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# Monsanto Lecture

## CLEANING UP THE ENVIRONMENTAL LIABILITY INSURANCE MESS

KENNETH S. ABRAHAM\*

### I. INTRODUCTION

Until recently, the connections between civil liability and insurance law went largely unexamined. In the tort law of the first year of law school—the world of liability for personal injury caused by throwing lighted squibs,<sup>1</sup> of *Mrs. Palsgraf* and proximate cause,<sup>2</sup> and of liability for injuries caused by “defective” consumer products<sup>3</sup>—traditionally little or no attention was paid to these connections. In addition, both tort law scholarship and judicial decisions in tort cases were generally carried on without explicit concern for the insurance implications of different liability rules. That has all begun to change as tort law scholars<sup>4</sup> and the courts<sup>5</sup> have come to recognize that the old assumption of tort law, that where liability goes insurance is sure to follow,<sup>6</sup> is not always accurate. Several of the past Monsanto Lectures have been attentive to the

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\* Class of 1962 Professor of Law, University of Virginia School of Law. I wish to thank Timothy Dyk, Stephen Goodman, and the participants in a workshop at the University of Virginia School of Law for their comments on an earlier version of this piece. Although I have been involved as a sometime consultant to policyholders in environmental insurance litigation, my goal in this piece is to present a proposal that will benefit and be acceptable to both policyholders and insurers.

1. *Scott v. Shepherd*, 2 Wm. Bl. 892, 96 Eng. Rep. 525 (1773).

2. *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

3. See RESTATEMENT (SECOND) OF TORTS § 402A (1966).

4. See, e.g., Ralph A. Winter, *The Liability Insurance Market*, 5 J. ECON. PERSP. 115, 133 (1991); Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 OHIO ST. L.J. 399 (1987); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987).

5. See, e.g., *Carroll v. Otis Elevator Co.*, 896 F.2d 21 (7th Cir. 1990); *Torres v. Goodyear Tire & Rubber Co.*, 867 F.2d 1234 (9th Cir. 1989); *Sewell v. Gregory*, 371 S.E.2d 82 (W. Va. Sup. Ct. 1988).

6. For example, Justice (later Chief Justice) Traynor of California, one of the early advocates of strict products liability, deployed precisely this rationale in his most famous opinion on the issue: “[T]he risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.” *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).

connections between tort law and insurance generally,<sup>7</sup> and in his 1990 lecture Professor Epstein analyzed in detail the relationship between tort liability and automobile insurance.<sup>8</sup>

In this Lecture I wish to examine and propose a solution to a problem that lies at the intersection of civil liability, insurance, and health and safety regulation, and, in doing so, I wish to scrutinize several of the assumptions that lie behind the way in which civil litigation is conducted in this country. The problem is posed by the massive and (in my view) wasteful litigation over insurance coverage of environmental cleanup liability imposed by CERCLA<sup>9</sup>—the federal “Superfund” Act—and its state-by-state equivalents.<sup>10</sup> CERCLA liability and the insurance litigation it has spawned are of interest not only because their economic significance has grown exponentially in the last decade. In addition, unlike common law tort liability, whose evolutionary character at least in principle permits insurance law to evolve along with it, the CERCLA liability regime was adopted on a single day and led almost immediately to the need for a developed body of law governing insurance coverage of that liability; yet, this body of cleanup coverage law did not exist. For this reason, examining how the enactment of CERCLA has engendered massive litigation over coverage of cleanup liability may help us to understand more generally the ripple effects created by a new form of civil liability that emerges at a single moment, almost full-blown. In an era often characterized by rapid legal change, that understanding is likely to be valuable.

## II. THE INSURANCE CONSEQUENCES OF CERCLA LIABILITY

CERCLA became law on December 3, 1980. It was a new kind of environmental statute, for it was largely remedial rather than regulatory. The purpose of the statute is to assure cleanup of abandoned or inactive hazardous waste disposal sites.<sup>11</sup> It was designed to accomplish this cleanup goal in two

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7. See, e.g., Robert L. Rabin, *Tort Law in Transition: Tracing the Patterns of Sociolegal Change*, 23 VAL. U. L. REV. 1, 6, 13 (1988); George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1, 14-20 (1987).

8. See Richard A. Epstein, *A Clash of Two Cultures: Will the Tort System Survive Automobile Insurance Reform?*, 25 VAL. U. L. REV. 173 (1991).

9. See 42 U.S.C. §§ 9601-75 (1988). The full name of the statute is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

10. In the remainder of this article I shall use the terms ‘CERCLA’ and ‘CERCLA liability’ to refer not only to liability imposed under CERCLA itself, but also to analogous liability imposed under state “mini-Superfund” and other similar statutes. For a discussion and analysis of these state statutes, see U.S. ENVIRONMENTAL PROTECTION AGENCY, AN ANALYSIS OF STATE SUPERFUND PROGRAMS: A FIFTY-STATE STUDY (1989) [hereinafter EPA STUDY].

11. See ALFRED R. LIGHT, CERCLA LAW AND PROCEDURE 12-25 (1991).

ways. One way is through the federal expenditure of cleanup costs from a fund (hence the name "Superfund") raised through a series of different taxes, the most important of which is levied on producers of the chemicals that are typical constituents of hazardous waste.<sup>12</sup>

A second method by which CERCLA is to accomplish its goal, however, is through the imposition of liability for the cost of cleanup on designated "responsible parties": past or present owners and operators of a site in need of cleanup, certain transporters of material to a site, and any party who generated material deposited at a site.<sup>13</sup> Even as stated these are significant liabilities; but it also became clear soon after the statute's enactment that liability under CERCLA is strict,<sup>14</sup> retroactive,<sup>15</sup> and (except when the harm caused by different parties is divisible) joint and several,<sup>16</sup> and further that the defenses to liability are extremely limited.<sup>17</sup> Finally, in the wake of CERCLA, a number of states have enacted "mini-Superfund" statutes creating similar liabilities in connection with sites that are not subject to the federal regime.<sup>18</sup> The average cost of remedying hazardous conditions at a site on the Superfund "National Priority List" now exceeds \$30 million.<sup>19</sup> The list includes over 1200 sites; about 800 other sites probably will be added to it; and as many as 30,000 additional sites may eventually require less expensive cleanup under other federal and state remedial programs.<sup>20</sup> The consequence is that, in short order, federal and state governments have brought into being a form of liability that under current estimates is expected eventually to total several hundred billion dollars.<sup>21</sup>

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12. See CERCLA § 111, 42 U.S.C. § 9611 (1988) and references therein.

13. See CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988).

14. See *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983).

15. See *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

16. See *id.*; *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983).

17. Responsible parties under § 107(a) of CERCLA have defenses against liability only if a "release or threat of release of hazardous substances and the damages resulting therefrom were caused solely by (1) an act of God; (2) an act of war;" or an act or omission of a third party with whom the potentially responsible party is not in a direct or indirect contractual relationship, if the potentially responsible party exercised due care with respect to the hazardous substance and took precautions against the foreseeable acts or omission third parties. CERCLA § 107(b), 42 U.S.C. § 9607(b) (1988).

18. See, e.g., MASS. GEN. LAWS ANN. ch. 21E, § 5 (West Supp. 1992). See generally EPA STUDY, *supra* note 10.

19. U.S. GENERAL ACCOUNTING OFFICE, SUPERFUND: A MORE VIGOROUS AND BETTER MANAGED PROGRAM IS NEEDED 2 (Dec. 1989).

20. See MILTON RUSSELL ET AL., HAZARDOUS WASTE REMEDIATION: THE TASK AHEAD A-3.6 (1991).

21. *Id.* at 19.

American industrial companies, which can expect to bear the lion's share of liability imposed under CERCLA and its state equivalents, responded to the creation of this new liability in a manner that, in retrospect, seems entirely predictable. They claimed that they were covered against cleanup liability under the Comprehensive General Liability (CGL) insurance policies that they had been purchasing for decades. Their insurers reacted in a manner that also seems entirely predictable. The insurance companies denied the claims, arguing that the language of their policies did not provide coverage, and that such coverage was never contemplated by either policyholders or the insurance industry. Undoubtedly, their decision to deny coverage was also influenced by the prospect that paying the claims in full would risk rendering the insurers insolvent. When the insurers denied the claims, the last inevitable step in the process followed: many policyholders brought suit.

Litigation over coverage for CERCLA liability is not ordinary coverage litigation. Many policyholders face CERCLA liability at dozens or even hundreds of sites. Because the suits allege coverage under policies that insure against liability imposed because of property damage that occurs "during the policy period," each insurer that issued a policy during any of the ten, or twenty, or thirty different years when property damage may have occurred at any of the sites where the policyholder faces liability is likely to be made a defendant. And because policyholders almost always have purchased primary and excess liability insurance in "layers" from different insurers, a dozen or more insurers may have participated in the policyholder's coverage program in each year. Such litigation thus poses enormous practical and conceptual problems: complex issues and several hundred million dollars may be at stake in any given suit, and with several hundred billion dollars at stake in the aggregate, cleanup coverage litigation has become at least as time-consuming, contentious, and expensive as CERCLA litigation itself.

Two important differences between cleanup coverage litigation and other forms of mass litigation (including litigation over CERCLA liability itself) are worth investigating in detail, for these differences are heavily responsible for the character of cleanup coverage litigation. First, the results reached in cleanup coverage suits are not uniform, because state contract law governs cleanup coverage claims. Second, twelve years after the CERCLA liability against which policyholders claim coverage was created, authoritative law governing these claims is limited, because the claims pose numerous questions of first impression.<sup>22</sup>

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22. For analysis of the decisions that have emerged thus far, see KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW (1991).

The lack of uniformity in the results of cleanup coverage litigation is noteworthy especially because the litigation involves not only the same issues, but also insurance policies containing the same language. CGL insurance policies have been written on standard forms for over fifty years.<sup>23</sup> The provisions at issue in cleanup coverage litigation typically do not vary, even slightly, from case to case. Yet the decisions by the fifty-one different state court systems and by numerous federal courts in diversity actions faced with questions of first impression in cleanup coverage litigation have often been in direct conflict. For example, a standard CGL provision covering liability for sums payable "as damages" covers CERCLA liability in California but not in Maine;<sup>24</sup> and two federal courts of appeals disagree about how the courts of Missouri would rule on the same issue.<sup>25</sup> Similarly, the word 'sudden' in an exception to the "pollution exclusion" that was incorporated into CGL policies in the early 1970s means "unexpected" in Georgia (and five other states),<sup>26</sup> but it means "abrupt" in Ohio (and four other states).<sup>27</sup> To make matters even more complicated, there is conflicting authority regarding not only these substantive coverage questions, but also regarding the choice-of-law principles to be employed in this field. Some states apply the law of the state where a site is located to cleanup coverage claims;<sup>28</sup> others apply the law of the place of contracting;<sup>29</sup> and many employ a test (apply the law of the state with the

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23. *Id.* at 24.

