INSURANCE CLAIMS FOR RECOVERY OF ENVIRONMENTAL CLEANUP COSTS -- INCLUDING -- CASE LAW IN NEW JERSEY, OHIO AND MICHIGAN

By Ann M. Waeger*

 The author gratefully acknowledges the assistance of Scott E. Reiser, in the 2006 update of this Article.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

I. Introduction

A. Applicability to Various Environmental Damage Claims

Governmental and private party claims for environmental damage are by no means limited to catastrophic events. Environmental liability claims are asserted against business clients for such events as leaks from underground and above ground storage tanks, spillage from drum storage areas, even proper and costly disposal of hazardous wastes at licensed waste facilities.

Liability arises under the array of federal and state statutes as well as by continually evolving common law principles. Costs of cleanup continue to rise, creating severe economic pressures on many businesses.

One vital source of contribution in paying for these environmental cleanups is through primary and excess liability insurance policies. These materials deal with claims under such policies.

B. Principal Bases of Cleanup Liability

Once an event has occurred that has resulted in or has the potential to result in environmental harm or damage to property, there are many bases for the imposition of liability on businesses. The principal bases of liability are found in federal and state statutes, as well as in common law.

C. Liability Insurance Policies as a Principal Source of Cost Recovery

Aside from seeking contribution from prior owners, prior or current operators, neighbors or public sources, a targeted party should thoroughly review the potential of recovery from its insurers.

D. Liability Insurance Policies as a Principal Source of Cost Recovery

Aside from seeking contribution from prior owners, prior or current operators, neighbors or public sources, a targeted party should thoroughly review the potential of recovery from its insurers.

Given the state of case law, the focus will normally be on primary and excess liability policies as opposed to other policy types concerning which legal questions over coverage are either highly unsettled, purely speculative, or have been answered in the negative from the insured's point of view.

For example, first party property insurance differs from liability insurance in that it covers only claims for damage to a policyholder's own specifically covered property, whereas liability insurance covers claims for damage to the property of third parties. The problem with claims under policies, other than liability policies, in connection with environmental cleanup costs is that most courts have yet to decide a number of key coverage issues, and it remains unclear as to whether coverage will be found to exist under these policies. As the claim and litigation process is a long and expensive one, many policyholders are wary, for good reason, of starting down an unmarked path.

In contrast, a number of courts have decided key coverage issues in claims for environmental cleanup costs under liability policies. In New Jersey, the results have thus far been primarily favorable for policyholders.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

II. Preparing the Environmental Insurance Claim

Pursuit of insurance claims is often a long, arduous and time-consuming process, from investigating the existence of policies, through the initial claim process and the subsequent multi-tiered process of producing documents for the insurers, answering interrogatory-like information requests, attending meetings and negotiations, and, where necessary, commencing and prosecuting lawsuits against the insurance companies.

The most formidable threshold problem is that of locating crucial policy information. Many businesses purge records from time to time as standard operating procedure, and it is the oft-abused pack rat who is suddenly elevated to hero status when relevant documentation has been maintained in the back of the bottom filing cabinet.

Over the years, we have found the following sources to be particularly useful in the search for critical policy information:

A. Client's Internal Records

1. Insurance Records: Copies of insurance policies or portions of insurance policies; prior insurance claim files; names, addresses and phone numbers of prior and current insurance agents and brokers; memos and correspondence regarding past and present insurance coverage.

2. Accounting and Financial Records: Invoices from insurance agents, brokers and insurance carriers; canceled checks evidencing payment of premiums; records such as accountants' ledger sheets itemizing insurance coverage; insurance schedules prepared by brokers or agents.

3. Legal Records: Loan records; lawsuit records; lease records; contract records.

4. Quality Assurance/Safety Records: Information maintained by the client's personnel in charge of quality assurance or safety concerning insurance policies, insurance company surveys and prior claims to insurance carriers.

5. Corporate Records: Corporate minutes which document approval for purchase of insurance or adoption of a self-insurance program.

B. Outside Sources

1. Insurance Brokers and Agents: Schedules of insurance; invoices; copies of policies or portions of policies; personal records of brokers or agents concerning policy information.

2. Outside Accountants and Auditors: Financial statements; schedules of insurance; records such as ledger sheets.

3. Lending Institutions: Loan files which may contain copies of insurance certificates or which may reference specific insurance policies.

4. Governmental Authorities: Evidence of insurance coverage provided to governmental authorities or agencies pursuant to government contract requirements or statutory requirements.

5. Business and Industry Associations: Many business and industry associations have been involved in facilitating insurance packages for its members and may have helpful information as to the identity of insurance carriers.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

_____

The difficult lessons learned by policyholders concerning maintenance of insurance records have led us to recommend the following to our clients:

C. <u>Preparing Now For Potential Future Claims</u>

1. Search for and compile all existing insurance policies or portions of insurance policies, past and present.

2. Search accounting, financial and legal records for policy information; compile all such information past and present, and note the source of the information.

3. Search for and compile prior claim information.

4. Update compilations annually, or as often as coverage is renewed or altered.

5. Maintain duplicate copies of all policies and related information with financial or legal representative.

6. Maintain complete and accurate records of expenditures in connection with potential claims, such as environmental cleanup costs, consulting fees, legal fees and contractor costs.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

III. Hurdles to Coverage: Interpreting Policy Provisions to Obtain Coverage

A. Occurrence

1. Policy Language:

"Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

2. Policyholder's Position - The damage was neither intended nor expected. The standard of review should be subjective; that is, the actual intentions and expectations of the particular policyholder should be considered.

3. Insurer's Position - The discharge was expected or intended. The standard of review should be objective; that is, whether a reasonable policyholder would have expected or intended the damage.

4. Selected New Jersey Case Law

a. Lansco, Inc. v. Dept. of Environmental Protection, 138 N.J. Super. 275 (Ch. Div. 1975), aff'd, 145 N.J. Super. 433 (App. Div. 1976), cert. denied, 73 N.J. 57 (1977).

- Declaratory judgment action filed by tenant against its insurers to recover costs incurred to clean up an oil spill.
- Spill occurred when valves of two storage tanks at the leasehold were opened by third party, causing oil to leak from tanks onto the ground and into two storm drains which emptied into the Hackensack River.
- DEP required tenant to clean up, which it did after making a claim to its insurers.
- Insurer denied liability, arguing, among other things, that the occurrence was not sudden and accidental.
- Court found that the oil spill fit within the plain meaning of the policy definition of occurrence as it was accidental and was neither expected nor intended from the standpoint of the tenant, having been caused by a deliberate act of a third party.

b. Jackson Tp. Municipal Utilities Authority v. Hartford Acc. & Indemn. Co., 186 N.J. Super. 156 (Law Div. 1982).

- Township, the functions of which included collection, hauling and disposal of liquid wastes at designated landfills, sought a declaratory judgment that its insurers had a duty to defend it in two actions regarding contamination from the landfills. Insurers argued that the underlying bodily injury and property damage claims against the Township were not caused by an "occurrence" since it intentionally dumped the wastes at the landfills.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- In determining whether there was an occurrence, court noted that the frequency of dumping was not dispositive, but that the focus of inquiry should instead be whether the insured's acts resulted in unintended or unexpected damage.

- Court found that while dumping of the wastes was intentional, the insured never expected or intended that the wastes would leach into the groundwater, thus damaging and injuring property and individuals. Thus, court concluded, there was a covered occurrence.

c. Broadwell Realty Services, Inc. v. Fidelity & Casualty Co., 218 N.J. Super. 516 (App. Div. 1987).

- Landlord leased property to tenant that operated a gasoline service station at the premises. Landlord was advised by DEP that a discharge of hazardous substances from several underground storage tanks at the premises had migrated onto adjacent lands, and had discharged into a nearby stream.

- DEP directed landlord to commence cleanup immediately and warned that failure to comply with the directive would result in treble damages under the Spill Act.

- Landlord performed the required cleanup, which included installation of an interceptor trench on its own property to prevent further contamination from migrating off-site. Landlord, an additional insured under its tenant's liability policy, sought coverage.

- Insurer disclaimed, alleging, among other things, that the discharge was not "sudden and accidental." Landlord instituted action seeking damages and counsel fees.

- Court agreed with landlord's interpretation of the definition of occurrence as including not only the common concept of accident, but also continuous or repeated exposure to conditions which result in damages neither expected nor intended from the standpoint of the insured.

d. Summit Assoc. v. Liberty Mut. Fire Ins., 229 N.J. Super. 56 (App. Div. 1988).

- Developer purchased overgrown and vacant property from Edison Township. Developer was not informed of the existence of any sludge or hazardous substances existing at the property.

- During the course of clearing the property, the developer discovered a large underground sludge pit, an underground storage tank and other contamination at the property. DEP ordered the developer to clean up the contamination pursuant to the New Jersey Spill Act, at a cost in excess of $400,000.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Developer sued insurer to recover cost of cleanup and removal.

- Insurer argued, among other things, that coverage should not extend since the developer should reasonably have been aware of danger at the property, and the "occurrence" should be interpreted as the introduction of hazardous waste into the ground.

- Court rejected insurer's arguments, finding that discovery of waste was neither "expected nor intended" by Summit and that the "occurrence" in this case took place when the toxic wastes were discovered.

- Appellate Division affirmed trial court's determination on "occurrence."

e. Chemical Leaman Tank Lines, Inc. v. Aetna Casualty and Sur. Co., 817 F. Supp. 1136 (D.N.J. 1993), aff'd, 89 F.3d 976 (3d Cir.), cert. denied, 117 S. Ct. 485 (1996).

- From approximately 1960 to 1975, Chemical Leaman used a system of unlined ponds and lagoons for disposal of contaminated rinse water.

- In 1969, the New Jersey Department of Health ordered Chemical Leaman to construct a waste water treatment or disposal plant in response to community complaints. However, Chemical Leaman continued to use the pond and lagoon system until 1975, when it installed a waste water treatment system.

- In 1981, a DEP-ordered investigation revealed that the ponds and lagoons were the primary source of groundwater contamination at and around the site.

- In 1984, EPA placed the site on the Superfund national priority list. In 1985, Chemical Leaman entered into a consent order with EPA, admitting liability under CERCLA and agreeing to undertake a remedial investigation and feasibility study of the groundwater.

- In 1988, Chemical Leaman notified Aetna, one of its CGL carriers, of its claims. In 1989, it so notified LMI, another of its carriers.

- In Chemical Leaman's declaratory judgment action seeking coverage, the company sought summary judgment on a number of issues, including "occurrence."

- The insurers responded by arguing that the damage was expected and intended, and sought application of an objective test based on the recent Supreme Court determination in the non-environmental setting of Voorhees v. Preferred Mut. Ins. Co., 246 N.J. Super. 564 (App. Div. 1991), aff'd, 128 N.J. 165 (1992). In Voorhees, court declared that while the general rule should be one of evaluating subjective intent, the trier of fact may presume intent without inquiry into the subjective intent where

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

exceptional circumstances exist, in the form of "particularly reprehensible" actions, which "objectively establish the insured's intent to injure." (Voorhees involved sexual abuse of children in a day care center.)

- Court found that the facts of this case did not warrant application of the "particularly-reprehensible-act exemption," but also found that given the substantial evidence concerning Chemical Leaman's knowledge of the effects of its system, the company was not entitled to summary judgment.

- See also: Court's discussion of Diamond Shamrock Chemicals v. Aetna, 258 N.J. Super. 167 (App. Div. 1992) and Hatco Corp. v. W. R. Grace & Co., 801 F. Supp. 1334 (D.N.J. 1992), in regard to occurrence, and court's determination that despite the degree of evidence concerning Chemical Leaman's actions, it was not in a position to find no genuine dispute as to Chemical Leaman's intentions.

- Note: In succeeding trial, jury found for Chemical Leaman on the occurrence issue under several policies.

- Insurers appealed, contending that the trial court incorrectly instructed the jury on whether Chemical Leaman expected or intended to cause environmental damage under Morton (see subparagraph f. below).

- The Court of Appeals carefully reviewed the decision of the New Jersey Supreme Court in Morton, which it viewed as providing for a presumption of an insured's subjective intent to cause property damage where exceptional circumstances exist.

- The Court of Appeals noted that the appropriate inquiry with respect to an occurrence related to an insured's subjective intent to cause injury.

- Even though the trial court in this matter interpreted the law on the issue of an occurrence prior to Morton, the trial court's instructions to the jury to determine whether Chemical Leaman subjectively expected or intended the damage to soil, groundwater or wetlands was appropriate.

- The Court of Appeals also concluded, based on the facts presented at trial, that exceptional circumstances did not exist in this matter and that therefore there could be no presumption of Chemical Leaman's subjective intent to cause damage.

f. Morton Int'l, Inc. v. General Accident Ins. Co., 134 N.J. 1 (1993), cert. denied, 114 S.Ct. 2764 (1994).

Procedural History

- The insurance case arose out of underlying litigation in DEP v. Ventron, 182 N.J. Super. 210 (App. Div. 1981), aff'd as modified, 94 N.J. 473 (1983), in which Ventron was held strictly liable for cleanup costs resulting from discharges at its mercury processing

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

facility which polluted Berry's Creek in Bergen County, New Jersey.

- Morton International, Inc. ("Morton") is the successor of Ventron. When the Ventron complaint first was filed, all insurers disclaimed coverage. Subsequent to the New Jersey Supreme Court's decision on the underlying litigation in 1983, Morton filed a declaratory judgment action against its insurers seeking indemnity for remediation expenses and defense costs.

- Trial court granted partial summary judgment to all insurers with respect to their obligations to defend and indemnify Morton on the crossclaims by the subsequent purchasers of the contaminated property, since that claim was based substantially on Ventron's fraudulent non-disclosure of the facility's polluted condition.

- Cross-motions for summary judgment on the remaining issues resulted in a ruling that one insurer was liable for partial defense costs and that no insurer had a duty to indemnify Morton. A trial was then held to establish reasonable costs for defense.

- Morton appealed from trial court ruling dismissing its indemnity claim and from the limited defense award.

- The Appellate Division confirmed the trial court's ruling dismissing the indemnity claim and overruled the limited defense award.

Facts in Underlying Ventron Litigation

- Prior owners and operators of the mercury processing plant had continually dumped untreated waste material onto the property, resulting in mercury-laden effluent draining onto the land. Additionally, waste would routinely be discharged over the land through open drainage ditches, resulting in extensive mercury contamination of soil and water.

- Through DEP monitoring and EPA testing, it was determined that resulting mercury contamination was continually being deposited into Berry's Creek each day. Attempts were made by one operator to control the continuing contamination through the installation of a waste treatment system which abated, but did not halt, the flow of mercury into the creek.

- Property was eventually sold to individuals who began demolishing the facility. In the course of demolition, mercury-contaminated water was used to wet down the facility and was allowed to run into the creek. DEP ordered the work to stop and required containment of the contamination. DEP instituted suit in March 1976.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

Trial/Appellate Court on Insurance

- Trial court in the insurance litigation found that the deliberate dumping of toxic mercury onto the land by parties possessing knowledge of its dangers constituted an intent to injure as a matter of law. Morton argued that this was a legal conclusion and that it was improper fact-finding by the judge on the motion for summary judgment.

- Appellate Division rejected Morton's argument and affirmed trial court's conclusion on the factually undisputed record that as a matter of law, Morton's predecessor intended to cause harm to the environment in and around Berry's Creek.

- Appellate Division noted that the definition of "occurrence" contained in the policies issued by the insurers were similar, if not identical, to provisions in those cases where New Jersey courts have determined that the extreme quality of an act can be the basis of an objective inference that the insured intended the injury. This principle renders the actor's testimony about subjective intent moot, according to the appellate court.

- Appellate court concluded that in this case the insured's expectations, intent and conduct were indistinguishable and that the character of the acts led to the conclusion that the insured either intended, or was manifestly indifferent to, the prospect of injury.

- Morton also argued that since the trial judge in the underlying litigation ruled that DEP failed to prove intentional conduct on the part of Ventron, the trial court judge in the insurance litigation had no basis to conclude that Ventron intended to injure either the property or the environment. Morton also argued that the finding by the trial judge was strongly suggestive that a genuine issue of material fact existed on the issue of intent and that summary judgment should not have been granted.

- Appellate court noted that the liability trial between Ventron and DEP did not touch upon the issue of intent in connection with insurance coverage. The question of Ventron's intent to pollute was not considered in the context of insurance policy provisions, but only in terms of statutory and common law liability for such acts. Since the insurers did not have the opportunity to present their views on Morton's intent relative to insurance theories in the underlying litigation, they were found not to be precluded from arguing the issue in this action.

Supreme Court on Insurance

- On appeal to the state Supreme Court, Morton argued that the Appellate Division improperly invoked an objective standard in determining whether there had been an occurrence under the policies and that it ignored the long-standing principle that coverage exists for the unintended results of intentional acts.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Supreme Court noted that it had recently addressed analogous issues in Voorhees and SL Industries (cases cited below in Section E).

- Court explained that in Voorhees it held that "the accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury."

- Court also held in Voorhees, in a non-environmental context, that "[a]bsent exceptional circumstances that objectively establish the insured's intent to injure, we will look to the insured's subjective intent to determine intent to injure." Court also stated that in cases involving "particularly reprehensible" conduct, "the intent to injure can be presumed from the act without an inquiry into the actor's subjective intent to injure."

- Court also discussed its decision in SL Industries, again in a non-environmental context, where it confronted the issue of whether a valid claim of intentional fraud requires proof of intent to cause the specific injury or whether proof of subjective intent to cause the specific injury is required. Court explained that after evaluating alternative theories, it endorsed the view expressed in Prudential Property & Casualty Ins. Co. v. Karlinski, 251 N.J. Super 457 (App. Div. 1991) that if a wrongdoer subjectively intends or expects to cause some type of injury, that intent will generally preclude coverage. However, under Prudential, a court must inquire as to whether an insured subjectively expected or intended to cause an injury if the extent of the injury was improbable. If no such intent was found, then the injury was "accidental".

- In applying its holding in Voorhees to claims seeking coverage for property damage in connection with environmental pollution, court acknowledged "the impracticality of adhering to the general rule of looking to the insured's subjective intent to determine intent to injure", since absent "smoking gun" testimony, proof of subjective intent to cause environmental harm would rarely be available in coverage litigation.

- Court found unjustified the application of a general rule in environmental coverage litigation permitting intent to injure to be presumed simply on the basis of a knowing discharge of pollutants.

- Instead, court held that "in environmental-coverage litigation a case-by-case analysis is required in order to determine whether, in the context of all the available evidence, exceptional circumstances exist that objectively establish the insured's intent to injure."

- Further, court formulated a test for determining whether exceptional circumstances exist, the elements of which include: (1) the duration of the discharges; (2) whether the discharges occurred intentionally, negligently or innocently; (3) the quality of the insured's knowledge regarding the harmful propensities of the pollutants; (4) whether regulatory authorities attempted to discourage or prevent the insured's conduct; and (5) the

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

existence of subjective knowledge concerning the possibility or likelihood of harm.

- Court was satisfied that the Appellate Division had not assumed that the intentional discharge of pollutants by Morton's predecessors inherently warranted a presumption that any resultant damage was intended, but rather had concluded that environmental injury had been intended or expected on the basis of its evaluation of the record before it.

- Morton's argument that since the trial court in the underlying Ventron litigation concluded that it had not been established that Morton's predecessors intended to pollute the waters of the state, the trial court in the coverage proceeding could not properly conclude that an intent to pollute had been established as a matter of law was dismissed by court. Additionally, it explained that the Ventron court's observation was dictum and unnecessary to its conclusion that common law nuisance liability had been established because of the ultra-hazardous discharge of pollutants. In addition, the Ventron court focused on the question of whether intentional injury sufficient to constitute a common law nuisance had been proved which was different in substance and context from whether an injury was expected or intended under an occurrence-based liability insurance policy.

- Court was also in accord with the Appellate Division's conclusion that the insurers participating in the coverage litigation had the right to litigate the question of whether a covered occurrence had been established and were not bound by the Ventron court's determination as to intent involving different parties.

- Court noted that in view of its holding concerning the manner of establishing an insured's intent or expectation of injury in an environmental context, Morton's argument that material factual issues remained in dispute was unpersuasive.

- Court observed that although the magnitude of the damage to Berry's Creek may have exceeded any intention or expectation of Morton's predecessors, it did not give rise to a finding of "improbability of harm" such as would invoke the need for evidence of subjective intent, as set forth in SL Industries.

- Court stated that it was thoroughly persuaded that summary judgment was properly granted and that the record before it was such that it found "inescapable the conclusion that damage qualitatively comparable to that found to exist in the Ventron litigation must have been anticipated by Morton's predecessors on the basis of their prolonged knowledge of and avoidance of compliance with complaints by regulatory officials that the company was discharging unacceptable emissions, including mercury compounds, into Berry's Creek."

- Based on its conclusion, court concurred with both the trial court and Appellate Division determinations that as a matter of law the property damage to Berry's Creek and the surrounding area was not caused by an occurrence within the meaning of the term in the various liability policies.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

g. Lightman Drum Company Inc. v. Merchants Insurance Group, No. L-3688-90 (N.J. Super. Ct. Law Div. 1995), aff'd, No. A-63679472 (N.J. Super. Ct. App. Div. 1997).

- Insured's claims were for cleanup costs, fines and penalties imposed on insured for disposing of chemicals and toxic substances at landfills and on property it owned on which its business facility was located.

- Trial court utilized the five factor test formulated by the Supreme Court in Morton to determine whether exceptional circumstances existed which objectively established the insured's intent to injure.

- Proofs submitted for consideration by the trial court included violations, notifications and fines that were leveled against the insured with respect to a landfill site, including criminal charges, which court maintained indicated knowledge by the insured of the improper and illegal nature of its dumping.

- Court concluded that insured had subjective knowledge of likelihood of harm from its activities, as evidenced by the insured's repeated violations with respect to the landfill site, as well as the continuous dumping of hazardous wastes by the insured in utter disregard of the consequences, as evidenced by the criminal charges, arrests, fines and penalties.

- By comparing the five factors of Morton with the facts before it, court found there was no occurrence under the policies because of the egregious conduct of the insured in intentionally and deliberating polluting.

- Insured appealed.

- Appellate court affirmed the decision of the trial court, finding the testimony of the principal of the insured as to his knowledge of the toxicity of the substances to be compelling.

- Specifically, the appellate court held that while the insured may not have intended to cause environmental damage, it must have known that harm would ensue, and that this knowledge was established by the extraordinary circumstances test of Morton.

h. CPC International, Inc. v. Hartford Accident & Indemnity Co., No. L-37236-89 (N.J. Super. Ct. Law Div. 1996).

- Declaratory judgment was filed by insured against its insurers in 1989 seeking coverage for costs incurred and to be incurred to remediate contamination at three New Jersey facilities.

- Insurers filed a motion for summary judgment on the basis that, among other things, there was no occurrence as that term was defined in their policies.

- The primary argument of the insurers against coverage was that since the insured intended, or, at the least, expected that its long-

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

term pollution at the sites would cause damage, there was no occurrence under the policies.

- The insured maintained that the environmental problems at the sites were the result of leaking underground storage tanks and that the insured had no knowledge of the leaks until the tanks were investigated and excavated.

- According to the insured, the proper inquiry in determining whether there was an occurrence was whether the insured had a subjective intent to injure. The insured also contended that there should be coverage even if the insured's acts were intentional, provided that the consequences of those acts were unintended.

- Court noted that it was the insured's burden to prove that there was an occurrence under the policies, specifically that the insured did not expect or intend to cause the damage at issue.

- In reaching its decision, court rejected the insured's argument as to subjective intent and utilized the five prong test established by the Supreme Court in Morton in order to determine whether exceptional circumstances existed which objectively established the insured's intent to injure.

- After an extensive review of the facts with respect to each of the three sites utilizing the Morton test, court concluded that the insured failed to meet its burden to present evidence which would show a dispute as to a material fact.

- Court found that the insured's long-term continuous discharge of pollutants, combined with its knowledge of the injurious qualities of the pollutants, was more than sufficient to establish that there were exceptional circumstances which objectively established an intention or expectation of damage, and that therefore there was no occurrence under the policies.

i. Precision Adhesives Inc. v. ITT Hartford Insurance Group, No. L-5616-93 (N.J. Super. Ct. Law Div. 1997).

- Insured operated an adhesives manufacturing plant on leased property since the 1960's. Solvents, plasticizers and rubber compounds were utilized in insured's operations.

- In 1976, underground storage tanks were installed at the property for the purpose of storing various hazardous substances, including solvents.

- In 1988, it was determined that the piping associated with the tanks had leaked, grossly contaminating soil.

- DEP was notified and a directive issued to the insured to clean up.

- In 1989, groundwater contamination was discovered.

- Insured placed its carriers on notice in 1993.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- The primary carrier from 1976 to 1982 was in liquidation, and the primary carrier from 1985-1986 had an absolute pollution exclusion in its policies. Hartford Insurance Company ("Hartford") issued coverage from 1982-1985.

- At trial, one issue to be determined was whether an occurrence took place during Hartford's policy period.

- Insured alleged the leaks from the tank system were long-term, based upon the amount of grossly contaminated soil, groundwater contamination, and its expert testimony that the leak occurred before or during the years 1984-1985.

- Hartford alleged that the insured failed to meet its burden of proof in establishing an occurrence during its policy period.

- Trial court held that insured failed to meet its burden to prove by a preponderance of the evidence, an occurrence which caused property damage during Hartford's policy period.

- Court found Hartford's witness to be more credible than the insured's. In this battle of experts, defense expert won.

j. Carter-Wallace, Inc. v. Admiral Insurance Co., 154 N.J. 312 (1998).

- Plaintiff used a licensed waste hauler to dispose of its waste, which included trash and residual amounts of the chemical components of its products and solvents.

- This hauler deposited Plaintiff's waste, at the Lone Pine Landfill ("Lone Pine") from 1966-1979.

- EPA named Plaintiff as a PRP with respect to Lone Pine.

- Plaintiff eventually entered into an agreement with EPA and other PRPs to cleanup Lone Pine, as well as the off-site migration of the contamination.

- Plaintiff filed a declaratory judgment action against its insurers that issued coverage between 1966 and 1982.

- Plaintiff settled with all of its insurers, but for Commercial Union, prior to trial.

- As of the time of trial, Plaintiff's loss was approximately 9.2 million dollars, plus an additional loss of 6 million dollars consisting of counsel fees and expenses in the coverage action.

- At trial, jury found in favor of Plaintiff for coverage.

- On appeal, Commercial Union argued, among other things, that the trial court erred: (a) in assigning Commercial Union the burden to prove that Plaintiff's liability did not result from an occurrence; (b) in refusing to instruct the jury to apply the exceptional circumstances test in Morton; and (c) in instructing

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

the jury to apply a subjective standard in determining whether Plaintiff expected or intended the damage at Lone Pine.

- Appellate court noted that the trial court instructed the jury that the Plaintiff had the burden of proving coverage by "a fair preponderance of credible evidence" and that Commercial Union had the burden to prove "whether the damages were expected or intended by Plaintiff".

- Court disagreed with Commercial Union's position that it was Plaintiff's burden to prove an unexpected and unintended event, remarking that the general rule with respect to the issue is that the insurer must prove that a loss falls outside coverage.

- In reaching its decision, appellate court looked at whether the unexpected and unintended language in the definition of an occurrence was in the nature of a condition precedent or an exclusion.

- Court cited numerous decisions to support its conclusion that this was an exclusion, which shifted the burden of proof to Commercial Union.

- As to the allegation of Commercial Union that the jury should apply the Morton exceptional circumstances test, the appellate court looked to Morton and found that the Supreme Court noted you must look to the specific facts and circumstances of a case in order to determine whether proof of an occurrence has been established, not presume that the damage was intended.

- Agreeing with the trial court, the appellate court found that the evidence did not reach the level of intentional conduct as was found in Morton, and therefore there was no need to apply the exceptional circumstances test.

- Commercial Union then argued that a subjective standard should not apply because the definition of occurrence in its policy did include the words "from the standpoint of the insured".

- This court found that an application of both Voorhees and Morton instructs that the application of the subjective standard is not governed by the "from the standpoint of the insured" language.

- Commercial Union moved for leave to appeal to the Supreme Court.

- The Supreme Court granted certification.

- Court first noted the "exceptional circumstances" test it formulated in Morton in connection with occurrences and environmental coverage cases.

- It then explained that the burden to prove an insured expected or intended environmental damage rested with the insurer, since it would be impractical to require the insured to prove the

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

contrary, and since for all practical purposes, the unexpected and unintended language of the occurrence definition was tantamount to an exclusion which the insurer had the burden to prove.

- In this case, the trial court declined to instruct the jury in the five factor Morton "exceptional circumstances" test, although it did give extensive instruction as to whether Plaintiff expected or intended the contamination. Further, the Appellate Division upheld this determination on the basis that the conduct in this case did not rise to the level in Morton.
- Here, the Court concluded that if one assumes there was sufficient evidence to permit a jury to conclude Plaintiff expected or intended to damage the environment, *then the jury should have been instructed to consider the Morton* factors (emphasis added).
- Notwithstanding the foregoing, the Court found the instructions of the trial court to be sufficient to focus the jury on the issue of whether the Plaintiff expected or intended the damage in this instance, particularly since it emphasized that the jury could consider any circumstantial evidence presented, and that it should focus on the knowledge and expectations of Plaintiff's employees.
- In addition, the Court noted that Plaintiff's conduct in utilizing a licensed waste hauler to dispose of its waste, the majority of which was common trash, could in no circumstances be compared with the egregious conduct in Morton where mercury was disposed of into the environment without care or concern and despite demands from governmental authorities to cease such activities.
- Finally, the Court found that any shortcomings in the charges of the trial court were harmless, both in view of its instructions to the jury, combined with barely any evidence suggesting Plaintiff knew of or expected environmental harm.

k. Ciba-Geigy Corporation v. Liberty Mutual Insurance Company, UNN-L-97515-87 (N.J. Super. Ct. Law Div. 1998).

- Plaintiff insured filed a declaratory judgment and breach of contract action against its insurers in connection with environmental contamination at a number of sites, including its Toms River facility (the "Site").
- A bench trial as to the Site took place before Judge Lawrence Weiss in Union County.
- The time period at issue commenced in 1952, when the plant at the Site opened and ended on September 8, 1983, when EPA placed the Site on the NPL.

- Three primary carriers issued coverage during the years in question, as well as a number of excess carriers.

- The policies involved in the suit included both accident based policies, for the years 1955-1968, and occurrence based policies.

- Court found that New Jersey does not differentiate between these two types of policies for purposes of environmental coverage.

- Then the Court conducted an extensive review of the case law addressing whether there had been an occurrence under a liability policy, including a description of the application of the exceptional circumstances test of Morton, as well as an analysis of the case law with respect to the sudden and accidental pollution exclusion.

- The interesting conclusion reached by the Court was that "policies containing the standard pollution exclusion clause will be construed to provide coverage identical to the coverage provided in the previous 'occurrence' policies except in cases where an insured intentionally discharges a known pollutant."

- Court explained that in the situation of an intentional discharge of a known pollutant, it does not matter whether the resulting property damage was expected or intended, coverage will be barred.

- More importantly, the court noted that the insurers must show that the insured knew the pollutants were harmful at the time of disposal, not in this current day and age, which the insurers were unable to prove here.

- Court concluded that it was not enough to show the insured knew that full strength solvents were harmful to workers in the 1950's and 60's, since there was no knowledge until the DNAPL phenomenon was discovered in the 1980's that trace amounts of solvents could be a groundwater concern.

- Court also described that during the 1950's and 60's, the insurance industry recommended disposing of solvents by placing them on the ground to evaporate, evidencing that Plaintiff's actions were in accord with typical disposal practices of the time.

- It was also explained by the court that the federal government did not regulate most of the contaminants at issue in the groundwater at the Site until 1986 and that New Jersey did not regulate these types of contamination until the late 1970's and early 1980's.

- Next the court examined whether there was one occurrence or eight separate occurrences that triggered coverage (which was the insured's argument).

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- All of the disposal at issue took place at the Site as part of the insured's disposal of waste from its continuous manufacturing processes. Therefore, it was one continuous occurrence. The fact that waste was disposed of at separate portions of the Site was found by the court to be irrelevant as to this issue.

- Court supported its position by looking at both the definition of occurrence in the insured's policies and the continuous trigger theory of coverage advanced by the Supreme Court in Owens-Illinois. (See Section G 4e. below).

- The definition of occurrence specifically provided that "All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence."

- Further, the theory behind the application of the continuous trigger is that one cannot separate each individual instance of contamination from the whole process. This was found to be precisely the situation here, since there was no way to determine which portion of the groundwater contamination resulted from a particular disposal area.

- As to the burden of proof of whether the insured expected or intended the environmental damage at the Site, the court found that it fell squarely on the insurers and that it must be proven by a preponderance of the evidence, and that the insurers did not meet their burden.

- There were extensive findings of fact by the court concerning waste handling and disposal practices at the Site, which described in detail the various manufacturing processes of the insured, as well as its various generations of waste practices and treatments and the reasons for the changes in waste disposal practices over the years.

- Based upon the evidence before it, the court found most of the insured's waste disposal practices and mechanisms to be "state of the art" at the time they were utilized; that highly reputable individuals and consultants were hired to assist the insured with the design and redesign of various waste disposal systems; and that the governmental authorities were aware of most of the treatment systems and disposal areas, and in a number of instances laudatory of the insured's systems and practices.

- Court explained that the insurers could not use hindsight in their efforts to prove that the insured expected or intended to harm the groundwater at the Site.

- Further, based on the totality of the evidence presented, the Court held that unlike Morton, there were no "egregious circumstances present to require this court to infer intent on the part of Ciba."

- Court also noted that every time a problem was discovered by the insured, it took more than appropriate steps to address it.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Additionally, the court found the evidence presented supported the proposition that neither the insured, nor anyone else at the time, understood that the waste would effect the groundwater in the manner that presently exists, and since the insured did not have the knowledge at the time, it could not have expected or intended the pollution that the insured is remediating at the Site.

- Based on the foregoing, the Court held that all policies in effect from 1952, when the first of the plants began operating at the Site to 1984 were triggered.

l. Insurance Company of North America v. Anthony Amadei Sand & Gravel, Inc., No. A-2634-9575 (App. Div. 1998), rev'd on other grounds, judgment of trial court reinstated 162 N.J. 168 (December 12, 1999).

- This case arose out of the GEMS landfill, located on property owned by Gloucester Township ("Gloucester").

- The landfill was operated by Gloucester during the 1950's and 60's. In 1969, operations were taken over by the insured pursuant to a contract with Gloucester, which permitted the insured to also conduct a sand and gravel excavation business. The contract was guaranteed by the principals of the insured, including Anthony Amadei ("Amadei").

- The insured operated the landfill until 1975, continuing to accept municipal waste as well as other waste previously accepted by Gloucester.

- Amadei, a principal of the insured, had no knowledge of geology or how groundwater became contaminated. Further, when operations began at the Site, there was no EPA or DEP, only a state Department of Health. Amadei's primary concern at the time was trash fires, which was a common landfill occurrence.

- Further, Amadei maintained that he followed the directions of the appropriate regulatory authorities. In fact, in 1969 he asked for, and received permission from Gloucester for liquid waste from Rohm & Hass to be deposited at the landfill.

- Amadei dug holes 15 or 20 feet above the water table into which the liquid was deposited. He also would place some of the odorless chemicals on the landfill roads to keep the dust down.

- By letter dated June 5, 1970, the Chief of the State Bureau of Management informed Gloucester that the landfill could accept the Rohm & Hass waste. However, shortly thereafter a fire broke out, with state inspectors present, and neighbors complaining, and the permission was rescinded.

- Shortly thereafter, a permanent injunction was issued prohibiting "the dumping on the sanitary landfill or the acceptance for any purpose of oils, chemicals, or liquids with the exception of water."

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- After that, Amadei continued to accept sealed drummed waste which he claimed was with the knowledge of the local board of health, neighbors and DEP.

- Despite the Bureau's rescission letter, the insured applied to the Bureau for, and received, a solid waste disposal facility certificate of registration in August, 1970. This too was short lived. As a result of a September, 1970 oil incident, Amadei was again prohibited from accepting "any and all chemicals... "

- Nevertheless, Amadei continued to accept sealed drums as well as paint sludge.

- Despite everything, Amadei was never cited for improper disposal until 1974, when he was cited for disposal of paint sludge, and Amadei immediately ceased accepting the waste.

- Aetna Casualty and Surety Company ("Aetna") issued a primary and excess policy to the insured for the period of October, 1974 to October, 1975, both of which contained a sudden and accidental pollution exclusion.

- In 1986, INA, one of the other insurers of the insured, instituted a declaratory judgment action, asking the Court to find that it had no obligation to indemnify or defend the insured.

- After many years, motions and settlements, the matter proceeded to a jury trial in September, 1995. At that point the only remaining parties were Aetna, Amadei and the insured.

- Aetna presented its case first and the trial court ruled thereafter that Aetna had failed to establish that Amadei and the insured intended to pollute the environment and judgment was entered in favor of Amadei and the insured, without a determination by the jury.

- Aetna appealed.

- On the issue of whether the insured had the burden of proof with respect to whether there was an occurrence under the policies, after a lengthy examination of the case law on the topic, the appellate court concluded it was the insurers burden on the basis that the language that the damage must be unexpected and unintended from the standpoint of the insured was exclusionary in nature.

- Court noted that while the trial court did not conduct an analysis of this issue in a similar fashion, it nevertheless reached the same proper result in assigning the burden to Aetna, and therefore its decision was upheld.

- However, the trial court, rather than the jury, conducted the "exceptional circumstances" analysis under Morton as follows.

- As to the duration of the discharges, the trial court found no dispute that they took place from 1969 to 1974. In addition, it

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

concluded that the discharges were different from Morton in that despite the various regulatory approvals and rescissions, the discharges were properly placed into a recognized, licensed landfill by the insured.

- As to intentional discharges, there was no finding that toxic wastes were being intentionally discharged by the insured, since disposal was in accordance with approvals, again unlike Morton.

- As to the quality of the insured's knowledge of the harmful propensities of the waste, the court noted that while there were fires in the landfill, they were not caused by the chemicals at issue, but rather by hot mufflers, cigarettes and hot fiberglass. Further, there was no proof the fires caused the pollution. Again, the court continued to focus on the fact that there were no regulatory actions against the insured, other than minor ones that were resolved, and that Gloucester approved Amadei's use of the landfill.

- As to the efforts of regulatory authorities to discourage the insured's conduct, little or nothing was found. Further, the insured did not have specialized training and certainly could not have known or anticipated the contamination that resulted from the landfill operations.

- Finally, as to the existence of subjective knowledge of the possibility or likelihood of harm, the court found no evidence that Amadei had any knowledge of the possibility of harm, in a toxic sense, at the time these events were ongoing.

- On the issue of whether the jury should have made the determination under Morton as to the existence of exceptional circumstances and the determination as to whether there was proof of an occurrence under Aetna's policies, the appellate court concluded that Aetna's proofs in opposition to Amadei's claim of an innocent discharge and lack of knowledge of toxicity should go to a jury, and should not have been decided by the trial court.

- The primary basis of this decision was that the appellate court found that the facts at hand, which included both letters and injunctions,(which Amadei interpreted differently than Aetna), were sufficient to implicate his credibility and therefore required a determination by the jury, not by the court.

- Appellate Court concluded held that a well crafted jury instruction on the Morton exceptional circumstances test was warranted here and remanded the matter to the trial court.

- Note: Aetna appealed to the New Jersey Supreme Court on the issue of whether Aetna was entitled to a jury trial. The Supreme Court ruled that it was not.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

m. CPC International, Inc. v. Brodson Properties, Inc., 316 N.J. Super. 351 (App. Div. 1998).

- In 1989, insured filed suit against its insurance carriers in connection with claims relating to costs incurred with respect to environmental contamination at 6 sites.
- Pursuant to court order, the suit moved forward with respect to 3 of the 6 sites.
- All insurers, but for two, Allstate and Hartford, settled with the insured.
- In 1996, on a motion for summary judgment, the trial court ruled in favor of the insurers, on the basis that the insured intended the environmental harm and on the basis of "known loss" doctrine.
- Shortly thereafter, for apparently strategic reasons, the insured made a motion, which was granted, to dismiss the suit as to the remaining sites, without prejudice.
- Allstate and Hartford appealed this decision and the insured cross-appealed as to the summary judgment motion.
- Court noted that the trial court made over 80 findings of fact in connection with its determination that there was no occurrence under the policies, and therefore, no coverage.
- To temper that, however, appellate court noted that the majority of the most damaging testimony was elicited from disgruntled former employees, and that the credibility of those employees was an open issue that was truly for the trier of fact.
- Appellate court then conducted a separate factual analysis as to each site.

Lyndhurst Site

- Beginning in 1941, operations at the Lyndhurst site consisted of the production of various chemical products.
- In connection with those operations, the insured stored various chemicals, including solvents, in aboveground and underground storage tanks and in 55 gallon drums.
- There was conflicting testimony from former employees concerning the testing of underground storage tanks for leaks and corrosion.
- This testimony included recitations of evidence of leaks from an underground tank that stored toluene, including inventory records that indicated large losses of product and a deteriorating parking lot in the vicinity of the tank.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- The tank was ultimately removed from service when a hole was discovered.

- There were also allegations by the former employees of discharges of waste to an unlined drainage ditch and the sanitary sewer line.

Newark Site

- The Newark site was acquired in 1951 and produced pharmaceuticals until 1988.

- Underground storage tanks containing butanol, TCE and toluene were used in connection with the operations.

- According to testimony, inventory records reflected large losses of TCE.

- Ultimately it was determined by the insured that the butanol, TCE and toluene underground storage tanks all leaked.

- There was also testimony as to improper storage of drums of chemicals that leaked, and cracks in underground sewage piping that caused leaks.

- Appellate court noted that no evidence was presented that any of the foregoing resulted in soil or groundwater contamination.

Montville Site

- From 1945 to 1978, pharmaceutical products were manufactured at the Montville site.

- Waste was deposited in a clay lined lagoon from 1952 to 1970 and drums containing waste were buried on site from 1959 to 1974.

- In 1979, groundwater contamination arising from the foregoing areas was discovered.

- As early as 1955, the Passaic Valley Watershed complained of contamination from the lagoon, and it filed suit against the insured in 1959.

- As a result of the suit, the insured was permitted to continue to use the lagoon, provided the insured eliminated the seepage of contaminants.

- The Department of Health obtained a similar order about 9 years later with respect to contamination of the Crooked Brook.

- In addition, further evidence of the contamination of the Crooked Brook from the lagoon (through hydraulic pressure, rather than groundwater) was discovered around 1968 or 1969,

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

and the insured ultimately ceased using the lagoon around 1970. However, the tar at the bottom of the lagoon was left in place.

- The insured also ceased burying drums around the same time it ceased using the lagoons, but contamination from those drums continued to seep into waterways.

- In 1974, the insured allegedly removed all the buried drums, although additional drums were discovered in 1977 and removed.

Appeal

- On appeal, court took into consideration the foregoing factual information in determining whether summary judgment should have been granted to the insurers, on the basis that there had not been an occurrence under the policies issued to the insured from 1964 to 1986.

- Appellate Court reversed the trial court's grant of summary judgment on the basis that (1) trial court should have examined whether the insured intended to cause contamination that was "qualitatively comparable" with that which occurred; (2) the burden of proof was incorrectly placed on the insured; and (3) trial court made a determination as to certain factual issues, which should have been left to the trier of fact.

- As to the first issue, after a lengthy analysis, court concluded that the "exceptional circumstances" test in Morton should be applied to determine whether the insured intended to cause environmental harm comparable to that which did in fact take place.
  Of particular interest was appellate court's position that egregious conduct on the part of the insured was not a prerequisite to the application of the "exceptional circumstances" test.

- Since the trial court failed to focus on the issue of whether "qualitatively comparable" environmental harm was expected or intended, appellate court remanded the matter to the trial court.

- On the next issue, burden of proof, based on the decision of the Supreme Court in Carter-Wallace, the burden was on the insurers to prove that the insured expected or intended the environmental harm. Since, the trial court had placed the burden of proof on the insured, its analysis was faulty and a re-examination of the issue by the trial court was required.

- Finally, appellate court found genuine issues of material fact which precluded summary judgment.

- Specifically, the court explained that even though it found evidence submitted by the insurers, as to "exceptional circumstances", to be quite persuasive, especially as to the Montville site, it was not within the province of the trial judge to weigh the evidence and make conclusions when there were clearly issues of fact.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Appellate court found this to be particularly true in connection with trial court's determination as to the credibility of witnesses, clearly something to be left to the jury.

n. Merck & Company Inc. v. Federal Ins. Co., No.: CM-340-96 (N.J. Sup. Ct. 2000).

- Insured, Merck & Company, Inc. ("Merck"), filed a declaratory judgment action against its insurers in connection with environmental liabilities relating to thirty sites in the United States and abroad.

- As with most multi-site suits, Merck's claim concerning one site, in Hawthorne, New Jersey (the "Hawthorne Site"), was selected to be tried first.

- The Hawthorne Site was utilized for many years for the manufacture of compounds containing mercury.

- Merck acquired the Hawthorne Site in 1966 and maintains that the operations involving mercury ceased in 1970.

- Merck moved for summary judgment on the issue of whether there had been an occurrence under the applicable policies.

- In reaching its decision here, court cited Morton and Carter-Wallace for the proposition that the insurer has the burden to prove the subjective intent of an insured to cause environmental damage, and that subjective intent may be objectively inferred where "exceptional circumstances" exist.

- It then went on describe the Morton factors that can be used in establishing exceptional circumstances and held that there were certain allegations of this case that could fall within the Morton factors, such as that mercury was combined with dirt and other materials and used as fill until the early to mid 1960s; that industrial discharges continued at the Hawthorne Site in the early 1970's, in contravention of a sewage commission order; that stills used as part of the mercury recycling process continued operating through the late 1970's; and that photographic mercury was purchased for recycling into the 1970's.

- While Merck had testimony in its favor as well, court explained that the insurers could defeat the summary judgment motion by submitting " ... enough evidence of exceptional circumstances from which it could infer Merck's subjective intent to cause the environmental damage which ultimately occurred."

- Basically, court felt that there was sufficient contradictory evidence to give the insurers their day in court on this issue.

o. GAF Corp. v. Hartford Accident & Indemnity Co., No. 980-97 (N.J. Super. Ct. Law Div. 2000).

- In this suit, GAF seeks, among other things, coverage from its insurance companies in connection with contamination at six sites in New Jersey.

- The applicable insurers move for summary judgment on the basis that GAF had no nexus to the foregoing sites until after the policies pursuant to which it seeks coverage expired.

- GAF argues that the trigger of coverage is its legal liability for property damage not the actual events that caused the property damage.

- Court was not persuaded by GAF's argument that it was entitled to coverage under policies that expired prior to the involvement of GAF at the sites and granted summary judgment to the insurers, without prejudice, giving GAF a four month period within which to conduct discovery and prove a nexus to the sites.

p. Waste Management Inc. v. Admiral Ins. Co., No. L-931-92 (N.J. Super. Ct. Law Div. 2000).

- Waste Management and its affiliates ("Plaintiffs") filed suit against a number of its insurers in connection with contamination at a number of disposal facilities.

- Insurers moved for summary judgment as to five New Jersey sites on a number of bases, including that there was no occurrence during their policy periods.

- One of the first arguments raised by certain of the insurers was similar to that raised in the GAF case set forth above. Specifically, that Plaintiffs are not entitled to coverage under policies for a period of time in which they had no connection with a site or the environmental damage taking place at a site.

- Plaintiffs argued that since others had caused damage at the sites during the foregoing policy periods and since they are jointly and severally liable under CERCLA for all damage at the sites, even before any involvement at the sites, they should be entitled to coverage.

- Plaintiffs proposed that the language in the policies that provide that the insurer "...will pay all sums that the insured is legally obligated to pay because of property damage caused by an occurrence..." gives them the right to coverage.

- Insurers countered that the policy must be read as a whole, including the policy period provisions and the limitations on the amount of coverage during a policy period, to find that an insured must have liability during the policy period in order for there to be coverage.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Insurers further argued that they never intended to cover risks they could not foresee, including the strict liability provisions of CERCLA, which makes a party liable for all damage, not just the damage it created, and cite to a number of cases to support their position.

- Court, in reaching its decision, noted that the issue presented is a difficult one to resolve in an environmental damage context in which there is a retroactive imposition of absolute liability.

- It examined the theory of insurance, which relates to a transfer of risk to an insurer by the payment of a sum of money (premium) by the insured.

- Court explained that if it accepted Plaintiffs' argument, it would be imposing a risk upon an insurer which neither party could have foreseen at the time the policy was issued, and for which no premium was charged.

- Further, Court stated that even though Plaintiffs are technically jointly and severally liable under CERCLA for pre-involvement damage at a site, in reality loss is allocated among PRPs to the extent of risk assumed, such as the amount of waste disposed.

- Court held that "...based on the policy language some connection must exist within the policy period between the damages and liability of the insured." It concluded that the liability of Plaintiffs under CERCLA was based on status, whether owner, operator or transporter, and that the particular status was not achieved until Plaintiffs actually became involved at a site. As a result, there was no coverage under a policy for a period prior to such involvement.

- Insurers also moved for summary judgment on the basis that there was no occurrence at the sites.

- Court, citing to Carter Wallace, began with a general explanation of the issue stating that it was the burden of the insurers to prove whether Plaintiffs expected or intended the environmental harm. It also recited the test established by the Supreme Court in Morton to determine whether exceptional circumstances exist that objectively established Plaintiffs' intent to injure. Finally, it proposed that the focus of its inquiry should be whether the insured "...intended or expected to cause environmental harm comparable both as to severity and type with that for which indemnification is sought."

- It then described the factual information submitted by the insurers and the Plaintiffs in connection with the motion, as to each of the sites at issue.

- For example, at the Cinnaminson Landfill site, insurers presented factual information, some of which appeared to be quite persuasive, to support the argument "... that Plaintiffs expected and intended to cause environmental damage because

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

they dumped directly into the water and they were aware that leachate was flowing from the landfill into the groundwater."

- Even with the evidence propounded by the insurers as to each of the sites, court found that there were issues of fact and credibility as to Plaintiffs' intent that needed to be determined by the trier of fact and summary judgment was denied on this issue as to all of the sites.

q. Rohm and Haas Company v. Allianz Underwriters, Inc., Superior Court of New Jersey, Mercer County, Docket No.: L-87-4920. January 6, 2004.

- Rohm and Haas is a specialty chemical company.

- From 1951 to 1960, Rohm and Haas utilized an independent hauler to remove and burn liquid organic chemical wastes at sites in southern New Jersey known as the Woodlands Sites.

- CERCLA liability has since been imposed for those sites.

- In 1987, Rohm and Haas filed a declaratory judgment action to compel its insurers to provide coverage for the government ordered clean up costs due to soil and groundwater pollution at the Woodlands Sites. Since that time, Rohm and Haas settled with all defendants with the exception of CX Re, an excess CGL carrier.

- Based upon an agreement between the parties, the trial of this case was conducted by a Special Master.

- The Special Master concluded on July 24, 2000 that while Rohm and Hass proved its entitlement to insurance coverage under the excess policies by making out a prima facie case and establishing the existence of an "occurrence", that coverage was voided by three defenses raised by insurers: 1) the pollution was "expected or intended", 2) The pollution was not sudden and accidental, and therefore the pollution exclusion applied to the claim and 3) late notice. Thus, the Special Master a recommended that declaratory judgment be entered in favor of the Defendants on all claims for coverage against them.

- Both parties then sought the trial court's review of the Findings and Conclusions of the Special Master.

- After a thorough review, the Superior Court reversed the Special Master on all three of his findings, and held that the insured was entitled to coverage.

- For purposes of this Section, the Superior Court's decision with respect to the "expected or intended" defense will be analyzed. The pollution exclusion and late notice elements will be addressed in Sections B and C, respectively.

- In conducting its review, court noted that coverage is precluded for environmental cleanup costs resulting from an event that is "expected or intended by the insured."

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court then analyzed the intent of the parties here under Morton decision. (Summarized at f., above) noting that the insurer has the burden to prove that the insured actually intended or expected to cause qualitatively comparable harm from its actions to that which actually took place and that it acted knowing the actual injury that resulted from its actions was a substantial certainty.

- In analyzing the intent of the parties, the court concluded that the Special Master erred when he stated that a "known risk" may constitute a substantial certainty that harm will result.

- Court also examined the facts of this matter in light of the "exceptional circumstances" test established in Morton and explained that the determination of expectation and intent to cause environmental harm hinges on that of "corporate management", not on that of every employee of the corporation.

- Here court looked with favor on the insured's following of the guidelines of the American Insurance Association when its agents "cautiously ignited" or allowed its chlorinated hydrocarbons to evaporate. Court viewed the following of such guidelines as evidence that the insured did not expect or intend to cause environmental injury and noted that the Special Master failed to address this point in his findings. In addition, while the Special Master observed that the operations at the Woodlands Site were done with the knowledge and permission of the local authorities, it failed to take this important fact into account in its analysis particularly since the Carter Wallace and Universal-Rundle decisions each suggest that an "absence of regulatory warnings to the insured that its waste disposal methods were causing harm of the type later found to exist supports the conclusion that the insured did not expect or intend the harm."

- Court further noted that Rohm and Haas utilized an independent hauler and that there was no evidence of subjective knowledge that its actions were unacceptable.

- After analyzing the facts in this matter in light of the Morton factors, trial court held that the defendants did not assert a valid expected/intended defense and the trial court refused to uphold the recommendation of the Special Master precluding coverage on this basis.

r. Atlantic Disposal Service v. Utica Mutual Insurance Company, No. A-2980-01T2, N.J. Super., App. Div., June 14, 2004.

- Declaratory judgment action for indemnity and defense costs arising from state and federal environmental actions was filed by Atlantic Disposal Service ("ADS") and its owners collectively "Plaintiffs" against its insurers.

- ADS was a New Jersey corporation that operated as a waste disposal service.

- This suit involves the disposal activities of ADS at several state licensed non-hazardous waste dump sites and at a tract of undeveloped farmland in Tabernacle Township.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- ADS allegedly dumped hazardous wastes at a number of sites from 1973 to 1988.

- During the relevant time period, defendants issued primary, umbrella or excess comprehensive general and commercial liability policies to ADS in varying amounts ranging from $100,000 in 1973 to $10.5 million in 1988. ADS claims that the total value of the insurance over that period was in excess of $100 million.

Landfill Sites

- According to the facts of the case, ADS was licensed to transport non-hazardous municipal, non-chemical industrial, bulky and commercial waste to state licensed landfill sites.

- Alvin White, a principal of ADS, stated that ADS typically serviced "small, dry waste material companies". He further claimed that their general policy was to not accept liquid wastes.

- Defendants (insurers) maintained that in 1974 ADS filed a registration certification with DEP indicating that they were "hauling liquid hazardous wastes".

- ADS acknowledged that during the time period in question they hauled non-hazardous "drummed liquid waste" and "liquid chemical waste". Statements filed by White with the DEP at the same time indicated that ADS did not haul liquid hazardous wastes.

- White admitted that ADS did haul liquid wastes for certain customers. However, he insisted that it accepted drums of liquid for disposal before it was illegal to transport such drums routinely to landfills.

- The dispute over the landfill sites centers around whether ADS intentionally dumped the hazardous materials at the sites.

- The expert for ADS contended that the contamination at the landfill sites was neither expected nor intended by ADS because the sites were licensed by the DEP at the time the disposals took place.

- Trial judge denied the motion of ADS for summary judgment with regard to the landfill sites. Coverage hinged on the issue of whether or not there was an occurrence under the policies. Trial judge noted that the intent of ADS was dispositive of its entitlement to a defense, but held that issues of mental state are generally not appropriate for resolution by way of summary judgment.

- On appeal, Appellate Division reversed, seeing no genuine issue of material fact as to intent. Court noted that the defendants presented no evidence of intent by Plaintiffs to pollute the landfill sites and therefore failed to meet their burden to prove that Plaintiffs expected and intended to harm the environment.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

Since an insurer must bear that the burden and failed, summary judgment was appropriate in this instance.

- Appellate Division described the issue of whether hazardous substances were hauled to the site "irrelevant" and "insubstantial in nature". Court stated that even if ADS had hauled hazardous wastes to the landfills, it was "still entitled to a defense insofar as it may have done so unintentionally."

Tabernacle Site

- ADS also hauled waste described as paints and thinners, solvents, caustic solutions, zinc phosphate sludge and flammable material for a USX plant in Delair, NJ. According to ADS's former CFO, at one point ADS attempted to cease transporting the drums, only to be threatened by USX that it would lose its contract if it did so. Subsequently, ADS began storing the containers at its office headquarters.

- Robert Ware, an ADS truck mechanic who lived on a 15 acre tract in Tabernacle maintained that a manager from ADS approached him about storing the drums on his property. Ware claimed that he was paid between $2 and $5 a drum for the use of his land. According to Ware, ADS later entered his property and dumped the drums from a truck, allowing some of them to break open, spilling their contents. ADS disputes this claim, stating that Ware transported the drums himself, and sold them for a profit.

- On 2/17/84 an administrative order was issued by the EPA under CERCLA ordering ADS to remove the drums, contaminated soils, conduct soil sampling and install groundwater monitoring wells at this site.

- ADS notified its insurance carriers of the EPA claim. First State took the position that it could find "no clear cut indication of a sudden or accidental discharge."

- On June 30, 1988, EPA issued its record of decision directing further remedial action on the part of ADS.

- In August, 1990 EPA filed a federal enforcement action against USX and ADS demanding $1.1 million in unreimbursed response costs for the site. ADS named its various insurers as third party defendants, all of which subsequently denied coverage.

- In June, 1994, the EPA action was settled with respect to USX. In November of that same year, ADS entered into a consent order with EPA.

- In this action against its insurers, ADS seeks indemnification of its settlement amounts and defense costs.

- At trial, a battle of the experts commenced over whether the scientific community was aware during the 1970's of the dangers associated with groundwater pollution. The trial court ultimately concluded that Plaintiffs were not covered under the policies because of their knowledge of the dangers associated with the

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

actions at the Tabernacle site, and granted summary judgment to the insurer defendants.

- Appellate Division upheld the trial court's application of the Morton factors to the case in reaching its conclusion that Plaintiffs were not entitled to coverage under the policies. Court cited several factors as leading to the inescapable inference that ADS knew that environmental damage would result from the depositing of the drums at the Tabernacle site, specifically, the duration of the discharges, the length of time ADS allowed the drums to remain on the property, the reckless manner of depositing the drums, ADS's failure to quickly remediate the damage, and its specific knowledge that the drums contained liquid waste. Thus, the grant of summary judgment to the defendants here was affirmed.

s. Crivelli v. Selective Ins. Co. of America, 2005 WL 2649314 (N.J.Super.A.D. Sept. 27, 2005)

- Plaintiff Crivelli hired Svenson to install asphalt shingles on top of existing shingles on the roof of its residence. Svenson also made subsequent repairs to the soffit and fascia on the roof. Because of Svenson's negligence, Plaintiff sued and was awarded a $400,000 judgment against Svenson, in order to gain an assignment of rights held by Svenson and his employer, Svenson Bros., Inc., pursuant to the corporation's commercial general liability policies.

- Plaintiff then filed an action for a declaratory judgment against both Selective (1992-1993) and St. Paul Insurance Companies ("St. Paul"), which were successors in interest to United States Fidelity & Guaranty Co. (1988-1992), seeking indemnification under policies issued by these companies and satisfaction of their judgment.

- The policies at issue, which contained a pollution exclusion, guarded against bodily injury and property damage caused by a defined occurrence in the defined territory during the policy period.

- In granting summary judgment to St. Paul, the trial court found that the corporate policy did not protect Svenson in an individual capacity, and that there were no occurrences or any foundation for a continuous trigger coverage theory as applied by the courts in environmental cases in New Jersey.

- The trial court also granted summary judgment to Selective, holding that the Plaintiff had not suffered bodily injury or property damage pursuant to the terms of the policies during the policy period.

- On appeal, Plaintiff argued that there was an occurrence during the policy period, including continuous environmental contamination.

- Court upheld trial court's grants of summary judgment to the insurers. Court found that the complaint in the underlying litigation did not allege any water damage in the house before

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

1994, and no health problems until at least 1995. Because the Plaintiffs did not provide any factual or expert evidence of a leak before December 6, 1993, there was no dispute of material fact as to whether there had been an occurrence pursuant to the terms of the policy between 1992 and 1993. Also, Plaintiff failed to provide evidence of progressive injury from Svenson's installation and repair work in the late 1980s.

5. Selected Ohio Case Law

a. Grand River Lime Co. v. Ohio Casualty Ins. Co., 32 Ohio App. 2d 178 (Ohio Ct. App. 1972).

- Suit was brought by residents against Grand River Lime Co. ("Grand River") alleging property damage and personal injury caused by the quarrying and manufacturing operations of Grand River and the resulting emission of air pollutants over a period of seven years. Grand River then filed suit seeking a declaration that its insurer, Ohio Casualty Insurance Co. ("Ohio Casualty"), was obligated to defend Grand River in the underlying suit. Ohio Casualty responded with a motion for summary judgment, which was granted.

- The first cause of action asserted in the underlying suit involved allegations of nuisance and trespass and the second involved willful and intentional misfeasance and malfeasance.

- Court held that the second cause of action would not qualify as an "occurrence" under the policy since it asserted the knowledge and willful intent of the insured, which would constitute an expected or intended event.

- As to whether the allegations in the first cause of action constituted an "occurrence", Ohio Casualty proposed that court's focus should be on the activity which produced the alleged damage and whether the insured intended the activity. In applying this proposition Ohio Casualty argued that Grand River, which emitted substantial amounts of industrial waste into the atmosphere for a period of seven years, should necessarily be charged with expecting the damage to property which resulted.

- Grand River argued that an "occurrence" need not be sudden but can be produced over a long period of time and that coverage should be afforded for the injury or damage, regardless of whether the activities producing such injury or damage were intended and the residual results fully known to the policyholder, provided that the damage itself is unexpected and unintended.

- Court adopted Grand River's interpretation of "occurrence", holding that "occurrence" has a much broader meaning than "accident" and may encompass events over a period of time.

