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Articles

3 Insurance 101—Insights for Young Lawyers: Vapor Intrusion Costs in Environmental Insurance Coverage Cases: Is There Coverage or Just Hot Air?

by Brent W. Huber and Angela P. Krahulik

Because regulators are now requiring vapor intrusion testing in soil and groundwater cases, policyholders in such cases will expect their insurers to cover the costs they incur to satisfy these new regulatory demands. The Article reviews the emerging issues surrounding this new emphasis on vapor intrusion and suggests how policyholders may attempt to obtain coverage from their liability insurers for costs associated with vapor intrusion.

19 Insurance Coverage, Nanotechnology, and Emerging Liability Issues

by Robert Binion

Though once considered science fiction, nanotechnology—the science of the small—is used in consumer products and manufacturing processes and is expected to become ubiquitous in the near future. This article discusses some current uses and theoretical risks of nanotechnology and the unique coverage issues likely to be presented by future claims of injury or damage from nanotechnology.

26 When Two Worlds Collide: Understanding D&O Coverage in the Bankruptcy Setting

by Nancy D. Adams, CPCU

While entity coverage may be included in a company's D&O insurance program, a D&O policy is primarily intended to protect the directors and officers from personal loss. The proceeds of these policies, however, are being increasingly accessed by corporations, causing the dilution or even complete depletion of policy limits. In the bankruptcy context, the conflict between the company and its directors and officers over policy limits is heightened. This article describes the impact of a company's bankruptcy upon a D&O policy, as well as the success of efforts to avoid application of Bankruptcy Code provisions to a D&O policy.

Delaware Supreme Court Issues Significant Decision on Allocation

by John M. Sylvester*


The Delaware Supreme Court recently issued its decision in the insurance coverage case captioned: *Travelers Casualty & Surety Co. et al. v. E.I. duPont de Nemours & Co.* (the "DuPont Decision").¹ The DuPont Decision, which affirmed in all respects the summary judgment rulings of the Delaware Superior Court, brings clarity to Delaware law on several significant insurance allocation issues following its earlier, landmark decision in *Hercules Inc. v. AIU Insurance Co.*² In combination, these two Delaware Supreme Court decisions, *Hercules* and *DuPont*, will provide substantial guidance to policyholders and insurers alike regarding the allocation of coverage in situations where liability claims involve injuries or damage triggering occurrence-based policies in multiple policy years. The *DuPont* Decision should also prove to be influential in jurisdictions outside Delaware where the law on insurance allocation is not yet fully developed.

Background of the Liabilities At Issue

The facts giving rise to DuPont's liabilities that were the subject of this coverage action are set forth in detail in the Superior Court's summary judgment ruling in 2006, that was subject of the appeal to the Delaware Supreme Court. See *E.I. duPont de Nemours & Co. v. Allstate Insurance Co.* (the "2006 DuPont Ruling").³ A brief summary of those facts follows.


Beginning in 1983, DuPont began producing an acetal resin, known as Delrin® and selling it to other companies

(Continued on page 11)

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Insurance 101—Insights for Young Lawyers: Vapor Intrusion Costs in Environmental Insurance Coverage Cases: Is There Coverage or Just Hot Air?

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This article does not necessarily represent the views of Ice Miller LLP or its clients, nor is anything contained herein intended to constitute legal advice.

I. Introduction

In cases of soil or groundwater contamination, many regulators are now requiring testing for soil vapors or air emissions, raising the question whether costs for such work are covered by liability insurance. Is there a "suit seeking damages" that would permit the policyholder to recover? Do vapor intrusion claims involve actual or threatened "bodily injury," "property damage" or "personal injury?" If so, are they properly considered defense costs or indemnity costs? This Article argues that coverage for costs related to air monitoring, soil vapor testing, and other vapor intrusion issues should be covered to the same extent and in the same manner that other costs for addressing soil or groundwater problems are covered in the particular jurisdiction.

"Many regulators now require air quality testing of all buildings within specified distances of soil or groundwater impacts. The migration of volatile chemicals from the subsurface into overlying buildings is often referred to as 'vapor intrusion.'"

