

## CHAPTER 18

# SITE POLLUTION LIABILITY INSURANCE

BY ROBERT M. HORKOVICH, RENE F. HERTZOG, AND PETER A. HALPRIN

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### *I. Introduction*

Environmental impairment liability (EIL) insurance first appeared on the market in the mid-1970s. This first-generation coverage for environmental hazards emerged as an increasing number of businesses facing liabilities resulting from gradual pollution incidents were unable to obtain coverage under their general liability policies. While the availability of EIL insurance was expected to surge in response to the growing awareness of environmental hazards and federal laws designed to regulate hazardous waste—and, for a short time it did—the mid-1980s saw an abrupt disappearance from the market of EIL insurance products as fewer and fewer insurance companies were able to keep pace with the number of environmental claims and the often exorbitant costs of those claims. When coverage for environmental hazards reemerged in the 1990s and the first part of the twenty-first century, the products available were more specialized, the underwriting more detailed, and the targeted policyholders more varied, resulting in a sustainable market niche.

This chapter will discuss the origins and evolution of EIL insurance and conclude with a discussion of the primary pollution liability coverage products for site-specific environmental risks presently on the market.

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### *II. Origins of EIL Insurance*

Before beginning a discussion of the insurance products offered today for coverage of environmental liabilities, it is important to understand the climate in which insurance coverage for environmental liabilities emerged. A combination of high-profile environmental disasters, reactive legislation, and, of course, an eagerness by the insurance industry to tap a new market while maintaining the stability of

general liability products created an opening for this new specialized type of insurance coverage.

## A. GROWING NATIONAL AWARENESS OF ENVIRONMENTAL HAZARDS

Public awareness in the United States of the long-term, ill effects of environmental pollution on the public welfare, the environment, and natural resources came to the forefront after several well-publicized environmental disasters and the enactment of federal environmental legislation in response to those disasters. The increase in public awareness led to an increase in legislation and, inevitably, litigation over financial responsibility for the cleanup and damages resulting from environmental pollution.

### 1. *Love Canal and Other Environmental Catastrophes*

In the 1970s, the United States faced what was, at the time, one of the most significant environmental tragedies in its history, the so-called "Love Canal." Love Canal was meant to be a dream community after the vision of William T. Love, who began construction of the canal in the early 1900s. Years after the dream had died, Hooker Chemical Company used the land as a dump for its industrial waste. Eventually, a school and a number of homes were built on the site. As observed by Eckardt C. Beck in January 1979:

I wrote, regarding chemical dumpsites in general, that "even though some of these landfills have been closed down, they may stand like ticking time bombs." Just months later, Love Canal exploded.

The explosion was triggered by a record amount of rainfall. Shortly thereafter, the leaching began.

I visited the canal area at that time. Corroding waste-disposal drums could be seen breaking up through the grounds of backyards. Trees and gardens were turning black and dying. One entire swimming pool had been popped up from its foundation, afloat now on a small sea of chemicals. Puddles of noxious substances were pointed out to me by the residents. Some of these puddles were in their yards, some were in their basements, others yet were on the school grounds. Everywhere the air had a faint, choking smell. Children returned from play with burns on their hands and faces.<sup>1</sup>

The Love Canal tragedy included the declaration of two separate environmental emergencies by then President Carter as well as the evacuation of 950 families from a ten-block area surrounding the canal.<sup>2</sup>

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1. Eckardt C. Beck, *The Love Canal Tragedy*, EPA JOURNAL (Jan. 1979), <http://www.epa.gov/history/topics/lovecanal/01.html>.

2. Press Release, U.S. Env'tl. Prot. Agency, EPA Removes Love Canal from Superfund List (Sept. 30, 2004), available at <http://www.epa.gov/superfund/accomp/news/lovecanal.htm>.

The environmental contamination at Love Canal not only outraged the public, but also resulted in years of litigation involving the offending parties. It was not until 2004, after more than twenty years of cleanup and monitoring, that the Environmental Protection Agency (EPA) removed Love Canal from its National Priorities List.<sup>3</sup> Love Canal, and other incidents such as Three Mile Island and Times Beach, contributed to public awareness of the catastrophic consequences of the failure to address pollution.

## 2. Federal Environmental Cleanup Statutes

Largely in response to environmental tragedies like Love Canal, a growing awareness of the potentially devastating effects of contamination from hazardous wastes resulted in the enactment of several comprehensive and far-reaching statutory liability schemes.<sup>4</sup> The first of two federal environmental acts that played a significant role in the increase and development of environmental insurance policies was the Resource Conservation and Recovery Act of 1976 (RCRA).<sup>5</sup> RCRA was designed to be a “cradle-to-grave” regulation of hazardous waste. One important aspect of RCRA was to be its establishment of financial responsibility requirements for hazardous waste management facilities, known as treatment, storage, and disposal facilities (TSDFs).

In 1980, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) was enacted, now commonly known as Superfund.<sup>6</sup> As originally enacted, CERCLA provided for guidelines and requirements for abandoned and closed hazardous waste sites; established liability of responsible persons for releases of hazardous waste at such sites; and established a fund for cleanup of sites for which no responsible party could be identified.<sup>7</sup> The far-reaching liability that CERCLA imposed on corporations, landowners, and municipalities created the potential for substantial environmental cleanup responsibilities and costs. Indeed, the strict and retroactive liability standard imposed by CERCLA meant that potentially responsible persons (PRPs) could be held responsible for harm to the environment that had taken place decades prior. Persons liable under the statute could potentially include both current owners or operators of a facility and the owners and operators of the facility at the time the hazardous waste was disposed.<sup>8</sup>

Both statutes required property owners to demonstrate financial responsibility for the cleanup of a contaminated site. One method of showing such financial

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3. *Id.*

4. Earlier regulation of environmental hazards included acts such as the Clean Water Act, the Clean Air Act, and the Toxic Substances Control Act.

5. 42 U.S.C. §§ 6901 et seq. For an in-depth discussion of RCRA, see Chapter 2, *supra*.

6. 42 U.S.C. §§ 9601 et seq. CERCLA is discussed in Chapter 1, *supra*.

7. On the history of Superfund and current activity, see generally <http://www.epa.gov/superfund/index.htm>.

8. 42 U.S.C. § 9607.

responsibility was through the purchase of insurance coverage.<sup>9</sup> Accordingly, a market for environmental insurance products was born.

## B. FILLING THE GAP—THE “COVERAGE GAP” CREATED BY CGL POLICIES

As an increased number of policyholders began to face environmental liabilities resulting from gradual pollution, insurance companies initially denied coverage, arguing that the losses were excluded from coverage under the standard commercial general liability (CGL) policy. Coverage was primarily denied under two standard exclusions: the pollution exclusion, which excluded loss for anything other than “sudden and accidental” pollution, and the “owned property” exclusion, which excluded loss for damage to the policyholder’s owned or leased property. Because these exclusions are important in understanding why the need for a stand-alone EIL policy developed, they are discussed briefly below.

### 1. *The Pollution Exclusion*

Early CGL policies did not contain exclusions for pollution and were widely understood to cover environmental liabilities. But, as a result of a rise in the number and severity of environmental liability claims in the early 1970s, the first pollution exclusion was drafted by the insurance industry and began to appear in CGL policies. The “sudden and accidental” or “qualified” pollution exclusion, as it was alternately known, excluded coverage for damages resulting from gradual pollution but provided an exception to bring back within coverage damages where the pollution was “sudden and accidental.” The environmental liabilities that began to emerge in the latter half of the twentieth century were largely gradual legacy pollution impairments that arose from the disposal or seepage of hazardous wastes that may have occurred decades prior to the manifestation of contamination or resulting harm. In response, insurance companies asserted the qualified pollution exclusion to deny claims on the basis that the pollution at issue was neither “sudden” nor “accidental.” While not the focus of this chapter, the meaning of “sudden and accidental” provided fodder for a host of litigation surrounding the 1970-form pollution exclusion, including whether the word “sudden” should be given a temporal interpretation—to indicate an occurrence that is instantaneous or abrupt—and the extent to which the policyholder’s intent ought to be factored into the interpretation of “accidental.”

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9. This financial responsibility requirement extends to the regulation of underground storage tanks (USTs), which can be satisfied by proof of insurance coverage. *See Zurich Am. Ins. Co. v. Whittier Properties, Inc.*, 356 F.3d 1132, 1135 (9th Cir. 2004). Federal regulations allow a state to implement, with EPA approval, its own UST program to take the place of the federal program. EPA approval of a state UST program rests on whether the program adequately provides for contamination release detection, prevention, and correction, including requirements of proof of financial responsibility for all UST operators.

Due in part to the interpretation by many courts that the qualified pollution exclusion was ambiguous, and as the number of environmental liability claims continued to climb, the early 1980s saw the introduction from the insurance industry of the so-called “absolute” pollution exclusion, designed to restrict further the coverage for pollution under CGL policies. This form of the pollution exclusion, which since 1986 has been contained in the standard CGL policy, eliminated the “sudden and accidental” exception from the exclusion with the intention of excluding coverage for any and all damages resulting from pollution.<sup>10</sup> Through its efforts to avoid coverage for pollution claims under the CGL policy by drafting the pollution exclusion, the insurance industry created a market for policies whose sole purpose was to cover pollution claims.

## 2. *The “Owned Property” Exclusion*

The “owned property” exclusion also provided an avenue for insurance companies to avoid liability under the standard CGL policy for claims resulting from a policyholder’s environmental liabilities. The “owned property” exclusion referred to property damage to property owned, rented, or occupied by the policyholder. The 1973-form ISO exclusion read:

This insurance does not apply 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.

When faced with claims for coverage under CGL policies for loss resulting from environmental liabilities, many insurance companies argued that general liability insurance was meant to provide coverage only for property damage or bodily injury sustained by third parties, while first-party casualty coverage provided coverage for damage to the policyholder’s property. Though cleanup of environmental contamination could extend to third-party claims and thus did not implicate the owned property exclusion, the claims often involved cleanup of the policyholder’s own property.<sup>11</sup> As such, the exclusion was often successfully invoked to preclude coverage under these circumstances. Of course, even where the exclusion otherwise may

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10. While in its essence the absolute pollution exclusion was meant to exclude coverage only for industrial environmental pollution, insurance companies have attempted, and in some cases succeeded, to extend the exclusion to deny coverage for a host of incidents far removed from traditional industrial pollutants, such as asbestos, lead poisoning, and insecticides.

11. At the same time, the exclusion was found inapplicable by many courts as they did not consider policyholders to “own” the polluted area. For example, in the CGL context, courts found the exclusion inapplicable by distinguishing ownership in a regulatory sense (such as a state’s regulation of waterways) from ownership in a possessory sense. *See State v. Superior Court*, 93 Cal. Rptr. 2d 276, 287 (Cal. Ct. App. 2000)

apply, an insurance company may be required to pay the necessary costs a policyholder expends to mitigate losses that are in progress and to avoid damage to the property of others where there is potential for imminent harm. This is a rational result, as a policyholder who believes coverage will be precluded pursuant to the “owned property” exclusion may otherwise be reluctant to act and allow pollution and contamination to spread.