- Court also adopted Grand River's argument that intentional acts may result in unexpected and unintended damage.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

b. Buckeye Union Ins. Co. v. Liberty Solvents and Chem. Co., Inc., 17 Ohio App. 3d 127 (Ohio Ct. App. 1984).

- In 1982, the State of Ohio filed an action against Liberty Solvents & Chemicals Co., Inc. ("Liberty Solvents") alleging that it was a generator of hazardous waste which contracted with a disposer of hazardous waste, and that the waste was discharged when drums were dropped, ruptured or punctured by the disposer thereby contaminating the surface waters, soil and groundwater at the disposal facility.

- In 1983, EPA filed an action in connection with the same matter, and the state and federal lawsuits were thereafter consolidated for trial.

- Liberty Solvents notified its insurer of the pending lawsuits, and the insurer responded by filing a declaratory judgment action.

- The trial court granted the insurer's summary judgment motion on both its duty to defend and its duty to indemnify.

- On appeal, the appellate court overturned the trial court's decision.

- Court held that the release of pollutants which caused the damages alleged in the complaint was an occurrence for which coverage could be afforded under the liability policy.

- In reaching its determination, court found that for purposes of determining the insurer's duty to defend, the allegations of the underlying complaint sufficiently stated an "occurrence" within the meaning of the policy, noting that the "releases and threatened releases" of hazardous waste materials alleged in the complaint were surely "occurrences" within the common understanding of that term.

- Court also concluded that Liberty Solvents neither expected nor intended the releases of the substances into the environment.

c. Kipin Indus., Inc. v. American Universal Ins. Co., 41 Ohio App. 3d 228 (Ohio Ct. App. 1987).

- Worldpipe Service Company ("Worldpipe") was a partnership founded in part by Kipin Industries, Inc. Worldpipe hired Chem-Dyne Corporation ("Chem-Dyne") to dispose of the waste produced in connection with Worldpipe's operations. Worldpipe was insured by the insurer during the period it contracted with Chem-Dyne to dispose of its waste.

- Worldpipe was named in two consolidated suits brought by federal and state environmental agencies involving cleanup of a disposal site. Lower court held that the insurer had a duty to defend Worldpipe.

- Court applied Buckeye Union and held that an "occurrence" as defined in the policy may take place over a span of time, finding that releases of hazardous waste at landfill fit into definition of occurrence.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

d. Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co., 84 Ohio App. 3d 302 (Ohio Ct. App. 1993).

- Sanborn Plastics Corporation ("Sanborn") sold hydraulic oil used as part of its manufacturing process to a company engaged in the business of collecting and recycling waste oils. As part of its business, the recycler maintained a facility in Ohio where the collected oils were stored and recycled in above ground and underground storage tanks.

- In 1982, Sanborn received notice that it had been named as PRP in connection with the waste oil facility. Sanborn did not notify its insurer of that notice.

- In 1984, EPA instituted an action against the recycler seeking recovery of funds it expended in connection with the cleanup at the facility. The complaint alleged that the release or discharges of hazardous substances at the facility had occurred over a four year period and that on a date certain, there had been a discharge of oil and other substances from the facility into a nearby creek.

- In 1986, Sanborn was named as third party defendant in the EPA action on the basis that it had arranged for the disposal of hazardous substances at the facility.

- In April 1988, after receiving another letter from EPA, Sanborn notified its insurer of the third-party complaint requesting that it undertake its defense in this action.

- The insurer failed to respond and Sanborn instituted a declaratory judgment action.

- Trial court refused to grant the insurer's summary judgment motion on the issue of whether there was an "occurrence" or an "accidental event" under its policies.

- Appellate court rejected the insurer's argument that it was Sanborn's handling of the oil which must be judged in determining whether an "occurrence" or "accidental event" had taken place within the terms of the policy. Court noted that under CERCLA, Sanborn's actions were irrelevant since any company which gave waste to another to transport to a disposal site could be held absolutely liable for any damage which occurred after the waste has been transferred.

- Court proposed that the key events for determining whether an "occurrence" or "accidental event" had taken place included those which took place at the disposal facility and that the only facts relevant to this matter were those which took place after the oil was transferred from Sanborn to the facility.

- In describing the complaint in the underlying action, court noted that it was neither stated nor implied in the complaint that the releases of hazardous substances which had allegedly damaged

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

the land and environment were in any way intended or expected by the owner or operator of the facility.

- Court concluded that the complaint in the underlying action did state an event which arguably constituted an "occurrence" or "accidental event" under the policies at issue.

e. Sherwin-Williams Co. v. Certain Underwriters at Lloyd's of London, 813 F. Supp. 576 (N.D. Ohio 1993).

- Sherwin-Williams Company ("Sherwin-Williams") brought a declaratory judgment action against its insurers for defense and indemnification in connection with five suits against Sherwin-Williams for damages resulting from the use of lead pigment in paint.

- Sherwin Williams moved for summary judgment on the issue of the insurers' duty to defend.

- Court in reaching its conclusion as to whether there had been an occurrence under the policies at issue conducted a separate analysis of each of the five underlying complaints, as compared to the policy language.

- The complaint filed in Santiago v. Sherwin-Williams, the first underlying action, contained allegations that the plaintiff suffered severe pain, anxiety, mental distress and fear resulting from ingestion of lead paint during the years the insurers provided coverage. On motion for summary judgment, the insurer proposed that none of the plaintiff's claims constituted "occurrences" under the policies, arguing that the complaint contained allegations that Sherwin-Williams acted with a degree of foresight and intent in that it knew or should have known of the dangers of lead paint and it conspired to conceal the hazard lead paint posed to young children.

- Court stated that the insurers ignored the important distinction between intending an act and intending an injury, noting that it is possible to act in a manner producing risk and yet not intend to cause injuries.

- Court found that although Sherwin-Williams allegedly acted with knowledge of the risk posed by lead based paint, the complaint does not allege that it acted with the intent of injuring consumers or their children.

- In reaching its decision, court cited the holding in Physician's Ins. Co. of Ohio v. Swanson, 58 Ohio St. 3d 189 (1991) that in order to avoid coverage, the insurer must demonstrate that the injury itself was expected or intended not merely that the act was intentional.

- Two other underlying complaints, City of New York v. Lead Industries Association, Inc., and City of Philadelphia v. Lead Industries Association, contained allegations of negligent design and negligent failure to warn on the part of Sherwin-Williams

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

similar to those in the Santiago complaint. Court found that these types of negligent acts are "unintended" and "unexpected" within the meaning of the policy.

f. Goodyear Tire & Rubber Co. v. Aetna Cas. and Sur. Co., 2001 Ohio App. LEXIS 190 (Ohio Ct. App. Jan. 24, 2001).

- Goodyear and various related entities ("Goodyear") filed suit against its many insurance carriers in 1993, in connection with numerous actions under CERCLA relating to numerous disposal sites.

- By agreement of the parties, two sites, the Army Creek Landfill in New Castle, Delaware ("Army Creek") and the Motor Wheel Disposal site in Lansing, Michigan ("Motor Wheel Site") were tried first. Both of these sites related to the operations of Motor Wheel Corporation, a former subsidiary of Goodyear ("Motor Wheel").

- On June 8, 1998, court granted insurer's motion for a directed verdict on the basis that Goodyear failed to prove there was an accident or occurrence as a matter of law finding plaintiff, Goodyear, failed to "present sufficient evidence to put the defendants to their proof."

- Goodyear appealed the directed verdicts for a number of reasons, one of which related to whether there was an "accident" or "occurrence" under the policies at issue.

- Since court upheld directed verdict against Goodyear on other grounds with respect to the Motor Wheel Site, it only addressed the "occurrence/accident" issue as it relates to Army Creek.

- Insurers argued that Goodyear should have expected that its waste disposal practices would result in property damage.

- However, court found that this argument did not apply to Army Creek. Specifically, the trial evidence indicated that Goodyear believed that the phosphate sludge that was disposed of with its general trash in the 1960's was safe.

- As a result, court reversed the directed verdict on the basis that "Reasonable minds could conclude that at the time Motor Wheel sent the phosphate sludge for disposal during the 1960's, it did not expect or intend any property damage to occur."

g. Viola Altvater v. Ohio Casualty Insurance Company, 2003 WL 22077728, September 9, 2003. Not reported in N.E.2d.

- Robert Altvater was a plug mill operator in a brick factory operated by Claycraft from 1948-1980. During this time, he was exposed to silica dust. He died on March 17, 1983 as a result of chronic obstructive pulmonary disease and a lung autopsy revealed the existence of 15% silica dust.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- On August 10, 1984 Viola Altvater, his widow, filed a wrongful death and survivorship action against Claycraft, alleging Robert died as a result of an employer intentional tort.

- In this action, the jury ultimately found that Claycraft's actions constituted a "substantial certainty" employer intentional tort.

- Judgments were entered in Viola's favor, and several actions were undertaken to obtain the judgment award from Ohio Casualty, the insurer for Claycraft.

- Viola maintained in her suit that the "expected or intended" language in the policy does not preclude coverage of a substantial certainty tort, on the basis that there was no evidence of Claycraft's intent to actually injure the deceased.

- Court ruled in favor of Ohio Casualty , citing the Ohio Supreme Court decision in Penn Traffic Co. v. AIU Ins. Co. 99 Ohio St.3d 227 as dispositive. In Penn Traffic, a case with similar facts and issues, an additional endorsement existed in the commercial general liability policy at issue. The endorsement excluded coverage for: "bodily injury expected or intended from the standpoint of the insured" and for "acts committed by or at the direction of an insured with the deliberate intent to injure, and any liability for acts committed by or at the direction of an insured in which the act is substantially certain to cause bodily injury". Therefore, the plain language of the endorsement excluded coverage for direct intent as well as "substantial certainty employer intentional torts.

- In this case, there was no such additional endorsement specifically precluding coverage for "substantial certainty" torts. However, court concluded that the Penn decision ended the debate over whether intent to injure will be inferred as a matter of law in substantial certainty cases and that:

    1) where substantial certainty exists, intent to harm will be inferred as a matter of law;

    2) there is no coverage for substantial certainty employer intentional torts where an insurance policy excludes coverage for bodily injury "expected or intended" from the standpoint of the insured.

- Therefore court held, in the present case, that the underlying "substantial certainty" intentional tort excluded coverage under the policy.

- This decision has the net effect of creating an objective intent to injure standard, more easily provable than the alternative, subjective approach, which required the insurer to demonstrate actual intent to harm.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

6. Selected Michigan Case Law

a. United States Fidelity and Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139 (W.D. Mich. 1988).

- Thomas Solvent Co. ("Thomas Solvent") sold and distributed industrial solvents. Its operations included the underground and storage of solvents. Michigan's Department of Natural Resources ("MDNR") instituted suit against Thomas Solvent alleging groundwater contamination beneath the properties on which it conducted its operations. Thomas Solvent was also named in private party lawsuits alleging personal injury resulting from groundwater contamination.

- United States Fidelity & Guaranty Co. ("USF&G"), an insurer of Thomas Solvent, sued Thomas Solvent as well as other insurers of Thomas Solvent, seeking a determination as to which insurers must share in the defense of Thomas Solvent.

- On motion for summary judgment, USF&G argued that there had been no "occurrence" as that term is defined in its policy, since any property damaged that occurred during the policy period was expected or intended.

- Court, after reviewing supporting documentation, found that there were material facts as to whether any of the pollution was expected or intended.

- Court then went on to hold that since an occurrence may have happened during all of the policy periods in question, all insurers had a duty to defend.

b. Straits Steel and Wire Co. v. Michigan Millers Mut. Ins. Co., No. 91-72991-CK (Mich. Cir. 1992).

- Straits Steel and Wire Co. ("Straits Steel") was sued by EPA for cleanup costs incurred by EPA in connection with a landfill used by Straits Steel to dispose of hazardous waste. Straits Steel sought defense costs in connection with this suit from several of its general liability carriers which provided coverage between 1974 and 1988.

- Court interpreted the term "occurrence" to require that the damage be unexpected and unintended, not the accident. According to court, intentional dumping without knowledge of its effect would be an "occurrence".

- Court concluded that there would be coverage where there was an intentional discharge with unexpected and intended results.

c. Arco Indus. Corp. v. American Motorists Ins. Co., 198 Mich. App. 347 (Mich. Ct. App. 1993), rev'd, 448 Mich. 395 (1995).

- Arco Industries Corporation ("Arco") operated an automotive parts manufacturing plant in Michigan since 1967. As part of the manufacturing process, parts were dipped into a liquid plastisol or vinyl and some of the parts were treated with volatile organic

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

compounds ("VOCs"). Additionally, VOCs were used to remove the plastisol spilled onto the floors of the manufacturing plant, which contained a trench drainage system that emptied into an unlined "seepage lagoon" behind the plant. In conjunction with the foregoing activities, large quantities of VOCs were flushed through the drainage system into the lagoon.

- In November, 1985, the MDNR notified Arco of contamination emanating from its plant and ordered it to investigate the contamination and implement remedial measures.

- In October, 1987, the State of Michigan sued Arco seeking to compel it to remedy the contamination. Ultimately, a settlement was reached requiring Arco to pay $450,000 and to implement a groundwater treatment system and take other remedial measures.

- Arco notified its insurers of its claim in connection with the contamination, however, the insurers refused to indemnify or defend Arco. As a result, Arco instituted a declaratory judgment action against its insurers. All insurers but one settled prior to trial.

- The trial court found that Arco neither intended nor expected the VOCs to disperse into the lagoon and eventually into the groundwater and ordered the insurer to pay. The appellate court reversed.

- In reaching its decision, the appellate court noted that injury or damage is expected when it is the natural, foreseeable, expected and anticipated result of an intentional act.

- After reviewing the extensive evidence presented at trial, including the testimony of numerous former Arco employees that they intentionally dumped or spilled VOCs into the drains that led into the seepage lagoon and that they observed other Arco employees doing likewise, the appellate court held that there was no coverage since Arco knew or should have known "...that there was a substantial probability that certain detrimental consequences would result from its actions."

- On appeal, the Michigan Supreme Court reversed the appellate court decision, on the basis that the appellate court applied an incorrect standard in determining whether there had been an occurrence.

- Court held that the appellate court should have used a subjective standard, not an objective standard, in determining whether the insurer had a duty to indemnify and defend.

- Further, there should have been an analysis of the insured's conduct from its perspective as well as an analysis of whether the insured was aware that harm was likely to follow its actions.

- After a lengthy description of the factual findings of the trial court, court concluded that there was no evidence that

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

established that the intentional discharges were intended or expected to harm the environment.

d. City of Bronson v. American States Ins. Co., No. 175170 (Mich. Ct. App. 1996).

- Insured owned and operated three separate sewage and wastewater systems, including an industrial waste disposal system consisting of wastewater seepage ponds or lagoons, at an industrial area (the "Industrial Area").

- Insured constructed the industrial waste disposal system in 1939, which was utilized by several electroplating companies.

- From the mid to late 1940's, the system experienced serious problems, including an overflow from the lagoons which resulted in fish and cattle kills, and new lagoons were constructed. In addition, in 1950, evidence was presented to the Water Resource Commission that the lagoons were contaminating groundwater.

- Thereafter, the system continued to operate with another series of fish kills taking place in 1961 and 1962. Finally, the lagoons ceased operations in 1969.

- In 1986, EPA notified the insured that it was a PRP with respect to contamination from the lagoons.

- Insured also owned a sanitary landfill at which hazardous waste was disposed. In 1971 and 1972, it was determined that leachate from the landfill caused groundwater contamination and the landfill was closed in 1973.

- In 1986, the insured received a letter from an EPA contractor requesting permission to inspect the landfill site.

- In 1987, the insured instituted a declaratory judgment action against its insurers with respect to the Industrial Area and the landfill.

- On motion for summary disposition, the trial court concluded that there was no occurrence under an insurance policy because the insured knew that hazardous substances were being disposed of at the Industrial Area and the landfill and expected that this disposal could result in contamination.

- On appeal to the Michigan Court of Appeals the insured argued that the trial court incorrectly concluded that there was no occurrence under the policies.

- The Michigan Court of Appeals disagreed with the insured and affirmed the trial court decision holding that there was no occurrence under the policies since the insured knew by 1950 that the lagoons were causing groundwater contamination and continued to operate the lagoons knowing that such use could cause further contamination.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- In reaching its conclusion, the appellate court, citing Arco, held that a subjective standard should be utilized in determining whether the insured expected or intended the damage.

e. South Macomb Disposal Authority v. American Insurance Company, 225 Mich. App. 635 (1997).

- Insured developed and operated several landfills at various times from the late 1960's to the mid 1980's.
- Contamination of soil and groundwater at and in the vicinity of the landfill resulted from leakage of leachate.
- A number of declaratory judgment actions were instituted in connection with these landfills, which were consolidated into one action.
- The consolidated cases came before the appellate court on remand from the Supreme Court.
- Defendant, Westchester Insurance Company ("Westchester") argued on appeal that the trial court erred in failing to grant its motion for summary judgment on the basis that there was no occurrence under their policies.
- Westchester argued that the court should utilize an objective standard in determining whether there had been an occurrence under the policies.
- The court rejected this argument on the basis that the definition of "occurrence" in the policy was ambiguous since it failed to include either the word "reasonably" which would connote an objective standard or "from the standpoint of the insured" which would connote a subjective standard.
- Finding the definition of occurrence to be ambiguous, the court concluded that the policy must be construed in favor of the insured, and adopted the subjective, insured-based analysis.
- Court then looked to whether the insured evidenced an intent to cause contamination.
- Court examined whether there was evidence presented that the insured intended to cause the contamination at issue and knew that harm would result therefrom.
- Since Westchester failed to present such evidence, court concluded that there were no facts presented that showed the insured expected or intended the contamination. As a result, there was an occurrence under the Westchester policies.

f. Frankenmuth Mut. Ins. Co. v. Masters, 225 Mich. App. 51 (1997), rev'd 460 Mich. 105 (June 15, 1999)

- This decision was a non-environmental one. However, it is important from the perspective that it examined the issue of

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

whether an objective or subjective standard should be utilized in determining whether there had been an occurrence under a liability insurance policy.

- The insured was the owner of a retail store. He and his son set fire to the store intending to cause smoke damage to the inventory. They were each convicted of arson as to their store.

- The fire spread to two adjoining stores. The insured maintained he never intended to cause damage to those stores and was acquitted as to the arson charge as to those stores.

- The owners of the neighboring businesses and their insurers filed suit against the insured.

- Insured sought coverage under both a general liability and a homeowners policy.

- Frankenmuth Mutual, ("FM"), which issued the policies to the insured filed a declaratory judgment action.

- FM moved for summary judgment that there was no coverage under the policies, on the basis that there was no occurrence under the policies.

- Trial court granted the motion since the fire had been set intentionally.

- The insured argued that the trial court erred in ruling that there was no occurrence.

- In order to reach a decision, the appellate court first looked at the definition of occurrence in the policy, which included the term "accident", an undefined term.

- Based upon the Michigan Supreme Court's holding in Arco Industries Corp. v. American Motorists Ins. Co., 448 Mich. 395 (1995), this court concluded that it must look to the most commonly used meaning of the word.

- Additionally, the court held that since the policy was silent as to whose perspective was to be looked to in determining whether there was an occurrence, it must do so from the standpoint of the insured.

- Court analyzed whether the insured evidenced an intent to burn the adjoining buildings and whether he and his son were aware that their acts were likely to cause the harm.

- Court concluded that the trial court was in error in holding that there was no occurrence. Although the insured certainly intended to start the fire in his store, there was an issue of fact as to whether he expected or intended to burn the adjoining buildings. Court remanded matter to trial court for further factual development.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- On appeal, the Supreme Court reversed, holding that the collateral damage was not an occurrence as defined in the insurance policies at issue. Consequently, no occurrence triggered Frankenmuth's liability under the policies, since the fire was not accidental, and reinstated the trial court's grant of summary judgment in favor of Frankenmuth

- The Supreme Court focused its analysis on the definition of "accident". It found that the common meaning of this term, was that "an accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." Court therefore held that as a result, the accident must be evaluated from the standpoint of the party that set the fire, not those that were harmed.

- Court also held that the appropriate focus of the term "accident" must be on both "the injury causing *act* or *event* and its relation to the resulting property damage or personal injury." (Emphasis in original).

- When reaching a conclusion as to whether or not an act was accidental,..."determination must be made whether the consequences of the insured's intentional act either were intended by the insured or reasonably should have been expected because of the direct risk of harm intentionally created by the insured's actions." It does not matter that the resulting injury is different from the injury intended.

- Court noted that "it is irrelevant whether the harm that resulted, damage to the clothing store and surrounding businesses, was different from or exceeded the harm intended, minor damage to the clothing inventory", there is no coverage under the Frankenmuth policies.

g. Aetna Cas. & Sur. Co. v. Dow Chemical Co., No. 93-73601, 28 F. Supp. 2d 421 (E.D. Mich. Sept. 2, 1998).

- In 1956, the insured, Dow Chemical Co. ("Dow"), began producing thorium alloys at a facility in Illinois.

- A by-product of the foregoing operations was radioactive thorium sludge, which was deposited on a 40 acre portion of the facility (which is known as the Conalco site), pursuant to a governmental license.

- Dow complied with the license and with the law, including, training its employees and, testing for air emissions.

- In 1973, Dow sold the plant and its thorium disposal license to Conalco.

- In 1986, Conalco, sold the plant, but retained ownership of the Conalco site.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- In 1988, Dow and Conalco entered into an agreement to share the cost to remediate the thorium contamination. Dow's share was $17.2 million.

- Dow seeks coverage under policies issued from 1955 to 1971.

- The LMI moved for summary judgment on a number of issues, including that the damage was expected and intended, and therefore, there was no coverage.

- Court first examined the issue as to which party bore the burden of proof as to whether the insured expected or intended the damage. Unlike the New Jersey Supreme Court in Carter-Wallace, this court placed the burden on the insured, not the insurer.

- Dow argued that the "expected or intended" language was akin to an exclusion, and that therefore, the insurer had the burden of proof.

- While the court found the issue unsettled, it proposed that the better reasoned analysis places the burden on the insured to prove that the insuring agreement mandated coverage.

- Court was not persuaded by the argument that this result would be unfair in that it forced the insured to prove a negative, noting that it was within the insured's power to present evidence to support its position, since it had access to evidence concerning its expectations.

- The LMI also argued that there was no occurrence, since the insured intentionally deposited and stored the thorium.

- Citing to Arco, the court explained that Dow could obtain coverage if the harm was unintended, notwithstanding the fact the disposal was intended.

- Court also found that the analysis of whether the insured expected or intended the damage, should be performed utilizing a subjective standard.

- The next issue addressed by the court related to specific intent, that is whether the insured expected or intended the specific type and magnitude of damage.

- After a review of case law on this issue, including the decision of the New Jersey Supreme Court in Morton (which it found to be persuasive), the court explained that if evidence is presented to the effect that the damage that actually occurred was improbable, then the trier of fact must determine whether the insured actually expected or intended the damage that happened.

- There was also a lengthy discussion as to evidence of corporate expectation and intent.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- This included an examination of the conduct of the insured, together with subjective intent, and the competing interests of coverage for an insured that did not expect to cause harm, as opposed to conduct which evidenced an intent to cause harm.

- The LMI also argued that the collective knowledge of the officers and agents of Dow, should be imputed to Dow.

- Citing to Arco, court noted that while knowledge could be imputed, subjective intent could not.

- As to the issue of industry knowledge, court explained that it could be utilized as evidence of subjective intent, provided it was shown that "the insured actually received and understood the information."

- After examining the facts presented, court noted that there were issues of fact presented both as to whether Dow expected or intended that its disposal would contaminate the topsoil or cause the extent of actual contamination. As a result, summary judgment was denied.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

B. Owned Property Exclusion

1. Policy Language:

This insurance does not apply: (k) to property damage to (1) property owned or occupied by or rented to the insured, (2) property used by the insured, or (3) property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control; but parts (2) and (3) of this exclusion do not apply with respect to liability under a written sidetrack agreement and part (3) of this exclusion does not apply with respect to property damage (other than to elevators) arising out of the use of an elevator at premises owned by, rented to or controlled by the named insured.

2. Policyholder's Position - The owned property exclusion should not bar coverage for investigation and cleanup costs incurred by the policyholder if there has been damage to, or the threat of damage to, property of third parties.

3. Insurer's Position - The owned property exclusion excludes coverage for costs incurred to investigate or clean up contamination on the policyholder's own property, or for cleanup activities conducted on the policyholder's own property.

4. Selected New Jersey Case Law

a. Broadwell Realty Services, Inc. v. Fidelity & Casualty Co., 218 N.J. Super. 516 (App. Div. 1987), overruled, Reliance Ins. Co. v. Armstrong, 625 A.2d 601 (N.J. 1993).

- Court found that costs incurred by Broadwell for preventative measures taken on its own property, designed to abate the continued release of pollutants onto adjacent land, fell within the coverage afforded under the policy and could not be denied on the basis of the owned property exclusion.

- Court also acknowledged that recovery of expenses incurred solely to correct damage to Broadwell's own property, and not to prevent off-site contamination, was precluded by the owned property exclusion.

b. Summit Assoc. v. Liberty Mut. Fire Ins., 229 N.J. Super. 56 (App. Div. 1988).

- While trial court determined that the owned property exclusion did not preclude coverage since the health, safety, and welfare of citizens was at stake, Appellate Division in post-Broadwell setting, remanded for further factual determination as to whether contamination at the site threatened the property of third parties.

c. Diamond Shamrock v. Aetna Casualty, 231 N.J. Super. 1 (App. Div. 1989).

- In the course of chemical manufacturing operations, dioxins and other hazardous materials were released, resulting in contamination.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Manufacturer sought, among other things, indemnification from its insurers under primary and excess liability policies for the cost of remediating the dioxin contamination. Insurer disclaimed and the manufacturer brought suit.

- On review of motion for summary judgment, court noted that the appropriate inquiry as to the applicability of the owned property exclusion is not whether the sums expended are for work performed on the premises owned by the insured, but rather whether the sums expended were to prevent further imminent and impending injury to property owned by a party other than the policyholder.

- Court denied summary judgment, as Diamond Shamrock had not established that any other party or property had yet been damaged, and noted that if the evidence was established that contamination was posing an imminent threat to property interests of others, the trial judge would still have to determine whether abatement costs should be deemed as coming within the terms of the insurance contract.

- In light of the sketchy factual record, court declined to rule on whether the state's parens patriae interest in air, land and water is "property" which an insured must abate pursuant to a liability policy.

d. State, Dep't of Environmental Protection v. Signo Trading Intern., 235 N.J. Super. 321 (App. Div. 1989), aff'd, 130 N.J. 51 (1992).

- As a result of a warehouse fire, substantial remedial activities were undertaken inside a building. As neither the owner nor tenant took those actions, DEP proceeded to do the work at a cost of approximately $3.6 million.

- DEP instituted a cost recovery action, against the owner, Morton Springer & Co., which in turn filed a third party complaint against its primary and umbrella liability insurer seeking defense and indemnification with respect to DEP's claims.

- Trial court found that while there was "imminent danger" that contamination could migrate from the insured's property, it also specifically found that there had been no third party damage within the meaning of the policy. Specifically, trial court found no evidence that "there was migration of the chemical pollutants off the Morton Springer property... into any of the waters of the state."

- After decisions below, the New Jersey Supreme Court determined that "imminent" threat of danger to third parties is not sufficient to overcome the owned property exclusion, since the policy's definition does not encompass "threatened harm" alone.

- Supreme Court distinguished such cases as Broadwell and CPS Chemical v. Continental Ins., 222 N.J. Super 175 (App. Div. 1988), since in those cases a present injury to third parties had

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

already been demonstrated, together with continuing and imminent threat of further damage.

- Court noted that the Summit court had erred to the extent that it held that a policyholder could recover cost of preventative measures in the absence of established damage or injury to third parties.

- Significantly, Court declined to rule on whether damage to the state's *parens patriae* interest in air, land and water constitutes third party damage so as to constitute an exception to the owned property exclusion, since trial court had specifically found that there had been no migration of pollution into the waters of the state.

e. Reliance Ins. Co. v. Armstrong World Industries, 265 N.J. Super. 148 (Law Div. 1993), rev'd, 292 N.J. Super. 365 (App. Div. 1996).

- Armstrong, a former property owner, became involved in a multi-party suit after the current owner incurred substantial environmental cleanup costs due to alleged pre-existing contamination. At the time it owned the property, Armstrong was insured by Reliance under general liability policies which contained an owned property exclusion.

- Reliance instituted a declaratory judgment action seeking a declaration of no coverage. Armstrong filed a counterclaim for coverage and indemnification for its share of settlement costs paid to resolve the underlying action.

- Court rendered an initial interlocutory decision in favor of Reliance on the issue of the owned property exclusion based upon an analysis of Broadwell.

- However, following the Supreme Court's decision in Signo, Reliance filed a motion for modification of court's interlocutory ruling. The motion subsequently expanded to a motion for summary judgment by Reliance and a cross motion for summary judgment by Armstrong.

- Court held that the owned property exclusion precludes coverage for expenses incurred for cleanup measures designed to prevent future anticipated damage to adjacent property owners.

- Court rejected Armstrong's argument that groundwater is the property of the state and that cleanup costs to eliminate groundwater contamination is a third party claim unaffected by the owned property exclusion, noting that "there is no evidence presented that groundwater pollution has affected any actual third party adjacent property claimant."

- Court also rejected Armstrong's argument that the *parens patriae* interest of the state in the groundwater is a sufficient interest in property to constitute damage to a third party, namely the state, holding that the state's *parens patriae* authority is "a

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

colorable claim for damage" and is not synonymous with a "property interest" in real property.

- After three years on appeal before the Appellate Division, this matter was finally argued on May 15, 1996 and decided on July 22, 1996.

- Together with this matter, the Appellate Division heard seven other appeals on the issue of the owned property exclusion, which it also decided on the same day as this matter. See: Adron, Inc. v. Home Ins. Co., 292 N.J. Super. 463 (App. Div. 1996); Kentopp v. Franklin Mut. Ins. Co., 293 N.J. Super. 66 (App. Div. 1996); Ohaus v. Continental Cas. Ins. Co., 292 N.J. Super. 501 (App. Div. 1996); Sagendorf v. Selective Ins. Co., 292 N.J. Super. 81 (App. Div. 1996); Smidth v. Travelers Ins. Co., 292 N.J. Super. 483 (App. Div. 1996); Strnad v. North River Ins. Co., 292 N.J. Super. 476 (App. Div. 1996); United Mobile Homes, Inc. v. Foremost Ins. Co., 292 N.J. Super. 492 (App. Div. 1996).

- The Appellate Division noted that the issue before it was whether the groundwater beneath the insured's site was the property of the insured.

- Court explained that it previously addressed this issue in Morrone v. Harleysville Mut. Ins. Co., (See subparagraph h. below) and stated that it saw no need to revisit the issue or rehash the various arguments, although in reaching its conclusion, court did review numerous out of state decisions considering the issues relating to ownership of groundwater.

- Following the Appellate Division decision in Morrone, this court rejected the conclusion of the trial court that the owned property and alienated property exclusions were applicable because there was no evidence groundwater pollution harmed a third party. Instead, court reversed the trial court and held that the cost of remediation of groundwater pollution is covered and the owned property exclusion is inapplicable where damage is to the groundwater, rather than the insured's "property right of reasonable use" in the groundwater.

- In addition, this court adhered to the ruling in Morrone that the "care, custody or control" exclusion is inapplicable to groundwater, since it is not susceptible to the custody or control of a property owner.

- As to the "alienated premises" exclusion, court ruled that since the owned property exclusion was inapplicable, it could not be extended by this exclusion, the purpose of which was to take the place of the owned property exclusion when dealing with property that had been sold by the insured. Furthermore, since the insured did not own the groundwater, it was not part of the premises alienated by the insured.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

f. UMC/Stamford, Inc. v. Allianz Underwriters Ins. Co., 276 N.J. Super. 52 (Law Div. 1994).

- Insureds brought a declaratory judgment action against their insurers seeking coverage for groundwater contamination at sites in Roseland, New Jersey and Salinas, California.

- Insurers argued that since damage to the Roseland site was confined to the insured's own property, the owned property exclusion contained in its policies barred coverage.

- Court noted that while coverage is appropriate in connection with remediation expenses where off-site contamination results from on site contamination, the issue in this instance was whether there was coverage for soil and groundwater remediation on site, absent off-site damage.

- Insureds contended that groundwater contamination was not damage to an insured's own property but to that of another, and that therefore, damage to groundwater was not precluded by the owned property exclusion.

- Court framed the narrow issue presented to be whether the owned property exclusion precluded coverage in a situation where there was evidence of on site groundwater contamination only.

- In developing its holding, court noted that the Appellate Division in Woodson v. Pemberton Township, 172 N.J. Super. 489 (Law Div. 1980), aff'd, 177 N.J. Super. 639 (App. Div. 1981) held that a property owner has no proprietary interest in groundwater, only a right of beneficial use. Court then reviewed the trial court holding in Reliance that the owned property exclusion barred coverage for groundwater contamination.

- Court explained that the trial court in Reliance determined that there was no legislative authority creating a trustee status between the state and its citizens and that therefore, the property interest in groundwater was held by the owner of the surface land.

- Court rejected the position of the trial court in Reliance and instead found that N.J.S.A. 58:10-23. 11(a), 58:10-23. 11b(m) and (u) and 58:1A-2 imposed trustee status on the state with respect to public resources, such as groundwater, and that it was the public policy of New Jersey to eliminate the introduction of toxic chemicals into the groundwater N.J.S.A. 58:10-15.

- On the basis of the recited statutory authority, court concluded that there was legislative authority creating trustee status between the state and its citizens as to the groundwater.

- Court held that as long as there was actual contamination to groundwater which could be established to a reasonable degree of certainty to be likely to migrate off-site and cause damage, the owned property exclusion would not preclude coverage.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

g. Witco Corp. v. Travelers Indemnity Co., 1994 WL 706076 (D.N.J. 1994), aff'd, 82 F.3d 408 (3d Cir. 1996).

- Insured, Witco Corp. ("Witco"), a manufacturer of chemical products, operated a plant in Perth Amboy, New Jersey. The plant had its own sewer system which fed into the Perth Amboy municipal sewer system. In 1980, the sewer backed up and overflowed and eventually spilled into a creek. The DEP investigated and discovered a blockage in the sewer containing high levels of PCBs which was traced back to the Witco plant.

- As a result of the PCB contamination, three suits were instituted against Witco.

- Travelers Indemnity Company ("Travelers") issued liability policies to Witco from 1964-1973. It was Travelers position that the damages that were the subject matter of the three suits occurred after Travelers ceased insuring Witco.

- Witco instituted a declaratory judgment action against Travelers in 1986 after Travelers denied coverage of its claim.

- Travelers moved for summary judgment on the issue of whether Travelers policies would apply to remediation efforts on Witco's own property.

- In denying Travelers motion for summary judgment, court concluded that a question existed as to whether there was damage to third party property during the Travelers policy periods, but that under Owens-Illinois (see Section G below), it was likely that there was.

- Citing to Signo Trading, Broadwell Realty and CPS Chemical Co., Inc. v. Continental Insurance Co., 222 N.J. Super. 175 (1988) (all of which held that the cost of preventative measures taken on-site to abate the off-site migration of contamination were not precluded by the owned property exclusion), court concluded that if damage occurred while Travelers was on the risk, it would be obligated to cover at least some of the on-site contamination. Court also voiced its belief that on-site remediation efforts would be necessary to prevent the continued flow of previously released PCB's into the sewer system.

- Third Circuit affirmed without opinion.

h. Morrone v. Harleysville Mut. Ins. Co. 283 N.J. Super. 411 (App. Div. 1995).

- Harleysville Mutual Insurance Company ("Harleysville") issued garage liability policies to Antoinette Morrone ("Morrone") for a five year period from 1981-1986.

- Morrone sold the real property at issue in 1986.

- Suit was instituted against Morrone by subsequent owners of the real property alleging that during a period of time falling within

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

the policy periods, there were leaks of gasoline on the property resulting in soil and groundwater contamination.

- In order for the Appellate Division to reach a decision as to whether Harleysville owed Morrone a duty to defend under the policies, it first examined the issue raised by Harleysville that the owned property exclusion contained in the policies precluded coverage of Morrone's claim.

- The Appellate Division rejected Morrone's argument that the owned property exclusion did not apply since she no longer owned the property.

- Court explained that Morrone could not on the one hand claim that there was damage during the policy periods while at the same time avoiding the exclusion on the basis that the claim for damage was not made until after the property was sold.

- In reaching its conclusion, the Appellate Division examined two conflicting trial court decisions in Reliance and UMC/Stamford and found each to be well reasoned.

- However, court chose to take "...a more narrow view of the issue, although simplistic in its approach." Court noted that groundwater is unique and is not normally considered to be within the four corners of real property, but flows, trickles or oozes from one place to the other. Additionally, other than being a source of potable water, groundwater is not within the custody or control of the owner of the real property above it.

- Court then held that the groundwater does not clearly (emphasis added) fall within the category of owned property for the purposes of the exclusion. Consequently, since exclusionary clauses are enforceable only if clearly applicable and must be narrowly read with any ambiguities resolved in favor of the insured, the owned property exclusion was not applicable in this instance.

i. CPC International, Inc. v. Hartford Accident & Indemnity Co., No. L-37236-89 (N.J. Super. Ct. Law Div. 1996).

- Trial court noted that since summary judgment had been granted on the basis that there was no occurrence under the policies, the other issues raised were moot. However, court chose to address those issues.

- Insurers argued that there was no coverage under their policies on the basis of the owned property exclusions in the policies since costs incurred related to remedial work on insured's own property.

- Insured argued that the motion should be denied on the basis that there was off-site migration of contamination at two of the sites and on the basis that there was groundwater contamination beneath all of the sites.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court denied the insurers motion on the basis that there was insufficient evidence to determine whether contamination was off-site and on the basis of the Appellate Division decision in Morrone.

j. Kentopp v. Franklin Mut. Ins. Co., 293 N.J. Super. 66 (App. Div. 1996).

- Insured owned real property on which its home and business were located.

- Subsequent to the sale of the real property, contamination was discovered by a purchaser of the property which in turn instituted suit against insured and others.

- Insured sued its homeowners carrier for denying coverage of its claim with respect to the suit.

- Trial court granted summary judgment to the insurer for a number of reasons and followed the decision in Signo Trading that only cleanup costs associated with contamination of property owned by third parties would be covered. For example, when contaminated groundwater has migrated to the property of another. Trial court noted that there was no coverage in this instance since there was no off-site groundwater contamination.

- On appeal, court followed its decision in both Reliance and Morrone and reversed the trial court, concluding that the owned property exclusion did not relieve the insurer of its duty to defend and indemnify the insured as to allegations of liability related to groundwater contamination.

- Then, citing Signo Trading, the appellate court affirmed summary judgment as it pertains to defense and indemnification for claims solely regarding soil contamination, although it noted that "[c]onsidering the inter-connection between the soil and surrounding groundwater, remediation of adjacent soil contamination appears to be required to prevent future damage to groundwater when a past contamination is shown.

- See also: Smidth v. Travelers Ins. Co., 292 N.J. Super. 483 (App.Div.1996) and Strnad v. North River Ins. Co., 292 N.J. Super. 476 (App. Div. 1996) for a discussion concerning the potential for coverage of costs associated with groundwater contamination.

k. Universal-Rundle v. Commercial Ins., 319 N.J. Super. 223 (App. Div. 1999), cert. denied, 161 N.J. 149 (1999).

- Insured manufactured bathtubs, sinks and other similar items at a site in Pennsauken, New Jersey, from 1929-1972.

- Over the years, insured discharged waste from its manufacturing process in an on-site swampy area along the Delaware River.

- In 1973, insured sold the site to Vineland Construction Company ("Vineland") which used the site as a solid waste disposal facility.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Contamination was discovered at the site in 1989 and Vineland filed suit against the insured in 1992.

- In January, 1993, insured notified its insurers of the suit and in October 1993, Commercial Union Insurance Company ("Commercial") denied coverage under its policies.

- Insured settled the suit with Vineland and undertook the remediation of the site.

- In 1994, insured filed suit against its insurers, all of which, but for Commercial, settled prior to trial.

- A bench trial took place in 1997 and the court held insured was entitled to defense and indemnity.

- Appeals concerning various issues followed.

- One such issue was whether the owned property or "alienated property" exclusion in Commercial's policies were applicable to insured's claim.

- An interesting footnote to the decision stated that both the owned property exclusion and the "alienated property" (that is conveyed property) exclusion had the same legal effect, and that any distinction between the two would be without a difference.

- On appeal, Commercial argued that most of the waste material deposited by the insured on the site resulted in soil contamination, and that an allocation should have been made between the costs of soil remediation (to be borne by insured on the basis that this was owned property) and the cost of groundwater remediation (since prior courts had found that groundwater is not owned property).

- Since no evidence was presented by Commercial at trial as to an allocation of remediation costs, the trial court took the position that Commercial conceded that all remediation costs were covered.

- However, the appellate court held that this was an open issue, since the remediation costs had not yet been finalized at the time of trial.

- Citing to Strnad, supra, the court found that Commercial should be afforded the opportunity to produce allocation evidence and remanded the matter to the trial court.

l. Mitchell Heisler v. American Reliance Ins., Co., No. A-4221-97T1 (N.J. Super. Ct. App. Div. 1999).

- Insured homeowners removed an underground heating oil storage tank in order to sell their home.

- Upon removal, holes were observed in the tank and apparently contaminated water was observed in the excavation.

- DEP ordered an investigation and, if necessary, a remediation of the contamination.

- Insureds retained consultant to perform work and paid approximately $31,000 for the work and $6,000 for property restoration.

- After a bench trial, court found that all but approximately $1,200 in costs were related to soil contamination and, therefore, excluded from coverage by the owned property exclusion.

- On appeal, the insureds argued that the majority of costs were in fact groundwater related.

- After carefully reviewing the record below, the appellate court rejected the argument of the insureds and agreed that the owned property exclusion applied, finding that the water in the excavation was perched water (that is surface water that leached into the excavation) not groundwater.

- Of particular interest here was the criticism of the insureds' consultants for failing to recognize the difference between perched water and groundwater, and to immediately terminate the investigation when their soil sampled revealed no contamination in excess of DEP limits.

m. Muralo Co. v. Employers Ins., 334 N.J. Super 282 (App. Div. 2000), cert. denied, 2001 N.J. Lexis 240 (2001).

- Plaintiff was the successor to a company named Hotopp, a paint and coatings manufacturer, which, until 1971, leased property in Jersey City, identified in the decision as Parcels B-F.

- In 1990, Winko, New Jersey ("Winko"), subsequent owner of Parcels B-F, as well as two adjacent parcels, identified in the decision as Parcels A and G, triggered the requirements of the New Jersey Environmental Cleanup Responsibility Act ("ECRA").

- In conjunction with the investigation of all of the Parcels, pursuant to ECRA, extensive soil contamination was discovered.

- Winko remediated the Parcels by removing underground storage tanks and buried drums and by excavating and disposing of contaminated soil.

- DEP only required groundwater testing on Parcel F, and the results of the testing found no contaminants above DEP remediation standards. DEP issued a No Further Action determination after two rounds of groundwater sampling on Parcel F.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- In 1994, Winko filed suit against Plaintiff, alleging that it was responsible for damages resulting from the release of hazardous substances into soil, surface water and groundwater at all of the Parcels, including Parcels A and G.

- Plaintiff demanded that its insurers defend it in this suit, and the insurers denied coverage. Plaintiff then filed suit against its insurers.

- Ultimately, Plaintiff settled with both Winko and a number of its insurers, but for two, Zurich and Wausau.

- Summary judgment motions were filed by Zurich and Wausau, and the trial court found the insurers had no duty to defend or indemnify Plaintiff with respect to any of the Parcels.

- Based on the information available to the trial court, it concluded that Plaintiff failed to propound evidence of liability for either Parcel A or G and it found that the owned property exclusions in the policies at issue precluded coverage of costs incurred in connection with Parcels B-F.

- Plaintiff appealed.

- The issue raised on appeal, which was pertinent to the owned property exclusion, was whether the exception to the exclusion for groundwater contamination beneath owned property applied.

- As with the trial Court, court found here, that despite any allegations in the complaint filed by Winko, there was no evidence presented that showed any liability on behalf of Plaintiff for contamination on Parcels A or G.

- As to Parcels B-F, the court stated that the evidence established that the only remediation conducted was soil remediation and that therefore the owned property exclusion in the policies precluded coverage of the costs of remediation.

- Court explained that there were low levels of groundwater contamination, but noted that these levels were below DEP remediation standards and that no remediation of groundwater was required.

- On the basis of the foregoing, court found no damage to groundwater that would fall within the coverage offered under the polices.

- While court acknowledged that the extent of soil contamination posed a threat of future groundwater contamination before it was remediated, it noted that the Supreme Court in Signo Trading made it clear that the threat of imminent harm was not sufficient to bring a claim within coverage.

- In this case, no proof was presented to evidence that the groundwater was contaminated to a point that it was likely to cause damage to a third party if not remediated. In fact, DEP did

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

not even require that it be remediated, and that was sufficient for court to make the determination that there was no damage to the groundwater.

- In addition, citing to Universal Rundle, court advised that it was aware that soil removal could be a groundwater remediation mechanism, but that there had to be actual groundwater contamination, not merely a threat of it, in order for the exception to the owned property exclusion to apply.

- Plaintiffs petitioned the Supreme Court for certification on a number of issues, including the Appellate Court's ruling that groundwater contamination below DEP's standards did not constitute property damage. The petition was denied.

n. Quincy Mutual Fire Insurance Company v. Borough of Bellmawr, 172 N.J. 409 (2002).

- This case arises out of contamination at and emanating from the Kramer landfill ("Kramer"), an unlined landfill in New Jersey, which closed in March 1981, and was ultimately placed on the NPL.

- Commencing somewhere between April 27, 1978 and early May 1978 and continuing until May, 1981, the Borough of Bellmawr (the "Borough") deposited its municipal waste at Kramer

- During the foregoing time period, the Borough maintained liability insurance coverage with a number of insurers, including Century (Cigna) from June 1977-1978, Quincy Mutual, from June 1978-1981 and Harleysville from June 1981-1985.

- The Borough sought coverage from its insurers in connection with its liability relating to Kramer, which it settled with EPA by paying a sum in excess of $449,000.

- Quincy Mutual instituted a declaratory judgment action against the Borough and the other insurers.

- Trial court held that the liability of an insurer is based on when the damage occurred, not on when the actual dumping took place.

- Based upon testimony, as well as on the stipulation of the parties, trial court accepted that it would take 200 days for any contaminants placed in the landfill in May or June, 1978 to reach groundwater, and therefore, trial court held that Century was not liable, since its policies expired before then.

- Trial court found Quincy Mutual to be the only liable insurer. Quincy Mutual appealed.

- On appeal, Quincy argued that the New Jersey Supreme Court ruling in Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437 (1994) provides that the first exposure, in this case the first dumping event in April or May 1978, is the trigger for coverage and that therefore Century bears part of the liability.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Appellate court disagreed, and instead found that this case must be distinguished from Owens-Illinois in that there was no damage or injury at the time the Borough dumped the waste into a landfill designed for that very purpose. Rather, the damage or injury took place at the time the toxic leachate left the landfill and hit groundwater.

- Quincy Mutual appealed this 2-1 decision to the New Jersey Supreme Court and cert was granted.

- On appeal, the New Jersey Supreme Court, in a 5-2 decision, held that the initial triggering event here, under the continuous trigger theory of coverage espoused in Owens-Illinois, was the deposit of the waste in the landfill, not the leaching of the waste from the landfill.

- In reaching its conclusion, Court re-visited its holding in Owens-Illinois.

- Court explained that insurance policies generally do not reference the word "trigger". Rather they speak of an occurrence which requires a policy to respond to a claim.

- However, in cases involving environmental damage, the actual "damage" that has taken place is generally attributable to events that take place over a period of time. In order to address this situation, certain courts, beginning with the Keene Corp. v. Ins. Co. of No. America, 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007, reh'g denied, 456 U.S. 951 (1982) decision, have applied a theory that maximizes insurance coverage by triggering all insurance policies that are within the "trigger" period.

- Court explained that its decision in Owens-Illinois had a strong public policy basis and was designed to maximize the amount of insurance available in "mass exposure" tort cases. It also described a number of other cases that adopted the continuous trigger theory of coverage and the bases for those decisions.

- Court reversed Appellate Division decision that had the escape of the leachate from the landfill as the triggering event and adopted the analysis of the dissent in that case which found that Century's policy was in fact triggered and that the "injurious process" began during Century's policy period.

- Court saw an analogy between the "injurious process" in asbestos cases and the injurious process in this case.

- Based on expert testimony, once the contaminants were discharged in the landfill, there was a "natural and unavoidable progression of the original dumping" into the groundwater, which the dissent likened to "... a process analogous to the onset of asbestosis... " .

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court also explained that since this issue is complicated enough, it prefers a bright-line rule on the initial triggering event, as opposed to a rule that would require a calculation as to when contaminants actually hit the groundwater.

- Of significant interest is that Court repeated its desire that the application of the continuous trigger theory maximize coverage.

- Based on all of the foregoing, Court held that exposure resulting from the first deposit of waste at the landfill was an occurrence under the Century policy and therefore the initial trigger under the continuous trigger theory.

- Court remanded case to trial judge for an allocation consistent with the opinion.

- While this decision primarily relates to the allocation of the costs of remediation among triggered policies, it also has owned property exclusion overtones.

- Here the argument of one of the insurers was that the policy was not triggered until the waste that was disposed of at the unlined landfill hit the groundwater. That was the point at which there was actual damage to third parties.

- The Appellate Division agreed with that argument, the Supreme Court did not.

- The Supreme Court took great pains to discuss the injurious process in this instance as it relates to the initial trigger of coverage, ultimately holding, as mentioned above, that it preferred a bright-line rule triggering coverage when toxic waste is first deposited in a landfill.

- Certain case law examined by the Court in reaching that conclusion included the Arco Industries and Dow Chemicals decisions described in Section 6 e. and f. Both of those cases related to whether the owned property exclusion precluded coverage in instances in which there was an imminent threat of injury to a third party, a theory that the Supreme Court in the Signo Trading case rejected from the perspective of the owned property exclusion. The Court here used these decisions as part of the explanation for its determination that the injurious process in a property damage case, similar to that in a bodily injury case, begins when the waste was first deposited and continues as the waste makes its way to the groundwater.

- It will be interesting to see whether this decision has an impact on future owned property decisions in New Jersey, since it appears to be embracing an imminent harm concept in holding that a policy issued before the contamination hit groundwater, but after the waste was deposited in the landfill, was triggered.

- It should be noted that the Court took great pains to explain that its decision was based in part on the fact that the landfill was unlined. A different conclusion may have been reached if the

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

landfill was lined, since the concept of the liner is to hold contaminants in the landfill and prevent its flow into the environment.

o. Geri v. Egery Nelson, Inc., Superior Court of New Jersey, Appellate Division, Docket No. A-5344-03-T1 (July 18, 2006) (Not approved for publication).

- Plaintiffs Geri owned property which was used as a gas station until January 1980.

- The New Jersey Department of Environmental Protection ("NJDEP") discovered groundwater contamination on the Geri property on an adjacent property in an underground telephone vault next to property owned by the SICO Company ("SICO"), and on the SICO property, which was located across the street from the Geri property.

- In 1996, SICO sued Geri for damages from environmental contamination, alleging that gasoline had traveled from Geri's property onto SICO's property.

- Geri purchased a CGL policy from Farmer's Insurance ("Farmer's"), and policies of insurance from Selective Insurance Company ("Selective"). American Reliance Insurance Company ("ARI") subsequently purchased Farmer's interests.

- Selective agreed to defend Geri against the SICO lawsuit, but agreed to indemnify only for events after October 1981, the effective date of its policy.

- Meanwhile, ARI declined to provide coverage for Geri against SICO because Geri could not find a copy of the CGL policy originally issued by Farmer's. Court pointed out that Geri's only method of proving the existence of the policy was to use records that showed payment of premiums for the policies, as well as current policies issued by Selective.

- On September 25, 1997, Geri brought suit against ARI, claiming wrongful refusal to defend, as well as against Egery Nelson, Inc. ("Egery"), Geri's insurance agent, for a declaration compelling Egery to "'account for the placing of plaintiff[s'] [insurance] coverage'" and for both defendants to defend Geri against SICO.

- On May 23, 2003, after resolving various issues regarding a jury trial, the trial court granted summary judgment to Geri, finding that Farmer's had issued a series of CGL policies to Geri between February 1976 and October 1981. Court also granted summary judgment to Egery, finding that it had correctly placed the insurance coverage that Geri requested. A trial did ensue, though, to determine whether a release of contaminants on Geri's property caused groundwater contamination.

- At trial, Geri described the history of the property. In the early 1960s Geri installed underground storage tanks and pumps, and then leased the property as a gas station. The property had three

underground gasoline storage tanks (UST). In 1980, the former tenant disassembled its pumps, but Geri erroneously assumed that the tenant had pumped out all of the gasoline from the USTs.

- Environmental testing by NJDEP revealed the existence of gasoline in the soil of the Geri property, as well as on adjoining properties. After that examination, Geri informed Egery of the potential for a problem.

- In 1989 Geri decided to remove the USTs. Upon removal, a contractor discovered fifteen inches of fuel in one tank, and two inches in another.

- One of the tanks had two small holes, which had allowed gasoline to leak into the soil.

- Geri relied on the testimony of two expert witnesses: Dr. Elly Trigel, an environmental consultant, and Ralph Capone, a geologist. Both testified to the high probability that the Geri site contained groundwater contamination going back to 1978.

- After summation by Geri, court granted an involuntary dismissal to ARI, finding that Geri's experts had not proven that the contamination at issue occurred during the policy period, and that they had also failed to prove that such contamination moved to the SICO site during the time ARI insured the risk.

- On appeal, Geri contested the dismissal, arguing that the trial court dismissed their case in error because they had in fact met the burden required to prove that the contamination had migrated from Geri's property to the SICO site. They also raised other issues not pertinent to environmental insurance coverage.

- Specifically, Geri argued "that they only had to prove the groundwater beneath the Geri Property was contaminated while ARI was on the risk, and that 'a review of the trial testimony and exhibits demonstrate that the record is replete with evidence proving petroleum contamination was present in the groundwater on the Geri property as early as 1979."

- ARI agreed that Geri only had to prove that a discharge of petroleum on Geri's property caused contamination during the policy period.

- The appellate court overruled the trial court decision.

- Court disagreed with the trial court determination that Geri had to show that contamination migrated to the SICO property during ARI's policy period. Court, citing to Strnad, supra., noted that "for purposes of a CGL policy, groundwater should not be considered property owned by the insured."

- Further, court found that generally CGL policies guard against the costs associated with remediation, as long as the costs are "reasonably required to remediate contaminated groundwater

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

beneath the insured's property and to prevent damage to a third party." Those also may also include the costs for soil excavation, and possibly the costs to fill and remove tanks.

- Court then detailed Geri's burden of proof. In order to trigger ARI's duty to indemnify Geri for remediation costs, Geri only needed to prove that gasoline was discharged onto Geri's property, that the discharge caused groundwater contamination, and that these acts occurred during the duration of ARI's policy.

- Applying the facts to this standard, court found that NJDEP had verified the existence of groundwater contamination on or near the property in 1979 and the lessee gas station ceased operation in 1980. Furthermore, ARI had issued a CGL policy covering Geri from February 1976 through October 1981, and the court could draw a "reasonable inference...that any gasoline spills or releases that occurred on that property had occurred prior to January 1980."

- Finally, court found that Geri had sufficiently demonstrated evidence of gasoline-caused contamination during the policy period in order to survive a motion for involuntary dismissal.

- Court then remanded several other issues to the trial court, including issues regarding expert testimony, a plaintiff motion for recusal, and the plaintiff's right to a jury trial.

5. Selected Ohio Case Law

a. Constantine's Nursery & Garden Ctr., Inc. v. Florists Mut. Ins. Co., 1993 WL 413596 (Ohio Ct. App. 1993).

- Insured granted an easement for the installation of a storm sewer and permitted the general contractor on the sewer project to store slag adjacent to a lake on its real property. Subsequently, a large fish kill was discovered by the Ohio EPA which was ultimately tied to the heavy metals that were leaching from the slag. The insured notified its insurer that it had suffered contamination of its soil and water due to the slag. The insurer refused to provide coverage and as a result, the insured instituted suit against its insurer.

- Trial court found that the damage to the insured's property was not covered under the policies issued by the insurer. The insured appealed.

- Appellate Court held that the liability insurance portion of the policies issued to the insured was intended to provide coverage for claims of third parties. In affirming the trial court's decision, court held that there was no evidence that the insured had become legally obligated to pay any damages to a third party as a result of the contamination.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

6. Selected Michigan Case Law

a. Upjohn Co. v. New Hampshire Ins. Co., 178 Mich. App. 706 (Mich. Ct. App. 1989), rev'd on other grounds, 438 Mich. 197 (1991).

- Upjohn Co. ("Upjohn") stored toxic byproducts of antibiotics it was producing in an underground storage tank. Each weekday, an Upjohn employee measured the tank level. Inconsistent tank readings first appeared on August 16, 1992, however, Upjohn continued to pump byproducts into the tank for the next several weeks despite these readings. On September 3, 1992, Upjohn completed its monthly audit of the tank and since tank level measurements did not coincide with what it should have been, no additional quantities of the byproduct were pumped into the tank and the tank was emptied. A visual inspection revealed corrosion and holes in the tank. Upjohn believed that approximately 15,000 gallons of the byproduct had leaked. The byproduct contaminated the soil at the property as well as groundwater.

- Upjohn filed suit against its insurers seeking reimbursement of costs resulting from the leaking tank.

- Court of Appeals held that Upjohn's cleanup efforts on its own property were recoverable as damages since the groundwater below the property belonged to the people of the state. Michigan's Supreme Court did not address this issue.

b. Polkow v. Citizens Ins. Co. of Am., 180 Mich. App. 651 (Mich. Ct. App. 1989), rev'd on other grounds, 438 Mich. 174 (1991).

- Insured, in the business of hauling and storing waste oil, was required by state and federal environmental agencies to undertake a study to identify the source of groundwater contamination in the area surrounding its business.

- Insured sought a declaration that its liability insurer had a duty to defend and indemnify it for costs and potential liability arising from the government investigation.

- Lower court granted summary judgment in favor of the insured, holding that the insurer had a duty to defend and indemnify its insured for costs incurred in responding to the government inquiry.

- In response to the insurer's argument that the owned property exclusion barred coverage, Court of Appeals held that the exclusion did not apply because the allegations were essentially for "injury to the public interest in the well-being of the environment and natural resources of the state." In reaching its decision, court relied on the principle that the people of the state had a property interest in the groundwater underlying the insurer's property.

- Michigan's Supreme Court did not address this issue.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

c. Anderson Development Co. v. Travelers Indemnity Co., 49 F.3d 1128 (6th Cir. 1995).

- Anderson Development Co. ("ADC") manufactured and sold specialty organic materials.
- In connection with its manufacturing operations, ADC created a filtering system to avert the discharge into the environment of curene 442 ("Curene") a known carcinogenic chemical.
- In 1973 MDNR notified ADC that its wastewater contained excessive levels of potentially hazardous chemicals. In response, ADC designed a lagoon to operate as a settling pond for the accidental discharge of wastewater.
- Since the lagoon discharged to the sewer system, contaminated wastewater containing Curene ultimately ended up at the City of Adrian (the "City") sewage treatment plant.
- In 1979, MDNR prohibited the City from accepting wastewater from ADC and ordered ADC to cease production of Curene.
- In 1983, ADC's facility was placed on the National Priorities List by EPA, and in 1985 EPA sent ADC a PRP letter.
- ADC notified its insurer, Travelers, of these events. Travelers refused to defend. ADC instituted suit.
- Ultimately, ADC entered into a consent order with EPA and agreed to perform the response and cleanup activities required.
- On motion for summary judgment, the district court held that the owned property exclusion was not applicable with respect to insurance coverage for cleanup costs incurred by ADC.
- The Sixth Court affirmed, holding that "the 'owned property' exclusion does not bar recovery for ADC's liability."
- Rather than following the reasoning of certain Michigan appellate courts which addressed the issue, the Sixth Circuit ruled in accordance with the Seventh Circuit in Patz v. St. Paul Fire & Marine Insurance Co., 15 F.3d 699 (7th Cir. 1994).
- Specifically, the Sixth Court concluded that ADC was seeking recovery of the costs incurred in connection with a government mandated cleanup, not for damage to its own property.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

d. Upjohn Co. v. Aetna Casualty & Surety Co., 1991 WL 490026 (W.D. Mich. Sept. 9, 1991).

- Insured brought declaratory judgment against insurers with respect to coverage for property damage in connection with environmental contamination at a number of sites.
- On motion for summary judgment, court was asked to determine the proper application of the owned property exclusion in policies issued by Aetna.
- Aetna maintained that under the owned property exclusion, it is not responsible for damage to the insured's own property, including the groundwater.
- Court agreed with Aetna's argument with respect to the insured's own property, but rejected it with respect to the underlying groundwater.
- Citing Polkow, court noted that groundwater is the property of the state under Michigan law, and held that therefore the owned property exclusion "does not bar coverage for contamination to underlying groundwater."
- In a footnote to its holding, court stated that "costs associated with remedial efforts to prevent further contamination of the groundwater or the property of other parties is covered under the policy."

e. Arco Indus. Corp. v. American Motorists Ins. Co., 232 Mich. App. 146 (1998).

- Arco operated an automobile parts manufacturing plant in Michigan since 1967.
- In conjunction with its operations, Arco utilized an unlined seepage lagoon for its operational wastes. (See Section A, Item 6.c. for additional facts).
- Trial court determined that the owned property exclusion in the policies issued by AMICO did not bar coverage of the costs of remediating contaminated soils on Arco's property.
- AMICO appealed on the basis that the seepage lagoon and the soil at the site were owned property.
- Appellate court affirmed trial court's determination.
- Citing to Upjohn and Polkow, the court noted the public interest in the state's natural resources were paramount to the owned property exclusion in environmental cleanup matters.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Further, it noted that even in the absence of such an interest, the owned property exclusion would not apply where there is a "... threat that contaminants in the insured's soil would migrate to groundwater or the property of others," which it found to be the case here.

