

Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation

GEORGE PENDYGRAFT*

GEORGE M. PLEWS**

JAMES W. CLARK***

PETER C. WRIGHT****

I. INTRODUCTION

On October 17, 1986, the Superfund Amendments and Reauthorization Act of 1986 ("SARA") was signed into law as the first major revision of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").¹ Among other things, CERCLA established a fund (the "Superfund")² to be used for the cleanup of facilities³ from which there have been a release⁴ or a

*Partner, Baker & Daniels, Indianapolis. A.B. (summa cum laude) Franklin College (1968); Ph.D. University of Kentucky (1972); J.D. Columbia University (1975).

**Partner, Baker & Daniels, Indianapolis. A.B. (magna cum laude) Princeton University (1974); B.A. (with honours) Worcester College, Oxford University (1976); M.A. (1981); J.D. (cum laude) Harvard University (1979).

***Associate, Baker & Daniels, Indianapolis. B.A. (magna cum laude) Indiana University (1982); J.D. (cum laude) University of Michigan Law School (1985).

****Associate, Baker & Daniels, Indianapolis. A.B. (summa cum laude) Wabash College (1981); J.D. (summa cum laude) Indiana University (1986).

The authors gratefully acknowledge the contributions of Steven L. Householder, General Counsel for Inland Container Corporation.

The authors represent insureds seeking insurance coverage.

¹CERCLA, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C.A. §§ 9601-0675 (Supp. 1987)).

²42 U.S.C.A. § 9611 (Supp. 1987).

³42 U.S.C.A. § 9601(9) (Supp. 1987):

(9) The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, 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.

⁴42 U.S.C.A. § 9601(22) (Supp. 1987):

(22) The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or

threatened release of a hazardous substance⁵ into the environment.⁶ In addition, CERCLA authorized suits by the United States or by any other person to recover cleanup costs⁷ from responsible par-

contaminant), but excludes (A) any release which results in exposure to persons solely within a work place, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act [42 U.S.C.A. § 2210], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer.

⁵42 U.S.C.A. § 9601(14) (Supp. 1987):

(14) The term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901, et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

⁶See 42 U.S.C.A. § 9601(8) (Supp. 1987):

(8) The term "environment" means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.], and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

⁷The costs and damages recoverable under 42 U.S.C.A. § 9607(a)(4) are:

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release;

ties.⁸ CERCLA has already had a great impact in the State of Indiana as evidenced by the large number of sites that have been subject to CERCLA enforcement actions or that have or are involved in CERCLA settlement negotiations.⁹ These sites are but a small fraction of the potential CERCLA sites as evidenced by the number of sites located within Indiana that are listed on the National Priorities List ("NPL").¹⁰

SARA does a great deal more than simply reauthorize CERCLA. For one thing, the new Superfund will contain \$8.5 billion compared with \$1.6 billion that Congress originally authorized for the Superfund.¹¹ SARA will also have the effect of making cleanups more expensive to undertake and possibly very much more expensive due to a variety of factors: standards contained in other federal environmental laws may operate as cleanup standards;¹² different and more stringent state stan-

and (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title. 42 U.S.C.A. § 9607(a)(4). These amounts will be referred to hereafter as "environmental damages."

⁸42 U.S.C.A. § 9607(a) (1983); see *infra* note 9. Regarding private rights of action under CERCLA, see Belthoff, *Private Cost Recovery Actions Under Section 107 of CERCLA*, 11 COLUM. J. ENVTL. L. 141 (1986); Cross, *The Dimensions of a Private Right of Action Under Superfund*, 19 CONN. L. REV. 193 (1987); Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 ECOLOGY L.Q. 181 (1986); Mauhs, *Judicial Limitations on the CERCLA Private Right of Action*, 15 ENVTL. L. 471 (1985); Seng, *The Quasi-Contractual Nature of Cost-Recovery Actions Under CERCLA*, 5 VA. J. NAT. RESOURCES L. 85 (1985); Note, *Private Right of Action to Recover Cleanup Costs from Superfund*, 49 ALB. L. REV. 616 (1985); Note, *Private Cost Recovery Actions Under CERCLA*, 69 MINN. L. REV. 1135 (1985); Note, *The Case Against Waste in Private Liability Actions Under CERCLA*, 60 N.Y.U.L. REV. 888 (1985); Comment, *Private Response-Cost Recovery Actions Under CERCLA*, 34 U. KAN. L. REV. 109 (1985).

⁹The Indiana Department of Environmental Management lists the following Superfund sites in Indiana (December 1986): Allen County—Fort Wayne Reduction; Bartholomew County—Tri State Plating, Old City Dump #1; Boone County—Environ-Chem (ECC), Northside Sanitary Landfill, Wedzeb Enterprises; Elkhart County—Main Street Well Field; Grant County—Marion Bragg Dump; Hamilton County—Firestone; Hancock County—Norman Poer Farm; Jackson County—Seymour Recycling Corp.; Knox County—Prestolite; Lake County—Lake Sandy Jo, (Martell) Ninth Avenue Dump, Midco I, Midco II, American Chemical Services; LaPorte County—Fisher Calo, Waste, Inc. (Dis-Pos-Al); Marion County—Reilly Tar and Chemical Corporation, Southside Landfill; Monroe County—Bennett Stone Quarry, Lemon Lane Landfill, Neal's Landfill; Owen County—Neal's Dump; St. Joseph County—Douglass Rd. Landfill; Vigo County—International Minerals and Chemical; Whitley County—Wayne Waste Oil.

¹⁰The National Priorities List, at 40 C.F.R. § 300 Appendix B (1986).

¹¹Atkeson, Goldberg, Ellrad, III, & Connors, *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (SARA)* in SUPERFUND DESKBOOK 3 n. 24 (citing Conference Committee Report at 318, 320-21) ENVTL. L. INST. 1986) [hereinafter SUPERFUND DESKBOOK].

¹²42 U.S.C.A. § 9621(d) (Supp. 1987).

dards may apply;¹³ certain health assessments will be needed;¹⁴ and most importantly, permanent cleanup solutions will be emphasized.¹⁵ Even before the passage of SARA, the Environmental Protection Agency ("EPA") had a very strong hand in litigation against the potentially responsible parties and under SARA that hand has been strengthened considerably, by both institutionalizing some of EPA's enforcement and settlement policies into the statute and by giving the agency additional powers and protections.¹⁶ It is also worth noting that the State of Indiana in the last legislative term adopted legislation that has been dubbed the state's "mini-Superfund."¹⁷

In light of the changes made to CERCLA by SARA, this article will explore two areas of the law that are important to practitioners in Indiana and their clients who may be involved in CERCLA litigation. The first section of this article will address the parties responsible for CERCLA response costs. The second section of the article will address the issues that arise between liability insurers and insureds as the insureds seek insurance coverage for CERCLA response costs.

II. CERCLA LIABILITY ISSUES

The four classes of responsible parties (or "covered persons") from whom cleanup costs may be recovered are defined by section 107(a) of CERCLA.

- (1) The owner or operator of a vessel¹⁸ or a facility;
- (2) Any person who, at the time of disposal of any hazardous substance, owned or operated any facility at which such hazardous substances were disposed of;
- (3) Any person who arranged for the disposal of hazardous substances at any vessel or facility owned by another person and containing such hazardous substances; and
- (4) Any person who accepted any hazardous substances for transport to sites selected by such person.¹⁹

¹³42 U.S.C.A. § 9621(e) and (f) (Supp. 1987).

¹⁴42 U.S.C.A. § 9604(i)(6) (1983).

¹⁵42 U.S.C.A. § 9621(b) (Supp. 1987).

¹⁶SUPERFUND DESKBOOK, *supra* note 11, at 3.

¹⁷IND. CODE §§ 13-7-8.7-1 to -6 (Supp. 1987).

¹⁸*See* 42 U.S.C.A. § 9601(28) (1983): (28) "The term 'vessel' means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

¹⁹42 U.S.C.A. § 9607(a) (1983) ("Section 107(a)");

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —(1) the owner and operator

Each covered person is jointly and severally liable²⁰ for all environmental damages at a site, unless he can prove by a preponderance of

of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for — (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title. The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term “comparable maturity” shall be determined with reference to the date on which interest accruing under this subsection commences.

²⁰A covered person is jointly and severally liable for all environmental damages unless he can “prove that the environmental injury is divisible and there is a reasonable basis for apportioning the harm.” *United States v. Miami Drum Services, Inc.*, No. 85-0038, (S.D. Fla. Dec. 12, 1986); *see also United States v. Bliss*, No. 84-200(c)(1), slip op. (E.D. Mo. Aug. 7, 1987); *United States v. Dickerson*, 640 F. Supp. 448 (D. Md. 1986); *State of Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986); *State of Colorado v. Asarco, Inc.*, 608 F. Supp. 1484 (D.C. Colo. 1985); *United States v. Shell Oil Co.*, 605 F. Supp. 1064 (D.C. Colo. 1985); *United States v. Conservation Chem. Co.*, 589 F. Supp. 59 (W.D. Mo. 1984); *United States v. Northeastern Pharmaceutical and Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984); *United States v. A&F Materials Co., Inc.*, 578 F. Supp. 1249 (S.D. Ill. 1984); *United States v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1983); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983); *see generally Brennan, Joint and Several Liability for Generators Under Superfund: A Federal Formula for Cost Recovery*, 5 UCLA. J. ENVTL. L. & POL’Y 101 (1986); Price, *Dividing the Costs of Hazardous Waste Site Cleanups Under Superfund: Is Joint and Several Liability Appropriate?*, 52 U.M.K.C.L. REV. 339 (1984); Note, *The Comprehensive Environmental Response, Compensation and Liability Act of 1980: Is Joint and Several Liability the Answer to Superfund?*, 18 NEW ENG. L. REV. 109 (1982-83); Note, *Environmental Law — Joint*

the evidence that the environmental damages were caused solely by (1) an act of God; (2) an act of war; or (3) an act or omission of a third party.²¹ Courts have unanimously concluded that the standard

and Several Liability Under CERCLA, 57 *TEMPLE L.Q.* 885 (1984); Note, *Joint and Several Liability Under Superfund*, 13 *LOY. U. CHI. L.J.* 489 (1982); Note, *Joint and Several Liability for Hazardous Waste Releases Under Superfund*, 68 *VA. L. REV.* 1157 (1982); Casenote, *Joint and Several Liability Under Superfund: The Plight of the Small Volume Hazardous Waste Contributor*, 31 *WAYNE L. REV.* 1057 (1985).

²¹42 U.S.C.A. § 9607(b) (1983). The full text of § 9607(b) reads as follows:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by —(1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or (4) any combination of the foregoing paragraphs.

It is currently unclear whether the *only* defenses available to a covered person are those set forth in section 107(b)(3). See 42 U.S.C.A. § 9607(a) (Supp. 1987) (imposing liability "subject only to the defenses set forth in subsection (b) of this section"); see also *United States v. Tyson*, 17 *Envtl. L. Rep. (Envtl. L. Inst.)* 20527, 20531 (E.D. Pa. 1986) ("Congress intended that responsible parties within the coverage of section 107(a) should be strictly liable subject only to the affirmative defenses relating to causation which are set forth in section 107(b)."); *United States v. Ward*, 618 *F. Supp.* 884, 897 (D.C.N.C. 1985) (strict liability under section 107(a) "is subject only to the defenses listed in section 107(b)"); *United States v. Argent Corp.*, 14 *Envtl. L. Rep. (Envtl. L. Inst.)* 20616 (D.N.M. 1984). *But see Mardan Corp. v. C.G.C. Music, Ltd.*, 600 *F. Supp.* 1049, 1056 n. 9 (D. Ariz. 1984):

Because subsection (a) of Section 190 states that liability is "subject only to the defenses set forth in subsection (b) of this section," Mardan contends that the defenses listed in subsection (b) are exclusive. Mardan's argument does not withstand close analysis. As defendants have suggested, Mardan's interpretation would result in defendants being held liable even if they had already paid Mardan's Section 107(a) claim in a prior lawsuit since *res judicata*, payment, and accord and satisfaction are not listed as defenses in subsection (b). Similarly under Mardan's interpretation of the statute, defendants would not be able to raise such defenses as statute of limitations, waiver, laches, etc. For the foregoing reasons, the defenses listed in subsection (b) cannot be considered as exclusive.

See also *United States v. Conservation Chem. Co.*, 619 *F. Supp.* 162, 204 (W.D. Mo. 1985) ("Equitable defenses are proper under CERCLA in determining liability, the nature of the remedy and the amount of damage").

of liability imposed under section 107(a) is strict liability.²²

Although SARA did not directly amend section 107(a), its provisions have nevertheless had a major impact on the coverage of section 107(a). This section will address three areas in which SARA and judicial interpretation of CERCLA have had a major impact on liability under Section 107(a):²³ (1) the liability of owners of contaminated property; (2) the individual liability of corporate officers for acts by or on behalf of a corporation; and (3) the liability of creditors of covered persons. Finally, this section will apply the concepts developed in these areas to a consideration of potential liability under section 107(a) arising out of a trust's ownership of contaminated property.

