity of the Lincoln Creek parcel to be insured.

- In December, 1998, Marsh contacted Crump to purchase coverage for the County Parcel, which was called the "Lincoln Creek" parcel, provided it with a full copy of the Phase I and asked whether this was sufficient information for an underwriter to determine whether to provide coverage for the "Lincoln Creek" parcel.

- On February 25, 1999, Plaintiff authorized Marsh to bind coverage for a number of properties, including a property identified as "Lincoln Creek." Marsh then forwarded the binder order to Crump, which forwarded it to AISLIC.

- The next day, AISLIC confirmed in writing that coverage was bound and Crump sent the confirmation to Marsh and advised Marsh that Lincoln Creek was an insured property and that AISLIC needed a new policy application completed.

- On March 1, 1999, AISLIC faxed Crump a policy binder that listed the insured properties, but "Lincoln Creek" was not listed. When Crump noticed the omission the next day, it told AISLIC that "Lincoln Creek" would appear on the application and it added 'Lincoln Creek" to the binder, placed the binder on its letterhead, with a notation that coverage was subject to "receipt and satisfactory review of an application with site addresses for the insured properties by March 5," and faxed it to Marsh, and shortly thereafter to AISLIC.

- The next day, AISLIC objected to the inclusion of the "Lincoln Creek" parcel in the binder and advised Crump in no uncertain terms that there was no coverage for that property.

- On March 5, 1999, Marsh sent Crump the completed application which contained street addresses for all of the parcels except for Lincoln Creek (which was only identified in the application by a reference to the Phase I and the identification of Loving as the contact person.

- On March 8, 1999, AISLIC again informed Crump that it would not include "Lincoln Creek" as an insured property since its underwriting guidelines mandated that an insured property be owned…or in the operational control of an insured and that "Lincoln Creek" would have to be insured under a contractor's pollution liability policy.

- On March 12, 1999, Crump advised Marsh by fax (which it re-sent on March 29, 1999 with the indication "Urgent") that AISLIC "was having difficulty adding the entire 'Lincoln Creek' " to the Policy, that Crump needed a street address for the property and that AISLIC would only add "the portion [of Lincoln Creek] that the insured owns or operates."

- Marsh failed to notify Plaintiff of either fax and no response was provided to Crump.

- On March 16, 1999, AISLIC issued the Policy without "Lincoln Creek" included as an insured property and sent the Policy to Marsh for review and approval specifically asking to be advised on any necessary corrections.

- Marsh did not send the Policy to Plaintiff until September, 1999. Loving noticed that "Lincoln Creek" was not included and so advised Marsh. Marsh, in turn, mistakenly told Plaintiff that the insured property that had a 32nd Street address was the "Lincoln Creek" parcel and then sent a fax to Crump asking that it correct the address for the 32nd Street property to include all of the property indicated in the Phase I, which went far beyond the County Parcel that was to be the "Lincoln Creek" parcel insured under the Policy.

- The County Parcel was purchased by Plaintiff in October, 1999 and in November, 1999, Plaintiff discovered large quantities of waste ash on the County Parcel. In March 2000, Plaintiff submitted a claim to AISLIC for the costs to remove the waste ash from the County Parcel and in December 2001, AISLIC denied the claim.

- In examining Wisconsin law related to policy reformation, the appellate court focused in on the need for a prior agreement between the parties that is not reflected in the ultimate policy that is issued as a result of either: (a) mutual mistake; or (b) unilateral mistake, together with fraud or inequitable conduct on the part of the other party.

- Appellate court determined that the facts presented evidenced no such prior agreement on the part of the parties for the "Lincoln Creek" parcel to be an insured property under the Policy. For example, court concluded from the facts described above, that the identity of

the parcel to be insured was "patently insufficient." To support its position, appellate court noted that Plaintiff's employee, Loving, never knew the description of the "Lincoln Creek" parcel—she thought it was all of the property covered by the Phase I, when in fact, it was only a portion of that property. She was the one that conveyed her understanding of the "Lincoln Creek" parcel to Marsh, which in turn conveyed its understanding to Crump, which then in turn conveyed its understanding to AISLIC—and queried how could there be an agreement on the identity of the "Lincoln Creek" parcel, especially on the part of AISLIC.

- In disagreeing with the conclusion of the trial court that there had been a meeting of the minds between the parties on the basis that Crump altered the binder to include the "Lincoln Creek" parcel as an insured property, appellate court maintained that this one fact was not sufficient to evidence an agreement, particularly in view of the March 12 fax from Crump to Marsh in which Crump told Marsh that AISLIC "was having difficulty adding the entire 'Lincoln Creek' " to the Policy and that AISLIC would only add "the portion that the insured owns or operates." Court found this document, as well as the other evidence produced, to be a clear indication that AISLIC did not have an understanding of the property to be insured.

- Appellate court went on to say that even if its conclusion that there was no prior agreement between the parties is in error, the judgment could not stand because the Plaintiff failed to prove that there was a mistaken belief on its part, at the time the Policy was issued, that the "Lincoln Creek" parcel would be an insured property. In supporting its position, appellate court recited a number of the facts described above, all of which related to a period of time prior to the issuance of the Policy on March 16, 1999, including: (a) the December 1998 letter from Marsh to Crump asking whether the information provided was sufficient for underwriting purposes; (b) the March 1, 1999 altered binder which contained the notation that AISLIC's coverage was subject to "receipt and satisfactory review of an application with site addresses for the insured properties by March 5" ; (c) the lack of the required information in the policy application submitted on March 5; (d) the March 12 fax from Crump to Marsh that stated that that AISLIC "was having difficulty adding the entire 'Lincoln Creek' " to the Policy, that Crump needed a street address for the property and that AISLIC would only add "the portion [of Lincoln Creek] that the insured owns or operates."

- Appellate court found the March 12 fax to be of particular significance because it evidenced that Plaintiff knew, through its agent, Marsh, that the "Lincoln Creek" parcel must be owned or operated by Plaintiff in order for it to be covered under the Policy and that since it was not purchased until long after the Policy was issued, it could not be an insured property.

62. **Cain Petroleum Inc. v. Zurich American Ins. Co.**, 197 P.3d 596 (Or. Ct. App. 2008), appeal denied, 205 P.3d 887 (Or. 2009).

- Plaintiff, an operator of service stations in the State of Oregon, purchased a Storage Tank System Third Party Liability and Cleanup Policy from Zurich American Insurance Company ("Zurich"), which had a term that commenced on July 22, 2001 and ended on July 22, 2002 (the "Policy").

- The Policy provided first party cleanup coverage and third party liability coverage in connection with "scheduled storage tank system(s)" at a "scheduled location…" that commence on or after the "retroactive date."

- "Scheduled storage tank system(s)" is specifically defined in the Policy as a tank that is owned and/or operated by an insured and that is "identified in the applicable Endorsement and described on the Application".

- In this instance there was a "Site Schedule" attached to the Policy that identified the covered locations and each of the insured tanks.

- Property located at 833 Baseline, Hillsboro, Oregon (the "Property") was a scheduled location on and three tanks that were installed at the Property in 1994 were listed on the Site Schedule. In addition, the Property and the same tanks were listed in the Tank Schedule attached to Plaintiff's policy application.

- As to the retroactive date, which was defined in the Policy as "the earlier date that a release can commence for coverage to be provided under this policy", Plaintiff, which had the ability to select a retroactive date of either the date of policy inception or "other", checked the "other" box and inserted the words "Per Existing Site Schedule" in the area of the form that permitted an explanation.

- The retroactive date chosen for the Property was July 22, 1991.

- On May 15, 2002, the Oregon Department of Environmental Quality ("DEQ") issued a Notice of Violation, Department Order and Assessment of Civil Penalty to Plaintiff in connection with discharges of hazardous substances from underground storage tanks at the Property.

- It was determined that the releases at issue were not from any of the scheduled tanks.

- Notwithstanding that fact, Plaintiff made a claim under the Policy for the releases from the older tanks.

- Zurich denied coverage and Plaintiff filed suit against Zurich seeking a declaration that it was entitled to coverage under the Policy.

- Trial court, on Plaintiff's motion for summary judgment, found that the terms of the Policy were unambiguous and held that Plaintiff was not entitled to coverage.

- Plaintiff's argument before the trial court to support its motion was that even through coverage applies to releases from "scheduled storage tank systems" at "scheduled locations" after the "retroactive date", the Policy was ambiguous since the retroactive date of 1991, as to the Property, was senseless when one considered the fact that the "scheduled storage tank systems" were not installed until 1994. Plaintiff went on to argue that this ambiguity should be construed in its favor to conclude that the older tanks at the Property were also covered under the Policy with a 1991 retroactive date.

- Plaintiff's second argument was that since Zurich took the position in the Zurich American Ins. v. Whittier Properties case (See case number 30 above) that non-

scheduled tanks were covered for post retroactive date leaks, it should be estopped from taking the position in this case that there was no coverage for non-scheduled tanks.

- Zurich responded that the Policy was unambiguous and only provided coverage for scheduled tanks, that Plaintiff chose the retroactive date, not Zurich, and that therefore Plaintiff's argument for a finding of ambiguity was without basis. In addition, Zurich maintained that judicial estoppel was inappropriate in this instance since the policy at issue in Zurich v. Whittier had different terms than the Policy and Zurich did not prevail in that case.

- Trial court agreed ruling in favor of Zurich and holding as a matter of law that "there's no ambiguity that the intent of the parties here was to limit policies to the storage tanks that are specifically scheduled here."

