PERSONAL INJURY LIABILITY COVERAGE FOR ENVIRONMENTAL CONTAMINATION UNDER THE COMPREHENSIVE GENERAL LIABILITY POLICY: IS MIGRATING POLLUTION A "WRONGFUL ENTRY OR EVICTION OR OTHER INVASION OF THE RIGHT OF PRIVATE OCCUPANCY"?

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I. INTRODUCTION

The enforcement of environmental laws such as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA) has arguably left a cleaner environment in its wake. It is unquestionable, however, that this enforcement has cost the federal government, the state governments, and companies billions of dollars. The financial burden on private companies has been overwhelming. The biggest hope of these companies is that they can pass off some, or all, of the cost of clean-up on third parties. Principally, they hope to pass off these costs on their insurance companies.

The most common policy that companies rely upon when arguing insurance companies should pay is the comprehensive general liability policy. The comprehensive general liability (CGL) policy is a standard-form insurance policy[1] written for businesses since the mid-1940s. The purpose of the policy is to cover liability the policyholder might incur to

1. The CGL policy is considered a standard-form policy because the language was created by an insurance industry drafting committee called the Insurance Services Office, Inc. (ISO). The language remains quite consistent across all policies sold in the same year, regardless of which insurer sells the policy. *See generally* KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW 33-36 (Prentice-Hall 1991).

third parties for a variety of reasons.[2] The typical basic CGL policy provides that the insurer will "[p]ay on behalf of the insured all sums which the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this [insurance] applies, caused by an occurrence. . . ."[3]

This basic CGL coverage provides for indemnification under certain circumstances and it provides for defense of policyholders in certain circumstances. The policy language is a broad grant of coverage. It is natural that businesses strapped with liability for polluted ground water and soils have sought out their insurance carriers for indemnification of clean-up costs and for defense of claims brought by adjoining landowners and government agencies. As a result, there have been many years of litigation between insurers and policyholder businesses, each seeking to put the financial burdens of environmental clean-ups on the other party.

Policyholders have fought an uphill battle over the years because insurance companies made the policy language more restrictive over time. This is natural: insurance companies probably never contemplated the huge potential risk from environmental contamination and so they are adjusting accordingly. In an industry that profits largely because it can assess risks and charge premiums accordingly, the uncertainty arising from migrating, leaching pollutants throws a wrench into actuarial tables. Thus, the insurance industry has tried to limit the uncertainty by including more restrictive language. Since the early 1970s, CGL policies began to contain exclusions to limit coverage for pollution claims.[4] Since 1986, CGL policies have contained an absolute exclusion for pollution claims.[5]

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2. "Third party" means any person injured by the policyholder. These policies cover claims that run the gambit from a simple auto accident involving an employee to multimillion dollar product liability claims. Technically, the policy does not cover damage to the policyholder's property—other policies are purchased for this.

3. KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW 43 (Prentice-Hall 1991). Throughout this Article, I will refer to this coverage as "the basic CGL coverage," as opposed to the coverage for personal injury liability coverage or PIL.

4. The 1973 so-called "qualified pollution exclusion" stated that the policy did not apply to damage resulting from the "discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants or contaminants or pollutants into or upon land, the atmosphere or any water course or body of water . . . " unless the "discharge, dispersal, release or escape is sudden and accidental." KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW 146 (Prentice-Hall 1991); *see generally id.* at 145-63.

5. As one commentator has noted:

As the policy language has increasingly excluded more and more contamination claims, policyholders have been forced to try novel arguments to gain coverage. Otherwise, they are left with clean-up bills and liability to third parties potentially in the millions.

This Article concerns one of these novel arguments: whether there is coverage for environmental contamination in a secondary CGL coverage frequently called Personal Injury Liability (PIL).[6] This Article is broken into several sections. After an introduction to the coverage, Sections II and III deal with whether the PIL language can offer coverage for environmental contamination. Section IV will deal with the application of pollution exclusions to PIL coverage, and Section V is a brief conclusion.

A. Personal Injury Liability

A typical CGL policy contains a couple of individual coverages.[7] The first and most oft-applied is the basic third-party coverage as quoted above[8]; the vast majority of claims are made under this coverage because its language is so broad. CGL policies include PIL as a supplemental coverage.

PIL was first crafted in 1966 by the Insurance Services Office, Inc. (ISO) and it was called "Coverage P." The coverage was contained in an optional insert to the CGL policy in 1973.[9] PIL coverage states that the insurer "will pay on behalf of the insured all sums which the insured becomes legally obligated to pay as damages because of injury (herein called 'personal injury') sustained by any person or organization and arising out of one or more of the following offenses. . . ."[10] The policy

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> The 1986 revision of the CGL policy incorporated a major expansion in the scope of the pollution exclusion that included a complete change in its wording. The new exclusion is so broad that it is often termed 'absolute,' even though it does not exclude all pollution-related liability.

KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW 160-61 (Prentice-Hall 1991).

6. It has also been called Personal Injury Protection, but this is not to be confused with the common automobile coverage. Sometimes "Advertising Injury" is included.

7. Similarly, a single auto "policy" contains separate "coverages" for theft, liability, medical, etc.

8. I will refer to this as the "basic CGL coverage."

9. Laura A. Foggan, Robert R. Lawrence, & Dan Renberg, *Looking for Coverage in All the Wrong Places: Personal Injury Coverage in Environmental Actions*, 3 ENVTL. CLAIMS J. 291, 292 (Spring 1991).

10. *Id.* The list of "offenses" include the following:

then lists the specific covered "offenses." Included in the list is "wrongful entry or eviction, or other invasion of the right of private occupancy." In 1976, the coverage became part of the regular policy instead of being relegated to a separate endorsement.[11] In 1986, the ISO left out the "other invasion of the right of private occupancy" language.[12]

This Article, in Section II, will focus on the "wrongful entry or eviction or other invasion of the right of private occupancy" language and how it might cover common law tort claims. Section III deals exclusively with statutory causes of action as opposed to trespass and nuisance. Taking these two sections together, I hope to begin to answer the question posed in the title. More specifically, I hope to answer whether either the common law torts of trespass or nuisance or statutory causes of action can be considered a "wrongful entry or eviction or other invasion of the right of private occupancy."

B. The Advantages of Personal Injury Liability

According to a well-known advocate of PIL coverage, Kirk A. Pasich, there are several practical reasons why coverage under this language of the policy is beneficial to policyholders.[13] First, PIL coverage is not, by its own terms, subject to pollution exclusions.[14]

> false arrest, detention or imprisonment; malicious prosecution; oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; oral or written publication of material that violates a person's right of privacy.

Id.

11. Laura A. Foggan, Robert R. Lawrence, & Dan Renberg, *Looking for Coverage in All the Wrong Places: Personal Injury Coverage in Environmental Actions*, 3 ENVTL. CLAIMS J. 291, 293 (Spring 1991).

12. *Id.*

13. I have adapted and expanded on the benefits mentioned in Kirk A. Pasich, *The Breadth of Insurance Coverage for Environmental Claims*, 52 OHIO ST. L.J. 1131, 1172-75 (1991). Mr. Pasich is a partner in the firm of Hill, Wynne, Troop & Meisinger in Los Angeles, and was one of the earliest writers on this subject.

14. The typical listed exclusions for this coverage are as follows:

> (1) There is no coverage for liability assumed under contract or agreement.
>
> (2) There is no coverage for any personal injury arising when the insured has knowledge of a statute or ordinance and willfully violates such.
>
> (3) There is no coverage for personal injury arising from libel, slander, other defamatory or disparaging material, or violation of someone's right of privacy which first occurred before the effective date of this insurance.

Second, the maximum dollar limits of PIL coverage are separate from—and in addition to—the aggregate limits of coverage provided under the basic CGL coverage. Thus, not only can PIL offer greater amounts of coverage, these dollar amounts can be added to amounts received under the basic CGL coverage. Third, unlike the basic CGL coverage, PIL offers coverage for some intentional acts of the policyholder.[15] Fourth, most PIL coverages do not contain the "occurrence" language that is part of the basic CGL coverage.[16] This is an additional reason why some intentional acts can be covered: there need not be an accident. Additionally, this means that PIL coverage avoids some of the problematic legal issues that arise from the "occurrence" language such as "trigger of coverage" issues.[17] PIL avoids this because it requires only

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> (4) There is no coverage for any insured for personal injury arising from expression:
>
> > (I) of libel, slander or other defamatory or disparaging material or
> >
> > (ii) in violation of someone's right of privacy made by or at the direction of that insured, with knowledge that the expression was false.

No other exclusions apply to this insurance. SAFECO Ins. Co. policy, copyright by ISO, Inc., 1986. It is crucial to note that this is not an open-and-shut case, however. There is still some question as to whether the pollution exclusions apply to this coverage; this subject is addressed in Section IV of this Article.

15. The basic CGL coverage contains an exclusion for damages that were "expected or intended from the standpoint of the insured," but PIL does not contain this exclusion. Note, however, that PIL may only cover for intentional acts and not intentional injuries. The reason for this is pure public policy: no one should be able to pass off the liability for harm they intentionally caused. This issue is beyond the scope of this Article.

16. The basic CGL coverage pays for damages "caused by an occurrence," and this is usually defined as an accident. *See generally* KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW 91-94 (Prentice-Hall 1991).

