INSURERS' LIABILITY UNDER CERCLA: SHIFTING HAZARDOUS WASTE SITE CLEANUP COSTS TO THE INSURANCE INDUSTRY

Insurance companies and the United States government have reached an impasse regarding coverage for hazardous waste generators, transporters, and disposers.[1] The strict liability standard of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[2] holds hazardous waste generators,[3] transporters,[4] and disposers[5] liable for damages[6] resulting from materials left in aban-

1. *See generally, Insurance Issues and Superfund: Hearings on S. 321-24 Before the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 1 (1985) [hereinafter *Senate Hearings*] (detailed discussion of government and insurers' views of hazardous waste insurance problems and proposed solutions).

One insurance industry spokesman predicts that insurers will stop issuing insurance policies for hazardous waste generators, haulers, or disposers under the existing liability scheme. *Id.* at 37 (comments of Wheeler Hess, Senior Vice President of the Travelers Insurance Company).

2. 42 U.S.C. §§ 9601-9657 (1982). CERCLA is also commonly referred to as "Superfund." CERCLA's liability standard is found at § 9607. See *infra* note 22 and accompanying text for a discussion of CERCLA's use of strict liability.

3. A generator is generally defined as a company or person that produces hazardous waste. 42 U.S.C. § 9607(a) (1982). This section states that persons who arrange by contract, agreement, or otherwise for disposal, treatment, or transport for disposal or treatment of hazardous substances by others can be liable for response costs and natural resource damages from an abandoned waste site at which the hazardous wastes were deposited. *Id.* § 9607(a)(3). This provision does not cover generators disposing of wastes on-site. *But see infra* note 5 (some on-site generators would qualify for liability under § 9607(a)(1) and (2)).

4. A transporter is defined as a party that "accepts or accepted hazardous substances for transport to disposal or treatment facilities or sites selected by such person. . . ." 42 U.S.C. § 9607(a)(4).

5. Disposers are defined as owners or operators of facilities at the time the hazardous waste is discarded, or the current owners and operators of a facility when the CERCLA suit is brought. 42 U.S.C. § 9607(a)(1), (2).

CERCLA broadly defines "facility" as:

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon,

doned waste sites.[7] CERCLA burdens insurers of hazardous waste generators, transporters, and disposers because the insurers have a duty to defend and indemnify these high risk policyholders.[8] Insurers, therefore, are threatening to stop insuring hazardous waste generators, transporters, and disposers until Congress imposes a cap on damage awards under CERCLA.[9] Insurers argue that such a cap is necessary because current technology cannot prevent leaks of stored hazardous wastes.[10] Court decisions holding insurers liable under expired policies,[11] including policies containing pollution exclusion clauses,[12] fur-

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impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or

(B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9).

6. Damages include removal and response costs incurred by the government or other individuals when cleaning up the abandoned site, and the compensation for injury to, destruction of, or loss of natural resources, including the expenses and costs of assessing the injury, destruction or loss resulting from the release. *Id.* § 9607(a)(4)(A)-(C).

7. *See* Jernberg, *Insurance For Environmental and Toxic Risks: A Basic Analysis of the Gap Between Liability and Coverage*, 34 FED'N INS. COUNSEL Q. 123, 126-27 (1984). The most common CERCLA violation is hazardous wastes leaking from the disposal site and contaminating the area ground water. *Id.* at 137.

8. *See generally* R. KEETON, INSURANCE LAW § 7.1 (1971).

9. *See generally Senate Hearings, supra* note 1.

10. *Id.* at 34-35. (testimony of T. Lawrence Jones, President of the American Insurance Association). Private insurers may refuse to cover site operations because of the "near certainty" that leakage will occur. *See* Parizeh, *The Time Perspective in the Subsurface Management of Waste*, in HAZARDOUS AND TOXIC WASTES: TECHNOLOGY, MANAGEMENT AND HEALTH EFFECTS 137-69 (Majumdar & Miller eds. 1984) (discussion of how the ground water flow system transports disposed waters to pollute surface and subsurface waters); Schmalz, *Geological Factors in Disposal Site Selection*, in HAZARDOUS AND TOXIC WASTES: TECHNOLOGY, MANAGEMENT AND HEALTH EFFECTS, *supra*, at 187 (discussing the difficulties in finding adequate burial sites that will isolate hazardous wastes from the environment, and describing burial site requirements).

In 1980 the Environmental Protection Agency (EPA) estimated that 14,000 to 90,000 land-disposal sites were leaking pollutants, contaminating surface waters and ground waters. S. EPSTEIN, L. BROWN & C. POPE, HAZARDOUS WASTE IN AMERICA 303 (1982). One author also questions if any landfill can be truly secured from leaking pollutants on a long-term basis. *Id.* at 336.

11. *See infra* note 50 and accompanying text.

12. See *infra* notes 42-43 and accompanying text for an example of a pollution exclusion clause.

ther exacerbate the problem.[13]

The insurance dispute raises many critical policy considerations, including the proper scope of industry liability for hazardous waste cleanup;[14] the insurability of hazardous waste generators, haulers, and disposers;[15] the scope of insurers' liability for hazardous waste damage incurred by a present or former policyholder;[16] and Congress' possible ban on production of chemicals whose manufacture creates hazardous byproducts.[17]

This Recent Development studies the problems arising between insurer and policyholder in CERCLA litigation, and suggests appropriate responses to the public policy considerations. Part I discusses CERCLA's liability standard for the hazardous waste insurance industry. Part II traces the development of insurance policies covering hazardous wastes. Part III examines recent CERCLA litigation and analyzes judicial interpretations of insurance policies. This Recent De-

13. *Senate Hearings, supra* note 1, at 33 (testimony of T. Lawrence Jones, President of the American Insurance Association). Insurers disapprove of court-imposed coverage when the policy terms clearly indicate that insurers did not intend coverage in these situations. *Id.* at 33.

14. *See generally* F. ANDERSON, D. MANDELKER & A.D. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 1-30 (1984). One problem with the free market system is that environmental resources remain outside the market and, therefore, are still unpriced. Valuable environmental assets such as rivers, air, landscape features and "even silence are 'used up,' but their use is not accurately reflected in the price system." These externalities burden society at large, not just the user who actually consumes them. F. ANDERSON, A. KNEESE, P. REED, R. STEVENSON & S. TAYLOR, ENVIRONMENTAL IMPROVEMENT THROUGH ECONOMIC INCENTIVES 3-4, 22-26 (1977).