- Plaintiff appealed taking the same position that:

  - the policy was ambiguous, because of the 1991 retroactive date, and should therefore be construed in favor of Plaintiff; and

  - Zurich took a different position on a similar policy in another jurisdiction and should be estopped from taking a contrary position here.

- Appellate court agreed with the trial court and upheld trial court's grant of summary judgment to Zurich, denial of Plaintiff's summary judgment motion and dismissal of Plaintiff's complaint.

- In reaching its conclusion, appellate court explained that in order for an insurance policy to be ambiguous, there must be "multiple reasonable interpretations of the policy wording…"

- In this instance, court found no debate that Zurich's reading of the Policy to provide coverage for "scheduled storage tank systems" was reasonable and that Plaintiff's proposed construction of the Policy was not since it was directly contradicted by the express wording in the Policy that it only covered releases from scheduled storage tank systems at scheduled locations.

- Plaintiff's judicial estoppel argument was also rejected by the appellate court since Zurich did not benefit from the position taken in the Zurich v. Whittier case, notwithstanding the language that may have been in the policy at issue in that case.

63. **RSR Corp. v. Int'l Ins. Co.**, 612 F.3d 851 (5th Cir. 2010).

- This decision is another decision in a longstanding litigation between the parties in connection with environmental impairment liability ("EIL") policies. See Section XI, Item Number 21 for further background on this matter.

- This particular aspect of the case involved the appeal of a decision by a Texas district court that the "other insurance" provision in the EIL policies at issue prevented RSR from recovering from International in connection with the Harbor Island, Washington site since RSR had been fully compensated by its settlements with its CGL insurers.

- Fifth Circuit agreed with the district court.

- The terms of the "other insurance" clauses in the International EIL policies provided that the policy was excess in situations in which a liability was also covered under another policy.

- RSR's position on appeal was twofold – first that the payment pursuant to settlement agreements with its CGL insurers was not insurance, and therefore, the "other insurance" provisions in the EIL policies were not triggered and second that even if the payments were considered insurance, the EIL policies and the CGL policies covered different liabilities and therefore the "other insurance" provision in the EIL policies was not applicable.

- Court quickly rejected the first argument of RSR explaining that it did not matter how recovery was achieved under the CGL policies and that in fact the applicable trigger of the "other insurance" provisions was the existence of other policies that covered the same liabilities as the EIL policies.

- As to the position of RSR that the CGL policies and the EIL policies covered different liabilities, court rejected this argument on the basis of judicial estoppel since RSR had successfully argued in another action that the policies covered the same liabilities.

- To support its position, RSR advanced the argument that EIL policies covered "routine" pollution and CGL policies covered "non-routine" pollution.

- Fifth Circuit quickly disposed of this argument noting that the position taken by RSR was that the pollution at Harbor Island was accidental, that was the position taken in the CGL suit and therefore the district court did not abuse its discretion in holding that RSR was estopped from arguing that the CGL and EIL policies covered different liabilities.

- The final issue to be determined by the Fifth Circuit was whether or not the settlements under the CGL policies fully compensated RSR for its Harbor Island liabilities.

- The total amount collected by RSR from the CGL settlements was in excess of $76 million while the amount RSR sought from International for Harbor Island was $13.1 million.

- RSR failed to allocate its settlements with the CGL insurers among the sites for which coverage was sought.

- As a result, based on Texas law, Fifth Circuit found that the $76 million settlement had to be allocated to the Harbor Island liabilities of $13.1 million and as a result, the "other insurance" provisions in the EIL policies precluded recovery by RSR under the EIL policies.

64. **Alan Fisher and Dab Three LLC v. American Int'l Specialty Lines Ins. Co.**, No. 3:07CV1871(MRK), 2010 WL 2573909 (D. Conn. May 14, 2010).

- On the same day that Plaintiffs purchased certain real property located in Brookfield, Connecticut (the "Insured Property"), they purchased a Pollution Legal Liability Select Policy from American International Specialty Lines Insurance Company ("AISLIC") to cover the Insured Property, with a policy term that commenced on August 1, 2000 and ended on August 1, 2002 and with an extended reporting period that expired on October 1, 2002 (the "Policy"). Plaintiffs also entered into a Purchase and Sale Agreement (the "Agreement") with Iroquois Gas Transmission ("Iroquois") on that same date, in which they agreed to sell the Insured Property to Iroquois and to clean-up the Insured Property.

- At the time Plaintiffs purchased the Insured Property, they knew that there was some solid waste that they would need to remove. However, Iroquois insisted that the Agreement required Plaintiffs to undertake a more extensive cleanup than anticipated, which included buried debris discovered by Plaintiffs, including "household waste, tires, concrete, appliances, vehicle parts, plastics, pipes, trash, and other waste materials ("Waste Materials"); though they did not discover any receptacles that were leaking hazardous substances." **Note: See case number 59 above for another discussion related to similar Waste Materials.**

- Plaintiffs' notified AISLIC on June 14, 2001 of their claim for coverage under the Policy seeking payment of clean-up costs related to the Waste Materials, which claim was denied by AISLIC on August 30, 2001.

- On or about September 25, 2002, Plaintiffs sent AISLIC another letter, attached to which was a letter from Iroquois that advised that it intended to enforce its rights under the Agreement to require Plaintiffs to clean-up the Insured Property. AISLIC again denied coverage on November 8, 2002.

- In June, 2003, in order to comply with their obligations under the Agreement, Plaintiffs entered into the Connecticut Voluntary Remediation Program ("VRP"). They also sold the Insured Property to Iroquois and, after the sale, engaged in the clean-up of the Waste Materials."

- Plaintiffs ultimately filed suit against AISLIC for breach of contract, a declaratory judgment that it was entitled to coverage under the Policy for the cost of cleanup and for a breach of the covenant of good faith and fair dealing.

- AISLIC moved for summary judgment on all of Plaintiffs claims.

- In its summary judgment motion, AISLIC proposes four reasons why Plaintiffs are not entitled to coverage under the Policy: (1) there was no "Claim" (as defined in the Policy) made or reported during the term of the Policy; (2) Plaintiff did not incur "Clean-up Costs" (as defined in the Policy); (3) the Waste Materials were not a "Pollution Condition" (as defined in the Policy); and (4) the contractual liability exclusion in the Policy precludes coverage.

- Court granted summary judgment to AISLIC holding that "Plaintiffs did not submit a claim under the Policy because they never notified AISLIC that they were required by environmental law to cleanup the Site."

- In reaching its conclusion, court recites the applicable insuring agreement as well as the definition of several of the applicable terms of the Policy. These included the definition of Claim, Clean-Up Costs (which includes investigation and remediation costs to the extent required by Environmental Laws), the definition of Environmental Laws (which includes federal, state and local laws pursuant to which the Insured has or may have an obligation to incur Clean-Up Costs) and the definition of Pollution Conditions, which included the "…discharge…of any …irritant or contaminant including…waste materials into or upon the land…". In addition, court recites the contractual liability exclusion which precludes coverage of "… liability of others assumed by the Insured under any contract…unless the liability of the Insured would have attached in the absence of such contract…".

- Court's conclusion based on its analysis of the coverage provided under the Policy was that there had to be a claim for Clean-Up Costs made against the Plaintiffs (Insured) and reported to AISLIC during the Policy and that in order for the claim to be a reportable claim, Clean-Up Costs had to be required by Environmental Laws.

- The first hurdle that Plaintiffs needed to overcome in connection with the summary judgment motion was whether the Clean-Up Costs they incurred were required to be incurred by Environmental Laws. Plaintiffs conceded that they were under no obligation under federal or state law to undertake the Cleanup, but they argued that the Town of Brookfield issued notices under local laws (in 1981[cease and desist, which was later rescinded] and 1996 [notices of violation that appeared not to have been rescinded]) that required Plaintiffs to Cleanup the Insured Property. However, according to the evidence presented, the 1996 notices were not orders requiring compliance with the laws recited therein and did not require corrective action. In fact, court found that at best the notices may have required that Plaintiffs not permit any further dumping at the Insured Property—but did not require the Plaintiffs to Cleanup the Insured Property.

- The bottom line of court's decision was that all of the notices of claim provided by Plaintiffs to AISLIC under the Policy alleged that Plaintiffs were required to conduct a Cleanup under the Agreement—not under Environmental Laws, which court found not to be a covered claim under the Policy, since the Policy required that Clean-up Costs be incurred to the extent required by Environmental Laws and no Environmental Law required Plaintiffs to incur such Costs.

- Court noted that it need go no further to address the alternate arguments raised by AISLIC in its motion papers, whether the Waste Materials were a Pollution Condition (court seems by its comments to be leaning toward a position that the Waste Materials were a Pollution Condition) and whether the contractual liability exclusion applied (court by its discussion raises what it sees as the issues).

- Finally court dismissed Plaintiffs claim for breach of the covenant of good faith and fair dealing, since there can be no such claim since Plaintiffs are not entitled to coverage under the Policy.

65. **Lowry Assumption LLC v. American International Specialty Lines Insurance Co.**, 2011 U.S. Dist. LEXIS 40403 (D. Colo. 2011).

- Insured, Lowry Assumption LLC ("Insured"), was hired to perform a remediation at the Lowry Air Force Base.

- Insured and the Lowry Economic Development Authority purchased a blended finite risk insurance policy from AISLIC entitled a Clean-Up Cost Cap and Closure Cost Insurance Policy (the "Policy").

