

THE PERSONAL INJURY ENDORSEMENT: AN UNWARRANTED STRAINING TO OBTAIN INSURANCE COVERAGE FOR ENVIRONMENTAL DAMAGE

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I. INTRODUCTION

Both the government and private parties often initiate lawsuits for injunctive relief and damages against landowners and corporations for the cleanup of hazardous waste.¹ These defendants have turned to their insurers to pay the immense costs of defending and indemnifying such claims.² In many cases, the insurance companies will not defend or indemnify these claims based on a pollution exclusion clause contained in their insurance policies.³ Pollution exclusion clauses operate to exclude coverage for pollution damage that is not sudden or accidental.⁴ Thus, an insurance policy with such a clause would not provide coverage for gradual pollution caused by the repeated discharge of contaminants onto a third party's soil.⁵

In an effort to obtain coverage for pollution damage, the attorneys for the policyholders have pursued an alternative tactic.⁶ Notwithstanding the presence of a pollution exclusion clause, these attorneys assert that the personal injury endorsement, present in many

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1. William J. Bowman & Patrick F. Hofer, *The Fallacy of Personal Injury Liability Insurance Coverage for Environmental Claims*, 12 VA. ENVTL. L.J. 393 (1993). See, e.g., *County of Columbia v. Continental Ins. Co.*, 634 N.E.2d 946 (N.Y. 1994); *City of Edgerton v. General Casualty Co.*, 493 N.W.2d 768 (Wis. Ct. App. 1992).

2. Laura A. Foggan, *Environmental Coverage Sought Under Personal-Injury Policies*, NAT'L L.J., Aug. 19, 1991, at 14. See generally MITCHELL L. LATHROP, *INSURANCE COVERAGE FOR ENVIRONMENTAL CLAIMS* (1992).

3. Foggan, *supra* note 2, at 14. See *infra* note 54 for an example of a typical pollution exclusion clause.

4. BARRY R. OSTRAGER & THOMAS R. NEWMAN, *HANDBOOK ON INSURANCE COVERAGE DISPUTES* 322-23 (5th ed. 1992).

5. *Id.*

6. Richard D. Williams, *Another Invasion!: Environmental Insurance Coverage Claims Based Upon the Personal Injury Endorsement*, 5 ENVTL. CLAIMS J. 391 (1992-93).

insurance policies, will provide coverage for pollution damage.⁷ They argue that a pollutionary event is a trespass or, in the alternative, a nuisance.⁸ By relying on the “wrongful entry or eviction, or other invasion of the right of private occupancy” language contained in these policies the policyholders’ attorneys assert that the insurers must provide coverage.⁹ However, the courts are not in agreement on this issue.¹⁰ Some jurisdictions have rejected the arguments presented by the policyholders.¹¹ Other courts have recognized that the personal injury endorsement does create a duty for insurers to defend and indemnify pollution claims.¹² For example, in *Gould Inc. v. Arkwright Mutual Insurance Co.*,¹³ a federal district court in Pennsylvania denied the insurers’ motion for summary judgment.¹⁴ The court held that a personal injury endorsement was not limited by a pollution exclusion clause contained in the property damage portion of the insurance policy.¹⁵

This article will address whether hazardous waste claims fall within the personal injury endorsement contained in many insurance policies. First, Part II will offer an overview of the potential scope of liability. This section will outline the various ways that a landowner may be responsible for the damages and costs of environmental contamination and the difficulties facing such parties in attempting to receive coverage from their insurance companies. Particularly, this section will address the pollution exclusion clause. Next, Part III will focus on the policyholders’ arguments supporting the personal injury endorsement as a method of recovery for environmental claims. Part IV will present *Gould Inc. v. Arkwright Mutual Insurance Co.*,¹⁶ as an

7. Laura A. Foggan et al., *Looking for Coverage in All the Wrong Places: Personal Injury Coverage in Environmental Actions*, 3 ENVTL. CLAIMS J. 291 (1991); Williams, *supra* note 6, at 391; Bowman & Hofer, *supra* note 1, at 393.

8. Bowman & Hofer, *supra* note 1, at 393.

9. *Id.*

10. *E.g.*, Gregory v. Tennessee Gas Pipeline Co., 948 F.2d 203, 209 (5th Cir. 1991) (holding that the personal injury endorsement does not cover environmental claims). *Contra* Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265, 273 (1st Cir. 1990) (holding that the personal injury endorsement covers environmental claims).

11. W.H. Breshears, Inc. v. Federated Mut. Ins. Co., 832 F. Supp. 288 (E.D. Cal. 1993), *aff'd in part and rev'd in part*, 38 F.3d 1219 (9th Cir. 1993); O'Brien Energy Sys., Inc. v. American Employers' Ins. Co., 629 A.2d 957 (Pa. Super. Ct. 1993); Decorative Ctr. of Houston v. Employers Casualty Co., 833 S.W.2d 257, 263 (Tex. Ct. App. 1992).

12. *See* Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037 (7th Cir. 1992); Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265 (1st Cir. 1990); Gould Inc. v. Arkwright Mut. Ins. Co., 829 F. Supp. 722 (M.D. Pa. 1993).

13. 829 F. Supp. 722 (M.D. Pa. 1993).

14. *Id.* at 729.

15. *Id.*

16. 829 F. Supp. 722 (M.D. Pa. 1993).

illustration of an erroneous approach to the personal injury endorsement. Finally, Part V will criticize *Gould* and the policyholders' assertion, arguing that the personal injury endorsement was not intended to deal with environmental problems and that these claims should be barred by the pollution exclusion clause.

II. INCURRING ENVIRONMENTAL COSTS, INSURANCE COVERAGE & THE POLLUTION EXCLUSION CLAUSE

This section will describe how landowners and corporations incur liability for environmental damage. This section will also address their efforts to obtain coverage from their insurance companies and describe how the pollution exclusion clause bars coverage for environmental damage.

A. *Liability for Environmental Damage*

A number of causes of action can eventually lead to liability for an individual or company responsible for the discharge of chemicals, gases, or some other polluting agent. Plaintiffs often bring trespass and nuisance actions against individuals and companies for the discharge of hazardous waste.¹⁷ Additionally, actions may be brought against individuals and companies under state and federal statutory provisions. This section will address liability under two of the federal statutes: the Resource Conservation and Recovery Act of 1976 (RCRA)¹⁸ and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).¹⁹ Also, this section will briefly address environmental liability under state statutory provisions.

1. RCRA

In 1976, Congress enacted RCRA to protect the public and the environment from the dangers posed by the treatment, storage, and disposal of hazardous waste.²⁰ RCRA provides the federal government, through the Environmental Protection Agency (EPA), with the authority to regulate and enforce the proper handling, treatment, and

17. Nancy L. Quackenbush, *The Personal Injury Endorsement: Breathing New Life into CGL Coverage for Pollution-Related Offenses*, 29 GONZ. L. REV. 385 (1993-94).

18. 42 U.S.C. §§ 6901-6992 (1988 & Supp. V 1993).

19. 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

20. Jarred O. Taylor, II, *Cleaning Up the Dirty Nest: Who Pays for Environmental Cleanup? Issues of Concern to the General Practitioner*, in ENVIRONMENTAL COVERAGE: FROM INTERPRETATION TO LITIGATION 1, 8 (1990).

storage of hazardous waste.²¹ RCRA regulates three categories of persons: 1) those who generate or produce hazardous wastes; 2) those who transport hazardous waste; and 3) owners and operators of treatment, storage, and disposal facilities (TSDs).²² Under section 7003 of RCRA, the EPA may exercise its regulatory authority by suing to compel the cleanup of hazardous waste on property that may present an imminent and substantial danger to health or the environment.²³

Additionally, RCRA has a citizen suit provision that allows any person to commence a civil action against parties whose past or present hazardous waste activities contribute to an imminent hazard, under a standard similar to section 7003 of RCRA.²⁴ Formerly, under RCRA's citizen suit provision a private party could only seek injunctive relief and could not obtain money damages.²⁵ However, the United States Court of Appeals for the Ninth Circuit recently held that under RCRA a private plaintiff may collect restitution for cleanup costs.²⁶ Thus, in the Ninth Circuit, a landowner may use RCRA's

21. For example, section 3002 of RCRA gives the EPA the authority to set standards for generators of hazardous waste covering record-keeping, reporting, labeling, and the use of appropriate containers. 42 U.S.C. § 6922 (1988 & Supp. V 1993).

22. Taylor, *supra* note 20, at 19, citing 42 U.S.C. §§ 6922-6924 (1988 & Supp. V 1993).

23. Edmund B. Frost, *Strict Liability as an Incentive for Cleanup of Contaminated Property*, 25 HOUS. L. REV. 951, 955 (1988); 42 U.S.C. § 6973(a) (1988 & Supp. V 1993). Section 6973(a) provides in pertinent part:

Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation, or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both.

Id.

24. 42 U.S.C. § 6972(a) (1988 & Supp. V 1993).

25. Walls v. Waste Resource Corp., 761 F.2d 311, 316 (6th Cir. 1985); Portsmouth Redevelopment & Hous. Auth. v. BMI Apartment Assocs., 847 F. Supp. 380, 385 (E.D. Va. 1994); see also Taylor, *supra* note 20, at 39-40.

