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COMMERCIAL GENERAL LIABILITY COVERAGE EXCLUSIONS UNDER PENNSYLVANIA LAW

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This article is intended to provide a brief overview of the exclusions commonly found within Coverage A of the Commercial General Liability (CGL) Coverage Form and the interpretation of those exclusions by the insurance industry and the Pennsylvania courts. While the applicability of policy exclusions to any given set of facts must obviously be determined on a case by case basis, and will generally be governed when determining an insurer's defense obligations by the factual allegations of a plaintiff's complaint, the aim of this article is to provide the claims professional with general guidance for use in identifying those situations in which the exclusions might apply, and those in which they will not.

Although the applicable policy language will differ in some cases, this article will address the various CGL exclusions as they commonly appear in current ISO policy forms, stating that the commercial general liability insurance coverage provided by such policies does not apply to the following:

a. Expected or Intended Injury

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.

- First and foremost, it must be recognized that this is not an “intentional *act*” exclusion and should not be referred to as such. It does not apply merely because the insured commits an intentional act (e.g., putting down a tool box in a location where someone later falls over it) but only where the resulting *injury* or *damage* was intended by the insured. This important distinction was recognized by the Supreme Court in Eisenman v. Hornberger, 264 A.2d 673 (Pa. 1970), in which the insured and several teenage companions broke into the plaintiffs' home and stole a quantity of liquor. To avoid detection while in the darkened house, the group lit its way with matches rather than turning on the lights, dropping them to the floor as they burned down. One of the matches landed in an upholstered chair which, after smoldering for several hours, erupted in flames which destroyed the entire house. It was held that a homeowners policy exclusion barring coverage for damage caused intentionally by the insured did not apply because there was no basis to conclude that the insured intended to set fire to the property when dropping the matches, the Court recognizing the distinction between intending an act and intending the result.

- Although some courts draw a distinction between the two, the terms “expected” and “intended” are considered synonymous in Pennsylvania.

- The use of the phrase “*the insured,*” rather than “*an*” or “*any insured,*” is construed as meaning that coverage is barred only where the injury or damage was intentional from the standpoint

of the particular insured seeking coverage. Coverage remains in force for innocent co-insureds who did not themselves intend the injury. Conversely, policies excluding coverage for the intentional injuries of “an” or “any insured” are interpreted as barring coverage to all insureds if any one of them engaged in the excluded conduct. General Accident Ins. Co. of America v. Allen, 708 A.2d 828 (Pa.Super. 1998).

- For this exclusion to apply, the insured need not act with the “*specific intent*” to cause the precise injury or damage which in fact resulted; it is sufficient if the insured expected or intended to cause injury or damage of the “*same general type*.” United Services Automobile Ass’n. v. Elitzky, 517 A.2d 982 (Pa.Super. 1986), *appeal denied*, 528 A.2d 957 (Pa. 1987).

- For the exclusion to apply, the resulting injury must have either been intended, or it must have been “*substantially certain*” to follow from the insured’s conduct. It is not enough that the insured should have reasonably foreseen the injury which his actions caused. *Id.*; Erie Insurance Exchange v. Fidler, 808 A.2d 587 (Pa.Super. 2002). The law is not fully developed regarding the extent to which this principle can result in a finding of coverage where the victim suffers an improbable or “freak” injury due to an insured’s intentional actions, such as permanent brain damage from a punch in the nose.

- The Pennsylvania courts have held that an intent to cause injury will be inferred as a matter of law in cases involving particularly reprehensible acts such as engaging in sexual relations with minors, but have not extended that rule to other contexts. Aetna Casualty & Surety Co. v. Roe, 650 A.2d 94 (Pa.Super. 1984); Erie Insurance Exchange v. Claypoole, 673 A.2d 348 (Pa.Super. 1996).

- Although the courts do not use the phrase “inferred intent” in cases outside of the sexual molestation of minors context, it is also well established that an insured is chargeable with knowledge of the natural and obvious consequences of his actions, and will not be permitted to argue that he had no intent to cause them. For example, in Donegal Mutual Ins. Co. v. Ferrara, 552 A.2d 699 (Pa.Super. 1989), in which the insured intentionally kicked a policeman in the crotch, but denied the intent to injure him, the court held that injury to the officer’s genitals was substantially certain to result from the insured’s actions and that an intentional injury exclusion barred coverage. This concept has also been employed frequently in gunshot cases.

- An insured’s voluntary intoxication may be considered in determining whether an injury is subject to this exclusion. Nationwide v. Hassinger, 473 A.2d 171 (Pa.Super. 1984). The question of the requisite level of intoxication necessary to avoid application of the exclusion has not been clearly established, though in one case in which this issue was addressed, the insured purportedly suffered from a complete, alcohol induced “blackout”. Stidham v. Millvale Sportsmen’s Club, 618 A.2d 945 (Pa.Super. 1992). The Superior Court also recently suggested that the level of intoxication necessary to avoid application of an intentional injury exclusion might rise to the level of a “total lack of consciousness” in Donegal Mutual Ins. Co. v. Baumhammers, 893 A.2d 797 (Pa.Super. 2006), *reversed on other grounds*, 938 A.2d 286 (Pa. 2007).

- On the other hand, it has been held both at the trial level and by the Superior Court (in a decision that was later reversed on other grounds) that an insured's claimed mental illness or lack of mental capacity is not relevant in determining the applicability of the exclusion. Erie Insurance Exchange v. Heisey, 81 D.&C.4th 18 (C.P. Lebanon Co. 2007); Baumhamers, *supra*.