Because waste-assimilating capacities of air and water as public resources do not command a price, the private market system encourages their overuse instead of their conservation. A. KNEESE & C. SCHULTZE, POLLUTION, PRICES AND PUBLIC POLICY 5-6 (1975). Private producers use these resources instead of expensive mechanisms to reduce generated residues. *Id.* Some authorities advocate shifting the costs of these externalities to the manufacturer that uses the resource for waste disposal. In this way the market price of the product bears its true cost to society. F. ANDERSON, A. KNEESE, P. REED, R. STEVENSON & S. TAYLOR, *supra.*

15. *See supra* notes 106-11 and accompanying text.

16. *Id.*

17. *See* S. EPSTEIN, L. BROWN & C. POPE, *supra* note 10, at 368-69 (use of a limited governmental ban of specific highly toxic and carcinogenic chemicals to reduce disposal problems). *See also Senate Hearings, supra* note 1, at 28 (testimony of Thomas C. Jorling, Professor of Insurance Studies and Director of the Center for Environmental Studies, Williams College). The marketplace makes the judgment that an activity is so inherently risky that it is uninsurable and it should not be pursued. *Id.*

velopment concludes that insurers have a broad duty to defend or indemnify an insured generator, transporter, or disposer.

I. CERCLA'S LIABILITY STANDARD

CERCLA requires hazardous waste generators or disposers to carry liability insurance.[18] Congress intended to achieve cleanup of abandoned hazardous waste sites by allowing the government to recover "response costs"[19] incurred in cleaning up abandoned sites.[20] Most

18. *See* 42 U.S.C. § 9601-9615 (1982). CERCLA requires the owner or operator of any "vessel" over 300 gross tons that transports hazardous wastes to establish financial responsibility for the greater of $300 per gross ton or $5,000,000. 42 U.S.C. § 9608(a)(1). This financial responsibility can be established by any combination of insurance, guarantee, surety bond, or qualification as self-insurer. *Id.* The President is required to set financial responsibility requirements for waste disposal facilities "consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances." 42 U.S.C. § 9608(b)(1). This financial responsibility requirement does not mandate insurance coverage.

CERCLA's passage concurrent with the passage of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6987 (1982), may be one reason why an insurance requirement provision is absent. RCRA regulates the disposal of hazardous wastes by seeking safe disposal through implementation of a manifest system of controls. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 35 (1982). CERCLA regulates cleanups stemming from leakage at waste sites. *Id.* at 36. CERCLA's Post-Closure Tax and Liability Trust Fund also provides funds that the President can use to compensate claims resulting from a closed facility's hazardous waste releases. *Id.* at 35-36.

RCRA requires insurance coverage for owners and operators of hazardous waste treatment, storage, and disposal facilities. *See* 40 C.F.R. § 264.147 (1986). The owners and operators "must have and maintain liability coverage for sudden accidental occurrences in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million, inclusive of legal defense costs." *Id.* § 264.147(a). A party may fulfill this requirement by passing a financial test for self-insured liability coverage. *Id.* § 264.147(f).

19. Response costs are the costs of actions under authority of the President to remedy or minimize a release or threatened release of hazardous substances into the environment under CERCLA. 42 U.S.C. § 9601(24), (25). The President can also delegate his authority to the state or political subdivision thereof. 42 U.S.C. § 9604(d)(1).

20. 42 U.S.C. § 9607(a)(4)(A)-(C). *See generally* H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119 (legislative history of CERCLA).

CERCLA also permits the government to recover for damages to natural resources. CERCLA defines natural resources as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . any State or local government, or any foreign government." 42 U.S.C. § 9601(16). *See generally* Menefee, *Recovery for Natural Resource Damages Under Superfund: The Rule of the*

courts hold that waste site contributors[21] are strictly liable for response costs and other environmental damage caused by hazardous waste releases.[22]

CERCLA insurance litigation usually involves insurer liability under expired policies.[23] Most courts hold that insurers have a duty to de-

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Rebuttable Presumption, 12 Envtl. L. Rep. (Envtl. L. Inst.) 15,057-64 (1982) (describes government suits to recover compensation for natural resource injuries).

CERCLA does not allow recovery for third parties who are victims of hazardous waste exposure. Several articles discuss ways in which third parties can recover compensation for injuries sustained from hazardous waste releases. *See, e.g.*, Note, *Long-Term Liability for Hazardous Waste Induced Injury: Latent Harm Sufferers Beware*, 28 WASH. U.J. URB. & CONTEMP. L. 299, 319-43 (1985) (reviews common tort law approaches victims can use to obtain compensation and advocates adoption of a state statutory cause of action for hazardous waste pollution induced personal injuries); Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575, 614-15 (1983) (suggests using an environmental risk approach to compensate toxic waste victims-allowing victims to recover from a government fund administered similar to CERCLA's Superfund); Note, *Hazardous Waste: Third-Party Compensation for Contingencies Arising from the Inactive and Abandoned Hazardous Waste Disposal Sites*, 33 S.C.L. REV. 543, 573-75 (1982) (advocates national legislation that would provide hazardous waste victims with statutory causes of action against polluters); Comment, *In Search of Adequate Compensation for Toxic Waste Injuries, Who and How to Sue*, 12 PEPPERDINE L. REV. 609 (1985) (discusses traditional tort theory application to toxic waste injury claims).

21. "Contributors" refers to generators, transporters, or disposal facility owners and operators who had contact with chemicals deposited in an authorized or unauthorized hazardous waste site.

22. *See generally* F. ANDERSON, D. MANDELKER & A.D. TARLOCK, *supra* note 14, at 573-78 (discussion of CERCLA liability standard); Price, *Dividing the Costs of Hazardous Waste Site Clean Ups Under Superfund: Is Joint and Several Liability Appropriate?*, 52 UMKC L. REV. 339, 362-63 (1984) (courts should not apply strict joint and several liability under CERCLA); *compare* Tripp, *Liability Issues in Litigation under the Comprehensive Environmental Response, Compensation and Liability Act*, 52 UMKC L. REV. 364-82 (1984) (early CERCLA cases support using strict joint and several liability concepts in hazardous waste litigation); Hinds, *Liability Under Federal Law for Hazardous Waste Injuries*, 6 HARV. ENVTL. L. REV. 1, 27 (1982) (CERCLA seems to require joint and several liability but case law suggests courts will generally apportion damages).

