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## Forum Non Conveniens: A Case Management Tool for Comprehensive Environmental Insurance Coverage Actions

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# FORUM NON CONVENIENS: A CASE MANAGEMENT TOOL FOR COMPREHENSIVE ENVIRONMENTAL INSURANCE COVERAGE ACTIONS?

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## I. INTRODUCTION

Consider the following hypothetical, unlikely though it may seem. Plaintiff manufacturer brings a comprehensive environmental insurance coverage action, *i.e.*, a suit against one hundred or so in-

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insurance companies, seeking a declaration of its contractual rights under insurance policies issued to it by defendants with respect to its environmental liabilities spread throughout the country. The court in the chosen forum has the requisite subject matter and personal jurisdiction. The parties do substantial business in the forum, where about 10% of the underlying liabilities arise. All agree that a plaintiff's choice of forum is to be accorded substantial deference. Nevertheless, the court decides that the case as pled is simply too burdensome. It needs to be restructured. Accordingly, the court dismisses the suit insofar as the manufacturer seeks insurance for liabilities located outside the forum state. For these environmental losses, the court directs the parties to litigate their disputes (over the same insurance contracts) in *each* of the twenty-three states where the liabilities arose (the "Site-Specific Approach"). Instead of one judge, one series of pleadings, and one set of counsel, the court would require twenty-three judges, twenty-three series of pleadings and discovery, and twenty-three sets of counsel. To support its novel exercise of judicial power and approach to case management, the trial court invokes *forum non conveniens*, a doctrine whose traditional purpose is to avoid vexatious and harassing litigation.

Notwithstanding its improbability, the scenario is not fictional; it is drawn from the experience of Westinghouse Electric Corporation ("Westinghouse"), which on March 22, 1988 had its suit, the first "mega" comprehensive environmental insurance coverage action, fragmented in the manner described above.<sup>1</sup> Armed with this ruling, two of the largest casualty insurers in the country, the American International Group, Inc. ("AIG") and Kemper Group,<sup>2</sup> embarked on a national campaign to persuade courts from Rhode Island to California to fracture comprehensive environmental insurance

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1. *Westinghouse Elec. Corp. v. Aetna Casualty & Sur. Co.*, 227 N.J. Super. 504, 547 A.2d 1167 (1988), *rev'd sub nom. Westinghouse Elec. Corp. v. Liberty Mut. Ins. Co.*, 233 N.J. Super. 463, 559 A.2d 435 (1989).

2. AIG is one of the world's largest insurance organizations. Its lead companies include National Union Fire Insurance Company of Pittsburgh, PA, New Hampshire Insurance Company, and American Home Assurance Company. The Kemper Group, which includes Lumbermens Mutual Casualty Company (hereinafter "Lumbermens") and American Motorists Insurance Company, also ranks among the top twenty property casualty insurance groups in the United States. *Best's Insurance Reports: Property-Casualty*, 176, 1366 (1988).

coverage along the lines adopted by the *Westinghouse* trial court. They have had few successes. Most courts, including the Circuit Court for Mercer County, West Virginia,<sup>3</sup> and indeed most insurance companies,<sup>4</sup> have rejected the Site-Specific Approach. Within the last year, New Jersey's Appellate Division dealt AIG and Kemper a severe setback by reversing the *Westinghouse* trial court decision and by repudiating its reasoning.<sup>5</sup>

The Site-Specific Approach may be down, but it is definitely not out. Union Carbide Corporation, Avnet, Inc., and United Technologies Corporation can attest to the resilience of its reasoning, which has prevailed—at least for the moment—in their comprehensive suits originally filed in Connecticut, New York, and Massachusetts, respectively.<sup>6</sup> In view of the professed allegiance of the AIG and Kemper Groups to the Site-Specific Approach,<sup>7</sup> it seems clear

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3. Joy Technologies, Inc. v. Liberty Mut. Ins. Co., No. 88-C-96 (W. Va. Cir. Mercer County Aug. 29, 1988), reported in 2 Mealey's Litig. Rep. (Ins.) 10 (Oct. 25, 1988).

4. See, e.g., Consolidated Brief of Defendant-Appellants, Union Carbide Corp. v. Aetna Casualty & Sur. Co., 212 Conn. 311, 562 A.2d 15 (1989); Brief of Respondent-Cross-Appellant, Liberty Mutual Insurance Company, Westinghouse Elec. Corp. v. Aetna Casualty & Sur. Co., 233 N.J. Super. 463, 559 A.2d 435 (1989).

5. Westinghouse Elec. Corp. v. Liberty Mut. Ins. Co., 233 N.J. Super. 463, 559 A.2d 435 (1989) (hereinafter "*Westinghouse*").

6. Union Carbide Corp. v. Aetna Casualty & Sur. Co., No. 294989 (Conn. Super. Danbury Dist. Feb. 6, 1989), reprinted in 3 Mealey's Litig. Rep. (Ins.) I-1 (Feb. 14, 1989), *aff'd*, 212 Conn. 311, 562 A.2d 15 (1989); Avnet, Inc. v. Aetna Casualty & Sur. Co., No. 11091/86 (N.Y. Sup. N.Y. County Feb. 1, 1989), reprinted in 3 Mealey's Litig. Rep. (Ins.) J-1 (Feb. 14, 1989); United Technologies Corp. v. Liberty Mut. Ins. Co., No. 87-7172 (Mass. Super. Suffolk County Feb. 16, 1989), reprinted in 3 Mealey's Litig. Rep. (Ins.) H-1 (Feb. 28, 1989), *rev. granted*, No. SJC-5228 (Mass. Super. Jud. Oct. 13, 1989) (hereinafter "*United Technologies*").

7. The commitment to the Site-Specific Approach has been less than unwavering. From time to time, whether out of perceived self-interest or breakdowns in the coordination of their national strategy, Kemper companies have taken positions of record before courts throughout the country endorsing the comprehensive approach to environmental insurance coverage litigation. For example, in October 1987, Lumbermens filed its own comprehensive thirty-site environmental insurance coverage action in the United States District Court for the District of Delaware. In defending its choice of forum, Lumbermens argued that "[t]o the extent the case requires access to proof with regard to the waste disposal sites, the location of these sites cannot be determinative in the convenience question." Plaintiffs' Brief in Opposition to Defendants' Motion to Stay or, in the Alternative, to Transfer at 20, Lumbermens Mut. Casualty Co. v. SCM Corp., No. 87-527-JJF (D. Del. filed Oct. 6, 1987); Avco Corp. v. Aetna Casualty & Sur. Co., No. 87-3496 transcript of proceedings at 14 (R.I. Super. Feb. 16, 1988) (Lumbermens' counsel offering to stipulate that client will not file a motion to dismiss on the basis of forum non conveniens if entire action involving sites located in several different states is brought in a state which "has a logical relationship to this suit in terms of the waste sites or the shipping materials . . .").

that courts throughout the country will be presented over and again with the opportunity to use forum non conveniens as a means of dismantling a comprehensive suit in favor of piecemeal, site-specific litigation.