II. Discussion

A. The Emerging Significance of Monitoring for Vapor Intrusion

Over the past several years, increasing attention has been paid to the impact of soil and groundwater contamination on the indoor air quality of nearby buildings.¹ Many regulators now require air quality testing of all buildings within specified distances of soil or groundwater impacts.² The migration of volatile chemicals from the subsurface into overlying buildings is often referred to as "vapor intrusion."³ Vapor intrusion poses potential health risks to building occupants and can also have a negative impact on property values.⁴

Essentially, vapor intrusion occurs when volatile or semi-volatile organic compounds migrate from impacted soil and/or groundwater into nearby structures. The vaporized contaminants can travel through soil gases and into sub-slab, crawlspace or basement air and on into the building where human exposure can occur.⁵ The contaminants are allowed to enter the structure through pressure differentials between indoor and outdoor air, such as by operation of a HVAC system, through foundation construction or via a building's penetrating features, such as drains and utilities.⁶ The risk and severity of vapor intrusion is obviously impacted by many factors, including the chemical properties of the particular contaminant(s) of concern, soil conditions, and the depth and degree of impacts. If soil gas or air sampling reveal levels of vapor intrusion above applicable screening guidelines, corrective actions may include treating

the contamination in place or removing the contamination source and preventing upward migration into inhabited space through ventilation technologies or construction of protective barriers.⁷

"At its essence, vapor intrusion simply presents an additional media—indoor air—into which contamination in the soil and/or groundwater has migrated. Just like soil and water, indoor air must be similarly monitored, tested, characterized and possibly remediated to eliminate risk of human exposure and harm."

Vapor intrusion can present a public health hazard.⁸ Just as regulators require delineation and characterization of contaminated soil and groundwater, regulatory agencies are increasingly requiring similar testing for resulting impacts to indoor air quality, as demonstrated by the rapidly growing number of jurisdictions promulgating vapor intrusion regulations and requirements. At its essence, vapor intrusion simply presents an additional media—indoor air—into which contamination in the soil and/or groundwater has migrated. Just like soil and water, indoor air must be similarly monitored, tested, characterized and possibly remediated to eliminate risk of human exposure and harm. This Article suggests that vapor intrusion claims and related costs should be evaluated and handled for coverage purposes no differently than other costs associated with soil and groundwater contamination in an environmental liability case.

B. Coverage for Defense Costs Under General Liability Policies in Environmental Coverage Cases

Most primary general liability ("CGL") insurance policies contain an insuring clause in which the insurer agrees to defend and indemnify the insured. The historical purpose of such policies was to cover all of the insured's liability to third parties unless the liability is expressly and unambiguously excluded under the policy. The typical CGL insuring agreement states:

Insurer will pay on behalf of insured [all or those] sums that the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence, and 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 the allegations of the suit are groundless, false, or fraudulent.⁹

Thus, CGL policies require the insurer to defend its

insured against any "suit" seeking damages for "bodily injury" or "property damage." Many such policies also include coverage for "personal injury," which is generally defined as including "wrongful entry or eviction or other invasion of the right of private occupancy."¹⁰

This Article focuses on the insurer's duty to defend its insured when issues related to vapor intrusion arise. At the time of this Article, only five reported court decisions could be located specifically mentioning the term "vapor intrusion," and none of those decisions deals specifically with the issue of insurance coverage for costs associated with vapor intrusion.¹¹ In fact, the five decisions located refer to "vapor intrusion" only as the subject of witness testimony or as part of site plans and investigation.

The duty to defend under CGL policies has been interpreted to include defense of suits by third parties alleging bodily injury or property damage resulting from the insured's contamination of the environment, as well as those alleging personal injury.¹² In addition, many courts have found that the duty to defend includes defending against governmental or agency action brought against the insured pursuant to environmental regulations, as discussed below. The general standard for determining the duty to defend is that the duty to defend is broader than the duty to indemnify, with the duty to defend being prompted by the initiation of the suit or claim against the insured, so long as there is a potential for coverage

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under the policy.¹³

1. "Suit Seeking Damages."

A related threshold issue in determining an insurer's defense obligation is what constitutes a "suit seeking damages" under the CGL policy. The courts are in agreement that a third party-initiated lawsuit claiming the insured is responsible for environmental contamination presents a "suit seeking damages" under such policies. Thus, if the allegations of the complaint raise the possibility for coverage under the policy, the insurer must defend its insured. This is commonly referred to as the "comparison test." Simply put, the pleadings of the underlying claim are compared to the insurance policy language to determine if the facts as alleged are at least arguably covered, resolving any doubt or ambiguity in favor of the insured and the insurer's duty to provide a defense.¹⁴

"Because vapor intrusion, by definition, involves the migration of chemical vapors into buildings, vapor intrusion cases can give rise to a variety of suits and environmental claims. With the amplified regulatory awareness and emphasis on the vapor intrusion pathways, it should come as no surprise that vapor intrusion cases can implicate several different coverage parts of a CGL policy."

