

INSURANCE CONSUMER COUNSEL'S COLUMN

"Insurance for Pollution in Montana"

By Professor Greg Munro¹

A. Introduction

Since the 1970s, America has experienced an explosion of litigation involving damage from pollution. The enactment of federal legislation such as CERCLA, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980² and state counterparts to such federal acts has resulted in civil actions by federal and state authorities seeking to clean up waste contaminated sites across the nation. Defendants are those who generate, transport, or dispose of the wastes as well as those who own or operate the sites which contain the wastes. In addition, private civil lawsuits for bodily injury and property damage have grown exponentially as lawyers have mastered the science necessary to prove the causal connection between environmental pollution and the damages it inflicts on people and their property.

It is estimated that the cost of remedying hazardous waste conditions at the sites in the United States alone will be at least \$500 billion.³ Hence, the overarching social economic question in issues of pollution insurance is whether manufacturers or the insurance industry will pay the bill. For its part, the insurance industry has been overwhelmed by the number and magnitude of pollution claims that have developed and has sought to extricate itself from covering the risks of pollution damage. The property/casualty insurance industry has used a fairly uniform set of policy forms during the last half century, and issues involving pollution coverage arising under those forms have been litigated in coastal manufacturing states like New Jersey and California. Slowly, non-manufacturing states like Montana have developed their own case law interpreting the policy grants of coverage and exclusions to answer the critical questions about coverage for pollution. Montana state and federal courts have now produced enough decisions to merit review to determine where claimants and insurance consumers stand in securing insurance coverage of claims for pollution damage.

The scope of this article will be limited to review of those Montana State and federal decisions involving insurance for pollution. For a broader consideration of the issues raised here, see Joshua Rosenkranz's article, *The Pollution Exclusion Clause Through the Looking Glass*.⁴ For the seminal Montana perspective, see Mark Williams's 1993 article, *Insurance Coverage of Environmental Liability in Montana*.⁵

B. History of the CGL coverage provisions

Issues of insurance for pollution can only be discussed in context of the pertinent policy language. Review of the policy language is made easier by the fact that the insurance industry during the past fifty or sixty years was using roughly the same forms drafted by the property/casualty trade organizations. Review of these past policy changes is also important, because so many pollution claims involve activities that have been conducted by commercial enterprises for decades. In Montana, for example, pollution litigation has involved mining sites (including the largest superfund site in the world), gas stations, tank truck terminals, pole yards, rail yards and other sites many of which have polluted for decades and, in some cases, for more than 100 years. Discovery of pollution damage often triggers policies dating back to World War II.

For purposes of our review, we can break the policy drafts down into four types over four

periods: (1) “accident” based policies before 1966; (2) “occurrence” based policies post 1966; (3) policies containing the “standard” pollution exclusion from 1970 until 1986; and (4) policies containing an absolute pollution exclusion from 1986 to date. In the discussion that follows, the author will relate back to these policies and periods.

1. The Pre-1966 “accident” policies

Before 1966, CGL policies, in their grant of coverage, covered an “accident” which was generally undefined. For the insurers, in the context of pollution, accident meant a sudden discharge referable to a fixed time and did not cover gradual pollution.⁶ However, the courts fashioned different definitions of accident generally finding that an event or series of events was an accident if unexpected and unintended.⁷ Also, they deemed the ultimate loss an accident even if the polluter intended the disposal of the waste, so long as the ultimate loss was not intended.⁸ Common issues under the pre-1966 policies were whether there was an accident and whether the damage was expected or intended. Courts simply construed the pre-1966 policies to cover gradual pollution. Recovery under the pre-1966 policies is relatively easy, but their limits are often so low as to be insignificant in the face of the enormous damages in many pollution cases today.

2. The 1966 change to “occurrence” policies

In response to the uncertainty caused by a diverse array of common law interpretations of the accident-based policies, the insurance industry made a universal change to occurrence-based policies in 1966. Those policies defined an “occurrence” as “an accident, including continuous or repeated 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.”⁹ By definition, an occurrence would include gradual pollution so long as it was neither expected nor intended by the insured. As might be expected, litigation over application of the new occurrence-based policies to pollution focused on the construction of the “neither expected nor intended” language.

In adopting the occurrence-based coverage, the insurance industry wanted to avoid covering industrial clients who knowingly polluted the environment.¹⁰ However, with the “sudden” requirement gone, the courts began to find all pollution related damage covered, even that resulting from intentional dumping, so long as the ultimate loss was neither expected nor intended.¹¹ During this period, “the well-publicized environmental disasters of Times Beach, Love Canal and Torrey Canyon”¹² caused insurers to see the writing on the wall for pollution coverage.

3. The “standard” pollution exclusion of 1970 and its exception

In 1970, the industry introduced an endorsement to the standard form CGL policy that contained the first pollution exclusion. Its pertinent provisions were as follows:

[T]his policy shall not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.”¹³

In 1973, the ISO incorporated what came to be known as the “standard” pollution exclusion directly into its policies as exclusion (f). This provision excluded all pollution but contained an exception for “sudden and accidental” discharges. As Judge Hatfield said in *Enron Oil Trading & Transport v. Underwriters of Lloyd’s of London*, (1996),¹⁴ the practical purpose of the pollution exclusions “is to avoid the yawning extent of potential liability arising from the gradual or repeated discharge of hazardous substances into the environment.”

