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INSURANCE COVERAGE FOR ENVIRONMENTAL DAMAGE CLAIMS

By: James A. Hourihan

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I. INTRODUCTION.

The last decade has seen a remarkable development of public opinion in favor of protecting the environment. This concern for protecting the environment has been given expression in many state and federal laws, including the National Environmental Policy Act (42 U.S.C. § 4321, et seq. (1970)), the Clean Air Act (42 U.S.C. § 7401, et seq. (1976)), the Federal Water Pollution Control Act Amendments (33 U.S.C. § 1251, et seq. (1972)) and the Coastal Zone Management Act (16 U.S.C. §§ 1451, et seq. (1972)). Contemporaneous with the proliferation of environmental legislation has been a burgeoning of environmental litigation. Many of these cases involved claims for hundreds of millions of dollars. The purposes of this paper are to review the historical treatment of pollution claims by the insurance industry and to examine insurance coverage issues which currently exist in environmental litigation.

A. The Anatomy of a Typical Pollution Claim.

Pollution damage claims, which typically present significant exposure problems to both the insurer and the insured, generally may be classified into four common factual patterns. First, the activity of the defendant causing the damage is usually of long duration. It may take the form of seepage of

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oil or chemicals into a stream over many years, the dumping of chemicals into streams during the manufacturing process such as Kepone, the release of gaseous emissions into the atmosphere such as SO_2 from a power generating station, or the escape of toxic chemicals from drums buried in dumps for 15 or 20 years such as is currently occurring along the Love Canal in Niagara, New York. The claims may also arise from the use of a defendant's produce such as asbestos paneling in classrooms.

Secondly, the pollutant or contaminent usually causes widespread damage and injury. Kepone, for example, is alleged to have caused injury to the employees of the factory at which it was being manufactured along with others who came in contact with Kepone dust. Damage also is alleged to have been sustained by property owners along the James River into which the Kepone was dumped. Other claimants include rivermen who regularly farmed oyster beds in the river. It is estimated that the total claims exceed $100 billion.

A third element common to most significant pollution claims is that the damages and injuries normally are not detected until years after exposure to the pollutant begins. In many cases, by the time the injury has been detected, the effect of the pollutant has caused irreversible injury.

The final element common to most large pollution claims is the presence of multiple claimants, multiple defendants, multiple insurance companies and multiple policy periods. Many

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pollution claims are filed as class actions. Frequently, the source of the pollution cannot be accurately pinpointed and several defendants are joined in the action. Because most plaintiffs are unable to identify the exact time when the damage occurred and because most insurance policies are effective on an annual basis with manufacturers changing carriers on a frequent basis, large environmental litigation cases invariably become complicated lawsuits with multiple parties having multiple and divergent interests. The insurance industry quickly learned that these cases are extremely expensive to litigate and presented exposures far in excess of anything which was reasonably contemplated at the time the insurance was written. The industry's response to this problem came in June 1970 with the introduction of the pollution exclusion.

B. A Brief History of Coverage for Pollution Damage Claims.

Before the explosion of claims for damages caused by pollutants flooded the courts during the last 10 to 15 years, pollution claims were relatively few. Coverage, if any, was only afforded by the general comprehensive liability policy. Prior to 1966, coverage generally was limited to "an accident." Thus, only sudden and accidental discharges of a pollutant were covered. See DRI Monograph, The New Comprehensive General Liability - A Coverage Analysis 6 (Nov. 1966). Larger insureds did, however, purchase "occurrence" coverage either in manuscript policy form or by endorsement of the standard policy.

See DRI Monograph, Environmental Law: Defense and Insurance Problems 46 (1977). "Occurrence" coverage was intended to be broader than accident coverage in that it included coverage for "injurious exposure to conditions, which result, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Id.

Insurance underwriters, during the 1950s and early 1960s, began to include occurrence coverage with increasing frequency. This coverage normally was accompanied by a small increase in premiums. By 1966, the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau concluded that occurrence coverage should be included within the comprehensive general liability form policy. Thus, suddenness was no longer a condition to coverage. Foreseeability and intent became the new focus for determination of coverage in pollution claims.