Because CGL policies typically do not define the term "suit," courts are not in agreement as to whether the insurer's duty to defend is triggered when enforcement action is taken against the insured by federal or state environmental regulatory agencies. There is also a split among the courts on the question of whether potentially responsible party (PRP) notification letters, administrative enforcement proceedings, and threatening demand letters from regulators constitute a "suit" or otherwise trigger a duty to defend.¹⁵ Many courts have ruled that an administrative agency enforcement action or even the threat of such an action is a "suit seeking damages" for purposes of a CGL policy.¹⁶ Elsewhere, courts have reached an opposite conclusion.¹⁷ Because vapor intrusion, by definition, involves the migration of chemical vapors into buildings, vapor intrusion cases can give rise to a variety of suits and environmental claims. With the amplified regulatory awareness and emphasis on the vapor intrusion pathways, it should come as no surprise that vapor intrusion cases can implicate several different coverage parts of a CGL policy.

2. Coverage for Vapor Intrusion Costs Under the Property Damage Coverage Part

In environmental liability claims, the existence of "property damage" is often a debated issue. Insurers commonly litigate whether the term "property damage" affords coverage for costs incurred for environmental remediation or as a result of government-mandated action. The majority of courts have found that government-initiated response costs are recoverable damages.¹⁸ However, some courts have questioned whether similarly directed cleanup costs are covered as "property damage" under CGL policies.¹⁹ Insureds assert that the interpretation of the term property damage should be focused on the term's general meaning, including any damage to property without distinction as to the legal or equitable nature of the relief.²⁰ On the other hand, insurers argue that response costs are not recoverable "as damages" because the term is meant only to apply to legal damages while environmental cleanup costs constitute equitable relief.²¹

In cases involving vapor intrusion, the volatilization of chemicals into the air necessarily emanates from concentrations of those chemicals in the soil and/or groundwater. As a consequence, vapor intrusion claims and costs arise from or as a consequence of damage to real property. The process of delineating the extent to which the contamination in the soil or groundwater has migrated indoors and creating remedies for any resulting actionable levels of vapor intrusion is not unlike the process of delineating and addressing contamination in the soil and groundwater. If there is coverage for costs associated with delineating and addressing soil and groundwater contamination under the policy's property damage liability coverage part, therefore, it would appear that the costs for delineating and addressing vapor intrusions caused by that same contamination should likewise be covered.

3. Coverage for Vapor Intrusion Costs Under the Personal Injury Coverage Part

Vapor intrusion claims can also implicate the "personal injury" coverage part of the policy. An increasing number of environmental claims allege liability under the CGL policy's "personal injury" coverage grant. Such a provision often defines personal injury as an "injury arising out of one or more of the following offenses" which include "wrongful entry or eviction or other invasion of the right of private occupancy." Accordingly, as opposed to bodily injury and property damage coverage, personal injury coverage depends not on the *type* of

injury, but whether the injury arose from an enumerated offense. In a vapor intrusion claim, coverage would stem from the fact that the vapors or volatile chemicals entering into the structure constitute a "wrongful entry" into that space or an "eviction" or "invasion of the right of private occupancy" regardless of the degree of resulting damage. In addition, most CGL policies contain a pollution exclusion that purports to apply to the bodily injury and property damage liability coverage parts, but may not apply to personal injury coverage. Insureds have successfully argued that contamination released onto another's property constitutes a "wrongful entry or eviction or other invasion of the right of private occupancy" because the contamination is an "invasion" or "entry" and interferes with the use and enjoyment of the property, much like a common law nuisance.²² Logically, in jurisdictions where personal injury coverage has been found applicable to claims involving contamination to soil or groundwater, the same arguments can be advanced to support coverage for vapor intrusion costs.

