General Liability Insurance Coverage

Key Issues in Every State

Fifth Edition

Volume I

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CHAPTER 5

Duty to Defend Standard: "Four Corners" or Extrinsic Evidence?

If coverage issues were stocks, the duty to defend would be Blue Chip. Just as investors purchase such stocks in hopes of steady and consistent returns, the rules concerning an insurer's duty to defend have long been unwavering.

This is why it comes as a surprise to no one when a court states that the duty to defend is broader than the duty to indemnify. After all, this has been the case for decades. *Goldberg v. Lumber Mut. Cas. Ins. Co. of N.Y.*, 77 N.E.2d 131, 133 (N.Y. 1948) ("The courts have frequently remarked that the duty to defend is broader than the duty to pay."). Likewise, it does not make news when a court declares that an insurer is obligated to defend even groundless, false, or fraudulent claims. This too has been the case for a very long time. *Patterson v. Standard Accident Ins. Co.*, 144 N.W. 491, 492 (Mich. 1913) (describing a provision in an automobile liability policy that obligated the insurer to defend any suits alleging injuries and demanding damages even if the allegations or demands were "wholly groundless, false or fraudulent"). Still another duty to defend truism is that "the appropriate starting point" for such a determination are the allegations contained in the complaint filed against the insured. *Essex Ins. Co. v. Fieldhouse, Inc.*, 506 N.W.2d 772, 775 (Iowa 1993). And, of course, no citation is needed for the test for determining an insurer's duty to defend: whether a claim in the complaint is potentially covered under the policy.

Given that these principles are so universally held, they are not candidates for a fifty-state survey. Any such survey would be the proverbial broken record. But there is a duty to defend issue about which courts do not agree. While all courts may begin their duty to defend determination by reviewing the complaint filed against the insured and comparing it to the policy, they often part ways on whether such examination also ends there. There is wide variation between courts over whether, and, if so, the extent to which, information contained outside the complaint—so-called "extrinsic evidence"—can be considered when deciding if an insurer's duty

factual contentions beyond what Manes included in her complaint in the underlying action. . . . As a result, in addressing this Motion for Summary Judgment, the Court considers not only the allegations in Manes's Superior Court complaint but also the assertions contained in her pre-litigation correspondence to which Nautilus was privy."); *Nautilus Ins. Co. v. Flor*, 801 Fed. Appx. 703 (11th Cir. 2020) (following *Colonial Oil*).

Hawaii: The Supreme Court of Hawaii overruled prior decisions to the "extent that they imply that an insurer may rely upon extrinsic facts that may be subject to dispute in the underlying lawsuit as a basis for disclaiming its duty to defend where the complaint in the underlying lawsuit alleges facts within coverage. Instead, we adopt the majority rule to the contrary [insurer cannot rely upon extrinsic evidence for the purpose of disclaiming the duty to defend] along with its limited exception -- that the insurer may only disclaim its duty to defend by showing that none of the facts upon which it relies might be resolved differently in the underlying lawsuit." *Dairy Road Partners v. Island Ins. Co., Ltd.*, 992 P.2d 93, 117 (Hawaii 2000). "One example of an extrinsic fact upon which an insurer might rely pursuant to the new rule arises when an insurer argues that an occurrence was outside of the effective period of the policy. In such a case, the factual issue regarding the parameters of the effective period of the policy would not normally be subject to dispute in the underlying action." *Id.*, n.14. In *Nautilus Ins. Co. v. Lexington Ins. Co.*, 321 P.3d 634 (Hawaii 2014), the Supreme Court of Hawaii addressed *Dairy Road Partners* at length and held that "a primary insurer may not look to another insurance policy in disclaiming its duty to defend. If a primary insurer is tendered a defense, and believes that it is actually an excess insurer or otherwise has no duty to defend by operation of its 'other insurance' clause, then that primary insurer must still defend in the action. This is the appropriate remedy, rather than leaving the defense up to other insurers or, potentially up to the insured, where the insured has contracted for primary insurance coverage." The court further explained its decision: "The extrinsic evidence considered in *Dairy Road Partners* included factual matters relevant to the outcome of the underlying litigation. Here, in contrast, the question is whether an insurer may take into account the operation of its policy in conjunction with other insurance policies, to determine if it must defend a particular suit. Thus, the insurer would be looking at the construction and operation of other insurance policies in disclaiming a duty to defend, which presents some different considerations than the 'extrinsic evidence' that was at issue in *Dairy Road Partners*." *See also Hart v. Ticor Title Ins. Co.*, 272 P.3d 1215 (Hawaii 2012) (addressing the use of extrinsic evidence,

beyond the complaint, to find a duty to defend) ("The insurer must employ a good-faith analysis of all information known to the insured or all information reasonably ascertainable by inquiry and investigation to determine whether the possibility of coverage under a policy exists."); *Gemini Ins. Co. v. ConstRX Ltd.*, 360 F. Supp. 3d 1055 (D. Hawaii 2018) ("Hawaii abides by the 'complaint allegation rule,' whereby the determination of whether an insurer has a duty to defend focuses on the claims and facts that are alleged."); *AIG Prop. Cas. Co. v. Anenberg*, No. 19-00679, 2020 U.S. Dist. LEXIS 143485 (D. Hawaii 2020) (noting that Hawaii courts apply the "complaint allegation rule" but also stating: "[A]n insurer must look beyond the effect of the pleadings and must consider any facts brought to its attention or any facts which it could reasonably discover in determining whether it has a duty to defend. . . . The possibility of coverage must be determined by a good-faith analysis of all information known to the insured or all information reasonably ascertainable by inquiry and investigation.").