Some jurisdictions apply CERCLA retroactively. *See generally* Blaymore, *Retroactive Application of Superfund: Can Old Dogs be Taught New Tricks?*, 12 B.C. ENVTL. AFF. L. REV. 1-50 (1985) (advocates retroactive application of CERCLA to past conduct that results in present hazardous releases). Insurers oppose retroactive liability under CERCLA because it burdens the insurance companies to the extent that they cannot service other markets. *Senate Hearings, supra* note 1, at 34. (testimony of T. Lawrence Jones, President of the American Insurance Association).

23. *E.g.*, CPS Chem. Co. v. Continental Ins. Co., 199 N.J. Super. 558, 489 A.2d 1265 (Law Div. 1984) (policyholder sued to compel insurer to defend him in 1982 CER-

fend the policyholder, and in some cases indemnify that policyholder, if the particular policy was in effect at the time of the alleged injury.[24] Section 112(c)(3) of CERCLA allows the government to sue insurers and other guarantors of a liable party directly to recover government expenditures paid out of CERCLA's Superfund.[25] No reported cases exist involving suits brought by the government against insurers. Instead, the government has sued former policyholders, who in turn demand that the insurer defend the suit.[26]

The government contends that strict joint and several liability promotes just and efficient cleanups.[27] Insurers criticize this scheme because it imposes liability on "innocent parties" such as generators who were unaware of their haulers' illegal dumping activities.[28] Insurers also claim that joint and several liability leads to inequitable results, such as holding a generator liable for the entire response cost after it contributed only slightly to a hazardous waste leak.[29] Additionally,

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CLA liability action under an insurance policy that was effective between March 2, 1974 and March 2, 1975), *rev'd on other grounds*, 203 N.J. Super. 15, 495 A.2d 886 (App. Div. 1985).

24. *Id.* at 1271.

25. 42 U.S.C. § 9612(c)(3). In these recovery actions, CERCLA limits the guarantor's defenses to those available to the owner or operator, 42 U.S.C. § 9607(b), and to the defense that the owner or operator's actions amounted to willful misconduct. 42 U.S.C. § 9608(c).

CERCLA limits the guarantor's liability to the monetary limits of the insurance policy or indemnity contract when the guarantor is acting in good faith. 42 U.S.C. § 9609(d). *See generally* Kunzman, *The Insurer As Surrogate Regulator of the Hazardous Waste Industry: Solution or Perversion?*, 20 FORUM 469, 473 (1985) (discussion of insurer's responsibilities under CERCLA).

26. *E.g.*, CPS Chem. Co. v. Continental Ins. Co., 199 N.J. Super. 558, 489 A.2d 1265 (Law Div. 1984), *rev'd*, 203 N.J. Super. 15, 495 A.2d 886 (App. Div. 1985). *See also* Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co., 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984) (insurer filed for declaratory judgment seeking determination that it had no duty to defend or indemnify policyholder in CERCLA liability suit filed against policyholder).

27. *Senate Hearings, supra* note 1, at 8 (testimony of Gene A. Lucero, Director of the Office of Waste Program Enforcement, EPA). Lucero said that removing strict joint and several liability "would require the government to establish what each party's relationship was to the site and its liability for it." *Id.* This process would be too slow and cumbersome, considering that some CERCLA cases could have over 300 individual parties involved. In addition, this process would discourage group settlements. *Id.*

28. *Id.* (testimony of T. Lawrence Jones, President of the American Insurance Association (AIA), reading statement of William O. Bailey, President of Aetna Life & Casualty and immediate past President of AIA).

29. *Id.* at 8. *See also* McLaughlin, *Superfund Suits and Tactics*, 24 FOR THE DEF. 2 (Apr. 1982) (current owner who had no control over prior disposal practices and who

insurers argue that the government's liability scheme unduly encourages courts to "misinterpret" expired policies to impose a duty on insurers to defend and indemnify under the old polices.[30] Imposing this duty extends insurers' potential liability far beyond that contemplated at the time the policy was issued.[31]

II. THE DEVELOPMENT OF INSURANCE POLICIES COVERING HAZARDOUS WASTE

Until the 1960s, pollution claims were insured under Comprehensive General Liability (CGL) policies.[32] Companies involved in hazardous waste disposal purchased CGL policies to protect themselves against "fortuitous" losses.[33] These policies typically limited coverage to losses resulting from a sudden and accidental pollution discharge.[34] Large companies purchased additional "occurrence"[35] coverage,[36] which provided protection against gradual releases in addition to sudden releases.[37] In 1966 the insurance industry reacted to the develop-

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may not have owned the land when the hazardous material was dumped can be held liable under CERCLA). *Id.*

30. *Senate Hearings, supra* note 1, at 33 (testimony of T. Lawrence Jones, President of AIA, reading statement of William O. Bailey, President of Aetna Life & Casualty and immediate past President of AIA). Mr. Bailey's statement criticized recent court decisions that extended insurance policy coverage to gradual leaks of hazardous waste when the policy's pollution exclusion clause allowed only coverage for "sudden and accidental" leaks. *Id.*

31. *Id.*

32. Hourihan, *Insurance Coverage for Environmental Damage Claims*, 15 FORUM 551, 552 (1980). The CGL policy is the instrument most often purchased to provide liability protection for commercial ventures. *See* Tyler & Wilcox, *Pollution Exclusion Clauses: Problems in Interpretation and Application Under the Comprehensive General Liability Policy*, 17 IDAHO L. REV. 497, 498 (1981).

33. Hourihan, *supra* note 32, at 552. Losses in pollution claims are usually due to property damage and bodily injury caused by pollutants. *Id.*

34. *Id.* CGL policies covered only damages and injuries resulting from sudden and accidental discharges of pollutants. A typical definition of "accident" used during the 1960s was "a distinctive event that takes place by some unexpected happening, at a date which can be fixed with reasonable certainty." 11 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 44:288 (R. Anderson rev. 2d ed. 1982).

35. "Occurrence" was defined in modified liability insurance forms as "an accident, including continuances or repeated exposure to conditions which result in bodily injury or property damage neither expected nor intended from the standpoint of the insured." R. KEETON, *supra* note 8, § 35.10(d).