- Court explained that applying either theory, the owned property exclusion would not apply here.

- Motion filed for leave to appeal to Michigan Supreme Court, which was dismissed by stipulation of attorneys for parties.

f. Aetna Cas. & Sur. Co. v. Dow Chem Co., 28 F. Supp. 2d 421 (E.D. Mich. 1998).

- Several insurance companies filed a declaratory judgment action against Dow Chemical Company ("Dow"), with respect to insurance coverage for various contaminated sites.

- Dow filed a summary judgment motion as to the applicability of the owned property exclusion and the "alienated premises" exclusion with respect to five sites.

- Trial court conducted an extensive review of Michigan case law on the issue, including Anderson Development, Polkow and Upjohn, all of which held that the owned property exclusion does not apply to the costs of groundwater remediation.

- Next the court reviewed the Arco Industries holding, cited immediately above, that the costs of soil remediation are not precluded by the owned property exclusion "... where there is a threat that the contaminants in the insured's soil would migrate to the groundwater [sic] or to the property of others." Court explained further that if third party damage was not imminent, then the owned property exclusion would preclude coverage of soil remediation.

- In addition, upon examination of the decision Anderson Development, the court found that the owned property exclusion also does not apply where a government mandated remediation has taken place.

- Court took pains to explain that a government mandate is the equivalent of third party liability, and that the mere fact that the insured's own property may benefit from the remedial efforts does nothing to alter that position. The key is that the policy is designated to cover third party liability, and a government mandate was just that.

- In sum, the court held that the owned property exclusion would not apply where there was: (a) groundwater contamination; (b) the imminent threat of damage to a third party; and (c) a government mandate for remediation.

- Applying the foregoing holding to the sites at issue in this matter, the court found that the exclusion did not apply to the:

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

(a) Casper/Brookhurst Site, because there was groundwater contamination and a government mandated cleanup.

(b) Midland Site, because there was groundwater contamination.

(c) Dalton Site, because there was groundwater contamination and a government demand.

(d) Cliffs-Dow Site, because there was groundwater contamination, notwithstanding the possibility that there was no government demand and that the insured had not remediated groundwater.

(e) Conalco Site, only as to certain contamination. The court determined that there was an issue of fact as to whether the owned property exclusion applied to the remediation of on-site thorium.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

C. Pollution Exclusion and Absolute Pollution Exclusion

1. First Generation Policy Language:

This insurance does not apply: (f) to 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; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

2. Policyholder's Position - Pollution exclusion is a restatement of the definition of occurrence and does not bar coverage for damage which is unexpected and unintended by the policyholder. The term "sudden and accidental" contained in the exclusion means unexpected and unintended.

3. Insurer's Position - Pollution exclusion bars coverage for environmental contamination and is not simply a restatement of the occurrence definition. The exception for "sudden and accidental" discharges has a temporal meaning; that is, an identifiable event that transpires quickly.

4. Selected New Jersey Case Law

a. Lansco, Inc. v. Dept. of Environmental Protection, 138 N.J. Super. 275 (Ch. Div. 1975), aff'd, 145 N.J. Super. 433 (App. Div. 1976), cert. denied, 73 N.J. 57 (1977).

- Court found that the word "sudden" means happening without previous notice or on very brief notice, unforeseen, and unexpected. Court then concluded that the spill which was caused by the deliberate action of a third party was unexpected and unintended on the part of the policyholder and fit within the exception to the pollution exclusion clause.

b. Jackson Tp. Municipal Utilities Authority v. Hartford Acc. & Indemn. Co., 186 N.J. Super. 156 (Law Div. 1982).

- Court, applying rule of construction that where policy language supports two meanings, interpretation in favor of the policyholder controls, interpreted exclusion in favor of the policyholder and defined the pollution exclusion clause as a restatement of "occurrence"; that is, one which excludes claims where the resulting injury is intended but allows coverage for the unintended results of an intentional act.

c. Broadwell Realty Services, Inc. v. Fidelity & Casualty Co., 218 N.J. Super. 516 (App. Div. 1987).

- Court rejected "temporal" definition of word "sudden" urged by insurer, finding that New Jersey courts construe word in terms of "unexpected," "unforeseen" or "fortuitous."

- Court cited and agreed with prior New Jersey decisions interpreting "sudden and accidental" exception to pollution

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

exclusion as restatement of definition of "occurrence" that policy will cover claims where injury was neither expected nor intended. Court held that "the pollution exclusion focuses upon the intention, expectation and foresight of the insured."

d. Summit Assoc. v. Liberty Mut. Fire Ins., 229 N.J. Super. 56 (App. Div. 1988).

- Court held that the pollution exclusion is equivalent to the definition of occurrence and bars coverage only where damage appears to be expected or intended on the part of the insured.

e. Chemical Leaman Tank Lines, Inc. v. Aetna Casualty and Sur. Co., 817 F. Supp. 1136 (D.N.J. 1993), aff'd, 89 F.3d 973 (3d Cir.), cert. denied, 117 S. Ct. 485 (1996).

- Federal district court rejected insurer's argument that the word "sudden" should have a temporal element when construing the "sudden and accidental" exception to the pollution exclusion.

- Following the reasoning and analysis in Broadwell, the district court found the term "sudden and accidental" to be ambiguous because the term "sudden" may or may not include a temporal element, and court predicted that the New Jersey Supreme Court would follow Broadwell in that regard.

- In rejecting the insurer's proposal that evidence of the drafter's intent be reviewed in determining the meaning of the word "sudden", court applied the rule of contra proferentum and held that the term "sudden" in the pollution exclusion does not include a temporal aspect in its meaning.

- Court concluded that a long term environmental pollution occurrence, such as the one at issue, fell within the exception to the pollution exclusion so long as it was neither expected nor intended by the insured.

- Insurers appealed to the Third Circuit after a jury trial resulted in a finding of partial coverage under a number of policies.

- Certain insurers argued that the Supreme Court's regulatory estoppel holdings in Morton (see subparagraph f. below) were inapplicable to them since they did not affirmatively deceive regulators in securing approval of their pollution exclusion, and since their pollution exclusion was different than the standard form reviewed by the Supreme Court.

- The Third Circuit rejected these arguments and concluded that the "non standard" pollution exclusion clause should be interpreted in the same manner as the "standard" clause since even if the insurers did not directly misrepresent the effect of the pollution exclusion, they benefited from those misrepresentations.

- The insurers also objected to the trial court's jury charge which required separate findings with respect to intent to discharge

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

into the soil, wetlands and groundwater, contending that: (1) if any discharge was intended, coverage was precluded; and (2) the trial court's grant of summary judgment to the insurers with respect to discharge to soil, should result in an automatic denial of coverage for any resulting property damage. The Third Circuit rejected this objection on procedural grounds finding that the insurers failed to preserve this issue for appeal, and refused to exercise its discretion to reverse.

f. Morton Int'l., Inc. v. General Accident Ins. Co., 134 N.J. 1 (1993), cert. denied, 114 S.Ct. 2764 (1994).

- Supreme Court overruled the Appellate Division's decision in Broadwell, to the extent that it held that the standard pollution exclusion was merely a restatement of the occurrence definition and focused on whether the ultimate damage was expected or intended from the standpoint of the insured.

- Court noted that it was evident from the text of the standard clause that the phrase "sudden and accidental" was keyed into the discharge, dispersal, release or escape of pollutants and not the damage caused by the pollution.

- Court stated that it was persuaded that the term "sudden" possesses a temporal element, "generally connoting an event that begins abruptly or without prior notice or warning, but the duration of the event -- whether it lasts an instant, a week, or a month -- is not necessarily relevant to whether the inception of the event is sudden."

- Court discerned that the phrase "sudden and accidental" in the standard pollution exclusion clause described only those discharges, dispersals, releases and escapes of pollutants that occurred abruptly or unexpectedly and were not intended.

- Court stated that it was satisfied that if given literal effect, this interpretation of the pollution exclusion would limit coverage for pollution damage to so great an extent that the insurance industry's representation of the standard clause's effect in its presentation to New Jersey and other state insurance regulatory agencies, would have been grossly misleading.

- Supreme Court severely chastised the insurance industry for proffering the clause as a clarification of existing coverage, when in fact its actual effect on coverage was both apparent and unjustifiable.

- Court found that as presented by the insurance industry, regulatory authorities would not have understood that the pollution exclusion clause eliminated all coverage for pollution related claims except in cases of accidental discharges. In fact, rather than clarifying the scope of coverage, the clause virtually eliminated coverage, without any suggestion by the industry that the change in coverage was so sweeping or that rates should be reduced.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Based upon the actions of the insurance industry, court declined to enforce the pollution exclusion clause as written, noting that to do so would "contravene this State's public policy requiring regulatory approval of standard industry wide policy forms to assure fairness in rates and in policy context, and would condone the industry's misrepresentation to regulators in New Jersey and other states concerning the effect of the clause."

- Court's decision contains a lengthy discussion of the adoption and approval of the pollution exclusion clause as well as a lengthy review of the cases interpreting the pollution exclusion.

- Court held that it would construe and give effect to the standard pollution exclusion clause "only to the extent that it shall preclude coverage for pollution-caused property damage caused by an occurrence if the insured intentionally discharged, dispersed, released or caused the escape of a known pollutant."

- Court set forth an example to illustrate that the pollution exclusion will not be given effect if a third party intentionally discharged, dispersed, released or caused the escape of a known pollutant.

- Supreme Court expressly limited the effectiveness of the pollution exclusion clause to cases in which the insured or an agent specifically authorized to act for the insured intentionally discharged a known pollutant.

- Turning to Morton, court held that it was not entitled to indemnification for remediation costs imposed on its predecessors, because "the conclusion is unavoidable that its predecessors had intentionally discharged known pollutants over a long and continuing period."

- In reaching its determination, court noted that the knowledge of Morton's predecessors that its discharges into Berry's Creek contained unacceptable emissions, including organic and inorganic mercury compounds, combined with its evasive conduct from 1956 to 1970, involving a series of unfulfilled representations and undertakings to remediate the quality of its emissions, demonstrated beyond question that it regularly and intentionally discharged known pollutants during that period.

g. Nestle Foods Corp. v. Aetna Casualty & Sur. Co., 842 F. Supp. 125 (D.N.J. 1993).

- Insured owned and operated a coffee manufacturing plant in Freehold, New Jersey since the 1940's. Trash and waste were removed from the plant by a licensed waste hauling company and disposed of at a number of locations, including the Lone Pine Landfill ("Lone Pine").

- Lone Pine was closed by the State of New Jersey in 1979. During the 1980's insured and others became the subject of state and federal governmental proceedings in connection with Lone Pine.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- EPA alleged that insured was liable in connection with Lone Pine because it used certain hazardous substances during the 1960's and 70's that were found in the groundwater at Lone Pine and were traceable to insured's waste stream.

- Insured filed a declaratory judgment action against its insurer seeking defense and indemnity in connection with contamination at Lone Pine.

- Both parties moved for summary judgment on the issue of the pollution exclusion contained in the policies. Insured argued that the insurer could not deny coverage on the basis of the pollution exclusion, since it could not make the threshold showing under Morton that there was a discharge by insured.

- In agreeing with the argument of insured, court found as a matter of law that the plain and ordinary meaning of the words "discharge, dispersal, release or escape" does not encompass... "the transfer of wastes to an independent hauler, which in turn, disposes of the waste at a landfill... ."

- Court rejected the insurer's arguments that the exclusion should apply since the deposit of wastes at the landfill was intentional and since there was a reasonable relationship between the pollution and the pollutants, finding that the arguments were not consistent with the scope of the pollution exclusion established in Morton.

- Court granted insured's motion for summary judgment on the basis of the pollution exclusion, since the insurer failed to meet the threshold definition of "discharge" as that term was used in Morton, and barred the insurer from raising the pollution exclusion as a means of denying coverage.

h. UMC/Stamford, Inc., v. Allianz Underwriters Ins. Co., 276 N.J. Super. 52 (Law Div. 1994).

- On motion for summary judgment, court held that the pollution exclusion in the policies subject to the suit would be construed in accordance with the Supreme Court's decision in Morton.

- In describing the basis of its decision, court noted that the insured was doing business in New Jersey and was seeking coverage for liability imposed upon it and its subsidiaries, while the insurers were attempting to avoid coverage based upon a provision in their policies which the New Jersey Supreme Court found resulted from deliberate, misleading and wrongful conduct by the insurance industry.

- Court held that in view of the strong language of the Supreme Court in Morton, the pollution exclusion, irrespective of the location of the site, must, in a New Jersey action, particularly where the insured does business in New Jersey, be construed and applied in accordance with Morton.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court went on to explain that based upon Morton, insurers were estopped as a matter of equity and fairness from using the literal language of the pollution exclusion to preclude coverage.

- Consequently, court denied all motions seeking dismissal of insured's cause of action based upon the pollution exclusion.

i. CBS Inc. v. Crum & Forster Inc., No AM-000712-9472 (N.J. Super Ct. App. Div. 1995)

- Insured sued its insurers in connection with environmental contamination at numerous sites in six states.

- On motion for summary judgment, the trial judge, ruling from the bench, found that the choice of law ruling of the New Jersey Supreme Court in Gilbert Spruance Co. v. Pennsylvania Manufacturers Association Insurance Co., 134 N.J. 96 (1993) was not applicable with respect to the law governing the interpretation of the pollution exclusion in a liability policy.

- Trial court concluded that the strong public policy arguments advanced by the Supreme Court in Morton, mandated that New Jersey law apply with respect to the interpretation of the pollution exclusion by a New Jersey court.

- On appeal, the Appellate Division summarily reversed on the choice of law issue and held that the trial court must be bound by Gilbert Spruance with respect to the choice of law for non New Jersey sites. In other words, there must be a site specific analysis applying all relevant factors to determine governing law.

j. Astro Pak Corp. v. Fireman's Fund Ins. Co., 284 N.J. Super. 491 (App. Div.), cert. denied, 143 N.J. 323 (1995).

- Insured transported to and discharged at the Kin-Buc landfill over one and one half million gallons of wastes, solvents, and chemicals between April, 1973 and July 1976.

- Barrels of waste were placed in the landfill in areas directed by the operator. Liquid from tank trucks was deposited in a hole dug by the operator.

- Landfill was allegedly constructed to be impervious so that deposited waste would not affect the surrounding land or water. Ultimately it was discovered that this was not the case in that leachate from the landfill was polluting the Raritan River.

- Pursuant to a July 1976 order of DEP, operations were terminated at the landfill. Once the insured learned of this fact, it ceased its disposal activities at the landfill.

- In 1979, EPA sued Kin-Buc and others for recovery of remediation costs with respect to the landfill and in 1983 EPA ordered 11 parties to remediate the landfill.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- No claim was made against the insured until 1984, when EPA notified the insured that it was a PRP with respect to the landfill. Insured settled EPA claim for a de minimis sum.

- In 1990, a primary PRP, Transtech, filed suit against all users of the landfill, including the insured. In 1993, Transtech filed an amended complaint alleging future remediation costs of in excess of one hundred million dollars.

- The filing of the amended complaint precipitated the insured's suit against its insurers.

- On motion for summary judgment, the trial court rejected the position of the insurers that the pollution exclusion was applicable to this claim, and ruled that coverage was available to the insured. Trial court found that Morton required an intentional discharge. Court noted that the insured had no knowledge of the initial discharges from the landfill in 1971, and ceased disposal on learning of such discharges.

- On appeal, the Appellate Division rejected the argument of the insurers that the pollution exclusion should apply because the insured intentionally deposited waste at the landfill.

- Appellate Division focused on the fact that the offending "pollution" was the escape from the landfill caused by the defect in the landfill, not the placing of the waste in the landfill. Consequently, court applied the Supreme Court holding in Morton to find that the pollution exclusion was not applicable, since the escape of pollutants from the landfill was not intentional.

- Supreme Court denied cert.

k. Cessna Aircraft Co. v. Hartford Accident & Indemnity Co., No. L-3868-92 (N.J. Super. Ct. Law Div 1997).

- Insured was an aircraft corporation headquartered in Kansas, which purchased insurance that covered sites in at least three states: Kansas, Oklahoma and New Jersey.

- On motion for summary judgment, insured argued that Morton should govern the interpretation of the pollution exclusion in the policies at issue.

- Two of the insurers argued that they should not be bound by Morton since they were not selling CGL policies when the misrepresentations as to the effect of the pollution exclusion on coverage were made to insurance regulators.

- All of the insurers argued that Morton should not apply since a federal district court in Kansas had already found the pollution exclusion precluded coverage under these policies in another case among the same insured and insurers. Further, that court found that the Kansas regulatory authorities had not been misled.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Here, court found the Supreme Court's determination in Morton that the Insurance Rating Board ("IRB") generally misled insurance regulators was controlling and binding in this matter.

- Court noted that the fact that an insurer did not participate in the fraud was insignificant. Rather, the significant fact was that the IRB acted broadly on behalf of the insurance industry in misleading regulators.

- Court held that every insurer that employed the pollution exclusion benefited from the fraud perpetrated by the IRB, and therefore must be bound by the consequences.

l. Pfizer, Inc. v. Employers Insurance of Wausau, 1998 WL 32173 (N.J. Sup. Ct. 1998).

- Plaintiff, a multi-state, multi-national pharmaceutical company filed a declaratory judgment suit against its insurance carriers in connection with environmental contamination liability claims for sites in nineteen states and Puerto Rico.

- Trial court held that New Jersey law should govern the interpretation of both the sudden and accidental pollution exclusion and the issue of late notice, finding that: "New Jersey has an interest in protecting its businesses through the application of its laws" and that "[f]ailure to apply New Jersey law to the pollution exclusion and the notice issues would frustrate significant New Jersey public policies."

- Supreme Court granted leave to appeal, and in a 6-0 decision reversed the trial court holding that "... the law of the waste site would appear to have the more dominant significant relationship to the issues of interpretation of the pollution exclusion clause and the late notice defense."

- In reaching its conclusion, the court utilized the Restatement Section 6 factors, as grouped into five categories by the Third Circuit in General Ceramics v. Fireman's Fund Insurance Company, 66 F.3d 647 (1995), and as further streamlined into four categories by this court.

- Those factors are as follows:

  (1) the states' competing interests;

  (2) the overall national interests of free commerce;

  (3) the interests of contract law and the parties; and

  (4) the interests of the administration of the judicial system.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- In utilizing these factors, the Court explained that the interests of three states were involved as to each site; New Jersey, where Plaintiff had a number of operations and employees, and which was the forum of the suit; New York, where Plaintiff maintained its corporate headquarters and entered into its insurance contracts; and the state in which the waste site was located.

- As to the pollution exclusion, based on Morton, New Jersey has a strong public policy to only apply the exclusion where there were international discharges of known pollutants; as to New York, there were statutory and other directives and pronouncements against providing coverage to polluters; and in most instances the law of the waste site will hold some similarity to either New Jersey or New York.

- As to the first factor, New Jersey's interest, as identified in the Gilbert Spruance Company v. Pennsylvania Manufacturers' Association Insurance Company, 134 N.J. 96 (1993), in having a fund to remediate contaminated sites and compensate victims of contamination, was found to be a domestic concern, and not implicated here with respect to out of state sites. On the other hand, the interests in this case appeared to be more closely related to either the laws of New York (to discourage insuring pollution) or the waste site.

- Looking at the second factor, Court believed that the interests of commerce would not be served by applying the New Jersey view of the pollution exclusion, if it does not have a dominant and significant relationship with the waste site.

- New Jersey law was not favored by the third factor as well, since the policies were not only purchased and paid for in New York, but they were also maintained at Plaintiff's principal headquarters there as well. However, the expectation of the insured would be that the law of the place where the liability is imposed would apply, in the absence of a choice of law provision, to give effect to coverage where the risks arise.

- Finally, the Court looked to the interests of judicial administration, and found that while there may be difficulties in requiring courts to analyze the laws concerning the pollution exclusion in a number of states, it was likely that these interpretations could be grouped. The Court also noted its decision in Ciba-Geigy Corp v. Liberty Mutual Insurance Co., 144 N.J. 372 (1996), which permits non-jury trials in certain instances, which will ease concerns over jury management.

- After completing its analysis, the Court concluded that both as to the pollution exclusion and the issue of late notice, the law of New York should apply, and if that law conflicted with the law of the waste site, then the law of the waste site would apply, since under the site specific Restatement approach, it would have the dominant significant relationship.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

m. Ciba-Geigy Corporation v. Liberty Mutual Insurance Company, UNN-L-97515-87 (N.J. Super. Ct. Law Div. 1998).

- After a bench trial, the Court held that "the organic solvents which are now contaminating the groundwater at the Toms River Site were not 'known pollutants' at the time these insurance policies were in effect."

- The Court explained that while the solvents were known to be hazardous at full strength, it was not known that trace amounts of such solvents in the groundwater were a concern.

- Also, the solvents were believed, by not only the insured but also by experts at the time at issue, to flush out of the groundwater over time.

- It was not until the 1980's that it was discovered that the solvents in fact did not flush out of the groundwater, but rather pooled together in the soil causing rainwater to pass around the pool rather than to "flush out" the contaminants. This phenomenon, together with the low solubility of the chlorinated compounds, kept the contaminants locked in the soils for many years.

- Since the court found the chlorinated compounds were not a known pollutant, it concluded that all of the policies containing a "sudden and accidental" pollution exclusion provided coverage identical to the occurrence policies issued without one.

- As a result, since the Court held there was an occurrence under the policies at issue, all policies issued from 1952 - 1984, including those with a pollution exclusion, were triggered.

n. Insurance Company of North America v. Anthony Amadei Sand & Gravel Inc., No. A-2634-9575 (App. Div. 1998), rev'd on other grounds, judgment of trial court reinstated 162 N.J. 168 (12/12/99).

- This case arose out of the GEMS landfill. The pertinent facts can be found in Section A, item 4l.

- On appeal by Aetna of a trial court's ruling that Amadei and the insured were entitled to coverage as a matter of law, the court looked at the issues of the applicability of the pollution exclusion in this case, and whether the trial court erred by failing to find that the pollution exclusion precluded coverage under Aetna's policies as a matter of law, or in the alternative that a jury should have decided the issue.

- In reaching its conclusion, the appellate court revisited the decision of the Supreme Court in Morton which found the sudden and accidental pollution exclusion only to be applicable where there was an intentional discharge of a known pollutant by the insured or an agent of the insured.

- Prior to taking any testimony, the trial judge and counsel agreed that the issues for resolution were whether: "(1) ...there was an intentional discharge of known pollutants under the standard pollution-exclusion clause as interpreted by Morton; and (2)

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

...there was an occurrence as defined under the policy as interpreted by Morton."

- The trial court at the end of the evidence presentation conducted a Morton "exceptional circumstances" analysis and found that none of the five factors were applicable here, and therefore, there was an occurrence.

- In addition, the trial court concluded that the matter should not go to the jury, since no reasonable jury could find that Amadei expected the environmental damage that arose out of the landfill operations.

- When asked by counsel if it was addressing both the issue of whether there was an occurrence under the policies, as well as the issue of whether the pollution exclusion was applicable, when it performed its analysis under Morton, the trial court responded affirmatively.

- Aetna argued on appeal that the trial court blurred the distinction between the two issues; that in fact all Aetna needed to show was that Amadei intentionally discharged known pollutants and that Aetna did not need to prove exceptional circumstances as to the pollution exclusion.

- Appellate Court found that the trial court did separate the two issues. It explained that while the exceptional circumstances analysis relating to whether there was an occurrence under the policies was far more extensive, after completing that analysis and utilizing its findings, the trial court found that there could be no conclusion but that the pollution exclusion was not applicable.

- Next, Aetna claimed that there were material issues of fact relating to the pollution exclusion that should have been resolved by a jury.

- Appellate Court, in conducting its analysis, first examined whether Aetna was entitled to a jury trial in light of the New Jersey Supreme Court's decision in Environmental Ins. Declaratory Judgment Actions, 149 N.J. 278 (1997). In that case, the Court held that there was no right to a jury trial where the relief sought was a declaration that an insurer was obligated to pay for future cleanup costs (which the Court found to be akin to a specific performance action), even where there was a claim for recovery of past damages, if that claim was ancillary to specific performance.

- In the present case, the appellate court found the declaratory judgment action did not seek recovery of future costs, but rather a declaration that the policies should be rescinded and that the insurer should pay no costs. In addition, the overall exposure was known and established here.

- On the basis of the foregoing, the appellate court concluded that Aetna was entitled to a jury trial and that there were factual

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

disputes at issue, which required resolution by a jury, not by a judge.

- Appellate Court reversed and remanded the matter.

- Note: Aetna appealed to the New Jersey Supreme Court on the issue of whether Aetna was entitled to a jury trial. The Supreme Court ruled that it was not.

o. Universal-Rundle v. Commercial Ins., 319 N.J. Super. 223 (App. Div. 1999), cert. denied, 161 N.J. 149 (1999).

- As part of its manufacturing process, insured bathtub manufacturer deposited waste materials at a site for over 40 years.

- The majority of the deposited waste consisted of sand and slag from its foundry process. The balance of the waste related to an enameling process.

- The primary contaminants at issue were lead and antimony.

- Much testimony was given at trial by former employees of the insured and expert witnesses of both the insured and Commercial, as to the waste disposal practices of the insured and the insured's knowledge of the harmfulness of the waste.

- Trial court determined that while the insured certainly intended to dispose of the waste, there was no evidence that it was aware that its activities would harm the environment, and therefore the pollution exclusion was not applicable to this claim.

- Court went on to find that the mere knowledge of the insured of the danger of exposure of its workers to the contaminants did not mean that it knew the waste would harm groundwater. Further, the court found persuasive evidence that the insured's disposal practices were acceptable industry practices at the time in question and that there was no evidence of regulatory agencies looking at those practices.

- On appeal, Commercial argued that the trial court did not correctly apply the Morton factors governing the applicability of the pollution exclusion, and instead "collapsed the pollution exclusion analysis into the 'occurrence' analysis... "

- Appellate court agreed that a court cannot cease its coverage analysis with a determination that there was an occurrence under a policy. Rather, the court must determine whether the pollution exclusion applies.

- As to the pollution exclusion, the appellate court focused on the concept of an intentional discharge of a known pollutant as the key distinction between whether there was an occurrence under a policy and the applicability of a pollution exclusion.

- Appellate court found that the trial court utilized the Morton occurrence test in making its determination as to the

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

applicability of the pollution exclusion, but noted that parts of the test were relevant to the issue of both the insured's subjective intent to injure and the insured's subjective intent to discharge a known pollutant.

- Further, even though the trial court seemed to blur the distinction between the two points at times, it nevertheless focused on the pollution exclusion key of knowledge of the polluting quality of the waste, and found there to be no such knowledge of the insured here in the context of contamination of the environment.

- Commercial also argued that the Supreme Court in Morton mandated a finding that long term discharges (40 years here) were not "sudden".

- This argument was swiftly rejected by the appellate court which noted that the Supreme Court in Morton rejected the "sudden" concept in the pollution exclusion in favor of an interpretation based on the intentional discharge of a known pollutant.

- Appellate court let stand the trial court's decision that the pollution exclusion was not applicable in this matter.

p. Rohm and Hass Co. v. AIU Ins. Co., No L-004 664-95 (N.J. Super. Ct. Law Div. 1998).

- Certain insurers moved for summary judgment on the basis of a pollution exclusion which contained the following language in an endorsement, in addition to the typical sudden and accidental pollution exclusion language:

  "...or the cost of removing or [sic] cleanup substances described above."

- Since this language was not part of the pollution exclusion considered by the Supreme Court in Morton, the trial court stated that it must be reviewed on its own merits.

- Summary judgment was denied on the basis of an ambiguity as to the terms and conditions of the insurance contract at issue; particularly as to the effect of the endorsement containing the foregoing language on the pollution exclusion.

q. Waste Management, Inc. v. Admiral Ins. Co., No. L-931-92 (N.J. Super. Ct. Law Div. 2000).

- Waste Management and its affiliates (“Plaintiffs”) filed suit against a number of its insurers in connection with contamination at a number of disposal facilities.

- Insurers moved for summary judgment as to five New Jersey sites on a number of bases, including that coverage was barred on the basis of the sudden and accidental pollution exclusion contained in their policies.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Looking to Morton for guidance, court noted that it needed to determine whether there had been an intentional discharge of a known pollutant by Plaintiffs.

- Further, court explained that the Morton occurrence test was relevant to the determination of whether Plaintiffs subjectively intended to discharge a known pollutant.

- Court examined facts presented by each party relative to each of the sites at issue in the motion.

- As to the Cinnaminson site, insurers listed over five pages of facts, which they proposed clearly evidenced Plaintiffs' intentional discharge of known pollutants.

- Further, insurers argued that the fact that Plaintiffs dumped chemicals and liquids at the site in the 1960s, when they knew the landfill was not constructed to be a container, was the equivalent of an intentional discharge of a known pollutant.

- Plaintiffs, however, produced contradictory evidence, and argued that they believed that they did not dump directly into the groundwater and believed that the groundwater was protected by a clay layer at the bottom of the landfill.

- As a result of the foregoing, court held that the insurers did not produce sufficient evidence on which court could grant summary judgment and that there were issues of fact that required determinations by the trier of fact, including assessments as to the credibility of witnesses.

- Another site at issue was the Combe-Fil North landfill. Here Plaintiffs were neither an owner nor operator of the site. Rather, Plaintiffs, on ten occasions over a two-year period from 1978-1980, discharged a mixture of oil and water on the roads of the landfill to keep down dust.

- Plaintiffs submitted evidence that the spreading of oil and water for dust control was an accepted practice at the time and that the Plaintiffs did not intentionally discharge a known pollutant.

- Insurers argued that the fact that certain of the witnesses for Plaintiffs testified that they knew oil was hazardous, should be sufficient to grant their motion.

- Court disagreed with the insurers and in fact granted summary judgment to Plaintiffs', finding that Plaintiffs' application of oil was an "innocent" discharge.

- As to the Evor-Phillips site, the GEMS landfill and the Kin-Buc landfill, court found issues of fact that precluded it from granting summary judgment to either party.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- The facts submitted to court by each party are recited in the decision and contain interesting arguments, including testimony as to common practice at the time, as well as arguments concerning disposal into licensed landfills.

r. Essex Chemical Corp. v. Hartford Accident and Indemnity Co., 261 F.3d 491 (3d Cir. 2001).

- Plaintiff, a chemical manufacturer, operated at a number of facilities located in New Jersey during the 1970s.

- Plaintiff filed suit against its insurers to recover costs related to investigating and remediating contamination at a number of sites.

- Northbrook, the appellant in this instant matter, provided excess liability coverage to Plaintiff for the years 1974 through 1977.

- In a motion for summary judgment, Northbrook argued that it was not bound by the New Jersey Supreme Court decision in Morton, since it was not a party to that suit.

- District Court disagreed and denied the motion. Northbrook appealed.

- On appeal, Northbrook described four reasons why it should not be bound by Morton. However, the Third Circuit was not persuaded by any of the arguments and it affirmed the District Court decision.

- The first argument raised by Northbrook was that it was neither a party to or in privity with a party to the Morton decision and therefore, should not be bound to the decision by the doctrine of collateral estoppel.

- While the Third Circuit found that argument to be true, it also found that the District Court decision did not rely on collateral estoppel. Rather it relied on the position of the New Jersey Supreme Court in Morton that its interpretation of the industry wide pollution exclusion applied to all insurers and therefore, Northbrook was bound to their interpretation as a matter of law.

- The second argument raised by Northbrook was that its right to due process had been violated since it never had the opportunity to argue the issue in court.

- While the Third Circuit recognized that Northbrook did not even begin its operations until after the insurance industry made misrepresentations to state regulators, it found that fact was irrelevant to the decision in Morton. The reason – Morton applies to all insurers that used the standard pollution exclusion language and therefore benefited from the misrepresentations.

- Court explained that Northbrook could have chosen to submit its own language to the regulatory authorities for approval, but instead chose to use the standard provision. Having benefited

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

from the higher premium rates approved contemporaneously with the approval of the exclusion, Northbrook cannot now make the argument that its rights have been violated.

- As a third argument, Northbrook proposed that it should be entitled to relitigate the factual determination of the New Jersey Supreme Court in Morton.

- Third Circuit disagreed with this as well, noting that since the facts have been "...used to fashion a legal rule, it is no longer open for relitigation to challenge that rule."

- Finally, utilizing both a procedural and substantive due process argument, Northbrook proposed that the decision in Morton is unconstitutional and therefore a federal court is prohibited from applying the decision to Northbrook.

- Third Circuit rejected both arguments. The first, on the basis that even though insurers may dispute the factual findings in Morton, the Court did not violate due process by choosing not to remand for a factual finding. The second, on the basis that the Court had the right to refuse to enforce the sudden language in the exclusion and that the decision was neither arbitrary nor irrational.

s. Rohm and Haas Company v. Allianz Underwriters, INC., Superior Court of New Jersey, Mercer County, Docket No.: L-87-4920, January 6, 2004.

- Facts appear in Section III A. 4 q above.

- It should be noted that this decision deals strictly with an excess insurer, as opposed to the case excerpted at p above. The language of the pollution exclusion in this decision is the standard sudden and accidental exclusion.

- In analyzing the validity of a Special Master's recommendation precluding coverage under certain policies on the basis of a pollution exclusion defense, court noted that the pollution exclusion defense is inextricably linked to the outcome of an "expected or intended" defense.

- Court based its analysis on the test set forth in Morton and Universal-Rundle, as to "whether the insured knew that its waste, which it intentionally discharged, was a known pollutant." Court explained that the mere disposal of waste materials on the ground is not the equivalent of an intentional discharge.

- Court went on to describe how the pollution exclusion defense, with its focus on the intentional discharge of a pollutant, as opposed to the insured's knowledge of expected or intended *property damage*, serves to narrow coverage beyond the "occurrence" based expected/intended defense.

- Court then concluded that the plaintiff's discharges were not "intentional", for the same reasons enumerated in its expected/intended analysis. (Summarized at III A4. q. above) including that Rohm and Haas did not know that burning and

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

evaporating the waste would cause soil and groundwater contamination, or that it was disposing a known pollutant.

- For the foregoing reasons, the Superior Court refused to uphold the Special Master's recommendation that a valid pollution exclusion defense existed for the landfill sites.

5. Selected Ohio Case Law

a. Buckeye Union Ins. Co. v. Liberty Solvents and Chem. Co., Inc., 17 Ohio App. 3d 127 (Ohio Ct. App. 1984).

- Trial court found that the releases of hazardous substances alleged in the underlying complaint were not sudden and accidental. The appellate court disagreed.

- Appellate court stated that policy provisions which exclude coverage are to be strictly construed against the insurer where the language is ambiguous, noting that the term "sudden and accidental" was not defined in the policy which had caused several courts to find the pollution exclusion to be ambiguous.

- Court commented that its construction of the pollution exclusion appeared to be a question of first impression in Ohio, but that the overwhelming authority from other jurisdictions where the issue had been presented led it to conclude that the trial court erred in finding that the releases of hazardous substances alleged in the complaint could not be sudden and accidental.

- Court, in construing the term "sudden and accidental" in favor of the insured, found that there were no allegations in the underlying complaint that compelled the conclusion that Liberty Solvents intended or expected the releases of hazardous substances by the disposer or the damage that such releases would cause.

- Court concluded that the releases and resultant property damage could be found to be "sudden and accidental" from the standpoint of Liberty Solvents.

- In reaching its conclusion in favor of Liberty Solvents, court cited two New Jersey cases, Lansco, Inc. v. Dept. of Environmental Protection, 138 N.J. Super. 275 and Jackson Tp. etc. v. Hartford Acc. & Indemn. Co., 186 N.J. Super. 156 (Law Div. 1982).

b. Kipin Indus., Inc. v. American Universal Ins. Co., 41 Ohio App. 3d 228 (Ohio Ct. App. 1987).

- Court interpreted pollution exclusion clause as did the Court of Appeals in Buckeye Union, finding that an event is "sudden and accidental" if the damaging result is neither expected nor intended from the standpoint of the insured. Court further noted that the pollution exclusion clause should be construed against the insurer because it was ambiguous and an exclusion from coverage.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

c. Morton Int'l., Inc. v. Harbor Ins. Co., 79 Ohio App. 3d 183 (Ohio Ct. App. 1992), appeal after remand, 104 Ohio App. 3d 315 (Ohio Ct. App. 1995).

- Southwest Specialty Chemicals, Inc. ("Southwest"), the predecessor to Thiokol Corporation arranged for the disposal of herbicides at a licensed waste disposal facility. Southwest was named as a potentially responsible party by the Ohio EPA and federal EPA. Southwest settled with both state and federal agencies.

- Morton International, Inc. was the successor to Thiokol and was assigned the rights and liabilities of Thiokol with respect to Southwest. Southwest was a named insured under an excess liability policy issued by Harbor Insurance Company ("Harbor"). The period of coverage under the policy included the years that Southwest arranged for disposal of waste at the disposal facility.

- Trial court held in favor of Southwest on the applicability of the pollution exclusion. Harbor appealed from the entry of partial summary judgment in favor of plaintiffs.

- Appellate court rejected Harbor's contention that coverage was excluded under the pollution exclusion based upon its determination that the environmental damage was neither expected nor intended from the insured's standpoint.

- In interpreting the pollution exclusion clause, court followed the holding in Kipin that the "sudden and accidental" exception to the exclusion was a restatement of the definition of occurrence.

- On appeal after remand, Harbor argued that the intervening decision of the Ohio Supreme Court in Hybud required judgment in its favor as to the interpretation of the pollution exclusion clause.

- Appellate court rejected Harbor's argument on the basis that Harbor failed to file a motion to certify the original adverse decision of this court to the Supreme Court.

- Court noted that when the matter was originally remanded to the trial court, nothing was remanded as to the interpretation of the pollution exclusion, and therefore judgment was final as to the issue at that time.

d. Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd., 64 Ohio St. 3d 657 (1992), cert. denied, 507 U.S. 987 (1993).

- Former owner of landfill, transporter of waste to two Ohio landfills, and its officer and director were sued by a neighboring property owner, EPA and the State of Ohio as a result of the leakage of pollutants from the landfills.

- The insureds initiated a declaratory judgment action against their insurer as to their right to defense and indemnification.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- The first underlying action against the insureds contained allegations of bodily injury and property damage resulting from damage to storage containers at a landfill, which caused various chemicals to escape into the environment over a fourteen year period.

- The second underlying action against the insureds was brought by EPA in connection with the same landfill as the first underlying action and was predicated on an administrative order that found that waste had been accepted at the landfill over a twelve year period, even though the owner had failed to install an impermeable liner, resulting in the migration of contaminants into residential water wells.

- The third underlying action was filed by the State of Ohio in connection with a second landfill from which hazardous waste was seeping into the ground and surface waters. The insured transporter was a third-party defendant in this action. The third-party complaint alleged that the transporter had transported waste to the unlicensed landfill over a period of years.

- Trial court held that the insurer was obligated to provide a defense to the actions and to indemnify the insureds.

- Appellate court affirmed the judgment of the trial court, rejecting the insurer's contention that the pollution exclusion barred coverage.

- The Ohio Supreme Court, in a unanimous decision, reversed the trial and appellate court decisions and concluded that the insurer was not under an obligation to defend the insureds in the underlying actions because the claims in those actions were excluded from coverage by the pollution exclusion contained in its policies.

- Court rejected the Ohio appellate court's conclusion in Buckeye Union that the phrase "sudden and accidental" in the pollution exclusion was ambiguous and therefore was to be construed against the insured and that it was to have the same meaning as the phrase "neither expected nor intended" in the definition of occurrence.

- Court noted that the trial court in Buckeye Union, in its discussion of the meaning of the pollution exclusion, stated that "the overwhelming authority from other jurisdictions" supported its interpretation of the term "sudden and accidental". Court, in rejecting the Buckeye Union decision, stated that while this may had been true in 1984, recent decisions had rejected that interpretation.

- Court then cited recent decisions of the Supreme Courts of North Carolina, Michigan and Massachusetts for the proposition that the term "sudden" in the pollution exclusion must be interpreted as having a temporal meaning.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court also noted that in addition to the plain and ordinary meaning of the word "sudden", some courts have placed heavy emphasis upon the fact that "sudden" would not have any meaning in the exclusion if it were not interpreted to also mean "quick" or "abrupt".

- Court held that the word "sudden" in the pollution exclusion was not synonymous with the word "unexpected" in the typical definition of "occurrence" and instead had a temporal aspect.

- The reasons for Court's conclusion were as follows:

  (1) The word "sudden" is not ambiguous in the context of the entire exclusion. As it is most commonly used, "sudden" means happening quickly, abruptly, or without prior notice and is the plain and ordinary meaning of the word.

  (2) Unless "sudden" is interpreted to have a temporal aspect, the word does not add anything to the phrase "sudden and accidental" since in its common, ordinary use the word "accidental" means unexpected and unintended.

  (3) If "sudden" were interpreted to be synonymous with "unexpected", the pollution exclusion would not serve the purpose for which it was intended, since it would only exclude bodily injury or property damage already excluded by the common definition of "occurrence".

- Court reiterated that the primary basis for its holding was the lack of ambiguity in the wording of the exclusion and that the inclusion of the word "sudden" readily indicates the exception to the pollution exclusion was not intended to apply to a release that occurred over an extended period of time.

e. Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co., 84 Ohio App. 3d 302 (Ohio Ct. App. 1993).

- The insurer argued that since the complaints in the underlying actions did not allege that releases happen suddenly, the pollution exclusion precluded coverage.

- In reaching its decision the appellate court cited the Ohio Supreme Court's decision in Hybud for the proposition that the term "sudden" had a temporal aspect.

- Court noted that the complaints in the underlying action contained conflicting allegations. In one paragraph, the complaints alleged that the releases continued over at least a four year period and in another paragraph that there was a specific release on a date certain.

- Court stated that it could not be determined from the complaints whether the release on the date certain was different than the releases that occurred over a four year period, but noted that the complaints implied that to be so.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- In relying on Hybud, court concluded that a series of releases which took place over four years could not be deemed to have happened suddenly, but that a release of pollutants which occurred on one specific day and which was not part of a series of releases, could potentially be a "sudden" release covered under the policies.

- In distinguishing this case from Hybud, court concluded that the Ohio Supreme Court found the pollution exclusion to be applicable in Hybud because there was never any allegation that the release or discharge of wastes happened abruptly or instantaneously. In contrast, in the underlying complaints in this matter, there was at least one allegation inferring that a separate release may have occurred suddenly.

- Court therefore found that the exception to the pollution exclusion was conceivably applicable to the release which took place on a date certain.

f. Lumberman's Mut. Casualty Co. v. S-W Indus., Inc., 23 F.3d 970 (6th Cir.), cert. denied, 115 S. Ct. 190 (1994).

- S-W Industries, Inc. ("S-W") was sued by its employee, Carl Viok ("Viok"), for bodily injury resulting from his continuous and repeated exposure to toxic substances during the course of performance of his duties for S-W.

- S-W made a claim against its insurers in connection with Viok's suit. One of its insurers, Lumberman's Mutual Casualty Company, filed a declaratory judgment action as to its obligations under certain insurance policies it issued. Other insurers that issued various policies to S-W were also named as parties to the action.

- The district court granted summary judgment in favor of the insurers and S-W appealed.

- One of S-W's insurers argued that there was no coverage of the claim on the basis of the pollution exclusion contained in its policies, since Viok's injuries were caused by his exposure to toxic substances.

- The Sixth Circuit Court of Appeals disagreed. Court held that in order for the exclusion to apply, there must be a "discharge, dispersal, release or escape". As part of its analysis of the issue, court reviewed the meaning of these terms as defined in Webster's Third New International Dictionary.

- Court stated that it was undisputed that the fumes and dust that injured Viok were confined to the inside of S-W's plant and found that it strained the plain meaning of the language of the pollution exclusion to propose that the movement of the fumes from a container to Viok's lungs was a "discharge, dispersal, release or escape."

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court held that the pollution exclusion "...is intended to shield the insurer from the liabilities of the insured to outsiders, either neighboring landowners or governmental entities enforcing environmental laws, rather than injuries caused by toxic substances that are still confined within their area of intended use."

- In ruling against the insurer, court stated that Hybud supported its position because the Ohio Supreme Court in Hybud focused on the plain meaning of the words "sudden and accidental" and in this case, court looked to the plain meaning of the words "discharge, dispersal, release or escape".

g. Goodyear Tire and Rubber Co. v. Aetna Casualty & Surety Co., 1995 WL 422733 (Ohio Ct. App.), appeal not allowed, 74 Ohio St. 3d 1477 (1995).

- The Goodyear Tire and Rubber Company and certain of its subsidiaries ("Goodyear") instituted a declaratory judgment action against its insurance carriers with respect to environmental claims at twenty-two sites.

- On motion for summary judgment by the carriers, the trial court dismissed all but the contract claims in the complaint.

- The primary basis for Goodyear's remaining claims against its carriers was that the Insurance Rating Board ("IRB"), acting on behalf of insurance carriers, represented in a letter to the Superintendent of Insurance of Ohio submitting the pollution exclusion for approval, that "Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident."

- According to Goodyear, in reliance upon the IRB representations, the Ohio Department of Insurance approved the pollution exclusion clause without requiring a reduction in premiums.

- In reaching its decision, the appellate court reviewed the New Jersey Supreme Court decision in Morton and the Ohio Supreme Court decision in Hybud and found neither to be persuasive as to this matter.

- Court noted that Goodyear was primarily seeking to invalidate the pollution exclusion, not on the basis that the operation of the exclusion is prohibited by public policy as in Morton, but rather because the means of procuring approval was invalid.

- According to court, this was an important distinction, because the Supreme Court in Hybud found that the restriction of the pollution exclusion to "sudden" events was not against public policy, but it did not address the process by which the pollution exclusion became a part of a CGL policy.

- As to Morton, court explained that the effect of the New Jersey Supreme Court decision was to render unenforceable the literal language of the pollution exclusion. However, Goodyear was

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

going beyond this decision in seeking to have the representations form the basis for an independent cause of action under Ohio law.

- Court then sought to determine whether Ohio would recognize the causes of action alleged by Goodyear, and found as follows:

  (1) Even if the actions of IRB violated statutory and administrative law, as alleged, there was no policyholder private right of action under Ohio law.

  (2) There is no recognized cause of action for a "violation of public policy", particularly since the Supreme Court in Hybud found that enforcement of the pollution exclusion does not violate public policy.

  (3) There was no valid cause of action for fraud, because even if insurance carriers fraudulently represented to the Superintendent of Insurance that the pollution exclusion did not change coverage for gradual events, Goodyear had no right to rely on a representation made to the regulatory agency and not directly to Goodyear in determining whether to purchase insurance coverage. In addition, Goodyear had no justifiable right to rely on the representation of the IRB as an expression as to the intent of the parties, since as a matter of law the statement of intent was immaterial to the meaning of the provision as expressed in the policy.

  (4) Since Goodyear could not establish justifiable reliance in its fraud claim, it could likewise not establish justifiable reliance in its equitable estoppel claim.

  (5) Goodyear had no claim for reformation on the basis of mistake resulting from the inequitable conduct of the insurers through IRB's representations, on the basis that this claim was virtually indistinguishable from the estoppel claim, and that therefore the same result must be reached as to the estoppel claim.

- Appeal to Supreme Court not allowed.

h. Danis Industries Corp. v. Travelers Indemnity Co., 95 CVH12-8904, Ohio Comm. Pls. Franklin Co. (1997).

- Court denied the motion of Travelers Indemnity Co. ("Travelers") to strike provisions of insured's complaint alleging the unenforceability of the pollution exclusion under doctrines of estoppel and violation of public policy, citing lack of binding precedent from the Supreme Court or the appellate court governing its district.

- In rejecting Travelers' argument that a policyholder has no cause of action in connection with misrepresentations to an insurance regulator, court noted that the actual effect of the exclusion reduced coverage, while the insurers received the full benefit of the premiums.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Travelers moved for reconsideration of its motion on the basis of the appellate court decision in Goodyear.

- In denying this motion, court stated that it had considered Travelers' argument based on Goodyear, and rejected it in favor of the decision of the New Jersey Supreme Court in Morton.

- Further, court held that Goodyear was not binding since it was neither a published opinion, nor an unpublished opinion from the Tenth District.

i. Cravat Coal Co. v. Commercial Union Insurance Co., 1997 WL 35419 (Ohio Ct. App. Jan. 24, 1997).

- Cravat Coal Co. ("Cravat") was a member of a joint venture which operated a sanitary landfill known as the Buckeye Reclamation Site, which is a Superfund site.

- EPA and Ohio EPA commenced proceedings against Cravat in connection with property damage resulting from the storage of hazardous waste at the site.

- Cravat commenced suit against its insurers with respect to the suit filed against it by EPA and Ohio EPA concerning the site.

- Trial court granted insurers motion for summary judgment on the basis that all policies either pertained to mining operations, which the court found does not encompass a landfill, or had a pollution exclusion.

- Cravat appealed.

- On appeal, court affirmed judgment of lower court granting summary judgment to insurers with pollution exclusions in their CGL policies, on the basis of Hybud, finding sufficient credible evidence to uphold conclusion that any discharge at the site was not sudden and accidental.

- However, as to the coal mine policy, the appellate court reversed the trial court, noting that the coal mine policies may be applicable to the claim since the named insureds in the policies were in businesses, other than mining, including a landfill operator, and the insurers were aware of that fact.

- Court remanded to trial court for further proceedings.

j. Employers Insurance of Wausau v. Amcast Industrial Corp., 126 Ohio App. 3d 124 (Ohio App. 2 Dist. April 17, 1998).

- Insured was the operator of a foundry from 1916 to 1984, which utilized a waste disposal facility for disposal of spent sand from its foundry operations which contained phenols.

- From 1945 - 1977, Allied Signal used the same waste disposal facility to dispose of hazardous waste from its tar plant.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- In 1989, EPA issued an administrative order to both Allied Signal and the insured to remediate the disposal facility. The insured refused and Allied Signal sued.

- Wausau filed a declaratory judgment action against the insured and its other insurers.

- Trial court granted insurers' motion for summary judgment on the basis of the pollution exclusion in their policies, citing to Hybud, and finding that "the migration of PAH's into soil does not meet the temporal requirement and that even if each individual release was sudden and accidental, the contamination was the result of continuing releases over a period of years which when looked at together could not be viewed as sudden and accidental."

- On appeal, the insured sought to focus the court's attention on the release of contaminants into the environment. This was rejected. Instead, the court affirmed the trial court's decision finding the polluting event to be the release of foundry sand at the disposal site, which was not sudden and accidental, rather than the release of PAH's from the foundry sand into the environment when mixed with waste from Allied Signal's tar plant.

k. Goodyear Tire & Rubber Co. v. Aetna Cas. and Sur. Co., 2001 Ohio App. LEXIS 190 (Ohio Ct. App. Jan. 24, 2001), rev'd, 95 Ohio St.3d 512 (2002).

- As mentioned in Section A.5.f. above, directed verdicts were entered against Goodyear in 1998, with respect to the Motor Wheel Site and Army Creek, in connection with the insurance declaratory judgment action it had filed.

- Goodyear appealed on a number of bases, one of which was whether the Travelers' pollution exclusion in policies issued from 1971-1976, was applicable to the claim of Goodyear in connection with these sites.

- Travelers' exclusion was different than the standard "sudden and accidental" pollution exclusion and instead provided that coverage was precluded if the discharge, etc., is: "...either expected or intended from the standpoint of the insured."

- According to Travelers, the placement of waste at the disposal site was the relevant discharge. According to Goodyear, the relevant discharge was the migration of contaminants from the disposal site into the groundwater.

- Court admitted that while there was authority to support both positions (although in the "sudden and accidental context), it preferred the reasoning of Travelers.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- To support its decision, court cited to Amcast, in which appellate court found the initial disposal of the foundry sand and not the subsequent migration of contamination to groundwater to be the point of focus in determining whether the discharge was sudden and accidental.

- Using similar reasoning, and applying it only to Army Creek, since it previously disposed of the Motor Wheel Site on other grounds, court found that since the plant trash was not placed in any type of container, and instead was placed on the ground and covered with earth, there was an expected or intended discharge, and therefore coverage would be precluded.

- Court completely rejected argument of Goodyear that the landfill was the container and the discharge should only apply to the movement from the landfill into the environment. Rather, it was court's position that the directed verdict be affirmed since Goodyear intentionally disposed of its waste and expected its waste would be disposed of on the ground of a disposal site.

- On appeal, the Ohio Supreme Court reversed and remanded.

- Court explained that case law has established that exclusions will be narrowly read and only apply to that which is clearly intended to be excluded.

- The pollution exclusion at issue here applied to an emission, discharge, seepage, release or escape of a pollutant. However, none of the terms were defined in the policy.

- After examining cases in other states, as well as dictionary definitions of the foregoing words, Court was convinced that the words required "... some sort of movement by a contaminant from one location to another."

- Court therefore held that in order for the pollution exclusion to apply, there needed to be an intentional movement from the Army Creek Landfill as opposed to the mere placing of contaminants in the Landfill.

- Court noted that the evidence indicated no expectation or intention on the part of Goodyear that pollutants would migrate from Army Creek and remanded to trial court for further proceedings.

l. Sherwin-Williams Company v. Travelers Casualty & Surety Company, 2003 Ohio App. LEXIS 5357. (November 13, 2003).

- Sherman-Williams, which was the subject of numerous claims made by federal, state and private parties regarding waste disposal, filed suit against its insurers.

- This decision arises out of an appeal by Sherwin-Williams of the trial court's grant of summary judgment in favor of the insurance companies.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- On appeal, Sherman-Williams propounded an argument that was basically seeking to bypass the pollution exclusion by proposing that the personal injury coverage under the policies at issue was not subject to the pollution exclusion, and that the claims at issue fall within the personal injury coverage.

- It must be noted that personal injury coverage is not bodily injury coverage and is rather keyed into trespass and nuisance type claims, instead of injury to a person.

- Court stated that proper construction of a policy containing both a pollution exclusion and a personal injury endorsement was a matter of first impression under Ohio Law.

- After analyzing the claims against Sherwin-Williams, court concluded that the claims asserted did not constitute those type of claims that come within the policy's personal injury coverage.

- Court explained that the language of the personal injury endorsement is quite specific and only allows coverage for injuries that arise from specifically listed offenses, all of which involve intentional tortuous conduct.

- Sherwin-Williams argued that coverage was available since the at issue injury derived from a wrongful entry or eviction, or other invasion of the right of private occupancy, each of which were specifically listed as being covered in the policies.

- While court does concur that the pollution exclusion clause applies to bodily injury and property damage and that there is no specific exclusion for personal injury, the court bypasses that factor and instead rests its decision upon the fact that the claims do not fall within the personal injury coverage.

- Court held that "wrongful entry" and "invasion of the right to private occupancy" refer to the improper physical entry of a person onto property, and do not serve to provide coverage for the costs of clean up of hazardous materials in the soil and groundwater.

- Court stated that Sherwin-Williams was attempting to recharacterize property damage as personal injury, in order to circumvent the pollution exclusion, which would in effect render the pollution exclusion meaningless.

- Court therefore upheld the trial court grant of summary judgment to the insurers.

m. Pure Tech Systems, Inc. v. Mt. Hawley Ins. Co., 2004 U.S. App. LEXIS 5988 (6th Cir., March 26, 2004).

- Refer to text of case for citation restrictions pursuant to Sixth Circuit Rule 28(g).

- Pure Tech was the operator of a waste oil processing and recycling facility, which accepted two 55 gallon drums of waste,

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

one of which contained PCBs. During the processing of the waste, Pure Tech's oil separation/water reclamation system became contaminated.

- Pure Tech then filed a claim for losses from the PCB contamination with its property insurance policies.

- The insurers denied coverage on the basis of the pollution exclusion contained in their policies, and this action ensued.

- The language of the pollution exclusion provided that the insurers were not liable to Pure Tech for damages resulting from 1) a discharge, dispersal, seepage, migration, release or escape, 2) of pollutants, 3) not caused by a specified cause of loss.

- On motion for summary judgment on the basis of the pollution exclusion, court ruled in favor of the insurers.

- The focus of the appeal was whether the PCBs were "dispersed". If they were, the pollution exclusion would operate to exclude coverage.

- In applying the ordinary meaning of the term "dispersed", the Sixth Circuit found that the PCBs were in fact "dispersed" when Pure Tech emptied the contaminated drums of oil into a tanker truck, which then pumped the mixture into a storage tank, which in turn processed the solution through an oil/water separator.

- The Sixth Circuit rejected Pure Tech's claim that "discharge", "dispersal", "seepage", "migration" and release" are environmental terms of art, and apply to "traditional environmental contamination" only, holding that Ohio law mandates that the court give policy terms their "ordinary and usual meaning".

- Court also refused to accept Pure Tech's argument that Anderson v. Highland House Co. stands for the proposition that the "reasonable expectations doctrine" applies in the context of pollution exclusions. Court felt that it would be overstepping its role as a federal court sitting in diversity, given that the Ohio Supreme Court has yet to adopt the doctrine in such a manner.

- The Sixth Circuit also refused to read language into the pollution exclusion which would restrict its application to instances of "traditional environmental contamination".

- Based on the foregoing analysis, the Sixth Circuit upheld the district court decision and held that "...the pollution exclusion at issue unambiguously precludes coverage of the loss from PCB contamination, and this court must enforce the policies as written."

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

6. Selected Michigan Case Law

a. Upjohn Co. v. New Hampshire Ins. Co., 178 Mich. App. 706 (Mich. Ct. App. 1989), rev'd, 438 Mich. 197 (1991).

- Lower court held in favor of Upjohn and found that even a continuous discharge may be sudden and accidental. Court of Appeals affirmed.

- Supreme Court, in a 4-3 decision, reversed, holding that the phrase "sudden and accidental" was unambiguous and included a temporal element. As a matter of law, Court found that Upjohn had sufficient information available to it to expect a leak from the tank and therefore the leak could not be considered sudden. Court imputed the knowledge of Upjohn employees regarding the suspicious tank measurements to Upjohn.

b. Protective Nat'l Ins. Co. of Omaha v. City of Woodhaven, 438 Mich. 154 (1991).

- City of Woodhaven ("City") was sued by residents for damages allegedly resulting from exposure to pesticides sprayed by City.

- City sought coverage under its liability policies claiming its insurer had a duty to defend and indemnify in connection with the suit. Insurer agreed to defend City under a reservation of rights.

- Insurer later sought declaratory judgment that the pollution exclusion in its policy absolved it of any duty to defend or indemnify City.

- Lower court granted summary judgment in favor of the insurer holding that since the discharge of pesticides was intentional and part of the normal services provided by the City to residents, coverage was precluded.

- Court of Appeals reversed, holding that the pollution exclusion arguably did not apply and therefore, there was a duty to defend.

- In a 5-2 decision, Supreme Court reversed court of Appeals. Supreme Court stated that the application of the pollution exclusion depends exclusively on the discharge into the atmosphere. According to court, the subsequent migration after the release is irrelevant. Since the spraying of chemical pesticides was intentional, court held that the sudden and accidental exception to the pollution exclusion would not apply.

c. Polkow v. Citizens Ins. Co. of Am., 180 Mich. App. 651 (Mich. Ct. App. 1989), rev'd, 438 Mich. 174 (1991).

- Insured testified in his deposition that his regular business activities involved the transfer of waste oil from trucks to underground storage tanks and that the process involved frequent spillage. However, there was some evidence that the contamination was not from these oil spills. Additionally, the contamination may have resulted from underground storage tank leaks.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Lower court granted summary judgment for the insured.

- Court of Appeals affirmed, concluding that the evidence submitted to the lower court indicated without contradiction that the contamination was unexpected and unintended from the insured's standpoint.

- Supreme Court noted that it accepted the proposition that the pollution exclusion is dispositive and that the issue is whether the discharge was sudden and accidental, but that a factual resolution of when the release occurred was necessary.

- Supreme Court concluded that without proof of the source of the discharge and the cause of contamination, it could not determine whether the discharge fell within the pollution exclusion.

- Supreme Court, in a 4-3 decision, reversed and remanded the case, holding that the lower court's granting of summary judgment was inappropriate in light of the factual disputes. Court also commented that the lower court, by resolving factual issues, deprived parties of the right to an evidentiary hearing.

d. Matakas v. Citizens Mut. Ins. Co., 202 Mich. App. 642 (Mich. Ct. App. 1993).

- Insured was the owner of real property on which a tenant conducted a business extracting silver from x-ray film using a sodium/cyanide solution as a wash.

- As part of the process, film chips were stored by the tenant outside the building on the property. Wind dispersed the chips throughout the property and onto an adjacent field. Testing revealed that the chips were contaminated with high levels of cyanide.

- Even after investigations by EPA and Michigan governmental authorities, the tenant continued to dispose of hazardous substances in violation of law. Ultimately, the tenant abandoned the site leaving thousands of pounds of cyanide-laced film in corroded trailers and boxes.

- EPA ordered tenant and insured to clean up the property. When they failed to do so, EPA commenced the cleanup operations, and ultimately filed suit against the insured.

- Insured sought coverage from its insurers, which declined to defend the suit, and insured instituted a declaratory judgment action against its insurers.

- Trial court granted summary judgment in favor of insured on a number of issues.

- Appellate Court reversed trial court on the basis of the pollution exclusion contained in the policies, and did not reach the other policy issues.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court found the term "sudden and accidental" did not mean unexpected and unintended, but included the temporal element defined in Upjohn. Insured argued the exception to the pollution exclusion applied where the insured, as owner, is unaware of the pollution activity of a tenant. Court rejected the insured's argument reasoning that the focus of the "sudden and accidental" inquiry in Upjohn was from the standpoint of the polluter, not the insured.

- Additionally, court stated the pollution exclusion links the term "sudden and accidental" with the release rather than the knowledge, intent or expectation of the insured. Court went on to say that to focus on the intent of the insured in interpreting the meaning of "sudden and accidental" would rewrite the terms of the contract, which is forbidden under Michigan law.

- Court determined that the release of pollutants occurred over a period of time and was fully expected by the polluters. Given the interpretation of "sudden and accidental" to include a temporal element and that the release was neither quick nor without warning, court reversed the trial court and entered summary judgment in favor of the insurers.

e. Auto Owners Insurance Company v. City of Clare, 446 Mich. 1, reh'g denied, 447 Mich. 1202 (1994).

