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INSURANCE COVERAGE LITIGATION FROM THE U.S. TO THE U.K.

U.S. Policyholders Look to the London Market for Coverage for Environmental Claims

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INTRODUCTION

Both governmental entities and private parties in the United States increasingly have brought lawsuits against the generators, disposers, and transporters of hazardous wastes in the U.S. to pay for environmental cleanup of waste disposal sites that pose a potential threat to public health or the environment. Indeed, since the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund") was signed into law over twelve years ago in December 1980, the Environmental Protection Agency ("EPA") has obtained settlements amounting to more than $3.7 billion.[2] The estimated future cleanup costs for potentially dangerous hazardous sites is billions of dollars more. Who is going to pay for this?

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[2] See Mealey's Litigation Reports - Superfund, Vol. 3 No. 17 (Dec. 12, 1990), at 16-18.

U.S. policyholders increasingly are looking to both their primary and excess insurance companies to pay for environmental cleanups. They, therefore, are looking beyond their shores -- to the excess insurance companies in the London Market, for example -- for coverage.

The London Market insurance companies have been in the business of insurance for over 300 years, beginning at the end of the 17th century when investors met at Edward Lloyd's coffeehouse in London and began insuring English shipping merchants. By the end of the 19th century, these London insurers had branched out to cover non-marine business activities and soon began to export their non-marine insurance policies to the United States to cover catastrophic business losses there as well. For the past 100 years, then, the London Market has been actively involved in (and has profited from) insuring American businesses.

The London Market, therefore, is not an unwitting target for U.S. environmental insurance coverage claims. Indeed, while the London Market insurance companies try to distinguish their policies from those of their American counterparts,[3] the London

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[3] In past years, United States companies typically have purchased primary comprehensive general liability ("CGL") insurance policies from U.S. insurance companies and umbrella and excess policies from the London Market to provide coverage for their business operations. Courts in the United States that have been called upon in recent years to interpret these policies often have read the policies, which until recently were written on an "occurrence" or "accident" basis, to provide coverage to policyholders for environmental claims and cleanup.

Umbrella policies in general are broader that the underlying policies and provide coverage where the underlying policy does not. The umbrella policy usually has a follow-form endorsement

policies should also provide coverage for U.S. environmental claims. This outline briefly discusses some of the issues that arise in coverage litigation between the London Market and U.S. policyholders.

Thus, the proliferation of environmental insurance coverage litigation in the U.S. and its necessary spread to include foreign insurance companies should not be viewed as an entirely American phenomenon. Indeed, the environmental insurance controversies and the lawsuits underlying these cases can find their roots in the United Kingdom and the rule-of-law established there in the nineteenth century. The principles of strict liability and negligence that form the basis for imposing sanctions and ordering environmental cleanup under CERCLA,[4] for example, are grounded in the principles established in the classic law-school-text case of Rylands v. Fletcher.[5] The

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which clarifies that the umbrella policy follows the terms and conditions of the underlying policy where the underlying policy provides coverage, but follows its own terms and conditions where the underlying policy does not provide coverage.

[4] CERCLA §9604 authorizes the EPA to remedy any release or threatened release into the environment of allegedly hazardous materials and to hold the parties identified in CERCLA §9607 strictly liable for response costs, studies, and environmental cleanup costs needed to remedy alleged environmental damage caused by the release of threatened release of a hazardous substance.

[5] 3 H & C 774 (Ex. 1866), rev'd in Fletcher v. Rylands, L.R. 1 Ex. 265 (1866), aff'd in Rylands v. Fletcher, L.R. 3 H.L. 330 (1868). Rylands established the rule-of-law that holds a landowner strictly liable for damages to others caused by unduly dangerous or non-natural or abnormal activities.

