# Environmental Insurance Coverage Under the Comprehensive General Liability Policy: Does the Personal Injury Endorsement Cover CERCLA Liability?

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## INTRODUCTION

In the late 1970's, the potential environmental and health problems associated with decades of uncontrolled toxic waste disposal became apparent. Events like the tragedy of Love Canal in New York increased public awareness of the need to control hazardous waste disposal and restore dangerous waste dumps located across the country.

Indeed, Love Canal was a landmark occurrence sparking public and regulatory interest in addressing the waste problem. Between 1942 and 1953, under a license from the City of Niagara Falls, the Hooker Chemical Company disposed of nearly forty-four million pounds of hazardous waste from its Niagara Falls plant in the sixteen-acre Love Canal tract. The tract was subse-

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quently developed to include an elementary school and, by 1976, over 200 residential homes.[1] Heavy rains in the mid-1970's brought the thirty year old waste to the surface, forcing New York State to close the school and evacuate residents living near or on the site.[2]

In response to Love Canal and similar threats posed at waste sites across the country, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") in 1980.[3] It authorizes the United States Environmental Protection Agency ("EPA") to restore hazardous waste sites and surcharge "potentially responsible parties" ("PRP"s).[4] PRPs are liable under the statute even if they can prove that their conduct was lawful, in good faith, nonnegligent and consistent with the applicable state of the art industry and government standards.[5] Furthermore, courts have consistently held that when the government is unable to locate the other parties responsible for contributing to the dump site, the EPA can hold any *one* of the responsible parties liable for the *entire* cleanup cost of a particular site, thus imposing joint and several liability.[6]

In 1988, the EPA sued Hooker Chemical, now owned by Occidental Chemical Corporation, to recover the money the EPA had expended in cleaning up the Love Canal site, and to hold Occidental liable for all future cleanup costs under CERCLA. In turn, Occidental filed a claim against its liability insurers seeking coverage for this CERCLA-imposed liability.[7] Because of CERCLA, policyholders such as Occidental now seek coverage under their insurance policies for liability that was nonexistent at the time the policies were drafted and sold.

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1. ROBERT J. MASON & MARK T. MATTSON, ATLAS OF UNITED STATES ENVIRONMENTAL ISSUES 141 (1990).

2. *Id.*

3. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9657 (1988 & Supp. III 1991)).

4. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988).

5. *See, e.g.*, United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984 (D.S.C. 1984) *cert. denied*, 490 U.S. 1106 (1989) (applying strict liability standard); United States v. Price, 577 F. Supp. 1103, 1114 (D.N.J. 1983) (nonnegligent off-site generators can be liable under CERCLA). *See also* cases cited *infra* note 28.

6. *See, e.g.*, South Carolina Recycling & Disposal, 653 F. Supp. 984; United States v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1905 (C.D. Cal. 1984); United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1356 (D.N.M. 1984). *See also* cases cited *infra* note 30.

7. Daniel B. Moskowitz, *Lawsuits Can Pit Companies Against Their Insurers*, WASH. POST, July 20, 1992, at F11.

This scenario will be repeated in thousands of courtrooms across the country. The EPA has targeted approximately 14,000 sites for possible inclusion in the federal cleanup program.[8] Remediation activities could last thirty years or more. Projections of the total cost to clean up the sites range from twenty billion to five hundred billion dollars.[9] Depending on the outcome, the verdict in a lawsuit between an insured and its insurer, over who is financially responsible for CERCLA liability, could potentially raise the specter of bankruptcy for either the average business or insurance company.

Courts have generally cited the "pollution exclusion" to deny coverage to insureds bringing claims under their Comprehensive General Liability ("CGL") insurance policies for CERCLA liability.[10] Unless the pollution was "sudden and accidental," the "pollution exclusion" clause excludes coverage for pollution-caused property damage and for the ensuing cleanup costs.[11]

In response to these court decisions, insureds have become more creative in their search for coverage. Specifically, they contend that the insurance company should both defend them in court[12] and provide coverage for CERCLA liability under a section of the policy to which the pollution exclusion does not apply — the personal injury section. Insureds have advanced this new coverage theory only recently.[13] As a result, they are only begin-

8. JAN P. ACTON & LLOYD S. DIXON, SUPERFUND AND TRANSACTION COSTS: THE EXPERIENCES OF INSURERS AND VERY LARGE INDUSTRIAL FIRMS 2 (1992).

9. Philip H. Abelson, *Cleaning Hazardous Waste Sites*, SCIENCE, Dec. 1, 1989, at 1097.

10. *See, e.g.*, Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984); United States Fidelity & Guar. Co. v. Murray Ohio Mfg. Co., 693 F. Supp. 617 (M.D. Tenn. 1988), *aff'd*, 875 F.2d 868 (6th Cir. 1989) (per curiam); Hayes v. Maryland Casualty Co., 688 F. Supp. 1513 (N.D. Fla. 1988); International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co., 522 N.E.2d 758 (Ill. 1988), *appeal denied*, 530 N.E.2d 246 (Ill. 1988); Powers Chemco v. Federal Ins. Co., 548 N.E.2d 1301 (N.Y. Ct. of App. 1989); Techalloy Co. v. Reliance Ins. Co., 487 A.2d 820 (Pa. Sup. Ct. 1984).

11. 3 CALIFORNIA INSURANCE LAW AND PRACTICE § 49.22[1] (Matthew Bender ed., 1992). In 1985, the insurance industry introduced a new pollution exclusion, the so-called "absolute pollution exclusion." This exclusion no longer includes the "sudden and accidental" language; it was designed to absolve insurers from *all* pollution-related liability. This Comment, however, solely focuses on the pre-1985 pollution exclusion, as the majority of policies at issue in CERCLA coverage lawsuits were issued before 1985, thus triggering the pre-1985 exclusion.

12. The CGL policy typically provides that the insurer must defend the insured in the underlying action as well as indemnify the insured for damages that the insured is legally obligated to pay. *See infra* text accompanying notes 43-51.

13. Morton Thiokol Inc. v. General Accident Ins. Co. of Am., No. C-3956-85 (not designated for publication) (N.J. Super. Ch. Div. Aug. 27, 1987). This is the first case

ning to be heard on the issue. The courts' acceptance or rejection of this new coverage theory has significant policy implications and will determine private sector allocation of CERCLA cleanup costs.

Given the enormous financial stakes involved, both insurers and insureds must understand what types of liability the CGL policy covers. Unfortunately, the courts have failed to provide consistent and well-reasoned decisions, causing a split in the case law addressing whether the personal injury provision provides coverage for CERCLA liability.[14] Judicial indecision on this issue precludes effective planning for CERCLA liability and ultimately results in repetitive and inefficient litigation.

This Comment approaches the CGL policy from a contract interpretation perspective. Specifically, it discusses whether insurance carriers have a duty to defend and a duty to indemnify insureds for CERCLA cleanup cost claims under the personal injury section of the standard CGL policy.[15] Part I gives a general overview of CERCLA. Part II provides an introduction to the typical CGL policy. It includes a discussion of how the current controversy over interpreting the personal injury clause arose. Part III presents the cases that have interpreted the personal injury provision in the environmental context. Part IV analyzes both existing case law and the personal injury policy language at issue in environmental coverage actions. It studies both the insurer's duty to defend and its possible duty to indemnify. It concludes that while the insurance companies generally must defend insureds under the personal injury provision, they have a much narrower duty to indemnify insureds. Part V sug-

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in which an insured contended that the personal injury endorsement provides coverage for pollution claims.

14. *See* discussion *infra* part II.

15. The only articles that have been written about applying the personal injury endorsement to pollution claims have been authored by partisan attorneys who either represent the insureds, *e.g.*, Stephen A. Dvorkin, *"Personal Injury" Insurance Coverage for Environmental and Toxic Tort Liabilities*, 2 ENVT'L. CLAIMS J. 333 (1990); Kirk A. Pasich, *The Breadth of Insurance Coverage for Environmental Claims*, 52 OHIO ST. L.J. 1131 (1991), or the insurers, *e.g.*, Laura Foggan, *Looking for Coverage in All the Wrong Places: Personal Injury Coverage in Environmental Actions*, 3 ENVT'L CLAIMS J. 291 (1991); Robert A. Zeavin, et al., *The Limits of Coverage Under Personal Injury Endorsements for Environmental Claims: An Insurer's Perspective*, 4 MEALEY'S LITIGATION REPORTS 25 (July 31, 1990). As a result, most of the existing articles discussing the personal injury coverage issue are subjectively focused and fail to discuss the merits of the opposing viewpoint. The purpose of this Comment is to analyze the new personal injury coverage theory in a neutral, objective fashion.

gests a mechanism to eliminate the potential confusion regarding the parameters of the carrier's indemnification obligations under the personal injury provision.

In sum, this comment seeks a resolution of the coverage issue based on the parties' mutual expectations under the policy. Moreover, the suggestions provided will enable the courts to provide clear rules and consistent results to permit the parties to make intelligent business decisions when facing future CERCLA liability.

## I.

### CERCLA

On December 11, 1980, in response to growing national concern about environmental pollution, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[16] CERCLA contains provisions for the identification and remediation of the most hazardous closed and abandoned waste sites.[17] The statute allows the EPA and state agencies to take immediate action to clean up or at least stabilize a hazardous condition.[18] It also enables them to recover

16. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C.A. §§ 9601-9657 (West 1983 & Supp. 1992)). This Comment briefly discusses CERCLA's main provisions to explain the type of liability for which insureds seek coverage. For an exhaustive analysis and critique of CERCLA, see Adam Babich, *Understanding the New Era in Environmental Law*, 41 S.C. L. REV. 733 (1990); Lewis M. Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 45 BUS. L.J. 923 (1990); Michael B. Hingerty, *Property Owner Liability for Environmental Contamination in California*, 22 U.S.F. L. REV. 31 (1987).

17. 42 U.S.C. § 9607 (West 1983 & Supp. 1994).

18. The EPA derives its response authority from CERCLA § 104, 42 U.S.C.A. § 9604 (West 1983 & Supp. 1994), which provides in pertinent part:

> (1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act . . . to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated resource), or take any other response measure . . . deem[ed] necessary to protect the public health or welfare or the environment.

42 U.S.C.A. § 9604 (a)(1) (West Supp. 1994) *cert. denied* 484 U.S. 848 (1987); *see* United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 733 (8th Cir. 1986); United States v. Mottolo, 605 F. Supp. 898, 904 (D.N.H. 1985).

The President delegates to the EPA and other administrative agencies the authority to implement CERCLA through Executive Order No. 12580, 52 Fed. Reg. 2,923 (1987), *reprinted in* 42 U.S.C.A. § 9615 (West Supp. 1994). In addition, the Presi-

the costs expended in such an effort from any responsible party.[19] To pay for the government's expenditures, CERCLA created the $1.6 billion Hazardous Substance Response Trust Fund ("Superfund").[20] The fund is comprised of revenues from taxes on the petroleum and chemical manufacturing industries.[21] The Superfund finances federal actions to clean up sites on the National Priorities List ("NPL").[22] The NPL ranks sites eligible for Superfund money.[23] Sites are investigated and their potential hazard assessed; those sites considered sufficiently toxic warrant placement on the NPL.[24]

Although Congress created the Superfund to pay for the EPA's response activities, it did not intend ultimate responsibility for response costs to rest with the government. Thus, CERCLA also authorizes government agencies to sue any "potentially responsible party" ("PRP") to recover the money expended on cleanups. A party is a PRP if it (1) currently owns and/or operates a hazardous waste facility; (2) previously owned and/or op-

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dent must consult with "the affected state or states before determining any appropriate remedial action to be taken" in response to a release or threat of release of any hazardous substances. *See* 42 U.S.C.A. § 9604 (b)(2) (West Supp. 1994). Where states or local governments are capable of carrying out the actions deemed necessary to respond effectively to the release or threatened release of hazardous substances and where such governments agree to carry out the actions, the President must enter into contracts or cooperative agreements with the states or local governments to take the actions. *See* 42 U.S.C.A. §§ 9604 (b)(3) & 9604 (d)(1) (West Supp. 1994).

19. 42 U.S.C.A. § 9607 (West 1983 & Supp. 1994).

20. *See* 42 U.S.C.A. § 9631 (West 1983) (provision establishing Superfund); 42 U.S.C.A. § 9611 (West Supp. 1994) (repealing 42 U.S.C.A. § 9631) (current provision regarding uses of Superfund).

21. *See* 26 U.S.C.A. §§ 4611, 4612, 4661, 4662, 4671 (West 1983) (CERCLA revenue provisions amending Internal Revenue Code of 1954). An excise tax on forty-two hazardous feedstock chemicals, as well as on crude oil and imported petroleum products, accounted for about 86% of the original Superfund. *Id.* The remainder came from general revenues. *See* 42 U.S.C.A. § 9631 (b)(2) (West 1983). In 1986, SARA increased the Superfund to $8.5 billion. 42 U.S.C.A. § 9606(a) (West Supp. 1994).

22. 42 U.S.C.A. § 9605 (8)(B) (West 1983 & Supp. 1994).

23. *Id.* The original NPL contained over 400 sites. Each state had at least one site among the top 100 sites listed. *Id.* As of December 1990, the EPA had identified approximately 34,000 sites for possible inclusion on the NPL. ACTON & DIXON, *supra* note 8, at 2. The EPA has determined that 58% of these sites require no further federal action, leaving approximately 14,000 sites across the nation for possible inclusion in the federal program. By mid-1991, the EPA had placed 1,236 of such sites on the NPL. *Id.* at 2.