- The structure of the Policy was such that the Insured pre-funded $39.6 million for clean-up, with AISLIC paying the covered costs as agreed upon milestones were met. The Insured also paid an additional premium to cover potential unknowns.

- The premium for the Policy paid by the Insured to AISLIC was $2.5 million and additionally, AISLIC had the right to invest, for its benefit, the sums not disbursed from the fund.

- After several years, AISLIC began to dispute payments, notwithstanding completion of the agreed upon milestones. In addition, Insured maintained that AISLIC paid unauthorized sums to itself from the fund.

- As a result, Insured filed suit against AISLIC alleging various claims for relief, including breach of contract, breach of fiduciary duty and unjust enrichment.

- Thereafter, AISLIC filed a motion to compel Insured to submit its claim to arbitration pursuant to the terms of the Policy and to stay the case.

- AISLIC maintained that the arbitration condition in the Policy gave either party the right to resolve Policy disputes through arbitration and that the language granting that right was mandatory.

- Insured argued that the arbitration condition of the Policy was permissive, not mandatory, and that it wanted to litigate, not arbitrate, the matter.

- The arbitration provision in the Policy stated in pertinent part as follows:

  M. Arbitration - "… all disputes or differences that may arise under or in connection with this Policy…, including any determination of the amount of Clean-Up Costs or Closure Costs, may be submitted to the American Arbitration Association… .

  Any party may commence such arbitration proceeding… .

  The written decision of the arbitrators… shall be provided simultaneously to both parties and shall be binding on them… ."

- Court explained that there were two reasonable interpretations of the Policy language. First, that arbitration was a remedy available to the parties, but not the sole remedy, since there was other language in the policy related to the law to be applied in the event of a suit, which references litigation or other form of dispute resolution in addition to

arbitration. Second, that the word "may" did indicate that the parties intended arbitration to be the sole remedy, in which event arbitration could be pursued in the event of a dispute or alternatively, the claim could be abandoned.

- Based on the foregoing interpretations, court concluded that the arbitration language in the Policy was ambiguous and refused to stay the matter and refer it to arbitration. Court noted that if AISLIC wanted arbitration, it would need to factually establish that arbitration is mandatory.

66. **Penn Tank Lines Inc. v. Liberty Surplus Ins. Corp.**, 2011 U.S. Dist. LEXIS 57331 (E.D. Pa 2011).

- Insured, Penn Tank Lines Inc. ("Penn Tank"), purchased three consecutive contractor's pollution liability policies from defendant, Liberty Surplus Insurance Corporation ("Liberty"), which encompassed the period from July 1, 2002 through July 1, 2008.

- On March 24, 2006, a Penn Tank truck overturned as the result of an accident and in addition to the death of the driver, there was a spill of over 8,000 gallons of the truck's cargo of gasoline, as well as the truck's diesel fuel (the "Accident").

- Penn Tank also purchased a trucking and automobile liability policy issued through FS Insurance, Ltd. ("FS").

- The Accident was reported to FS and for a period of time FS covered the cost of the initial cleanup of the gasoline spill, including the removal of contaminated soil, performed by Penn Tank's contractor, Florida Environmental Regulation Specialists ("FERS").

- FS paid the invoices submitted to it by FERS, directly to FERS, and Penn Tank maintains that no demand was made against it for the costs to clean-up the spill.

- On March 30, 2006 the safety director of Penn Tank and a representative of FERS visited the Accident site. The next day the safety director provide a detailed description of the situation to the risk control manager of Penn Tank, including that the gasoline had entered the groundwater and that approximately 20,000 gallons of contaminated water would need to be removed from the site. He also explained that the FERS representative believed that clean-up efforts would not achieve the "groundwater clean" level, but that he hoped it would eventually reach "natural attenuation" levels that would not require active clean-up, but rather a period of regular monitoring.

- By March 31, 2006, Penn Tank's CEO was advised that the costs of cleanup would be at least $400,000 and possibly more.

- FERS prepared a Source Removal Report on behalf of Penn Tank, dated May 24, 2006, which recommended a further assessment of the groundwater, and forwarded it to the Florida Department of Environmental Protection ("FDEP") that same day (the "Source Removal Report").

- During a portion of the time that the foregoing Accident and clean-up activities were taking place, Penn Tank was in the process of renewing its current contractors pollution

liability policy, which had a term of July 1, 2004 to July 1, 2006 (the "2004-2006 Liberty Policy"), which was set to expire on July 1, 2006.

- According to Penn Tank, it did not receive any notice from a governmental authority of its responsibility for the spill or demand from any person asserting it was responsible to clean-up the spill prior to the issuance of the renewal policy on July 1, 2006 (the "Renewal Policy"), which was bound on June 27, 2006.

- During the renewal process, Penn Tank's broker, Marsh, provided various information and documentation requested by the underwriter for Liberty, including an application that Penn Tank completed for another insurance company that listed a loss for the Accident. Marsh also noted that the completed application requested by the underwriter would follow. However, there was no specific notice of the gasoline spill given to Liberty by Penn Tank prior the issuance of the Renewal Policy.

- Penn Tank maintains that prior to the issuance of the Renewal Policy, it did not believe that it had or might have liability for environmental damage or loss or that it might pursue a claim against Liberty since FS had accepted coverage for cleanup expenses, with no reservation of rights to decline coverage.

- On September 28, 2006 FDEP sent a letter to Penn Tank noting that it reviewed the Source Removal Report and that since petroleum contamination associated with the Accident still existed, it was referring the matter to the Brevard County Natural Resources Management office ("Brevard County") since a complete assessment of the contamination needed to be conducted (the "FDEP Letter").

- On November 30, 2006, Marsh sent a partially completed renewal application to Penn Tank's CEO and asked that he review, complete and sign the application, date it July 1, 2006 and return it to them.

- The application contained the following question which had the "No" box checked.

  "Is the applicant aware of… any circumstances or any allegations of the applicant's liability, or any allegations of an act, error or omission in the performance of the applicant's services which may result in any claim, suit, or demand for money against the applicant or any person or entity for who coverage is sought?..."

- On December 21, 2006, Brevard County sent a letter to Penn Tank advising that Penn Tank was "required to perform a site assessment and site assessment report by February 24, 2007, and that a failure to do so may result in a formal enforcement action." (the "Brevard County Letter").

- On December 26, 2006, Marsh, on behalf of Penn Tank, notified Liberty of the Accident, the involvement of FDEP, the costs incurred for cleanup and the potential of future expenses to assess the groundwater.

- After reviewing information submitted to Liberty in connection with the claim, on April 30, 2007, Liberty denied coverage of the claim of Penn Tank in connection with the Accident under both the 2004-2006 Liberty Policy (on the basis that Penn Tank failed to report the claim made against it during the policy period) and the Renewal Policy (on the

basis that Penn Tank made a material misrepresentation in its application for the Renewal Policy), which was reaffirmed by Liberty on May 1, 2007, and again on December 15, 2009.

- On April 30, 2007, Penn Tank was also notified that Discover Re, the underwriter of the policy issued by FS, denied coverage of Penn Tank's claim in connection with the cleanup, based on a pollution exclusion endorsement in the policy and that FS demanded that Penn Tank repay the amounts already paid on its behalf with respect to the cleanup.

- Penn Tank filed suit against Liberty and ultimately each of the parties filed summary judgment motions seeking resolution of the issue of whether Penn Tank was entitled to coverage.

- The first issue addressed by the trial court on summary judgment was whether there was a claim made against Penn Tank and reported to Liberty during the term of the Renewal Policy, since it was a "claims made and reported" policy.

- Court reviewed the definition of "claim" in the policy, specifically "… a written demand received by the insured seeking a remedy or asserting liability or responsibility on the part of the insured for loss."

- In reaching its determination that the first claim made against Penn Tanks was the Brevard County Letter, which was received by Penn Tank during the Renewal Policy term and reported to Liberty by Penn Tank during that policy period, court explained that: (a) the "Accident" was not a claim, rather it was an occurrence; (b) the FERS invoices were not a claim, because while they demand payment, they do not seek a legal remedy for services it or its contractors rendered at the site nor do they assert liability on the part of Penn Tank for pollution conditions caused by the Accident; and (c) the FDEP Letter was not a claim, but rather notice that Penn Tank might be subject to a claim from Brevard County.

- The next issue was whether the Known Circumstances and Non-Disclosure exclusion and the condition in the Renewal Policy requiring notice of a pollution condition were applicable to the claim of Penn Tank.

- Liberty contents that the exclusion and condition both preclude coverage since the pollution condition at issue was known to Penn Tank prior to the effective date of the Renewal Policy.

- In reviewing the language of the Renewal Policy, Court explained that the exclusion and condition were both keyed into whether the pollution condition was such that the insured "knew or could have reasonably foreseen [it] would give rise to a claim… ."

- Court noted that while there was no case law directly on point, in looking at decisions containing analogous exclusions under claims made legal professional liability policies, courts typically used a standard that would "consider first the subjective knowledge of the insured and then the objective understanding of a reasonable insured with that knowledge", and that it would use that standard in this instance.

- After evaluating all of the information known by the CEO of Penn Tank and other employees, court concluded that Penn Tank had not received any communication from a governmental authority or third party as to Penn Tank's responsibility for the spill, and that FS had agreed to cover the cost to clean-up the contamination.

- Ultimately court declined to grant summary judgment to either party as to the foregoing exclusion and condition because it determined that there were factual issues as to whether Penn Tank could have reasonably foreseen that an environmental enforcement action would have resulted from the spill, and therefore, as a matter of law, when viewing the evidence in a manner most favorable to the applicable non-moving parties, Liberty had not carried its burden to prove that the exclusion was applicable and Penn Tank failed to prove that it had complied with the notice provisions of the Renewal Policy.