For those with a bent toward irony, there may be a certain pleasure in observing this metamorphosis of forum non conveniens from a rather crude and cumbersome shield forged to protect harassed defendants into a modern offensive weapon programmed to search and destroy "mega" cases through defendant-activated and judicially-imposed fission. Nevertheless, in the opinion of the authors, and as we have argued in several of the leading cases on this subject,<sup>8</sup> the Site-Specific Approach represents a dangerous manipulation of the forum non conveniens doctrine. We contend below that it imposes unnecessary transaction costs on the already exorbitantly expensive environmental cleanup effort. It perverts, in the name of case management, a legal principle, which may, under appropriate circumstances, be used to dismiss, but not to redraft, a complaint. It cannot be justified under the private and public interest factors traditionally associated with forum non conveniens rulings. It threatens, indeed it is intended, to undermine the widely recognized goal of comprehensive adjudication. It is rejected by the decisive majority of cases on point. In our view, the challenges posed by comprehensive environmental insurance coverage litigation can, and should, be met through innovative case management techniques, not through forum non conveniens dismissals.

## II. THE EMERGENCE OF THE COMPREHENSIVE ENVIRONMENTAL INSURANCE COVERAGE ACTION AND THE SITE-SPECIFIC RESPONSE

To assess properly the merits of the Site-Specific Approach, it is useful to step back and consider why comprehensive environmental insurance coverage actions are brought in the first place. Prior to the passage of the Resource Conservation and Recovery

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8. *Westinghouse*, 233 N.J. Super, 463, 559 A.2d 435; *United Technologies*, 3 Mealey's Litig. Rep. (Ins.) H-1 (Feb. 28, 1989); *Carrier Corp. v. Travelers Indem. Co.*, No. CV 88-0352383S (Conn. Super. Hartford-New Britain Dist. Aug. 25, 1988).

Act<sup>9</sup> in 1976, there was little regulation of the disposal of the wastes<sup>10</sup> that Maurice Greenberg, AIG's President and Chief Executive Officer, has aptly termed the "by-product" of our "industrial development" and the "residue of progress."<sup>11</sup> This is not surprising. Our knowledge today of the hazards of such materials is "worlds apart"<sup>12</sup> from what was known in that less environmentally attuned era. In Mr. Greenberg's own words, "[m]ost of today's ground and water contamination did not result from deliberate, conscious acts but is an unintended result of our economic history."<sup>13</sup>

Nevertheless, in the legal climate of the 1980s, embodied most prominently in the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA" or "Superfund"),<sup>14</sup> manufacturers have discovered that the generation of industrial wastes—those by-products of manufacturing processes used in the 1970s, 1960s, and earlier—that were disposed of in conformity with all applicable laws and industrial standards at that time, subjects them *today* to staggering environmental liabilities.<sup>15</sup> As applied by governmental agencies and as interpreted by many courts, liability under CERCLA and its state progeny<sup>16</sup> may be imposed retroactively, with-

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9. 42 U.S.C. §§ 6901-6920 (1982).

10. See, e.g., D. STERVER, LAW OF CHEMICAL REGULATION AND HAZARDOUS WASTE § 5.1 (1988).

11. Greenberg, *Needed: A Fee on Commercial and Industrial Insurance to Finance Hazardous Waste Cleanup*, 19 ENVTL. L. REP. 10,254, 10,254 (1989). For a view critical of Mr. Greenberg's proposed fee, see Kalis, *Environmental Trust Fund: A Bailout For Insurance Industry?*, Legal Times, Dec. 18, 1989, at 29, col. 1.

12. *New Castle County v. Continental Casualty Co.*, No. 85-436-JLL (D. Del. Oct. 23, 1989), reported in 3 Mealey's Litig. Rep. (Ins.) 9, 10 (Oct. 24, 1989).

13. Speech by Maurice R. Greenberg to the Press Club in Washington, D.C., entitled *The National Environmental Trust Fund: Dealing with the Residue of Progress* (March 2, 1989).

14. 42 U.S.C. §§ 9601-9620 (as amended).

15. Even the most ardent opponents of policyholders' attempts to access coverage for these claims have acknowledged the plight in which many manufacturers find themselves. See Greenberg, *supra* note 11 at 10,254; Thomas, *The Tort System's Ticking Time Bomb*, reprinted in part in 2 Mealey's Litig. Rep. (Ins.) 24, 26 (Mar. 9, 1988) (Chairman and Chief Executive Officer of the Hartford Insurance Group; noting that under Superfund, Congress "has chosen to finance this enormous societal cost through an arbitrary, and unfair, liability scheme that attempts to reach those corporations with the deepest pockets, regardless of their responsibility.").

16. See, e.g., Massachusetts Oil and Hazardous Material Release Prevention Act, MASS. ANN. LAWS ch. 21E §§ 1-18 (Law. Co-op. 1988); New Jersey Spill, Compensation and Control Act, N.J. STAT. ANN. §§ 58:10-23.11-35.4 (West 1982); West Virginia Hazardous Waste Emergency Response Fund, W. VA. CODE §§ 20-5G-1-6 (1989).

out regard to fault, and on a joint and several basis.<sup>17</sup> The defenses to such liability are quite limited.<sup>18</sup> When manufacturers ensnared in the net of CERCLA liability turned to their insurers for coverage under the terms of the comprehensive general liability insurance ("CGL")<sup>19</sup> policies purchased over the years, the insurance industry's response was, as a federal judge observed in a related context, typically to "run for cover rather than coverage."<sup>20</sup>

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17. See, e.g., *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), cert. denied, 109 S. Ct. 3156 (1989); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986); *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); Jones & McStarrow, . . . but Were Afraid To Ask: *Superfund Case Law, 1981-1989*, 19 ENVTL. L. REP. 10,430, 10,447 (1989); Pendencygraft, Plews, Clark & Wright, *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 IND. L. REV. 117, 121-23 (1988); Price, *Dividing the Costs of Hazardous Waste Site Cleanups Under Superfund: Is Joint and Several Liability Appropriate?*, 52 UMKC L. REV. 339 (1984).

18. See 42 U.S.C. § 9607(b) (covered entity must prove by preponderance of evidence that environmental damage caused solely by act of God, act of war, or act or omission of third-party).

19. Until about fifty years ago, policyholders typically purchased liability insurance whose coverage was limited to a specific type of hazard, e.g., products and "completed operations." In the late 1930s or early 1940s, the insurance industry began to market what eventually became the dominant, standardized form of liability insurance covering public and private sector policyholders, the CGL policy. To induce the purchase of this extensive and more expensive coverage, the industry explained to insureds:

The burden of determining what to insure and what not to insure is removed from the shoulders of the insured and placed squarely on the producer and the carrier. How much better it is to say—"We cover *everything* except this and this and this" instead of "We cover *only* this and this and this."

Egloff, *Comprehensive Liability Insurance: The Outside*, BEST'S FIRE & CASUALTY NEWS May 1941, at 19 (emphasis in original); see also Sawyer, *Comprehensive Liability Insurance: The Inside*, BEST'S FIRE & CASUALTY NEWS May 1941, at 60 (Instead of insuring against only the hazards specified in the policy, comprehensive liability insurance embraces all hazards not excluded.)