A. Landowner Liability

Among the covered persons under section 107(a) are the current and former owners of contaminated property.²⁴ Former owners may be held

²²See, e.g., *J.V. Peters & Co. v. Administrator*, 767 F.2d 263 (6th Cir. 1985); *State of New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States v. Miami Drum Services, Inc.*, No. 85-0038, slip op. (S.D. Fla. Dec. 12, 1986); *United States v. Dickerson*, 640 F. Supp. 448 (D. Md. 1986); *In re T.P. Long Chemical, Inc.*, 45 B.R. 278 (Bankr. N.D. Ohio 1985); *United States v. Conservation Chem. Co.*, 589 F. Supp. 59 (W.D. Mo. 1984); *United States v. Northeastern Pharmaceutical and Chem. Corp.*, 579 F. Supp. 823 (W.D. Mo. 1984); *United States v. Price*, 577 F. Supp. 1103 (D.N.J. 1983); *United States v. Ottati & Goss, Inc.*, 16 *Envtl. L. Rep. (Envtl. L. Inst.)* 20763 (D.N.H. 1985); *United States v. Ward*, 16 *Envtl. L. Rep. (Envtl. L. Inst.)* 20127 (E.D.N.C. 1985); *United States v. Argent Corp.*, 14 *Envtl. L. Rep. (Envtl. L. Inst.)* 20616 (D.N.M. 1984); *United States v. South Carolina Recycling and Disposal, Inc.*, 14 *Envtl. L. Rep. (Envtl. L. Inst.)* 20272 (D.S.C. 1984); *United States v. Tyson*, 17 *Envtl. L. Rep.* 20527 (E.D. Pa. 1986).

²³Regarding liability under section 107(a), see generally Giblin, & Kelly, *Judicial Development of Standards of Liability in Governmental Enforcement Actions Under the Comprehensive Environmental Response, Compensation and Liability Act*, 33 *CLEV. ST. L. REV.* 1 (1984); Hinds, *Liability Under Federal Law for Hazardous Waste Injuries*, 6 *HARV. ENVTL. L. REV.* 1 (1982); Lotz, *Liability Issues Under CERCLA*, 23 *A.F. L. REV.* 370 (1982); Tripp, *Liability Issues in Litigation Under the Comprehensive Environmental Response, Compensation and Liability Act*, 52 *U.M.K.C. L. REV.* 364 (1984); Warshauer & Stansel, *Analyzing the Relationship Between the Civil, Governmental, and Criminal Obligations and Liabilities for Hazardous Waste*, 22 *TORT & INS. L.J.* 37 (1986); Comment, *Personal Liability for Hazardous Waste Cleanup: An Examination of CERCLA Section 107*, 13 *B.C. ENVTL. AFF. L. REV.* 643 (1986); Note, *CERCLA Defendants: The Problem of Expanding Liability and Diminishing Defenses*, 31 *WASH. U.J. URB. & CONTEMP. L.* 289 (1987).

²⁴See generally Levitas & Hughes, *Hazardous Waste Issues in Real Estate Transactions*, 38 *MERCER L. REV.* 581 (1987); Moskowitz, & Hoyt, *Enforcement of CERCLA Against Innocent Owners of Property*, 19 *LOY. L.A.L. REV.* 1171 (1986); Note, *Successor Landowner Suits for Recovery of Hazardous Waste Cleanup Costs: CERCLA Section 107(a)(4)*, 33 *UCLA. L. REV.* 1737 (1986).

liable only if hazardous substances were disposed of at the property during their ownership.²⁵ Current owners may be liable even if no hazardous substances were disposed of at the property during their ownership.²⁶ In either case, liability is based solely upon ownership of the contaminated property, regardless of the landowner's lack of knowledge of or participation in any hazardous waste activity.²⁷

This liability scheme can give rise to particularly harsh consequences when a landowner leases property to a tenant that engages in operations resulting in the release of a hazardous substance. The owner/lessor becomes a "covered person" and is strictly, jointly, and severally liable for all environmental damages resulting from the release.²⁸ The landowner could argue that, because the environmental damages were caused by the lessee's actions, the landowner should be entitled to rely on the third party defense of section 107(b)(3).²⁹ The third party defense is unavailable, however, if the third party was the landowner's employee or agent, or was one whose "act or omission occur[red] in connection with a contractual relationship, existing directly or indirectly, with the [landowner]."³⁰ The term "contractual relationship" includes the relationship

²⁵See 42 U.S.C.A. § 6907(a)(2) (Supp. 1987). Former owners who had actual knowledge that their property was contaminated may be subject to liability as a current owner if they transferred ownership without disclosing the property's contaminated condition. See 42 U.S.C.A. § 9601(35)(C)(Supp. 1987), which provides:

(C) Nothing in this paragraph or in section 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no defense under section 9607(b)(3) of this title shall be available to such defendant.

²⁶See 42 U.S.C.A. § 9607(a)(1) (Supp. 1987); *United States v. Tyson*, 17 *Envtl. L. Rep. (Envtl. L. Inst.)* 20527, 20531 (E.D. Pa. 1986) ("The current owner of a facility is within section 9607(a)(1) even if it never operated the facility as a hazardous waste dump site and even if no hazardous wastes were dumped at the facility during its period of ownership."); see also cases cited in *SUPERFUND DESKBOOK*, *supra* note 11.

²⁷See, e.g., *United States v. Cauffman*, 15 *Envtl. L. Rep. (Envtl. L. Inst.)* 20161 (C.D. Cal. 1984).

²⁸See, e.g., *United States v. Cauffman*, 15 *Envtl. L. Rep. (Envtl. L. Inst.)* 20161 (C.D. Cal. 1984); *United States v. Argent Corp.*, 14 *Envtl. L. Rep. (Envtl. L. Inst.)* 20616 (D.N.M. 1984); *United States v. South Carolina Recycling and Disposal, Inc.*, No. 80-1274-6, slip op. (D.S.C. Aug. 28, 1984) (sublessor may also be an "owner" under 107(a)(1)). The lessee will also be liable under 107(a)(1) as an "operator."

²⁹See 42 U.S.C.A. § 9607(b)(3) (1983).

³⁰42 U.S.C.A. § 9607(b)(3) (1983).

between lessor and lessee,³¹ and the owner/lessor is therefore barred from this defense.

The term "contractual relationship" also includes the relationship between the purchaser and seller of contaminated property.³² Prior to SARA, it was therefore possible that an innocent purchaser of real estate might become subject to liability for environmental damages under CERCLA. SARA has ameliorated this harsh result. It is now clear that an "innocent" landowner—one whose only connection to his property's contamination is his deed to the contaminated property—is not liable under CERCLA. To establish his "innocence," the landowner must prove by a preponderance of the evidence: (1) that he acquired the property after it became contaminated, (2) that at the time he acquired the property, he had no reason to know that any hazardous substance contaminated the property, (3) that the landowner "is a government entity which acquired the [property] by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation, [or] (4) [that the landowner] acquired the property by inheritance or bequest."³³

The landowner must also prove that he exercised due care with respect to the hazardous substance concerned and that he took precautions against the foreseeable acts or omissions of third parties and the consequences that could foreseeably result from such acts or omissions.³⁴

Although SARA now protects an "innocent" landowner from liability under section 107(a), a purchaser may not become an innocent landowner by remaining deliberately ignorant of the acquired property's contamination. A purchaser cannot claim that he had "no reason to know" that the property was contaminated unless he can establish by a preponderance of the evidence that, at the time he acquired the property, he made "all appropriate [inquiries] into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability."³⁵

³¹See 42 U.S.C.A. § 9601(35)(A) (Supp. 1987), which provides in relevant part that "[t]he term 'contractual relationship', for the purpose of section 9607(b)(3), includes, but is not limited to, land contracts, deeds, or other instruments transferring title or possession" See also *United States v. Argent Corp.*, 14 *Envtl. L. Rep.* (Envtl. L. Inst.) 20616 (D.N.M. 1984).

³²See *supra* note 31.

³³42 U.S.C.A. § 9601(35)(A) (Supp. 1987). The Conference Report on SARA explains, however, that one who inherits property with actual knowledge of its contamination may not rely on the innocent landowner defense. See H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 187 (1986).

³⁴42 U.S.C.A. § 9601(35)(A) (Supp. 1987), 9607(b)(3)(a), 9607(b)(3)(b) (1982).

³⁵42 U.S.C.A. § 9601(35)(B) (Supp. 1987).

For purposes of the preceding sentence, the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.³⁶

The conference report on SARA provides some helpful guidance regarding the nature of the inquiry required to become an innocent landowner.³⁷ First, the duty to inquire "shall be judged as of the time of acquisition."³⁸ Second, landowners "shall be held to a higher standard as public awareness of the hazards associated with hazardous substance releases has grown."³⁹ Third, landowners engaged in commercial transactions will "be held to a higher standard than those who are engaged in private residential transactions."⁴⁰ Fourth, property heirs and devisees have a duty to inquire, but the standard of inquiry is lower than for those engaged in private transactions. Also, heirs who acquire property without knowledge of the inheritance have no duty to inquire.⁴¹

B. *The Corporate Context*

A number of courts have held corporate officers individually liable under section 107(a) for environmental damages resulting from acts by or on behalf of a corporation. In such cases, the individual defendants have been held personally liable based upon the nature and extent of their involvement with the corporation's hazardous waste activities. Consequently, such cases are highly fact specific.

In *United States v. Northeastern Pharmaceutical & Chemical Co.* ("NEPACCO"),⁴² the Eighth Circuit Court of Appeals found NEPACCO's president ("Michaels") and vice president ("Lee") individually liable under Section 107(a)(3), which imposes liability on "any person"⁴³

³⁶*Id.*

³⁷JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, CONFERENCE REPORT 99-962, p. 187.

³⁸*Id.*

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.*

⁴²810 F.2d 726 (8th Cir. 1986).

⁴³*See* 42 U.S.C.A. § 9601(21) (Supp. 1987): (21) "The term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body."

who arranges for the disposal of hazardous substances.⁴⁴ NEPACCO arose out of the Company's disposal of hazardous wastes at a site known as the "Denny farm." Lee, as vice president and a major shareholder of the Company, was directly responsible for arranging the disposal of the Company's hazardous wastes, assisting in the selection of the Denny farm site, and supervising the Company's contract with the operator of the site. Michaels was the Company's founder, president, and a major stockholder, and had the capacity and responsibility to control the Company's hazardous waste activities, to direct negotiations concerning waste disposal, and to prevent and abate the damage resulting from the Company's hazardous waste activities.⁴⁵ Noting that "the term 'person' includes both individuals and corporations and does not exclude corporate officers or employees,"⁴⁶ the court rejected the individual defendants' argument that they could not be held individually liable because they had acted solely as corporate officers on NEPACCO's behalf:

Lee argues that he cannot be held individually liable for NEPACCO's wrongful conduct because he acted solely as a corporate officer or employee on behalf of NEPACCO. The liability imposed upon Lee, however, was not derivative but personal. Liability was not premised solely upon Lee's status as a corporate officer or employee. Rather, Lee is individually liable under CERCLA §107(a)(3), 42 U.S.C. §9607(a)(3), because he personally arranged for the transportation and disposal of hazardous substances on behalf of NEPACCO and thus actually participated in NEPACCO's CERCLA violations.⁴⁷

The court also held that the individual defendants could be held liable without regard to whether it would be appropriate to pierce the corporate veil:

Lee can be held individually liable because he personally participated in conduct that violated CERCLA; this personal liability is distinct from the derivative liability that results from "piercing the corporate veil." "The effect of piercing a corporate veil is to hold the owner of the corporation liable. The rationale for piercing the corporate veil is that the corporation is something less than a bona fide independent entity." . . . Here, Lee is liable because he personally participated in the wrongful conduct

⁴⁴See 42 U.S.C.A. § 9607(a)(3) (Supp. 1987).

⁴⁵NEPACCO, 810 F.2d 726.

⁴⁶*Id.* at 744.