24. JAN P. ACTON, UNDERSTANDING SUPERFUND: A PROGRESS REPORT vi (1989). *See generally* Robert L. Henrichs, *Superfund's NPL: The Listing Process*, 63 ST. JOHN'S L. REV. 717-54 (1989).

erated a hazardous waste facility; (3) arranged for disposal of hazardous substances at the facility; or (4) transported hazardous substances to the facility.[25] Pursuant to CERCLA, a PRP can be held strictly liable for cleanup costs as a current or previous "owner or operator" even if it did not actually cause or contribute to the pollution.[26] CERCLA applies retroactively to environmental damage that occurred before its enactment.[27] All PRPs are jointly and severally liable for remediation costs.[28] The statute also enables private parties to bring cost-recovery actions for damages due to hazardous substance releases.[29]

Financially, the potential exposure of PRPs for their waste handling and disposal activities during the last three or four decades is staggering. Cleanup costs can range up to one million dollars per acre, and some sites contain more than a hundred acres.[30] The EPA reports that the average cleanup cost per site is currently twenty-six million dollars.[31] For example, International

25. 42 U.S.C.A. § 9607(a) (West 1983 & Supp. 1994).

26. *Id.*; New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985); United States v. Conservation Chemical Co., 589 F. Supp. 59, 65 (W.D. Mo. 1984); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 804-07 (S.D. Ohio 1983).

Several courts have held a past owner liable notwithstanding uncontroverted evidence of the party's passive, unknowing role in conditions at the site. For example, in *In re* Hemingway Transport, Inc., 108 B.R. 378 (Bankr. D. Mass. 1989), *aff'd*, 126 B.R. 656, *modified* 126 B.R. 656 (D. Mass. 1991) *vacated* 993 F.2d 915, the current owner of a contaminated site sued the trustee of the bankrupt former owner, Hemingway, for recovery of response costs. The plaintiff alleged that a cache of leaking barrels had been disposed of on the site during the tenure of a former owner. There was no allegation or finding, however, that Hemingway was the former owner who disposed of the drums or knew of their existence, or even that whoever disposed of the drums did so during Hemingway's tenure; rather, the leaking of the drums during Hemingway's ownership was alleged to be sufficient basis for liability. *Id.* at 380. J.B. Ruhl, *The Plight of the Passive Owner: Defining the Limits of Superfund Liability*, 45 Sw. L.J. 1129 (1991) discusses the problems of imposing liability on the "passive past owner."

27. *See* State of Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300 (N.D. Ohio 1983); United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982), *appeal dismissed*, 713 F.2d 49 (3d Cir. 1983). This retroactive application to past acts has withstood constitutional due process challenges. *See, e.g.*, United States v. Conservation Chemical, 619 F. Supp. 162, 217-21 (W.D. Mo. 1985) (and cases cited therein); United States v. Tyson, 25 Env't Rep. Cas. (BNA) 1897, 1901 (E.D. Pa. 1986).

28. *See, e.g.*, O'Neil v. Picillo, 883 F.2d 176 (1st Cir. 1989) *cert. denied* 493 U.S. 1071 (1990); United States v. Northeastern Pharmaceutical & Chemical Co., 579 F. Supp. 823 (W.D. Mo. 1984) *modified* 810 F.2d 726 (8th Cir. 1986); United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983).

29. 42 U.S.C.A. §§ 9607 & 9613 (West 1983 & Supp. 1994); *see, e.g.*, United States v. Conservation Chemical Co., 628 F. Supp. 391, 405 (W.D. Mo. 1985); Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 288-90 (N.D. Cal. 1984).

30. Abelson, *supra* note 9, at 1097.

31. ACTON & DIXON, *supra* note 8, at 11.

Business Machines ("IBM") spent more than fifty million dollars to remedy a groundwater contamination problem in Santa Clara County.[32] IBM has proposed spending an additional thirty million to complete the job.[33] These figures do not even include the large litigation costs incurred while defending against CERCLA-imposed liability.[34]

Faced with enormous potential liabilities and ruinous defense costs, businesses that once participated in hazardous waste activities are increasingly seeking coverage under their respective Comprehensive General Liability insurance policies in an effort to reduce their exposure.[35]

## II.

### THE COMPREHENSIVE GENERAL LIABILITY POLICY

The Comprehensive General Liability ("CGL") insurance policy developed in response to American industries' desire to obtain insurance protection against "all manner of claims arising in the performance of their . . . business."[36] This basic coverage protects against third party claims.[37] In the late 1930's, the National Bureau of Casualty Underwriters ("NBCU") and the Mutual Insurance Rating Bureau ("MIRB") prepared uniform language for inclusion in the CGL. The NBCU, the MIRB, and later, the Insurance Services Office ("ISO") periodically revised the standard language.[38] Most insurers have been or are members of these insurance industry organizations responsible for

32. Dale Champion, *Plan for Cleaning Silicon Valley Water* S.F. CHRON., Oct. 20, 1988, at A9.

33. *Id.*

34. In testimony before the Senate Committee on Environment and Public Works, a consultant to the American Insurance Association reported that the cleanup of CERCLA sites will result in litigation costs of over $8 billion. *Insurance Issues and Superfund: Hearing Before the Senate Committee on Environment and Public Works*, 99th Cong., 1st Sess. 115-37 (1985) (statement of John C. Butler, Director, Putnam, Hayes & Bartlett, Inc.).

35. *See infra* part II.

36. Kissel v. Aetna Casualty & Sur. Co., 380 S.W.2d 497, 506 (Mo. Ct. App. 1964).

37. 3 CALIFORNIA INSURANCE LAW AND PRACTICE, *supra* note 11, § 49.01[2].

38. CALIFORNIA JUDGES ASSOCIATION, INSURANCE LITIGATION 199 (1990); 2 MICHAEL DORE, LAW OF TOXIC TORTS § 28.04[4] (1988). *See generally* William R. Fish, *An Overview of the 1973 Comprehensive General Liability Insurance Policy and Products Liability Coverage*, J. MO. BAR 257, June 1978; Robert Kahn, *Looking for "Bodily Injury": What Triggers Coverage Under a Standard Comprehensive General Liability Insurance Policy*, 19 FORUM 532 (1984); George H. Tinker, *Comprehensive General Liability Insurance- Perspective and Overview*, 25 FED'N INS. COUNS. Q. 217, 220-21 (1975). For a history of the development of the standard provision CGL policy, *see* E.W. SAWYER, COMPREHENSIVE LIABILITY INSURANCE (1943).

drafting the standard form policy language. The CGL policy terms used over the years differ to some extent. However, many of the largest insurance companies that have historically offered such coverage use the ISO standard form policies.[39]

### A. *Rules Governing the Construction of Insurance Policies*

Courts interpret insurance policies according to general rules of contract interpretation.[40] Words used in an insurance policy are interpreted according to the plain and ordinary meaning that a layperson would ordinarily give them.[41] Moreover, courts give effect to all policy provisions and consider the whole of the contract, using each clause to interpret the others.[42] If, however, after applying these rules, the insurance contract is "fairly susceptible of two different interpretations,"[43] the court will adopt the interpretation most favorable to the insured.[44] This doctrine is sometimes referred to as the "contra insurer" rule.[45]

This interpretation principle developed out of the typical relationship between the insured and the insurer. The insurer generally drafts the policy and offers it to the insured on a "take it or

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39. CALIFORNIA JUDGES ASSOCIATION, *supra* note 40, at 200.

40. Liverpool & London & Globe Ins. Co. v. Kearney, 180 U.S. 132, 135-36 (1901); Western Line Consol. School Dist. v. Continental Casualty Co., 632 F. Supp. 295, 301 (S.D. Miss. 1986); Walters v. Marler, 83 Cal. App. 3d 1, 33 (1978); 13 APPLEMAN, *supra* note 42, § 7384; 1 CALIFORNIA CONTINUING EDUCATION OF THE BAR *supra* note 43, § 3.45; 2 COUCH, *supra* note 42, § 15:1.

41. CAL. CIV. CODE § 1644 (West 1982); National Fidelity Life Ins. Co. v. Karaganis, 811 F.2d 357, 361 (7th Cir. 1987); State Farm Fire & Casualty Co. v. Miles, 730 F. Supp. 1462, 1465 (S.D. Ind. 1990); National State Bank v. American Home Assurance Co., 492 F. Supp. 393, 396 (S.D.N.Y. 1980); AIU Ins. Co. v. Superior Court, 799 P.2d 764, 775 (Cal. 1990); Reserve Ins. Co. v. Pisciotta, 640 P.2d 764, 769 (Cal. 1982); Acorn Ponds, Inc. v. Hartford Ins. Co., 105 A.D.2d 723, 724 (N.Y. 1984).

42. CAL. CIV. CODE § 1641 (West 1982); Harbor Ins. Co. v. Lewis, 562 F. Supp. 800, 804-05 (E.D. Pa. 1983); Harris v. County of Racine, 512 F. Supp. 1273, 1280 (E.D. Wis. 1981); Medical Operations Management v. National Health Lab., 176 Cal. App. 3d 886, 893 (1986); Burgess v. North Carolina Farm Bureau Mut. Ins. Co., 261 S.E.2d 234, 236 (N.C. 1980) (citing Woods v. Ins. Co., 246 S.E. 2d 773, 777 (N.C. 1978).

43. First State Underwriters Agency of New England Reinsurance Corp. v. Travelers Ins. Co., 803 F.2d 1308, 1312 (3d Cir. 1986) (citing Gray v. Zurich Ins. Co., 419 P.2d 168, 171 (Cal. 1966)).

44. Royal College Shop, Inc. v. Northern Ins. Co., 895 F.2d 670, 674 (10th Cir. 1990); Howard v. Russell Stover Candies, Inc., 649 F.2d 620, 623 (8th Cir. 1981); Safeco Title Ins. Co. v. Moskopoulos, 116 Cal. App. 3d 658, 667 (1981); Allstate Ins. Co. v. Gutenkauf, 431 N.E. 2d 1282, 1286 (Ill. Ct. App. 1981); Dale Elecs., Inc. v. Federal Ins. Co., 286 N.W.2d 437, 441 (Neb. 1979); 2 COUCH, *supra* note 42, § 15:74.

45. 1 CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 43, § 3.52.

leave it" basis.[46] The courts interpret the insurance policy as an adhesive contract because of the parties' unequal bargaining strength.[47] As a result, the insured should be protected from any ambiguity.[48]

## B. *The Duties of Insurers*

CGL insurance protects insureds against liability for third-party damages which they legally must pay.[49] In addition to this "duty to indemnify," the insurer also has a "duty to defend" all potentially covered claims made against the insured.[50] The CGL duty-to-defend provision requires the insurer to defend against

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46. *Id.*, § 3.52.

47. Garcia v. Truck Ins. Exch., 682 P.2d 1100, 1105 (Cal. 1984); Gray v. Zurich Ins. Co., 419 P.2d 168, 171 (Cal. 1966); 1 CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 43, § 3.52.

48. Insurance carriers, however, contend that many coverage claims involve "sophisticated insureds" whose insurance departments and counsel have sufficient knowledge and bargaining power to render the usual "contra insurer" rule inapplicable. The case law is split on the issue. Some courts have accepted the insurer's argument and have refused to apply strict "pro-insured" interpretive rules when the insured was a sophisticated entity with considerable bargaining leverage. *See, e.g.*, Eagle Leasing Corp. v. Hartford Fire Ins. Co., 540 F.2d 1257, 1260-62 (5th Cir. 1976), *cert. denied*, 431 U.S. 967 (1977) (court refused to apply contra insurer rule when the "insured is not an innocent but a corporation . . . managed by sophisticated businessmen, and represented by counsel on the same professional level as the counsel for insurers."); McNeilab, Inc. v. North River Ins. Co., 645 F. Supp. 525, 546 (D.N.J. 1986), *aff'd*, 831 F.2d 287 (1987) (court, after noting that the insured had its own expert insurance staff to represent it in determining its insurance program, refused to construe ambiguities strictly against the insurer).

Other courts, however, have been more limited in their holdings. For example, in AIU Ins. Co. v. Superior Court, 799 P.2d 1253 (Cal. 1990), the California Supreme Court ruled that ambiguous provisions will be interpreted against the insurer even when the insured possesses both legal sophistication and substantial bargaining power. The only exception is if the *specific* policy language in question is the product of joint drafting. *Id.* at 1257.

49. 7C JOHN A. APPLEMAN, INSURANCE LAW AND PRACTICE § 4681-4684 (1979 & Supp. 1993); 14 COUCH ON INSURANCE § 51:35 (2d ed. 1982 & Supp. 1988).

50. ROBERT REIGEL & JEROME S. MILLER, INSURANCE PRINCIPLES & PRACTICES 430-31 (1976). The insurer ordinarily selects the defense counsel for the insured. However, the existence of a conflict of interest between the interests of the insurer and the interests of the insured requires that the insurer provide independent counsel to represent the insured. An conflict of interest can arise when the insurer reserves its right to later contest coverage of a particular issue, and the outcome of that issue can be controlled by the counsel retained by the insurer to handle the defense of the claim. 1 CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA LIABILITY INSURANCE PRACTICE: CLAIMS & LITIGATION § 13.08[4][a] (M. Colleen Clancy, ed., 1991).

all allegations against the insured with respect to covered claims, even if the allegations are "groundless, false or fraudulent."[51]

In determining whether an insurer has a duty to defend, the great majority of jurisdictions apply the "comparison test."[52] This requires a side-by-side comparison of the provisions of the policy with the allegations of the complaint. Courts require an insurer to defend whenever the allegations can be reasonably construed to find a possibility of liability falling within the policy coverage.[53] This defense duty is much broader than the duty to indemnify because the defense obligation depends only on the allegations raised in the complaint, while the insurer's duty to indemnify is contingent on the ultimate resolution of the underlying claims.[54] Thus, an insurer may have to defend an action

51. JOHN D. LONG & DAVIS W. GREGG, PROPERTY AND LIABILITY INSURANCE HANDBOOK 465 (1965). Of course, if the claim brought by the third party against the insured is shown to be fraudulent, the insured can file for sanctions under Federal Rule 11 in the federal courts, FED. R. CIV. P. 11, and under the various state civil procedure rules, *e.g.*, CAL. CODE CIV. PROC. § 128.5 (West 1982), allowing the imposition of sanctions on a plaintiff who brings a lawsuit in bad faith.