Consistent with these and similar representations, the CGL policy has been interpreted in a manner to provide the maximum coverage for policyholders. See, e.g., Chesler, Rodburg & Smith, *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 RUTGERS L.J. 9, 14-15 (1986) ("CGL insurance purchased by commercial enterprises provides indemnity for, and defense against, the broadest spectrum of property damage and personal injury claims brought by third parties arising out of day to day business operations . . ."); Note, *The Applicability of General Liability Insurance to Hazardous Waste Disposal*, 57 S. CAL. L. REV. 745, 757 (1984) ("The very title 'Comprehensive General Liability Insurance' suggests the expectation of maximum coverage."); *Asbestos Ins. Coverage Cases* No. 1072 (Cal. Super. San Francisco County May 29, 1987), reprinted in 1 Mealey's Litig. Rep. (Ins.) 4440, 4466-68 (June 9, 1987) (hereinafter "*Asbestos Ins. Coverage Cases*") (refusing to adopt restrictive interpretation of CGL policy in context of asbestos claims and relying, in part, on policy's broad and flexible language).

20. *Sandoz, Inc. v. Employer's Liab. Assurance Corp.*, 554 F. Supp. 257, 258 (D.N.J. 1983); see Kalis, *Insurers Run for Cover, Not Coverage*, 12 Legal Times 14, July 3, 1989, col. 1 (detailing insurance industry's defensive strategy).

Occasionally, insurance companies, after covering environmental claims, have filed subrogation

That left many manufacturers with two options: fund the liabilities out of operating revenues or sue in the hope that a court would force the insurance companies to cover the losses. Some chose litigation; others had the choice made for them by their insurers, often in jurisdictions thought to be hospitable to the interests of insurance companies.<sup>21</sup> Thus, in courthouses from West Virginia to Washington, manufacturers and insurance companies are locked in combat. The stakes are enormous—only the most intrepid even venture an estimate.<sup>22</sup> The gladiators are well-equipped—virtually all

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actions against other insurers on the risk. To the great embarrassment of their colleagues, some of these subrogated insurers have contended quite forcefully in briefs that the standard insurer defenses to environmental claims are legally unsound. *See, e.g.*, Plaintiffs-Appellees' Brief on Appeal at 22, *Upjohn Co. v. New Hampshire Ins. Co.*, 178 Mich. App. 706, 444 N.W.2d 813 (1989) (First State Insurance Company; pollution exclusion "is aimed solely at deterring intentional and willful pollution . . ."); Allstate Insurance Company's Brief in Support of Motion for Partial Summary Judgment at 19, *Allstate Ins. Co. v. Quinn Constr. Co.*, No. 85-2220-WD (D. Mass. Feb. 28, 1989) ("National Union and INA should not be allowed to escape liability merely because Allstate is seeking reimbursement for cleanup costs rather than for some other type of damages"); *see also, e.g.*, Plaintiff United States Fidelity and Guaranty Company's Brief in Support of Its Motion for Summary Judgment at 22-24, *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139 (W.D. Mich. 1988) (urging court to follow pro-policyholder ruling on "damages" in *United States Axiex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838 (1983)); Appellee's Brief at 14-15, *Compass Ins. Co. v. Cravens, Dargen & Co.*, 748 P.2d 724 (Wyo. 1988):

Taken to its logical extension, [Compass'] argument would mean that if an insured cleans up pollution for which it is responsible, thereby eliminating the injurious condition which existed, then there is *no* coverage under its policy—But if the insured fails to clean-up the pollution, leaving the water and land in a damaged condition, then there *is* coverage for such damage. Surely such an illogical conclusion should not be allowed, particularly in light of unambiguous policy language providing coverage for the effects of sudden and accidental oil discharge.

*See also* Memorandum of Plaintiff Fireman's Fund Insurance Company in Support of its Motion for Summary Judgment as to Count 11 of Its Complaint at 10, *Fireman's Fund Ins. Co. v. Rogerson*, No. 85-0916-Y (D. Mass. July 15, 1985) (environmental insurance coverage dispute: "[w]ith this backdrop, Utica and CNA can hardly maintain that the allegations against [their policyholder] do not raise a reasonable possibility that property damage occurred within their policy periods . . .").

21. *See, e.g.*, *Employers Ins. of Wausau v. Xerox Corp.*, No. B87-625D (D. Conn. filed Sept. 14, 1987); *Travelers Indem. Co. v. Monsanto Co.*, No. H-88-34 (D. Conn. filed Jan. 19, 1988); *Travelers Indem. Co. v. Allied Signal, Inc.*, No. JFM 88-99 (D. Md. filed Jan. 14, 1988), reported in 2 *Mealey's Litig. Rep. (Ins.)* 18 (Feb. 9, 1988); *General Reinsurance Co. v. CIBA-GEIGY Corp.*, No. 87-CV-8304 (S.D.N.Y.), *aff'd*, 853 F.2d 78 (2d Cir. 1988).

22. One of those braver souls is Mr. Greenberg, who cites estimates ranging between \$150 and \$700 billion. Greenberg, *supra* note 11, at 10,254. Adding to this already enormous expense is the "potentially staggering costs of [private party] property damage and bodily injury lawsuits" arising out of alleged exposure to the hazardous wastes. *See* Thomas, *supra* note 15, at 27.

The EPA originally estimated that the average cleanup of a site appearing on the National Priority List ("NPL") would cost about \$8 million. *Extent of the Hazardous Release Problem and Future*



casualty insurers and much of the country's manufacturing base are in litigation.<sup>23</sup> The blows are sometimes low—for example, one advisor to the insurance industry suggested, with apparent seriousness,<sup>24</sup> that insurers forge an alliance in Congress against policyholders, *i.e.*, the paying clients to whom insurers owe a duty of good faith and fair dealing.<sup>25</sup> The preferred mode of combat has been the comprehensive environmental insurance coverage lawsuit.<sup>26</sup>

*Funding Needs*, CERCLA § 301(a)(1)(C) study, Final Report (Dec. 1984), *cited in* Chesler, *supra* note 18, at 12 and n.18. In part because of the more rigorous cleanup standards under the Superfund Amendments and Reauthorization Act, EPA's estimate, by 1986, had increased to between \$30 million and \$50 million per site. Chesler, *supra* note 19, at 12 and n.23. As of November 1989, according to the Superfund Hotline, 981 sites appear on the NPL, five of which are located in West Virginia. Thomas cites a General Accounting Office Study that "there are at least 131,000 and possibly as many as 425,000, hazardous waste sites that will have to be investigated, put on a priority list and finally cleaned up." Thomas, *supra* note 15, at 24.

23. *See, e.g.*, *The Boeing Co. v. Aetna Casualty & Sur. Co.*, No. C86-352D (W.D. Wash. July 24, 1989), *reprinted in* 3 Mealey's Litig. Rep. E-1 (Sept. 12, 1989); *Diamond Shamrock Chem. Co. v. Aetna Casualty & Sur. Co.*, 231 N.J. Super. 1, 554 A.2d 1342 (1989); *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, No. 3-87-140 (D. Minn.), *reported in* 2 Mealey's Litig. Rep. (Ins.) 9 (Aug. 9, 1988); *Morton Thiokol, Inc. v. General Accident Ins. Co. of America*, No. C-3956-85 (N.J. Super. Ch. Div. Bergen County), *reprinted in* 3 Mealey's Litig. Rep. (Ins.) E-1 (July 25, 1989); *Polaroid Corp. v. Travelers Indem. Co.*, No. 88-5207 (Mass. Super. Middlesex County filed Aug. 3, 1988); *see also infra* note 26.