- The final issue before the court was whether Penn Tank had forfeited its insurance coverage as a result of a deliberate misrepresentation on the application for the Renewal Policy. In granting summary judgment to Penn Tank, court concluded it had not.

- Court noted that Liberty could not rescind the Renewal Policy unless it met its burden to prove by clear and convincing evidence that there was a knowing failure on the part of Penn Tank to disclose information to Liberty that was material to the risk it was insuring or that Penn Tank knowingly made false statements.

- In reviewing the record, court failed to find factual support for the proposition that "… the contamination at the site was material to the risk for which insurance was sought and bound", instead noting that even though Liberty "requested an application, it relied on other information provided by Marsh to formulate a renewal premium quotation and bind coverage."

- Further, court found that the record failed to reveal that Penn Tank deliberately intended to deceive Liberty in connection with the issuance of the Renewal Policy, noting again, among other things, that: (a) FS agreed to indemnify Penn Tank, without a reservation of rights, and had paid a significant sum for cleanup costs, (b) there was no claim made against Penn Tank in connection with the spill prior to the effective date of the Renewal Policy, (c) Penn Tank noted to FS that there had been an accident by virtue of Marsh submitting a copy of the policy application for another insurance company to Liberty that mentioned the Accident, and (d) the application for the renewal policy was dated the effective date of the Renewal Policy, notwithstanding that it was actually signed much later.

67. **Picerne Military Housing LLC v. American International Specialty Lines Ins. Co.**, 2011 U.S. Dist. LEXIS 79180 (D. RI. 2011).

- See case number 59 for factual background and defined terms.

- After court rendered its decision denying prior summary judgment motions, based on two disputed material factual issues, first whether construction and demolition debris ("C&D Debris") meets the definition of Pollution Conditions in the Policy, and second whether a Responsible Insured failed to properly report the Pollution Condition to Defendant, court permitted parties to conduct further discovery, particularly as to Plaintiff's late

allegations that sinkholes and methane gas emissions arose at the Insured Property as a result of the C&D Debris.

- Following closure of discovery, the parties again filed summary judgment motions in connection with Plaintiff's claim under the Policy.

- Court denied the motions for the reasons set forth below.

- The three issues raised on the summary judgment motions were the two recited above, as well as whether the notice of the North Carolina DENR mandating that Plaintiffs remove the C&D Debris was promulgated pursuant to Environmental Laws since the Policy only covered cleanups to the extent required by Environmental Laws.

- As to whether the C&D Debris constitutes a Pollution Condition, court found that fact issues still remain that must be decided at trial.

- Court also held that Defendant failed in its argument that the NOV issued by the North Carolina DENR is not an Environmental Law since a directive to remove solid waste from a site has nothing to do with pollution. Rather, court explained that North Carolina statutes define "solid waste as potentially hazardous waste", and that based on North Carolina statutes, a Delaware Supreme Court decision and the plain language of the Policy, the NOV is an Environmental Law as defined in the Policy.

- Finally, as to Defendant's allegation that Plaintiff failed to provide the required notice of a Pollution Condition and that therefore the intentional noncompliance with law exclusion precludes coverage of any claim of Plaintiff for Clean-Up Costs, court again found that there are triable issues of fact that can only be determined at trial.

68. **Sierra Recycling and Demolition Inc., v. Chartis Specialty Insurance Co. f/k/a American International Specialty Lines Ins. Co.**, 2011 U.S. Dist. LEXIS 127354 (E.D. Calif. 2011).

- Plaintiff purchased a contractor's pollution liability policy from Defendant for the policy period June 1, 2009 to October 1, 2010 (the "Policy").

- During the Policy term a claim was made against Plaintiff in connection with construction debris that was hauled to a recycling facility (the "Recycling Facility"), which allegedly contained elevated levels of lead and zinc.

- Plaintiff was neither the owner nor operator of, or tenant at the Recycling Facility.

- Notice of the claim by the Recycling Facility was provided to Defendant by Plaintiff and Defendant denied the claim and thereafter reaffirmed the denial on a number of occasions.

- Eventually Plaintiff filed suit against Defendant and made a motion for summary judgment on its breach of contract claim, with Defendant moving for summary judgment on both of Plaintiff's claims.

- The key issue in connection with Plaintiff's breach of contract claim was whether the Non Owned Site Disposal exclusion in the Policy, described below, was applicable.

- This exclusion provided that there was no coverage for, among other things, "…property damage or environmental damage arising from the final disposal [emphasis added] of material and/or substances of any type (including but not limited to any waste) at any site or location which is not owned, leased or rented by you."

- The critical dispute between Plaintiff and Defendant related to the meaning of the term "final disposal", which was not defined in the Policy.

- Plaintiff's position was there was no "final disposal" because the debris was delivered to a recycling facility, and it would not stay there (as in a landfill situation) but would instead either be sold, recycled or sent elsewhere.

- Court found Plaintiff's interpretation to be reasonable given the ordinary and popular understanding of the term.

- As to Defendant, it asserted that the term was meant to apply to exclude the Plaintiff's final relinquishment of the debris, whether or not a landfill was involved, and contends that Plaintiff's interpretation would make the exclusion moot in that there could be a continuous movement of waste without ever achieving a final disposal. In support of its position, it noted that the words "including, but not limited to any waste" appear in the exclusion and there would have been no reason to have those words in the exclusion if it was only meant to apply to a landfill. Further, Defendant noted that Plaintiff had the option to purchase the Non-Owned Disposal coverage specifically provided in the Policy if it had desired coverage for that risk.

- Court found that each party had a reasonable interpretation of the exclusion and therefore the exclusion was ambiguous.

- Since the exclusion was ambiguous, court construed the language against Defendant and granted Plaintiff's motion for summary judgment on the breach of contract claim.

- Defendant also sought summary judgment on the issue of whether it had breached the covenant of good faith and fair dealing in the Policy. However court denied the summary judgment motion since it ruled in favor of Plaintiff as to the breach of contract claim.

69. **Chartis Specialty Ins. Co. v. Akanase,** 2011 U.S. Dist.**.** LEXIS 35018 (S.D. Texas).

- David J. Akanase is the Chapter 7 Bankruptcy Trustee (the "Trustee" appointed in connection with the bankruptcy of CES Environmental Services, Inc. ("CES").

- Chartis issued two pollution liability policies to CES, which Chartis maintains do not apply to pollution conditions that occurred within the boundaries of the facilities insured under the policies, but that may apply to pollution conditions outside the boundaries (emphasis added).

- Four suits were filed against CES related to alleged pollution, for which Chartis is providing a defense, subject to a reservation of rights (the "Suits").

- In addition, CES filed two suits against the City of Houston on the basis that the City of Houston "allegedly 'shut down' CES's business for no reason." (the "Houston Suits").

- In December, 2010, the Trustee filed an application with the Bankruptcy Court requesting the appointment of special counsel in connection with both the Four Suits and the Houston Suits.

- Court granted the application and appointed Camara & Sibley ("C&S") to serve as special litigation counsel in the Four Suits and the Houston Suits.

- In addition, court ordered that C&S be compensated on a contingent fee basis in the Houston Suits and under the applicable insurance policies (subject to court approval) in connection with the Four Suits.

- Chartis subsequently moved to vacate and modify the order appointing C&S as counsel in the Four Suits alleging that its due process rights were violated since it was not given notice and the opportunity to object to the appointment.

- Chartis went on to state that the bankrupt estate had no right to the insurance proceeds at issue because the plaintiffs in the Four Suits waived its claims against the estate, and that CES was a nominal party in the Four Suits and therefore Chartis was the only one that had the right to appoint counsel.

- In January, 2011, court held a hearing on the motion of Chartis, giving both parties the opportunity to present their respective positions.

- Four exhibits, consisting of the two policies and two reservation of rights letters were presented to the Trustee at the hearing and one witness, the Trustee himself.

- No evidence or witnesses were presented by Chartis, which instead chose only to cross examine the Trustee.

- The Trustee testified that it was necessary that special counsel be appointed by the Trustee and not Chartis because a negative result in any of the Four Suits could adversely impact the position of CES in the Houston Suits, such as by supporting the position of the City of Houston that it had a valid reason to "shut down" the business of CES.

- The Trustee also testified that a conflict of interest was created by the reservation of rights by Chartis and that he had a concern that the Four Suits could go in a direction impacting the Houston Suits.

- Chartis took the position that any impact of the Four Suits on the bankrupt estate was speculative and further that Chartis had the contractual right under the policies to appoint counsel.

- Court ruled against Chartis and in favor of the Trustee finding that the Trustee did have the right to select counsel, taking specific note of the reservation of rights.

- Chartis appealed to the district court, arguing that the bankruptcy court's order in connection with its motion was a "final order", or in the alternative that the order was interlocutory and the appeal should be allowed.

- In analyzing whether an interlocutory appeal was justified, the court evaluated the position of Chartis that CES was a nominal party and that therefore, the bankruptcy court did not have jurisdiction and the Trustee did not have the right to appoint counsel and found it unpersuasive.

- Court found the Trustee's concern about the potential impact of the Four Suits on the Houston suits to be a credible one.

- Further court made note of the reservation of rights letters sent by Chartis which specifically stated that CES had selected counsel on the recommendation of Chartis and that CES was given control over the appointed counsel.