17. A full discussion of the "trigger of coverage" issue is beyond the scope of this Article; however, it deserves a brief introduction. For contamination that has occurred over more than one policy period (as is often the case with leaching environmental contaminants), courts will choose those policies that potentially apply (those carriers that are "on the risk") by picking one of several "trigger of coverage" rules. The various trigger of coverage rules are really legal presumptions of when the contamination occurred. The choice of trigger rule will greatly affect the ultimate outcome in the case because insurers with policies that are not triggered have no potential liability to the insured. For example, suppose there was gradual contamination at a site that occurred over twenty years and there were twenty policies written by twenty different insurers. Suppose further that the contamination was found in the twentieth year. If the court chose one of the triggers called the "manifestation" trigger, the only insurer potentially liable would be the last carrier—all previous carriers would be off the hook. If the "continuous" trigger is chosen by the court, all policies that were in effect while the leaching took place are triggered. Note, however, that the choice of a trigger is not the final determination of coverage. It merely determines which policies have potential coverage. Insurers get the chance to fight coverage based on a multitude of other grounds

that the "offense" occurs during the policy period; unlike the basic CGL coverage which requires both that the "property damage" occurs during the policy period and that the damage is caused by an "occurrence."[18] Fifth, insurance carriers, in coverage denial letters to the insured, may unintentionally leave out denials for this coverage. The carrier may be prevented from later asserting defenses against PIL coverage.[19]

These possible advantages of PIL coverage are important enough to keep in mind, but only one will be discussed at length in the following sections: the application of the pollution exclusions to PIL coverage, in Section IV. As I stated previously, it is because of these potential advantages that PIL coverage is sought in the first place. However, it is not settled that the pollution exclusion is inapplicable to PIL coverage. The next two sections deal with whether PIL coverage can apply to environmental contamination at all.

II. PERSONAL INJURY LIABILITY COVERAGE FOR COMMON LAW TORT CLAIMS SUCH AS TRESPASS AND NUISANCE

The litigation over coverage for environmental contamination under PIL has revolved around the "offenses" of "wrongful entry or eviction or other invasion of the right of private occupancy." As noted

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later. It is easy to see the dramatic effect the choice of trigger has. The effect is even more dramatic when the pollution exclusions are taken into account. For example, using the hypothetical, suppose all the policies after the fifteenth had absolute pollution exclusions and the court chose the manifestation trigger. The result would be no coverage at all. *See generally* KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW 94-106 (Prentice-Hall 1991).

18. This raises an interesting question that I will not deal with in this Article, except to raise it here. Under the basic CGL coverage, as I just stated, battles are fought over when there was an "occurrence" and when there was "property damage." This is the essence of the trigger of coverage issue. PIL coverage, on the other hand, does not contain this language, but rather the "offense" must occur during the policy period. Thus, PIL probably creates a whole new trigger of coverage dynamic. If only the "offense" need take place during the policy period, then the resulting property damage may be completely hidden from view. Thus, in a state that has chosen a manifestation trigger, PIL coverage may still be triggered because it side-steps the normal application of the trigger for the basic CGL coverage.

19. If an insurance company chooses to deny coverage after being notified of a potential claim, it sends a letter stating the reasons for the denial and containing a "reservation of rights" section. The reservation of rights states that the insurer has reserved the right to later give further reasons for denial or to later accept coverage (this prevents the letter from being construed as the final position of the insurer regarding coverage). Even with a reservation of rights, the denial applies only to specific coverages. So, if the insurer has not mentioned PIL coverage in the denial letter, the insurer may not be able to deny this coverage later. Kirk A. Pasich, *The Breadth of Insurance Coverage for Environmental Claims*, 52 OHIO ST. L.J. 1131, 1175 (1991) (citing Dillingham Corp. v. Employers Mutual Liability Ins. Co., 503 F.2d 1181, 1185 (9th Cir. 1974)).

previously, this phrase is one group of listed "offenses" for which there is personal injury coverage. Some policies do not contain the "other invasion" language.

Typically, companies with policies run to their insurance companies for coverage if legal action is taken against them by a governmental unit or by surrounding landowners.[20] This section of the paper will deal with the following scenario: a nearby or adjoining landowner sues the insured alleging that the policyholder committed a trespass or nuisance (or a cause of action that can be considered one of these two torts). Assuming this scenario, two questions arise. First, is trespass or nuisance a "wrongful entry or eviction"? Second, is trespass or nuisance an "other invasion of the right of private occupancy"?

A. *Can Common Law Torts such as Trespass or Nuisance be Considered a Wrongful Entry or Eviction*?

The courts and the parties have relied on several excellent reasons for considering trespass and nuisance part of "wrongful eviction or entry." The modern definitions of trespass and nuisance have blurred with wrongful entry and wrongful eviction. This argument will be considered in the next segment. Additionally, it is conceptually feasible for trespass and nuisance to rise to the level of causing a landowner to be dispossessed of his property—a constructive dispossession or eviction.

There are several good arguments for denying coverage for these torts. The principle argument is that wrongful entry and eviction arise in the landlord-tenant context only. Second, it has been argued that this would go against the intent of the parties to provide coverage where none was intended.[21] Third, it has been argued that this type of coverage would provide a windfall to insureds who did not bargain and pay for this coverage.[22] Fourth, insurers have argued that damages under PIL are for personal injuries and not property damage. They have argued that

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20. Policyholders can not seek coverage under CGL policies for damage to their own property because of the "owned property exclusion." The policy is considered a third-party coverage because it covers liability to others, as opposed to first-party coverage which protects the policyholder's property. This is why policyholders may not seek coverage before some action is taken against them by a third party.

21. One of the best presentations of drafting history of the language was presented in Victor C. Harwood, *The Drafting History of Personal Injury Liability Provisions and Environmental Coverage Claims*, 7 MEALEY'S LITIGATION REPORTS 16, 22 (Feb. 23, 1993).

22. See *infra* note 134, for a similar argument.

trespass and nuisance suits are for property damage because of contamination and should not be considered damage to personal rights.

1. Defining the Terms

a. Wrongful Eviction, Wrongful Entry, and the Concept of Ouster

Modern legal dictionaries or basic legal encyclopedias such as American Jurisprudence do not specifically list torts called “wrongful eviction” or “wrongful entry.” There is little reference to them anywhere. The terms by themselves are present, however, and an easy way to develop definitions is to craft new ones by using the word “wrongful” to modify definitions of entry and eviction.

Eviction means “dispossession by process of law” or the “[a]ct of turning a tenant out of possession, either by re-entry or legal proceedings, such as an action of ejectment.”[23] Generally, modern eviction takes the form of the statutory “forcible entry and detainer” (FED). This is the only “process of law” that allows for evictions today. Wrongful eviction could refer to an eviction that harmed the party being evicted or was unwarranted. But dispossessed tenants have an opportunity to prevent eviction in the FED proceeding. It is unlikely, then, that there is cause of action called wrongful eviction after an FED action.

On the other hand, even though FED is the only dispossession by process of law, there is an extra-judicial form of eviction—“constructive eviction.”[24] The essence of constructive eviction is when a possessor is effectively forced off of his land by an extreme disturbance of his beneficial enjoyment of the property. The dispossessed party, after a constructive eviction, could sue his tormentor and this could be considered a “wrongful eviction” suit.[25]

Turning to the word “entry” as used to refer to real property, it is only defined insofar as it is used in the term “writ of entry.” A writ of entry was an old English writ used to recover possession of lands from a

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23. BLACK’S LAW DICTIONARY 555 (6th ed. 1990). A plaintiff in an action of ejectment must show that he has a present right to possession of the premises, that he has been ousted, or that possession has been wrongfully withheld from him by the defendant. 25 AM. JUR. *Ejectment* § 46 (1966).

24. BLACK’S LAW DICTIONARY 555 (6th ed. 1990); *see also id.* at 313.

25. The suit would probably allege trespass or nuisance!

person who is wrongfully withholding possession.[26] The term "open entry" is "[a]n entry upon real estate, for the purpose of taking possession. . . ."[27] The term "re-entry" is the "resumption of the possession of the leased premises by the landlord on the tenant's failure to pay the stipulated rent or otherwise to keep the conditions of the lease."[28] The modern FED is the statutory proceeding used to restore possession in someone who has been wrongfully deprived of possession and it has replaced the writ of entry.[29] There is little to distinguish entry and eviction in modern times: both involve harm to a possessor of real estate.

Another term close in definition to a wrongful eviction or wrongful entry is the term "ouster." It is a "wrongful dispossession or exclusion of a party from real property."[30]

> Ouster has been defined as a wrongful dispossession or exclusion from real property of a party who is entitled to possession thereof, and in a general way it may be said that any acts of ownership and control over the property to the exclusion of the plaintiff will constitute and ouster.[31]

Ouster, wrongful eviction, and wrongful entry involve dispossession of a person from real property, and all may include constructive dispossession.

b. Trespass[32] and Nuisance[33] Compared and Contrasted[34]

Once the foundation for understanding the concepts of entry and eviction is laid, the next logical step in the inquiry is defining the terms

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26. BLACK'S LAW DICTIONARY 534 (6th ed. 1990).

27. *Id.* at 533.

28. *Id.*

29. ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 6:9 (1980); BLACK'S LAW DICTIONARY 646 (6th ed. 1990).

30. BLACK'S LAW DICTIONARY 1101 (6th ed. 1990) (The section also says that it is a "species of injuries to things real, by which the wrong-doer gains actual occupation of the land, and compels the rightful owner to seek his legal remedy in order to gain possession.").

31. 25 AM. JUR. *Ejectment* § 47 (1966). Somewhere there is a line drawn between ouster and trespass. "If such entry is made under a claim or color of right, the entry is an ouster; otherwise, it is a mere trespass." *Id.*

32. RESTATEMENT (SECOND) OF TORTS §§ 157, 158 (1965).

33. 58 AM. JUR. 2d *Nuisances* §§ 1, 2, 5 (1989); 66 C.J.S. *Nuisances* §§ 1a, 82b (1950).

34. W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW ON TORTS § 87, at 622 (5th ed. 1984).

"trespass" and "nuisance." The terms, notwithstanding historical differences, have broad, fuzzy definitions. According to the Restatement's definition of trespass,

> [o]ne is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally enters land in the possession of the other, or causes a thing or a third person to do so or remains on the land, or fails to remove from the land a thing which he is under a duty to remove.[35]

The key element in this definition is an intentional wrongful entry. Many authorities outside of the environmental context have equated the concepts of wrongful entry and trespass.[36]

Nuisance is defined as "conduct that is either unreasonable or unlawful and causes annoyance, inconvenience, discomfort, or damage to others" or "that which annoys or does damage to another" or "anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights."[37] Absent from the definition is any reference to possession of property, but nuisance suits commonly involve the infringement of a possessor's rights.