52. DORE, *supra* note 42, § 28.05[2][a]; BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 8.02[C] (4th ed. 1991); *See generally* Annotation, *Allegations in a Third Person's Action Against the Insured as Determining the Liability Insurer's Duty to Defend*, 50 A.L.R. 2d 458 (1956).

53. *See* Travelers Indem. Co. v. Dingwell, 414 A.2d 220, 225 (Me. 1980) ("The correct test is whether a *potential* for liability within the coverage appears from whatever allegations are made."). *Accord* Continental Casualty Co. v. City of Richmond, 763 F.2d 1076, 1079 (9th Cir. 1985); Baldt, Inc. v. American Universal Ins. Co., 599 F. Supp. 955, 957 (E.D. Pa. 1985); Danek v. Hommer, 100 A.2d 198, 202 (App. Div. of N.J. Super. Ct. 1953), *aff'd*, 105 A.2d 677 (1954) (per curiam); Gray v. Zurich Ins. Co., 419 P.2d 168 (Cal. 1966).

54. St. Paul Fire and Marine Ins. Co. v. Three "D" Sales, Inc., 518 F. Supp. 305 (D.N.D. 1981); Commercial Union Ins. Co. v. Albert Pipe & Supply Co., 484 F. Supp. 1153 (S.D.N.Y. 1980); Nichols v. Great American Ins. Cos., 169 Cal. App. 3d 766 (1985); Frank Revere & Arthur J. Chapman, *Insurer's Duty to Defend*, 13 PAC. L.J. 889 (1982); Donald E. Sharp and Jean K. Shaffer, *The Parameters of an Insurer's Duty to Defend*, 19 THE FORUM 555 (1984).

The CGL policy covers liability that third parties impose on the insured. Accordingly, there are three main parties in an insurance coverage case: the third party plaintiff, the insured, and the insurer. These parties participate in two, or sometimes three, stages of litigation. In the first phase, the "underlying action," the third party plaintiff files suit against the insured. The insured then notifies its insurer that it is being sued. Assuming that the CGL policy at least potentially covers the third party claims, the insured requests a defense from its insurer against the third party plaintiff in the underlying action. The insurer, however, will often dispute that the policy covers the allegations, and refuse to defend on behalf of the insured in the underlying suit. This leads to the second stage of litigation - the "coverage action" between the insured and the insurer, in which the duty to defend issue is resolved. If, after the underlying action has been decided and a judgment entered, the insured and insurer disagree as to the scope of coverage for the liability imposed on the insured, a third lawsuit may be necessary. This action will center on the insurer's duty to

even though it ultimately has no duty to indemnify the insured. If an insurer defends the claim successfully, no damages result, and thus the insurer does not have to indemnify the insured for any liability. Alternatively, if the actual judgment involves only uninsured damages, the insurer is also absolved of any indemnification obligation.

*Gray v. Zurich*,[55] the seminal California case on the insurer's defense obligation under the CGL policy, illustrates the distinction between the duty to defend and the duty to indemnify. In *Gray*, which involved a complaint for assault, the court held that the insurer had to defend the insured, even though the policy exclusion for damages resulting from an intentionally caused injury may have excluded coverage.[56] The exclusion did not necessarily apply because the complaint could have been resolved in at least three ways, each with different coverage implications. The assault could have been intentional, in which case the insurer would not indemnify the loss; negligent, in which case the insurer would have to indemnify the loss; or not proved, or excused as

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indemnify for damages that the insured has become legally obligated to pay to the third party plaintiff.

To illustrate the sequence of events in the environmental context, suppose John lives adjacent to a hazardous waste disposal site which is owned by ABC Company. After discovering the presence of contaminants on his land, which John believes are the result of ABC's dumping activities, John brings a lawsuit against ABC for property damage. This constitutes the underlying action. ABC then files a claim against its insurer, Aetna, seeking a defense and coverage. If there is a dispute over the insurer's duty to defend or duty to indemnify, then there will be a coverage lawsuit between ABC and Aetna, in which these issues are resolved.

Regardless of the outcome of the coverage actions between the insured and the insurer, the third party plaintiff is always "made whole." If his claims are proved, the insured will compensate him in damages for the injury he has suffered. The coverage actions between the insured and the insurer focus solely on the *insurer's* obligations under the insurance policy. The coverage action centers on whether the insurer must defend the insured in the underlying suit. Alternatively, it resolves the issue of whether the insurer is required to reimburse the insured for the damages it has paid to the third party plaintiff. The third party plaintiff, however, is not involved in these coverage actions, and the payment of his damage award is not contingent on the outcome of the coverage actions.

In this Comment, the terms "third party plaintiff" and "plaintiff" will be used interchangeably to refer to the party bringing the initial lawsuit against the insured in the underlying action. The third party plaintiff is either a private party, suing under CERCLA, or a government agency. The words "underlying action" or "underlying suit" will be used to denote the first stage of litigation between the insured and the third party plaintiff. The phrase "coverage action" will be used to refer to the lawsuit between the insurer and the insured over the insurer's duty to defend or duty to indemnify.

55. 419 P.2d 168 (Cal. 1966).

56. *Id.* at 272.

self-defense, in which case the claim would have been "groundless."

At trial in the underlying action, the insured was held liable for intentionally assaulting the plaintiff (thus confirming the supposition on which the insurer had based its refusal to defend).[57] Nevertheless, the *Gray* court found that the insurer had breached its duty to its insured by refusing to defend at the outset of the case, when the insured's liability for assault had not been established. As a result, even though the policy excluded coverage for the judgment in the underlying action, the insurer incurred liability for the award of damages because of its breach of contract.[58]

### C. *The Pollution Exclusion*

The CGL policy provides that the insurance carrier will "[p]ay on behalf of the insured all sums[59] which the insured becomes legally obligated to pay as damages because of bodily injury or property damage."[60] Bodily injury includes "bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom."[61] The policy defines property damage as "physical injury to or destruction of tangible property which occurs during the policy period. . . . "[62]

The CGL policy provides coverage only if the tortious conduct occurred in the same year that the insured purchased the policy, because the coverage for bodily injury and property damage is "occurrence-based." The CGL policy does not apply unless the harm *occurred* during the policy period of the insurance contract.[63] For example, if a company disposed of hazardous waste in 1968 and purchased an insurance policy that year and every year through 1992, the company could bring a claim *only* under the policy or policies during which damage to the third party property resulted.[64]

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57. *Id.* at 172.

58. *Id.* at 179.

59. Naturally, the coverage limits that the insured purchases define the extent of the insurer's indemnification obligation.

60. 3 CALIFORNIA INSURANCE LAW AND PRACTICE, *supra* note 11, at app. A (1991).

61. *Id.*, § 49.05.

62. *Id.*, § 49.06[1].

63. LONG & GREGG, *supra* note 44, at 467.

64. *Id.* There must be damage to third party property because CGL policies commonly exclude coverage for property owned or used by or in the care, custody and control of the insured. *Id.*

The CERCLA claim to recover incurred cleanup costs is a unique statutory cause of action with no foundation in the common law. Nevertheless, because the claim for cleanup costs stems from contamination of property, most courts treat such a claim as one for property damage.[65]

Various exclusions accompany the standardized coverage for bodily injury and property damage.[66] The CGL exclusion relevant to environmental coverage disputes is the "pollution exclusion." Insurers included the pollution exclusion to "eliminate any doubt that may have existed concerning coverage for damages caused by the emission of pollutants as a regular or continuous part of the insured's business."[67] The standard pollution exclusion clause provides that the CGL policy:

> does not apply to bodily injury or property damage (1) arising out of pollution or contamination caused by oil or (2) arising out of the discharge, dispersal, release or escape of smoke, vapors, soot fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*[68]

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65. AIU Ins. Co. v. Superior Court, 799 F.2d 1253, 1265-66 (9th Cir. 1990).

66. For example, the CGL policy contains exclusions for liability assumed under contract, for liability relating to any automobile or aircraft owned or operated by the insured, for liability arising from watercraft, and for liability for selling alcohol to a minor, selling to a person under the influence of alcohol, or causing the intoxication of any person. *See* WILLIAM H. RODDA, PROPERTY AND LIABILITY INSURANCE 386-87 (1966).

67. International Surplus Lines Ins. Co. v. Anderson Device Co., No. 86-CV-60392-AA (E.D. Mich. Oct. 19, 1987), *aff'd*, 901 F.2d 1368 (6th Cir. 1990).

68. 3 CALIFORNIA INSURANCE LAW AND PRACTICE, *supra* note 11, § 49.22[1] (emphasis added). There is a great deal of case law addressing the interpretation of the pollution exclusion. The litigation centers on what is the meaning of "sudden and accidental." *See, e.g.*, Northern Ins. Co. of New York v. Aardvark Assocs., Inc., No. 90-3687 (3d Cir. Aug. 8, 1991) ("[T]he exception for 'sudden and accidental' discharges applies only to discharges that are abrupt and last a short time."); Ogden Corp. v. Travelers Indem. Co., 924 F.2d 39, 42 (2d Cir. 1991) ("[F]or a release or discharge to be sudden, it must 'occur[ ] over a short period of time.' "); Technicon Elecs. Corp. v. American Home Assurance Co., 141 A.D.2d 124, 137 (N.Y. 1988) (A "sudden and accidental" event is "one which is unexpected, unintended, and occurs over a short period of time."), *aff'd*, 542 N.E.2d 1048 (N.Y. 1989); *compare* Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686, 688 (Ga. 1989) ("[E]ven in its popular usage, 'sudden' does not usually describe the duration of an event, but rather its unexpectedness: a sudden storm, a sudden turn in the road, sudden death."); Du-Wel Prods., Inc. v. United States Fire Ins. Co., 565 A.2d 1113, 1117 (N.J. Sup. Ct. 1989) ("[A]pplicability of the exception to the pollution clause is not precluded by a long-term or continuous exposure .... [D]amage caused by accidental or even ordi-

Thus, coverage does not exist for damage caused by a release of pollutants unless the release was "sudden and accidental."[69]

As will be discussed shortly, most CERCLA lawsuits involve situations where the pollution was *not* "sudden and accidental," and therefore the pollution exclusion excludes coverage for the property damage.[70] As a result, the insurer does not have any duty to indemnify the insured. However, if a plaintiff *alleges* property damage, the insurer does still have a duty to defend under the property damage section, even if it is ultimately determined that there is no duty to indemnify. A *potential* for coverage is all that is needed.[71] Whether or not the pollution was "sudden and accidental" is a factual issue to be resolved at trial. Since there *could* be coverage under the property damage sec-

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narily negligent polluters who neither intend nor expect the ensuing damage is indemnifiable despite long-term and repeated polluting activity.").

This ongoing dispute over the meaning of "sudden and accidental" is beyond the scope of this Comment. The discussion of the pollution exclusion serves the purpose of this Comment only to show that as a result of courts ruling that the pollution exclusion precludes coverage for hazardous waste claims, insureds have recently developed a new theory of coverage under the personal injury provision. For a detailed analysis of both the meaning of the pollution exclusion and the case law interpreting it, *see* Robert M. Tyler, Jr. & Todd J. Wilcox, *Pollution Exclusion Causes Problems in Interpretation and Application Under the Comprehensive General Liability Policy*, 17 IDAHO L. REV. 497 (1981).

69. The rationale behind the "sudden and accidental" exception to the pollution exclusion emanates from the insurance law concept of "moral hazard." Moral hazard arises from indifference concerning loss, often brought about by the security of the insurance which leads to carelessness. GEORGE E. REJDA, PRINCIPLES OF INSURANCE 602 (1982). For example, under the moral hazard doctrine, an insured who purchases an auto theft insurance policy will be more likely to leave his car unlocked and the keys in the ignition because he knows that if the car is stolen, the insurance policy will cover his loss. *Id.*

The exclusion of all but "sudden and accidental" pollution will prevent the moral hazard phenomenon from occurring in two ways. First, the language clearly precludes coverage for intentional polluting, as this conduct is not accidental. The exclusion for intentional conduct prevents an insured from purposefully dumping under the belief that its insurer will indemnify it for any harm flowing from its intentional acts. The language also precludes coverage for gradual pollution. If the pollution is gradual, and is occurring over a long period of time, then presumably the gradual pollution is something that is or could be under the insured's control, and is the result of a conscious decision not to halt the pollution or at least not to monitor the possible sources of pollution. Thus, precluding coverage for gradual pollution prevents the moral hazard of an insured becoming aware of gradual pollution but not acting to stop the pollution, or disregarding potential pollution sources, because it knows that the insurer will cover any harm stemming from the gradual pollution. For a discussion of the moral hazard phenomenom, see Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313 (1990).

70. *See infra* text accompanying notes 68-70.

71. *See supra* text accompanying notes 43-51.

tion if the pollution is found to be sudden and accidental, the insurer must defend.

This example illustrates how much more broadly defined the insurer's duty to defend is than its duty to indemnify. Most of the CERCLA cases involve situations where the pollution exclusion will ultimately exclude coverage. Yet, the mere existence of a possibility, however slim, that the pollution was "sudden and accidental," and thus covered by the property damage section, invokes the insurer's duty to defend.