36. Hourihan, *supra* note 32, at 552-53.

37. *Id.* The basic promise contained in most policies was:

[T]o pay on behalf of the insured all sums which the insured shall become legally

ment of "occurrence" coverage by making "occurrence" the benchmark for all CGL policies.[38] Insurer liability under an "occurrence" standard includes losses from gradual releases because liability is triggered if the accident is unforeseeable[39] and the policyholder did not intend the release.[40]

A deluge of pollution claims following the Torrey Canyon disaster and the Santa Barbara off-shore oil spill led the insurance industry to modify its pollution coverage.[41] Insurers began writing pollution exclusion clauses[42] into CGL policies.[43] The insurance industry contended that pollution exclusion clauses in CGL policies expressly exclude liability for losses caused by gradual pollutant releases.[44] Insurers supported this position through the development of Environmental Impairment Liability Insurance (EIL), which specifically

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obligated to pay as damages because of bodily injury or property damage to which this insurance applies caused by an occurrence, and arising out of any other operation, activities, or use of property, real or personal, except an occurrence incident to a non-business pursuit.

Tyler & Wilcox, *supra* note 32, at 498. *See generally* Soderstrom, *The Role of Insurance in Environmental Litigation*, 11 FORUM 762, 763 (1976) (discussion of what constitutes an occurrence that triggers insurer's duties under a CGL policy).

38. Hourihan, *supra* note 32, at 553. *See also* Tyler & Wilcox, *supra* note 32, at 499; R. KEETON, *supra* note 8, § 2.11(c) (discussing the 1966 revision made by automobile liability insurance firms).

39. Note, *Insurance and Its Role in the Struggle Between Protecting Pollution Victims and the Producers of Pollution*, 31 DRAKE L. REV. 913, 915 (1982) (arguing that policyholder would be denied coverage if a reasonable person expected that his actions would violate an environmental responsibility).

40. *Id.* at 915.

41. The Torrey Canyon was an oil tanker that went aground along the coast of England in 1967. The Santa Barbara oil spill occurred in 1969, when an oil platform exploded off California's coastline. *Id. See* Hourihan, *supra* note 32, at 553; Kunzman, *supra* note 25, at 475.

42. A typical pollution exclusion clause states:

This insurance does not apply: . . . (f) 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 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.*

Bucheye Union Ins. Co. v. Liberty Solvents & Chems. Co., 17 Ohio App. 3d 127, 132, 477 N.E.2d 1227, 1233 (1984) (emphasis added).

43. Hourihan, *supra* note 32, at 553.

44. *Senate Hearings, supra* note 1, at 33 (testimony of T. Lawrence Jones, President of AIA, reading statement of William O. Bailey, President of Aetna Life & Casualty and immediate past President of AIA).

protects against losses due to gradual pollutant releases.[45]

EIL policies compensate policyholders for damage resulting from unintentional, unexpected releases of hazardous wastes that occur during the policy term.[46] Coverage for a particular incident is determined on a "claims made" basis,[47] and payment is limited to pollution claims filed during the policy term.[48] In most cases, the occurrence provision in a CGL policy provides broader coverage than an EIL policy.[49] The courts hold that CGL occurrence provisions merely require the complaint to allege that the damaging event occurred during the policy term.[50] In most jurisdictions, liability under a standard CGL policy does not depend on when the insured discovers the injury or whether

45. Insurers developed EIL policies to cover the gap in CGL coverage due to the use of pollution exclusion clauses. The EIL policy includes a broad definition of environmental impairment that triggers coverage for:

> (a) The emission, discharge, dispersal, disposal, *seepage*, release or escape of any liquid, solid, gaseous or thermal irritant, contaminant or pollutant into or upon land, the atmosphere or any water course or body of water; (b) the generation of smell, noises, . . . changes in temperature or any other sensory phenomena; arising out of or in the course of the insured's operations, installations or premises, all as designated in the Declarations.

Note, *supra* note 39, at 923 (emphasis added).

46. The EIL usually contains an exclusion clause stating that insurers do not have to cover policyholders when any responsible person of the insured "was aware of noncompliance" with any rule or regulation relating to environmental impairment. *Id.* at 923-24.

47. Rosbe, *Transport of Hazardous Substances*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 10,255, 10,254 (insurers will pay claim under an EIL policy only if it is made while the insurance is in force). The claim can be a single claim or a series of claims from one or multiple claimants. Note, *supra* note 39, at 923.

48. EIL policies provide coverage for claims of "environmental impairment" as opposed to claims of "accident" or "occurance." *Id.*

49. *See infra* notes 66-70 and accompanying text.

50. *See, e.g.*, Mraz v. American Universal Ins. Co., 616 F. Supp. 1173 (D. Md. 1985). The court in *Mraz* held that the insurer had a duty to defend the policyholder in a CERCLA liability suit. *Id.* at 1182. The complaint alleged that damage occurred to the ground and water when leaking drums were first placed into the hazardous waste disposal site. *Id.* at 1176. The policyholder buried the drums in 1969, while the insurer's policy was in effect. The damage was not discovered until late 1981. *Id.* The United States filed a CERCLA lawsuit in 1983 against the generator-policyholder.

Compare Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co., No. 84-5034-CV-S-4 (W.D. Mo. June 25, 1985) (LEXIS, Genfed library, Dist file). The court in *Continental Insurance* held that the insurer did not have a duty to defend or indemnify the policyholder. The court stated that the government, in prior CERCLA lawsuits, did not allege that damages were incurred during the time of the policy's effective dates. In addition, the government did not seek compensation for bodily injury or property damage, but only for site cleanup costs that accrued almost seven years after the

the insured files the resulting claim after the policy period ends.[51]

Policyholders rarely file claims in CERCLA litigation for defense or indemnification under EIL policies. A long time period usually elapses between the release of hazardous waste and the discovery of the resulting damage.[52] The EIL policy usually expires before the policyholder discovers the injury and files the claim.[53] In addition, policyholders fear that insurers will terminate their policies. Policy cancellation could force the policyholder out of business because the Resource Conservation Recovery Act (RCRA)[54] requires EIL coverage.[55] As a result, most policyholders defend CERCLA claims under their CGL policies.[56]

III. RECENT CERCLA LITIGATION

CGL policies obligate insurers to defend and/or indemnify the policyholder in any suit alleging bodily injury or property damage that falls within the scope of the insurance agreement.[57] The standard CGL policy, requiring insurers to defend a claim even if the suit is groundless, false, or fraudulent,[58] shows that the duty to defend can be triggered even if it is unlikely the court will find a duty to indemnify.[59]

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policies terminated. *See infra* note 89 (discussion of what triggers the insurer's duty to indemnify).