While the distinctions between nuisance and trespass continue to blur, it is helpful to note them.

> [T]here is a distinction between nuisance and trespass, the difference being that a trespass is an invasion of the plaintiff's interest in the exclusive possession of his land, as by entry on it, while a nuisance is an interference with the use and enjoyment of the land, and does not require interference with the possession.[38]

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35. RESTATEMENT (SECOND) OF TORTS § 158 (1965).

36. *See, e.g.*, Triscony v. Brandenstein, 6 P. 384, 385 (Cal. 1885); Hansen v. Gary Naugle Constr. Co., 801 S.W.2d 71, 74 (Mo. 1990). "The essence of trespass is wrongful entry." J.D. LEE & BARRY LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 38.03 (Rev. ed. 1990) (citing Looney v. Hindman, 649 S.W.2d 207 (Mo. 1983)). "The most obvious way to commit a trespass on land is by an intentional entry on the surface, without the consent of the owner and not in the exercise of privilege." FOWLER V. HARPER & JAMES FLEMING, THE LAW OF TORTS § 1.5 (2d ed. 1986).

37. 58 AM. JUR. 2d *Nuisances* § 1 (1989).

38. *Id.* at 5.

This distinction is less observed today than in the past.[39]

c. The Relationship of Trespass and Nuisance to Personal Rights

Although trespass and nuisance involve property damage usually, nuisance can involve damage to personal rights, creating personal injury.[40] A popular legal encyclopedia stated it best:

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> The distinction between trespass and nuisance was originally that between the old action of trespass and the action on the case. If there was a direct physical invasion of the plaintiff's land, as by casting water on it, it was a trespass; if the invasion was indirect, as where the defendant constructed a spout from which the water ultimately flowed upon the land, it was a nuisance. * * * With the abandonment of the old procedural forms, direct and indirect invasions have lost their significance, and the line between trespass and nuisance has become wavering and uncertain. The distinction which is now accepted is that trespass is an invasion of the plaintiff's interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it.

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 87, at 622 (5th ed. 1984).

> The early common law, which regarded a nuisance only as an injury to some interest in land, gave the right to recover damages for nuisances only to persons having interests in lands; and in the common law action, by writ of nuisance, the declaration had to show that the plaintiff had a freehold estate in the premises affected by the nuisance. The tendency is to break away from the early common-law rule, and it is now generally held that a lawful possession, although unaccompanied by any title, is sufficient to support an action for damages for interference with the lawful enjoyment of the premises by the person in possession, but not for an injury to the fee or for injuries which occurred prior to the time he acquired possession or was entitled to possession.

66 C.J.S. *Nuisances* § 82a (1950).

40. This is explained by a popular legal encyclopedia, which states:

> A person in legal possession of property affected by a nuisance may recover for personal injuries and physical suffering or discomfort resulting to himself or members of his family. Furthermore, while there is authority to the effect that a nuisance action to recover for personal injuries resulting from the nuisance cannot be maintained by a mere occupant who has no direct interest in or possession of the premises, even though he is a member of the possessor's family, the view has also been followed that any lawful occupant of the premises may maintain such an action, even though he has no legal interest or estate in the land, a possessory interest being sufficient to authorize bringing of such an action.

58 AM. JUR. 2d *Nuisances* § 258 (1989).

> It has been said that a private nuisance exists only where one is injured in relation to a right which he enjoys by right of his ownership of an interest in land. However, there is also authority for the view that a private nuisance

> At common law a nuisance was regarded as merely an injury to some interest in land, and although many jurisdictions have defined 'nuisance' in terms of both interferences with property or *personal rights*, without distinction, others have formulated definitions focusing specifically on interests in or regarding property. In this regard, a nuisance has been said to be the invasion of plaintiff's interest in the reasonable use and enjoyment of his land, anything which annoys or disturbs one in the free use, *possession*, or enjoyment, or his property, or which renders its ordinary use or physical occupation uncomfortable, anything which materially lessens the enjoyment of property or the *physical comfort of persons* in their homes, and an interference with the use and enjoyment of land including conduct on property disturbing the peaceful, quiet, and undisturbed use and enjoyment of nearby property.[41]

Since personal rights can be effected by nuisance as well as property rights, there is no reason why nuisance should not fall under coverage for "personal injuries" in PIL.

2. The Cases

It is not an easy matter to determine if the greater weight of authority would hold that either trespass or nuisance constitutes either wrongful eviction or entry. There are several dynamics that have affected

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> includes all injuries to an owner or occupier in the enjoyment of property of which he is in possession, without regard to the quality of the tenure.

Id. at § 46.

41. 58 AM. JUR. 2d *Nuisances* § 2 (1989) (emphasis added). *American Jurisprudence* is not alone in its characterization:

> The term "nuisance" is used to designate the wrongful invasion of a legal right or interest, and it comprehends not only the wrongful invasion of the use and enjoyment of property, but also the wrongful invasion of personal legal rights and privileges generally.

66 C.J.S. *Nuisances* § 1a (1950).

> A person in legal possession of premises may recover damages for injuries caused by a nuisance to the health or person of himself or of other occupants who are members of his household, and the right of action does not depend on an injury to the land.

66 C.J.S. *Nuisances* § 82b (1950).

this. First, often, policyholders may or may not be forced to rely on the terms "wrongful entry or eviction" because their policy might contain the "other invasion of the right of private occupancy" language. Thus, for example, courts may not need to hold that a trespass allegation is equivalent to a wrongful entry because the court may be able to fall back on the "other invasion language." If a policy does contain the "other invasion" language and a court discusses wrongful entry or eviction, this discussion is, at best, an alternative holding and, at worst, dicta. Second, several courts have skipped the issue entirely by holding that the pollution exclusion denies coverage, whether or not there was potential coverage in the first place. Third, allegations in the underlying complaint by the adjoining landowners may not clearly allege trespass or nuisance. Fourth, and most confusing, is the fact that, in many of the cases, the policyholder is seeking not indemnification but defense. Insurance companies will provide defense of policyholders (in underlying lawsuits) if there is potential coverage (for the underlying lawsuit). Thus, courts reviewing cases dealing with the duty to defend policyholders need only decide whether or not there is a *potential* for coverage and not decide whether there is *in fact* coverage. Literally, an appellate court could decide that there *might* be coverage for trespass under the policy without reaching the issue of whether there *is* coverage for trespass. The actual interpretation of an ambiguous policy might be a mixed question of law and fact that is within the realm of the trial court and not a pure legal question to be answered by appellate level courts.[42]

An additional important concept in analyzing these cases is the issue of intent. It is crucial to not mix up two different "intent" issues. On one hand, intentional conduct in the form of an intentional *invasion* of another's property may be a requirement for trespass under state law or the policy.[43] Thus, a polluting landowner may need to intend for its pollution to invade or enter another's property instead of merely being

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42. To be a little more specific, the rules for interpretation of insurance policies differ from state-to-state. Different states will allow different evidence in to interpret the policies. In some cases, the interpretation is a matter of deciding what the intent of the parties was and this is usually considered a matter for a trier of fact and not an appellate court. If the duty to defend is at issue and hence the only question before the court is potential coverage, a court of appeals could decide if there is potential coverage as a matter of law and yet remand to the trial court for the ultimate determination of actual coverage. *See, e.g.*, Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265, 273 (1st Cir. 1990) (The court remanded so that the parties could produce evidence of intent of the parties).

43. *See* RESTATEMENT (SECOND) OF TORTS § 158 (1965).

negligent in allowing the migration.[44] Some states accept the concept of a negligent trespass, however.[45] On the other hand, the policy, by its language, may require an *intent to dispossess* the other of his or her property. For example, the enumerated offenses in PIL coverage of "wrongful entry or eviction" may be read as requiring an intent on the policyholder's part to dispossess an occupier of property. This issue was dealt with in the preceding sections about ouster and possession. The cases clearly stated that this intent was not necessary for trespass,[46] but the cases differ as to this requirement under the policy.[47]

Notwithstanding the difficulties in analysis, a review of the case law is illuminating. In one of the most oft-cited cases in this area, *Pipefitters Welfare Educational Fund v. Westchester Fire Insurance Co.*, the court made it clear that trespass and wrongful entry are quite similar torts. Employees from a company called Arst accidentally spilled PCBs from a transformer sold by plaintiff Pipefitters to Arst.[48] The underlying suit did not contain explicit allegations of either nuisance or trespass. In the underlying litigation, Arst brought suit against the Pipefitters under federal and state environmental statutes and state common law.[49] The suit alleged that the plaintiff negligently and unlawfully failed to warn Arst that the transformer contained PCBs and sought damages "for cleanup costs incurred to comply with federal and state environmental law, diminution of property value," harm caused by imposition of an environmental reclamation lien on the property by the state EPA, and

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44. This is what was required by the court in the following case, *Titan Holdings Syndicate, Inc. v. City of Keene*, because it found this requirement in the state law of trespass. *See, e.g.*, Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265, 272 (1st Cir. 1990) (citing Moulton v. Groveton Papers Co., 289 A.2d 68, 72 (N.H. 1972)).

45. *See, e.g.*, Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1042 (7th Cir. 1992) ("trespass can be either negligent or willful," citing Dial v. City of O'Fallon, 411 N.E.2d 217, 220 (Ill. 1980)).

46. *See, e.g.*, Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1041-42 (7th Cir. 1992).