- The insured's conviction on criminal charges relating to the incident is admissible and may be conclusive in determining whether such an exclusion applies, provided the criminal charge establishes the requisite intent. *See, e.g.*, West American Ins. Co. v. Klein, 1998 U.S. Dist. LEXIS 9500 (E.D.Pa. 1998). However, it should be recognized that an insured's conviction on criminal charges establishing mere recklessness has been considered insufficient to establish that the insured acted with substantial certainty that injury or damage would occur. *See, e.g.*, State Farm Fire and Casualty Co. v. Dunlavey, 197 F.Supp.2d 183 (E.D.Pa. 2001).

- In cases involving intentional misconduct on the part of an insured, it should be noted that there may also be alternative coverage defenses apart from this exclusion including:

(a.) The "Occurrence" Requirement :

The Insuring Agreement to a commercial liability policy typically affords coverage for injuries or damage only when caused by an "occurrence", a term defined as meaning an "accident". At one time, there was authority which could be cited for the proposition that a court will focus when making this determination solely upon the nature of the act which produced the injury or damage and that, if the character of the event could not be considered an "accident", no coverage would be afforded to any insured even if the insured was not directly involved. *See, e.g.*, Gene's Restaurant v. Nationwide Ins. Co., 548 A.2d 246 (Pa. 1988), (holding that a malicious, wilful assault could never be considered an "accident" and denying coverage to the owner of a tavern in connection with an assault upon one of its patrons). The law with respect to this issue was recently clarified by the Supreme Court in Donegal Mutual Ins. Co. v. Baumhammers, 938 A.2d 286 (Pa. 2007), in which it was held that the question of whether an injury was accidental must be determined by viewing the nature of the underlying incident from the perspective of each insured seeking coverage - thus, where parents were sued for negligence in the supervision of their mentally ill son, who later engaged in a shooting spree resulting in several deaths, there was little question but that the incident was no "accident" from the son's perspective, but coverage was nonetheless afforded to the parents because the incident was an "accident" when viewed from their perspective.

(b.) Public policy:

It is contrary to public policy in Pennsylvania to afford liability coverage in connection with an insured's wilful and intentionally injurious criminal acts. Elitzky, *supra*; Hassinger, *supra*; Federal Ins. Co. v. Potamkin, 961 F.Supp. 109 (E.D.Pa. 1997).

- Finally, it is no secret that the complaints which are filed in assault cases are often disingenuously framed in a manner aimed at triggering at least a defense obligation on the part of

the assailant's insurer by omitting facts, or by describing the insured's conduct in a more benign way than the actual facts would warrant. Complaints in such cases will frequently indicate that the insured assailant merely acted negligently or recklessly in striking the plaintiff with a baseball bat or in shooting his victim several times in the head. Complaints have also gone so far as to allege that the insured was intoxicated and unable to formulate an intent to injure the plaintiff, or that the insured mistakenly believed that his beating of the plaintiff was necessary in self-defense.

Although it is the complaint which initially determines an insurer's defense obligations under Pennsylvania law, it is the factual allegations of the pleading which are controlling, not the legal labels or conclusions which accompany them. Thus, our courts have repeatedly recognized that mere allegations of negligence in a complaint are not sufficient to trigger a duty to defend where the factual allegations of the pleading clearly indicate that there is no potential coverage under the policy. *See, e.g., Germantown Ins. Co. v. Martin*, 595 A.2d 699 (Pa.Super. 1989), (no duty to defend when insured allegedly went to his former girlfriend's home with an automatic weapon, shot and killed her new boyfriend and injured a boarder by shooting him four times in the chest, despite allegations of mere negligence); *Erie Insurance Exchange v. Fidler*, 808 A.2d 587 (Pa.Super. 2002), (holding that insured's actions in throwing fellow student against a wall fell within scope of intentional injury exclusion, even though his actions were merely characterized as negligent in the complaint).

b. Contractual Liability

“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a written contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or**
- (2) Assumed in a contract or agreement that is an “insured contract”, provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement**

- This should not be mistaken for an exclusion of coverage with respect to breach of contract claims in general, but instead applies only to indemnification agreements under which, to use the language of the exclusion, an insured has “assumed” the tort liability of another party. *See, e.g., Brooks v. Colton*, 760 A.2d 393 (Pa.Super. 2000). As the concept is explained in the Fidelity, Casualty & Surety Bulletins, “*the language of the exclusion of contractual liability coverage is concerned only with liability that is assumed (that is, liability incurred when one promises to indemnify or hold harmless another) and does not deal with liability that results from breach of contract.*”