1. The Pollution Exclusion.

Pollution claims burst on the insurance scene following the Torrey Canyon disaster and the Santa Barbara off-shore drilling oil spills in 1969. These and other pollution disasters led Lloyds of London to impose restrictive endorsements upon its policies for pollution coverage.

There are two standard endorsements which are presently used throughout much of the insurance industry. The first endorsement (IRB-G335) entitled "contamination" or "pollution

exclusion" excludes coverage for bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water. This exclusion does not apply, however, if the discharge, dispersal, release or escape is sudden or accidental. The second restrictive endorsement (IRB-G336) is applicable to contamination or pullution resulting from oil and natural gas lease operations, oil pipeline operations and oil rig or derrick erecting or dismantling. Coverage is not available for bodily injury or property damage arising out of the discharge, dispersal, release or escape of oil or other petroleum substantives or derivatives into or upon any water course or body of water. Coverage is excluded whether or not the discharge, dispersal or escape is sudden or accidental.

At first blush, it would appear that the role of insurance in pollution claims has been virtually eradicated by the pollution exclusions. This is not entirely true for several reasons. First, many of the claims which are filed involve exposure to pollutants over a 10 to 15-year period. Thus, some claims encompass the entire gamut of coverage beginning with accident coverage and ending with the standard pollution exclusion. In addition, many manufacturers have purchased coverage against pollution damage. This coverage may be contained in either a

primary or excess liability policy and is similar to occurrence coverage provided before the pollution exclusions were introduced. However, the terms and conditions of the policy are only one-half of the equation for determining the availability of insurance coverage. The nature of the plaintiffs' claims and how they are pleading are of equal importance in determing coverage for pollution claims.

C. Principal Theories upon which Environmental Litigation Actions are Based.

The determination of coverage begins with a review by the underwriters of the plaintiff's claims. Thus, how the plaintiff drafts his complaint and the theories upon which he proceeds can have a critical impact upon the availability of insurance coverage. The most common theories advanced in environmental litigation cases are private nuisance, public nuisiance, negligence, strict liability and statutory rights created by federal and state environmental legislation. Complaints in environmental actions also commonly include claims for both compensatory and punitive damages and a request for injunctive relief.

1. Claims for injunctive relief and punitive damages.

Claims for injunctive relief are not within the coverage of the standard insurance contract. The insurance company under the typical contract is obligated to: (a) defend against any suit against the insured seeking damages on account of bodily injury, personal injury or property damage if the claim falls

within the coverage provided; and (b) to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, personal injury or property damage to which the policy applies. Thus, claims for injunctions and other equitable relief are virtually never within the coverage of the insurance agreement.

Punitive damages present a much more difficult question. Some policies specifically exclude coverage for punitive damages. However, many policies are silent regarding coverage for punitive damages. Conflict of laws assumes an important role in determining coverage for punitive damages as well as for pollution claims generally. Since insurance is a contract between the insurer and the insured, coverage questions will be determined by applying the conflict of laws doctrines of the forum state.

The current conflict theories give the trial judge wide discretion to select the controlling jurisdiction by application of such theories as grouping of contacts, most significant contacts, state interest analysis and the more traditional contracts approach of applying the law of either the jurisdiction in which the contract was made (particularly with respect to questions interpreting the scope of coverage) or the law of the jurisdiction in which the contract was to be performed (normally the jurisdiction in which the insured resides or where the loss occurred).

The primary conflict issue is what was the intent of the parties. However, in environmental litigation, the state interest analysis may be paramount. For example, the New York insurance law requires that the carrier must exclude from coverage liability for personal injury or property damage arising out of pollution caused by discharge of any pollutants into land, air or water, unless such discharges were "sudden or accidental." N.Y. INSURANCE LAW § 46 (McKinney 1966). A court may very well hold that, for all policies written in New York, the New York legislature has expressed a strong public policy that insurance companies cannot insure against damages caused by pollution except where they are the result of a sudden and accidental discharge.