### *3. Additional Defenses to Coverage under the CGL Policy*

While the pollution exclusion and the “owned property” exclusion provided insurance companies with ample means to avoid liability for their policyholders’ environmental claims, other defenses to coverage also arose. Several of the most common of these are discussed below.

One example of a defense an insurance company could assert in response to a claim for environmental losses is that such losses are not covered damages. Pursuant to CERCLA, a party responsible for environmental damage is required to clean up the contaminated site. Unsurprisingly, responsible parties facing liability under CERCLA attempted to obtain coverage under their CGL policies for the cleanup costs incurred. The insurance industry’s response was that the cleanup costs did not constitute “damages” under the CGL policy. While many courts did not accept this argument, it nevertheless provided further incentive to market specialized products meant specifically to provide coverage for CERCLA liability and government-mandated cleanup costs.

Another example concerns the commencement of a cleanup action. Cleanup actions are generally initiated by the EPA or a state environmental agency issuing a letter informing the PRP that it may be liable for cleanup of a hazardous waste site. Standard CGL policies obligate the insurance company to defend a “suit” against the policyholder seeking damages. Accordingly, insurance companies argued that a PRP letter is not a “suit” and that it does not constitute the threat of legal action required to trigger the duty to defend, but rather is merely a request that the PRP take voluntary action toward cleanup of a contaminated site.

It was in this climate of increased awareness of environmental hazards, coupled with perceived “gaps”—real or manufactured—in the coverage provided by standard CGL policies for those hazards that early EIL policies were conceived and marketed.

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(holding owned property exclusion inapplicable to groundwater pollution arising from State’s operation of toxic waste facility).

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### III. *The Rise and Fall of Early EIL Insurance*

#### A. INTRODUCTION

EIL insurance was first introduced in the United States in the late 1970s. Early providers of EIL insurance included the London-based firm of Wohlreich and Anderson; Shand Morahan and Company of Evanston, Illinois; Swett & Crawford; and American International Group (AIG). In an August 1980 press release, Shand Morahan introduced its new coverage:

Shand, Morahan & Company has recently instituted a new program: ENVIRONMENTAL IMPAIRMENT LIABILITY INSURANCE (EIL). This program is specifically designed to fill the gap in traditional insurance portfolios, by providing coverage for claims arising out of “non-sudden” and gradual pollution.<sup>12</sup>

As the Shand Morahan press release demonstrates, many insurance companies focused their marketing efforts on the perception that CGL coverage left a “gap” that must be filled with specialized EIL insurance in order to guarantee coverage for environmental claims. This allowed insurance companies to market their new environmental products while also reinforcing the insurance industry’s assertion that CGL coverage did not, and was never meant to, cover environmental hazards. Properly viewed, however, EIL insurance is not exclusively a gap filler, but merely specialized insurance meant for a very specific risk that operated to supplement CGL coverage. Indeed, many policyholders understood their purchase of EIL insurance to be a supplement to their liability or property coverage rather than a necessity without which there would be no coverage for environmental claims.

The early EIL policies did provide for coverage of gradual pollution liabilities, the most significant of the alleged “gaps” in coverage left by CGL policies.<sup>13</sup> The policies’ overall effectiveness in meeting the needs of individuals and entities facing pollution-related losses and the industry’s preparedness for the enormous environmental liability claims that threatened to besiege the industry, however, proved to be lacking.

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12. The press release is attached as Exhibit B to a brief dated October 29, 1992, in *Browning-Ferris Industries, Inc. v. Evanston Ins. Co.*, No. 90-059406 (113 Tex. Dist. Ct. Oct. 29, 1992) [hereinafter *Browning-Ferris*].

13. Because EIL policies were relatively new, much of the early litigation sought to determine the relationship between EIL and CGL policies when a policyholder suffered a loss and sought coverage from both its EIL and CGL insurance companies. *See, e.g.*, *RSR Corp. v. Int’l Ins. Co.*, No. 3:00-CIV-0250, 2009 WL 927527 (N.D. Tex. Mar. 23, 2009) (finding that the EIL insurance company was entitled to credit for settlements where CGL policies covered the same claims over the same period), *aff’d*, 612 F.3d 851 (5th Cir. 2010); *Ins. Co. of N. Am. v. Kayser-Roth Corp.*, 770 A.2d 403 (R.I. 2001); *Shell Oil Co. v. Winterthus Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815 (Cal. Ct. App. 1993) (holding an EIL policy to be excess to CGL policies, which contained qualified rather than absolute pollution exclusions).

## B. COVERAGE PROVIDED BY FIRST-GENERATION EIL POLICIES

The earliest of the EIL policies provided coverage only for third-party claims for bodily injury, property damage, and cleanup costs related to a pollution incident emanating from a policyholder's site. In a handbook created for its agents in 1982, the Hartford Steam Boiler Inspection & Insurance Company described EIL insurance as

coverage for third-party damage claims arising out of bodily injury or property damage which result from the gradual release of a pollutant into the environment. In addition, it provides insurance for claims arising out of an impairment or interference with an environmental right, as well as the cost to clean up the release of the pollutant (off-site) when that cost is imposed upon the insured by and [sic] authorized governmental body.<sup>14</sup>

Coverage for claims or costs incurred in connection with pollution conditions on the policyholder's premises generally was only offered at an additional premium. The Evanston Insurance Company specimen policy circa 1980 included an exclusion that precluded coverage for many of the various categories of losses for which policyholders were in growing need. The exclusion applied to claims for or in connection with "(a) any conditions on the premises of the Insured, (b) neutralizing, restoring, landfilling, cleaning up or inactivating any waste disposal sites, (c) any maintenance operation, (d) the dumping of toxic or radioactive substance in international waters."

While early EIL policies varied greatly—much like their modern-day successors—and there was no standard form policy available, first-generation policies nevertheless did share certain key features, which are discussed below. Coverage was not often litigated under early EIL policies, and, as such, there is relatively little case law on these policies.<sup>15</sup> Indeed, according to one California court, "[a]n environmental impairment liability insurance policy . . . is fairly uncommon and rarely discussed in case law."<sup>16</sup> Nonetheless, there were at least a few issues that were litigated with some regularity.

### 1. Coverage for Environmental Impairments

EIL policies included coverage for damages or costs resulting from "environmental impairment," also called a "pollution incident" or "pollution conditions," provided that the environmental impairment or pollution incident resulted in environmental damage. One policy defined "environmental impairment" as:

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14. THE HARTFORD STEAM BOILER INSPECTION & INSURANCE CO., ENVIRONMENTAL RISK CONTROL SERVICES, SPECIAL AGENT HANDBOOK (rev. ed. 1982) [hereinafter THE HARTFORD HANDBOOK] (on file with authors).

15. See Tod I. Zuckerman & Mark Raskoff, 3 ENVTL. INS. LITIG.: L. & PRAC. § 28:2 (2010).

16. See *Masonite Corp. v. Great Am. Surplus Lines Ins. Co.*, 274 Cal. Rptr. 206, 208 (Cal. Ct. App. 1990).



(a) the emission, discharge, dispersal, disposal, seepage, release or escape of any liquid, solid, gaseous or thermal irritant, contaminant or pollutant into or upon land, the atmosphere or any watercourse or body of water;

(b) the generation of smell, noises, vibrations, light, electricity, radiation, changes in temperature or any other sensory phenomena but not fire or explosion arising out of or in the course of the Insured's operations, installations or premises, all as designated in the Declarations.<sup>17</sup>

Some early EIL policies specifically excluded coverage for the “sudden and accidental” pollution coverage that was covered by the standard form CGL policy, making these policies in many ways truly only a “gap” filler and not comprehensive pollution coverage. For example, in a policy from 1982 to 1983 issued by Evanston Insurance Company, the definition of “environmental impairment” included the qualifier that “such occurrence or event is not sudden and accidental.”<sup>18</sup>

Similarly, “pollution conditions” was defined in early policies to mean:

the discharges, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollution into or upon land, the atmosphere or any watercourse of body of water, which results in bodily injury or property damage.

## 2. *Claims-Made Coverage*

Standard CGL policies provide coverage for an “occurrence” within the policy period. The standard-form CGL policy in existence at the time of first-generation EIL policies defined “occurrence” as “an accident, including injurious exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” Because of the retroactive liability imposed by CERCLA, the occurrence-based CGL policy meant that a policyholder could assert a claim for coverage of an “occurrence” or “accident” that happened decades prior to the resulting claim against the policyholder for resulting damage, even if a policy period had long since ended and no current coverage was in place, so long as the identified occurrence fell within the policy period. Recognizing the need to limit their long-tail exposure to environmental claims, insurance companies that sold specialized EIL products sold what were almost uniformly “claims-made” policies.<sup>19</sup>

A claims-made policy provides coverage only for claims made against the policyholder and reported to the insurance company within the policy period.

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17. Specimen policy attached to *THE HARTFORD HANDBOOK*, *supra* note 15.

18. Policy is attached as an exhibit to a brief dated October 29, 1992, in *Browning-Ferris*, No. 90-059406, *supra* note 13 (Exhibit A, Definitions, ¶ 6).

19. As one underwriter succinctly commented when advising what one should seek in an EIL policy: “Occurrence-form coverage as opposed to claims-made form (if you find this anywhere, kindly let us know).” Richard P. Kropp, *Finding the Right EIL Policy*, *BUSINESS INSURANCE* (Nov. 28, 1983).

Claims-made policies provide a mechanism for an insurance company to limit its long-tail exposure, as it will have knowledge of the finite liabilities faced by its policyholder as of the policy's termination date or extended reporting period, and the insurance company will not remain subject to liability past that date. Unlike an occurrence policy, in order to be continuously covered, an EIL policyholder must continuously renew (or purchase new insurance) at the termination of each policy period. In claims-made policies, the requirement that a claim be reported during the policy period is generally seen as a condition precedent to coverage.