- Although there is extensive Pennsylvania case law establishing that a commercial general liability policy is not intended to apply to breach of contract claims in general, those cases are not based upon this exclusion, but are instead based upon both the perceived nature of liability insurance coverage in general and the Insuring Agreement language affording coverage for injury or damage only when caused by an “occurrence” or “accident.” See, e.g., Ryan Homes, Inc. v. The Home Indemnity Co., 647 A.2d 939 (Pa.Super. 1994); Redevelopment Authority of Cambria Co. v. International Ins. Co., 685 A.2d 581 (Pa.Super. 1996).
- It is the exception to this exclusion under which an insured will be covered for liability premised upon an indemnification agreement, and that coverage exists only where the agreement is contained within an “*insured contract*”. Traditionally, the term “insured contract” (formerly “incidental contract”) was very narrowly defined so as to afford coverage only with respect to indemnification agreements appearing in leases, railroad sidetrack agreements, elevator maintenance agreements, easements and agreements to indemnify municipalities. Optional “broad form” coverage could be purchased to apply on a broader basis to any indemnification agreement relating to the named insured’s business. It is more common now for policies to include *any* agreement under which the named insured has assumed the tort liability of another party, provided it is related to the named insured’s business, subject to only a few seldom encountered limitations.
- Although there is Pennsylvania case law establishing that indemnification agreements may be oral, or may even be legally inferred from a prior course of dealings between parties, note that the exception to this exclusion affords coverage only for *written* indemnification agreements.
- Note also that the written indemnification agreement must be “*executed*” before the injury or damage occurs, a term which most would construe as meaning that the agreement must be signed prior to the date of the underlying incident. At least one court, however, has held that the term is ambiguous and that one may “execute” an agreement merely by commencing performance of the contracted work. There is no Pennsylvania authority on that question.

c. Liquor Liability

“Bodily injury” or “property damage” for which any insured may be held liable by reason of :

- (1) Causing or contributing to the intoxication of any person;**
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or**
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.**

This exclusion applies only if you are in the business of manufacturing, distributing, selling,

servicing or furnishing alcoholic beverages.

- Note that this exclusion does not apply to “*social host*” liability, including the furnishing of alcoholic beverages by a commercial insured to its customers or employees, but is instead confined in its application to situations in which the named insured is essentially in the liquor business.
- The Pennsylvania courts have deemed similar exclusions clear, unambiguous and enforceable. United States Fidelity and Guaranty Co. v. Griggs, 491 A.2d 267 (Pa.Super. 1985).
- One issue which has not yet been squarely decided by a Pennsylvania appellate court is that of whether such an exclusion will serve to relieve an insurer of its defense obligations where a complaint also includes general allegations of negligence not expressly aimed at the insured’s conduct in furnishing the alcoholic beverages, such as allegations that an insured was negligent in its hiring or training of bar employees, its failure to provide a victim with alternate transportation, or its failure to call the police or to otherwise prevent the intoxicated individual from operating his car. It has been held in at least two trial level cases that even those allegations of ancillary negligence on the part of an insured fall within the scope of such an exclusion, since the fundamental basis for the insured’s legal duty and liability to the plaintiff is ultimately its furnishing of alcohol. Hamburg v. 14,000 Siblings and Certain Underwriters at Lloyd’s, 1998 U.S. Dist. LEXIS 13598 (E.D.Pa. 1998); Certain Underwriters and Insurers Subscribing to Lloyd’s Policy No. SP93/7131 v. 6091 Frankford Ave., 1996 U.S. Dist. LEXIS 19930 (E.D.Pa. 1996). That approach is also consistent with the prevailing view in other jurisdictions.

d. Workers Compensation And Similar Laws

Any obligation of the insured under a workers’ compensation, disability benefits or unemployment compensation law or any similar law.

- Pretty self-explanatory, but note that it applies only to statutory benefit claims - there is no reason to cite this exclusion (as is often done in coverage position letters) merely because an employee injury is involved in the claim.

e. Employers Liability

“Bodily injury” to:

(1) An “employee” of the insured arising out of and in the course of :

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured’s business; or

(c) The spouse, child, parent, brother or sister of that “employee” as a consequence of Paragraph (1) above.

This exclusion applies:

(1) Whether the insured may be liable as an employer or in any other capacity; and

(2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an “insured contract.”

- While the impact of such exclusions is fairly obvious in barring coverage with respect to claims for bodily injury to an insured’s employees arising out of their employment or the performance of duties relating to the insured’s business, as well as any derivative claims by their family members, there are some recurring issues about which to be aware.

- First, it must be noted that this exclusion will not apply with respect to claims asserted against an insured under a contractual indemnification agreement which falls within the policy definition of an “insured contract.” Accordingly, if the insured has agreed to indemnify a third party, it is entitled to contractual liability coverage under that indemnity agreement even in connection with a claim involving injury to one of its own employees. This liability is actually consistent with the immunity provisions of our workers compensation statute, which permit an employer to be joined as a party to its employees’ personal injury suits against other parties based upon a written and signed indemnification agreement, provided that the terms of the indemnification agreement either expressly waive the employer’s statutory workers’ compensation immunity, or specifically include claims of injury on the part of its employees. *See, e.g., Bester v. Essex Crane Rental*, 619 A.2d 304 (Pa.Super. 1993).

- Current Pennsylvania case law takes a minority approach, seemingly inconsistent with the terms of the exclusion, in the additional insured context, holding that this exclusion will serve to bar coverage not only to an insured for claims of bodily injury by its own employees, but also to an additional insured under the same policy, even though it did not employ the claimant. This is so despite the use of the phrase “the insured” (suggesting that the exclusion applies only with respect to bodily injuries suffered by employees of the specific insured whose rights are at issue) as opposed to the phrase “any insured” (which might support a denial of coverage if the claimant were an

employee of any party qualifying as an insured under the policy). This result is seemingly dictated by the Supreme Court's 40-year-old decision in PMA Insurance Co. v. Aetna Casualty & Surety Co., 233 A.2d 548 (Pa. 1967). That result has been criticized, but reluctantly followed in several more contemporary cases including Roosevelt's, Inc. v. Zurich American Ins. Co., 2005 Phila. Ct. Com. Pl. LEXIS 226 (C.P. Phila. 2005); Brown & Root Braun, Inc. v. Bogan, Inc., 2002 U.S. App. LEXIS 226 (3d Cir. 2002), and Northbrook Ins. Co. v. Kuljian Corp., 690 F.2d 368 (3d Cir. 1982).