With respect to punitive damages some courts have held that, because punitive damages are awarded in order to punish and deter, it is against public policy to allow the party against whom the damages were awarded to escape punishment by collecting from his or her insurance company. See American Surety Co. of N.Y. v. Gold, 375 F.2d 523 (10th Cir. 1966). Denial of coverage for punitive damages is based upon the doctrine that, "no one shall . . . take advantage of his own wrong." Northwestern National Casualty Co. v. McNulty, 307 F.2d 423 (5th Cir. 1962).

Courts which permit coverage for punitive damages point out that there is no evidence that punitive damages do in fact deter wanton conduct. These courts by and large appear to rest their opinions on construction of the contract language and the

countervailing public policy not to permit insurers to evade protection upon which the policy premium was, at least in part, based. Further, since punitive damages are damages the insured becomes legally obligated to pay, these courts have found that the policy provision did expressly include punitive damage coverage. See Southern Farm Bureau Casualty Co. v. Daniel, 440 S.W.2d 582, 584 (Ark. 1969); Abbie Uriguen Oldsmobile Buick, Inc. v. U.S. Fire Insurance Co., 95 Idaho 501, 511 P.2d 783 (1973). Courts which permit punitive damage coverage have also noted that the insured could have expressly excluded punitive damage coverage from the contract if it wished to avoid liability for punitive damages. See Concord General Mutual Insurance Co. v. Hills, 345 F. Supp. 1090 (S.D. Me. 1972).

It is apparent that, since environmental litigation is so imbued with the public interest, the forum in which the case is litigated may very well determine the outcome of the litigation. The choice of laws selection in these cases will undoubtedly be made on a state interest analysis basis. If the forum has a strong public policy against insurance coverage for pollution damage or punitive damages, and there is some contact with the forum besides the place of trial, then in all likelihood the law of the forum will be applied.

II. THE INSURANCE POLICIES.

A. Primary and Excess Coverage.

Virtually every major manufacturer in the United States

has primary and excess insurance coverage for bodily injury and property damage caused by its employees or its products. The primary coverage can be in the form of self insurance to a specified amount or insurance provided by a carrier. Typically, the terms of the primary policy and the excess insurance policy dovetail. This can be done by using identical language in both policies regarding coverage or the excess policy can adopt as its terms the terms of the primary policy. However, in many instances the peculiarities of an insured's business require that a specially tailored policy be written for it. The result is that the terms of the primary and the excess policies are not co-extensive, and in some instances, are in conflict with each other. Coverage may exist under one policy which is not available under the other thus giving rise, in the first instance, to the question of who has the duty to defend the insured.

1. The primary and excess carriers' duty to defend.

Whether the insurer has a duty to defend its insured against a particular claim is a question of contract interpretation. See 7A J. APPELMAN, INSURANCE LAW AND PRACTICE § 4682 (1962). Generally speaking, the primary carrier has the obligation to investigate and defend against the claim. There are a number of problems which you should be aware of when both primary and excess coverage are available. The cases differ sharply as to whether: (a) the primary carrier's duty to defend continues after its liability limits are exhausted; (b) the excess

carrier has a duty to defend if the ad damnum exceeds the primary limits; (c) the excess carrier's duty to defend attaches at the outset of the litigation or only after the primary carrier's limits are in fact exhausted; and (d) the primary carrier may obtain contribution or reimbursement from the excess carrier for the costs incurred in defense; and if so, how are those expenses to be allocated. See, e.g., Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyds, 56 Cal.App.3d 791, 129 Cal. Rep. 47 (1976). Normally, the excess policy merely provides that the excess carrier has the right to participate in the defense if it wishes but it has no duty to defend the insured. See, e.g., King Aluminum Corp. v. William Hyndman III Ins. Agency, Inc., 371 F. Supp. 621 (E.D. Pa. 1974).