The explosive growth of environmental tort claims, the magnitude of the losses, and the desperation of defendant companies to secure coverage made inevitable intense litigation of whether discharges were sudden and accidental. Some courts found the word “sudden” ambiguous and deemed it to mean “unexpected” often finding in favor of the insured manufacturers. Others found it unambiguous and held that it had a temporal aspect meaning that the event had to be abrupt or quick therefore finding in favor of the insurers. Insurers found themselves embroiled in one of “the most hotly litigated insurance coverage questions of the 1980s.”¹⁵

4. The 1986 “absolute” pollution exclusion

By 1985, what is now known as the “absolute pollution exclusion” began to appear in the policies. It is now widely used and was intended to block any kind of pollution coverage. It provides in pertinent part as follows:

This insurance does not apply to:

* * *

f.(1) “Bodily injury” or “property damage” arising out of actual, alleged or threatened discharge, dispersal, release or escape of pollutants:¹⁶

“Pollutants” are defined as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste include materials to be recycled, reconditioned or reclaimed.”¹⁷

The absolute pollution exclusion removed the exception for “sudden and accidental” releases and no longer required that the discharge be “into or upon land, the atmosphere or any watercourse or body of water” to be excluded pollution. It was intended to be unambiguous and broad in its exclusion of any pollution coverage. As will be seen, that breadth would lead to mischief and litigation as to its application.

C. The Montana decisions on issues of insurance for pollution liability

With that background we can review the Montana decisions by looking at the issues with which the Courts have contended. We can categorize the cases under the following six issues:

1. Whether the discharge was “sudden and unexpected” so as to fit in the exception to the 1973 standard pollution exclusion.

a. The *Town Pump* decisions: “sudden” meaning unexpected

Under the standard pollution exclusion written directly into the policies in 1973, pollution could only be covered if it was sudden and accidental. Because the standard pollution exclusion was in effect as an endorsement or a direct policy exclusion from 1970 through 1985, it is

involved in many cases where pollution damage has only recently become manifest. The 1981 case of *Town Pump, Inc. v. Diteman*,¹⁸ involved a contractor who improperly installed gasoline lines at a Town Pump service station in Bozeman so that the tanks leaked gasoline into neighbors' water wells. Town Pump ignored evidence that the tanks were leaking substantial amounts of gasoline, until the neighbors filed suit for personal injury and property damage caused by pollution of the wells.

General Ins. Co. of America v. Town Pump, Inc. (1984),¹⁹ was the culmination of litigation to secure insurance coverage for those suits. The policy in the *Town Pump* cases contained the "standard" pollution exclusion with the attendant exception for what the Supreme Court described as "sudden, unexpected and unintentional discharges" of gasoline.²⁰ An employee of town pump had repeatedly reported to Town Pump officers her observations of gas pump "hesitation," gasoline inventory loss, earth depression around the tanks, and neighbors' complaints of gas in their water, all of which indicated that gasoline was being lost into the ground.²¹ The District Court found that the spillage occurred over a period of two years from Summer 1973 through March of 1975, but nevertheless, found that the "gasoline leakage was sudden, unexpected and unintentional as far as Town Pump was concerned."²² On appeal, General Insurance Company conceded that the pollution exclusion was not applicable to the gasoline leakage in the case, so that the Montana Supreme Court said, "we accept that the pollution was sudden, unexpected and unintentional and that coverage was properly invoked by the insured."²³ While there is no holding to such effect, the Court's acceptance that the spillage over a period of two years was "sudden, unexpected and unintentional" puts the decision in a category with those that did not assign the word "sudden" a temporal aspect so as to require that the event be abrupt in order to invoke coverage.

b. The *Quisel* case raises the issue: Is "sudden" temporal?

In 1990, Judge Battin, in *U.S.F. & G. v. Quisel*,²⁴ was confronted with the issue of whether "sudden and unexpected" had a temporal aspect. A high pressure hose attached to an underground gasoline storage tank at Quisel's gas station in Livingston ruptured leaking 5,000 gallons of gasoline which migrated into surrounding properties. The State of Montana intervened to clean up the spill and then sued to recover its costs for the clean-up program. Quisel tendered defense of the state action to U.S.F.&G. which declined coverage on the basis of the absolute pollution exclusion. U.S.F.&G. had by endorsement placed the absolute pollution exclusion in the renewal policy for the first time without giving notice to Quisel. Judge Battin held that U.S.F.&G. was equitably estopped from asserting the absolute pollution exclusion, because the policy was a renewal and the carrier, under the circumstances of the case had misled the insured into thinking he was covered on the same renewal terms.

Consequently, the Court held that Quisel's policy consisted of the standard pollution exclusion which contained an exception for "sudden and accidental" discharges which exception had been previously explained by the agent to the insured. Whether the leakage was "sudden and accidental" within that exception then became the issue. Judge Battin observed that the courts around the U.S. were split on the questions of whether the phrase "sudden and accidental" was ambiguous and whether "sudden" had a temporal aspect or whether it simply meant unexpected. Noting the importance of the issue and the fact that the Montana Supreme Court had not decided it, he indicated he would certify it to that court. However, it appears the issue was never decided

there presumably because the case settled after the decision of the federal court.

c. The *Grindheim* case: “sudden” being temporal (but still ambiguous)

In the 1995 federal case of *Grindheim v. Safeco Ins. Co. of America*,²⁵ the Deerfield Hutterite Colony near Lewistown, Montana had for years allowed human and livestock sewage waste to flow into a coulee which crossed Grindheim’s property and flowed into the Judith River. Grindheims alleged the sewage polluted their water and land and created offensive odors that seriously interfered with their enjoyment of their property and endangered their health

The policy grant of coverage covered the Colony for liability for any claim or suit “for damages because of **bodily injury or property damage** caused by an **occurrence** to which this coverage applies.” An “Occurrence” was defined as “an accident, including exposure to conditions which results, during the policy period, in bodily injury or property damage.” Before 1990, the policy contained the “standard pollution exclusion” excluding:

(8) injury or damage caused by or resulting from a **Pollution Incident** unless injury or damage:

1. Occurs suddenly during the policy period , and
2. Is unknowingly caused, and
3. Would not have been expected or intended by a reasonably prudent person in [the insured’s] position.