51. *See supra* note 50.

52. *See* Rosbe, *supra* note 47, at 10,254. *See also supra* notes 45-48 and accompanying text.

53. *See* Rosbe, *supra* note 47, at 10,254.

54. 42 U.S.C. §§ 6901-6987 (1983).

55. *Id.* § 6924. This section refers to financial requirements for hazardous waste site owners and operators.

56. *See* Rosbe, *supra* note 47, at 10,254.

57. *See supra* note 37 (scope of typical CGL policy's granting powers).

58. In Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co., 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984), the court found that the insurer had a duty to defend the waste generator in a CERCLA liability suit. The complaint clearly alleged an occurrence that fell within the coverage of the insurance policy. *Id.* at 131-32, 477 N.E.2d at 1233. The court noted that CERCLA can impose strict liability on a generator regardless of its relative degree of fault or responsibility in creating the hazardous condition. *Id.* at 130, 477 N.E.2d at 1232.

59. *Id.* at 129, 477 N.E.2d at 1230. The generator would probably not be held liable for damages because the company he contracted with to receive the waste was careless in its treatment of the hazardous wastes on the property. *Id.* at 128, 477 N.E.2d at 1229. The disposal company stored drums and other containers on its site for long periods, exposed to the weather. Many of the barrels leaked because of corrosion and careless handling. *Id.* at 129, 477 N.E.2d at 1231. *See* Jackson Township Mun. Utils.

Most courts limit inquiry concerning the duty to defend to the allegations filed in the complaint against the policyholder.[60] Courts hold insurers responsible for defending policyholders when the allegations underlying the complaint fall within the risks the policy covers.[61] In *Mraz v. American Universal Insurance Co.*[62] the court expanded this standard. The court found a duty to defend when the alleged claim against the policyholder was "potentially within" the policy's cover-

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Auth. v. Hartford Accident & Indem. Co., 186 N.J. Super. 156, 451 A.2d 990 (Law Div. 1982). The *Jackson* court held that an insurer had a duty to defend an insured municipal utilities authority, which owned and operated a landfill, in a tort suit. The suit alleged that the Authority negligently selected and operated a landfill that resulted in seepage of pollutants into neighboring residents' ground water. *Id.* at 159, 451 A.2d at 991. The court held that an insurer's duty to defend is not excused because a claim cannot be maintained against the insured either in law or in fact. *Id.* at 160, 451 A.2d at 992. "The question of which carrier must indemnify for the occurrence or occurrences of pollution is a separate and perplexing question . . . [that] should await the outcome of the main [liability] suit." *Id.* at 165-66, 451 A.2d at 995.

60. *See, e.g., Buckeye*, 17 Ohio App. 3d at 129, 477 N.E.2d at 1230 (court must determine whether the complaint's allegations state a claim that is or may be within the policy's coverage); CPS Chem. Co. v. Continental Ins. Co., 199 N.J. Super. 558, 563-64, 489 A.2d 1265, 1268 (Law Div. 1984) (court must determine whether the complaint's allegations fall within the risks covered by the CGL policy).

Compare Riehl v. Travelers Ins. Co., 772 F.2d 19 (3d Cir. 1985). In *Riehl* the insured owner of a toxic waste dump site sought a declaration that certain insurance policies covered the expense of cleaning up his property. *Id.* at 20. The EPA notified the insured owner that it would commence cleanup and assess response costs against insured, but failed to file legal proceedings against the insured before the declaratory action. *Id.* at 21. The court found that genuine issues of material fact existed concerning whether an "occurrence" had taken place and whether the owner knew of illegal dumping on his property. The court had to decide these issues before it could determine if the policies covered the cleanup costs. *Id.* at 23-24. *Buckeye, CPS*, and *Riehl* all show that the drafter of a CERCLA liability complaint can control whether a defendant policyholder's insurance company will be brought into a lawsuit.

61. *See Buckeye*, 17 Ohio App. 3d at 131, 477 N.E.2d at 1232. The *Buckeye* court held that a CERCLA liability suit against the generator raised a claim that fell within an insurance policy because the generator can be held strictly liable under CERCLA for any damages resulting from his toxic wastes. In *CPS* the court held that the insurer had a duty to defend a generator-policyholder in a government liability suit. The complaint alleged that the generator was liable even if it turned the wastes over to a third party for disposal. 199 N.J. Super. at 564-65, 489 A.2d at 1268-69.

Compare Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984). The court held that a CGL policy did not provide coverage for pollution that the government alleged resulted from the manufacturer's irregular business activity because the resultant damage fell within language of one of the policy's exclusions. *Id.* at 32-33.

62. 616 F. Supp. 1173 (D. Md. 1985).

age.[63] The court added that allegations "clearly outside the scope of coverage" do not trigger the insurer's defense obligation.[64]

Courts must analyze the allegations raised in a complaint to determine if they trigger the duty to defend.[65] In *Mraz* the court first examined the allegations in the complaint,[66] and then studied the CGL policy to determine if the claim raised was "potentially within" the policy coverage.[67] The court focused its inquiry on whether the damage resulting from the policyholder's actions was either foreseeable or intentional.[68] The court found that although the policyholder intended to dispose of the hazardous material at the waste site, it did not intend or expect subsequent leakage.[69] Consequently, the release was an "occurrence" within the meaning of the CGL.[70]

After a court determines that a particular release is an "occurrence," it must decide if the resulting damage is within the policy's pollution exclusion provision.[71] Pollution exclusion clauses commonly preclude

63. *Id.* at 1177.

64. *Id.*

65. *See supra* notes 60-61 and accompanying text.

66. *Id.* at 1175. The insured faced liability for cleanup of an alleged hazardous waste dump site in Maryland under CERCLA and state law. *Id.* The allegations in the complaint were:

> (1) that hazardous substances had in the past been released and threatened to continue to be released from the [hazardous waste landfill] into the air, water, and soil, before the site was cleaned up, (2) that those releases resulted in strong odors in the air and discolored run-off in a nearby creek, (3) that they imposed a possible health threat to residents, and (4) that [Mraz] was at least partially responsible.

Id. at 1177.