- Although many claims of employer sexual harassment will not fall within the scope of a general liability policy because they do not involve allegations of "bodily injury" as opposed to purely emotional distress, this exclusion should serve to bar coverage for those sexual misconduct claims which do include allegations of bodily injury or disease. It has been said that the overwhelming weight of legal authority holds that this policy language excludes coverage for claims based upon the sexual harassment of employees. *See, e.g., Truck Ins. Exchange v. Gagnon*, 33 P.3d 901 (N.M.App. 2001). While Pennsylvania state court precedent is lacking, our federal courts have reached the same conclusion and have held that such exclusionary language also bars coverage in cases where some of the harassment occurred when the participants were "off the clock" because it was causally related to the victim's employment. Scottsdale Ins. Co. v. Scholl Fassnacht, 2000 U.S. Dist. LEXIS 9030 (E.D.Pa. 2000).
- In determining whether an employee suffers injury arising out of and in the course of employment under the terms of this exclusion, all that should be required is a "but for" or "cause and result" relationship between the injury and the employment, rather than proximate causation, for the exclusion to apply. McCabe v. Old Republic Ins. Co., 228 A.2d 901 (Pa. 1967).

f. Pollution

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor, or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or guests;

(ii) Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed

for that additional insured at that premises ...;

(iii) “Bodily injury” or “property damage” arising out of heat, smoke or fumes from a “hostile fire”;

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:

(i) Any insured; or

(ii) Any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured’s behalf are performing operations if the “pollutants” are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

(i) “Bodily injury” or “property damage” arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of “mobile equipment” or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them [subject to exception for intentional discharges] ;

(ii) “Bodily injury” or “property damage” sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) “Bodily injury” or “property damage” arising out of heat, smoke or fumes from a “hostile fire”.

(e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured’s behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, “pollutants”.

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any

way respond to, or assess the effects of, “pollutants”; or

(b) Claim or “suit” by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, “pollutants”.

However, this paragraph does not apply to liability for damages because of “property damage” that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or “suit” by or on behalf of a governmental authority.

- This version of the pollution exclusion, generally referred to as the “*absolute*” pollution exclusion (even though it is not) was reportedly written in response to adverse judicial interpretations of the original 1973 ISO version, which excluded coverage for injury or damage resulting from pollution or contamination more generally, but contained a troublesome exception to that exclusion for pollution incidents which were “*sudden and accidental*,” resulting in insurers affording coverage on a broader basis than anticipated in some jurisdictions.
- This common version is both much lengthier and less comprehensive than the newer and so-called “*total*” pollution exclusion, which is sometimes substituted by endorsement. For purposes of comparison, one variation upon the “*total*” exclusion provides that the policy does not apply to:

f. Pollution

- (1) “Bodily injury” or “property damage” which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of “pollutants” at any time.
- (2) Any loss, cost or expense arising out of any:
 - (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of “pollutants”; or
 - (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, “pollutants”.

Sometimes the less said, the better.

- For purposes of interpreting this exclusion, the term “*pollutants*” is defined to mean, “**any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.**”

- While the answer to the question of whether a policy provision is ambiguous is one which can vary when applied to differing circumstances, the Pennsylvania courts have generally held that both the “absolute” pollution exclusion and the definition of the term “pollutants” are clear and unambiguous.

- The Pennsylvania courts have *rejected* the arguments accepted in some jurisdictions that such exclusions are intended to apply only to discharges into the general atmosphere or environment, and are not meant to apply to products which otherwise serve a “useful purpose.” Thus, it was held that a substantially identical “absolute” pollution exclusion unambiguously barred coverage in connection with an indoor incident in which a job site worker was overcome by noxious fumes emanating from a concrete sealer product which, despite its usefulness, was undoubtedly an “irritant” within the scope of the definition of a “pollutant” and which was clearly “dispersed” or “discharged” into the air. Madison Construction Co. v. Harleysville Mutual Ins. Co., 735 A.2d 100 (Pa. 1999).

The Supreme Court in Madison also rejected the insured’s contention that the underlying plaintiff’s claims were covered to the extent they involved allegations that the insured was negligent not in using the product or releasing the noxious fumes, but in failing to warn and protect workers in the area, failing to adequately ventilate the area, and failing to cover the site where the injured worker fell. In doing so, the Court reasoned that all of the negligence claims fundamentally arose from the release of the fumes at the construction site. A similar argument to the effect that a defense was owed because the insured was allegedly guilty of negligence in failing to properly ventilate a work site, in addition to its negligence in discharging a pollutant, was rejected in Matcon Diamond, Inc. v. Penn National Ins. Co., 815 A.2d 1109 (Pa.Super. 2003), in which the court held that coverage was unambiguously barred by the same exclusion with respect to an incident in which a worker was overcome by carbon monoxide fumes emanating from a contractor’s concrete floor cutting saw. In both cases, the courts rejected arguments that the policy language was ambiguous and should be disregarded under the “reasonable expectations” doctrine.