Hence, there was no coverage for pollution unless it was sudden and unexpected. The policy defined a **Pollution Incident** as “the emission, discharge, release or escape of any solid, liquid, gaseous, or thermal contaminant, irritant, or pollutant into or upon land, the atmosphere, or any water. The policy also contained a standard exclusion excluding from occurrences “**bodily injury or property damage** which is expected or intended by the **insured.**”

In 1990, Safeco altered the policy to absolutely exclude coverage for a “Pollution Incident” defined to mean “the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of any pollutants.” The policy further defined “Pollutants” as:

any solid, liquid, gaseous or thermal irritant or contaminant, including: smoke, vapor, soot, fumes, acids, alkalis, chemicals, fertilizers (whether of plant or animal origin, composed of other natural substances, or chemically formulated) and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

The pollution exclusion was absolute, because it no longer had an exception for sudden and unexpected discharges.

Under the standard pollution exclusion that governed coverage for the Colony until 1990, the court had to determine if the discharges were “sudden and accidental.” The court noted first that numerous courts construing the standard form limited pollution exclusion “have adopted the unexpected/unintended view, and found that releases of pollutants that an insured did not expect or intend are sudden and accidental within the meaning of the exception.”²⁶ Secondly, the Court noted the word sudden can mean unexpected or can have a temporal connotation of abrupt or instantaneous, so that it is ambiguous. But, it also recognized that many other courts assign the word sudden a temporal definition but are not clear on whether the focus is on the duration or inception of the polluting event. The *Grindheim* Court elected to hold the word sudden to have a temporal quality while finding it ambiguous as to whether it was the commencement or the

duration of Grindheim's injury that had to be sudden.²⁷ As will be seen, the Montana Supreme Court would also hold the word sudden in the exception to the 1973 pollution exclusion to have a temporal quality.

d. The *Sokoloski* case: "sudden" meaning abrupt

In 1999, in *Sokoloski v. American West Ins. Co.*,²⁸ the Supreme Court held that smoke and soot damage to interior ceilings, floors, walls and personal property from burning candles over a period of four to five weeks was not "sudden and accidental" so as to fit in the exception to the standard pollution exclusion. The Court noted two opposing lines of authority, one of which has held such terms as "sudden and accidental" or "sudden and unexpected" are subject to more than one reasonable interpretation and therefore ambiguous so as to require interpretation in favor of the insured. The other line of decisions had concluded that such terms as sudden and accidental are unambiguous and have a temporal element so that they apply only to events that are abrupt and last a short time. The Court, in *Sokoloski*, concluded that, even if the term sudden and accidental includes the concept of unexpectedness, it "also encompasses a temporal element, because unexpectedness is already expressed by the word accidental."²⁹ The Court said that sudden "connotes a sense of immediacy" which might encompass seconds, minutes or hours, but simply would not accommodate weeks.

e. The *Ribi* case: "sudden" as temporal

In the 2005 case of *Travelers Casualty and Surety Company v. Ribi Immunochem Research, Inc.*,³⁰ Ribi, a biopharmaceutical manufacturer, had routinely disposed of solvents used in producing its products, by dumping them in the Bitterroot Valley Sanitary Landfill in Ravalli County, Montana. Between 1981 and 1985, the company poured the solvents into a grave-sized earthen pit in the landfill with the expectation that they would evaporate before reaching groundwater. Later investigation revealed that the solvents were actually reaching the shallow groundwater within 13 to 34 minutes of each disposal.

Ribi was sued in 1993 by neighbors of the landfill for personal injury and property damage by reason of contamination of the groundwater. In 1997, the State of Montana sued for its response costs incurred in and around the landfill, and, in 1998, the federal government sued for the costs of excavation and cleaning of contaminated soil performed by the National Institute of Health. Ribi tendered all three cases to its CGL carrier, Travelers, which declined coverage with three separate reservation of rights letters each of which denied any duty to indemnify or defend and warned that Travelers would seek reimbursement of any defense costs expended.

The trial court found that Ribi's acts constituted an "occurrence" under the policy but were not "sudden and accidental" so as to escape the policy's standard pollution exclusion which excluded all pollution save for discharges that were sudden and accidental. On appeal, the Montana Supreme Court noted at the outset that the intent of the CGL policy is to cover the insured's acts or omissions including intentional acts so long as the resulting injury is not expected or intended from the standpoint of the insured. Traveler's policy defined an "occurrence" as "an accident that results in property damage neither expected nor intended from the standpoint of the insured."

The District Court treated the "neither expected nor intended" language as an exclusion and placed the burden of proof on the insurer. The Supreme Court disagreed holding that the "neither expected nor intended" language was part of the grant of coverage within the insured's

burden of proof. Hence, the insured must prove that the damages from its disposal of waste was not “expected or intended” from its standpoint.