⁴⁷*Id.*

and not because he is one of the owners of what may have been a less than bona fide corporation.⁴⁸

Finally, the court also found that, for purposes of section 107(a)(3), it was irrelevant that the individual defendants did not own or possess the hazardous substances disposed at the Denny farm site:

It is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme. The district court found that Lee, as plant supervisor, actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal of the NEPACCO plant's hazardous substances at the Denny farm site. We believe requiring proof of personal ownership or actual physical possession of hazardous substances as a precondition for liability under CERCLA Section 107(a)(3), 42 U.S.C. §9607(a)(3), would be inconsistent with the broad remedial purposes of CERCLA.⁴⁹

In *United States v. Conservation Chemical Co.*,⁵⁰ a district court in Missouri held the Company's president and majority stockholder ("Hjersted") individually liable under sections 107(a)(1) and (2). Hjersted was the Company's founder, and president, and at all times owned at least ninety-three percent (93%) of its stock. In addition, Hjersted, acting as a chemical engineer and the Company's sole "technical person," was primarily responsible for the Company's environmental controls. Finally, Hjersted controlled the Company's fiscal matters and was closely involved in the Company's day-to-day operations.

The court analyzed the concept of "owner or operator"⁵¹ and concluded that "a person who owns an interest in the facility and is actively

⁴⁸*Id.* (citations omitted).

⁴⁹*Id.*

⁵⁰628 F. Supp. 391 (W.D. Mo. 1985).

⁵¹See 42 U.S.C.A. § 9601(20) (Supp. 1987):

(20)(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an on shore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. (B) In the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except as provided in section 9607(a)(3) or (4) of this title, (i) the term "owner or operator" shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, (ii) the shipper of such hazardous substance

participating in its management can be held liable for the disposal of hazardous waste.”⁵² Based upon Hjersted’s “high degree of personal involvement in the [company’s] operation and decision-making process,”⁵³ the court found him individually liable.

In *State v. Shore Realty Corp.*,⁵⁴ the Second Circuit Court of Appeals held the defendant corporation’s majority shareholder and chief executive officer (“LeoGrande”) individually liable as an owner or operator under Section 107(a). *Shore Realty Corp.* resulted from extensive contamination at a hazardous waste disposal facility owned and operated by the defendant corporation. The court found that LeoGrande had incorporated the corporation solely for the purpose of purchasing the contaminated property and that “[a]ll corporate decisions and actions were made, directed, and controlled by him.”⁵⁵ The court rejected LeoGrande’s argument that he could not be held individually liable without piercing the corporate veil and concluded that “an owning stockholder who manages the corporation, such as LeoGrande, is liable under CERCLA as an ‘owner or operator’.”⁵⁶

In *State v. Bunker Hill*,⁵⁷ a district court in Idaho relied upon similar principles in holding a parent corporation liable as an owner or operator of its subsidiary’s facility. Although the court cautioned that “care must be taken so that ‘normal’ activities of a parent with respect to its

shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control. (C) In the case of a hazardous substance which has been delivered by a common or contract carrier to a disposal or treatment facility and except as provided in section 9607(a)(3) or (4) of this title (i) the term “owner or operator” shall not include such common or contract carrier, and (ii) such common or contract carrier shall not be considered to have caused or contributed to any release at such disposal or treatment facility resulting from circumstances or conditions beyond its control. (D) The term “owner or operator” does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally—and substantively,—as any nongovernmental entity, including liability under section 9607 of this title.

⁵²628 F. Supp. at 418.

⁵³*Id.* at 420.

⁵⁴759 F.2d 1032 (2d Cir. 1985).

⁵⁵*Id.* at 1038.

⁵⁶*Id.* at 1052.

⁵⁷635 F. Supp. 665 (D. Idaho 1986).

subsidiary do not automatically warrant finding the parent an owner or operator,"⁵⁸ the court rejected the parent's contention that only the subsidiary, and not the parent, could be an owner and operator of the facility:

Defendant Gulf was in a position to be, and was, intimately familiar with hazardous waste disposal and releases at the Bunker Hill facility; had the capacity to control such disposal and releases; and had the capacity, if not total reserved authority, to make decisions and implement actions and mechanisms to prevent and abate the damage caused by the disposal and releases of hazardous wastes at the facility. As noted previously in this opinion, approval from Gulf was necessary before more than Five Hundred Dollars (\$500) could be spent on pollution matters and before capital expenditures could be made. Gulf at times controlled a majority of Bunker Hill's board of directors and Gulf obtained weekly reports of day-to-day aspects of Bunker Hill operations. With respect to Congress' intent that those who bore the fruits must also bear the burdens of hazardous waste disposal, it must be noted that Bunker Hill's authorized capital was a mere Eleven Hundred Dollars (\$1100) while Gulf received Twenty-Seven Million Dollars (\$27,000,000) in dividends from Bunker Hill. Gulf fully owned Bunker Hill.

The court finds that the evidence presented is sufficient to impose liability on Gulf as an owner or operator for purposes of Section 107(a)(2), 42 U.S.C.A. § 9607(a)(2).⁵⁹

Despite the fact specific nature of these cases, certain consistent themes have emerged. First, courts have consistently upheld the principle that corporate officers may be held individually liable if they exercise sufficient control over corporate activities.⁶⁰ The decided cases, however,

⁵⁸*Id.* at 672.

⁵⁹*Id.*

⁶⁰*See* cases cited and accompanying text *supra* notes 42-59. *See also* United States v. Ward, 618 F. Supp. 884, 894 (E.D.N.C. 1985) ("A corporate officer of a company who exercises authority for the company's operations and participates in arranging for the disposal of hazardous wastes is liable under 107(a)(3) for cleanup costs."); United States v. Mottolo, 605 F. Supp. 898 (D.N.H. 1985) (individual defendant who was president, treasurer, and sole shareholder of corporation may be held individually liable under CERCLA 107(a)(3) without piercing corporate veil); United States v. Carolawn, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20699, 20700 (D.S.C. 1984) ("[T]o the extent that an individual has control or authority over the activities of a facility from which hazardous substances are released or participates in the management of such a facility, he may be held liable for response costs incurred at the facility, notwithstanding the corporate character of the business."). *But see* United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983) (insufficient evidence to hold president of corporation individually liable under CERCLA 107(a)(4)).

have all involved individuals who were shareholders and officers in close corporations, and were, therefore, extensively involved in day-to-day corporate management. However, individual liability should not be imposed upon the executive officers of a major publicly held corporation, since such officers would lack the intimate knowledge and operational control possessed by the officers of a close corporation.

Second, courts have interpreted CERCLA to impose liability for cleanup upon those who benefit from the activities which result in contamination.⁶¹ It is clear that the shareholder-officers of a closely held corporation benefit in a direct and immediate way from the corporation's activities, but it is far less clear that the shareholder-officers of a major, publicly held corporation benefit analogously. This distinction militates against the imposition of liability upon shareholder-officers in publicly held corporations, to the extent that the shareholder-officers do not actually participate in hazardous waste activities.

Third, individual liability has consistently been premised more upon operational control than upon ownership. Although the corporate officers thus far held liable have all been shareholders, the courts have focused upon the individuals' operational control of corporate decision-making to a far greater extent than upon their ownership interest.⁶² This point is underscored by the fact that courts have imposed liability without regard to the propriety of piercing the corporate veil.

Finally, courts will likely employ a similar analysis to impose liability upon parent corporations for their subsidiaries' waste management practices. If a parent corporation becomes too entangled with its subsidiary's activities, the parent will likely be deemed an owner or operator under Section 107(a).

⁶¹See *United States v. Mirabile*, 15 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20994, 20995 (E.D. Pa. 1985) (citing Congressional "intent to impose cleanup costs on those who bore the fruits of hazardous waste disposal and who were involved in the planning and implementation of the disposal practices"); *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1072 (D. Colo. 1985) (quoting S. REP. No. 96-848, 96th Cong., 2d Sess. at 98 (1980)):

[S]ociety should not bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dumpsite owner or operator who has profited or otherwise benefited from commerce involving these substances and now wishes to be insulated from any continuing responsibilities for the present hazards to society that have been created.

See also *United States v. Northeastern Pharmaceutical and Chem. Co.*, 579 F. Supp. 823, 848 (1984) ("Congress has determined that the persons who bore the fruits of hazardous waste disposal also bear the costs of cleaning it up.').

⁶²Apparently, no reported decision has based individual liability under 107(a) solely on an individual's ownership of stock.

C. Lender Liability

A secured creditor of a covered person may also become subject to liability under Section 107(a).⁶³ The statutory definition of "owner or operator" provides a limited exemption from liability for a secured creditor:

"Owner or operator" means . . . (ii) in the case of an on shore facility or an offshore facility, any person owning or operating such facility *Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.*⁶⁴

In *United States v. Mirabile*,⁶⁵ a Pennsylvania district court held that American Bank and Trust Company ("AB&T") was not liable under Section 107(a) for the cleanup of property subject to AB&T's mortgage. In *Mirabile*, AB&T advanced a loan to Turco Coatings, Inc. ("Turco"), which operated a paint manufacturing facility (the "Turco facility"), and secured the loan with a mortgage on the Turco facility. When Turco defaulted on the loan, AB&T foreclosed on its mortgage and was highest bidder at the resulting foreclosure sale. Before AB&T took legal title to the Turco facility, however, AB&T assigned its bid to the defendant Mirabile, who accepted a deed to the property. When the Turco facility was subsequently found to be contaminated, the United States sued Mirabile under CERCLA to recover its response costs. In turn, Mirabile joined AB&T as a third party defendant.

The *Mirabile* court considered the secured creditor exemption and concluded:

[T]he exemption plainly suggests that provided a secured creditor does not become overly entangled in the affairs of the actual owner or operator of a facility, the creditor may not be held liable for cleanup costs. The difficulty arises, of course, in determining how far a secured creditor may go in protecting its

⁶³Regarding lender liability under CERCLA, see Burcat, *Environmental Liability of Creditors Under Superfund*, 33 (No. 2) PRAC. LAW. 13 (1987); Burcat, *Environmental Liability of Creditors: Open Season on Banks, Creditors, and Other Deep Pockets*, 103 BANKING L.J. 509 (1986); Murphy, *The Impact of "Superfund" and other Environmental Statutes on Commercial Lending and Investment Activities*, 41 BUS. LAW. 1133 (1986); Vollman, *Double Jeopardy: Lender Liability Under Superfund*, 16 REAL EST. L.J. 3 (1987); Comment, *The Impact of the 1986 Superfund Amendments and Reauthorization Act on the Commercial Lending Industry: A Critical Assessment*, 41 U. MIAMI L. REV. 879 (1987).

⁶⁴42 U.S.C.A. § 9601(20)(A) (Supp. 1987).

⁶⁵15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20994 (E.D. Pa. 1985).

financial interests before it can be said to have acted as an owner or operator within the meaning of the statute.⁶⁶

The court noted that other decisions had addressed the individual liability of corporate officers under Section 107(a),⁶⁷ but concluded that these decisions were inapplicable because they involved defendants who were intimately involved in the management of closely held corporations. Corporate officers in a closely held corporation actively participated in the day-to-day operations of the corporation's business. In *Mirabile*, the secured creditor's participation in the corporation's business was limited to financial decisions. The court considered this distinction important⁶⁸ and stated: "The participation which is critical is participation in operational, production, or waste disposal activities. Mere financial ability to control waste disposal practices of the sort possessed by the secured creditors in this case is [insufficient to impose liability]."⁶⁹ Because AB&T had not participated in the day-to-day operation of the Turco facility, the court held AB&T not liable as an owner or operator under Section 107(a).⁷⁰

In *United States v. Maryland Bank & Trust Co.*,⁷¹ the court reached the opposite conclusion, based upon a slightly different set of facts and a different reading of the secured creditor exemption. In *Maryland Bank & Trust*, the debtor owned and operated a waste disposal facility in California, Maryland (the "CMD site"). Maryland Bank & Trust Company ("MB&T") advanced a loan to the debtor to purchase the CMD site, and secured the loan with a mortgage on the site. When the debtor defaulted on the loan, MB&T instituted a foreclosure action, purchased the property at a foreclosure sale, and took title to the property. Four years later, the site was discovered to be contaminated by hazardous wastes disposed of prior to MB&T's ownership. EPA then brought suit against MB&T to recover its CERCLA response costs.⁷²

The court rejected MB&T's contention that it was exempted from liability by the secured creditors exemption, and distinguished *Mirabile* by noting that MB&T had actually taken title to the property and had held title for more than four years, whereas in *Mirabile* the bank took

⁶⁶*Id.* at 20995.

⁶⁷See *supra* notes 42-56 and accompanying text.

⁶⁸15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20995.

⁶⁹*Id.*

⁷⁰The *Mirabile* court noted that its ruling was: limited to financial institutions which provide funds to entities which dispose of hazardous waste as a result of their business operations. It may be that a different test would be appropriate for financiers of entities whose sole business is that of hazardous waste disposal.

⁷¹632 F. Supp. 573 (D. Md. 1986).