26. KFC Western, Inc. v. Meghriq, 49 F.3d 518, 521 (9th Cir.), *cert. granted*, 116 S. Ct. 41 (1995). The Ninth Circuit noted that under section 6973 of RCRA the EPA may bring reimbursement actions against generators of hazardous waste. *Id.* at 522. The court further reasoned that nothing indicates that Congress intended citizen suits to serve a purpose different than governmental actions. *Id.* Therefore, the court rejected the contention that section 6972 only entitles citizens to injunctive relief. *Id.* at 521-22. *Contra* Furrer v. Brown, 62 F.3d 1092 (8th Cir. 1995) (finding that "the [KFC] court began with a questionable proposition and then mistakenly reached its result in reliance on cases from this Circuit that, when carefully analyzed, do not support the KFC Western decision").

citizen suit provision to recover money damages against an owner or operator of a TSD.²⁷

2. CERCLA

Congress passed CERCLA because RCRA only covers sites that manage present or on-going hazardous waste and does not cover the cleanup of abandoned or inactive hazardous waste sites.²⁸ The principal purpose of CERCLA is to achieve prompt cleanup of hazardous waste sites and to impose the cost of cleanup on those responsible for contamination.²⁹ Listing a hazardous waste site on the National Priorities List (NPL), or in a related state cleanup priorities list, is the primary means of triggering cleanup under CERCLA.³⁰ Under the Act, the EPA and state governments have the authority to take immediate action to clean up or stabilize a hazardous condition.³¹ CERCLA's Hazardous Substance Response Trust Fund (Superfund) finances the expenditures of the EPA and state governments in the cleanup of hazardous waste sites.³² Nevertheless, the ultimate responsibility to cover cleanup costs lies with any "potentially responsible party" (PRP), not the federal government.³³ Thus, section 107 of CERCLA authorizes governmental agencies to sue PRPs for money expended to clean up hazardous waste sites.³⁴ Additionally, section 107 of CERCLA allows a private party with land adjacent to a leaking facility to bring a cause of action against a PRP for damages, without prior governmental approval.³⁵

Under CERCLA, a PRP falling within the statutory criteria for liability will be found strictly liable unless the PRP satisfies one of the Act's narrow defenses.³⁶ CERCLA imposes strict liability for cleanup

27. Landowners in jurisdictions other than the Eighth Circuit, relying on the Ninth Circuit's decision, may also attempt to recover money damages under RCRA against owners or operators of TSDs.

28. Taylor, *supra* note 20, at 12.

29. City & County of Denver v. Adolph Coors Co., 829 F. Supp. 340, 344 (D. Colo. 1993).

30. Frost, *supra* note 23, at 958. The government lists a site on the NPL based on its potential to endanger the public health and the environment. *Id.* Citizen reports to the EPA can also trigger listing a site on the NPL. *Id.* Additionally, a site may be considered for listing if an owner reports a spill of a hazardous substance under section 9603(a) of CERCLA or if contamination is found during the course of an environmental audit or assessment of a facility. *Id.*

31. 42 U.S.C. § 9604 (1988 & Supp. V 1993).

32. 42 U.S.C. § 9611 (1988 & Supp. V 1993).

33. Brette S. Simon, *Environmental Insurance Coverage Under the Comprehensive General Liability Policy: Does the Personal Injury Endorsement Cover CERCLA Liability?*, 12 UCLA J. ENVTL. L. & POL'Y 435, 440 (1994).

34. 42 U.S.C. § 9607(a) (1988 & Supp. V 1993).

35. *Id.*

36. To state a prima facie case under CERCLA, a plaintiff must allege 1) that a waste disposal site is a facility within the meaning of the Act; 2) that release or threatened release of a

costs on three categories of responsible parties: 1) past and present owners and operators of sites containing hazardous substances; 2) certain parties that transported material to a site; and 3) any party that has generated ("arranged for the disposal of") material at the site.³⁷ Liability is based on responsibility and does not require a showing of causation or culpability.³⁸ Thus, the mere ownership of a site contaminated with a hazardous substance is sufficient to create liability.³⁹ Additionally, many courts have interpreted liability under CERCLA as joint and several when the contributions of responsible parties to the dangers posed at a site are indivisible.⁴⁰

3. Liability Under State Statutes

Many states have their own superfund statutes that complement or supplement CERCLA and RCRA.⁴¹ Some of these state statutory schemes go beyond CERCLA and RCRA with separate cleanup and liability provisions.⁴² For example, some states require environmental inspections as a prerequisite to the transfer of industrial real estate.⁴³ Inspections under these provisions may identify contaminated property and trigger cleanup under federal or state provisions.⁴⁴

Many states have other environmental statutes that can create large financial burdens for individuals and companies beyond that imposed by the federal statutes.⁴⁵ For example, Florida's Pollutant Discharge Prevention and Control Act seeks to preserve the state's

hazardous substance from a facility has occurred; 3) that such release or threatened release will require expenditure of response costs that are consistent with the national contingency plan; and 4) that the defendant falls within one of the classes of persons subject to CERCLA's liability provisions. *Cose v. Getty Oil Co.*, 4 F.3d 700 (9th Cir. 1993). The limited exceptions to a liability action brought under CERCLA include acts of God or war or omissions of certain "third parties" such as vandals. 42 U.S.C. § 9607(b) (1988 & Supp. V 1993).

37. 42 U.S.C. § 9607(a) (1988 & Supp. V 1993); see also KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW: AN ANALYSIS OF TOXIC TORT AND HAZARDOUS WASTE INSURANCE COVERAGE ISSUES 11 (1991).

38. *E.g.*, *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 484 (8th Cir. 1992).

39. *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1279 (3d Cir. 1993). Liability also extends to an owner/lessor of a facility and a lessee that maintains control over subleased property. *United States v. South Carolina Recycling & Disposal Inc.*, 653 F. Supp. 984, 1003 (D.S.C. 1984).

40. ABRAHAM, *supra* note 37, at 11. *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 267 (3d Cir. 1992); *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 570 (6th Cir. 1991).

41. *Frost*, *supra* note 23, at 956.

42. *Id.*

43. ABRAHAM, *supra* note 37, at 14. See, *e.g.*, Environmental Cleanup Responsibility Act, N.J. STAT. ANN. § 13:1K-9 (West 1991 & Supp. 1995).

44. ABRAHAM, *supra* note 37, at 14.

45. See, *e.g.*, Pollution Discharge Prevention & Control Act, FLA. STAT. §§ 376.011-.319 (1993 & Supp. 1994); Pollution of Waters Act, N.J. STAT. ANN. § 58:10-50 (West 1992 & Supp. 1995).

seacoast for recreational use.⁴⁶ The Florida Act prohibits the discharge of pollutants into or upon any coastal waters, estuaries, tidal flats, beaches and lands adjoining the seacoast of the state.⁴⁷ This Act, like CERCLA, has a citizen suit provision that imposes strict liability on its violators unless they can satisfy one of the Act's limited defenses.⁴⁸ Thus, liability is difficult to avoid under this Act.

State environmental statutes provide plaintiffs with an additional means of recovery that might not be available under a federal provision.⁴⁹ The statutes are significant because they increase the administrative force behind cleanup requirements and the likelihood that cleanup will be required at any particular site.⁵⁰

B. Insurance Coverage and the Pollution Exclusion Clause

The cleanup of pollution damage under CERCLA, RCRA, state environmental control acts, or common law trespass and nuisance actions can create enormous financial burdens for individuals and companies.⁵¹ The EPA has estimated that the average cleanup cost is twenty-six million dollars per hazardous waste site.⁵² Additionally, these individuals and companies have to deal with substantial litigation costs associated with defending these environmental suits. Faced with immense costs and potential bankruptcy, these defendants have sought relief from their comprehensive general liability (CGL) insurance policies.⁵³ Their insurance companies, however, have denied coverage if the CGL policies contained a pollution exclusion clause.

46. FLA. STAT. § 376.021 (1993 & Supp. 1994).

47. FLA. STAT. § 376.041 (1993 & Supp. 1994).

48. FLA. STAT. § 376.205 (1993 & Supp. 1994). Acceptable defenses include an act of war, an act of state, federal or municipal government, an act of God which is without human interference, and an act or omission of a third party. FLA. STAT. §§ 376.12(6)(a)-(d) (1993 & Supp. 1994).

49. Frost, *supra* note 23, at 956.

50. *Id.*

51. Simon, *supra* note 33, at 441.

52. JAN P. ACTON & LLOYD S. DIXON, SUPERFUND AND TRANSACTION COSTS: THE EXPERIENCES OF INSURERS AND VERY LARGE INDUSTRIAL FIRMS 2 (1992), *noted in* Simon, *supra* note 33, at 441.