### D. *The Personal Injury Endorsement*

In addition to the standard coverage for bodily injury and property damage, businesses can obtain specialized insurance by purchasing certain endorsements.[72] An endorsement is a written provision that adds to the coverage already provided in the original policy and may require the payment of an additional premium. One such endorsement covers various personal injuries.[73]

The term "personal injury" is a misnomer. "Personal injury," as used in the CGL policy, does not refer to physical harm to people; the *bodily injury* section of the policy covers physical harm.[74] Instead, the personal injury endorsement provides coverage for injury

> sustained by any person or organization and arising out of one or more of the following *offenses* committed in the conduct of the named insured's business:

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72. GRAY CASTLE ET AL., THE BUSINESS INSURANCE HANDBOOK 189-90 (1981).

73. *Id.*, at 187, 189. After 1986, the personal injury section was relocated to the main body of the policy.

74. *See* Beltway Management Co. v. Lexington-Landmark Ins. Co., 746 F. Supp. 1145, 1148 (D.D.C. 1990) ("The term "personal injury" is not used in the normal sense in [the policy]. It does not refer to physical injuries; those are described as bodily injuries and treated in section III . . . ."); 3 CALIFORNIA INSURANCE LAW AND PRACTICE, *supra* note 11, § 49.40[3] ("[T]he term 'personal' is used in a highly specialized sense. It does not mean physical damage to a person; rather, it means injury arising out of one or more specified offenses.").

In many of the cases, the insured's polluting activities have caused not only property damage to the plaintiff's land, but bodily injury to the plaintiff himself. For example, the presence of toxic chemicals underneath a claimant's land may cause him to contract cancer. This type of physical injury is covered by the bodily injury section of the policy, not by the personal injury provision. This Comment does not discuss the bodily injury harms that polluting activity can cause, nor does it address the coverage of these harms under the bodily injury section; its focus is strictly on pollution-caused property damage and the resulting cleanup costs, and how these harms are covered (or not covered) by the property damage and personal injury sections.

> Group A- false arrest, detention or imprisonment, or malicious prosecution
> Group B- the publication or utterance of a libel or slander or of other defamatory or disparaging material, or a publication or utterance in violation of an individual's right of privacy . . . .
> Group C- wrongful entry or eviction, or other invasion of the right of private occupancy . . . .[75]

Unlike the bodily injury and property damage provisions, which provide coverage based on the type of *injury* sustained, the personal injury endorsement provides coverage when the injury arose from the commission of an enumerated *offense*.[76] It is also occurrence-based. The endorsement only provides coverage if the offense occurred during the policy period. In the environmental coverage actions, controversy surrounds the subpart that provides coverage for personal injury stemming from the commission of a "wrongful entry or eviction, or other invasion of the right of private occupancy."

The legal dispute over coverage for CERCLA cleanup cost claims involves both the property damage and personal injury provisions and the pollution exclusion. Many of the underlying actions between third parties and insureds have involved situations where toxic waste had gradually leaked for a prolonged period of time.[77] In other cases, the courts found the defendant to have intentionally dumped hazardous waste.[78] In a great number of these suits, the courts ruled that the pollution was not "sudden and accidental."[79] Therefore, the pollution exclusion excluded

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75. 3 CALIFORNIA INSURANCE LAW AND PRACTICE, *supra* note 11, at app. B (1991) (emphasis added).

76. *See, e.g.*, Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265, 270 (1st Cir. 1990) ("[C]overage for 'personal injury' liability depends not primarily on the type of *injury* sustained, but whether the injuries arose from the commission of certain *offenses*.").

77. *See, e.g.*, Gregory v. Tennessee Gas Pipeline Co., 948 F.2d 203 (5th Cir. 1991); Hirschberg v. Lumbermen's Mutual Casualty, No. C-91-3776 (N.D. Cal. filed May 7, 1992).

78. *See, e.g.*, Straits Steel & Wire Co. v. Michigan Miller's Mut. Ins. Co., No. 91-72991-CK (Mich. Cir. Ct. June 10, 1992); County of Columbia v. Continental Ins. Co., No. 236-98 (N.Y. Sup. Ct. June 4, 1991); Morton Thiokol, Inc. v. General Accident Ins. Co. of Am., No. C-3956-85 (N.J. Super. Ct. Ch. Div. Aug. 27, 1987).

79. *See, e.g.*, United States Fidelity & Guar. Co. v. Murray Ohio Mfg. Co., 693 F. Supp. 617, 622 (M.D. Tenn. 1988) ("Simply put, an event that occurs over the course of six years logically cannot be said to be 'sudden.' "), *aff'd*, 875 F.2d 868 (6th Cir. 1989) (per curiam); Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 702 F. Supp. 1317, 1326 (E.D. Mich. 1988) (" '[S]udden' in the pollution exclusion includes the temporal component of briefness, and means 'brief, momentary, or lasting only a short time.' 'Sudden' is to be contrasted with 'gradual.' "); Technicon Elecs. Corp. Ameri-

coverage for the cleanup costs under the property damage section.

These denials have required insureds to advance a new and novel theory of coverage.[80] Insureds now seek both a defense and coverage for cleanup cost claims under the "wrongful entry or eviction, or other invasion of the right of private occupancy" personal injury language.[81] Although the pollution exclusion applies to the property damage section, it does not apply to the personal injury endorsement.[82] Therefore, if courts accept this new coverage theory, insureds could receive coverage under the personal injury section for property damage otherwise excluded by the pollution exclusion.

To obtain coverage under the personal injury provision, insureds argue first that common-law tort theories of trespass and nuisance supply an injured party with relief for pollution-caused damages. Next, they analogize these theories of liability to the "wrongful entry or eviction, or other invasion of the right of private occupancy" torts; hence, the personal injury provision covers the trespass and nuisance claims, and the insurer must defend in the underlying action.[83]

## III.

### CASE LAW ON THE DUTIES OF INSURERS

Since insureds have only recently started pursuing coverage for CERCLA cleanup costs under the personal injury endorsement, the cases address only the duty to defend. Typically, the duty to defend issue arises and is resolved before the issue of indemnification becomes a concern. The question of whether the insurer

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can Home Assurance Co., 542 N.E. 2d 1048 (N.Y. Ct. App. 1989) (pollution exclusion operated to defeat insured's claim for defense costs where complaint alleged, and defendant conceded, that defendant had intentionally discharged toxic wastes over a period of years).

80. Insureds have advanced this coverage theory previously in asbestos litigation. However, its application to CERCLA liability is relatively recent. *See supra* note 13.

81. *See infra* part II.

82. By its very terms, the pollution exclusion applies only to bodily injury or property damage. *See supra* text accompanying note 59. Courts have recently confirmed that the pollution exclusion does not apply to the personal injury section. *See, e.g.*, Titan Holdings Syndicate v. City of Keene, N.H., 898 F.2d 265, 270 (1st Cir. 1990) (pollution exclusion does not apply to personal injury section).

83. *See generally* Dvorkin, *supra* note 15 (discusses insureds' main arguments for coverage under personal injury section); Pasich, *supra* note 15 (same); Kirk A. Pasich, *Insurance Coverage For Environmental Claims: The Benefits of Personal Injury Provisions*, 4 MEALEY'S LITIGATION REPORTS 27 (June 12, 1990) (same).

owes a defense is much more immediate. The insured is being sued by a third party plaintiff *right now*; therefore, if the insurer refuses to defend the insured, this issue must be resolved promptly so that the underlying lawsuit can proceed. The issue of indemnification, on the other hand, can only be litigated if the underlying lawsuit actually results in a trial and a judgment against the insured, a process which could take years to complete.[84]

Courts are split as to whether insurers owe a defense under the personal injury provision of the CGL policy for cleanup cost claims due to the release of hazardous waste. As stated above, the controversy over the interpretation of the personal injury clause in the environmental context erupted only recently. Consequently, there are relatively few cases on the issue.

### A. *Cases Imposing a Duty to Defend*

*Titan Holdings Syndicate v. City of Keene*[85] was one of the first opinions to rule for the insureds on the personal injury issue. In *Titan*, the plaintiffs brought a lawsuit against the City of Keene, alleging that they "ha[d] been continuously bombarded by and exposed to noxious, fetid and putrid odors, gases and particulates, to loud and disturbing noises during the night, and to unduly bright night lighting"[86] emanating from the city's sewage treatment plant which abutted their land. The plaintiffs contended that the operation of the plant had "unreasonably and substantially interfered with [their] quiet enjoyment of the home-

84. The duty to indemnify, however, is equally significant. The cost involved in indemnifying the insured will be much greater than the money expended in defending the insured. *See supra* text accompanying note 9. Accordingly, the insurer's indemnification obligation is likely to be even more aggressively contested than the duty to defend issue. It will become the next bone of contention between insureds and insurers as soon as judgments finding insureds liable are handed down in the underlying lawsuits. Parts IV(B) and V address the indemnification issue and provide suggestions to the parties that will prevent them from having to litigate over the insurer's possible duty to indemnify.

It is foreseeable that insureds and insurers will eventually litigate the insurer's indemnification obligation. Neither party has been able to resolve the disagreements surrounding the insurer's duty to indemnify in non-environmental coverage disputes; thus, it would appear that the same problems that arise over the duty to indemnify in cases outside of the pollution context will present themselves here as well. Interview with Kirk Pasich, insurance partner at Hill, Wynne, Troop & Meisinger, in Los Angeles, California (August 5, 1992). This calls attention to the need for some changes in how the parties approach the issue.

85. 898 F.2d 265 (1st Cir. 1990).

86. *Id.* at 267.

stead and ha[d] substantially deprived [them] of the use of the homestead."[87]

The city, the insured, sought coverage under the personal injury provision of its insurance policy. It argued that the plaintiffs' allegations regarding the plant's fumes, noise and light constituted a "wrongful entry" onto the plaintiffs' property.[88] The court agreed, stating, "[w]hile we have been unable to find any New Hampshire cases defining a tort of wrongful entry, we think it most closely resembles that of trespass. (Indeed, the [plaintiffs] labelled Count I of their writ as sounding in 'trespass . . . .')."[89] However, under New Hampshire law, a trespass is an intentional tort.[90] Since the plaintiffs failed to characterize the city's actions as intentional, the court held that the insurer was not obligated to defend the trespass allegation under the personal injury endorsement.[91]

The court then focused on the "other invasion of the right of private occupancy" language in the insurance contract.[92] The court reiterated that the complaint alleged that the city's plant had interfered with the plaintiffs' quiet enjoyment and use of the homestead. Concluding that this allegation, "sounding in 'nuisance,' " constituted an invasion of the right of private occupancy, the court found that the insurer owed a defense.[93]

The court reached a similar conclusion in *Napco Inc. v. Fireman's Fund Insurance Co.* In that case, the plaintiff, Napco, located in Pennsylvania, had contracted with the Vogel corporation to remove, haul and dump waste that Napco's plants generated. In the late 1980's, the EPA forced Vogel to clean up the site. Vogel filed suit against Napco, alleging that it had improperly included toxic chemicals in its waste. Among other theories of liability, Vogel's complaint alleged nuisance and trespass causes of action. Napco then filed a suit against its insurer, seeking a

87. *Id.*

88. *Id.* at 270-272.

89. *Id.* at 272.

90. *Id.*

91. *Id.* In a sense, this is a bizarre result. The court seemed to be implying that if the plaintiff *had* alleged an intentional trespass, then the "wrongful entry" personal injury language would have covered the claim. However, this runs contrary to the basic policy notion that intentional torts are typically uninsurable. *See infra* text accompanying notes 190-91 for a discussion of the public policy against insuring intentional torts.

92. *Titan*, 898 F.2d at 270.

93. *Id.* at 272.

defense to Vogel's claims under the personal injury endorsement.[94]

The court concluded that because the "other invasion of the right of private occupancy" language potentially covered the nuisance claim, the insurer had a duty to defend.[95] In reaching this conclusion, the court recognized that a nuisance may affect the possession of property "to the extent that the person or persons with possessory interests in the property suffer real diminution of those interests through an interference with their right to use or enjoy the property."[96]

Regarding the trespass claim, the court's reasoning paralleled the *Titan* ruling.[97] Asserting that "wrongful entry is akin to trespass; trespass is a direct physical interference with the property of another; [and] the essence of trespass is wrongful entry,"[98] it concluded that the insured's complaint had "raised allegations which potentially fall within the coverage provided," since Pennsylvania law does not require intent to constitute a trespass.[99] Thus, this satisfied the test to invoke a duty to defend.[100] Apparently as an afterthought, and without explaining its reasoning, the court added that "[a]t the very least, the terms 'wrongful entry' and 'other invasion of the right of private occupancy,' as used in the insurance contracts in question, are . . . ambiguous."[101] Construing the ambiguity against the insurance carrier, the court confirmed that the insurer owed a defense.[102]

The court in *Hirschberg v. Lumbermen's Mutual Casualty*[103] followed the *Napco* court's reasoning. The insured in *Hirschberg* had leased and contaminated a parcel of land in northern California that was subsequently sold to the plaintiff. The complaint included allegations of trespass and nuisance as a result of the pollutants left on the plaintiff's property.[104] The insured contended that the nuisance claim fell within the policy definition of personal injury.

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94. *Id.*
95. *Id.*, slip op. at 14.
96. *Id.*, slip op. at 11.
97. *See supra* text accompanying notes 87-90.
98. *Napco*, slip op. at 13.
99. *Id.*, slip op. at 14.
100. *See supra* text accompanying notes 43-51.
101. *Napco*, slip op. at 14.
102. *Id.*, slip op. at 14-15.
103. 798 F. Supp. 600 (N.D. Cal. 1992).
104. The hazardous waste primarily consisted of trichloroethylene ("TCE"). *Napco*, slip op. at 2.