24. *See* AIU Ins. Co. v. Superior Court, 799 P.2d 1253 (Cal. 1990) (holding that liability for cleanup costs may constitute "damages" under CGL insurance policies). *Contra* Patrons Oxford Mut. Ins. Co. v. Marois, 573 A.2d 16 (Me. 1990).

25. *See* Continental Ins. Cos. v. Northeastern Pharmaceutical and Chemical Co., 842 F.2d 977 (8th Cir. 1988) (holding that liability for cleanup costs does not constitute "damages" under CGL insurance policies under Missouri law). *Contra* Independent Petrochemical Corp. v. Aetna Casualty and Surety Co., 944 F.2d 940 (D.C. Cir. 1991).

26. *See* Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204 (Ill. 1992); Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 1992 WL 212008 (Fla.); Joy Technologies, Inc. v. Liberty Mutual Ins. Co., 421 S.E.2d 493 (W.Va. 1992); Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991); *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570 (Wis. 1991); *Claussen v. Aetna Casualty and Surety Co.*, 380 S.E.2d 686 (Ga. 1989).

27. *See* Hybud Equipment Corp. v. Sphere Drake Ins. Co. Ltd., 597 N.E.2d 1096 (Ohio 1992); *Upjohn Co. v. New Hampshire Ins. Co.*, 476 N.W.2d 392 (Mich. 1991); *Lumbermens Mutual Casualty Ins. Co. v. Belleville Indust., Inc.*, 555 N.E.2d 568 (Mass. 1990); *Technicon Electronics, Inc. v. American Home Assurance Co.*, 542 N.E.2d 1048 (N.Y. 1989); *and Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374 (N.C. 1986).

28. *See, e.g.*, *Johnson Matthey Inc. v. Pa. Manufacturer's Ass'n. Ins. Co.*, 593 A.2d 367 (N.J. Super. Ct. App. Div. 1991) (holding that New Jersey law applies to the meaning of insurance policies potentially applicable to cleanup of sites located in New Jersey).

29. *See, e.g.*, *Liberty Mut. Ins. Co. v. Triangle Industries, Inc.*, 390 S.E.2d 562 (W.Va. 1990) (describing the facts in which a policy was issued in New Jersey, whereas waste was generated in West Virginia, but deposited in Ohio). *But see* *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493 (W.Va. 1992) (holding that West Virginia law applies to a site located in West Virginia, where representations about policies' meanings were made to the West Virginia Insurance Commissioner).

“most significant interest” in the outcome of the dispute)<sup>30</sup> that will sometimes invoke the forum state’s law, sometimes invoke the law of the state where each site is located, and sometimes invoke the law of the place of contracting.

The state-to-state differences in cleanup coverage law might be unfortunate, but tolerable, if this body of law were not in the early stages of development. The law governing coverage of other forms of liability is not uniform across the states, yet there is comparative stability in these areas of insurance law. When the law governing a coverage question is mature, litigants forum shop, contest choice-of-law issues, assess their prospects, and settle cases in light of the reasonably predictable result if the case were litigated to judgment.<sup>31</sup> In such situations, differences between the interpretations of CGL policy provisions by different courts may cause a particular state’s law to seem arbitrary, but results are predictable nonetheless, and settlements can occur in the shadow of these predictions. In contrast, because there are so few authoritative decisions governing the issues that arise in cleanup coverage claims, uncertainty abounds, and reference points to guide settlement negotiations are missing. Whether there would be more settlements if cleanup coverage law was more mature and authoritative decisions were more plentiful is uncertain. But since cleanup coverage litigation continues with a vengeance more than twelve years after CERCLA was enacted, and because there apparently have been few major settlements in all that time, it is plausible to conclude that the absence of a body of law to guide settlement is at least partly responsible.

This entire predicament dramatizes the sense in which legal precedent is a public good. If we continue on the present course, the development of a body of settled doctrine will take years, and even then results will depend heavily on the state whose rules are applied to a claim. This kind of uncertainty and potential inconsistency is costly and destabilizing for all concerned. It encourages forum shopping and pre-emptive suits, and it wastes scarce resources on litigation instead of using them for environmental cleanup. It is therefore worth asking if our legal system should permit this situation to continue. The settling of cleanup coverage rules could reduce resource-consuming litigation, probably substantially. And if such rules were uniform, then parties who are in most important respects similarly situated would be treated alike.

It may be, therefore, that the undoubted value in our federal system of

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30. See, e.g., *Chesapeake Utilities Corp. v. American Home Assur. Co.*, 704 F. Supp. 551 (D. Del. 1989); RESTATEMENT (SECOND) CONFLICTS OF LAW, *supra* note 3, at § 188.

31. For discussions of the conditions under which cases settle, see Samuel R. Gross and Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991); George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

permitting states to adopt and apply their own common law contract rules is outweighed by the national interest in assuring that the identical insurance contracts used across the nation mean the same thing in Nebraska as they do in Florida, New Jersey, or New Mexico. It may be that the law governing the meaning of essential legal documents such as CGL insurance policies should not be inconsistent, and that the American economy should not be investing billions of dollars in the litigation that results from the legal system's inability to quickly generate uniform rules governing the meaning of CGL policies and their application to environmental cleanup liability.

### III. POSSIBLE SOLUTIONS TO THE PROBLEM

Having isolated the nature of the problems that state-by-state environmental insurance coverage litigation has created, the question becomes whether anything sensible can alleviate these problems. A number of relatively conventional alternatives are plausible, but all except one are either sufficiently flawed or impractical that in the following discussion I shall analyze and reject them. Then I will consider in detail a less conventional solution: federal legislation creating retroactive national coverage rules governing the most pressing legal issues that arise in these disputes.

#### A. *A Global National Settlement*

Ideally, the piecemeal litigation of cleanup coverage issues that plagues this field would be avoided through voluntary agreement between policyholders and insurers, acting collectively. Under such an agreement, insurers would agree to pay and policyholders would agree to accept specified sums or percentages of coverage for different categories of cleanup coverage claims. A model for this approach was the result of an effort to solve the insurance coverage problems associated with asbestos liability through the "Wellington Agreement," which, for complicated reasons, eventually unravelled.<sup>32</sup>

One can readily see the difficulty of achieving a global national settlement, however, by conceiving of such a settlement as a form of insurance itself. The settlement of any contested legal claim is a form of risk transfer. To protect against the risk that it would be wholly unsuccessful if the claim was litigated to judgment, the claimant pays a premium—a surrender of the possibility of being completely successful; to protect against the risk that it would be wholly unsuccessful if the claim was litigated to judgment, the defendant pays a premium—the amount of the settlement. But settlements, like any form of

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32. See Lawrence Fitzpatrick, *The Center for Claims Resolution*, 53 LAW & CONTEMP. PROBS. 13, 15-17 (1990).



insurance, are likely to be afflicted by adverse selection—the tendency of any potential policyholder posing an above-average risk to find insurance more attractive than a policyholder posing an average or below-average risk.<sup>33</sup>

In two-party settlements, the threat of adverse selection can be mitigated through detailed analysis by both parties of the risks they both face. Given each party's risk aversion and the transaction costs that they will incur if they do not settle, settlements are common. But assessment of the strength of individual policyholders' claims as part of a global national settlement would be impossible; indeed, avoiding the cost of such investigation by settling in a way that would be optimal in the aggregate—even if the settlement was suboptimal for particular policyholders and insurers—would be the whole object of this approach.

As a result, however, policyholders and insurers who consider subscribing to any proposed global settlement would have to be concerned about adverse selection. Because subscribing to a global settlement would be optional, any policyholder whose insurer planned to subscribe would have to wonder whether the policyholder could obtain a global settlement on better terms by opting out; and any insurer who saw a policyholder planning to subscribe would have to wonder whether the policyholder's actual claims would lead to less coverage than the settlement would provide. This problem would seriously threaten the viability of a global national settlement, and may in fact be one reason we have not yet seen any movement toward such a settlement.

### *B. A Uniform State Law*

The Uniform Commercial Code (UCC), fully enacted in fifty of the fifty-one jurisdictions in the United States,<sup>34</sup> has had a very substantial unifying effect on the commercial law of the United States. Despite the lack of a federal body of law, the Code has reduced variation in the rules of the different states and has facilitated the nationalization of the American commercial system. A uniform state law model is therefore a second possible model to be used in resolving the environmental liability insurance controversy.

I have two concerns about this model. First, as a practical matter, the possibility of obtaining a fifty-one jurisdiction consensus on a solution is slight. The stakes for some parties are so high that even if a consensus was achievable at the drafting stage, breakdown of that consensus at the enactment stage within some state legislatures seems almost inevitable. Any significant breakdown

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33. See ABRAHAM, *supra* note 22, at 21-22.

34. Louisiana has not adopted Articles 2 and 6. See ALAN SCHWARTZ & ROBERT E. SCOTT, SALES LAW AND THE CONTRACTING PROCESS 2 (2d ed. 1991).

would shatter overall uniformity and effectively reinstate the differences that had prompted the effort to enact a uniform state law in the first place.

Second, even if, by some miracle, cross-state statutory uniformity was achieved, that uniformity would be vulnerable to breakdown at the judicial level. The pressures on the state courts would undoubtedly result in divergent results, and the grounding of any uniform statute in state law would make it impossible for any single appellate court to harmonize differences among the states. Litigation even under various provisions of the UCC has to some extent produced these kinds of differences.<sup>35</sup> Yet, in many ways the Code is just what its name implies—a codification of generally harmonious results,<sup>36</sup> not the political compromise of starkly inconsistent state rules that any uniform state law governing cleanup coverage would have to be. For both reasons, therefore, the uniform state law model does not appear to be a promising solution to the environmental cleanup coverage controversy.