Based on the District Court’s determination that Ribi intentionally disposed of hazardous wastes at BVSL for an extended period of time, and the dispute as to whether Ribi intended or expected damage from its discharge, the Supreme Court assumed for purposes of its decision that there was an “occurrence” and turned its focus to whether coverage was blocked by the policy’s standard pollution exclusion. The only exception to the exclusion was for “sudden and accidental” discharges. On the issue of whether Ribi’s disposals were sudden and accidental, the Court followed its holding in *Sokoloski* to conclude that the word “sudden” was unambiguous and had a temporal aspect to its meaning and not merely a sense of something unexpected. The Court then applied what it determined to be the majority rule that the insured bears the burden of proving an exception to an exclusion, i.e. that its discharge was sudden and accidental.

The next issue was whether the “sudden and accidental” exception applied to Ribi’s initial disposal of the solvents or to the damage caused by the migration of the wastes. The Court said:

We determine that the language of the CGL policy’s pollution exclusion clearly excludes coverage for property damage arising out of the discharge of hazardous wastes into or upon the land unless such discharge . . . is sudden and accidental. (Emphasis added) The occurrence that must be sudden and accidental then, is the disposal of hazardous wastes into or upon the land from which the property damage arose, not the unexpected migration and corresponding damages.

Because the court had held that the term “sudden” means abrupt and quick, it was clear that the routine disposal of solvents over a period of three years could not be sudden. Hence, Ribi could not meet the burden of bringing the claims into the sudden and accidental exception to the pollution exclusion.

Hence, *Grindheim*, *Sokoloski* and *Ribi* establish that, in Montana, the word “sudden” in the exception to the standard pollution exclusion has a temporal definition so as to mean abrupt or quick. These decisions favor the insurers and will make it very difficult to obtain coverage of gradual pollution regardless of whether the damage is unexpected.

2. Whether the discharge was excluded by the “expected and intended” exclusion

a. Whether the gasoline leakage in *Town Pump* was “expected or intended”

Since 1966, the property/casualty policies have covered an “occurrence” and defined occurrence to mean “an accident including injurious exposure to conditions, which results, during the policy period, in bodily injury and property damage that was neither expected nor intended from the standpoint of the insured.” Pollution is not a covered “occurrence” if it is “expected or intended.”

In *General Ins. Co. of America v. Town Pump, Inc.*,³¹ the insurer did not expressly invoke the “expected or intended” exclusion but nevertheless sought to avoid coverage on the ground that Town Pump was actively negligent after the loss was discovered, so that it could be said to have participated in the loss. The Court stated General’s proposed rule of law as follows: “If the insured is guilty of active negligence after the loss is or should have been discovered, then

it participates in the loss and total coverage should not be afforded.” The Court rejected the proposition as unsupportable saying “Protection against liability for negligence is the principal purpose of liability policies like the one we are reviewing here. It is well established that mere negligence on the part of an insured will not defeat recovery on a policy. The insurer assumes the risk of negligence and recovery is permitted even though the negligence of the insured contributed to the loss. The Court said that at most the allegation was of “negligent failure to investigate and mitigate damages.”³² Hence, the insured’s active negligence should not meet the expected or intended standard so as to exclude coverage.

b. Portal Pipeline Company and the “expected or intended” injury

In *Portal Pipe Line Company, v. Stonewall Ins. Co.* (1993),³³ the operator of a crude oil pipeline between Montana and Minnesota intentionally accepted from Enron and others extremely volatile high vapor pressure liquids for transportation through the pipeline. This was in violation of the contract “tariff” that governed the handling and operation of the crude oil pipeline. Ashland Oil Company which operated a refinery in Minnesota filed suit against Portal alleging that, for four years, as a result of Portal’s conduct, it had suffered losses of income. Portal settled the litigation and sought indemnity from four excess insurers.

The policy at issue was an occurrence policy covering Portal for all liability for property damage caused by an “occurrence.” The policy defined “occurrence” as:

[A]n accident or event including continuous repeated exposure to conditions, which results, during the policy period in PERSONAL INJURY or PROPERTY DAMAGE neither expected nor intended from the standpoint of the INSURED.

The district court granted summary judgment in favor of the insurers and dismissal of all claims on the ground that the damage was “expected or intended.” Portal appealed asserting that, in making the decision to allow the volatile mix into the pipeline, it did not expect or intend the resulting damage. The Court looked to its 1979 decision in *Northwestern National Cas. Co. v. Phalen*,³⁴ where it said of “expected or intended”: [I]t precludes coverage for bodily injuries or damages, though not specifically intended by the insured, if the resulting harm was within the expectation or intention of the insured from his standpoint.”³⁵ The Court in *Portal* went on to say:

We explained that the use of the word “occurrence” had a broader definition than the word “accident” and that the intent of the policy is to insure the acts or omissions of the insured, including his intentional acts, excluding only those in which the resulting injury is either expected or intended from the insured’s standpoint.³⁶

The Court determined that Portal intentionally accepted the high vapor pressure liquids in the pipeline knowing that the tariff prohibited vapor pressures over 13 psi and determined that “Portal knew, despite its subjective contentions to the contrary that its actions were expected to cause injury to Ashland’s refinery.”³⁷ Consequently, it held that Ashland’s claims did not constitute an “occurrence” so as to be covered.