67. *Id.* The 1969 policy provided for general liability insurance coverage, including "personal injury or property damage by an 'occurance' within the policy period." *Id.* The policy defined "occurrence" as " 'an accident, including injurious exposure to condition, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.' Property damage was defined as 'injury to or destruction of tangible property.' " *Id.*

68. *Id.* at 1178. The court adopted the *Buckeye* court's interpretation of "unexpected or unintended" as referring to the *leakage*, not to the actual dumping. *Id. But see* American States Ins. Co. v. Maryland Casualty Co., 587 F. Supp. 1549 (E.D. Mich. 1984). The *American States* court held that the release of toxic chemicals from a dump site was not an "occurrence" within the insured's policy because the waste dumping was part of the insured's usual business. *Id.* at 1152-53.

69. 616 F. Supp. at 1178.

70. *Id.* at 1178-79. The court found the resulting leakage unintended and unexpected because the waste was legally disposed of in a clap pit. The pit was expected to form a natural barrier against leakage. *Id.* at 1170.

71. The court in *Mraz* held that the leakage of hazardous wastes, causing contami-

coverage for property damage and bodily injury resulting from disposal, dispersion, or release of hazardous wastes unless the release was sudden and accidental.[72] Courts in CERCLA cases generally hold that gradual releases are within the sudden and accidental exception.[73]

In *CPS Chemical Co. v. Continental Insurance Co.*[74] the court explicitly rejected an insurer's definition of "sudden and accidental" that required a dramatic catastrophe "limited in duration and immediate in its consequences."[75] The court adopted a definition of "sudden" that required a "happening without previous notice or on very brief notice; unforeseen; unexpected; unprepared for."[76] When interpreting "sudden and accidental" provisions, courts generally distinguish between

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nation of soil and water, was property damage within the policy's coverage. *Id.* at 1179. *See also* Port of Portland v. Water Quality Ins. Syndicate, 549 F. Supp. 233, 235 (D. Or. 1982) (water contamination from an oil slick released from sunken dredging vessel held to be property damage for insurance policy purposes). *Compare* Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co., No. 84-5034-CV-S-4 (W.D. Mo. June 25, 1985) (LEXIS, Genfed library, Dist file) (court held that the filing of the CERCLA suit constituted property damage suffered by the insured for insurance policy purposes, not the alleged property damage resulting from a release of hazardous wastes).

72. 616 F. Supp. at 1178. *See also Buckeye*, 17 Ohio App. 3d at 130, 477 N.E.2d at 1232 (generator-policyholder's potential liability under CERCLA establishes insurer's duty to defend absent clear and unambiguous exclusion of coverage). See *supra* note 42 and accompanying text for a common pollution exclusion clause used in CGL policies.

73. This broad interpretation probably developed because some courts found the terms "sudden and accidental" ambiguous. The court in Lansco, Inc. v. Department of Envtl. Protection, 138 N.J. Super. 275, 350 A.2d 520 (Ch. Div. 1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977), found that an occurrence, which resulted from vandals' release of hazardous substances from the insured's storage tank, was sudden and accidental because the *event* was unexpected. *Id.* at 278, 350 A.2d at 523.

Other courts broadened the insured's coverage by holding an occurrence to be sudden and accidental when the *result or injury* was unexpected or unintended. In *Buckeye*, 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984), the court concluded that the definition of sudden and accidental was a restatement of the definition of occurrence. The court held that the policy would cover claims when the injury was "neither expected nor intended." *Id.* at 133, 477 N.E.2d at 1234. The court then determined that the CGL policy covered claims arising from a gradual release of hazardous wastes leaking from a landfill. *Id.* at 134, 477 N.E.2d at 1235. *Accord* Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co., 186 N.J. Super. 156, 162-64, 451 A.2d 990, 993-94 (Law Div. 1982) (court held city's CGL policy covered a suit alleging that the city negligently polluted and contaminated ground water with gradual hazardous waste leakage from the municipal landfill).

74. 199 N.J. Super. 558, 489 A.2d 1265 (Law Div. 1984), *rev'd on other grounds*, 203 N.J. Super. 15, 495 A.2d 886 (App. Div. 1985).

75. *Id.* at 569, 489 A.2d at 1270-71.

76. *Id.*, 489 A.2d at 1270 (quoting *Lansco*, 138 N.J. Super. at 282, 350 A.2d at 524).

policyholders who intend a release by conscious, illegal dumping activities[77] and those whose hazardous waste release into the environment is unintentional.[78]

Insurers include other policy exclusions such as "completed operations hazard"[79] and "products hazard"[80] to restrict liability for pollution claims.[81] Cases determining an insurer's duty to defend CERCLA

77. *See* Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30, 33 (1st Cir. 1984) (court held that hazardous waste release was not "sudden and accidental" because the generator-policyholder emptied chemical storage barrels on its property as a regular business activity).

In American States Ins. Co. v. Maryland Cas. Co., 587 F. Supp. 1549 (E.D. Mich. 1984), the court held that insurers did not have a duty to defend or indemnify policyholders in a tort suit. *Id.* at 1553. The court found that the tort complaint alleged that the general policyholder intentionally and continuously dumped hazardous wastes, contaminating neighboring water supplies. *Id.* at 1551. Thus, the court concluded that the waste generator did not state a claim within the policy coverage. *Id.* at 1553-54. *Accord* Riehl v. Travelers Ins. Co., 772 F.2d 19 (3d Cir. 1985) (court held a CGL policy excluded coverage of property owners who had knowledge of the toxic waste dumping).

78. *See* Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co., 17 Ohio App. 3d 127, 134, 477 N.E.2d 1227, 1235 (1984) (court held the illegal disposal of hazardous wastes was sudden and accidental from the standpoint of the insured generator because the CERCLA suit did not allege that the generators knew of or expected the illegal dumping). *See also* Allstate Ins. Co. v. Klock Oil Co., 73 A.D.2d 486, 426 N.Y.S.2d 603 (1980). The court held that the insurer had a duty to defend and indemnify an insured landowner in a tort suit. *Id.* at 489, 426 N.Y.S.2d at 605. The complaint alleged that the landowner negligently installed and maintained gasoline storage tanks that leaked gasoline and damaged neighboring property. *Id.* at 487, 426 N.Y.S.2d at 604. The court found the negligence allegation within the "sudden and accidental" exception to the pollution exclusion clause: "If there was no intent to cause harm then any injury resulting from ordinary negligence is considered to be accidental." *Id.* at 488, 426 N.Y.S.2d at 605.