U.S. courts also are not the only courts addressing these environmental issues. British courts as well are being called on

question of appropriate damages in both the underlying and coverage cases also are rooted in the U.K. in such cases as Hadley v. Baxendale.[6]

The U.S., therefore, may prove to be merely a breeding ground for a British virus that now has come full circle in environmental insurance coverage litigation in which U.S. companies seek insurance from U.K. insurers. This seems only fitting since the virus came from the U.K. initially.

COVERAGE ISSUES OVERVIEW

The London Market insurers, like their American counterparts, often claim that their policies do not provide coverage for environmental claims based on several key issues, including: (a) the duty to defend and the "suit" issue; (b) the trigger of coverage; (c) the pollution exclusion; (d) cleanup

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to decide underlying environmental lawsuits. In a recent case decided before Supreme Court of Judicature Court of Appeal, Cambridge Water Co. Ltd. v. Eastern Counties Leatherworks PLC, OBEN 91/1306/C (Nov. 19, 1992), the court expanded Rylands and held a business strictly liable for pollution of groundwater even though the damage resulted from the operation of ordinary natural processes rather than abnormal activities. The court noted that Rylands "is a rule which makes a person liable for the event of an escape rather than for his actions. This case [however] is one where liability attached by reason of actions of the respondent in spilling [contaminants]."

[6] 9 Exch. 341, 156 Eng. Rep. 145 (1854). In Hadley v. Baxendale, the court established that an aggrieved party may recover both actual damages (i.e., those arising naturally from a breach of contract) and consequential damages (i.e., those which are a probable result of the breach of contract and were reasonably foreseen by the parties at the time of the contracting).

costs as "damages"; and (e) the intent-to-cause-injury issue.[7] Each of these issues, and an analysis of the London Market policies, is discussed briefly below.

A. The Duty To Defend and the "Suit" Issues

The provision of a defense in environmental impairment actions has been of paramount importance to U.S. policyholders involved in coverage litigation. Indeed, for generators, disposers, and transporters of hazardous waste involved in extensive delayed-manifestation bodily injury or property damage litigation, the costs of defense could exceed the net amount of judgments and settlements.[8]

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[7] Other issues that have generated a great deal of coverage litigation in the U.S. include: (a) choice of law; (b) allocation; (c) the inapplicability of the 1980's pollution exclusion; (d) the inapplicability of any care, custody, control/owned or leased property exclusion; (e) the legal standard regarding notice; and (f) the number-of-occurrences issue.

[8] For example, in testimony before the United States Congress several years ago, a principal of Tillinghast testified that:

> Some sources estimate that 70% of the money spent to date on Superfund sites has gone to legal costs, implying that legal costs might exceed actual cleanup expenses. However, this reflects the fact that legal disputes tend to precede the cleanup work. It is not reasonable to assume that once remediation is underway, legal costs will continue to outpace cleanup costs.

"U.S. Insurers' Potential Liabilities for Inactive Hazardous Waste Sites: Scenarios and Discussions," testimony of Amy S. Bouska before the House Subcommittee on Policy Research and Insurance, September 27, 1990.

One issue that often arises in environmental impairment cases with regard to the duty to defend is the proper interpretation of the term "suit" as that term is used in the defense provisions of the policy. The standard post-1966 CGL policies typically provide, in relevant part:

> [The company] shall have the right and duty to defend any suit against the insured seeking damages on account of . . . bodily injury or property damage even if any of the allegations of the suit are groundless, false or fraudulent.

See, e.g., Commercial Union Ins. Co. v. Pittsburgh Corning Corp., 553 F. Supp. 425, 429 (E.D. Pa. 1981). Insurance companies often challenge whether a "suit" has been instituted against the policyholder at the administrative level for purposes of activating the defense provisions of the CGL policy.