24. Freed, *The Politics of Pollution Liability*, 89 *BEST'S REV.* 39 (March 1989).

25. *See, e.g.*, *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 573, 510 P.2d 1032, 1037, 108 Cal. Rptr. 480, 485 (1973); *Spencer v. Aetna Life & Casualty Ins. Co.*, 227 Kan. 914, 917, 611 P.2d 149, 151-52 (1980); Kornblum, *The Current State of Bad Faith and Punitive Damage Litigation in the U.S.*, 23 *Tort & Ins. L.J.* 812, 824-27 (1988). *But see, e.g.*, *Santilli v. State Farm Life Ins. Co.*, 278 Or. 53, 61-62, 562 P.2d 965, 969 (1977).

As one commentator observed:

Allstate's slogan "You're in Good Hands," Travelers' motto of protection "Under the Umbrella," and Fireman's Fund symbolic protection beneath the "Fireman's Hat," exemplify the industry's own efforts to portray itself as a repository of the public trust. But with the public trust may be visited responsibility for a violation of such trust as evidenced by recent recognition of extra-contractual "rights" of insureds or tortious responsibility of insurers beyond the four corners of the insuring agreement—particularly in the first party area.

*State Farm Fire & Casualty Co. v. Nicholson*, 777 P.2d 1152, 1155-56 n.6 (Alaska 1988) (quoting McMains, *Bad Faith Claims—New Frontiers: A Multi-State Cause of Action in Search of a Home*, 53 *J. AIR L. & COMM.* 901, 904 (1988)).

26. *See, e.g.*, *FMC Corp. v. Liberty Mut. Ins. Co.*, No. 643058 (Calif. Super. Santa Clara County Jan. 3, 1989), *reprinted in* 3 Mealey's Litig. Rep. (Ins.) E-1 (Jan. 11, 1989); *Purex Indus., Inc. v. Procter*, No. C-446-935 (Calif. Super. Los Angeles County Nov. 7, 1988), *reprinted in* 3 Mealey's Litig. Rep. (Ins.) E-1 (Nov. 22, 1988); *Employers Ins. of Wausau v. Xerox Corp.*, No. B87-625D (D. Conn. filed Sept. 14, 1987); *Monsanto Co. v. Aetna Casualty & Sur. Co.*, No. 88C-JA-118-1-CV (Del. Super. New Castle County filed Jan. 20, 1988), *reported in* 3 Mealey's Litig. Rep.

Grounded in state law and generally lacking complete diversity, these contract-based actions typically may be brought only in state court.<sup>27</sup> Since there is at least some likelihood that the forum will elect to apply its own substantive law,<sup>28</sup> and further since there are

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(Ins.) 21 (Feb. 9, 1988); *North American Philips Corp. v. Aetna Casualty & Sur. Co.*, No. 88C-JA-155 (Del. Super. New Castle County Oct. 21, 1988); *E.I. Du Pont de Nemours & Co. v. Admiral Ins. Co.*, No. 89C-AU-99-1-CV (Del. Super. New Castle County filed Aug. 16, 1988); *United Technologies*, 3 Mealey's Litig. Rep. (Ins.) H-1 (Feb. 28, 1989); *W.R. Grace & Co. v. Admiral Ins. Co.*, No. 87-6624 (Mass. Super. Suffolk County Jan. 20, 1989); *Whirlpool Corp. v. Aetna Casualty & Sur. Co.*, No. 88-1062-CZ-Z (Mich. Cir. Berrian County filed Apr. 11, 1988), reported in 2 Mealey's Litig. Rep. (Ins.) 19 (Apr. 27, 1988); *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 720 F. Supp. 597 (E.D. Mich. 1989); *Ciba-Geigy Corp. v. Liberty Mut. Ins. Co.*, No. L-97515-87 (N.J. Super. Union County Dec. 17, 1987); *RCA Corp. v. Travelers Indem. Co.*, No. L87-4931 (N.J. Super. Law Div. Mercer County filed Dec. 2, 1987); *BOC Group, Inc. v. Liberty Mut. Ins. Co.*, No. 86840-88 (N.J. Super. Union County Jan. 10, 1989), reprinted in 3 Mealey's Litig. Rep. (Ins.) E-1 (Jan. 24, 1989); *Peabody Int'l Corp. v. Commercial Union Ins. Co.*, No. C87-0242 (N.J. Super. Ch. Div. Mercer County filed Aug. 10, 1988); *American Tele. & Tele. Co. v. Aetna Casualty & Sur. Co.*, No. W-56581 (N.J. Super. Law Div. Essex County filed Nov. 9, 1988); *Westinghouse*, 233 N.J. Super. 463, 559 A.2d 435; *Detrex Chem. Indus. v. Employers Ins. of Wausau*, 681 F. Supp. 438 (N.D. Ohio 1987); *In re Texas E. Transmission Corp.*, No. 764 (E.D. Pa. Sept. 15, 1988), reprinted in 2 Mealey's Litig. Rep. (Ins.) C-1 (Sept. 28, 1988); *Firestone Tire & Rubber Co. v. AIU Ins. Co.*, No. CV-89-01-0158 (Ohio Comm. Pl. Summit County filed Jan. 17, 1989); *Textron, Inc. v. Aetna Casualty & Sur. Co.*, No. 87-3497 (R.I. Super. filed Aug. 14, 1987); *Avco Corp. v. Aetna Casualty & Sur. Co.*, No. 87-3496 (R.I. Super. Feb. 24, 1988); *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, No. 88-C-96 (W. Va. Cir. Mercer County Aug. 29, 1988), reported in 2 Mealey's Litig. Rep. (Ins.) 10 (Oct. 25, 1988). *But see* *Minnesota Mining & Mfg. Co. v. Commercial Union Ins. Co.*, No. 88-325 (July 18, 1988), reprinted in 2 Mealey's Litig. Rep. (Ins.) H-1 (July 27, 1988) (retaining jurisdiction at request of policyholder, although more comprehensive environmental insurance coverage action was pending in Minnesota).

This list is not, and does not purport to be, comprehensive.