- Additionally, court explained that the bankruptcy court did not err in giving the Trustee the right to choose special counsel since the only issue that Chartis claims is open in the Four Suits is whether the policies cover damages, indicating that Chartis has no interest in making sure that CES was not involved in wrongdoing. Its only interest is to show that there is no coverage. Therefore, court found that the Trustee should be given the same right that CES had to control the Four Suits in order to protect the position of CES in the Houston Suits.

70. **Gemini Ins. Co. v. Kukui'□□ula Dev. Co.**, 2012 U.S. Dist. LEXIS 26099 (D. Hawaii 2012), reconsideration denied, 2012 U.S. Dist. LEXIS 76816 (D. Hawaii 2012).

- Kukui □□ula Development Co. ("KDC") was hired to provide planning, development and construction services in connection with the Kukui□ula Residential Community Project on Kaua □□□i (the "Project").

- In 2009, three suits were filed against KDC ("Underlying Actions") in connection with the Project, which included allegations of, among other things, damages and injuries arising from noise, dirt, dust, toxic fumes and pests. In addition, an individual claim was made against KDC (but no suit filed) by Patti Erikson, for alleged damage to her property resulting from the Project.

- KDC requested that its CGL insurance companies, Gemini Insurance Company ("Gemini") and Certain Underwriters at Lloyd, as well as its pollution liability insurance company, Indian Harbor Insurance Company ("Indian Harbor") defend it and others in connection with the Underlying Actions.

- In November, 2009, Gemini filed a declaratory judgment action against KDC, and subsequently filed an amended complaint on March 7, 2011, seeking a declaration that there was no coverage under the policy issued by Gemini, on a number of bases, including that there was no occurrence during the policy period and that the pollution exclusion in its policy applied.

- Indian Harbor was brought into the suit in late March 2011, by virtue of a Third Party Complaint filed by KDC which sought, among other things, a declaration that Indian Harbor had a duty to defend and indemnify KDC in connection with the Underlying Actions.

- In response, Indian Harbor filed a First Amended Counterclaim in May, 2011, in which Indian Harbor asserted that it had no defense or indemnification obligation to KDC or others, because its policy only provided excess coverage.

- Subsequently, a series of summary judgment motions were filed by the parties in connection with the coverage sought by KDC.

- Indian Harbor sought summary judgment on a number of grounds, including that Indian Harbor's insurance policy was excess to Gemini, and therefore, it had no obligation to defend KDC, and that Indian Harbor had no obligation whatsoever to two KDC, entities - DMB Associates (Hawaii), Inc. ("DMB") and A&B Properties, Inc. ("A&B"), because they were not insureds under the Indian Harbor Pollution and Remediation Legal Liability Policy (the "Pollution Policy").

- Court quickly disposed of the issue of whether DMB or A&B were entitled to coverage under the Pollution Policy, finding that they were not.

- The Pollution Policy clearly recited the named insureds, either on the declarations page or in endorsements, and DMB and A&B were not found. Since KDC did not oppose the motion, court granted the motion. [Note: it is critical that a party purchasing insurance makes sure that all related parties that have potential liability be named as additional named insureds under its pollution insurance policy].

- Indian Harbor also sought summary judgment in connection with its position that the terms of the "Other Insurance" provision in the Pollution Policy applied and that therefore the coverage provided by the Pollution Policy was excess over the Gemini policy, and as a result, Indian Harbor had no duty to defend KDC in the Underlying Actions.

- Court declined to grant the motion on this basis, finding that Indian Harbor failed to show as a matter of law that its coverage was excess.

- The pertinent language in the "Other Insurance" provision reviewed by the court was as follows:

  "I. Other Insurance - Subject to… this insurance shall be in excess of the Retention Amount stated in the Declarations and any other valid and collectible insurance available to the Insured… ."

- The other parties to the suit disputed the position of Indian Harbor, noting that the Gemini policy and the Pollution Policy cover different risks, with the Gemini policy specifically excluding coverage of pollutants and the Pollution Policy expressly covering pollution conditions.

- Court agreed, noting the position of the other parties that the Pollution Policy likely covered the alleged "toxic fumes, toxic dust, diesel fumes, pesticides and other poisons" alleged in the Underlying Action, while the pollution exclusion in the Gemini policy likely excluded the same constituents.

- Court explained that while the Gemini policy is primary in certain instances in connection with the allegations in the Underlying Actions, it would not be primary as to pollution and therefore the Pollution Policy would be primary in that instance.

- Indian Harbor subsequently moved for reconsideration of the court's decision denying summary judgment with respect to the applicability of the "Other Insurance" provision in the Pollution Policy.

- Court held that Indian Harbor failed to provide any basis for such reconsideration and denied Indian Harbor's motion.

71. **Sunnyside Development Co. LLC v. Chartis Specialty Insurance Co.**, 2012 U.S. Dist. LEXIS 9392.

- Plaintiff, Sunnyside Development Co. LLC ("Sunnyside"), was an additional insured under a pollution legal liability insurance policy (the "Policy") issued by defendant American International Specialty Lines Insurance Co., predecessor to Chartis Specialty Insurance Co. ("Chartis"), to Sunnyside's tenant, Opsys US Corporation ("Opsys") for the policy period October 28, 2002-October 28, 2005 with respect to certain property located in Fremont, California (the "Property").

- The Policy covered property damage, including loss of use, resulting from pollution conditions.

- Opsys, which engaged in operations that generated hazardous substances, filed a Chapter 7 bankruptcy on May 5, 2003.

- The Fremont Fire Department ("FFD"), which was in charge of regulated facilities, such as that of Opsys, that handled hazardous materials or generated hazardous waste, upon learning that Opsys would be discontinuing operations at the Property, conducted an inspection of the Property and issued a Notice of Violation and Order to Comply (the "Order") based on the abandonment of hazardous materials and waste by Opsys which resulted in a condition "dangerous to human health, property and the environment."

- The Order mandated that proof be presented to the FFD that "no evidence of contamination at or above the levels of concern…" remain at the Property. As a result, until a Closure Plan and Report was completed and accepted by the FFD, the Property could not be occupied.

- In September 2003, both Sunnyside and Opsys filed a Notice of Loss/Notice of Claim with Chartis in connection with the contamination related to the Property, which was supplemented by a direct claim submitted by Sunnyside to Chartis on October 6, 2003, which advised of damage to the interior of the building at the Property resulting from the release of toxic chemicals and leaking drums (the "Sunnyside Claim").

- Chartis denied the Sunnyside Claim.

- A closure plan was submitted to the FFD in October 2003, and approved by the FFD, and on June 16, 2004 a Closure Report was submitted to the FFD detailing the results of the decontamination process. The Closure Report was accepted by FFD, after which Sunnyside was permitted to lease the Property. Also of note in connection with the reports that were prepared was that a Post Closure report indicated that there was evidence of leaks from drums on the concrete floor of the building at the Property.

- In April 2005, Sunnyside sued Opsys in California alleging claims under CERCLA and for negligence and public nuisance (the "California Action").

- On June 24, 2005 Sunnyside notified Chartis of the suit and asked whether it intended to defend the suit, noting that if it failed to do so, Sunnyside would obtain a default judgment and pursue payment from Chartis under the Policy.

- There is no evidence of a response from Chartis to the notice and Chartis did not intervene in the California Action.

- A final default judgment in the amount of $1,000,000 was entered in the California Action on April 8, 2010 (the "Default Judgment").

- Sunnyside instituted an action against Chartis to enforce the Default Judgment on April 30, 2010 (after entry of the Default Judgment) and to collect under the Policy.

- Subsequently, both parties moved for summary judgment.

- In the first instance, Sunnyside claims that it is entitled to coverage as an additional insured under the Policy.

- While not disputing the additional insured status of Sunnyside, Chartis in its summary judgment motion maintains that the Policy specifically provides that Sunnyside is only entitled to coverage as an additional insured where it is named in a suit as a co-defendant of Opsys, which was not the case here.

- Therefore, court granted the motion of Chartis for summary judgment, on the basis that Sunnyside was not a co-defendant in a suit with Opsys, noting that under California law an order of a government agency is not a suit.

- As to Sunnyside's motion to enforce the Default Judgment against Chartis as a third party creditor, court ruled in favor of Sunnyside.

- Court explained that California law permits a judgment creditor to pursue the defendant's liability insurance policies to obtain satisfaction of the judgment and permits an insurer to intervene in the action brought by the judgment creditor, prior to judgment.

- Once Sunnyside, as judgment creditor, obtained the Default Judgment, it had to prove that the judgment was "against a person insured under the Policy" and that "the Policy covers the relief awarded in the judgments… ."

- Since Opsys was an insured under the Policy, only the second half of the foregoing proofs were required.

- Sunnyside argued that facts were established in both the California Action and the instant action which demonstrated that the Policy provides coverage.

- Chartis argued against the relief on two bases, namely that there was no coverage under the Policy since the loss did not result from "Pollution Conditions" (as defined in the Policy) and that the Default Judgment was not constitutionally enforceable since Chartis was not given "reasonable notice" or any opportunity to be heard in the California Action.

- In rejecting the argument of Chartis that it was not provided with reasonable notice of the California Action, court noted that Chartis received appropriate notice at every stage, from the original notice of the Pollution Condition in 2003, to Sunnyside's bankruptcy claim against Opsys, to the direct claim of Sunnyside against Chartis, to the December 30, 2004 letter from Sunnyside to Chartis requesting that Chartis reconsider its position prior to Sunnyside's commencement of suit against Opsys, to the notice of the California Action Sunnyside sent to Chartis advising of its planned suit and asking Chartis to advise Sunnyside of its intention (which was never responded to by Chartis).