In the context of environmental claims, the majority view is that the formal institution of a lawsuit is not necessary to trigger the carriers' duty to defend. Rather, the receipt of a demand or communication from the EPA or state regulatory agency, which states that the policyholder is or may be responsible for certain environmental problems, is sufficient to trigger the duty to defend because it begins an adjudicatory process. E.g., Avondale Indus. v. Travelers Indem. Co., 697 F. Supp. 1314 (S.D.N.Y. 1988), aff'd, 887 F.2d 1200 (2d Cir. 1989), reh'g denied, 894 F.2d 498 (2d Cir. 1990), cert. denied, 1101 S. Ct. 2558 (1990) ("Avondale"); Boeing Co. v. Aetna Casualty & Sur. Co., No. C86-352WD, transcript at 23-24 (W.D. Wash. April 16, 1990); A.Y. McDonald Indus., Inc. v. Ins. Co. of N. Am., 457

N.W.2d 607 (Iowa 1991) ("A.Y. McDonald"); C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co., 326 N.C. 133, 388 S.E.2d 557 (1990) ("C.D. Spangler").

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The London umbrella insurance companies are obligated to pay the policyholder's defense costs (and may have a duty to defend).[9] Defense costs are covered in the "ultimate net loss" section of the "Limits of Liability" portion of the policy. This section provides coverage for "damages, direct and consequential and expenses, all as more fully defined by the term 'ultimate net loss.'" "Ultimate net loss" includes the "total sum" which the insured is obligated to pay, including defense costs for claims and suits.

The London policies, thus, generally cover claims and suits and plainly do not require a legal action in order to provide coverage. The definition of "ultimate net loss" in certain terms recognizes that there does not have to be a lawsuit in court for coverage to attach.[10] London personnel have confirmed in depositions that their entities would not require that an action be filed in court in order to have a claim within the meaning of their insurance policies in testimony given.

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[9] The umbrella insurance company must pay defense costs if they are not covered by the primary policy.

[10] One such provision defines "ultimate net loss" as the "total sum" a policyholder becomes obligated to pay "by reason of personal injury, property damage or advertising injury claims, either through adjudication or compromise,...."

B. The Trigger-of-Coverage Issue

The CGL policy requires the insurance company to pay all sums "which the insured shall become legally obligated to pay as damages because of ... bodily injury or property damage... caused by an occurrence...." An "occurrence" often is defined as, "an accident, including injurious exposure to conditions which results during the policy period in bodily injury or property damage neither expected nor intended from the standpoint of the insured" (emphasis added). The CGL policy further provides that the policy applies "only to bodily injury or property damage which occurs during the policy period." The question that has arisen in insurance coverage litigation, then, is: when does injury occur?

Where, as in most environmental cases, there is bodily injury or property damage spanning multiple policy periods, numerous cases in the United States have adopted a form of multiple trigger requiring successive policies in effect to provide coverage. See, e.g., New Castle County v. Continental Casualty Co., 725 F. Supp. 800 (D. Del. 1989); Broderick Inv. Co. v. Hartford Accident & Indem. Co., 742 F. Supp. 571 (D. Col. 1989) ("Broderick"); National Union Fire Ins. Co. of Pittsburgh, PA v. Rhone-Poluenc Basic Chems. Co., No. 87C-SE-11 (Del. Super. Jan. 16, 1992)("Rhone-Poulenc"); Montrose Chem. Corp. v. Admiral Ins. Co., 5 Cal. Rptr. 2d 358 (Cal. App. 1992), review granted, No. BO62993 (Cal.).

Courts have adopted this trigger of coverage because (a) this result is supported by other delayed-manifestation cases involving property damage and bodily injury claims spanning multiple policy periods, including asbestos bodily injury and property damage claims, DES, welding fume, and silicosis claims;[11] and (b) U.S. insurance industry drafting history documents[12] support the continuous trigger.[13]

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[11] See, e.g., Ducre v. Executive Officers of Halter Marine, Inc., 752 F.2d 976 (5th Cir. 1985) (bodily injury - silicosis); Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982) ("Keene") (bodily injury - asbestos); Lac d'Amiante du Quebec, Ltee. v. American Home Assurance Co., 613 F. Supp. 1549 (D.N.J. 1985), vacated on other grounds only as to one insolvent defendant, 864 F.2d 1033 (3d Cir. 1988) (property damage - asbestos); Eli Lilly & Co. v. Home Ins. Co., 653 F. Supp. 1 (D.D.C. 1984), certified question answered, 482 N.E.2d 467 (Ind. 1985), aff'd, 794 F.2d 710 (D.C. Cir. 1986), cert. denied, 479 U.S. 1060 (1987) (bodily injury - DES-related).