- The City of Clare (the "City") began operations of a landfill at a site in 1974. The landfill was used by many individuals and businesses.

- In 1980 MDNR advised the City that the landfill must either be upgraded or closed down, and reminded the City on a number of subsequent occasions that year that the City did not have a license to operate the landfill.

- In 1982 MDNR warned the City, that its continued use of the landfill without monitoring could increase any existing contamination problem.

- Several years passed, and the City failed to complete the required hydrogeological study.

- In 1985, MDNR notified the City that it expected that the landfill was contaminating groundwater.

- In 1986, MDNR notified the City that its investigation indicated contamination emanating from the landfill and advised the City to immediately terminate its operations, close the landfill and install a cap.

- Notices and demands from MDNR with respect to the landfill continued during the years 1986 and 1987.

- Further, in 1986, a neighboring township filed suit against the City with respect to contamination of residential wells and in 1987, MDNR sued the City alleging that it had continually operated the landfill in a manner that caused environmental contamination and violated laws.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- The two suits were consolidated and the circuit court ordered steps to be taken to close the landfill, cap it, provide potable water to nearby residents as well as other remedial steps.

- During the years the foregoing events took place, the City was insured by three insurers which issued liability policies to the City containing the "sudden and accidental" exception to the pollution exclusion.

- Insurers filed a declaratory judgment action with respect to the policies issued to the City.

- The parties filed cross motions for summary judgment.

- Trial court ruled in favor of the City denying the motion of the insurers for summary judgment with respect to the application of the sudden and accidental exception to the pollution exclusion.

- Trial court found issues of fact as to whether the City expected contamination from the landfill.

- Appellate court, in lieu of granting the insurers application for leave to appeal, remanded matter to trial court to determine whether there was a genuine issue as to the suddenness of the contamination.

- In response, trial court issued a supplemental opinion stating that it saw the determinative issue to be "whether the City knew or should have known that waste materials discharged into the landfill proximately caused contamination of the underlying and nearby soils and groundwater", noting that neither party had shown the absence of a genuine issue of material fact with respect to the issue.

- After the supplemental opinion, appellate court vacated initial order and again remanded to trial court to address "whether there are genuine issues regarding the temporal element required for a discharge to be sudden."

- Insurers filed joint application to the Michigan Supreme Court for leave to appeal.

- Citing to its decision in Upjohn, the Supreme Court, in a 5-2 decision held as a matter of law that the "sudden and accidental" exception to the pollution exclusion did not apply in this case.

- There was a twofold basis for Court's decision, first that the City must have expected the release of contaminants, particularly since the MDNR had been warning the City about this for years; and second that there was no issue as to the landfill being the source of the contamination.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

f. City of Bronson v. American States Ins. Co., No. 175170 (Mich. Ct. App. 1996).

- Trial court held that the pollution caused by years of use of a lagoon system and a landfill for disposal of industrial waste was not "sudden and accidental" and that therefore the pollution exclusion was applicable to all policies but for one.

  See Section A, Michigan subparagraph d. for discussion of the issue as to whether there was an occurrence.

- On appeal, the Michigan Court of Appeals concluded that its disposition of the insured's claim on the basis that there was no occurrence under the policies made it unnecessary to consider the insured's remaining claims.

- However, court did note that the record supported the trial court's conclusion that even if there had been an occurrence, there would be no coverage on the basis of the pollution exclusions contained in all but one policy, since the release of the contaminants was intentional and not sudden and accidental.

g. R.W. Meyer, Inc. v. ITT Hartford, 1996 U.S. Dist. LEXIS 19903 (W.D. Mich. Dec. 6, 1996).

- Plaintiff leased real property to an electroplating company, which disposed of waste into a private sewer system which flowed into public sewer system.

- Sewer line was designed to leach some of the waste into the surrounding area over time. This resulted in contamination to neighboring property.

- Before operations commenced at facility, City advised that hazardous materials would be used in connection with such operations. As a result, City required a monitoring manhole be installed for purposes of sampling.

- Beginning in 1973, testing revealed hazardous discharges in excess of local ordinances. These violations continued on a regular basis. In 1978, City advised Plaintiff of non-compliance.

- Complaints against discharges from the property continued and testing of the wastewater found high levels of chromium.

- In October, 1978, City denied the operator at the property the right to use the public sewer system. Operations ceased in 1981, and in January, 1982, a pipe at the closed facility burst, allegedly causing sludge to be washed into soils.

- In 1983, EPA determined that there was a significant amount of harmful contamination at the site and commenced a removal action, which included removal of the contaminated sewer line.

- In 1978, Plaintiff notified Defendant of losses relating to the sewer line and possible groundwater contamination.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Defendant took no steps until 1982, when it received a report concerning the contamination and issued a reservation of rights letter, under which it undertook Plaintiff's defense.

- In 1983, Defendant issued a second reservation of rights letter denying coverage, but agreeing to defend.

- EPA subsequently sued Plaintiff and the operator for costs in connection with the removal action and the contamination. Following protracted litigation, court held in favor of the federal government.

- In 1989, court made a determination as to damages and apportioned the costs among the parties. Defendant defended Plaintiff in this action.

- In 1991, the State of Michigan sued Plaintiff, among others, for environmental damage at the property and Defendant undertook Plaintiff's defense pursuant to a reservation of rights.

- In 1993, Defendant withdrew its defense on the basis of the pollution exclusion in its policies. Following this, Plaintiff entered into a consent judgment with the State of Michigan.

- Plaintiff subsequently instituted a coverage action against Defendant.

- Defendant moved for summary judgment.

- Court granted summary judgment to Defendant with respect to the pre-1982 policies on the basis of the pollution exclusion in the policies, citing to Upjohn. Court held that the pollution that took place prior to 1982 was due to the consistent use of the sewer system for disposal of the rinse water and sludge of the operator at the property, which was not "sudden and accidental." Therefore, the exception to the pollution exclusion was not applicable to the Plaintiff's claim.

- Summary judgment was denied, however, with respect to the 1982 pipe breakage, which caused a large spill of sludge water onto the property, on the basis that this event appeared to be sudden and accidental.

h. South Macomb Disposal Authority v. American Insurance Company, 225 Mich. App. 635 (1997).

- Defendants argued on appeal that they were entitled to summary judgment on the basis that the pollution exclusion in the policies precluded coverage.

- Court held that the proper focus in determining whether there was a sudden and accidental discharge in this case was the leak of the leachate from the landfill, not the discharge of the waste at the landfill, since the landfill had been designed and licensed to contain the deposited waste.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Next, the court examined an issue of first impression, specifically whether there could be separate, distinct sudden occurrences which were not part of a long term gradual pollution event.

- Agreeing with the trial court, the appellate court held that isolated, "sudden and accidental" discharges of leachate from the landfill may be separated from overall continuing landfill leakage.

- Court examined each of the three distinct events alleged by the insured. As to the first, in 1971, which resulted from the blocking of drainage, the court found an issue of fact as to whether the event was "sudden and accidental", as to the second in 1976, which resulted from erosion gullies caused by rain and the third, in 1980, caused again, in part by erosion gullies, the court held that since the insured should have expected the gullies, the resulting discharge of contaminants through the gullies could not be deemed to be sudden and accidental.

i. Michigan Millers Mut. Ins. Co. v. Bronson Plating Co., 1998 Mich. App. LEXIS 1786, 1998 WL 1991635 (Mich. Ct. App. June 23, 1998).

- On appeal, court affirmed trial court and determined that the pollution exclusion precluded coverage of the insured's claim, as a matter of law, on the basis that the long term intentional discharge of operational waste by the insured was neither sudden nor accidental.

j. Aetna Cas. and Surety Co. v. Dow Chemical Co., 44 F.Supp.2d 771 (E.D. Mich. 1998).

- Claims were brought against insureds with respect to contamination at several hundred sites.

- Aetna Casualty and Surety Co. ("Aetna"), one of the insurers of the insured, instituted a declaratory judgment action against the insured and various other insurers.

- The insured seeks indemnification and defense under policies issued from 1944-1985.

- Two insurers filed a summary judgment motion on the basis that the pollution exclusion in their respective policies precluded coverage.

- Rather than attempting to litigate several hundred sites, the parties and the court selected ten sites on which to focus the litigation.

- The insured conceded that the pollution exclusion was applicable to three of the sites, leaving seven sites at issue.

- The insurers argued that South Macomb, was decided incorrectly and that there cannot be a separation of identifiable discharges from a pattern of discharges.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court rejected the insurers argument, finding South Macomb to be persuasive. It stated that it believed that the Michigan Supreme Court would also find that the pollution exclusion applied to the release of contaminants into the environment, not to the initial placement of waste; and that there may be instances where an insured can show separate, distinct discharges.

- Court stated that in order to overcome the summary judgment motion, the insured must present evidence sufficient to create a material issue of fact: "specifically, Dow must present evidence that at each site: (1) there was a discrete, identifiable isolated discharge or release that can be separated from the historical, ongoing gradual discharges or releases of pollution or contaminants that occurred in the normal course of operations; (2) each of those discrete discharges can be considered 'sudden and accidental' as defined by the Michigan Supreme Court; and (3) that some of the relevant damage at a particular site arguably may be traced to these discrete 'sudden and accidental' discharges."

- Court then conducted an extensive case by case analysis of the applicability of the pollution exclusion to the seven sites at issue.

- Fireman's Fund brought a motion for summary judgment based on the pollution exclusion as to five sites. As to three of these sites, the insured admitted it could not provide evidence of a sudden and accidental event. As to the other two sites, the insured failed to present evidence of alleged sudden and accidental events during the policy periods of Fireman's Fund. Based upon the foregoing, the court granted the motion.

- As to Aetna's motion, summary judgment was granted with respect to the three sites where the insured admitted it had no evidence of sudden and accidental events. As to the remaining sites, the court granted the motion as to four sites and denied it as to three. The court described in detail the events which sustained the insured's summary judgment burden as to three sites, one a sudden and massive break of a levee in 1970, the second, three fires and explosions between 1977, and 1983 at a licensed waste disposal facility to which the insured sent waste, and the third a 1977 fire and explosion at another licensed waste disposal facility to which the insured sent waste.

k. Arco Indus. Corp. v. American Motorists Ins. Co., 232 Mich. App. 146 (1998).

- Arco operated an automobile parts manufacturing plant in Michigan since 1967.

- In conjunction with its operations, Arco utilized an unlined seepage lagoon for its operational wastes (See Section A, Item 6.c. for additional facts).

- Three of AMICO's insurance policies contained a "sudden and accidental" pollution exclusion.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- On appeal, AMICO maintained that the trial court erred in failing to find that these exclusions served to preclude coverage of Arco's claims under the three policies, arguing that the discharges at issue were not sudden and accidental.

- Appellate court disagreed and affirmed the trial court's decision.

- Appellate court examined the decision of the Michigan Supreme Court holding that there had been an occurrence under Arco's policies. (See Section A, Item 6.c.) for guidance.

- Court noted that the Supreme Court analyzed a list of incidents during the policy periods and found them to be unexpected and accidental.

- In examining these same incidents, spills of mop buckets of solvents, accidental puncturing of drums, and accidental spillage from drums, the appellate court determined that the Supreme Court would have found a temporal element to these incidents as well, and that therefore the pollution exclusion would not apply.

- Motion filed for leave to appeal to Michigan Supreme Court.

l. Hoechst Celanese Corp. v. Aetna Cas. & Sur. Co., No. 1997-541375-CK (Mich. Cir., Oakland Co. 1999).

- Insurers moved for summary judgment on the basis of the pollution exclusion.

- Trial court denied motion finding issues of fact as to whether sudden and accidental events resulted in an appreciable amount of contamination.

- Insurers moved for reconsideration, and upon reconsideration court granted summary judgment to insurers.

- In this case the insured alleged that certain contamination at the site resulted from fires that caused drums to explode.

- Examining the decision in South Macomb, the court noted that summary judgment must be denied in the situation where there is a "scintilla of evidence that some of the spills were sudden and accidental."

- However, the court explained that based on South Macomb, the analysis must go further to show that the sudden and accidental events caused an "appreciable" amount of damage.

- Based on evidence supplied by the insurers that over 78,000 barrels of waste had been disposed of at the site prior to any fires, and that only 3,650 barrels were involved in the cleanups resulting from the fires, there was no "appreciable" amount of contamination from sudden and accidental events. As a result, summary judgment was granted to insurers.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

m. City of Albion v. Guaranty National Ins. Co., 73 F. Supp. 2d 846 (W.D. Mich. 1999).

- The City of Albion ("Albion") operated a landfill from 1966-1981, pursuant to a license issued in 1966 by the State of Michigan.
- In 1980 it was determined that pollutants, consisting of heavy metals, were being deposited at the landfill, and in 1981 the landfill was closed.
- EPA began investigating the landfill in 1986 and placed it on the NPL in 1989, after discovery of significant amounts of toxic chemical waste and metallic sludge.
- In 1991, Albion and others were identified as PRPs with respect to the landfill and in 1999, after a suit was filed by EPA, Albion reached a comprehensive settlement with EPA with respect to the landfill.
- Albion placed its insurers on notice of the Complaint filed by EPA, and the insurers denied coverage on the basis of a pollution exclusion.
- A declaratory judgment was subsequently filed by Albion against its insurers.
- During a status conference, Albion asked the court for permission to file a motion as to the applicability of the pollution exclusion to this matter, which was granted.
- The issues raised in the motion included whether the "sudden and accidental" pollution exclusion applied to discharges from a landfill into the environment and whether a subjective or objective standard should be utilized in determining the applicability of the pollution exclusion.
- In reaching its conclusion, court analyzed a number of Michigan state court decisions including the Michigan Supreme Court rulings in Upjohn and Protective National, as well as the Michigan Appellate court rulings in Kent County and South Macomb.
- As a result court held that for purposes of interpretation of the sudden and accidental pollution exclusion in this case, " ... the relevant release... will be the release from the landfill into the environment if the City is able to establish that the landfill was licensed by the State of Michigan and designed and constructed in accordance with then contemporary standards in order to contain the contents that were to be placed in the landfill."
- In addition, in order to demonstrate that the exception to the "sudden and accidental" pollution exclusion applies here, court explained that Albion must show separate and distinct discharges that are not part of the general leaking of the landfill.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Finally, court found that the standard to be utilized in connection with the pollution exclusion was an objective standard, and was not the subjective standard found to be applicable with respect to the issue of the definition of the term occurrence.

n. South Macomb Disposal Authority v. Westchester Fire Insurance Company, 239 Mich. App. 344 (2000).

- This appeal relates to the operators of two of the four landfills at issue in this suit, sites 9 and 9A. See Section A, Item 6e. and Section C, Item 6h. for additional facts.

- Site 9 began operating as a licensed landfill in 1968. Within six months thereafter, groundwater problems were discovered, which workers sought to correct. The site closed in 1975.

- In 1971, South Macomb sought to expand landfill operations at site 9A. Although a license was issued, there were various stipulations due to groundwater concerns. This site closed in 1979.

- While site 9A was operating, there were concerns about leachate outbreaks, including one that occurred in 1971, and problems with the underdrain system.

- Trial and appellate courts previously ruled that there were issues of fact as to whether the 1971 outbreak was sudden and accidental.

- On this appeal, insurers argued that the 1971 leachate outbreak was excluded from coverage by the pollution exclusion, and the appellate court agreed.

- Court explained that the trial court predicated its decision for coverage on its belief that the discharge from the underdrain in 1971 was an initial discharge into the environment and was therefore sudden and accidental, both of which conclusions this court found to be erroneous.

- Based upon the evidence presented here, this court concluded that the underdrain was not a containment system, but was rather a conduit to divert groundwater from site 9A, and further that the source of the contaminated leachate was its migration from site 9 and not an independent discharge from site 9A. Therefore, the discharge from the underdrain was not an initial discharge of contaminants and it does not fall with the exception to the pollution exclusion.

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

- In 1999, Dow Chemical Co ("Dow") filed suit against a number of its insurers in connection with numerous environmental liabilities associated with Dow manufacturing facilities throughout the world. Due to the complexity of the suit, court separated the case into a number of phases.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- One of the insurers brought a summary judgment motion under the policies, joined in by other insurers, alleging that the pollution exclusion in the policies precluded coverage and that the sudden and accidental exception to that exclusion was not applicable to any of the claims at issue.

- Court noted that Dow had the burden to prove that there were specifically identifiable and isolated discharges that were different than any overall pattern of leakage and that were "sudden and accidental" discharges for which it was entitled to coverage. In addition, court explained that if Dow met that burden, then court would determine whether they created issues of fact that precluded summary judgment.

- After an extensive analysis of the facts, summary judgment was granted by the trial court as to two of the five (5) sites that were the subject of Phase One of the suit, since Dow failed to provide any evidence whatsoever that there were any issues of fact as to whether the pollution exclusion applied.

- As to the balance of the three sites, trial court held as follows:

  (a) Magnolia, Arkansas. Dow alleged that there were two "sudden and accidental" releases at the site, both related to tanks, one that failed in 1971 and one that failed in 1978-1979. As to the latter tank, court determined that since the insurers that were still part of the suit failed to contest the issue, summary judgment was denied. As to the former tank, court determined that sufficient evidence was produced by Dow that the failure of a tank in 1971 did contribute to at least some of the contamination at the site and that the discharge from the tank resulted from a crack in the tank. As a result, summary judgment was denied.

  (b) Plaquemine, Louisiana. Dow alleged that the "sudden and accidental" pollution exclusion did not apply with respect to leaks related to certain tanks at the site. As to the first tank, identified as the HCI tank, Dow alleged that the tank collapsed and caused contamination resulting in damage to the site in the early 1970's. Although Dow produced witness testimony that a collapse took place, it presented no evidence that the collapse resulted in damage during the policy periods at issue and therefore summary judgment was granted to the applicable insurers. As to the three Vinyl II tank failures, two of which were alleged to take place as the result of defective welds, and one of which had holes in the weld plate, court rejected the argument of Dow that notwithstanding the fact that there was a long period of leakage from the tank, the "sudden and accidental" pollution exclusion did not apply on the basis that the initial discharge was caused by a "sudden and accidental" event. Citing to Upjohn, court held that there had to be an "immediate and unexpected" discharge to get past the pollution exclusion and that the mere fact that the initial discharge was sudden was not

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

sufficient to eliminate the application of the pollution exclusion in connection with the discharges at issue.

(c) Midland, Michigan. There were two groups of discharge events that took place at this site, the first related to a benzene pipeline leak in 1978 and the second to a number of brine water spills. As to the pipeline leak, court found that "pinhole" sized holes created by corrosion caused the leak and that this was not a "sudden" event for which there would be coverage, rather it was an event that took place over a period of time. As to the brine water spills, notwithstanding the report of an expert of Dow's which documented the dates and location of the brine water spills, as well as a consent order between Dow and the DNR containing an extensive list of events characterized as spills, court found that summary judgment for the insurers was appropriate because Dow failed to comply with the requirements of South Macomb in that it neither showed how many of the brine water spills were "sudden and accidental", nor did it demonstrate that the damage caused by each spill could be distinguished from the damage caused by all spills. Therefore, Dow failed to overcome the presumption that it was not entitled to coverage.

p. Aero – Motive Company v. Great American Insurance, 302 F. Supp. 2d 738, (W.D. Mich. 2003).

- Plaintiff, Aero-Motive, filed suit against its insurer, Great American Insurance Company ("Great American") alleging that it must indemnify and defend Aero-Motive under a CGL policy for environmental property damage.

- On a prior motion by Great American for summary judgment, the court left open the issue of whether the "sudden and accidental" pollution exclusion applied with respect to contamination resulting from a disposal pit utilized by Aero-Motive.

- In conjunction with some further motion practice, court again examined this issue.

- Aero-Motive maintained that any releases of hazardous substances from the disposal pit should be deemed "sudden and accidental" on the basis that the pit was operated in accordance with generally-accepted industrial waste practices of the time, and no one was aware that it would leak.

- Court noted that certain Michigan courts have ruled that discharges from sites that were "state of the art disposal sites at the time of placement of such substances into the site have been deemed "accidental".

- Court also looked at several factors which were noted by the court in Kent County v. Home Ins. Co. 217 Mich. App. 250 as being indicative of whether a facility was "state of the art",

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

specifically, whether the facility was licensed by a governmental authority; whether it complied with state or federal guidelines; and whether the design had as its genesis engineering studies that concluded that the actual design was effective to contain hazardous substances.

- When court previously examined the issue of whether the facility was "state of the art", it was unable to make a determination as to whether the release of substances that had been deposited into the pit was accidental, since the evidence presented failed to address the foregoing factors.

- While Aero-Motive admitted that its disposal pit was not a "state of the art" landfill under the three Kent County factors, it took the position that the disposal pit was not a landfill, but merely a disposal pit, and should thus not be subject to the same standards as set forth above. Rather, it argued that the quality of the disposal pit should be evaluated based upon the generally accepted disposal practices of the time.

- Court notes this distinction, but also points out that the "sudden and accidental" determination does not rest solely on whether or not the plant is deemed to be "state of the art".

- For purposes of its analysis, court assumed that the relevant discharge was the movement of waste materials from the pit to the surrounding earth, rather than the actual discharge of materials into the pit. Thus, court had to make a determination whether the movement of materials from the pit to the surrounding earth was "sudden and accidental".

- In order for a discharge to be considered to be sudden under Michigan law, it must be an identifiable, temporally isolated event, not a gradual seepage over time.

- After examining the facts before it, court concluded that Aero-Motive failed to demonstrate that the discharges were sudden, thus rendering the "sudden and accidental" prong not applicable. As a result, summary judgment for Great American was deemed appropriate as to the disposal pit issue.

- This placing of the burden of proof on Aero-Motive was a critical component of the decision

- The court also ruled on the applicability of the "sudden and accidental" exclusion to other alleged incidents on Aero-Motive's property, including the overflow of a parts degreaser, fires in the disposal pit, and spills in the vicinity of the 1967 factory. Unfortunately for Aero-Motive, these claims were only supported by hearsay, conjecture and speculation, all insufficient to withstand Great American's motion for summary judgment.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

7. Second Generation Language: Absolute Pollution Exclusion

Examples of Absolute Pollution Exclusion Policy Language:

1. Example 1 - Pollution Exclusion Endorsement

It is agreed that exclusion (f) is deleted and replaced by the following:

(f) (1) to "bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:

(a) at or from premises owned, rented or occupied by the named insured;

(b) at or from any site or location used by or for the named insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for the named insured or any person or organization for whom the named insured may be legally responsible; or

(d) at or from any site or location on which the named insured or any contractors or subcontractors working directly or indirectly on behalf of the named insured are performing operations:

(i) if the pollutants are brought on or to the site or location by or for the named insured in connection with such operations; or

(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

(2) Any loss, cost or expense arising out of any governmental direction or request that the named insured test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

Pollutants mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

2. Example 2 - Hazardous Substances Remedial Action Exclusion

This policy does not apply to the liability of the Insured, or liability of another for which the Insured may be liable in whole or in part, resulting from any suit, action, proceeding or order brought or issued by or on behalf of any Federal, State or local governmental authority seeking (a) Remedial Action, or the costs thereof, (b) damages for injury to, destruction of or loss of natural resources, including the costs of assessing such injury, destruction or loss, of such suit, action, proceeding or order arising from the release of a hazardous substance at any area, whether or not owned by the insured. The company shall not have the obligation to defend any suit, action or proceeding seeking to impose such liability.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

Special Definitions

The following definitions apply to this Exclusion:

Release means: any spilling, leaking, pumping, pouring, emitting, emptying, injecting, escaping, leaching, dumping or disposing into the environment.

Remedial Action means:

(a) the cleanup or removal of released hazardous substances from the environment; and,

(b) such actions as may be necessary to monitor, assess and evaluate the release or threat of release of hazardous substances; and,

(c) the disposal of removed material, or the taking of such other actions as may be necessary to temporarily or permanently prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

Hazardous Substance means: smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants.

Note: Courts have held that the absolute pollution exclusion bars coverage for claims arising from environmental contamination. See Kimber Petroleum Corporation v. Travelers Indemnity Company, 298 N.J. Super. 286 (App. Div. 1997). However, policies issued from 1985 forward still need to be carefully reviewed since the absolute pollution exclusion may not have been approved in a state at the time the policy was issued; the insurer may have forgotten to include the exclusion in a policy; or the facts of the claim may fall outside the exclusion.

In addition, policyholders have looked at the personal injury provisions of liability policies, which generally afford coverage for certain enumerated offenses. One offense is wrongful entry or eviction. Another is the invasion of the right of private occupancy. This coverage is separate from the coverage for bodily injury or property damage. Policyholders argue that while the absolute pollution exclusion may preclude coverage for bodily injury and property damage, it does not apply to the personal injury offenses.

8. Selected New Jersey Case Law

a. Crown, Cork & Seal Company Inc., v. Aetna Casualty & Surety Co., No. A-5564-9673 (N.J. Super. Ct. App. Div. 1998).

- Plaintiff appealed from a summary judgment motion in favor of insurers.

- The basis of the appeal was that the so called "absolute" pollution exclusion was not applicable in that it: (a) failed to resolve the public policy concerns of the Supreme Court in Morton as to the

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

sudden and accidental pollution exclusion and; (b) was ambiguous and was not properly included in existing policies.

- Appellate Court affirmed lower court ruling on basis that the absolute pollution exclusion "...is neither ambiguous nor offensive to policy considerations, especially in contracts of insurance entered into between knowledgeable and sophisticated parties... ".

- See also: Kimber Petroleum Corp. v. Travelers Indemnity Co., 298 N.J. Super. 286 (App. Div.), cert. denied, 150 N.J. 26 (1997).

b. Byrd v. Blumenreich, 317 N.J. Super. 496 (App. Div. 1999).

- Landlord was sued by parents of a child for bodily injury resulting from ingestion and/or exposure to lead paint and lead paint dust.

- Landlord then included its insurer in the suit since it denied coverage of the landlord's claim for coverage on the basis of the absolute pollution exclusion in its policy.

- Trial court granted insurer's motion for summary judgment on the basis of the absolute pollution exclusion.

- On appeal, the court noted that the issue of whether the absolute pollution exclusion precludes this type of lead paint bodily injury claim was one of the first impression.

- After reviewing recent decisions in other jurisdictions, this court focused on the proposition that the exclusion is ambiguous as to injury or damage caused by indoor exposure to lead paint in a residential setting.

- In examining the exclusion, the court concluded that the words discharge, disposal etc. indicated some type of active or physical event.

- Since the involuntary chipping or flaking of lead paint could not, in the court's opinion, be perceived as such, it found the absolute pollution exclusion to be ambiguous and remanded the matter to the trial court.

c. Leo Haus, Inc. v. Selective Ins., 353 N.J. Super. 67 (App. Div. 2002), overruled by Nav-Its, Inc. v. Selective Ins. Co. of America, 133 N.J. 110, 869 A.2d 929 (N.J. 2005).

- Plaintiff was a homebuilder sued by homeowners for injuries suffered as a result of exposure to carbon monoxide over a one year period, which resulted from the defective installation of heating units in a home built by Plaintiff.

- Plaintiff sought coverage in connection with the suit, from its liability insurer, Selective Insurance ("Selective"), which denied coverage on the basis of a so-called "absolute" pollution exclusion in its policy.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Trial court granted Selective's motion for summary judgment on the basis of the pollution exclusion.

- Plaintiff appealed arguing that the pollution exclusion was not applicable in a residential setting and cited to the Appellate Division decision in Byrd.

- Court rejected the Plaintiff's argument noting that the facts of this case were clearly distinguishable from Byrd.

- In reaching its conclusion, court quoted the entire pollution exclusion which contained an exception for bodily injury which resulted from an interior discharge of pollutant which begins and ends in a forty-eight hour period during which the exposure which causes the injury takes place. (This exception was not contained in the pollution exclusion in Byrd.)

- Court explained that the decision in Byrd was based on the fact that there was no active polluting event involving lead paint, but rather a chipping or flaking over a period of time. On this basis court found the exclusion to be ambiguous due to the fact that it did not address exposure to lead paint in a residence.

- In this case, court determined that there was an active discharge which clearly fell within the language of the pollution exclusion.

- As a further basis to distinguish the case from Byrd, court noted the exception language in this particular exclusion, which it felt clearly established that the exclusion was intended to apply in an interior setting.

- While court explained that it was ... "sensitive to the argument that general notions of "pollution" relate to industrial discharges and environmental contamination and catastrophes ...", court found nothing in the policy to support the argument that the exclusion only applied in such settings.

- Based on all of the foregoing, court affirmed trial court decision.

d. Estate of Phillip Mini v. Metro Supply & Service Inc. v. Selective Insurance Company of America, No. A-3976-02T2, N.J. Super., App. Div.).

- Decedent, Mini, purchased cedar mulch from Metro Supply & Service, Inc. (“Metro”). After applying the mulch, plaintiff alleges that decedent became unconscious and subsequently died after a 20 month long illness.

- The underlying complaint alleges that Mini’s death resulted from his exposure to “unsafe and dangerous toxins” in the cedar mulch.

- At the time in question, Metro carried a commercial general liability insurance policy, which contained a so-called “absolute” pollution exclusion.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- In the underlying claim, plaintiff was unable to establish the presence of any toxic substance in the mulch, and thus voluntarily dismissed the action.

- Insurer then sought a declaration of no coverage. The motion judge granted the motion.

- Appellate division reverses, noting that there is nothing in the underlying complaint that alleges that the decedent breathed in any toxin given off by the mulch, it merely alleged "exposure" to the mulch.

- Court explained that the facts of this case were somewhat similar to the Byrd decision in that "the underlying complaint ... does not allege an active or physical event that could constitute a discharge, dispersal, seepage, migration, release or escape of a pollutant" that would be precluded by the pollution exclusion. Rather, the complaint alleged an exposure to a toxin, yet such allegation had no factual basis. Thus, the only interpretation available is that the underlying complaint alleged a cause of action outside the scope of the pollution exclusion.

- This is a very interesting conclusion and indicative of the need to carefully compare the facts of any claim to the actual language of an absolute pollution exclusion.

e. Nav-Its, Inc. v. Selective Ins. Co. of America, 183 N.J. 110 (2005)

- This case concerns the applicability of a so-called "absolute" pollution exclusion provision in a commercial general liability insurance policy.

- After an analysis of both the policy language and its general intent, the Court held that the so-called "absolute" pollution exclusion provision is limited to traditional environmental pollution claims, i.e. the "discharge, dispersal, release or escape of pollutants" and is not a bar to coverage in this case involving exposure to toxic fumes that emanated from a floor coating/sealant operation performed by the insured.

- In addition, the Court found that an exception to the exclusion that allows coverage where the injury takes place within a single 48-hour period and the exposure occurs within the same 48-hour period was not applicable in this instance.

- Plaintiff, Nav-Its, Inc. ("Nav-Its"), a construction contractor, entered into a contract to perform fit-out work at a shopping center in Allentown, Pennsylvania (the "Center").

- Defendant, Selective Insurance Company of America ("Selective"), issued a comprehensive general liability insurance policy to Nav-Its for the period of May 7, 1998 through May 7, 1999.

- During construction, Dr. Roy Scalia, a physician with office space in the Center, was allegedly exposed to fumes that were released during performance of coating/sealant work. As a result of that

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

exposure, Dr. Scalia allegedly suffered from nausea, vomiting, lightheadedness, loss of equilibrium, and headaches and sought medical treatment in September 1998.

- In December 2000, Dr. Scalia filed a suit against Nav-Its and several others for personal injuries arising out of his exposure to fumes at his office.

- Nav-Its sought defense and indemnification from Selective in connection with the suit. Based upon the pollution exclusion in its policy, Selective denied coverage to Nav-Its.

- Nav-Its then filed a declaratory judgment action against Selective for defense and indemnity costs in connection with the underlying personal injury action filed by Dr. Scalia.

- Trial court denied summary judgment by Selective and instead granted partial summary judgment in favor of Nav-Its, finding Selective did in fact have an obligation to defend and indemnify Nav-Its in accordance with the terms of its insurance policy.

- The primary basis of trial court decision was that "...Nav-Its had a reasonable expectation that liability arising out of normal painting operations would be covered under the policy" and found that the pollution exclusion in the policy was only applicable to traditional environmental pollution claims.

- In addition to the foregoing, trial court found that the exception to the exclusion which permits coverage where both the injury and the exposure takes place during the same 48 hours period applied on the basis that Dr. Scalia suffered individual exposures every day he entered his office, specifically that each exposure began and ended in less than a forty-eight hour period.

- Appellate Division reversed, concluding that the pollution exclusion was not necessarily limited in applicability to traditional environmental damage. Notwithstanding the foregoing, the court left it to a jury to decide whether each period of time that Dr. Scalia was at work represented a separate exposure of less than forty-eight hours, or instead one continuous period of exposure.

- On appeal the Supreme Court reversed the appellate court decision and agreed with the trial court's conclusion that the exclusion did not bar coverage here.

- Just as the Supreme Court panel did in reaching its conclusion concerning the "sudden and accidental" pollution exclusion in the Morton decision, the Court here reviewed both the language of the policy and the general intent behind the so-called "absolute" pollution exclusion.

- Also, as in Morton, Court here cited to various testimony given by insurance company representatives to insurance regulators concerning the meaning of the "absolute" pollution exclusion, in reaching its conclusion that "...its purpose was to have a broad exclusion for traditional environmentally related damages."

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court noted that if read literally, the exclusion in Selective's policy would require its application to all instances of injury or damage to persons or property caused by "any pollutants arising out of the discharge, dispersal, seepage, migration, release or escape of ... any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

- Instead, Court found through a review of the history of this particular pollution exclusion, and the earlier decision in Morton, that a literal reading would not only be unfair, but also would be contrary to the objectively reasonable expectations of not only the insured, but also the New Jersey and other state regulatory authorities that were presented with an opportunity to evaluate and to disapprove the clause.

- Court here also relied on other case law and commentators suggesting that "the available evidence most strongly suggests that the absolute pollution exclusion was designed to serve the twin purposes of eliminating coverage for gradual environmental degradation and government-mandated cleanup such as Superfund response cost reimbursement."

- Court also explained that its conclusion that the scope of the pollution exclusion should be limited to injury or property damage arising from traditional environmental pollution is consistent with the choice of the policy terms, "discharge, dispersal, release or escape" found in Selective's policy.

- Since Court found that the pollution exclusion did not apply to the injuries at issue for the reasons set forth above, it chose not to address the ramifications of the 48-hour exception.

- Another great victory for policyholders.

f. Merchants Ins. Co. of New Hampshire, Inc. v. Hessler, 2005 U.S. Dist. LEXIS 18173 (D.N.J. Aug. 18, 2005)

- This insurance action stems from an underlying suit by George and Stacy DePoe ("DePoe") against Veronica and Timothy Hessler ("Hessler"), trading as Coastal Painting and Restoration Co. ("Coastal"). DePoe alleged bodily injury and property damage, caused by exposure to lead, toxic fumes and dust. DePoe hired Coastal to paint the exterior of their home, and Coastal's alleged negligence caused the injuries detailed in the Complaint.

- In turn, Coastal demanded that Merchants Insurance Co. of New Hampshire ("Merchants"), its insurer, defend and indemnify it in the underlying action. Merchants agreed to provide a defense, but brought a declaratory judgment action for a determination that the liability policy it issued to Coastal did not provide coverage for the DePoe claims; that it had no duty to defend Coastal, and that it had no duty to indemnify Coastal if the court hearing the DePoe complaint awarded a judgment against Coastal.

- The policy at issue contained a total pollution exclusion endorsement that expressly precluded recovery for bodily injury or property

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

damage occurring because of an "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." It also excluded recovery for costs either arising out of any response to pollutants, or stemming from suits brought by a governmental authority for damages arising out of remediation. The policy also contained a specific exclusion for damages caused by lead paint or lead contamination. Further, the policy prohibited recovery for expected or intended damages. Finally, it excluded damages from a contractual assumption of liability.

- Merchants filed a motion for summary judgment.

- In order to resolve Merchants' motion, court examined whether the allegations in the complaint in the DePoe matter could fall within the policy's scope of coverage.

- The DePoe complaint had six counts, alleging 1) that Coastal informed DePoe that its lead testing had revealed the absence of lead and that Coastal caused lead paint and debris to enter their property as a result of their negligent performance; 2) that they suffered from emotional distress which led them to vacate their property and in an alternative housing costs; 3) violation of New Jersey's Consumer Fraud Act; 4) intentional misrepresentation; 5) breach of contract for causing extra damages over the contract price, and 6) nuisance created by unreasonable interference with DePoe's use and enjoyment, and other personal injuries.

- Court first turned to the policy's total pollution exclusion endorsement, which Merchants asserted gave it the right to deny defense and indemnity to Coastal. In reaching its conclusion, that the total pollution exclusion did not apply, court sought guidance from the New Jersey Supreme Court decision, in Nav-Its, Inc. v. Selective Ins. Co. of America, 869 A.2d 929 (N.J. 2005). In that decision, the Court defined pollution as an "environmental catastrophe related to intentional industrial pollution." Merchants argued that Nav-Its did not apply to this situation because the absolute pollution exclusion at issue in Nav-Its differed from the exclusion contained in the policy it issued to Coastal. Court noted that there was no such distinction made by the Supreme Court. Merchants also argued in the alternative that it had met the environmental component required by Nav-Its for purposes of the exclusion because a layer of soil contaminated with lead chips had to be removed from the property and replaced with another layer of clean soil. Court rejected this argument, noting that Nav-Its applies to all pollution cases and that mere soil removal does not constitute an environmental catastrophe.

- Court then reviewed the lead exclusion in the policy. Merchants claimed that this exclusion precluded coverage of the underlying suit. Court analyzed the complaint, on a count-by-count basis, to see if the exclusion would apply to bar coverage.

- Court found that based on the plain language of the exclusion, coverage was barred for the first count and the emotional distress allegation of the second count, but did not apply to property loss claims of the second count.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court also held that with respect to property loss related to the nuisance claim, the lead exclusion did not apply.

9. Selected Ohio Case Law

a. Celina Mutual Insurance Company v. Marathon Oil Company, 2000 Ohio App. LEXIS 2453 (Ohio Ct. App. Jun. 8, 2001).

- Marathon Oil Company ("Marathon") was one of the owners of an oil pipeline that was punctured by a contractor operating a trenching machine on a third party's property, resulting in a significant discharge of unleaded gasoline into the environment.

- Pursuant to the Oil Pollution Act of 1990, Marathon had an emergency response plan (the "Plan") in place with respect to the pipeline. Marathon had a contract in place with Interdyne Inc. ("Interdyne") to perform emergency responses pursuant to the Plan and therefore, notified Intertype of the discharge and Intertype proceeded to perform the necessary remedial actions.

- Celina Mutual Insurance Company ("Celina") issued a liability insurance policy to the negligent contractor.

- Celina notified the contractor that there was no coverage under its policy on the basis of an "absolute" pollution exclusion.

- Marathon sued the contractor for costs it incurred in investigating and remediating the discharge and shortly thereafter Celina filed a declaratory judgment action.

- As part of the settlement, the contractor assigned its rights under the Celina policy to Marathon.

- Trial court ultimately ruled in favor of Celina on the basis of the following language in the "absolute" pollution exclusion:

  "This insurance does not apply to:

  F. (2) Any loss, cost or expense arising out of any:

  (a) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; ...."

- Specifically, court found that even though there was no explicit demand or order to investigate and/or remediate the discharge, there was an implied request by both the owner of the property and the Ohio EPA.

- Marathon appealed arguing that the recited provision of the "absolute" pollution exclusion did not apply to the facts of this case.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- The crux of the argument of Marathon was that there had been no "request, demand or order" that resulted in a "loss, cost or expense" to Marathon.

- Appellate Court found the argument persuasive and reversed the trial court decision on this issue.

- In reaching its decision, court first focused on the word "request," since the parties had stipulated that there was no demand or order.

- Next, court noted that the word "request" must be given its plain meaning and looked to dictionary definitions for that meaning, finding that the word required an overt act.

- In addition, court found that there was no ambiguity in the meaning of the word and that therefore it would not read into the policy language the concept of an implicit request, as argued by Celina.

- Court also noted that there was no exclusion in the policy for a voluntary remediation, rather the exclusion keyed into a "request" etc.

- Next, Court moved onto the issue of whether an express request was made that resulted in a "loss, cost or expense."

- After examining the evidence before it, court found that there was no request by any party, be it the contractor, Ohio EPA or the property owner that Marathon conduct a remediation. Rather, Marathon implemented its voluntary emergency plan, and the costs related thereto were not the result of a request.

- This decision is very interesting in that it illustrates the crucial need for an insured to analyze the terms its policies in light of the facts of the claim.

b. Anderson v. Highland House Co., 93 Ohio St. 3d 547 (2001).

- One resident of an apartment unit died from inhaling carbon monoxide resulting from a defective heating unit and another was injured.

- The owner of and management company for the apartment unit were sued and sought coverage under their liability policy.

- Insurer refused to cover the claim on the basis of an "absolute" pollution exclusion in the policy.

- A declaratory judgment action ensued.

- Trial court granted summary judgment in favor of the insured.

- Trial court reviewed a number of cases in other jurisdictions before holding that "... the pollution exclusion at issue applies

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

only to an environmental discharge of traditionally environmental pollutants and not to cases involving exposure to carbon monoxide produced by a defective heating unit... ."

- On appeal, court found that the "absolute" pollution exclusion was unambiguous.

- Further, citing to a number of decisions by Ohio courts, appellate court concluded that carbon monoxide did fall within definition of pollutants, which included terms such as "gaseous" irritant or contaminant, including vapors.

- Based on the foregoing, appellate court found that the trial court erred in finding an ambiguity in the policy where none existed, and reversed.

- Ohio Supreme Court reversed the appellate court, finding that: "... because the policy does not clearly include death or injuries caused by residential carbon monoxide poisoning, [the insured] reasonably believed that [the insurer] would insure them for claims relating to premises hazards... ".

- Court placed the burden on the insurer to prove that its interpretation that the policy precluded coverage was the only fair interpretation of the exclusion, and the insurer failed to meet that burden.

- The concurring opinion, noted that in determining whether to issue the policy, the insurer asked the insured to complete a questionnaire about the property to be insured, which included a question as to whether carbon monoxide detectors were present. Based upon this fact, court felt that there was a clear indication that the insurer intended to cover the risk.

c. Rybacki v. Allstate Insurance Company, 2004 Ohio App. LEXIS 1836 (Ohio Ct. App. Apr. 28, 2004).

- Property owners filed suit against their insurer seeking a declaratory judgment that their homeowners policy covered damages resulting from the rupture of an underground heating oil storage tank. Trial court granted Allstate's motion for summary judgment, ruling that the absolute pollution exclusion contained in the policy applied in this instance.

- Court of Appeals affirmed, rejecting insured's claim that Anderson mandated that policy exclusions must clearly and unambiguously exclude coverage of the specific pollutant in question.

- Court notes that Anderson was primarily concerned with determining whether carbon dioxide from an internal heater was the type of pollution that absolute pollution exclusions were designed to exclude. In this instance, Court refused to equate underground tank leakage, and the damage resulting therefrom with the release of carbon dioxide from an internal heating unit, finding instead that this was the type of claim that was clearly precluded from coverage by the absolute pollution exclusion.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

d. Southside River-Rail Terminal, Inc. v. Crum & Foster Underwriters of Ohio, 157 Ohio App. 3d 325 (Ohio Ct. App. 2004).

- A tank collapse on insured's site released 990,000 gallons of liquid nitrogen fertilizer (Uran 28) onto property and into the Ohio River.
- Experts examining the tank collapse agreed that the primary cause of the collapse was the improper welding of the tank seam at the time of construction.
- Trial court, relying on Anderson, held that Uran 28 was not a pollutant within the meaning of the policy language, and therefore the insured was entitled to coverage under the policies on the basis that Uran 28 was not "clearly, specifically, and unambiguously" declared a pollutant under the policy language.
- Court of Appeals reverses, citing Rybacki, holding that "the sudden escape of 990,000 gallons of liquid Uran 28 from a collapsed storage tank on an industrial site does equate to a traditional release of a pollutant into the environment" and that therefore the absolute pollution exclusion precluded coverage of this claim.

10. Selected Michigan Case Law

a. Carpet Workroom v. Auto Owners Insurance Co., No. 223646 (Mich. Ct. App. 2002) and Meridian Mutual Insurance Co. v. Mary Anne Handprints, et al. No.: 224040 (Mich. Ct. App. 2002).

- These consolidated appeals related to two trial court decisions which examined similar facts and identical policy language and came to differing conclusions as to whether a so called "absolute" pollution exclusion precluded coverage under a policy.
- Both cases related to suits for bodily injury arising from fumes from adhesives which contained hazardous components used in connection with the installation of carpeting.
- The insureds in both cases argued that the pollution exclusion at issue was ambiguous and was only intended to prelude traditional types of environmental contamination, and not an inadvertent release of fumes from an adhesive product.
- Appellate court disagreed with the insureds and affirmed the trial court decision which held that coverage was precluded by the pollution exclusion and reversed the other trial court decision which had denied summary disposition of the issue.
- Court found the recent appellate court decision in McKusick v Travelers Indemnity Co., 246 Mich. App. 329 (Mich. Ct. App. 2001) to be dispositive of a number of the issues raised. In that case, the appellate court found the pollution exclusion to be unambiguous and applicable to non-traditional type environmental claims and also that the operative words, "discharge", "dispersal", etc., should be afforded their plain meaning.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- As a result of the foregoing, court here concluded, as a matter of law, that the claims involving bodily injury sustained as a result of the fumes from adhesives containing pollutants were precluded from coverage by the pollution exclusion in the policies.

b. Lansing Board of Water and Light v. Deerfield Insurance Co., 183 F. Supp. 2d 979. (W.D. Mich., 2002).

- Contractor sued Plaintiff, which was a City Agency, for unanticipated costs it incurred in removing asbestos from a property owned by plaintiff.

- Contractor alleged that information on the asbestos project submitted by Plaintiff failed to provide a true picture of the project, resulting in significant unanticipated costs.

- Plaintiff maintained Defendant was obligated to indemnify and defend it in connection with the suit filed by the contractor. Defendant disagreed, on a number of bases, including the so called "absolute" pollution exclusion in the policy.

- The pollution exclusion here precluded coverage of claims "arising out of (emphasis added) any ... "discharge ... removal and disposal ... of ... contaminants or pollutants ..."

- Defendant moved for summary judgment on the basis of the pollution exclusion.

- Court denied Defendant's motion finding that the underlying claim against Plaintiff did not arise out of the removal or disposal of pollutants. Rather, it arose out of a failure to disclose information.

- In reaching its decision, court cited to a Sixth Circuit decision that examined similar language and found that the words "arising out of" requires a higher causal connection between the asbestos and the underlying claim.

- Here, court found that the immediate cause of the claim was an alleged misrepresentation and was not the existence of the asbestos.
- Court went on to say that the particular terms of the pollution exclusion at issue here do not preclude coverage of this claim. While asbestos was the subject of the contract, the actual claim was based on misrepresentation.

c. Michigan Mun. Risk Mgmt. Auth. v. Seaboard Sur. Co. 2003 Mich. App. LEXIS 1869 (Mich. Ct. App. Aug. 7, 2003).

- Basements of several hundred homes were flooded, allegedly as a result of the negligence of contractors, who were separating the town's storm drain and sewage drain systems.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- City of Westland obtained owners and contractors protective liability insurance through defendant prior to the commencement of the contractor's activities.

- Plaintiffs filed suit against the defendant alleging that it had a duty to defend and indemnify Westland with respect to claims by homeowners as a result of the flooding.

- Trial court ruled in favor of plaintiffs.

- On appeal, the Court of Appeals held that the trial court erred in concluding that the pollution exclusion itself created an ambiguity in the policy. Rather, court found the language of the absolute pollution exclusion to be clear and unambiguous. Therefore after careful analysis, court held that there was no coverage under the policies in connection with the claims.

- Court noted that the mere existence of an exclusion in a policy does not equate to an ambiguity, but rather limits the scope of available coverage.

- Furthermore, court rejected plaintiff's argument that the defendants failed to offer evidence indicating the homeowner's homes were in fact flooded with pollutants has no merit since the exclusion covers the *alleged* discharge of pollutants, which was clearly alleged in the underlying complaints. (emphasis in original)

- Additionally, appellate court concluded that trial court improperly applied the rule of "reasonable expectations" of the parties to the issue of coverage here, holding that when the contract is clear and unambiguous, the reasonable expectations doctrine shall not apply.

d. City of Grosse Pointe Park v. Michigan Mun. Liab. & Prop. Pool, 473 Mich. 188 (Mich. 2005).

- Here we find the Michigan Supreme Court examining the absolute pollution exclusion in the context of a matter involving sewage.

- Plaintiff allegedly allowed sewage overflow into a creek when its system became overtaxed, resulting in a series of suits, including suits by residents living in the vicinity of the creek (the "Creek Residents").

- Plaintiff made a claim against Defendant, its self insurance pool, in connection with the suit filed by the Creek Residents.

- The policy at issue, which was issued for the term 8/1/94-7/31/95, contained fairly typical absolute pollution exclusion language, including specific references to waste.

- Defendant agreed to defend the lawsuit by the Creek Residents but reserved its rights as to indemnity.

- Ultimately Plaintiff and the City of Detroit each agreed to take all steps necessary to cease the discharge, as well as to each pay the Creek Residents the sum of $1.9 million.

- Defendant subsequently notified Plaintiff that it would not provide indemnification in connection with its claim.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Plaintiff filed this suit seeking a declaratory judgment.
- On dual motion for summary judgment, trial court held that Defendant was estopped from refusing to cover this claim, since it had covered other similar claims.
- Appellate court reversed finding an issue of fact as to whether coverage existed under the policy for this claim.
- On appeal, the Michigan Supreme Court considered the issues of whether:

  "(1) Sewage is a "pollutant" under the applicable insurance policy's pollution exclusion clause;

  (2) Extrinsic evidence may be used to establish an ambiguity in this pollution exclusion clause; and

  (3) The Pool may be estopped from asserting the pollution exclusion clause."

- Relying on the general principle of contract interpretation that when a term is not specifically defined, it is accorded the commonly understood meaning, the Court determined that "waste" is commonly understood to include sewage which includes human waste, bathwater and dishwater, paper products and countless other substances typically introduced into a sewer system.
- Using this definition of "waste", the Court determined that waste is a pollutant and as a result, the pollution exclusion clause at issue was not ambiguous. Therefore, no extrinsic evidence was warranted in connection with an interpretation of the pollution exclusion.
- Finally, the Court rejected the Plaintiff's estoppel argument that the Defendant's coverage of basement backup claims and failure to enforce the pollution exclusion in those instances rendered the pollution exclusion ineffective, specifically noting that Plaintiff was aware of Defendant's reservation of rights with respect to the Creek Residents suits on the basis of the exclusion.
- As a result of its analysis, Court held that Plaintiffs discharge did in fact include "pollutants" as defined in the policy, the pollution exclusion was unambiguous as to the claim, and that Defendant was not estopped from raising the pollution exclusion as a defense to coverage.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

D. Notice Requirements

1. Policy Language:

Insured's duties in the event of occurrence, claim or suit: (a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable.

2. Policyholder's Position - Late notice should not preclude coverage under the policies unless the insurer has been materially prejudiced.

3. Insurer's Position - Policyholder's failure to provide timely notice bars coverage under the policy.

4. Selected New Jersey Case Law

a. Cooper v. Government Employees Ins. Co., 51 N.J. 86 (1968).

- In non-environmental matter, policyholder notified insurer immediately after receipt of a summons and complaint and two years after date of motor vehicle accident which was the subject of the complaint.
- Insurer claimed late notice.
- Supreme Court agreed with trial court that the insured was justified in omitting to give notice at the time of the accident since he reasonably and in good faith believed that there was no claim contemplated against him either because the damage was trivial or because there was no suggestion in the circumstances that he was causally involved.
- Court further declared that it is "far from clear" that a carrier "should be able to disclaim if the failure to give timely notice did not in fact prejudice the defense of the claim."
- Court determined that burden of proof on breach of contract and appreciable prejudice rests with the insurer.
- Court found that since under the circumstances the notice provisions could not be deemed to have been breached, there was no need to reach the second question as to whether the insurer may have been appreciably prejudiced by the lateness of notice.

b. Morales v. National Grange Mut. Inc. Co., 176 N.J. Super. 347 (Law Div. 1980).

- In non-environmental matter, court refused to apply a per se rule precluding an accident victim from recovery against the

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

plaintiff's insurer where the plaintiff did not give notice to its insurer until after entry of a judgment against the plaintiff.

- In determining the issue of what constitutes appreciable prejudice, court began with the principles set forth in Cooper.

- Based on its review of relevant case law, court articulated two factors which must be considered in resolving whether appreciable prejudice exists:

    1. whether substantial rights have been irretrievably lost by the insured's failure to notify the insurer in a timely manner; and

    2. the likelihood of the insurer's success in defending against the claim.

- Court found that in order to show that substantial rights have been irretrievably lost, insurer must prove more than a mere inability to use its standard investigatory and evaluation procedures.

- Court ordered a plenary hearing to determine whether the insurer was able to defend against the plaintiff's claim and whether the insurer could show the likelihood that a meritorious defense would have existed.

c. Peskin v. Liberty Mut. Ins. Co., 214 N.J. Super. 686 (Law Div. 1986), aff'd in part and remanded, 219 N.J. Super. 479 (App. Div. 1987).

- In case involving an eleven year delay in giving notice under a fire insurance policy, insurer argued "appreciable prejudice" due to its alleged inability to establish whether coverage included business property of the policyholder, since the insurer's relevant records had been destroyed pursuant to a company records destruction schedule.

- Appellate Division agreed with trial court that the eleven year delay constituted untimely notice, but went on to note that aside from late notice, an insurer must prove that it has been prejudiced.

- Appellate Division further determined that insurer's destruction of records had to be considered before the issue of prejudice could be properly evaluated.

- Appellate Division therefore remanded to determine whether insurer's record retention policy comported with industry standards and was otherwise reasonable.

d. Solvents Recovery v. Midland Ins., 218 N.J. Super. 49 (App. Div. 1987).

- Policyholder was named as a PRP at two superfund sites. In both instances, one insurer was not given notice of claim until almost three years after the policyholder's other insurers were put on notice. At one site, the policyholder had already been found

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

strictly liable. At the other, it had already entered into a consent agreement on liability with EPA.

- On summary judgment motions, trial court ruled in favor of policyholder and held that the insurer did not and could not suffer any prejudice as a result of late notice.

- Appellate Division remanded, holding that the insurer must be given the opportunity to demonstrate appreciable prejudice.

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

- W.R. Grace operated a chemical manufacturing facility between 1959 and 1978, and then sold it to Hatco. Hatco later sued Grace seeking indemnification and contribution for alleged pre-existing contamination and cleanup of that contamination. Grace in turn sued its primary and excess carriers for indemnification.

- Grace and the defendant insurers cross-moved for summary judgment on the issue of late notice.

- The primary insurer argued that Grace breached the notice provision in the policy since it had received two letters from Hatco in 1981 and 1986 notifying Grace of a potential claim. Notice to the insurer was not given until 1987. The 1981 letter notified Grace that Hatco had been ordered to clean up the site and that it would hold Grace liable for any costs incurred to comply with the order.

- The district court followed the two part test established in Cooper.

- In response to Grace's argument that the letter did not constitute an actual "claim", court held that under New Jersey law, the notice provision places a duty on a policyholder to provide notice upon learning that a claim was contemplated. According to court, the issue presented was whether the officer of Grace that received the letter reasonably and in good faith believed that Hatco did not contemplate a claim against Grace.

- Court found that the first prong of the notice defense (breach of contract) had been established by the insurers.

- As to whether there was appreciable prejudice, court applied the two part test set forth in Morales.

- Court found significant the insurer's failure to diligently pursue a factual investigation after its receipt of untimely notice from Grace.

- Court found the insurer's arguments in support of its claim of appreciable prejudice insufficient to grant a summary judgment motion in its favor.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

f. Rohm and Hass Co., v. AIU Ins. Co., No. L-004664-95 (N.J. Super. Ct. Law Div. 1998), on remand No.:L-87-4920 (N.J. Super. Ct. 2004)

- Insured filed suit against a number of its insurers with respect to claims against it for contamination at various sites.
- Insurers moved for summary judgment against the insured on the basis of late notice.
- In considering the motion, the court divided the issue of notice between pre and post 1982 liability policies.
- As to the policies issued in 1982 and before, the insured notified its primary and EIL insurers of a PRP notice it received from the DEP in 1983 with respect to the Woodlands Site, a waste disposal facility to which it sent waste.
- Insured maintains that it did not notify its excess insurers at that time since it believed that its primary and EIL policy limits would cover the claim.
- Insurers argued that notice should have been given in 1979 or at the latest 1980. The basis of this position was that a senior official of the insured had visited the site and reported back to his superiors after a negative newspaper article which identified the insured as the owner of the site.
- However, during that visit the insured's official was advised by public officials that the owner of the site was responsible for remediation and that the estimated remedial cost would be between $1,000,000 and $1,500,000. Further, a groundwater sample collected by the insured's official revealed no contamination.
- In March 1988, the insured gave notice to its 1982 and prior excess carriers of various claims including the Woodlands claim.
- Insured argues that its March 1988 notice was timely in that this was when it first knew that the costs it faced could exceed those mentioned by the DEP official in 1979.
- Since it was apparent to the court that there were issues of fact as to the timeliness of notice, the motion of the 1982 and prior excess insurers was dismissed without prejudice. As a result, the court did not examine the issue of prejudice, which is the second prong of the late notice analysis.
- As to the 1983 and later excess insurers, notice was not given until at the earliest the date this suit was filed, and in some instances as late as 1996 and 1997, which the court noted was clearly late notice.
- However, as to the second prong of the test, namely whether the insurers were prejudiced in the investigation of a claim or preparation of its defense, the court denied the motion, without

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

prejudice, on the basis that there were issues of fact as to this point.

- Footnotes to this decision contain interesting hints as to the court's consideration of the issue of prejudice -- one, as it relates to St. Paul Insurance Company, which only issued post 1982 policies and, which the court noted, has had insufficient time to conduct discovery and "come up to speed" on the case, which was scheduled for a bench trial in the near future, and the other, which relates to Allianz Insurance Company, which had been in the case as a high level excess carrier as to 1982 and prior policies, but at a much lower level for post 1982 policies.

- The case was subsequently submitted to a Special Master who made certain Findings of Fact and Conclusions of Law, including that the late notice defense was applicable to this claim on the basis that the insured had made a conscious and deliberate decision to withhold notice resulting in prejudice to the insurers.

- The parties then filed exceptions, and the case again wound up in Superior Court. The Superior Court then took up the issue of prejudice as it pertains to the 1983 and later excess insurers.

- Insured conceded that its notice to its post 1982 insurers was untimely. However, it maintains that no "appreciable prejudice" was demonstrated by any of the affected insurers and that late notice was not a viable defense.

- The Superior Court noted that courts have interpreted the notice provisions in policies similar to those at issue to "require the insured to give notice only when the insured has reason to believe that the occurrence would involve the excess policy."

- In reversing the recommendation of the Special Master, the Superior Court explained that as to the underlying claim, the defendant insurers could never have mounted a meritorious defense no matter when notice was given since the government's claim was in strict liability, the very nature of which precludes any type of defense.

- In analyzing the issue of whether the insurers were deprived of the opportunity to defend against the insured's actual claim for coverage, court cites Morales v. Nat'l Grange Mutual Insurance Co., 176 NJ Super 347, for the proposition that the insurers must show the likelihood that a meritorious coverage defense would have existed. Furthermore, court maintained that defendant would be considered to have been appreciably prejudiced only if it could be proven that a prompt investigation would have produced material evidence which would no longer be obtainable.

- Because court found defendants did not raise any instances of appreciable prejudice, it refused to uphold the Special Master's recommendation that coverage be denied to the insured with respect to its excess policies.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

5. Selected Ohio Case Law

a. West American Ins. Co. v. Hardin, 59 Ohio App. 3d 71 (Ohio Ct. App. 1989).

- Motor vehicle accident occurred in May, 1978. In December, 1986, the insurer was first notified of a potential claim under the policy issued to the operator of the motor vehicle.
- Insurer argued that because of the lapse of eight years from the date of the alleged accident, the intervening death of a witness to the accident and the resulting prejudice to the company, it should have no obligations under the policy because of the breach of the notice provisions by the insured.
- Lower court granted summary judgment for the insurer and found that the insured's delay was unreasonable as a matter of law.
- Appellate court stated that issue of whether notice was timely was not a matter of law but a question of fact for a jury. Court adopted the emerging rule in a majority of jurisdictions that late notice relieves an insurer of its obligations under a policy only if it demonstrates prejudice as a result of the delay.
- Court presumed prejudice from the late notice and found significant the death of one critical witness. Since the insured presented no evidence to demonstrate lack of prejudice to the insurer, court held in favor of the insurer.

b. American Employers Ins. Co. v. Metro Regional Transit Auth., 802 F. Supp. 169 (N.D. Ohio 1992), rev'd, 12 F.3d 591 (6th Cir. 1993).

- In November, 1989 a vehicle accident involving Metro Regional Transit ("Metro") occurred. Metro was first named as a defendant in the underlying tort suit in July, 1991. Metro sent notice to one of its insurers in November, 1991.
- Metro was advised by the insurer placed on notice, on two separate occasions, that notice should be given to its liability insurer.
- Metro conceded that it did not timely comply with the notice provisions contained in the liability policy.
- District court stated that the relevant rule of law in Ohio was "if an insured fails to give timely notice of a possible claim as required by the insurance policy, the insurer is relieved of its obligations under the policy only if the delay prejudices the insurer."
- Insurer claimed prejudice due to its inability to participate in the investigation of the accident and defense of the claim. Metro

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

argued that the insurer's inability to participate in the investigation and defense did not result in any prejudice.

- District court predicted that the Ohio Supreme Court would place the burden of proof on the insurer to show that it had suffered prejudice by the insured's delay in giving notice. Court held that the insurer must show more than deprivation of an opportunity to investigate and participate in the defense in order to demonstrate actual prejudice. A showing of how the inability to investigate and participate caused actual prejudice to the insured must be made.

- On appeal, the Sixth Circuit Court of Appeals reversed the district court's ruling.