- Court also noted that the Default Judgment was not entered until April 8, 2010, close to five years from the date of Sunnyside's notice of suit to Chartis, giving Chartis more than sufficient time to take action.

- As a result, court found in favor of Sunnyside, and Chartis was bound by all of the findings of fact of a material nature that were essential to the Default Judgment.

- Included in the material facts were the following: (a) many of the drums stored at the Property leaked and caused contamination; (b) a third party removing equipment sold by Opsys caused further discharges of contamination; (c) Sunnyside incurred CERCLA response costs in excess of $132,000 to address the release of hazardous substances at the Property; (d) the negligent acts of Opsys caused Sunnyside to suffer economic losses, including lost rent and stigma damages associated with the contamination; and (e) Sunnyside suffered economic losses as the result of the public nuisance created by the Opsys caused contamination.

- When the clerk of the court entered the Default Judgment, the factual allegations of the complaint in the California Action, including the allegations of proximate cause, were taken as true, and Sunnyside was thereafter required to prove the amount of damages through reliable evidence.

- Sunnyside proved damages in excess of $1,000,000 in connection with the contamination caused by Opsys, which included hazardous materials that leaked onto the floors and ceilings of the building, but since the bankruptcy court limited the claim of Sunnyside against Opsys to not more than $1,000,000, that was the amount of the final Default Judgment.

- Finally, court ruled in favor of Sunnyside on the issue of whether the Default Judgment was covered under the Policy.

- Notwithstanding the arguments of Chartis as to why it was not liable to pay the Default Judgment, including that the loss was not the result of a Pollution Condition, the court held that the findings in the California Action that there were Pollution Conditions that caused Property Damage (including loss of use of the Property for which Sunnyside was entitled to lost rents), as those terms were defined in the Policy, stand and therefore Chartis is bound by the Default Judgment and obligated to pay Sunnyside.

72. **Ackley v. Paramus Bd. of Education,** 2012 N.J. Super. Unpub. LEXIS 452.

- Third Party Defendants, Ace USA and Illinois Union Insurance Company (collectively Referred to as "ILU") issued a premises pollution liability Insurance policy for the policy period July 1, 2006 - July 1, 2007, which included the Paramus Board of Education (the "Board") as an additional Named Insured (the "Policy").

- The Policy included a Retroactive Date of July 1, 2005 and an endorsement that provided that there was no coverage for "Pollution Conditions" (as defined in the Policy) that existed prior to the Retroactive Date.

- In December 2006, the Board was advised that certain soil excavated by a contractor at the Westbrook Middle School contained types of pesticides that had been banned for use since the 1980's.

- The Board notified ILU of the discovery of contamination during the Policy period.

- ILU denied coverage on the basis of the Retroactive Date endorsement.

- Subsequently, on or about May 21, 2009, plaintiff, Jillian Ackley and numerous other plaintiffs filed suit against the Borough of Paramus and the Board alleging injuries and/or the increased risk of injuries suffered as a result of the pesticide contamination.

- The Board notified ILU of the suit and sought coverage under the policy in effect at that time.

- ILU again denied coverage on the basis of the Retroactive Date.

- As a result, the Board filed a Third Party Complaint against ILU for a declaratory judgment seeking coverage for, among other things, remediation costs, defense of claims and any judgments and fees incurred by the Board.

- Subsequently, the Board filed a summary judgment motion seeking a declaration that ILU had a duty to indemnify and defend the Board.

- ILU moved for summary judgment at the same time seeking dismissal of the Third Party Complaint.

- The Board's position was clear cut, the Pollution Condition was discovered after the Retroactive Date and the definition of a Pollution Condition specifically included the "discovery" of a Pollution Condition.

- ILU's position was that since the Pollution Condition was in existence prior to the Retroactive Date, there was no coverage.

- Trial court granted the Board's motion for summary judgment finding that the discovery of the pesticides constituted a Pollution Condition and that since the discovery took place after the Retroactive Date the Board was entitled to coverage under the Policy.

- ILU subsequently appealed on the basis that the trial court erred when it concluded that the Board was entitled to coverage even though the contamination was in existence prior to the Retroactive Date.

- The argument advanced by ILU was that the Policy limited coverage to contamination that came into existence after the Retroactive Date. It proposed that notwithstanding the fact that the Policy provided that the discovery of contaminants was a Pollution Condition, the date of discovery was not relevant for the purpose of determining coverage.

- The Board rejected that argument noting that the definition of a Pollution Condition was the "…discovery, discharge, … release, … of any solid, liquid…irritant including …hazardous substances… .

- Court explained that the Insuring Agreement in the Policy expressly states that ILU will pay remediation costs arising out of Pollution Conditions that were first discovered and reported to ILU during the Policy period.

- Court noted that both the first discovery and the reporting by the Board took place during the Policy period as expressly required by the terms of the Policy.

- If in fact the language of the Policy is ambiguous, then the law requires that the language be construed against ILU and in favor of the Board to provide coverage.

- As a result the appellate court affirmed trial court's decision noting that the word "discovery" in the definition of Pollution Condition has meaning and will not be ignored.

- It is interesting to note that ILU changed the definition of Pollution Conditions in the 2009-2010 policy it issued to remove the word "discovery".

73. **Great Am. Fid. Ins. Co. v. JWR Constr. Servs.,** 2012 U.S. Dist. LEXIS 49257 (5. D. FLA)

- Great American issued two Contracting Services Environmental Liability policies to JWR.

- Great American filed suit against JWR seeking a declaratory judgment from the court that it had no duty to defend or indemnify JWR in connection with claims made and a suit filed against JWR in connection with Chinese drywall used in certain condominium units at a condominium complex in Florida.

- Included in the causes of action in the underlying complaint against JWR were strict liability, negligence, breach of warranty, nuisance and vicarious liability claims.

- The policies provided coverage for loss, cleanup costs and legal expense because of a "POLLUTION CONDITION arising from CONTRACTING SERVICES…"

- Great American sought summary judgment that it had no duty to defend or indemnify JWR under the policies.

- The exclusions in the policy at issue on summary judgment were the faulty workmanship and products liability exclusions.

- The initial issue reviewed by the court was whether Great American had a duty to defend JWR in the underlying suit.

- In order to make that determination, the court had to (i) compare the allegations in the underlying complaint with the language of the exclusions, to determine whether Great American has demonstrated that the allegations of the complaint fall within the relevant exclusions; (ii) consider whether there are any facts supporting a reasonable possibility of coverage; and (iii) determine that there is no basis for Great American's obligation to indemnify JWR, either legal or factual.

- The faulty workmanship exclusion precluded coverage for loss, cleanup costs and legal defense: "…based on or arising out of the cost to repair or replace faulty workmanship, construction, fabrication, installation or remediation if such faulty workmanship… was performed in whole or in part by the Insured."

- Great American claims that the damages sought by the Plaintiffs in the underlying complaint are based on JWR's performance of faulty workmanship, construction and installation, relating to the Chinese drywall, but does not state that there are allegations of faulty fabrication, or assembly.

- Court references a number of the counts of the underlying complaint that Great American proposes places the claim within the faulty workmanship exclusion.

- In response, both JWR and the Plaintiffs in the underlying suit take the position that the exclusion is not applicable, since it only applies to the cost to repair or replace the work performed by JWR, and therefore would not apply to damages that do not flow from such costs. Further, the exclusion would not apply since JWR did not perform the work, rather a contractor did.

- Based on New York law, court agreed with the position of Great American that the exclusion would apply to any damages that arise from or are connected with the drywall and would include the other property that was allegedly damaged. However, court sided with the Insured in connection with the other aspect of the exclusion, since it only applied to work performed by an Insured and the defined term "Insured" did not include a subcontractor.

- Court also examined whether there were any allegations in the underlying complaint that the faulty workmanship, construction or installation was performed in part by the Insured, since the exclusion could apply in that instance. No such allegations were found by the court as to faulty installation and in fact the allegations related to the proper installation of the defective drywall.

- As to faulty construction or workmanship, there were some allegations in the underlying complaint that were based on fault, and court assumed that if the allegations proved fault on the part of JWR the exclusion would be implicated.

- However, court noted that this alone would not be sufficient to grant summary judgment to Great American on the basis of the exclusion, and that in order to prevail Great American would either have to: "(i) show that JWR has no evidence that supports its case; or (ii) present affirmative evidence demonstrating that JWR will be unable to prove its case at trial."

- Court noted that Great American knew that a subcontractor installed the drywall. It also stated that as a result of such knowledge, Great American knew there were possible circumstances in which there could be a factual or legal basis for coverage, and that as a result Great American had a duty to defend JWR.

- Court next examined the applicability of the products liability exclusion to JWR's claim. This exclusion precludes coverage for "…LOSS…, LEGAL EXPENSE… based upon or arising out of goods or products manufactured, sold, handled, distributed, … by the INSURED…"

- Great American proposed that the allegations of damages in the underlying complaint "… are based upon or arise out of goods or products, namely Chinese drywall, which were allegedly sold, handled or distributed by JWR…"

- Court then recites the allegations in the underlying complaint that Great American maintains supports its position as to the applicability of the exclusion.

- In response, JWR and the Plaintiffs take the position that the condominium units are not a product as Great American alleges.

- They also argue that even if prior to becoming part of the unit, the drywall itself is shown to be a product, the exclusion would still not be applicable because the drywall was not sold, distributed or handled by JWR.