While it was clear that a claim must be made against the policyholder during the policy period, what constituted a "claim" often lacked clarity since many first-generation EIL policies failed to define the term. As others have observed, in an effort to apply the term, courts utilized an objective test analyzing two elements. Under this objective standard, in order to show that a claim exists, there must be (1) an identifiable existing injury to a third party and (2) a demand by such third party that the injury be redressed.<sup>20</sup>

Whether the facts in a particular dispute constituted a claim or suit under an EIL policy was often a primary point of contention between EIL policyholders and their insurance companies. In general, this determination tended to be very fact specific and was resolved on a case-by-case basis.<sup>21</sup>

*Pacific Insurance Co. v. Cordova Chemical Co.* presents a fact pattern typical of the cases in which this issue arose.<sup>22</sup> Cordova received correspondence from the EPA in connection with environmental contamination for which it had been identified as a potentially responsible party.<sup>23</sup> The court held that such correspondence constituted a claim or suit under the policy because the letter notified the policyholder of its potential liability.<sup>24</sup> Thus, letters from environmental regulatory bodies are typically held to constitute a claim under EIL policies.<sup>25</sup> By contrast, a letter

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20. See, e.g., David M. Siesko, *EIL Contracts and Market Availability*, ANNUAL MEETING ABA: LITIGATION SECTION 11 (Oct. 19, 1990).

21. See *Int'l Ins. Co. v. RSR Corp.*, No. Civ. A. 3:00-CV0250P, 2004 WL 572360 (N.D. Tex. Mar. 8, 2004). See also *Yankee Caithness Joint Venture L.P. v. Planet Ins. Co.*, No. 94 CIV. 8939 (S.D.N.Y. Apr. 24, 1996) (denying cross-motions for summary judgment as to whether a claim was made where the policyholder received letters from an attorney threatening suit, but it was unclear if the letters were related to a suit that was later filed).

22. *Pac. Ins. Co. v. Cordova Chem. Co.*, No. 87-23270-CK (Mich. Cir. Ct. Jan. 20, 1989), reported in *Mealey's Litig. Reports (Ins.)* 109 (Mar. 1989).

23. *Id.*

24. *Id.*

25. See *RSR Corp.*, 2004 WL 572360, at \*2 (holding that the listing of a pollution site on the EPA National Priority List constituted a claim); *Cargill, Inc. v. Evanston Ins. Co.*, 642 N.W.2d 80 (Minn. Ct. App. 2002) (ruling that letters from the Georgia Department of Natural Resources constituted a claim, even though no demand was made for money damages or services, where the letters explicitly stated that remedial investigations were to be conducted at the policyholder's expense). But see *Cent. Ill. Pub. Serv. Co. v. Am. Empire Surplus Lines Ins. Co.*, 642 N.E.2d 723 (Ill. App. Ct. 1994) (finding that where Illinois EPA commu-

from a business to a policyholder revealing that the business was under investigation by a state agency, but declaring the investigation to be baseless, was not a claim entitling the policyholder to coverage under the EIL policy.<sup>26</sup> Similarly, where a policyholder was given notice of pollution or contamination but no demand to engage in cleanup efforts or similar activities was made, courts were unlikely to find that a claim existed for the purpose of triggering coverage.<sup>27</sup>

Timely notice to insurers was also litigated under a number of early EIL policies, often in concert with the “claim” issue. As with other insurance policies, a policyholder’s failure to comply with notice provisions can provide insurance companies with a basis to avoid their coverage obligations.<sup>28</sup> In *Cargill, Inc. v. Evanston Insurance Co.*, a Minnesota appeals court reversed a summary judgment ruling for Evanston on notice grounds.<sup>29</sup> Despite the fact that the policyholder waited two years before providing notice, the court overturned the lower court’s judgment because the policyholder did not believe notice was proper before it had exceeded its deductible. Although the courts in *Canadyne-Georgia Corp.* and *Cargill* did not require the insurance companies to demonstrate that they had been prejudiced by the late notice, many jurisdictions now require such a demonstration when litigating notice issues. In fact, this standard has become so widespread that courts often apply a prejudice requirement in order to prevent forfeiture of coverage where a policyholder has otherwise breached a condition in a policy, even if it does not pertain to notice.<sup>30</sup>

### 3. Underground Storage Tanks

Under RCRA, the EPA was required to issue regulations to protect the environment from underground storage tank (UST) leaks and to require owners and operators to demonstrate financial responsibility for them. While enforcement of these

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communications with policyholder did not include a demand, written or otherwise, no claim was made within the policy period that would trigger coverage).

26. Claim was defined in only one of the policies at issue; the court therefore applied the common law definition of claim—“demand for money or property as of right”—to the other EIL Policies. See *Hatco Corp. v. W. R. Grace & Co-Conn.*, 801 F. Supp. 1334, 1374 (D.N.J. 1992).

27. See, e.g., *A.J. Hall, Inc. v. Federated Mut. Ins. Co.*, Nos. 01-A-01-9508-CH00369, 8981, 1996 WL 23368 (Tenn. Ct. App. Jan. 24, 1996) (holding that although policy did not define “claim,” the term was unambiguous such that notice of pollution incident was not notice of a claim); *S. Macomb Disposal Auth. v. Westchester Fire Ins. Co.*, No. 84-2686 (Mich. Cir. Ct. 1995), reported in 9(15) *Mealey’s Litig. Rep. (Ins.)* 3 (Feb. 15, 1995) (holding that a notice of leachate outbreak was not a claim).

28. *Canadyne-Ga. Corp. v. Cont’l Ins. Co.*, 999 F.2d 1547 (11th Cir. 1993) (declining to reach the issue of whether the policyholder was entitled to coverage for pre-notice expenditures, where policyholder failed to report environmental contamination within three years of having knowledge of the occurrence).

29. *Cargill*, 642 N.W.2d 80.

30. *Int’l Ins. Co. v. RSR Corp.*, 148 F. App’x 226 (5th Cir. Sept. 19, 2005) (requiring the insurance company to demonstrate prejudice where the policyholder allegedly violated a provision that prevented settlement or acknowledgment of fault in connection with any claim).

regulations was not as rigorous as initially intended, what enforcement there was allowed for the development of a market for storage tank coverage. By 1990, five carriers offered storage tank coverage.<sup>31</sup> Early coverage focused on third-party bodily injury and property damage, but in select cases, coverage was available for on-site cleanup as well.<sup>32</sup>

Prior to the 1990s, policyholders seeking coverage for contamination associated with UST sites sought coverage under general EIL policies. In *Alan Corp. v. International Surplus Lines Insurance Co.*, the policyholder sold fuel oil to gas stations and, as a consequence, stored oil in large underground tanks.<sup>33</sup> During the policy period, Alan became aware of potential contamination from the tanks. In an attempt to comply with state fire regulations, Alan reported the contamination to the local fire department. At trial, Alan argued that this phone call, which occurred during the policy period, constituted governmental action as required for coverage under the policy. The court rejected this position, holding that the phone call was not government action, even though it may have been one of the steps that led to an eventual cleanup action initiated by the Massachusetts Department of Environmental Protection.<sup>34</sup> The eventual cleanup action commenced after the policy period had ended and was independent of the call to the fire department.<sup>35</sup> Accordingly, the court held that the policyholder was not entitled to coverage.

#### 4. Typical Exclusions

Typical exclusions in early EIL policies included restrictions based on prior knowledge, “owned property,” mitigation of damage, and intentional misconduct.

##### (a) The Prior Knowledge Exclusion

The doctrine of “fortuity” was often raised as a defense to coverage under CGL policies. Of course, the terms “fortuity” and “known loss” were not present in the language of CGL policies.<sup>36</sup> Instead, the concept was based on common law and, in some states, on statutes.<sup>37</sup> The fortuity doctrine is based on the principle that a policyholder may not get insurance coverage for liabilities it knew had occurred or that it intended to occur prior to purchasing coverage. The doctrine was applied to avoid intentional, fraudulent acts by an insured to procure insurance funds. The doctrine has been inappropriately expanded by both insurance companies and

31. See David M. Siesko, *EIL Contracts and Market Availability*, ANNUAL MEETING ABA: LITIGATION SECTION 20–24 (Oct. 19, 1990).

32. *Id.*

33. See *Alan Corp. v. Int’l Surplus Lines Ins. Co.*, 22 F.3d 339, 340 (1st Cir. 1994).

34. *Id.* at 342.

35. *Id.*

36. The known loss defenses are generally considered to be part of the “fortuity” doctrine. The concept of fortuity has been discussed in detail in numerous publications, and many of the seminal authorities are cited in *Aluminum Co. of America v. Aetna Casualty & Surety Co.*, 998 P.2d 856, 878 (Wash. 2000).

37. *Aluminum Co. of Am.*, 998 P.2d at 878.

some courts to suggest that a policyholder cannot get coverage for an event that it knew would occur. But, of course, it is the knowledge of the possibility that loss may occur in the future that drives the decision to purchase insurance in the first place.<sup>38</sup> Thus, the fortuity doctrine is appropriately applied where a policyholder knew that it would be *held liable* for an occurrence prior to its purchase of insurance coverage—not merely because it had knowledge that loss may occur in the future.<sup>39</sup>

With respect to EIL policies, the pivotal issue is the insured’s knowledge of the imposition of liability on it for the discharge of contaminants and not whether the insured was actually aware that it was discharging contaminants.<sup>40</sup> As one court recognized, holding that general knowledge that a loss may occur precludes coverage would be much too broad.<sup>41</sup>

The prior knowledge exclusion—which exists in several forms in EIL policies, including known loss or known conditions—was often litigated and emerged as a bar to coverage for preexisting pollution conditions. It is referred to as “known loss” because the policyholder’s knowledge that preexisting conditions may result in liability was generally the critical issue in determining whether a loss was known prior to the policy’s inception, rendering it not covered under a typical EIL policy.<sup>42</sup>

Certainly not every discharge leads to liability; if the test turned on whether the insured knew that it was discharging contaminants prior to the purchase of the policy, coverage would be rendered illusory. Instead, the standard focuses on the insured’s knowledge of likely imposition of liability prior to buying a policy to cover that liability. Despite this critical difference, courts sometimes misconstrued the standard. In *American Micro Devices v. Great American Surplus Lines Insurance Co.*, for example, a computer chip manufacturer sought coverage for the costs associated with the removal of a toxic contaminant from the premises of its manufacturing plant.<sup>43</sup> Ignoring the issue of liability as a key factor, the court held that although the problem “may not have appeared ‘near as big a problem as it turned out to be,’”

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38. See, e.g., *Pub. Utility Dist. No. 1 of Klickitat Cnty. v. Int’l Ins. Co.*, 881 P.2d 1020, 1032 (Wash. 1994).

39. To illustrate the point, consider the purchase of a twenty-year life insurance policy. A person may reasonably understand that there is a risk that he will die within twenty years. It is the knowledge of that risk and the desire to prepare for and manage that risk that drives the purchase of that policy.

40. See *Aluminum Co. of Am*, 998 P.2d at 882 (citing *Rohm & Haas Co. v. Cont’l Cas. Co.*, 732 A.3d 1236, 1258 (Pa. Super. 1999) (observing that the appropriate standard “should not be knowledge of certainty of damages and liability, but whether the evidence shows that the [policyholder] was charged with knowledge which reasonably shows that it was, or should be, aware of a likely exposure to losses which would reach the level of coverage”).