### C. Federal Common Law

A third model would vastly reduce the possibility of divergent judicial interpretations of a uniform state law by making the proper application of past CGL insurance policies to CERCLA and analogous state cleanup liability a question of federal common law.<sup>37</sup> This approach would not of itself prescribe

35. For example, courts are divided on the issue of what constitutes "knowledge" under U.C.C. § 9-401(2), which protects a secured party who does not file his financial statement properly against one with knowledge of his claim. William L. Tabac, *The Courts and Section 9-401(2): When Does a Searcher Acquire Knowledge of a Misfiled Financing Statement?*, 25 UCC L.J. 68, 69 (1992). One line of cases construes 9-401(2) to require only that a creditor searching for the financial statement know that the secured party has an attached interest. See, e.g., *In re Davidoff*, 351 F. Supp. 440 (S.D.N.Y. 1972); Tabac, *supra*, at 73, 74. Other courts hold that the searcher must have actual knowledge of the financing statement. See, e.g., *Goldberg Co. v. County Green Ltd.*, 438 F. Supp. 693, (W.D. Va. 1977); Tabac, *supra*, at 73, 74.

States have also taken a variety of approaches to the interpretation of the warranty provisions of §§ 2-213 to 2-315, applying to sellers of goods. See SCHWARTZ & SCOTT, *supra* note 34, at 172. In *Riffe v. Black*, 548 S.W.2d 175, 177 (Ky. App. 1977), the court considered a swimming pool installation contract to be a sale of goods governed by the implied warranty provisions of the U.C.C.; the same type of contract has been interpreted in Connecticut to be a contract for services falling outside the U.C.C. *Gulash v. Stylarama, Inc.*, 384 A.2d 1221 (Conn. 1975).

36. See Paul D. Carrington, *A Foreword to the Study of the Uniform Commercial Code*, 14 WYO. L. REV. 17, 24 (1959); Karl N. Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367, 373-74 (1957).

37. This approach has a number of analogs. For example, in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), the Supreme Court held that "the substantive law to apply in suits under § 301(a) [of the Labor Management Relations Act of 1947, vesting jurisdiction in the federal courts over suits involving certain labor contracts] is federal law, which the courts must fashion from the policy of our national labor laws." *Id.* at 456. In subsequent cases, the Court held that state courts have concurrent jurisdiction, *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), and that

any particular interpretation of such policies, but because the correct interpretation would be a matter of federal rather than state law, a series of uniform rules governing the application of CGL insurance policies to cleanup liability could eventually emerge.

The federal common law approach is superior in certain respects to the uniform state law model, but it also has two major deficiencies. First, although uniformity would eventually emerge under this approach, it could take a great deal of time to do so. There could still be conflicts among the states or among the different federal courts of appeals on particular issues, and the U.S. Supreme Court might wish to permit the maturation of federal common law in the state and lower federal courts before resolving such conflicts. The result would be continued inconsistency in the law governing the entire field.

The second deficiency of the federal common law model may appear at first to be paradoxical: precisely because this approach would eventually produce uniform results, it could prove to be unacceptably devoid of compromise for the policyholders and insurers whose rights and obligations it would govern. On each important issue, either policyholders or insurers would either completely succeed or completely fail. And because defeat on any one of several issues would mean complete defeat for policyholders, the gamble associated with this approach would be very great indeed. The odds of gaining sufficient agreement among the affected parties to enact it into law are therefore slim.

#### *D. National Coverage Rules*

The foregoing approaches each suffer from deficiencies that are likely to

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state courts hearing such claims must apply federal law, not state contract law. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co.*, 369 U.S. 95, 102 (1962). The Court explained the latter holding by noting that "the subject matter of § 301(a) 'is peculiarly one that calls for uniform law'":

The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements . . . . Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation . . . . The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.

*Id.* at 103-04 (footnote and citations omitted).

Similarly, insurance policies subject to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1101 (1988) et seq., are to some extent governed by federal law. *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437 (9th Cir. 1990); *Sampson v. Mut. Benefit Life Ins. Co.*, 863 F.2d 108 (1st Cir. 1988).

doom them to failure.<sup>38</sup> In particular, isolating the deficiencies in the uniform state and federal common law models underscores the characteristics that a successful and acceptable approach must have: it must simultaneously produce uniform results and embody a compromise that provides both sides in the cleanup coverage controversy a measure of success. The predicament is how to accomplish both results simultaneously. Such a solution would have to avoid the need for agreement by all fifty-one jurisdictions and eliminate the risk that one of the sides in the environmental insurance controversy would suffer total defeat.

I propose a solution that would embody both uniformity and compromise: national, retroactively applicable coverage rules prescribed by federal legislation. National coverage rules should treat both policyholders and insurers fairly. In this context, fair treatment requires recognition that there is a division of authority regarding the major issues in cleanup coverage litigation. At present, any given policyholder's expected insurance recovery is a function of the probability that its claim will succeed, and any given CGL insurer's expected loss is a function of the probability that its defenses will fail. In the aggregate, then, both policyholders and insurers hold expectancies. Any acceptable compromise must protect these expectancies while assuring uniformity.

To achieve this goal, national coverage rules should as nearly as possible replicate the aggregate result that could be expected if detailed rules governing the legal issues in environmental liability insurance litigation were developed on a state-by-state basis over a period of decades. Thus, the goal of national coverage rules should not be to substitute national rules that would differ from state rules, but to generate quickly roughly the same overall result that would be reached after decades of state-by-state coverage litigation. Since individual results would vary, national coverage rules would have to reflect partial success by both policyholders and by insurers—in effect, national coverage rules would have to provide partial coverage of environmental cleanup costs under past CGL

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38. I shall not discuss proposals to alter the CERCLA liability scheme itself, although that regime gives rise to cleanup coverage litigation. One such approach worth noting, however, is the "National Environmental Trust Fund" recently proposed by a number of insurance companies. This approach would eliminate most cleanup liability, and it would finance cleanup out of a fund created by levying taxes on premiums collected by property/casualty insurers and on corporate enterprises that would otherwise be liable for cleanup under CERCLA. Creating such a fund would take cleanup coverage litigation out of the courts, but it could also end up charging current policyholders instead of insurance company stockholders and reinsurers for their fair share of cleanup costs. See AMERICAN INTERNATIONAL GROUP, INC., CRUM AND FORSTER INS. COS., & FIREMAN'S FUND INS. COS., *PUTTING CLEANUP FIRST: THE NATIONAL ENVIRONMENTAL TRUST FUND* (June 1991). For a proposal for the wholesale revision of CERCLA that is also associated with the insurance industry, published by the Insurance Information Institute, see ORIN KRAMER & RICHARD BRIFAUULT, *CLEANING UP HAZARDOUS WASTE: IS THERE A BETTER WAY?* (1993).

policies. These rules would apply, retroactively,<sup>39</sup> to the CGL insurance policies at issue in cleanup coverage litigation—almost exclusively, policies issued before 1986.<sup>40</sup> Of course, some coverage issues are fact-sensitive rather than purely legal. Consequently, a set of national coverage rules should resolve only those purely legal issues that are characteristically and predominately the subject of cleanup coverage litigation, while leaving resolution of factual disputes (plus generic as well as subsidiary legal issues) within the existing system.

Because this entire approach requires predicting in a rough way the overall legal outcome of future coverage litigation, its details are likely to be the subject of reasonable disagreement. There would not necessarily be some coverage of every cleanup claim; it is possible that the rules would be fashioned in a way that deprived certain policyholders in certain situations of any coverage. But if national coverage rules, in the aggregate, provided partial coverage of cleanup liability, then both policyholders and insurers collectively would have been treated fairly.

#### IV. THE SHAPE OF THE RULES

There are two basic approaches to the formulation of compromise coverage rules. A *percentage-of-coverage* rule would entitle the policyholder to coverage of a percentage of its loss, notwithstanding a policy provision that might otherwise preclude coverage. A *partial-coverage* rule would provide for full coverage of certain kinds of loss and preclude coverage of other kinds of loss, notwithstanding a policy provision that was potentially applicable to both kinds of loss.

These compromises would not necessarily have equal and opposite effects on policyholders and insurers. Insurers are likely to have a portfolio of potential cleanup liabilities under their CGL policies. The more geographically diverse the policies in this portfolio are, the more likely that the insurer would find that

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39. It is reasonably clear that Congress has the authority under the Commerce and Due Process Clauses of the U.S. Constitution to enact legislation that retroactively assures necessary uniformity and compromises the interests of the two sides, by providing for national rules governing hazardous waste cleanup insurance coverage claims. Given the interstate impact of cleanup coverage litigation, the Commerce Clause authority is beyond question. Similarly, the authority of Congress to enact retroactive legislation is limited only loosely by the "rationality" requirement of the Due Process Clause. *See, e.g.,* *Usury v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

40. Policies issued beginning in 1986 contain a provision often referred to as the "absolute pollution exclusion," which precludes most pollution-related coverage. *See* ABRAHAM, *supra* note 22, at 160-63.

its treatment under a national percentage-of-coverage rule would closely resemble the results it could expect if its policyholders litigated claims against it on a state-by-state basis over a period of time. The only difference would be that the national percentage-of-coverage rule would save the insurer the costs of state-by-state litigation.

In contrast, any given policyholder is less likely simply to save litigation costs through this portfolio effect of a national percentage-of-coverage rule. Most policyholders do not have hundreds or thousands of claims for cleanup coverage, each subject to the law of different states. Rather, most policyholders have claims involving fewer than a dozen sites—only the largest have claims involving over one hundred sites—and even the coverage claims in these cases are as likely as not to be subject to the law of one state, not several or many states. Consequently, for most policyholders the enactment of a national percentage-of-coverage rule would do more than merely save litigation costs. Such a rule actually would provide a form of risk diversification; in effect, a national coverage rule would provide policyholders with insurance against the risk that their claims would not succeed. For this reason, it could be argued that a modest discount from the expected value of policyholders' claims would be appropriate, as a kind of "premium" for the risk diversification that a national coverage rule would provide.

The effect of a partial-coverage rule on policyholders and insurers might or might not be more nearly uniform. If, over time (in the absence of a national coverage rule), the provisions made subject to a partial-coverage rule would have been interpreted in different ways by different courts—some holding that the provisions completely precluded coverage, some holding that they provided partial coverage, and some holding that they provided full coverage—then a partial coverage rule would have effects similar to a percentage-of-coverage rule. That is, each insurer would save transaction costs, but otherwise would end up with roughly the same aggregate liabilities that it would have faced in the absence of a national rule; and individual policyholders, whose claims would have resulted in very different degrees of success, each would receive the same treatment. The policyholders would thus save not only on transaction costs, but would also be provided with a form of risk diversification that they would not have been afforded in the absence of the national rule.