Idaho: The Supreme Court of Idaho held that the determination of the duty to defend is limited to the allegations in the complaint. *Hoyle v. Utica Mut. Ins. Co.*, 48 P.3d 1256, 1264 (Idaho 2002) ("Despite [notice pleading], it makes little sense to require an insurer to defend a lawsuit simply because a complaint, with no covered claims, could potentially be amended to include covered claims. If this were true, an insurer would be required to defend every lawsuit regardless of the allegations. The better rule is that if there is a subsequent change in the pleadings, a duty to defend may arise and the issue of the duty to indemnify would likewise come before the court again."); *see also Amco Ins. Co. v. Tri-Spur Inv. Co.*, 101 P.3d 226, 231 (Idaho 2004) (quoting *Hoyle*, 48 P.3d at 1264); *County of Boise v. Idaho Counties Risk Management Program, Underwriters*, 265 P.3d 514 (Idaho 2011) ("The insurer need only look at the words of the complaint to determine if a possibility of coverage exists."); *Nautilus Ins. Co. v. Pro-Set Erectors, Inc.*, 928 F. Supp. 2d 1208 (D. Idaho 2013) (quoting *County of Boise*); *Scout, LLC v. Truck Ins. Exch.*, 434 P.3d 197 (Idaho 2019) ("[E]ven if we adopted Scout's interpretation of the Four Corners Rule [allowing extrinsic evidence] the district court also found that extrinsic facts, if considered, would still trigger the prior publication exclusion and relieve Truck Insurance's duty to defend.").

Illinois: The Supreme Court of Illinois held that the determination of the duty to defend is not limited to the allegations in the complaint. *Pekin Ins. Co. v. Wilson*, 930 N.E.2d 1011, 1020 (Ill. 2010) ("It is certainly true that the duty to defend flows in the first instance from the allegations in the underlying complaint; this is the concern

CHAPTER 6

Insured's Right to Independent Counsel

The question whether an insurer is obligated to provide a defense to its insured, for a suit filed against it, turns on whether the claim is potentially covered under the terms of the policy. It is a substantive question and one that can sometimes be the subject of significant analysis and dispute over the answer. Once the insurer determines that it has a defense obligation, the focus shifts to a seemingly easier task and, indeed, one that sounds ministerial—picking up the phone and hiring a lawyer. But it is sometimes far from it. Just as the question whether a defense was owed in the first place can be complex, and a source of great dispute between insurer and insured, so too can be the question of which lawyer to hire to represent the insured.

After an insured has been sued and served with the complaint, the clock begins to tick on the time available under the applicable court rules for the insured to file an answer or other type of responsive pleading. Since time is of the essence, it makes sense that insurance companies maintain lists of law firms that have been pre-screened as acceptable to represent their insureds in the various type of legal proceeding in which they find themselves. By maintaining lawyers at the ready—often referred to as "panel counsel"—the insurer can act quickly to protect its insured's interests. Much time is saved because the insurer knows that the law firm it is hiring is qualified to handle the type of case at issue, at a previously agreed upon hourly rate or other payment arrangement, and has familiarity concerning the insurer's various guidelines on billing, reporting, and litigation management.

While the use of panel counsel makes sense in a lot of ways, not all insureds are content being represented by the defense counsel selected by the insurer. This is particularly the case when the defense is being provided by the insurer under a reservation of rights. In this situation, the insurer has agreed to hire counsel to represent its insured, but, at the same time, has informed the insured that some or all of any damages that may be awarded against it may not be covered under the terms of the policy.

This situation is created by the so-called tripartite relationship:

111070 (D. Minn. Aug. 20, 2015) ("The Court has no duty to Arrowood to pore over the hundreds of pages of records Select Comfort has submitted, searching for potentially objectionable billing. The award Select Comfort requests is not facially unreasonable, is supported by detailed documentation, and seems commensurate with the rate of compensation that the jury found to be the reasonable cost of litigating the *Stearns* action."); *Nat'l Union Fire Ins. Co. v. Donaldson Co.*, 272 F. Supp. 3d 1099 (D. Minn. Aug. 23, 2017) (citing *C.H. Robinson* for the proposition that "Minnesota courts have 'declined to adopt a rule that assumes a conflict of interest arises when an insurer defends under a general reservation of rights'"); *Johnson v. West Bend Mut. Ins. Co.*, No. A17-1957, 2018 Minn. App. Unpub. LEXIS 1037 (Minn. Ct. App. Dec. 17, 2018) (rejecting insured's argument that the insurer is "required to hire—not just pay reasonable fees and costs" for independent counsel once the duty to appoint independent counsel is triggered because the Minnesota Supreme Court has clearly stated that "[w]hen an insurer is obligated to defend its insured and contests coverage in the same suit, the insurer must pay reasonable attorneys' fees for its insured rather than conduct the defense itself"); *Cont'l Ins. Co. v. Daikin Applied Americas. Inc.*, No. 17-552, 2018 U.S. Dist. LEXIS 14327 (D. Minn. Jan. 30, 2018) ("While a reservation of rights cannot, by itself, constitute a conflict of interest, the reservation of rights coupled with the nearly two-year delay raises the claim beyond the speculative.").

