insurer resulted in other real injuries to the insured, such as injury to reputation and credit, forced bankruptcy, and the likelihood of garnishment, that could be avoided by using the majority rule.

Defense of Administrative Action against Insured

Avondale Industries, Inc. v. Travelers Indemnity Co., 887 F.2d 1200 (2d Cir. 1989).

The Second Circuit Court of Appeals concluded that an insurer was obligated to defend the insured in an administrative action that could result in liability for pollution cleanup costs. Avondale serviced ships and barges and removed oil from them. It sold the oil to a salvage company which recycled it. The salvage company's recycling plant and dump became the source of both private and administrative actions against Avondale. Avondale demanded that Travelers defend the actions based on its policy which included a duty to defend the insured against "any suit . . . seeking damages." Travelers sought to avoid the defense of the administrative action on the basis that it was not a suit for damages within the meaning of the policy.

The court of appeals rejected Travelers' argument. The court first found that the administrative procedure initiated against Avondale was a suit. The parties to the administrative action for the cleanup (the state and Avondale) were adverse to one another because the state demanded that Avondale take charge of the cleanup or be liable for the costs. Second, the court concluded that the action was one for damages. The cleanup costs were a form of restoration of a third party and, therefore, amounted to damages. Further, the court noted that the provision for defense of the insured should be viewed from the perspective of the ordinary business person. In that view, the insured would expect to receive a defense under these circumstances.

Pollution Liability Exclusion Applies to Inherited Problem

Powers Chemco Inc. v. Federal Insurance Co., 1989 N.Y. Lexis 3216 (N.Y. Ct. App. 1989).

New York's highest court affirmed an appellate division decision that concluded that a passive owner of a pollution cleanup site cannot look to its insurance carrier for financial assistance. Powers purchased land that contained hazardous wastes. The state ordered Powers to decontaminate and restore the property. Powers sought a declaratory order that the costs of the cleanup were within the terms of its general comprehensive liability insurance. Although the policy covered most events, it contained a provision that excluded pollution costs. The only exception to the pollution clause was for sudden and accidental events. The court concluded that the prior owner's intentional discharge onto the property was not accidental within the meaning of the policy. The court also rejected the argument that the exclusion did not apply because Powers did not cause the pollution. The court stated there was nothing in the language of the clause to suggest that it did not apply if the cause of the pollution was the act of a third party.