A breach of the duty to defend by either the primary or excess insurance carrier can have serious consequences for the carrier. The carrier may be liable for any verdict rendered against the insured or reasonable settlement made by the insured, at least up to the policy limits. The breach may waive any subsequent duties of the insured under the policy and estop the carrier from relying on any subsequent breach of those duties to deny coverage. The carrier may be liable for reasonable attorneys fees and expenses incurred by the insured in defending the action. The carrier may also be liable for legal fees and expenses incurred by the insured in suing the carrier for breach of the duty to defend. And finally, the carrier may be liable

for consequential damages flowing from the breach. See P. MAGARICK, EXCESS LIABILITY 71-78 (1976). See also Johnson v. General Mutual Insurance Co., 24 N.Y.2d 42, 246 N.E.2d 712, 716 (1969); City of Virginia Beach v. Aetna Cas. & Sur. Co., 426 F. Supp. 821, 827 (E.D. Va. 1976).

Where an insurer improperly fails to defend its insured, a breach of contract occurs and two forms of estoppel may arise -- equitable estoppel and collateral estoppel.*/ Equitable estoppel arises where the carrier's failure to defend constitutes a breach of the contract of insurance. Because of the breach, the carrier is estopped from asserting defenses and exclusions under the policy as a defense to coverage. See 7A J. APPELMAN, INSURANCE LAW AND PRACTICE § 4689 (1962).

Collateral estoppel, on the other hand, is based upon the relationship between the insurer and the insured. Upon proper notice and opportunity to defend, the insurer-indemnitor is considered to be vouched in in an action brought against the insured-indemnitee and the carrier is bound by certain determinations reached in that case regardless of whether the carrier participates in the defense or not. See F. JAMES, CIVIL PROCEDURE § 1127; 1 MOORE'S FEDERAL PRACTICE ¶ 0.45[9]; Note, The Effect of

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*/ If the insured does defend its insured without a reservation of rights letter or similar agreement, it will also be equitably estopped from denying its own liability under the policy. For a discussion and comparative analysis of these doctrines, see Cowan v. Ins. Co. of N.A., 22 Ill.App.3d, 883, 318 N.E.2d 315, 320-23 (1974).

Collateral Estoppel on the Assertion of Coverage Defenses, 69 COLUM. L. REV. 1459 (1969). Collateral estoppel arises regardless of whether the carrier has a contractual obligation to defend the insured. See, e.g., Eason v. Weaver, 557 F.2d 1202, 1204 (5th Cir. 1977).

A reservation of rights by the carrier does not necessarily avoid the application of equitable and collateral estoppel doctrines. The purpose of the reservation of rights letter is to protect the carrier from the defenses of waiver and estoppel once the carrier undertakes the defense. A reservation of rights letter will be given effect absent endorsement by the insured as long as the insured raises no objection to it. P. MAGARICK, EXCESS LIABILITY 81-82 (1976). However, an objection from the insured may later result in application of these doctrines. See, e.g., Cowan v. Ins. Co. of N.A., 22 Ill.App.3d 883, 318 N.E.2d 315 (1974).

The purpose for the collateral estoppel doctrine is primarily to avoid the expense and delay of multiple trials on the same issue and to avoid inconsistent determinations on the merits when a party has already had, or was given an opportunity to have, its day in court. The doctrine is premised upon an identity of interests between the indemnitor and the indemnitee. Thus, if that identity of interest does not exist, then the doctrine will not be applied. See Farm Bureau Mutual Automobile Insurance Co. v. Hammer, 177 F.2d 793 (4th Cir. 1950). Accordingly, if an

insurance carrier refuses to provide a defense in a pollution damage case, it runs a substantial risk of being foreclosed from later asserting defenses available under the policy. The carrier, of course, will not be foreclosed from litigating the primary issue of coverage.

2. Primary carrier's bad faith failure to settle claims within its policy limits.

Most insurance policies contain a provision granting the insurer exclusive control of the settlement of actions arising under the policy. The courts, in interpreting this provision, have held that there is an implied corresponding duty on the part of the insurer to handle settlement negotiations in good faith. This duty stems from an implied covenant of good faith and fair dealing present in every contract. See, e.g., Bourget v. Government Employees Insurance Co., 456 F.2d 282 (2d Cir. 1972); 7A J. APPELMAN, INSURANCE LAW AND PRACTICE § 4712 (1962).