In a brief discussion of the personal injury provision, the court began by observing that "[a]t a minimum, the term 'other invasion of the right of private occupancy' is ambiguous,"[105] and that any ambiguity should be resolved against the insurer. In a holding similar to the *Napco* decision,[106] the *Hirschberg* court summarily declared that the policy language was ambiguous. The court then noted that "since the underlying complaint alleg[es] [a nuisance] claim for the interference with [the third party's] 'comfortable use and enjoyment of the property,' there exists the potential for coverage, and correspondingly, a duty to defend."[107]

B. *Cases Denying a Duty to Defend*

*Morton Thiokol, Inc. v. General Accident Insurance Co. of America*[108] was the first personal injury coverage ruling in the environmental context. In *Morton Thiokol*, the insured operated a mercury processing plant in New Jersey and allowed mercury-laden effluent to drain into a nearby creek. In the underlying suit, the court held the insured liable for causing a public nuisance.[109] Accordingly, the court ordered the insured to fund the removal of the mercury pollution that had seeped into the creek. The insured then brought an action against its insurer, seeking a declaration that the insurer was liable for defense costs already expended.[110]

The insured argued that the court's finding of a public nuisance in the underlying suit brought its claim against the insurer under the "wrongful entry or eviction, or other invasion of the right of private occupancy" personal injury language. The court rejected the argument that any of the personal injury offenses covered the nuisance claim:

> It is not necessary to repeat the facts of the underlying [action] to understand that the waters of Berry's Creek are public property. Thus, there cannot be an invasion of private occupancy or private possession.
>
> Similarly, eviction means a dispossession through legal process. The State [the plaintiff in the underlying action] was not dispossessed of the waters of Berry's Creek.

105. *Id.*, slip op. at 8.
106. *See supra* text accompanying notes 85-86.
107. *Hirschberg*, slip op. at 9.
108. No. C-3956-85 (N.J. Super. Ct. Ch. Div. Aug. 27, 1987).
109. *Id.*, slip op. at 4-6.
110. *Id.*, slip op. at 4.

> Wrongful entry with respect to real estate is the going upon land for the purpose of taking possession of it. Here, no one sought to take possession of Berry's Creek, neither the land that forms its bed, nor the waters flowing through it.[111]

The court concluded by noting that "[w]rongful entry, eviction and occupancy all have to do with the possession of property. The seepage of toxic waste has nothing at all to do with the possession of Berry's Creek. The personal injury clause of the policies [sic] do not provide coverage to plaintiff."[112] Therefore, the insurer was not required to reimburse the insured for its defense costs.

In *Gregory v. Tennessee Gas Pipeline Co.*,[113] the third party plaintiffs charged that the insureds were liable for contaminating their land. The insureds had released toxic chemicals into a lake, which consequently seeped onto the plaintiffs' adjoining land. The 5th Circuit concluded that the pollution exclusion precluded coverage for the property damage under the property damage section of the insureds' CGL policy.[114] However, the insureds contended that the allegation came within the personal injury provision. In reviewing the lower court's decision, the court stated:

> The district court held such a construction of [the personal injury provision] was unreasonable. The court stated that to extend [the personal injury provision] to all property damages, including damages which would be covered under [the property damage provision], would render the pollution exclusion meaningless. This is correct. The risk of property damage caused by pollution, a risk which Titan [the insurance carrier] expressly excluded and one for which the City [the insured] paid no premium under [the property damage provision], would be subsumed under [the personal injury provision].[115]

Thus, the Court of Appeals affirmed the trial court's ruling. There was no duty to defend under the personal injury provision because the plaintiffs premised their allegation on property damage, as opposed to personal injury.

The court ruled similarly in *Straits Steel & Wire Co. v. Michigan Millers Mutual Insurance Co.*[116] In that case, the insured,

111. *Id.*
112. *Id.*
113. 948 F.2d 203 (5th Cir. 1991).
114. *Id.* at 208.
115. *Id.* at 209.
116. No. 91-72991-CK (Mich. Cir. Ct. June 10, 1992).

Straits Steel and Wire Company, brought an action seeking defense costs from three insurance carriers. The carriers had provided it with CGL insurance over a period of years. The EPA sued the insured to recover the costs it had incurred in removing hazardous wastes from a Straits Steel landfill. Straits Steel alleged that a duty to defend arose from the personal injury policy terms.[117] The court distinguished the case from *Titan*, noting that in *Titan*, the interference with the use and enjoyment of the plaintiffs' property was a claim that

> arguably came within the [other invasion of the right of private occupancy] coverage. Clearly the cause of action fell within the general ambit of cases raising traditional issues involving wrongful entry, eviction, or invasion of rights of private occupancy as it alleged infringement on the right to the quiet enjoyment of property. It raised no issue involving *actual damage* to *land* or *realty* as this cause does.[118]

Due to the differences between the causes of action in the two cases, the court ruled contrary to *Titan* and against the insured. The court proclaimed, "the personal injury coverage is not applicable [to an allegation of property damage]."[119]

### C. *Summary of Case Law*

The above cases address the application of the personal injury endorsement to trespass, nuisance, or reimbursement of cleanup cost claims in the context of whether the insurance company had a duty to defend the particular allegation. As indicated earlier, an insurer's duty to defend is much broader than its actual duty to indemnify. A court only needs to find a *potential* for coverage to rule that the insurer has a duty to defend the claim.[120] As a result, the existing case law fails to analyze whether an insurance company has not only a duty to defend, but a duty to indemnify the insured under the personal injury section.

An insurer's duty to indemnify is not coextensive with its duty to defend.[121] The duty to indemnify depends on actual facts rather than on untested third party allegations.[122] When the only contested issue is the duty to defend, however, then the court

117. *Id.*, slip op. at 13.
118. *Id.*, slip op. at 15 (emphasis added).
119. *Id.*, slip op. at 16.
120. *See supra* text accompanying note 46.
121. *See* Willett Truck Leasing Co. v. Liberty Mut. Ins. Co., 410 N.E.2d 376, 380 (Ill. Ct. of App. 1980); *see also supra* text accompanying notes 43-51.
122. *See supra* text accompanying notes 43-51.

need not consider the merits of the claim. A duty to defend exists as long as the allegations in the complaint, when compared with the policy language, indicate there is a potential for coverage, regardless of whether such claims are meritorious.[123] As a result, the precedential value of decisions analyzing the personal injury clause in the duty to defend context is limited to other cases involving the duty to defend.

In discussing the insurer's duty to defend, many of the courts' opinions are written in a rather conclusory fashion. The courts, invoking the rule that any ambiguity is to be construed strictly against the insurer, declare with insufficient analysis that the personal injury language is ambiguous, and use that sole finding to justify their holding.[124] However, contract interpretation principles provide that words in a contract are ambiguous only if they are reasonably susceptible of two different interpretations.[125] So far, the courts holding that the personal injury language is ambiguous have failed to explain why there is no plain meaning. Moreover, once they find the language ambiguous, they neglect to define the two different interpretations. On the other hand, the decisions denying a defense obligation discuss what claims the personal injury provision should *not* cover, but fail to assert what claims the personal injury language *should* cover.[126]

Because of the enormous amount of money at stake in these coverage actions,[127] there is a compelling need for consistent, well-reasoned decisions to provide the parties with clear guidance as to what their respective liabilities are under CERCLA. Therefore, courts should not abandon their duty to determine the plain meaning of the policy language. A seemingly simple yet careful analysis of the personal injury terms evidences that the language does have an ascertainable plain meaning. This meaning suggests that the insurer has a duty to defend.

## IV.

## ANALYSIS OF THE PERSONAL INJURY LANGUAGE IN CGL POLICIES

A third party plaintiff suing an insured for pollution-caused property damages will typically assert one or more of three

123. *See supra* text accompanying note 44.
124. *See supra* text accompanying notes 99 & 103.
125. *See supra* text accompanying note 80.
126. *See supra* text accompanying notes 106-117.
127. *See supra* text accompanying note 9.

claims. The plaintiff may allege trespass or nuisance. Alternatively, the plaintiff may seek reimbursement of costs incurred to remedy the property damage under CERCLA. In determining whether the personal injury provision obligates the insurer to provide a defense, and possibly indemnification, one must first address whether the personal injury enumerated torts, "wrongful entry or eviction, or other invasion of the right of private occupancy," encompass these claims.

### A. *The Duty to Defend*

The following subsections analyze whether events triggering CERCLA liability fall within the "wrongful entry or eviction, or other invasion of the right of private occupancy" language of the personal injury endorsement.

#### 1. "Wrongful Entry"

A wrongful entry is committed when someone or something enters another's property without a right to do so.[128] For example, if A walked onto B's land without permission to do so, and subsequently entered B's home, then A engaged in a wrongful entry. In this hypothetical example, A both wrongfully entered onto B's land and into B's home. In so doing, A interfered with B's possessory interest. When A committed the wrongful entry, he disturbed B's right to occupy the property exclusively.

Courts interpreting the wrongful entry language contained in the personal injury clause have stated that the " 'personal injury' contemplated by the business liability policies was the 'wrongful entry' . . . relating to some interest in real property."[129] Thus, the wrongful entry offense imposes liability on a party who has

128. Combining the individual definitions of the word "wrongful" and the word "entry" yields a definition of the wrongful entry tort. Black's Law Dictionary defines the term "wrongful" as indicating the "infringement of some right." BLACK'S LAW DICTIONARY 1612 (6th ed. 1990). Similarly, courts have defined "wrongful" as "not rightful, unlawful", People *ex rel.* Evans v. Denno, 175 N.Y.S.2d 643, 645 (1947), and "having no legal sanction." State v. Van Pelt, 49 S.E. 177, 187 (N.C. 1950). An entry entails "the right or privilege of entering" or "the act of entering." WEBSTER'S TENTH COLLEGIATE DICTIONARY 387 (1983). Courts often look to dictionaries to help them determine the plain meaning of contractual terms. Analyzing the personal injury terms in this manner may seem facile; nevertheless, the fact remains that no court has ever even attempted to ascertain the plain meaning of the personal injury language.

129. *E.g.*, Waranch v. Gulf Ins. Co., 218 Cal. App. 3d 356, 359, (1990); Nichols v. Great Am. Ins. Cos., 169 Cal. App. 3d 766, 775-76 (1985).

wrongfully entered upon another person's land and as a result, has interfered with the landowner's possessory property interest.

Trespass can be similarly characterized. According to Dean Prosser, trespass to property is the unlawful interference with its possession, and is commonly used to mean any actionable, that is, tortious, entry on land.[130] Indeed, as courts have asserted, "the essence of the tort of trespass is wrongful entry."[131] Since both case law and secondary authority equate trespass with wrongful entry, it seems reasonable to conclude that the "wrongful entry" language covers trespass claims. A common law trespass, such as walking onto another's property without a privilege to do so, means that the defendant has wrongfully entered onto the plaintiff's premises. As a result, he has interfered with the plaintiff's exclusive possessory right. The very essence of a trespass claim is that the defendant has come onto the property, that is, "entered" it, without the owner's consent. Indeed, if the entry was not wrongful or unlawful, there would be no tortious act, and no actionable trespass.

Some insurers contend that the wrongful entry language does not include trespass claims.[132] They argue that the wrongful entry offense includes elements that go beyond mere trespass. To commit a wrongful entry, they assert, the tortfeasor must actually intend to dispossess the landowner.[133] The court in *Morton Thiokol* seemed to concur with this reasoning, observing that "wrongful entry means the going upon land with the intent of taking possession of it."[134]

Defining wrongful entry in this way renders the wrongful eviction language in the personal injury clause meaningless. Wrongful eviction traditionally requires dispossessing the tenant or

130. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 13, at 67, 69 (5th ed. 1984).

131. *E.g.*, Napco Inc. v. Fireman's Fund Ins. Co., No. 90-0993 (W.D. Pa May 22, 1991); Hansen v. Gary Naugle Constr. Co., 801 S.W.2d 71 (Mo. 1990). *See also* Titan Holdings Syndicate v. City of Keene, N.H., 898 F.2d 265, 272 (1st Cir. 1990) (tort of wrongful entry "closely resembles that of trespass"); Triscony v. Brandenstein, 6 P. 384, 385 (Cal. 1885) ("[E]very wrongful entry upon land in the occupation or possession of the owner constitutes a trespass."); ROBERT I. MEHR ET AL., PRINCIPLES OF INSURANCE 67 (8th ed. 1985) ("Trespass to real property arises from the wrongful entry on the land of another.").

132. *See, e.g.*, Foggan, *supra* note 15; Zeavin, *supra* note 15.

133. Foggan, *supra* note 15, at 294, 296-97.

134. No. C-3956-85, slip op. at 15 (N.J. Super. Ct. Ch. Div. Aug. 27, 1987).

landowner.[135] If so, then the wrongful entry offense must refer to a different tortious act that does not require dispossession. Otherwise, inclusion of the wrongful eviction language would be superfluous. As one court maintained, "[i]t is not lightly to be assumed that any contractual terms are mere surplusage, especially those included in a definition."[136] The personal injury section includes both the wrongful entry and wrongful eviction torts as covered offenses. Therefore, they must constitute two different types of wrongful conduct, or there would be no need to include them both in the coverage clause. This analysis is also consistent with the general rule of contract construction that one must attempt to give effect and meaning to every word and phrase of a contract.[137]

Moreover, contract interpretation rules dictate that words in a contract should be read as a layperson would read them and not as they might be analyzed by an attorney or insurance expert.[138] A layperson interpretation of the "wrongful entry" language imports that the tort includes any entry that is committed wrongfully, whether or not a dispossession occurs. The words "wrongful entry" themselves do not implicitly require any sort of dispossession. As the *Napco* court confirmed, "[i]ndeed, . . . trespass [and hence wrongful entry] need not necessarily entail an ouster from ownership or possession of the property in question."[139]

The interpretation offered by insurers and the *Morton Thiokol* court would be on firmer ground if the policy language said "wrongful entry and subsequent dispossession." However, with only "wrongful entry" included in the clause, the language does not indicate a prerequisite of dispossession to find coverage for trespass under the wrongful entry offense.