⁷²*Id.*

only equitable title and reconveyed the property after only four months. More importantly, however, the *Maryland Bank & Trust* court took a different view of the secured creditor exemption than did the *Mirabile* court. The *Maryland Bank & Trust* court concluded that the exemption does not protect creditors who take legal title to contaminated property:

MB&T purchased the property at the foreclosure sale not to protect its security interest, but to protect its investment. Only during the life of the mortgage did MB&T hold indicia of ownership primarily to protect its security interest in the land. Under the law of Maryland (and twelve other states), the mortgagee financial institution actually holds title to the property while the mortgage is in force Congress intended by this exception to exclude these common law title mortgagees from the definition of "owner" since title was in their hands only by operation of the common law. The exclusion does not apply to former mortgagees currently holding title after purchasing the property at a foreclosure sale, at least when, as here, the former mortgagee has held title for nearly four years, and a full year before the EPA clean-up.⁷³

The court also based its decision upon the policy underlying CERCLA:

The interpretation of Section 101(20)(A) urged upon the court by MB&T runs counter to the policies underlying CERCLA. Under the scenario put forward by the bank, the federal government alone would shoulder the cost of cleaning up the site, while the former mortgagee-turned-owner, would benefit from the clean-up by the increased value of the now unpolluted land. At the foreclosure sale, the mortgagee could acquire the property cheaply. All other prospective purchasers would be faced with potential CERCLA liability, and would shy away from the sale. Yet once the property has been cleared at the taxpayers expense and becomes marketable, the mortgagee-turned-owner would be in a position to sell the site at a profit. In essence, the defendant's position would convert CERCLA into an insurance scheme for financial institutions, protecting them against possible losses due to the security of loans with polluted properties. Mortgagees, however, already have the means to protect themselves, by making prudent loans. Financial institutions are in a position to investigate and discover potential problems in their secured properties. For many lending institutions, such

⁷³*Id.* at 579 (citations omitted).

research is routine. CERCLA will not absolve them from responsibility for their mistakes of judgment.⁷⁴

In summary, two clear themes emerge from an analysis of *Mirabile* and *Maryland Bank & Trust*. First, a secured creditor may become subject to liability as an owner or operator if it involves itself in the debtor's operations. This conclusion is consistent with an underlying theme of CERCLA that liability be imposed upon those with operational control of hazardous waste activities.⁷⁵

Second, a lender that takes actual title to contaminated property (e.g., through a foreclosure sale) may become subject to liability as an owner. This conclusion is consistent with the apparent purpose of the secured creditor exemption,⁷⁶ and is also consistent with an underlying theme of CERCLA that those who benefit from hazardous waste activities should also bear the burden.⁷⁷ Lenders would therefore be wise to undertake a commercially reasonable investigation before taking title to potentially contaminated collateral.⁷⁸

D. Potential Section 107(a) Liability of Trustees and Beneficiaries

Some interesting issues arise when the foregoing principles are applied to the potential CERCLA liability of parties to a trust. Assume, for example, that Settlor establishes an inter vivos trust⁷⁹ on behalf of Beneficiary and that the corpus of the trust consists of commercial real estate. Assume further that Settlor appoints Trustee to manage the trust on Beneficiary's behalf and that Beneficiary is to receive income from the trust until he reaches twenty-one (21) years of age, at which time he is to receive legal title to the trust property. Finally, assume that after the trust is established but before Beneficiary takes legal title, the property is discovered to be contaminated as a result of the disposal of hazardous wastes prior to the establishment of the trust. Who is responsible for cleanup of the property: Settlor, Trustee, Beneficiary, all three of them, or none of them?

⁷⁴*Id.* at 580.

⁷⁵See *United States v. Northeastern Pharmaceutical and Chem. Co.*, 579 F. Supp. 823, 848 (W.D. Mo. 1984)(CERCLA was designed to insure, so far as possible, that the parties responsible for the creation of hazardous waste sites be liable for the response costs in cleaning them up."); *cf. supra* notes 42-62 and accompanying text.

⁷⁶See *supra* note 64 and accompanying text.

⁷⁷See *supra* note 61 and accompanying text.

⁷⁸See *supra* notes 35-41 and accompanying text.

⁷⁹For a discussion of various aspects of inter vivos trusts, see 1 W. FRATCHER, SCOTT ON TRUSTS §§ 19, 31, 32 (4th ed. 1987).

Settlor no longer holds any legal or equitable interest in the property.⁸⁰ Assuming that Settlor is not currently involved in the operation of the property or the disposal of hazardous waste at the property, Settlor could be liable only as a former owner of the property.⁸¹ Settlor's liability would therefore depend upon whether hazardous wastes were disposed of at the property during his ownership⁸² and, if so, whether he could establish an innocent landowner defense.⁸³

Trustee has legal title to the property⁸⁴ and the authority to exercise control over its disposition and use.⁸⁵ However, Trustee holds legal title only to enable him to manage the property on Beneficiary's behalf, and

⁸⁰The analyses of Settlor's potential liability would likely follow a different path if the Settlor retained some equitable interest in the trust property or the power to revoke the trust. In such a case Settlor might well be found to be a current owner or operator. For example, in *United States v. Carolawn*, 14 *Envtl. L. Rep. (Envtl. L. Inst.)* 20698 (D.S.C. 1984), the court denied a defendant corporation's motion for summary judgment on the issue of its liability as an owner or operator under 107(a). The corporation obtained title to contaminated property from a trustee-in-bankruptcy and almost simultaneously transferred title to three individual defendants. The court rejected the corporation's contention that it was nothing more than a conduit in the transfer of title:

The facts regarding the transfer of title to the Fort Lawn property and the degree of COCC's continuing interest and control are somewhat cloudy. This Court certainly cannot say that, based on the record presently before it, there is no room for controversy and that the government could not prevail under any circumstances . . . Possession of title, or the lack thereof, is not necessarily dispositive with respect to the questions of ownership or control. "While a certificate of title is an indicium of ownership, and may establish the person entitled to possession, such a certificate is not conclusive evidence of ownership." *Justice v. Fabey*, 541 F.Supp. 1019, 1023 n.4 (E.D. Pa. 1982) (citations omitted); see also *Hemme v. Stein*, 218 P. 853 (Okla. 1923) ("Title and rights in real property may not always be as appears by the record." *Id.* at 854.) Thus, at the very least, further inquiry concerning whether COCC retained a legal or equitable interest in the property after the transfer is necessary before the court can determine whether COCC is liable under CERCLA Section 107(a) as an owner of the Fort Lawn site.

Id. at 20698-99. For a discussion of settlor as beneficiary, see 2 W. FRATCHER, SCOTT ON TRUSTS § 114 (4th ed. 1987). For a discussion of a settlor's power to modify or terminate a trust, see 4 A. SCOTT, SCOTT ON TRUSTS §§ 330, 331 (3d ed. 1967).

⁸¹See 42 U.S.C.A. § 9607(a)(2) (Supp. 1987). If Settlor had previously generated wastes disposed at the property, arranged for disposal of wastes at the property or transported wastes to the property for disposal, Settlor might also be subject to liability. See 42 U.S.C.A. § 9607(a)(2), (3) (Supp. 1987).

⁸²See 42 U.S.C.A. § 9607(a)(2) (Supp. 1987).

⁸³See *supra* notes 35-41 and accompanying text.

⁸⁴See 1 W. FRATCHER, SCOTT ON TRUSTS § 2.6 (4th ed. 1987) ("A trust is created only where title to property is held by one person for the benefit of another.").

⁸⁵For a discussion of a trustee's powers and duties with respect to the administration of a trust, see 2A W. FRATCHER, SCOTT ON TRUSTS §§ 163A-185 (4th ed. 1987); 3 A. SCOTT, SCOTT ON TRUSTS §§ 185A-196 (3d ed. 1967 and 1985 Supp.).

it is not at all clear that Trustee benefits in any meaningful way from "ownership" of the property.⁸⁶ Beneficiary is the beneficial owner of the property⁸⁷ and, as between Trustee and Beneficiary, is clearly the party who benefits from ownership. On the other hand, Beneficiary may have no authority whatever to control the disposition or use of the property before he takes legal title.

Neither Beneficiary nor Trustee fits neatly into the owner or operator pigeonhole; each has good arguments that the other should be responsible. However, a facility can clearly have more than one owner or operator under CERCLA.⁸⁸ Therefore, a court might resolve this apparent conflict by holding Trustee and Beneficiary liable.⁸⁹

Trustee may be able to escape liability by asserting the third party defense of Section 107(b)(3).⁹⁰ This defense may prove successful with respect to the third parties responsible for contamination of the property, because Trustee would presumably have no contractual relationship with them.⁹¹ It may not prove successful with respect to Settlor, however, because Trustee may be deemed to have a contractual relationship with Settlor by virtue of the trust agreement.⁹² With respect to Settlor, therefore, Trustee might be barred from the third party defense unless he undertook a commercially reasonable investigation before he accepted title to the property as Trustee.⁹³

Beneficiary might also escape liability by asserting the third party defense. Beneficiary could argue that the contamination was caused solely by Settlor, Trustee, or other parties with whom Beneficiary had no contractual relationship. On the other hand, it could be argued that Beneficiary does stand in a contractual relationship with both Settlor

⁸⁶See *supra* note 82 (A trustee may receive compensation for his services). See 3 A. SCOTT, SCOTT ON TRUSTS § 242 (3d ed. 1967). It is not at all clear, however, that such a "benefit" is in any way meaningful for purposes of CERCLA. Cf. *supra* notes 50-53 and accompanying text.

⁸⁷For a general discussion of trust beneficiaries and their interest in trust property, see 2 W. FRATCHER, SCOTT ON TRUSTS §§ 112-131 (4th ed. 1987). A beneficiary's equitable interest may cause a beneficiary to be deemed an owner or operator. Cf. *supra* note 77.

⁸⁸See, e.g., *United States v. South Carolina Recycling and Disposal, Inc.*, No. 80-1274-6, slip op. (D.S.C. Aug. 28, 1984) (both property owner and lessee who subleased property deemed "owners" under 107(a)).

⁸⁹Cf. *United States v. Price*, 577 F. Supp. 1103, 1109 (D.N.J. 1983) ("[T]he liability provisions are of no help if 'a financially responsible owner of the site cannot be located'").

⁹⁰42 U.S.C.A. § 9607(b)(3) (1983).

⁹¹See *id.*

⁹²Regarding a trustee's duty to comply with the terms of a trust, see 2A W. FRATCHER, SCOTT ON TRUSTS § 164.1 (4th ed. 1987). Regarding the requirement of a written memorandum, see 1 W. FRATCHER, SCOTT ON TRUSTS §§ 38-52.1 (4th ed. 1987).

⁹³See *supra* notes 36-41 and accompanying text. Regarding a trustee's right to disclaim, see 1 W. FRATCHER, SCOTT ON TRUSTS § 35 (4th ed. 1987).

and Trustee as a third party beneficiary of the trust agreement.⁹⁴ If so, Beneficiary would be barred from the third party defense unless he conducted an investigation of the property before accepting his inheritance.⁹⁵

A court might seek to mitigate these harsh results by limiting a Section 107(a) recovery to the value of the trust assets, but it is unclear how such a principle would be derived from CERCLA. Since contaminated property might be completely valueless, this principle could deny Section 107(a) plaintiffs any recovery at all. Finally, such a limitation on liability would create a powerful incentive for covered persons to place contaminated property in trust, in order to shield themselves from liability.

As this example makes clear, fundamental concepts in CERCLA remain ill-defined, and CERCLA's application is problematic outside the paradigm cases apparently contemplated by Congress. The uncertainties inherent in Section 107(a) will certainly provoke further litigation before any clear answers develop.

III. INSURANCE COVERAGE FOR ENVIRONMENTAL CLEANUPS

A. Introduction

CERCLA remedial actions and cleanups often impose large and unexpected cost responsibilities on private parties. Increasingly, "potentially responsible parties" ("PRPs") have looked to their general liability insurers to obtain coverage for CERCLA claims. Businesses typically seek to invoke the insurer's obligation to defend⁹⁶ and to indemnify for

⁹⁴*But see* 1 W. FRATCHER, SCOTT ON TRUSTS §14 (4th ed. 1987) (distinguishing trust and contract for benefit of third party).

⁹⁵Regarding a beneficiary's right to disclaim, see *id.* at 36.

⁹⁶This article will not address the insurer's "duty to defend," which is the obligation to the insured to provide an attorney or attorneys' fees and reimbursement of other costs associated with the defense of actions that are or may be covered by a liability insurance policy. The majority of jurisdictions hold that the duty to defend an insured is broader than the duty to indemnify the insured for amounts paid in judgment or settlement of an action. As one court has stated:

[It] is crystal clear that the insurer's duty to defend is separate and distinct from the duty to indemnify. The duty to defend is contractual and one that is heavier and broader than the duty to indemnify. The obligation to defend has been deemed "litigation insurance" as well as "liability insurance." Thus the insurer is required to provide a defense to any action, however groundless, in which there exists any possibility that the insured may be held liable for damages where facts are alleged within the coverage of the policy.