Mississippi: The Supreme Court of Mississippi adopted a per se rule that a reservation of rights requires the insurer to pay for the insured's independent counsel. *Moeller v. Am. Guarantee & Liab. Ins. Co.*, 707 So. 2d 1062, 1071 (Miss. 1996). "A law firm which cannot be one hundred percent faithful to the interests of its clients offers no defense at all. 'There is no higher ethical duty in the legal profession than complete absolute fidelity to the interest of the client.'" *Id.* (quoting *State Farm. Mut. Auto. Ins. Co. v. Commercial Union Ins. Co.*, 394 So.2d 890, 894 (Miss. 1981)). The *Moeller* Court also concluded—while recognizing the inconvenience—that the insurer could have retained counsel to defend solely the one covered claim against the insured. *Id.* at 1070; *see also Liberty Mut. Ins. Co. v. Tedford*, 658 F. Supp. 2d 786, 797–98 (N.D. Miss. 2009) (insured presented genuine issues of material fact whether insurer should be equitably estopped from denying coverage, because of prejudice sustained by the insured, on account of the insurer failing to advise it of its rights under *Moeller*); *Hartford Underwriters Inc. Co. v. Found. Health Serv. Inc.*, 524 F.3d 588, 592–99 (Miss. Ct. App. 2008) (determining that Mississippi law applied because "Mississippi law requires an insurer defending an insured under a reservation of

rights to provide the insured with independent counsel because of the 'built-in' conflict that is created" and applying Louisiana law, which requires a concurrent conflict of interest to trigger the right to independent counsel, would infringe upon Mississippi's interest "to enforce its conflict of interest rules in litigation in order to protect parties and the judicial process"); *Maryland Cas. Co. v. Nestle*, No. 1:09cv644, 2010 U.S. Dist. LEXIS 98053 (S.D. Miss. Sept. 17, 2010) (following *Moeller* and noting that insurer should afford the insured ample opportunity to select his own independent counsel to look after his interest) (citations omitted); *PIC Group, Inc. v. LandCoast Insulation, Inc.*, 795 F. Supp. 2d 459, 464 (S.D. Miss. 2011) ("*Moeller* has been the law in Mississippi for almost fifteen years. It is reasonable for a party being defended by an insurance company under a reservation of rights to retain *Moeller* counsel. Indeed, the Mississippi Supreme Court noted that a law firm chosen and hired by an insurer to defend claims against an insured under a reservation of rights 'offers no defense at all.'") (quoting *Moeller*) (addressing reasonableness of *Moeller* counsel fees); *Deviney Construction Co. v. Ace Utility Boring & Trenching, LLC*, No. 11-468, 2014 U.S. Dist. LEXIS 88658 (S.D. Miss. June 30, 2014) (noting that an additional insured is entitled to *Moeller* counsel); *Fed. Ins. Co. v. Singing River Health Sys.*, 850 F.3d 187 (5th Cir. 2017) ("At bottom, the Mississippi Supreme Court in *Southern Healthcare* [*Services v. Lloyd's of London*, 110 So. 3d 735 (Miss. 2013)] determined that the general duty to provide independent counsel set forth in *Moeller* is subject to the terms of the applicable policy. Applying this rationale, Federal's duty to pay Defense Costs is subject to the terms of the 2014-2015 Policy, which states in multiple locations that Defense Costs erode policy limits. Indeed, SRHS specifically declined to purchase separate coverage for Defense Costs."); *Grain Dealers Mut. Ins. Co. v. Cooley*, 734 Fed. Appx. 223 (5th Cir. 2018) (rejecting the argument that *Moeller* does not apply when insurer defends but also disclaims coverage for any liability, *i.e.*, defense not under a reservation of rights) ("We see no relevant distinction between Grain Dealers' outright denial of coverage from the start versus a reservation to later deny coverage. Grain Dealers' refusal to ultimately cover the claim creates the same conflict of interest addressed in *Moeller*.").