- It has also been held that a substance need not be specifically listed in the definition of “pollutants” to fall within the scope of the exclusion, and that a substance which is not considered a pollutant when found in one place may be considered a pollutant if it ends up in a location where it does not belong. In Wagner v. Erie Ins. Co., 801 A.2d 1226 (Pa.Super. 2002), *affirmed*, 847 A.2d 1274 (Pa. 2004), it was held that an “absolute” pollution exclusion unambiguously barred coverage in connection with an incident in which an insured filling station owner’s gasoline storage tanks leaked and caused contamination to adjoining properties.

- It should be noted, however, that the standard pollution exclusion will not serve to defeat coverage in connection with residential lead paint poisoning claims, our Supreme Court having determined that lead-based paint would be considered a “pollutant”, but that the manner in which the victim had ingested or inhaled the paint, which was present on the interior surfaces of the rental properties in which she resided, was not clearly and unambiguously released, dispersed or discharged within the meaning of the similar “absolute” pollution exclusions which appeared in the landlords’ policies. Based upon scientific evidence, the Court concluded that the process of gradual and

imperceptible degradation in the paint surfaces would not ordinarily be viewed as a discharge, release or escape and that it was unclear if it could be viewed as a dispersal. Lititz Mutual Ins. Co. v. Steely, 785 A.2d 975 (Pa. 2001).

g. Aircraft, Auto Or Watercraft

“Bodily injury” or “property damage” arising out of the ownership, maintenance, use or entrustment to others of any aircraft, “auto” or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and “loading or unloading”.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the “occurrence” which caused the “bodily injury” or “property damage” involved the ownership, maintenance, use or entrustment to others of any aircraft, “auto” or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to :

(1) A watercraft while ashore on premises you own or rent;

(2) A watercraft you do not own that is:

(a) Less than 26 feet long; and

(b) Not being used to carry persons or property for a charge;

(3) Parking an “auto” on, or on the ways next to, premises you own or rent, provided the “auto” is not owned by or rented or loaned to you or the insured;

(4) Liability assumed under any “insured contract” for the ownership, maintenance or use of aircraft or watercraft; or

(5) “Bodily injury” or “property damage” arising out of:

(a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of “mobile equipment” if it were not subject to a compulsory or financial responsibility law ...; or

(b) The operation of any of the machinery or equipment listed in Paragraph f.(2) or f.(3) of the definition of “mobile equipment”.

- Note that this exclusion, which is obviously intended to avoid overlap with an insured’s auto insurance coverage and to generally remove auto, aircraft and watercraft related claims which should be the subject of other policies from the scope of a CGL policy, is written in terms which encompass

autos owned by “any insured”, thus including within the scope of the exclusion autos owned, leased or operated by the employees and corporate officers of the named insured, as well as the named insured’s own autos. At the same time, because a CGL policy typically does afford coverage for the ownership, maintenance or use of “mobile equipment” (such as bulldozers, forklifts, power cranes, and other construction or off-road vehicles used in the insured’s line of work) the exclusion and policy definitions do not extend to such items.

- The second paragraph of this exclusion is aimed at addressing situations in which an insured seeks coverage for an auto, aircraft or watercraft related claim based upon allegations of ancillary negligence on its part in the hiring or training of employees, presumably in response to case law from some states holding that such claims did not fall within the scope of the exclusion.

- The exclusion expressly includes within the term “*use*” the “*loading and unloading*” of autos, aircraft or watercraft, which should defeat the existence of general liability coverage to an insured which is engaged in the loading or unloading of vehicles at a warehouse, loading dock, etc., even though it is not actually operating the autos. Some courts have, however, declined to apply this exclusion where the injury allegedly results from a defect on the loading dock or premises, or from the deficient manner in which the cargo was secured or packaged, rather than from the actual loading or unloading process.

- Note that the exclusion contains an exception with respect to liability assumed by the named insured under an indemnification agreement in an “insured contract”, with the result that coverage might conceivably be owed under such an agreement with respect to an otherwise excluded auto, aircraft or watercraft related loss.

- The exceptions to the exclusion with respect to watercraft would indicate that the policy would afford coverage in connection with claims relating to the use of a watercraft which is not owned by the named insured (but is owned or operated by another insured) if the boat is less than 26' long and is not being used to transport persons or property for a charge. Thus, if an employee or officer of the insured takes clients out for a trip on his personal fishing boat and injury results, coverage would be afforded to that individual and to the policyholder despite the exclusion, as long as the boat is less than 26' long.

h. Mobile Equipment

“Bodily injury” or “property damage” arising out of :

- (1) The transportation of “mobile equipment” by an “auto” owned or operated by or rented or loaned to any insured; or**
- (2) The use of “mobile equipment” in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.**

- Consistent with the fact that a CGL policy is generally intended to cover the insured’s use of “mobile equipment” (forklifts, tractors, graders, bulldozers, cherry pickers, and the like), this exclusion is very narrow, essentially denying coverage where such equipment is in transit via “auto”, or in the unlikely event it is used in a prearranged (but not an impromptu) racing or stunting activity - no coverage for tractor-pulls or fork-lift races unless they are engaged in on the spur of the moment.

i. War

“Bodily injury” or “property damage”, however caused, arising directly or indirectly out of:

- (1) War, including undeclared or civil war;**
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or agents; or**
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.**

- Fortunately, this exclusion, which bars coverage for injury or damage arising directly or indirectly out of war, warlike action by a military force, insurrection, rebellion, etc., has not been the subject of any recent Pennsylvania case law and warrants little discussion other than to note that it seems highly questionable whether it would apply to acts of terrorism, possibly explaining the recent appearance of separate exclusionary endorsements in some policies on that topic. *See, TAG 380, LLC v. ComMet 380, Inc.*, 830 N.Y.Supp.2d 87 (N.Y.App. 2007), (holding that similar language contemplates actions by a hostile nation or standing military force, not paramilitary actions by individuals who are not affiliated with a military force or any particular sovereign power, including terrorist organizations).