- Court explained that if it makes the sole assumption that a unit or real estate or drywall constituted a product, then it would have to conclude that Great American had demonstrated that the "…allegations of the underlying complaint cast the pleadings wholly within the Products Liability exclusion."

- Notwithstanding the foregoing, court noted that there were no facts presented that suggested that JWR sold or distributed "products". Rather, the evidence indicated that JWR supplied a service. As a result, court concluded that even assuming that the units or drywall were products, Great American failed to prove that either was sold or distributed by JWR. Court also rejected the argument of Great American that JWR handled the drywall.

- Since Great American failed to carry its burden to show that there was no possibility that it could have a duty to indemnify JWR in connection with the underlying suit, court found that Great American had a duty to defend JWR.

- While court chose not to make a determination as to whether Great American had a duty to indemnify JWR, finding it to be premature to do so, court did grant summary judgment to JWR that the two exclusions were not applicable for purposes of Great American's duty to defend, and that Great American had a duty to defend JWR.

74. **City of Cleveland v. Chartis Specialty Ins. Co.**, 2013 U.S. Dist. LEXIS 8362 (N.D., Ohio, Jan. 15, 2013).

- The City of Cleveland (the "City") purchased a pollution legal liability insurance policy from American International Specialty Lines Insurance Company ("AISLIC") for a ten year term commencing on October 30, 2009, (the "Policy").

- Included as an insured property under the Policy were certain parcels of land referred to as the Midtown Site.

- The Policy provided coverage for, among other things, clean-up costs resulting from Pollution Conditions on or under the Midtown Site, as more particularly set forth in the Policy.

- In addition, the Policy contained a "Known Conditions Exclusion", negotiated between the parties, which precluded coverage of Loss, Clean-Up Costs, etc. arising from "Pollution Conditions due to or associated with volatile organic compounds (VOCs), Semi-VOCs, Barium, Cadmium, … or any additives to or degradation by-products thereof on, under or migrating from the Insured Property(ies)…"

- Between 2002-2006 (which was prior to the commencement date of the Policy), the City conducted a remediation at a portion of the Midtown Site.

- The geologist in charge of the remediation at that time advised that PAHs (which the parties allegedly admit are Semi-VOCs) were discovered on certain portions of the Midtown Site during the remediation efforts at that time.

- In March, 2010, "black gray oily sand and clay mixed with black gray oily construction and demolition debris" (the "Black Gray Oily Materials") were discovered at the Midtown Site…"

- The Black Gray Oily Materials, which were characterized as "petroleum contaminated" were removed from the Midtown Site, without being tested for PAH's.

- Post removal samples were taken and tested for PAHs, with a result of non-detect.

- The City submitted its notice of claim seeking coverage of the cleanup costs for the Black Gray Oily Materials to AISLIC on or about July 27, 2010, which was after the work had been performed by the City.

- AISLIC denied coverage of the City's claim.

- The City filed suit against Chartis (formerly AISLIC) seeking coverage of the claim and alleging bad faith on the part of Chartis.

- Subsequently, the parties filed motions for summary judgment on various matters.

- Chartis sought summary judgment on the basis that it had no obligation to provide coverage in connection with the cleanup by the City of the Black Gray Oily Materials.

- Chartis argues, in the first instance, that the Pollution Conditions for which coverage was sought were discovered in 2006, prior to the purchase of the Policy.

- In addition, Chartis maintains that the Black Gray Oily Material removed in 2010, was the same material removed in 2006 and therefore contained PAH's (which were found during the 2006 testing) which were excluded from coverage.

- Further Chartis maintains that even if one assumes that the 2006 testing is not relevant, the City would not be able to prove that the Black Gray Oily Material removed in 2010 was a Pollution Condition since it failed to analyze it.

- Court denied all summary judgment motions on the basis of material issues of fact..

- As to the Chartis motion in particular, court noted that a factual determination would need to be made as to whether the Black Gray Oily Material was a known condition that was excluded from coverage under the Policy, as well as whether such materials contained PAHs.

- Court set the matter for trial.

Table of Cases

1. **Wolf Bros. Oil Co., Inc. v. Int'l Surplus Lines Ins. Co.**, 718 F.Supp. 839 (W.D. Wash. 1989).
2. **W.R. Grace & Co. v. Maryland Casualty Co.**, 33 Mass. App. Ct. 358 (Middlesex, 1992), review denied, 413 Mass. 1109 (Mass. 1992).
3. **Hatco Corp. v. W.R. Grace & Co.**, 801 F. Supp. 1334 (D.N.J. 1992).
4. **The Alan Corporation v. Int'l Surplus Lines Ins. Co.**, 823 F.Supp. 33 (D.Mass 1993), aff'd, 22 F3d 339 (1st Cir. 1994).
5. Antrim Mining, Inc. v. Pennsylvania Ins. Guaranty Ass'n**,** 436 Pa. Super. 522 (Penn. Sup. Ct. 1994), appeal denied, 657 A. 2d 487 (Pa. 1995).
6. Central Illinois Public Service Co. v. American Empire Surplus Lines Ins. Co., 267 Ill. App. 3d 1043 (First Dist., Sixth Div. 1994), appeal denied, 649 N.E. 2d 414 (Ill. 1995).
7. Rhone-Poulenc Inc. v. Int'l Ins. Co., 71 F.3d 1299 (7th Cir. 1995).
8. **Pritchard v. Federated Mutual Ins. Co.**, No. 93-2765-TUA, 1995 WL 854775 (W.D. Tenn Oct. 2, 1995).
9. **Ken Moorhead Oil Co., Inc. v. Federated Mutual Ins. Co.**, 476 S.E. 2d 481 (S.C. 1996).
10. **Federated Mutual Ins. Co. v. Germany**, 712 So. 2d 1245 (Fla. App. 1998), review denied, 725 So. 2d 1108 (Fla. 1998).
11. Complaint Filed In California Superior Court in **Owens Financial Group Inc. v. American Int'l Group Inc**. (Reported in Mealey's Insurance Supplement, October 15, 1998).
12. **Iowa Comprehensive Petroleum Underground Storage Tank Fund Board v. Federated Mutual Ins. Co.**, 596 N.W. 2d 546 (Iowa 1999).
13. **Camalloy Wire, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.**, 695 N.Y.S. 2d 562 (First Dept. 1999).
14. American Empire Surplus Lines Ins. Co. v. Wightman Envt'l., Inc., 2000 U.S. Dist. LEXIS 1046 (W.D. Mich. Jan. 31, 2000).
15. Camalloy Wire Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa**.**, 273 A.D. 2d 123 (First Dept. 2000), leave to appeal denied, 95 N.Y. 2d 763 (N.Y. 2000).
16. The Morrow Corp. v. Harleysville Mutual Ins. Co., 101 F. Supp. 2d 422 (E.D. Va. 2000), motion to modify denied, 110 F. Supp. 2d 441 (E.D. Va. 2000).
17. Golden Eagle Refinery Co., Inc. v. Associated Int'l Ins. Co., 85 Cal. App. 4th 1300 (Cal. App 2001).
18. Goldenberg Development Corp. v. Reliance Ins. Co. of Illinois**,** No. Civ. A. 00-CV-3055, 2001 U.S. Dist. LEXIS 12870 (E.D.Pa. May 15, 2001), motion for reconsideration denied, 2001 U.S. Dist. LEXIS 10887 (E.D.Pa. June 26, 2001).
19. Cargill Inc. v. Evanston Ins. Co., 642 N.W. 2d 80 (Minn. App. 2002), review denied, 2002 Minn. App. LEXIS 396 (Minn. June 26, 2002).
20. John Boerman v. American Empire Surplus Lines Ins. Co., 2001 U.S. Dist. LEXIS 16270 (W. D. Mich., Oct. 2, 2001), aff'd, 50 Fed. App'x 248 (6th Cir. 2002).
21. International Ins. Co. v. RSR Corp., 2002 U.S. Dist. LEXIS 5337 (N.D. Tex. Mar. 27, 2002), aff'd, 148 Fed. App'x 226 (5th Cir. 2005).
22. **Complaint Filed in** United Nat'l Ins. Co. v. Connell Industries Inc., (Reported in Mealey's Insurance Pleadings, April 9, 2002).
23. CNA Ins. Co. v. Selective Ins. Co., 354 N.J.Super. 369 (App. Div. 2002).
24. Kemper Nat'l Ins. Cos. v. Heaven Hill Distilleries, Inc., 82 S.W. 3d 869 (Ky. 2002).
25. **Complaint Filed in Arizona Superior Court in** LCRI Investments L.L.C. v. Steadfast Ins. Co., (Reported in Mealey's Litigation Report: Insurance, May 13, 2003).
26. Associated Indemnity Corp. v. Dow Chemical Co**.**, 248 F.Supp. 2d 629 (E.D. Mich. 2003).
27. **Complaint Filed in the Superior Court of New Jersey in** EPEC Polymers, Inc. v. Kemper Indemnity Ins. Co.**,(Reported in Mealey's Litigation Report: Insurance, March 2, 2004).**