53. Simon, *supra* note 33, at 442. The insurance industry designed the CGL policy to provide American industries with coverage against "all manner of claims arising in the performance of their . . . business." Simon, *supra* note 33, at 442 (citing *Kissel v. Aetna Casualty & Sur. Co.*, 380 S.W.2d 497, 506 (Mo. Ct. App. 1964)). The CGL policy provides the insured with basic coverage that protects against third party claims. *Id.* The CGL policy provides the policyholder with insurance coverage for bodily injury and property damage. *See also* ABRAHAM, *supra* note 37, at 24. One significant feature of the CGL policy is that the policy provides general coverage regardless of the identity or nature of the insured's business. *Id.*

After 1973, the standard CGL policy form contained a pollution exclusion clause that excluded coverage for environmental damage unless the discharge, disposal, release or escape of chemicals, gases or some other polluting agent was "sudden and accidental."⁵⁴ After 1986, the insurance industry modified the standard CGL policy form with an absolute pollution exclusion clause eliminating the "sudden and accidental" exception.⁵⁵ Without the "sudden and accidental" exception, this modified clause virtually excludes all pollution-related claims from coverage.⁵⁶

Most of the litigation surrounding the pollution exclusion clause deals with insurance policies that existed prior to the adoption of the absolute pollution exclusion clause.⁵⁷ The primary focus of this litigation is the correct meaning of the "sudden and accidental" exception, with the jurisdictions disagreeing on its meaning.⁵⁸ Some courts have held that "sudden and accidental" is unambiguous, having a temporal meaning which only provides coverage for immediate or abrupt discharges of pollutants.⁵⁹ Thus, these courts hold that the

54. George Pendygraft et al., *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 IND. L. REV. 117, 151-52 (1988). The standard 1973 CGL pollution exclusion clause provides that coverage:

does not apply to bodily injury or property damage (1) arising out of pollution or contamination caused by oil or (2) arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*

OSTRAGER & NEWMAN, *supra* note 4, at 322-23 (emphasis added).

55. Pendygraft et al., *supra* note 54, at 151-152; Brooke Jackson, *Liability Insurance for Pollution Claims: Avoiding A Litigation Wasteland*, 26 TULSA L.J. 209, 224 (1990); David J. Barberie, *Reaching in the Wrong Pocket?: Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corporation*, 9 J. LAND USE & ENVTL. L. 161, 168 (1993). The typical absolute pollution exclusion clause provides that coverage does not apply:

to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or other pollutant into or upon land, the atmosphere or any water course or body water, *whether or not such discharge, dispersal, release or escape is sudden or accidental.*

OSTRAGER & NEWMAN, *supra* note 4, at 338.

56. Jackson, *supra* note 55, at 224; Barberie, *supra* note 55, at 168. Policyholders desiring pollution coverage under the new CGL policy may purchase limited pollution coverage at very high premiums. Jackson, *supra* note 55, at 224; Barberie, *supra* note 55, at 168.

57. Jackson, *supra* note 55, at 224.

58. OSTRAGER & NEWMAN, *supra* note 4, at 320. Most courts agree that the pollution exclusion clause prohibits insurance coverage for events that were expected or intended. *Id.* (citing *International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co.*, 522 N.E.2d 758, 767 (Ill. App. Ct.), *appeal denied*, 530 N.E.2d 246 (1988)).

59. Barberie, *supra* note 55, at 168-69; see *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, 636 So. 2d 700, 704-05 (Fla. 1993) (finding a pollution exclusion clause and that the term sudden has a temporal meaning indicating abruptness or brevity); *Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 52 F.3d 1522, 1528 (10th Cir. 1995) (finding the terms

pollution exclusion clause precludes coverage for gradual pollution.⁶⁰ By contrast, other courts have held that the term "sudden and accidental" is patently ambiguous and have construed liability in favor of the policyholders.⁶¹ Still, other courts, favoring policyholders, have held that the "sudden and accidental" exception refers to pollution damage that is "unexpected or unintentional."⁶² Hence, these courts have provided a broader range of coverage for policyholders.

Notwithstanding the dispute concerning the scope of the 1973 pollution exclusion clause, a class of policyholders will face denial of insurance coverage for pollution-related claims. Further, as the 1986 CGL policy replaces the 1973 policy, more policyholders will not have coverage for pollution related claims. Thus, these policyholders will continue to face immense costs to clean up environmental damages. Facing these tremendous costs, the policyholders' lawyers have shifted focus to the personal injury endorsement.

III. THE PERSONAL INJURY ENDORSEMENT AS A METHOD FOR RECOVERY

Many landowners and corporations facing damage claims and cleanup costs for hazardous waste pollution are turning to their insurers as a "deep pocket" to pay these costs.⁶³ The attorneys for the insured assert that the personal injury endorsements in the insurance policies require the insurance companies to defend and indemnify these claims.⁶⁴ Insurance policies containing a personal injury endorsement will provide coverage for damages during the policy period arising out of specific enumerated offenses.⁶⁵ Many personal injury endorsements read as follows:

The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury (herein called personal injury) sustained by any person or

"sudden and accidental" to be unambiguous). Discrete discharges of pollutants occurring during routine business operations are not "sudden and accidental." *Id.*

60. OSTRAGER & NEWMAN, *supra* note 4, at 328. See *Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 52 F.3d 1522, 1531 (10th Cir. 1995) (holding pollution exclusion clause bars coverage for property damage).

61. Barberie, *supra* note 55, at 169.

62. *Id.*; see also OSTRAGER & NEWMAN, *supra* note 4, at 334.

63. See Foggan, *supra* note 2, at 14.

64. See *id.*

65. See *Martin v. Brunzelle*, 699 F. Supp. 167, 171 (N.D. Ill. 1988); *County of Columbia v. Continental Ins. Co.*, 634 N.E.2d 946 (N.Y. 1994); *O'Brien Energy Sys., Inc. v. American Employers' Ins. Co.*, 629 A.2d 957 (Pa. Super. Ct. 1993).

organization and arising out of one or more of the following offenses:

Group A—false arrest, detention or imprisonment, or malicious prosecution.

Group B—the publication or utterance of a libel or slander or of other defamatory material, or a publication or utterance in violation of an individual's right of privacy

Group C—wrongful entry or eviction, or other invasion of the right of private occupancy.⁶⁶

The coverage provided by the personal injury endorsement is a supplement to CGL insurance.⁶⁷ While the CGL provides coverage for property damage and bodily injury, the personal injury endorsement provides coverage for specific personal injuries not covered in the CGL policy.⁶⁸ For example, if a store owner detained a shoplifter, the shoplifter may sue for slander or false arrest.⁶⁹ The CGL policy would not provide the owner with coverage since the shoplifter did not sustain any property damage or bodily injury.⁷⁰ The personal injury endorsement, however, will provide coverage because slander and false arrest are enumerated offenses in the endorsement.⁷¹ In another example, a tenant may sue a landlord for “wrongful entry or eviction” if the landlord entered the tenant's premises and evicted the tenant.⁷² The landlord in this situation would have coverage if his or her insurance policy contained a personal injury endorsement since group C of the endorsement specifically provides coverage for “wrongful entry or eviction.”⁷³ Coverage provided by group C of the personal injury endorsement is the provision that policyholders rely on to assert their indemnification actions.⁷⁴

Frequently, the underlying plaintiffs in environmental damage actions seek relief under theories of trespass, nuisance, and loss of

66. See Bowman & Hofer, *supra* note 1, at 397; Quackenbush, *supra* note 17, at 386-87 n.5.

67. Bowman & Hofer, *supra* note 1, at 397.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. Bowman & Hofer, *supra* note 1, at 397.

73. *Id.*

74. *Id.* An additional example of why PRPs must seek indemnification under the personal injury endorsement is the Fourth Circuit's holding in *Mraz v. Canadian Universal Insurance Co.*, 804 F.2d 1325 (4th Cir. 1986). In this case the court held that although damage to the environment is property damage, CERCLA response costs are not. *Cf. New Castle County v. Hartford Accident & Indemnity Co.*, 673 F. Supp. 1359 (D. Del. 1987).

enjoyment of property.⁷⁵ The policyholders argue that trespass and nuisance are equivalent to “wrongful entry or eviction, or other invasion of the right of private occupancy.”⁷⁶ Thus, they argue that the “wrongful entry or eviction, or other invasion” language of the personal injury endorsement covers pollution claims.⁷⁷ By contrast, the insurance companies argue that the personal injury endorsement does not encompass claims for trespass and nuisance.⁷⁸

The First Circuit Court of Appeal was one of the first courts to rule in favor of the policyholders under this theory.⁷⁹ In *Titan Holdings Syndicate, Inc. v. City of Keene*,⁸⁰ residents alleged that light, noise, and noxious odors from the city’s sewage treatment plant created a nuisance.⁸¹ The city asserted that the personal injury endorsement in its insurance policies provided coverage for the residents’ claims.⁸² The First Circuit found that although trespass resembled “wrongful entry,” no coverage existed because of the absence of intent allegations in the underlying complaint.⁸³ The court, however, concluded that an “invasion of the right of private occupancy” may constitute a nuisance.⁸⁴ Accordingly, the court allowed coverage under the personal injury endorsement.⁸⁵

Likewise, the Seventh Circuit found that the personal injury endorsement entitles policyholders to coverage for environmental claims.⁸⁶ In *Pipefitters Welfare Education Fund v. Westchester Fire Insurance Co.*,⁸⁷ approximately eighty gallons of oil spilled, contaminating surrounding property with polychlorinated biphenyls.⁸⁸ During a lawsuit resulting from the spill, the policyholder sought indemnification under the personal injury endorsement in its insurance policy.⁸⁹ The Seventh Circuit ruled that eviction required an intent to take

75. E.g., Kirk A. Pasich, *Personal Injury Coverage for Environmental Claims: A Response to “Another Invasion!”*, 5 ENVTL. CLAIMS J. 509, 512 (1992-93).

76. *Id.* at 511; *O’Brien Energy Sys., Inc. v. American Employers’ Ins. Co.*, 629 A.2d 957, 963 (Pa. Super. Ct. 1993).