41. See *Klickitat Cnty.*, 881 P.2d at 1032.

42. See *Ins. Co. of N. Am. v. Kayser-Roth*, 770 A.2d 403, 415–16 (R.I. 2001) (ruling that the “known loss” doctrine does not apply where the policy incepted before the policyholder had any indication that the government would hold it liable for the costs of remediation).

43. *Am. Micro Devices v. Great Am. Surplus Lines Ins. Co.*, 245 Cal. Rptr. 44 (Cal. Ct. App. 1988).

because American Micro Devices had actual knowledge of the contamination prior to the inception of the policy, it was not entitled to coverage.<sup>44</sup>

(b) Intentional Discharge or Misconduct Exclusion

A similar issue, akin to the misdirected focus on the policyholder's prior knowledge of contamination, is an exclusion barring coverage for the intentional discharge of pollutants. Early EIL policies, influenced by pollution exclusion litigation, barred coverage for loss arising from environmental impairment that is sudden and accidental. In *Masonite Corp. v. Great American Surplus Lines Insurance Co.*, the insured purchased a wood preserving plant, operation of which included the discharge of chemical waste into the grounds around the plant.<sup>45</sup> The insurance company denied coverage on the grounds that the releases were gradual and fortuitous rather than sudden and accidental. A jury found that the insured was not entitled to coverage because the releases were expected or intended. On appeal, the jury instruction that coverage would be available only if the pollution was gradual, and neither expected nor intended, was upheld.<sup>46</sup> Accordingly, EIL policies with such exclusions are unlikely to provide coverage when courts classify the underlying contamination as the result of expected or intended actions.<sup>47</sup>

(c) "Owned Property" Exclusion

CGL policies typically do not provide coverage for property damage to the insured's own property. The insurance industry has maintained that general liability insurance was meant to provide coverage only for an insured's liabilities arising from third-party property damage or bodily injury claims, while first-party property policies are the appropriate mechanism for covering the insured's property. Concepts of "loss mitigation" challenged this principle, given that, in select circumstances, a policyholder may be reimbursed for costs expended in mitigating losses. Early EIL policies failed to adequately address this particular "gap" in coverage since they, too, maintained a bar on environmental cleanup coverage of an insured's site through the "owned property" exclusion.

In *Cargill, Inc. v. Evanston Insurance Co.*, the insured purchased a business that made pesticides for peanut and cotton farmers. After purchasing the plant, the insured operated the business for one year before ceasing operations and turned the site into a storage facility. The soil and groundwater around the facility were con-

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44. *Id.* at 802.

45. *Masonite Corp v. Great Am. Surplus Lines Ins. Co.*, 274 Cal. Rptr. 206, 207 (Cal. Ct. App. 1991).

46. *Id.* at 210-11.

47. *See also* *Antrim Mining, Inc. v. Pa. Ins. Guar. Ass'n*, 648 A.2d 532 (Pa. 1994) (ruling that there was no coverage where policyholder was aware of the fact that its surface mining business was discharging pollutants and failed to obtain the proper permits, thus erroneously finding that any damages suffered were expected and intended in that they were the result of the policyholder's willful failure to comply with the relevant statutes).

taminated by pesticides produced at the plant. The EIL insurer denied coverage for the site on the basis of the “owned property” exclusion. The exclusionary language in the policy stated that

coverage will not apply to claims for damage to property: (a) owned or occupied by or rented to any Insured, or (b) used by any Insured, or (c) in the care, custody or control of any Insured.<sup>48</sup>

The court granted summary judgment in favor of the insurer on the grounds that the contaminated groundwater at issue was part of the insured’s property.<sup>49</sup>

As in *Cargill*, many courts have failed to recognize that property owners generally do not have ownership rights to the groundwater within the boundaries of their property, a key factor that would preclude application of the “owned property” exclusion.<sup>50</sup>

### C. THE MID-1980S CRASH IN THE EIL MARKET

By the mid-1980s, as the insurance industry began to realize the potential for enormous costs resulting from environmental liabilities, the EIL market—along with most liability insurance—experienced an abrupt crash.

EIL coverage became a financially unviable proposition for many insurance companies. One commentator noted that the “motivation for [carriers] becoming involved in this marketplace in many instances turned on the need to protect their commercial and industrial accounts for which a pollution liability insurance policy would become part of an overall insurance program for such a risk.”<sup>51</sup> Although insurers were initially eager to enter the specialized market, as claim expenses significantly outweighed premiums, many withdrew. Insurance companies found themselves facing liabilities that they could not have foreseen at the time their policies were underwritten and sold. Primary insurance companies also had difficulties obtaining reinsurance on these risks. This was due in large part to the strict and retroactive liability imposed under CERCLA and the high level of uncertainty it created within this type of risk.<sup>52</sup>

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48. See *Cargill, Inc. v. Evanston Ins. Co.*, 642 N.W.2d 80, 89 (Minn. Ct. App. 2002).

49. *Id.* This finding was based on Georgia law, under which groundwater is part of the owner’s property to the extent that it is below the owner’s property. On appeal, however, the trial court’s grant of summary judgment was reversed as the appellate court held that the trial court erred by applying Georgia law (the location of the contamination) rather than the law of the state of the parties to the insurance policy. Groundwater rarely was found to be the policyholder’s “own property.”

50. See *State v. Superior Court*, 93 Cal. Rptr. 2d 276, 287 (Cal. Ct. App. 2000).

51. David C. Sterling, *Environmental Impairment Liability: An Insurance Perspective* 240 (3d ed. 1984).

52. For a good discussion of the role uncertainty played in the demise of first general EIL policies, see generally Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942 (June 1988).

Consequently, many insurance companies left the EIL market, while others began to issue underwriting guidelines that eliminated entire classes of business that may have significant exposure to environmental liabilities.<sup>53</sup> In fact, a study conducted by the General Accounting Office (GAO) in 1987 indicated that there was only one insurance company then writing pollution liability policies.<sup>54</sup> In a paper presented at the annual meeting of the American Bar Association (ABA) Litigation Section in 1990, one commentator noted that there were only two carriers underwriting EIL coverage—Commerce & Industry Insurance Company, a subsidiary of AIG, and Planet Insurance Company, a member of the Reliance Group.<sup>55</sup>

Policyholders, of course, faced their own problems. Many did not believe they needed the additional specialized insurance since many courts were construing the “sudden and accidental” exception to the pollution exclusion in favor of coverage.<sup>56</sup> Some policyholders may also have been reluctant to purchase the insurance because the long-term nature of the risk made their exposure to the risk less obvious. As observed in *THE HARTFORD HANDBOOK*, the “writing of this insurance presents not the problem of persuading the insured to change carriers, but rather educating the insured that it has exposures that require engineering and insurance that it needs to take action *now*.”<sup>57</sup> Insurance companies’ internal marketing efforts emphasized the need to make all clients aware of the potential environmental liabilities they faced, not just the traditional “polluters” like industrial manufacturing companies and waste treatment and disposal facilities. An undated document prepared by National Union Fire Insurance Company of Pittsburgh urged its employees to

scan your files for companies that are affected by the new EPA regulations. Helping these clients obtain such protection could be the most important service you can offer at this time. After all, there are hundreds of thousands of companies affected by the new regulations on gradual pollution. Even for the largest ones, a pollution catastrophe is a tough expense to bear. And for the many small to medium-sized companies somehow involved in hazardous wastes, the clean-up costs could literally clean them right out of business.

On top of the reluctance of some policyholders to purchase the new EIL policies, in practice, the policies did not adequately close up many of the gaps that existed in CGL policies. As discussed above, many of the early EIL policies only provided

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53. See David J. Dybdahl, *EIL Coverage: Action and Reaction*, RISK MANAGEMENT (Sept. 1985).

54. The name of the General Accounting Office was changed to the Government Accountability Office (GAO) in 2004. See GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, § 8, 118 Stat. 811, 814 (2004).

55. See David M. Siesko, *EIL Contracts and Market Availability*, ANNUAL MEETING ABA: LITIGATION SECTION 11 (Oct. 19, 1990).

56. See, e.g., *Masonite Corp. v. Great Am. Surplus Lines Ins. Co.*, 274 Cal. Rptr. 206, 208 (Cal. Ct. App. 1990); *Antrim Mining, Inc. v. Pa. Ins. Guar. Ass’n*, 648 A.2d 532, 532-33 (Pa. 1994).

57. *THE HARTFORD HANDBOOK*, *supra* note 15, at 3.



coverage for third-party claims, and not the first-party contamination cleanup that many needed. Thus, EIL policies largely disappeared from the insurance market and would not return again until the 1990s.

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## *IV. Present-Day Coverage for Environmental Hazards*

### **A. INTRODUCTION**

After the unsuccessful initial foray into EIL coverage and abrupt departure of nearly every carrier from the market, the 1990s brought a reemergence of the insurance industry's interest in marketing pollution coverage. Today's site pollution liability insurance policies may alternately be called premises environmental coverage, pollution legal liability insurance, premises pollution liability insurance, and site-specific or "site incident" pollution liability insurance. For the purposes of this chapter, the current, or second-generation environmental policies, will be referred to generally as pollution legal liability (PLL) policies.

The renewed interest in coverage for environmental liabilities can be traced in part to the increased interest of federal and state governments in redeveloping contaminated properties known as brownfields.<sup>58</sup> While early EIL policies largely targeted traditional industrial corporations and facilities, today's policies recognize the potential for environmental liabilities faced by businesses of all sorts, including apartment and corporate complexes, strip malls, dry cleaners, hospitals, hotels, golf clubs, and other entities. The most significant change and improvement from the first-generation policies to modern, second-generation coverage is that today's pollution liability policies cover on-site bodily injury and property damage and first-party cleanup costs.

In the last several years, an increasing number of insurance companies have entered the marketplace as providers of environmental liability coverage. In early 2011, one survey indicated seventeen separate environmental liability insurers, ranging from small shops with only 3 employees dedicated to environmental liability to long-time heavyweights like Chartis, Inc. (formerly AIG) and XL Insurance Co., with 300 and 160 dedicated employees, respectively. Of the fifteen companies for which information was available, ten sold their first environmental insurance policy in the year 2000 or later. Each of these companies offers some form of site pollution liability insurance. Some insurance companies also offer a stand-alone cleanup cost-cap program, or a section of cost-cap coverage in their blended programs, which can serve as important insurance tools for remediation projects.

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58. The EPA describes "brownfields" as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant. Cleaning up and reinvesting in these properties protects the environment, reduces blight, and takes development pressures off greenspaces and working lands." See <http://www.epa.gov/brownfields/>.