[12] For a general background discussion of the drafting process of the CGL policy in the United States, see American Home Prods. Corp. v. Liberty Mutual Ins. Co., 565 F. Supp. 1485, 1500-03 (S.D.N.Y. 1983) ("AHP"), aff'd as modified, 748 F.2d 760 (2d Cir. 1984).

[13] Courts also have adopted various multiple triggers of coverage in environmental cases. For example, courts have adopted an "exposure" trigger in environmental impairment cases in, inter alia, Continental Ins. Co. v. Northern Pharmaceutical & Chem. Co., 842 F.2d 977, 984 (8th Cir.), cert. denied sub nom Missouri v. Continental Ins. Co., 100 S.Ct. 66 (1988)("NEPACCO"); Mapco Alaska Petroleum, Inc. v. Central National Ins. Co. of Omaha, 784 F. Supp. 1454, 1461 (D. Alaska 1991)("Mapco"); and Armotek Indus., Inc. v. Employers Ins. of Wausau, No. 88-3110 (CSF) (D.N.J. Oct. 15, 1990), aff'd, Nos. 90-5969, -6001 (3d Cir. Dec. 31, 1991). Environmental cases following a "manifestation" trigger include, inter alia: Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325 (4th Cir. 1986); Safeco Ins. Co. v. Federated Mutual Ins. Co, 915 F.2d 1565 (4th Cir. 1990); and Transamerica Ins. Co. v. Insurance Co. of N. Am., 472 N.W.2d 5 (Mich. App. 1991). The "injury-in-fact" trigger has been adopted in Detrex Chem. Indus., Inc. v. Employers Ins. Co. Wausau, 746 F. Supp. 1310 (N.D. Ohio 1990); Dow Chem. Co. v. Assoc. Indem. Corp., 724

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The definition of an "occurrence" in the standard London umbrella policy is very similar to the CGL policy and, therefore, should be similarly interpreted. A typical London umbrella policy defines the term "occurrence" to mean:

> an occurrence or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period...

Indeed, London witnesses in coverage cases typically have testified that the trigger of coverage to be applied to an occurrence or an accident policy is damage during the policy period. They have agreed that their policies could cover something that happened over a period of time, and also agreed that "occurrence" policies could cover events of a gradual nature. Thus, continuous damage will trigger multiple policies.

Many witnesses have recognized that the term "occurrence" is ambiguous and that the industry has taken inconsistent positions on the trigger issue. Indeed, in the early asbestos coverage cases, the London Market split on its position regarding the trigger of coverage, adopting either an exposure or manifestation trigger. London personnel later admitted that the occurrence policy could be interpreted both ways.

To avoid this Market split in environmental cases, policyholders believe that the London Market founded the

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F. Supp. 474, 485 (E.D. Mich. 1989);and in High Voltage Eng'g Corp. v. Liberty Mutual Ins. Co., No. 90-00566 (Mass. Super. Jan. 24, 1992).

Environmental Claims Group, a group of leading claims managers in the London Market. This group seems to have united the Market behind an injury-in-fact or damage-in-fact trigger. Under this trigger of coverage, damage must occur during the policy period. Therefore, if damage occurs during more than one policy period, multiple policies can respond to provide coverage for the policyholder.

