Over the first nine months of 2007, a number of courts have issued decisions addressing environmental insurance issues. Courts have continued to provide guidance regarding the scope of coverage afforded under pollution liability and clean up cost cap policies as well as the proper trigger of coverage on claims made policies. Disputes continued throughout the United States as to whether clean up of contamination caused by the release of petroleum products would be covered under CGL policies containing "total" and "absolute" pollution exclusions. Internationally, the English High Court determined that the term "damages" contained in a liability insurance policy did not include statutory liabilities.

1. Pollution Legal Liability ("PLL") and Clean Up Cost Cap ("CCC") Insurance

In *Denihan Ownership Co., LLC v. Commerce and Indus. Ins. Co. et al*., 37 A.D.3d 314 (N.Y. App. Div. 2007), an owner of several parcels, including a dry cleaner, engaged AKRF, an environmental consulting firm, to perform environmental assessments and prepare a remediation cost estimate. Denihan purchased a cleanup cost cap (CCC) insurance policy and a supplemental pollution legal liability (PLL) policy from Commerce. Denihan moved forward with the remediation and Commerce paid out the maximum under the CCC policy. After the discovery of previously unidentified and unknown petroleum contamination and several additional underground storage tanks, Denihan also sought coverage under the PLL policy. The PLL policy contained an exclusion for "any clean up costs or claims that arise out of or are related to the pollution conditions discussed" in the reports prepared by AKRF. *Id.* at 315. The reports prepared by AKRF referenced petroleum contamination, the same contaminate that was subsequently discovered. Commerce argued that under the referenced exclusion it was not contractually obligated to pay the additional cleanup costs. The court, in agreeing with Commerce, held that phrases such as "arising from" are broad and comprehensive and, in this case, meant to prevent overlap in coverage between the CCC and PLL policies.

In a similar case *D.C. USA Operating Co., LLC v. Indian Harbor Ins. Co.*, 2007 WL 945016 (S.D.N.Y. Mar. 27, 2007), D.C. USA purchased a PLL policy in conjunction with its acquisition of a site that had been comprehensively investigated and remediated to the satisfaction of the State. The policy included a "Site Development Exclusion" for remediation expenses related to conditions known to the insured and identified in the referenced document including petroleum hydrocarbons. During D.C. USA's redevelopment activities, 18 new USTs were discovered. D.C. USA tendered its claim for remediation of the newly discovered petroleum contamination. Indian Harbor and its consultant participated in the remediation spending approximately $3.4 million and receiving claims from contractors due to construction delay. Indian Harbor denied coverage and D.C. USA sued for breach of contract. The court applying New York law held that the exclusionary language relied on by Indian Harbor was ambiguous denying Indian Harbor's motion to dismiss D.C. USA's claim for breach of contract.

The court reasoned that one reasonable interpretation of the exclusionary language would be that an insured would need to have prior knowledge of the petroleum hydrocarbon conditions. Further, if the intent of the exclusionary language was to bar coverage for all releases of petroleum hydrocarbons, then there would be no need to qualify the language with the term "known." Finally, the court reasoned that the insurer's interpretation of the exclusionary language was equally plausible. Based on these considerations, the court held that the exclusion was ambiguous and would not operate to bar coverage in this instance.

In *Tech. Square, LLC v. United Nat'l Ins. Co.*, 2007 WL 534450 (D. Mass. Feb. 15, 2007), Tech performed due diligence on a former "heavy industrial" property prior to acquisition, and purchased a PLL policy to cover clean up costs related to unknown environmental conditions. Tech provided the Phase I report to the insurance broker for submittal to the market. In addition, prior to acquiring the property, Tech's board performed an analysis of the various environmental risks and potential clean up costs based on the information provided in the Phase I report. Although the Phase I report did not identify any specific concerns, based on the historic use, Tech's consultant prepared a cost estimate to address the likely environmental conditions. Tech did not provide these documents to the insurance broker. After seeking coverage for costs to address pollution conditions identified after closing, UNIC sought to void the policy for misrepresentation or in the alternative, deny coverage based on two exclusions. Tech maintained that it did not withhold any

material facts and that UNIC could have arrived at the same conclusions as those included in Tech's due diligence documents based on its own underwriting of the risks presented in the Phase I report. The court agreed and denied UNIC's motion for summary judgment.

The primary issue in *Thomas Steel Strip Corp. v. American Int'l Specialty Lines Ins. Co*., 2007 WL 127935 (N.D. Ohio Jan. 11, 2007) was the proper trigger of coverage under a claims made and reported PLL policy. An inspection conducted at Thomas's facility in 1984 revealed RCRA non-compliance and a complaint was filed. In 1986, Thomas entered into a consent agreement that required submittal of a closure plan. Thomas's closure plan was finally approved in 2005. Thomas sought coverage under a "claims made" PLL effective from 2003-2006. Thomas argued that the claims made coverage was triggered because it did not become legally obligated to clean-up the facility until the closure plan was approved. The court rejected Thomas's argument and denied Thomas's motion for partial summary judgment.

2. Commercial General Liability ("CGL") Insurance

The presumption of prejudice recognized under New York law due to an insured's late notice of claim fell under legislative attack this year. However, on August 1, 2007, New York Governor Elliot Spitzer vetoed Senate Bill 6306, which would have abolished New York's presumption of prejudice to the insurer, in cases involving late notice of claim or circumstance. If the bill had passed, an insurer denying coverage based upon late notice would have been required to demonstrate "material prejudice" as a result of the delay. This "late notice" issue arises, *inter alia*, in the context of demands for insurance relating to pollutant releases alleged to have taken place over a substantial period of time. In those situations, there may be months or years between the insured first becomes aware of an alleged "occurrence" or circumstance and the date when the insurer is notified of the release.