As a general rule, if the carrier, in bad faith, refuses to settle a claim within the policy limits and a judgment is entered against the insured in excess of those limits, the carrier becomes liable for the total judgment, including the sum in excess of the policy limits. See, e.g., Knobloch v. Royal Globe Insurance Co., 38 N.Y.2d 471, 344 N.E.2d 364, 381 N.Y.S.2d 433 (1976). (The courts have expressed widely differing views on what constitutes bad faith. This is a subject which has been greatly discussed in many treatises and monographs. See, e.g., 7A J. APPELMAN,

INSURANCE LAW AND PRACTICE § 7412 (1962).) Further, if the primary carrier fails to settle a claim within the primary policy limits and an excess verdict results, the excess carrier will be subrogated to the claim of the insured against the primary carrier for the excess over the primary limits. See Lear Sigler, Inc. v. Employers' Surplus Lines Insurance Co., No. C68324 (L.A. Super. Ct. 1976), discussed in, Hardies, "Guiding Principles (and Principals) in Primary and Excess Problems," INS. L. J. 469, 480-81 (1977).

The obligation to exercise good faith in settling pollution damage claims has been applied to excess carriers notwithstanding the lack of duty to defend. In Kelley v. British Commercial Insurance Co., 221 Cal.App.2d 554, 34 Cal. Rep. 564 (1963), the excess carrier argued that it owed no duty of good faith toward its insured because it occupied the position of a secondary or excess carrier and took no active part in defense of the litigation. The court rejected this argument as "untenable." Id. at 569. The court found that the excess carrier's control over the settlement negotiations was clearly separate and distinct from its right to take over the defense of the action. The carrier alone had the authority to settle the case in excess of the primary limits and was under a duty to exercise good faith toward its insured in considering any offer of compromise within the limits of its policy.

B. Critical Terms and Conditions in the Insurance Agreements.

Before discussing some of the more critical terms of the insurance agreement, a number of threshold questions should be considered if interpretation problems or ambiguities exist with respect to the contract. For example, how are these issues to be resolved? What rules of interpretation will be applied by the courts? Will these issues be resolved by the court as a matter of law or by the jury as an issue of fact?

The general rule for interpreting insurance policies is that, "in case of ambiguity or doubt as to the meaning of language used in an insurance policy, it shall be construed in favor of the insured. . . ." Elston-Richards Storage Co. v. Indemnity Ins. Co. of N.A., 194 F. Supp. 673, 679 (W.D. Mich. 1960). See also Aschenbrenner v. United States Fidelity & Guaranty Co., 292 U.S. 80, 85 (1934). Thus, where the carrier argues for an interpretation which would restrict coverage, if an ambiguity is found to exist in the terms of the policy, then that ambiguity will be resolved in favor of the insured and in favor of coverage.

The determination of interpretive issues has been resolved by some courts as a question of law. See, e.g., Hartford Accident & Indemnity Co. v. Wesolowski, 33 N.Y.2d 169, 305 N.E.2d 907 (1973). The U.S. Court of Appeals for the Second Circuit has suggested that an evidentiary proceeding may often be necessary to resolve the ambiguity. Home Insurance Co. v. Aetna Cas. & Sur. Co., 528 F.2d 1388 (2d Cir. 1976). However, in all likelihood, the court will

treat the issue as one for disposition by the court rather than the jury.

1. The policy period.

The policy period is also an important threshold issue in determining coverage. Most policies afford coverage only for injury and damage which occur during the policy period. Frequently, the plaintiff is unable to establish with precision when the damage began or to allocate what portion of the damage occurred during a particular time frame. Generally speaking, this becomes a problem for the insurance company since courts normally will only require the plaintiff to prove that the damages occurred and to leave to the defendants the burden of allocating the damages among themselves. The policy period is also significant because the carriers' liability is limited to an aggregate amount during the policy period for some types of coverage. Product liability and completed operations coverage are two types of coverage to which these limitations would be applicable. See pp. 22-25 infra. But probably the most frequently litigated term in determining coverage is the term "occurrence."