- It is worth mentioning, however, that one generally authoritative insurance industry treatise, the Fidelity, Casualty & Surety Bulletins, states that the attack on the World Trade Center would be a “*prime example*” of a claim falling within this exclusion in that it constituted “*a warlike action taken by a military force or some other authority using agents other than military personnel.*” That

would likely be considered a somewhat strained interpretation of the exclusion, which instead speaks only of warlike action by a “*military force*” and defensive actions by “*military personnel or agents*,” particularly bearing in mind the adverse judicial construction of policy ambiguities.

j. Damage To Property

“Property damage” to:

- (1) Property you own, rent, or occupy ...;**
- (2) Premises you sell, give away or abandon, if the “property damage” arises out of any part of those premises;**
- (3) Property loaned to you;**
- (4) Personal property in the care, custody or control of the insured;**
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the “property damage” arises out of those operations; or**
- (6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.**

Paragraphs (1), (3) and (4) of this exclusion do not apply to “property damage” (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days

Paragraph (2) of this exclusion does not apply if the premises are “your work” and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to “property damage” included in the “products-completed operations hazard.”

- This exclusion, as it appears in more recent ISO forms, combines what were formerly several separate exclusions including what were previously known as the own property, alienated premises, and care, custody and control exclusions, and it must be read carefully in that both the limitations appearing within the exclusion and the exceptions which follow sharply curtail its applicability in many commonly encountered situations.

- Regarding Paragraph (4), barring coverage for damage to property in the insured’s “*care*,

custody or control”, it should initially be noted that the exclusion applies only to personal property, as opposed to real property. It has been held that the policy term “personal property” is unambiguous and refers to everything that is the subject of ownership other than real estate. Hartford Ins. Co. v. B. Barks & Sons, Inc., 1999 U.S. Dist. LEXIS 7733 (E.D.Pa. 1999). Chattels that are not physically attached to real estate are always considered personal property, but those which are permanently attached to realty in such a manner that they cannot be removed without materially damaging the property, or which are fixtures essential to the use of the building are considered real property. See, Noll v. Harrisburg YMCA, 643 A.2d 81 (Pa. 1994); Lehman v. Keller, 684 A.2d 18 (Pa. 1996).

- Under current Pennsylvania law, it is unnecessary to the application of the “*care, custody or control*” exclusion that the insured have either an ownership interest in, or “exclusive control” of the property at the time it is damaged - an insured’s physical possession of the property is sufficient. The mere presence of the property owner’s representatives while an insured is handling the property at issue does not render the exclusion inapplicable, though the situation might differ depending upon the degree of control still exercised by the owner’s representatives at the time. It has also been held that, for the exclusion to apply, an insured contractor’s possession of the property must be “a necessary element of the work involved”, rather than being “merely incidental” to the work. International Derrick & Equipment Co. v. Buxbaum, 240 F.2d 536 (3d Cir. 1957), (holding that exclusion applied where insured hired to install antenna mast on broadcasting tower allowed it to fall to the ground, despite insured’s lack of proprietary interest in the mast and despite presence of owner’s representatives at the time) ; Masters v. Celina Mutual Ins. Co., 224 A.2d 774 (Pa.Super. 1966), (adopting International Derrick and holding that exclusion unambiguously applied where insured destroyed a derrick which it had been hired to move in a stone quarry when a cable on the insured’s crane snapped); Slate Construction Co. v. Bituminous Casualty Corp., 323 A.2d 141 (Pa.Super. 1974), (holding that exclusion was ambiguous under circumstances where damage to property was caused by the insured’s subcontractor, but that property is generally within an insured’s “care, custody or control” whenever it is being moved by an insured under contract, is being put in place by an insured under contract, or is possessed by an insured as a “bailee”). Compare, Boswell v. Travelers Indemnity Co., 120 A.2d 250 (N.J.Super. 1956), (exclusion did not apply where damaged heating units handled by insured were under continuous supervision of the owner’s maintenance engineer).

- It is unclear in Pennsylvania whether this exclusion will apply to cases in which an insured has handled property without the owner’s consent. Pfeiffer v. Grocers Mutual Ins. Co., 379 A.2d 118 (Pa.Super. 1977), (noting conflicting authorities on this issue and declining to decide the question when deciding case on other grounds).

- Regarding Paragraph (5), barring coverage for damage to “*that particular part of real property on which you or your subcontractors or subcontractors ... are performing operations,*” will apply by reason of that present-tense (“*are performing*”) language only to damage which occurs (or becomes manifest) while the work is ongoing and actually in progress, having no application to an insured’s completed operations, or arguably, to any injury occurring at a time when the insured or

its subcontractors are absent from the scene. As this language also indicates, the exclusion extends only to “*that particular part*” of real property on which the insured’s operations are being performed, a limitation which has been a fertile source of litigation. To use a clear example, if an insured sets an entire building on fire when soldering plumbing pipes, coverage would be afforded for the resulting damage apart from any damage to the plumbing work on which the insured or its subcontractors were working at the time.