27. The federal courts *may* be available where the policyholder was insured by the Insurance Corporation of Ireland, Ltd. (hereinafter "ICI"), a relatively minor participant in certain Lloyd's policies. The majority of the stock of ICI is apparently owned by the Republic of Ireland. According to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330(a) (1982), federal district courts have original jurisdiction over "any non-jury civil action against a foreign state . . ." On the strength of this somewhat arcane provision, three courts have issued decisions retaining jurisdiction over environmental insurance coverage actions (involving ICI) that lacked complete diversity among the parties. *See In re Texas E. Transmission Corp.*, No. MDL 764 (E.D. Pa. Sept. 15, 1988), reprinted in 2 Mealey's Lit. Rep. (Ins.) C-1 (Sept. 28, 1988); *Liberty Mut. Ins. Co. v. Insurance Corp. of Ireland*, 693 F. Supp. 340 (W.D. Pa. 1988); *see also National Sur. Corp. v. Sangamo Westin, Inc.*, Nos. 8:88-3437-17 and 6:89-642-17 (D.S.C. Aug. 11, 1989), reprinted in 3 Mealey's Litig. Rep. (Ins.) G-1 (Aug. 22, 1989) (retaining jurisdiction over environmental insurance coverage action, which lacked complete diversity, even after ICI, whose presence apparently supplied federal jurisdiction, had been dismissed as a defendant). *But see* *Sequa Corp. v. Aetna Casualty & Sur. Co.*, No. 89-234-JRR (D. Del. Oct. 5, 1989), reported in 3 Mealey's Litig. Rep. (Ins.) 11 (Oct. 10, 1989) (remanding to state court in apparently similar circumstances). To the extent that these cases rely on principles of pendent party jurisdiction, they may no longer be good law. *See* *Finley v. United States*, 109 S. Ct. 2003 (1989) (rejecting pendent party jurisdiction in context of action under Federal Tort Claims Act).

28. *See Asbestos Ins. Coverage Cases*, 1 Mealey's Litig. Rep. (Ins.) at 4,453 (June 9, 1987)

sharp conflicts among the states as to coverage for environmental liabilities under identical insurance contract language,<sup>29</sup> it is not surprising that defendant insurance companies named in such suits often react by erecting a host of procedural hurdles: the complaint lacks the necessary specificity;<sup>30</sup> the declaratory judgment action fails to state a case or controversy against a particular defendant;<sup>31</sup> the plaintiff has failed to name certain necessary or indispensable parties;<sup>32</sup> or the policyholder has failed to comply with certain pre-suit conditions rendering the action premature.<sup>33</sup> Although it may come as a surprise that large, sophisticated, national and international insurance companies could credibly argue that they are inconvenienced, numerous insurers have invoked the doctrine of *forum non conveniens* in support of their position that another court (typically one whose insurance jurisprudence is deemed to favor the insurer) should hear the case.<sup>34</sup>

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(quoting *Hurtado v. Superior Court*, 11 Cal. 3d 574, 581 (1974)) (applying law of forum, California, since insurance contract interpretative principles of possibly interested jurisdictions, where discernible, do not conflict; "normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the decision found in the law of the forum"); *Crown Cork & Seal Co. v. Aetna Casualty & Sur. Co.*, No. L-007456-88 (N.J. Super. Law Div. Hudson County Aug. 8, 1989) (applying New Jersey law to environmental insurance coverage action although neither policyholder nor its insurers were incorporated or headquartered in that jurisdiction, and most of the sites were located out-of-state); cf. *Travelers Indem. Co. v. Allied Signal, Inc.*, No. JFM-88-99 (D. Md. Aug. 4, 1989), reprinted in 3 Mealey's Litig. Rep. (Ins.) F-1 (Aug. 22, 1989) (interpreting *Westinghouse* as suggesting that New Jersey law would apply to substantive coverage disputes).

29. See *infra* notes 58-63 and accompanying text.

30. *E.g.*, *Monsanto Co. v. Aetna Casualty & Sur. Co.*, No. 88C-JA-118, slip op. at 15 (Del. Super. New Castle County May 22, 1989) (treating such a motion as moot in light of scheduling order requiring policyholder to provide more specific information).

31. Compare *North America Philips Corp. v. Aetna Casualty & Sur. Co.*, No. 886-JA-115 (Del. Super. New Castle County Aug. 21, 1989), reprinted in 3 Mealey's Litig. Rep. (Ins.) D-1 (Sept. 12, 1989) (rejecting argument) with *Borg-Warner Corp. v. Liberty Mut. Ins. Co.*, No. 88-539 (N.Y. S. Tompkins County Sept. 15, 1989), reprinted in 3 Mealey's Litig. Rep. (Ins.) B-1 (Oct. 10, 1989) (accepting argument).

32. See, *e.g.*, *Monsanto Co. v. Aetna Casualty & Sur. Co.*, No. 88C-JA-118, slip op. at 15 (Del. Super. New Castle County May 22, 1989) (rejecting argument that policyholder failed to join underlying governmental claimants as necessary parties); cf. *Reading Co. v. Travelers Indem. Co.*, No. 87-2021 (E.D. Pa. Feb. 18, 1988), reprinted in 2 Mealey's Litig. Rep. (Ins.) B-1 (Mar. 23, 1988) (asbestos insurance coverage action; denying motion to dismiss for failure to join certain insurers possibly on the risk).

33. See *United Technologies Corp. v. Liberty Mut. Ins. Co.*, No. 87-7172 (Mass. Super. Suffolk County Oct. 24, 1988), reprinted in 3 Mealey's Litig. Rep. (Ins.) B-1 (Nov. 8, 1988) (finding that policyholder failed to comply with certain alleged pre-suit conditions in property insurance policies and dismissing action without prejudice with respect to such policies).

34. See, *e.g.*, *W. R. Grace & Co. v. Admiral Ins. Co.*, No. 87-6624 (Mass. Super. Suffolk

As set forth in the Introduction, this article concerns itself not with these rather standard defenses, but rather with the position, advanced in West Virginia and throughout the country, by a small but powerful group of insurance companies, primarily the AIG and Kemper Groups, that comprehensive adjudication of environmental insurance coverage disputes is inappropriate no matter where the action is sited. Instead, these insurers advocate that a separate lawsuit be instituted in *each* state where an underlying waste site is located. Their approach, the Site-Specific Approach, is designed to destroy the ability of the policyholder and insurance companies to resolve, on a comprehensive basis, a dispute that will have a profound impact upon this country's physical and economic landscape.<sup>35</sup> That dispute, engendered by CERCLA and its draconian regime, is whether the insurance industry must participate alongside its public and private sector policyholders in the nation-wide environmental cleanup. In a system that is already widely criticized by the insurer and policyholder communities alike for its arbitrariness and inefficiency,<sup>36</sup> it is worth exploring carefully indeed whether this

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County Jan. 20, 1989), *reprinted in* 3 Mealey's Litig. Rep. (Ins.) H-1 (Feb. 14, 1988) (rejecting argument of Maryland Casualty Company and four other insurers that case should proceed in New York); *United Technologies Corp. v. Liberty Mut. Ins. Co.*, No. 87-7172 (Mass. Super. Suffolk County Oct. 17, 1988), *reprinted in* 2 Mealey's Litig. Rep. (Ins.) C-1 (Oct. 24, 1988) (accepting argument of Travelers Indemnity Company and two other insurers that case insofar as it involved claims of Carrier Corporation, a subsidiary of United Technologies Corporation, should proceed in New York or Connecticut); *cf. Westinghouse Elec. Corp. v. Liberty Mut. Ins. Co.*, Nos. L-069351-87 and L-069352-87 (N.J. Super. Law Div. Union County Sept. 18, 1989) (declining to defer to action pending in the United States District Court for the Western District of Pennsylvania as urged by Liberty Mutual Insurance Company).