## B. PRODUCTS AVAILABLE FOR SITE-SPECIFIC COVERAGE

As with their early EIL counterparts, there is no standard form for site-specific pollution liability insurance policies. The nature of the risks against which pollution policies insure requires that each policy be tailored to meet the specific needs of the insured, based on the history and future use of the site at issue, the operations in which the insured engages, and the potential for harm to the surrounding environment. Because the policies are “manuscripted,” the policyholder may choose from a variety of forms of coverage offered by a given company. The primary site-specific policies available are PLL policies and cost-cap policies, but other site-specific policies designed for additional risks, including underground or aboveground storage tanks, are also available.

### 1. *Pollution Legal Liability Policies*

A standard PLL policy covers three types of losses: (1) third-party claims for bodily injury, property damage, and cleanup arising from pollution conditions on, at, under, or migrating from a covered location; (2) first-party on-site cleanup for pollution conditions; and (3) legal defense expenses arising from third-party claims. Purchasers of PLL policies can generally be said to fall into two categories—those that seek coverage for new pollution conditions that may arise out of their ongoing operations and those involved in brownfield redevelopment who need insurance primarily for coverage of preexisting pollution.

Whatever the insured’s primary goal in purchasing pollution coverage, a number of standard coverage elements are available according to the potential risks faced by the insured. For example, a policyholder may seek coverage for known or unknown preexisting on-site contamination; new on-site or off-site contamination occurring during the policy period; and unknown preexisting off-site contamination. In addition to the standard package of coverage available, optional endorsements or enhancements may also be offered for additional categories of loss, including non-owned disposal sites, pollution incidents resulting from transported cargo, underground storage tanks, business interruption, loss of rental income, mold, loss resulting from lead-based paint and asbestos bodily injury, property damages or cleanup, and even carbon capture and storage—a method of capturing carbon dioxide and injecting it into the ground for storage.

Unlike standard CGL policies, which typically include a “duty to defend” the insured in any claim asserted against it, PLL policies generally do not obligate the insurer to defend such claims. Some policies may include a duty to defend, and others may provide the option to purchase this coverage. Whether it is an optional purchase or included as a standard provision of a particular policy, defense costs often reduce the applicable limits of liability of PLL policies.

Typical exclusions found in a PLL policy may include exclusions for asbestos, lead paint, contractual liability, abandoned property, products liability, criminal fines and penalties, undisclosed pollution conditions known to the insured, and

radioactive matter. Contamination from storage tanks is also an exclusion common in most PLL policies, but, as noted, coverage of storage tanks is usually available as a stand-alone product.

(a) Coverage for Losses Resulting from Pollution

In order for a loss to be covered under a PLL policy, it must be the result of pollution. While the wording will vary slightly from policy to policy, a “pollution incident” covered by a site-specific pollution liability policy may be defined as:

The discharge, dispersal, release, seepage or escape of any solid, liquid, gaseous or thermal irritant or contaminant, including but not limited to, smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, hazardous substances, petroleum hydrocarbons, low level radioactive materials, medical waste, and waste materials into or upon land, or any structure on land, the atmosphere or any watercourse or body of water, including groundwater. Pollution incident does not include loss arising in whole or in part out of any fungus.

As will be readily apparent to any practitioner familiar with the CGL policy’s pollution exclusion, PLL policies are meant to cover precisely the type of loss that is excluded by the CGL policy.<sup>59</sup> In one insurance company’s product description, the definition of “pollution condition” goes further to include “medical infectious and pathological waste, low-level radioactive waste and material, Legionella, and microbial matter” such as fungus or mold—conditions not normally considered traditional industrial environmental pollutants but provided coverage pursuant to this policy’s definition.<sup>60</sup>

Other policies may provide coverage for bodily injury, property damage, or cleanup losses resulting from “contamination,” which is defined as:

The discharge, dispersal, release or escape of any *contaminants* into or upon land, or any structure on land, the atmosphere or any watercourse or body of water, including groundwater, provided such conditions are not naturally present in the environment in the amounts or concentrations discovered.

The presence of *contaminants* that have been illegally disposed of or abandoned at *your insured location* by parties other than an *insured* provided such presence, disposal or abandonment are unknown to the *insured*.

In this particular policy, “contaminant” is defined as:

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59. Indeed, litigation over the pollution exclusion often is based not solely on whether the perceived loss was the result of a “pollutant,” but also whether there was a “discharge, dispersal, release, seepage or escape of” that pollutant.

60. Beazley ECLIPSE Fixed-Site Environmental Coverage Brochure, [www.beazley.com/Documents/Environmental%20Liability/Beazley%20ECLIPSE%20Factsheet.pdf](http://www.beazley.com/Documents/Environmental%20Liability/Beazley%20ECLIPSE%20Factsheet.pdf). Sphere Drake Ins. Co. P.L.C. v. Y.L. Realty Co., 990 F. Supp. 240 (S.D.N.Y. 1997); Island Assocs., Inc. v. Eric Group, Inc. 894 F. Supp. 200, 202 (W.D. Pa. 1995); Center for Creative Studies v. Life & Cas. Co., 871 F. Supp. 941, 946 (E.D. Mich. 1994) Continental Casualty Co. et al. v. Rapid-American Corp. et al., 80 N.Y.2d 640 (NY 1993).

any solid, liquid, gaseous or thermal irritant or pollutant, including but not limited to smoke, vapor, odors, soot, fumes, acids, alkalis, toxic chemicals, hazardous substances, petroleum hydrocarbons, legionella, electromagnetic fields, low level radiological matter and waste materials including but not limited to municipal, industrial, medical, pathological, and low level radioactive waste materials.<sup>61</sup>

(b) Coverage for Bodily Injury and Property Damage

PLL policies usually cover bodily injury and property damage losses resulting from a pollution incident. Much like it is in CGL policies, in PLL policies, “bodily injury” is generally defined to include physical injury, sickness, and disease, including death resulting therefrom. Some policies expand the definition to include medical and/or environmental monitoring.

The definition of “property damage” is much like its CGL counterpart as well, but, within the PLL context, property damage also includes “natural resource damages.” Natural resource damage has been defined as:

Physical injury to or destruction of, including the resulting loss of value of, land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States, any state or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.

(c) Coverage for Cleanup Costs or Remediation Expense

At its most basic, cleanup costs—which may also be referred to as remediation expenses in some policies—are defined to include the reasonable and necessary costs, charges, and expenses incurred for cleanup of a pollution condition. Some policies qualify the definition further by specifying that “cleanup” relates to the investigation, removal, remediation, or disposal of contamination—to the extent required by environmental law—that has been incurred by the government, that has been incurred by third parties, or that has been recommended by an environmental professional.

PLL policies generally also include “restoration costs” as covered cleanup costs. Restoration costs include those expenses incurred to restore, repair, or replace real or personal property damaged during the course of work performed during cleanup activities.

Policies vary as to how they address costs incurred for litigation, arbitration, or the retention of consultants or experts. While some may exclude such costs with language specifying that they may only be covered if the insurer provides its prior

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61. *Id.*

consent, others include these expenses in the definition of cleanup costs or remediation expenses while noting that the insurer's written consent is necessary.<sup>62</sup>

(d) Coverage for Legal/Defense/Claim Expenses

Though PLL policies do not always obligate the insurer to provide a defense for claims asserted against the insured in the manner of CGL policies, they may provide separate coverage for expenses incurred in the investigation, defense, or settlement of a claim for loss of cleanup costs or in connection with the payment of cleanup costs. These expenses may be addressed in the insuring agreement, in the definition of "loss," or in the defense provision of policies that provide a duty to defend. These provisions should always be read carefully because policies may distinguish between outside defense counsel, whose fees would be covered, and in-house counsel, whose fees would not be covered. Further, they may or may not include the fees and expenses of third-party professionals like consultants, expert witnesses, and accountants, and may differ on other bases as well. Many policies will condition payment of these expenses on obtaining the insurer's consent before the expenses are incurred. Finally, the insured should take care to understand whether any such expenses reduce the limits of liability. Often, they do.

(e) Trigger of Coverage

PLL policies are claims-made policies, meaning that a claim must be made against the insured during the policy period in order for the policy's coverage to be triggered. For the purposes of a PLL policy, a "claim" is generally defined to include a written demand received by the insured seeking a remedy or alleging liability or responsibility on the part of the insured for a loss that is covered by the policy. A policy will also usually qualify that definition by specifying that such a demand, notice, or other assertion of a legal right alleging liability or responsibility on the part of the insured must "aris[e] out of a pollution condition, and shall include but not be limited to lawsuits, orders, petitions or governmental or regulatory actions, filed against the insured."

In addition to providing notice of a claim, coverage under a PLL policy may also be triggered at any point when a pollution incident is discovered. A typical "discovery" provision usually requires that the pollution incident be "first discovered by a responsible insured during the policy period." A "responsible insured" may be defined as an officer or director of the named insured, the manager of a covered location, or the individual within the insured's business who is responsible for environmental issues and compliance.

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62. Many policies contain a "voluntary payments" condition that prohibits the policyholder from voluntarily entering into a settlement, making any payment, or assuming any obligation without the insurance company's consent.

## 2. Cleanup Cost-Cap Policies

Unlike most early EIL policies, today's pollution policies provide coverage for first-party property damage, of which the cleanup cost-cap policy—also sometimes called a remediation cost-cap or remediation stop-loss policy—is a prime example. Cleanup cost-cap policies provide first-party coverage for amounts that exceed the estimated cleanup costs and expenses an insured incurs as a result of planned remediation activities—meaning cleanup activities—at a covered location. Cleanup cost-cap policies are a primary source of insurance coverage for brownfield redevelopment projects and can also be useful in property transactions where the seller is responsible for cleanup of site contamination. Indeed, as one judge has noted, the cleanup cost-cap policy

is designed to address the risk and uncertainty associated with beginning an environmental remediation project. . . . The policy attaches above the expected clean-up costs (self-insured retention). . . . Typically, substantial analytical data, agency-approved work plans, sophisticated cost estimates and formal contractor quotations are necessary to underwrite cost cap policies.<sup>63</sup>

The cleanup cost-cap policy is based on an estimate of how much it will cost to clean up a specific contaminated site, usually calculated after a detailed remediation plan has been prepared by environmental engineers. Generally, the policy will have a built-in buffer whereby the insurer's liability is not implicated directly at the estimated cost, but at a higher attachment point. Because cleanup of contaminated sites can prove to be enormously costly, these policies can provide an insured with some degree of financial assurance with respect to any additional reasonable and necessary expenses incurred pursuant to the remedial activities.

For example, additional contamination may be discovered that will add to the remediation plan's initial estimates. There may also be regulatory changes during the course of cleanup that affect the cost. And, of course, despite the best planning efforts, unforeseen issues may arise in any project.