4. Coverage for Vapor Intrusion Costs Under the Bodily Injury Coverage Part

Vapor intrusion cases can also implicate the liability coverage part for "bodily injury." Bodily injury is typically defined in a CGL policy as "bodily injury, sickness, or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom."²³ While third party liability claims for environmental contamination do not always involve allegations of direct physical harm, the very nature of claims involving vapor intrusion make them more likely to contain allegations of at least some degree of physical injury. Indeed, the reason that state environmental regulators are requiring vapor intrusion testing is that these vapors pose a risk to human health, i.e., bodily injuries. Vapor intrusion claims by definition involve the entry of dangerous chemicals into inhabited structures with potential for human exposure. The intrusion of chemical vapors into inhabited structures understandably will almost always involve some degree of physical harm given the "calculated health risks" posed by vapor intrusion.²⁴ Thus, "bodily injury" or at least threat of such injury in such cases will likely be apparent.²⁵

C. Defense Versus Indemnity Costs in Environmental Claims

The duty to pay defense costs attaches immediately once there is a duty to defend under most historic primary CGL policies, and payments for defense costs generally do not apply to reduce the

overall available policy limits under these types of policies. On the other hand, indemnity costs must not be paid until after there is a settlement or judgment. Nevertheless, insurers often debate what expenses constitute "defense" versus "indemnity" costs in environmental liability cases. When an insurer agrees to defend its insured, the classification of the amounts paid to environmental consultants for work to delineate and characterize site contamination can greatly affect not only whether or how quickly the insured will be reimbursed for those costs, but also the overall available limits to address liabilities that arise from the contamination. Unfortunately, while several courts have wrestled with these issues, the case law on the subject is difficult to reconcile, and many courts have been reluctant to develop any bright-line tests.

A 1997 commentary on this issue claims to identify three different approaches, including the "Michigan Test," the "New Jersey Test" and the "New York Test".²⁶ Although it was written in 1997, this commentary contains a helpful discussion of the seminal case authorities to which the courts continue to look for guidance. The Michigan Test defines defense costs broadly, in practice allocating most remedial investigation and feasibility study ("RI/FS") expense liability to the insurer. Under this Test, although RI/FS costs are initially presumed to be indemnity costs, the insured can fairly easily rebut this presumption by showing that the expenses in question were part of a reasonable and necessary strategy either to defeat or limit the scope of liability or to limit the cost of remediation.²⁷ Since feasibility studies almost by definition seek to find the least expensive (most "feasible") remediation alternative, under the Michigan Test, these expenses are usually considered defense costs as long as they are part of a "reasonable and necessary" defense.²⁸ Under the Michigan Test, feasibility studies would be considered indemnity costs in situations in which the study involves the actual implementation of the cleanup,²⁹ in which case the study should probably not have been described as a "feasibility" study in the first place.

Like the Michigan Test, the New Jersey Test establishes the same rebuttable presumption that RI/FS expenses are damages. Under the New Jersey Test, however, the allocation between defense and indemnity costs is based on four broad factors: (1) the relative risk that the PRP would have borne if it had not produced the RI/FS; (2) the extent to which environmental agencies may have mandated the details of the RI/FS; (3) the extent to which the RI/FS provided a means for the insurer or PRP to mitigate potential claims for damages; and (4) the cost of producing the RI/FS in relation to policy limits provided.³⁰

The final test discussed in the Schafer article, the New York Test, follows the equitable allocation method of the New Jersey Test, but in the interest of clarity and simplicity, strictly divides the activities that reduce liability (remedial investigations) from those that reduce damages (feasibility studies). The court then exercises broad discretion in allocating or dividing expenses that cannot otherwise be separated.³¹ The article describes remedial investigations as work that addresses the sources and extent of the contamination, determining whether environmental damage can be mitigated by controlling the sources, or whether additional action is necessary because of migration of contaminants from the site. To the extent an expense is primarily attributable to feasibility studies—which comprise plans for selecting and implementing the remediation alternative for the site—the expense will be treated as damages to be indemnified under the New York test.

Courts in other states, without expressly adopting the tests from the courts in New York, New Jersey, or Michigan, have adopted rules that essentially shift the costs of most types of environmental studies to the insurer as “defense” costs. For example, the Minnesota Supreme Court recognized that investigative and oversight costs mandated by an agency, although presumed to be indemnity costs, may be shown to be defense costs where the expenses are not incurred solely to comply with regulatory demands but also to avoid more onerous future action.³² In perhaps a better example, the California Supreme Court set forth a three part test to determine if site investigation expenses constitute defense costs: (1) The site investigation must be conducted within the temporal limits of the insurer’s duty to defend (between tender of defense and conclusion of the action); (2) The site investigation must amount to a reasonable and necessary effort to avoid or at least minimize liability; and (3) The site investigation must be reasonable and necessary for that purpose.³³