35. A clear signal of the controversy's importance emanates from the number of federal and state governmental entities, including the Insurance Commissioner of West Virginia, filing briefs *amicus curiae* (opposing insurers' efforts to avoid coverage). *See, e.g.*, *Amicus Curiae Brief of the Commonwealth of Massachusetts in Support of Plaintiff-Appellee, Shapiro v. Public Service Mut. Ins. Co.*, 19 Mass. App. 648, 477 N.E.2d 146 (1985); *Amicus Curiae Brief of John K. Van De Kamp, Attorney General of the State of California, in Support of Petitioners Aerojet-General and Cordova Chemical Company, Aerojet-General Corp. v. Superior Court*, No. A042785 (Cal. App. San Mateo County filed July 13, 1988); *Brief of Amicus Curiae the Commonwealth of Pennsylvania, Department of Environmental Resources, United States Fidelity & Guar. Ass'n v. Lower Paxton Township*, No. 141 (Pa. Super. filed Aug. 18, 1988); *Supplemental Brief for the United States as Amicus Curiae on Rehearing En Banc, Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir. 1988); *Amicus Curiae Brief of the Insurance Commissioner of West Virginia, Liberty Mut. Ins. Co. v. Triangle Indus.*, No. CC999 (W. Va. filed Jan. 17, 1990).

36. *See Greenberg, supra* note 11, at 10,254 ("Studies show that, of the total funds spent since 1980 on environmental matters, something between 30 and 60 percent has gone for legal expenses"); *Thomas, supra* note 15, at 26; *Kalis, supra* note 20, at 14.

wholesale attack on the comprehensive suit is legally supported.

### III. THE DEVELOPMENT AND CONTENT OF THE FORUM NON CONVENIENS DOCTRINE

It is often assumed that forum non conveniens—with its Latin name—has an ancient lineage.<sup>37</sup> Eminent legal figures such as Justice Robert Jackson and Paxton Blair have purported to trace the doctrine's antecedents back to English and Scottish case law.<sup>38</sup> As Professor Stein convincingly demonstrates, however, forum non conveniens, at least as currently understood, is of much more recent vintage.<sup>39</sup> In the era of *Pennoyer v. Neff*,<sup>40</sup> and the enforcement of rigid territorial limits on the power of state courts, there was little need or opportunity to apply the forum non conveniens doctrine. As courts began to apply a more functional approach to personal jurisdiction, ultimately culminating in the *International Shoe Co. v. Washington*<sup>41</sup>

37. The doctrine is often attributed to Paxton Blair's article published in 1929 in the COLUMBIA LAW REVIEW. See Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929). Blair, who at the time was an associate at Cadwalader, Wickersham & Taft, was fortunate to have his article (in the words of one commentator) meet "with the kind of judicial reception that law professors dream of." Stein, *Forum Non Conveniens And The Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 811 (1985); see *Williams v. Green Bay & W.R. Co.* 326 U.S. 549, 557 n.4 (1946) (citing Blair); *Canada Malting Co. v. Patterson S.S. Ltd.*, 285 U.S. 413, 423 n.13 (1932) (citing Blair).

Perhaps as a consequence of Blair's success, forum non conveniens has garnered its share of print in the country's law reviews. Among the renowned scholars and jurists that have written on the subject are Professors Bickel and Currie as well as Judge Friendly. See generally Bickel, *The Doctrine of Forum Non Conveniens As Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L. Q. 12 (1949); Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 416-38 (1955); Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982). A selection of other works follows. Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947); McAllen, *Deference to the Plaintiff in Forum Non Conveniens*, 13 S. ILL. U.L.J. 191 (1989); Morely, *Forum Non Conveniens: Restraining Long-Arm Jurisdiction*, 68 NW. U.L. REV. 24 (1973); Stein, *supra*; Note, *Considerations of Choice of Law in the Doctrine of Forum Non Conveniens*, 74 CALIF. L. REV. 565 (1986); Note, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. CHI. L. REV. 373 (1980); Note, *Forum Non Conveniens in the Absence of an Alternative Forum*, 86 COLUM. L. REV. 1000 (1986) (hereinafter "Alternative Forum"); Note, *The Convenient Forum Abroad*, 20 STAN. L. REV. 57 (1967). On the experience of forum non conveniens in environmental insurance coverage litigation, see Kalis & Reiter, *Examining Choice-of-Law and Choice-of-Forum Issues Before Litigating Environmental Insurance Coverage*, 2 ENVTL CLAIMS J. 165 (Winter 1989) (offering a viewpoint similar to that presented in this Article).

38. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947); Blair, *supra* note 37, at 20.

39. See Stein, *supra* note 37, at 796-802; *Alternative Forum*, *supra* note 37, at 1001-02.

40. 95 U.S. 714 (1877).

41. 326 U.S. 310 (1945).

minimum contacts test, plaintiffs could more often bring a lawsuit in one of many different jurisdictions. It is hardly coincidental, therefore, that the seminal, and still leading, case on forum non conveniens was decided two years after *International Shoe* loosened the reins on the exercise of personal jurisdiction. The case is *Gulf Oil Corp. v. Gilbert*.<sup>42</sup>

The facts of *Gulf Oil* may be briefly summarized. Gilbert Storage and Transfer Company (“Gilbert”) brought a diversity action in the United States District Court for the Southern District of New York against Gulf Oil Corporation (“Gulf Oil”), a Pennsylvania corporation at the time. Gilbert claimed that, in the course of making a gasoline delivery, Gulf Oil negligently caused a fire, resulting in substantial damage to Gilbert’s warehouse in Lynchburg, Virginia. Acknowledging that venue was proper and that Gulf Oil was subject to the district court’s jurisdiction, the Supreme Court nonetheless determined that the case was properly dismissed on grounds of forum non conveniens.

The *Gulf Oil* analysis, though familiar, is worthy of recitation. Forum non conveniens presumes two forums in which a plaintiff may bring its suit, and offers guidelines in making the choice between them with much discretion left to the trial court.<sup>43</sup> The relevant considerations can be grouped into two categories: private interests and public interests.<sup>44</sup> The private interest factors—those affecting the litigants themselves—consist of (i) the relative ease of access to sources of proof; (ii) the availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; (iii) the possibility of view of premises, if view would be appropriate to the action; (iv) and all other practical concerns

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42. 330 U.S. 501 (1947).

43. Rather presciently, the Court acknowledged the possibility that some courts might use this discretion to avoid cases deemed to be unappealing. The Court pronounced itself satisfied that experience had disclosed few such abuses. *Id.* at 508; see also *Starr v. Berry*, 25 N.J. 573, 587, 138 A.2d 44, 51 (1957) (declining to dismiss on forum non conveniens grounds and noting “the prospect of a lengthy trial offers a strong temptation to decline to entertain the suit”); cf. *Westinghouse*, 233 N.J. Super. at 468, 559 A.2d at 437 (“We must, as a judicial system, devote our efforts to determining how best to adjudicate controversies on their merits, not how to avoid adjudication.”).