47. *See* Fibreboard Corp. v. Hartford Accident and Indemnity Co., 16 Cal. App. 4th 492, 511-12 (Cal. App. 1993) ("Although wrongful entry can describe a trespass committed for the specific purpose of dispossessing the owner or occupant of land, we agree with Fibreboard that it can also describe a more general, 'simple trespass' involving no intent to dispossess"). *Cf.* County of Columbia v. Continental Ins. Co., 189 A.D.2d 391, 395 (N.Y. App. Div. 1993).

48. Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1038-39 (7th Cir. 1992).

49. *Id.* at 1039.

harm due to restricted access to Arst's site because of a state-imposed "seal order."[50]

The court broadly interpreted the common law allegations in the complaint and reasoned that Pipefitters had "impaired Arst's right to occupy its property" because the state clouded Arst's title to the property due to the spill.[51] There was no allegation of intent to dispossess Arst of the property.[52] First, discussing trespass, the court stated that "[b]oth Missouri and Illinois courts recognize that wrongful entry is substantially similar to trespass."[53] The court stated that intent to deprive someone of occupancy is not a requirement of trespass and nuisance allegations, but stopped short of determining whether trespass is wrongful entry because it relied on the "other invasion" language as a grant of coverage.[54] The court held that wrongful eviction takes place within the landlord-tenant context only.[55] One can conclude from the case that, in the future, the court might hold that trespass is a wrongful entry but not a wrongful eviction.

Another court has come close to holding that nuisance and trespass can be wrongful entries. The case involved the duty to defend the policyholder, therefore, *potential* coverage was at issue. In *Gould, Inc. v. Arkwright Mutual Insurance Co.*, adjoining property owners filed three suits against the owner of a battery processing station; the processing had caused lead and other hazardous substances to contaminate the soils.[56] The three lawsuits by adjoining property owners explicitly alleged trespass and nuisance.[57] The owner of the battery

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50. *Id. See* Section III for more discussion of the statutory allegations.

51. Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1040 (7th Cir. 1992).

52. *Id.*

53. *Id.* at 1041.

54. *Id.* at 1041-42. The court noted in one part of the opinion that policy itself did not "seem to require that the 'invader' bear any intent to deprive the occupant of possession." *Id.* at 1040. Later in the opinion, it noted that neither state required intent to deprive the occupant of possession for trespass. It is unclear what controls whether or not there should be intent to deprive the occupant of possession: if trespass does not require intent to dispossess, does the language of the policy still require it? This question gets more confusing as more of the cases are analyzed.

55. Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1040 (7th Cir. 1992).

56. Gould, Inc. v. Arkwright Mutual Ins. Co., 829 F. Supp. 722, 723-24 (M.D. Pa. 1993). The summary judgment motion at issue only dealt with allegations by the adjoining landowners; it did not address coverage for the clean-up consent order involving the USEPA (dealing with CERCLA and RCRA) that cost Gould over $17 million. *Id.*

57. *Id.* at 726.

processing station sued its insurer seeking coverage.[58] The court held that the language "wrongful entry" was ambiguous and the ambiguity, as a matter of policy construction, is resolved in favor of insured.[59] Therefore there was potential coverage. "Wrongful eviction" was not discussed, probably because it was not argued by the parties. Since the issue was potential coverage and since the policy contained the "other invasion" language, the holding that trespass and nuisance can be wrongful entries is at best an alternative holding. It would have been sufficient for the court to hold that the potential coverage existed under the "other invasion" language. Still, the case indicated the direction that the court is taking toward acceptance of these claims.

These results are backed up by dicta in several major cases. On point is one of the seminal cases providing coverage for nuisance claims under PIL coverage: *Titan Holdings Syndicate, Inc. v. City of Keene*.[60] The plaintiffs in *Titan* neighbored a sewage treatment plant run by the city.[61] The complaint alleged classic nuisance: the plaintiffs in the underlying suit alleged that they were "continuously bombarded by and exposed to noxious, fetid and putrid odors, gases and particulates, to loud and disturbing noises during the night, and to unduly bright night lighting."[62] They alleged damages of mental and physical suffering and loss of the use of their property.[63] The city's insurance carrier sued the city in federal court under diversity jurisdiction for a declaratory judgment and claimed that there was no potential coverage under the policy for the underlying suit.[64]

The policy had the typical PIL language covering "wrongful entry or eviction or other invasion of the right of private occupancy."[65] In finding coverage, the court made a strong statement that the tort of wrongful entry "most closely resembles that of trespass."[66] However, since the plaintiffs in the underlying case did not allege the requisite

58. *Id.* at 723.

59. Gould, Inc. v. Arkwright Mutual Ins. Co., 829 F. Supp. 722, 726-29 (M.D. Pa. 1993) (The court cited Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265 (1st. Cir. 1990); Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037 (7th. Cir. 1992); and Napco, Inc. v. Fireman's Fund Ins. Co., No. 90-0993, slip op. (W.D. Pa. May 22, 1991).).

60. Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265, 272 (1st Cir. 1990).

61. *Id.* at 267.

62. *Id.*

63. *Id.*

64. *Id.*

65. Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265, 271 (1st Cir. 1990).

66. *Id.* at 272.

intent (to invade) needed for trespass under New Hampshire law, there was no wrongful entry.[67] Negligent invasions could not be trespasses apparently.[68] The court clearly did not hold that trespass and wrongful entry are one and the same, but it gave a pretty clear indication that this was a possibility in New Hampshire. The case does stand for the proposition that wrongful eviction requires a landlord-tenant relationship, however.[69]

Taking the preceding cases together, trespass can be a wrongful entry. The level of intent needed is still an open question. The next case focuses on the policy language in its determination that intent to dispossess is required instead of focusing on whether the state law of trespass requires intentional invasion.

In *A.J. Gregory v. Tennessee Gas Pipeline Co.*, riparian owners sued the city—owner of the reservoir and the company for contamination of a recreational lake; they alleged loss of business income, diminution in value, emotional distress, and damages for "future expenditures necessary to remove contaminated soil, flora and fauna."[70] The city brought in its CGL insurance carrier.[71] The policy had PIL coverage for "wrongful entry into, or eviction of a person from a room, dwelling or premises that the person occupies."[72]

Noting that "the complaints do not allege trespass per se," the court nonetheless analyzed whether there was coverage for wrongful entry.[73] There was no allegation of intent, only an allegation that the city knew of the pollution and failed to clean it up.[74] The court cited to *Titan Holdings Syndicate* and appeared to accept that court's characterization of wrongful entry as a trespass.[75] The court did not grant coverage, however.[76] It focused on the fact that there was no allegation that the city intended harm to the landowners.[77] It read *Titan Holdings Syndicate* as

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67. *Id.*
68. *Id.* (The New Hampshire Supreme Court has "held that such claims require an intentional, not just negligent, invasion of the plaintiff's property.") *Id.*
69. Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265, 272 (1st Cir. 1990).
70. Gregory v. Tenn. Gas Pipeline Co., 948 F.2d 203, 209 (5th Cir. 1991).
71. *Id.* at 205.
72. *Id.* at 208.
73. *Id.*
74. *Id.* at 209.
75. Gregory v. Tenn. Gas Pipeline Co., 948 F.2d 203, 209 (5th Cir. 1991).
76. *Id.*
77. *Id.*

requiring intentional invasion, even though that court based its reasoning on New Hampshire law and this court based its reasoning on the policy language itself.[78] It stated that "[e]ach of the enumerated risks specifically assumed [by the policy language] requires active, intentional conduct by the insured."[79] By this, the court presumably meant that PIL coverage was intended to cover intentional conduct by the policyholder that results in one of the enumerated offenses.[80]

Several federal courts of appeal have given the indication that intentional trespass can be considered a wrongful entry. Ultimately, however, since these policy decisions are state law questions, it is going to be up to each individual state to make the call on whether trespass is a wrongful entry. States courts have begun to add their reasoning to the issue. In *Fibreboard Corp. v. Hartford Accident and Indemnity Co.* , the court stated that a trespass is a wrongful entry even if it is without intent to dispossess.[81] This was not a holding of the case, however, since the case focused more on products liability and it contained only nuisance allegations. In the case, an asbestos manufacturer sought coverage for claims against it by forty-two building owners.[82] Claims against the plaintiff reached across the spectrum from nuisance to conspiracy, negligence, strict liability, breach of warranties, and misrepresentation.[83] The building owners sought inspection and removal of the asbestos.[84] The court refused the plaintiff coverage.[85] First, the court held that the complaints did not "describe an actionable trespass" because there was no

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78. *Id.* at 205, 209. *See* Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265, 272 (1st Cir. 1990) (citing Moulton v. Groveton Papers Co., 289 A.2d 68, 72 (N.H. 1972), for the proposition that state law required an intentional invasion for trespass).

79. Gregory v. Tenn. Gas Pipeline Co., 948 F.2d 203, 209 (5th Cir. 1991).

80. This begs the question of how it should be decided whether intentional invasions are required: should we look to the policy or to the state common law? Using the *Titan Holdings* reasoning, in a state like Illinois, which does not require willful trespass, the invasion under the policy need not be intentional. However, using the *Gregory* reasoning, no matter what state law requires for intent, the policy language still requires intent.

81. Fibreboard Corp. v. Hartford Accident and Indemnity Co., 20 Cal. Rptr. 2d. 376, 388 (Cal. Ct. App. 1993).

82. *Id.* at 378-79.

83. *Id.* at 378.

84. *Id.* at 379.

85. The policy did not have the typical "other invasion" language, but instead it granted coverage for "other invasion[s] of an individual's right of privacy," the court was thus constrained to the eviction and entry language. Fibreboard Corp. v. Hartford Accident and Indemnity Co., 20 Cal. Rptr. 2d. 376, 391 (Cal. Ct. App. 1993).

direct or indirect entry upon land of the building owners.[86] Second, the court held that nuisance is not a wrongful entry nor is it a wrongful eviction.[87] The message of the California court: if trespass is properly plead against a policyholder, that policyholder can have coverage under wrongful entry language.