National Grange Mutual Ins. Co. v. Continental Casualty Ins. Co., 650 F. Supp. 1404,

liability imposed on the insured⁹⁷ under comprehensive general liability policies ("CGL") and other similar excess and umbrella liability insurance policies. Insurers typically have responded to notice of such claims with "reservation of rights letters"⁹⁸ and in some cases have denied coverage for the CERCLA claims altogether. A declaratory judgment action concerning defense and coverage between insured and insurer often follows.

Recently there has been an explosion of such coverage litigation. As little as two years ago, there were barely ten reported decisions in the United States directly addressing environmental insurance coverage issues.⁹⁹ Today there are over fifty such decisions, and scores of enormous coverage cases presently are being litigated.¹⁰⁰ Many jurisdictions lack appellate court decisions resolving the issues that are typically disputed between insured and insurer in environmental claims. Indiana only has one appellate decision directly addressing any of the major issues in this area and that case had limited significance due to its unusual facts.¹⁰¹

1407 (S.D.N.Y. 1986) (citations omitted).

Typically courts will use a "comparison test" to determine whether its duty to defend has been triggered. This test looks at the allegations in a complaint filed against an insured in an attempt to determine whether there are any allegations for which there could be coverage under the policy regardless of the merits of the claim. *See, e.g.,* Jonesville Products, Inc. v. Transamerica Ins. Group, 156 Mich. App. 508, 402 N.W.2d 46, 47 (1986); American States Ins. Co. v. Maryland Casualty Co., 587 F. Supp. 1549, 1551 (E.D. Mich. 1984). If such an allegation is made, the courts will usually find that there is a duty to provide a defense to the insured unless it appears "as a matter of law" that there would be no coverage under the policy for the actions of the insured. *See also* Travelers Indem. Co. v. Dingwell, 414 A.2d 220 (Me. 1980).

⁹⁷The insurer's duty to indemnify is the obligation to reimburse the insured for any monies that the insured is obligated to pay as "damages" which are the result of a covered occurrence.

⁹⁸A "reservation of rights" letter usually tells the insured that the insurer believes there are potential grounds to deny coverage for the claim the insured has made. "[A] reservation of rights . . . to be effective, must be communicated to the insured. It must fairly inform the insured of the insurer's position and must be timely, although delay in giving notice will be excused where it is traceable to the insurer's lack of actual or constructive knowledge of the available defense." 14 G. COUCH, COUCH ON INSURANCE (2d Rev. ed.) § 51:88 (1982).

The reservation of rights letters received by insureds who file environmental claims generally allege one or more of the following grounds: (1) lack of a covered "occurrence," (2) lack of bodily injury or property damage occurring during the policy period, (3) lack of "property damage" where reimbursement for government-imposed remedial costs is sought or (4) absence of coverage due to a "pollution exclusion."

⁹⁹10 CHEMICAL & RADIATION WASTE LIT. REP. (CCH) 30 (1985).

¹⁰⁰For example, Westinghouse Electric Corporation and one of its subsidiaries recently sued 155 property and liability insurers who represented all property and liability insurers (including successors) for the companies from 1948 to the present. 1 TOXIC LAW REP. (BNA) 97 (June 24, 1987).

¹⁰¹Barnet of Indiana, Inc. v. Security Ins. Group, 425 N.E.2d 201 (Ind. Ct. App.

This article will outline some major issues in environmental insurance coverage disputes and assess trends in recent decisions in these areas.

B. Standard CGL Policy Terms

Policies covering only environmental injuries are quite rare. Typically, insureds have claimed coverage for environmental claims under a CGL policy. The language of the main body of virtually all CGL policies is identical because it is based on insurance industry forms. Policies are individualized by the addition of particular endorsements. Coverage under this type of policy is triggered by a happening or event that meets the policy's definition of an "occurrence." A standard definition of an "occurrence" in the CGL policies typically involved in current claims is "an accident, an 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 by the Insured."¹⁰² The occurrence need not take place and no claim needs to be filed during the period that the policy is in effect, but an event that qualifies as an occurrence must cause either "property damage" or "bodily injury" during the period of time the policy is in effect.

"Property damage" typically is defined as:

- (a) physical injury to or destruction of tangible property, including the loss of use thereof at any time resulting therefrom, or
- (b) loss of use of tangible property which has not been physically injured or destroyed, provided such loss of use is caused by an occurrence during the policy period.¹⁰³

1981). There are a number of environmental insurance coverage cases presently in Indiana's state and federal lower courts that may decide many of the issues discussed in this Article. For example, in August, 1987, Great Lakes Chemical Corporation sued 15 of its insurers in state court in Tippecanoe County seeking a declaration that these insurers are obligated to pay defense and indemnification costs for certain environmental claims. *Great Lakes Chem. Corp. v. Northwestern Nat'l Ins. Co. of Milwaukee, et. al.*, now pending as Cause No. 23CO18711CP263 in the Fountain Circuit Court. Conversely, insurance companies sometimes initiate similar actions. In *Auto-Owners (Mutual) Ins. Co. v. J & B Metal Finishing, Inc., et. al.*, Cause No. 87-1038C Division, filed September 29, 1987, a liability insurer seeks similar declaratory relief from such obligations under its policies (The authors represent the insureds seeking insurance coverage.).

¹⁰²*United Pacific Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 664 P.2d 1262, (1983). See also D. Day & S. Ray, ANNOTATED COMPREHENSIVE LIABILITY POLICY 3 (Defense Research Institute [hereinafter DRI] 1984); A. REICHENBERGER, THE GENERAL LIABILITY INSURANCE POLICIES - ANALYSIS OF 1973 REVISIONS (DRI, Vol. 1974 No. 1 Jan. 1974) (a copy of this Article is on file in the offices of the Indiana Law Review).

¹⁰³*United Pacific Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 664 P.2d 1262 (1983).

A standard definition of "bodily injury" includes "bodily injury, sickness or disease sustained by any person which occurs during the policy period."¹⁰⁴

Covered occurrences are subject to certain express exclusions from coverage found in another portion of the standard form CGL policy. The most significant exclusion for environmental claims is the so-called "pollution exclusion." This commonly provides:

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.¹⁰⁵

C. *Existence of an Occurrence*

The first issue that must be addressed to determine whether there is coverage under a CGL policy is whether there has been an "occurrence." The historical background behind the inclusion of the requirement of an "occurrence" in the standard CGL policy is revealing. Insurers often insist that the requirement of an "occurrence . . . neither expected or intended by the Insured" bars coverage for claims arising from intentional release or deposit of wastes, especially repeated releases or deposits over a long period of time, where it was reasonably foreseeable that these wastes might damage the environment.

At least with respect to environmental claims, however, contemporaneous industry commentary on the 1966 CGL policy does not support the insurers' present contention that there was any intent to avoid coverage, even for extended pollution claims. At an insurance industry meeting in 1965 G.L. Bean, Assistant Secretary, Liberty Mutual Insurance Company, gave a precisely contrary assessment, stating that when the new CGL policy went into effect:

[I]t is in the waste disposal area that a manufacturer's basic premises-operation coverage is liberalized most substantially. Smoke, fumes, or other air or steam pollution have caused an endless chain of severe claims for gradual property damage. The waste disposal cases have been difficult ones, because when the

¹⁰⁴*Acands, Inc. v. Aetna Casualty & Surety Co.*, 764 F.2d 968, 971 (3d Cir. 1985).

¹⁰⁵*Barnet*, 425 N.E.2d at 202.

injury or damage first starts to emerge, no corrective action is taken in many cases, because the manufacturer is reluctant to admit his waste disposal is causing it. This is probably an honest doubt. When the case is pinpointed, it may or may not be easy to make a quick elimination of the cause. The cost of an alternative method of waste disposal may be terrifically expensive or might even force the manufacturer out of business, and even if it can be made, it may take months to convert.¹⁰⁶

Lyman Baldwin, Secretary of Underwriting for the Insurance Company of North America, amplified this understanding in 1966:

Let us consider how this would apply in a fairly commonplace situation where we have a chemical manufacturing plant which, during the course of its operations, emits noxious fumes that damage the paint on buildings in the surrounding neighborhood. Under the new policy there is coverage until such time as the insured becomes aware that the damage was being done. If he continues the operation causing the damage, coverage would not apply subsequent to the time of his becoming aware of the damage. Naturally, if he could reasonably have anticipated that the damage would ensue there would be no coverage at all for it certainly would not have been unexpected.¹⁰⁷

Plainly insurers contemplated continued coverage for volitional releases or deposits even over an extended period of time, of pollutants, and the "occurrence" requirement was not added to block such claims.

In the face of such comments and further contemporaneous industry commentary and representations concerning the "pollution exclusion," added in 1970 and discussed below, it is clear that insurers will have a difficult time proving an intention in 1966 to exclude coverage of most current environmental claims. As discovery proceeds in coverage cases, more examples of exactly contradictory evidence—that the new CGL policy plainly was intended to cover such claims—are surfacing.

¹⁰⁶*New Comprehensive Guaranty and Automobile Program, The Effect on Manufacturing Risks*, paper presented at Mutual Insurance Technical Conference, November 15-18, 1965 at 6 (a copy is on file in the office of the Indiana Law Review). Mr. Bean made a similar point in a 1966 paper on the new policy, citing the following as covered liabilities: "gradual BI or gradual PD resulting over a period of time from exposure to the insured's waste disposal. Examples would be gradual adverse effect of smoke, fumes, air or stream pollution, contamination of water supply or vegetation." *Id.* For this and other aspects of the drafting history of the CGL policy, see generally Anderson & Luppi, *Environmental Risk Insurance: You Can Count On It*, 1987 RISK MANAGEMENT 68.

¹⁰⁷Anderson & Luppi, *supra* note 106, at 72.

There is nothing extraordinary in finding coverage for claims arising from volitional conduct that results in a tort. Most tort insurance covers this type of conduct. Claims arising from truly unintentional or non-volitional acts are rare. What is typical is a lack of intention of consequences, such as injury from the negligently driven automobile, not the lack of an intention to drive the automobile in the fashion in which it was driven.

Courts in many jurisdictions have found that there has been an occurrence under a CGL policy resulting from pollution claims where the damage occurred as a result of intentional, long-term discharge of pollutants.¹⁰⁸ A handful of courts have denied coverage in long-term discharge cases on the basis that there was no occurrence because the insured's acts relating to the pollution event or events were either intended or expected; however, those decisions generally involve facts in which the insured clearly was or should have been aware of the adverse environmental effects of its actions when the actions occurred.¹⁰⁹ Like many other jurisdictions, Indiana courts have not squarely confronted the issue of whether claims for pollution caused by damage resulting from "innocent" long-term activities are covered.¹¹⁰

The judicial interpretation of the phrase "expected or intended" as applied in typical environmental situations makes it evident that the standard definition of "occurrence" was pollution claims. On the one hand, waste generator insureds contend that although the insured intended to dispose of its waste at what later becomes a CERCLA cleanup site, the insured neither intended nor expected any eventual harm, and therefore its deposits constituted occurrences. On the other hand, insurers argue that when the generator deposited its wastes usually over a period of several years, it did so intentionally. Furthermore, it was reasonably

¹⁰⁸See, e.g., *Benedictine Sisters v. St. Paul Fire & Marine Ins. Co.*, 815 F.2d 1209, 1211 (8th Cir. 1987) (applying South Dakota law); *Industrial Steel Container Co. v. Fireman's Fund Ins. Co.*, 339 N.W.2d 156, 159 (Minn. Ct. App. 1987); *Shapiro v. Public Service Mut. Ins. Co.*, 19 Mass. App. 648, 477 N.E.2d 146, (1985) ("Thus even [where we] view the escape of oil from Shapiro's tank as a foreseeable consequence of an unknown but 'natural progressive condition,' i.e., corrosion, we would not conclude that the escape was 'nonaccidental'"). The *Shapiro* court distinguishes the facts of its case from *Barnet of Indiana, Inc. v. Security Ins. Group*, 425 N.E.2d 201 (Ind. Ct. App. 1981), "[W]here the insured knew that its pollution control system malfunctioned on a regular and frequent basis and the insured had received numerous complaints concerning its polluting, the discharge of emissions was not sudden and accidental.") *Id.*

¹⁰⁹See, e.g., *American States Ins. Co. v. Maryland Casualty Co.*, 587 F. Supp. 1549 (E.D. Mich. 1984).