- Regarding what used to be known as the “faulty workmanship” exclusion at Paragraph (6), excluding coverage to damage to “*any property*” that must be “*restored, repaired or replaced because of ‘your work’*,” it must be noted that the exceptions which follow sharply limit the scope of the exclusion by stating that it does not apply to damage included in the “*products-completed operations hazard*,” i.e., after the insured’s work at a particular job site is completed, or put to its intended use. While this exclusion draws the line somewhat differently than that at Paragraph (5), clearly neither will apply to claims of faulty workmanship or construction defects which materialize only after a project has ended.

- Although Paragraph (2) of this exclusion, barring coverage for damage to premises sold by the named insured, might otherwise suggest that a home builder or developer would lack coverage in connection with any faulty workmanship or construction defect claim, the second exception to the exclusion indicates that it will not apply where the premises constitute “*your work*”, provided the builder has never occupied or rented them.

k. Damage To Your Product

“Property damage” to “your product” arising out of it or any part of it.

- When interpreting this exclusion in the context of construction defect or faulty workmanship claims, it is important to note that the current ISO definition of the phrase “*your product*” includes any goods or products manufactured, sold, handled, distributed or disposed of by the named insured, their containers and related warranties, but expressly does not include within its scope “*real property*”. Thus, the holding in Gene & Harvey Builders, Inc. v. PMA Ins. Co., 517 A.2d 910 (Pa. 1986), that no coverage was afforded to a general contractor for damage caused to the dwelling which it constructed on unstable ground because the finished house was its “product,” (based upon an earlier version of the exclusion which did not exempt real property from the “your product” definition) would not be warranted under more current policy language.

I. Damage To Your Work

“Property damage” to “your work” arising out of it or any part of it and included within the “products-completed operations hazard”.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

- Unlike exclusions j(5) and j(6), which do not apply after the insured’s work has been completed, this exclusion applies *only* where the damage occurs (or becomes manifest) after the insured’s work at the site has been completed, or put to its intended use by parties other than other contractors.
- Note that this exclusion contains a significant exception which is of particular relevance when considering the coverage afforded to a general contractor or home builder, in that it does not apply if either the damaged work, or the work out of which the damage arises was performed by a subcontractor. That exception was evidently added to this exclusion in response to cases such as our Superior Court’s decision in Ryan Homes, Inc. v. Home Indemnity Co., 647 A.2d 939 (Pa.Super. 1994), holding on the basis of earlier policy language that the work performed by an insured home builder must be viewed as including the work of all of the subcontractors hired by the insured in connection with the overall project. Under the current language of this exclusion, it will never apply to a general contractor or home builder which subcontracts all of the work in constructing a building to other parties.

m. Damage To Impaired Property Or Property Not Physically Injured

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”;** or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.**

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

- The interpretation of this exclusion is obviously dependent upon the meaning of the term, “*impaired property*”, which is essentially defined elsewhere in the CGL form as meaning tangible property other than the named insured’s work or product that either cannot be used, or is rendered

less useful because it incorporates the named insured's defective or deficient work or product, and which can be restored to use by repairing, replacing, adjusting or removing the insured's work or product.

- A good example of a situation in which this exclusion would apply can be found in the case of St. Paul Fire & Marine Ins. Co. v. The Bergquist Co., 31 Phila. 122, 28 D.&C.4th 141 (1996), where the insured supplied heat transfer tape for use in a manufacturer's water coolers which omitted an offensive sulphur or rotten egg like odor when the coolers were placed in use, requiring the purchaser to rework already manufactured coolers to remove and replace the defective tape. It was held that the manufacturer's claims for the cost of taking those steps and for lost profits resulting from cancelled orders for the coolers fell within the scope of the exclusion since the water coolers were clearly "impaired property" which could be restored to use by the removal and replacement of the insured's product. The court also held that the claims would fall within the "product recall" exclusion discussed below.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of :

- (1) "Your product";**
- (2) "Your work"; or**
- (3) "Impaired property"**

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

- Although prior versions were sometimes referred to as the "sistership" or "product recall" exclusion, the language of this policy exclusion actually extends far beyond situations in which there has been a formal recall of a defective product from the marketplace and should apply whenever an insured's work or its product are withdrawn from use by anyone due to a defect, deficiency, inadequacy or dangerous condition.
- One example might be a situation in which an insured plumbing contractor improperly installs a defective shower drain line, causing water to leak to the room below. In order to inspect, repair, remove, replace or adjust that defective work, it is necessary for the homeowner or its new contractor to remove the glass shower enclosure and to demolish the tile flooring. The expenses incurred for that work should fall within the intended scope of this exclusion and/or Exclusion n.

Note: The “Occurrence” Requirement as an Alternative Basis for the Denial of Coverage for Property Damage Resulting from Faulty Workmanship or Construction Defects.

Although it involves a subject beyond the topic of CGL policy exclusions, it should be noted that there is a potential alternative basis for the denial of many faulty workmanship and construction defect claims in Pennsylvania, including some which would otherwise fall outside the scope of the previous policy exclusions or within their exceptions, based upon the Insuring Agreement language stating that any “property damage” must be caused by an “occurrence”, a term defined as meaning an “accident”.