77. Pasich, *supra* note 75, at 512; see also Stephen A. Dvorkin, *Personal Injury Insurance Coverage for Environmental and Toxic Tort Liabilities*, 2 ENVTL. CLAIMS J. 333 (1990).

78. See Foggan et al., *supra* note 7.

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

80. 898 F.2d 265 (1st Cir. 1990).

81. *Id.* at 267.

82. *Id.*

83. *Id.* at 272.

84. *Id.*

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

86. *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir. 1993).

87. 976 F.2d 1037 (7th Cir. 1993).

88. *Id.* at 1039.

89. *Id.*

possession.⁹⁰ However, the court found that “wrongful entry” is “substantially similar to trespass.”⁹¹ Reasoning that trespass did not require an intent to take possession, the court also found that “wrongful entry” did not require an intent to take possession.⁹² Similarly, applying the principle of *ejusdem generis*,⁹³ the Seventh Circuit ruled “other invasion of the right to private occupancy” did not require an intent to take possession.⁹⁴ Thus, the court found that the personal injury endorsement covered the spill.⁹⁵

In response to assertions that the personal injury endorsement did not cover trespass or nuisance claims, the policyholders argued that the personal injury endorsement was ambiguous and, as a result, coverage was required.⁹⁶ The nature of this ambiguity is whether the terms “wrongful entry or other invasion of the right to private occupancy” encompass trespass and nuisance.⁹⁷ Policyholders note the well-settled principle of insurance law that requires courts to construe ambiguities in insurance policies in their favor.⁹⁸ Accordingly, they contend that the personal injury endorsement provides coverage for environmental claims.⁹⁹

A number of plaintiffs have argued for coverage by applying this ambiguity argument somewhat successfully.¹⁰⁰ For example, in

90. *Id.* at 1040.

91. *Id.* at 1041-42.

92. *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1041-42 (7th Cir. 1993).

93. Where a general term follows a series of specific terms, the former should not be given its broadest possible meaning, but rather extends only to matters of the same general class or nature as the terms specifically enumerated. *Pipefitters*, 976 F.2d at 1041.

94. *Id.* at 1041.

95. *Id.*

96. *Titan Holdings Syndicate v. City of Keene*, 898 F.2d 265, 269 (1st Cir. 1990). Indeed, policyholders frequently claim that provisions of their insurance policies are ambiguous when the insurers claim that coverage is precluded. *Id.* at 269 (arguing ambiguity in the pollution exclusion clause and ambiguity in the definition of “pollutant”); *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Co.*, 636 So. 2d 700, 703 (Fla. 1993) (arguing ambiguity in the term “sudden and accidental” in the pollution exclusion clause); *O’Brien Energy Sys., Inc. v. American Employers’ Ins. Co.*, 629 A.2d 957, 962 (Pa. Super. Ct. 1993) (quoting *Lower Paxton Township v. United States Fidelity & Guar. Co.*, 557 A.2d 393, 398 (indicating that a number of courts have rejected policyholders’ argument that the pollution exclusion clause is ambiguous)).

97. *Titan Holdings Syndicate*, 898 F.2d at 272.

98. *E.g.*, *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1040 (7th Cir. 1992); *Titan Holdings Syndicate*, 898 F.2d at 270; see also Stacy Gordon, *Court Opens New Door to CGL Pollution Coverage*, BUSINESS INSURANCE, Apr. 27, 1992, at 2.

99. *Titan Holdings Syndicate*, 898 F.2d at 273; *O’Brien Energy Sys., Inc. v. American Employers’ Ins. Co.*, 629 A.2d 957, 963 (Pa. Super. Ct. 1993).

100. *E.g.*, *Napco, Inc. v. Fireman’s Fund Ins. Co.*, No. 90-0993 (May 22, 1991) (Report and Recommendation of Magistrate Judge), *dismissed per stipulation*, No. 90-0993 (W.D. Pa. July 21, 1993). Although this case was ultimately dismissed by stipulation of the parties upon a settlement agreement, the Report and Recommendation issued by Magistrate Judge Benson prior to this dismissal allowed coverage after applying the ambiguity argument.

Napco, Inc. v. Fireman's Fund Insurance Co.,¹⁰¹ the policyholder sought coverage for a trespass action involving the removal of toxic wastes.¹⁰² The policyholder argued that the trespass action fell under the definition of "wrongful entry" or "other invasion of the right of private occupancy."¹⁰³ The Magistrate Judge's Recommendation and Report in *Napco* found that "wrongful entry" and "other invasion of the right of private occupancy," as used in the insurance contracts in question, are ambiguous.¹⁰⁴ Accordingly, the Magistrate Judge construed the ambiguity against the insurer and recommended allowing coverage.¹⁰⁵

By asserting that the personal injury endorsement provides coverage, policyholders attempt to claim an advantage that is not present in a CGL policy. They argue that the personal injury endorsement is separate and distinct from the CGL policy, each having its own set of exclusions.¹⁰⁶ Many CGL policies contain a pollution exclusion clause precluding coverage for *bodily injury* or *property damage* arising from pollutionary events.¹⁰⁷ The personal injury endorsement does not usually contain a pollution exclusion clause.¹⁰⁸ Thus, policyholders argue that the pollution exclusion clause does not reach the personal injury endorsement, which provides coverage for enumerated *personal injuries*.¹⁰⁹ They also argue that although the pollution exclusion clause applies to property damage and bodily injury, the clause does not apply to personal injuries such as trespass and nuisance.¹¹⁰

IV. GOULD INC. V. ARKWRIGHT MUTUAL INSURANCE CO.¹¹¹

*Gould Inc. v. Arkwright Mutual Insurance Co.*¹¹² provides an instructive example of how a court erroneously found that the personal injury endorsement requires insurers to pay the costs to defend and indemnify pollution claims. In *Gould*, the policyholder owned a bat-

101. No. 90-0993 (May 22, 1991) (Report and Recommendation of Magistrate Judge), *dismissed per stipulation*, No. 90-0993 (W.D. Pa. July 21, 1993).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Quackenbush, *supra* note 17, at 395; Foggan et al., *supra* note 7, at 300.

107. OSTRAGER & NEWMAN, *supra* note 4, at 322-23.

108. Quackenbush, *supra* note 17, at 395.

109. Foggan et al., *supra* note 7, at 300.

110. See generally Pasich, *supra* note 75.

111. 829 F. Supp. 722 (M.D. Pa. 1993). This case provides an example of how an improper judicial finding of an ambiguity in an insurance policy will lead to an unjust result.

112. *Id.*

tery crushing and lead recovery facility.¹¹³ The emissions from this facility contaminated the premises of nearby property owners.¹¹⁴ As a result, the property owners filed lawsuits against Gould alleging bodily injury, property damage, nuisance, and trespass.¹¹⁵ Additionally, the EPA brought an action against Gould to clean up the contamination at and around the facility.¹¹⁶ Eventually, Gould entered into settlement agreements in all of the cases.¹¹⁷ The EPA required Gould to enter into a Consent Agreement and Order to conduct site stabilization activities concerning lead and other hazardous substances at the facility and surrounding residential areas.¹¹⁸

After entering into the settlement and consent agreements, Gould brought an action in federal court seeking indemnification from its insurance companies.¹¹⁹ Specifically, Gould sought to indemnify: 1) costs for the defense and settlement of the lawsuits; 2) costs incurred in the government-ordered cleanup of the facility; and 3) a declaration that the insurers had a continuing obligation to defend and indemnify it against any further EPA proceedings arising out of contamination at the facility.¹²⁰ In response to this action, one of the insurance companies, National Union, filed a motion for summary judgment.¹²¹

Gould relied on the personal injury endorsement contained in its insurance policy as the basis for its indemnification action.¹²² Gould alleged that the underlying trespass and nuisance complaint fell within the offenses listed in Group C of the policy, which provided coverage for “wrongful entry or eviction, or other invasion of the right of private occupancy.”¹²³ National Union countered this argument, stating that the “personal injury endorsement relates to purposeful

113. *Id.* at 724.

114. *Id.* at 723.

115. *Id.*

116. *Id.* at 724. As previously stated, CERCLA imposes strict liability on PRPs falling within the statutory criteria with very narrow exceptions. *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993); *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415 (8th Cir.), *cert. denied*, 499 U.S. 937 (1990). Thus, an owner of a contaminated site has difficulty escaping liability.

117. *Gould Inc. v. Arkwright Ins. Co.*, 829 F. Supp. 722, 723 (M.D. Pa. 1993).

118. *Id.* at 724. Gould entered into this first Consent Agreement and Order in 1988. *Id.* Then in 1990, Gould entered into a subsequent Consent Agreement and Order requiring it to undertake interim measures and a facility investigation concerning hazardous wastes allegedly found at the site. *Id.* Gould claimed that it incurred a total cost of \$17.5 million. *Id.* This figure illustrates the enormous costs involved in these claims.

119. *Id.*

120. *Id.*

121. *Id.* at 725. National Union argued that “the language of the pollution exclusion clause clearly and unambiguously excludes coverage for gradual pollution from repeated discharges of contaminants.” *Id.*

122. *Gould Inc. v. Arkwright Ins. Co.*, 829 F. Supp. 722, 726 (M.D. Pa. 1993).

