The court then rejected three arguments to recharacterize clean up costs. First, the insurers argued that federal law makes a distinction between clean up costs and damages for environmental injury. The court found that Congress intended the terms to overlap and did not feel it was bound by the distinction when interpreting insurance contracts. Second, the insurers argued that the costs were a cost of doing business and, therefore, were similar to the costs of compliance with general governmental regulation. The court rejected the second argument because the costs were primarily incurred for remediation, not to prevent future violations. Finally, the insurers argued that the recovery was intended as restitution of the costs of cleanup rather than the loss of value to the property. Once again, the court rejected the argument because damages often included restitution. Moreover, those cases denying recovery generally related to attempts by insureds to recover amounts paid as penalties. In the case of an environmental clean up, however, there is no allegation of fault. Rather, the goal was to remedy injury to the environment.

The costs of compliance with an injunction, however, presented the court with a more complicated problem. While the costs of complying did not fall within the common notion of damages, the court nonetheless concluded that compliance remedying an existing problem was within the meaning of damages. Whether the government sought recovery for its clean up costs or caused the insured to incur those costs by injunction, the same basic result would occur—the insurers would pay for cleaning up the site. Given the similarities of the remedies, each presented a claim for "damages" within the policies' terms.

Finally, the court concluded that the costs were incurred due to an injury to property. Contamination of the environment came easily within the meaning of the phrase. Thus, environmental damage satisfied the third element of the coverage provision.

Based on its interpretive starting point, the supreme court concluded that the coverage provision of the comprehensive general insurance policy extended coverage to clean up costs and costs of complying with an injunction. Given this interpretation, the insurers must look to policy exclusions to limit the scope of coverage. The courts have addressed several of the standard exclusions in recent decisions.

Business Judgment to Pollute Not Within Coverage

American Motorists Insurance Co. v. General Host Corp., No. 88-1503 (8th Cir. March 21, 1991) (LEXIS, Genfed, Currnt file).

An insurer need not defend a claim resulting from intentional acts of pollution under the standard exclusions for coverage contained in general liability policies. In a prior suit, several property owners complained that discharges from an American Salt plant had damaged the water and land of their property. Further they demonstrated that American Salt officers consciously decided to accept the consequences of spills in trade for reduced maintenance costs. As a result, the trial court in the private action found the pollution was intentional. Because the spills were not accidental, American, the insurer, refused to defend the claims or indemnify the judgments and settlements against American Salt and its parent, General Host. A trial court granted the insurer summary judgment in its request for a declaratory judgment that its refusal was within its authority under a pollution exclusion clause. The court of appeals affirmed.

In affirming, the court of appeals looked to the policy to determine the scope of American's coverage. The policy provided coverage for bodily injury or property damage caused by an "occurrence" which was defined as "an accident or a happening or event or a continuous or repeated exposure to conditions which results during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." The policy then excluded coverage for "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 pollutants into or upon land, the atmosphere or any watercourse or body of water." The pollution exclusion, however, did not apply if the release was "sudden and accidental." Although the court did not enter the semantic quagmire of what was sudden, it had no trouble finding there was no duty to defend because the discharge was not accidental.

Relying on decisions from several other courts of appeals and state courts, the Eighth Circuit noted "accidental" refers to acts which are unexpected, unintended, or fortuitous. Those acts that result from conscious choices did not fall within the term. The court then reviewed the findings of the lower court in the private action and found that the pollution was the result of a deliberate choice of American Salt not to perform maintenance. In particular, the court was critical of management's "reasoned business decision to maximize profits at the expense of the necessary and required preventative maintenance of their complex physical plant and equipment." As a result, the resulting pollution was foreseeable, not accidental. Having found no duty to defend, the court further held that the insurer did not have an obligation to indemnify.

Criminal Conviction Prevents Pollution Coverage

Town of Moreau v. Orkin Exterminating Co., Case No. 61170 (N.Y. Sup. Ct., App. Div. Apr. 4, 1991) (LEXIS, States, N.Y. file).

As in the *American Motorists* decision, a preceding case can trigger an exclusion of coverage for environmental hazards. In *Moreau*, Walter and Jane Blank demanded that their general liability carriers defend a nuisance action against them that resulted from the disposal of pesticides. The Blanks' corporation, however, had previously been convicted of criminal violations for the dumping of the hazardous waste in their landfill. Based on the criminal convictions, the insurers successfully argued that their policies did not cover an intentional release of pollutants.