On the other hand, if the provisions made subject to a partial-coverage rule would otherwise have been systematically interpreted in favor of or against coverage, then a partial-coverage rule would provide one side with decided advantages and the other side with decided disadvantages, as compared to what the aggregate results of actual litigation would have been. This possibility obviously underscores the importance of basing partial-coverage rules on accurate, or at least jointly acceptable, predictions of the probable outcome of

future litigation involving any provisions that would be the subject of partial-coverage rules.

In the following Sections, I explore the ways in which percentage-of-coverage and partial-coverage rules might be employed to develop national rules applicable to cleanup coverage disputes. For purposes of explication and comparison, I also discuss two issues that commonly figure in cleanup coverage litigation, but that, for different reasons, should not be made the subject of national coverage rules.

#### A. *The CGL Insuring Agreement*

Shortly after the enactment of CERCLA, insurers began to see the handwriting on the wall, and redrafted CGL policies to include a provision that is commonly referred to as the "absolute pollution exclusion." Although the absolute pollution exclusion is not absolute in a strict sense, as a consequence of its incorporation into CGL policies, virtually all the litigation that raises the issues with which I am concerned involves CGL policies issued before 1986. The language of the "Insuring Agreement," or grant of coverage contained in standard-form CGL policies, has remained largely the same for several decades. For example, the Insuring Agreement in the standard-form CGL policy that was sold between 1973 and 1985 provided that the insurer agreed to pay "all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury or . . . property damage to which this insurance applies, caused by an occurrence . . ." <sup>41</sup> Virtually every word in this language has been the subject of dispute in cleanup coverage litigation, but three issues have dominated disputes over the application of this language to cleanup coverage liability: whether CERCLA and similar cleanup liabilities are payable "as damages," whether the property damage "because of" which such liability is imposed was caused by "an occurrence," and which policy or policies in effect during the year or years when contamination occurred are responsible for coverage. The first and third issues can appropriately be made the subject of national coverage rules, but the second cannot.

##### 1. The "Damages" Issue

The standard-form CGL policy insures against liability payable "as damages." Insurers have argued that liability imposed for cleanup costs is equitable or restitutionary, and therefore not payable "as damages." <sup>42</sup> To see the basis of this argument, it is necessary to understand the character of

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41. *Id.* at 291.

42. *See, e.g.,* Continental Ins. Cos. v. Northeastern Pharmaceutical & Chemical Co., 842 F.2d 977 (8th Cir. 1988).

CERCLA liability, which may take one or more of several forms. First, under CERCLA, the EPA may either issue an administrative order requiring cleanup<sup>43</sup> or seek an injunction ordering a party to abate an "imminent and substantial endangerment" to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility.<sup>44</sup> Second, the EPA, a state government, or a private party may undertake cleanup and then recover its costs from any of a series of named responsible parties, which include past and present owners of a site in need of cleanup, certain transporters of hazardous substances to a site, and any party that generated substances deposited at a site.<sup>45</sup> Third, a federal "natural resources trustee" may recover damages for injury to natural resources from these responsible parties. Fourth, a responsible party who has been held liable for the cost of cleanup may seek contribution for these costs from other responsible parties.<sup>46</sup> Last, CERCLA liability may be imposed not only for the cost of remedying existing damage, but also for the cost of preventing damage.<sup>47</sup> Conceivably none, one or more but not all, or all of these different forms of CERCLA liability could be characterized as "damages." For example, some courts have suggested that liability for "pure" preventive costs does not qualify "as damages."<sup>48</sup>

Policyholders have been successful in defeating the argument that CERCLA liability for cleanup costs can never constitute "damages" in all but one of the cases decided by state supreme courts.<sup>49</sup> However, decisions in the lower state and federal courts are mixed.<sup>50</sup> For the most part, the courts have not distinguished among the different forms of CERCLA liability in reaching their conclusions.

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43. CERCLA § 106(a), 42 U.S.C. § 9606(a) (1988).

44. *Id.*

45. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988).

46. *Id.*

47. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988), imposes liability for "all costs of removal or remedial action," and §§ 101(23) and (24) define these terms to include steps necessary to "prevent" the "release of hazardous substances."

48. *See* AIU Ins. Co. v. Superior Ct., 799 P.2d 1253, 1272 (Cal. 1990).

49. *See* Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204 (Ill. 1992); Coakley v. Maine Bonding and Casualty Co., 618 A.2d 777 (N.H. 1992); A.Y. McDonald Industries v. Ins. Co. of N. America, 475 N.W.2d 607 (Iowa 1991); Boeing Co. v. Aetna Casualty and Surety Co., 784 P.2d 507 (Wash. 1990); Minnesota Mining & Mfg. Co. v. Travelers Indem. Co., 457 N.W.2d 175 (Minn. 1990); Hazen Paper Co. v. United States Fidelity & Guaranty Co., 55 N.E.2d 576 (Mass. 1990); C.D. Spangler Construction Co. v. Industrial Crankshaft & Engineering Co. 388 S.E.2d 557 (N.C. 1990); AIU Ins. Co. v. Superior Ct. 799 P.2d 1253 (Cal. 1990). The single authoritative exception is Patrons Oxford Mut. Ins. Co. v. Marois, 573 A.2d 16 (Me. 1990).

50. *See, e.g.*, cases cited within *supra* note 25.



One approach to the resolution of this issue through a national coverage rule might be to provide policyholders a percentage of coverage. A policyholder whose relevant policy or policies contained an "as damages" clause would receive a percentage of the coverage that would otherwise be provided by the policy or policies, as a discount for the insurer's "damages" defense. The particular percentage recovery afforded could be proportionate to the policyholders' degree of aggregate success and defeat on this issue at the time national coverage rules were enacted. For example, at present, roughly ninety percent of the state supreme courts that have addressed the issue on the merits have ruled that at least some forms of cleanup cost liability are payable "as damages" under CGL policies.<sup>51</sup> Simply for purposes of illustration, if this success rate were used as the basis for a discount, then policyholders faced with an "as damages" defense would recover ninety percent of the coverage for cleanup liability that would otherwise be provided by their policy or policies.

As an alternative to the percentage-of-coverage approach, a national rule could afford partial coverage by providing that the cost of remedying existing contamination qualify as "damages" under CGL insurance policies, but that the cost of preventing further harm resulting from existing contamination do not qualify as "damages." In a sense, this split would probably come closer to reflecting what some courts have been worried about in addressing the damages issue—the difference between insurance against liability for existing loss and insurance against the cost of complying with forward-looking health and safety regulations. The weakness of this kind of compromise, however, is that it would generate fact-sensitive disputes about whether or to what extent a particular expense was for remedial, as distinguished from purely preventative, purposes.

## 2. The "Occurrence" Issue

Pre-1986 CGL insurance policies defined an "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."<sup>52</sup> The main question posed in the application of this provision to claims for coverage of environmental cleanup liability turns on the requirement that the bodily injury or property damage be "neither expected nor intended." A number of legal issues arise in applying this requirement to cleanup coverage claims: whether the test used to determine if harm was expected or intended is subjective or objective;<sup>53</sup> whether there was an "occurrence" if a low-level

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51. See cases cited within *supra* note 49.

52. See ABRAHAM, *supra* note 22, at 92.

53. See, e.g., *City of Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146 (2d Cir. 1989) (employing a subjective test).

employee of the policyholder expected or intended harm but higher-level management did not;<sup>54</sup> whether there is coverage if the policyholder expected one type or magnitude of harm and harm of a different type or greater magnitude occurred;<sup>55</sup> and whether the insurer or the policyholder bears the burden of proving that the limitation on coverage does or does not apply.<sup>56</sup>

None of these legal issues, however, arises only or even mainly in cleanup coverage claims; there is a good deal of pre-existing case law developed in other kinds of cases that can be drawn upon to guide decisions on these issues in cleanup coverage claims and to help shape settlement.<sup>57</sup> In fact, the issue that does arise characteristically in cleanup coverage claims is factual rather than legal: whether, in whatever sense the terms are defined, the policyholder "expected" or "intended" bodily injury or property damage to result from the waste-disposal activities that gave rise to the liability for which it now claims coverage. In most cases, extensive discovery is directed at determining what the policyholder knew about the risks posed by its waste-disposal activities, and when the policyholder knew of these risks. And in the cases that have gone to trial thus far, both sides have presented extensive evidence regarding this issue.<sup>58</sup>

One might legitimately ask how much sense it makes to try to reconstruct the states of mind of the policyholder's personnel as they stood some ten, twenty, or even thirty years before the time when a coverage claim is being litigated. But whether this makes sense or not, the policy language does seem to render it necessary. The important point about the expected-or-intended issue for my present purpose, then, is that the issue is highly fact-sensitive. Although resolutions of the issue might well vary from case to case, these variations will result from differences in the facts of each case, and differences in the ways different juries evaluate similar or even nearly identical facts. Variations of this sort will not, however, turn on differences in the way that the law of different states deals with the same issue. In short, although the expected-or-intended

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54. See ABRAHAM, *supra* note 22, at 137-39.

55. *Id.* at 135-37. Cf. *Breland v. Schilling*, 550 So. 2d 609 (La. 1989) (groping toward such a distinction in connection with an "expected or intended" issue under a homeowners' insurance policy).

56. See *In re Acushnet River & New Bedford Harbor*, 725 F. Supp. 1264 (D. Mass. 1989).

57. For a discussion, see ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW 305-13 (1987).

58. Perhaps the most prominent of these cases is *Shell Oil Company v. Accident & Casualty Co. of Winterthur*, No. 278953 (Calif. Super. Ct. San Mateo Cty.), which resulted in a jury verdict for the defendants in December, 1989. In that case, there was testimony that the insured's employees had witnessed dead ducks at an area where waste had been deposited—there thus emerged what has come to be known as the "dead duck" defense, based on the "expected or intended" limitation on coverage. See ABRAHAM, *supra* note 22, at 133-34.

issue is an important feature of environmental cleanup coverage disputes, it lies outside the problem with which I am concerned, and therefore should not be the subject of a national coverage rule.