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

28. Complaint Filed in the United States District Court, Southern District of New York in **Indian Harbor Ins. Co. v. The Lamson & Sessions Co.** (Civ. Action **No.: 03CV9861) (reported in** Mealey's Pollution Liability Report 23, March 8, 2004)).
29. **Hudson Envt'l. Services Inc. v. New Jersey Property–Liability Ins. Guaranty Assoc.**, 858 A.2d. 39 (N.J. Super. 2004).
30. **Zurich American Ins. Co. v. Whittier Properties, Inc.**, 356 F.3d 1132 (9th Cir. 2004).
31. **Technology Square, L.L.C. v. United National Ins. Co.**, Civ. Action No. 04-10047-GA0, 2007 WL 534450 (D.Mass. February 15, 2007).
32. **USAA Casualty Ins. Co. v. Duell Fuel Co.,** Docket No. ATL-L-1121-02. (2004).
33. **ABO Petroleum, Inc. v. Colony Ins. Co.**, No. 04-CV-72090-DT, 2005 WL 1050220 (E.D. Mich. April 19, 2005).
34. Complaint Filed in the United States District Court for the Southern District of New York in **Greenwich Ins. Co. v. SLC Holdings, as successor in interest to Gateway Group, Inc., St. Louis Cardinals, L.L.C. f/k/a St. Louis Cardinals, L.P.**, (Civ. Action No. 06-CV-745) (filed January 31, 2006).
35. Complaint Filed in the Superior Court of the State of California, Los Angeles County, in **Los Angeles Unified School District v. American Int'l Group** (Case No. BC348165) (filed February 28, 2006).
36. **Viacom Int'l v. Admiral Ins. Co.**, 2006 WL 1060504 (N.J. Super. A.D. April 21, 2006) (Unpublished).
37. **Konell Construction and Demolition Corp. v. Valiant Ins. Co.**, 2006 WL 1360956 (D. Or. May 15, 2006).
38. **R.L. Vallee, Inc. v. American Int'l Specialty Lines Ins., Co.**, No. CV03-412-MO, 2006 WL 1364306 (D.Vt. May 17, 2006).
39. **Continental Carbon Co., Inc. v. American Int'l Specialty Lines Ins. Co.**, No. Civ. A. 4-05-1187, 2006 WL 1442237 (S.D. Tex. May 23, 2006).
40. **City Fuel Corp. v. Nat'l Fire Ins. Co. of Hartford,** 846 N.E. 2d 775 (Mass. 2006).
41. **Supreme Tank, Inc. v. Evanston Ins. Co.**, (Docket No.: C81-06 [Superior Ct. Chancery Division, Bergen Cty., September 18, 2006] and Docket No.: BER-L-7100-06 [Superior Ct., Law Division, Bergen Cty., November 1, 2006]).
42. **Frazer Exton Development, L.P. v. Kemper Envt'l., Ltd.,** No. 06Civ.14228 HB DFE, 2007 WL 756494 (S.D.N.Y. Mar. 13, 2007).
43. **Thomas Steel Strip Corp. v. American Int'l Specialty Lines Ins. Co.**, No.4:06 CV 0658, 2007 U.S. Dist. LEXIS 94623 (N.D. Ohio Jan. 11, 2007).
44. **Denihan Ownership Co., LLC v. Commerce & Industry Ins. Co.,** 830 N.Y.S. 2d 128 (N.Y. App. Div. 2007).
45. **D.C. USA Operating Co., LLC v. Indian Harbor Ins. Co. and XL America, Inc.**, No. 07-CV-0116, 2007 WL 945016 (S.D.N.Y. Mar. 27, 2007).
46. Complaint filed in California Superior Court, San Francisco County on October 13, 2006 in **Zeneca Inc. v. American Int'l Specialty Lines Ins. Co.,** Case No.: CGC-06-456 935 (Motion filed for arbitration reported in Mealey's Insurance Pleadings, December 19, 2006).
47. **Ispat Inland, Inc. v. Kemper Envt'l., Ltd.**, No. 05 Civ.5401 (85J) (HBP), 2007 WL 2197837 (S.D.N.Y. July 31, 2007).
48. **Chambliss, Ltd. v. Commerce and Industry Ins. Co.**, No. 06-61202-Civ,, 2007 U.S. Dist. LEXIS 77664 (S.D. Fla. Oct. 18, 2007).
49. **John R. MacKenzie Jobber, Inc. v. Mid–Continent Casualty Co.**, No. 8:07-CV-214-T-30MAP, 2007 WL 3379884 (M.D. Fla. Nov. 14, 2007).
50. **American Int'l Specialty Lines Ins. Co. v. NWI-1 Inc. [f/k/n Fruit of the Loom]**, No. 05-6386, N.D. Ill. (Settlement Agreement reported in Mealey's Litigation Report: Insurance, January 10, 2008).

51. **Mid-Continent Casualty Co. v. L.B. King d/b/a King Oil and Tires**, 552 F.Supp. 2d 1309 (N.D. Fla. 2008).
52. Complaint filed in **Velsicol Chemical Corp ("Velsicol") v. American Int'l Specialty Lines Ins. Co.,** Civ. Act. No. 08-2822, U.S. Dist Ct. (N.D. Ill. 2008) [See case number 50 for related information].
53. Complaint filed in **24 Porter Street Realty, LLC v. American Int'l Specialty Lines Ins. Co.**, Civ. Act. No. 1:07-CV 12178-RWZ, U.S. Dist. Ct. (Mass. Dist. Ct. 2007).
54. **Midwest Envtl. Consultants, Co. et al v. Greenwich Ins. Co.**, No. 08-4099 CV-C-NKL, 2009 WL 702214 (W.D. Mo. Mar. 16, 2009).
55. **Wells Fargo Bank N.A. v. Zurich American Ins. Co**., 874 N.Y.S.2d 68 (First Dept. 2009), appeal denied, 910 N.E. 2d 431 (N.Y. 2009).
56. **Ispat Inland, Inc., v. Kemper Envt'l., Ltd**., No. 05 Civ. 5401 (85J), 2009 U.S. Dist. LEXIS 108634 (S.D.N.Y. Nov. 20, 2009).
57. **American Int'l Specialty Lines Ins. Co. v. United States of America**, No. CV 09-01734 AHM(RZX), 2010 U.S. Dist. LEXIS 65590 (C.D. Calif. June 30, 2010).
58. **Mears Transportation Group Inc. v. Zurich American Ins. Co.**, 660 F.Supp. 2d 1297 (M.D. Fla. 2009).
59. **Picerne-Military Housing, LLC v. American Int'l Specialty Lines Ins. Co.**, 650 F.Supp. 2d 135 (Dist. Ct. RI 2009).
60. **Pennzoil–Quaker State Co. v. American Int'l Specialty Lines Ins. Co.**, 653 F.Supp. 2d 690 (S.D. Tex. 2009).
61. **Milwaukee Metropolitan Sewage District v. American Int'l Specialty Lines Ins. Co.**, 2009 WL 142328 Case No. 05-CV-1352 (E.D.Wis. 2009), rev'd and remanded, 598 F. 3d 311 (7th Cir. 2010).
62. **Cain Petroleum Inc. v. Zurich American Ins. Co.**, 197 P.3d 596 (Or. Ct. App. 2008), appeal denied, 205 P.3d 887 (Or. 2009).
63. **RSR Corp. v. Int'l Ins. Co.**, 612 F.3d 851 (5th Cir. 2010).
64. **Alan Fisher and Dab Three LLC v. American Int'l Specialty Lines Ins. Co.**, No. 3:07CV1871(MRK), 2010 WL 2573909 (D. Conn. May 14, 2010).
65. **Lowry Assumption LLC v. American International Specialty Lines Insurance Co.**, 2011 U.S. Dist. LEXIS 40403 (D. Colo. 2011).
66. **Penn Tank Lines Inc. v. Liberty Surplus Ins. Corp.**, 2011 U.S. Dist. LEXIS 57331 (E.D. Pa 2011).
67. **Picerne Military Housing LLC v. American International Specialty Lines Ins. Co.**, 2011 U.S. Dist. LEXIS 79180 (D. RI. 2011).
68. **Sierra Recycling and Demolition Inc., v. Chartis Specialty Insurance Co. f/k/a American International Specialty Lines Ins. Co.**, 2011 U.S. Dist. LEXIS 127354 (E.D. Calif. 2011).
69. **Chartis Specialty Ins. Co. v. Askanase,** 2011 U.S. Dist.**.** LEXIS 35018 (S.D. Texas).
70. **Gemini Ins. Co. v. Kukui'□□ula Dev. Co.**, 2012 U.S. Dist. LEXIS 26099 (D. Hawaii 2012), reconsideration denied, 2012 U.S. Dist. LEXIS 76816 (D. Hawaii 2012).
71. **Sunnyside Development Co. LLC v. Chartis Specialty Insurance Co.**, 2012 U.S. Dist. LEXIS 9392.
72. **Ackley v. Paramus Bd. Of Education,** 2012 N.J. Super. Unpub. LEXIS 452.
73. **Great Am. Fid. Ins. Co. v. JWR Constr. Servs.,** 2012 U.S. Dist. LEXIS 49257 (5. D. FLA).
74. **City of Cleveland v. Chartis Specialty Ins. Co.**, 2013 U.S. Dist. LEXIS 8362 (N.D., Ohio, Jan. 15, 2013).

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

XII. Conclusion

While the specialized environmental insurance coverage offered today is by no means a panacea, it may serve as a useful device, deserving of consideration in either crafting a solution that will facilitate the closing of a particular commercial transaction, or in addressing operational risks. Currently, there are over 35 insurance companies offering environmental insurance coverage globally and the stiff competition has resulted in the opportunity for a more affordable premium and better policy terms. It may be that an environmental insurance product that was once prohibitively expensive will now be an affordable risk management tool in the property ownership and operations setting or it may now fit within the financial parameters of a deal, in the transactional setting, particularly if a cost-sharing arrangement can be negotiated between the parties to the transaction.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600