44. *Gulf Oil*, 330 U.S. at 508-09.

that lead to an easy, expeditious, and inexpensive trial of the case.<sup>45</sup> The public interest factors are: (i) docket congestion; (ii) the burden of jury duty on a community that has no relation to the lawsuit; (iii) the benefit of having cases affecting a particular forum adjudicated in that forum; (iv) the avoidance of choice-of-law issues; and (v) the benefit of having a court familiar with the substantive law adjudicate the suit.<sup>46</sup>

*Gulf Oil* is not binding on a state court's determination of how, or whether, to apply forum non conveniens principles.<sup>47</sup> In fact, a small number of states has declined to adopt the doctrine at all. As of this writing, West Virginia remains among this dwindling minority,<sup>48</sup> although in *Gardner v. Norfolk & W. Ry.*,<sup>49</sup> Justices Neely and Brotherton, in dissent, expressed their approval of the doctrine.<sup>50</sup>

While the contours of the forum non conveniens doctrine vary from state to state, the *Gulf Oil* public and private interest factors are almost universally adopted.<sup>51</sup> In applying these factors, courts

45. *Id.* at 508.

46. *Id.* at 509. In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), *reh'g denied*, 455 U.S. 928 (1982), the Court returned to the doctrine, and found the *Gulf Oil* methodology still satisfactory. *Piper*, 454 U.S. at 249-60. In *Piper*, the Court held that the court of appeals had erred in assuming that the possibility of an unfavorable change in law bars dismissal on forum non conveniens grounds. The Court also concurred with the trial court's determination that the presumption favoring a plaintiff's choice of forum applied with less force when the plaintiff is a foreigner. *Id.* at 261.

47. *See, e.g.*, *Missouri v. Mayfield*, 340 U.S. 1, 3 (1950) ("According to its own notions of procedural policy, a State may reject, as it may accept, the doctrine [of forum non conveniens] for all causes of action begun in its courts.").

48. *See Chambers v. Merrell-Dow Pharmaceuticals, Inc.*, 35 Ohio St. 3d 123, 126 n.3, 519 N.E.2d 370, 372 n.3 (1988); *see also* Comment, *Procedure—Intrastate Application of Forum Non Conveniens*, 70 W. VA. L. REV. 249, 252-53 (1968).

49. 372 S.E.2d 786 (W. Va. 1988), *cert. denied*, 109 S. Ct. 1132 (1989).

50. *Id.* at 793-96 (Neely, J., dissenting). The majority refused to apply the doctrine to cases brought under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982). Writing for the court, Chief Justice McHugh did caution, however, that "[o]ur holding . . . does not deny or recognize the applicability of the common law principle of *forum non conveniens* to cases not brought under the Federal Employers' Liability Act." *Gardner*, 372 S.E.2d at 793.

51. *See* Stein, *supra* note 37, at 831; RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 84 comment c (1971). Its lure is such that to this day the *Gulf Oil* analysis is recited almost reverentially by nearly every court considering a forum non conveniens motion. With perhaps only the slightest exaggeration, Professor Stein describes the style of federal and state forum non conveniens decisions as follows:

[T]hey are typically one or two pages in length and consist primarily of block quotations

typically have been guided by several legal principles that for the most part are drawn from *Gulf Oil* itself. A defendant moving to dismiss on the basis of forum non conveniens bears a heavy burden. A plaintiff's choice of forum is presumptively valid.<sup>52</sup> It is sometimes stated that the doctrine is concerned primarily with preventing harassment and vexation to the defendant.<sup>53</sup> Dismissals are granted rarely,<sup>54</sup> especially, some courts have explained, when the cause of action is based on a contract.<sup>55</sup> The defendant must establish that plaintiff's choice of forum is inappropriate, even demonstrably inappropriate,<sup>56</sup> and generally must offer an alternative forum in whose favor the balance of conveniences is strongly weighted.<sup>57</sup>

#### IV. APPLICATION OF THE *GULF OIL* TEST

Prior to the judicial initiative of the *Westinghouse* trial court, forum non conveniens had never been used by any court as a substitute for case management. Ultimately, this gap between the doctrine's traditional role—to dismiss suits under limited circumstances—and its function under the Site-Specific Approach—to restructure a large case—was exposed by the *Westinghouse* appellate court, which

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of the public and private factors listed in *Gulf Oil*. The 'analysis' frequently is limited to a statement that in applying these factors the court found the balance of public and private interests to weigh in favor of retention or dismissal.

Stein, *supra* note 37, at 831.

52. *E.g.*, *Gulf Oil*, 330 U.S. at 508; *Starr*, 25 N.J. at 584, 138 A.2d at 50.

53. *E.g.*, *Wangler v. Harvey*, 41 N.J. 277, 286, 196 A.2d 513, 518 (1963); *see generally* Braucher, *supra* note 37, at 910, 930.

54. *E.g.*, *Gulf Oil*, 330 U.S. at 509 (examining whether plaintiff's is "one of those rather rare cases where the doctrine should be applied"); *Carey-Canada, Inc. v. California Union Ins. Co.*, No. 83-1106, slip op. at 2 (D.D.C. Apr. 17, 1984) (LEXIS, Genfed library, Dist file) (refusing to transfer asbestos insurance coverage case; "[d]ismissal for reasons of forum non conveniens is rare"); *Kearsarge Metallurgical Corp. v. Peerless Ins. Co.*, 383 Mass. 162, 169, 418 N.E.2d 580, 584 (1981).

55. *E.g.*, *Amercoat Corp. v. Reagent Chem. & Research, Inc.*, 108 N.J. Super. 331, 347, 261 A.2d 380, 388 (1978); *Van Dam v. Smit*, 101 N.H. 508, 509, 148 A.2d 289, 291 (1959).

56. *E.g.*, *Civic S. Factors Corp. v. Bonat*, 65 N.J. 329, 333, 322 A.2d 436, 438 (1974); *Kolber v. Holyoke Shares, Inc.*, 59 Del. 66, 69, 213 A.2d 444, 447 (1965) ("The dismissal of an action on the basis of the doctrine, and the ultimate defeat of plaintiff's choice of forum, may occur only in the rare case in which the combination and weight of the factors to be considered balance overwhelmingly in favor of the defendant.").

57. *E.g.*, *Gulf Oil*, 330 U.S. at 508 ("But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."); *Kearsarge*, 383 Mass. at 169, 418 N.E.2d at 584; *Gore v. United States Steel Corp.*, 15 N.J. 301, 104 A.2d 670, *cert. denied*, 384 U.S. 861 (1954).



rejected the position out of hand. Even if the Site-Specific Approach is assumed to present an alternative forum requiring that the public and private interest factors be applied, the analysis below establishes that the approach fails.

#### A. *Private Interest Factors*

The fundamental premise of the Site-Specific Approach is that environmental insurance coverage litigation is inherently site-specific. In briefs, AIG and Kemper have contended with great vigor that a host of factual questions (*e.g.*, whether the policyholder intended to pollute, when the wastes were disposed of, how the damage process developed) are the crux of the dispute between policyholder and insurer. So great and varied is this asserted array of factual issues that each site purportedly requires independent and intensive site-specific discovery and factfinding. Because this is so, AIG and Kemper conclude that a separate suit for each state where a site is located will be far more convenient than a comprehensive action, since the relevant witnesses and documents will be located nearer to the courthouse. While the argument has some surface appeal, it collapses on meaningful review.