Some courts, such as the ones in *Hirschberg*[140] and *Napco*,[141] have held that "wrongful entry" is ambiguous.[142] Those courts did not identify the two possible meanings that make the lan-

135. BLACK'S LAW DICTIONARY 555 (6th ed. 1990); 2 TIFFANY, *Landlord and Tenant* §§ 185(d), 1263 (1968).

136. Beltway Management Co. v. Lexington-Landmark Ins. Co., 746 F. Supp. 1145, 1154 (D.D.C. 1990).

137. *See supra* text accompanying note 76.

138. *See supra* text accompanying note 76.

139. No. 90-0993, slip op. at 11 (W.D. Pa May 22, 1991).

140. 798 F.Supp. 600 (N.D. Cal. 1992)

141. No. 90-0993 (W.D. Pa. May 22, 1991).

142. *See supra* text accompanying notes 99 & 103.

guage ambiguous. However, it seems likely that the two interpretations would be that a wrongful entry requires dispossession, or that it does not. Even so, the "contra insurer" rule requires that the insured's interpretation, that the wrongful entry tort does *not* require dispossession, should prevail.[143]

2. "Wrongful Eviction"

Analyzing the wrongful eviction tort is important in concluding that the wrongful entry offense cannot involve dispossession because it would render the "wrongful eviction" language redundant. However, the wrongful eviction tort plays no role in environmental coverage actions. No insured has presented an argument that the wrongful eviction language should cover pollution-caused property damage. As a result, this Comment does not further analyze the eviction language.

3. "Other Invasion of the Right of Private Occupancy"

The inclusion of the word "other" indicates that the "other invasion of the right of private occupancy" ("other invasion") language covers torts that are different and discrete from the torts of wrongful entry or eviction. Nonetheless, those torts still fall within the overall category of invasion of possessory interests. If the policy instead read "wrongful entry, eviction, *or* invasion of the right of private occupancy," then this would imply that the first two torts are not considered offenses that involve invasion of occupancy rights. However, the second conjunction "or other" indicates that the third category of offenses refers to torts that interfere with the right to occupy land that are similar to, but not the same as, wrongful entry or eviction. As one court assessed:

> 'Other invasion of the right of private occupancy' is simply *part* of a more complete definition of 'personal injury,' following directly on the heels of 'wrongful entry or eviction.' Ejusdem generis[144] principles draw on the sensible notion that words such as 'or other invasion of the right of private occupancy' are intended to encompass actions of the same general type as, though not specifically embraced within, 'wrongful entry or eviction.' Those two terms have commonly understood meanings. Absent a catch-all phrase

143. *See supra* text accompanying note 77.

144. In the construction of contracts, the "ejusdem generis" rule is, that "where general words follow an enumeration of things, by words of a particular and specific meaning, such general words are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." BLACK'S LAW DICTIONARY 517 (6th ed. 1990).

> such as 'or other invasion of the right of private occupancy,' an insurer could resist coverage for actions that did not fit within those precise meanings, yet would clearly seem within the same class of conduct intended to be insured against.[145]

One such claim that the "other invasion" language would seem to cover is a nuisance cause of action. A nuisance is any interference with the use and enjoyment of property.[146] Black's Law Dictionary defines occupancy as the "taking possession of property and *use* of the same; a tenant's *use* of leased premises."[147] This definition suggests that use is central to the concepts of occupancy and possession. Owning land necessarily involves not only the right to occupy or possess the property, but also the right to some reasonable comfort and convenience in its occupation. Thus, the law treats many interferences with personal comfort as nuisances because they interfere with a right to the undisturbed enjoyment of the premises. This right is inseparable from ownership and occupancy of the property.[148] Therefore, the "other invasion" language would apparently cover a nuisance claim, as the right to occupy land includes the right to use and enjoy it free of impediment. However, the word "private" in the "other invasion of the right of *private* occupancy" phrase limits the coverage to private, as opposed to public, nuisance actions.[149]

Many courts have interpreted the "other invasion" language similarly, both in environmental and non-environmental coverage actions. In *Beltway Management Co. v. Lexington-Landmark Insurance Co.*,[150] the issue was whether the "other invasion" language covered a breach of the implied warranty of habitability. The court discussed the interpretation, advanced by the insured, that the language provided coverage for the breach:

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145. Waranch v. Gulf Ins. Co., 218 Cal. App. 3d 356, 360-61 (1990) (quoting Martin v. Brunzelle, 699 F. Supp. 167, 170 (N.D. Ill. 1988) (footnotes omitted)).

146. KEETON ET AL., *supra* note 132, § 87, at 619; RESTATEMENT (SECOND) OF TORTS § 821D (1965).

147. BLACK'S LAW DICTIONARY 1078 (6th ed. 1990) (emphasis added).

148. KEETON ET AL., *supra* note 132, § 87, at 619.

149. Unlike a private nuisance, which is an interference with another's private use and enjoyment of land, RESTATEMENT (SECOND) OF TORTS § 821D (1965), a public nuisance is an interference with a right common to the general public. *Id.* § 821B. A public nuisance must affect a considerable number of persons. *Id.* For example, the playing of loud music at night which disturbs an entire neighborhood constitutes a public nuisance. People v. Mason, 124 Cal. App. 3d 348 (1981).

150. 746 F. Supp. 1145 (D.D.C. 1990).

> Beltway [the insured] contends that the *rights of private occupancy* referred to in the Broad Form Endorsement[151] . . . *include within those rights certain rights to use the premises.* The chief right would be the right to a premises fit for use, which is equivalent to the implied warranty of habitability. Thus, Beltway reads the right of private occupancy to include the right to something occupiable.[152]

The court agreed with Beltway, noting that "[t]oday's urban tenant, the vast majority of whom live in multiple dwelling houses, are interested, not in the land but solely in a house *suitable for occupation.*"[153] Concluding that the right to occupy included with it a right to use and enjoy the premises, the court held that the "other invasion" language potentially covered the breach.[154] The court focused on the idea that the occupational right, as delineated in the personal injury "other invasion of the *right of private occupancy*" provision, included the ability to use and enjoy the premises.

Since the interference with the plaintiff's use and enjoyment was in the landlord-tenant context, the tenant brought a claim for breach of the implied warranty of habitability. However, the court's general discussion of the "other invasion" language covering interferences with a person's use and enjoyment of property indicates that the language should also cover nuisance claims, since a nuisance is also an interference with the use and enjoyment of property.

Analogously, in the environmental coverage cases, the courts have confirmed that nuisance claims fall under the "other invasion" language. In *Titan*,[155] discussed in part III, the underlying claim included a nuisance allegation that the City's sewage treatment plant's noxious odors, noise and light interfered with the plaintiffs' use and enjoyment of their homestead. The court concluded that it was "reasonable and consonant with the ordinary meaning of the [other invasion of the right of private occupancy] clause to hold that the plaintiffs' suit alleged just such an invasion."[156] Therefore, the insurers owed a defense.

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151. As discussed in Part II, every CGL policy at issue in the cases discussed in this Comment is a standardized policy. Each provides identical forms of coverage. However, the title of each section of coverage under each CGL policy may differ slightly from policy to policy, depending on the issuer.

152. 746 F. Supp. at 1151 (emphasis added).

153. *Id.* at 1153 (emphasis added).

154. *Id.* at 1156.

155. 898 F.2d 265, 273 (1st Cir. 1990).

156. *Id.* at 273.

The complaint in *Hirschberg*[157] also alleged interference with the plaintiff's use and enjoyment of the property. This compelled the court to find that a potential for coverage for this nuisance claim existed under the "other invasion" language. Correspondingly, this potential obligated the insurer to defend.[158]

The *Napco*[159] ruling also noted that the "other invasion" language encompasses nuisance claims. In the opinion, the court reviewed prior decisions that had interpreted the "other invasion" language. It began with *Town of Goshen v. Grange Mutual Insurance Co.*[160] In *Town of Goshen*, the New Hampshire Supreme Court determined that a planning board's action, which deprived a land developer of his intended use of a land parcel, constituted an "invasion of the [developer's] right of private occupancy."[161] The *Napco* court observed that "[t]his holding was based upon a conclusion that an 'invasion of the right to private occupancy' does not require an appreciable interference with the property itself, so long as the *right to enjoy the property* is infringed."[162]

The *Napco* court next discussed *Town of Stoddard v. Northern Security Insurance Co.*[163] In *Town of Stoddard*, a planning board amended a zoning regulation that consequently prevented the plaintiff from using his land as he had planned. The *Town of Stoddard* court concluded that this deprivation of intended use fell within the "other invasion" policy language.[164]

In its concurrence with *Town of Goshen* and *Town of Stoddard*, the *Napco* court emphasized that "persons with possessory interests in . . . property suffer real diminution of those interests through an interference with their right to use or enjoy the property."[165] Accordingly, the "other invasion" language should cover this type of disturbance.

*Napco*, *Town of Goshen*, and *Town of Stoddard* all involved nuisance claims. The plaintiff in each case alleged that the defendant interfered with the plaintiff's use and enjoyment of property. Thus, cases interpreting the "other invasion" language

157. 798 F. Supp. 600, 601 (N.D. Cal. 1992).
158. *Id.*
159. No. 90-0993 (W.D. Pa May 22, 1991).
160. 424 A.2d 822 (N.H. 1980).
161. *Napco*, slip op. at 9-10.
162. *Id.* (emphasis added).
163. 718 F. Supp. 1062 (D.N.H. 1989).
164. *Napco*, slip op. at 10.
165. *Id.*, slip op. at 11.

both inside and out of the pollution context maintain that the language should provide coverage for nuisance allegations.[166]

One could argue, as insurers have, that the right to occupy land is distinct from the right to use and enjoy the land.[167] However, insurers cite no authority for this argument, and fail to explain how the two rights are distinguishable. Furthermore, their contention goes directly against the above mentioned decisions that reject this proposition.

In any event, it seems that a layperson would be reasonable in construing the "other invasion" language to mean that one has the right to occupy land free of intrusions that jeopardize its use or enjoyment. As a result, she could conclude that the "other invasion" language covers interferences with the use and enjoyment of property. One cannot occupy land without using it; thus, a layperson could plausibly believe that the "other invasion" language encompasses nuisance claims. Under contract interpretation rules, the layperson's, not the insurance expert's, interpretation prevails.[168]

4. Distinguishing Property Damage From Personal Injury Claims

The previous discussion suggests that the personal injury provision encompasses the torts of trespass and nuisance. Consequently, under the personal injury provision, the insurer must defend the insured in an underlying suit involving either cause of action. However, the insurer's obligation to defend or indemnify for a property damage claim stems from the property damage provision and not from the personal injury section. Quite simply, the personal injury language obligates the insurer to pay for damages resulting from *personal injury*, not from property damage. It is the *property damage* section that requires the insurer to indemnify the insured for all property damage.

If the plaintiff sues for reimbursement of cleanup costs under CERCLA, then this cause of action will trigger the property damage section. As stated earlier, a claim for cleanup costs

166. Even the *Straits Steel* court, which ultimately concluded that coverage was unavailable under the personal injury endorsement, acknowledged that nuisance allegations fall within the ambit of the personal injury language. In discussing *Titan*, the court noted, "[d]amages alleged would fall within the range of those ordinarily connected with personal injury actions as its gravamen was the injury to the intangible personal right to *enjoy one's home.*" *Id.*, slip op. at 16 (emphasis added).

167. *See, e.g.*, Foggan, *supra* note 19, at 297.

168. *See supra* note 77 and accompanying text.

brought by either the government or by a private party is a unique cause of action created by CERCLA. In coverage actions disputing whether the CGL policy covers CERCLA cleanup cost claims, courts have consistently held that cleanup costs are "damages because of *property damage*," as the CGL policy defines property damage.[169] Accordingly, a claim for cleanup costs would invoke the property damage provision. Since it is a statutorily mandated cause of action, it is separate and distinct from a trespass or nuisance cause of action. Trespass and nuisance allegations trigger *personal injury* coverage. A claim for clean up cost reimbursement, however, is a specially created theory of liability under CERCLA that falls under the property damage section. Thus, if a complaint contained nuisance and cleanup cost claims, then the nuisance allegation would invoke the personal injury section, while the claim for cleanup cost reimbursement would trigger the property damage provision.

The pollution exclusion may ultimately exclude the claim for cleanup costs, thus freeing the insurer from any indemnification obligation. However, as discussed earlier, even if the insurer ultimately has no duty to indemnify under the property damage section, because the pollution exclusion applies, it still has a duty to defend the insured as long as the insured includes a claim for cleanup costs in the complaint.[170]

Determining whether the property damage or personal injury section covers a property damage allegation is crucial; the outcome dictates whether the pollution exclusion applies. By its very terms, the pollution exclusion applies only to bodily injury and property damage.[171] The insurer will have a duty to defend under the property damage section as long as the insured alleges property damage in the complaint. However, as discussed earlier, in most cases the insurer will ultimately have no duty to indemnify under the property damage section because the pollution exclusion *will* usually exclude coverage.[172]

Yet, if courts accept the premise that personal injury can encompass property damage, this will undermine the purpose of the pollution exclusion: to exclude coverage for pollution that is not

169. *See, e.g.*, Avondale Indus. v. Travelers Indem. Co., 887 F.2d 1200 (2d Cir. 1989); Township of Gloucester v. Maryland Casualty Co., 668 F. Supp. 394 (D. N.J. 1987); Chemical Applications Co. v. Home Indem. Co., 425 F. Supp. 777 (D. Mass. 1987).

170. *See supra* text accompanying notes 61-62.

171. *See supra* text accompanying notes 59 & 72.

172. *See supra* text accompanying note 70.

sudden and accidental. Since the pollution exclusion does not apply to the personal injury section, if courts allow insureds to relabel property damage as personal injury, insureds could receive not just a defense, but *actual coverage* for the very property damage that the pollution exclusion otherwise would have expressly excluded.