- The Sixth Circuit, after reviewing a number of pertinent decisions including those of the Ohio Supreme Court, concluded that the current state of Ohio law on the issue of notice was:

  (1) An insured must act within a reasonable time where "prompt" or "immediate" notice is required by contract.

  (2) Whether notice was reasonable must be determined by examining the surrounding facts and circumstances.

  (3) Prejudice is a fact to be considered, and "unreasonable" delay can give rise to a rebuttable presumption of prejudice.

  (4) Timely notice is of the "essence".

- In this case, the insured never made the argument that notice was reasonable, and in fact there was "a tacit concession that the subject delays were unreasonable."

- Taking into account its interpretation of Ohio law, the Sixth Circuit concluded that notice was late as a matter of law and therefore coverage was precluded.

c. Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co., 84 Ohio App. 3d 302 (Ohio Ct. App. 1993).

- Trial court refused to grant the insurer's motion for summary judgment on the basis that Sanborn failed to give proper notice of the underlying action by waiting nineteen months. Sanborn never disputed the fact that the nineteen month delay rendered its notice untimely, but instead contended that it was entitled to a defense under the policies because the insurer was not prejudiced by the delay.

- Court cited the Ohio Supreme Court's holding in Ruby v. Midwestern Indemn. Co. 40 Ohio St. 3d 159 (1988) that unreasonable delay may be presumed to be prejudicial in the absence of contrary evidence. It also cited the appellate court's decision in Ohio Cas. Ins. Co. v. Joseph Sylvester Construc. Co., (Sept. 30, 1991) Trumbull App. No. 90-T-4439 unreported, which took the Ruby decision once step further, holding that untimely notice was rebuttably presumed to be prejudicial to the

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

insurer, and that the burden of producing evidence sufficient to rebut the presumption was on the insured.

- In support of its position, Sanborn contended that court docket in the underlying action showed that little occurred in the furtherance of the litigation during the nineteen month delay. Sanborn also contended that court docket established that the insurer had adequate time to investigate the situation.

- Appellate court found that by producing these evidentiary materials, Sanborn met its burden of going forward with some evidence to rebut the presumption. Court also found that Sanborn raised a genuine factual issue as to whether the insurer was prejudiced by the delay.

d. Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London, 813 F. Supp. 576 (N.D. Ohio 1993).

- Sherwin-Williams gave notice in four of the underlying lead pigment cases within four months of the time suit was filed and within six months in the fifth case.

- Court noted that while these facts gave rise to the presumption of prejudice in favor of the insurers, it was rebuttable by evidence that Sherwin-Williams adequately safeguarded the insurers' interest by assuming the defense of the lead pigment cases.

- Court explained that the control of Sherwin-Williams over the lead pigment cases made it incumbent on the insurers to show actual prejudice caused by the late notice rather than to rely on the rebuttable presumption raised by law.

- Court held that in the absence of some other evidence of prejudice no question of fact on the issue of notice existed for trial.

e. Champion Spark Plug Co. v. Fidelity and Casualty Co., No. 91-3185 (Ohio Comm. Pls. 1994), aff'd, 116 Ohio App. 3d 258 (Ohio Ct. App. 1996), appeal not allowed, 77 Ohio St. 3d 1501 (1996).

- Champion Spark Plug Company ("Champion") filed suit for a declaratory judgment against its insurance carriers with respect to coverage for costs associated with environmental contamination at two sites, one owned by Champion (the "Site"), and the other, used by Champion and others to dispose of wastes (the "Waste Disposal Site").

- From the early 1950's, Champion used lagoons at the Site for holding chemicals and industrial by-products.

- In 1975, Champion was notified by the Pennsylvania Department of Environmental Resources that the lagoons were draining into the groundwater in violation of law. Shortly thereafter, Champion closed the lagoons.

- In 1984, an investigation of the Site detected a groundwater contamination threat; in 1985, a consultant hired by Champion

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

found some degree of contamination in the groundwater; in 1987, EPA named Champion as a PRP with respect to the Site; and in 1988, Champion and EPA entered into a consent order with respect to the Site.

- As to the Waste Disposal Site, in 1987, EPA asked Champion to provide information concerning its use of the Waste Disposal Site; and in 1988, after being informed that EPA named it as a PRP with respect to the Waste Disposal Site, Champion and EPA entered into a consent order with respect to the Waste Disposal Site.

- On motion for summary judgment, the insurers argued that Champion failed to give timely notice of its claims and that therefore coverage was precluded.

- Court explained that while the Ohio Supreme Court in Ruby v. Midwestern Indemnity acknowledged the rebuttable presumption of prejudice rule, it did not include the rule in its syllabus of the opinion, and therefore, the acknowledgment was dicta and not the law of Ohio.

- Court concluded that the controlling law of Ohio does not require a showing of prejudice in order to preclude coverage of a claim on the basis of late notice.

- Consequently, court reviewed the late notice issue on the basis of whether notice was reasonable, which review included a prejudice analysis.

- As to the Site, court concluded that notice was due in 1975, or at the very latest in 1985.

- In granting the insurers motion for summary judgment, court found a thirteen year delay to be unreasonable as a matter of law and rejected Champion's argument that the insurers were not prejudiced.

- As to the Waste Disposal Site, Champion provided notice to its insurers in 1991. However, court found that the duty to notify the insurers arose in April, 1988 when EPA requested Champion enter into a consent order.

- Court held that the three year delay in giving notice with respect to the Waste Disposal Site was unreasonable as a matter of law, and granted summary judgment in favor of insurers.

- Appeals and cross appeals were filed in late 1994, and early 1995.

- On appeal, Champion argued that the insurers must prove prejudice as a necessary element of a late notice defense and that the trial court erred when it concluded that there was no issue of fact as to whether Champion's notice was late.

- The appellate court acknowledged that the issue of whether notice was late was generally one for the jury, but that when

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

dealing with undisputed facts, it can be determined as a matter of law.

- The appellate court noted that the trial court had carefully reviewed the undisputed facts, and on that basis concluded that notice was late.

- After reciting the pertinent undisputed facts, this court reached the same conclusion as the trial court and rejected Champion's argument that notice to its primary insurers was timely.

- The appellate court concluded that: (1) "reasonable minds could not draw conflicting inferences from the undisputed evidence in this case and that Champion offered no plausible grounds for excuse in the delay of reporting its claims to the primary insurers."; and that (2) Champion's delay in notifying its insurers was unreasonable as a matter of law.

- However, the appellate court did not accept the trial court's rejection of the rebuttable presumption of prejudice rule in Ruby v. Midwestern Indemn Co. on the basis that this presumption did not appear in the syllabus of the decision. Instead, it found that this presumption was merely an explanation of the rule of law that appeared in the syllabus and did not conflict with it.

- As to burden of proof, Champion, not the insurers, had the burden of proof to rebut the presumption of prejudice where notice was late as a matter of law, and the appellate court found that Champion failed to carry that burden.

- The appellate court noted that it was Champion's obligation to present evidence that the insurers could discover the same information after late notice that they would have discovered with timely notice and that Champion failed to present such evidence.

- Supreme Court refused to accept the appeal.

f. Owens-Corning Fiberglas Corp. v. American Centennial Insurance Company, 74 Ohio Misc.2d 263 (Ohio Comm. Pls. 1995).

- Owens-Corning Fiberglas Corp. ("Owens"), a manufacturer and distributor of products containing asbestos, suffered substantial losses arising from product liability suits.

- In 1990, Owens filed a declaratory judgment action, seeking coverage from its insurers with respect to its losses.

- Owens moved for a declaration that its notice to its insurers remaining in the suit was timely.

- Court granted the motion holding as a matter of law that based on the facts and circumstances of the case, Owens provided its insurers with timely notice.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- In reaching its decision, court agreed with the conclusion of the trial court in Champion that the acknowledgment by the Supreme Court of the rebuttable presumption of prejudice rule in Ruby, was insufficient to make the rule the law in Ohio, since it was not included in the syllabus of the case.

- As a result, court concluded that the controlling law of Ohio does not require a showing of prejudice by an insurer in order to preclude coverage, but that prejudice may be examined in determining whether notice was given within a reasonable time.

- Unlike the trial court in Champion, this court, after examining the facts and circumstances of this case, concluded that Owens notified its insurers as soon as it could reasonably conclude that the policies were likely to be reached.

g. Ormet Primary Aluminum Corp. v. Employers Insurance of Wausau, 88 Ohio St. 3d 292 (2000).

- Trial court granted insurers motion for summary judgment finding that a delay of more than twenty years from the time the insured had knowledge of contamination, and more than five years after entry of an administrative notice was unreasonable as a matter of law.

- The insured's argument that it was permissible to delay notice until the liability was liquidated was rejected by the court.

- On appeal, insured argued that the trial court erred in granting summary judgment to the insurer.

- Appellate court first examined whether notice was timely.

- In reviewing the policies at issue, it noted various requirements for notice as soon as practicable, or immediate notice, or notice (in an excess carrier situation) when it appeared loss would likely exhaust primary limits.

- Court noted that the insured knew of groundwater contamination in 1971 and knew that contamination was the result of its waste disposal practices by 1972. Further, by 1976, it knew the costs involved would be in excess of $3,000,000. Yet, notice was not given until 1992.

- Court agreed with trial court and found notice to be late as a matter of law.

- Next, appellate court examined whether insurers were prejudiced.

- Citing to Ruby, court noted that there is a presumption of prejudice in situations in which there was an unreasonable delay in giving notice.

- Insured sought to use witness testimony, including that of a former EPA official, to support its position that the costs

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

incurred were appropriate in light of the Superfund requirements and that the insurers were not affected by the timing of the notice, in a material fashion.

- On the other hand, the insurers argued that witnesses had died and vital documents had been lost and discarded, resulting in an inability to conduct an appropriate investigation, have a say in costs and pursue other possible liable parties.

- After examining the evidence presented, court noted that the insured failed to see the actual prejudice to its insurers, specifically the loss of the "opportunity to participate in the investigation, settlement and defense of the underlying claim."

- This court was not persuaded in the least by the arguments of the insured, and instead continued to return to its initial premise, that where notice is 21 years or 16 years late, as the case may be, the presumption of prejudice applies.

- Insured appealed to the Supreme Court.

- The first step taken by the Supreme Court was to make a determination as to whether notice was late. In doing so, the court reviewed and recited the lengthy history of insured's knowledge of contamination at the site beginning in 1966 and continuing through its first notice to insurers in 1992, including the site being placed on the NPL in 1987, insured's acknowledgment in 1988 that the cost to address the contamination would be between $3,000,000 and $8,000,000, its discussion with its insurance broker in 1989, that it spent $2,000,000 in costs by 1991 and that it knew that the construction of a remedial system would be between $2,500,000 and $3,000,000.Court rejected all of the insured's arguments as to why it did not believe it was necessary to place its insurers on notice, including that even though it knew of the contamination, it did not know until much later that it would be faced with governmental regulatory action. Needless to say, that particular argument did not impress court, which noted that pursuant to the policies the insured was required to give notice within a reasonable period of time, which clearly did not happen in this case.

- Next court examined the issue of whether the insurers were prejudiced and noted the holding of the lower court that "...unreasonable delay in the giving of notice may be presumed prejudicial to the insurer absent evidence to the contrary." Here, court explained that since the only reasonable conclusion that could be reached was that the insurers were prejudiced, court did not even have to determine whether the insured had produced proof to rebut the presumption.

- Court then described instances of prejudice, including the death of witnesses, the fading of memories over such a lengthy period of time, changes to site conditions, decisions by the insured which may not have been in the best interest of any party, including the settlement agreement between the insured and EPA, and destruction or loss of documents.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Like the appellate court, the Supreme Court was not impressed by the arguments of the insured that the insurers had not been prejudiced, including the reliance by the insured on the testimony of an EPA representative that the costs incurred by the insured prior to 1992 were reasonable and the remedy was less stringent and less costly than were similar remedies at other sites.

- There was however, one dissenting justice who felt that due to the evolution of law and potential liability over a period of time, it was difficult to measure the concept of timeliness, and that this issue as well as the issue of prejudice was better left to a jury.

h. Goodyear Tire & Rubber Co. v. Aetna Cas. and Sur. Co., 2001 Ohio App. LEXIS 190, rev'd, 95 Ohio St. 3d 512 (2002).

- As described in Sections A and C above, Goodyear appealed a directed verdict after trial with respect to two facilities, the Motor Wheel Site and Army Creek, for which it sought coverage from its insurance carriers in connection with certain CERCLA claims relating to the disposal of waste.

- One of Goodyear's appeals related to whether proper notice had been given under the applicable insurance policies.

- In the first instance, court examined the argument of Goodyear that notice to its insurance broker constituted notice to its insurance carriers, and found that it did not.

- Court was not persuaded by this argument, since the evidence indicated that Goodyear specifically told the broker which insurance companies to place on notice and when. In addition, there was no evidence presented to court that indicated that Goodyear believed that its notice to its broker was the equivalent of notice to all of its insurance companies. Further, there was no evidence at trial that the insurers authorized the broker to receive notice from Goodyear on their behalf.

- Next, court made a determination as to when the duty to notify the insurers arose as to each site. In the first instance, court concluded that the correct inquiry would be to examine when the insured had knowledge that should have caused it to reasonably conclude that there was a possibility of a claim.

- While court agreed that environmental claims are unique and that no one particular fact or circumstance could establish that an insured knew of a claim, it did recite a number of facts it considered to be significant, such as notice of liability for a contaminated site, communications with a governmental authority concerning a contaminated site, cooperation with governmental authorities, even the hiring of environmental consultants.

- Taking into account those concepts, court reviewed the facts of both the Motor Wheel Site and Army Creek.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- As to the Motor Wheel Site, court found many applicable facts, including a 1970 letter from MDNR relating to the potential impact of disposal practices on groundwater, a 1973 letter from MDNR that disposal practices were in violation of law and should be ceased, a 1979 Health Department letter demanding the cessation of dumping, a 1981 EPA hazardous waste notification form and Goodyear's subsequent hiring of an environmental consultant to investigate the site, and a December 1982 letter from MDNR advising Goodyear that the Motor Wheel Site was contaminated and must be remediated.

- On April 11, 1983, Goodyear asked its broker to place certain of its insurance carriers on notice with respect to the Motor Wheel Site, and about 16 months later Goodyear asked its broker to place some other insurers on notice.

- Court found that the December 1982 letter was the latest trigger of Goodyear's duty to notify, and that Goodyear's first notice to its general liability carriers twenty months later was unreasonable as a matter of law, and that therefore the insurance carriers were presumed to have suffered prejudice.

- Court rejected any argument by Goodyear that its knowledge of the specific type or extent of contamination had an impact on when notice should be given.

- Court also rejected Goodyear's arguments as to why its insurance carriers did not suffer prejudice, including Goodyear's efforts to achieve a cost effective settlement with EPA.

- Using the Ohio Supreme Court decision in Ormet as support, court stated that it could not determine from the evidence presented whether the settlement with EPA would have been more or less costly if the insurers could have played a role from the beginning, but it did find that little documentation existed and many witnesses were dead by the time Goodyear notified the insurance carriers, and the twenty month delay only made things worse.

- Based on the foregoing, court affirmed the directed verdict based on late notice as it relates to the Motor Wheel Site.

- Notice as to Army Creek was a different story. Here court found that Goodyear's first notice was the EPA information request in December 1984, and Goodyear gave notice to its insurers in January, 1985.

- Based on foregoing, court reversed directed verdict on basis of late notice as to Army Creek.

- Goodyear filed a notice of appeal for a discretionary appeal on this issue with respect to the Motor Wheel Site, to the Ohio Supreme Court on November 6, 2000.

- On appeal to the Ohio Supreme Court, Goodyear argued that its notice with respect to the Motor Wheel Site was not

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

unreasonable as a matter of law. The Court agreed and reversed the directed verdict finding this to be an issue to be determined by the trier of fact.

- Court noted that the appellate court relied on Ormet in reaching its conclusion, but that Ormet was distinguishable from the facts of this case.

- Looking at the same facts described above which were examined by the appellate court, the Supreme Court failed to find "... a clear manifestation of unreasonableness."

- Court explained that none of the correspondence received by Goodyear clearly established any responsibility on the part of Goodyear for contamination at the Motor Wheel Site. Court focused on one fact in particular, specifically that the 1982 local health department letter to MDNR indicating that a water well in the area of the Motor Wheel Site should be monitored for contamination, contained no mention of responsibility on the part of Goodyear. Nevertheless, while Goodyear began a ten year investigation of contamination that year, it did not undertake a cleanup until 1992, which was well after the 1983 and 1984 notices of Goodyear to its insurers.

- After viewing all of the facts in a manner favorable to Goodyear, Court explained that none of the relevant documents indicated that Goodyear was responsible for the cost to remediate the contamination, nor did Goodyear admit that it was liable for such costs, and that therefore the directed verdict must be reversed as to the issue of late notice.

i. B.F. Goodrich v. Commercial Union Insurance Co., 2001 WL 1692410 Ohio Comm. Pls., Dec. 19, 2001), rev'd 2002 WL 31114948 (Ohio Ct. App. Sept. 25, 2002).

- Plaintiff conducted manufacturing operations on property in Kentucky known as the Calvert City Site ("Calvert City").

- EPA notified Plaintiff in 1984 that it was a PRP with respect to soil and groundwater contamination at Calvert City.

- Plaintiff failed to notify its insurers of its claim with respect to Calvert City until 1989, at which time Plaintiff had spent in excess of $22 million.

- In 1999, Plaintiff filed suit against its insurers that had issued umbrella and excess liability insurance policies.

- Insurers subsequently filed a summary judgment motion against Plaintiff based on a number of reasons, including late notice.

- Insurers argued that not only was notice late, but that they were prejudiced since they lost the opportunity to interview certain witnesses, memories had failed as to other witnesses, documents had been lost or destroyed, a settlement had been achieved with

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

EPA without their input, and the site had changed, due to the closure of wastewater lagoons which were at issue in this case.

- Court noted that the facts of this case were similar to those in the Ormet and Goodyear cases, and held that as in those cases, the insurers were entitled to summary judgment here.

- Decision contains a description of numerous instances beginning in 1964 and continuing through 1989 that evidenced an occurrence for which insurers maintained Plaintiff was obligated to provide notice.

- Court accepted the insurers' arguments that they were prejudiced, noting the similarities of those arguments to those advanced to the Supreme Court in Ormet and rejected Plaintiff's arguments to the contrary.

- Court held that notice was therefore late as a matter of law and granted summary judgment to the insurers that were parties to the motion.

- Plaintiff filed an appeal arguing that the trial court incorrectly granted summary judgment.

- On appeal, court reversed the trial court's finding that summary judgment was appropriate on the basis that there were numerous disputed issues of material fact as to whether or not notice was late that were best left to be determined by the trier of fact.

- Court explained that it disagreed with the trial court's finding that there was no material difference in the timing for notice under primary and excess policies.

- Instead, court found that notice to excess insurers was not required until an insured had information from which it could conclude that the primary policies would be exhausted and the excess policies triggered.

- On the other hand, court noted that when dealing with a primary insurer, the insured must notify its insurer as soon as it realizes that it is liable for any environmental cleanup and remediation costs.

j. Bay Metal, Inc. v. Liberty Mut. Ins. Co., No. Cv. 2001 04 1538, (Ct. Common Pleas, Summit Co., OH August 24, 2004)

- Bay Metal is a scrap metals dealer, which sold various metals and which conducted business with Metcoa from approximately 1978 through 1982.

- In 1983, the EPA found approximately 3000 drums containing hazardous materials at the Metcoa site in Pennsylvania and undertook remedial actions.

- It appeared that a significant portion of the contamination resulted from seepage from the slag which resulted from the use of a furnace in connection with the production of metal alloys.

- About seven years later, the EPA instituted an action to recover cleanup costs from several PRP's at the Metcoa site. In 1992, a third-party plaintiff action was commenced against several other PRP's including Bay Metal.

- Ultimately, Bay Metal was found to be a significant contributor of metals to the Metcoa site, specifically the sixth largest contributor by weight.

- Bay Metal rejected an initial settlement demand for $327,000, which ultimately proved to be a big mistake on its part since the case proceeded to a bench trial on the issue of damages with Bay Metal as the single remaining "non-settling" defendant.

- After $1,495,267 was awarded to the EPA, Bay Metal finally settled for $900,000.

- As an aside, punitive damages were imposed against Bay Metal as a result of its failure to settle the claim, negotiate in good faith, and admit to its share of the cleanup costs.

- Bay Metal sought indemnification from the defendant insurers in the amount of the punitive damages.

- Court rejected Bay Metal's claim and noted that "Ohio law disfavor[s] insurance against punitive damages resulting from the insured's own torts," State Farm Mut. Ins. Co. v. Blevins, 49 Ohio St.2d 165, 168 (1990).

- On motion for summary judgment on the balance of Bay Metal's claim, defendant insurers argued that the sudden and accidental pollution exclusion in each of their policies completely precluded Bay Metal's claim for coverage under their policies.

- Court noted that no evidence was submitted by Bay Metal to demonstrate that the "discharge, dispersal, release or escape" of the contaminants at issue was sudden and accidental, and that therefore there was no coverage.

- On Motion for summary judgment, insurers argued that there was no coverage under the policies they issued since Bay Metal failed to provide appropriate notice to the insurers and failed to cooperate.

- On this point, court found that even if coverage was available to Bay Metal, it had breached the notice and cooperation provisions contained in each policy and as a result breached the policy preconditions to its right to coverage.

- Court found that notice given by the insured to its insurers in 1993 and 2000 was late and unreasonable as a matter of law and resulted in prejudice to the Defendant insurers because they

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

were precluded from having an opportunity to investigate the claim and/or having a meaningful role in the lawsuit.

- To make matters worse, Bay Metal incurred substantial legal fees and expenses by litigating the case to judgment, and even settled the underlying litigation without prior notice, all of which supported the court's position of prejudice to the insurer.

- Court granted summary judgment in favor of insurers.

6. Selected Michigan Case Law

a. Upjohn Co. v. Aetna Casualty & Sur. Co., 1991 WL 490026 (W.D. Mich. 1991).

- Aetna Casualty Co. ("Aetna") filed a motion for partial summary judgment on the issue of late notice in connection with two of 26 sites which were the subject of a dispute as to defense and indemnification costs resulting from environmental damage at the sites.

- In January 1983, Michigan's Health Department tested groundwater in the area of the first of the two Upjohn Co. ("Upjohn") sites. As a result of the investigation, Upjohn was required to install 50 monitoring wells to identify the scope of the groundwater problem. In March 1985, Upjohn submitted a groundwater remedial action plan to MDNR and entered into a proposed compliance agreement in January 1986.

- Upjohn contended that Aetna became aware of the contamination at a meeting held in September 1986. Written notice was not given to Aetna until April 1988.

- Court found as a matter of law that Upjohn did not provide timely notice to Aetna, since the policy clearly stated the notice was to be in writing.

- Court then examined several factors relevant to the issue of whether Aetna was materially prejudiced by the late notice: deprivation of the opportunity to investigate and participate in remedial efforts, consent by the insured to clean up and the right to pursue third party claims.

- Due to the extent of investigative activities at the site by Upjohn, court found that late notice effectively prevented Aetna from investigating the source, extent and degree of environmental contamination. In addition, court concluded that since Aetna did not participate in the selection of an environmental consultant, it was denied any input into the remedial activities conducted by Upjohn.

- Although court could not find that Aetna suffered prejudice in pursuing third party claims, it concluded, based on all the factors, that Aetna had been materially prejudiced by the late notice.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- As to the second site at issue, court found that the facts were not sufficiently developed for court to decide the issue of prejudice. In that case, there had been an eighteen month delay in notifying Aetna of the environmental contamination. Court noted that a conclusory statement by the insurer that it was prejudiced by the late notice was not a sufficient basis for making such a finding.

b. Petoskey Mfg. Co. v. Commercial Union Ins. Co., 1992 U.S. Dist. LEXIS 14929 (W.D. Mich. June 26, 1992).

- Petoskey Manufacturing Co. ("PMC") was named as a potentially responsible party ("PRP") by the federal EPA. PMC sought a declaratory judgment regarding its insurers' duty to defend and indemnify PMC for damages in connection with EPA's claim.

- EPA notified PMC of its status as a PRP in March 1984. PMC notified its insurers of its claim in July and August 1984. As part of its notice, PMC advised its insurers for the first time that there had been an accidental spill of trichloroethylene ("TCE") in 1977.

- Insurers contended that PMC should have notified them at the time of the alleged spill in 1977, in 1978 and 1979 when MDNR inspected the property and advised PMC of soil contamination, in March 1982 when MDNR requested PMC to remove contaminated soil and in June 1983 when PMC was advised that the site was placed on EPA's National Priority List. PMC contended that it was not until March 1984, when EPA notified PMC of its status as a PRP for TCE groundwater contamination, that it learned of the potential loss.

- Court characterized PMC's arguments as "an unsuccessful attempt to bury substantial evidence in the record of its early knowledge of contamination and potential claims". According to court, the facts clearly showed that PMC was on notice for years of its risk of liability for groundwater pollution before giving notice to its insurers. Court found support for its conclusion in PMC's own theory that groundwater contamination was the result of a 1977 TCE spill which tended to show, according to court, that notice was due in 1977.

- Other events contributed to PMC's knowledge of the probability of a future groundwater claim, including MDNR's investigation of complaints of PMC discharges into a river in 1977, notification that PMC was a potential source of contamination of the city's water supply in 1981, notification from MDNR that soil samples from PMC's plant were heavily contaminated, a warning from MDNR that the contaminants "undoubtedly have the potential for leaching into the groundwaters of the state", and notification by MDNR that sample results from the observation well on-site indicated that groundwater had been contaminated as result of PMC operations in 1982.

- The recurrent notifications PMC received between 1978 and 1983 alerting PMC to the presence of soil and groundwater contamination, rendered PMC's notice to its carriers in 1984 unreasonable, according to court.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court noted that late notice is not a defense to coverage unless the insurer can demonstrate it has been prejudiced by the delay and that the burden of proof is on the insurer to demonstrate prejudice.

- The insurers contended they had been prejudiced as a matter of law since they had been denied the opportunity to investigate the facts, effectively present an affirmative defense, participate in the remediation effort and bring claims against third parties.

- Court agreed with insurers' argument and found prejudice against them as a matter of law on the basis that the insurers were materially impaired in their ability to contest their liability since they did not have the ability to conduct a prompt investigation and witnesses could no longer be identified or located. Court commented that the removal of soil prevented the insurers from conducting their own inspection of contaminated soil, adding that an investigation by the insured's consultant was a "poor substitute" for the insurers own investigation.

c. William A. Christopher v. Hartford Ins. Group, 1992 U.S. Dist. LEXIS 21640 (E.D. Mich. July 1, 1992).

- Insured owned and operated a drum reconditioning facility, involving the removal of chemicals and wastes from the drums. As a result of the operations, the facility became contaminated.

- Three suits were filed against the insured in connection with the cleanup of the facility.

- Notice was given by insured to insurers four years after one private-party suit was filed against insured and three years after the state action and another private party action was filed.

- On motion for summary judgment, insurers asserted late notice as a defense to coverage, arguing that they did not receive notice of any of the underlying actions until the declaratory judgment action was filed by the insured in 1989. As some examples of the prejudice they experienced, insurers argued that the insured had already engaged in some discovery in the underlying actions and had determined the course of the litigation and that substantial cleanup activities had been undertaken at the facility thereby depriving the insurers of the opportunity to investigate.

- In denying summary judgment, court found the insurers' arguments as to prejudice unpersuasive, since they did not indicate how or to what extent the cleanup at the facility had prejudiced their investigation nor did they offer any specifics as to how the litigation decisions prejudiced them.

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

- In 1999, Dow Chemical Co. (“Dow”) filed suit against certain of its insurers seeking insurance coverage in connection with

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

numerous environmental liabilities associated with Dow manufacturing facilities throughout the world.

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

  > "Whenever the Manager of the Insurance Department of (Dow) has information from which the Insured may reasonably conclude that an occurrence covered hereunder involves injuries or damages which in the event the Insured should be held liable is likely to involve this policy, notice shall be sent to the company as soon as practicable, provided, however, that failure to give notice of any occurrence which at the time of its happening did not appear to involve this policy but which at a later date would appear to give rise to claims hereunder, shall not prejudice such claim."

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

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

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

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

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

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

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

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

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

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

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

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

e. Century Indemnity Co. v. Aero-Motive Co., 318 F.Supp.2d 530 (W.D. Mich. 2003), aff'd, 155 Fed. App'x 833 (6th Cir. 2005)

- On motion for summary judgment, insurer argued that it did not have the duty to defend on the basis that the insured failed to give timely notice.

- On the other hand, the insured claimed that timely notice was not a condition precedent to the duty to defend citing Aetna Casualty & Surety Co. v. Dow Chemical Co. 44 F. Supp. 2d 847 for its holding that "under Michigan Law the duty to defend arises when the underlying claim is brought against the insured and, therefore, the duty to defend precedes the insured's obligation to give notice." *Id*. at 857."

- In a ruling in favor of the insured, court also described the practical differences between the duty to defend and the duty to indemnify, pointing out that the duty to defend is a duty to provide services, while the duty to indemnify is a financial obligation. Thus, according to the court's logic an insurer is more likely to suffer prejudice from late notice in its duty to indemnify rather than its duty to defend.

- Further, court concluded that the insurers failed to produce any proof of actual prejudice that would warrant a ruling in their favor.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

E. Duty to Defend

1. Policy Language:

...and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

2. Policyholder's Position - A suit is not required in order to trigger the duty to defend. Government mandated actions are sufficient to trigger the duty to defend.

3. Insurer's Position - A suit is required in order to trigger the duty to defend. Government mandated actions do not trigger the duty to defend. The duty to defend extends only to claims covered by the policy.

4. Selected New Jersey Case Law

a. Hartford Acc. & Indem. Co. v. Aetna Life & Casualty Ins. Co., 98 N.J. 18 (1984).

- Hartford defended and paid a judgment entered against its insured, Tilden-Yates Laboratories ("Tilden-Yates"), in connection with a claim by the parents of a child injured by ingestion of a drug manufactured by Tilden-Yates. Hartford then sought to recover fifty percent of the amount of the judgment and defense costs from Aetna, which provided coverage to Tilden-Yates for the period immediately prior to Hartford. The basis of Hartford's theory of recovery was that the complaint in the underlying action alleged that the events establishing the liability of Tilden-Yates occurred "in and about the month of February 1971." Aetna provided coverage to Tilden-Yates through February 10, 1971 and Hartford's coverage began on February 11, 1971.

- Trial court entered judgment in favor of Aetna and Appellate Division affirmed.

- Hartford argued that since the allegations of the complaint on its face fell within Aetna's coverage, Aetna had a duty to defend Tilden-Yates and as a result of the breach of that duty, Aetna was liable for fifty percent of the amount of the judgment and defense costs as a matter of law.

- Supreme Court rejected Hartford's argument, adopting trial court finding that Aetna had a factual basis for disputing coverage because the facts required to resolve the coverage issues would not be decided by the trial of the underlying claim.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court also found that counsel retained by Aetna to defend Tilden-Yates against the underlying claim and at the same time to defend Aetna against the coverage claim of Tilden-Yates would be placed in an unacceptable conflict position.

- Court held that Aetna's refusal to defend Tilden-Yates in the underlying action was justified by the existence of a substantial issue as to whether its policy provided coverage for that claim.

b. CPS Chem. Co., Inc. v. Continental Ins. Co., 199 N.J. Super. 558 (Law Div. 1984), rev'd and remanded, 203 N.J. Super. 15 (App. Div. 1985).

- CPS sought declaratory judgment that its insurers were obligated to defend and indemnify under comprehensive liability policies despite certain exclusions. The underlying suit arose out of a federal action in which the City of Philadelphia alleged that CPS and others had dumped toxic waste at a city landfill. While the federal district court had granted partial summary judgment for the defendants, common law nuisance and trespass actions remained against CPS, including allegations of intentional and reckless misconduct.

- Trial court entered partial summary judgment in favor of CPS and against insurer on duty to defend, based upon a representation that Philadelphia was dropping intentional tort and reckless trespass claims.

- Subsequent proof submitted to Appellate Division established that the intentional tort claim had not been dropped. Appellate Division reversed, concluding that on the record before it, insurers should not be required to currently assume the defense as a matter of law, since unresolved issues still existed concerning the nature of the claims in the underlying suit and their impact on coverage. However, court further held that the insurer was not freed from its contractual covenant to defend but that its obligation would instead be one to reimburse the insured if it were later adjudged that the claim was one within the policy's covenant to indemnify.

- Court remanded the matter for reconsideration of the duty to defend.

c. Voorhees v. Preferred Mut. Ins. Co., 246 N.J. Super. 564 (App. Div. 1991), aff'd, 128 N.J. 165 (1992).

- Mother (Voorhees), sued by her child's teacher for comments on teacher's competency and fitness, sought defense from insurer.

- Insurer refused to do so on the bases that the policy excluded coverage for liability created by intentional acts and that the teacher's claim sounded in libel or slander causes of action, which are not bodily injury claims and therefore not covered under the policy.

- The underlying case settled for $750. Voorhees sued the insurer, alleging that she spent more than $14,000 defending the suit.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Supreme Court affirmed Appellate Division's holding that the insurer had a duty to defend.

- Court noted that the complaint was not well drafted and did not clearly articulate facts necessary to prove any particular cause of action. However, in ruling for the insured, Court explained that the duty to defend is determined by whether a covered claim is made and not by how well it is made.

- Court ruled that the complaint as written alleged outrage and negligent infliction of emotional distress (which could constitute bodily injury claims covered under the policy) just as convincingly as it had defamation (an uncovered claim), and that the complaint sufficiently notified the insurer that multiple alternative causes of action could be argued, potentially including covered claims.

d. SL Indus. v. American Motorists Ins. Co., 248 N.J. Super. 458 (App. Div. 1991), aff'd as modified and remanded, 128 N.J. 188 (1992).

- SL Industries sought declaratory judgment under general and excess liability policies for liability to a former employee who had filed a complaint alleging willful age discrimination and common law fraud. SL Industries also asked its insurer to defend against the underlying complaint. The insurer declined to defend, arguing that its policies did not cover liability for the events alleged in the complaint.

- Subsequently, in response to interrogatories in the underlying suit requesting the factual basis of the employee's damage claim, the employee stated that he had "suffered loss of sleep, loss of self-esteem, humiliation and irritability." A supplemental response stated that he had "received treatment for his emotional pain and suffering...."

- SL Industries again requested coverage from its insurer. The insurer again declined to defend the suit.

- The suit was then settled between the employee and SL Industries.

- On the declaratory judgment action, trial court held that the insurer had no obligation to defend SL Industries. Appellate Division reversed, holding that the insurer's duty to defend was triggered once it knew of the employee's claim for emotional damage.

- Supreme Court held that even where a complaint does not on its face allege any covered injuries triggering the insurer's duty to defend, facts discovered outside of the complaint may trigger the duty to defend.

- Court reasoned that result was in accord with insureds' objectively reasonable expectation that coverage be determined by the nature of claims against them, and not by the manner in which a third party chooses to phrase a complaint.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court stressed that the duty to defend is triggered by facts known to the insurer, and that the policyholder is responsible for promptly conveying to the insurer information that it believes will trigger coverage. If the policyholder fails to do so, it cannot demand reimbursement for defense costs that the insurer has had no opportunity to control.

- Court also held that where an insurer has wrongfully refused to defend an action and is required to reimburse the insured for defense costs, its duty to reimburse is limited to allegations covered under the policy, provided there can be an apportionment between covered and non-covered claims. If no apportionment is possible, the insurer must assume the cost of the defense for both the covered and non-covered claims.

e. Chemical Leaman Tank Lines, Inc. v. Aetna Casualty and Sur. Co., 817 F. Supp. 1136 (D.N.J. 1993), aff'd, 89 F.3d 973 (3d Cir.), cert. denied, 117 S. Ct. 485 (1996).

- Federal district court divided Aetna's duty to defend into two categories, pre-notice and post-notice defense costs.

- Court found that Aetna was not responsible for reimbursing Chemical Leaman for defense costs incurred by Chemical Leaman prior to the date of notice, and cited the New Jersey Supreme Court's decision in SL Industries for the rule that the duty to defend is triggered by facts known to the insured. Court also cited SL Industries for the proposition that where an insured's delay in providing relevant information prevented the insurer from assuming control of the defense, the insurer was liable only for that portion of the defense costs arising after it was informed of the facts triggering the duty to defend.

- As for post-notice defense costs, court noted that while the underlying CERCLA claim was grounded in strict liability, where the issue of intent plays no role, Chemical Leaman could only obtain coverage if it could prove that it did not intend to cause damage. Consequently, since the resolution of the CERCLA claim would not resolve the coverage issue, Aetna had no current duty to provide a defense. However, court added, Aetna would have to reimburse Chemical Leaman for defense costs if Chemical Leaman ultimately prevailed on the coverage question.

- See items p. and q. below.

f. Morton Int'l, Inc. v. General Accident Ins. Co., 134 N.J. 1 (1993), cert. denied, 114 S.Ct. 2764 (1994).

- Morton contended that its insurers were obligated to defend the underlying litigation, since at least some of the allegations of the Complaint and Crossclaim could potentially come within the policy's coverage.

- While the Appellate Division agreed with Morton's restatement of the general rule concerning the duty to defend, it found that Morton would only have the right to reimbursement of its defense costs if it prevailed on the coverage issue. As the

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

Appellate Division held Morton was not entitled to indemnification, it also held that Morton was not entitled to defense either.

- On appeal, the Supreme Court rejected Morton's contention that certain of its insurers breached their duty to defend in the Ventron litigation, finding the Appellate Division's decision in the matter to be controlling and dispositive of Morton's contention and noting that it was fully in accord with the Appellate Division's determination concerning the insurers' duty to defend.

g. Carter-Wallace, Inc. v. Admiral Ins. Co., No. L-12287-89 (N.J. Super. Ct., Law Div. 1993).

- Carter-Wallace, Inc. ("C-W") sought coverage from twenty-two insurers in connection with its obligations with respect to the cleanup of the Lone Pine Landfill, to which it shipped waste from 1966 to 1979.

- One of the issues before the trial court was whether a letter from EPA to a PRP under CERCLA constituted a "suit" as that term was defined in C-W's insurance policies.

- Trial court held that such a letter constituted a "suit", thereby triggering an insurer's duty to defend.

h. Rutgers v. Liberty Mut. Ins. Co., et al., 277 N.J. Super. 571 (App. Div. 1994) appeal dismissed, 143 N.J. 314 (1995).

- Insured was sued by a property owner for costs incurred by the property owner with respect to soil and groundwater contamination at its property, allegedly arising from the acts of insured, among others.

- Property owner alleged that the insured was responsible for the acts of the tenant of the property by virtue of its funding of the tenant and support of its activities.

- Liberty Mutual Insurance Company ("Liberty Mutual") issued policies to the insured, and insured requested that Liberty Mutual provide coverage in connection with the suit. Liberty Mutual denied coverage on the basis that the insured exercised dominion and control over the property at issue, which was sufficient to place the claim within the owned property exclusion.

- Insured instituted a declaratory judgment action against its insurers and filed a partial summary judgment motion against Liberty Mutual seeking to impose a duty to defend.

- Trial court noted that under New Jersey law, if the allegations of a complaint include those which may be covered by a reasonable interpretation of the policy language, an insurer is obligated to defend an insured and a determination as to whether there is a duty to indemnify can be made at a later date.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Trial court found that the duty to defend was unmistakable since there was no substantial question that a reasonable reading of the allegations of the complaint in the underlying action placed the claim within the coverage provided by Liberty Mutual.

- Liberty Mutual argued that it would be placed in an untenable position if it was forced to defend, since ultimately facts might be developed which would defeat insured's right to indemnification, thereby placing Liberty Mutual in a conflict position.

- While the trial court agreed that the insured and Liberty Mutual might have hostile interests in the determination of certain issues, the insured bargained for a defense of its claim and was entitled to such a defense.

- Trial court proposed that the "ideal solution" would be for all insurers to jointly retain independent counsel to carry out this duty, but that absent such voluntary action there was a clear duty for Liberty Mutual to defend the insured. Court held that Liberty Mutual must therefore pay insured's reasonable attorneys fees and costs already expended and continue to pay defense costs in the underlying action, reserving the right to seek contribution from the other insurers.

- In response, Liberty Mutual made a motion for leave to appeal the trial court decision, which was granted by the Appellate Division.

- The Appellate Division reversed the trial court and held that the duty to defend should not have been decided on the basis of a comparison of the allegations of the complaint against the policy coverage.

- While agreeing with the trial court position that ordinarily an insurer has a duty to defend when a complaint alleges a basis of liability under an insurance policy, it immediately noted that there were several exceptions to this rule. The Appellate Division explained that this case fell within one of the exceptions.

- In this case, Liberty Mutual alleged, in its denial of coverage, that the damage was expected or intended by the insured, since it was involved in the spraying program and had knowledge of the harmfulness of DDT.

- The Appellate Division stated that if the allegations of Liberty Mutual were true, it would have no duty to indemnify the insured, and in that respect its obligation to defend is co-extensive with and not broader than, its obligation to indemnify. Court also noted that the coverage issues would not be resolved in the underlying suit.

- Based upon the holding in Hartford v. Aetna and its predecessor decisions, the matter was remanded to the trial court to determine whether Liberty Mutual had a duty to indemnify the insured, which would in turn be dispositive of whether Liberty Mutual had a duty to defend.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- On March 21, 1995, the New Jersey Supreme Court granted leave to appeal the Appellate Division ruling.

- Matter settled prior to Supreme Court ruling and appeal dismissed.

i. General Acc. Ins. Co. v. State, 278 N.J. Super. 412 (App. Div. 1995), rev'd 143 N.J. 462 (1996).

- General Accident Insurance Company ("General Accident") issued liability insurance policies to N.B. Fairclough & Son ("NB") which operated a fuel storage business.

- In 1974, an act of vandalism resulted in the discharge of fuel oil on NB's property, which resulted in contamination of groundwater and private wells.

- The DEP commenced a cleanup of the contamination and issued two directives and an administrative order against NB.

- In 1987, General Accident filed a declaratory judgment action against NB, which ultimately resulted in a consent order pursuant to which General Accident agreed to pay $100,000 in indemnity costs and additionally to continue to pay defense costs until the full indemnity payment was made.

- General Accident hired an environmental counsel and engineer and spent in excess of $100,000 complying with the directives and order, primarily for remedial investigation engineering costs.

- In 1994, General Accident filed a motion in aid of litigant's rights contending that the $100,000 it spent on engineering costs was an indemnity cost, not a defense cost, and that therefore, its defense obligations must cease. The trial court agreed.

- On appeal General Accident argued that the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, makes no material distinction between the remedial investigation and the cleanup obligation, and that therefore both were indemnity costs.

- In reaching its decision, the appellate court noted that the DEP had three options when the spill occurred. The one chosen was to direct the responsible party, NB, to cleanup. General Accident, on behalf of NB, chose to comply with the directives rather than to resist (which it had the right to do).

- Noting that General Accident conceded that engineering costs are investigative costs, court focused on the language in the policy dealing with General Accident's duty to defend, specifically the provision that states that General Accident "may make such investigation and settlement of claim or suit as it deems expedient."

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court concluded that based upon the plain language of the policy, remedial investigations, while not falling under the traditional notions of "settlement", were clearly performed to delineate and mitigate NB's ultimate liability and were therefore defense costs, not indemnity costs.

- General Accident appealed to the Supreme Court.

- The Supreme Court granted cert.

- On appeal, the Supreme Court in a 7-0 decision reversed the Appellate Division decision which allocated all of the costs of the remedial investigation to the defense provisions of the policy.

- Court remanded the matter to the trial court to make a fair allocation of the costs of the remedial investigation between the defense and indemnity provisions of the policy.

- Court stated that the issue with which it was faced was whether remedial studies conducted in connection with environmental cleanups mandated by the government should be considered to be defense costs or indemnity costs under a liability policy.

- In reaching its decision, Court reviewed a number of factors and noted that it believed that the only fair result on the issue was a balanced solution that took multiple factors into account.

- Court stated that there should be a presumption that mandated investigative costs are indemnity costs and that the insured bears the burden to prove that the insurer will unjustly benefit from such an allocation to the extent the insurer is relieved of an obligation to defend which it would otherwise have.

- Court remarked that this type of dispute appeared to be suited to mediation and arbitration and failing that, trial courts (upon the recommendation of a master, if one is appointed) should have broad discretion to resolve a fair allocation of costs between defense and indemnity, based on written submissions of the parties, without any additional expert testimony.

- The following four factors were then set by Court to be considered in connection with the allocation: (1) the relative risk borne by the insured if it did not produce the Remedial Investigation/Feasibility Studies ("RI/FS"); (2) the extent to which the RI/FS was mandated by an environmental agency; (3) the extent to which the RI/FS provided a means to relieve an insured or insurer of a potential claim for damages or mitigate such potential claim; and (4) the cost to produce the RI/FS as compared to the limits of the policy at issue.

- As to this case in particular, Court stated that factors to be considered included the extent to which the DEP mandated and approved the methodology of the studies; the agreed upon indemnity limits of $100,000; and the engagement letter of the engineering firm hired to conduct the study which advised the insured's attorneys that its "primary objective is to prepare a

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

technical plan which will form one of the cornerstones of your negotiation with the DEP."

j. Pfizer v. Employers Insurance of Wausau, No C-108-92 (N.J. Super. Ct. Law Div. 1995).

- Pfizer sought defense from Employers Insurance of Wausau ("Wausau") and Insurance Company of North America ("INA") in connection with governmental or private claims relating to environmental contamination with respect to six sites.
- Wausau and INA maintained that the resolution of these claims would not resolve the underlying coverage issues.
- According to court, in 1994, Pfizer offered INA and Wausau the opportunity to comply with their defense obligations by paying past defense costs and undertaking future defense obligations, all under a reservation of rights to later contest coverage.
- Court held that "the tendering of defense with a reservation of rights for the insurer to later contest coverage requires that the carriers step forward and fulfill their covenants to defend".
- Noting that the right to defense is a crucial benefit under a liability policy, court stated that an insurer cannot reject a defense under a reservation of rights, for no reason at all or for its own selfish reason to postpone payment of sizeable defense costs to a later day.
- Court explained that if it were later determined that the insurer had no defense obligation, it would be entitled to reimbursement of defense costs plus interest.
- Court also remarked that whether the insured would have the ability to reimburse an insurer at a later date was an underwriting problem, which is not to be a factor in determining a duty to defend.

k. Morrone v. Harleysville Mut. Ins. Co., 283 N.J. Super. 411 (App. Div. 1995).

- Morrone sought defense from Harleysville, in connection with a suit filed against her by the owners of certain real property she formerly owned.
- Trial court, on motion for summary judgment, directed Harleysville to defend Morrone in connection with the suit.
- Appellate Division affirmed, but noted that Harleysville's duty to defend only related to damages arising from groundwater contamination.
- Appellate Division went on to rule that since the underlying complaint alleges both soil and groundwater contamination, Harleysville must provide a defense, subject to appropriate

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

apportionment and reimbursement, citing the Supreme Court decision in SL Industries.

- Court then left it to Morrone and Harleysville to negotiate a satisfactory resolution of the costs relating to soil contamination and the costs relating to groundwater contamination.

l. Air Products and Chemicals Inc. v. Hartford Accident & Indemnity Co., No. L-17134-89 (N.J. Super. Ct. Law Div. 1996).

- Insured brought suit against its insurers with respect to environmental contamination at a number of sites in New Jersey and elsewhere.

- Insured moved for partial summary judgment ordering a primary carrier, Hartford Accident & Indemnity Co. ("Hartford"), to pay past and present defense costs for all sites.

- The basis of the motion was a letter from the insured to Hartford tendering defense of all environmental claims to Hartford, while reserving Hartford's right to later contest coverage and any requirement to indemnify with respect to the sites. Hartford failed to respond.

- Court limited its holding to New Jersey sites, since it did not have sufficient information to render a decision as to non-New Jersey sites.

- The initial conclusion reached by court was that New Jersey courts defined the term "suit", for which a defense may be required, to include a coercive action or some other action which could result in liability being imposed upon the insured for injury. Court found that the insured was placed at coercive risk and faced liability for environmental contamination at the New Jersey sites.

- Court noted that the intent of the insured's letter was to have Hartford pay the defense costs, and not control the defense, and that the scenario was similar to that in the Pfizer matter.

- As in Pfizer, court ordered the insurer, in this case Hartford, to pay all defense costs incurred by the insured after the date of the letter and left it open as to whether Hartford should pay any of the defense costs of the insured prior to the date of the letter.

- Court then explained its rationale for the decision. It noted that an insurer's duty to defend is broader than its duty to indemnify, but that under New Jersey law, if the policy does not cover the claim, then neither duty exists. Under Burd v. Sussex Mut. Ins. Co., 56 N.J. 383 (1970), court addressed the issue as to the duty to defend where the underlying claim did not resolve the issue of coverage. Court then translated the duty to defend into a duty to reimburse if coverage was ultimately found. Court also noted it would be acceptable for the parties to agree that the insurer would defend but would reserve the right to later disclaim coverage.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- As a solution to this insured's request for defense, court ordered Hartford to assume defense costs, without control of the action, but gave it the right to seek reimbursement of those costs should it be determined that there was no coverage.

m. Trustees of Princeton University v. Aetna Casualty & Surety Company, 293 N.J. Super. 296 (App. Div. 1996), leave to appeal granted, 147 N.J. 574 (1997).

- Princeton University ("Princeton") owns real property (the "Site") on which major research facilities were located, including fusion research facilities.

- In 1993, DEP issued a Directive to Princeton on the basis of tetrachlorethane and trichloroethane contamination of the groundwater at the Site.

- Subsequently, Princeton entered into a Memorandum of Agreement with the DEP to address the contamination.

- Princeton was also named as a third party defendant in the EPA and DEP actions against the owner of the Helen Kramer Landfill (the "Landfill") on the basis that Princeton disposed of liquid sewage sludge at the Landfill.

- Princeton notified its insurers of its claims with respect to the Site and the Landfill. Princeton instituted suit against its insurers for failure to defend the foregoing claims.

- Insurance Company of North America ("INA") was Princeton's insurer from 1980-1987.

- Princeton maintained that INA must undertake its defense with respect to the claims since Princeton agreed: (1) to waive any conflict of interest that might exist; and (2) that INA could reserve its right to contest coverage, while at the same time paying the costs of defense.

- On Princeton's motion for summary judgment concerning the insurers duty to defend, the trial court, relying on the Supreme Court decision in Burd v Sussex, concluded that INA had no present duty to defend. Princeton appealed.

- On appeal, the appellate court explained that Burd gave insurers a right to refuse to defend in certain circumstances.

- The appellate court also relied upon the Supreme Court decision in Morton, which followed Burd, finding that the insured was obligated to provide its own defense, subject to reimbursement by the insurer should the insured prevail on the issue of coverage.

- Princeton argued that the Burd rule eliminates an insurer's duty to defend. The appellate court, however, agreed with the explanation of Court in Burd that the insurer's duty to defend was not eliminated, but rather it was converted into an obligation

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

to reimburse if it was ultimately determined that insured was entitled to coverage.

- This case was found by court to fall directly within the situation contemplated in Burd, since the pleadings in this case created a conflict between the insured and the insurer.

- Court observed that certain issues central to coverage, particularly the subjective intent of the insured to injure, will not be determined by the resolution of the underlying claims, since those claims involved strict liability and would not look to the insured's intent.

- In addition, it was the position of this court that if INA was required to provide defense, it would be doubtful that INA's counsel could act without qualification, since counsel could not ignore issues which would assist in the coverage dispute. Further, the appellate court concurred with the trial court's conclusion that Princeton's tendered waiver, which was delivered simultaneously with its demand for defense, was illusory.

- In reaching its decision, the appellate court distinguished this case from the cases cited by Princeton, Morrone and Sands v. Cigna Property and Casualty Ins. Co., 289 N.J. Super. 344 (App. Div. 1995).

- Court stated that Morrone only discussed the Burd issue in dicta and mistakenly cited to Hartford for the proposition that the "insurer may be required to finance [the] defense subject to a right to reimbursement for costs attributable to non-covered claims." According to this court, it was in fact concluded by court in Hartford that the practical effect of the Burd rule was that the insured must finance the defense. As to the Sands case, this court noted that the case could be looked at as presenting circumstances which did not come within the Burd rule, rather than as imposing a new "presumption" of coverage, or it could be looked at as presenting circumstances which justified a departure from the Burd rule.

- Court affirmed trial court holding that under general rule of Burd, INA has no present duty to defend Princeton in the underlying environmental actions.

- Supreme Court granted Princeton's motion for leave to appeal.

n. Universal-Rundle Corp. v. American Motorist Insurance Co., No. L-06892-94 (N.J. Super. Ct. Law Div. 1997).

- Plaintiff owned and operated a bathtub manufacturing facility from the 1930's until 1973.

- Contamination was discovered at the site after Plaintiff's sale of the site.

- Subsequent owner sued Plaintiff with respect to the contamination.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Plaintiff instituted a declaratory judgment action against its insurers, settling with all but Commercial Union ("CU").

- Court examined facts of case in light of Morton "exceptional circumstances" test.

- While the evidence showed that waste was deposited behind the plant from the 1930's to the 1970's, court found no evidence that Plaintiff knew that the waste was unacceptable, or that it was discharging a known pollutant.

- Interestingly, court found that the fact that workers used dirt collectors and respirators in connection with operations at the facility did not evidence knowledge that the waste was harmful and would cause contamination.

- Further, court noted that the use of waste for landfill purposes was acceptable practice, and therefore there was no intentional discharge of a pollutant by Plaintiff, rather there was a discharge of what Plaintiff believed to be a harmless waste.

- Court held that there was therefore an occurrence under CU's policies and therefore CU had an obligation to defend Plaintiff.

o. Flintkote Co. v. Liberty Mutual Insurance Company, No. L-38115-88 (N.J. Super. Ct. Law Div. 1996).

- Court granted motion of Flintkote Co. ("Flintkote") to compel its insurers to reimburse its future defense costs.

- In a brief letter order, court found that under New Jersey law, unless an insurer can provide a legitimate basis to deny coverage, it must defend its insured.

- In this instance, court concluded there was no valid basis to deny coverage, since there was no proof that insured intended pollution.

p. Chemical Leaman Tank Lines, Inc. v. The Aetna Casualty and Surety Co., 978 F. Supp. 589 (D.N.J. 1997), rev'd, remand, 177 F.3d 210 (3d Cir. N.J. 1999).

- After trial by jury finding partial coverage, and remand from the Third Circuit on the issue of allocation of costs among triggered policies, the trial court first looked to allocate the costs incurred by the insured between defense and indemnity, since the excess carriers only had a duty to indemnify and not to defend.

- The primary dispute between the parties in this regard related to the costs of the RI/FS.

- On the basis of General Accident, the insured proposed that all such costs were indemnity costs.

- The insurers countered that there should be a fair allocation of the costs on the basis of a New York case, Endicott Johnson

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

Corp. v. Liberty Mutual Ins. Co., 928 F. Supp. 176 (N.D.N.Y 1996), appeal dismissed, 116 F.3d 53 (2d Cir. 1997), where the court held that the costs attributable to the feasibility study were defense costs, while those attributable to the remedial investigation were indemnity costs.

- This court, since it was sitting in New Jersey, looked to the Supreme Court decision in General Accident, ignoring the New York decision cited by the insurers.

- In General Accident, the court held that there was a presumption that the costs of an RI/FS were indemnity costs unless the policyholder demonstrated that the insurer would be unjustly relieved of an obligation it would otherwise have.

- Since the insured here embraced the presumption rather than opposing it, this court ruled that all of the RI/FS investigation and remediation costs are indemnity costs.

- On appeal, the excess insurers argued that the District Court should not have allocated all RI/FS costs to indemnity costs.

- The Third Circuit noted that the holding of the District Court that the presumption that all costs associated with an RI/FS favored the insured, was stated to be based upon the decision of the New Jersey Supreme Court in Fairclough, and the presumption stated therein.

- However, the Third Circuit concluded that the decision in Fairclough created a presumption that could be rebutted by any party disadvantaged by an allocation of all costs to indemnity costs, not just the insured.

- Citing the existing record of the matter, the Third Circuit noted that even the insured had previously argued in this very case that certain of the RI/FS costs were defense costs.

- Therefore, if all costs were allocated to indemnity costs, the insured would derive an unjust benefit if any of the costs were in fact defense costs.

- While the Third Circuit did not hold that the insurers had rebutted the presumption as to indemnity costs, it remanded the matter to the District Court for a determination of whether the excess insurers rebutted the presumption, and, if necessary, for an allocation between defense and indemnity costs.

- Also note that the Third Circuit rejected the adoption of the "bright line" rule advanced by the excess insurers that all remedial investigations are defense costs and all feasibility study costs are indemnity costs.

q. Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co., Civ. Act. No. 89-1543 (D.N.J. 1998).

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Plaintiff insured made a motion for attorneys fees and costs which was referred to a magistrate by the trial court pursuant to the decision set forth in subparagraph p above.

- The insured sought recovery of attorneys fees and expenses in the amount of $7,000,000.

- The magistrate looked to New Jersey Court Rule 4:42-9, which gives the court discretion to award attorneys fees to a successful claimant in an action under a liability policy.

- The magistrate recited the seven year saga of this case which included both a successful jury trial and the appeal to and remand by the Third Circuit.

- Based on the totality of the case, the magistrate found that the court should exercise its discretion and award attorneys fees as well as reasonable out of pocket expenses to the insured.

- The magistrate also found the attorneys fees incurred by the insured to be reasonable in most instances, but that they should be calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate, after taking into account the objections of the insurers.

- The magistrate calculated the reasonable fees based on the relevant market rate in the district of New Jersey and then agreed with the insurers that the transitional fees that resulted when the insured moved from one law firm to another should be deducted from the total.

- The magistrate refused to rule that the actual fees of out of state counsel were the relevant market rate fees for New Jersey.

- Instead, the magistrate took the hourly rate of Anderson Kill, a New Jersey firm which had submitted an affidavit for the insured, and calculated that an award of approximately $4.8 million of attorneys fees be made to the insured, as opposed to the $7 million requested by the insured.

r. GAF Corp. v. Hartford Accident & Indemnity Co., No L-980-97 (N.J. Super. Law Div. 1999).

- GAF filed suit against a number of its insurance carriers in connection with environmental liabilities.

- GAF moved for summary judgment on the issue of whether GAF's insurers were obligated to provide defense with respect to certain underlying actions.

- Trial court denied the motion on the basis of the decision of the Supreme Court in Burd v. Sussex, 56 N.J. 383 (1970). Specifically, that where coverage issues will not be determined by the trial of the underlying actions, insurers have a duty to reimburse, rather than a duty to defend.

- Court was not persuaded by GAF's proposal that its insurers defend under a reservation of rights that would permit them to later contest payment.

- Motion filed for leave to appeal.

- Motion denied by appellate court.

s. Zurich Insurance Co. v. Joseph Dixon Crucible Co., No. L-4898-96 (N.J. Super. Ct. Law Div. 1999).

- Insurers made a motion for summary judgment arguing that they were entitled to reimbursement of defense costs paid to insured with respect to a site in Jersey City, New Jersey, on the basis that most of the underlying claims of the insured were not covered.

- Summary judgment was granted in part and denied in part.

- Insured moved for reconsideration, arguing that the insurers did not have a right to reimbursement.

- One insurer sought to refute the motion by explaining that its claims were based on both the policy language and on New Jersey case law.

- As for the insurer's argument with respect to New Jersey case law, it sought to use the well established rule that an insurer that wrongfully refuses to defend an insured has a duty to reimburse, as supporting its proposition that since it reserved its rights when paying, the insured had a duty to reimburse the insurer for costs the insurer was not obligated to pay.

- Court was not impressed by the argument, finding that (1) the policy does not contain an express right of reimbursement; and (2) New Jersey case law does not "... stand for the proposition that an insurer may seek reimbursement from an insured if it chooses to voluntarily defend claims... ."

- As a result, Court granted insured's motion for summary judgment holding that the insurers do not have a right of reimbursement.

t. Curtiss-Wright Corporation v. Public Service Mutual Insurance Company, No. A-217-99T3 (N.J. Super. Ct. App. Div. 2002).

- This decision by the Appellate Division arose in the aftermath of years of disputes between Curtiss-Wright Corporation ("Curtiss-Wright") and Public Service Mutual Insurance Company ("Public Service") relating to a claim for defense and indemnity under a policy it issued.

- Curtiss-Wright, the owner of certain real property, was named as an additional insured under a policy issued by Public Service to its tenant at the property.

- In 1986, Curtiss-Wright sought coverage from Public Service in connection with various bodily injury suits brought by a number of employees of a subtenant at the property arising from chemical exposure.

- Public Service refused to indemnify or defend Curtiss-Wright in connection with the suits and Curtiss-Wright was forced to retain its own counsel to defend the suits and ultimately to file a declaratory judgment action against Public Service in 1988.

- Based on the information before the trial court, it was determined that the occurrence at issue only took place during the Public Service policy period.

- On a partial summary judgment motion brought by Curtiss-Wright in 1990, it was determined that Public Service had an obligation to defend Curtiss-Wright in connection with the suits.

- In October 1991, Public Service retained counsel to provide a defense and sought to have that counsel substituted for the personal defense counsel retained by Curtiss-Wright.

- Ultimately, court decided to permit the personal counsel of Curtiss-Wright to continue as defense counsel and ordered Public Service to pay all reasonable and necessary defense costs from that date forward.

- Disputes continued for years over payment of defense costs by Public Service, which chose not to take any active role in the defense of the matter, including in defense strategy.

- Ultimately, Curtiss-Wright was only found liable by a jury for $32,500 in medical monitoring costs, but the defense costs were in the neighborhood of $1,000,000.

- Over the years, the trial court ordered Public Mutual to pay the defense costs of Curtiss-Wright, but always with a caveat that gave Public Service the right to have a hearing on the fairness of the invoices and whether the services were reasonable and necessary.

- However, in 1998, a different judge granted the motion of Curtiss-Wright to estop Public Service from contesting the bills for defense costs, on the basis that it refused to take any active part in the defense of this matter and that, therefore, it should not be entitled to contest the bills.