c. Enron and fraud as expected or intended injury

While Portal was being denied insurance for its part in defrauding the Ashland oil refinery, Enron was in federal court seeking coverage for the damages it caused in the same scheme. In *Enron Oil Trading & Transp. Co. v. Underwriters of Lloyd's of London* (1996),³⁸ the court detailed Enron's fraud in injecting a cheap but highly volatile crude oil gas mix into the crude it contracted to provide the Ashland Oil Refinery. Through misrepresentations and outright fraud, Enron was able to bilk Ashland out of millions of dollars while causing substantial damage to the refinery. Enron was sued and sought CGL coverage for the extensive damages claimed. The insurers denied coverage on the ground that Enron expected or intended the damage, and the court said:

“[The business decision on the part of Enron to inject B-G mix into the pipeline was not, by any stretch of the imagination, a sudden, unintended and unexpected happening. The allegations of Ashland's complaint describe a calculated business scheme whereby Enron reaped profits in the millions of dollars by concealing the nature of its actions.”³⁹

Interestingly, in *Enron Oil Trading & Transp. Co. v. Underwriters of Lloyd's of London*, the manuscript excess policies involved contained no exclusion for the insured's intentional acts⁴⁰ However, the Court examined Enron's conduct in light of the public policy against coverage for an insured's intentional wrongdoing or criminal misconduct. The Court cited the universal recognition of an implied exclusion from coverage under any form of insurance for intentional or expected injury and denied Enron coverage.

However, the reader should note that it is not the intentional act that is excluded but the expected or intended injury or damage.⁴¹ The Montana Supreme Court has consistently so held.⁴² Nevertheless, acts which by their very nature are certain to cause harm are precluded by public policy from coverage.⁴³ This is because the insurance principle protects the insured against injury or loss arising from contingent events.⁴⁴ An insured cannot be allowed to consciously control risks through intentional acts, because that would violate the central principle of insurance.⁴⁵ The Court in *Enron Oil Trading* found that Enron “undertook a series of knowing and intentional acts designed to achieve tremendous economic gain at Ashland's expense” and held the losses precluded from indemnification as a matter of public policy.⁴⁶

3. Whether the “absolute pollution exclusion” applies to the discharge

The plaintiff and the insured often have a common interest in securing coverage for the pollution claim. For claims that occurred after 1985, that means finding some way around absolute pollution exclusion (f). The *Grindheim* decision illustrates one of the possible arguments.

In *Grindheim*, the pollution consisted of sewage from pig enclosures and human sewage from the habitations of the colony. The pollution exclusion is exceptionally broad, covering any solid, liquid or gas, so that arguably its very breadth makes it ambiguous. The Colony contended that it used pig sewage as fertilizer on crops, so that the sewage (and resulting odors) could not be deemed pollution. Hence, one potential escape from the pollution exclusion is to show that the material involved is not an irritant or contaminant.

For example, in *Duensing v. Traveler's Companies* (1993),⁴⁷ the Parrot Confectionary store in Helena was forced to destroy its entire Christmas inventory of candy because one of its employees had contracted hepatitis. The store sought coverage for the loss of the inventory, and

its insurer, Travelers, refused in part because of a contamination clause. However, the insurer was not able to show that the candy was actually contaminated. The Montana Supreme Court held the plain, ordinary meaning and understanding of contamination requires the actual presence of a foreign substance.

The *Enron Oil Trading & Transp. Co.*⁴⁸ decision illustrates avoiding the absolute pollution exclusion by arguing its overbreadth. Enron had intentionally arranged to mix the crude oil product it agreed to deliver through the Portal Pipeline which ran from Eastern Montana to Minnesota with a highly volatile but cheap contaminant thereby defrauding the Ashland Oil Refinery in Minnesota of millions of dollars. When the volatile B-G mix caused an explosion and \$5 million in damage to the refinery, Enron was sued and tendered defense to its insurers. The insurers refused the tender on the basis of the absolute pollution exclusion (f). Enron argued that the product shipped was not pollution because it was not a foreign substance and was not discharged into the environment. The federal Court agreed saying:

“The terms irritant and contamination, when viewed in isolation, are virtually boundless, for there is no substance or chemical in existence that would not irritate or damage some person or property.”⁴⁹

* * *

“Without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results. To take but two simple examples, reading the clause broadly would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution.”⁵⁰

The Court distinguished pollution from “everyday activities gone slightly, but not surprisingly awry” saying “There is nothing unusual about paint peeling off a wall, asbestos particles escaping during the installation or removal of insulation, or paint drifting off the mark during a spray painting job. A reasonable policy holder, these courts apparently believed, would not characterize such routine incidents as pollution.”⁵¹ The court in *Enron* held the absolute pollution exclusion ambiguous saying: “The exclusion, if read as broadly as the excess insurers urge, would be virtually boundless and could conceivably impact the scope of coverage far beyond the reasonable expectations of the insured.”⁵²

On appeal in *Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., Ltd.*,⁵³ the Ninth Circuit upheld the conclusion that the absolute pollution exclusion was ambiguous in its overbreadth. The Ninth Circuit did not reach the lower court’s ruling that the coverage was barred by public policy by reason of expected or intended injury. Instead, the court reversed in part and remanded, because the underlying complaint had plead negligence and strict product liability which claims the Circuit held would be covered and the subject of a duty to defend.