### 3. The "Trigger of Coverage"

The third major issue in cleanup coverage litigation relating to the Insuring Agreement of CGL policies concerns the "trigger of coverage." Which policy or policies issued to the insured provide coverage against liability imposed for the cost of cleanup? And if more than one policy provides coverage, how is coverage responsibility to be allocated among these policies? These "trigger" and "allocation" questions have been especially troublesome, because they not only pit the policyholder against its insurers; they also pit insurer against insurer.

The answer to the trigger question is easy enough to state in the abstract: the CGL insurance policy covers liability imposed because of "property damage." In one way or another over the years, successive versions of the policy have required that the property damage in question occur "during the policy period."<sup>59</sup> Thus, the answer to the trigger question depends on the year or years in which the property damage for which liability is imposed took place. The trouble here is that it is technically difficult, and sometimes impossible, to provide such an answer. For example, waste may have been deposited at a site in metal drums in 1965, and contamination at the site discovered in 1983. But during which year or years did property damage take place?

Added to this factual question is a conceptual one: in simple liability insurance claims, the policy on the risk when a tortious act first causes damage covers the policyholder's liability for all the damage ultimately resulting from that tortious act. For example, if I am covered by an auto liability insurance policy that expires at midnight on December 31, 1992, and my negligent driving on the way to a New Year's Eve party injures your leg, then my 1992 policy covers me against all liability that may ultimately be imposed on me "because of" that bodily injury, even if additional injury (your wound becomes infected, or you suffer further pain and suffering, for example) occurs after the expiration of the policy.

By that analogy, if a policyholder deposited waste in Year 1 and the waste first caused property damage in Year 1, then the policy on the risk during Year 1 and only that policy should cover all liability ultimately imposed "because of" that property damage, even if some such damage (further migration of the waste

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59. *Id.* at 91.

and contamination of soil, for example) occurred after the expiration of the Year 1 policy period. But this analogy may be simplistic. Suppose some of the waste remained contained (say, in metal drums) at the end of Year 1, and did not leak (and therefore did not cause property damage) until Year 2. It could be argued that because distinct property damage has occurred during both Years 1 and 2, the policies applicable to each year are triggered. This situation may be analogous to an additional auto accident, though involving the same injured party, in Year 2—one taking place, for example, after I had circled the block in my car, returned to the scene of the accident shortly after midnight on December 31, 1992, and negligently injured you again in 1993. This analogy is not entirely apposite either, however, since in the waste deposit hypothetical I take no further action after making a deposit, whereas I continued to drive and committed a fresh act of negligence in the auto accident hypothetical.

Sometimes the facts in a cleanup coverage case are more closely analogous to the two-injury auto hypothetical. Often a policyholder made deposits of waste at a site over a period of years. Then, in theory, each policy on the risk during a year when property damage resulting from a waste deposit or deposits first occurred could be held to cover all liability for property damage ultimately resulting from these particular deposits. But in most cases, that is only a theoretical possibility. For practical purposes, a determination of what damage was caused by what deposits is impossible. Typically, waste deposited during different years leaks and commingles, causing aggregate contamination. Allocating coverage responsibility on this basis would be like trying to unscramble an egg.

These potential difficulties have prompted many courts to adopt what might be called “per se” trigger rules. But different courts have adopted different rules. Two such per se rules are the potentially multi-year “years-of-exposure”<sup>60</sup> and “continuous” triggers.<sup>61</sup> Another is the single-year “manifestation” trigger, under which only the policy on the risk during the year when damage first manifests itself provides coverage.<sup>62</sup> Exactly how coverage responsibility is allocated among primary and excess policies in triggered years and to self-insured or uninsured periods or layers of coverage also has been the subject of a number of different rules.

Depending on the case, the difference between one approach to trigger and

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60. See, e.g., *Firemans' Fund Ins. Cos. v. Ex-Cell-O Corp.*, 662 F. Supp. 71 (E.D. Mich. 1987).

61. Under this trigger, each policy issued between the date of first exposure and the date of manifestation provides coverage. See, e.g., *New Castle County v. Continental Casualty Co.*, 725 F. Supp. 800 (D. Del. 1989), *aff'd*, 933 F.2d 1162 (3d Cir. 1991).

62. See, e.g., *Allstate Ins. Co. v. Quinn*, 713 F. Supp. 35 (D. Mass. 1989).

allocation and another approach can be enormous. A policyholder may have purchased different amounts of coverage in different years, but be unable to locate evidence of the coverage it purchased decades ago, or have come to expect or intend harm at a site at some point after the date of first exposure. In addition, although the Insuring Agreement of CGL policies changed little in relevant respects over the years, new exclusions were added as the years went on, and the triggering of policies containing one such provision that was incorporated in the standard-form CGL policy in 1973—the pollution exclusion<sup>63</sup>—can mean the difference between full coverage and no coverage in some jurisdictions.

There are many different ways in which a compromise between the expansive, multi-year triggers and the narrow, single-year manifestation trigger could be fashioned. For example, a national coverage rule could provide that a percentage of the years between exposure and manifestation would be triggered. The percentage could be made to vary with the maximum number of years that would otherwise be triggered—for example, all years if three or fewer years were triggered, one-half the years if between four and ten years were triggered, and one-third of the years if eleven or more years were triggered.

Probably the simplest approach, however, would be to adopt a constant percentage. For instance, one-half of the years between exposure and manifestation could be triggered by allocating coverage responsibility to the middle one-half of these years. Thus, an equal number of policy years on either side of the midpoint of this time period would be triggered under this approach: if the years of exposure through manifestation were 1971 to 1982 (twelve years), then six years would be triggered—those issued in 1974 through 1979. If there were an odd number of years between exposure and manifestation, then the number of years triggered could be rounded down—only six years would be triggered even if the years of exposure through manifestation were 1971 through 1983, for example.

Further, coverage responsibility could be allocated among triggered years in a standard manner prescribed by a national rule, instead of varying from state to state and case to case. For instance, an equal amount of coverage responsibility could be allocated to each triggered year. Policyholders then would bear a share of coverage responsibility for self-insured or uninsured years or layers of coverage, but would not automatically be deprived of all coverage by an extreme approach to trigger and allocation, and would not be subjected to the rule adopted in some jurisdictions requiring “exhaustion” of primary

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63. See *infra* note 66.

coverage in all triggered years before calling upon their excess coverage.<sup>64</sup>

These trigger and allocation-of-coverage compromises would have a number of interesting effects. Only policies issued during the middle years between exposure and manifestation would be triggered. Since manifestation of damage rarely occurred after the mid-1980s, a compromise trigger applicable to multi-year property damage would tend to exempt from coverage responsibility the policies issued after the mid to late 1970s—because these policies normally would have been issued after the last year triggered by the compromise rule. The earliest policies issued also would be exempted. For example, in cases where waste deposits began in the late 1940s or early 1950s, policies issued before about 1960 probably would receive this protection.

Finally, policies issued during the middle period—between the early 1960s and the late 1970s—would bear a substantial share of coverage responsibility. Any insurer that had a substantial position in the CGL market only in the early or only in the late years of the period 1950-1980 would be especially advantaged by a trigger compromise resembling what I have proposed. In contrast, any insurer that had a substantial position in the market only during the early 1960s to the mid-1970s would be especially disadvantaged by such a rule. But because there is no reason to think either of these categories of insurers would share any other characteristics, these advantages and disadvantages probably would be randomly distributed.

A compromise that triggered a set of middle years between exposure and manifestation also would avoid the current maneuvering on trigger and allocation issues designed to avoid or to invoke the pollution exclusion. At least in jurisdictions where the meaning of the pollution exclusion is not settled in favor of policyholders, insurers typically favor a manifestation trigger, among other reasons because manifestation is more likely than any other approach to call trigger policies containing the pollution exclusion. Policyholders typically favor a trigger that avoids as much as possible any years in which policies contained the pollution exclusion. By triggering the middle years between exposure and manifestation, the compromise I have proposed would, in many cases involving multiple years of “exposure,” select some years in which policies contained the pollution exclusion and some years before which the exclusion was introduced.

On the allocation issue a compromise is also needed. For example, many large policyholders’ insurance programs contain a large deductible, or “SIR” (self-insured retention) that is applied before triggered coverage is called upon. When a policyholder is faced with a comparatively large set of SIRs because one

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64. See ABRAHAM, *supra* note 22, at 227-33.

is applicable in each triggered year, the policyholder is likely to argue for the right to allocate coverage to a single year. The result of such an allocation is the application of only one SIR to the claim, and allocation of a consequently greater portion of coverage responsibility to the policyholder's primary and excess insurers.

On the other hand, if the total amount of primary and excess coverage available to a policyholder in any given triggered year is exceeded by the liability for which it claims coverage, then the policyholder is likely to argue for the right to allocate coverage responsibility to multiple years, to maximize the amount of its insurance coverage. In particular cases, all insurers' positions on the allocation issue are not simply the converse of the policyholder's position, because different insurers normally provided coverage in different triggered years and in different layers of coverage. Different methods of allocation would advantage different insurers in different layers during different years. But any individual insurer's proposed method of allocation is likely to be as result-oriented and responsibility-avoiding as the policyholder's.

An equal-per-triggered-year allocation of coverage responsibility among triggered years would have two advantages: it would provide a compromise between approaches whose burdens and benefits fall unevenly on the affected parties and it would avoid maneuvering on this issue. Under this rule, no single policy or year could be made to bear exclusive responsibility if other policies and years had been triggered. To the extent that the insured had purchased sufficient insurance in triggered years to cover its liabilities, it would be protected. In triggered years containing an SIR or uninsured layer of coverage, the insured would be treated as if it were an insurer. But because only half of all potentially-triggered years would have coverage responsibility, a per-year SIR for only half the years from exposure to manifestation would be applied to reduce the amount of coverage afforded.

Similarly, allocating equal coverage responsibility to each triggered year would compromise what has come to be known as the "exhaustion-by-years" versus "exhaustion-by-limits" issue. In settings where a multi-year trigger has been applied, excess insurers have sometimes denied coverage of a liability exceeding the limits of liability underlying their policies, on the ground that the insured must turn first to the primary policies issued during other triggered years before calling upon any excess policy. In contrast, policyholders sometimes argue that as long as the limits of liability of a primary (or lower-level excess) policy are exhausted, then a policy for that year providing coverage in excess of this underlying limit of liability is responsible for coverage, even if the limits of liability of primary policies issued in other triggered years have not been paid.