- On appeal, court cited Burd for the proposition that an insurer that fails to defend a claim and which is ultimately found liable for indemnity has a duty to reimburse the insured for its reasonable and necessary defense costs.

- However, court found it to be unreasonable to prohibit Public Service from contesting the reasonableness of the defense fees incurred after (not before) Public Service agreed to undertake the defense of Curtiss-Wright. Also, court noted that the original

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

trial judge never indicated that Public Service could not contest the defense fees, despite the history of the failure of Public Service to pay defense costs even after it agreed to undertake the defense.

- Court noted that the various letters produced by defense counsel to support the position of Curtiss-Wright that Public Service could not protest defense costs, may provide a basis to estop Public Service from challenging certain costs, but not all costs.

- Court then looked at the impact of the non-covered claims on the liability of Public Service for the costs of defense as a whole.

- Citing to SL Industries, court explained that Public Service would be responsible for the defense of both covered and non-covered claims, where the defense costs could not be reasonably allocated between these claims. However, according to the court, no such allocation had been presented by Public Service.

- Court remanded the matter for a hearing on the issue of the reasonableness of defense costs incurred by Curtiss-Wright after Public Service agreed to undertake the defense. Also, court agreed that Public Service could re-open the apportionment issue if its previously prepared expert report and previously submitted evidence provided a basis for apportionment.

u. Cycle Chem, Inc. v. Lumbermen's Mutual Casualty Company, 365 N.J. Super. 58 (App. Div. 2003).

- From the late 1960's to the mid 1980's, Cycle Chem distilled, sold and distributed chemical solvents for use in dry cleaners and various types of manufacturing operations.

- Several suits were filed against Cycle Chem by municipalities and property owners, alleging that chemical solvents distributed by the company caused water and soil contamination.

- Insured filed suit against a number of insurers, including Lumbermen's Mutual Casualty Company ("Lumbermen's").

- Neither Cycle Chem nor Lumbermen's were able to locate the actual policies at issue, but they did stipulate to certain terms.

- The applicable policy language at issue here was as follows:

  "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence and **arising out of the ownership, maintenance or use of the insured premises and all operations necessary or incidental to the business of the named insured conducted at or from the insured premises..."**

- Lumbermen's, on a motion for summary judgment in 1996, maintained that the policies at issue were limited in scope and only applied to the office operations that were presumed to be located at

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

the property that was reflected in the insurance information either available and/or stipulated.

- Trial court orally ruled in favor of Lumbermen's on that motion finding that the code classification found in the insurance information for the property "reflects a building, a premises office code" and that therefore, the coverage under the lost policies would be limited to claims arising out of an office operation.

- Following settlements with other carriers, the trial court memorialized the decision from which Cycle Chem now appeals.

- Appellate Division reverses, finding the policy language itself broad enough to cover off site environmental risks.

- Specifically, court interpreted the language in the policy providing coverage for all operations necessary or incidental to the business conducted at the insured premises to be broad enough and sufficiently clear to preclude the entry of summary judgment in favor of Lumbermen's and that Cycle Chem is entitled to have the opportunity to present evidence to the trier of fact of the nexus between the operations that are the subject of the underlying suits and the insured property.

- This is an interesting outcome particularly when you consider the minimum premiums paid by the insured for the policies. An implication definitely exists that this policy was only designed to cover the minimal risk of an office operation. Notwithstanding that fact, the insuring agreement was broad enough to give Cycle Chem the opportunity to argue that it covered its sales and distribution operations as well.

5. Selected Ohio Case Law

a. City of Willoughby Hills v. Cincinnati Ins. Co., 9 Ohio St. 3d 177 (1984), appeal after remand, 26 Ohio App. 3d 146 (Ohio Ct. App. 1986).

- Two lawsuits were filed against the insured, one alleging violation of constitutional rights by the insured and the second sounding in defamation. After timely notice to the insurer, the insurer refused to accept the defense of either action on the basis that the allegations in the complaints did not fall within the coverage afforded under the policy. Thereafter, the insured incurred legal fees in defending the two actions.

- The insured then sought a declaration that the insurance company was bound to provide a defense in the two actions.

- Court set forth the general rule that a duty to defend arises where the allegations in the complaint clearly bring the actions within the policy coverage.

- Court then went beyond this rule to hold that where the duty to defend is not apparent from the allegations in the complaint, but the allegations state a claim which is potentially or arguably

within the policy coverage, the insurer must accept the defense of the claim.

- Appeal after remand related to costs associated with declaratory judgment and interest. Appellate court affirmed trial court and remanded for further proceedings consistent with opinion.

b. Professional Rental, Inc. v. Shelby Ins. Co., 75 Ohio App. 3d 365 (Ohio Ct. App. 1991).

- Professional Rental, Inc. ("Professional") sought a declaration that Shelby Insurance Co. ("Shelby") was obligated to defend and indemnify it with respect to a third-party claim brought by a defendant in a suit initiated by EPA against several potentially responsible parties. Professional's involvement in the underlying suit arose from one transaction during which Professional sold seventy-five gallons of waste motor oil which was transported to a disposal site later designated by EPA as a Superfund Site.

- Professional put Shelby on notice of the pending litigation and demanded that Shelby defend the suit and provide coverage. Shelby denied any obligation to defend or indemnify under the policy. Subsequent to its denial of coverage, Professional was dismissed from the suit on the basis of a settlement with the third-party defendants. Professional was then notified by EPA directly that it was a PRP.

- Trial court granted judgment in favor of Shelby because there was no actual "suit" pending against Professional and therefore no duty to defend.

- Appellate court affirmed, holding that receipt of a PRP notification from EPA was not equivalent to a "suit". Court noted that "it is only when the EPA actually begins to enforce liability against an alleged polluter that the latter will bear the consequences of strict liability." Court held that a "suit" is commenced for purposes of triggering an insurer's duty to defend when EPA issues an administrative order, since it is only then that the PRP is legally obligated to act.

c. Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co., 84 Ohio App. 3d 302 (Ohio Ct. App. 1993).

- Appellate court determined that the exception to the pollution exclusion could be applicable to the releases set forth in the underlying complaint alleged to have happened on a date certain, but not to the continuous releases thereafter.

- In determining the extent of the insurer's duty to defend in this action, the issue before court was whether the insurer must defend Sanborn as to the date certain release only, or as to the entire complaint.

- In reaching its decision, the appellate court cited the Ohio Supreme Court's holding in Preferred Mut. Ins. Co. v. Thompson (1986), 23 Ohio St. 3d. 78, that a complaint which stated both negligence and intentional tort claims based on the same

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

occurrence obligates an insurer to defend both claims regardless of the ultimate outcome.

- Appellate court inferred from this holding that if claims arose from separate occurrences, the insurer was only obligated to defend the claim covered under the policy.

- Court noted that the allegations in the underlying complaint inferred that the separate release on a date certain was different than the subsequent releases. Consequently, the insurer's obligation only extended to the separate occurrence, even though the underlying complaint did not contain separate claims for each of the alleged releases.

- Court stated that although its holding could present practical difficulties for Sanborn in defending itself in the underlying action, any further extension of the duty to defend would violate the specific requirements of the policies at issue.

- Court also rejected the insurer's argument that it had no duty to defend Sanborn on the basis that Sanborn failed to present evidence showing that the oil it sold to the recycler was taken to the recycling facility. Court found that since the underlying complaint alleged that the hazardous materials had been taken to the facility, the claims were sufficient to require the insurer to defend Sanborn in the underlying action.

d. Affiliated FM Ins. Co. v. Amcast Indus. Corp., No. 92-4530 (Ohio Comm. Pls. 1993).

- In 1989 the EPA issued an Administrative Order directing Allied Signal and Amcast Industrial Corp. ("Amcast") to clean up contaminants disposed of at a waste disposal facility in Ohio. Amcast refused to participate on the basis that it was not responsible for disposing of any hazardous substances at the site. As a result, Allied Signal sued Amcast for contribution.

- Amcast then sought to have its insurer defend it against Allied Signal. On motion for summary judgment, the insurer claimed that by virtue of the pollution exclusion, it was not contractually responsible for Amcast's cleanup costs at the waste disposal facility and that the alleged discharges of hazardous materials were not "sudden and accidental".

- In opposition, Amcast proposed that the pollution exclusion argument was premature since Amcast expressly denied sending hazardous materials to the waste disposal facility. Amcast argued that until conclusive evidence of pollution by Amcast was demonstrated, the existence of material facts precluded the insurer's motion for summary judgment.

- In support of its position, the insurer cited the Ohio Supreme Court's decision in Hybud which held that an insurer was not obligated to provide a defense for an insured in actions in which a variety of wastes were disposed of or accepted in landfills over an extended period of time, resulting in injuries or damages, since this came within the scope of a pollution exclusion.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Amcast attempted to distinguish its case from Hybud by the fact that it had expressly denied responsibility for depositing hazardous substances at the disposal facility.

- Court however, noted that the duty to defend arises when the allegations in the underlying complaint potentially or arguably render the party within the policy coverage and held that the claims against Amcast did not fall within the policy coverage.

- In reaching its conclusion, court stated that if Amcast was found responsible for contamination, then the pollution exclusion precluded any obligation of the insurer to defend Amcast; and if Amcast was not responsible for the contamination, then the policy coverage would not operate at all.

e. Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London, 813 F. Supp. 576 (N.D. Ohio 1993).

- Court, in granting the motion of Sherwin-Williams for summary judgment on the insurers' duty to defend, found that Sherwin-Williams had demonstrated that no material factual disputes remained and that it was entitled to summary judgment as a matter of law.

- Court noted that in Ohio two different rules govern an insurer's duty to defend. One applies when an insurer has not agreed to defend groundless claims. Under those circumstances, an insurer is entitled to show that the true facts differ from the facts in the complaint, thereby removing the complaint from coverage. The second rule applies when an insurer has agreed to defend based on the allegations in the complaint, which was the situation in this action. In this event, the insurer must defend the insured when the facts in the complaint arguably or potentially fall within the scope of the insurer's coverage or when there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded. Court explained that the second test was commonly referred to as the "pleadings" or "scope of the allegations" test.

- Under the scope of the allegations test, the duty of the insurer to defend is broader than the duty to indemnify and a duty to defend may exist even though the insurer ultimately may have no obligation to indemnify the insured.

- In arguing that a separate factual inquiry was required when a complaint failed to resolve questions pertinent to an insurer's duty to defend, the insurer cited New Jersey decisions. Court, however, rejected these cases as not binding precedent in Ohio and held that the insurer's duty to defend was based solely on the claims arguably or potentially stated against the insured in the complaint and that doubts in the pleadings regarding coverage, if any exist, must be resolved in favor of the insured rather than in a separate factual inquiry.

- In reaching its conclusion that the carriers must defend Sherwin-Williams, court compared the language of the insurance policies, including the exclusionary language, with the claims stated in

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

each of the underlying complaints and determined that the claims arguably fell within the scope of coverage.

f. U.S. Industries, Inc. v. Insurance Company of North America, 110 Ohio App. 3d 361 (Ohio Ct. App. 1996).

- Insured, a manufacturer of polystyrene resin, operated a facility in Copley, Ohio from 1969 until its sale of the facility in 1976.
- In 1987, EPA instituted suit against the subsequent owner of the facility, Polysar, Inc. ("Polysar"), with respect to contamination at the facility.
- After investigation, Polysar discovered that hazardous substances had been stored, released or disposed of at the facility prior to its acquisition of the facility, and in 1989, it filed suit against the insured.
- Subsequently, Polysar discovered an earthen pit at the facility which allegedly contained hazardous materials which had been buried by the insured, and it filed an amended complaint with respect to the buried waste.
- In 1992, the insured instituted suit against its insurers for a declaratory judgment.
- The insured then moved for partial summary judgment alleging that the insurers were obligated to pay all defense costs, and two of the insurers moved for partial summary judgment that they had no duty to defend on the basis of the pollution exclusion in their policies.
- Trial court granted motion of insurers and denied motion of the insured.
- On appeal the insured argued that summary judgment should not have been granted to the insurers, since Polysar's amended complaint alleged a "tank rupture" which was a sudden and accidental event, not barred by the pollution exclusion in the policies.
- Court explained that under Plasticolors, Inc. v. Cincinnati Ins. Co., 85 Ohio App., 3d 547 (1992), the burden was on the insured to prove that the exception to the pollution exclusion was applicable.
- Court concluded that the insured failed to meet its burden of proof since the amended complaint did not allege damages resulting from a sudden discharge, but rather alleged that the damage was caused by the insured's actions after the discharge and a gradual release or discharge of pollution. As a result, no insurer had a duty to defend the insured.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

g. Danis Industries Corp. v. Travelers Indemnity Co., No. 95 CVH12-8904 (Ohio Comm. Pls. 1997).

- Plaintiff operated two Ohio landfills, one from 1965-1980 and the other from 1965-1975.
- The first site was placed on the NPL in 1986, and Plaintiff subsequently entered into two consent orders with EPA, one to investigate the site, and one to clean up the site.
- As to the second site, EPA notified Plaintiff that it was a PRP with respect to this site in 1994.
- Following the appellate court's ruling in Professional Rental, this court held that the insurers had the duty to defend Plaintiff as to the first site, since there was a consent decree involved. However, it did not have to defend as to the second site because a "PRP" notice was not the equivalent of a suit.
- Court also noted that even though property damage was not discovered until after the expiration of the last Travelers policy, the duty to defend was triggered because the Plaintiff's claim was arguably within coverage since the damage "occurred" when the injury took place, not when it was discovered.

h. Employers Insurance of Wausau v. Amcast Industrial Corp. 1998 WL 177546 (Ohio App. 2 Dist.).

- Trial court granted insurers motion that they had no duty to defend the insured with respect to a suit filed by Allied Signal as to a waste disposal facility to which the insured sent foundry sand.
- While appellate court agreed with insured's position that an insurers' duty to defend may be broader than its duty to indemnify, in this instance the claims for which the insured sought defense were not arguably or potentially within coverage since they were precluded by the pollution exclusion. Therefore, the trial court's decision was affirmed.

i. Este Oils Co. v. Federated Ins. Co., 1999 Ohio App. LEXIS 421.

- In 1990, insured delivered heating oil to a home that no longer had a heating oil tank, resulting in 320 gallons of oil in the basement, and obvious property damage.
- The homeowners sued the insured.
- The insured sought coverage from its insurer, Federated, under a business auto policy.
- The insured dismissed its case against Federated when the homeowner sought binding arbitration.

- Ultimately, the insured settled with the homeowner for $21,000 and then the insured filed suit against Federated for both the indemnity payment and for defense costs in excess of $56,000.

- Trial court found no coverage, on the basis of an "absolute" pollution exclusion.

- On appeal, court found there was no duty of Federated to indemnify the insured, but it did find a duty to defend.

- Appellate court explained that the duty to defend is separate and distinct from the duty to indemnify.

- Citing to Willoughby Hills, court held that Federated had a duty to defend, since there was "some doubt as to whether the [homeowners] had pleaded a theory of recovery within policy coverage."

- As a result, Federated was to reimburse the insured for the costs incurred in defending the homeowners suit only, not the cost to pursue coverage.

j. Air Products & Chemicals, Inc. v. Indiana Ins. Co., 1999 Ohio App. LEXIS 6217.

- Air Products & Chemicals, Inc., ("Air Products") operated a system at the Rumpke Landfill in Hamilton, County, Ohio, (the "Landfill") which extracted gases created by the decomposition of buried materials, which was then processed and sold.

- Air Products hired an architectural firm, McGill, Smith, Punshon, Inc. ("MSP") to design a foundation for a new maintenance and storage building. Air Products was named as an additional insured on a liability policy issued to MSP by Indiana Insurance Company ("Indiana").

- The policy contained an exclusion for acts of professional liability (covered under another policy) and an exclusion for bodily injury arising out of the "... discharge... of pollutants."

- After the foundation was constructed, Air Products hired a contractor to construct the prefabricated building. However, this building did not have a methane gas venting system for gases that might seep through the foundation.

- Unfortunately, methane gas did seep into the building through cracks and seams in the foundation, and a contractor working in the building was severely injured when he lit a cigarette, which caused an explosion.

- Two suits were filed against Air Products by the contractor, and Air Products sought defense and indemnity from Indiana, which was denied.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Air Products ultimately instituted suit against Indiana, and after some discovery proceedings, each filed a motion for summary judgment.

- Court held that Indiana had a duty to defend Air Products and that there were issues of material fact as to whether Indiana had a duty to indemnify.

- At trial, court held that Indiana had no duty to indemnify, on the basis of the professional liability and pollution exclusion, and from that point forward, no duty to defend.

- After trial, both parties appealed; Air Products on the pollution exclusion issue, and Indiana on the trial court's summary judgment ruling on the duty to defend.

- Here, the appellate court described the law of Ohio on this issue, specifically, that the duty to defend is separate from the duty to indemnify and that it arises where it is clear that the action is within coverage and where the action is potentially or arguably within coverage, citing to Willoughby Hills.

- Then court went on to explain that at the time of the summary judgment motion, there were issues of fact as to the duty to indemnify. According to the appellate court, this in and of itself was sufficient to warrant summary judgment in favor of Air Products on the issue of the duty to defend. Further, it did not matter that the trial court later extinguished the duty, it was present at the time of summary judgment.

k. Century Surety Company v. Oster, 2000 Ohio App. LEXIS 172.

- In 1994, suit was filed against Cleveland Asbestos Management, Inc. ("Cleveland Asbestos"), alleging negligence in connection with an asbestos removal project.

- Cleveland Asbestos sought defense and indemnity from Century Surety Co. ("Century") in connection with the suit.

- After settling property damage claims in connection with the suit, Century denied coverage for bodily injury claims on the basis of a pollution exclusion.

- Subsequently, Century filed a declaratory judgment action.

- In March, 1995, at the time of various motions, Century noted in its answering papers that it agreed to defend Cleveland Asbestos in the underlying lawsuit under a reservation of rights.

- In May, 1995, the trial court ruled that Century had a duty to defend Cleveland Asbestos in the underlying lawsuit, but that it was not precluded from doing so under a reservation of rights.

- In July, 1998, Cleveland Asbestos and others moved for summary judgment, which was granted in August, 1998.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- At that time court held that Century had both a duty to defend and indemnify Cleveland Asbestos in the underlying suit. Century appealed.

- Century argued that it had conducted its defense of Cleveland Asbestos pursuant to a reservation of rights, on the basis that its policy contained a pollution exclusion relating to bodily injury claims.

- The alleged reservation of rights consisted of language contained in a 1994 release that indicated that the release did not apply to bodily injury claims. Interestingly, this language was added by an attorney for one of the plaintiffs and not by Century.

- Trial court held that this language does not notify Cleveland Asbestos that Century will defend the claims remaining in the underlying suit, nor does it contain any reservation of rights under the policy. Therefore, Century waived its right to assert the pollution exclusion as a defense to coverage.

l. Jerry Cremeans v. Nationwide Mutual Fire Insurance Co., Case No. 841 (Ohio Ct. App. 2000).

- Plaintiffs owned a home which was sold to new owners.

- Subsequent to the sale, new owners discovered petroleum in the drinking water well and filed suit against Plaintiffs on the basis of intentional misrepresentation and negligent failure to give notice of the contamination.

- Plaintiffs sought coverage under a homeowners policy in connection with the suit. Insurer refused to defend Plaintiffs in the suit and Plaintiffs filed a declaratory judgment action against insurer.

- On motion for summary judgment, trial court ruled in favor of insurer.

- On appeal, Plaintiffs maintained that the negligence allegations in the suit required that its insurer provide coverage.

- Insurer maintained that its policy does not cover fraudulent conduct or loss resulting from intentional conduct.

- Citing to Willoughby Hills, court noted that an insurer has a duty to defend where a claim may arguably or potentially be within coverage.

- As to the first count of intentional misrepresentation, court found no duty to defend on the basis of an exclusion in the policy for intentional acts.

- As to the second count, relating to the negligent failure of Plaintiffs to give notice of contamination, and the alleged ensuing diminution in value of the property and damage to pipes and appliances, court found a duty to defend.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court rejected various additional arguments of the insurer to bolster its position, including that the new owners had no cause of action due to the doctrine of caveat emptor and that the property damage took place outside of its policy period, finding these points to be issues of fact and not appropriate for summary judgment.

- Appellate Court reversed and remanded to determine whether the alleged occurrence took place during the policy period, and if it did, insurer would be obligated to provide a defense.

m. Cincinnati Insurance Co. v. Colelli & Associates Inc., No. 00CA0053 (Ohio Ct. App. 2001), rev'd, No. 2001-1309 (Ohio Sup. Ct. 2002).

- Colelli & Associates ("Colelli") supplied various chemicals to crude oil and natural gas companies, one of which was toluene.

- In September, 1995, Pennzoil Products Company ("Pennzoil") filed suit against Colelli for damages to its refinery resulting from toluene contaminated with silicon allegedly sold by Colelli to distributors and placed in oil wells.

- Colelli notified its insurer, Cincinnati Insurance Co. ("Cincinnati") of the suit and of complaints related to the contaminated toluene.

- Cincinnati filed a declaratory judgment action alleging no responsibility to either defend or indemnify Colelli and subsequently filed a summary judgment motion.

- Trial court denied the summary judgment motion of Cincinnati and instead granted summary judgment to Colelli holding that Cincinnati had both a duty to defend and a duty to indemnify.

- Appellate court reversed and remanded finding that trial court did not adequately analyze either the issues or the policy terms.

- On remand, trial court again denied summary judgment motion of Cincinnati and granted partial summary judgment to Colelli finding a duty to defend on the part of Cincinnati.

- On appeal again, court reversed trial court as set forth below.

- As to its duty to defend, Cincinnati argued that there was a material issue of fact that precluded judgment as a matter of law. Appellate court agreed.

- Court explained that the language in the policy at issue concerning defense, did not include the caveat that defense will be provided even if "...allegations of suit are groundless, false or fraudulent...".

- As a result rather than following Willoughby Hills, the court must follow the rule established in Preferred Risk Ins. Co. v. Gill, 30 Ohio St. 3d. 108, that where an insurer only agrees to defend claims for which there is actually coverage, an insured cannot rely on the facts alleged in the complaint and rather there must be a determination of coverage based on the true facts.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court found that as a result of the competing affidavits of the parties, issues of fact remained as to the true facts of Pennzoil's claim and therefore as to whether there is coverage under the policy. Therefore summary judgment was inappropriate on the issue of the duty to defend, and the trial court was reversed.

- Colelli appealed to the Ohio Supreme Court.

- In a two sentence decision, court reversed Appellate Court on the basis of Willoughby Hills, finding that the Preferred Risk decision is limited to its facts, and that there was a duty to defend.

6. Selected Michigan Case Law

a. Michigan Millers Mut. Ins. Co. v. Bronson Plating Co., 197 Mich. App. 482 (Mich. Ct. App. 1992), aff'd, 445 Mich. 558 (1994).

- Bronson Plating Co. ("Bronson") conducted electroplating operations which involved the release of large quantities of rinse water and waste materials. In 1986, Bronson's site of operations was listed on EPA's National Priority List. EPA notified Bronson that it was a potentially responsible party for the contamination at the site. Bronson notified its insurers of the PRP letter and demanded a defense.

- Michigan Millers Mutual Insurance Co. ("Michigan Millers") tendered a defense, subject to a reservation of rights, and later filed a complaint alleging that it had no duty to defend or indemnify Bronson since no "suit" had been brought against Bronson.

- Lower court held in favor of Michigan Millers and the other insurers finding that the duty to defend was not triggered by EPA's PRP letter. Appellate court reversed, relying on Court of Appeals decision in Polkow that EPA's PRP letter amounted to a "suit". Court noted that Supreme Court's reversal of court of appeals decision in Polkow did not address "suit" issue.

- On appeal, the Michigan Supreme Court affirmed the appellate court. After finding that the term "suit", as used in insurance policies, was ambiguous and could be applied in other than court proceedings, Court held that the notice received by Bronson was equivalent to the initiation of a legal proceeding thereby triggering the insurers' duty to defend.

- In its analysis of the meaning of the term "suit" in the insurance policies, Court noted that broadening its definition better reflected the modern realities of the legal system in which courts are moving towards less formal dispute resolution.

- Court found this point to be of particular validity when dealing with actions under CERCLA, since this legislative system encourages "voluntary" cooperation rather than litigation.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court concluded that since the term "suit" was not defined in the policies, it must look to the reasonable expectations of the parties, and if there was ambiguity, construe the term most favorably to the insured.

- In making its determination, Court examined the contents of the letter received by Bronson from EPA, which offered Bronson the opportunity to participate in a remedial investigation and feasibility study, and warned that if it failed to do so, it could be held jointly and severally liable for all costs in connection with the investigation and remediation of the site.

- Court noted that "the significant authority given to the EPA in such matters allows it to essentially usurp the traditional role of a court of law in determining and apportioning liability. Such matters are concluded by the EPA before the action is ever brought to court."

- After taking into account the demands of the PRP letter from EPA and its ramifications, Court found that "...the legal proceeding initiated by the receipt of that notice is the functional equivalent of a suit brought in a court of law."

- In September, 1994, Michigan Supreme Court denied a motion for rehearing.

b. Auto Owners Insurance Company v. City of Clare, 446 Mich. 1, reh'g denied, 447 Mich. 1202 (1994).

- On appeal, the Michigan Supreme Court, found that the trial court erred in its decision that the insurers had a duty to defend the City on the basis that there was arguable coverage, since there were issues concerning the applicability of the "sudden and accidental" exception to the pollution exclusion.

- Court found that the "sudden and accidental" exception to the pollution exclusion was not applicable to either the City's claim or the underlying claims in the suits against the City. As a result, there was no arguable coverage under the policies issued and consequently, no duty to defend.

- Supreme Court denied motion for rehearing.

c. Anderson Development Co. v. Travelers Indemnity Co., 49 F.3d 1128 (6th Cir. 1995).

- On Travelers motion for summary judgment, the district court held that "actions taken by EPA and ADC, including the EPA letter and the filing of the consent decree, did not constitute a "suit" which would trigger coverage under the policies".

- On appeal, the Sixth Circuit reversed the district court citing the holding of the Michigan Supreme Court in Michigan Millers that a PRP letter is the functional equivalent of a suit, and held that the PRP letter received by ADC was equivalent to the institution of a suit which triggered Travelers duty to defend.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

d. Arco Indus. Corp. v. American Motorists Inc. Co., 215 Mich. App. 633 (1996).

- Michigan Supreme Court remanded this matter to the appellate court for a determination of issues raised by the insured with respect to the insurer's duty to defend. (See decision of Michigan Supreme Court in Section A, Michigan subparagraph c.)

- Appellate court concluded that the insurer had no duty to defend the insured in the underlying litigation because there was no trigger of coverage during its policy period.

- In reaching its conclusion, the appellate court noted that the issue raised was whether there was damage during the policy period caused by the insured's discharge of contaminants.

- Following the decision of the Michigan appellate court in Gelman Sciences, Inc. v. Fidelity & Cas. Co., (See Section G, Michigan subparagraph e.), this appellate court concluded that the manifestation trigger of coverage applied; specifically, that coverage was triggered at the time of discovery of the damage.

- Appellate court held that since the damage was not discovered until 1985, which was well after the expiration of the insurer's last policy, there was no coverage under the policies and therefore no duty to defend on the part of the insurer.

e. American Bumper and Manufacturing Co. v. Hartford Fire Ins. Co., 452 Mich. 440, reh'g denied, 554 N.W.2d 10 (Mich. 1996).

- Insured cleaned, brightened, anodized and sealed parts for the automotive industry.

- From 1962 to 1987, insured discharged wastewater containing hazardous substances and wastes from its manufacturing process into a large seepage lagoon pursuant to an MDNR permit.

- Although MDNR expressed concerns about the lagoons in the 1970's, it took no action.

- In the 1980's, as part of the renewal process with respect to the permit, MDNR requested that the insured undertake certain investigative activities to determine if the discharges into the lagoon resulted in groundwater contamination in the area of the lagoon.

- Insured's consultant issued a report in 1982 which concluded that there was no problem and that most contaminant levels were background levels. Another consultant concurred, except for the level of phosphates.

- Notwithstanding the studies, in 1986, insured learned EPA was proposing the site for inclusion on the National Priorities List.

- Insured abandoned the permit process and notified its carriers of EPA's claim, and in 1987 ceased use of the lagoon system.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- In 1987, EPA named insured as a PRP. Subsequently, insured entered into a consent order with EPA to perform an RI\FS.

- Insured hired yet another consultant which in 1988 confirmed the results of the earlier studies, and requested a no action record of decision ("No Action ROD").

- EPA and MDNR demanded further testing however, and did not issue the No Action ROD until 1993.

- Insured instituted a declaratory judgment action against its insurers.

- Insurers moved for summary judgment on the basis that they had no duty to indemnify or defend with respect to the EPA claim.

- Trial court granted motion of insurers.

- Insured appealed and Michigan Court of Appeals reversed the trial court, finding that certain insurers might owe a duty to defend to the insured since they failed to clearly establish the absence of an occurrence until the defense of the claim was completed.

- Insurers appealed to the Michigan Supreme Court, which affirmed the appellate court decision.

- Court explained that since no contamination was found, the issue was not whether the insurers must indemnify the insured for cleanup costs. Rather, the issue was whether the insurers were obligated to pay the insured's defense costs in responding to EPA's claim.

- After reviewing standard CGL provisions, as well as decisions interpreting them in connection with environmental claims, Court found that insurers agreed to cover losses caused by an occurrence, but for damages caused by contamination, unless the release of the contamination was sudden and accidental.

- Court also found two separate, but related, duties of an insurer were contained in a CGL policy, the duty to defend an insured, even if the allegations of the suit were groundless, and the duty to indemnify.

- Next, Court reaffirmed its holding in Michigan Millers that a PRP letter from EPA, similar to that received by the insured in this case, was a suit and found that the letter received by the insured from EPA in this matter constituted a "suit" under the policy.

- Court explained that the duty to defend was related to the duty to indemnify in that it only applied to coverage afforded by the policy, but that the scope of the duty to defend was broader than the duty to indemnify, since if the allegations of a suit even arguably came within coverage the insurer must provide a defense. In addition, an insurer must look beyond the

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

allegations against the insured to analyze the possibility of coverage. The resolution of any doubt must be in favor of the insured.

- Insurers with pollution exclusions in their policies argued that they had no duty to defend since EPA's concern focused on the intentional dumping of pollutants into lagoons and that any contamination was therefore not sudden and accidental.

- Court rejected this argument on two grounds, first that during the RI/FS period until the No Action ROD, it was not clear as to whether there was an occurrence, since property damage by the insured had not been established; (2) even if property damage was found, there were no means to determine at the time whether the cause was sudden and accidental as opposed to gradual and intentional.

- The primary reason for the difficulty of the case was the lack of contamination. Had contamination been found, the cause could have been discovered and coverage determined.

- On the basis that there was uncertainty as to whether there was contamination that required cleanup, as well as uncertainty as to the cause and possible source of the contamination, Court determined that the insurers could not escape their duty to defend.

- Court made a similar determination with respect to those policies which did not contain a pollution exclusion.

- In addition, Court rejected the insurers arguments that there was no duty to defend on the basis of issues relating to trigger of coverage (see Section G, Michigan subparagraph g. for a further discussion) and loss in progress.

- Next, Court addressed the question as to whether costs incurred in responding to EPA's letter were defense costs.

- Court concurred with the holding of the appellate court in Gelman Sciences, Inc. v. Fireman's Fund Ins. Co., 183 Mich. App. 445 (1990) that remediation costs during an RI/FS or costs that make an injured party whole are indemnification costs.

- The difference with respect to this case, however, was that the majority of the costs were expended so that EPA could determine whether the insured was liable for cleanup.

- Court then discussed the difference between defense costs and the costs of doing business, which were not defense costs even if they incidentally aided in defeating or limiting liability. Examples of those costs of the insured which were costs of doing business included: (1) hooking up to the sewers; (2) dredging sludge from and filling in the lagoons; (all of which Court viewed as improvements to the site which were likely to have taken place even if there was no EPA claim); and (3) the costs, including

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

consulting costs, associated with the MDNR permit prior to the EPA claim.

- Court held that site investigation costs during the RI/FS were defense costs if they were expended to disprove or limit liability and if they did not represent an ordinary cost of doing business, and remanded the matter to the trial court to make a determination, as to what costs were defense costs.

f. South Macomb Disposal Authority v. American Insurance Company, 225 Mich. App. 635 (1997).

- Defendant insurers argued that the trial court erroneously concluded that letters from the MDNR constituted a suit.

- While a similar issue in connection with a notice under CERCLA had been addressed by the Michigan Supreme Court in Michigan Millers, supra, this was an issue of first impression.

- Here, the appellate court explored the insurers' duty to defend in connection with: (a) a 1990 letter from MDNR requesting a workplan from the insured with respect to groundwater contamination and an explanation of the immediate actions to protect the potable aquifer; (b) a 1992 letter from MDNR instructing the insured to address groundwater contamination; and (c) a 1993 letter from MDNR with respect to groundwater contamination again requesting a workplan and threatening the imposition of fines for failure to do so.

- Appellate court first concluded that since it had previously ruled that the Environmental Response Act, M.C.L. 299.612(1), is similar to CERCLA, by analogy it was appropriate to determine the powers of MDNR by looking at EPA's policies. Taking this one step further, the court found that it could utilize the analysis as to the EPA in Bronson Plating to MDNR in this instance.

- Since MDNR clearly had full authority under Michigan law to take action against the insured, which was equivalent to the enforcement of the statutory provision against unpermitted discharges, court held that the letters from MDNR did in fact constitute a "suit" and therefore, triggered the insurers' duty to defend.

- Appellate court was also asked to rule on another aspect of the duty to defend, specifically whether the insurers were obligated to pay the insured's defense costs.

- Citing to the Michigan Supreme Court's decision in American Bumper, supra, the court ruled that the duty to defend is broader than the duty to indemnify and that site investigation costs incurred during an RI/FS are defense costs rather than indemnity costs if they relate to an effort to contradict or limit liability.

- In the instant case, the costs at issue arose in connection with the design of the most cost-effective remediation plan for the

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

contamination at issue, which the appellate court, in upholding the trial court's decision, determined were clearly defense costs.

g. Arco Indus. Corp. v. American Motorists Ins. Co., 232 Mich. App. 146 (1998).

- Prior to the decision of the Michigan Supreme Court on trigger of coverage, (See Section G, item 6.j. below), a Michigan Appellate Court determined, in a prior decision in this matter cited at item d. above, that the insurers had no duty to defend Arco.

- After the decision on trigger in Arco, the matter was remanded to the trial court for a determination of, among other things, whether the insurers had a duty to defend.

- Trial court determined that Arco was not entitled to reimbursement of its defense costs incurred between the 1985 PRP notice from the MNDR and the filing of suit against Arco in 1987.

- Arco appealed.

- Appellate Court examined the decisions in Michigan Millers and South Macomb. The former held that an EPA PRP letter was the equivalent of a suit, and the latter extended that holding to MDNR notice letters.

- Here, Arco received a PRP letter from MNDR advising that Arco was required to determine the extent of contamination and address it, and requesting the submission of an appropriate plan.

- Even though the wording of this letter was not as strong as that in Michigan Millers and South Macomb, the appellate court determined that there was a "clear implication" in the letter that MDNR would undertake an enforcement action, and that therefore it gave rise to the level of a suit for purposes of a duty to defend.

- Based on the foregoing, the appellate court reversed the trial court decision and remanded for a determination of the costs.

h. Trimas Corp. v. Zurich American Ins. Group, 2003 WL 1861482 (Mich. App. Apr. 10, 2003) rev'd, 469 Mich. 879 (Mich. 2003)

- Zurich American Insurance Group ("Zurich") denied coverage to Trimas Corporation ("Trimas") after Trimas was sued by one of its employees for lead poisoning to his son.

- The employee's son allegedly suffered from lead poisoning caused by lead dust carried by the employee from his employment.

- The basis of the coverage denial was the claim of Zurich that the child's injury was not covered by the policy.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Trimas filed suit against Zurich seeking coverage in connection with the employee's suit under an Employer's Liability Insurance policy it purchased from Zurich.

- In reaching a decision as to whether Zurich had a duty to defend Trimas, court cited to American Bumper and noted that it must make an initial determination whether coverage was possible under the policy at issue.

- Court then began an analysis of the policy to determine whether the language of the policy when reviewed as a whole was ambiguous.

- It examined the applicable policy language that provided that there would be coverage for damages for consequential bodily injury to a child of an injured employee; provided that the damages were the direct consequence of bodily injury arising out of the injured employee's employment.

- Zurich maintained that the policy only provided coverage if the child's injury arose out of his father's injury. Trimas proposed the policy mandated coverage if the child's injury arose out of his father employment.

- Court noted that the policy language could be interpreted in two different ways, either that the child's injury had to be the direct consequence of an injury to the employee, or that the child's injury had to be a direct consequence of the employee's employment with Trimas.

- As a result, court held that the provision in the insurance policy was ambiguous, since language in the policy that limited the coverage provided to an employee's child was capable of two interpretations. Further, since the injury was arguably covered by the Employer's Liability Insurance policy, Zurich had a duty to defend Trimas in the underlying action.

- On appeal to the Supreme Court of Michigan, Court reversed and held, in a one sentence opinion, that under the clear language of the policy at issue, there needed to be actual bodily injury to the employee, not his child.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

F. Defining Covered Damages: The "As Damages" Issue

1. Policy Language:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

Coverage A, bodily injury or

Coverage B, property damage

to which this insurance applies, caused by an occurrence...

2. Policyholder's Position - The term "as damages" includes all costs incurred by the policyholder in undertaking government mandated cleanup actions.

3. Insurer's Position - Costs incurred by the policyholder to respond to governmental cleanup demands are equitable in nature, not legal, and therefore not damages covered under the policy.

4. Selected New Jersey Case Law

a. Lansco, Inc. v. Dept. of Envtl. Protection, 138 N.J. Super. 275 (Ch. Div. 1975), aff'd, 145 N.J. Super. 433 (App. Div. 1976), cert. denied, 73 N.J. 57 (1977).

- Appellate Division rejected insurer's argument that coverage under the policy did not include damages recoverable by the State and that the term "property damage" must be read as meaning measurable damage to identifiable physical property.

- Court held that policyholder's cleanup costs comprised the amount it was legally obligated to pay and the amount for which it was entitled to indemnification.

b. Broadwell Realty Services, Inc. v. Fidelity & Casualty Co., 218 N.J. Super. 516 (App. Div. 1987).

- Court found that DEP's directive, demanding cleanup and threatening to assess Broadwell treble damages unless the work was undertaken, constituted a claim for damages, since Broadwell's expenditures were to discharge its legal obligation for abatement and response costs.

c. Gloucester Tp. v. Maryland Casualty Co., 668 F. Supp. 394 (D.N.J. 1987).

- Policyholder was the owner of a landfill which was the subject of a cleanup and compliance action by DEP.

- DEP sought cleanup, injunctive relief, penalties and damages from the policyholder for failure to properly close and clean up the landfill.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Insurers argued there was no duty to indemnify the insured for costs to close and clean up the landfill and for DEP fines and penalties issued against the policyholder for failure to comply with environmental laws, since DEP sought equitable rather than legal relief.

- On the issue of closure and cleanup costs, court rejected the equitable relief/damages distinction with respect to contaminated sites.

- Emphasizing the fact that DEP's complaint alleged contamination of groundwater both on and off-site, and consequently damage to third parties, court found that the costs of cleanup and closure constituted "damages" under the policies.

- As to indemnification of the policyholder for fines and penalties assessed by DEP, court held that such costs were not covered "damages" under the policies.

d. CPS Chem. Co., Inc. v. Continental Ins. Co., 222 N.J. Super. 175 (App. Div. 1988).

- CPS was engaged in the processing, treatment and storage of organic compounds at its plant in Old Bridge, New Jersey.

- Perth Amboy filed a civil action against CPS and others seeking monetary damages in connection with contamination of its water supply, which it alleged resulted from the discharge of harmful and toxic chemicals from CPS's facility.

- DEP instituted a separate action against CPS and Madison Industries asserting claims under the Spill Act and the Water Pollution Control Act, alleging that CPS and Madison were strictly liable for the costs to be incurred in restoring the watershed and a public well field.

- CPS sought a declaratory judgment that its insurers were contractually obligated under their policies to pay all defense costs and to indemnify it for the amounts awarded in the underlying proceedings.

- Trial court found that the award against CPS in the underlying litigation was "not to compensate for property damage sustained," but constituted "costs to effect changes in systems and conditions that existed in and around the CPS plant." Therefore partial summary judgment was entered in favor of insurers.

- Appellate Division reversed, holding that monetary amounts awarded to DEP for the purpose of implementing measures designed to abate continued migration of hazardous wastes and to restore the acreage and water to their natural condition constituted damages subject to the carrier's obligation of indemnification.

- Court also rejected insurers' argument that sums assessed against CPS and in favor of DEP were ancillary to essential injunctive relief directed by trial court and were therefore not damages within the policy meaning.

e. Chemical Leaman Tank Lines v. Aetna Cas. & Sur., 788 F.Supp. 846 (D.N.J. 1992), aff'd, 89 F.3d 973 (3d Cir. 1996), cert. denied, 117 S. Ct. 485 (1996).

- In this preliminary decision by the federal district court in the Chemical Leaman matter, one of the issues addressed was whether cleanup costs constituted "damages" on account of "property damage" within the meaning of comprehensive general liability policies.

- Policyholder sought ruling that cleanup costs which it was obligated to pay pursuant to CERCLA with respect to ground and surface water contamination in the vicinity of its Bridgeport site constituted damages on account of property damage. The insurer's position was that cleanup costs were not damages, but costs incident to complying with equitable and injunctive relief.

- Court rejected the insurer's position and instead found that the cleanup costs which Chemical Leaman was obligated to pay pursuant to CERCLA with respect to ground and surface water contamination constituted damages on account of property damage.

f. Morton Int'l, Inc. v. General Accident Ins. Co., 134 N.J. 1 (1993), cert. denied, 114 S.Ct. 2764 (1994).

- Trial court held that the term "damages" encompassed the remediation expenses mandated in Ventron. The Appellate Division did not address the issue.

- Several of the insurers in their joint cross petition for certification to the Supreme Court argued that the expenditures compelled by the judgment in Ventron did not constitute "damages" for which indemnification was available under the policies.

- The insurers argued that the phrase "as damages" that appears in liability insurance policies confined the insurer's duty of indemnity to judgments for traditional tort-liability money damages and imposed no obligation to reimburse Morton for equitable remedies such as governmentally mandated response costs intended to remediate environmental harm.

- The insurers also maintained that the phrase "as damages", which was not defined in the policy, was understood in the context of insurance coverage to have an unambiguous, technical and well-settled meaning referring only to traditional third party compensatory awards rather than equitable type relief.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- In addition, the insurers argued that the Spill Act, the statutory basis of Morton's liability in Ventron, distinguished between "cleanup and removal costs" and "damages".

- Morton argued that the undefined term "as damages" should not be construed technically but rather should be given its plain meaning in order to vindicate the objectively reasonable expectations of insureds who would assume liability policies covered environmental remediation costs as well as third party liability claims.

- In reaching its decision, the Supreme Court noted that the clear weight of authority among both federal and state courts is that the term "damages" should be accorded its plain, non-technical meaning, thereby encompassing response costs imposed to remediate environmental damage.

- Court noted that although it declined to address the issue in Signo, Justice O'Hern's dissenting opinion on other grounds in that case concluded that "environmental response costs are covered damages under a CGL policy."

- Court stated that it found Justice O'Hern's analysis of the issue in Signo to be persuasive and recited portions of his opinion.

- In the Signo opinion, Justice O'Hern noted that the term "damages" means money to most people and cited a New Jersey federal district court decision which reasoned that the average person would not engage in a complex comparison of legal and equitable remedies in order to define the word damages.

- Based upon Justice O'Hern's analysis of the issue in Signo and the clear weight of authority, the Supreme Court held that "the environmental response costs and remediation expenses imposed on Morton's predecessors in the Ventron litigation constitute sums that Morton will have to pay as damages because of property damage, within the meaning of the CGL policies at issue."

g. Crest Foam Corporation v. Hartford Accident & Indemnity Co., No. L-1068-93 (N.J. Super. Ct. Law Div. 1996).

- From 1965-1986, insured operated a foam manufacturing facility in New Jersey (the "Site").

- In 1986, the insured triggered the New Jersey Environmental Cleanup Responsibility Act, now known as the Industrial Site Recovery Act (collectively "ISRA"), by virtue of its plan to transfer ownership of its shares.

- In connection with its ISRA obligations, the insured conducted an environmental investigation of the Site, which revealed soil and groundwater contamination.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- The insured entered into an Administrative Consent Order ("ACO") with the DEP and proceeded with the remediation of the Site.

- The insured filed a declaratory judgment action against its insurers in connection with its claim with respect to contamination at the Site.

- All insurers settled with the insured, but for Hartford Accident & Indemnity Co. ("Hartford"), which issued four consecutive liability policies to the insured.

- Both the insured and Hartford filed cross motions for partial summary judgment under the policies.

- The issue raised in the motion, which was one of first impression, was whether the insured's ISRA liability constituted a legal obligation of the insured to pay for damages or whether the costs were voluntary payments excluded from coverage under the policies.

- In its motion, Hartford relied on the following provision of its policy for the proposition that ISRA costs were voluntary payments: " . . . The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than that for first aid to others at the time of accident."

- After due consideration of the language of the policies, taking into account the propositions that an insurance contract should be interpreted to reflect the mutual intent of the parties and that ambiguities should be construed in favor of the insured, court held in favor of the insured.

- Specifically, court held that " . . . ECRA cleanup costs are damages for which plaintiff is legally obligated to pay and not excluded from coverage as voluntarily assumed."

- Court reached this conclusion after carefully analyzing the following issues: (1) whether ISRA costs were damages under a liability policy; (2) whether the insured was legally obligated to pay such costs; and (3) whether such costs were voluntary payments.

- First, as to the issue of "damages," court looked to the New Jersey Supreme Court decision in Morton holding that Spill Act cleanup costs were damages under a liability policy. Court found ISRA and the Spill Act to be sufficiently similar and concluded that the holding in Morton should also apply to ISRA cleanup costs.

- Next, since the insured was mandated by statute to clean up the Site, under Summit Associates, the insured's costs were a legal obligation under the terms of Hartford's policies.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Finally, court rejected Hartford's argument that the insured's voluntary decision to sell its shares thereby triggering ISRA precluded coverage under Hartford's policies. Rather court was persuaded by the insured's argument that whether DEP oversight came through ISRA or another environmental law, the ultimate result of mandatory remediation was the same.

h. Metex Corp. v. Federal Ins. Co., 290 N.J. Super. 95 (App. Div. 1996).

- Beginning in 1968, the insured used TCE in its wire mesh manufacturing operations at its facility on new Durham Road in Edison, New Jersey (the "New Durham Site").

- In 1986, an environmental consultant retained by the insured advised the insured that there had been a discharge of TCE to the waters of the State, which was reported to DEP.

- Subsequently, a DEP representative made two inspections of the New Durham Site.

- In 1987, insured concluded there was groundwater contamination at the New Durham Site and reported it to the DEP.

- In 1988, insured hired a consultant to delineate contamination and develop a plan for remediation.

- In 1990, insured contacted DEP again and advised it that detailed investigation revealed TCE contamination of the deep aquifer, and in 1991, it submitted a Groundwater Investigation Report and Remedial Investigation Report to DEP.

- During the foregoing time period, DEP did not correspond with the insured and it was not until July, 1995 that the first correspondence arrived from DEP, which invited the insured to enter into a Memorandum of Agreement ("MOA").

- In June 1990, the insured filed suit against its insurers after the insurers refused to pay costs incurred by the insured with respect to the New Durham Site and a site located on Talmadge Road in Edison, New Jersey (the "Talmadge Site").

- In January, 1995, the insurers moved for summary judgment arguing that there was no coverage on the basis of the owned property exclusion (since no proof of off-site damage) and on the basis that no party had taken any action to establish a legal obligation of the insured to pay.

- The trial court held that there was no claim for coverage as to the New Durham Site since no party had asserted a claim for bodily injury or property damage.

- The trial court then dismissed the insured's claim with respect to the New Durham Site on the basis that it was not ripe for adjudication.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- The insured moved for leave to appeal, which was granted, and supplemented the record with the July, 1995 letter from DEP. The Appellate Division temporarily remanded the matter to the trial court to consider the significance of the letter. The trial court concluded the letter had no effect on its decision.

- After the appellate court issued its original opinion on March 26, 1996 on the sole issue of whether the insured was legally obligated to pay for investigation at and remediation of the New Durham Site, all insurers moved for reconsideration.

- The appellate court granted the motion, recalled its initial opinion and issued a new opinion.

- In reaching its conclusion in its new opinion, the appellate court found that:

  (i) There was no provision in the insured's primary policies that limits coverage to costs incurred after an agency directive was issued, or a third party suit was filed. Court noted that Court in Morton held that environmental cleanup costs were damages and that the plain language of the policies did not require any "enforcement", "claim" or "suit" by a third party to trigger coverage. As a result, a statutory mandate was a sufficient legal obligation.

  (2) Costs incurred pursuant to a Memorandum of Agreement were not voluntary. Rather the insured was strictly liable under the Spill Act for all cleanup and removal costs and the Memorandum of Agreement was simply a mechanism through which the insured addressed its obligations with the oversight of the DEP.

  (3) The public policy of New Jersey, the plain language of both the Spill Act and the policy issued by the primary carrier, as well as the reasonable expectations of the insured, all required a finding of coverage under the primary policies.

- As a result, the appellate court reversed the trial court decision dismissing the insured's complaint as to its primary insurer and remanded the matter to the trial court for a determination, consistent with its opinion, as to whether the insured had coverage under its umbrella and excess insurance.

- The primary insurer moved for leave to appeal this decision to the New Jersey Supreme Court.

i. Strnad v. North River Ins. Co., 292 N.J. Super. 476 (App. Div. 1996).

- Plaintiffs were owners of the shares of a corporation which operated a button manufacturing business (the "Corporation") on a parcel of property in New Jersey for about 20 years.

- Plaintiffs sold the shares of the Corporation to Stub Ends, Inc. ("Stub Ends").

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Subsequently the Corporation, now owned by Stub Ends, triggered the Environmental Cleanup Responsibility Act, now known as the Industrial Site Recovery Act ("ISRA"), as a result of its sale of the property.

- During the course of compliance with ISRA, contamination was discovered at the property.

- Contaminated soils were excavated and replaced, and although groundwater remediation was initially recommended, additional groundwater monitoring showed decreased levels of contamination. Subsequently, the DEP approved the recommendation of the consultant for Stub Ends that no further work be performed and issued a full compliance letter permitting the monitoring wells at the property to be sealed.

- Trial court granted summary judgment to the insurer on the basis that the only "damage" that occurred was to the insured's own property and that coverage of this "damage" was precluded by the owned property exclusion.

- On appeal, the appellate court reversed the trial court following its decision in Morrone and found that based upon the holding of the Supreme Court in Morton, environmental response costs were "damages" under a CGL policy and that"...the expenses of monitoring the site's groundwater were 'damages' under the policies...".

  See also: Sagendorf v. Selective Ins. Co., 292 N.J. Super. 81 (App. Div. 1996).

j. American Alliance Ins. Co. v. Jencraft Corp., 21 F. Supp. 2d 485 (D.N.J. 1998).

- Insured sold vinyl mini-blinds to the public.

- Over time the mini-blinds deteriorated and released lead dust into the surrounding area.

- A number of class action suits were filed against the insured on behalf of purchasers of the mini-blinds.

- The insured sought defense and indemnity from the insurer.

- The insurer filed a motion for summary judgment on the basis that none of the underlying suits contained allegations of bodily injury or property damage and, therefore there was no coverage under its policies.

- Court denied insurer's motion for summary judgment.

- Court noted that while allegations of property damage were not the focus of the underlying actions, it was reasonable for the court to " ...infer the specter of property damage claims... ".

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- To support its position, the court cited to three of the underlying suits, which either implied lead dust contamination of homes or clearly alleged it.

- In addition, while the other underlying complaints did not contain similar allegations, they did seek "restitution" or "such other relief as the court deems just and proper". Therefore, the court found it reasonable to infer that contamination could become an issue in those cases, and as a result, summary judgment could not be granted.

5. Selected Ohio Case Law

a. Kipin Indus., Inc. v. American Universal Ins. Co., 41 Ohio App. 3d 228 (Ohio Ct. App. 1987).

- On appeal, insurer argued that contamination to the air, land and water did not constitute property damage. Court held that "property" included the interest of the federal and state governments in the environment and that "when the environment has been adversely affected by pollution to the extent of requiring governmental action or expenditure, or both, for the safety of the public, there is property damage whether or not the pollution affects any tangible property owned or possessed exclusively by the government."

b. Morton Int'l., Inc. v. Harbor Ins. Co., 79 Ohio App. 3d 183 (Ohio Ct. App. 1992), appeal after remand on other grounds, 104 Ohio App. 3d 315 (Ohio Ct. App. 1995).

- Trial court determined that environmental damages alleged in government claim against policyholder constituted property damage payable under the policy and that payments in settlement of CERCLA claims brought by state and federal EPA were "damages" because of property damages.

- Appellate Court affirmed, concluding that decision in Kipin compelled the conclusion that environmental damage constituted property damage and that the insured's settlement payments were "damages" and thus payable under the policy.

c. Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co., 84 Ohio App. 3d 302 (Ohio Ct. App. 1993).

- In affirming the trial court's conclusion that the costs of environmental cleanup constituted damages under the policies, the appellate court rejected the insurer's argument that there was no coverage for environmental cleanup costs on the basis that such costs did not constitute legal damages for which an obligation to pay arose, but rather constituted equitable relief.

- Court proposed that if a nearby resident asserted a claim for property damage as a result of pollution, it would be covered under the policy. It stated that in many respects the claims of the government and the resident were similar in that they each sought recovery of funds to correct harm caused by pollution. Court explained that the language of the policies does not

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

support a distinction between these two types of claims and concluded that the costs of environmental cleanup constituted "damages" under the policies.

- Court cited Kipin in reaching its decision, and commented that although the Kipin logic appeared to be somewhat strained, its ultimate conclusion was supported by the policy language.

d. Hartzell Industries Inc. v. Federal Ins. Co., No. C-3-99-325 (S.D. Ohio 2001).

- In 1992, Plaintiffs supplied Allegheny Power Company ("Allegheny") with seven roof fans for its boiler room.

- In 1993, the propellers of one fan disintegrated and Plaintiffs replaced the propellers on all seven fans.

- In August 1994, Plaintiffs purchased a liability policy from Federal Insurance Co. ("Federal"). A few months later propellers on the same boiler room fan disintegrated again.

- Concerned, Allegheny shut down all seven fans. After failing to come to an agreement with Plaintiffs as to how to resolve the problem, Allegheny filed suit for damages consisting of repair and replacement costs, consultants costs and lost worker productivity, resulting from the inability of the workers to work in an environment without fans.

- Plaintiffs sought a defense from Federal, which it undertook pursuant to a reservation of rights.

- Ultimately Plaintiffs and Federal settled with Allegheny, with Federal paying $50,000 and Plaintiffs paying $160,000.

- Subsequently, Plaintiffs filed suit against Federal seeking reimbursement of all but about $16,000 of the share of the costs paid by Plaintiffs.

- Summary judgment motions were filed by both parties.

- The first issue in the motion addressed by court was whether there was "property damage" caused by an occurrence during the policy period.

- One of the definitions of property damage included "loss of use of tangible property that is not physically injured".

- Plaintiffs proposed that Allegheny lost the use of its boiler house even though it was not physically injured, and that all damages suffered by Allegheny flowed from that loss of use.

- Federal argued that Allegheny did not lose the use of the boiler room and only lost the use of the fans, and that therefore there was no property damage since the roof fans were not covered property.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Further, Federal took the position that the allegations of Allegheny resulting from lost worker productivity was a purely economic loss and not a loss of tangible property.

- Court was not persuaded by Federal's argument and held that the decreased worker productivity allegation was a covered "loss of use of tangible property that is not physically injured", for which Plaintiffs were entitled to indemnification, even though there was not a total loss of use.

- It was also the conclusion of court that damages for the loss of use of property that is not physically injured could not be anything other than an economic loss.

- Court, however, did not agree with Plaintiffs position that all other costs incurred by Allegheny as a result of the damaged fans were covered under the policy. Rather those costs were incurred to determine the cause of the failure of the fan and to repair and replace it.

- As a result, court rejected summary judgment motion of both parties as to costs other than loss of worker productivity, without prejudice to renew.

6. Selected Michigan Case Law

a. U.S. Aviex Co. v. Travelers Ins. Co., 125 Mich. App. 579 (Mich. Ct. App. 1983).

- A fire destroyed the chemical manufacturing facility of U.S. Aviex Co. ("Aviex"). In extinguishing the fire, toxic chemicals in the facility were released causing contamination to the groundwater beneath the facility. Aviex was notified by MDNR that it must investigate and remediate any contamination. Insurer contended that the groundwater contamination was excluded from coverage due to the owned-property exclusion in its policy and that no claim for "damages" had been presented against Aviex.

- Insurer argued that Aviex's compliance with equitable or injunctive orders was not "damages" which the insurer must pay. Court disagreed, holding that since the state had an interest in its natural resources and the ability to recover costs incurred in cleaning up contamination, the fact that the state had chosen to require Aviex to remedy the problem, rather than incur the costs itself and sue Aviex, should not bar Aviex's recovery of those costs.

b. U.S. Fidelity and Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139 (W.D. Mich. 1988).

- Seller and distributor of industrial solvents was named in several lawsuits, including actions brought by the State of Michigan and the United States pursuant to CERCLA alleging responsibility for groundwater contamination.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court held that cleanup costs are "damages", finding that "the insured ought to be able to rely on the common sense expectation that property damage within the meaning of the policy includes the claim which results in causing him to pay sums of money because his acts or omissions affected adversely the rights of third parties".

c. Polkow v. Citizen's Ins. Co. of Am., 180 Mich. App. 651 (Mich. Ct. App. 1989), rev'd on other grounds, 438 Mich. 174 (1991).

- Lower court required Citizen's Insurance Company to reimburse insured for costs expended in conducting an investigation into possible groundwater contamination as part of an administrative inquiry by state and federal environmental agencies.

- Court of Appeals affirmed, holding that response costs incurred pursuant to an agency investigation are damages within the meaning of the general liability policy at issue.

- Michigan Supreme Court did not address the "damages" issue in its opinion.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

G. Trigger of Coverage

1. Policy Language:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

Coverage A, bodily injury or

Coverage B, property damage

to which this insurance applies, caused by an occurrence...

2. **Policyholder's Position** - Coverage is afforded under all policies issued to the policyholder from the date of release until full manifestation of the damage.

3. **Insurer's Position** - Usually, that the only policy triggered is the one in effect at the time of the manifestation of the damage. However, a number of insurers apply the "exposure theory" asserting that only the policy in effect at the time of initial exposure to the injury is triggered. Note: that under New Jersey law, the continuous trigger theory of coverage would be applicable under Owens-Illinois (See e. below), unless an insurer can prove a distinct occurrence with a distinct effect or unless the law of another state is applicable to the claim.

4. Selected New Jersey Case Law

a. Keene Corp. v. Ins. Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007, reh'g denied, 456 U.S. 951 (1982).

- While this is not a decision of the courts of New Jersey, its theory of the trigger of coverage is a critical one.
- Here, manufacturer of asbestos-containing products between 1948 and 1972 was named in lawsuits alleging personal injury and wrongful death as a result of exposure to asbestos.
- Court of Appeals held that every insurer that covered the policyholder in the years from the initial exposure through the manifestation of disease was liable for indemnification and defense costs.
- In sum, court held that coverage is triggered by exposure to asbestos, the subsequent development of disease and the manifestation of an asbestos-related disease.

b. Lac D'Amiante du Quebec, Ltee. v. Am. Home Assur., 613 F. Supp. 1549 (D.N.J. 1985).

- On cross motions for summary judgment, district court considered the issue of trigger of coverage in case involving company which mined and sold asbestos used by other companies in the manufacturing of products. Claims against policyholder included personal injury and property damage.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court predicted that New Jersey Supreme Court would apply the continuous trigger theory in line with Keene as to both personal injury and property damage claims, and so applied law.

- Court also followed Keene as to the extent of coverage and found that Supreme Court would impose joint and several liability for the total amount of settlement or judgment, subject to contribution by other insurers.

c. Gottlieb v. Newark Ins. Co., 238 N.J. Super. 531 (App. Div. 1990).

- Homeowners sued pesticide company for damages suffered as a result of the company's application of toxic chemicals in their home. The company sprayed certain areas inside and outside of the Gottlieb's home. Subsequent testing revealed that the chemicals had migrated into other areas of the home.

- The company had insurance coverage from the year the pesticides were applied through the testing period. The homeowners argued that coverage should be afforded under all of the company's policies.

- Court applied continuous trigger theory, citing Keene and Lac D'Amiante.

- However, court warned that it would not "blindly invoke the continuous trigger theory when either a policyholder's or a victim's dilatory response has produced the very continuum relied on to enhance coverage," and held that the issue was fact-sensitive.

d. Chemical Leaman Tank Lines, Inc. v. Aetna Casualty and Sur. Co., 817 F. Supp. 1136 (D.N.J. 1993), aff'd, 89 F.3d 973 (3d Cir.), cert. denied, 117 S. Ct. 485 (1996).

- District court found that New Jersey law permits the application of the continuous trigger theory, subject to certain factual findings. It also found that under the continuous trigger theory all insurers that issued policies activated by an ongoing occurrence are jointly and severally liable to their policy limits for all damage resulting from the occurrence, including damage that occurred before and after the particular policy period.

- Court also determined that New Jersey law requires the insured to make two factual showings before imposing joint and several liability under the continuous trigger theory: First, the insured must establish that some kind of property damage occurred during the policy period for which the insured seeks coverage; second, the insured must establish that the property damage was part of a continuous and indivisible process of injury.

- Court declared that to establish the first showing, Chemical Leaman must prove that soil and groundwater damage took place during each policy period for which it seeks coverage, and that to establish the second, Chemical Leaman must show that

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

the damage caused by its use of the rinsewater system was of a continuous, indivisible nature.