Missouri: The Eighth Circuit Court of Appeals, interpreting Missouri law, concluded that when a complaint alleged alternative grounds for relief, one covered by the policy and one not, the insurer "must either provide an independent attorney to represent the insured or pay the costs incurred by the insured in hiring counsel of its own choice." *Howard v. Russell Stover Candies, Inc.*, 649 F.2d 620, 625 (8th Cir. 1981) (quoting *U.S. Fidelity & Guar. Co. v. Louis A. Roser Co.*, 585 F.2d 932, 939 n.6

CHAPTER 9

Number of Occurrences

Most disputes under general liability policies center around the fundamental question whether an insurer is obligated to defend and/or indemnify its insured for certain "bodily injury" or "property damage." But, in some cases, after it is determined that indemnity is owed, a dispute ensues over the extent of the insurer's obligation. In particular, a significant issue bearing on the amount of the insurer's obligation may be the number of "occurrences" that caused the covered "bodily injury" or "property damage."

This issue arises because the Insuring Agreement of virtually all commercial general liability policies states that coverage is owed for "bodily injury" or "property damage" that is caused by an "occurrence." *See, e.g.*, Ins. Servs. Office, Inc., Commercial General Liability Coverage Form, No. CG 00010413, § I1b(1) (2012). In addition, the commercial general liability (CGL) policy's Limits of Liability section typically states that the policy's Each Occurrence Limit is the most that the insurer will pay for the sum of damages because of all "bodily injury" and "property damage" arising out of any one "occurrence." ISO Form, CG 000110413 at § III5. Lastly, most policies define "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." ISO Form, CG 00010413 at § V13. The combination of these policy provisions, when applied to certain facts, leads to what is commonly referred to the "number of occurrences" issue.

Consider a commercial general liability policy that is subject to a $1 million Each Occurrence Limit and a $2 million General Aggregate Limit (being the most that will be paid under the policy for *all* damages—perhaps with an exception for those damages included in the "products-completed operations hazard," which may have its own Aggregate Limit). Under this relatively common limits of liability scenario, if all "bodily injury" and "property damage," even if there are multiple persons injured and multiple properties damaged, arises out of one "occurrence," then the insurer's maximum liability for *all* such damage will be capped at the policy's $1 million Each Occurrence Limit. On the other hand, if the same injury to persons and

product." *Id.* at 1527. The court's decision resulted in the insured's obligation being limited to a single deductible.

Florida: The Supreme Court of Florida held that injuries sustained by two individuals who were shot in a restaurant lobby constituted separate occurrences. *Koikos v. Travelers Ins. Co.*, 849 So. 2d 263, 273 (Fla. 2003). The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at 266. The court concluded that, notwithstanding that the insured restaurant owner was sued for negligent failure to provide security, "occurrence" is defined by the immediate injury-producing act and not by the underlying tortious omission. *Id.* at 272. Despite this multiple occurrence holding, the court specifically emphasized that it was adopting the "cause," and not the "effect," test. *Id.* at 273. "[I]n this case, the immediate causes of the injuries were the intervening intentional acts of the third-party—the intruder's gunshots." *Id.* at 272; *see also GuideOne Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317, 1332 (11th Cir. 2005) (applying *Koikos* and holding that the rape, robbery, kidnapping, and each act of assault and battery upon a victim, and each of her children, were each separate occurrences since the various acts committed by the perpetrator were separated by sufficient "time and space"); *State Nat. Ins. Co. v. Lamberti*, 362 Fed. Appx. 76, 82 (11th Cir. 2010) (applying Florida law) ("[T]he immediate cause of the FTAA Claims plaintiffs' injuries is not the single, coordinated police action, as BSO argues. Instead, each interaction with the individual officers is the cause of the claim, and is distinguishable in time and space. Thus, each interaction could be a separate occurrence. The number of occurrences is not immediately clear, but this court is only called upon to determine whether there is one occurrence or more than one occurrence. It is clear that it is the latter."); *Mid-Continent Cas. Co. v. Basdeo*, 742 F. Supp. 2d 1293, 1347–48 (S.D. Fla. 2010) ("Upon review of the relevant cases, the Court concludes that three occurrences transpired: (1) damages caused in connection with First State's tarping work; (2) damages caused in connection with First State's work on the roofs; and (3) damages caused in connection with First State's work on the mansards. Each of these categories of damages resulted from a separate force, distinguishable in time and space.") (affirmed with further discussion at 477 Fed. Appx. 702 (11th Cir. 2012)); *Citizens Property Ins. Corp. v. Cook* , 93 So. 3d 479 (Fla. Ct. App. 2012) (rejecting trial court's conclusion that each drink provided to each deceased minor constituted a separate occurrence and instead held that there was only one occurrence causing the deaths, i.e., the car crash); *Maddox v. Florida Farm Bureau General*, 129 So. 3d