C. The 1970's U.S. Pollution Exclusion

The U.S. cases are divided as to the effect to which various exclusions written into the CGL policies bar coverage for environmental claims. One example of this division is the 1970's pollution exclusion, which bars coverage for property damage arising out of the "discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acid, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants," but only if the discharge is not "sudden and accidental."

Earlier decisions "have almost unanimously held [the pollution exclusion] to be ambiguous." United Pac. Ins. Co. v. Van's Westlake Union, Inc., 34 Wash. App. 708, 664 P.2d 1262 (Ct. App.), review denied, 100 Wash. 2d 1018 (1983) ("Van's Westlake"); Dimmit Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., No. 78, 293 (Fla. Sept. 3, 1992); United States Fidelity & Guaranty Co. v Thomas Solvent Co., 683 F. Supp. 1085, 1156 (6th Cir. 1992)(the "comprehensive debate" regarding the meaning of

the "sudden and accidental" exception to the pollution exclusion alone "comes close to proving" that the exclusion is ambiguous); Payne v. United States Fidelity & Guar. Co., 625 F. Supp. 1189, 1193 (S.D. Fla. 1985).

Courts in some jurisdictions have equated the terms "sudden and accidental" with the "neither expected nor intended" language in the definition of occurrence and found that pollution is sudden and accidental where the results of the alleged pollution were neither expected nor intended from the standpoint of the policyholder, e.g., Claussen v. Aetna Casualty & Sur. Co., 259 Ga. 333, 380 S.E.2d 686, 690 (1989); Colonial Tanning Corp. v. Home Indem. Co., 780 F. Supp. 906, 921 (N.D.N.Y. 1991); Rhone-Poulenc, slip op; such courts have found that the insurance companies have a duty to defend and/or indemnify the policyholder in underlying environmental cases. See, e.g., Joy Technologies, Inc. v. Liberty Mutual Ins. Co., No. 20153 (W. Va. June 11, 1992), mod. and reconsid. den. (July 26, 1992); Dimmit Chevrolet, slip op.; Outboard Marine Corp. v. Liberty Mutual Ins. Co., Nos. 71753, 71761 (Ill. Dec. 4, 1992)("Outboard Marine").

Other courts have held that "sudden" necessarily has a temporal meaning, thereby barring coverage for gradual pollution damage. See, e.g., F.L. Aerospace v. Aetna Casualty & Sur. Co., 897 F.2d 214 (6th Cir. 1990), cert. denied 111 S.Ct. 231 (1990); United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31 (6th Cir. 1988); Ogden Corp. v. Travelers Indem. Co., 924 F.2d 39 (2d Cir. 1991); Hybud Equip. Corp. v. Sphere Drake Ins.

Co., 597 N.E.2d 1096 (Ohio 1992), reh. den., No. 91-641 (Oct. 28, 1992).

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Many years ago, the London Market tried expressly to exclude gradual pollution claims. In 1959, for example, London developed a Seepage and Pollution clause known as the "1959 Clause." This clause excluded coverage for "personal injury or property damage resulting from any gradual cause including but not limited to subsidence, seepage, pollution or contamination" (emphasis added). The 1959 clause was developed because of concern that existing policies covered pollution. The clause was not well-received.

In 1960, London developed a "1960 Clause" which purported to exclude coverage for seepage and pollution or contamination unless "caused by accident." This clause also was rejected, policyholders believe undoubtedly in light of U.S. court decisions which construed "accident" to cover gradual and unintentional pollution, provided that the damage was "unexpected."

In 1961, the London Market adopted NMA 1333, a standard seepage and pollution clause. This clause provided, in relevant part, that:

> This Insurance does not cover any liability for: -
>
> ...
>
> (3) Property damage caused by seepage, pollution or contamination, unless such seepage, pollution or contamination is caused by a sudden, unintended and

> unexpected happening during the period of this Insurance.
>
> but this paragrapgh (3) shall not be construed as excluding any liability which would otherwise be covered under this Insurance for property damage caused by a sudden, unintended and unexpected happening during the period of this Insurance arising out of seepage, pollution or contamination....