Unfortunately for insurance consumers, the Montana Supreme Court, in *Sokoloski v. American West Ins. Co.* (1999),⁵⁴ rejected a similar argument that the definition of pollution is ambiguous in its overbreadth and must be limited to traditional environmental pollution. Sokoloskis used scented candles during four or five weeks of the holiday season in 1994, and the candles caused smoke and soot which accumulated on the walls, ceilings, floors and personal

belongings in their home. The insurance carrier refused the claim on the ground that such damages were barred by the pollution exclusion. Recall that, in 1985 the industry removed the requirement that the discharge be “into or upon land, the atmosphere or any watercourse or body of water” to be pollution. Sokoloski argued that “pollutant” is an environmental term of art and should only apply to “discharges of pollution into the environment from sources outside the home” citing the *Enron* case. Unfortunately, the Court said the word pollutants was defined within the insurance policy to expressly include smoke and soot damages. Though that analysis begs the whole point of the *Enron* decision, the *Sokoloski* Court found the definition of pollution in the standard pollution exclusion unambiguous.

The 2001 decision in *Montana Rail Link v. Lexington Insurance Company*,⁵⁵ involved an absolute pollution exclusion and hinged on the meaning of the word “contamination.” A train derailment had dumped a propane car, asphalt and a load of canned beer into the Clark Fork River in Western Montana. The Court determined that the CGL policy involved expressly covered debris removal which it interpreted to apply to the costs of removing the beer, asphalt and the car full of propane from the river.

The policy contained an absolute pollution exclusion but also had an Endorsement No. 1 which contained an exception for costs of removal of debris and cleanup. That exception, in turn, had an exception that provided “this Policy does not insure against the costs of decontamination. . . .” Hence, the issue apparently became whether such damages were precluded as “contamination” under the absolute pollution exclusion or the exclusion in Endorsement No. 1.

To resolve the issue, the Court simply noted that the policy covered the asphalt and beer as debris on the railroad right of way, and it didn’t make it contamination just because it landed in the river. Without expressly saying so, the case would seem to be authority for the proposition that whether a substance or product is pollution depends on its context, whether (to paraphrase *Pipefitters*, supra) it is “everyday activities . . . gone awry”, or traditional environmental pollution. As the Court said in *Enron Oil Trading*, “...contamination is an environmental term of art such that pollution exclusion clauses utilizing that particular term apply only to discharges of pollutants into the environment.”⁵⁶ Sokoloski and Enron are not consistent, but Enron is well reasoned and should protect claimants and insurance consumers from misuse of the exclusion by insurers.

Whether pig sewage was “pollution” was not actually the determining issue in *Grindheim*. The Court there was swayed by the fact that Grindheims had also sued in trespass and nuisance which constituted invasions of privacy interests and fell under the “personal injury” (as opposed to bodily injury) portions of the Farm Liability policy. The Court determined that injury that fell under “personal injury” was not subject to the pollution exclusion. Consequently, the Court concluded and held that Safeco had a duty to defend at least those portions of the claims that sounded in trespass and nuisance and alleged conduct before the Colony had notice of the damage it was doing to Grindheim’s property. Consequently, Grindheim illustrates another technique for securing coverage of pollution even in the fact of the absolute pollution exclusion. If one pleads the claim as a form of “personal injury” under the CGL policy definitions, then the exclusion does not apply.

4. Whether the insurer had a duty to defend the pollution claim

a. Duty to defend in the *Grindheim* case

In the *Grindheim* case, plaintiffs alleged the human and animal sewage from the Deerfield Colony polluted their water and land and created offensive odors that seriously interfered with their enjoyment of their property and endangered their health.⁵⁷ When they sued, Safeco refused to defend or indemnify citing the policy's pollution exclusion. The Colony confessed judgment for \$500,000 on a covenant not to sue and assigned its rights against Safeco to the Grindheims. Grindheims then sued Safeco in a case that, on appeal, would raise several seminal pollution coverage issues in Montana among them the duty to defend.

Ordinarily, the insurer initially determines whether the duty to defend has been triggered by reviewing the allegations set forth in the complaint.⁵⁸ The duty to defend arises if the complaint against an insured alleges facts, which if proven, would result in coverage.⁵⁹ If the insurer, without justification, refuses to defend, it will later be estopped from denying coverage to the insured.⁶⁰ On the other hand, if the allegations of the complaint show that no coverage exists under the policy, the insurer has no duty to defend and does not have a duty to make any further investigation.

Safeco denied coverage asserting there was no occurrence, because all the property damage claimed was expected or intended by the Deerfield Colony. On appeal, however, the Supreme Court disagreed, citing *Portal Pipe Line Co. v. Stonewall Ins. Co.*, for the proposition that "the intent of the policy is to insure the acts or omissions of the insured, including [its] intentional acts, excluding only those in which the resulting injury is either expected or intended from the insured's standpoint."⁶¹ Accordingly, the Court concluded that the expected and intended exclusion applies to the damage and not the discharge. Consequently, the exclusion would only apply to damage caused after the Colony had notice of the damage their pollution was causing neighbors. That conclusion prompted the court to add that "The duty to defend with respect to a particular complaint is triggered regardless of the fact that only a portion of the complaint alleges facts, which if proven would result in coverage."⁶²

b. The duty to defend in *Ribi*

In the *Ribi* case, Travelers defended under reservation of rights warning that it had no coverage and intended to seek reimbursement of its costs of defense if it prevailed in its declaratory action. The District Court determined that Travelers had no duty to defend, and the Supreme Court was faced with the conflict between its claimed adherence to the "four corners" rule and its abhorrence of requiring insurers to defend cases involving intentional conduct that has been pleaded as negligence.