Although it is difficult to draw broad generalizations about the case law across the country, in states where the courts have found state enforcement actions or threats of enforcement action (i.e., PRP letters) are “suits” for purposes of triggering coverage under a liability policy, the courts seem more inclined to find that all environmental consulting work is a defense cost. In other words, in those jurisdictions, the line between defense and indemnity costs is drawn much more favorably to the policyholder. For example, in Michigan, the courts have routinely found that an agency enforcement action is a “suit seeking damages.”³⁴ Likewise, application of the “Michigan Test,” as set forth above, results in favorable cost allocation for the policyholder.

In contrast, in states where the courts do not hold that regulatory demands to clean up contaminated property constitute a “suit,” environmental response costs are much more likely to be considered indemnity costs. For example, administrative proceedings have been found not to constitute a “suit” as defined in a liability policy under Pennsylvania law.³⁵ In that same case, the court applied the “New Jersey Test,” as set forth above, and concluded that the insured’s cleanup expenses were presumed to be indemnity expenses.³⁶ Again, whether environmental consultant costs and expenses for soil gas, air testing and other costs related to vapor intrusion issues are defense costs will likely turn on how the courts in the jurisdiction in question construe the terms “suit” and “defense costs” generally in environmental cases.

“Because vapor intrusion claims are an emerging issue, the case law addressing coverage for vapor intrusion costs is in its formative stages. However, in cases in which the insurer is already defending its policyholder against claims alleging soil or groundwater contamination, the defense provided should logically extend to include any resulting costs associated with vapor intrusions from that same contamination, as there necessarily must be some underlying soil or groundwater contamination to give rise to the vapor intrusion issue.”

III. Conclusion

Because vapor intrusion claims raise emerging issues, the case law addressing coverage for vapor intrusion costs is in its formative stages. However, in cases in which the insurer is already defending its policyholder against claims alleging soil or groundwater contamination, the defense provided should logically extend to include any resulting costs associated with vapor intrusions from that same contamination, as there necessarily must be some underlying soil or groundwater contamination to give rise to the vapor intrusion issue. For the same reason, if environmental consultant, soil and groundwater testing, or other costs are covered as defense costs by the insurer, any similar costs related to vapor intrusion issues should likewise be covered. As the case law evolves, policyholders and insurers should expect to see new court decisions breaking down along the same lines as existing case authorities, with jurisdictions typically favoring coverage for policyholders continuing the trend in this area and jurisdictions considered less favorable to policyholders maintaining that inclination as well.

¹ For example, a recent newspaper article discusses concerns over possible vapor intrusion into homes, businesses, churches, and schools from a toxic groundwater plume created by chemical spills at the former Kelly Air Force Base. Roddy Stinson, *Decade After Kelly AFB Expose, Health Questions Still Being Asked*, San Antonio Express-News, November 11, 2007 at 1B. An Ohio daily newspaper announces meetings to be held by the U.S. Environmental Protection Agency with regard to vapor intrusion worries in neighborhoods surrounding two industrial sites. Kristin McAllister, *EPA Sets Meetings on Industrial Sites*, Dayton Daily News, November 10, 2007 at A11. Yet another article within the same week expresses concern over possible vapor intrusion and the need for testing homes and businesses near a contaminated Myrtle Beach site. David Wren, *AVX Targeted in Lawsuit Over Contamination Chemical Found at Potentially Unsafe Levels on MB Land*, Myrtle Beach Sun News, November 8, 2007 at A1. See also Matthew Traister, American Institute of Chemical Engineering, Chemical Engineering Progress, Vol. 103, Issue 10, *Understanding the Emerging Issue of Vapor Intrusion*, October 1, 2007.

² As of this writing, along with the United States Environmental Protection Agency (“U.S. EPA”), the following states are believed to have published vapor intrusion guidance documents: Alaska, California, Delaware, Indiana, Kansas, Minnesota, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, and Wisconsin. Yet other states have published more general indoor air guidance documents and/or documents regarding vapor intrusion as related to specific circumstances or chemicals.

³ See U.S. EPA, Draft Vapor Intrusion Guidance, November 2002.