123. *Id.*

acts of entry, such as a landlord who intentionally deprives or attempts to deprive the injured party of its right to occupy property.”¹²⁴ National Union also argued that the pollution exclusion clause should relieve them from any duty to pay costs for the settlement or cleanup.¹²⁵

The district court approached National Union’s insurance policy by employing principles of contract law.¹²⁶ The court noted that an insurance policy is a contract and should be construed as such.¹²⁷ A contract is ambiguous if it could be susceptible to more than one interpretation.¹²⁸ Courts interpreting ambiguous contracts must resolve any ambiguity against the insurer.¹²⁹ Additionally, the district court stated that a court should not “torture the language of a contract to create ambiguity.”¹³⁰

After discussing cases in other jurisdictions that considered the issue, the *Gould* court looked at the insurance policy as a whole and how the pollution exclusion clause affected the personal injury endorsement.¹³¹ The court noted that the pollution exclusion clause applied only to property damage and bodily injury.¹³² Next, the court found that the pollution exclusion clause did not restrict coverage for personal injury.¹³³ Although the policy contained a pollution exclusion clause, the court recognized the possibility that the personal injury endorsement represented “an addition or an extension of coverage which is not limited by the pollution clause contained in the property damage portion of the policy.”¹³⁴ The *Gould* court further noted that one can reasonably interpret the policy as providing coverage for damages which are not subject to the policy’s pollution exclusion provisions.¹³⁵ The *Gould* court held that the personal injury endorsement, in the context of the entire policy and specifically the pollution exclusion clause, was ambiguous.¹³⁶ Accordingly, the

124. *Id.*

125. *Id.*

126. *Id.* at 725.

127. *Gould Inc. v. Arkwright Ins. Co.*, 829 F. Supp. 722, 725 (M.D. Pa. 1993) (quoting *Pennbarr Corp. v. Insurance Co. of Am.*, 976 F.2d 145, 151 (3d Cir. 1992)).

128. *Gould*, 829 F. Supp. at 725.

129. *Id.* (quoting *Little v. MGIC Indem. Corp.*, 836 F.2d 789, 793 (3d Cir. 1987)).

130. *Gould*, 829 F. Supp. at 725 (quoting *Pennbarr Corp. v. Insurance Co. of Am.*, 976 F.2d 145, 151 (3d Cir. 1992)).

131. *Gould*, 829 F. Supp. at 726-29.

132. *Id.*

133. *Id.*

134. *Id.* at 729.

135. *Id.*

136. *Id.* Particularly, the district court found ambiguity in the “wrongful entry” and “other invasion” language contained in the policy. *Id.*

district court denied National Union's motion for summary judgment.¹³⁷ It is this author's opinion that the *Gould* court's holding was erroneous.

V. THE PERSONAL INJURY ENDORSEMENT DOES NOT COVER POLLUTION CLAIMS

Despite the policyholders' arguments, insurance companies never intended to use the personal injury endorsement to cover environmental claims.¹³⁸ The following discussion demonstrates the flaws in the policyholders' arguments.

The pollution exclusion clause bars claims of property damage, bodily injury, trespass, or nuisance caused by the gradual discharge of gases, chemicals, or other polluting agents.¹³⁹ Alternatively, policyholders argue that they are entitled to coverage under the personal injury endorsement.¹⁴⁰ Efforts to find coverage under the personal injury endorsement, however, render the pollution exclusion clause meaningless.¹⁴¹ Furthermore, "wrongful entry or eviction, or other invasion of the right of private occupancy" are injuries with elements that are common to, yet distinct from, trespass and nuisance.¹⁴² Since these torts are distinct, "wrongful entry or eviction, or other invasion of the right of private occupancy" does not encompass trespass or nuisance.¹⁴³ Moreover, courts should construe insurance policies according to the plain and ordinary meaning of their terms.¹⁴⁴ Accordingly, courts should not expand coverage to other offenses such as trespass and nuisance where the personal injury endorsement provides coverage for certain enumerated offenses.¹⁴⁵ Additionally, the doctrine of *eiusdem generis* should restrict the "other invasion of the right of private occupancy" language to offenses equivalent to a "wrongful entry or eviction."¹⁴⁶ This restriction would

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

138. See generally Foggan et al., *supra* note 7.

139. OSTRAGER & NEWMAN, *supra* note 4, at 322-23.

140. See *supra* notes 75-110 and accompanying text.

141. *County of Columbia v. Continental Ins. Co.*, 634 N.E.2d 946, 950 (N.Y. 1994). See *infra* notes 155-72 and accompanying text.

142. See *infra* notes 178-222 and accompanying text.

143. See *infra* notes 178-222 and accompanying text.

144. *O'Brien Energy Sys., Inc. v. American Employers' Ins. Co.* 629 A.2d 957, 960 (Pa. Super. Ct. 1993).

145. See *supra* text accompanying note 66.

146. See *infra* notes 245-70 and accompanying text.

limit "other invasion" to offenses that involve the interference with the possession or occupancy of property.¹⁴⁷

A. *The Pollution Exclusion Clause Bars Coverage*

Pollution claims, including those arising under trespass or nuisance, are precluded from coverage if an insurance policy contains a pollution exclusion clause and the pollutionary event was not sudden or accidental.¹⁴⁸ Many pollution exclusion clauses preclude coverage for bodily injury or property damage.¹⁴⁹ Therefore, the policyholders argue that the pollution exclusion clause does not reach personal injuries such as trespass and nuisance.¹⁵⁰ Allowing policyholders to assert environmental claims under the personal injury endorsement nullifies the effect of the pollution exclusion clause.¹⁵¹ When considering the applicability of the personal injury endorsement, courts should not disregard other provisions in the insurance policy.¹⁵² Rather, courts must look at the policy as a whole, especially the pollution exclusion clause.¹⁵³

Asserting their arguments, the policyholders use semantics to place false boundaries on the pollution exclusion clause. They take an event that caused property damage and claim a personal injury resulted. First, the policyholders seek coverage under the CGL policy because chemicals, gases, or some other polluting agent caused property damage to the premises of an underlying plaintiff.¹⁵⁴ When the insurance companies deny coverage based on the pollution exclusion clause, the policyholders then claim that the environmental harm caused a personal injury as well as property damage.¹⁵⁵ Therefore, they argue that the personal injury endorsement entitles them to coverage.¹⁵⁶ If policyholders cannot obtain coverage under a CGL

147. See *infra* notes 245-70 and accompanying text.

148. See *infra* notes 154-77 and accompanying text; Scott D. Marrs, *Pollution Exclusion Clauses: Validity and Applicability*, 26 TORT & INS. L.J. 662 (1991).

149. OSTRAGER & NEWMAN, *supra* note 4, at 322-23.

150. See, e.g., *Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265, 271 (1st Cir. 1991).

151. See *Titan Corp. v. Aetna Casualty & Sur. Co.*, 27 Cal. Rptr. 2d 476, 485 (Ct. App. 1994).

152. See *id.*

153. *Id.* See also *County of Columbia v. Continental Ins. Co.*, 634 N.E.2d 946, 950 (N.Y. 1994).

154. See *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1039 (7th Cir. 1993) (alleging coverage under property damage and personal injury provisions); *Titan Holdings*, 898 F.2d at 270.

155. See *Titan Holdings*, 898 F.2d at 270 (alleging coverage under CGL policy and the personal injury endorsement). In many cases the policyholders will challenge the pollution exclusion clause asserting ambiguity. *Id.* See *supra* notes 75-85 and accompanying text.

156. *Titan Holdings*, 898 F.2d at 270.

policy due to an unambiguous pollution exclusion clause, they then will argue that the *same claim* qualifies for coverage under the personal injury endorsement.¹⁵⁷ This effort to obtain coverage fails to recognize that the pollution exclusion clause carries over into the personal injury endorsement.¹⁵⁸

Allowing coverage for property damage claims under the personal injury endorsement renders the pollution exclusion clause meaningless.¹⁵⁹ Eventually, other policyholders will discover that they may seek coverage under the personal injury endorsement when the pollution exclusion clause bars their property damage claims. Any event involving the discharge or dispersal of gases, chemicals, or other polluting agents would be characterized as a trespass or nuisance.¹⁶⁰ Thus, the personal injury endorsement would cover *all* pollutionary events.¹⁶¹ In other words, the pollution exclusion clause would be ineffective if a policyholder's insurance policy also contains a personal injury endorsement.¹⁶² Denying coverage in one area, but allowing coverage in another area for the same event, is illogical. Courts should recognize this fallacy and deny coverage when a policyholder claims that the personal injury endorsement covers its environmental damage.

Actually, several courts have recognized this flaw in logic and have denied coverage for these claims under the personal injury endorsement. In *O'Brien Energy Systems, Inc. v. American Employers' Insurance Co.*,¹⁶³ the policyholder sought coverage under several CGL policies in an action alleging that the migration of methane gas caused damages.¹⁶⁴ The superior court held the personal injury endorsement in the policies did not provide indemnification for environmental damage claims based on migrating gases.¹⁶⁵ The court found that the pollution exclusion clauses specifically excluded coverage for such

157. Richard D. Williams, *The Personal Injury Endorsement: An Insurer Reply to the Misguided Policyholder Lawyer*, 6 ENVTL. CLAIMS. J. 79, 85 (1993-94).