This clause was used specifically for oil and chemical risks.

In 1970, a new seepage and pollution clause, "NMA 1685", was added to the London umbrella policies. This clause contained a specific "buyback" of coverage for "the costs of removing, nullifying or cleaning up seepage, polluting or contaminating substances" caused by a "sudden, unexpected and unintended happening."

The London exclusion has been interpreted similarly to the "sudden and accidental" pollution exclusion by courts addressing this issue. See, e.g., Hatco Corp. v. W.R. Grace & Co. - CONN., No. 89-1031, slip op. at 25-26 (D.N.J. Aug. 31, 1992)("Because the phrase 'sudden, unexpected and unintended' is no less ambiguous than 'sudden and accidental', it must be construed against its drafter, the London defendants."); Time Oil Co. v. CIGNA Property & Casualty Ins. Co., 743 F. Supp. 1400, 1407-08 (W.D. Wash. 1990); but see In re Texas Eastern Transmission Corp. PCB COntamination Ins. Coverage Litigation, MDL No. 764, slip op. at 135 (E.D. Pa. July 9, 1992) ("In the context of this exclusion, 'sudden' clearly has a temporal meaning").

D. Cleanup Costs as Covered Damages

Another issue which has generated considerable controversy in insurance coverage litigation is the question of the proper definition of the term "damages." Under the standard CGL policy language, the insurers generally are required to pay "all sums that [the policyholder] is legally obligated to pay as damages because of bodily injury or property damage." Many insurance companies have argued that environmental cleanup costs, which they contend are equitable in nature, do not constitute "damages" within the meaning of the CGL policy.

The overwhelming majority of cases in the U.S. have held that cleanup costs are damages on account of property damage, which are covered under CGL policies. E.g., Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., No. 89-5367 (D.C. Cir. Sept 13, 1991), reh. den. en banc (D.C. Cir. Nov. 5, 1991); A.Y. McDonald, 475 N.W.2d 607; AIU Ins. Co. v. Superior Ct. of Santa Clara Cty., 51 Cal. 3d 807, 799 P.2d 1253, 274 Cal. Rptr. 820 (1990) (insurance policies "cover the costs of reimbursing government agencies and complying with injunctions ordering cleanup under CERCLA and similar statutes"); Mapco, 784 F. Supp. at 1465; Colonial Tanning, 780 F. Supp. at 924-25; Aetna Casualty & Sur. Co. v. Pintlar Co., 948 F.2d 1507 (9th Cir. 1991); C.D. Spangler, 388 S.E.2d at 569; Minnesota Mining & Mfg. Co. v. Travelers Indem. Co., 457 N.W.2d 175, 184 (Minn. 1990);

Coakley v. Maine Bonding & Casualty Co., No. 90-401 (N.H. Nov. 23, 1992); Outboard Marine, slip op.

These decisions rejected any technical distinction between so-called "equitable" and "legal" damages, as urged by the insurance carriers, and held that all money that the policyholder was legally compelled to pay as a result of property damage, including environmental harm, constituted recoverable damages under the policyholder's liability insurance policies.[14]

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London policies often specifically provide for a "buyback" for cleanup costs. This means that cleanup costs are covered in the absence of an exclusion, or where they result from a sudden, unexpected and unintended happening. Indeed, some London interests have paid cleanup costs for other environmental claims.