⁴ See generally U.S. EPA, Draft Vapor Intrusion Guidance; ITRC (Interstate Technology & Regulatory Council), 2007, *Vapor Intrusion Pathway: A Practical Guideline*. VI-1, Washington, D.C.: Interstate Technology & Regulatory Council, Vapor Intrusion Team. www.itrcweb.org.

⁵ See *Vapor Intrusion Pathway* at p. 2; Fig. 1-1.

⁶ See *Vapor Intrusion Pathway* at pp. 2-3.

⁷ See *Vapor Intrusion Pathway* at pp. 43-69.

⁸ See, e.g., Indiana Dept. of Env. Mngmt., Draft Vapor Intrusion Pilot Program Guidance at p. 1 (April 26, 2006).

⁹ See, e.g., *Padilla Const. Co., Inc. v. Transportation Ins. Co.*, 58 Cal. Rptr. 3d 807, 813 (Cal. App. 4 Dist. 2007); *U.S. v. U.S. Fidelity & Guranty Co.*, 601 F.2d 1136, 1142 (C.A. Okl. 1979); *First Newton Nat'l Bank v. General Cas. Co. of Wisconsin*, 426 N.W.2d 618, 622 (Iowa 1988).

¹⁰ See, e.g., *Great American Ins. Co. of New York v. Helwig*, 419 F. Supp. 2d 1017, 1026 (N.D. Ill. 2006); *Travelers Indem. Co. v. Summit Corp. of America*, 715 N.E.2d 926 (Ind. Ct. App. 1999); *Wolf Lake Terminals, Inc. v. Mutual Marine Ins. Co.*, 433 F. Supp. 2d 933 (N.D. Ind. 2005); *Kitsap County v. Allstate Ins. Co.*, 964 P.2d 1173, 1176 (Wash. 1998).

¹¹ *Antolovich v. Brown Group Retail, Inc.*, — P.3d —, 2007 Colo. App. LEXIS 1750 at *28 (Colo. Ct. App. 2007) (mentions vapor intrusion as subject of witness testimony); *U.S. v. Apex Oil Co.*, 2007 U.S. Dist. LEXIS 18143 at *13 (S.D. Ill. 2007) (motion to strike expert testimony regarding vapor issues and motion for summary judgment including dispute as to cause of vapor intrusion both denied); *Ohio Casualty Ins. Co. v. Reed*, 2006 U.S. Dist. LEXIS 56625 at *39 (S.D. Ind. 2006) (order denying motion for summary judgment mentions environmental consultant's vapor intrusion analysis at site); *Action Mfg. Co. v. Simon Wrecking Co.*, 428 F. Supp. 2d 288, 305 (E.D. Pa. 2006) (site plans in contribution action include plans to “monitor and remediate . . . soil vapor intrusion.”); *Jaasma v. Shell Oil Co.*, 412 F.3d 501, 514 (3d Cir. 2005) (order reversing lower court's exclusion of expert testimony, including expert's testimony regarding risk of vapor intrusion at site).

¹² See *Travelers Indem. Co. v. Summit Corp. of America*, 715 N.E.2d at 938; *Hartford Acc. & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285 (Ind. Ct. App. 1997); *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1056 (Ind. 2001); *Governmental Ins. Exch. v. City of Angola*, 8 F. Supp. 2d 1120 (N.D. Ind. 1998).

¹³ The duty to defend arises not from the probability of recovery, but from its possibility, no matter how remote. *American Home Assurance Co. v. Port Authority of New York and New Jersey*, 66 A.D.2d 269, 277-278 (N.Y.A.D. 1979); *Howard v. Guidant Mut. Ins. Group*, 785 A.2d 561, 562 (R.I. 2001); *McCormack Baron Mgmt. Serv., Inc. v. Am. Guar. & Liab. Ins. Co.*, 989 S.W.2d 168, 170 (Mo. 1999); *Blair v. Mid-Continent Casualty Co.*, 167 P.3d 888, 891 (Mont. 2007); *LDF Food Group, Inc. v. Liberty Mut. Fire Ins. Co.*, 146 P.3d 1088, 1093 (Kan. App. 2006).

¹⁴ E.g., *Pulte Home Corp. v. American Southern Ins. Co.*, 647 S.E.2d 614, 620 (N.C. App. 2007); *First Specialty Ins. Corp. v. Maine Coast Marine Const., Inc.*, 497 F. Supp. 2d 11, 16 (D. Me. 2007); *Barrett Paving Materials, Inc. v. Continental Ins. Co.*, 488 F.3d 59, 64 (1st Cir. 2007).