A picture begins to emerge that nuisance is neither a wrongful eviction nor a wrongful entry. Additionally, trespass is not a wrongful eviction, according to the courts. In the case law, the reasoning has been sparse, but the general direction is toward trespass as a "wrongful entry."

Courts do disagree, however, even within the same state. In *W.H. Breshears, Inc. v. Federated Mutual Insurance Co.*, the court denied coverage because it held that trespass and nuisance are not wrongful eviction or entry.[88] In that case, vandals caused a large quantity of gasoline to be spilled into the ground.[89] Neighboring property owners sued the plaintiff; the plaintiff sought coverage for costs it incurred to clean up property and for claims made by neighbors.[90] The court reasoned that wrongful eviction occurs in the landlord-tenant context and wrongful entry "takes place when someone other than the landlord claims a possessory interest in the room, dwelling or premises," while trespass does not involve a claim over occupancy.[91]

One court has gone further than the others in restricting the language of the policy. In *County of Columbia v. Continental Insurance*

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86. *Id.* at 388.

87. *Id.* at 391 ("The essence of the nuisance-related actions is that the sum of the defendant-manufacturers' tortious behavior created public and private nuisances on plaintiffs' property. But the underlying discrete offenses are not among the enumerated torts coming within the definition of personal injury and, in particular, they do not constitute wrongful evictions, wrongful entries or invasions of privacy.") *Id.* The invasion of privacy language does not help the plaintiff because the plaintiff is a corporation not a natural person and has no right of privacy. *See* Fibreboard Corp. v. Hartford Accident and Indemnity Co., 16 Cal. App. 4th 492, 516 (Cal. Ct. App. 1993).

88. W.H. Breshears, Inc. v. Federated Mut. Ins. Co., 832 F. Supp. 288, 291 (E.D. Cal. 1993) (The court went so far as to say that as a matter of law, neither trespass, public or private nuisance nor strict liability for ultra hazardous activity are covered by wrongful eviction or wrongful entry). Interestingly enough, this case came less than a year after the *Hirschberg v. Lumbermens Mut. Casualty*, 798 F. Supp. 600 (N.D. Cal. 1992) case discussed later. The two courts, each United States District Courts in California, resolved the same issue in opposite ways. One notable difference between the cases is that the CGL policy that was at issue in Breshears did not contain the "other invasion" language. *See* W.H. Breshears, Inc. v. Federated Mut. Ins. Co., 832 F. Supp. 288, 290-91 (E.D. Cal. 1993).

89. *Id.* at 289.

90. *Id.*

91. *Id.* at 291.

Co., the court reasoned that PIL coverage "is limited to liability for purposeful acts aimed at dispossession of real property by someone asserting an interest therein. . . ."[92] This court apparently found a requirement in the policy language that a simple trespass is not enough. Regardless of whether there is a requirement of intentional invasion, the court stated that the necessary intent element to be plead is intent to dispossess. The court went so far as to say that, in its view, "an action for environmental damage to real property such as the one pleaded in [the plaintiff's] complaint could not possible constitute a 'wrongful entry or eviction or other invasion of the right of private occupancy' so as to come within the personal injury liability coverage of [the insurer's] policies."[93]

In the case, the county used a parcel of land for solid waste disposal.[94] Some of the wastes disposed there allegedly leached onto adjoining land owned by a hunt club.[95] The hunt club sued the county for nuisance and trespass and alleged that the actions of the county were putting the hunt club "out of its own property in an unlawful manner and continue[d] to hold and keep [the club] out of its property by unlawful means."[96] The court reasoned that the coverage, unlike the broad general liability coverage, was meant to be narrow and only cover defined risks.[97] Thus, the case stands for the proposition that neither trespass nor nuisance can be either a wrongful entry or wrongful eviction.

The greater weight of authority accepts trespass as a wrongful entry, with only a minority of courts indicating that the policy language can not apply to these torts. The cases differ on two issues: the application of the policy language outside of the landlord-tenant context and the issue of whether intent to dispossess is a requirement of the policy language. For policies with the "other invasion" language, the equation may be changed somewhat. This is the next topic.

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92. County of Columbia v. Continental Ins. Co., 595 N.Y.S.2d 988, 991 (N.Y. App. Div. 1993).
93. *Id.*
94. *Id.* at 989.
95. *Id.*
96. *Id.*
97. County of Columbia v. Continental Ins. Co., 595 N.Y.S.2d 988, 991 (N.Y. App. Div. 1993). The court noted the enumerated covered "offenses." *See supra* note 10.

B. *Can Common Law Torts such as Trespass and Nuisance be Considered "Other Invasion[s] of the Right of Private Occupancy*"?

There are convincing arguments for considering trespass and nuisance as "other invasion[s] of the right of private occupancy." First, the addition of the phrase "other invasion . . ." evinces an intent to expand the breadth of "wrongful eviction or entry." If insurers meant to limit the breadth of these offenses, the phrase should have been left out. It adds to the breadth of the use of the conjunctive "or." Second, if trespass and nuisance are not "other invasions of the right of private occupancy," then it is unclear what the phrase would include. Courts generally strive to read meaning into language instead of making language essentially useless.

There are also plausible arguments for denying coverage of trespass and nuisance under this language. First, courts generally apply the interpretive principle of *ejusdem generis*[98] and read all three offenses together. This rule requires that the "other invasion" language be limited to torts of the same class as wrongful eviction or wrongful entry.[99] If trespass and nuisance are wholly different from wrongful eviction and wrongful entry, then they can not be considered an invasion of the right of private occupancy.[100] Further definition provides insight into why trespass and nuisance should be considered an other invasion of the right to private occupancy.

1. Defining the Terms

a. Occupancy and Possession

One word that stands out in the phrase "other invasion of the right of private occupancy" is the word "occupancy." Defining this term clarifies the rights associated with the concept of occupancy and how those rights can be invaded.

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98. This term is defined as "where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated." BLACK'S LAW DICTIONARY 517 (6th ed. 1990).

99. Parties arguing for policyholders tend to define this doctrine as meaning "of the same kind" while those arguing for insurers tend to define this term as meaning "of the same or lesser kind." Insurers emphasize the restrictive nature of the doctrine.

100. I will not spend time enumerating the historical differences. This has been done convincingly in Bowman, William J., & Hofer, Patrick F., *The Fallacy of Personal Injury Liability Insurance Coverage for Environmental Claims*, 12 VA. ENVTL. L.J. 393 (1993).

At a basic level, occupancy involves the possession, use, and control of real property. "Occupancy" means "[t]aking possession of property and use of the same."[101] An "occupant" is a "[p]erson in possession" or a "[p]erson having possessory rights, who can control what goes on premises" or "[o]ne who has actual use, possession or control of a thing."[102] "Possession" is defined as "[h]aving control over a thing with the intent to have and to exercise such control."[103] The definitions are circular: "[A] person who is in possession of land includes only one who is in occupancy of land with intent to control it."[104] "By 'occupancy' is meant such acts done upon the land as manifest a claim of exclusive control of the land, and indicate to the public that he who has done them has appropriated it."[105] So occupancy involves possession and use, and possession denotes control. Therefore, possession with control is equivalent to occupancy.[106]

These concepts have a broad sweep. It is apparent that if a party owns and lives on a piece of real estate the party has physical possession of the real estate and is considered an occupant. Without question, ownership connotes control, however, occupancy embraces more than ownership of real estate. The concept of occupancy may even extend to those who are not lawfully in possession.[107] Additionally, and more importantly, the preceding definitions make it apparent that a party need not own property to occupy it, therefore the definitions extend to tenants as well as to owners.[108] Furthermore, since possession, control, and use

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101. BLACK'S LAW DICTIONARY 1078 (6th ed. 1990); *see also* RESTATEMENT (SECOND) OF TORTS § 157, cmt. a (1965).

102. BLACK'S LAW DICTIONARY 1078 (6th ed. 1990).

103. *Id.* at 1163.

104. RESTATEMENT (SECOND) OF TORTS § 157 (1965).

105. *Id.* at cmt. a.

106. It is important not to make deductive mistakes. If either possession or occupancy are more broadly defined than the other, then it would be illogical to argue that while one equals the other, the inverse is true also. In that case, if "X is a subset of Y," then Y can not equal X. For example, although occupancy includes control, control can not be equated with occupancy because control is only one part of the definition of occupancy. Here, however, X=Y and Y=X (occupancy = possession and possession = occupancy) because the definitions are so circular.

107. "Possession of land may be acquired by one who is not by law entitled to it and thus, as against another, may not be rightful." RESTATEMENT (SECOND) OF TORTS § 157, cmt b (1965).

108. This is a tautology: tenants that have an estate for years have possession and control over real property for the term of their tenancy. None of the definitions are limited to owners exclusively. Those with leaseholds have control over the property even to the exclusion of the actual owner.

are not confined to residential real estate, it is logical to apply this concept to owners and tenants of commercial real estate also.[109]

Occupancy focuses on possession and, ultimately, control. An "invasion" of the "rights" of occupancy must be action adverse to the occupant's control or possession.[110] Interference with a person's occupancy involves interference with the person's control over the property.

b. Occupancy's Relationship to Nuisance and Trespass

Both trespass and nuisance are interferences with an occupant's rights. Nuisance suits can be maintained by those with mere possession of property; one need not be the owner of the property.[111] A modern view is that nuisance is an interference with the lawful enjoyment of property by someone who is in lawful possession.[112] Injured possessors no longer need to demonstrate that they are the owners of the property.[113] Nuisance, then, is an interference with an occupant's enjoyment of property.[114] One element of control is the ability to enjoy the property. Enjoyment free from interference is a "right" of control. Control is one of the "rights" associated with occupancy. If enjoyment of property is threatened, then occupancy is threatened. Therefore, nuisance is a threat to rights inherent in occupancy.