158. *American Univ. Ins. v. Whitewood Custom Treaters*, 707 F. Supp. 1140, 1144 (D.S.D. 1989) (concluding that all exclusions set forth in the policy, including the pollution exclusion clause, must be construed as a part of the general liability insurance endorsement unless otherwise removed by the plain terms of the endorsement). *But see* *Gould v. Arkwright Mut. Ins. Co.*, 829 F. Supp. 722, 729 (M.D. Pa. 1993); *City of Edgerton v. General Cas. Co.*, 493 N.W.2d 768, 782 (Wis. Ct. App. 1992) (finding the insurer's "carry over" argument unpersuasive).

159. *E.g.*, *County of Columbia v. Continental Ins. Co.*, 634 N.E.2d 946, 950 (N.Y. 1994).

160. *Bowman & Hofer*, *supra* note 1, at 437.

161. *Id.* If the personal injury endorsement covered *all* pollutionary events, it would render the pollution exclusion clause a nullity. *Id.*

162. *Id.*

163. 629 A.2d 957 (Pa. Super. Ct. 1993).

164. *Id.* at 959.

165. *Id.* at 964.

claims.¹⁶⁶ Additionally, the court stated that “[t]o hold otherwise would emasculate the clear and unambiguous provisions of the pollution exclusion and could not be justified except as an unwarranted straining to reach a result different than that intended by the parties.”¹⁶⁷

A New York court reached a similar result in *County of Columbia v. Continental Insurance Co.*¹⁶⁸ In *Continental Insurance*, an underlying complaint alleged that leachate contamination from the policyholders’ landfill had polluted another’s soil, air, ground and surface waters and had constituted a continuing trespass and nuisance.¹⁶⁹ The New York Supreme Court, Appellate Division, stated coverage was excluded under the personal injury endorsement, holding the pollution exclusion clause barred such a claim.¹⁷⁰ The court noted that “to extend the personal injury coverage to occurrences which fall squarely within the property damage coverage would have the effect of rendering the pollution exclusion meaningless.”¹⁷¹ Affirming the appellate division, the court of appeals stated that “[i]t would be illogical to conclude that the claims fail because of the pollution exclusion while also concluding that the insurer wrote the personal injury endorsement to cover the same eventuality.”¹⁷²

Thus, in both *O’Brien Energy Systems* and *Continental Insurance*, the courts followed logic and denied coverage for pollution claims under the personal injury endorsement.¹⁷³ The court in *American Universal Insurance v. Whitewood Custom Theaters*¹⁷⁴ recognized that the pollution exclusion clause carries over into the personal injury endorsement.¹⁷⁵ The *Gould* court should have agreed with this reasoning. Instead, the *Gould* court let the policyholder execute an “end around” the pollution exclusion clause by classifying property dam-

166. *Id.*

167. *Id.* Policyholders may attempt to distinguish this case from their assertions by noting the presence of an absolute pollution exclusion clause that barred coverage for bodily injury, property damage and personal injury. *Id.* at 961. However, the superior court construed three insurance policies: American Employers’, Liberty Mutual, and National Union. *Id.* The National Union policy was the only policy containing an absolute pollution exclusion clause. *Id.* Nonetheless, the court found that none of the insurers owed a duty to defend. *Id.* at 959.

168. 595 N.Y.S.2d 988 (App. Div. 1993), *aff’d*, 634 N.E.2d 946 (N.Y. 1994).

169. *Id.* at 989.

170. *Id.*

171. *Id.* at 991.

172. *County of Columbia v. Continental Ins. Co.*, 634 N.E.2d 946, 950 (N.Y. 1994). *See also* *Titan Corp. v. Aetna Casualty & Sur. Co.*, 27 Cal. Rptr. 2d 476, 486 (Ct. App. 1994) (stating that the relabeling of such an injury as an “other invasion” of the right of private occupancy would render the pollution exclusion a “dead appendage to the policy”).

173. *See supra* notes 150-168 and accompanying text.

174. 707 F. Supp. 1140 (D.S.D. 1989).

175. *Id.* at 1144.

age caused by contamination as a personal injury to obtain coverage under the personal injury endorsement.¹⁷⁶ If other courts follow this approach, the pollution exclusion clause will become worthless.¹⁷⁷ Courts should recognize this diversionary tactic and deny coverage under the personal injury endorsement.

B. Trespass and Nuisance are Distinct from Wrongful Entry or Eviction

The presence of a pollution exclusion clause is not the only reason why courts should recognize that the personal injury endorsement does not provide coverage for the discharge or dispersal of gases, chemicals, or other polluting agents. Courts should recognize that trespass and nuisance are offenses which are distinguishable from "wrongful entry or eviction."¹⁷⁸ A "wrongful entry or eviction" involves the intent to dispossess an individual of property.¹⁷⁹ Neither trespass nor nuisance threatens a property owner's right of possession.¹⁸⁰ Accordingly, the policyholders' assertions that "wrongful entry or eviction" are equivalent to trespass or nuisance are misplaced.¹⁸¹

Both wrongful entry and wrongful eviction require taking possession of property.¹⁸² They involve a dispossession of property by someone other than the occupant who asserts an interest in the property.¹⁸³ A wrongful eviction consists of a landlord or his agent entering the premises and dispossessing the tenant.¹⁸⁴ Thus, in a wrongful eviction a tenant will no longer retain possession of the

176. *Gould*, 829 F. Supp 722.

177. See *supra* notes 163-172 and accompanying text.

178. *W.H. Breshears, Inc. v. Federated Mut. Ins. Co.*, 832 F. Supp. 288 (E.D. Cal. 1993), *aff'd in part and rev'd in part*, 38 F.3d 1219 (9th Cir. 1993); *Morton Thiokol, Inc. v. General Accident Ins. Co.*, No. C-3956-85 (N.J. Super., Aug. 27, 1987) (LEXIS, States library, N.J. file).

179. *Breshears*, 832 F. Supp. at 291.

180. *Foggan et al.*, *supra* note 7, at 297.

181. See *Bowman & Hofer*, *supra* note 1. The authors distinguish "wrongful entry or eviction" from trespass and nuisance by discussing the origins and development of the respective torts. *Id.*

182. *W.H. Breshears, Inc. v. Federated Mut. Ins. Co.*, 832 F. Supp. 288 (E.D. Cal. 1993), *aff'd in part and rev'd in part*, 38 F.3d 1219 (9th Cir. 1993); *Morton Thiokol v. General Accident Ins. Co.*, No. C-3956-85 (N.J. Super., Aug. 27, 1987) (LEXIS, States library, N.J. file).

183. *Foggan et al.*, *supra* note 7, at 296; *Williams*, *supra* note 157, at 81.

184. *Foggan*, *supra* note 2, at 14. See also *Toombs N.J. Inc. v. Aetna Cas. & Sur. Co.*, 591 A.2d 304, 307 (Pa. Super. Ct. 1991) (finding that a wrongful eviction within the meaning of a CGL policy meant a situation where party was already in possession of the premises and had been evicted without legal justification); *3855 Broadway Laundromat Inc. v. 600 W. 161st St. Corp.*, 548 N.Y.S.2d 461, 462 (App. Div. 1989) (finding that changing locks and preventing access by tenant amounted to "wrongful eviction" or "actual eviction").

premises.¹⁸⁵ Wrongful entry occurs when someone, other than the landlord, enters the premises without title and claims or acquires a possessory interest in the property.¹⁸⁶ Both wrongful entry and wrongful eviction involve interference with an individual's possession of property.¹⁸⁷

Trespass has elements that are common to "wrongful entry or eviction."¹⁸⁸ Yet, the offenses are distinguishable.¹⁸⁹ Trespass is an intentional invasion of property by a person or other tangible matter that interferes with an individual's possession of property.¹⁹⁰ However, "wrongful entry or eviction" is permanent and the interference caused by trespass is transitory.¹⁹¹ A person taking a shortcut across another's property is an example of the transitory nature of trespass.¹⁹² Moreover, the transitory nature of trespass does not involve a dispossession of property by someone asserting an interest in it.¹⁹³ Although trespass and "wrongful entry or eviction" contain common elements, the offenses are not identical.

Similarly, nuisance is different from "wrongful entry or eviction."¹⁹⁴ Nuisance involves the interference with an individual's use and enjoyment of property.¹⁹⁵ By contrast, "wrongful entry or eviction" involves interference with possession or occupancy of property.¹⁹⁶ The release of hazardous chemicals across an individual's property may constitute a nuisance.¹⁹⁷ Yet, this release does not affect a property owner's right of possession or occupancy of property.¹⁹⁸ Accordingly, the offenses "wrongful entry or eviction" have striking differences from nuisance.

185. Foggan, *supra* note 2, at 14.

186. *Breshears*, 832 F. Supp. at 291; *Morton Thiokol v. General Accident Ins. Co.*, No. C-3956-85 (N.J. Super. Ct., Aug. 27, 1987) (LEXIS, States library, N.J. file).

187. *See Breshears*, 832 F. Supp. at 291; *Morton Thiokol v. General Accident Ins. Co.*, No. C-3956-85 (N.J. Super. Ct., Aug. 27, 1987) (LEXIS, States library, N.J. file).

188. *Garvis v. Employers Mut. Casualty Co.*, 497 N.W.2d 254, 259 (Minn. 1993) (recognizing that although a kinship exists between wrongful entry and trespass, the two concepts are not quite the same).

189. *Id.*

190. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 70 (5th ed. 1984).