¹⁵ See Mark S. Dennison, 58 Am. Jur. Proof of Facts 3d 213, *Proof of Insurer's Duty to Defend "Suit" Alleging Insured's Liability for Environmental Contamination* §§ 13-23 (containing a comprehensive discussion and compilation of case law on this subject).

¹⁶ See, e.g., *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 665 N.W.2d 257, 284-285 (Wis. 2003) (PRP letter from U.S. EPA or equivalent state agency is a “suit” triggering insurer's duty to defend its insured); *Hartford Accident & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285 (Ind. Ct. App. 1997); *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305 (Minn. 1995); *Michigan Millers Mutual Ins. Co. v. Bronson Plating Co.*, 519 N.W.2d 864 (Mich. 1994); *A.Y. McDonald Indus., Inc. v. Ins. Co. of N. America*, 475 N.W.2d 607 (Iowa 1991).

¹⁷ See, e.g., *Lapham-Hickey Steel Corp. v. Protection Mutual Ins. Co.*, 655 N.E.2d 842 (Ill. 1995); *Foster-Gardner, Inc. v. National Union Fire Ins. Co.*, 959 P.2d 265 (Cal. 1998); *Patrons Oxford Mutual Ins. Co. v. Marois*, 573 A.2d 16 (Me. 1990).

¹⁸ See, e.g., *Morton Int'l, Inc. v. General Acc. Ins. Co. of America*, 629 A.2d 831, 845 (N.J. 1993) (“The clear weight of authority among both federal and state courts adopts the view that the term “damages” [includes] costs imposed to remediate environmental

damage.”); *Aetna Cas. & Sur. Co. v. Commonwealth*, 179 S.W.3d 830 (Ky. 2005); *Intel Corp. v. Hartford Acc. & Indem. Co.*, 952 F.2d 1551, 1562 (9th Cir. 1991).

¹⁹ See, e.g., *Aetna Cas. & Surety Co. v. General Dynamics Corp.*, 968 F.2d 707, 714 (8th Cir. 1992).

²⁰ See *Morton Int'l*, 629 A.2d at 845 (discussing opposing viewpoints on this issue).

²¹ See *Morton Int'l*, 629 A.2d at 845.

²² See footnote 12, *supra*; *Millers Mutual Ins. Assn. of Illinois v. Graham Oil Co.*, 668 N.E.2d 223, 231 (Ill. App. 1996); *but see Lockheed Corp. v. Continental Ins. Co.*, 35 Cal. Rptr.2d 799, 816 (Cal. App. 6 Dist. 2005) (such an interpretation would “nullify the pollution exclusion”); *Buell Indus., Inc. v. Greater New York Mut. Ins. Co.*, 791 A.2d 489, 509 (Conn. 2002) (same); *cf. Newnam Mfg., Inc. v. Transcontinental Ins. Co.*, 871 N.E.2d 396 (Ind. Ct. App. 2007) (air emissions not a “wrongful entry” sufficient to trigger personal injury coverage where no allegations existed that the emissions contaminated or interfered with another person’s land).

²³ See David L. Leitner et al, 1 *Law of Ins. Coverage Litig.* § 6:12 (*Coverage for Bodily Injury and Definition of Bodily Injury*) (2007).

²⁴ See Laurence S. Kirsch and Carrie F. Jenks, *Regulating Vapor Intrusion: What Standards Should Apply?*, *Occupational Safety & Health Reporter*, Vol. 37, No. 11, p. March 15, 2007.

²⁵ However, it should be noted that bodily injury typically does not include purely emotional or mental harm or suffering unless accompanied by physical injury or manifestation. See *State Farm Fire & Cas. Co. v. Basham*, 520 N.W.2d 713, 715 (Mich. App. 2004); *Universal Inc. Co. v. Cowan*, 945 S.W.2d 819, 826 (Tex. 1997); *Economy Preferred Ins. Co. v. Jia*, 92 P.3d 1280, 1282–1283 (N.M. App. 2004).

²⁶ See Alan B. Schafer, *Allocating RI/FS Expenses Between Defense and Indemnity Provisions of Old Insurance Policies*, 1997 U. Chi. Legal F. 551 (1997) (Discussing the “Michigan Test,” the “New Jersey Test,” and the “New York Test.”).