Trespass' relationship to occupancy is very similar. Trespass is an entry onto land possessed by another.[115] One of the most basic "rights" of occupancy is the ability to exclude others.[116] Acts of trespass are interferences with one of the "rights" inherent in occupancy. Both

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109. Once again, this is tautology: the definitions of these concepts are not restricted to certain types of real property. It is difficult to imagine why possession, control, and use would be any different for commercial property.

110. There may be other "rights" that attach to an occupant/possessor/controller of land, but they are not clearly defined in the law and they are not relevant to this discussion.

111. 66 C.J.S. *Nuisances* § 82a (1950).

112. *See* 58 AM. JUR. 2d *Nuisances* § 46 (1989).

113. *See id.*

114. Occupancy is defined as possession. *See supra* p. 59. If nuisance is an interference with a possessor's enjoyment of property, then it follows that nuisance is an interference with an occupant's enjoyment of property.

115. *See* J.D. LEE & BARRY LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 38.01, 343 (rev. ed. 1990) ("Trespass is an offense against possession.").

116. RESTATEMENT OF THE LAW OF PROPERTY § 1 (1965) (A right is a "legally enforceable claim of one person against another, that the other shall do a given act, or shall not do a given act.").

trespass and nuisance, under modern definitions, are interferences with the bundle of rights inherent in occupancy.[117]

2. The Cases

Similar issues appear under insurance policies containing the "other invasion" language. Courts have generally held that trespass and nuisance are "other invasions of the right of private occupancy."

The First Circuit, in *Titan Holdings Syndicate, Inc. v. City of Keene*, held that odors and fumes that interfere with the quiet enjoyment and use of property can be considered "other invasion[s] of the right of private occupancy."[118] The court found this clause ambiguous and read it against the insurer in favor of coverage.[119]

Other courts have followed the reasoning of *Titan Holdings*.[120] In *Hirschberg v. Lumbermens Mutual Casualty*, a lessee had been held liable for trespass and nuisance causing trichloroethylene (TCE) contamination and the lessee sued its insurance carrier for coverage.[121] The court held that because the "other invasion" language was ambiguous, it should be resolved against the insurer.[122] Given this ambiguity, the court construed the language to cover trespass and nuisance.[123]

As noted earlier, a federal district court in *Gould, Inc. v. Arkwright Mutual Insurance Co*. held that the language "other invasion of the right of private occupancy" was ambiguous and, therefore the

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117. Once again, I make no claim that all of the rights of occupancy are threatened. The only two rights relevant to this discussion are the right to exclude others and the right to control and therefore the right to enjoy property. These rights are affected or threatened by trespasses and nuisances, respectively.

118. Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265, 273 (1st Cir. 1990).

119. *Id.* (citing Town of Epping v. St. Paul Fire and Marine Ins. Co., 444 A.2d 496 (N.H 1982) and Town of Goshen v. Grange Mutual Ins. Co., 424 A.2d 822 (N.H. 1980), which dealt with this language in non-environmental contexts.) The court in *Titan Holdings* reversed and remanded the case, so that the insurance company could put on evidence that there was a different understanding between the parties as to what the "other invasion" language meant. New Hampshire law allows the insurer to overcome the presumption that the insurance language should be construed in favor of the insured by offering extraneous evidence of the parties' intentions. *Id.* at 272-73.

120. *See*, *e.g.*, Hirschberg v. Lumbermens Mut. Casualty, 798 F. Supp. 600 (N.D. Cal. 1992); Gould, Inc. v. Arkwright Ins. Co., 829 F. Supp. 722 (M.D. Pa. 1993).

121. *Hirschberg*, 798 F. Supp. at 602.

122. *Id.* at 604.

123. *Id.* at 604-05 (citing *Titan Holdings* and Donald F. Faberstein and Francis J. Stillman, *Insurance for the Commission of Intentional Torts*, 20 HASTINGS L.J. 1219, 1241 n.96 (1969)).

ambiguity should be resolved in favor of insured.[124] The court favorably discussed the *Titan Holdings* and *Hirschberg* opinions.[125]

Some courts have restricted the "other invasion" language to applications in the landlord-tenant context only. Most notable is *Decorative Center of Houston v. Employers Casualty Co.*, in which a company hired a contractor to build a commercial building next to a residential area.[126] The project reportedly caused flooding, noise, and damage to the adjoining property.[127] The adjoining homeowners sued the company for nuisance and trespass, alleging that the construction was causing them physical and mental harm.[128] The CGL insurer defended the suit, but refused to indemnify the company or the contractor because the jury found that the contractor had intentionally injured the homeowners.[129] The insurer brought a declaratory judgment action against the company in order to avoid indemnification.[130]

The language at issue in the case was "other invasion of the right of private occupancy."[131] The court found that the policy language was unambiguous.[132] It also stated that "[t]he phrase in question is not a legal term or phrase of art."[133] According to the court, the plain language of the phrase must mean that:

> The right of "private occupancy" can only refer to those rights associated with an individual's act of inhabiting the premises, and not to rights associated with the individual's right to use and enjoy the inhabited premises.... [The offenses of wrongful eviction, entry, or other invasion of the right of private occupancy] are meant to cover only landlord-tenant situations, or, if

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124. Gould, Inc. v. Arkwright Mut. Ins. Co., 829 F. Supp. 722, 729 (M.D. Pa. 1993).

125. *Id. at* 726-28. Also noted was the case of Napco, Inc. v. Fireman's Fund Ins. Co., No. 90-0993, slip op. (W.D. Pa. May 22, 1991), which held that the language of the policy was ambiguous and resolved in favor of the insured.

126. Decorative Ctr. of Houston v. Employers Casualty Co., 833 S.W.2d 257, 258 (Tex. Ct. App. 1992).

127. *Id.*

128. *Id.* at 259.

129. *Id.*

130. Decorative Ctr. of Houston v. Employers Casualty Co., 833 S.W.2d 257, 259 (Tex. Ct. App. 1992).

131. *Id.* at 260.

132. *Id.*

133. *Id.* (citing Beltway Management Co. v. Lexington Landmark Ins. Co., 746 F. Supp. 1145, 1156 (D.D.C. 1990)).

> extended, only similar instances where the defendant insured has some superior right of occupancy to that of the plaintiff.[134]

The court arrived at this conclusion by using the *Webster's Dictionary* definition of "occupancy," which defines "occupancy" as including "possessing," "holding," or "residing."[135] The court understood this definition to require habitation.[136] It is difficult to see how the adverse effects on the use and enjoyment of the adjoining landowners property did not affect the habitability of the property and, in turn, affect their occupancy. Clearly, the plaintiffs in the underlying lawsuit were inhabiting the property affected by the actions of the policyholder and clearly, their inhabitation was affected by the policyholder's actions.[137] As such, the court's distinction between habitation and use is dubious.

According to the court, the "other invasion" covers claims against landlords for breaches of the implied warranty of habitability.[138] Beyond the landlord-tenant context, there can be coverage "when the occupier has a vested interest in the occupancy of the premises."[139] This part of the court's opinion is the most cryptic. The landowners in the underlying case certainly had a vested right in the occupancy of their own premises, therefore, by the court's own reasoning, there should be coverage.

The *Decorative Center* court decided that the language in the policy should be read strictly[140] and that trespass and nuisance should be covered only under the basic CGL coverage, if at all.[141] Since there was

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134. Decorative Ctr. of Houston v. Employers Casualty Co., 833 S.W.2d 257, 261 (Tex. Ct. App. 1992).

135. *Id.*

136. *Id.*

137. Decorative Ctr. of Houston v. Employers Casualty Co., 833 S.W.2d 257, 258 (Tex. Ct. App. 1992).

138. *Id.* at 262 (quoting Beltway Management Co. v. Lexington Landmark Ins. Co., 746 F. Supp. 1145, 1156 (D.D.C. 1990)).

139. Decorative Ctr. of Houston v. Employers Casualty Co., 833 S.W.2d 257, 263 (Tex. Ct. App. 1992).

140. *Id.* at 260.

141. *Id.* at 262-63 (The court would have excluded trespass and nuisance from the basic CGL coverage, stating that coverage does not apply to intentional acts). This double-coverage argument has arisen frequently. Insurers argue that a liberal reading of PIL would permit insureds "to seek coverage under two separate and distinct parts of the policy for the same exact allegations. This construction would expose the Insurers to a form of double liability that plainly was not contemplated by the terms of the policy." Amicus Brief of Insurance Envtl. Litig. Ass'n at 13; County of Colombia v. Continental Ins. Co., 189 A.D.2d 391 (N.Y. App. Div. 1993) (No. 326-90), *appeal denied*, 627 N.E.2d 513, 606 (N.Y. 1993), *order aff'd*, 634 N.E.2d 946 (N.Y. 1994).

no landlord-tenant relationship, the court implied that something more then simple interference with the use of property would be required for coverage.[142]

The court in *County of Columbia v. Continental Insurance Co.* held that trespass and nuisance can not come under the "other invasion" language.[143] In reaching this determination, the court reasoned that the entire phrase needed to be read together and read strictly.[144] Because of the definitions of "wrongful entry" and "wrongful eviction," the court emphasized that invasions of the right of private occupancy must involve actual interference with possessory rights to real property.[145]

It is important to limit this case to its fact-specific context: "[T]he issue is not whether a nuisance or trespass claim may possibly fit within the policies' personal injury coverage but whether the facts alleged [in the complaint] do."[146] Thus, in New York it is unclear how much of an interference with property is needed to fall within the "other invasion" language.

Other theories have been introduced as to why trespass and nuisance should not be covered under "other invasion" language. For example, one court read all of the PIL offenses as involving issues of individual freedom, but not property damage.[147] Other courts have not disclosed their reasoning for denying coverage in written opinions.[148]

Similarly, no court would allow a policyholder to seek recovery under both fire and automobile policies, even where a post-collision fire caused a significant portion of the injury. *Id.*

142. Decorative Ctr. of Houston v. Employers Casualty Co., 833 S.W.2d 257, 263 (Tex. Ct. App. 1992).

143. County of Columbia v. Continental Ins. Co., 595 N.Y.S.2d 988, 991 (N.Y. App. Div. 1993).

144. *Id.*

145. *Id.*

146. *Id.* at 990-91.