- After a trial by jury finding in favor of Chemical Leaman with respect to partial coverage under certain insurance policies, the insurers appealed.

- On appeal the insurers argued that the New Jersey Supreme Court would reject the continuous trigger theory of coverage. This argument proved to be without merit on the basis of the intervening decision of the New Jersey Supreme Court in Owens-Illinois.

- However, based upon the holding in Owens-Illinois (see subparagraph e. below), the Third Circuit accepted the insurers argument that the district court was in error holding that all policies were jointly and severally liable, and remanded this matter to the district court for reallocation of liability among the triggered policies in accordance with Owens-Illinois.

- See item j. for the decision on remand.

e. Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437 (1994).

- Owens-Illinois ("O-I") manufactured an asbestos containing product between 1948 and 1958. Claims against O-I for bodily injury and property damage resulting from its product totaled approximately one billion dollars.

- O-I instituted a declaratory judgment action against its insurers seeking coverage in connection with these claims. The Chancery Division granted the motion of O-I for summary judgment on a number of issues, including trigger of coverage. The insurers appealed.

- Appellate Division affirmed the lower court's adoption of the continuous trigger theory in determining coverage, holding that in the asbestos related context, each insurer on the risk between the initial exposure and manifestation was obligated to indemnify and defend the insured.

- In reaching its decision, the appellate court explained that the terms of the policies did not definitively resolve the "trigger" issues raised, nor were they helpful in determining which policies were triggered.

- Appellate Division commented that the continuous trigger theory represented a judicial response which attempts to provide certainty where policy language was ambiguous. Court also stated that it was convinced that this theory was the best theory to accommodate the competing interests of both insured and insurers.

- It was the position of the Appellate Division that the continuous trigger theory comports with both the teachings of medical science and the dictates of common sense, specifically, that a

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

disease begins on exposure and continues until it is manifest. Therefore, insurance policies from exposure to manifestation provide coverage.

- Appellate Division also found that the continuous trigger theory would apply to property damage claims.

- On appeal the Supreme Court of New Jersey.

  (1) Affirmed the adoption by the Appellate Division of the continuous trigger theory of coverage as the law of New Jersey, holding that "when progressive indivisible injury or damage results from exposure to injurious conditions for which civil liability may be imposed, courts may reasonably treat the progressive injury or damage as an occurrence within each of the years of a CGL policy."

  (2) Reversed the Appellate Division decision as to the allocation of the costs of defense and indemnity, on the basis that none of the costs were allocated to periods of no insurance, and on the basis that court directed contribution under the "other insurance" clauses of the policies was inapplicable to the proper allocation.

- In adopting the continuous trigger theory of coverage, Court reviewed the policy language as well as the various theories of trigger of coverage including (1) the exposure theory, (2) the manifestation theory and (3) the continuous trigger theory.

- Court noted that the concept underlying the continuous trigger theory was that injury occurs during each phase of environmental contamination, exposure, exposure in residence (progression, after exposure ceases) and manifestation.

- On the basis of the voluminous medical documentation resulting from years of asbestos bodily injury cases, Court recognized the progressive nature of asbestos related disease in the bodily injury context.

- Court found the record less persuasive when it came to property damage claims, nevertheless it held (in the context of this case), that policies in effect from the installation of the asbestos through discovery or remediation were triggered. Court noted that there was an issue as to when the injurious process ends, but that it did not reach the issue in this case.

- After determining that the continuous trigger theory of coverage should be adopted in progressive injury cases, Court decided that the issue of scope of coverage of the triggered policies must be resolved as well.

- In reaching its decision, Court rejected the joint and several allocation model adopted by court in Keene. That model provided the limits of one policy year apply to each injury and that the insured had the right to choose a year during the trigger period, with the chosen insurers then seeking contribution from the other insurers with a triggered policy.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Also rejected by Court was the argument advanced by O-I that once a policy is triggered, the very language of the policy provides that an insurer is liable for all sums involved, as well as the argument advanced by the insurers that a policy only covers that damage which occurs during the policy period, finding both arguments flawed.

- Court revealed that it was troubled with finding a fair allocation in the case of a gradual release of contaminants.

- After reviewing the case law on the topic, the drafting history of the policy and the policy language itself, and finding no clear answer, Court looked to public interest factors for guidance, among them, how to make the most efficient use of available resources to deal with environmental disease and damage.

- Keeping that factor in mind, Court found the insurance concept of transferring and spreading risks to be an efficient concept. It proposed that a fair allocation of the costs of damage or injury would relate to both time on risk and degree of risk assumed, providing an example of its concept based on policy years and limits. Court felt that it was reasonable for an insured, which chooses not to purchase insurance and to therefore retain the risk, (as opposed to periods when coverage for a risk is not available) to share in the allocation.

- Court chose not to create the allocation formula to be used in this case, and instead ruled that the trial court appoint a master "skilled in the economics of insurance" to create a model for allocating claims, which would include a "workable system" to process the claims.

- A number of issues were left open by Court which are vital to any model that might be constructed by the master, such as: (1) whether the insured bears the risk for: (a) lost policy years; or (b) years where insurance carriers are insolvent; or (c) years when the so called "absolute" pollution exclusion is contained in policies; or (2) whether excess carriers are to be included in the formula, since they did assume some risk for the triggered years.

- Realizing that its solution might not work, Court stated that it was prepared to revisit the issue of allocation if its proposed solution did not work.

- At the same time Court, in an effort to encourage settlements, suggested that insurers begin assuming responsibility for coverage or face the prospect that courts will utilize Court Rule permitting the imposition of the insured's attorneys fees on its insurers, when insureds are forced to sue for coverage.

f. Witco Corp v. Travelers Indemnity Co., 1994 WL 706076 (D.N.J. 1994), aff'd, 82 F.3d 408 (3d Cir. 1996).

- Travelers moved for summary judgment on the basis that there was no damage during its policy periods.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Witco argued that although the suits were for damages which occurred after 1980, the damages were covered under Travelers policies.

- Witco submitted evidence that PCB containing oils were used in its manufacturing process from 1964-1973. Witco claimed that during this time period there were occasional leaks of PCB containing oil on the floor of the plant, into the drains and into the soil outside.

- Witco claimed that it ceased all use of oil containing PCB's by 1973.

- Travelers proposed that compensable damage did not arise until the injury became manifest, which it believed to be when the DEP ordered remediation in 1981.

- In rejecting Traveler's position, court relied on the Supreme Court's decision in Owens-Illinois.

- Court related that the Supreme Court in Owens-Illinois found that in an asbestos property damage context all policies on the risk from installation through exposure were triggered. Court stated that this expansive period was used because it is difficult to determine when the injury actually occurred as the asbestos was slowly released into the environment.

- Ultimately, court decided that if Witco could demonstrate that PCB's were released into the environment sometime during Travelers' policy periods, Travelers was liable.

- Since Witco submitted affidavits that raised a question of fact as to whether PCBs were released into soil during the policy periods, court refused to grant summary judgment.

- Third Circuit affirmed without opinion.

g. Schering Corporation v. Evanston Insurance Co., No. L-197311-88 (N.J. Super. Ct. Law Div. 1995).

- Schering Corporation ("Schering") instituted a declaratory judgment action against its insurers in connection with environmental contamination.

- Schering settled with a number of its insurers, but would only agree to give the non settling insurers a pro tanto credit for the settlements.

- The non-settling insurers contended that a pro rata set off was appropriate and that the full policy limits must be deducted from the insured's total recovery.

- Court noted in its decision, that after briefing of the motion and oral argument, the Supreme Court decided Owens-Illinois, causing a change in the way court viewed the motion.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court quoted language from the Supreme Court's decision in Owens-Illinois, setting forth the proposition that an allocation formula must be adopted. Court then held that if an insured accepted anything less than the insurer should have paid, other insurers would not have to bear the difference. Rather, other insurers would only be liable for their proportionate share of the costs based on the allocation formula.

- Next court addressed the issue of whether an excess policy must respond after the limits of its underlying carrier are exhausted, or whether all primary policies must be exhausted before the excess policies respond.

- Quoting again from Owens-Illinois, court observed that the Supreme Court recognized that this issue exists, but was left unresolved.

- After adopting at length the decision of court in United States Gypsum Co v. Admiral Insurance Co., et al., 268 III.App.3d 598 (1994), appeal denied, 161 III. 2d 542(1995), court held that all available primary coverage must be exhausted before Schering can proceed against its excess insurers.

- Both the New Jersey Appellate Division and the New Jersey Supreme Court denied Schering's motion for leave to appeal.

- See also: Crown Cork & Seal Company, Inc. v. Aetna Casualty & Surety Co., No. L-007456-88 (N.J. Super. Ct. Law Div. 1995).

- However, see Carter-Wallace in k. below.

h. Astro Pak Corp. v. Fireman's Fund Ins. Co., 284 N.J. Super. 491 (App. Div.), cert. denied, 143 N.J. 323 (1995).

- Disposal records evidenced delivery of contaminants to the Kin-Buc landfill throughout 1974-1976, during the policy period of Fireman's Fund, when the escape of pollutants from the landfill was known by EPA, but not by insured.

- Hartford argued that under a continuous trigger analysis, it would not be responsible under its policies since the manifestation of injury occurred no later than the date of the closure of the landfill.

- Court stated that the slow progression of contaminants into land and water after closure implicated Hartford's policies.

- In addition, court noted that the key was the escape of pollutants from the landfill not the deposit of pollutants into the landfill.

- Court explained that the pollution, which was first identified in 1971, continued well past the closing of the landfill in 1976, and that remediation plans were still being submitted to EPA in 1984, the last year of Hartford's coverage.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court noted that the contamination was progressive and indivisible and concluded that the property damage for which coverage was sought occurred within the policy periods of the policies issued by both Fireman's Fund and Hartford, even though insured's deposit of pollutants may have preceded Hartford's policies.

- Supreme Court denied cert.

i. Pfizer Inc. v. Employers Insurance of Wausau, No. C-108-92 (N.J. Super. Ct. Law Div. 1996).

- Insured instituted a declaratory judgment action against its insurers with respect to environmental contamination at thirteen sites in New Jersey and elsewhere.

- In late 1995, the insured and the insurers moved for summary judgment on a number of issues.

- Certain of the insurers moved for summary judgment with respect to certain sites on the basis that the insured did not contribute to the waste streams at these sites until after the expiration of their policies.

- Insured argued that under CERCLA and certain other statutes, it was strictly liable for property damage at these sites, including property damage resulting from disposal of waste at the sites prior to the insured's first disposal at the sites, and that therefore the insurers were liable to provide coverage.

- Insured maintained that a literal reading of the policies did not require a nexus between the damage and the disposal, and that as long as there was damage during the policy period for which the insured was liable, there was coverage under the policy.

- Court explained that case law goes both ways with respect to the issue, but that it agreed with the argument of the insurers and granted summary judgment to these insurers, noting that it accepted an exposure trigger for damage.

- Court rejected the policy language which only required damage during the policy period, and focused on the policy language that required that the insured be legally obligated to pay for damage.

- Court concluded that the only way the insured could be legally obligated to pay for damage would be for the insured to contribute to such damage and that therefore a policy that expired prior to such contamination could not be triggered.

- Court proposed that its interpretation of the policy language comported with the reasonable expectations of the parties, since at the time the policies were issued neither party could anticipate the conduct of parties polluting sites that were unconnected with the business of the insured.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

j. Chemical Leaman Tank Lines, Inc. v. The Aetna Casualty and Surety Co., 978 F. Supp. 589 (D.N.J. 1997), 1999 U.S. App. LEXIS 10219 (3d Cir. 1999).

- Insured instituted a declaratory judgment action against its insurers in connection with coverage for costs incurred with respect to insured's facility in New Jersey.

- The case was tried by a jury which found partial coverage under certain policies. The insured settled with Aetna Casualty and Surety Company ("Aetna"), its primary carrier, after trial.

- On appeal, the Third Circuit affirmed the trial court's post verdict judgment against the London Market Insurers ("LMI"), with the exception of the issue of joint and several liability, which was remanded to the trial court for an apportionment of costs in accordance with Owens-Illinois.

- Trial court designated a magistrate to conduct settlement discussions between the parties, but they were unsuccessful.

- Trial court then became involved with the allocation issue.

- First, the trial court addressed whether Aetna's triggered policies had been exhausted.

- It concluded that the Third Circuit had implicitly decided the exhaustion issue since it related in its decision that a settlement had been reached with Aetna and that the trial court was left to formulate an allocation as to the applicable policies, which could only be those of the LMI.

- Court then concluded that the LMI was entitled to a credit for the full policy limits for the Aetna policies before an allocation was made, notwithstanding the amount of the settlement with Aetna or that other sites were part of that settlement.

- This decision was based on the holding in UMC/Stamford, Inc. v. Allianz Underwriters Ins. Co., 276 N.J. Sup. 52 (Law Div. 1994) which the trial court found to be persuasive. In that case, the court ruled that a settlement with a primary carrier triggers an excess policy, but the insured has no right to coverage for the difference between the settlement amount and the balance of the primary limits.

- The argument propounded by the insured that over $6 million of the Aetna primary limits of $11,055,000 were for other sites not involved in this suit and that the LMI should only receive a credit for the $5.23 million, was rejected by the court as being contrary to the spirit of New Jersey's entire controversy doctrine. Specifically, the court would be unable to evaluate whether or not the allocation was reasonable since the other sites were not involved in the case at hand.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court found undisputed that after a credit for the primary limits, the LMI's apportioned liability would primarily be the anticipated $20 million to $50 million in future costs and about $30,000 of past costs.

- Next, the court sought to determine which policies were subject to allocation.

- Here, the court agreed with the argument of the insured that the Third Circuit had ruled against any allocation back to the insured on the account of the pollution exclusion. The basis for this position was that the Third Circuit had identified "triggered policies" as those found to cover response costs for each of the three identified environmental issues. That is the 1960-1981 policies for groundwater costs, the 1960-1971 policies for soil costs and the 1961-1971 policies for wetlands costs.

- Note: that this allocation method does not require the insured to bear the risk for any policy years for which the jury found no coverage on the basis of the pollution exclusion.

- The next task of the court was to allocate the damages among the triggered policies, first considering the controversial issue of how the indemnity costs should be allocated among the various layers of coverage, horizontally or vertically.

- Noting that while the New Jersey Supreme Court did not resolve this issue in Owens-Illinois, it did give guidance in that it intentionally assigned a greater portion of the indemnity costs to the years in which there was greater amounts of coverage.

- Based upon that guidance, this court rejected the LMI's argument that each layer of coverage must be horizontally exhausted before moving up to the next layer.

- Rather, allocation percentages should be determined for each triggered policy year and an indemnity amount should then be determined for each policy year based upon those percentages. An insured would then move up from one layer to the next if there were insufficient policy limits available to cover the indemnity amount for that year.

- Court gave the example of $1.4 million of indemnity costs being allocated for a year in which the first layer excess coverage had $1 million in policy limits and the second layer had $8.5 million. Here, the first layer would be exhausted and the second layer would be allocated the balance of $400,000, still leaving $8.1 million of policy limits available for other claims.

- On the issue of whether per occurrence limits should be allocated to each year of a multi year policy, the court found this to be a matter of first impression and held that the continuous trigger theory of coverage mandates that any of the LMI's policies which were greater than one year "are liable up to their respective per-occurrence limits for a separable occurrence during each triggered policy year in which they were on the risk."

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Finally, as to the issue of who bears the burden of the risk of an insurer insolvency, based on the holding of the New Jersey Supreme Court in Werner Industries, Inc. v. First State Ins. Co., 112 N.J. 30 (1988) that an excess policy does not drop down in the event of an insolvency of an underlying carrier, the court concluded that the insured would bear the losses attributable to the shares of insolvent carriers.

- On appeal, the insured argued that the settlement credit to be allocated to the site that was the subject matter of the suit was $5,226,750, not the full settlement sum.

- In reaching its conclusion, the appellate court examined a number of issues, including: (1) whether the excess insurer should be credited with the full primary policy limits when a primary carrier settled; (2) whether the first suit to go to judgment should receive the full primary policy limit credit; and (3) whether the credit should be offset against the total indemnity costs prior to allocation, or instead allocated among the applicable policy years and offset.

- As to the first issue, the appellate court held that the excess insurer cannot be held liable for the difference between the amount of the settlement and the policy limits of the settling insurers. Therefore, the LMI were given a credit in the amount of $11,055,000, the entire policy limits of the settling insurers, not the amount of the settlement allocated to this site.

- As to the second issue, the appellate court presumed that Aetna's policies had an aggregate limit, and held that excess insurers in the first suit to go to judgment, should be entitled to a credit for the full per occurrence limits in each Aetna policy.

- Finally, as to the third issue, the appellate court held that the settlement credit should not be deducted from the total indemnity costs, but rather that on remand, the District Court should formulate a per year allocation of the credit.

- In addition, in order to determine whether the policy limits of any primary policy have been exceeded, it would be necessary for the District Court to first make an allocation of costs between soil, groundwater and wetlands, then allocate each of the types of costs to the relevant policy years in accord with Owens-Illinois, and finally, it must add up all the costs allocated to each year, and determine whether they exceed the primary policy limits.

- The final issue on appeal was the argument of the LMI that the insured should bear a portion of the indemnity costs based on soil and wetlands for the years in which the pollution exclusion precluded coverage.

- Looking to the New Jersey Supreme Court decision in Owens-Illinois, the appellate court held that contrary to the District Court's interpretation of the Third Circuit's prior decision, the Third Circuit in fact meant all policies in effect while there was a continuous discharge, even those containing pollution exclusions, were triggered (which could result in the insured bearing a portion of these costs for the pollution exclusion years).

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- However, it remanded the matter to the District Court for a determination as to whether pollution coverage was available to the insured in the years during which there was a pollution exclusion in the insured's policies, citing to the statement in Owens-Illinois that the insured does not bear the allocation for periods in which no coverage is available.

- More importantly, the appellate court placed the burden on the LMI to prove coverage was available, rather than placing the burden on the insured to prove that coverage was not available. The District Court would also be obligated to reallocate the costs if it is proved that coverage was available to the insured in any of those years.

k. Carter-Wallace, Inc. v. Admiral Insurance Co., 154 N.J. 312 (1998).

- Commercial Union Insurance Company ("Commercial Union"), together with certain other insurers, issued second layer excess insurance coverage to Plaintiff for a three year period.

- The policy limits of the Commercial Union policy was a $1,000,000 portion of the $10,000,000 excess layer, which was in excess of $5,100,000 in underlying coverage.

- At the time of trial, Plaintiff's loss was approximately $9,200,000, with an additional $6,000,000 in legal fees and other costs in connection with the insurance coverage action.

- As to the allocation of the loss among the triggered policies, trial judge, applying a horizontal allocation methodology, concluded that Commercial Union had no exposure since the limits of Plaintiff's primary policy more than covered the amount of the loss.

- In reaching its conclusion, appellate court looked to Owens-Illinois and concluded that the Supreme Court rejected the "straight annual progression allocation", which this court concluded was identical to the horizontal allocation used by the trial court.

- Rather, the court explained that the Supreme Court in Owens-Illinois considered a better formulation to be "on the basis of the extent of the risk assumed, i.e., proration on the basis of policy limits, multiplied by years of coverage."

- After a lengthy examination of publications and decisions addressing the issue, the appellate court stated that it was convinced that the Supreme Court in Owens-Illinois adopted a pro rata or proportionate method of allocation, which was designed to consider both an insurer's time on the risk, as well as the degree of risk assumed by the insurer.

- Although Plaintiff suggested an allocation method to the trial court, no evidence of this method was presented at trial (due to the trial court adoption of a horizontal method). As a result, this court was unable to make a determination as to whether Plaintiff's method was appropriate.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Appellate court remarked that the Plaintiff's method, on the surface, did not appear inconsistent with Owens-Illinois. It then described the Plaintiff's formula as follows:

Damages Incurred	$9,200,000
Underlying Limits	5,100,000
Difference	$4,100,000

- Since Commercial Union's limits were 10% of $10,000,000, or $1,000,000, Plaintiff maintained that its triggered layer would be 10% of $4,100,000 or $410,000. This sum would then be divided by the number of triggered years, which was proposed to be 17, resulting in a per year trigger of $24,117.64. This sum would then be multiplied by 3, the number of years of coverage issued by Commercial Union, resulting in a share of Commercial Union of $72,350.

- Finally, the appellate court rejected Commercial Union's argument that its policy would not even be "triggered" until all underlying limits were exhausted, on the basis that the Supreme Court has made it clear in Owens-Illinois that the issuance of a policy during the triggered years was what caused coverage to be triggered.

- Appellate court remanded matter to trial court for a further determination.

- Commercial Union moved for leave to appeal.

- The Supreme Court granted certification.

- On appeal, the Court rejected the allocation formula of Plaintiff accepted by the Appellate Division, as well as Commercial Union's argument that all primary and first layer excess policies through the seventeen year trigger period be exhausted before reaching its coverage.

- Instead, the court adopted the allocation method advanced in Chemical Leaman, finding it to be well reasoned, wherein the court broke down the amount of the indemnity costs borne by each year of the continuous trigger period, and then applied it to the necessary layers of coverage in each year.

- The Supreme Court provided the following example. Assume the loss attributed to year 1 is $325,000. Then assume that primary coverage was $100,000; first layer excess coverage was $200,000 and second layer excess was $450,000. Here, the primary and first layer excess coverages would be exhausted as would $25,000 of the $450,000 second layer excess coverage.

- Court also reiterated its concept that Owens-Illinois requires an allocation based on time on the risk and degree of risk assumed. Therefore, the greater the policy limits in a policy year, the greater the costs that will be borne by that year.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Further, the Court proposed that the principles of Owens-Illinois, as clarified by this decision, would be the presumptive rule in connection with allocation among layers of coverage unless exceptional circumstances dictate application of a different standard.

- It was also the position of the Court that this allocation method not only respected the distinction between primary and excess coverage (while at the same time preventing excess insurers from avoiding liability in long term cases such as these) but also will help to create a degree of predictability in allocation cases such as these.

l. Princeton Gamma-Tech Inc. v. Hartford Insurance Group, No. L-1289-91 (N.J. Super. Ct. Law Div. June 5, 1997 as supplemented October 1, 1997), as supplemented on December 8, 2000.

- Plaintiff filed suit against its insurers seeking coverage for liability arising out of contamination at four sites in Somerset County, New Jersey.

- Trial court was asked to make a determination as to the applicable policies with respect to Plaintiff's claims.

- Applying Owens-Illinois, court held that under the continuous trigger theory of coverage, the trigger period commenced on the release of the contaminant and ended on discovery or remediation.

- Court rejected insurers view that the trigger period should end in 1979 when Plaintiff was advised of TCE in its septic system.

- Rather, court concluded that there was a continuing problem with contaminant migration in the groundwater, about which Plaintiff was not informed, and that the contaminant plume expanded for years after the last contaminants were released into the environment, thereby resulting in further property damage.

- As a result, court held, as a matter of law, that based on Owens-Illinois, the trigger period ended in 1986 when Plaintiff's insurance policies first contained the absolute pollution exclusion, noting that periods when coverage is not available for a risk are not included in the allocation period.

- On request of the parties for resolution of certain additional issues before assigning the matter to an allocation master, the court agreed to examine two issues.

- Specifically, whether the insured made a conscious decision to retain a risk by: (a) failing to purchase appropriate excess coverage; and (b) purchasing a policy containing an absolute pollution exclusion.

- As to the first issue, after an analysis of the testimony of both the insured's broker and the expert witness for the insurers, the court found that there was no reason for the insured to believe its

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

insurance to be inadequate and further that the insurers failed to meet their burden to prove that the insured decided to underinsure the risk.

- As to the second issue, the court found that the insured's decision to purchase an insurance policy with an absolute pollution exclusion was an acceptance by the insured of a greater risk. As a result, this period of no coverage is the insured's risk, rather than that of the insurers.

- A supplemental opinion issued by court on December 8, 2000, addressed the issue of allocation of defense costs among triggered policies.

- In accordance with the New Jersey Supreme Court decision in Owens Illinois, an expert, Professor Neil Doherty, was appointed to work through an appropriate allocation of costs method.

- This court found that neither Carter-Wallace nor Chemical Leaman addressed the issue of allocation of defense costs, and that an allocation method would need to be created. (See Stepan Company decision below which reaches a contrary result).

- Professor Doherty submitted a report on the allocation of defense costs, which was greatly criticized by Plaintiff as being overly complex. Further Plaintiff maintained that Professor Doherty was not an impartial party, having written two books on the subject matter of risk management.

- In his report, Professor Doherty proposes that Plaintiff share in the defense costs where there have been settlements or where policy limits are exhausted. Plaintiff disagrees.

- Safety National argued that Professor Doherty's model should be revised to include payment of both defense and indemnity costs in determining when the policies of Safety National exhausts, since it maintained that defense costs are included in its policy limits.

- North River argued that the only policies that should share in defense costs are those of primary carriers.

- Federal argued that allocation of defense costs should be determined based on time on risk and should not take into account policy limits.

- Court adopted allocation report of Professor Doherty, but agreed to give parties the opportunity to dispute the allocation proposed based on specific policy provisions.

- As the report of Professor Doherty currently stands, there is, among other things, an allocation based on number of years of coverage and policy limits.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

m. Prolerized Schiabo Neu Company v. Hartford Accident and Indemnity Company, Civ. Act. No. 94-4857 (D.N.J. 1997).

- Since 1967, Plaintiff has operated a metal recycling business, which includes the shredding of automobiles.
- As a result of these operations, a waste known as automobile shredder residue ("ASR") was generated.
- At some point, Plaintiff unintentionally deposited ASR on a neighboring property.
- In 1987, Conrail, the then owner of the neighboring property, corresponded with Plaintiff demanding that the ASR be removed.
- Prior to notifying its insurers, Plaintiff agreed to do so and also voiced an interest in purchasing the property.
- Plaintiff commenced removal of the ASR at a cost of approximately $1.9 million. Rather than removing the balance, Plaintiff purchased the property from Conrail for $1.6 million and contemporaneously sold an easement over the property for approximately $500,000.
- Plaintiff notified its primary insurer, Hartford, of Conrail's claim shortly after completion of the ASR removal, and its excess insurer about 7 years later. Hartford denied coverage.
- In 1994, Plaintiff filed a declaratory judgment action seeking coverage of its removal costs and the cost to purchase Conrail's property.
- Hartford made a motion for summary judgment on a number of issues, including that the ASR deposited in 1974, during its policy period, was not the ASR removed in 1987.
- Plaintiff argued that its disposal of ASR was a single occurrence under the continuous trigger theory of coverage, resulting in a single injury which was not divisible.
- Court disagreed, finding that this characterization of this case as a continuous trigger case, was contrary to the rationale of the theory as explained by the New Jersey Supreme Court in Owens-Illinois.
- Based on the evidence presented, the Court found the placement of ASR on Conrail's property to be neither progressive nor indivisible.
- Court explained that the concept of progressive injury relates to something that is not visible and develops over a period of time before it becomes visible. In other words, it is a situation where there is no way to point to one distinct moment in time when the injury took place.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- In this case, there was injury each time the insured deposited ASR on Conrail's property and this injury was manifest each time a deposit took place. However, this continuous deposit did not create a progressive injury, rather it was a series of distinct instances of unintentional behavior.

- Further, the court found this was not a situation where there was an indivisible injury as contemplated by the Court in Owens-Illinois. What was contemplated by the Court was a situation where one could not parcel out, with any scientific accuracy, the injury that resulted from each event.

- Here, the Court found that a determination of the time and amount of injury could be made. For example, if Plaintiff could prove that 50% of the ASR was deposited during Hartford's 1974-1975 policy period, then Hartford would be responsible for 50% of the costs.

- Court concluded that it was Plaintiff's burden to prove that the 1987 removal addressed the 1974 deposit, and that since it failed to provide any evidence whatsoever to support its burden, summary judgment was granted to Hartford.

n. Universal-Rundle v. Commercial Ins., 319 N.J. Super. 223 (App. Div. 1999), cert. denied, 161 N.J. 149 (1999).

- On appeal, the court examined the issue as to whether an Owens-Illinois allocation should be applied to defense costs as well as indemnity costs.

- The trial court in this case had allocated all defense costs to Commercial, as the non-settling insurer, as well as any remediation costs in excess of the settlements of the other insurers, and then provided that if Commercial felt that this resulted in its payment of more than its Owens-Illinois share, it should file suit on the allocation issue.

- Citing to the decisions of the Supreme Court in both Carter-Wallace and Owens-Illinois, the appellate court noted that the trial court should have determined a percentage share for Commercial based on time on risk and degree of risk assumed for all applicable policies, and that this share would be applicable for defense and indemnity.

- Appellate Court rejected the trial court's apparent use of a straight line annual progression allocation, rather than the percentage and criticized its failure to resolve the allocation issue now, instead leaving it to Commercial to resolve the issue at a later date if it believed it was paying more than it should.

- New Jersey Supreme Court denied certification on June 9, 1999.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

o. The Mennen Company v. Federal Ins. Co., UNN-L-2030-97 (N.J. Super. Ct. Law Div. 1999).

- The insured is a manufacturer of personal care products.
- A declaratory judgment action was instituted by the insured against its insurers with respect to claims involving environmental contamination.
- At the time Federal Insurance Company ("Federal") made its motion for summary judgment on the issue of allocation of defense costs, all but two of those claims were resolved.
- Federal argued that there should be a pro-rata allocation of defense costs, not an allocation based on either Owens-Illinois or Carter-Wallace.
- The primary bases for the position of Federal were that since defense costs were payable in excess of policy limits, they were unlimited, and that since this would be the case for all policies at issue, equity would dictate an equal sharing of those costs (including by the insured) as opposed to a time on risk and degree of risk assumed allocation.
- Federal also argued that the Supreme Court did not decide the issue of allocation of defense costs in either Owens-Illinois or Carter-Wallace, since Owens-Illinois dealt with an atypical pooling arrangement for defense costs and Carter-Wallace dealt with an excess carrier which had no liability for defense costs.
- In reaching its decision, the trial court noted that the Owens-Illinois and Carter-Wallace decisions each clearly rejected a pro-rata allocation, and instead mandated the time on risk and degree of risk assumed allocation of not only indemnity costs, but defense costs as well, unless there were some exceptional circumstances which dictated otherwise.
- Court granted the insured's motion for an Owens-Illinois allocation of defense costs and denied Federal's motion, rejecting in full the proposed pro-rata allocation of defense costs.

p. Mennen v. Atlantic Mutual Insurance Company, No. 93-Civ. 5273 (D.N.J. 1999).

- Insured manufacturers, sells and distributes personal care products.
- From 1987-1995, insured was notified of various claims with respect to eleven hazardous waste sites.
- Claims were made by insured against various insurance carriers.
- Insured filed suit against its carriers in 1993.
- In the suit, insured maintains that: (a) defendant, Atlantic Mutual Insurance Company ("Atlantic Mutual") was a primary

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

carrier that issued policies to the insured from 1962-1983; (b) defendant, Centennial Insurance Company ("Centennial") was an excess carrier that issued policies to the insured from 1964-1983, some of which were for a one year term and some of which were for a three year term; and (c) defendant, Aetna Casualty and Surety Company ("Aetna") was another excess carrier that issued policies to the insured from 1973-1985, some of which were for a one year term and some of which were for a three year term.

- Both the insured and the carriers filed motions for summary judgment on a number of issues primarily related to allocation of costs among triggered policies.

- The first issue addressed by court related to language contained in the "other insurance" clause of Centennial's umbrella policy. This clause addressed allocation of costs when there was more than one applicable policy. Atlantic Mutual and Centennial maintained that the language required that only the Centennial policy containing the highest policy limit was triggered, as opposed to all Centennial policies.

- This argument was swiftly rejected by the court based upon the Supreme Court ruling in Owens-Illinois that rejected the "other insurance" provision argument in favor of the time on the risk and degree of risk assumed allocation.

- Court also noted that the Supreme Court reiterated this holding in Carter-Wallace, noting that the "other insurance" provision was generally not applicable when dealing with successive, as opposed to concurrent, policies.

- Based on the foregoing, court granted summary judgment to the insured, holding that the policy provision was not applicable to this matter.

- The next issue raised by Atlantic Mutual and Centennial was whether the three year policies had an annual limit or a per occurrence limit.

- Insured argued that it was an annual limit based on continuous injury.

- Atlantic Mutual and Centennial argued that the plain language of the policy keyed into the concept of an "occurrence" and that liability was limited to a per occurrence basis over the three year period of the policy.

- The obvious issue being addressed here was whether the insured had access to one policy limit for the entire three year period or one policy limit per year for each of the three years.

- Citing to Owens-Illinois, and Chemical Leaman, court noted that progressive injuries must be treated as one occurrence per year.

- Court held that provided the insured can show continuous injury over a three year policy period, then there will be one occurrence per year in each of the three year Centennial policies.

- Atlantic Mutual and Centennial also sought a declaration that each hazardous waste site that gave rise to a liability constituted one occurrence.

- This position was also rejected on the basis of court's prior holding concerning continuous injury (that is one occurrence per year).

- Finally, Atlantic Mutual, Centennial and Aetna each asked the court to rule that the insured should bear the costs of any post "absolute pollution exclusion" allocation, arguing that the insured could have purchased environmental impairment liability ("EIL") coverage and chose not to do so.

- Insured argued that even if it could have obtained an EIL policy, it would not have covered the claims at issue in this suit.

- On the basis of the factual dispute between the parties as to this issue, court denied the summary judgment motion of each party.

q. Winding Hills Condo Ass'n Inc. v. North American Specialty Insurance Co., 332 N.J. Super. 85 (App. Div. 2000).

- Plaintiff, a condominium association, filed a declaratory judgment action against its insurers in connection with damage to building foundations resulting from a defective subsurface drainage system.

- Trial court granted summary judgment to insurers that issued policies prior to the discovery of the damage.

- Insured filed an appeal.

- The parties do not dispute that the damage was first discovered in 1989 during an evaluation of the capital reserve funding for the insured.

- The issue at hand was when the loss occurred and which policy or policies were implicated in the loss.

- Trial court found that the date of the loss was not the discovery of the structural deficiencies in 1989, but was rather the date the loss became manifest, specifically when plaintiff first had knowledge of the actual loss, which court found to be in January, 1991 when a report was issued indicating the deficiencies had resulted in damage.

- Ultimately, the cost to repair that identified damage proved to be approximately $1.3 million.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- On appeal, court agreed with the trial court that January, 1991 was the date the loss became manifest. Court then looked at whether manifestation was the correct trigger, or whether the trigger should be continuous trigger, as insured proposed.

- Appellate court rejected the proposition of insured that continuous trigger was the appropriate trigger in first party property insurance claims.

- Court explained that the continuous trigger rule was adopted by the New Jersey Supreme Court in toxic-tort type cases on the basis of public policy reasons and on the basis that there is no scientific certainty as to when a toxic substance damages the body in an irrevocable fashion.

- Court went on to explain that this trigger has never been adopted in a first party property insurance case, and this court saw no reason to change the established law and denied the appeal, finding that the only policy triggered was the one in effect in 1991.

r. Quincy Mutual Fire Insurance Company v. Borough of Bellmawr, 172 N.J. 409 (2002).

- This case arises out of contamination at and emanating from the Kramer landfill ("Kramer"), an unlined landfill in New Jersey, which closed in March 1981, and was ultimately placed on the NPL.

- Commencing somewhere between April 27, 1978 and early May 1978 and continuing until May, 1981, the Borough of Bellmawr (the "Borough") deposited its municipal waste at Kramer.

- During the foregoing time period, the Borough maintained liability insurance coverage with a number of insurers, including Century (Cigna) from June 1977-1978, Quincy Mutual, from June 1978-1981 and Harleysville from June 1981-1985.

- The Borough sought coverage from its insurers in connection with its liability relating to Kramer, which it settled with EPA by paying a sum in excess of $449,000.

- Quincy Mutual instituted a declaratory judgment action against the Borough and the other insurers.

- Trial court held that the liability of an insurer is based on when the damage occurred, not on when the actual dumping took place.

- Based upon testimony, as well as on the stipulation of the parties, trial court accepted that it would take 200 days for any contaminants placed in the landfill in May or June, 1978 to reach groundwater, and therefore, trial court held that Century was not liable, since its policies expired before then.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Trial court found Quincy Mutual to be the only liable insurer. Quincy Mutual appealed.

- On appeal, Quincy argued that the New Jersey Supreme Court ruling in Owens-Illinois, provides that the first exposure, in this case the first dumping event in April or May 1978, is the trigger for coverage and that therefore Century bears part of the liability.

- Appellate court disagreed, and instead found that this case must be distinguished from Owens-Illinois in that there was no damage or injury at the time the Borough dumped the waste into a landfill designed for that very purpose. Rather, the damage or injury took place at the time the toxic leachate left the landfill and hit groundwater.

- Court also relied on the decision in Astro Pak that the trigger for coverage does not begin until there is some damage, which based on testimony here could not have been until the policies of Quincy Mutual were in force.

- Quincy Mutual appealed this 2-1 decision to the New Jersey Supreme Court and cert was granted.

- On appeal, the New Jersey Supreme Court, in a 5-2 decision, held as follows:

  (a) The initial triggering event here, under the continuous trigger theory of coverage espoused in Owens-Illinois, was the deposit of the waste in the landfill, not the leaching of the waste from the landfill; and

  (b) The proper allocation method for allocating costs among the triggered policies are days on the risk, not years on the risk.

- In reaching its conclusion, Court re-visited its holding in Owens-Illinois.

- Court explained that insurance policies generally do not reference the word "trigger". Rather they speak of an occurrence which requires a policy to respond to a claim.

- However, in cases involving environmental damage, the actual "damage" that has taken place is generally attributable to events that take place over a period of time. In order to address this situation, certain courts, beginning with the Keene decision, have applied a theory that maximizes insurance coverage by triggering all insurance policies that are within the "trigger" period.

- Court explained that its decision in Owens-Illinois had a strong public policy basis and was designed to maximize the amount of insurance available in "mass exposure" tort cases. It also described a number of other cases that adopted the continuous trigger theory of coverage and the bases for those decisions.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court reversed Appellate Division decision that had the escape of the leachate from the landfill as the triggering event and adopted the analysis of the dissent in that case which found that Century's policy was in fact triggered and that the "injurious process" began during Century's policy period.

- Court saw an analogy between the "injurious process" in asbestos cases and the injurious process in this case.

- Based on expert testimony, once the contaminants were discharged in the landfill, there was a "natural and unavoidable progression of the original dumping" into the groundwater, which the dissent likened to "... a process analogous to the onset of asbestosis... " .

- Court also explained that since this issue is complicated enough, it prefers a bright-line rule on the initial triggering event, as opposed to a rule that would require a calculation as to when contaminants actually hit the groundwater.

- Of significant interest is that Court repeated its desire that the application of the continuous trigger theory maximize coverage.

- Based on all of the foregoing, Court held that exposure resulting from the first deposit of waste at the landfill was an occurrence under the Century policy and therefore the initial trigger under the continuous trigger theory.

- As to the issue of allocation, Court was adamant in its position that the allocation be based on the number of days a policy was triggered under the continuous trigger theory and not the automatic "year" that Quincy proposed.

- Court explained that it used a year in its hypothetical in Owens-Illinois for ease of reference, but that the actual "time on the risk" was a key component in the formula and that if the facts of a case required the need for the precision of days, then that will be the component used in the formula.

- Here, Century's share was de minimis in that its trigger period was only 45 days out of 880 days.

- Court remanded case to trial judge for an allocation consistent with the opinion.

s. The Stepan Company v. New Jersey Manufacturers Insurance Co., No. C-297-98 (N.J. Super. Ct. Chance. Div. 2001).

- Plaintiff filed suit against New Jersey Manufacturers Insurance Co. (“NJM”) seeking defense and indemnity under liability insurance policies issued over a twenty-five year period, with respect to a suit filed by 550 individuals arising from chemical and radiological contamination relating to a facility in Maywood, New Jersey.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- In an effort to resolve this matter without the need for full blown litigation, the matter was placed before a mediator.

- However, the parties were unable to resolve the issue of the method for allocating covered defense and indemnity costs among the triggered policies, and the court agreed to rule on a summary judgment motion to be brought by Plaintiff, after which the matter would be returned to mediation.

- Plaintiff argued and asked court to agree that NJM's defense obligations were unlimited. In addition, Plaintiff asked court to agree on the amount of policy limits to be allocated for indemnity as to each bodily injury claim (since the NJM policies did not provide property damage coverage).

- NJM argued that Plaintiff's position as to defense had no basis in law and that its position as to indemnity would not assist the mediation process since Plaintiff was not seeking an allocation determination under Owens-Illinois, and NJM cross-moved for summary judgment.

- Court agreed with position of NJM and granted NJM's summary judgment motion, holding that the clear weight of authority on the issue of allocation, including the decisions of the New Jersey Supreme Court in Owens-Illinois and Carter-Wallace and the Appellate Division decision in Universal Rundle, all mandated an allocation that would be based on policy term and limits.

- Further, court noted that the applicable trigger period would begin with the first bodily injury exposure through manifestation, and that the allocation would be based upon the number of years of that trigger period insured by NJM and the NJM policy limits during each year of the trigger period.

t. Mid-Monmouth Realty Assoc. v. Metallurgical Industries, Inc., MON-L-2422-00 (N.J. Super. Ct. Law. Div. 2001).

- This case is an interesting one in that, like the Winding Hills case, the court here is asked to make a determination of the trigger of coverage for first party property policies, as opposed to liability policies.

- This case involves property in Tinton Falls, New Jersey, which is owned by Plaintiff, and on which a tenant operated a facility for almost thirty years, which resulted in contamination to the property.

- Plaintiff sued the property insurers for costs related to the tenant caused contamination at the property.

- Property insurers, which issued policies during various periods from 1967-1987, moved for dismissal of claims against them on the basis that the contamination at issue did not become manifest until 1993, which was well after expiration of their policies and on the basis of the twelve month suit limitation clause in the policies.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- To counter these arguments, Plaintiff maintained that the continuous trigger theory of coverage espoused in Owens Illinois is applicable here.

- Property insurers cite to Winding Hills and argue that the manifestation trigger is appropriate in first party property cases since loss resulting from damage to property can be compensated in full when the damage becomes manifest, even if it results from a condition that is unknown and continuous.

- Court saw the issue here was whether the Plaintiff had "...the ability to obtain full protection against his finite potential loss simply by obtaining, in each policy year, coverage for the full actual cash value of his property."

- Plaintiff argued he did not, while property insurers argued that environmental impairment liability coverage was available.

- Based on the testimony and evidence submitted, court found that policy forms adopted by IRI contained by endorsement First Party Property Coverage for Pollutant Cleanup and Removal, that these forms were submitted to and approved by the New Jersey Insurance Department and that policies with the form were issued in New Jersey during the late 1980's to early 1990's.

- Accordingly, court concluded that based on the Winding Hills decision, and the fact that first party insurance was available which Plaintiff failed to purchase, manifestation was the correct policy trigger and therefore Plaintiff had no claim against the pre-1993 property insurers.

u. Spaulding Composites Company, Inc. v. Liberty Mutual Insurance Company, 176 N.J. 25 (2003).

- Plaintiff filed a declaratory judgment action against its insurers, in connection with claims arising from a waste disposal facility to which Plaintiff sent lead containing waste from 1958-1973.

- Eventually, Plaintiff filed a motion for partial summary judgment against Liberty Mutual Insurance Company ("Liberty Mutual") in connection with a non-cumulation clause contained in its policies.

- Liberty Mutual issued nine consecutive primary policies to Plaintiffs from 1975-1984. The first policy had limits of $500,000 and the balance of the policies had limits of $1,000,000 each.

- Plaintiff maintained it had $8.5 million of policy limits available from Liberty Mutual. However, Liberty Mutual maintained that based on the non-cumulation provision in its policies, there were only $1,000,000 of available limits.

- Basically the non-cumulation provision related to a limitation of Liberty Mutual's liability for injury and/or damage arising out of one continuous occurrence.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Specifically, it reduced payments due from Liberty Mutual when the same occurrence takes place both before and within the policy period, so that according to Liberty Mutual, only one policy limit would effectively be available.

- Plaintiff argued that a non-cumulation clause was not effective in the environmental context, primarily basing its position on the Owens-Illinois holding that the "other insurance" clause in a policy did not apply when you were dealing with a continuous trigger allocation situation.

- Trial court agreed with Plaintiff, finding that Owens-Illinois required the nullification of this clause in an environmental property damage context.

- Appellate court disagreed and reversed trial court.

- Court found the issue to be addressed was whether the language of the non-cumulation clause was ambiguous and therefore, unenforceable.

- In coming to its conclusion, court examined Voorhees and other decisions which addressed ambiguities in insurance policies.

- Court keyed into the proposition that words in an insurance policy need to be interpreted in accordance with their usual, plain meaning.

- Also court noted that the plain language of a policy cannot be bypassed simply to satisfy public policy concerns.

- Here, appellate court found that there was no ambiguity in the policy language that provided that "continuous or repeated exposure to substantially the same general conditions constitute a single occurrence," and accepted the insurers' argument that when such an occurrence gives rise to bodily injury or property damage "partly before and partly within the policy period," the amount payable by the insurance company for the policy period at issue, must be reduced by the payments made for the same occurrence under the prior policy.

- In examining the Owens-Illinois and Carter-Wallace decisions by the New Jersey Supreme Court, appellate court found no inconsistency in its ruling that the plain language of the policy required a finding that the non-cumulation clause in the Liberty Mutual policies was enforceable and that the maximum amount payable by Liberty Mutual was $1,000,000.

- Court rejected the insured's argument that the non-cumulation clause was in fact an "other insurance" clause and was unenforceable in light of the continuous nature of the injury at issue since the policies at issue were successive policies, not concurrent policies which were the typical type of policy to which "other insurance" provisions customarily applied.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Plaintiff, not surprisingly, moved for leave to appeal to the New Jersey Supreme Court, which was granted in March 2002.

- On appeal, the Court described the holding on Owens-Illinois as having eliminated "...reliance on particular contract language (other than limits and exclusions) and on traditional rules of interpretation"... and that it..."set forth a uniform standard for resolving allocation issues in long term environmental exposure cases."

- Court then examined whether the enforcement by the appellate court of the non-cumulation clause in the Liberty Mutual policies was in accord with the rules established in Owens-Illinois and affirmed in Carter Wallace and determined, in a unanimous decision, that it was not.

- While Court agreed with the appellate court's rejection of the Plaintiff's argument that the non-comulation clause was an invalid "other insurance" clause, it took the position that the argument was irrelevant to the ultimate decision here. Rather, the true issue was the nature of the actual clause.

- Court described that the key to the non-cumulation clause was the proposition that there was a "single occurrence" that affected multiple policy years, and that therefore there should not be a cumulation of policy limits over multiple years for that single occurrence.

- However, in Owens-Illinois, the Court determined that under the continuous trigger theory of coverage, the progressive indivisible property damage should be treated as separate occurrences in each triggered policy year, not one occurrence that spanned multiple policy years. On this basis, Court found the non-cumulation clause to be "facially inapplicable."

- Moreover, Court noted that even if the foregoing were not the case, it would not enforce the non-cumulation clause in the Liberty Mutual policies because it would "...thwart the Owens-Illinois pro-rata allocation modality," which is based on the proposition of maximizing coverage utilizing a fair method of allocation, by giving an insurer on the risk a means of avoiding payment of its fair share of the liability.

- Based on the foregoing, Court reversed the decision of the appellate court and reinstated the trial court's grant of summary judgment on the issue in favor of the Plaintiff.

- It is interesting to note that the Court specifically stated that it was not taking a position on any other issues, such as the number of occurrences, but that it was "...reaffirming the vitality of the Owens-Illinois approach and our commitment to its uniform application."

- Subsequently, Court denied insurer's motion for reconsideration.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

v. Benjamin Moore & Co. v. Aetna Casualty & Surety Co., 2003 WL 1904383 (App. Div.), aff'd 179 N.J. 87 (2004).

- Benjamin Moore, a national paint manufacturer, was sued as a defendant in two class action suits.
- Plaintiffs in those suits alleged both bodily injury and property damage arising from lead-based paints manufactured by Benjamin Moore and others.
- Benjamin Moore filed a declaratory judgment action against its insurers in connection with its claims for coverage under its liability insurance policies with respect to the suits.
- Lumbermens Mutual Casualty Company ("Lumbermens") insured Benjamin Moore under ten liability insurance policies issued from 1991-2001.
- Each policy, but for one, contained a $250,000 deductible.
- Benjamin Moore sought a defense from Lumbermens in connection with the suits and filed a summary judgment motion on the deductible issue in connection with one of the suits.
- The position of Lumbermens in connection with its duty to defend was that the deductible in each policy year had to be satisfied by Benjamin Moore before Lumbermens would have a duty to defend.
- The position of Benjamin Moore was that it could select one policy to provide the defense, or in the alternative, that there must be an allocation of the deductible in a manner similar to the indemnity allocations set forth in Owens-Illinois and Carter Wallace.
- Trial court noted that the issue of deductibles had not been addressed by the Supreme Court. However, it immediately rejected the "select one policy for defense" approach on the basis that this theory of allocation had been rejected by the Supreme Court.
- As to Benjamin Moore's proposal to allocate the deductible among the triggered policy years, trial court rejected the position of Benjamin Moore that it was only equitable to pro rate the deductible among the triggered policies if it was going to pro rate the losses.
- Benjamin Moore argued that if there was no such allocation of the deductible, coverage could be significantly reduced or eliminated, since the deductibles for each of the policy periods would need to be satisfied before the insurers would be obligated to pay.
- On the other hand, Lumbermens saw the situation as being analogous to an allocation in which an insured is dealing with a primary layer of coverage as well as excess layers. It proposed

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

that the deductible was in fact a primary layer and that it was appropriate under both Carter Wallace and Chemical Leaman that this layer be exhausted before the Lumbermen's policies were impacted.

- Trial court examined the unpublished Special Master's position on this issue in the Pfizer Inc. v. Employers Insurance of Wausau matter and found its reasoning to be persuasive.

- In that case, the Special Master held that the deductibles had to be satisfied in each year before the coverage could be reached.

- Ultimately, trial court held that the deductibles would not be prorated as requested by Benjamin Moore and instead must be exhausted before Lumbermen's coverage would apply.

- Benjamin Moore moved for leave to appeal, which was granted.

- On appeal, court affirmed trial court's determination that there must be a satisfaction by the insured of the deductible contained in each of the triggered policies.

- Appellate court agreed with trial court's adoption of the rationale of the Special Master in the Pfizer decision in reaching its conclusion that the deductible in each triggered policy must be satisfied.

- Court found the language of the policies at issue to be unambiguous and concluded that the policies only provided coverage after the deductible was paid.

- Court determined that if the insured triggered multiple policies, it also triggered multiple deductibles. It noted that Benjamin Moore agreed to accept the risk of high deductibles in exchange for significantly lower premiums. It also stated that a finding in favor of Benjamin Moore would allow insureds to unfairly mitigate risk by avoiding its obligation to pay the deductible amount before receiving coverage.

- Further, the appellate court rejected Benjamin Moore's position that it should be able to select the policy under which it is entitled to a defense, noting that the "joint and several allocation scheme" proposed by Benjamin Moore was examined and rejected by the Supreme Court in Owens-Illinois, Carter Wallace and Quincy Mutual in favor or a time on the risk – degree of risk assumed allocation method.

- Benjamin Moore subsequently appealed to the Supreme Court of New Jersey. On appeal, the Supreme Court affirmed, agreeing with the underlying courts that the full per occurrence deductible in each triggered policy must be satisfied before the insured would be entitled to coverage.

- Court notes that Benjamin Moore's position is based upon the concept of a single occurrence that spans multiple years. However, this is not the concept advanced by the court in

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

Owens-Illinois. Specifically that there are separate losses in each policy period triggered. Court went on to say that the intent of the holding in Owens-Illinois was that once a determination is made that there was a loss during the policy period, the doctrine has served its purpose and you are kicked back into the policy language which gives the insured the benefit of the full limits of the policy for the losses occurring during the policy period, subject to the basic policy provisions, including any applicable deductible.

- Court focuses on the fact that the deductible is by the terms of the policy, part of the policy limits. Specifically, the insurer only has to pay that part of the policy limit that exceeds the deductible. So, for example, if there was a $1,000,000 policy limit, a $1,000,000 claim and a $250,000 deductible, the insurer would only be responsible for $750,000 and the insured for the balance.

- After its extensive analysis, the Court concluded that in the continuous injury context, insureds must satisfy the deductible for each triggered policy and that an allocation of the deductible is not appropriate.

w. U.S. Mineral Products Company v. American Insurance Company, 348 N.J. Super. 526 (App. Div. 2002).

- Plaintiff, United States Mineral Products Company ("USM"), manufactured asbestos containing products from 1954-1971.

- According to the decision, numerous bodily injury and property damage suits were filed against USM in connection with injury and damage arising from the asbestos containing products.

- In 1992, USM instituted a declaratory judgment action against numerous primary, umbrella and excess liability insurers.

- Ultimately USM entered into settlements with all insurers. However, one issue remained with its settlement with Twin City Fire Insurance Company ("Twin City"); specifically whether a policy had a separate aggregate limit of coverage for a two week period.

- Naturally, USM argued there was a separate aggregate limit and Twin City argued there was not.

- Interestingly, arguments between the parties to this suit on this issue went back to a 1996 trial court decision, which followed a prior decision of the trial court on the same issue, relating to another insurer.

- In 1996, trial court held that another insurer, Puritan Insurance Company, had provided separate per occurrence and aggregate limits for a 90 day policy period.

- Court rejected argument of insurer that this 90 day period was merely an extension of an existing policy period as an

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

accommodation to the insured, which was seeking to coordinate the policy periods of its primary and excess policies.

- Trial court carefully analyzed the issue and ultimately determined that there was a reasonable expectation by the insured that by paying a 1/4 premium for 1/4 a year of coverage, it had all the rights and benefits of a policy, including the aggregate limits.

- Court noted that if Puritan truly wanted to limit coverage so that the insured would not have the benefit of those separate limits, it needed to specifically say so in the policy.

- In reaching its conclusion, court found that the reduced premium was indicative of the reduced period of risk faced by the insurer and that it was logical that the insured would expect to have access to the separate policy limits.

- Later in 1996, USM filed a partial summary judgment motion against a number of its insurers, including Twin City, seeking a ruling consistent with the earlier decision in Puritan.

- Trial court ruled in favor of the insured and against Twin City and others on the issue.

- Court explained that the policies at issue each specifically provided that the annual aggregate limits applied to each "annual period", and that each of the policies were extended for a period of less than one year by payment of a pro rated premium. To further support its position, court noted that the Twin City policy contained language that permitted the insurer to cancel the policy and retain a pro rated premium, but that the policy would still be obligated to pay the full aggregate limits.

- After an extensive analysis of the issue, trial court found that there was an additional set of aggregate limits for the two week period, and granted the summary judgment motion of USM.

- Twin City moved for leave to appeal, but the motion was denied.

- Ultimately, after settling all issues but for this one, Twin City filed a notice of appeal in 2001.

- Appellate court carefully analyzed and responded to the points raised by Twin City on appeal.

- First, Twin City argued that there was only one occurrence. Court rejected this argument based on the holding in Owens-Illinois and other decisions, including Chemical Leaman, that in progressive injury or exposure damage cases, there is a separate occurrence in each of the years of coverage.

- Next, court examined argument of Twin City that the two week extension did not create an additional aggregate limit of liability, and basically rejected this argument and adopted the trial court holding that it did.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court found policy to be ambiguous on the issue of whether there was a separate aggregate limit for the two week policy period, and that therefore there was a reasonable expectation that there would be full policy limits, but with a reduced "time on the risk."

x. Champion Dyeing & Finishing Co. v. Centennial Insurance Company, 355 N.J. Super. 262 (App. Div. 2002).

- In 1998, Champion Dyeing and Finishing Co. ("Champion") filed suit against its CGL insurers for costs relating to contamination discovered in 1997 resulting from leaking underground storage tanks.

- The leaks were estimated to have commenced in January 1980.

- From 1980 through 1986, Champion had two different primary insurers, with all policies written on an occurrence basis. After 1986, policies issued to Champion by its insurers contained an absolute pollution exclusion (as opposed to the "sudden and accidental" language of its earlier policies).

- Champion maintained that it was unaware of the change in pollution exclusions and, as a result, did not seek alternative coverage after 1986.

- After a bench trial, court determined that Champion was entitled to coverage under the policies issued from 1980-1986. Further court found that EIL coverage was available to Champion during the years 1987-1997 at an affordable price but that Champion failed to obtain the coverage.

- As a result when allocating the costs associated with the claim under the triggered policies, court determined that Champion was to bear the allocation for the uncovered years of 1987-1997, representing 71.7% of the costs.

- Not surprisingly, Champion appealed.

- On appeal, Champion argued that:

  (i) The Court's determination in Owens-Illinois to allocate risk to an insured that had chosen not to obtain available insurance should not be applied retroactively.

  (ii) Insurers failed to prove that EIL coverage was available and affordable in connection with 20 year old underground storage tanks.

  (iii) The trial court erred in including the years 1987 to 1997 in calculating the risk assumed by Champion, since EIL coverage was only available on a claims-made basis; therefore, coverage limits for only one year could be triggered.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Appellate court summarily rejected Champion's first argument as to the retroactive application of Owens-Illinois, noting that the Supreme Court always intended a retroactive application.

- As to its second argument concerning the availability of EIL coverage for Champion, court agreed with Champion's argument and reversed the trial court, holding that the insurers failed to prove that coverage was available for Champion's specific risk, as opposed to risks in general. Further court noted that the insurers had to prove that EIL coverage for the risk was available in 1997 when the damage became manifest, not in some other year.

- Interestingly, when making the foregoing determination, the appellate court rejected Champion's position that loss could only be allocated to uncovered years if the insured subjectively determined not to purchase coverage, noting that if coverage was not available, the "subjective" decision was irrelevant, and if it was available, court did not want to encourage lack of diligence in seeking the coverage, by utilizing a subjective standard.

- Court then recited testimony from an expert for the insurers and Champion's own expert, which basically backed up Champion's position that EIL coverage would not have been available for Champion's risk.

- As to the final issue concerning the proper allocation of costs, based on the fact that no EIL coverage was available to Champion, the costs were only to be allocated between Champion's two insurers and Champion was to bear none of the costs unless the costs went beyond the policy limits of the two insurers.

y. Taylor Oil Co., Inc. v. Pa. Nat'l Mut. Cas. Ins. Co. and N. River Ins. Co., No.: Som-L-1275-03 (N.J. Super., Somerset Co., Law Div. Sept. 28, 2004)

- Plaintiff owned and operated a petroleum distribution facility in Somerville New Jersey from 1954-1991.

- In June, 1995, it sold the property on which it conducted operations to Sovereign Bank ("Sovereign") and agreed to indemnify Sovereign for any unknown contamination.

- During the course of construction activities at the property, Sovereign discovered significant contamination and sought indemnification from Plaintiff.

- After resolving its claim with Sovereign, Plaintiff sued its insurers for coverage of the claim as well as prejudgment interest and attorneys fees.

- Penn National, one of its insurers, was deemed liable to Plaintiff on a summary judgment motion, which struck its only defense.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- As a result, the summary judgment motion by Plaintiff here was seeking an allocation of damages to Penn National.

- As to Penn National's share of defense and indemnity costs, the court noted that "under the continuous trigger theory, court must allocate among an insured's carriers by accounting for both the insurers' time on the risk and the risk assumed. Owens-Illinois, 138 N.J. 437, 475 (1994)."

- Utilizing the allocation formula developed in the Carter-Wallace decision, both Plaintiff and Penn National made a determination as to the share of Penn National. Plaintiff claimed it was 25.12% and Penn National claimed it was 25%. The effective difference in costs was under $1,000.

- Court held that even if it allowed Penn National all favorable inferences, it still found Plaintiff's allocation to be the appropriate one and it granted summary judgment to Plaintiff.

- Plaintiff also sought a judgment that Penn National was obligated to pay a significant share of its attorneys fees in pursuing coverage based on Court Rule 4:42-9(a)(6).

- Penn National argued that it should only have to pay its allocated share.

- Court noted that Penn National asserted frivolous defenses to the suit and added to cost of litigation.

- Court also determined that attorneys fees should not be awarded under the Carter-Wallace theory of allocation, as argued by Penn National, but instead fees should be calculated by looking at the amount billed and by making a determination, if possible, against which insurers the attorneys' efforts were directed.

- Court explained that litigation expenses do not depend on the years or amounts of coverage. Rather, there can be a great variance in litigation expenses depending on whether or not an insurer denies coverage completely, disputes only its allocated share, chooses to litigate, or chooses to discuss settlement. "If the Carter-Wallace formula were applied, those insurers who settle quickly or choose not to litigate would be forced to pay disproportionate amounts of attorney's fees, which the Universal-Rundle case forbids."

- In granting summary judgment in favor of Plaintiff as to its right to reimbursement of attorneys fees, court noted that other insurers immediately engaged in settlement discussions with Plaintiff after the filing of the Complaint, but Penn National did not. As a result, Penn National should bear a greater share of litigation expenses.

- Matter was remanded to trial court for a determination of attorneys fees.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Court denied Plaintiff's summary judgment as to the amount of fees, without prejudice, because sufficient information about rates and times charged by Plaintiff's counsel were not provided.

5. Selected Ohio Case Law

a. B.F. Goodrich Co. v. American Motorists Ins. Co., 1986 WL 191786 (N.D. Ohio, 1986).

- Suit had been instituted against the B.F. Goodrich Co. ("Goodrich"), a producer of chemical products, by a number of individuals alleging damage from exposure to the chemicals which Goodrich manufactured, sold, distributed or used.

- American Motorist Insurance Co. ("AMICO") insured Goodrich since the early 1940's.

- Goodrich filed a declaratory judgment action with respect to liability insurance coverage provided to Goodrich by AMICO.

- Goodrich argued that it was covered by AMICO for all of the underlying cases that alleged exposure to its products before July 1, 1974, regardless of the date of injury and that coverage was triggered not only by exposure but also by the presence of chemicals in an individual's tissue and by manifestation of an injury.

- AMICO's position was that there was no coverage unless the date of injury was prior to July 1, 1974 and it characterized personal injury as injury-in-fact, that is, subclinical undiagnosed damage to the cells of a person.