2. How courts determine the meaning of occurrence.

Probably the most frequently litigated issue arising from claims for insurance coverage in environmental litigation matters is the meaning and application of the term "occurrence." The courts have developed five tests for determining the meaning of occurrence: the effect test, the causation test, the time and

space test, the operative hazard test and the popular meaning test.

The Effect Test. In general, the courts have held that the meaning of the term "occurrence" in insurance policies should be determined by the intent of the parties themselves. See Grand River Lime Co. v. Ohio Casualty Co., 32 Ohio App.2d 178, 289 N.E.2d 360, 364-65 (1972). The effect test was first articulated by the Fifth Circuit Court of Appeals in the case Anchor Casualty Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1949). The question in McCaleb was how many "accidents" had occurred when debris emitted by an oil well explosion and transported by intermittent gusts of wind caused damage to various parcels of property owned by different individuals. The court reasoned that the term accident should be defined "from the point of view of the person whose property is injured," and explained that from that perspective, "numerous accidents were the product" of the damage caused by the explosion and the wind. Id. at 324.

Several other courts have, by implication, accepted the rationale of McCaleb. See Lombard v. Sewage & Water Board of New Orleans, 284 So.2d 904, 915-16 (La. 1973)(damage to each of numerous owners' property caused by construction project held separate occurrence); Kuhn's of Brownsville v. Bituminous Casualty Co., 270 S.W.2d 358, 359 (Tenn. 1954)(collapse of two buildings resulting from same proximate cause held two occurrences).

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The effect test also derives some support from a line of cases which state that, for purposes of determining when an occurrence has happened, the courts consider the time of the damage or injury, rather than the time of the act which caused the injury. E.g., Kansas City Insulation Co. v. American Mutual Liability Insurance Co., 405 F.2d 53, 56 (8th Cir. 1968); Annot., 57 A.L.R. 2d 1385, 1389 (1958). The effect test has been accepted only in a few jurisdictions and has been specifically rejected by many courts. See, e.g., American Casualty Co. v. Heary, 423 F. Supp. 995, 997 (E.D. Va. 1977).

The Causation Test. Less than 10 years after it decided McCaleb, the Fifth Circuit Court of Appeals embarked on a different approach in determining the number of occurrences in St. Paul-Mercury Indemnity Co. v. Rutland, 225 F.2d 689 (5th Cir. 1955). In Rutland, the insured's truck collided with a railroad train, causing damage to 16 railroad cars and property of 14 owners. Under the effect test suggested in McCaleb, the loss to each property owner would have constituted a separate accident within the meaning of the insurance contract limiting coverage to $5,000 per accident. This is precisely what the trial court did. The Court of Appeals reversed holding that the collision between the insured's truck and the railroad train constituted only one occurrence despite the multiple injuries which resulted. In concluding that the occurrence should be constructed from the cause rather than the effect, the court pointed out that the effect

test would make the policy potentially limitless and would be simply incompatible with efficient computation of insurance premium rates.

The causation test of Rutland has been widely accepted. Thus, in American Casualty Co. v. Heary, supra, the court accepted the causation test as the "majority," "more modern," and "only rational" point of view. Id. at 997.

The causation test has also been applied in other situations. When damage to many items of property owned by different individuals is caused by one fire, the courts have consistently held that one accident or occurrence has taken place. See Barrett v. Iowa National Mutual Insurance Co., 264 F.2d 224, 229 (9th Cir. 1959). The "trend of authority" is toward the adoption of the causation test. Annot., 55 A.L.R.2d 1300, 1303, (1957).