1179 (Fla. Ct. App. 2014) ("[I]n this case, it is reasonable to construe the occurrence as the entire dog attack or as each separate dog bite. Because ambiguous provisions must be construed against the insurer, the occurrence language in the instant policy must be construed as meaning each separate dog bite that resulted in a separate injury to a separate victim was a separate occurrence."); *Port Consol., Inc. v. Int'l Ins. Co. of Hannover, PLC*, 826 Fed. Appx. 822 (11th Cir. 2020) ("[U]nder Florida law, an 'occurrence' under the Policy is defined by the 'immediate injury-producing act.' Here, the immediate injury-producing acts consist of numerous alleged fuel thefts by several of Allied's affiliated drivers from different fuel dispensers at the Garden Road Facility on different days over the course of a year. Because each alleged fuel theft was an act separated and distinguishable in 'time and space,' we find that each alleged act of fuel theft constituted a separate 'occurrence' under the Policy.") (citing *Koikos* and *GuideOne*); *Travelers Indem. Co. v. Garcia*, No. 19-2911, 2020 U.S. Dist. LEXIS 203339 (M.D. Fla. Oct. 28, 2020) (analyzing *Koikos* in the context of a vehicle collision); *Belt v. USAA Cas. Ins. Co.*, No. 4D20-339, 2021 Fla. App. LEXIS 3522 (Fla. Ct. App. Mar. 10, 2021) ("The trial court employed the *Matty* [*see* Georgia] definition in its instruction: '[m]ultiple impacts will be considered one accident if there is but one proximate, uninterrupted, and continuing cause of injury.' It also provided the jury with factors to consider in that determination, gleaned from *Matty* and other cases. We agree with *Matty* as to the policy construction and the court's instruction was consistent with the cause theory and the policy language.").

Georgia: The Supreme Court of Georgia adopted the "cause" test for purposes of determining how many accidents occurred when a motorist struck two bicyclists, perhaps just over one second apart. *State Auto Prop. & Cas. Co. v. Matty*, 690 S.E.2d 614, 618 (Ga. 2010). "[T]he term 'each accident' appears in the limitation of liability section of the State Auto policy, which clearly contemplates that there can be a single 'accident' in which there are multiple vehicles, injured parties, and claims and provides that for that type of single accident, there will be a liability limit of $100,000." *Id.* at 618–19. The court rejected the "effect" theory (number of impacts), as it would mean that there would never be a single limit of liability in a multiple vehicle collision, because it is virtually impossible for multiple vehicles to collide simultaneously. *Id.* at 617. The Supreme Court remanded to the trial court to determine whether, applying the "cause" theory, there was "but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage." *Id.* at 619 (citation omitted). *See also Travelers Prop. Cas. Co. of Am. v. Cont'l Cas. Co.*, No. 14-2207, 2017 U.S. Dist. LEXIS 41796 (N.D. Ga. Jan. 4, 2017) ("Here, the

CHAPTER 12

Is Faulty Workmanship an "Occurrence"?

When it comes to claims for latent injuries and damages, such as asbestos and hazardous waste, some would say that they were never contemplated under the historic policies that were later—sometimes decades later—called upon to respond. That being so, it is not surprising that questions such as trigger of coverage and allocation have been viewed by courts as particularly vexing, with the result being a lack of unanimity in their handling as different schools of thought developed in response to the issues.

But claims for coverage for construction defects, and the damage they cause, present a different situation. It is unquestionably contemplated that such claims will be made under commercial general liability policies—especially when the insured is in the construction business. For this reason, it is surprising that so much disparity has developing around the country in the case law over the treatment of such claims, especially those involving relatively similar facts and oftentimes identical policy language.

Many construction defect claims follow a typical pattern. A general contractor is hired to build a residential or commercial building. The general contractor employs various subcontractors to assist with the completion of the project, such as to pour the foundation, frame the building, or install the plumbing, windows, HVAC, etc. The house or building is completed. After taking possession, the owner discovers defects in the construction—such as defectively installed windows that are now leaking or an improperly poured foundation that is causing the building to shift. The owner and general contractor are unable to resolve the problem in a manner that is satisfactory to both parties. Left with no choice, the owner files suit against the general contractor. The general contractor then files a third-party complaint against the allegedly at-fault subcontractors. And all defendants turn to their commercial general liability policies seeking coverage for a defense and any liability that may be assessed against them.

As a general rule, courts have concluded that defects in the insured's work product are not covered—unless a certain exception applies, as discussed below.

as an 'undesigned or unexpected event,' and thus there was no 'accident.' Because there was no 'accident,' there was no 'occurrence' within the meaning of the policy, no 'property damage' to which the policy applied, and hence no duty on the part of TBIC to defend The View."); *Westfield Ins. Co. v. Miller Architects & Builders*, 949 F.3d 403 (8th Cir. 2020) (allegations of water coming through a defectively installed roof, which caused damage to the "finishes and electrical work in the building's interior" alleged "property damage" caused by an "occurrence"); *Am. Family Mut. Ins. Co. v. Mid-American Grain Distribs., LLC*, 958 F.3d 748 (8th Cir. 2020) ("Just like the damages resulting from the insured's work in *Mathis*, *Davis*, and *View Home Owner's Association*, Lehenbauer's damages are the 'normal, expected consequence' of Mid-American's work. They are thus foreseeable as a matter of law, so Mid-American's work is not an 'accident,' and thus not an 'occurrence,' under the CGL.") (internal citations omitted).