That is precisely what happened in *Frazer Exton Development, LP v. Kemper Environmental, Ltd.*, where the EPA was still in the process of determining a remedy for a polluted site, and the insured was aware that its cost estimates were likely to change.<sup>64</sup> As a result, the insured, while shopping for an appropriate policy, informed the broker that it wanted “‘cost cap’ coverage that would ‘insure against the risk of cost overruns for all of our environmental costs to get from where [the policyholder] would be at the time it acquired the . . . Site to a completed remedy

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63. *Frazer Exton Dev., LP v. Kemper Envtl., Ltd.*, No. 03 Civ. 0637, 2004 WL 1752580, at \*1 n.5 (S.D.N.Y. Jul. 29, 2004) (citing Andrew L. Kolesar & Jacqueline M. Kovilaritch, *Environmental Law Issue—Buying and Selling Brownfield Properties: A Practical Guide for Successful Transactions*, 27 N. KY. L. REV. 467, 487 (2000)).

64. *Frazer Exton*, 2004 WL 1752580, at \*2.

with EPA signoff.”<sup>65</sup> The insured determined that it “specifically needed protection against the risks that the remedy would change, that additional investigation may be required, that we would discover more or different contaminants at the Site, and that the environmental standards for the Site would change.”<sup>66</sup>

Insurers that offer cost-cap coverage generally do so as either stand-alone coverage or in combination with a more comprehensive program. Claims for bodily injury and property damages are not covered by stand-alone cost-cap policies, so a policyholder facing those potential risks may wish to purchase a blended policy. The insurer’s liability is not available until the insured has exceeded the self-insured retention for which it is responsible.

Cost-cap policies are typically more expensive to purchase than PLL policies and generally are not available for projects estimated to cost less than \$1 or \$2 million because it would not be cost effective. Similar to pollution liability insurance policies, cleanup cost-cap policies are also claims made and reported. The policyholder must report any cleanup costs that are incurred within the policy period for cleanup that occurs within the policy period.

Cleanup cost-cap policies may also be purchased on a prefunded basis or to provide “reopener” coverage. The premise of prefunding cleanups is that the insured will pay the insurance company for the estimated cleanup costs, and the insurance company then pays for the cleanup activities from this fund as necessary. This type of cost-cap coverage may be beneficial to a PRP who has liability for a contaminated site, but otherwise no long-term interest in the property. Reopener coverage refers to an environmental agency’s determination that a site previously considered clean and issued a “no further action” letter needs additional cleanup or remediation, which causes the site to be reopened. This coverage may also be implicated where there has been a change in regulatory standards, contaminants have migrated, or where a third-party makes a claim, perhaps for personal injury actions for long-term latent illnesses.

Cost-cap policies may exclude coverage for “known conditions,” which are defined as those

based upon or arising from *pollution conditions* existing prior to the inception of this Policy, and reported or known by any officer, director, partner or other employee responsible for environmental affairs of the *insured* unless all of the material facts relating to the *pollution conditions* were disclosed to the Company in the application and other supplemental materials and information prior to the inception of this Policy.<sup>67</sup>

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65. *Id.*

66. *Id.*

67. *Id.* at \*8.

CCC (cleanup cost cap) policies and PLL policies often are meant to cover distinct conditions and not provide overlapping coverage.<sup>68</sup> In *Denihan Ownership Co. v. Commerce Industry Insurance Co.*, the insured, an owner of two parcels of real estate, commissioned environmental site assessments of the properties. The assessments revealed contamination of the soil. The insurer contracted to sell the parcels to a buyer who, in turn, sold the parcels to another buyer. Contractually, however, the insurer remained obligated to remediate the contamination.

Following the assessments, the insured purchased two policies for the cleanup, a CCC policy and a PLL policy. The CCC policy was purchased to cover the insured's cleanup costs associated with the environmental assessments and remediation; the PLL was purchased and designed to provide coverage for new and different conditions—i.e., all costs other than those associated with the remediation that were covered by the CCC. In fact, an exclusion was placed in the PLL that specifically excluded coverage for loss arising from the pollution conditions identified in the environmental assessments.

When contamination was discovered by the buyer of the property in the form of leaks from previously undiscovered USTs, the insured sought to have it covered under the PLL policy. The insurer, however, denied coverage on the ground that the new contamination was related to the contamination found during the environmental assessments. The trial court agreed and found no coverage on the basis of the exclusion, which was affirmed on appeal.

### 3. *Underground/Aboveground Storage Tank Policies*

UST policies cover third-party bodily injury and property damage claims resulting from pollution conditions emanating from scheduled tanks which may be located aboveground or underground. Both on-site and off-site cleanup costs for release incidents are also covered.

Incidents that would subject the owner of a storage tank to liability include leaks in the tank or failure of its pipes that result in groundwater contamination, and bodily injury or environmental damage as a result of that contamination.

Typical purchasers of tank policies include gas station owners, hospitals, hotels, and office buildings. Purchase of a policy can be used to meet the financial responsibility requirements issued by the EPA and state regulators.<sup>69</sup> In the absence of a state UST program, however, federal rules govern the regulation of UST policies issued in a jurisdiction.

UST policies also are notable because they generally contain a schedule of covered storage tanks and/or facilities. Where a policyholder is unable to demonstrate that a release emanated from a scheduled storage tank system, an insurance com-

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68. See *Denihan Ownership Co., LLC v. Commerce & Indus. Ins. Co.*, No. 601399/04, 2005 WL 6082571 (N.Y. Sup. Ct. Oct. 3, 2005), *aff'd*, 830 N.Y.S.2d 128 (N.Y. App. Div. 2007).

69. See, *supra*, note 8.



pany may be able to avoid their coverage obligations.<sup>70</sup> Similarly, in *Piedmont Broadcasting Corp. v. Ace American Insurance Co.*, the insurance company sold a “Tank Safe—Storage Tank Liability Insurance Policy” to the insured. The policy provided coverage for both aboveground and underground storage tanks.<sup>71</sup> A covered UST is defined in the policy as “a petroleum product containing tank and associated piping and appurtenances connected thereto with more than 10% of its volume below ground.”<sup>72</sup> The policy, however, did not define piping or appurtenances. On that basis, the insured argued that coverage was available for a 25-gallon day tank that was an appurtenance to the 2,000-gallon storage tank for which the policyholder acquired coverage under the policy. Like the result in the aforementioned UST cases, the court rejected the insured’s argument and held that the policy specifically insured only the 2,000-gallon storage tank.<sup>73</sup>

### C. KEY FEATURES OF SITE-SPECIFIC POLLUTION LIABILITY POLICIES

#### 1. *Claims Made and Reported During Policy Period*

As with their predecessor policies, today’s PLL and CCC policies are claims-made policies, which require a claim to be made against the policyholder during the effective policy period in order to activate coverage. Most also require that the claim be reported to the insurer during the policy period. For this reason, many of the products available come with automatic extended reporting periods, typically for a period of sixty or ninety days, to allow the insured to continue to report after the end of the policy period claims for pollution incidents that occurred during the policy period. The insured may also purchase an optional supplemental extended reporting period that may extend coverage as long as several years.

Because of the claims-made nature of the policies, the notice requirement of a claim under an EIL policy may be more strictly construed than the notice requirement under an occurrence policy. While some jurisdictions will only allow an insurance company to avoid liability for a policyholder’s late notice under a “per occurrence” policy where the insurance company has been prejudiced by that late notice, historically, a prejudice requirement has less often been applied to late

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70. See *ABO Petroleum, Inc. v. Colony Ins. Co.*, No. 04-CV-72090-DT, 2005 WL 1050220 (E.D. Mich. Apr. 19, 2005) (denying coverage as the tanks in question passed all of the required tightness tests; thus it appeared that there may have been other sources for a release). See also *Cain Petroleum, Inc. v. Zurich Am. Ins. Co.*, 197 P.3d. 596 (Or. Ct. App. 2008) (finding that “scheduled storage tank system” is unambiguous and will not provide coverage for tanks that are not listed on the schedule); *Chambliss, Ltd. v. Commerce & Indus. Ins. Co.*, No. 06-61202, 2007 WL 3047144, at \*4 (S.D. Fla. Oct. 18, 2007) (ruling that coverage “hinges on [the policyholder’s] knowledge of a confirmed release resulting from a pollution condition from an underground storage tank system at the time of applying for that coverage”).

71. *Id.*

72. *Id.*

73. *Id.* at \*6.

notice under a claims-made policy. This may be a changing trend as the modern rule—which allows more flexibility—is appearing in more and more jurisdictions.<sup>74</sup>

(a) Litigation Related to the Definition of “Claim”

In *ABO Petroleum, Inc. v. Colony Insurance Co.*, the insurer sold a policy to ABO Petroleum, which maintained storage tanks to store gasoline. The policy defined “claim” as “written notice to the Company during the ‘policy period’ of a ‘release’ of a ‘petroleum product’ from a ‘scheduled storage tank system’ at a ‘scheduled facility. . . .”<sup>75</sup> ABO Petroleum argued that it provided notice of a claim as soon as was practicable, which is required by the policy.<sup>76</sup> The court rejected this argument and held that notice was late because ABO Petroleum notified the State of Michigan within a few days of the release but did not make a claim with the insurance company until a month later.<sup>77</sup> The insurer, however, could not demonstrate material prejudice as a matter of law, and the court ruled that it was an issue for trial.<sup>78</sup>

The term “claim” is defined with more frequency in modern PLL policies than in the past and remains intertwined with issues including that of notice and what constitutes a demand. In *Hartford Fire Insurance Co. v. Guide Corp.*, the insured, a company that made lighting fixtures for automobiles, sought coverage for a “fish-kill” incident in which fish began to die by the thousands as a result of the release of chemicals from one of the company’s factories.<sup>79</sup> The policy in *Guide Corporation* defined “claim” as a “written demand received by the Insured seeking a remedy and alleging responsibility on the part of the Insured for loss.”<sup>80</sup> The language of the policy required notice of such claims to be made as soon as practicable.<sup>81</sup> The insurer argued that the insured failed to give notice as soon as practicable because the insured failed to inform the insurer of criminal claims against it, in connection with discharges in violation of environmental laws, until the government proposed penalty calculations nearly one year after the claims became known to the insured.<sup>82</sup> Although some form of settlement negotiations were under way prior to

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74. See, e.g., *ABO Petroleum*, 2005 WL 1050220 (prejudice applied but held to be an issue of fact precluding summary judgment); *Hartford Fire Ins. Co. v. Guide Corp.*, No. IP 01-572-C-Y/F, 2005 WL 675406 (S.D. Ind. Feb. 14, 2005) (granting summary judgment in favor of policyholder on notice issue where notice was timely and, even if it was delayed, no prejudice was suffered where the policyholder assumed its own defense and the insurance company did not offer or request to assume the defense); *Countryside Coop. v. Harry A. Koch Co.*, 790 N.W.2d 873 (Neb. 2010) (applying notice prejudice rule but finding no prejudice).

75. *ABO Petroleum*, 2005 WL 1050220, at \*2.

76. *Id.* at \*12.

77. *Id.* at \*15.