147. Straits Steel & Wire Co. v. Michigan Millers Mut. Ins. Co., No. 91-72991, slip op. at 8 (Mich. Cir. Ct., Kent County June 10, 1992).

148. Biddle Sawyer Corp. v. National Union Ins. Co., Doc. No. Mon-L-5219-91 (N.J. Sup. Ct., Monmouth Co., Law Div., July 24, 1992). Similarly, in an action by Spokane County, to get coverage for contamination of ground water by landfills that it operated, the court stated that "[i]t would defy logic to label the type of property damage alleged in this case as personal injury." Spokane County v. American Re-Ins. Co., No. CS-90-256-WFN, slip op. at 5 (E.D. Wash. May 12, 1993).

III. PERSONAL INJURY PROTECTION IN CASES INVOLVING STATUTORY CAUSES OF ACTION

Often insureds are not sued by adjoining landowners but rather by the state or federal government entities that enforce environmental laws. These entities typically do not sue for trespass or nuisance, but act under the authority of statutes such as CERCLA or RCRA. Such actions can range from a letter indicating that the insured's property is a suspected source of contamination to a full lawsuit.

When insureds seek coverage solely for state or federal agency action, without involving trespass and nuisance claims, the previously discussed dynamics change dramatically. By definition, when an insured is pursued by a government agency, there is no private occupant involved; therefore, it is questionable whether rights of private occupancy are violated. Remedies for environmental law violations are unlike common law remedies for trespass and nuisance. Violating an environmental statute does not necessarily lead to an invasion of private occupancy rights because the rights being vindicated by enforcement are the rights of the general public.

A. Courts Denying Coverage

Several courts have used the rationale that PIL coverage requires a claim against the policyholder by private occupants and not a governmental unit.[149] In *Harrow Products, Inc. v. Liberty Mutual Insurance Co.*, the Michigan Department of Health detected TCE in a municipal water supply.[150] The Department of Natural Resources investigated, traced it to the plaintiff's site, and requested a remediation plan.[151] Charges were brought under the Michigan Water Resources Commission Act, the Michigan Environmental Protection Act, and CERCLA.[152] The company that owned the site sought insurance coverage for the remediation.[153] One of the insurers provided coverage

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149. *Id.*
150. Harrow Products, Inc. v. Liberty Mut. Ins. Co., 833 F. Supp. 1239, 1241 (W.D. Mich. 1993).
151. *Id.*
152. *Id.* at 1241-42.
153. *Id.* at 1241.

for approximately a year, but then denied coverage because of pollution exclusions in the policy.[154]

The court stated that PIL coverage only applies when private-party occupants of property have brought suit.[155] Since no private-party occupants had sued the company, the court held that there was no PIL coverage.[156] According to the court, the agencies were vindicating the rights of the general populace to uncontaminated ground waters.[157]

The court in *Morton Thiokol, Inc. v. General Accident Insurance Co.*, followed the same reasoning.[158] The case dealt with the site of an old mercury processing plant that caused contamination of ground water after 268 tons of waste seeped into the ground and nearby creeks.[159] In a prior suit, a trial court imposed liability on a previous owner for creating a public nuisance.[160] The later owner argued that the finding of nuisance meant that there was coverage under PIL.[161] The *Morton* court held that there could not be an invasion of the right of private occupancy because the contaminated waters were public property.[162]

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154. *Id.*

155. Harrow Products, Inc. v. Liberty Mut. Ins. Co., 833 F. Supp. 1239, 1246 (W.D. Mich. 1993). In so doing, the court agreed with prior case law. *Id.* at 1243; *see also Titan Holdings; Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037 (7th Cir. 1992); Hirschberg; Gregory v. Tennessee Gas Pipeline Co., 948 F.2d 203 (5th Cir. 1991).*

156. Harrow Products, Inc. v. Liberty Mut. Ins. Co., 833 F. Supp. 1239, 1246 (W.D. Mich. 1993).

157. *Id.* It is interesting to note, however, that the court gave the indication that the state or village might have sued as subrogees or representatives of occupants and thereby met the court's requirement of private occupants. *Id.*

158. Morton Thiokol, Inc. v. General Accident Ins. Co., No. C-3956-85, slip op. at 1 (N.J. Super. Ct., Ch. Div. Aug. 27, 1987), *aff'd on other grounds*, No. A-895-89T3, 1991 WL 348049 (N.J. Super. Ct. App. Div. Oct. 2, 1991), *aff'd on other grounds*, 629 A.2d 831 (N.J. 1993).

159. *Id.*

160. *Id*. at 2 (N.J. Super. Ct., Ch. Div. Aug. 27, 1987), *aff'd on other grounds*, No. A-895-89T3, 1991 WL 348049 (N.J. Super. Ct., App. Div. Oct. 2, 1991), *aff'd on other grounds*, 629 A.2d 831 (N.J. 1993) (citing New Jersey Dept. of Envtl. Protection v. Ventron Corp., 440 A.2d 455, 459 (N.J. Super. Ct. App Div. 1981), *cert. granted*, 450 A.2d 530 (N.J. 1982), *and aff'd as modified*, 468 A.2d 150 (N.J. 1983), *aff'd on other grounds*, No. A-895-89T3, 1991 WL 348049 (N.J. Super. Ct. App. Div. Oct. 2, 1991), *and aff'd on other grounds*, 629 A.2d 831 (N.J. 1993)).

161. *Morton*, No. C-3956-85, slip op. at 27.

162. An additional step in the *Morton* court's reasoning was that there could be no eviction or wrongful entry because there was no dispossession of the creek. *Id.* at 28. The court stated that the

> [p]laintiff [has] confused the concept of trespass with wrongful entry. Its argument that the common law distinction between nuisance and trespass has been blurred has no relevance to the insurance contract clause with respect to 'personal injury.' Wrongful entry, eviction and occupancy all have to do with

Several other courts have distinguished common law nuisance and trespass from statutory actions. A federal court in California noted that statutory actions are wholly unlike claims for invasions of occupancy:

> [T]here is no California authority which supports Intel's contention that CERCLA claims can be construed as claims for wrongful eviction or invasions of the rights of private occupancy. A review of the provisions of CERCLA indicates that it was enacted to vindicate [the] public['s] rights to a clean environment. Its provisions simply do not support the contention that a claim under it, such as made here, in and of itself constitutes a claim for "Wrongful Entry or Eviction, or Other Invasion of the Right of Private Occupancy."[163]

B. Courts Providing Coverage

Courts sometimes have not distinguished between common law actions and statutory violations.[164] A Wisconsin court sent a clear message that statutory violations are covered under the policy. In *City of Edgerton v. General Casualty Co. of Wisconsin*, the E.P.A. uncovered Volatile Organic Compound (VOC) contamination at a site owned by a company and leased to the city for use as a landfill.[165] The EPA required reporting to the state agency. The Wisconsin Department of Natural Resources threatened action if a remediation plan was not proposed quickly.[166] The court rejected the insurer's argument that PIL requires an "unprivileged taking" of real estate by someone claiming a possessory interest.[167] The court supported the idea that the policy covered invasions of "another's interest in the private use and enjoyment of land,"

> the possession of property. The seepage of toxic waste has nothing at all to do with the possession of [the creek].

Id.

163. Intel Corp. v. Hartford Accident & Indemnity Co., No. C-87-20434-RMW (PVT) slip op. at 4 (N.D. Cal. Sept. 9, 1992)(alteration in original).

164. *See*, *e.g.,* Hirschberg v. Lumbermens Mut. Casualty, 798 F. Supp. 600, 602-603 (N.D. Cal. 1992)

165. City of Edgerton v. General Casualty Co. of Wisconsin, 493 N.W.2d 768, 771 (Wis. Ct. App. 1992).

166. *Id.*

167. *Id.* at 780.

including negligent trespass.[168] Although the court recognized that ground water contamination involved in the case was not technically an invasion of private rights, it held that,

> access to, and use of, an undefiled underground water supply is a right of private occupancy. The invasion of that right is a personal injury liability which is covered by [the policy language 'wrongful entry or eviction of other invasion of the right of private occupancy'].[169]

Another example of a case that fails to distinguish between statutory law and common law is *Pipefitters Welfare Educational Fund v. Westchester Fire Insurance Co*.[170] The action against the plaintiff was initiated by a third party rather than a state agency for statutory violations and recovery of CERCLA response costs.[171] The court, however, never seemed to distinguish statutory causes of action from common law causes of action.[172]

California state courts may be moving in the same direction. In *Aydin Corp. v. American Employers Insurance Co.*, the court seemed to accept the argument that an invasion of the right of private occupancy could extend to both nuisance and statutory claims.[173] In this case, a policyholder's property was contaminated by polychlorinated biphenyls (PCBs) because of production of electrical transformers.[174] Several California state agencies and the E.P.A. directed a clean-up of the facility.[175]

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168. City of Edgerton v. General Casualty Co. of Wisconsin, 493 N.W.2d 768, 780-81 (Wis. Ct. App. 1992).

169. *Id.* at 781.

170. Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037 (7th Cir. 1992).

171. *Id.* at 1039 n.1. I have included this case in this section because there were no explicit allegations of trespass or nuisance and the action was apparently based on a statutory right of contribution for CERCLA clean-up costs.

172. *Id.* at 1042.