Montana: The Supreme Court of Montana held that an insured's subcontractor's defective manufacturing of disposable sanitary bags, for use in another party's portable toilets, qualified as an "event," defined in the policy as an "accident." *Revelation Indus., Inc. v. St. Paul Fire & Marine Ins. Co.*, 206 P.3d 919, 929 (Mont. 2009). The court rested its decision, in part, on the following example contained in the policy of the operation of the "your work" exclusion and "subcontractor exception," which the court deemed to be indistinguishable from the situation before it: "You construct a building as a general contractor. Some of the work is done by you while the rest is done for you by subcontractors. The building is accepted by the owner. If it's damaged by a fire caused by electrical wiring installed by a subcontractor, we won't apply the exclusion. However, if the wiring was installed by you, we'll apply the exclusion to property damage to your completed work done by you." *Id.*; *see also King v. State Farm Fire & Cas. Co.*, No. CR 09–96-M-DWM, 2010 U.S. Dist. LEXIS 49029 (D. Mont. May 18, 2010) (holding that claims against the seller of a log home kit, for misrepresentations about the quality of the logs and refusal to correct deficiencies, did not allege an "occurrence") (*affirmed* 500 Fed. Appx. 699 (9th Cir. 2012)); *Haskins Const., Inc. v. Mid-Continent Cas. Co.*, No. CV–10–163, 2011 U.S. Dist. LEXIS 127231 (D. Mont. Nov. 3, 2011) ("[S]ince the Montana Supreme Court has held that, from the insured's standpoint, the term 'accident' means 'any unexpected happening that occurs without intention or design on the part of the insured,' *Blair v. Mid–Continent Casualty Co.*, 167 P.3d 888, 891 (Mont. 2007), 'occurrence' encompasses the faulty workmanship alleged in the ... Amended Complaint."); *Thomas v. Nautilus Ins. Co.*, No. 11–40, 2011 U.S. Dist. LEXIS 108915

(D. Mont. Aug. 24, 2011) ("That faulty workmanship is an 'occurrence' that may ultimately, under certain circumstances, be covered, is evidenced by the fact that the Policy contains a subcontractor exception to the 'your work' exclusion, which otherwise precludes coverage for property damage to the insured's completed or abandoned work.") (*adopted at* 2011 U.S. Dist. LEXIS 109018 (D. Mont. Sept. 19, 2011)); *Northland Cas. Co. v. Mulroy*, No. 13-232, 2015 U.S. Dist. LEXIS 94631 (D. Mont. July 21, 2015) (citing a treatise for the following proposition: "A claim for faulty workmanship, in and of itself, is not an occurrence under a commercial general liability policy because a failure of workmanship does not involve the fortuity required to constitute an accident. Instead, what does constitute an occurrence is an accident caused by or resulting from faulty workmanship, including damage to any property other than the work product and damage to the work product other than the defective workmanship. In other words, although a commercial general liability policy does not provide coverage for faulty workmanship that damages only the resulting work product, the policy does provide coverage if the faulty workmanship causes bodily injury or property damage to something other than the insured's work product."); *Phoenix Ins. Co. v. Ed Boland Constr., Inc.*, 229 F. Supp. 3d 1183 (D. Mont. 2017) ("Montana federal courts, applying Montana law, have concluded that defective workmanship is not considered an 'occurrence' under the insuring language of a CGL policy.") (citing *King* and *Mulroy*); *W. Heritage Ins. Co. v. Slopeside Condo. Ass'n*, 371 F. Supp. 3d 828 (D. Mont. 2019) ("The Court finds that Slopeside's damages arose from the unanticipated and unexpected consequences of Folkman's conduct. Folkman's installation of the T-panel systems constitutes an 'occurrence,' and the underlying dispute between Slopeside and Folkman falls within the policy's insuring agreement."); *Atl. Cas. Ins. Co. v. Quinn*, No. 18-76, 2019 U.S. Dist. LEXIS 103566 (D. Mont. June 20, 2019) (rejecting argument that "faulty workmanship is not a covered occurrence because it is not a fortuitous event" because "[a]s this Court recognized in *Western Heritage*, faulty workmanship can be an occurrence under *Fisher Builders* if the consequences were not objectively intended or expected by the insured, notwithstanding the work was intentional").

Nebraska: The Supreme Court of Nebraska held that damage to roof structures and buildings, caused by an insured's subcontractor's negligent installation of shingles, qualified as an "occurrence." *Auto-Owners Ins. Co. v. Home Pride Cos.*, 684 N.W.2d 571, 579 (Neb. 2004). "[A]lthough a standard CGL policy does not provide coverage for faulty workmanship that damages only the resulting work product, if faulty workmanship causes bodily injury or property damage to something other

CHAPTER 15

"Absolute" Pollution Exclusion

As discussed in the previous chapter, commercial general liability insurance policies have for some time sought to exclude coverage for pollution. The 1973 commercial general liability (CGL) form contained the qualified pollution exclusion addressed in the prior chapter. Under this exclusion, pollution-related claims were generally not covered unless the discharge of the pollutant was "sudden and accidental." Insurers interpreted this language to mean that the discharge must be both unintentional and abrupt if there was to be coverage. However, approximately half the states disagreed and found it sufficient to establish coverage if the discharge (or sometimes even the damage from the discharge) was unintentional, no matter how extended or ongoing the time period of the discharge. As the previous chapter illustrates, litigation over the meaning of "sudden and accidental" was abundant.