The Court has long subscribed to the principle that if, within its four corners, the complaint states a claim that, if proven, would invoke coverage, the insurer owes its insured a defense.⁶³ Correspondingly, if the complaint alleges only events not within the coverage of the policy so that there would be no indemnification, then the insurer has no duty to defend.⁶⁴ The Supreme Court has also asserted that, when comparing the allegations of the complaint with the operative language of the policy, a court must liberally construe the allegations in the complaint to resolve all doubts about their meaning in favor of finding and obligation to defend.⁶⁵ If the complaint alleges facts that would not be covered along with facts that would be covered, the carrier must defend.⁶⁶ If the insurer chooses to look at facts outside the complaint, it does so at its own risk.⁶⁷

Nevertheless, when faced with a clearly intentional act which was plead in the four corners of the complaint as negligence, the Court, in *New Hampshire Ins. Group v. Strecker*

(1990),⁶⁸ compromised the four corners rule by saying that the acts giving rise to the claim form the basis for coverage, not any legal theories contained in the underlying complaint. So too, in *Burns v. Underwriters Adjusting Co.* (1988),⁶⁹ the Court said, over Justice Sheehy's strong dissent, "the proper focus of inquiry is the acts giving rise to coverage, not the language of the complaint." We should note that the *Strecker* and *Burns* cases involved heinous claims of physical assault and child sexual molestation respectively for which the Court would be loathe to grant the wrongdoers the benefit of a defense at the expense of the insurers.

In deciding the duty to defend issue in *Ribi*, the Supreme Court announced that "We apply the four-corners rule as the policy's language determines an insurer's duty to defend its insured."⁷⁰ However, citing *Strecker* in the next sentence, the Court said "The acts giving rise to the claim form the basis for coverage, not any legal theories contained in the underlying complaint."⁷¹ The Court asserted that circumstances in *Ribi* differed from those in *Staples* where the Court had said the insurer may not look to facts outside the complaint. Here, the Court reasoned that the facts were not in dispute and that *Ribi*'s intentional disposal cannot be considered "accidental" and therefore "sudden" in order to invoke the exception to the pollution exclusion. *Ribi* bites pollution plaintiffs and insureds who might benefit by pleading negligence in those situations where the insured intentionally disposed but never dreamed that damage was being caused. The case compromises the four-corners rule in pollution cases and favors the insurer over local parties who didn't realize they were polluting groundwater or other property.

5. Whether the insurer that defends can recoup defense costs from the insured

The Court in *Ribi* also dealt insureds a bad hand in its decision that Travelers could recoup its defense costs for claims that were ultimately determined to be barred by the pollution exclusion. In order for an insurer to recoup defense costs it must: "(1) specifically reserve the right to seek reimbursement from the insured; and (2) provide the insured with adequate notice of this potential reimbursement."⁷² The Court found that Travelers had met both requirements in the reservation of rights letters it sent *Ribi*.

The holding applies to but is not necessarily limited to CGL policies and the pollution exclusion. While it may have dire repercussions for insureds in other situations, its impact is significant in the area of toxic torts where insurers have discovered that their defense obligations often cost more than the loss paid. It likely will prompt more negotiation of defense costs between insureds and their insurers. Insurers who deny coverage for indemnity but are cognizant that the duty to defend is broader than the duty to indemnify now have a much more secure position from which to bargain over defense costs. The commercial polluters are likely to be solvent entities from whom recovery of defense costs may be viable. Hence, insureds will have more risk now that the Court has, for the first time, recognized the insurer's ability to recoup defense costs if it ultimately prevails on the coverage issue.

6. Whether remedial measures are "property damage" under the policies

In the Montana Federal District Court decision in *Quisel*,⁷³ the insurer raised the issue whether pollution clean-up costs qualify as "Property Damage" under the grant of coverage of the CGL policy. The policy there defined "Property Damage" to mean:

- (1) physical injury to or destruction of tangible property which occurs during the policy

period, including the loss of use thereof at any time resulting therefrom, or
(2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

The Court noted that courts deciding this issue have been “sharply divided,” some construing environmental clean-up costs to be property damage, and others saying they are not. The Court reflected that attempts by the government to recoup do not seek contribution or indemnity for “loss of use of property or for physical damage to property.” However, they do seek damages “directly attributable to the underlying pollution event, and the damages caused therefrom, to the insured’s property and to the property of others.”

Because of the split of authority and the fact that the federal court deemed this a matter of state law, Judge Battin elected to certify the question to the Montana Supreme Court. As was mentioned earlier, the case was never decided there presumably because it settled.

*Grindheim*⁷⁴ also raised the issue of whether clean-up costs and costs for taking remedial measures to protect adjoining landowners are covered as property damage under the liability provisions of the CGL policy. The Court, however, deferred any decision on that issue on the ground that it was not ripe for determination, such remediation apparently being prospective at that time.

Hence, at this time, the Montana Courts have not decided whether clean-up costs are “property damage.” For a good discussion of the issue and a holding that they are covered as property damages, see the Iowa Supreme Court’s 1991 decision in *A.Y. McDonald Industries, Inc. v. Insurance Co. of North America*⁷⁵

D. Conclusion

The significant increase in the amount of environmental pollution litigation in Montana will produce a corollary increase in the number of pollution insurance issues that Montana state and federal courts will have to address. The challenge under policies before the absolute pollution exclusion will be to secure coverage for insureds who knowingly discharged pollution but did not know the damage that would ultimately be caused. The challenge under the policies with the absolute pollution exclusion is to keep the insurance industry from misusing the exclusion to simply deny liability in any case whose instrument of damage was any solid, liquid or gas.