Policyholders contend that there are no damages limitations under the pre-1971 London umbrella policies. The "Ultimate Net Loss" section of the "Limits of Liability" portion of the pre-1971 London umbrella policy provides coverage for "damages, direct and consequential and expenses, all as more fully defined by the term "'ultimate net loss.'" "Ultimate Net Loss" includes the "total sum" which the insured is obligated to pay, including

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[14] Contra Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977 (8th Cir.), cert. denied sub nom Missouri v. Continental Ins. Co., 109 S. Ct. 66 (1988); General Dynamics, slip op. at 23-24; Maryland Casualty Co. v. Armco, Inc., 643 F. Supp. 430 (D. Md. 1986), aff'd, 822 F.2d 1348 (4th Cir. 1987) cert. denied 484 U.S. 1008 (1988); Hayes, 688 F. Supp. at 1515; Cedar Chemical Corp. v. American Universal Ins. Co., No. 87-2838-4B (W.D. Tenn. Sept. 13, 1989).

cleanup costs. Although, after 1971, the London Market changed the policy language to provide coverage simply for "damages," no change in coverage was intended by the modification.

B. The Intent-To-Cause-Injury Issue

Another issue which often has arisen in coverage litigation is one raised by insurance companies who question whether the policyholder's conduct satisfies the definition of "occurrence" in the CGL policy. The "occurrence" definition often contains an exclusion for damage intentionally caused by the policyholder.

The majority of U.S. courts have focused on the resulting damage or injury, and not the causative acts of the policyholder, when deciding whether coverage is excluded under the occurrence definition. E.g., United States Fidelity & Guaranty Co. v. Specialty Coatings Co., 180 Ill. App. 3d 378, 535 N.E.2d 1071 (1989); In re Asbestos Insurance Coverage Cases, Judicial Council Coord. Proc. No. 1072, slip op. at 74 (Cal. Super. May 29, 1987)("Asbestos Coverage Cases I"); James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273 (Ky. 1991), reh. den. (Sept. 26 1991).

Thus, the issue is not whether the policyholder intended the activity that caused the resulting damage or injury, but whether the policyholder intended the resulting damage or injury, itself. Asbestos Coverage Cases I, id. Usually, the insurance company has the burden of proving that the policyholder intended to cause the specific resultant injury or damage. Id., slip op. at 72-73;

Auto-Owners Ins. Co. v. Jensen, 667 F.2d 714, 720 (8th Cir. 1981); Clemco Indus. v. Commercial Union Ins. Co., 665 F. Supp. 816, 820 (N.D. Cal. 1987), aff'd without opinion, 848 F.2d 1242 (9th Cir. 1988).[15]

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London witnesses recognize as well the validity of the subjective approach. Later umbrella policies recognize that expected or intended could be construed as being subjective, and have added specific language which makes sure that an objective standard would be applied. For example, NMA 2233, a standard excess claims-made liability policy contains an exclusion concerning bodily injury, personal injury or property damage that states: "This policy shall not apply: ... 3. to Bodily Injury, Personal Injury, Property Damage and/or Advertising Injury which the insured intended or expected or reasonably could have expected;" (emphasis added).

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[15] Further, the standard is the subjective intent of the policyholder. As a federal court in New Jersey recently held in an environmental coverage action, "[t]he proper inquiry is what the subjective intent or expectation of the insured was, with respect to the results of its waste disposal scheme; what the insured 'should have known' is irrelevant. What the insured actually intended is central. . . ." J.T. Baker, Inc. v. Aetna Casualty & Sur. Co., 135 F.R.D. 86, 90 (D.N.J. 1989). See also Metropolitan Property & Liability Ins. Co. v. DiCicco, 432 Mich. 656, 433 N.W.2d 734 (1989); Queen City Farms, Inc. v. Central National Ins. Co., No. 22744-1-I (Wash. App. Apr. 6, 1992); Broderick, 954 F.2d 601.

CONCLUSION

Over a century ago, the United Kingdom spawned a litigation virus which spread throughout the United States in the following years. At the same time, the U.K. provided coverage for U.S. liabilities. It seems appropriate that the U.K. insurers should provide the medicine for the virus which grew in the U.K. in the first place.[16]

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[16] The issues briefly addressed in this paper are the subject of ongoing litigation, and new decisions undoubtedly will add to the body of law on these subjects. The complexity of insurance coverage litigation in the United States will continue to present new issues and new challenges to all parties involved.