Briefly, the Pennsylvania courts have recognized that commercial liability policies are intended to apply to tort claims where an insured’s work or product has caused accidental injury to another person or other property, but are not intended to guaranty the quality of the insured’s work product. It has repeatedly been held that faulty workmanship and defective product claims are essentially contractual in character even when they are couched in terms of negligence, and are not the intended subject of insurance coverage, at least where the alleged damage involves the insured’s own work or product itself. CGL policies, it has been said, are not the equivalent of performance bonds, and claims premised upon an insured’s poor performance of its contractual undertakings do not constitute an “occurrence” for coverage purposes, even when it is claimed that an insured was negligent. *See, e.g., Ryan Homes v. The Home Indemnity Co.*, 647 A.2d 939 (Pa.Super. 1994), *appeal denied*, 657 A.2d 491 (Pa. 1995); *Toombs NJ, Inc. v. Aetna Cas. Co.*, 591 A.2d 304 (Pa.Super. 1991); *Solcar Equipment Leasing Co. v. PMA Ins. Co.*, 606 A.2d 522 (Pa.Super. 1992); *Phico Ins. Co. v. Presbyterian Medical Services Corp.*, 663 A.2d 753 (Pa.Super. 1995); *Redevelopment Authority of Cambria Co. v. International Ins. Co.*, 685 A.2d 581 (Pa.Super. 1996); *Snyder Heating Co. v. PMA Ins. Co.*, 715 A.2d 483 (Pa.Super. 1998); *Freestone v. New England Log Homes*, 819 A.2d 550 (Pa.Super. 2003), *appeal granted*, 848 A.2d 929 (Pa. 2004), *appeal dismissed*, 2004 Pa. LEXIS 3393; *PMA Ins. Co. v. L.B. Smith, Inc.*, 831 A.2d 1178 (Pa.Super. 2003); *Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888 (Pa. 2006); *Millers Capital Ins. Co. v. Gambone Brothers Development Co., Inc.*, 2007 Pa.Super. LEXIS 4447 (December 28, 2007), *reargument denied*, 2008 Pa.Super. LEXIS 160 (March 5, 2008).

There appears to be no question under this line of cases but that a suit against an insured for property damage premised upon its faulty workmanship or furnishing of a defective product will not be viewed as falling within the scope of the Insuring Agreement to Coverage A of a CGL policy because such claims are viewed as being fundamentally contractual in origin and as not being the intended subject of a liability insurance policy, at least where the claim involves allegations of damage confined to the insured’s work or product.

Again, this argument can support a denial of coverage with respect to claims which would otherwise arguably be covered under the terms of the exclusions discussed previously in this opinion, as illustrated in the recent *Millers Capital* decision. In that case, the insured housing developer was confronted with two class action suits by the homeowners in two housing developments, all of whom

claimed to have suffered water damage to the exteriors and interiors of their homes due to poor workmanship or construction defects, apparently due to the use of a synthetic exterior stucco product, or the manner in which it was applied. Evidently, the interior damage claims did not include allegations of damage to the plaintiffs' home furnishings and both the interior and exterior damage claims were instead viewed as involving alleged damage to the insured's work product. In challenging the insurer's disclaimer of coverage under this line of cases, the insured pointed out to the terms of the policy exclusion for property damage to "your work" and to the exception to that exclusion where the work was performed on its behalf by subcontractors, as it was in that case, arguing that this simply made no sense and that the court's interpretation of the law rendered the policy exclusions and their exceptions mere "surplusage". The Superior Court rejected that argument simply by stating that the insured's argument would itself render the policy definition of an "occurrence" as an "accident" mere surplusage in any case where a subcontractor is involved.

Although the Superior Court in two of the above cases (Freestone and Solcar) appears to have applied the same rule to situations in which there were also claims of damage to property beyond the insured's work or product, the cases on this subject contain numerous statements to the effect that coverage is not intended for damage to the insured's work product, but is to be provided where the insured's work or product causes injury to other persons or property. That issue is one which has not been squarely addressed by the Supreme Court of Pennsylvania, whose only published opinion on the subject to date is the Kvaerner decision, which involved damage confined to the insured's work product. The Supreme Court neither adopted, nor rejected the Freestone and Solcar decisions, though it did rely upon numerous out of state cases in which the same rule has been applied only to situations in which damage to the insured's work product is involved and it carefully noted that the underlying suit "*avers only property damage from poor workmanship to the work product itself.*"

o. Personal And Advertising Injury

"Bodily injury" arising out of "personal and advertising injury".

- This exclusion is simply aimed at avoiding any overlap between the "bodily injury" liability coverage provided by Coverage A to the CGL form and the "personal and advertising injury" liability coverage afforded by Coverage B. Under Pennsylvania law, it is not likely that any "bodily injury" would result from a covered "personal and advertising injury" offense since the term "bodily injury" has been interpreted as not including purely emotional injuries, which are the sort of thing which would typically be involved with personal or advertising injury "*offenses*" such as libel, slander, malicious prosecution and copyright infringement, though it is certainly conceivable that "bodily injury" might occur in the context of a wrongful eviction, or false arrest or imprisonment claim. If so, that claim would fall under Coverage B.

p. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data

- According to the F.C.&S. Bulletins, this exclusion was added to the ISO CGL Coverage Form with the 2004 revision is “to strengthen the point” that such policies do not cover damage to electronic data. That point is already made in the policy definition of “property damage,” which refers only to damage to or the loss of use of “*tangible property*,” which electronic data is not.

Fire Legal Liability Coverage

- The final paragraph to the list of exclusions with respect to Coverage A of the CGL form states that exclusions c through n do not apply to damage by fire to premises rented to or temporarily occupied by the named insured with the owner’s permission, noting that a separate limit for such coverage appears in the policy Declarations. This exception to the listing of exclusions provides what is commonly known as fire legal liability coverage.