- Court was guided by a decision of the Sixth Circuit holding that the terms "occurrence" and "bodily injury" were ambiguous in the context of tort suits involving progressive disease claims even though insurance policies in that case defined both "occurrence" and "personal injury" to require injury during the policy period.

- Court found that an "occurrence" triggered the coverage which AMICO provided Goodrich and determined that the term "occurrence" was ambiguous so that extrinsic evidence was necessary to determine its meaning.

- Based on the extrinsic evidence, court concluded that AMICO recognized that if exposure caused personal injury, then exposure triggered coverage. Consequently, court held that the trigger of coverage was the exposure which caused the personal injury regardless of the time of injury.

b. Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 829 F.2d 227 (1st Cir. 1987).

- Eagle-Picher Industries Inc. ("Eagle-Picher"), an asbestos manufacturer, sought a declaratory judgment against various insurers which resulted in a 1982 decision by the First Circuit

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

adopting the manifestation theory of insurance coverage; namely that each insurer with a policy in effect at the time the asbestos related disease first manifested itself by way of medically diagnosable symptoms was responsible for providing coverage.

- Following that decision, all insurers with the exception of American Motorist Insurance Co. ("AMICO") settled with Eagle-Picher. Prior to settlement, Eagle-Picher presented expert evidence to the insurer that asbestos related diseases were diagnosable five to six years prior to the actual date of diagnosis. For purposes of settlement, the insurers agreed that the date of diagnosability and the trigger of insurance coverage was the date five years before the actual diagnosis date.

- Eagle-Picher sought further relief in the district court to compel AMICO to comply with the "rollback" coverage theory adopted by the settling insurers. The district court endorsed the rollback theory.

- An appeal to the First Circuit followed.

- The First Circuit, applying Ohio law, declined to reverse the earlier decision adopting the manifestation trigger of coverage.

c. Owens-Corning Fiberglas Corp. v. American Centennial Insurance Company, 74 Ohio Misc.2d 183 (Ohio Comm. Pls. 1995).

- On motion, Owens requested court declare that the "continuous injury" or "triple trigger" rule apply to asbestos claims. Specifically, that each policy in effect from first exposure through diagnosis are triggered.

- One carrier argued for an exposure trigger, and two other carriers argued for an injury-in-fact trigger.

- Court rejected each of the carriers proposed triggers, noting that the carriers own experts stated that asbestos fibers that are not removed from lungs causes immediate damage to cells and tissues and that the bodily injury is continuous during its presence.

- Court found that the plain meaning of policies provide that coverage is triggered as long as there is personal injury during the policy period.

- According to court, applying the continuous injury rule to asbestos claims under the policy is a "natural fit".

- Court reviewed various decisions adopting the continuous injury rule, including Keene, the New Jersey Appellate Division decision in Owens-Illinois and the Pennsylvania Supreme Court decision in J.H. France Refractories Co. v. Allstate Insurance Co., 626A2d 502 (1993), and found them persuasive.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- As to the exposure theory and injury-in-fact theory, court concluded that neither were appropriate in view of the policy language and the nature of asbestos related injury.

- When faced with the issue of allocation of costs among triggered policies, court followed the thinking in the J.H. France decision and found that once an occurrence triggers a policy each policy must provide coverage in full for all sums which Owens becomes liable to pay. Court stated, however, that Owens would be limited to one policy of its choice.

- Court rejected the carriers' argument that Owens must contribute its pro rata share for periods of no insurance, finding nothing in the policy permitting pro ration of liabilities.

- Court also rejected carriers' argument for a pro rata sharing of costs on the basis of the "other insurance" clause, finding that the clause does not affect the amount Owens can recover from any one insurer.

d. Lincoln Electric Co. v. St. Paul Fire and Marine Ins. Co., No. 1: 96 CV0537 N.D. Ohio (1998).

- Insured, an Ohio corporation, manufactured welding equipment and products.

- Insured purchased general liability insurance from St. Paul Fire and Marine Insurance Company ("St. Paul") from at least 1945 to 1996. Beginning in 1985, the general liability policy was purchased on a claims made basis, rather than an occurrence basis.

- Beginning in the 1970's, suits were instituted against the insured for bodily injury resulting from asbestos contained in, or from breathing fumes generated by, insured's welding products.

- On the issue of trigger of coverage, the court followed Keene Corp. v. Ins. Co. of No. America, 667 F.2d 1034 (D.C. Cir. 1981), finding that any welding fume claim would be triggered when the claimant suffered some bodily injury during the policy period.

- Following Corning Fiberglass v. American Centennial Ins. Co., 74 Ohio Misc. 2d 183, the court found St. Paul's duty to defend to be triggered at any point during the period from initial exposure to diagnosis or death. Further, the insured was entitled to select the triggered policy which will pay all of its defense costs in a particular case.

- Court found that the breaches of its insurance contracts by St. Paul damaged the insured in an amount in excess of $23 million through December, 1997, which was the difference between the amount the insured paid for defense costs, settlements and judgments based on St. Paul's allocation and the correct allocation.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

e. Gen Corp., Inc. v. AIU Ins. Co., 2000 U.S. Dist. LEXIS 10302.

- Insured filed suit against its insurers in connection with claims arising out of contamination resulting from the long term disposal of waste.
- Trial was anticipated to begin in August 2000.
- In the fall of 1999, court ruled on several motions for summary judgment, but declined to rule on the issues of trigger and allocation, as requested by insured.
- Subsequently, the parties requested guidance from court on these issues in order to effectively prepare for trial and to aid in settlement negotiations.
- Court therefore permitted the parties to brief the issue of trigger and allocation in a manner to be styled as preliminary arguments concerning jury instructions.
- In order to reach a decision, court analyzed the various types of triggers of coverage and case law on each, including manifestation, continuous trigger, injury in fact and exposure.
- Here, court found that continuous trigger was the correct theory, provided insured could prove continuous injury. Court also noted that this type of case could be analogized to the asbestos bodily injury case.
- In addition, court found that the initial triggering event was injury-in-fact, as opposed to exposure, provided initial triggering event was capable of proof.
- Finally, the end point of the trigger period was found to be manifestation.
- As for the allocation method, Court found that pro-rata was the appropriate basis.

f. Goodyear Tire & Rubber Co. v. Aetna Cas. and Sur. Co., 95 Ohio St. 3d 512 (2002).

- The pertinent facts relating to this complex suit can be found in sections A, C and D above.
- Appellate court granted directed verdicts to excess insurers on the basis of its determination as to how costs should be allocated among policies triggered by Goodyear's claims.
- On appeal, the Ohio Supreme Court was asked to determine the appropriate method for allocating such costs.
- While the parties agreed that the appropriate trigger of coverage was the "continuous trigger" theory, they disagreed on the method of allocating covered costs among the triggered policies.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Goodyear argued that the proper allocation method was the "all sums" method described in Keene. The insurers argued for a pro rata method, in which the costs would be allocated "horizontally" among all triggered policy years.

- Court, in a 4-3 decision, adopted the Goodyear approach, finding the policy language which states that the insurer will pay "... all sums which the insured shall become legally obligated to pay as damages ...," to be determinative of the issue.

- In reaching its decision, the Court here, as in Keene, was persuaded by the fact that the triggered policies do not contain any language which would result in a reduction of an insurer's obligation to pay if there is only part of an injury occurring during a policy period

- Based on Court's holding, Goodyear could select a single primary policy for its claim, and if the policy limits were exhausted, Goodyear could pursue coverage under other primary and excess policies. The selected insurer or insurers could then seek contribution from the other insurers under the other triggered policies.

- At this juncture, since Goodyear had not yet selected a primary policy, Court could not determine whether its limits would be exhausted or whether Goodyear would need to seek excess coverage. As a result, Court reversed lower court judgment, finding that excess insurers were necessary parties to the proceedings in the event any of their policies become a factor.

g. GenCorp v. AIU Insurance Company, 297 F. Supp. 2d 995 (N.D. Ohio 2003.) (GenCorp II) motion for reconsideration denied, 304 F. Supp. 2d 955 (N.D. Ohio 2004), aff'd, 138 Fed. Appx. 732 (6th Cir. 2005).

- GenCorp sued its primary, umbrella and excess insurers in connection with its liability for environmental clean-up costs at six sites.

- In earlier case cited above *GenCorp I*, the court ruled that the continuous trigger theory was the correct governing theory in connection with the policies triggered with respect to the claims *at issue*.

- In addition, Court in GenCorp I dismissed claims against excess insurers without prejudice on the basis that their policy limits would not be reached in connection with the claims.

- In this action, defendant excess insurers move for summary judgment against GenCorp on the basis that they have no obligation to reimburse GenCorp *in connection with its claims*, since the limits of its primary policies far exceed the costs incurred or to be incurred at the sites at issue.

- Prior to this action, GenCorp settled with all primary insurers implicated with respect to the six sites.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- In 2002, the Goodyear case was decided by the Ohio Supreme Court, which conceptually permitted Goodyear to select a single primary policy for its claim, and upon exhaustion of that policy's limits, Goodyear could pursue other primary and excess insurers, which could in turn seek contribution from the other applicable insurers.

- In this action, GenCorp proposes that the excess insurers breached their insurance contracts by failing to reimburse and indemnify GenCorp for its environmental liability for cleanup, notwithstanding the settlements *with its p*rimary insurers.

- Excess insurers maintained that GenCorp's settlements with its primary insurers effectively create a "settlement credit" which relieves them of liability.

- While court ultimately reached the conclusion that the excess insurers were not liable, rather than giving *the* excess insurers "settlement credits", (the legality of which has not yet been determined in Ohio, the court held that the combined limits of the primary insurance policies in fact exceed*ed* GenCorp's own maximum estimates of liability at the sites in question, and that the excess policies limits will not be reached. Based on the foregoing, court granted summary judgment to excess insurers on the basis that they had no liability to GenCorp.

- Court bases its decision on the proposition that the settlement with *the* primary insurers effectively extinguished all claims related to the issues in dispute. This, in turn, left the excess insurers with no obligation to pay since the settlements with the primary insurers had to be treated as if they had paid the maximum amount covered under their policies. Because the amount in question did not exceed the maximum amount covered by the primary policies, court found that the excess insurers have no obligations under their policies.

- GenCorp a*rgues* that *summary judgment is not appropriate in that* various issues of material fact remain. *Court rejected the arguments.*

- One critical ruling of the court was that the Goodyear decision was not applicable in this instance. Court maintained that the concepts of Goodyear could not apply where an insured settles with all its primary insurers, thereby eliminating the ability of the excess insurers to seek contribution from the primary insurers for any payments that were made by an excess insurer since the liability of the primary insurers no longer existed. Court went on to state that GenCorp's belief that it could allocate its liability during a particular policy period to a single primary policy and then seek coverage from its excess insurers without exhausting the coverage of other primary policies is not consistent with Goodyear.

- Basically it appears that this decision stems from the fact that the court felt it was inappropriate for GenCorp to take away the remedies of its excess insurers by settling with its primary insurers and that GenCorp should have either obtained full reimbursement from its primary insurers or it should not have

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

settled with all of its primary insurers so that its excess insurers would have had somewhere to turn for reimbursement.

h. Glidden Co. v. Lumbermens Mutual Casualty Co. and Millennium Chemicals Inc. v. Lumbermens Mutual Casualty Co., (Nos.: 409309 and 411388, Ohio Ct. Comm. Pleas, Cuyahoga, 2002, 2004 WL2931019 (Ohio App 8 Dist.).

- Claims had been made against Plaintiffs alleging bodily injury and/or property damage caused by the manufacture and sale of lead paint prior to 1974.

- Each Plaintiff alleged that it was entitled to coverage under the same insurance policies based on their corporate history and relationship to SCM (NY).

- The insurers maintained that, with the exception of one Plaintiff, Millennium Holdings, none of the Plaintiffs had the right to claim coverage under the policies.

- Court spent a great deal of time analyzing which parties would be entitled to claim coverage under the policies at issue. After completion of the analysis, court determined that only Millennium Holdings had a claim right.

- In determining the issue of the insurer's duty to defend Millennium Holdings, Court held that at least as to some counts in the various complaints, the insurers had a duty to defend, since there were allegations of bodily injury or property damage that arguably came within the coverage provided under the primary policies at issue.

- On the issue of how defense costs should be allocated among triggered policies, court ordered a pro-rata allocation that the insurers work out among themselves, but subject to their right to seek contribution from others. Court went on to provide that if the insurers could not agree, the court would decide.

- Plaintiff Glidden appealed.

- The primary issue before court on appeal was whether Plaintiff, Glidden, acquired the insurance benefits covering pre-acquisition risks of the paint business that were assigned to or acquired by it.

- After a lengthy analysis, court found that Plaintiff, Glidden did in fact acquire insurance coverage benefits with respect to the bodily injury and property damage claims referenced above by operation of law.

- Court also adopted the theory that a corporation which succeeds to the liability for pre-acquisition operations of another entity, either by purchase of assets or the purchase of a portion of the

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

predecessor entity, acquires the right to insurance coverage by operation of law.

- As to the issue of allocation of defense costs, court found that Ohio law should apply and that rather than a pro rata allocation of defense costs, the allocation should be based on the "all sums" approach whereby the insured has the right to select a policy of its choice for coverage.

i. Fid. and Guar. Ins. Underwriters, Inc. v. Nationwide Tanks, Inc., 2006 U.S. Dist. LEXIS 9854 (S.D. Ohio Feb. 22, 2006)

- In December 1992, Nationwide contracted with Northeast Fertilizer II, Inc. d/b/a/ Morrall Chemical Company ("Northeast"), partially owned by Land O'Lakes, to construct a 1.5 million gallon above-ground storage tank (the "Tank"). Construction began in 1993.

- Fidelity and Guaranty Insurance Underwriters, Inc. ("FGIU") wrote a primary liability policy for Nationwide Tanks, Inc. ("Nationwide"). The policy began on June 1, 1996, and FGIU terminated the policy on February 7, 1997, as a result of the failure of Nationwide to pay the policy premium. Nationwide subsequently went out of business.

- In March 2000, the Tank burst, leaking its contents and damaging the property of Northeast, as well as other properties in the area.

- Northeast and Land O'Lakes, as intervening defendants, filed suit, along with their insurers, against now-defunct Nationwide, seeking reimbursement for costs and damages associated with the discharge from Tank.

- FGIU filed suit, seeking a declaratory judgment that it owed no duty to Nationwide, Northeast, or Land O'Lakes to either defend or indemnify them for damages stemming from the ruptured Tank.

- On a motion for summary judgment, court conducted an analysis of the arguments of each side.

- First, FGIU argued that it owed no duty to Nationwide because the injuries complained of by both the intervenor defendants, and allegedly also suffered by third parties making claims against Northeast and Land O'Lakes, did not occur within the policy period.

- Court reviewed the language of the occurrence based policy at issue, and found that FGIU correctly argued that under an occurrence-based policy, the insurer need not provide coverage for injuries that did not occur while the policy was in effect. Court pointed to the policy dates (June 1, 1996 through February 6, 1997), and the policy language related to property damage, which defined injuries as "'occurr[ing] at the time of the physical injury that caused [them].'" As such, FGIU proposed that the

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

injuries occurred in 2000, which was more than three years past the end of its policy. Therefore, the policy would not cover the alleged damages.

- An analysis of intervenor defendants' argument was also conducted by court. Essentially, these defendants argued that the policy would cover an act that occurs while the policy remains in effect. As such, intervenor defendants proposed that Nationwide acted negligently in construction as soon as the Tank began operation, that the negligence continued during the FGIU policy period, and that the negligence later caused the Tank rupture. Essentially, they argued for a continuous trigger, claiming that "because the tank corroded in a continuous process, it falls within the policy's definition of an occurrence as 'an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

- Court rejected that argument and ruled in favor of FGIU, finding that in an occurrence based policy, the date of injury was the policy trigger, not the date of the negligence that caused the injury. Here, even though the corrosion that led to the rupture occurred continuously, the injuries sustained occurred only when the Tank failed and spilled its contents. Ohio law, which the court followed, holds "that it is the time of the injury, not the time of negligence causing the injury, that controls whether an injury triggers coverage during the policy period" in an occurrence-based policy.

- Because the injuries occurred when the Tank burst, three years after the insurer cancelled the policy, the insurer owed no duty to defend or indemnify the intervenor defendants for the damages caused by the incident.

6. Selected Michigan Case Law

a. Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 662 F.Supp. 71 (E.D. Mich. 1987).

- Insured sought declaration that its insurers had a duty to defend it against potential environmental liability at twenty-two sites.

- Court held that "each exposure of a pollutant to the environment constitutes an occurrence and triggers coverage."

b. Transamerica Ins. Co. of Mich. v. Safeco Ins. Co., 189 Mich. App. 55 (Mich. Ct. App. 1991).

- Transamerica Insurance Co. ("Transamerica") provided defense and indemnification to its insured in connection with an underlying action for damages resulting from foam insulation installed by the insured, which allegedly emitted harmful gases.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Transamerica sought a declaration that insurers that provided coverage to the insured after Transamerica were liable for their pro rata share of defense costs and ultimate liability of the insured.

- Transamerica argued that the carriers that provided coverage during the years that injury or property damage manifested itself were liable. Insurers argued that the exposure theory should apply, that is, that only those insurers that provided coverage to the insured during the time of first exposure to the gases, were liable.

- Court adopted the manifestation trigger of coverage, that is, that coverage was triggered when property damage or bodily injury first becomes manifest.

c. Straits Steel and Wire Co. v. Michigan Millers Mut. Ins. Co., No. 91-72991-CK (Mich. Cir. 1992).

- Relying on Transamerica, court adopted the manifestation trigger of coverage. Court held that the damage became manifest, at the very latest, in September 1982 when EPA issued its inspection report.

d. Cello-Foil Products Inc. v. Michigan Mutual Liability Co., 1995 WL 854728 (Mich. App. 1995), leave to appeal granted, 560 N.W.2d 637 (Mich. 1997).

- Two suits were filed against the insured and other generators to recover costs in connection with solvent contamination of the Verona Water Wells.

- On motion for summary judgment trial court held, on the basis of the rationale in Transamerica v. INA, that only the policies in effect in August or September, 1991, when the contamination became manifest were triggered.

- The appellate court affirmed the trial court's holding since there is no dispute that the manifestation of the property damage took place in August or September, 1991.

e. Gelman Sciences, Inc. v. Fidelity & Cas. Co., 214 Mich. App. 560 (Mich. Ct. App. 1995), leave to appeal granted, 560 N.W.2d 638 (Mich. 1997).

- Insured was a manufacturer that utilized the chemical 1,4-dioxane ("Dioxane") in its manufacturing process.

- From 1966 to 1984, insured utilized an industrial wastewater treatment system consisting of several treatment ponds, which for two years in the late 1960's discharged directly into a marshy area. To halt the discharge, and with approval from a governmental authority, the insured dredged one of the ponds and permitted water to seep into the ground.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- In 1985, drinking water wells were found to be contaminated with Dioxane. Subsequently, several suits were instituted against the insured.

- The insured instituted suit against its insurers seeking to establish the insurers' duty to defend and indemnify the insured in connection with the suits.

- Trial court granted summary judgment to insurers. Insured appealed of right.

- Insured argued it was entitled to coverage because the Dioxane was discharged when the insurers policies were in effect. Insurers argued that coverage was triggered in 1985 upon discovery of the groundwater contamination.

- Appellate court affirmed the trial court decision. It found the issue in this case to be whether the damage from an occurrence took place during the policy period.

- The conclusion reached by the appellate court was that the trial court was correct in applying Transamerica and in ruling that for purposes of insurance coverage, the damage was suffered by the plaintiffs in the various underlying suits when the Dioxane was discovered in 1985.

- Supreme Court granted leave to appeal. See item i. below.

- See also: Westfield Insurance Co. a/k/a Ohio Farmers Insurance Co. v. Theodore T. Keyes et al., No. 169272 (Mich. Ct. App. 1996) which follows Gelman.

f. Dow Corning Corp. v. Granite State Insurance Co., No. 93-325-788 CK (Mich. Cir. 1996).

- The issue before court was whether there should be vertical or horizontal exhaustion of policy limits in connection with claims concerning implants.

- Insurers argued that based on court's prior ruling adopting the continuous trigger theory of coverage, there should be horizontal exhaustion of one level of coverage before going to next.

- Insured argued for vertical exhaustion, that is, exhaustion of all available coverage at a particular level in a policy period before moving to the next, relying on court's prior rulings rejecting the insured's proposed pro rata allocation and permitting insured to allocate indemnity and defense to any applicable policy.

- In reaching its decision that vertical exhaustion applied, court stated that the "other insurance" clause in a policy can only be reasonably interpreted to mean that other insurance must pay first if it provides coverage for the same policy period.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- In addition court, at the suggestion of the insured, retained jurisdiction to insure an equitable implementation of vertical exhaustion.

g. American Bumper and Manufacturing Co. v. Hartford Fire Ins. Co., 550 N.W.2d 475, reh'g denied, 554 N.W.2d 10 (Mich. 1996).

- On appeal to the Supreme Court of Michigan, insurers argued that they had no duty to defend based upon a manifestation trigger of coverage. (See Section E, Michigan subparagraph e. for a discussion of the duty to defend). Insurers proposed that the earliest possible trigger date would be 1974, the date of MDNR's first letter indicating contamination.

- Insured argued for a continuous trigger theory of coverage.

- Court declined to adopt either theory on the specific facts of the case, and noted that when the issue related to a duty to defend a claim that is later proven groundless, neither theory was appropriate because there was never an event sufficient to trigger indemnification.

- Court also remanded case to trial court to determine which insurers were liable and for what share.

h. Corduroy Rubber Co. v. The Home Indemnity Co., No. 191846 (Mich. App. 1997).

- From 1919 through December 1986, insured, owned and operated a mechanical rubber manufacturing facility in Grand Rapids, Michigan ("Grand Rapids") which utilized trichlororoethylyene ("TCE") as a degreasing agent.

- In 1978, insured acquired another facility which also utilized TCE.

- Litigation over the environmental condition of both facilities began in the early 1990's.

- Insured instituted suit against its insurers demanding coverage.

- Following the appellate court decisions in Gelman Sciences and Arco, trial court granted summary judgment to the insurers with respect to the Grand Rapids site, on the basis that their policies were not triggered.

- On appeal, insured sought to distinguish facts of this case from these decisions, proposing that the manifestation trigger was utilized in those cases based upon the continuous nature of those particular occurrences, while in the instant case contamination took place at discrete times and was therefore not continuous.

- Specifically, the insured maintained that there was a spill from a TCE tank in the late 1970's, a spill of fuel oil in 1977 and discrete events involving the application of waste oil as a dust

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

suppressant on its unpaved parking lot from the late 1960's to the late 1970's.

- While this court agreed that it need not apply the manifestation trigger when there is a single identifiable event of contamination, it proceeded to find that this was not the case here. Rather, just as in Gelman Sciences and Arco, there were discharges of contaminants, with gradual migration into soil and groundwater, in this case.

- Court went on to affirm the trial court decision and held that the manifestation trigger was the appropriate trigger. Applying the manifestation trigger, the court found that the insurers had no duty to defend or indemnify since their policies were not triggered.

i. Joan Graham v. Providence Washington Insurance Company, No. 182088 (Mich. App. 1997).

- In 1979, in excess of 3,000 drums of chemicals were discovered by the MDNR at the site known as Springbrook Farm, together with severe environmental contamination.

- In the early 1980's, MDNR designated this site for cleanup under CERCLA.

- Subsequently MDNR and other third parties filed suit against Plaintiff with respect to the contamination.

- Plaintiff then instituted a declaratory judgment action against her insurers.

- The insurers moved for summary judgment on basis that the contamination had become manifest outside of their policy periods.

- Trial court granted motion on the basis that the applicable triggered policies were those in effect in 1979, when the damage became manifest; and none of the insurers' policies were in effect at that time.

- On appeal, court reviewed various theories as to when coverage is triggered.

- Citing the appellate court holdings in Transamerica, Gelman Sciences, and Arco, this court held that "[f]or purposes of triggering coverage, property damage occurs when the damage is detected by the party claiming to be injured.", not when the contamination is discharged.

- Appellate court affirmed, holding that based on Gelman Sciences, the occurrence took place on or about December 12, 1979, because that was the date MDNR discovered the property damage.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

j. Gelman Sciences, Inc. v. Fidelity and Cas. Co. of New York and Arco Industries Corporation v. American Motorists Insurance Company, 456 Mich. 305 (1998).

- These cases were consolidated by the Michigan Supreme Court for purposes of appeal. See item 6e. above for a factual description of Gelman Sciences. See Section A, Michigan, item 6c. for a factual description of Arco.

- The Court of Appeals in both cases had held that the manifestation of injury was the trigger of coverage under the liability insurance policies at issue.

- Gelman dealt with long term contamination resulting from the permitted disposal of contaminated wastewater in treatment ponds and from a spray irrigation system.

- Arco dealt with long term contamination resulting from the use by an automotive parts manufacturer of a drainage system and seepage lagoon into which VOC's from its operations flowed.

- Supreme Court rejected the Court of Appeals adoption of the manifestation trigger of coverage.

- In making its determination, the Court explained that it could not simply look at the various trigger theories. Rather, it must apply the policy language to the facts of a case in order to determine whether or not there is coverage.

- Initially, a determination must be made as to whether the applicable terms of the insurance policy are ambiguous on its face. If there are ambiguities, then they must be construed against the insurer.

- Based upon the plain language of the policies, specifically, the definition of occurrence, the Court determined that the manifestation trigger was not the appropriate trigger, while the injury in fact trigger was, since the policies unambiguously provide that there must be actual injury during the time the policy is in effect.

- While the Court admitted that in many instances it is difficult to determine an accurate timing of the actual damage under a policy, nevertheless courts should endeavor to make such a determination based upon the evidence presented.

- Court went on to state that in instances where an insured had established that property damage had taken place within one or several policy periods, it may not be able to identify a precise moment in time or to apportion the amount of damage occurring during each policy period.

- While the Court did not decide the issue of allocation of those costs, since this issue was not on appeal, it did mention the fact that other courts had utilized various proration methods, as well

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

as joint and several liability, in this regard and it commented that a fair allocation of the risk was appropriate.

- This decision also effectively reversed the decision in Transamerica (see item 6 b. above), by finding that to the extent the court advocated a manifestation trigger of coverage, it was erroneous and should not be followed.

- In applying the injury in fact trigger in Gelman, the Court held that the policies were triggered when property damage (i.e. groundwater contamination) first occurred as well as during any subsequent policy periods when contamination continued, and remanded the matter to the trial court for further proceedings.

- In applying this same trigger in Arco, the court affirmed the finding of the trial court that there had been "... triggering occurrences in each of defendant's policy periods."

k. Arco Indus. Corp. v. American Motorists Ins. Co., 232 Mich. App. 146 (1998).

- In the Arco Indus. case cited at item j above, the Michigan Supreme Court determined that the appropriate trigger of coverage was injury-in-fact.

- It then remanded the matter to the trial court for a fair allocation of the risk.

- Trial court determined, based on the "other insurance" provisions of the policies at issue, that AMICO bore a 68.63% share of the costs. This share was based on the ratio of AMICO's policy limits to the limits of all triggered policies.

- On appeal, the trial court decision was reversed.

- After an extensive review of the five possible methods of allocating liability, the appellate court determined that the appropriate method of allocation when dealing with an injury-in-fact trigger was simply time on the risk.

- In this case, there was a twenty year trigger period, with AMICO bearing seven of those years. Therefore, AMICO's share was 7/20 or 35% of Arco's costs, not 68.63%.

- It was the position of the appellate court that its conclusion was consistent with not only the intention of the drafters of the policies at issue, that there be coverage during the policy periods, but also with the concept that the allocation must be based on damage during the policy period.

- Court noted that allocation based on "other insurance" provisions was not appropriate here, because such provisions relate to concurrent coverage for one occurrence, as opposed to coverage under consecutive policies for different policy periods.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

- Motion filed for leave to appeal to Michigan Supreme Court, which was dismissed by stipulation of attorneys for parties.

l. Corduroy Rubber Co. v. Home Indemnity Co., No. 191846 (Mich. App. 1999).

- Previously, the appellate court held that manifestation was the correct trigger of coverage in environmental cases.

- Subsequently, the Michigan Supreme Court decided Gelman and remanded matter to the appellate court reconsideration.

- Appellate court, following Gelman stated that if the insured's policies contained the concept of continued exposure, then coverage would be triggered from first discharge through each year of continuing damage.
- The matter was remanded to the trial court for further findings of fact.

m. Century Indemnity Co. v. Aero-Motive Co., 318 F.Supp.2d 530 (W.D. Mich. 2003), aff'd, 155 Fed. App'x 833 (6th Cir. 2005).

- On motion for summary judgment, *c*ourt addresses the issue of whether defense costs must be allocated among the insurers or whether the insurers are jointly and severally liable for all defense costs.

- Insurers argued that on the basis of Arco (above at k.), defense costs should be allocated among triggered policies according to the "time on the risk" method.

- Court advised that even though Arco did not address apportionment of defense costs, it relied upon Insurance Co. of North America v. Forty-Eight Insulations, Inc. 633 F.2d 1212, which held that for the period when an insured had no insurance, defense costs should be properly proportioned between *the* insurer and insured.

- Adopting that reasoning, this court held that defense cost*s* should be apportioned among the triggered insurers, *in a manner* that would *not* require *any* insurer to pay for any damage occurring outside the*ir* policy period and that this allocation was something that could easily be done since the defense costs had already been incurred.

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

A. Occurrence

Selected New Jersey Case Law

Selected Ohio Case Law

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

Grand River Lime Co. v. Ohio Cas. Ins. Co., 32 Ohio App. 2d 178 (Ohio Ct. App. 1972).

Buckeye Union Ins. Co. v. Liberty Solvents and Chem. Co., Inc., 17 Ohio App. 3d 127 (Ohio Ct. App. 1984).

Kipin Indus., Inc. v. Am. Universal Ins. Co., 41 Ohio App. 3d 228 (Ohio Ct. App. 1987).

Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co., 84 Ohio App. 3d 302 (Ohio Ct. App. 1993).

Sherwin-Williams Co. v. Certain Underwriters at Lloyd's of London, 813 F. Supp. 576 (N.D. Ohio 1993).

Goodyear Tire & Rubber Co. v. Aetna Cas. and Sur. Co., 2001 Ohio App. LEXIS 190.

Viola Altvater v. Ohio Cas. Ins. Co., 2003 WL 22077728, September 9, 2003. Not reported in N.E.2d.

Selected Michigan Case Law

United States Fid. and Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139 (W.D. Mich. 1988).

Straits Steel and Wire Co. v. Michigan Millers Mut. Ins. Co., No. 91-72991-CK (Mich. Cir. 1992).

Arco Indus. Corp. v. Am. Motorists Ins. Co., 198 Mich. App. 347 (Mich. Ct. App. 1993), rev'd, 448 Mich. 395 (1995).

City of Bronson v. Am. States Ins. Co., No. 175170 (Mich. Ct. App. 1996). 215 Mich.App.612

South Macomb Disposal Authority v. Am. Ins. Co., 225 Mich. App. 635 (1997).

Frankenmuth Mut. Ins. Co. v. Masters, 225 Mich. App. 51 (1997), rev'd 460 Mich. 104, June 15, 1999

Aetna Cas. & Sur. Co. v. Dow Chemical Co., No. 93-73601, 28 F. Supp. 2d 421 (E.D. Mich. Sept. 2, 1998).

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

B. Owned Property Exclusion

Selected New Jersey Case Law

Broadwell Realty Services, Inc. v. Fid. & Cas. Co., 218 N.J. Super. 516 (App. Div. 1987).

Summit Assoc. v. Liberty Mut. Fire Ins., 229 N.J. Super. 56 (App. Div. 1988).

Diamond Shamrock v. Aetna Cas., 231 N.J. Super. 1 (App. Div. 1989).

State, Dep't of Envtl. Prot. v. Signo Trading Int'l., 235 N.J. Super. 321 (App. Div. 1989), aff'd, 130 N.J. 51 (1992).

Reliance Ins. Co. v. Armstrong World Indus., 265 N.J. Super. 148 (Law Div. 1993), rev'd, 292 N.J. Super. 365 (App. Div. 1996).

UMC/Stamford, Inc. v. Allianz Underwriters Ins. Co., 276 N.J. Super. 52 (Law Div. 1994).

Witco Corp. v. Travelers Indem. Co., 1994 WL 706076 (D.N.J. 1994), aff'd, 82 F.3d 408 (3d Cir. 1996).

Morrone v. Harleysville Mut. Ins. Co. 283 N.J. Super. 411 (App. Div. 1995).

CPC Int'l., Inc. v. Hartford Accident & Indem. Co., No. L-37236-89 (N.J. Super. Ct. Law Div. 1996).

Kentopp v. Franklin Mut. Ins. Co., 293 N.J. Super. 66 (App. Div. 1996).

Universal-Rundle v. Commercial Ins., 319 N.J. Super. 223 (App. Div. 1999), cert. denied, 161 N.J. 149 (1999).

Mitchell Heisler v. Am. Reliance Ins., Co., No. A-4221-97T1 (N.J. Super. Ct. App. Div. 1999).

Muralo Co. v. Employers Ins., 334 N.J. Super 282 (App. Div. 2000), cert. denied, 2001 N.J. Lexis 240 (2001).

Quincy Mut. Fire Ins. Co. v. Borough of Bellmawr, 172 N.J. 409 (2002).

Geri v. Egery Nelson, Inc., Superior Court of New Jersey, Appellate Division, Docket No. A-5344-03-T1 (July 18, 2006) (Not approved for publication).

Selected Ohio Case Law

Constantine's Nursery & Garden Ctr., Inc. v. Florists Mut. Ins. Co., 1993 WL 413596 (Ohio Ct. App. 1993).

Selected Michigan Case Law

Upjohn Co. v. New Hampshire Ins. Co., 178 Mich. App. 706 (Mich. Ct. App. 1989), rev'd on other grounds, 438 Mich. 197 (1991).

Polkow v. Citizens Ins. Co. of Am., 180 Mich. App. 651 (Mich. Ct. App. 1989), rev'd on other grounds, 438 Mich. 174 (1991).

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

Anderson Dev. Co. v. Travelers Indem. Co., 49 F.3d 1128 (6th Cir. 1995).

Upjohn Co. v. Aetna Cas. & Sur. Co., 1991 WL 490026 (W.D. Mich. 1991).

Arco Indus. Corp. v. Am. Motorists Ins. Co., 232 Mich. App. 146 (1998).

Aetna Cas. & Sur. Co. v. Dow Chem Co., 28 F. Supp. 2d 421 (E.D. Mich. 1998).

C. Pollution Exclusion

Selected New Jersey Case Law

Lansco, Inc. v. Dept. of Envtl. Prot., 138 N.J. Super. 275 (Ch. Div. 1975), aff'd, 145 N.J. Super. 433 (App. Div. 1976), cert. denied, 73 N.J. 57 (1977).

Jackson Tp. Municipal Utilities Auth. v. Hartford Acc. & Indem. Co., 186 N.J. Super. 156 (Law Div. 1982).

Broadwell Realty Services, Inc. v. Fid. & Cas. Co., 218 N.J. Super. 516 (App. Div. 1987).

Summit Assoc. v. Liberty Mut. Fire Ins., 229 N.J. Super. 56 (App. Div. 1988).

Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co., 817 F. Supp. 1136 (D.N.J. 1993), aff'd, 89 F.3d 973 (3d Cir.), cert. denied, 117 S. Ct. 485 (1996).

Morton Int'l., Inc. v. Gen. Accident Ins. Co., 134 N.J. 1 (1993), cert. denied, 114 S.Ct. 2764 (1994).

Nestle Foods Corp. v. Aetna Cas. & Sur. Co., 842 F. Supp. 125 (D.N.J. 1993).

UMC/Stamford, Inc., v. Allianz Underwriters Ins. Co., 276 N.J. Super. 52 (Law Div. 1994).

CBS Inc. v. Crum & Forster Inc., No AM-000712-9472 (N.J. Super Ct. App. Div. 1995)

Astro Pak Corp. v. Fireman's Fund Ins. Co., 284 N.J. Super. 491 (App. Div.), cert. denied, 143 N.J. 323 (1995).

Cessna Aircraft Co. v. Hartford Accident & Indem. Co., No. L-3868-92 (N.J. Super. Ct. Law Div 1997).

Pfizer, Inc. v. Employers Ins. of Wausau, 1998 WL 32173 (N.J. Sup. Ct. 1998). 154 N.J. 187

Ciba-Geigy Corp. v. Liberty Mut. Ins. Co., UNN-L-97515-87 (N.J. Super. Ct. Law Div. 1998).

Ins. Co. of N. America v. Anthony Amadei Sand & Gravel Inc., No. A-2634-9575 (App. Div. 1998), rev'd on other grounds, judgment of trial court reinstated 162 N.J. 168 (12/12/99).

Universal-Rundle v. Commercial Ins., 319 N.J. Super. 223 (App. Div. 1999), cert. denied, 161 N.J. 149 (1999).

Rohm and Hass Co. v. AIU Ins. Co., No L-004 664-95 (N.J. Super. Ct. Law Div. 1998).

Waste Mgmt., Inc. v. Admiral Ins. Co., No. L-931-92 (N.J. Super. Ct. Law Div. 2000).

Essex Chemical Corp. v. Hartford Accident and Indem. Co., 261 F.3d 491 (3d Cir. 2001).

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

Rohm and Haas Co. v. Allianz Underwriters, Inc., Superior Court of New Jersey, Mercer County, Docket No.: L-87-4920, January 6, 2004.

Selected Ohio Case Law

Buckeye Union Ins. Co. v. Liberty Solvents and Chem. Co., Inc., 17 Ohio App. 3d 127 (Ohio Ct. App. 1984).

Kipin Indus., Inc. v. Am. Universal Ins. Co., 41 Ohio App. 3d 228 (Ohio Ct. App. 1987).

Morton Int'l., Inc. v. Harbor Ins. Co., 79 Ohio App. 3d 183 (Ohio Ct. App. 1992), appeal after remand, 104 Ohio App. 3d 315 (Ohio Ct. App. 1995).

Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd., 64 Ohio St. 3d 657 (1992), cert. denied, 507 U.S. 987 (1993).

Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co., 84 Ohio App. 3d 302 (Ohio Ct. App. 1993).

Lumberman's Mut. Cas. Co. v. S-W Indus., Inc., 23 F.3d 970 (6th Cir.), cert. denied, 115 S. Ct. 190 (1994).

Goodyear Tire and Rubber Co. v. Aetna Cas. & Sur. Co., 1995 WL 422733 (Ohio Ct. App.), appeal not allowed, 74 Ohio St. 3d 1477 (1995).

Danis Indus. Corp. v. Travelers Indem. Co., 95 CVH12-8904, Ohio Comm. Pls. Franklin Co. (1997).

Cravat Coal Co. v. Commercial Union Ins. Co., 1997 WL 35419 (Ohio Ct. App. Jan. 24, 1997).

Employers Ins. of Wausau v. Amcast Industrial Corp., 126 Ohio App. 3d 124 (Ohio App. 2 Dist. April 17, 1998).

Goodyear Tire & Rubber Co. v. Aetna Cas. and Sur. Co., 2001 Ohio App. LEXIS 190, rev'd, 95 Ohio St.3d 512 (2002).

Sherwin-Williams Co. v. Travelers Cas. & Sur. Co., 2003 Ohio App. LEXIS 5357. (November 13, 2003).

Pure Tech Systems, Inc. v. Mt Hawley Ins. Co., 2004 U.S. App. LEXIS 5988 (6th Cir. Mar. 26, 2004).

Selected Michigan Case Law

Upjohn Co. v. New Hampshire Ins. Co., 178 Mich. App. 706 (Mich. Ct. App. 1989), rev'd, 438 Mich. 197 (1991).

Protective Nat'l Ins. Co. of Omaha v. City of Woodhaven, 438 Mich. 154 (1991).

Polkow v. Citizens Ins. Co. of Am., 180 Mich. App. 651 (Mich. Ct. App. 1989), rev'd, 438 Mich. 174 (1991).

Matakas v. Citizens Mut. Ins. Co., 202 Mich. App. 642 (Mich. Ct. App. 1993).

Auto Owners Ins. Co. v. City of Clare, 446 Mich. 1, reh'g denied, 447 Mich. 1202 (1994).

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

City of Bronson v. Am. States Ins. Co., No. 175170 (Mich. Ct. App. 1996).

R.W. Meyer, Inc. v. ITT Hartford, 1996 U.S. Dist. LEXIS 19903 (W.D. Mich. Dec. 6, 1996).

South Macomb Disposal Author. v. Am. Ins. Co., 225 Mich. App. 635 (1997).

Michigan Millers Mut. Ins. Co. v. Bronson Plating Co., 1998 Mich. App. LEXIS 1786, 1998 WL 1991635 (Mich. Ct. App. June 23, 1998).

Aetna Cas. and Sur. Co. v. Dow Chemical Co., 44 F.Supp.2d 771 (E.D. Mich.1998).

Arco Indus. Corp. v. Am. Motorists Ins. Co., 232 Mich. App. 146 (1998).

Hoechst Celanese Corp. v. Aetna Cas. & Sur. Co., No. 1997-541375-CK (Mich. Cir., Oakland Co. 1999).
City of Albion v. Guar. Nat'l Ins. Co., 73 F. Supp. 2d 846 (W.D. Mich. 1999).

S. Macomb Disposal Auth. v. Westchester Fire Ins. Co., 239 Mich. App. 344 (2000).
Associated Indem. Corp. v. Dow Chemical Co., 248 F. Supp. 2d 629 (E.D. Mich. 2003).

Aero – Motive Co. v. Great Am. Ins., 302 F. Supp. 2d 738 (W.D. Mich. 2003).

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

C. Absolute Pollution Exclusion

Selected New Jersey Case Law

Crown, Cork & Seal Co. Inc., v. Aetna Cas. & Sur. Co., No. A-5564-9673 (N.J. Super. Ct. App. Div. 1998).

Byrd v. Blumenreich, 317 N.J. Super. 496 (App. Div. 1999).

Leo Haus, Inc. v. Selective Ins., 353 N.J. Super. 67 (App. Div. 2002).

Estate of Phillip Mini v. Metro Supply & Service Inc. v. Selective Ins. Co. of America, No. A-3976-02T2, N.J. Super., App. Div.).

Nav-Its, Inc. v. Selective Ins. Co. of America, 183 N.J. 110 (2005)

Merchants Ins. Co. of New Hampshire, Inc. v. Hessler, 2005 U.S. Dist. LEXIS 18173 (D.N.J. Aug. 18, 2005)

Selected Ohio Case Law

Celina Mut. Ins. Co. v. Marathon Oil Co., 2000 Ohio App. LEXIS 2453 (Ohio Ct. App. Jun. 8, 2001).

Andersen v. Highland House Co., 93 Ohio St. 3d 547 (2001).

Rybacki v. Allstate Ins. Co., 2004 Ohio App. LEXIS 1836 (Ohio Ct. App. Apr. 28, 2004).

Southside River-Rail Terminal, Inc. v. Crum & Foster Underwriters of Ohio, 157 Ohio App. 3d 325 (Ohio Ct. App. 2004).

Selected Michigan Case Law

Carpet Workroom v. Auto Owners Ins. Co., No. 223646 (Mich. Ct. App. 2002) and Meridian Mut. Ins. Co. v. Mary Anne Handprints, et al. No.: 224040 (Mich. Ct. App. 2002).

Lansing Bd. of Water and Light v. Deerfield Ins. Co., 183 F. Supp. 2d 979 (W.D. Mich., 2002).

Michigan Mun. Risk Mgmt. Auth. v. Seaboard Sur. Co., 2003 Mich. App. LEXIS 1869 (Mich. Ct. App. Aug. 7, 2003).

City of Grosse Pointe Park v. Michigan Mun. Liab. & Prop. Pool, 473 Mich. 188 (Mich. 2005).

D. Notice Requirements

Selected New Jersey Case Law

Morales v. Nat'l. Grange Mut. Inc. Co., 176 N.J. Super. 347 (Law Div. 1980).

Peskin v. Liberty Mut. Ins. Co., 214 N.J. Super. 686 (Law Div. 1986), aff'd in part and remanded, 219 N.J. Super. 479 (App. Div. 1987).

Solvents Recovery v. Midland Ins., 218 N.J. Super. 49 (App. Div. 1987).

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

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

Rohm and Hass Co., v. AIU Ins. Co., No. L-004664-95 (N.J. Super. Ct. Law Div. 1998), on remand No.:L-87-4920 (N.J. Super. Ct. 2004)

Selected Ohio Case Law

W. Am. Ins. Co. v. Hardin, 59 Ohio App. 3d 71 (Ohio Ct. App. 1989).

Am. Employers Ins. Co. v. Metro Reg'l Transit Auth., 802 F. Supp. 169 (N.D. Ohio 1992), rev'd, 12 F.3d 591 (6th Cir. 1993).

Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co., 84 Ohio App. 3d 302 (Ohio Ct. App. 1993).

Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London, 813 F. Supp. 576 (N.D. Ohio 1993).

Champion Spark Plug Co. v. Fid. and Cas. Co., No. 91-3185 (Ohio Comm. Pls. 1994), aff'd, 116 Ohio App. 3d 258 (Ohio Ct. App. 1996), appeal not allowed, 77 Ohio St. 3d 1501 (1996).

Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co., 74 Ohio Misc.2d 263 (Ohio Comm. Pls. 1995).

Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau, 88 Ohio St. 3d 292 (2000).

Goodyear Tire & Rubber Co. v. Aetna Cas. and Sur. Co., 2001 Ohio App. LEXIS 190 (Ohio Ct. App. Jan. 24, 2001), rev'd, 95 Ohio St. 3d 512 (2002).

B.F. Goodrich v. Commercial Union Ins. Co., (2001 WL 1692410 Ohio Comm. Pls. Dec. 19, 2001), rev'd., 2002 WL 31114948 (Ohio Ct. App. Sept. 25, 2002).

Bay Metal, Inc. v. Liberty Mut. Ins. Co., No. Cv. 2001 04 1538, (Ct. Common Pleas, Summit Co., OH August 24, 2004)

Selected Michigan Case Law

Upjohn Co. v. Aetna Cas. & Sur. Co., 1991 WL 490026 (W.D. Mich. Sept. 9, 1991).

Petoskey Mfg. Co. v. Commercial Union Ins. Co., 1992 U.S. Dist. LEXIS 14929 (W.D. Mich. June 26, 1992).

William A. Christopher v. Hartford Ins. Group, 1992 U.S. Dist. LEXIS 21640, 1992 WL 873328 (E.D. Mich. July 1, 1992).

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

Century Indem. Co. v. Aero-Motive Co., 2003 U.S. Dist. LEXIS 24565 (W.D. Mich. 2003).

E. Duty to Defend

Selected New Jersey Case Law

Hartford Acc. & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18 (1984).

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

CPS Chem. Co., Inc. v. Continental Ins. Co., 199 N.J. Super. 558 (Law Div. 1984), rev'd and remanded, 203 N.J. Super. 15 (App. Div. 1985).

Voorhees v. Preferred Mut. Ins. Co., 246 N.J. Super. 564 (App. Div. 1991), aff'd, 128 N.J. 165 (1992).

SL Indus. v. Am. Motorists Ins. Co., 248 N.J. Super. 458 (App. Div. 1991), aff'd as modified and remanded, 128 N.J. 188 (1992).

Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co., 817 F. Supp. 1136 (D.N.J. 1993), aff'd, 89 F.3d 973 (3d Cir.), cert. denied, 117 S. Ct. 485 (1996).

Morton Int'l, Inc. v. Gen. Accident Ins. Co., 134 N.J. 1 (1993), cert. denied, 114 S.Ct. 2764 (1994).

Carter-Wallace, Inc. v. Admiral Ins. Co., No. L-12287-89 (N.J. Super. Ct., Law Div. 1993).

Rutgers v. Liberty Mut. Ins. Co., et al., 277 N.J. Super. 571 (App. Div. 1994) appeal dismissed, 143 N.J. 314 (1995).

Gen. Acc. Ins. Co. v. State, 278 N.J. Super. 412 (App. Div. 1995), rev'd 143 N.J. 462 (1996).

Pfizer v. Employers Ins. of Wausau, No C-108-92 (N.J. Super. Ct. Law Div. 1995). 1995 WL 868157

Morrone v. Harleysville Mut. Ins. Co., 283 N.J. Super. 411 (App. Div. 1995).

Air Products and Chemicals Inc. v. Hartford Accident & Indem. Co., No. L-17134-89 (N.J. Super. Ct. Law Div. 1996).

Trustees of Princeton Univ. v. Aetna Cas. & Sur. Co., 293 N.J. Super. 296 (App. Div. 1996), leave to appeal granted, 147 N.J. 574 (1997).

Universal-Rundle Corp. v. Am. Motorist Ins. Co., No. L-06892-94 (N.J. Super. Ct. Law Div. 1997).

Flintkote Co. v. Liberty Mut. Ins. Co., No. L-38115-88 (N.J. Super. Ct. Law Div. 1996).

Chemical Leaman Tank Lines, Inc. v. The Aetna Cas. and Sur. Co., 978 F. Supp. 589 (D.N.J. 1997), 1999 U.S. App. LEXIS 10219 (3d Cir. N.J. 1999).

Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co., Civ. Act. No. 89-1543 (D.N.J. 1998).

GAF Corp. v. Hartford Accident & Indem. Co., No L-980-97 (N.J. Super. Law Div. 1999).

Zurich Ins. Co. v. Joseph Dixon Crucible Co., No. L-4898-96 (N.J. Super. Ct. Law Div. 1999).

Curtiss-Wright Corp. v. Pub. Serv. Mut. Ins. Co., No. A-217-99T3 (N.J. Super. Ct. App. Div. 2002).

Cycle Chem, Inc. v. Lumbermen's Mut. Cas. Co., 365 N.J. Super. 58 (App. Div. 2003).

Selected Ohio Case Law

City of Willoughby Hills v. Cincinnati Ins. Co., 9 Ohio St. 3d 177 (1984), appeal after remand, 26 Ohio App. 3d 146 (1986).

Prof'l Rental, Inc. v. Shelby Ins. Co., 75 Ohio App. 3d 365 (Ohio Ct. App. 1991).

Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co., 84 Ohio App. 3d 302 (Ohio Ct. App. 1993).

Affiliated FM Ins. Co. v. Amcast Indus. Corp., No. 92-4530 (Ohio Comm. Pls. 1993). Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London, 813 F. Supp. 576 (N.D. Ohio 1993).

U.S. Indus., Inc. v. Ins. Co. of N. America, 110 Ohio App. 3d 361 (Ohio Ct. App. 1996).

Danis Indus. Corp. v. Travelers Indem. Co., No. 95 CVH12-8904 (Ohio Comm. Pls. 1997).

Employers Ins. of Wausau v. Amcast Industrial Corp. 1998 WL 177546 (Ohio App. 2 Dist.).

Este Oils Co. v. Federated Ins. Co., 1999 Ohio App. LEXIS 421.

Air Products & Chemicals, Inc. v. Indiana Ins. Co., 1999 Ohio App. LEXIS 6217.

Century Sur. Co. v. Oster, 2000 Ohio App. LEXIS 172.

Jerry Cremeans v. Nationwide Mut. Fire Ins. Co., Case No. 841 (Ohio Ct. App. 2000).

Cincinnati Ins. Co. v. Colelli & Associates Inc., No. 00CA0053 (Ohio Ct. App. 2001), rev'd, No. 2001-1309 (Ohio Sup. Ct. 2002).

Selected Michigan Case Law

Michigan Millers Mut. Ins. Co. v. Bronson Plating Co., 197 Mich. App. 482 (Mich. Ct. App. 1992), aff'd, 445 Mich. 558 (1994).

Auto Owners Ins. Co. v. City of Clare, 446 Mich. 1, reh'g denied, 447 Mich. 1202 (1994).

Anderson Dev. Co. v. Travelers Indem. Co., 49 F.3d 1128 (6th Cir. 1995).

Arco Indus. Corp. v. Am. Motorists Inc. Co., 215 Mich. App. 633 (1996).

Am. Bumper and Mfg. Co. v. Hartford Fire Ins. Co., 452 Mich. 440, reh'g denied, 554 N.W.2d 10 (Mich. 1996).

South Macomb Disposal Auth. v. Am. Ins. Co., 225 Mich. App. 635 (1997).

Arco Indus. Corp. v. Am. Motorists Ins. Co., 232 Mich. App. 146 (1998).

Trimas Corp. v. Zurich Am. Ins. Group, 2003 WL 1861482 (Mich. App. Apr. 10, 2003) rev'd, 469 Mich. 879 (Mich. 2003),

F. Defining Covered Damages: The "As Damages" Issue

Selected New Jersey Case Law

Lansco, Inc. v. Dept. of Envtl. Prot., 138 N.J. Super. 275 (Ch. Div. 1975), aff'd, 145 N.J. Super. 433 (App. Div. 1976), cert. denied, 73 N.J. 57 (1977).

Broadwell Realty Services, Inc. v. Fid. & Cas. Co., 218 N.J. Super. 516 (App. Div. 1987).

Gloucester Tp. v. Maryland Cas. Co., 668 F. Supp. 394 (D.N.J. 1987).

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

CPS Chem. Co., Inc. v. Continental Ins. Co., 222 N.J. Super. 175 (App. Div. 1988).

Chemical Leaman Tank Lines v. Aetna Cas. & Sur., 788 F.Supp. 846 (D.N.J. 1992), aff'd, 89 F.3d 973 (3d Cir. 1996), cert. denied, 117 S. Ct. 485 (1996).

Morton Int'l, Inc. v. Gen. Accident Ins. Co., 134 N.J. 1 (1993), cert. denied, 114 S.Ct. 2764 (1994).

Crest Foam Corp. v. Hartford Accident & Indem. Co., No. L-1068-93 (N.J. Super. Ct. Law Div. 1996).

Metex Corp. v. Fed. Ins. Co., 290 N.J. Super. 95 (App. Div. 1996).

Strnad v. N. River Ins. Co., 292 N.J. Super. 476 (App. Div. 1996).

Am. Alliance Ins. Co. v. Jencraft Corp., 21 F. Supp. 2d 485 (D.N.J. 1998).

Selected Ohio Case Law

Kipin Indus., Inc. v. Am. Universal Ins. Co., 41 Ohio App. 3d 228 (Ohio Ct. App. 1987).

Morton Int'l., Inc. v. Harbor Ins. Co., 79 Ohio App. 3d 183 (Ohio Ct. App. 1992), appeal after remand on other grounds, 104 Ohio App. 3d 315 (Ohio Ct. App. 1995).

Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co., 84 Ohio App. 3d 302 (Ohio Ct. App. 1993).

Hartzell Indus. Inc. v. Fed. Ins. Co., No. C-3-99-325 (S.D. Ohio 2001). 168 F. Supp.2d 789

Selected Michigan Case Law

United States Aviex Co. v. Travelers Ins. Co., 125 Mich. App. 579 (Mich. Ct. App. 1983).

United States Fid. and Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139 (W.D. Mich. 1988). Polkow v. Citizen's Ins. Co. of Am., 180 Mich. App. 651 (Mich. Ct. App. 1989), rev'd on other grounds, 438 Mich. 174 (1991).

G. Trigger of Coverage

Selected New Jersey Case Law

Keene Corp. v. Ins. Co. of North Am., 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007, reh'g denied, 456 U.S. 951 (1982).

Lac D'Amiante du Quebec, Ltee. v. Am. Home Assurance, 613 F. Supp. 1549 (D.N.J. 1985).

Gottlieb v. Newark Ins. Co., 238 N.J. Super. 531 (App. Div. 1990).

Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co., 817 F. Supp. 1136 (D.N.J. 1993), aff'd, 89 F.3d 973 (3d Cir.), cert. denied, 117 S. Ct. 485 (1996).

Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437 (1994).

Witco Corp v. Travelers Indem. Co., 1994 WL 706076 (D.N.J. 1994), aff'd, 82 F.3d 408 (3d Cir. 1996).

Schering Corp. v. Evanston Ins. Co., No. L-197311-88 (N.J. Super. Ct. Law Div. 1995).

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

Astro Pak Corp. v. Fireman's Fund Ins. Co., 284 N.J. Super. 491 (App. Div.), cert. denied, 143 N.J. 323 (1995).

Pfizer Inc. v. Employers Ins. of Wausau, No. C-108-92 (N.J. Super. Ct. Law Div. 1996).

Chemical Leaman Tank Lines, Inc. v. The Aetna Cas. and Sur. Co., 978 F. Supp. 589 (D.N.J. 1997), 1999 U.S. App. LEXIS 10219 (3d Cir. 1999).

Carter-Wallace, Inc. v. Admiral Ins. Co., 154 N.J. 312 (1998).

Princeton Gamma-Tech Inc. v. Hartford Ins. Group, No. L-1289-91 (N.J. Super. Ct. Law Div. June 5, 1997 as supplemented October 1, 1997), as supplemented on December 8, 2000.

Prolerized Schiabo Neu Co. v. Hartford Accident and Indem. Co., Civ. Act. No. 94-4857 (D.N.J. 1997). 990 F. Supp 356

Universal-Rundle v. Commercial Ins., 319 N.J. Super. 223 (App. Div. 1999), cert. denied, 161 N.J. 149 (1999).

The Mennen Co. v. Fed. Ins. Co., UNN-L-2030-97 (N.J. Super. Ct. Law Div. 1999).

Mennen v. Atlantic Mut. Ins. Co., No. 93-Civ. 5273 (D.N.J. 1999). 1996 WL 33654297

Winding Hills Condo Ass'n Inc. v. N. Am. Specialty Ins. Co., 332 N.J. Super. 85 (App. Div. 2000).

Quincy Mut. Fire Ins. Co. v. Borough of Bellmawr, 172 N.J. 409 (2002).

The Stepan Co. v. New Jersey Mfrs. Ins. Co., No. C-297-98 (N.J. Super. Ct. Chance. Div. 2001).

Mid-Monmouth Realty Assoc. v. Metallurgical Indus., Inc., MON-L-2422-00 (N.J. Super. Ct. Law. Div. 2001).

Spaulding Composites Co., Inc. v. Liberty Mut. Ins. Co., 176 N.J. 25 (2003).

Benjamin Moore & Co. v. Aetna Cas. & Sur. Co., 2003 WL 1904383 (App. Div.), aff'd 179 N.J. 87 (2004).

United States Mineral Products Co. v. Am. Ins. Co., 348 N.J. Super. 526 (App. Div. 2002).

Champion Dyeing & Finishing Co. v. Centennial Ins. Co., 35 N.J. Super. 262 (App. Div. 2002).

Taylor Oil Co., Inc. v. Pa. Nat'l Mut. Cas. Ins. Co. and N. River Ins. Co., No.: Som-L-1275-03 (N.J. Super., Somerset Co., Law Div. Sept. 28, 2004)

Selected Ohio Case Law

B.F. Goodrich Co. v. Am. Motorists Ins. Co., 1986 WL 191786 (N.D. Ohio, 1986).

Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 829 F.2d 227 (1st Cir. 1987).

Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co., 74 Ohio Misc.2d 183 (Ohio Comm. Pls. 1995).

Lincoln Electric Co. v. St. Paul Fire and Marine Ins. Co., No. 1: 96 CV0537 N.D. Ohio (1998). 10 F. Supp 856

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600

Gen Corp., Inc. v. AIU Ins. Co., 2000 U.S. Dist. LEXIS 10302.

Goodyear Tire & Rubber Co. v. Aetna Cas. and Sur. Co., 95 Ohio St. 3d 512 (2002).

GenCorp v. AIU Ins. Co., 297 F. Supp. 2d 995 (N.D. Ohio 2003.) (GenCorp II) motion for reconsideration denied, 304 F. Supp. 2d 955 (N.D. Ohio 2004).

Glidden Co. v. Lumbermens Mut. Cas. Co. and Millennium Chemicals Inc. v. Lumbermens Mut. Cas. Co., (Nos.: 409309 and 411388, Ohio Ct. Comm. Pleas, Cuyahoga, 2002), 2004 WL2931019 (Ohio App 8 Dist.).

Fid. and Guar. Ins. Underwriters, Inc. v. Nationwide Tanks, Inc., 2006 U.S. Dist. LEXIS 9854 (S.D. Ohio Feb. 22, 2006)

Selected Michigan Case Law

Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 662 F.Supp. 71 (E.D. Mich. 1987).

TransAmerica Ins. Co. of Mich. v. Safeco Ins. Co., 189 Mich. App. 55 (Mich. Ct. App. 1991).

Straits Steel and Wire Co. v. Michigan Millers Mut. Ins. Co., No. 91-72991-CK (Mich. Cir. 1992).

Cello-Foil Products Inc. v. Michigan Mut. Liab. Co., 1995 WL 854728 (Mich. App. 1995), leave to appeal granted, 560 N.W.2d 637 (Mich. 1997).

Gelman Sciences, Inc. v. Fid. & Cas. Co., 214 Mich. App. 560 (Mich. Ct. App. 1995), leave to appeal granted, 560 N.W.2d 638 (Mich. 1997).

Dow Corning Corp. v. Granite State Ins. Co., No. 93-325-788 CK (Mich. Cir. 1996).

Am. Bumper and Mfg. Co. v. Hartford Fire Ins. Co., 550 N.W.2d 475, reh'g denied, 554 N.W.2d 10 (Mich. 1996).

Corduroy Rubber Co. v. The Home Indem. Co., No. 191846 (Mich. App. 1997). 1997 WL 33347764

Joan Graham v. Providence Washington Ins. Co., No. 182088 (Mich. App. 1997).

Gelman Sciences, Inc. v. Fid. and Cas. Co. of New York and Arco Indus. Corp. v. Am. Motorists Ins. Co., 456 Mich. 305 (1998).

Arco Indus. Corp. v. Am. Motorists Ins. Co., 232 Mich. App. 146 (1998).

Corduroy Rubber Co. v. Home Indem. Co., No. 191846 (Mich. App. 1999). 1999 WL 33453994

Century Indem. Co. v. Aero-Motive Co., 2003 U.S. Dist. LEXIS 24565 (W.D. Mich.).

99 Wood Avenue South, Woodbridge, NJ 07095 | 732.549.5600 / 75 Livingston Avenue, Roseland, NJ 07068 | 973.535.1600