²⁷ See Schafer (citing *American Bumper & Mfg. Co. v. Hartford Fire Ins. Co.*, 550 N.W. 2d 475 (Mich. 1996); *Fireman’s Fund Ins. Cos. v. Ex-Cell-O Corp.*, 790 F. Supp. 1318 (E.D. Mich. 1992)).

²⁸ See Schafer (citing *American Bumper*, 550 N.W. 2d at 485).

²⁹ *American Bumper*, 550 N.W. 2d at 486.

³⁰ See Schafer (citing *General Accident Ins. Co. v. Dept of Environmental Protection*, 672 A.2d 1154 (N. J. 1996)).

³¹ See Schafer (citing *Endicott Johnson Corp. v. Liberty Mutual Ins. Co.*, 928 F. Supp. 176 (N.D.N.Y. 1996)).

³² *Domtar, Inc. v. Niagara Fire Ins. Co.*, 552 N.W. 2d 738 (Minn. Ct. App. 1996), *aff’d*, 563 N.W. 2d 724 (Minn. 1997). Other Minnesota courts have subsequently agreed that costs incurred to investigate and comply with a Request for Response Action issued by the State environmental agency are defense costs when the insured has incurred the costs in an attempt “to avoid or at least minimize the cost of the remediation.” See *Westling Mfg. Co., Inc. v. Western Nat’l Mutual Ins. Co.*, 581 N.W. 2d 39 (Minn. Ct. App. 1998) (citing *Domtar* at 738).

³³ *Aerojet-General Corp. v. Transport. Indem. Co.*, 948 P.2d 909, 921 (Cal. 1997).

³⁴ See, e.g., *American Bumper*, 550 N.W. 2d at 481.

³⁵ *Sunoco, Inc. v. Illinois Nat’l Ins. Co.*, 503 F. Supp. 2d 743, 754–755 (E.D. Pa. 2007).

³⁶ *Sunoco, Inc.*, 503 F. Supp. 2d at 754–755.

Editor’s Notes

I am extremely lucky to work with great Managing Editors. Angela Elbert, Celeste Elliott, Ted Howard, Georgia Kazakis, Michael Levine and Ellis Medoway serve as Managing Editors of *Coverage* and make my job as Editor in Chief much easier because of their diligence and professionalism. Our Managing Editors provide tireless work on behalf of the publication by soliciting, editing and polishing the high quality articles that appear in this publication. As members of the Insurance Coverage Litigation Committee, you can assist our great Managing Editors by submitting high quality, cutting-edge articles for consideration for publication. This month’s issue typically is available just prior to the Committee’s Annual CLE Seminar in Tucson, Arizona, which this year will take place on February 27 through March 1, 2008. Ted Howard has done a wonderful job of soliciting, selecting and editing the articles in this issue. If you are a speaker or panelist at the Seminar in Tucson,

Managing Editor Profile

Ted Howard is a partner in the Insurance Practice Group of Wiley Rein LLP in Washington, DC, where he specializes in the counseling of domestic and international insurers with respect to complex liability and property coverage and reinsurance disputes and represents insurers in coverage litigation matters in the state and federal courts. Mr. Howard is a frequent author and lecturer concerning insurance coverage claim-handling and litigation matters and is the co-author of the *Practitioner’s Guide to Litigating Insurance Coverage Actions* (2d ed. Aspen/Wolters Kluwer Law & Bus.). He has been recognized by *Chambers USA* as one of “America’s Leading Lawyers for Business” in the practice area of Insurance. He is a graduate of the University of Notre Dame and Harvard Law School.

please consider submitting an article based on your presentation at the seminar. If you're an attendee at the Seminar, and a great panel or speaker sparks a creative idea, please follow up and submit an article to *Coverage* for potential publication. This publication is only as good as the Committee members who engage and participate in our Committee by writing and submitting high quality articles for publication. The Annual CLE Seminar traditionally has been a wonderful source of materials for subsequent issues of *Coverage*. I encourage you to continue this great tradition, and to become more involved in the Committee by submitting an article to *Coverage*. Many of our Managing Editors started out as writers for *Coverage*, and through their hard work and dedication, evolved into the high quality volunteer staff that makes this publication possible today. This month I'd simply like to thank Angela, Celeste, Ted, Georgia, Michael and Ellis for making my job as Editor in Chief rewarding and enjoyable. Thanks for all of your hard work.

—Erik A. Christiansen, Esq.
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