¹¹⁰*Barnet of Indiana, Inc. v. Security Ins. Group*, 425 N.E.2d 201 (Ind. Ct. App. 1981). This case cites no other Indiana decision construing either the pollution exclusion or a CGL policy in an environmental claim.

foreseeable at the time of deposit, and therefore expected, that the hazardous materials might one day escape and contaminate the environment. But courts in most jurisdictions have found that reasonable foreseeability is not alone a sufficient basis for the insurer to argue that the insured expected or intended the resulting damage.¹¹¹ In contrast, the court may find a lack of an occurrence if the insurer can show that the insured was aware that property damage was taking place or that human health was being threatened and the insured did nothing to correct the situation, or that an insured is in the business of disposing of hazardous waste.¹¹²

Moreover, although *Barmet* offers no guidance on the occurrence issue, Indiana's general liability insurance law plainly requires that policy exclusions for intentional conduct are to be construed to exclude only conduct where harmful *consequences* are intended, and not merely the conduct itself. A leading case construed a clause in a homeowner's policy excluding coverage for "bodily injury or property damage caused intentionally by or at the direction of the insured" for its activities.¹¹³ In *Home Insurance Co. v. Neilsen*,¹¹⁴ the insured sought coverage for an alleged assault; the insurer refused coverage on the basis that an assault was an intentional act. The *Neilsen* court acknowledged the general rule in Indiana that "in an action for assault and battery, a person will be presumed as a matter of law to have intended the natural and probable consequences of his wrongful act."¹¹⁵ But in the context of insurance coverage, the court required a more specific intent before an insured's conduct would come within an exclusion for "intentional" acts.¹¹⁶ The court held that the exclusions would apply only where the insurer could show "an actual intent to injure" or that the nature and the character of the act is such that "the intent to cause harm to the other party must be inferred as a matter of law."¹¹⁷

This requirement that an insurer show intent to cause specific harm as opposed to merely foreseeable harm in order to deny coverage is

¹¹¹See, e.g., *Benedictine Sisters v. St. Paul Fire & Marine Ins. Co.*, 815 F.2d 1209, 1211 (8th Cir. 1987); *Industrial Steel Container Co. v. Fireman's Fund Ins. Co.*, 399 N.W.2d 156 (Minn. Ct. App. 1987); and *United States Fidelity and Guaranty Co. v. Armstrong*, 479 So. 2d 1164 (Ala. 1985).

¹¹²*Steyer v. Westvaco Corp.*, 450 F. Supp. 384, 388 (D. Md. 1978); *American Mutual Liab. Ins. Co. v. Neville Chem. Co.*, 650 F. Supp. 929, 933 (W.D. Pa. 1987) (applying Pennsylvania law and citing *Techalloy Co. v. Reliance Ins. Co.*, 338 Pa. Super. 1, 47 A.2d 820 (1984)); *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30 (1st Cir. 1984).

¹¹³*Home Ins. Co. v. Neilsen*, 165 Ind. App. 445, 332 N.E.2d 240 (1975).

¹¹⁴*Id.*

¹¹⁵*Id.* at 448, 332 N.E.2d at 242.

¹¹⁶*Id.* at 449, 332 N.E.2d at 243.

¹¹⁷*Id.* at 451, 332 N.E.2d at 244.

amplified by the decision in *Indiana Lumberman's Mutual Insurance Co. v. Brandum*.¹¹⁸ There, the Indiana Court of Appeals found coverage for injuries and damage to a woman and a utility company after the insured intentionally rammed his vehicle into a vehicle occupied by his fiancée and another man causing that vehicle to hit and injure the woman and do damage to the utility pole. The court ruled that because the insured only intended to injure the occupants of the car he hit and not the other parties, there was coverage for the other parties' injuries.¹¹⁹

Thus, Indiana insureds should prevail on the question of whether there has been an occurrence even where there has been a gradual deposit or release of hazardous wastes into the environment. The history of the "occurrence" requirement favors coverage for such claims. At a minimum that requirement is ambiguous which leaves insurers vulnerable to well established precedent construing ambiguity in favor of coverage. It is indisputable that the phrase "expected" or "intended" is at least susceptible to a construction requiring a conscious intent to do the harm actually suffered and not just to do the act leading to the harm. Courts throughout the United States and the Indiana Supreme Court recently and emphatically have strictly construed ambiguous language against the insurer who drafted the policy and in favor of coverage. Moreover, the majority of cases in other jurisdictions squarely confronting the question have found an occurrence unless it can be shown that the insured intended to dispose of hazardous substances illegally or the insured was aware of a high degree of probability that its hazardous waste would pose an environmental problem.

These holdings are consistent with general Indiana insurance law. In Indiana, the insurer cannot avoid its duty to indemnify solely upon its basis that the act which produced the circumstances giving rise to liability was volitional and not fortuitous. The insurer also must demonstrate that specific harmful consequences of the insured's act were intended.

D. Trigger of Coverage

A second critical issue in environmental coverage disputes between insurers and insureds is when coverage is "triggered," or when the covered "bodily injury" or "property damage" occurred.¹²⁰ This timing is important because it determines what coverages will be available to help pay for indemnification or defense costs. Depending upon the "trigger of coverage" theory adopted by the jurisdiction, a single policy

¹¹⁸419 N.E.2d 246 (Ind. Ct. App. 1981).

¹¹⁹*Id.* at 248.

¹²⁰*Eli Lilly and Co. v. Home Ins. Co.* 462 N.E.2d 467, 470 (Ind. 1986).

or a number of policies might apply. Courts have developed, primarily in asbestos and certain delayed manifestation drug exposure cases, various major theories to determine the appropriate trigger for insurance coverage.

The "exposure" theory determines that an injury occurs and coverage is triggered at the point where exposure to the body occurs, even though the injury could not then be diagnosed and the cumulative effects of the damage have not yet manifested themselves as a recognized disease.¹²¹

Under the "manifestation" theory, an actionable injury occurs at the time an injury first manifests itself, even if the cause of the injury occurred sometime earlier. An injury is manifest when it would be observable and therefore readily diagnosable.¹²² The "injury-in-fact" theory requires the fact finder to decide when an "injury" occurred.¹²³ This theory is based on the premise that the term "injury" is not ambiguous but has a plain meaning that converts this issue into a factual one.

The "multiple trigger" theory also is known as the *Keene* theory because it was first decisively articulated in *Keene Corp. v. Insurance Co. of North America*.¹²⁴ The court in *Keene* held that asbestos injuries was progressive and constituted a single continuous harm, therefore, each insurer whose policy was in effect at any time during the period of exposure, exposure-in-residence,¹²⁵ or manifestation of the injury is jointly and severally liable for the entire harm. The *Keene* approach has been discussed and adopted in two recent pollution cases, *Pacific Indemnity Co. v. Bunker Hill Co.*,¹²⁶ and *National Standard Insurance Co. v. Continental Insurance Co.*¹²⁷ In both cases the courts decided,

¹²¹See, e.g., *Ducree v. The Executive Offices of Halter Marine, Inc.*, 752 F.2d 976 (5th Cir. 1984) (applying Louisiana law), *reh'g denied en banc*, 758 F.2d 651 (5th Cir. 1985); *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981) (applying Louisiana law), *cert. denied*, 454 U.S. 1109 (1981), *reh'g denied* 455 U.S. 1009 (1982); *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814 (1981), *cert. denied*, 454 U.S. 1109 (1981).

¹²²See, e.g., *Eagle-Picher Indus. Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983).

¹²³See *American Home Products Corp. v. Liberty Mutual Ins. Co.*, 748 F.2d 760 (2d Cir. 1984).

¹²⁴667 F.2d 1034 (D.C. Cir. 1981).

¹²⁵"Exposure-in-resident" is the concept that with a long developing condition such as asbestosis "the body [repeatedly] incurs microscopic injury as asbestos fibers become lodged in the lungs and as the surrounding tissue reacts to the fibers thereafter." *Keene*, 687 F.2d at 1042.

¹²⁶Civ. No. 79-2010, slip op. (D. Idaho July 3, 1984).

¹²⁷CA-3-81-1015-D, slip op. (N.D. Tex. Oct. 4, 1983). See *Anderson & Luppi*, *supra* note 106, at 72 for contemporaneous insurance industry commentary making it plain that insurers believed a multiple trigger approach should apply to pollution claims.

as the *National Standard* court stated, "that all insurers on the risk between the initial exposure and the time of the manifestation are obligated to defend" the insured against bodily injury claims.¹²⁸

In *Eli Lilly and Co. v. Home Insurance Co.*,¹²⁹ the Indiana Supreme Court adopted the multiple trigger approach. *Home Insurance* involved a large number of DES products liability claims made against Eli Lilly and Company for which Lilly was seeking insurance coverage from its liability insurers. The plaintiffs in such cases generally allege injuries from exposure to DES many years prior to manifestation of any injury. The Indiana Supreme Court stated a strong insurance law and public policy preference for the coverage trigger theory that would most likely meet insureds' reasonable expectations of coverage:

In order to achieve the objectives of Indiana law, of giving effect to the policies' dominant purpose of indemnity, we hold that coverage is triggered at any point between ingestion of DES and the manifestation of DES-related disease. This holding comports with the rule of interpretation that courts should strive to give effect to the reasonable expectations of the insured.¹³⁰

The multiple trigger theory should apply to Indiana insureds' pollution claims.¹³¹ The similarities between a DES drug case and the typical fact pattern in pollution cases are striking. Each involve claims from prolonged exposure to foreign substances resulting in a delayed manifestation of injury. Each involves the insured's reasonable expectations of coverage throughout the period of its activities. Application of the multiple trigger theory in pollution claims cases will serve the same policies and objectives of the law that guided the Indiana Supreme Court in *Home Insurance*. To apply any other trigger theory would be inconsistent with *Home Insurance*, would defeat the reasonable expectations of insureds in Indiana, and would not serve the public interest of Indiana in making the maximum amount of funds available to pay legitimate claims for any harm to Indiana residents and natural resources.

E. Coverage for Cleanup Costs as Property Damage

A third crucial issue in environmental insurance disputes is whether costs of cleanups required by governmental agencies are covered "property damage" under a CGL policy.

¹²⁸*National Standard Ins. Co. v. Continental Ins. Co.*, CA-3-81-1015-D, slip op. at 6 (N.D. Tex. Oct. 4, 1983).

¹²⁹482 N.E.2d 467 (Ind. 1985).

¹³⁰*Id.* at 471.

¹³¹*Development in the Law, Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1581-83 (1986); Note, *The Applicability of General Liability Insurance to Hazardous Waste Disposal*, 57 S. CAL. L. REV. 745, 758-59 (1984); Anderson & Luppi, *supra* note 106, at 72.

1. *What Qualifies as "Property Damage"?*—Courts have divided over whether governmentally imposed cleanup costs are covered, but a clear majority favor inclusion of such costs as "property damage."¹³² In *Lansco, Inc. v. Department of Environmental Protection*¹³³ one of the first and leading decisions in this area, the New Jersey court declared that the insurer's argument that "property damage" be construed only as "measurable damage to identifiable physical property" was "without merit."¹³⁴ The court determined the insurer was obligated to pay the cleanup costs associated with a spill of oil from Lansco's facility because Lansco "could have reasonably expected to be indemnified for any liability arising out of the operation of its business which was not specifically excluded."¹³⁵ The court also noted that the New Jersey spill law mandating cleanup of spills "fixed as a measure of damages the cost of eliminating the harmful substance from the waters of the State. Hence, the cost of cleanup determines the amount Lansco became legally

¹³²*See, e.g.,* *Continental Ins. Cos. v. Northeastern Pharmaceutical Chem. Co.*, 811 F.2d 1180, 1184-87 (8th Cir. 1987), *petition for reh'g en banc granted*, 815 F.2d 51 (8th Cir. 1987); *New Castle v. Hartford Accident and Indemnity Co.*, No. 85-436 JLL, slip op. at 15-19 (D. Del. Nov. 2, 1987); *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 662 F. Supp. 71, 76 (E.D. Mich. 1987) ("damages" in CGL policies encompass "money spent to clean up environmental contamination" in CERCLA case); *Gloucester v. Maryland Casualty Co.*, 661 F. Supp. 394 (D.N.J. 1987); *Powers Chemco, Inc. v. Federal Ins. Co.*, No. 8462/85, slip op. at 4 (N.Y. Sup. Ct. Nassau County, Apr. 3, 1987) ("It is the Court's opinion that the cost of complying with the [Department of Environmental Conservation] order insofar as they can be attributed to restoring the groundwater and environment to its pre-contamination state and preventing future contamination constitutes damages within the meaning of the policy."); *Consolidated Rail Corp. v. Certain Underwriters at Lloyds*, No. 84-2669, slip op. at 11 (E.D. Pa. June 3, 1986); *Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co.*, No. 83-3347, slip op. (D.D.C. May 2, 1986) (cleanup costs in CERCLA action from alleged dioxin contamination constitute damages for purposes of liability insurance coverage); *Port of Portland v. Water Quality Ins. Syndicate*, 549 F. Supp. 233 (D. Or. 1982), *aff'd in part, rev'd in part*, 796 F.2d 1188 (9th Cir. 1986); *Bankers Trust Co. v. Hartford Accident and Indemnity Co.*, 518 F. Supp. 371 (S.D.N.Y. 1981); *Chemical Applications Co. v. Home Indemnity Co.*, 425 F. Supp. 777 (D. Mass. 1977); *United States Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838 (1983); *Lansco, Inc. v. Department of Env'tl Protection*, 138 N.J. Super. 275, 350 A.2d 520 (N.J. Super. Ct. Ch. Div. 1975), *aff'd*, 45 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976) *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977); *Kutsher's Country Club Corp. v. Lincoln Ins. Co.*, 119 Misc. 2d 889, 465 N.Y.S.2d 136 (Sup. Ct. 1983); *Waste Management of the Carolinas, Inc. v. Peerless Ins. Co.*, 72 N.C. App. 80, 323 S.E.2d 726 (1984), *rev'd on other grounds*, 315 N.C. 688, 340 S.E.2d 374 (1986).