The Time and Space Test. The third approach to interpreting the meaning of the term occurrence is the time and space test. According to this theory, the number of accidents or occurrences involved in any case depends upon "the closeness of connection in time and space between the individual items of injury or damage." Annot., 55 A.L.R.2d 1300, 1304 (1957). Thus, the "aggregate of events" caused by an insureds negligent act constitute one accident or occurrence, "provided there is a close connection in time and place and a single sequence of cause and effect," while a series of injuries involving a common

causal factor will nevertheless be interpreted as separate accidents or occurrences if "the times or places and detailed causes of each" are different. Id.

The time and space test was applied in Elston-Richard Storage Co. v. Indemnity Ins. Co. of N.A., 194 F. Supp. 673 (W.D. Mich. 1960). There several thousand appliances were damaged over a nine-month period by a defective lift truck used to move each one of them in a storage warehouse. Although the same defect in the lift truck caused the damage to each appliance, the court held that the injury to each constituted "one event or occurrence," because each appliance was damaged at a different time by a "separate impact of pressure" by the forklift. Id. at 682.

The Operative Hazard Test. This test seems to have been provoked by the dissatisfaction of some courts with the other tests. In Johnson Corp. v. Indemnity Ins. Co. of N.A., 6 App.Div. 2d 97, 175 N.Y.S.2d 414 (1958), aff'd, 7 N.Y.2d 222, 196 N.Y.S.2d 678 (1959), the court rejected the effect test for the reasons stated in Rutland, the causation theory on the ground that it improperly applied tort concepts to a contractual issue, and the time and space test on the basis that it failed to acknowledge that the effects of a single accident may be widely separated in space and time.

In the Johnson court's view, the real question is the "event of liability" or "operative hazard which brings the policy into play." Id. at 420. In Johnson, the insured negligently

constructed two temporary walls to protect the basements of two buildings during the digging of a subway trench. The trench was flooded during a rainfall causing the walls to collapse and the basements to flood. The court found two occurrences on the basis that there were two distinct and separate acts in constructing a protective wall for each building and therefore gives rise to two accidents or occurrences.

The Average Person Test. The Johnson case was also responsible for creating the fifth theory -- the average person test. The court stated that it would determine "simply whether there was one unfortunate event or occurrence," in a manner which would correspond with "what the average person interprets when he buys insurance and reads the 'accident' limitation." Johnson, supra, N.Y.S.2d at 683-84. The average person test has gained support from the New York State courts (e.g., Allied Grand Doll Mfg. Co. v. Globe Indemnity Co., 15 App.Div.2d 901, 225 N.Y.S.2d 595 (1962)) as well as courts in other jurisdictions. See, e.g., Wilkinson & Son, Inc. v. Providence Wash. Ins. Co., 124 N.J.Super. 466, 307 A.2d 639, 642-42 (1973).

The causation and the average person tests appear to be the tests most frequently applied by the courts. These tests, by and large, serve to limit the number of occurrences and therefore limit the insurance company's liability.

C. Product Hazard and Completed Operations Coverage.

The product hazard coverage (more commonly known as product

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liability coverage) and the completed operations hazard coverage may serve as the basis for insurance coverage for what ostensibly appears to be a pollution damage claim. The significance of this form of coverage rather than the "occurrence" coverage is that the occurrence is usually stated in an amount per occurrence, e.g., $1,000,000. There is no aggregate limit for occurrence coverage. However, the completed operations hazard and product hazard coverages generally contain aggregate limitations.

While in earlier policies these two coverages were normally combined in a single paragraph, they have now come to be recognized as separate and distinct coverages. The product hazard coverage relates to claims for bodily injury and property damage arising out of the use of the insured's product. The completed operations hazard coverage has been a source of much confusion (see, generally, Annot., 58 A.L.R.3d 12 (1974)). Most courts which have construed this coverage have held that it does not apply to purely service operations, but to some act or service in connection with the sale, distribution or installation of the insured's product. See, e.g., McNally v. American States Ins. Co., 308 F.2d 438 (6th Cir. 1962). There are many issues associated with these coverages which cannot be explored in depth here. However, I will attempt to flag some of them for your future consideration.