78. *Id.*

79. The incident is described in detail at Library Factfile, *The White River Fish Kill*, INDIANAPOLIS STAR, at [http://www2.indystar.com/library/factfiles/environment/white\\_river/fish\\_kill.html](http://www2.indystar.com/library/factfiles/environment/white_river/fish_kill.html) (updated July 2002).

80. *Guide Corp.*, 2005 WL 675406, at \*1.

81. *Id.*

82. *Id.*

the time the insured gave notice to the insurer, formal criminal charges were not filed until more than four months after notice was provided.<sup>83</sup> The court held that the notice given was timely because no claim had been made under the terms of the policy and that it was “fair to interpret demand to mean something more than preliminary stages of settlement negotiations.”<sup>84</sup>

In *Thomas Steel Strip Corp. v. American International Specialty Lines Insurance Co.*, the insured sought coverage for costs associated with the closure plans for one of its facilities.<sup>85</sup> The insured argued that it was entitled to coverage under a commercial environmental insurance policy over a period from 2003 to 2006.<sup>86</sup> Although the insured received a demand letter in 2005 from the government requiring it to close the facility, a similar demand had also been made for closure of the facility in 1984.<sup>87</sup> Thus, the approval of the 2005 closure plan was related to the 1984 demand and did not constitute a new claim.<sup>88</sup> The insured also asserted that it was not obligated to pay prior to the receipt of a 2005 letter approving the disclosure plan.<sup>89</sup> The court rejected this argument and held that the insured had already been informed of its duty to clean up contamination by the appropriate agency.<sup>90</sup> As such, the policyholder was not entitled to coverage because the claim was not “first made and reported” during the policy period.<sup>91</sup>

In another case featuring identical language, an insurance policy conflated the terms “cleanup costs” with “claim” to such an extent that “to collect on a claim under the Policy, the insured must inform AISLIC that it has incurred costs because it was required to do so by environmental law.”<sup>92</sup> Thus, where the insured’s obligation to pay for cleanup costs was triggered by a contractual obligation and not an environmental law, no claim was held to have been made under the policy.<sup>93</sup>

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83. *Id.* at \*2

84. *Id.*

85. *Thomas Steel Strip Corp. v. Am. Int’l Specialty Lines Ins. Co.*, No. 4:06 CV 0658, 2007 WL 127935 (N.D. Ohio. Jan. 11, 2007).

86. *Id.*

87. *Id.* at \*5.

88. *Id.*

89. *Id.* at \*4.

90. *Id.*

91. *Id.* at \*6.

92. *Alan Fischer & Dab Three LLC v. Am. Specialty Lines Ins. Co.*, No. 3:07CV1871, 2010 WL 2573909, at \*4 (D. Conn. May 14, 2010).

93. *Id.* at \*5. Although the applicability of the contractual liability exclusion was not reached in this case as the case was disposed of pursuant to the definition of “claim,” contractual liability exclusions—where a policyholder has expressly assumed liability pursuant to a contract—are common in policies of all types. Though insurance companies may attempt to apply an expansive interpretation to such an exclusion, the proper application of this exclusion is where a policyholder has entered into a contract to hold a third party harmless or to provide indemnification to a third party.

## (b) Litigation Related to Notice of a Claim

A frequently litigated issue relevant to notice is the discovery of pollution conditions. An AISLIC (American International Specialty Lines Insurance) PLL policy typically contains language requiring the insurance company to “pay on behalf of the Insured, Clean-Up costs resulting from Pollution Conditions or under the Insured Property,” provided that “the discovery of such pollution conditions is reported . . . as soon as possible after discovery.”<sup>94</sup> Pollution Conditions are defined in the policy as

discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant including, but not limited to, smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical wastes, waste materials in or upon land, or any structure on land, the atmosphere, or any watercourse or body of water including groundwater provided such conditions are not naturally present in the environment in the amounts or concentrations discovered.<sup>95</sup>

In *Picerne-Military Housing, LLC v. American International Specialty Lines Insurance Co.*, the insured was involved in the development, construction, and property management of the Fort Bragg Privatized Family Housing Project in North Carolina. An investigation revealed that the insured had illegally dumped construction and demolition debris in an open dump. A subcontractor was alleged to have been responsible, but the insurer argued that the insured was aware of and consented to the dumping. After coverage was denied, the insured sued and sought coverage for the costs associated with the ongoing investigation and remediation of buried construction and demolition debris. On the issue of whether the discovery of the pollution conditions were reported as soon as possible after discovery, the court held that it was unclear when the insured became aware of the debris.<sup>96</sup> The court also held, in denying the insured’s motion for summary judgment, that it was unclear whether personnel who were aware of the debris at some earlier point constituted “responsible insureds.”<sup>97</sup>

Accordingly, policyholders that have purchased modern PLL policies, as with most policies, would be best served by providing notice of a claim—even if they are unsure whether it actually rises to the level of a claim—as soon as possible.

## 2. Retroactive Date

A policy’s retroactive date governs the date from which a policy will provide coverage for any pollution incidents or contamination. This date may be negotiated during

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94. See *Picerne-Military Housing, LLC v. Am. Int’l Specialty Lines Ins. Co.*, 650 F. Supp. 2d 135, 137 (D.R.I. 2009).

95. *Id.* at 137–38.

96. *Id.* at 139.

97. *Id.* The provision relating to discovery mentions “Responsible Insured” in the context of the requirement that pollution conditions be reported as soon as a Responsible Insured becomes aware of such conditions.

the brokering process, and it is in the interests of the insured to negotiate an early retroactive date or to take great care not to have a retroactive date included at all. In other words, where there is no retroactive date, a pollution incident that occurred at any time prior to the policy's inception date may be covered, provided the claim for damages resulting from that incident is made within the policy period. This is a key feature of claims-made policies and, given the potentially lengthy period of dormancy for some environmental hazards, is one of the most attractive features to policyholders interested in purchasing PLL insurance.<sup>98</sup>

### 3. *Multiyear Policies*

While a pollution policy may be purchased for a one-year term, many companies offer the option to purchase for a multiyear period, typically ranging from three to ten years. Longer terms are likely to be offered only to a site with no history of environmental contamination.

### 4. *Detailed Technical Risk Assessment*

The uncertainty and nature of the risks involved when insuring environmental hazards requires that a detailed, technical risk assessment be performed as a part of the underwriting process. Indeed, many insurance companies promote their specialized underwriters in their advertisements for environmental liability coverage. Underwriters' guidelines are strict, and environmental liability underwriters often come from years of experience in the environmental field as consultants, engineers, geologists, and environmental lawyers. Many insurance companies, such as Chartis, also provide their own environmental engineering and consulting services that will assist with remediation plans, project management, and environmental assessment.

Applications for site pollution liability insurance commonly ask for a disclosure of environmental reports, incidents, or violations occurring within a period of years prior, as well as any known existing pollution conditions or any past or present remediation, cleanup activities, or monitoring at the location for which coverage is sought. Information regarding past operations of the scheduled sites, intended future uses, and the use of the land adjoining the site is often necessary to complete disclosures on a PLL insurance application.

The information supplied in the application may prove important not just for writing the coverage and assessing the risks, but also in handling claims that ultimately arise. In *Technology Square, LLC v. United National Insurance Co.*, for example, the insured was a real estate investment and development firm that bought a PLL policy to cover environmental costs associated with its development of specific properties.<sup>99</sup> In response to a question on the policy application asking for dis-

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98. See, e.g., *Invensys Sys., Inc. v. Centennial Ins. Co.*, 473 F. Supp. 2d 211 (D. Mass. 2007) (finding no coverage under primary Pollution Legal Liability Policy because the policy contained a retroactive date that barred coverage for releases prior to 1982, and the releases in question occurred between 1956 and 1978).

99. *Tech. Square LLC v. United Nat'l Ins. Co.*, No. 04-10047, 2007 WL 534450 (D. Mass. Feb. 15, 2007).

closure of circumstances that might lead to a claim, the policyholder responded as follows: “[i]nformation previously provided in Phase 1 Report submitted prior to binding coverage.” Following the discovery of environmental contamination on the property, the insurer sought to rescind the site-specific policy, arguing that the insured’s answer was a misrepresentation that failed to disclose certain relevant documents. In response, the insured argued that the Phase 1 Report represented the extent of the policyholder’s knowledge as to what known circumstances would give rise to a claim. On these facts, the court rejected the insurer’s motion for summary judgment on the issue of misrepresentation.

Other factors to consider during the underwriting and risk assessment processes are the types of waste produced, the containment systems in place, the pathways—such as air, surface water, groundwater—through which hazardous chemicals or waste could migrate off-site, and what populations or natural resources could potentially be exposed through such migration. Moreover, applications for storage tanks require a schedule of covered tanks with information regarding the location, age, capacity, contents, integrity, and material of the tanks.<sup>100</sup>

### 5. Exclusions

Typical exclusions in modern PLL policies include a known conditions exclusion, the site development exclusion, and the abandoned property exclusion.<sup>101</sup>

#### (a) Known Conditions Exclusion

Similar to the issue of knowledge of pollution conditions in early EIL policies, the “known loss” or fortuity doctrine has been applied to modern PLL policies.<sup>102</sup> Under the “known loss” or fortuity doctrine,

the basic premise is that insurance policies are intended to protect insureds against risks of loss; not losses that have already taken place or are substantially certain to occur. Accordingly, the doctrine is properly invoked when the insured “knows” about the claimed loss before the policy is purchased.<sup>103</sup>

The “known conditions” exclusion—a type of known loss exclusion—excludes coverage for loss

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100. See, e.g., *Cain Petroleum, Inc. v. Zurich Am. Ins. Co.*, 197 P.3d. 596 (Or. Ct. App. 2008); *Chambliss, Ltd. v. Commerce & Indus. Ins. Co.*, No. 06-61202, 2007 WL 3047144 (S.D. Fla. Oct. 18, 2007).

101. As discussed earlier, other exclusions include exclusions for asbestos, lead paint, contractual liability, property damage, products liability, criminal fines and penalties, undisclosed pollution conditions known to the policyholder, and radioactive matter.

102. See *supra* Part III B. 4(a) for a discussion of the misapplication of the fortuity doctrine.

103. *ABO Petroleum, Inc. v. Colony Ins. Co.*, No. 04-CV-72090-DT, 2005 WL 1050220, at \*8 (E.D. Mich. Apr. 19, 2005) (holding the fortuity doctrine inapplicable where the losses at issue postdate the policyholder’s initial purchase of a Storage Tank Pollution Liability Policy).

arising from Pollution Conditions existing prior to the inception of this Policy, and reported to any officer, director, partner or other employee responsible for environmental affairs of the Named Insured, unless all of the material facts relating to the Pollution Conditions were disclosed to the company in materials prior to the inception of this Policy.<sup>104</sup>

It is the disclosure of the conditions that is the key to applicability of this exclusion and not whether the policyholder knew of the conditions prior to the policy.