1. The author is grateful for editing by Pat Sheehy and review by Gary Zadick.
2. 42 U.S.C. § 9601 et seq., as amended by the Superfund Amendments Reauthorization Act of 1986 (SARA).
3. Kenneth S. Abraham, *INSURANCE LAW AND REGULATION*, 461 (4TH Ed. 2005).
4. 74 Geo. L. J. 1237 (1985-86).
5. 54 Mont. L. Rev. 105.
6. E. Joshua Rosenkrantz, 74 Geo. L.J., at 1241-42.

7. *Id.*, at 1244.
8. *Id.*
9. *Id.*, at 1246-47.
10. *Id.*
11. *American State Insurance Co. v. Koloms*, 177 Ill.2d 473, 687 N.E.2d 72, 80 (Ill. 1997).
12. *Id.*
13. *Id.*, 687 N.E.2d, at 80.
14. 47 F.Supp.2d 1152, 1163 fn. 15.
15. J. Stempel, INTERPRETATION OF INSURANCE CONTRACTS: LAW AND STRATEGY FOR INSURERS AND POLICYHOLDERS 825 (1994) quoted in *Koloms*, 687 N.E.2d at 81.
16. ISO form CG 00 01 10 01, pg. 3 .
17. ISO form CG 00 01 10 01, pg. 15.
18. 191 Mont. 98, 622 P.2d 212.
19. 214 Mont. 27, 692 P.2d 427.
20. 692 P.2d at 429.
21. 622 P.2d at 214-15.
22. 692 P.2d at 428.
23. *Id.*, at 430.
24. CV-149-BLG-JFB, 7 M.F.R. 483.
25. 908 F.Supp. 794 (D. Mont.).
26. *Id.*, at 806, fn. 18.
27. *Id.*, at 808.
28. 294 Mont. 210, 980 P.2d 1043.
29. *Id.*, at 1045.

30. 2005 MT 50, 326 Mont. 174, 108 P.3d 469.
31. *Supra*, 692 P.2d at 430.
32. *Id.*
33. 256 Mont. 211, 845 P.2d 746.
34. 182 Mont. 448, 597 P.2d 720.
35. *Id.*, at 726.
36. *Supra*, 597 P.2d at 749.
37. *Id.*.
38. 47 F.Supp.2d 1152 (D. Mont.).
39. *Id.*, fn.14.
40. *Id.*, at Fn 16.
41. *Id.*, at 1165.
42. *Citing, Burns v. Underwriters Adjusting Co.*, 234 Mont. 508, 765 P.2d 712. (1988); *Mutual Service Casualty Ins. Co. v. McGehee*, 219 Mont. 304, 711 P.2d 826 (1985).
43. *American States Ins. Co. v. Willoughby*, 254 Mont. 218, 836 P.2d 37 (1992).
44. *Enron Oil Trading, supra*, 47 F.Supp.2d at 1166.
45. *Id.*
46. *Id.*
47. 257 Mont. 376, 849 P.2d 203.
48. *Supra*, 47 F.Supp.2d at 1164.
49. *Id.* at 1164 *citing Westchester Fire Ins. Co. V. City of Pittsburg, Kan.*, 768 F.Supp. 1463, 1470 (D. Kan. 1991).
50. *Id.* at 1164, *citing Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Company*, 976 F.2d 1037, 1043 (7th Cir. 1992).
51. *Pipefitters, supra*, 976 F.2d at 1044.
52. *Enron Oil Trading*, at 1164.

53. 132 F.3d 526 (1997).
54. *Supra* 980 P.2d at 1044-45.
55. 175 F.Supp.2d 1248 (D. Mont.).
56. 47 F.Supp.2d at 1163.
57. 908 F.Supp. at 797.
58. *Id.*, at 798.
59. *Id.*
60. *Id.*
61. 256 Mont. 211, 845 P.2d 746 (1993).
62. *Grindheim, supra* 908 F.Supp.2d at 801.
63. *See, for example, McAlear v. Saint Paul Ins. Companies*, 158 Mont. 452, 493 P.2d 331 (1972); *Graber v. State Farm Fire and Cas. Co.*, 244 Mont. 265, 797 P.2d 214 (1990).
64. *Graber, supra*, 797 P.2d at 217.
65. *Farmers Union Mut. Ins. Co. v. Staples*, 2004 MT 108, 321 Mont. 99, 90 P.3d 381; *and see* Montana federal cases of, *Grindheim v. Safeco Ins. Co. Of America*, 908 F. Supp. 794 (D. Mont. 1995); *Mutual Service Cas. Ins. Co. v. Co-op Supply, Inc. of Dillon, Mont.*, 699 F.Supp. 1438 (D. Mont. 1988).
66. *Staples, supra*, 90 P.3d at 385.
67. *Id.*, at 386.
68. 244 Mont. 478, 798 P.2d. 130.
69. 234 Mont. 508, 765 P.2d 712.
70. *Ribi, supra*, 108 P.3d at 478.
71. *Id.*
72. *Id.*, at 479.
73. *Supra*, 7 M.F.R. at 505.
74. *Supra*, 908 F.Supp., at 807.
75. 475 N.W.2d 607.