191. Foggan et al., *supra* note 7, at 297.

192. *Id.*

193. *Id.*

194. *Bowman & Hofer*, *supra* note 1, at 402.

195. KEETON ET AL., *supra* note 190, at 625; *BLACK'S LAW DICTIONARY* 736 (6th ed. 1991).

196. *See supra* notes 178-183 and accompanying text.

197. *W.H. Breshears, Inc. v. Federated Mut. Ins. Co.*, 832 F. Supp. 288, 291 (E.D. Cal. 1993), *aff'd in part and rev'd in part*, 38 F.3d 1219 (9th Cir. 1993).

198. *Gregory v. Tennessee Gas Pipeline Co.*, 948 F.2d 203, 209 (5th Cir. 1991); *Breshears*, 832 F. Supp. at 291.

Several courts have applied similar reasoning to distinguish trespass and nuisance from “wrongful entry or eviction.”¹⁹⁹ In *W.H. Breshears, Inc. v. Federated Mutual Insurance Co.*,²⁰⁰ a policyholder sought indemnity from its insurer for costs incurred in the cleanup of contamination resulting from spilled gasoline.²⁰¹ The policyholder argued that the personal injury endorsement in the policy covered the escaped gasoline because the endorsement was subject to claims of trespass, nuisance, and strict liability.²⁰² The district court rejected the policyholder’s contentions, noting that a wrongful eviction “takes place when a tenant is dispossessed by his or her landlord.”²⁰³ The court further noted that a “[w]rongful entry takes place when someone other than the landlord claims a possessory interest in the room, dwelling or premises.”²⁰⁴ Next, the court contrasted these offenses with trespass and nuisance stating that neither trespass nor nuisance involve a dispute concerning the occupancy of property.²⁰⁵ Thus, the district court ruled that the personal injury endorsement did not protect against trespass and nuisance for “ultrahazardous” activity.²⁰⁶

Likewise, a New Jersey court distinguished “wrongful entry or eviction” from trespass and nuisance.²⁰⁷ In *Morton Thiokol, Inc. v. General Accident Insurance Co.*,²⁰⁸ the policyholder dumped toxic waste containing mercury onto its land for many years.²⁰⁹ Eventually, the mercury drained into a nearby creek.²¹⁰ The policyholder argued that the underlying nuisance action entitled it to coverage under the personal injury endorsement.²¹¹ The superior court disagreed, indicating that eviction requires a dispossession through the legal process.²¹² The court further stated that a wrongful entry requires a

199. *W.H. Breshears, Inc. v. Federated Mut. Ins. Co.*, 832 F. Supp. 288 (E.D. Cal. 1993), *aff’d in part and rev’d in part*, 38 F.3d 1219 (9th Cir. 1993); *Morton Thiokol v. General Accident Ins. Co.*, No. C-3956-85 (N.J. Super., Aug. 27, 1987) (LEXIS, States library, N.J. file). See also *Decorative Ctr. v. Employers Casualty Co.*, 833 S.W.2d 257 (Tex. Ct. App. 1992) (finding no coverage under personal injury endorsement and stating that although appellants intentionally interfered with a right to use property, they did not interfere with right of private occupancy).

200. 832 F. Supp. 288 (E.D. Cal. 1993).

201. *Id.* at 289.

202. *Id.* at 291.

203. *Id.*

204. *Id.*

205. *W.H. Breshears, Inc. v. Federated Mut. Ins. Co.*, 832 F. Supp. 288, 291 (E.D. Cal. 1993), *aff’d in part and rev’d in part*, 38 F.3d 1219 (9th Cir. 1993).

206. *Id.*

207. *Morton Thiokol, Inc. v. General Accident Ins. Co.*, No. C-3956-85 (N.J. Super. Ct., Aug. 27, 1987) (LEXIS, States library, N.J. file).

208. No. C-3956-85 (N.J. Super., Aug. 27, 1987) (LEXIS, States library, N.J. file).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

“going upon the land for the purpose of taking possession.”²¹³ The court reasoned that the State was not dispossessed of the waters of the creek.²¹⁴ Furthermore, the court noted that:

no one sought to take possession of Berry’s Creek, neither the land that forms its bed, nor the waters flowing through it.

The plaintiff has confused the concept of trespass with wrongful entry. . . . Wrongful entry, eviction and occupancy all have to do with the possession of property. The seepage of toxic waste has nothing at all to do with the possession of Berry’s Creek.²¹⁵

Thus, the court held that the personal injury endorsement did not provide coverage for the contamination of the creek.²¹⁶

Breshears and *Morton Thiokol* demonstrate that “wrongful entry or eviction” require an interference with the possession of property.²¹⁷ The cases also show that trespass and nuisance do not require such an interference.²¹⁸ By contrast, the *Gould* court held that coverage for “wrongful entry” and “other invasion of the right of private occupancy” was ambiguous.²¹⁹ By suggesting that the personal injury endorsement may provide coverage for the pollution damage, the *Gould* court failed to distinguish trespass and nuisance from “wrongful entry or eviction.”²²⁰ Instead, the *Gould* court should have followed the *Breshears* and *Morton Thiokol* line of reasoning that “wrongful entry or eviction” require an interference with the possession and occupancy of property.²²¹ Furthermore, the *Gould* court should have recognized that the emissions caused by battery crushing, although creating a trespass or nuisance, does not constitute a “wrongful entry or eviction.”²²² In the absence of a “wrongful entry or eviction,” the *Gould* court should have denied coverage under the personal injury endorsement.

C. The Personal Injury Endorsement Applies to Specific Enumerated Offenses

Neither trespass nor nuisance is covered by the personal injury endorsement because both offenses are separate and distinct from

213. No. C-3956-85 (N.J. Super., Aug. 27, 1987)(LEXIS, States library, N.J. file).

214. *Id.*

215. *Id.*

216. *Id.*

217. See *supra* notes 199-216 and accompanying text.

218. *Id.*

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

220. Cf. *supra* notes 182-216 and accompanying text.

221. See *supra* notes 199-216 and accompanying text.

222. See *supra* notes 182-216 and accompanying text.

“wrongful entry or eviction.”²²³ When construing the applicability of the personal injury endorsement, courts should interpret the policy according to its plain and unambiguous language.²²⁴ In other words, courts should recognize that the personal injury endorsement provides coverage only for those offenses enumerated within the endorsement.²²⁵ Indeed, many courts have construed the personal injury endorsement narrowly, requiring allegations of damages resulting from one of the enumerated offenses before extending coverage.²²⁶ Trespass and nuisance are not enumerated offenses under the personal injury endorsement.²²⁷ Therefore, courts should deny coverage under the personal injury endorsement for environmental claims arising under trespass or nuisance.²²⁸ If insurance companies intended to provide coverage for trespass or nuisance they certainly would have included trespass and nuisance as enumerated offenses within the personal injury endorsement.²²⁹

For example, the New York Court of Appeals recognized that the personal injury endorsement does not provide coverage for trespass and nuisance.²³⁰ In *County of Columbia v. Continental Insurance Co.*,²³¹ the court of appeals stated the personal injury endorsement did not include trespass and nuisance.²³² The court reasoned that trespass and nuisance were not among the offenses enumerated in the personal injury endorsement.²³³ Furthermore, trespass and nuisance are not equivalent to the “enumerated offense of ‘wrongful entry or eviction or other invasion of the right of private occupancy.’”²³⁴

The Pennsylvania Superior Court also recognized that trespass and nuisance are not specifically enumerated under the personal

223. See, e.g., *County of Columbia v. Continental Ins. Co.*, 634 N.E.2d 946, 950 (N.Y. 1994); *O'Brien Energy Sys., Inc. v. American Employers' Ins. Co.*, 629 A.2d 957, 964 (Pa. Super. Ct. 1993). Cf. *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1040 (7th Cir. 1992); *Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265, 270 (1st Cir. 1990).

224. See *O'Brien Energy Sys., Inc. v. American Employers' Ins. Co.*, 629 A.2d 957 (Pa. Super. Ct. 1993).

225. *Id.*

226. *American & Foreign Ins. Co. v. Church Schs.*, 645 F. Supp. 628, 633-34 (E.D. Va. 1986); *A. Meyers & Sons Corp. v. Zurich Am. Ins. Group*, 74 N.Y.2d 298, 303 (1989). See also *Williams*, *supra* note 5, at 394.

227. See *supra* text accompanying note 66.

228. See *infra* notes 231-238 and accompanying text.

229. *Foggan et al.*, *supra* note 7, at 296. See also *Garvis v. Employers Mut. Casualty Co.*, 497 N.W.2d 254, 259-60 (Minn. 1993) (stating that the policy could have listed trespass as a covered offense, but did not do so).

230. *County of Columbia v. Continental Ins. Co.*, 634 N.E.2d 946, 950 (N.Y. 1994).

231. 634 N.E.2d 946 (N.Y. 1994).