¹³³138 N.J. Super. 275, 350 A.2d 520 (1975), *aff'd*, 45 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977).

¹³⁴138 N.J. Super. at 282, 350 A.2d at 524.

¹³⁵*Id.*

obligated to pay and the amount for which it is entitled to indemnification."¹³⁶

Recently, the Eighth Circuit in *Continental Insurance v. Northeastern Pharmaceutical Chemical Co.* decided that under Missouri law, both the state and the federal governments suffered "property damage" by reason of the pollution involved and that the cost of cleaning up the environmental damage imposed upon the insured was properly indemnifiable by the insurer as "property damage" under a standard CGL policy.¹³⁷ The court first determined that not only private individuals who own land, but also the government of the United States and the government of the State of Missouri have an interest in the contaminated property sufficient to have stated a claim for "property damage."¹³⁸ The court justified its conclusion that environmental pollution fell within the standard CGL policy's definition of "property damage" in part by looking to the policy's "pollution exclusion" which the court noted "itself states that 'property damage' may result from the discharge of pollutants."¹³⁹ The court also agreed with *Lansco* that cleanup costs were the equivalent of damages that might be imposed after a trial.¹⁴⁰

Similarly, the court in *United States Aviex Co. v. Travelers Insurance Co.*,¹⁴¹ rejected the insurer's contention that mandated cleanup costs are equitable relief and not damages required to be indemnified under a CGL policy. The *Aviex* court responded that this was a distinction without a difference:

If the state were to sue in court to recover traditional "damages," including the state's cost incurred in cleaning up the contamination, for the injury to the groundwater, [the insurer's] obligation to defend against the lawsuit and to pay damages would be clear.

It is merely fortuitous from the standpoint of either plaintiff or defendant that the state has chosen to have plaintiff remedy the contamination problem, rather than choosing to incur the cost of clean-up itself and the suing plaintiff to recover those costs. The damage to the natural resources is simply measured in the cost to restore the water to its original state.¹⁴²

¹³⁶*Id.* at 284, 350 A.2d 525.

¹³⁷811 F.2d 1180 (8th Cir. 1987).

¹³⁸*Id.* at 1185-86.

¹³⁹*Id.* at 1186-87 (citing *Port of Portland v. Water Quality Ins. Syndicate*, 549 F. Supp. 233, 235 (D. Or. 1982)).

¹⁴⁰*Id.* at 1188.

¹⁴¹125 Mich. App. 579, 336 N.W.2d 838 (1983).

¹⁴²*Id.* at 589-90, 336 N.W.2d at 843 (citing *Lansco*, 138 N.J. Super. 275, 350 A.2d 520 (1975)).

A few courts have expressed a contrary view, holding that cleanup costs and any costs associated with injunctive relief are not legal "damages," but are equitable relief not covered by the CGL policy. A federal district court in Maryland in *Maryland Casualty Co. v. Armco, Inc.*¹⁴³ granted an insurance company summary judgment in its declaratory judgment action on the duty to defend a CERCLA action against the insured. The court ruled that the CERCLA action was an equitable action and "[t]raditionally, courts have found no insurance coverage for costs of complying with an injunction even in cases where the suits could have been brought for damages."¹⁴⁴ The court upheld the insurance company's position that the CGL policy intended to draw the line "at the historic division between law and equity."¹⁴⁵

The district court in *Maryland Casualty* was upheld on appeal by the Fourth Circuit.¹⁴⁶ Judge Chapman, writing the opinion for the court, stated that "[t]he best approach in construing the term "damages" as contained in this insurance contract is to afford it the legal, technical meaning"¹⁴⁷ The court expressed concern that if "damages" were given a broad reading by the court, it would permit "any obligation to pay" to be covered by the insurance contract.¹⁴⁸

Judge Chapman also recently wrote the majority opinion in *Mraz v. Canadian Universal Insurance Co.*¹⁴⁹ which reversed a frequently cited lower court decision¹⁵⁰ which had found that the insurer had the duty to defend the insured in a government cleanup action. The Fourth Circuit found that the response costs sought by the government under CERCLA were an "economic loss" and therefore not a loss within the policy's definition of property damage.¹⁵¹ It is noteworthy that the *Mraz* case involved costs expanded to prevent future harm to the environment and not costs of cleanup of past harm.

There is little to recommend the minority view that cleanup costs are not property damage. It is not supported by the history of the CGL policy. When it was rewriting the CGL policy in 1966, the insurance industry added a provision that required the insured to undertake and pay for cleanup. William J. Obrist of the General Accident Group, described the proposed provision as follows: "At his own expense, the

¹⁴³643 F. Supp. 430 (D. Md. 1986), *aff'd*, 822 F.2d 1348 (4th Cir. 1987).

¹⁴⁴643 F. Supp. at 434 (citations omitted).

¹⁴⁵*Id.* at 435.

¹⁴⁶822 F.2d 1348 (4th Cir. 1987).

¹⁴⁷*Id.* at 1352.

¹⁴⁸*Id.*

¹⁴⁹804 F.2d 1324 (4th Cir. 1986).

¹⁵⁰*Mraz v. Canadian Universal Ins. Co.*, 616 F. Supp. 1173 (D. Md. 1985).

¹⁵¹*Mraz*, 804 F.2d at 1329.

named insured must promptly take all reasonable steps to prevent other bodily injury or property damage from arising out of the same or similar conditions."¹⁵² But this requirement was removed from the CGL policy in 1973.¹⁵³ Some companies added an endorsement requirement policyholder cleanup, but most CGL policies applicable to current environmental claims do not contain any such requirement. Because this express exclusion was once included and then removed, the appropriate inference is that insurers anticipated, at least after 1973, that there was coverage for such costs.¹⁵⁴

Second, irrespective of the drafting history, coverage of such costs makes sound legal and policy sense. *Mraz* and *Maryland Casualty* place too much emphasis upon traditional formal pleading rules without substantive significance. As several courts have held, the plain meaning of "property damage," what an ordinary, reasonable, policy holder would expect to have covered in a liability insurance policy, would include such cleanup costs.¹⁵⁵ This is especially true because these policies are represented as *comprehensive* general liability policies.¹⁵⁶ Moreover, to the extent there is any ambiguity in the phrase "property damage," it must be construed against the drafter-insurer and in favor of indemnity for the insured.¹⁵⁷

There is no principled distinction between costs incurred by private parties in a CERCLA-imposed cleanup and damages awarded against the same parties after the government or some other private party does the same cleanup. Liability under CERCLA and similar statutes is liability for the costs of cleanup, not merely the actions involved, and is a traditional damage liability. In addition, CERCLA is intended to discourage litigation and to encourage private party cleanups, which generally are much more economical than government-conducted cleanups. Those purposes are frustrated if insurance policies are construed to provide coverage only for a traditional damage award obtained after someone else has done the cleanup.

F. Application of the "Pollution Exclusion"

The "pollution exclusion" is the last hurdle to coverage for environmental claims. The exclusion in the CGL policy purports to exclude

¹⁵²W. J. Obrist, *quoted in* Anderson & Luppi, *supra* note 106, at 69.

¹⁵³Reichenberger, *supra* note 102, at 12.

¹⁵⁴Anderson & Luppi, *supra* note 106, at 69.

¹⁵⁵*See, e.g.,* Queen City Farms, Inc. v. Aetna Consol. Sur. Co., No. 86-2-06236-0, slip op. at 6-7 (Wash. S. Ct. Kings Cty. Sept. 4, 1987) *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188, 1194-95 (9th Cir. 1986).

¹⁵⁶*National Screen Service Corp. v. United States Fidelity & Guar. Co.*, 364 F.2d 275, 279-80 (2d. Cir. 1965), *cert. denied*, 385 U.S. 958 (1966).

¹⁵⁷*Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 471 (Ind. 1985).

pollution claims, but it “does not apply if such discharge, disposal, release or escape is sudden and accidental.” Even if the insured can demonstrate that the claim it made with the insurer involved an occurrence that caused either property damage or bodily injury during the policy period, the insurer may still contend that the pollution exclusion releases the insurer from its duty to indemnify the insured.

The critical language in the exclusion is the exception for “sudden and accidental” pollution. Many more recently issued CGL policies have incorporated “absolute” pollution exclusions, which purportedly absolutely exclude coverage for claims caused by pollution because these modified exclusions do not contain the “sudden and accidental” clause.¹⁵⁸

To date, most courts have found that the pollution exclusion does not effectively exclude most environmental claims. A number of courts have held the language of the pollution exclusion is fundamentally ambiguous or insignificant, and have therefore found coverage. These courts have followed two basic lines of reasoning in finding coverage. The first is that the phrase “sudden and accidental” is by itself ambiguous, and should be construed to find coverage.¹⁵⁹ The second is that the pollution exclusion is nothing more than a restatement of the definition of occurrence, and allows coverage except in cases in which the pollution and damage from the pollution is expected or intended.¹⁶⁰

The ambiguity in the phrase “sudden and accidental” is patent. Insurers contend that “sudden and accidental” should be construed in a temporal sense, meaning immediate or swift. But insureds point to the ordinary dictionary definitions of unexpected or unanticipated. The “unexpected or unanticipated” interpretation of the phrase makes sense on two levels—both the pollution event and its harmful consequences can be unexpected or unintended. In contrast, the “immediate or swift” interpretation makes no sense at all if applied at the damage level. Why should delayed manifestation from a pollution event not be covered, but damage appearing immediately or swiftly be covered? The temporal construction would bar coverage on many claims, conversely the unexpected or unanticipated construction is much more likely to lead to

¹⁵⁸Chesler, Rodburg, Smith, *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 RUTGERS L.J. 9, 21 n.362 (1986). This article presents a comprehensive and cogent discussion of the decisions in this area of the law.

¹⁵⁹See *Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co.*, 17 Ohio App. 3d 127, 477 N.E.2d 1227, 1234 (1984); *Molton, Allen and Williams, Inc. v. St. Paul Fire and Marine Ins. Co.*, 347 So. 2d 95 (Ala. 1977). This case limited the pollution exclusion to industrial pollution. This consideration has not been followed by courts in other jurisdictions.

¹⁶⁰*Jackson Township Mun. Util. Auth. v. Hartford Accident and Indem. Co.*, 186 N.J. Super. 156, 451 A.2d 990 (1982). See also *City of Northglenn v. Chevron USA, Inc.*, 634 F. Supp. 217, 222 (D. Colo. 1986).

the conclusion that there is liability coverage. Faced with this ambiguity most courts have resolved the issue in favor of indemnity and insureds.

Two landmark New Jersey cases have laid the framework for the majority view favoring the converse for most pollution events. First, in *Lansco, Inc. v. Department of Environmental Protection*¹⁶¹ the court identified the ambiguities in the language of the exclusion and found coverage where the event of pollution was neither expected nor intended by the insured.

In *Jackson Township Municipal Utility Authority v. Hartford Accident and Indemnity Co.*, New Jersey reaffirmed the presence and consequences of the exclusion's ambiguity:

If there exists a problem of construction of the policy, that is, if the controlling language will support two meanings, one favorable to the insured and the other favorable to the insurer, the interpretation sustaining coverage must be applied.¹⁶²

The court summarized and embraced the expansion of the ambiguity, identified in *Lansco*:

Thus, almost unanimously, the courts in other jurisdictions go one step beyond *Lansco* . . . in finding that the pollution clause is ambiguous. In *Lansco* the occurrence was sudden and accidental because the event was unexpected, whereas in each of the other cases the court held the occurrence to be sudden and accidental because the result or injury was unexpected or unintended.¹⁶³

As the *Jackson* court pointed out, the interpretation of the phrase "sudden and accidental" to mean unanticipated or unintended is consistent with the definition of a covered "occurrence" in the policy. Indeed, "when viewed in light of the case law cited, the clause can be interpreted as simply a restatement of the definition of 'occurrence'—that is, that the policy covers claims where the injury was 'neither expected nor intended'."¹⁶⁴ Viewing the facts from the standpoint of the insured, the court stated that "the function of depositing the waste may have been intentional but it was never expected or intended that the waste would seep into the aquifers resulting in damage and injury

¹⁶¹138 N.J. Super. 275, 350 A.2d 520 (1975), *aff'd*, 145 N.J. Super. 433 (App. Div. 1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977).