The doctrine also has been applied in so-called “site development” exclusions. A site development exclusion precludes coverage of “‘known conditions’ arising from Pollution Conditions that existed prior to the inception of the policy.”<sup>105</sup> At least one court, however, has held that a site development exclusion is ambiguous on the grounds that there are multiple reasonable interpretations of the term.<sup>106</sup> For example, it is unclear if the threshold of knowledge required is one of specific knowledge of a specific condition, or if merely general knowledge of a general condition is required.<sup>107</sup>

#### **D. CURRENT TRENDS IN ENVIRONMENTAL COVERAGE**

Modern policies for environmental hazards have increasingly focused on specialized policy language that addresses the specific risks faced by particular classes of policyholders and specific types of risks. Some current trends seem likely to continue, which may inspire new and more specialized environmental products.

##### *1. Natural Disasters*

The natural disasters of the first dozen years of the twenty-first century have had devastating effects on the environment. While the adverse effects of these disasters have some obvious implications on the property damage and business interruption insurance markets, among other things, the effects on property owners’ environmental liabilities also play a role in the claims and losses that resulted from the hurricanes in the Gulf Coast states, the BP oil spill, and deadly tornadoes. The environmental liabilities incurred as a result of these forces of nature include loss resulting from tank or storage failures, overflow from waste or treatment facilities, contamination as the result of buildings collapsing or exploding, and contaminant migration from off-site onto an insured’s premises and vice versa.

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104. *Tech. Square*, 2007 WL 534450, at \*13 (denying motion for summary judgment as to “known conditions” exclusion where there were issues of material fact as it was unclear whether the Pollution Conditions existing prior to the inception of the policy were disclosed in materials submitted with the policy application).

105. *Id.* at \*8.

106. *Id.* at \*12.

107. *Id.* at \*9.

## 2. “Green” Improvements

The continued and rapid development of new technology during the last decade has also given rise to increased regulation of the disposal or recycling of “e-waste,” a term used to describe obsolete electronic equipment. Many states have enacted laws to address the disposal of e-waste, requiring that manufacturers accept their products back from consumers for ultimate disposal and that registered e-waste facilities adhere to certain requirements.<sup>108</sup> E-waste facilities face potential liabilities for pollution incidents due to their processing, handling, transporting, or disposal of the waste, and may also face liabilities for any failure to comply with EPA regulations.<sup>109</sup>

Some environmental carriers are also taking steps to actively encourage “green” improvements. For example, Chartis operates a Sustain-a-Build Program that allows policyholders whose buildings are green-certified to receive a discounted premium when purchasing a PLL policy. Additionally, Zurich advertises that its “cleanup costs” definition can be expanded to include, as an additional limit of liability, “green remediation costs” and “green standards.” The liabilities covered by these expanded definitions would include costs for using green cleanup technologies and for replacing damaged property to comply with green standards.

## 3. Property Transaction Coverage

Issues relating to environmental liabilities in the context of mergers and acquisitions are likely to present continuing issues in the years to come. Because of the often latent and unforeseen nature of environmental liabilities, entities that seek to acquire or purchase property need to protect themselves when negotiating property transactions by considering the property’s potential for and history of environmental liabilities. Two main steps constitute due diligence for performing environmental risk assessments. Phase I identifies environmental contamination and hazards, while Phase II involves a more detailed and comprehensive review of the environmental impact of the hazards that have been identified. Even if there is no readily identifiable problem with a site involved in a transaction, pollution liability insurance may still be important because of the risks of contamination from adjacent properties and businesses.

There are numerous examples of incidents in the case law where companies were forced to litigate coverage for remediation costs that were incurred as a result of contamination caused by the environmental mismanagement of predecessor corporations.<sup>110</sup>

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108. See N.Y. ENVTL. CONSERV. LAW, art. 27, title 26 (2010).

109. See Barbara Deas, *Left to Your Own Devices*, WASTE 360, May 1, 2011, <http://waste360.com/print/e-waste/left-your-own-devices>.

110. See, e.g., *Invensys Sys., Inc. v. Centennial Ins. Co.*, 473 F. Supp. 2d 211 (D. Mass. 2007); *Cargill, Inc. v. Evanston Ins. Co.*, 642 N.W.2d 80 (Minn. Ct. App. 2002).



#### 4. Industry-Specific Coverage

While site-specific pollution liability insurance has always targeted environmental facilities such as landfills, waste recycling or disposal facilities, and manufacturers and industrial plants of all kinds, in recent years, insurance companies have increased their marketing efforts toward specific industries. For example, in the spring of 2011, Ironshore's environmental group added to its suite of site-specific insurance products a program to address the specific risks of the education sector. According to an Ironshore press release, the program is designed to provide coverage for environmental pollutants including mold, Legionella, drinking water contaminants, and PCB-containing materials, without scheduling specific school properties. Ironshore also has similar programs in place for the hospitality and health care industries. Under its NextGen Protection product, Chartis advertises coverage targeting specific industries such as health care, higher education, municipal governments, fertilizer manufacturers, and manufacturers of paints and coatings.

For its part, ACE Westchester offers a package policy for the green energy marketplace, which, according to the company's press release, is designed to cover particular exposures faced by companies specializing in renewable clean fuel technologies and alternative power generation. PLL coverage is just one part of the package offered.

Specialized PLL policies also exist for real estate lenders. Under these policies, coverage is available for "mortgage impairment" caused by pollution conditions occurring at a covered location where a borrower has defaulted during the policy period.<sup>111</sup> These policies also provide PLL coverage.

#### 5. Incentives

In 2002, the Federal Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Act) was signed into law, amending CERCLA to provide small businesses with funds to assess and clean up brownfields.<sup>112</sup> Other federal brownfields legislation offers tax incentives to encourage development of brownfields sites. Many states also now offer incentives for ensuring that environmental insurance is in place to cover cleanup and development costs of hazardous sites, including brownfields. Some local governments, including New York City, offer credits and other similar incentives.<sup>113</sup>

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111. For an example of such a policy, see Indian Harbor Insurance Company, Pollution and Remediation Legal Liability—Real Estate Lender's Policy, available at <http://www.xlenvironmental.com/forms/pdf/IHIC-RELP4CP.pdf>.

112. Pub. L. No. 107-118, 115 Stat. 2356.

113. See Robert S. Cook, Jr., John G. Nevius & Peter A. Halprin, *Brownfield Redevelopment: A New Funding Alternative*, REAL ESTATE WEEKLY, Mar. 2, 2011, at [www.thefreelibrary.com/Brownfield+redevelopment:+a+new+funding+alternative.-a0251631511](http://www.thefreelibrary.com/Brownfield+redevelopment:+a+new+funding+alternative.-a0251631511); NEW YORK CITY, OFFICE OF ENVTL. REMEDIATION, GRANT APPLICATION AND AWARD LIMITS, [http://www.nyc.gov/html/oer/html/big/granttypes.shtml#BOA\\_TAG](http://www.nyc.gov/html/oer/html/big/granttypes.shtml#BOA_TAG).

In 2009, Ohio enacted its VAP Environmental Insurance Program, through which eligible participants may receive a 10 percent discount on the premium for PLL policies.<sup>114</sup> Similarly, Massachusetts has established a Brownfields Redevelopment Access to Capital Fund. Created in 1999, the fund subsidizes environmental liability insurance for parties and sites meeting certain eligibility requirements.<sup>115</sup>

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## V. Conclusion

EIL policies initially were developed to cover environmental liability imposed by emerging federal and state regulatory regimes and to account for language allegedly intended to exclude coverage for such liability in CGL policies. Traditional early EIL policyholders were largely industrial concerns and manufacturers. Early policies did not define “claims” and relied on mechanisms such as the “known loss” exclusion to deny coverage to policyholders. Over time, however, as the insurance industry had to cope with the enormous costs resulting from environmental liabilities, the EIL market—along with most areas of liability insurance—experienced an abrupt crash as the framework for environmental coverage became unsustainable for many insurers.

New, more efficiently designed policy schemes began to emerge in the 1990s, largely due to increased interest of federal and state governments in redeveloping contaminated properties known as brownfields. This second generation of policies includes carefully constructed definitions for what constitutes a “claim,” while still relying on select exclusions—often similar to the “known loss” exclusion—to deny coverage. Today’s policies are narrowly tailored to the needs of and risks faced by policyholders, whether the main concern is environmental cleanup costs or some other industry-specific risk. Given the unique nature of these policies, many current case law rulings tend to be narrow, difficult to generalize, and often limited to the specific facts of the case.

The *Kemper* case, in which the insured had a cleanup cost-cap policy for known contaminants and ongoing remediation efforts as well as a PLL policy to cover future contaminants and remediation, is one such decision. There, the insured was denied coverage because the PLL policy contained a specific exclusion that was designed to deny coverage where there may have been some overlap between past and new contamination coverages under the two policies. Although the decision went against the insured, the holding in *Kemper* will by no means discourage future

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114. See OHIO ENVTL. PROT. AGENCY, VAP (VOLUNTARY ACTION PROGRAM) ENVIRONMENTAL INSURANCE, <http://www.epa.state.oh.us/portals/30/vap/docs/VAP%20INS/EIWebPagedesign.pdf>.

115. See <http://www.mass-business.com/site/site-massbiz/content/brownfields/program-eligibility.asp> (last visited June 27, 2011).

insureds from litigating for coverage since the facts in the case—and, in particular, the unique composition of the insurance coverage at issue—will make it easier for courts and counsel to distinguish from future suits.

Looking ahead to the next generation of EIL policies, the trend toward specialization and risk-specific policies is likely to continue, and insurers will look to market their coverage to an increasingly diverse range of potential policyholders. Evidence of this trend is already apparent in the current efforts of insurers to market environmental liability coverage to nontraditional sectors such as the education and hospitality industries.

The insurance industry has always marketed to disasters and losses. Indeed, if there were no disasters and losses, insurers would not have a market for their products. EIL, PLL, and other environment-related products are simply the latest example of how insurers adapt their products for the emerging market driven by the increase in environmental disasters, losses, and regulation over the past three decades. Modern EIL products are at once more specialized, but are not without limited coverage and new exclusions, thus allowing insurers to market to a wider and more diverse array of potential clients, while simultaneously minimizing their exposure. Policyholders should always carefully consider and understand the business objectives of insurers when buying environmental policies and review the language of their policies carefully, with special attention to how insurers—and courts—may interpret definitions, exclusions, and other provisions after an expensive loss and claim.

Finally, as the scope of environmental cleanup legislation expands and additional industries and entities are at risk, those facing potential liability and loss due to environmental disasters should review the available insurance products thoroughly and attempt to balance the need for coverage against a policy that truly meets the needs of the policyholder.