232. *Id.*

233. *Id.*

234. *Id.*

injury endorsement.²³⁵ In *O'Brien Energy Systems, Inc. v. American Employers' Insurance Co.*,²³⁶ the court stated the personal injury endorsement provides coverage for specific torts affording coverage only for defined risks.²³⁷ Recognizing that trespass and nuisance were not equivalent to "wrongful entry or other invasion of the right to private occupancy," the court ruled that the policy did not provide indemnification for environmental claims based on migrating gases.²³⁸

The district court in *Gould*²³⁹ should have recognized that trespass and nuisance are not equivalent to "wrongful entry or eviction or other invasion of the right to private occupancy."²⁴⁰ The *Gould* court should have further recognized that trespass and nuisance are not enumerated offenses in the personal injury endorsement.²⁴¹ Understanding that the personal injury endorsement provides coverage only for enumerated offenses, the *Gould* court should have denied coverage for the policyholder's environmental claim.²⁴² If the insurer in *Gould* intended to provide coverage for environmental damage under the personal injury endorsement, the endorsement would have specifically indicated trespass and nuisance as covered offenses.²⁴³ Instead, the insurer provided coverage for "wrongful entry or eviction," which does not encompass environmental claims.²⁴⁴

D. Ejusdem Generis

Policyholders have argued that the personal injury endorsement wording "other invasion of the right of private occupancy" encompasses trespass and nuisance, thus allowing coverage for environmental damage.²⁴⁵ Additionally, some courts have determined that

235. *O'Brien Energy Sys., Inc. v. American Employers' Ins. Co.*, 629 A.2d 957, 964 (Pa. Super. Ct. 1993).

236. 629 A.2d 957 (Pa. Super. Ct. 1993).

237. *Id.* at 964.

238. *Id.*

239. *Gould Inc. v. Arkwright Mutual Ins. Co.*, 829 F. Supp. 722 (M.D. Pa. 1993).

240. *See supra* notes 178-222 and accompanying text.

241. *See supra* notes 223-238 and accompanying text.

242. *See, e.g., County of Columbia v. Continental Ins. Co.*, 634 N.E.2d 946, 950 (N.Y. 1994); *O'Brien Energy Sys., Inc. v. American Employers' Ins. Co.*, 629 A.2d 957, 964 (Pa. Super. Ct. 1993); *supra* notes 223-238 and accompanying text.

243. *Foggan et al., supra* note 7, at 296; *Garvis v. Employers Mut. Casualty Co.*, 497 N.W.2d 254, 259-60 (Minn. 1993).

244. *See, e.g., County of Columbia v. Continental Ins. Co.*, 634 N.E.2d 946, 950 (N.Y. 1994); *O'Brien Energy Sys., Inc. v. American Employers' Ins. Co.*, 629 A.2d 957, 964 (Pa. Super. Ct. 1993).

245. *O'Brien*, 629 A.2d at 963. *See supra* notes 75-95 and accompanying text.

this language is ambiguous.²⁴⁶ Construing ambiguity in favor of the policyholders, these courts allowed coverage for environmental damage.²⁴⁷ Yet, applying the *ejusdem generis* doctrine to the personal injury endorsement in insurance policies would clarify the meaning of “other invasion of the right of private occupancy.”²⁴⁸ In fact, this doctrine will narrow the application of the personal injury endorsement.²⁴⁹

Ejusdem generis is a doctrine of contract interpretation.²⁵⁰ This doctrine states that when general words follow a specific classification such general words are not to be construed in their widest extent.²⁵¹ Instead, the words are to apply only to those things of equal or inferior rank.²⁵² Under this doctrine, courts should limit “other invasion of the right of private occupancy” to situations equal or inferior to “wrongful entry or eviction.”²⁵³ Wrongful entry or eviction applies to situations involving an interference with the right of possession and occupancy of property.²⁵⁴ Courts should not construe “other invasion of the right of private occupancy” to its widest extent. Rather, courts should limit this clause to situations involving an interference with a right of possession and occupancy of property.²⁵⁵ Thus, “wrongful entry or eviction, or other invasion of the right of private occupancy” does not encompass environmental claims arising under trespass and nuisance. Applying this doctrine of contract interpretation will eliminate any ambiguity in the construction of an insurance policy’s personal injury endorsement.

Numerous courts have recognized that *ejusdem generis* limits the application of the personal injury endorsement to situations involving an interference with a right of possession and occupancy of property.²⁵⁶ In *Titan Corp. v. Aetna Casualty and Surety Co.*,²⁵⁷ the California Court of Appeal reasoned that “the term other invasion of

246. *Gould v. Arkwright Mut. Ins. Co.*, 829 F. Supp. 722 (M.D. Pa. 1993); *Napco, Inc. v. Fireman’s Fund Ins. Co.*, No. 90-0993, (May 22, 1991) (Report and Recommendation of Magistrate Judge), *dismissed per stipulation*, No. 90-0993 (W.D. Pa. July, 21, 1993).

247. *Gould*, 829 F. Supp. 722; *Napco, Inc. v. Fireman’s Fund Ins. Co.*, No. 90-0993 (May 22, 1991) (Report and Recommendation of Magistrate Judge), *dismissed per stipulation*, No. 90-0993 (W.D. Pa. July 21, 1993).

248. See *infra* notes 250-70 and accompanying text.

249. See *infra* notes 250-70 and accompanying text.

250. BLACK’S LAW DICTIONARY 357 (6th ed. 1991); Williams, *supra* note 157, at 81.

251. BLACK’S LAW DICTIONARY 357 (6th ed. 1991); see also Williams, *supra* note 157, at 81.

252. *E.g.*, Williams, *supra* note 157, at 81.

253. Williams, *supra* note 6, at 395.

254. See *supra* notes 182-222 and accompanying text.

255. Williams, *supra* note 157, at 81.

256. *Martin v. Brunzelle*, 699 F. Supp. 167 (N.D. Ill. 1988); *Titan Corp. v. Aetna Casualty & Sur. Co.*, 27 Cal. Rptr. 2d 476 (Ct. App. 1994).

257. 27 Cal. Rptr. 2d 476 (Ct. App. 1994).

the right of private occupancy draws meaning and content from . . . wrongful entry or eviction.”²⁵⁸ The court further reasoned that this language connotes disruptions of a landowners ability to actually occupy the property, rather than mere injuries to the property.²⁵⁹ The *Titan* court was not persuaded by courts that allowed coverage for environmental damage under the personal injury endorsement.²⁶⁰ Further, the *Titan* court observed that those courts “overlooked *ejusdem generis* principles, which caution that the ‘other invasion’ should be interpreted to mean the functional equivalent of “wrongful entry or eviction.”²⁶¹

Similarly, an Illinois District Court found no ambiguity in the terms “other invasion of the right of private occupancy.”²⁶² In *Martin v. Brunzelle*,²⁶³ the district court noted that the policyholder erred in urging ambiguity in the policy provision.²⁶⁴ The court then stated that “[*ejusdem generis* principles draw on the sensible notion that words such as ‘other invasion of the right of private occupancy’ are intended to encompass actions of the same general type as, though not specifically embraced within ‘wrongful entry or eviction.’”²⁶⁵ The court continued by noting the phrase “other invasion of the right of private occupancy” provides coverage only if there is a landlord-tenant relationship or if the plaintiff has a vested property right.²⁶⁶

In *Gould*, the district court found ambiguity existed in the relationship between the pollution exclusion clause and the personal injury endorsement.²⁶⁷ Instead of finding ambiguity, the *Gould* court should have followed the reasoning applied in *Titan Corp.* and *Martin*. Applying this reasoning the *Gould* court should have found that *ejusdem generis* limits “other invasion of the right of private occupancy” to situations functionally equivalent to “wrongful entry or eviction.”²⁶⁸ The court should have observed that “wrongful entry or eviction” applies when there is an interference with a right to possession and occupancy of property.²⁶⁹ By properly limiting the term “other invasion of a right to private occupancy,” the *Gould* court

258. *Id.* at 487.

259. *Id.*

260. *Id.* See, e.g., *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir. 1992); *Titan Holdings Syndicate, Inc. v. City of Keene*, 898 F.2d 265 (1st Cir. 1990).

261. *Titan Corp.*, 27 Cal. Rptr. 2d at 487.

262. *Martin v. Brunzelle*, 699 F. Supp. 167, 170 (N.D. Ill. 1988).

263. 699 F. Supp. 167 (N.D. Ill. 1988).

264. *Id.* at 170.

265. *Id.*

266. *Id.*

267. See *supra* notes 126-137 and accompanying text.

268. See *supra* notes 247-265 and accompanying text.

269. See *supra* notes 247-265 and accompanying text.

should not have found an ambiguity in the insurance policy.²⁷⁰ Accordingly, the *Gould* court should not have allowed coverage under the personal injury endorsement.

VI. CONCLUSION

The district court in *Gould* found that the personal injury endorsement was ambiguous, indicating the endorsement may cover environmental claims. Yet, the *Gould* court did not distinguish trespass and nuisance from “wrongful entry or eviction.” The court should have recognized that a “wrongful entry or eviction” applies to situations involving an interference with the possession and occupancy of property. Furthermore, applying the *ejusdem generis* doctrine would limit the general term “other invasion of the right of private occupancy” to situations similar to “wrongful entry or eviction.” Additionally, insurers did not intend to cover pollution claims under the personal injury endorsement. Such claims are addressed under a CGL policy. If more courts allow policyholders to pursue environmental claims under the personal injury endorsement, the result certainly would nullify the pollution exclusion clause. This result defies logic. Instead of granting coverage, courts should recognize the policyholders’ claims as an unwarranted straining of the personal injury endorsement. Accordingly, courts facing efforts to obtain coverage under the personal injury endorsement should grant summary judgment in favor of the insurers.

270. See *supra* notes 247-265 and accompanying text.