Reacting to this situation, the insurance industry replaced the qualified pollution exclusion with an "absolute" pollution exclusion that became part of the 1986 CGL form. Under the absolute pollution exclusion, the CGL policy clearly provides that it does not cover Superfund-style government-mandated cleanup and also states, more generally, that the policy does not cover bodily injury or property damage "arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants,'" provided that such discharge, dispersal, etc. was of waste or from various specifically described premises, subject to certain exceptions. *See* INS. SERVS. OFFICE INC., COMMERCIAL GENERAL LIABILITY COVERAGE FORM, NO. CG 00011185, § I2f (1984).

"Pollutants" are defined as

> any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Id.

in the state court action.") (rejecting argument that "pouring" did not satisfy the exclusion's discharge or dispersal, i.e., "movement," requirement).

Georgia: The Supreme Court of Georgia held that the pollution exclusion unambiguously precluded coverage for a carbon monoxide leak in an insured landlord's rental property because it qualified as a "pollutant." *Reed v. Auto-Owners Ins. Co.*, 667 S.E.2d 90, 92 (Ga. 2008). "As all parties recognize, the question thus narrows to whether carbon monoxide gas is a 'pollutant'—i.e., matter, in any state, acting as an 'irritant or contaminant,' including 'fumes.' We need not consult a plethora of dictionaries and statutes to conclude that it is." *Id.* The court concluded that nothing in the text of the pollution exclusion supported a reading that it was "limited to what is commonly or traditionally considered environmental pollution." *Id.* In *Ga. Farm. Bureau Mut. Ins. Co. v. Smith*, 784 S.E.2d 422 (Ga. 2016), the Supreme Court of Georgia held that "[u]nder the broad definition contained in Chupp's policy, we conclude that lead present in paint unambiguously qualifies as a pollutant and that the plain language of the policy's pollution exclusion clause thus excludes Smith's claims against Chupp from coverage." *See also Truitt Oil & Gas Co. v. Ranger Ins. Co.*, 498 S.E.2d 572, 574 (Ga. Ct. App. 1998) (holding pollution exclusion applicable to claim arising out of gasoline leak from storage container, rendering neighbor's real property inaccessible, because of road closure due to cleanup); *Scottsdale Ins. Co. v. Pursley*, 487 Fed. Appx. 508 (11th Cir. 2012) (following *Reed* and holding that carbon monoxide was a pollutant which triggered pollution exclusion); *Racetrac Petroleum, Inc. v. Ace American Ins. Co.*, 841 F. Supp. 2d 1286 (N.D. Ga. 2011) (holding that benzene, which is typically found in unleaded gasoline in small amounts, was a pollutant under the pollution exclusion, and it did not make a difference whether injuries resulted from exposure to highly concentrated amounts or typical concentration found in gasoline), *affirmed* 2011 U.S. App. LEXIS 22455 (11th Cir. Nov. 3, 2011) (concluding that the claims came within the scope of the pollution exclusion and also agreeing with the district court that the pollution exclusion did not "violate Georgia public policy since the liability insurance policies at issue are primarily intended to provide Racetrac with coverage for the countless other risks associated with operating convenience stores"); *Evanston Ins. Co. v. Sandersville R.R. Co.*, No. 5:15-247, 2016 U.S. Dist. LEXIS 134162 (M.D. Ga. Sept. 29, 2016) (following a detailed analysis of Georgia law addressing the pollution exclusion, court held that the exclusion precluded coverage for injuries caused by welding fumes). *But see Barrett v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 696 S.E.2d 326, 330 (Ga. Ct. App. 2010) (declining to