79. An insurance policy's "completed operations hazard" clause usually provides:
> 'completed operation hazard' includes bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. 'Operations' include materials, parts or equipment furnished in connection therewith.

Buckeye, 17 Ohio App. 3d at 134-35, 477 N.E.2d at 1236.

80. A typical insurance policy's "products hazard" exclusion provides:
> 'products hazard' includes bodily injury and property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others.

Id. at 135, 477 N.E.2d at 1236.

81. *See generally* Hourihan, *supra* note 32, at 562-63 (discussing products hazard and completed operations coverage).

claims hold that these clauses do not preclude liability. Courts interpret the "completed operations hazard" provision to exclude coverage for accidents caused by defective workmanship that occur after the policyholder completes the required construction or service contract work.[82] Courts, however, have failed to apply this exclusion to cases involving transporters' or disposers' activities.[83] In CERCLA litigation courts limit application of the "products hazard" exclusion by narrowly defining "products."[84] The court's reasoning in *CPS Chemical* is typical.[85] The court in that case held that industrial waste is not a "product" because it is "not intended for consumption, sale, or use by others."[86]

After the court determines that an "occurrence" is not within a pollution exclusion clause, it must decide if the occurrence is within the policy period. If so, the insurer has a duty to defend.[87] Courts that limit their inquiry to the allegations in the complaint require that the allegations specify that damage was sustained during the policy period.[88] Litigants may experience difficulty determining when the particular damage occurred, however, if the injury was not discovered until long after the initial exposure to toxic waste.[89]

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82. *See id.* The *Buckeye* court held that this exclusion does not apply to an insured generator when the allegations in a CERCLA liability suit do not involve construction or service operations of the generator. *Id.* The court reached this conclusion even though the CERCLA suit involved the contracted disposal company's illegal dumping of the generator's hazardous wastes. *Id.* at 135-36, 477 N.E.2d at 1237. *See also* CPS Chem. Co. v. Continental Ins. Co., 199 N.J. Super, 558, 567, 489 A.2d 1265, 1270 (Law Div. 1984) (court held that because the insured generator hired a disposal company to remove hazardous waste, the removal did not involve construction or service operations of generator).

83. Insurers usually assert that the "completed operations hazard" provision excludes coverage for transporters' and disposers' activities because they are performing a "service." *CPS*, 199 N.J. Super. at 567, 489 A.2d at 1270.

84. *See, e.g., id* at 568, 489 A.2d at 1270. Most courts define "products" as "goods and services that the insured deals in as his stock-in-trade." *Id. Compare Buckeye*, 17 Ohio App. 3d at 135, 477 N.E.2d at 1236 ("there must be a defective condition in the product itself which proximately causes the damage before the product hazard exclusion will preclude coverage.").

85. *See supra* note 84.

86. 199 N.J. Super. at 568, 489 A.2d at 1270.

87. *See supra* notes 49-51 and accompanying text.

88. *See supra* notes 60-64 and accompanying text.

89. This determination is critical in deciding whether an insurer has a duty to indemnify a policyholder because the court must make factual determinations concerning when this damage occurred. No court has specifically determined if an insurer has a duty to indemnify a CGL policyholder for liability arising from a CERCLA suit. The

Courts in CERCLA insurance coverage litigation often analogize to asbestos and DES case law to determine what factors trigger CGL coverage.[90] In asbestos and DES cases, courts rely on three different theories to determine policy coverage.[91] The "exposure theory" states that all insurers providing coverage from the injured party's initial exposure to the manifestation of the damage are jointly and severally bound to defend and indemnify the insured.[92] The "manifestation theory" states that liability extends only to insurance companies providing coverage when the injuries either manifest themselves, or become reasonably ascertainable by medical diagnosis.[93] The "injury in fact" theory re-

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courts await CERCLA liability determination before making factual determinations. *See, e.g.,* Mraz v. American Universal Ins. Co., 616 F. Supp. 1173, 1182 (D. Md. 1985) ("[w]hether there is indeed liability for coverage must await the outcome of the [CERCLA] action").

90. *See* Joest, *Will Insurance Companies Clean the Augean Stables?—Insurance Coverage for the Landfill Operator*, 50 INS. COUNS. J. 258, 261 (1983) (applies common law developed in asbestos litigation to landfill litigation); Note, *The Applicability of General Liability Insurance to Hazardous Waste Disposal*, 57 S. CAL. L. REV. 745 (1984) (good review of asbestos case law used in determining the time of "occurrence" for hazardous waste disposal cases).

91. *See generally* Stroch, *Coming to Terms with the Compensation Conundrum*, 71 A.B.A. J. 68 (Sept. 1985) (finds traditional tort law approach ineffective to compensate hazardous waste victims); Vagley & Blanton, *Aggregation of Claims Liability for Certain Illnesses with Long Latency Period Before Manifestation*, 16 FORUM 636 (1981) (discusses various theories of "occurrence" used in asbestos and DES litigation); Note, *Adjudicating Asbestos Insurance Liability: Alternatives to Contract Analysis*, 97 HARV. L. REV. 739, 758 (1984) (favors continuous injury exposure theory to determine insurer's liability for resulting illnesses).

92. *See* Ducre v. Executive Officers of Halter Marine, Inc., 752 F.2d 976, 991-94 (5th Cir. 1985) (court held that all insurers providing coverage at the time of initial silica inhalation liable for all resultant damages); Owens-Illinois, Inc. v. Aetna Casualty & Sur. Co., 597 F. Supp. 1515, 1524 (D.D.C. 1984) (insurer had a duty to indemnify the manufacturer for asbestos-related claims if the policy was in effect at any time between the claimant's initial exposure to asbestos and manifestation of the injury); Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034, 1043-46 (D.C. Cir. 1981) (insurance coverage triggered by exposure to asbestos dust and by the subsequent development of disease), *cert. denied*, 455 U.S. 1007 (1982); Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1218-19 (6th cir. 1980) (injury from asbestos first occurs after initial inhalation of asbestos fibers), *cert. denied*, 454 U.S. 1109 (1981).

93. Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56, 62 (3d Cir. 1982) (policy coverage triggered in employment discrimination suit when the injurious *effects* of the occurrence took place); Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 523 F. Supp. 110, 115-18 (D. Mass. 1981), *modified*, 682 F.2d 12, 19-20 (1st Cir. 1982) (asbestos-related lung damage does not cause "injury" until it accumulates to become clinically evident or manifest), *cert. denied*, 460 U.S. 1028 (1983); United States Fidelity & Guar. Co. v. American Ins. Co., 169 Ind. App. 1, 345 N.E.2d 267 (1976) (insurer, during whose period of coverage damage was first discovered, held liable for all loss or

quires the policyholder to prove that an injury in fact occurred during the policy period in order to receive coverage.[94]

Few court decisions determine which coverage theory applies in CERCLA cases. In *Continental Insurance Co. v. Northeastern Pharmaceutical and Chemical Co.*[95] the court stated in dictum that it favored applying the injury in fact theory in CERCLA cases.[96] The court in *Township of Jackson v. American Home Assurance Co.*,[97] however, said that the exposure theory is more suitable for ground water contamination than the manifestation theory.[98] The court held that a subclinical injury during the policy period is necessary to trigger coverage.[99]

Asbestos exposure and hazardous waste exposure are similar in that an occurrence can cause continuous, degenerative damage, and the initial damage takes place substantially before manifestation of the ultimate injury.[100] While asbestos litigation focuses on bodily injury, courts can apply the basic litigation principles to property damage in CERCLA cases.[101] The similarities between asbestos and CERCLA litigation arguably support the application of the exposure theory in CERCLA cases to determine the scope of an insurer's liability.[102]

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damage to structure occurring thereafter even though the loss or damage extended beyond insurer's period of coverage).

94. *See infra* notes 95-97 and accompanying text.

95. No. 84-5034-CV-S-4 (W.D. Mo. June 25, 1985) (LEXIS, Genfed library, Dist file).

96. *Id.* Litigation concerning the insurer's duty to defend and indemnify resulted in CERCLA liability suit. The court stated that the insured could not have an "occurrence" for insurance policy purposes until the government filed a CERCLA liability suit seeking recovery for cleanup costs. *Id.* The court, however, held that the issue was not ripe for adjudication until more specific findings on bodily injury and property damage were made. *Id.*

97. No. L-29236-80 (N.J. Super. Ct. Aug. 31, 1984).

98. *Id.*

99. *Id.*

100. Stroch, *supra* note 91, at 71-72.

101. Joest, *supra* note 90, at 261.

102. Courts deciding CERCLA insurance suits usually apply an exposure theory in determining if leakage from a hazardous waste site is an occurrence within the policy. The courts have not addressed the question of whether an injury in fact has to be proven within the policy period in order to trigger an insurer's duty to indemnify the policyholder. *See, e.g., Mraz*, 616 F. Supp. at 1179 (sufficient that the damage alleged occurred during the policy period even though actual damage was not discovered until approximately 10 years after the dumping); *CPS*, 199 N.J. Super. at 566, 589 A.2d at 1269 ("[t]ime of discovery of the accident does not determine when it took place");

The exposure theory approaches CERCLA problems from the policyholder's perspective to determine whether the policyholder reasonably expected its CGL to cover the particular "occurrence."[103] The CGL exposure theory provides the policyholder the most comprehensive coverage for damages,[104] and enlarges the "pool" from which the government may obtain reimbursement for response costs and other damages available under CERCLA.[105] Enlarging the recovery pool under the exposure theory also furthers an important public policy of providing a fast and efficient cleanup method for abandoned hazardous waste sites that are damaging or threatening to damage the environment.

The insurance industry recently proposed an amendment to CERCLA that would limit generators' and transporters' liability for hazardous waste leakeage from "approved" sites.[106] Under the proposal an insurer's liability to a hazardous waste generator or transporter ends when the waste is delivered to an approved disposal facility.[107] The disposal facility owners are liable for any leakage occurring at the site.[108]

The insurance industry claims that the proposed amendment encourages private insurers to provide greater coverage for chemical waste generators and transporters.[109] The proposal advocates insuring disposal site owners and operators under a joint government-private insurance program.[110] This joint program would be similar to current insurance policies covering floods, nuclear accidents, and damages due to rioting.[111]

Buckeye, 17 Ohio App. 3d at 132, 477 N.E.2d at 1233 (releases and threatened releases of hazardous waste materials are "occurrences" within the policy provisions).

103. *See supra* note 92.

104. The exposure theory holds *all* insurance carriers at risk to defend and indemnify the insured from the injured party's initial exposure to the manifestation of the damage. Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034, 1042 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

105. *See id.* at 1045-46. The *Keene* court found that if it used the manifestation theory, the insured would not be covered for most asbestos-related claims because insurance companies had ceased issuing policies that adequately covered asbestos-related diseases. *Id.*

106. *Senate Hearings, supra* note 1, at 34-35.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id. See also* M. WOODROOF, J. FONSECA & A. SQUILLANTE, AUTOMOBILE

Congress should reject the insurers' proposed CERCLA amendment. The proposal effectively renders the American public, rather than hazardous waste generators, liable for most damage resulting from hazardous waste disposal. Furthermore, absolving hazardous waste generators from liability for waste disposal inevitably entails government subsidization of the hazardous chemical industry.

Subsidizing the chemical industry, in turn, distorts the economic market's reaction to the social costs imposed by hazardous wastes. If waste generators are held responsible for disposal of their products, they will charge a price that includes disposal costs. This forces the hazardous chemical purchaser to balance a chemical's advantages against its true cost. If the costs outweigh the chemical's benefits, the purchaser will buy a different product. Consequently, chemical producers will only manufacture chemicals whose selling prices, including the cost of insuring against future CERCLA suits, are acceptable in the marketplace. Thus, rejecting the proposed CERCLA amendments will indirectly limit hazardous chemical production to chemicals that can be manufactured efficiently and disposed of safely.

In enacting CERCLA, Congress made a critical public policy decision. Congress explicitly enacted CERCLA to promote fast and efficient cleanup of hazardous waste sites that pose an imminent threat to our natural resources. The continued application of the strict joint and several liability standard to hazardous waste generators, transporters, and disposers promotes this overriding public policy. This liability scheme also properly shifts the fiscal burden for safe waste disposal from the general public to the party responsible for generating the hazardous waste. In doing so, CERCLA—and the strict joint and several liability standard—provides for equitable distribution of the cost of hazardous waste disposal.

Joan Wart Gillespie

INSURANCE AND NO-FAULT LAW § 1:66 (1974) (discussion of auto insurance problems for high risk individuals and the "pool" solution).