173. Aydin Corp. v. American Employers Ins. Co., No. 857-826 at 24-25 (San Francisco County Super. Ct. July 1, 1993). The court noted that, "the 'personal injury' endorsement could reasonably be interpreted to [be] encompass[ed] within the term 'invasion of the right of private occupancy' claims 'sounding in nuisance,'" and stated that the insurers offered, "an unpersuasive conclusory leap of interpretive logic when arguing that the personal injury coverage is inapplicable to the subject clean-up orders, because coverage for 'wrongful entry or eviction' is limited to the common law tort of 'wrongful entry' or 'forcible entry or detainer.'" *Id.*

174. *Id.* at 1-2.

175. *Id.* at 2.

IV. THE APPLICATION OF THE POLLUTION EXCLUSION TO PERSONAL INJURY LIABILITY

As a preliminary matter, it is crucial to understand that there is a two-step logical process used to read insurance policies. The first step asks whether there is potential or actual coverage. This is done by analyzing the language granting coverage.[176] The second step asks whether any exclusions apply. It is analytically useful to read the policy this way because it forces a complete analysis of the policy. Additionally, most insurance companies argue both steps because if they lose on the first step (i.e., PIL coverage might apply to trespass), they may still win under the second step (i.e., an exclusion might apply). The only exclusion this section focuses on is the pollution exclusion.

In the basic CGL coverage, there is an exclusion for damage "arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants."[177] This exclusion is, by its own terms, an absolute exclusion from coverage for claims involving contamination.[178] Although it has been frequently argued that this exclusion should also bar claims for PIL, this exclusion generally does not apply to PIL coverage. By its own terms, it typically applies only to the basic CGL coverage for bodily injury and property damage.

A. When the Pollution Exclusion Does Not Apply to PIL Coverage

There are two basic reasons for courts not to apply pollution exclusions. First, the policy is structured such that the pollution exclusion is listed either under the basic CGL coverage or directly after this coverage.[179] PIL coverage comes later in the policy and contains its own

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176. The meaning of "coverage" here is a narrow one. The term refers to whether the basic coverage language applies before any exclusions or conditions are analyzed, not to the result or to the final decision of whether the claim should be paid (i.e., whether there is "personal injury", "bodily injury" or "property damage"). *Id.*

177. This language is located in the 1985 ISO policy, under Section I, Coverage A, subsection 2.

178. This exclusion applied in 1986 and it is called the absolute pollution exclusion. An earlier version of the exclusion called the qualified pollution exclusion allowed for coverage if the event was accidental; it stated that, "this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental." This earlier exclusion was added in the 1973 policy language from the ISO.

179. The 1985 ISO policy, under Section I, Coverage A, subsection 2, includes the above-quoted language. The PIL coverage is located in Section I, Coverage B. It has its own exclusions under its own subsection 2.

exclusions. It typically does not refer to or explicitly adopt exclusions found elsewhere. Some policies even specifically state that no other exclusions apply to PIL other than the ones listed under PIL.[180] Second, the pollution exclusion is limited by its very terms to "bodily injury" and "property damage" and does not mention PIL coverage.[181]

The court in *Pipefitters* held that the pollution exclusion clause did not limit PIL coverage because it did not specifically include PIL in its language.[182] There were two policies at issue in the case: one policy's exclusion stated that it applied to "personal injury" as well as "bodily injury" and "property damage," while the other policy did not list "personal injury" in the exclusion.[183] The court criticized the second insurer, who had argued that the pollution exclusion should apply to PIL:

> [The insurer's] attempts to circumvent the plain language of the pollution exclusion in its policy are disingenuous and misleading—indeed they are nearly sanctionable—and as such do not warrant any discussion.[184]

B. *Applying the Pollution Exclusion to PIL Coverage*

Several courts have held that the pollution exclusion does apply to PIL coverage. The main argument for application of the exclusion to PIL stems from the maxim that the policy should be read as whole. Under this maxim, the whole policy should make sense and sections should be internally consistent. The argument assumes that the two coverages under the policy (the basic CGL and PIL coverages) are mutually exclusive and there can not be potential coverage under both; otherwise, PIL coverage could be used to circumvent the pollution

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180. *See supra* note 14.

181. The 1985 ISO policy, under Section I, Coverage A, subsection 2, states that there is an exclusion for "'[b]odily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants." By its very language, it does not apply to "personal injury."

182. Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1042 (7th Cir. 1992).

183. *Id.*

184. *Id.*

exclusion.[185] Alternatively, the pollution exclusion may explicitly mention PIL.[186]

The Fifth Circuit followed this reasoning in *Gregory v. Tennessee Gas Pipeline Co.*, when it agreed with the proposition that allowing coverage under PIL for damage that was excluded under the basic CGL coverage would "render the pollution exclusion meaningless."[187] Additionally, the court rationalized its decision by noting that the insured had paid no premium for the risk (because it was excluded under bodily injury/property damage) and that the basic CGL coverage might be "subsumed" under personal injury coverage.[188]

The San Francisco County Superior Court agreed, citing *Gregory*, and applied the pollution exclusion to PIL coverage.[189] In *County of Columbia*, the court reasoned that providing coverage under PIL would render the pollution exclusion meaningless.[190] Because the policyholder's liability would have been covered under the rest of the policy were it not for the pollution exclusion, the court was reluctant to allow an end-run around the exclusion.[191]

A Pennsylvania superior court also agreed with this reasoning.[192] The court denied coverage because pollution exclusions apply to PIL coverage too; otherwise the unambiguous exclusions would be "emasculated."[193]

Outcomes depend heavily on the wording of the exclusion or its placement in the policy. For example, in *W.H. Breshears, Inc. v. Federated Mutual Insurance Co.*, although the pollution exclusion was located at the end of the policy, the court applied it to PIL coverage by

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185. Coverage for contamination would normally fall squarely under the basic CGL coverage; however, the pollution exclusion typically preempts this coverage.

186. *E.g.*, Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1042 (7th Cir. 1992).

187. Gregory v. Tennessee Gas Pipeline Co., 948 F.2d 203, 209 (5th Cir. 1991).

188. *Id.*

189. Aydin Corp. v. American Employers Ins. Co., No. 857-826 at 25-26 (San Francisco County Super. Ct. July 1, 1993). The court held that the coverage did not apply because it would render the pollution exclusion inoperative to allow for coverage to "non-sudden, non-accidental, progressive events." *Id.*

190. County of Columbia v. Continental Ins. Co., 189 A.D.2d 391, 395-396 (N.Y. App. Div. 1993).

191. *Id.* at 395.

192. O'Brien Energy Systems, Inc. v. American Employers' Ins. Co., 629 A.2d 957 (Pa. Super. Ct. 1993).

193. *Id.* at 964.

reading the policy as a whole.[194] Obviously, this means that there was a better argument for applying the exclusion to the whole policy, including PIL coverage.

In *American Universal Insurance Co. v. Whitewood Custom Treaters, Inc.*, the court held that the pollution exclusion applied to PIL coverage because the pollution exclusion was part of the basic policy and the PIL coverage was part of an endorsement to the policy.[195] The court wrote that "all exclusions set forth in the basic policy ... [including the pollution exclusion] are carried forward and must be construed as a part of the general liability insurance endorsement [i.e., the PIL endorsement] unless otherwise removed by the plain terms of the endorsement."[196]

Outcomes are relatively simple if the pollution exclusion mentions PIL, or if PIL adopts other exclusions: the exclusion applies to PIL. It is also a relatively simple case if the exclusion is an endorsement tacked on to the end of the policy: the exclusion probably applies to PIL. However, when the pollution exclusion is located in its typical position in the policy and does not explicitly mention PIL, the results vary from jurisdiction to jurisdiction. Neither result has a superior argument to back it up. Reading the plain language of the pollution exclusion has just as much logical appeal as reading the policy as one internally consistent whole. This is still an open question.

V. CONCLUSION

Personal Injury Liability coverage is available to those policyholders who are sued by private landowners because of ground

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194. W.H. Breshears, Inc. v. Federated Mut. Ins. Co., 832 F. Supp. 288, 291 (E.D. Cal. 1993).

> Even if the "[p]ersonal [i]njury" coverages in the [federated] policies were to apply to the events . . . coverage would be excluded by virtue of the policies' "pollution" exclusions. . . . To find coverage for the events . . . under the "Personal Injury" coverages of the [federated] policies without applying the "pollution" exclusions of said policies to said coverages would be an anomalous result.

Id.

195. American Universal Ins. Co. v. Whitewood Custom Treaters, Inc., 707 F. Supp. 1140, 1143 (D.S.D. 1989). The Minnesota Mutual policy for automotive liability contained language that was very close to a basic CGL policy; it also contained a qualified pollution exclusion as part of the basic coverage. *Id.* The PIL coverage was located in an additional endorsement to the policy in a "broad form comprehensive general liability endorsement." *Id.*

196. *Id.* at 1144.

water or soil contamination; however, private landowners must allege that the policyholder trespassed on their property. Although policyholders have a much stronger argument for coverage if their policies contain the "other invasion" language, trespass claims should be covered as a "wrongful entry."

Although historically it was not so, the great weight of modern legal jurisprudence defines trespass as wrongful entry. Additionally, PIL covers trespass claims against the policyholder because trespass is an invasion of one of the rights associated with private occupancy: the right to exclude. Nuisance, on the other hand, is not widely accepted as an interference with occupancy, even though it violates one of the rights associated with occupancy: the right to enjoyment and use of property. Neither trespass nor nuisance are commonly accepted as wrongful evictions, which are relegated to the landlord-tenant context.

The result for the policyholder is different, however, if the state or federal government takes action against the policyholder under one of the environmental statutes such as RCRA or CERCLA. These statutes provide for actions and remedies that do not sufficiently resemble the kind of tort liability that PIL covers. Additionally, these actions do not involve a private occupant of land, but rather a governmental unit. PIL requires a claim by a private occupant.

The application of the pollution exclusion to PIL is largely fact-dependent. In the typical scenario, the pollution exclusion does not mention PIL and as such, the result will depend on whether the court decides that the plain language of the policy takes precedence over reading the policy as a consistent whole.