follow *Reed* because the allegations of the complaint indicated that the release of natural gas, standing alone, did not cause the underlying plaintiff's injuries) (distinguishing cases where the presence of the pollutant, following its release, dispersal, or seepage was the "but-for" cause of the plaintiff's injury); *Minkoff v. Action Remediation, Inc.*, No. 559/06, 2010 N.Y. Misc. LEXIS 4857 (N.Y. Sup. Ct. Sept. 30, 2010) (applying Georgia law) (concluding that damages resulting from the use of a bleach and Sporicidin mix in mold remediation were not precluded from coverage under policy's pollution exclusion because, as standard supplies in the cleaning business, "a reasonable insured would expect the chemicals released by the mix of bleach and Sporicidin ... to be covered by the CPL") (noting that a pollution exclusion including such chemicals "would raise public policy issues"); *Centro Dev. Corp. v. Cent. Mut. Ins. Co.*, 720 Fed. Appx. 1004 (11th Cir. 2018) (storm water qualifies as a pollutant); *Recyc Sys. Southeast, LLC v. Farmland Mut. Ins. Co.*, No. 17-225, 2018 U.S. Dist. LEXIS 82248 (M.D. Ga. May 16, 2018) (pollution exclusion applied to noxious odors from a holding pond containing nutrient-rich water disposed of by poultry plants); *Evanston Ins. Co. v. Xytex Tissue Servs., LLC*, 378 F. Supp. 3d 1267 (S.D. Ga. 2019) ("[W]hen bodily injury results from the migration, release, or escape of lead-based paint or carbon monoxide, the substances unambiguously meet the definition for 'pollutant.' The same cannot be said for nitrogen."); *Associated Indem. Corp. v. Hughes*, No. 18-00201, 2019 U.S. Dist. LEXIS 111883 (N.D. Ga. Apr. 25, 2019) (storm water, even when uncontaminated, is a "pollutant"); *Sullivan v. Everett Cash Mut. Ins. Co.*, No. 18-00207, 2019 U.S. Dist. LEXIS 141628 (N.D. Ga. Apr. 17, 2019) (concluding that airborne particulates and dust "fall well within the definition of 'pollutant'") ("The phrase 'any solid . . . irritant or contaminant' plainly includes dust and any other particles emitted by a poultry plant, even if those substances are not explicitly listed in the Policy."); *Evanston Ins. Co. v. Sandersville R.R.*, 761 Fed. Appx. 940 (11th Cir. 2019) (pollution exclusion applied to injury from inhaling welding fumes which contained iron particles) ("[W]elding fumes unambiguously qualify as an 'irritant or contaminant,' including . . . fumes."); *Century Cmtys. of Ga. v. Selective Way Ins. Co.*, No. 18-5267, 2019 U.S. Dist. LEXIS 224489 (N.D. Ga. Oct. 25, 2019 (pollution exclusion applied to property damage caused by "water runoff, sediment, silt, and other pollutants"); *Lang v. FCCI Ins. Co.*, No. 19-3902, 2021 U.S. Dist. LEXIS 73764 (N.D. Ga. Mar. 30, 2021) (dust from construction work qualified as a pollutant) ("[D]ust is inescapably and unambiguously a 'pollutant,' i.e., an 'irritant or contaminant' under the circumstances here where Plaintiff has alleged

that the dust, whether due to its accumulation or otherwise, caused Mr. Love's difficulty breathing and ultimate ICU visit").

Hawaii: A Hawaii District Court held that the pollution exclusion precluded coverage to a plumbing company, for claims arising out of its use of an extremely strong drain cleaner at a Wal-Mart store, which generated "noxious fumes" injuring a store employee. *Apana v. TIG Ins. Co.*, 504 F. Supp. 2d 998, 1006 (D. Haw. 2007). "Nothing in the language of the Total Pollution Exclusion Endorsement references or even impliedly limits the clause to instances of traditional environmental pollution or requires that the pollution cover an extended area." *Id.* On appeal, the Ninth Circuit certified the "traditional" versus "non-traditional" issue to the Supreme Court of Hawaii. *Apana v. TIG Ins. Co.*, 574 F.3d 679 (9th Cir. 2009). The case was subsequently dismissed by the parties. *Apana v. TIG Ins. Co.*, No. 29942, 2010 Haw. LEXIS 53 (Haw. April 7, 2010); *see also Allstate Ins. Co. v. Leong*, No. 09–00217, 2010 U.S. Dist. LEXIS 46277 (D. Haw. May 11, 2010) (finding that pollution exclusion was not applicable to sewage flow that damaged a neighbor's retaining wall) ("Even if the court assumes that the sewer pipe leaked waste materials or other irritants, contaminants or pollutants, it is unclear whether the damage to the retaining wall was *caused* by 'waste materials or other irritants, contaminants or pollutants.") (citation omitted from original); *Nautilis Ins. Co. v. Hawk Transp. Serv., LLC*, CV. No. 10-00605, 2011 U.S. Dist. LEXIS 65663 (D. Haw. June 20, 2011) (noting that Hawaii has not definitively decided whether to read total pollution exclusions as only applying to traditional environmental pollutants or more broadly to encompass any hazardous substance) (declining to determine which pollution exclusion interpretation to apply because "even applying the more liberal test— *i.e.* the test which limits the exclusion to situations involving traditional environmental pollution—[the insurer] is entitled to summary judgment because the [hazardous solid waste] pollutants alleged to have been dispersed in the Underlying Suit involve traditional environmental pollution") (citations omitted from original); *Nautilus Ins. Co. v. SER Trucking, Inc.*, No. 11-00172, 2011 U.S. Dist. LEXIS 138288 (D. Haw. Nov. 8, 2011) (concluding that the pollution exclusion barred coverage for damages from dumping solid waste consisting of "waste tires, partially buried tires, concrete rubble greater than eight inches in diameter, and partially buried re-bar"); *Charter Oak Fire Ins. Co. v. Endurance American Specialty Ins. Co.*, 40 F. Supp. 3d 1296 (D. Haw. 2014) (pollution exclusion did not preclude coverage for individuals killed by an explosion that occurred when seized fireworks were being destroyed); *Allen v. Scottsdale Ins. Co.*, 307 F. Supp. 2d 1170 (D. Haw. 2004) ("Considering the Hawaii