The *Gregory* court recognized this problem.[173] *Gregory* rejected the contention that "all property damage" should be covered under the personal injury head. To do so would circumvent the purpose of the pollution exclusion, and would allow the "risk of property damage caused by pollution, a risk which [the insurer] expressly excluded and one for which [the insured] paid no premium under [the property damage section], . . . [to] be subsumed under [the personal injury section]."[174] Shoehorning coverage of property damage under the personal injury section would effectively read the pollution exclusion out of the policy. Such an interpretation would run counter to the basic rule of contract construction that one must attempt to give effect to all policy provisions, including exclusions.[175] The *Gregory* court implicitly recognized this principle in reaching its result.

To contend that the personal injury provision, and not the property damage section, should cover an award for property damage would also run counter to the policy's plain meaning. This was the court's justification for its refusal to find coverage for property damage under the personal injury provision in *Straits Steel.* The court observed that "[n]othing in [the personal injury provision] suggests coverage for an injury to real property by contamination of ground soil. . . . None [of the personal injury clauses] involve damage to land."[176] The court was not stating that personal injury does not provide coverage for pollution-related harms. It was merely acknowledging the plain meaning of the policy, which states that the personal injury section covers claims for personal injury, such as nuisance; it does not cover damage to property.

The *Gregory* decision also comports with the principle that the policy appropriately covers property damage, when labeled as such, under the property damage section and not under personal injury. The insured in *Gregory* sought personal injury coverage

173. 948 F.2d 203.
174. *Id.* at 209.
175. *See supra* text accompanying note 76.
176. No. 91-72991-CK, slip op. at 15 (Mich. Cir. Ct. June 10, 1992).

based on an allegation that "the contaminants [released by the insureds] had affected *lands* adjacent to the polluted lake."[177] This is a claim for property damage, not trespass or nuisance. Therefore, the court accurately assessed that the personal injury section did not cover the allegation.

Therefore, if a third party plaintiff in an environmental action alleges property damage, for example, by seeking cleanup cost reimbursement, then this will obligate the carrier to defend the insured under the *property damage* coverage heading. However, there should be no duty to defend under the personal injury provision. On the other hand, if the complaint contains trespass or nuisance allegations, then these claims will trigger the personal injury section. Accordingly, the insurer must provide a defense. It is irrelevant that the trespass or nuisance claim may have no basis in fact; the policy obligates the insurer to defend even if the allegation is "groundless, false, or fraudulent."[178]

Whether the underlying cause of action can be substantiated, however, is relevant to the duty to indemnify. Only if the plaintiff proves the allegation and gains a judgment must the insurer reimburse the insured.[179] A groundless trespass or nuisance claim in a pollution case will therefore guarantee the insured a defense, but not indemnification. Ascertaining the scope of the insurer's duty to indemnify requires discussing the facts common to most of the underlying trespass and nuisance actions.

## B. *The Duty to Indemnify*

### 1. Trespass Claims

The law recognizes trespass as a cause of action for remedying pollution-caused damages.[180] However, as discussed earlier, the tort of trespass requires "an *unlawful* invasion which interferes

177. 948 F.2d at 208 (emphasis added).

178. *See supra* text accompanying note 44.

179. *See supra* text accompanying note 47.

180. The tort of trespass has been recognized for centuries as a theory of relief for pollution-caused damages. Any physical entry onto the property owner's land is a trespass, whether the entry is a walking upon it, flooding it with water, casting objects on it, or in the pollution context, causing hazardous waste to seep onto or under the premises. *See* Borland v. Sanders Lead Co., 369 So. 2d 523, 530 (Ala. 1979) ("[I]f, as a result of the defendant's operation, the polluting substance is deposited upon the plaintiff's property, thus interfering with his exclusive possessory interest, . . . then the plaintiff may seek his remedy in trespass . . . ."); Peter F. Langrock, *Class Action Litigation*, 25 TRIAL 46, 47-48 (Oct. 1989) (footnotes omitted) ("If polluting elements have actually traveled onto the property, you may also allege trespass, another old- fashioned theory.").

with the plaintiff's right to the exclusive possession of land."[181] If the invasion is not wrongful or unlawful, no cause of action for trespass accrues because the party has not committed a legally recognized wrong. Thus, privileged conduct cannot constitute a trespass.[182] In fact, the defense of privilege shields many insureds in the pollution cases from trespass liability, thereby dismissing the indemnification issue.

In many of the CERCLA suits, insureds possessed government permits or licenses which permitted them to dispose of the waste in the exact manner which CERCLA now condemns.[183] As a result, insureds cannot be held responsible for trespass because the element of unlawfulness was not present when the contamination occurred. The pollution did not wrongfully enter the claimant's property; in fact, the government expressly granted the insured a right to dispose of the contaminants. By today's standards, under CERCLA, the *presence* of the toxic waste on or under the plaintiff's land may be wrongful. However, the language in the policy provides coverage for wrongful *entry*, not wrongful presence; and at the time of entry, decades ago, the government legally sanctioned the insured's dumping activities.[184]

The proper forum for resolving this issue is at the underlying action stage of coverage litigation. The insurer should advance this argument *on behalf* of the insured when it provides a defense in the underlying dispute between the insured and the third party

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The interest in exclusive possession is not limited to the land's surface level; it extends above and below. *See* RESTATEMENT (SECOND) OF TORTS § 159 (1965) (trespass can be committed by "[i]ntrusions upon, beneath, and above surface of earth"); MEHR, *supra* note 133 ("Trespass includes invasion of the area above and below the land as well as the surface of the land."). Thus, when pollution seeps underneath property, it has invaded the landowner's exclusive possession and a trespass has been committed.

181. Note, *State Common Law Actions and Federal Pollution Control Statutes: Can They Work Together?*, 1986 U. ILL. L. REV. 609, 615-16 (1986); *see also supra* text accompanying notes 126-133.

182. RESTATEMENT (SECOND) OF TORTS § 210(B) (1965).

183. *See, e.g.*, United States v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1905 (C.D. Cal. 1984); United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1356 (D.N.M. 1984).

184. In fact, courts are beginning to hold the government liable for a percentage of the clean-up costs under CERCLA if it previously permitted the insured's waste disposal activities. In a case involving the dumping of hazardous waste in the Stringfellow acid pits near Los Angeles, a federal magistrate recently made a preliminary ruling that California is liable for as much as 85% of the cleanup costs at the dump. Stephen K. Yoder, *Firms Declare Victory in Suit on Toxic Site*, WALL ST. J., July 31, 1992, at B4.

plaintiff, as opposed to *against* the insured in the coverage action between the insurer and the insured. If the jury accepts this reasoning, then it will enter a judgment finding no liability for trespass. Consequently, the insured will not have committed a wrongful entry and the insurer will owe no duty to indemnify.

However, if the insurer does not present this argument at the underlying action stage, and the jury enters a judgment for trespass, then the insurer must indemnify for trespass under the "wrongful entry" language. The insurer cannot, after entry of a judgment in the underlying suit, contend that the insured actually did not commit a trespass. The claim's underlying merits cannot be relitigated in the coverage action.[185] Once the court enters a judgment, the decision on the merits is final, and the insurer must indemnify. Therefore, the insurer should argue against holding the insured liable for trespass while providing a defense for the insured in the *underlying suit.* The benefits of the insurer conducting a strong defense are two-fold: the insured is not held liable for a trespass it did not commit, and coverage is not invoked for an entry that was not wrongful.

Therefore, as discussed earlier, trespass can plausibly equate with the wrongful entry offense, thus securing a defense for the insured. However, the insurer, in most cases, will avoid a duty to indemnify if it advances the above mentioned argument on behalf of the insured in the underlying action.

In some of the pollution cases, the court found that the insured intentionally and illegally dumped toxic waste.[186] If so, public policy prohibits the insuring of intentional torts.[187] California's Insurance Code Section 533, for example, states that "[a]n insurer is not liable for a loss caused by the *wilful* act of the insured . . . ."[188] Therefore, if the insured actively and intentionally

185. Res judicata prevents parties from readjudicating the merits of a claim in a second lawsuit once a final judgment has been entered. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.1 (1985).

186. *See* cases cited *supra* note 69.

187. The rationale behind this notion is that if people can purchase insurance that will cover their intentional conduct, then they will not be deterred from committing intentional, tortious acts since they know their insurance policy will cover any harm suffered as a result of their intentional conduct. *See* Donald F. Farbstein & Francis J. Stillman, *Insurance for the Commission of Intentional Torts*, 20 HASTINGS L.J. 1219 (1969). It is analogous to the morale hazard principle.

188. CAL. INS. CODE § 533 (West 1994)(emphasis added). *See also* Morton Thiokol, Inc. v. General Accident Ins. Co. of Am., No. C-3956-85, slip op. at 11 (N.J. Super. Ct. Ch. Div. Aug. 27, 1987) ("Public policy prohibits insurance indemnity for the civil consequences of one's intentional wrongdoing."). Insuring the enumerated

dumped toxic waste and violated state or federal regulations, public policy would prevent insuring its actions.

There is one type of polluting conduct which would constitute a trespass and require the insurer to indemnify under the wrongful entry language. If the insured accidentally spilled hazardous waste, then the personal injury provision should cover damages flowing from the spill. The spill was not intentional, so public policy does not prevent coverage. However, it was wrongful, in that the insured did not possess a permit or license allowing him to dispose of the waste in this manner. Hence, in these situations, the accidental release of pollutants onto the claimant's land constitutes a trespass. As a result, this offense obligates the insurer to indemnify.

2. Nuisance Claims

Along with trespass, another commonly-used theory to impose liability for pollution-caused damages is nuisance.[189] *Titan*, for example, is a classic nuisance case. The insurer owes a defense duty in pollution cases where the plaintiff alleges nuisance. Moreover, if the pleaded facts substantiate the claim, the insurer must indemnify the insured for damages resulting from the nuisance.[190]

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personal injury torts, such as libel, slander, and malicious prosecution does not run counter to the public policy that intentional torts should not be insured. Although these torts involve intentional *acts*, they do not normally refer to intended *results*, which is the primary public policy concern in prohibiting insurance for intentional torts. For example, if an insured ran a red light and injured someone, and he intended to *run the light*, but did not intend to *injure the victim*, then his act and the ensuing injury would be covered, consistent with public policy. However, if an insured ran a red light *with the intent to cause injury* to someone, coverage would be precluded. *See* J.C. Penney Casualty Ins. Co. v. M.K., 804 P.2d 689, 696 (1991) (citing Walters v. American Ins. Co., 185 Cal. App. 2d 776, 783 (1960)).

189. *See* Note, *supra* note 184, at 609 n.4 (trespass and nuisance are two of the traditional common law tort actions courts use to address pollution). In the pollution context, the nuisance may consist of a disturbance of the comfort or convenience of the occupant by unpleasant odors, or perhaps smoke or dust or gas. "[I]f the smoke or polluting substance . . . causes discomfort and annoyance to the plaintiff in his use and enjoyment of the property, then the plaintiff's remedy is for nuisance." Borland v. Sanders Lead Co., 369 So. 2d 523, 530 (Ala. 1979).

The personal injury pollution cases themselves have concluded that the "other invasion of the right of private occupancy" language covers allegations of interference with the use and enjoyment of property. *See supra* text accompanying notes 92-106. Thus, these cases support both the fact that the personal injury provision covers nuisance claims, and that nuisance is an appropriate remedy for pollution-related harm.

190. Insureds and insurers frequently disagree over when coverage for the alleged nuisance is triggered. Insureds, seeking to invoke maximum coverage, contend that

As discussed earlier, the word "private" in the phrase "other invasion of the right of private occupancy" limits the coverage of nuisance claims in the environmental setting to private nuisances.[191] Many CERCLA suits involve situations where the defendant has contaminated either groundwater or public waters.[192] In most states, the government owns the groundwater.[193] Of course, the state also owns waterways such as lakes and rivers.[194] Hence, in these cases, the pollution has invaded a public, not private right; as a result, personal injury coverage is not available. As the court in *Morton Thiokol*, the case involving the pollution of a creek, maintained, "the waters of Berry's Creek are public property. Thus, there cannot be an invasion of private occupancy or private possession."[195]

Accordingly, the personal injury endorsement should require insurers to indemnify for private nuisance claims. They will also have an indemnification obligation for trespass if the release of contaminants was accidental. Cleanup cost reimbursement allegations, however, trigger the property damage provision and not the personal injury section of coverage. The insurer will therefore have a duty to defend cleanup cost reimbursement claims

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there is coverage for the pollution starting from the date the contaminants entered onto the claimant's property. For example, suppose hazardous waste began seeping onto the plaintiff's property in 1970. If the insured had purchased an insurance policy every year from 1970 to 1992, then, according to insureds, the insured could seek coverage under each and every one of the 22 policies held during the 22-year period.

However, the nuisance cause of action, and hence coverage, usually does not accrue until the plaintiff has discovered the pollution's presence; only at the time of discovery could the pollution possibly begin to interfere with the plaintiff's use and enjoyment of his property. The plaintiff cannot be nuisanced until he begins to suffer an actual diminishment of his right to use and enjoy the premises. Moreover, this cannot occur until the claimant realizes that the pollution is actually infringing on his right to undisturbed occupancy.

The landowner may begin to suffer a decrease in the right to use and enjoy his property the day the pollutants are deposited on the premises. However, more common is the case where the toxic waste has seeped under the plantiff's land, unbeknownst to the owner, until years later, when the negative effects of the toxic waste's presence become noticable. Therefore, coverage under the "other invasion" provision should not be triggered until this point in time, when a nuisance cause of action can be brought; only then has the "other invasion of the right of private occupancy" offense been committed.

191. *See supra* text accompanying note 152.

192. *See, e.g.*, Intel Corp. v. Hartford Accident & Indem. Co., 692 F. Supp. 1171 (N.D. Cal. 1988); Baldt, Inc. v. American Universal Ins. Co., 599 F. Supp. 955, 957 (E.D. Pa. 1985).