Senate Bill 6306 would also have allowed claimants in an underlying tort action to bring a declaratory judgment action against the insurer of the policyholder-defendant. Current law allows such actions only after judgment has been reached against the policy-holder defendant in the underlying action.

Gov. Spitzer's veto of Senate Bill 6306 is likely not the last word on the subject. The Governor indicated that he would have approved the legislation, but for his concerns over the expedited approval process the measure enjoyed in the State Senate. As a result, Albany insiders anticipate that a similar bill may be introduced in the next legislative session.

Four separate courts addressed the issue of whether releases of petroleum products constituted events excluded by the CGL policy. Three courts agreed that such events would be excluded by exclusionary language contained in the insurance contract while a third court voided an "absolute pollution exclusion" based upon regulatory shortcomings.

On July 10, 2007 the Supreme Judicial Court of Massachusetts applied a "total pollution exclusion" to bar coverage for both remediation and non-remediation damages resulting from a home heating oil spill. In *Thomas McGregor v. Allamerica Insurance Company*, 449 Mass. 400, 868 N.E.2d 1225 (2007), a case of first impression, the court was asked to determine whether oil constitutes a "pollutant" excluded by the total pollution exclusion. The *McGregor* Court concluded that oil was a "pollutant," noting that "spilled oil is a classic example of a pollutant, and a reasonable insured would understand oil leaking into the ground to be a pollutant." Accordingly, the court ruled that the total pollution exclusion applied to bar coverage, and that the insurer bore no obligation to defend or indemnify the insured for claims related to the spilled oil at issue.

The First Judicial District Court of Montana ruled that the Montana Petroleum Tank Release Board (the "Board") could not recover from a service station's insurer because the policy contained an "absolute pollution exclusion." *Montana Petroleum Tank Release Compensation Board v. American States Insurance Company*, 2007 Mont. Dist. LEXIS 42 (1st Jud. Dist. Ct. Mont. Feb. 22, 2007). In that case, the state agency charged with responsibility for recovering costs incurred in responding to petroleum tank releases sought recovery under insurance policies issued by various insurers of a petroleum discharger. Addressing the contention that gasoline was not specifically enumerated in the absolute pollution exclusion at issue, the court concluded that pollution resulting from gasoline release constituted excluded "pollution" and that Board's existence reflected recognition that gasoline released from a UST is a pollutant. The court held "if gasoline were not considered by the legislature as a pollutant or contaminant, there would be no need for the Board or the fund it administers." Based upon its finding that gasoline constitutes a "pollutant," the court applied the absolute pollution exclusion and denied the Board's claim for reimbursement of costs associated with a gasoline release into the soil.

Meanwhile, on March 20, 2007, the United States District Court for the District of Massachusetts applied the total pollution exclusion in a commercial general liability policy to bar coverage for remediation of real property contaminated by heating oil released from an underground storage tank ("UST") associated with the insured's property. In *Jack Nascimento v. Preferred Mutual Insurance Company*, 478 F. Supp. 2d 143 (D.C. Mass. 2007), the U.S. District Court for the District of Massachusetts began with a determination that home heating oil released from a UST associated with the insured's property constituted a "pollutant" excluded from coverage by the total pollution exclusion. Accordingly, the Court concluded that the insured was not entitled to coverage for costs to remediate contamination resulting from the UST's failure. Further, because the court found that the underlying complaint arose exclusively from the underlying claimant's demand for reimbursement of clean-up costs, the insured's entire claim for coverage was barred by the total pollution exclusion. Accordingly, the District Court concluded that the insurer owed no obligation of defense or indemnity with respect to the damage alleged.

Finally, and in contrast to the other decisions cited above, a Vermont trial court found coverage for a petroleum release, despite the fact that the policy contained an "absolute pollution exclusion." In *State of Vermont Agency of Natural Resources v. Stonington Insurance Company, et al.*, Docket No. 811-12-02 (Superior Ct. Washington, Vt. July 27, 2007), the court ruled that the absolute exclusion was void, and therefore declined to apply the exclusion to bar coverage for costs arising from a petroleum release at a service station. The Court reasoned that the absolute pollution exclusion at issue had not been approved by the Vermont Commissioner of Insurance, which had issued regulations requiring use of a different pollution exclusion form. Rather than read the Vermont-approved pollution endorsement into the policy, the Court voided the exclusion but not the balance of the policy. The court concluded that the Policy, without the voided pollution exclusion, did not bar coverage for the State's claim for reimbursement of costs incurred in response to the petroleum spill at issue.

3. International

In *Bartoline Ltd. v. Royal & Sun Alliance Insurance Plc* [2006] EWHC 3598, [2007] 1 All E.R. (Comm) 1043 (QBD), the English High Court ruled that the word "damages" in a public liability policy does not provide cover for statutory liabilities. The case arose as the result of a massive fire at Bartoline's factory in Yorkshire, England. Chemicals from the factory, which stored solvents and adhesives, fire-fighting foam and water polluted two watercourses. The court concluded that the policy provided cover only for tort liabilities and, thus, did not cover £622,681.78 ($1,258,191) incurred by Bartoline to reimburse the Environment Agency for its costs of cleaning up the pollution or £147,988.14 ($299,025) in clean-up costs incurred by Bartoline in complying with a works notice served on it by the Environment Agency under authority of the Water Resources Act 1991. An appeal of the case, which is the first case in English law on the issue of whether "damages" includes clean-up costs, is pending.