Under the equal-responsibility allocation, full exhaustion-by-layers would not be required, but neither would the insured be entitled to pick the year or years it wished to provide coverage responsibility, thus unilaterally deciding what allocation to adopt. Rather, once a lower layer of coverage had been exhausted, higher layers in that year would automatically bear coverage responsibility, but only for the amount of coverage that the equal-per-year rule had allocated to that year. In effect, once an allocation to any year had been made, the obligations imposed on the policies issued during that year would be independent of the obligations imposed on policies issued in other triggered years.<sup>65</sup>

### B. CGL Exclusions and Conditions

An old insurance adage suggests that "what the bold print giveth, the fine print taketh away." As I indicated in the preceding Section, there is a division of authority about what cleanup coverage (if any) the bold print of the CGL Insuring Agreement actually does give the policyholder. But even where this bold print does provide cleanup coverage, the fine print of the exclusions and conditions in a CGL policy may take that coverage away. Three such provisions figure centrally in cleanup coverage disputes: the pollution exclusion, the owned-property exclusion, and the conditions requiring notice of an occurrence and of a claim or suit. In my view, the first two issues are appropriate for treatment under a national coverage rule, but the notice issue, while important, would be better left within the current approach.

#### 1. The Pollution Exclusion

Between 1973 and 1985, the standard CGL policy excluded coverage of liability for harm caused by pollution, unless the discharge of a pollutant was "sudden and accidental."<sup>66</sup> Because this is the only provision in CGL policies

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65. A subsidiary allocation rule also could be employed to deal with the effect of any national coverage rules made applicable to the other issues in cleanup coverage litigation. A reduction in insurers' overall coverage obligations would disproportionately advantage excess insurers as compared to primary insurers under an equal-per-year allocation. To avoid this effect, the primary and excess insurers in any year triggered under a national compromise trigger rule each could bear a proportion of that year's coverage responsibility equal to the proportion that they would bear under an equal-per-year allocation if full rather than partial or a percentage of coverage were afforded the policyholder.

66. A number of policies incorporated the exclusion as an endorsement beginning in about 1970, prior to the 1973 revision of the standard-form CGL policy. The entire exclusion reads as follows:

This policy 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



of the period that deals explicitly with pollution, and because the exclusion was part of policies issued during a set of years that are likely to be triggered in a large number of claims, the meaning of the pollution exclusion is critically important to the claims of policyholders for cleanup coverage. In interpreting the pollution exclusion, the courts have split on a roughly equal basis, with about half holding that the term 'sudden' means unexpected (or is ambiguous because it can reasonably mean unexpected) and half holding that it means abrupt.<sup>67</sup> The courts reaching pro-coverage interpretations also differ among themselves about whether coverage is excluded when the mere discharge of pollutants is expected,<sup>68</sup> or the harm caused by a discharge also must be expected in order to fall within the exclusion.<sup>69</sup>

These differences arise for several reasons. Some courts have found the word 'sudden' to be unambiguous, and concluded that 'sudden' has the temporal connotation of abruptness.<sup>70</sup> Under this interpretation, the pollution exclusion precludes coverage of liability for damage caused by slow or gradual leakage of pollutants, even if the discharge and subsequent harm were accidental. Because a great deal of the pollution-related damage that is the subject of cleanup liability occurred in this way, such an interpretation substantially ends the dispute by finding that coverage of cleanup liability is excluded. On the other hand, some courts have examined dictionary definitions of the word 'sudden', seen that it may mean either "unexpected" or "abrupt," concluded as a result that the word is ambiguous, and invoked the maxim *contra proferentum* ("against the drafter") to interpret the entire phrase "sudden and accidental" against the insurer and in favor of coverage.<sup>71</sup> Still other courts have consulted the drafting history of

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gases, waste materials or other irritants or 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.

See ABRAHAM, *supra* note 22, at 146.

67. For example, the decisions from state courts of last resort are split six to five. Decisions favoring policyholders are *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204 (Ill. 1992); *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Co.*, 1992 WL 212008 (Fla.); *Joy Technologies, Inc. v. Liberty Mutual Ins. Co.*, 421 S.E.2d 493 (W. Va. 1992); *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991); *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570 (Wis. 1991); and *Claussen v. Aetna Casualty and Surety Co.*, 380 S.E.2d 686 (Ga. 1989). Decisions favoring insurers include *Hybud Equipment Co. v. Sphere Drake Ins. Co. Ltd.*, 597 N.E.2d 1096 (Ohio 1992); *Upjohn Co. v. New Hampshire Ins. Co.*, 476 N.W.2d 392 (Mich. 1991); *Lumbermens Mutual Casualty Ins. Co.*, 555 N.E.2d 568 (Mass. 1990); *Technicon Electronics, Inc. v. American Home Ins. Co.*, 542 N.E.2d 1048 (N.Y. 1989); and *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374 (N.C. 1986).

68. See *Claussen v. Aetna Casualty and Surety Co.*, 380 S.E.2d 686 (Ga. 1989), so holding.

69. See, e.g., *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co. of New York*, 528 A.2d 76 (N.J. Super. 1987).

70. See, e.g., *Technicon Electronics Corp. v. American Home Ins. Co.*, 542 N.E.2d 1048 (N.Y. 1989).

71. See, e.g., *Claussen v. Aetna Casualty and Surety Co.*, 380 S.E.2d 686 (Ga. 1989).

the pollution exclusion and concluded that, on the basis of certain insurance organizations' representations to state insurance commissioners at the time the exclusion was introduced, the pollution exclusion was intended merely to confirm the limitation in the definition of an "occurrence" to coverage of liability for bodily injury and property damage that is "neither expected nor intended."<sup>72</sup>

The result is that in some states the pollution exclusion precludes coverage of liability for harm caused by gradual pollution; in some states the exclusion does not preclude coverage of liability for harm caused by gradual pollution if the discharge of the pollutant was unexpected and unintended ("sudden and accidental"); and in some states the exclusion does not preclude coverage of liability for harm caused by gradual pollution, even if the discharge of the pollutant was expected or intended, if the harm caused by the discharge was not expected or intended ("sudden and accidental"). Of the state courts of last resort that have addressed the issue, five have held that the term 'sudden' is unambiguous and precludes coverage of liability for harm caused by non-abrupt pollution, but six have held that, at least under some circumstances, the pollution exclusion does not preclude coverage of such liability.<sup>73</sup> In most states, obviously, there is no authoritative decision on the issue.

As in the case of the "as damages" defense, a national coverage rule governing this issue could afford a policyholder, whose relevant policy or policies contained a "qualified" pollution exclusion, a percentage of the coverage that would otherwise be afforded by the policy or policies as a discount for the insurer's pollution exclusion defense. Here, also, the particular percentage of recovery afforded could be proportionate to the policyholders' degree of aggregate success and defeat on this issue at the time national coverage rules were enacted.

Under this approach, the typical policyholder's combined right of recovery on the damages and pollution exclusion issues would be the product of the two percentages of coverage afforded. For purposes of illustration, if it were concluded that an average policyholder stood a fifty percent chance of succeeding on this issue, then policyholders as a group would receive fifty percent of the coverage against liability for cleanup costs associated with non-abrupt pollution that would otherwise be covered by their policy or policies.

The typical policyholder's combined probability of success on the damages and pollution exclusion issues would then be the product of the two percentage

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72. See, e.g., *Joy Technologies, Inc. v. Liberty Mutual Ins. Co.* 421 S.E.2d 493 (W.Va. 1992).

73. See cases cited at *supra* note 67.

recoveries permitted.<sup>74</sup> Continuing the numerical illustrations used above, if ninety percent of coverage on the damages issue and fifty percent of coverage on the pollution exclusion were permitted, then a policyholder whose relevant policy or policies contained both a “damages” clause and the “qualified” pollution exclusion would receive forty-five percent (ninety percent of fifty percent) of the coverage that would otherwise be provided by its policy or policies, as a discount for the insurer’s “damages” and pollution exclusion defenses. The effect of this kind of compromise would resemble the effect of a compromise on the “as damages” issue. Policyholders and insurers in jurisdictions that had already rendered decisions favorable to coverage would be disadvantaged by the compromise, and policyholders in jurisdictions that had already rendered decisions favorable to insurers would be advantaged by it. On the other hand, any insurer with a large portfolio of geographically dispersed claims against it would find that the compromise left the insurer about where it eventually would have been anyway, but with a net saving in litigation expense.

The drawback of this compromise on the pollution exclusion is that it submerges in the percentage of coverage that is afforded what might be regarded as important differences among claimants regarding their intent to discharge a pollutant. An alternative would be to employ a partial-coverage rule that compromised the interests of policyholders and insurers by dictating the situations in which the exclusion does and does not apply. A national coverage rule governing the exclusion in this way could side with policyholders on the first feature of the pollution exclusion issue about which the courts have been divided, but with insurers on the second issue. Such a rule could provide, for example, that an unexpected and unintended discharge would fall within the exception to the exclusion, but that if a discharge were expected or intended, then coverage against liability for harm caused by the discharge would be excluded, even if that harm itself was unexpected and unintended. In effect, liability for harm resulting from unexpected and unintended discharges would be covered, but liability for harm resulting from expected or intended discharges would not be covered, even if the policyholder believed at the time that no harm would result from its actions.

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74. For the sake of simplicity, my analysis treats the probability of success or failure on each issue as if resolution of one issue were entirely independent of the resolutions of other issues. This may well be an oversimplification, however, for two reasons. First, the facts of a case may predispose a court to be favorable or unfavorable to a claim in general. Second, the courts of certain states may be generally favorable or unfavorable to cleanup coverage claims. If either or both of these variables is present, then the resolutions of key issues in cleanup coverage claims are likely to be correlated rather than independent. Calculating the aggregate value of cleanup coverage claims by multiplying probabilities, on the assumption that they are not correlated, may therefore overstate or understate the true aggregate value of such claims, depending on the effect that these variables would have on the resolution of a series of conceptually independent but possibly correlated issues.