¹⁶²186 N.J. Super. 156, 161, 451 A.2d 990, 992 (1982) (citing *Mazzilli v. Accident & Casualty Ins. Co. of Winterthur*, 35 N.J. 1, 170 A.2d 800 (1961)).

¹⁶³*Jackson*, 186 N.J. Super. at 164, 451 A.2d at 994.

¹⁶⁴*Id.*

to others.”¹⁶⁵ The court found it irrelevant that the seepage into the groundwater was gradual rather than sudden because the seepage was unexpected.¹⁶⁶ The *Jackson* court identified by example the types of cases in which the pollution exclusion would apply:

The chemical manufacturer or industrial enterprise who discharges, disburses or deposits hazardous waste material knowing, or who may have been expected to know, that it would pollute, will be excluded from coverage by the clause. The industry, for example, which is put on notice that its emissions are a potential hazard to the environment and who continues those emissions is an active polluter excluded from coverage.¹⁶⁷

The *Jackson* court's equation of the pollution exclusion with the requirement in the definition of occurrence that the damage be neither expected nor intended is supported by mounting evidence concerning the drafting and regulatory history of the exclusion. The exclusion was drafted and submitted to the various state insurance commissioners in 1970. The Mutual Insurance Rating Bureau, an insurance industry association which helped draft and submit the exclusion, wrote memoranda to the insurance commissioners which set forth the purpose of the exclusion: “This endorsement is actually a clarification of the original intent, in that the definition of occurrence excludes damages that can be said to be expected or intended.”¹⁶⁸ The memoranda stated that the exclusion was being added only to clarify that expected or intended pollution was not covered.

The regulators took the insurers at their word. West Virginia's insurance commissioner, for example, expressly relied upon these representations in approving the exclusion. In an order dated August 19, 1970, the Commissioner ruled:

(1) The said companies [INA, Travelers, American Home, St. Paul and American States] and rating organizations have represented to the Insurance Commissioner, orally and in writing, that the proposed exclusions . . . are merely clarifications of existing coverage as defined and limited in the definitions of the term ‘occurrence’, contained in the respective policies to which said exclusions would be attached;

(2) to the extent that said exclusions are mere clarifications of existing coverages, the Insurance Commissioner finds that

¹⁶⁵*Id.*

¹⁶⁶*Id.*

¹⁶⁷*Id.*

¹⁶⁸Mutual Insurance Rating Bureau, Submission to West Virginia Commissioner of Insurance, July 30, 1970, *quoted in* Anderson & Luppi, *supra* note 106, at 70.

there is no objection to the approval of such exclusions.¹⁶⁹

Thus, it is clear that the insurance industry represented the exclusion as nothing more than a restatement of the requirement in the definition of occurrence that a covered loss be unexpected and unintended. Recently, courts have expressly relied upon this drafting history to buttress the majority authority restricting the pollution exclusion to active polluters.¹⁷⁰ In *Kipin Industries, Inc. v. American Universal Insurance Co.*, for example, insurers sought to use the exclusion to escape coverage for claims—including CERCLA claims—made against non-active polluters, companies which had contracted for waste disposal with a firm which allegedly had mishandled the wastes. The Ohio Court of Appeals neatly summarized the limited application of the exclusion:

The claim must be construed strictly against the insurer because it is ambiguous in meaning and its subject matter is an exclusion from what is stated to be comprehensive coverage against liability. We find in the record before us a 1970 circular to the members of the Insurance Rating Board that in discussing [the pollution exclusion], states that the clause is intended to clarify the definition of "occurrence" so as to exclude coverage for expected or intended results. [The pollution exclusion] does not bar coverage in this case.¹⁷¹

Kipin and similar decisions make it plain that courts are increasingly inclined to make insurers adhere to their contemporaneous portrayal of this exclusion as nothing more than a clarification that the intentional "active" polluter is not covered, but that non-active polluters—the great majority of CERCLA claimants—are covered.

Numerous decisions have applied a similar distinction to find coverage for innocent as opposed to knowing or intentional pollutants. This approach was first adopted in *Niagara County v. Utica Mutual Insurance Co.*¹⁷² *Niagara* involved the Love Canal claims. In that case, the court found that the pollution exclusion was ambiguous and that it did not

¹⁶⁹August 19, 1970 Order of the Insurance Commissioner of the State of West Virginia in a proceeding entitled "Pollution and Contamination: Exclusion Filings," Administrative No. 70-4, p. 3 & 1 quoted in *Anderson & Luppi*, *supra* note 106, at 70.

¹⁷⁰*Kipin Industries, Inc. v. American Universal Ins. Co.*, No. A-8505288, slip op. (Ohio Ct. App., Aug. 12, 1987); See also *Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co. of New York*, 218 N.J. Super. 516, 528 A.2d 76 (N.J. Super. Ct. App., Div. 1987).

¹⁷¹*Kipin*, slip op. at 8-9.

¹⁷²103 Misc.2d 814, 427 N.Y.S.2d 171 (1980), *aff'd*, 80 A.D.2d 415, 439 N.Y.S.2d 538 (1981), *appeal dismissed*, 54 N.Y.S.2d 608, 427 N.E.2d 1191, 443 N.Y.S.2d 1030 (1981).

apply to the insured, the county government. The court held that the exclusion should apply only to an "active polluter," a culpable party, as opposed to a party who is liable because of the strict liability that attaches to the improper disposition of hazardous materials under federal and state law. The court in *United Pacific Insurance Co. v. Van's Westlake Union, Inc.*,¹⁷³ similarly found coverage by applying the "active polluter" doctrine from *Niagara County*.

In light of the extensive and continually expanding authority¹⁷⁴ and evidence limiting applicability of the pollution exclusion, most insureds should have little difficulty overcoming insurers' present efforts to reconstruct the exclusion. While there are some decisions in which the pollution exclusion has operated to disallow coverage,¹⁷⁵ those cases clearly are a minority view. Moreover, in a number of these decisions there was not an occurrence because the insured either intended or expected the damage, which means the court should have ended its inquiry before reaching the pollution exclusion.

The only Indiana appellate decision construing the pollution exclusion is such a special intentional pollution case. In *Barnet of Indiana, Inc. v. Security Insurance Group*,¹⁷⁶ the Indiana Court of Appeals found that the emissions from the insured's plant were neither sudden nor accidental because the insured's pollution control system malfunctioned on a regular and frequent basis. The insured was on notice of the regular escape of gases due to neighbors' complaints. The court was not impressed by the insured's claim that the emissions were either unforeseeable or unpre-

¹⁷³34 Wash. App. 708, 664 P.2d 1262 (1983).

¹⁷⁴See, e.g., *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71 (E.D. Mich. 1987); *Payne v. United States Fidelity and Guaranty Co.*, 625 F. Supp. 1189, 1193 (S.D. Fla. 1985); *United States Fidelity and Guaranty Co. v. Armstrong*, 479 So. 2d 1164, 1168 (Ala. 1985); *Molton, Allen and Williams, Inc. v. St. Paul Fire and Marine Ins. Co.*, 347 So. 2d 95 (Ala. 1977); *Reliance Ins. Co. of Illinois v. Martin*, 126 Ill. App. 3d 94, 467 N.E.2d 287 (1984); *Willett Truck Leasing Co. v. Liberty Mut. Ins. Co.*, 88 Ill. App. 3d 133, 410 N.E.2d 376 (1980); *Jonesville Products, Inc. v. Transamerica Ins. Group*, 156 Mich. App. 508, 402 N.W.2d 46, 48 (1986); *Autotronic Systems, Inc. v. Aetna Life and Casualty*, 89 A.D.2d 401, 456 N.Y.S.2d 504 (1982); *Niagara County v. Utica Mut. Ins. Co.*, 80 A.D.2d 415, 439 N.Y.S.2d 538, *appeal denied*, 54 N.Y.S.2d 831 (1981); *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 426 N.Y.S.2d 603 (1980); *United Pacific Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 664 P.2d 1262 (1983).

¹⁷⁵See, e.g., *Fischer & Porter Co. v. Liberty Mutual Ins. Co.*, 656 F. Supp. 132, 139-40 (E.D. Pa. 1986) (citing *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30, 33-34 (1st Cir. 1984)); *American States Ins. Co. v. Maryland Casualty Co.*, 587 F. Supp. 1549, 1552-53 (E.D. Mich. 1984); *Techalloy Co. v. Reliance Ins. Co.*, 487 A.2d 820 (Pa. Super. Ct. 1984).

¹⁷⁶425 N.E.2d 201 (Ind. Ct. App. 1981).

dictable.¹⁷⁷ Under these special facts, the Indiana court was persuaded that the pollution exclusion provision applied to deny coverage.

The *Barmet* decision highlights the critical requirement in Indiana's general insurance law discussed above that before an insurer can deny coverage for an intentional act, it must show that the insured knew or had reason to know that its act would cause harm.¹⁷⁸ The *Barmet* insured could foresee and expect that harm might come from its air pollution, even if it probably did not intend for the vapors to blow onto a highway and cause an automobile accident. Thus, under Indiana law, there was a basis for the insurer to deny liability because some harm was foreseeable.

Barmet has little significance in the typical circumstances usually confronting insureds and insurers in CERCLA cases. The insureds in *Barmet* were clearly "active" polluters. Typical CERCLA insureds' first notice of a pollution problem is a PRP notification letter from the EPA. *Barmet* plainly is no support for any contention that the pollution exclusion should operate in Indiana to deny coverage in the vast majority of cases in which the insured is not on notice that its operation is causing pollution.

IV. CONCLUSION

CERCLA liability can arise in a surprisingly wide variety of situations. Such liability can be imposed not only upon companies engaged in hazardous waste management, but also upon those companies' shareholders, directors, officers, and employees. CERCLA liability can arise from mere ownership of contaminated property, and can also arise from the purchase and sale of contaminated property. Even creditors of responsible parties may be exposed to CERCLA liability.

It is not yet possible to define with precision the limits of responsibility under CERCLA, but it is clear that the scope of liability is expanding. It is hoped that the application of CERCLA's liability provisions will become clearer as the limiting principles discussed in this article become more fully developed.

Federal and state courts in Indiana have not yet decided critical questions concerning liability coverage for environmental cleanup costs. Indiana courts should utilize the rapidly developing law concerning these issues in other jurisdictions and Indiana's own already well established general insurance law principles to decide these questions. Indiana courts should have little difficulty in holding that an occurrence has taken place in a typical environmental claim. They may look to prior Indiana in-

¹⁷⁷*Id.* at 203.

¹⁷⁸See *supra* notes 119-24 and accompanying text.

insurance decisions which hold that an "occurrence" takes place where the damage or harm was not actively intended by the insured. The courts of this state would be in step with the majority of environmental insurance coverage decisions by finding an occurrence in these circumstances.

In an analogous pharmaceutical case, Indiana's Supreme Court already had adopted the multiple trigger rule for determining which insurers are liable with respect to a particular bodily injury claim.¹⁷⁹ The multiple trigger rule should extend to most environment claims, which typically share vital characteristics with pharmaceutical claims—alleged injury from exposure to a foreign substance. The public policies and precedents cited by the Indiana Supreme Court supporting adoption of the multiple environmental trigger rule in the bodily injury context should be equally persuasive in adopting the same trigger of coverage rule for environmental property damage claims.

Indiana's courts also should hold that government mandated cleanup costs are properly "property damages" as defined by the standard CGL policy. That holding would be consistent with both the history of the CGL policy and the majority of cases addressing this issue in other jurisdictions. There is no principled reason to limit the protection of a *comprehensive* general liability policy so that cleanup costs are not covered.

Finally, the pollution exclusion, based on its drafting history and the sound reasoning of many other courts in other jurisdictions, should not be applied in cases other than those involving an insured engaged in active and intentional pollution. In the typical circumstances of a non-active polluter, named as a PRP in a CERCLA action, the vast majority of jurisdictions find the pollution exclusion to be ambiguous or redundant to the definition of occurrence, and tend to find in favor of the insured to avoid defeating their reasonable expectations of comprehensive liability insurance. Indiana courts should affirm coverage for environmental damage which the insureds neither intended nor expected.

¹⁷⁹Eli Lilly and Co. v. Home Ins. Co., 482 N.E.2d 467 (Ind. 1985).