193. *See, e.g*, CAL. WATER CODE § 102 (West 1966).

194. *Id.*

195. No. C-3956-85, slip op. at 15 (N.J. Super. Ct. Ch. Div. Aug. 27, 1987).

under the property damage section, although in most cases the pollution exclusion will exclude actual coverage for the cleanup costs, thus relieving the insurer of any duty to indemnify.

The above discussion clarifies which causes of action fall under which heading of coverage, thus resolving which claims place upon the insurer a duty to defend, and which claims will typically obligate the insurer to indemnify. However, in cases where the plaintiff successfully proves both property damage and personal injury claims, a problem arises in ascertaining how much of the general damage verdict the jury awarded for each claim. This assessment is necessary to determine how much money the insurer must pay under each corresponding coverage provision. To the extent that the jury renders an award for property damage, the pollution exclusion would likely preclude coverage for the award. Conversely, the personal injury section would fully reimburse the insured for a personal injury award, since the pollution exclusion does not apply to that section.

## V.

## ALLOCATION OF COVERAGE

Depending on what claims the plaintiff alleges and successfully proves, a problem of overlapping coverage could arise. The claims could trigger both the personal injury and the property damage sections to cover a general award for property damage. For example, suppose a plaintiff seeks reimbursement of cleanup costs and also alleges trespass. At first glance, the answer seems simple: if the plaintiff successfully proves both claims, then the personal injury section should cover the trespass, and the property damage section should cover the cleanup cost claim.

However, it is not so easy to dismiss the issue of allocating coverage between the two policy headings. One of the harms flowing from a trespass is often some form of damage to property.[196] Accordingly, a recognized common law remedy for property damage resulting from a trespass is the cost of restoring the damaged land.[197] Therefore, while the cleanup cost claim would clearly trigger the property damage section, it could also invoke the personal injury provision as a harm stemming from the tres-

196. For example, if during the course of a wrongful entry onto another's property, the wrongdoer removes natural resources from the owner's land, the trespasser has harmed the property while committing a trespass.

197. ROBERT N. LEAVELL ET AL., EQUITABLE REMEDIES, RESTITUTION AND DAMAGES 178-90 (1986).

pass. The selection of which coverage section applies dictates whether the policy will ultimately cover the harm. If the property damage flowing from the trespass falls under the property damage section, then the pollution exclusion will most likely exclude it. If, on the other hand, the claim invokes the personal injury provision, then this policy section will cover the property damage, since the pollution exclusion does not apply.

However, while it is necessary to address this potential problem, the facts common to most of the underlying actions make overlapping coverage an unlikely occurrence. As stated earlier, in most CERCLA lawsuits, the insured has not committed a trespass, since it was not acting unlawfully when it disposed of the toxic waste.[198] In these situations, no overlap problem exists because the insured did not trespass and the personal injury section therefore does not apply. Furthermore, in situations where the insured intentionally and illegally dumped hazardous waste, public policy prohibits insurance coverage for any of the harm caused, again dismissing the overlap difficulty.[199] If the plaintiff only alleges property damage, as was the case in both *Straits Steel*[200] and *Gregory*,[201] the personal injury section will not cover the property damage alleged because the plaintiff did not bring a trespass (or nuisance) cause of action. Overlapping coverage is only an issue in the rare case where the plaintiff alleges and proves both property damage and trespass. However, the application of traditional tort law recovery principles can resolve this problem.

Under the common law, if a wrongdoer commits a trespass and property damage results, the plaintiff recovers either the cost to restore the property to its original condition or the diminished value of the property, whichever is the lesser amount.[202] In CERCLA lawsuits, the cost to restore the site is the "big ticket item;" the diminution in property value resulting from pollution pales in comparison to the average $26 million spent to clean up a targeted site.[203] Therefore, while a trespass that results in damage to property will obligate the insurer to indemnify the insured for the property damage under the personal injury section, the

198. *See supra* text accompanying notes 186-187.
199. *See supra* text accompanying notes 190-91.
200. *See supra* text accompanying notes 114-17.
201. *See supra* text accompanying notes 111-13.
202. *See generally* LEAVELL ET AL, *supra* note 200.
203. ACTON, *supra* note 8, at 2.

common law recovery granted for the reduction in property value puts a cap on the insurer's indemnification obligation. As a result, under personal injury coverage, the insurer is never financially responsible for more than the value of the property. If there is a portion of the general damage award left over that the personal injury section does not cover, then this part of the award will fall under the property damage section and the pollution exclusion will apply. This part of the damage award that is in excess of what common law recovery allows is due to the statutorily created CERCLA cause of action. CERCLA ignores the "lesser value" common law recovery rule. Hence, this "extra" award for cleanup costs that CERCLA statutorily permits should fall under the property damage section.

Of course, the personal injury section also requires the insurer to indemnify the insured for any other "non-property damage" injuries that occur as a result of the trespass committed. These harms could include: lost profits due to the inability of the plaintiff to use the land to operate his business; lost rents if he was unable to use the property as a rent-producing property because of the contamination; costs incurred to move off of the land if the property became uninhabitable; and any other consequential "economic" damages awarded for common law trespass.[204]

In addition, if the jury awards the plaintiff damages for a nuisance claim, then the insurer must also indemnify under the personal injury section for these damages. The nuisance cause of action presents no overlap problem; it is entirely distinct from a cleanup cost claim.

A hypothetical example will illustrate the above analysis. Suppose a plaintiff successfully brings both a CERCLA cleanup cost claim and a trespass claim. To compensate the plaintiff for the costs incurred to clean up the property, the jury enters a $20 million general damage award. This situation presents an overlap problem. Since the policy considers CERCLA cleanup costs "property damage," as defined in the CGL policy, the entire award could fall under the property damage section. Alternatively, since the jury could also have granted the award for damage stemming from the trespass, it could trigger the personal injury provision.

204. 2 DORE, *supra* note 40, § 4.01 (discussing common law forms of recovery for trespass).

Under the above analysis, however, the personal injury section only requires the insurer to indemnify the insured for the proportion of the award that the common law would already have required the insurer to pay for trespass. Suppose the diminution in the value of the property was $10 million. Under common law recovery principles, the plaintiff could normally recover only the $10 million for the reduction in property value, since this figure is smaller than the $20 million cost of restoration. Therefore, the insurer must pay $10 million under the personal injury section because of the diminution in property value that resulted from the trespass. Because CERCLA creates a special cause of action that enables the plaintiff to recover *all* cleanup costs, even if they are greater than the reduction in property value, the plaintiff recovers the full $20 million. However, the insurer must pay only the $10 million of the cleanup cost award that corresponds to the reduction in property value, as this is what the personal injury section would require even if there was no CERCLA claim. The remaining $10 million of the overall award would then fall under the property damage section of the policy, and the pollution exclusion would most likely bar its coverage.

Modifying the above example, suppose the $20 million award consisted of $18 million for cleanup costs and $2 million for other nonproperty damages stemming from the trespass, such as lost rents or profits. In this case, the personal injury section would cover the $2 million, along with the $10 million awarded for diminution in property value.

Conversely, if the actual reduction in property value was $30 million, then the plaintiff would still only recover the $20 million in cleanup costs, whether the jury found for trespass or for the CERCLA claim. CERCLA only permits recovery of cleanup costs, and under common law trespass, since the $20 million cost of restoration is less than the $30 million reduction in property value, the plaintiff would only recover $20 million. The personal injury section would obligate the insurer in this case to indemnify for the full $20 million cleanup costs award, since again, usual tort recovery principles for a common law trespass would require it to pay for this amount anyway.

Thus, to the extent that a verdict for cleanup costs under CERCLA could also have been awarded and covered as a trespass under the personal injury section, the insurer must pay that part of the general damage award attributable to the trespass, even if the plaintiff had not brought a CERCLA claim. This solution is

fair to both insureds and insurers. It allows insureds to recover for what they would normally receive under usual common law recovery principles. At the same time, it does not require the insurer to indemnify under the personal injury section for more than common law rules dictate is permissible for trespass claims.

This approach also meets with the parties' mutual expectations regarding what each believed the policy would and would not cover. It holds the insurer only to what it already expected to indemnify for under the policy prior to the creation of CERCLA liability — common law damages stemming from a trespass. Similarly, the insured only receives coverage for the amount it expected; presumably it was aware of the pollution exclusion clause, and understood that the policy did not cover pollution-related property damage beyond what the personal injury section would cover. This approach does not completely relieve the insured or the insurer of all liability; nor does it require either party to pay the entire amount of the damage verdict. Instead, this rule requires the parties to "split the difference."

Insurers argue that they should not be liable for *any* of the cleanup costs under CERCLA. In their view, the inclusion of the pollution exclusion in the property damage section indicates that they did not intend to cover pollution of this sort at all, under any provision of the policy.[205] Insureds contend that personal injury language should cover *all* cleanup costs awarded, even if they are greater than the corresponding diminution in property value.[206] This Comment incorporates both of these extremist approaches into a compromise solution.

Otherwise, to adopt either the insureds' or the insurers' approach would result in a windfall to one of the parties. The personal injury section would normally require the insurer to indemnify the insured for the percentage of cleanup costs that constitute the diminution in property value. However, if the insurer could assert that because of CERCLA this personal injury should now be construed solely as property damage, then the insured would receive no coverage at all; the pollution exclusion would exclude coverage for the entire damage award. The insurer should not be able to convert what would normally be considered personal injury in the absence of CERCLA to property damage because of the new liability created by CERCLA. Simi-

205. *See* Foggan, *supra* note 15, at 300.

206. *See* Pasich, *supra* note 15, at 1150.

larly, if the insured would normally receive coverage under the personal injury section only for the proportion of the award constituting diminution in property value, the insured cannot shoehorn the remaining recovery for cleanup costs under the personal injury section in order to circumvent the pollution exclusion, thus receiving coverage for the entire award.

Usually, when the jury in an underlying action returns a damage award, it returns a general damages verdict, which fails to delineate what portion of the award the jury awarded for each type of harm.[207] As a result, this typically embroils insureds and insurer in a coverage dispute over which policy sections cover the general damages award, and how much of the award each section should cover.

Therefore, to ensure that the jury allocates coverage for the overall damage award in the above suggested manner, the parties should request the jury to return a special verdict in which the jury states how much it awarded for each type of harm. [208] Suppose a plaintiff proves claims for cleanup costs, trespass, and nuisance. The special verdict might list how much of the general damage award the jury awarded for cleanup costs, how much it gave for other non-property damage stemming from the trespass, such as lost profits or lost rents, and how much it allocated for the nuisance. In addition, the parties should ask the jury to state how much the property had decreased in value. In this way, the insured and the insurer can ascertain how much of the award the personal injury section will cover, and how much will fall under the property damage heading (and thus, be excluded by the pollution exclusion).

Requiring the jury in the underlying action to render a special verdict that states how much of the award it granted for each harm would prove beneficial for both insurers and insureds; the special verdict would eliminate the need to litigate this allocation

207. *See* FRIEDENTHAL ET AL., CIVIL PROCEDURE § 12.1 (1985) (discussing fact that general verdicts are more commonly used than special verdicts); LANDERS ET AL., CIVIL PROCEDURE 807 (2d ed. 1988) (same).

208. Federal Rule 49(a) authorizes a special verdict in which the court submits only a list of factual issues to the jury and requests it to make findings. FED. R. CIV. P. 49(a). Here, the court would ask the jury to make specific findings as to the amount of damages awarded for each harm. Courts have noted that the special verdict is a valuable tool in complicated, multi-issue litigation, and environmental coverage actions often involve complex, multi-issue lawsuits. *See* Mueller v. Hubbard Milling Co., 573 F.2d 1029, 1038 n.13 (8th Cir. 1978), *cert. denied*, 439 U.S. 865 (1978); Jamison Co. v. Westvaco Corp., 526 F.2d 922, 935 (5th Cir. 1976); Harding v. Evans, 207 F. Supp. 852, 855 (M.D. Pa. 1962).

issue in a second lawsuit, thus saving both parties litigation costs.[209]

## CONCLUSION

This Comment has analyzed both the insurer's duty to defend and its duty to indemnify in environmental lawsuits. It has attempted to provide courts with an analytical framework that will enable them to hand down consistent, well-reasoned decisions addressing the insurer's duty to defend. Clarity and uniformity in the case law will encourage more insightful financial planning on both sides, thus enabling insureds and insurers to effectively prepare for potential CERCLA liability in their everyday business decisions. This will ensure that both insurance companies and American businesses remain solvent and viable. In addition, if the case law provides a clear answer to the defense question, then insureds and insurers will no longer need to litigate whether the insurer owes a defense.

This Comment has also offered suggestions to insureds and insurers as how to best minimize their respective liabilities and litigation costs regarding the issue of the insurer's duty to indemnify. CERCLA is responsible for precipitating much of the debate between insurers and insureds. One can understand the insured's anger. The government currently imposes liability under CERCLA for the very activity it once legally condoned. CERCLA frustrates insurers as well. Its use of retroactive liability implicates decades-old policies that were drafted well before the origin of CERCLA. Thus, it obligates carriers to provide coverage for liability that the CGL policy's drafters never contemplated.

No solution could ever completely alleviate the harsh effects of CERCLA. It created an entirely new regime of retroactive liability that neither insureds nor insurers could have predicted. In light of the inescapable inequities created by the statute, this Comment has offered a compromise solution that most closely comports with the parties' mutual expectations under an insurance policy written years before the enactment of CERCLA.

209. Additionally, in this way, the jury's determination of damages is respected. The jury, in assessing the overall damage award, presumably took into account each claim, and the proper amount of recovery for each; by dividing up the amount awarded for each allegation, the coverage provided reflects the jury's decision in the underlying action.