As compared to the most favorable result that could otherwise be obtained, the principal burdens resulting from this approach would fall on policyholders that innocently but intentionally discharged material that later proved to be harmful, and on insurers faced with claims for coverage of liability for harm resulting from gradual but unexpected and unintended discharges. It is not at all clear how many policyholders would actually fall into the first category, because only if the material intentionally discharged was incorrectly understood at the time of discharge to be innocuous could the discharge be regarded as entirely "innocent." Under the compromise, intention to discharge (or expectation of discharge) would serve as a possibly overbroad proxy for intent to cause harm. That, in an attenuated sense, may be part of what the drafters of the exclusion actually had in mind, though without expressing it coherently.<sup>75</sup>

The effect of the second half of the compromise would, of course, be to read the term 'sudden' in the exception to the pollution exclusion to mean "unexpected" rather than "abrupt." No portion of any claim for coverage of liability for damage caused by a gradual but unexpected and unintended discharge would then be precluded by the exclusion. Given the difficulty of determining whether the type of discharge that typically results in cleanup liability was expected or intended—leakage of material from drums, holding ponds, or lagoons—it is possible that in the aggregate, insurers would find that most claims for coverage of cleanup liability would fall outside the exclusion under the second half of the compromise.

Yet another compromise could avoid this effect by excluding only a portion of claims for coverage of liability for harm resulting from gradual but unexpected and unintended discharges. Coverage of liability for harm caused by expected or intended discharges could be completely excluded, but a percentage of coverage of liability for harm caused by gradual but unexpected and unintended discharges could be afforded. This compromise would partially disappoint the expectations of vast numbers of policyholders in jurisdictions that have held the pollution exclusion to be ambiguous; but the compromise also would partially deprive insurers of a complete defense to large numbers of claims in jurisdictions that have held the exclusion to preclude coverage of

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75. In West Virginia, for example, insurer representatives submitted the following statement to the Insurance Commissioner in support of their request for approval of the exclusion:

Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion . . . clarifies this situation so as to avoid any question of intent. *Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident . . . .*

Joy Technologies, 421 S.E.2d at 499 (emphasis added).

claims associated with gradual pollution.

## 2. The Owned-Property Exclusion

Standard CGL policies have long excluded coverage of liability for damage to property "owned or occupied by or rented to the insured."<sup>76</sup> When a policyholder faces liability for the cost of cleanup associated with waste deposits made at property the policyholder owns (or owned at the time of deposit), this exclusion may come into play. The exclusion itself does not make clear, however, how it should be applied in cases where both owned and non-owned property have been contaminated. This state of affairs is more common than might first be supposed, because some states have held (and others probably will hold when the issue arises in this context) that groundwater under a site is not owned by (or not owned exclusively by) the owner of the site,<sup>77</sup> and groundwater at CERCLA sites is often contaminated. As yet, few decisions have applied the owned-property exclusion to environmental cleanup claims.<sup>78</sup> Moreover, a new set of cleanup obligations for property owners is emerging under the "corrective action" provisions of the Resource Conservation and Recovery Act.<sup>79</sup> The owned-property exclusion is therefore likely to figure prominently in environmental cleanup coverage claims for many years to come.

Most cleanups of soil and other owned property are designed not only to decontaminate that property, but also are directed at the prevention of harm to other property, such as groundwater. A national coverage rule consequently should recognize that both groundwater and soil cleanups have mixed purposes, but that the dominant purpose of the former is to benefit non-owned property, whereas the dominant purpose of the latter is to benefit owned property. In accordance with this distinction, a percentage-of-coverage rule could provide that policies containing the owned-property exclusion would cover a sizable percentage of the cost of groundwater cleanup, but a much smaller percentage of the cost of cleaning up owned property. For example, a policyholder might be entitled to eighty percent of the cost of groundwater cleanup, but only twenty percent of the cost of cleaning up owned property, if this liability was otherwise covered by its policy or policies. An alternative, partial-coverage rule would

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76. See ABRAHAM, *supra* note 22, at 163.

77. See, e.g., *United States Aviox Co. v. Travelers Ins. Co.*, 336 N.W.2d 838 (Mich. App. 1983).

78. For decisions applying the exclusion, see *New Jersey v. Signo Trading International, Inc.*, 612 A.2d 932 (N.J. 1992); *City of Edgerton v. General Casualty Co. of Wisconsin*, 493 N.W.2d 768 (Wis. Ct. App. 1992); *Allstate Ins. Co. v. Quinn Construction Co.*, 713 F. Supp. 35 (D. Mass. 1989).

79. See Resource Conservation and Recovery Act §§ 3004(e) and 3008(h), 42 U.S.C. § 6924(e) and 6928(h); Terry J. Satterlee & Jerry L. Anderson, *RCRA Corrective Action: The Next Wave of Hazardous Substance Cleanup*, 59 UMKC L. REV. 181 (1991).

be to provide for full coverage of groundwater cleanup and no coverage of the cost of cleaning up soil or other owned property lying above-ground.

Virtually all policies containing an owned-property exclusion also contain an "as damages" clause, and many contain the qualified pollution exclusion. Consequently, in cases where all three national percentage-of-coverage rules were in effect, the policyholder would be entitled to a substantially discounted percentage of the coverage its policy or policies would otherwise provide. For example, if the figures I have been using for illustration were adopted, a policyholder claiming coverage of the cost of cleaning up owned-property contaminated by non-abrupt pollution would receive nine percent (twenty percent of forty-five percent) of the coverage that would otherwise be provided by its policy or policies for the cost of decontaminating soil and other material on its property, but thirty-six percent (eighty percent of forty-five percent) of the coverage it would otherwise be provided by its policy or policies for the cost of decontaminating groundwater under its property.

Because so few decisions interpret the owned-property exclusion, few settled expectations of policyholders or insurers would be disturbed by a compromise approach to the owned-property exclusion. The major burden of the compromise for policyholders would be felt in jurisdictions that would have held the exclusion inapplicable to claims for coverage of the cost of cleaning up owned property when harm to non-owned property is imminent. Such policyholders would have no coverage under the first proposed compromise, and only a small percentage of coverage under the second. Insurers in such jurisdictions would receive a corresponding benefit.

On the other hand, in some jurisdictions the owned-property exclusion might have been interpreted in the future to preclude completely any coverage of the cost of soil cleanup at owned property, and largely or even entirely to preclude coverage of the cost of cleanup of groundwater lying directly under owned property. Either of the proposed compromises would substantially benefit policyholders at the expense of insurers in such jurisdictions. In the face of widespread uncertainty about the meaning and application of the owned-property exclusion, these compromises might generate aggregate benefits for both policyholders and insurers.

### 3. The Notice Conditions

A third limitation on coverage in CGL insurance policies is contained in a pair of provisions requiring the policyholder to provide the insurer with notice of an occurrence as "soon as practicable" and to provide the insurer

“immediately” with notice of a claim or suit against the insured.<sup>80</sup> In some cleanup claims the occurrence or occurrences in question (“an accident . . . which results in . . . property damage”) may have taken place years before notice was given; there may also have been a delay between the time the insured became the subject of a CERCLA or equivalent state proceeding and the time it gave its CGL insurers notice of this proceeding.

The majority rule governing delayed notice in such circumstances has two prongs: the notice conditions are satisfied if notice is provided within a “reasonable” time, and coverage is not forfeited even when a delay in providing notice was not reasonable unless the insurer was prejudiced by the delay.<sup>81</sup> But some states, New York most prominent among them, appear to reject the second, “notice-prejudice” prong of this test, and hold that coverage is forfeited as long as a delay in providing notice of an occurrence, claim, or suit was not reasonable, even in the absence of prejudice to the insurer as a result of the delay.<sup>82</sup>

This state-to-state difference in the rules governing notice under CGL policies has important effects on environmental cleanup claims, for it encourages forum shopping and strenuous efforts to avoid the application of New York law to these claims. But unlike the pollution and owned-property exclusions, state-to-state differences regarding the notice-prejudice rule do not uniquely affect environmental cleanup coverage claims. For example, the long latency of damage that delays notice of an occurrence in cleanup coverage claims has the same effect on toxic tort insurance claims, and the effect of delayed notice is sometimes an issue in conventional liability insurance disputes.<sup>83</sup>

As to the requirement that there be notice of a claim or suit, the slow startup of the CERCLA program and uncertainty about the application of CGL coverage to CERCLA liability delayed the provision of notice of CERCLA and equivalent state proceedings to CGL insurers to some degree almost across the board. But this feature of the notice issue is merely more common in cleanup coverage than in other insurance cases; it has been litigated in many types of cases, and the law governing it was mature before cleanup coverage litigation arose. Consequently, I recommend against developing a national coverage rule to govern this issue.

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80. See ABRAHAM, *supra* note 22, at 186-87.

81. See BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES 83-84 (3d ed. 1990).

82. See *Security Mutual Ins. Co. v. Acker-Fitzsimons Corp.*, 293 N.E.2d 76 (N.Y. 1972).

83. See, e.g., *Mighty Midgets, Inc. v. Centennial Ins. Co.*, 389 N.E.2d 1080 (N.Y. 1979).

### C. Summary

The issues for which I have proposed national coverage rules are by no means the only legal issues that arise in environmental liability insurance litigation, but they are the most important and most common issues. As I have noted, other legal and factual questions would remain—for example, the meaning of the “notice” requirement in CGL policies; how many occurrences caused the damage or injury at issue and therefore how many per occurrence limits of liability are available to the policyholder; whether the insured “expected or intended” bodily injury or property damage; and during what years exposure to the risk of harm and manifestation of harm first occurred. But by resolving the principal coverage issues in a manner that, in the aggregate, does not disproportionately benefit policyholders as a group or insurers as a group, national coverage rules could facilitate settlement and help to streamline any litigation that persisted. The spectacle of state-by-state pitched battles between policyholders and insurers would either come to an end or be substantially reduced, with benefits for both sides.

## V. WINNERS, LOSERS, FEASIBILITY, AND FAIRNESS

A number of considerations remain to be addressed. First, I argued above that national coverage rules would treat policyholders and insurers fairly in the aggregate by providing partial coverage reflecting the expected value of their rights and obligations under past CGL insurance policies. However, although such national coverage rules could be fair in the aggregate, they could specially advantage or severely disadvantage certain policyholders and insurers. To evaluate the overall fairness of the rules, therefore, it will be useful to see which groups of policyholders and insurers in general would gain or lose from the adoption of national coverage rules. Second, my proposal for the adoption of national coverage rules is intended to be more than a mere academic exploration. Consequently, it is important to consider whether enactment of the proposal is feasible. Finally, in addition to the impact of national coverage rules on particular categories of policyholders and insurers and the feasibility of their adoption, the general question whether replacement of individual adjudication with aggregative assignment of rights in this field is appropriate also is worth addressing.