1. The product hazard coverage.

The product liability coverage is designed to protect the insured who in the course of its business is exposed to claims

by third persons on the ground that its product caused injuries or damage after it no longer was in the insured's possession. 1 COUCH ON INSURANCE § 1:85 (2d ed. 1959). Issues have arisen regarding whether the pollutant which causes damage is the insured's product or merely something used during the manufacturing process. Similar issues arise with respect to whether the chemical or injury-producing pollutant is a product which is manufactured, sold, handled or distributed by the insured. Where the pollutant is discharged into the air or the water and causes damage elsewhere raises questions of whether the losses occurred after physical possession of the product had been relinquished to others by the insured and did the loss occur away from the insured's premises as required by the insuring provisions.

Arguments have also been made that product liability coverage is not applicable because the product itself was not defective, but the damage was the result of the insured's negligence in handling the product. But most courts have held, however, that there is no requirement that the product causing the injury be defective in any way. The existence of any condition in the product -- albeit, a normal, expected condition -- or any handling or use of the product is sufficient to provide coverage. Hagen Supply Corp. v. Iowa National Mutual Insurance Co., 331 F.2d 199 (8th Cir. 1964).

2. The completed operations hazard coverage.

A wide variety of acts have been considered "operations" within the meaning of the completed operations hazard provision.

For example, in Ketona Chemical Corp. v. Globe Indemnity Co., 404 F.2d 181 (5th Cir. 1968), the negligent act of a chemical manufacturer in loading chemicals into a defective tank car was an "operation" which had been completed when the tank car was delivered to another city where the accident occurred. The completed operations coverage includes materials, parts or equipment furnished in connection with the operation. "Operations" also includes representations or warranties made with respect thereto. Here again, the theory upon which the plaintiff proceeds and the manner in which he drafts his complaint may well determine whether product liability or completed operations hazard coverage will be applicable.

D. The Pollution Exclusion.

The standard pollution exclusion does not apply where the discharge, dispersal, release or escape of a pollutant is sudden and accidental. Interpretation of the terms "sudden" and "accidental" used in the pollution exclusion can be assisted by reference to the interpretation of similar terms in the "occurrence" provision of the general comprehensive liability policy. A study of case law shows that carriers have been able to avoid liability for their insureds' losses by arguing that the harm was expected by the insured and therefore not covered by the policy. The nusiance claims have been particularly vulnerable to this defense because the acts are continuing in character. See, e.g., Cosmopolitan Mutual Insurance Co. v. Packer's Supermarket, Inc., 72

Misc.2d 980, 340 N.Y.S.2d 461 (Sup. Ct. 1972).

In United States Fidelity & Guaranty Co. v. Briscoe, 205 Okla. 618, 239 P.2d 754 (1951), the court denied coverage where the alleged damages were the result of the insured's unloading, loading and handling of large quantities of dry powdered, bulk cement, which impregnated the immediate atmosphere with cement dust for a continuous period of four months. The court found that the damage was not caused by accident because the negligent conduct of the insured continued for four months and had at all times been voluntary and intentional. Similarly, the courts have denied coverage where the damage was the result of the insured's calculated acceptance of the risk of harm (Town of Tieton v. General Insurance Co., 61 Wash.2d 716, 380 P.2d 127 (1963)) or where the harm results from the insured's business operation. See Kuckenberg v. Hartford Accident & Indemnity Co., 226 F.2d 225 (9th Cir. 1955). In Kuckenberg the insured was seeking recovery from the carrier for unanticipated damage to railroad track and road bed caused by falling rock and trees during the course of the insured's construction of a highway on a mountainside above the railroad. The court, in ruling that the property damage was not "caused by accident" within the policy's coverage, stated that the damage done "was the reasonably anticipated, ordinary and expected result of the plaintiff's operation [blasting and clearing]." Id. at 226.

IV. CONCLUSION.

The adoption of the pollution exclusions in 1970 has not laid to rest many of the controversies surrounding the issue of insurance coverage for pullution damage. The wide use of special manuscript policies and riders modifying the pollution exclusion have continued the litigation over insurance coverage for pollution damage claims. There does not appear to be any lessening of these disputes in the immediate future.

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