### A. *Winners and Losers*

#### 1. Pre-Emptive Effects on Already-Litigating Parties

Because national coverage rules would pre-empt future decisions in coverage cases that would otherwise be rendered on the basis of state law, parties to litigation that has not yet produced a final judgment will find that their



investment in that part of the litigation directed at issues now governed by national coverage rules is lost. But it is a “sunk” cost that should be ignored in deciding what future course to take. The relevant question for the future is whether national coverage will save costs as compared to, and generate greater fairness than, continued state-by-state litigation.

In a sense, the predicament in which already-litigating parties would find themselves would resemble the situation faced by any party litigating a question of first impression whose answer would govern several simultaneously-litigated cases. Only one of these cases can be the first to establish a precedent governing the others; all the litigants take the risk that their investment in the effort to achieve a favorable result will be pre-empted by a decision rendered in another case that establishes an applicable precedent. The enactment of national coverage rules governing such cases would have precisely the same effect. But both sides to any given legal action would find that the pre-empted portion of their investment in proving or denying the existence of coverage would be lost. Thus, the pre-emptive effect of national coverage rules on previous litigation investment would be neutral as between policyholders and insurers.

## **2. Non-Litigating Parties Whose Rights Are Governed By Established Precedent**

The very possibility of estimating the aggregate expected value of policyholders’ and insurers’ rights and obligations respecting cleanup coverage under CGL policies demonstrates that some policyholders and insurers have already-existing rights and obligations under the law. In states where courts of last resort have rendered decisions on the issues that would be governed by national coverage rules, the rules would disestablish the rights and obligations of parties who were not yet protected by a final judgment regarding a coverage claim.

The number of cases in which the enactment of national coverage rules would disestablish clearly existing rights and obligations, however, should not be overestimated. In most states, courts have not decided any of the issues that would be governed by national coverage rules. In addition, like any newly created body of law, even the authoritative decisions leave many subsidiary questions unanswered. To what extent, if at all, are expenses designed to prevent future rather than to remedy existing contamination “damages”? When has real property been exposed to the risk of harm for purposes of the years-of-exposure and continuous triggers? If the owned-property exclusion does not preclude coverage of all cleanup costs that benefit both owned and non-owned property, on what basis is the portion of such costs that is excluded to be differentiated from the portion that is not? In cases that pose these kinds of questions, the existence of an authoritative decision on a major issue affects the parties’ chances of success, but does not make success or failure automatic.

Only in the kinds of cases in which either the policyholder or the insurer could be said in advance to have an extremely high chance of success would the enactment of national coverage rules disestablish pre-existing rights and obligations with clear monetary consequences attached to them.<sup>84</sup>

Even the notion that these would be disestablishments of clearly pre-existing rights, however, presupposes certainty regarding which state's law is applicable to a claim or set of claims by a policyholder against its insurers. And in most cases there is no such certainty. Choice-of-law rules governing claims involving multiple sites located in different states and multiple CGL insurance policies issued by different companies in different years are not fully developed, and these rules differ from state to state even where they have emerged.<sup>85</sup> With perfect choice-of-law foresight, some policyholders and insurers might be able to say that a particular national coverage rule had disestablished rights that they had enjoyed under precedents in particular jurisdictions. But because such foresight cannot be even close to perfect, whether any particular policyholder's or insurer's rights actually have been disestablished by a national coverage rule will be chiefly a matter of more or less informed speculation. Few policyholders or insurers will be able to say with any certainty that their firm rights have been disestablished by the enactment of a national coverage rule.

## B. Feasibility and Fairness

### 1. The Feasibility of the Proposal

There is little point in speculating about how individual policyholders and insurers will react to my proposal. Examining the overall political economy of the problems that the proposal attempts to address, however, may shed at least some light on the feasibility of the proposal's enactment.

I suggested earlier that a voluntary global settlement by policyholders and insurers was unlikely. Since legislating a solution would be politically impossible without a broad consensus by both sides, why would legislation be feasible when voluntary settlement would not? Of course, legislation may turn out not to be feasible. A sufficient number of policyholders and insurers may think that they would be better off without national rules than with them. For example, the solvency of some insurers may be sufficiently threatened even by compromise coverage rules that their best interest lies in fighting each claim

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84. For example, in a jurisdiction that had already ruled against coverage on the "damages" issue, insurers would find their state-law rights disestablished; in a jurisdiction that had found the pollution exclusion to be ambiguous and interpreted it in favor of coverage, policyholders would find their pre-existing rights had been compromised.

85. See text accompanying *supra* notes 28-30.

vigorously in the hope of defeating most claims, or at least delaying insolvency. Similarly, some policyholders may believe that because the expected value of their claims is sufficiently greater than the rights that any legislative compromise would provide them, incurring the transaction costs of individual litigation would be warranted.

Substantial opposition for these or other reasons would doom any effort to organize a global national settlement, because as these parties opted out of a proposed settlement and it became less and less global, the appeal of the solution would decline. In contrast, the great advantage of legislation is that it can be enacted without universal agreement. A perfect consensus among the affected parties is not required; rather, a working political majority suffices. Much like a reorganization under Chapter 11 of the Bankruptcy Code, legislation can "cram down" a solution if only a minority of affected parties (like a minority of creditors) opposes it.<sup>86</sup> For this reason, a legislative solution may well be more feasible politically than a voluntary global settlement among the parties.

Moreover, since some of the transaction costs saved by a legislative solution are not incurred by the parties—the costs of operating the court system, for example—they have no incentive to settle in order to avoid incurring these costs. In contrast, the national government and the states would be able to capture at least some of this cost saving for themselves if the Congress were to put together a solution and the states were to acquiesce in it. Representatives of the national government thus have some incentive to invest in building the consensus necessary to enact legislation that would generate these savings.

## 2. The Fairness of Aggregation

The last potential concern about my proposal is that, apart from the details of its effect on different categories of policyholders and insurers, it may be considered inappropriate to upset pre-existing contract rights through the aggregative device the proposal would employ. There are a number of responses to this concern.

From the standpoint of most insurers, it is difficult to understand the basis for this concern. Insurers with geographically distributed portfolios of past CGL policies would fare as well under sensibly formulated national coverage rules as they would by litigating claims individually. In addition, however, they would save the costs of litigation. The assertion that such insurers would be deprived of contract rights by national coverage rules therefore amounts to the argument that every contract entails the right to impose gratuitously the cost of

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86. See 11 U.S.C. §1126 (c)-(d).

adjudicating the accuracy of claims about the meaning of the contract on the other party. But it is at least arguable that contracts ordinarily entail only the *power* to impose this cost on the other party, not the *right* to do so. Contracting parties have the power to litigate in a case-by-case fashion, not because of any deep principle, but as matter of necessity—how else would disputes be resolved without an authoritative system for resolving them? National coverage rules would simply render individual adjudication unnecessary.

In contrast, the impact of national coverage rules on individual policyholders and on insurers without geographically diverse portfolios of past CGL policies will not simply be a transaction cost saving. These enterprises would in fact be deprived of a meaningful opportunity that they would otherwise have to litigate their rights to an adjudicated conclusion, and thereby to press for full vindication instead of the compromise afforded by national rules imposing an aggregative result. This is a question of principle, not merely of expediency, because for these enterprises, litigated results might well differ substantially from their treatment under national coverage rules. But for a number of reasons, the principle underlying the right to individualized litigation is not absolute in this setting.

First, cleanup coverage litigation poses issues that are almost entirely matters of purely economic interest to purely commercial enterprises. The argument that publicly held corporations should be permitted to insist on individualized adjudication of their rights under standard-form insurance contracts in the face of the huge national costs incurred in their doing so is deeply implausible. Second, even the individualized adjudications that are permitted in our legal system are permeated with aggregative compromises and collective treatment of individual litigants. The findings of fact in civil cases are themselves constructed on aggregative premises. For example, the preponderance-of-the-evidence standard requires implicit reference to factual probability. The logic of fact-finding in this context presupposes reference to and aggregation of past events that occurred under similar circumstances; otherwise, factfinders would have no basis for determining what facts in the present case “more probable than not” are true. And quotient verdicts by juries in cases involving money damages are little more than disguised aggregative conclusions. Finally, a variety of procedural devices result in aggregative treatment of individual litigants. Class actions from which opt-outs are not permitted have this effect, as does the principle at the very heart of our system’s effort to treat like cases alike—the doctrine of *stare decisis*.

These and other commonplace examples of the use of aggregative devices in our legal system suggest that, far from being a moral imperative, individualized treatment in civil cases is at most a right other things being equal, and perhaps not even that. It may be that individualization is the norm when it

is simply because individualized adjudication typically is the most convenient and cost-minimizing method of resolving disputes. If facts or issues are unique or idiosyncratic, as they tend to be in ordinary litigation, then gathering data about "this kind" of dispute to have a basis for its resolution would be more expensive than simply resolving it in our conventional, individually customized way. But when facts and issues are not unique, and aggregative or collective devices are available to reduce the costs of dispute resolution, often they are employed without objection. On that view, my proposal is far from revolutionary, for it simply contemplates employing aggregative devices that are commonly used in other legal settings, to resolve substantive contract issues.

## VI. CONCLUSION

The Superfund regime began with an apparently good idea. Those responsible for dangerous hazardous waste storage sites were made individually responsible for the costs of remedying the dangers posed by the sites. However, like so many apparently good ideas, when this idea was carried to its logical conclusion, it created more problems than it solved. One of these problems, the massive cleanup coverage litigation spawned by the Superfund regime, resulted largely from the absence of a mature and developed body of insurance law governing the issues posed in this litigation. The system can survive while we wait for this body of law to develop, but the cost we incur simply by waiting and litigating will be high.

The alternative is to adopt a body of national coverage rules that attempts to replicate in advance the results that can be anticipated from another decade or more of piecemeal litigation. Such an approach is unconventional, and it will not treat every policyholder and insurer precisely as they would have been treated in individual litigation. But in the aggregate, national coverage rules would treat policyholders and insurers very nearly as they would have been treated in individual litigation, though at a lesser cost and with quicker results. Such rules would have the advantage of generating uniform results under standard-form insurance contracts whose sellers and buyers in general have every reason to prefer such uniformity. That is a bargain that both sides should seriously consider accepting.