Contrary to the premise supporting the position of AIG and Kemper, environmental insurance coverage litigation is preeminently contractual, not site-specific. The focus is the policyholder's insurance program, not liability for the cleanup of the wastes.<sup>58</sup> Certainly,

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58. *Purex Indus. v. Underwriters at Lloyd's*, No. B030780, slip op. at 13 (Cal. App. 2d Dist. Mar. 21, 1989) (retaining jurisdiction over environmental insurance coverage action; "The primary right of plaintiff alleged in both the California and New Jersey actions is the right to insurance coverage in the form of reimbursement for the cost of environmental cleanup. . . . The existence of that right turns on interpretation of the insurance policies. . . ."); *Armotek Indus. v. Employers Ins. of Wausau*, No. 88-3110, slip op. at 5-6 (D.N.J. Mar. 7, 1989), *reprinted in* 3 *Mealey's Litig. Rep. (Ins.)* E-1 (Apr. 11, 1989) ("Regarding the convenience of the witnesses, it should be kept in mind that this case is not about pollution in Connecticut [where the only site was located]; rather it is about a contract. . . .") (hereinafter "*Armotek*"); *Monsanto Co. v. Aetna Casualty & Sur. Co.*, No. 88C-JA-118 (Del. Super. New Castle County Oct. 21, 1988), *reprinted in* 2 *Mealey's Litig. Rep. (Ins.)* F-1, F-8 (Oct. 25, 1988), *rev. denied*, (Del.), *reported in* 3 *Mealey's Litig. Rep. (Ins.)* 16 (Dec. 13, 1988) (hereinafter "*Monsanto*") ("The Court agrees with Monsanto that the issues involved may not require factual discovery. The Court may use substantive law to construe the terms of the insurance policies."); *North American Philips Corp. v. Aetna Casualty & Sur. Co.*, No. 88C-JA-155 (Del. Super. New Castle County Oct. 21, 1988), *reprinted in* 2 *Mealey's Litig. Rep. (Ins.)* G-1 (Oct. 25, 1988),

there have been a few well-publicized trials involving a detailed factual examination of the activities at a particular site.<sup>59</sup> Still, the critical issues separating policyholders from insurers are primarily legal,<sup>60</sup> require little or no site-specific factual development and discovery, and are capable of resolution by summary judgment or motion to dismiss. These issues include: (i) whether groundwater contamination is “property damage” within the meaning of the CGL policy;<sup>61</sup> (ii) whether governmental cleanup orders or actions for response costs under CERCLA or similar statutes constitute “damages” within the meaning of the CGL policy;<sup>62</sup> (iii) whether cleanup costs incurred in anticipation of governmental orders are amounts the policyholder is “legally obligated to pay as damages;”<sup>63</sup> (iv) whether administrative notices, such as the Environmental Protection Agency’s (“EPA”) so-called potentially responsible party (“PRP”) notice letter constitutes a “suit” that merits a defense by the insurers pursuant to their policies;<sup>64</sup> (v) whether an insurer whose policy has been determined to be on the risk (“triggered” in insurance argot) may reduce its liability to the policyholder because property damage occurred in other triggered policy periods;<sup>65</sup> and (vi) whether the so-

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*rev. denied* (Del.), reported in 3 Mealey’s Litig. Rep. (Ins.) 16 (Dec. 13, 1988) (hereinafter “North American”); cf. *W.R. Grace & Co. v. AIU Ins. Co.*, No. 87-3050, slip op. at 11 (Mass. Super. Middlesex County May 27, 1988), reprinted in 2 Mealey’s Litig. Rep. (Ins.) G-1 (June 8, 1988) (“The underlying asbestos-related cases are not the essence of the dispute between Grace and its excess insurers. The action presently before this court concerns the existence of, and the interpretation of excess liability insurance policies.”).

59. *E.g.*, *Occidental Unit Liable for Cost of Site Cleanup: Judge in New Jersey Rules Dixon is Responsibility of Diamond Shamrock*, Wall St. J., Apr. 13, 1989, § A, at 9, col. 1; *Shell Faces Cost Up to \$1 Billion For Toxic Waste*, Wall St. J., Dec. 20, 1988, § A, at 3, col. 1.

60. *E.g.*, *Monsanto*, 3 Mealey’s Litig. Rep. (Ins.) at F-8 (Oct. 25, 1988).

61. *Compare* *Boeing Co. v. Aetna Casualty & Sur. Co.*, No. 55700-4 (Wash. Jan. 4, 1990), reprinted in 4 Mealey’s Litig. Rep. (Ins.) B-1 (Jan. 16, 1990) with *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986).

62. *Compare* *Avondale Indus. v. Travelers Indem. Co.*, 887 F.2d 1200 (2d Cir. 1989) with *Continental Ins. Cos. v. Northeastern Pharmaceutical Chem. Co.*, 842 F.2d 977 (8th Cir. 1988) (en banc).

63. *Compare* *United States Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838 (1983) with *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), cert. denied, 484 U.S. 1008 (1988).

64. *Compare* *Polkow v. Citizens Ins. Co.*, 180 Mich. App. 651, 447 N.W.2d 853 (1989) with *Dextrex Chem. Indus. v. Employees Ins. of Wausau*, 681 F. Supp. 438 (N.D. Ohio 1987).

65. *Compare* *New Castle County v. Continental Casualty Co.*, No. 85-436-J11, slip op. at 38-

called pollution exclusion bars coverage.<sup>66</sup>

There are several environmental insurance coverage issues that may involve some limited, site-specific factual disputes. Yet, even these issues (*e.g.*, trigger of coverage,<sup>67</sup> the polluting intent of the insured,<sup>68</sup> and the owned property exclusion<sup>69</sup>) in the first instance

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40 (D. Del. Oct. 23, 1989), reported in 3 Mealey's Litig. Rep. (Ins.) 9-10 (Oct. 24, 1989) with Insurance Co. of N. America v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), modified, 657 F.2d 814, cert. denied, 454 U.S. 1109 (1981).

66. As the insurance companies themselves represented on record in securing the exclusion's approval by the West Virginia Insurance Commissioner, the so-called pollution exclusion merely clarifies the policy's requirement that the policyholder neither expect or intend the pollutional damage. See, *e.g.*, United States Fidelity & Guar. Co. v. Specialty Coatings Co., 535 N.E.2d 1071, 1077 (Ill. App. 1989); Broderick Ins. Co. v. Hartford Accident & Indem. Co., No. 86-2-1033 (D. Col. Oct. 4, 1989), reported in 3 Mealey's Litig. Rep. (Ins.) 3 (Oct. 10, 1989) (hereinafter "Broderick"). But see, *e.g.*, Techalloy Co. v. Reliance Ins. Co., 338 Pa. Super. 1, 487 A.2d 820 (1984) (applying exclusion to deny coverage for bodily injury claims allegedly arising out of more than twenty years of discharges in course of business).

West Virginia was hardly the only state in which such representations were made. For example, in states such as Pennsylvania, New York, and Ohio as well as West Virginia, the Mutual Insurance Rating Bureau and the Insurance Rating Bureau filed a standard explanatory memorandum concerning the so-called pollution exclusion, on behalf of their members, and stated: "This endorsement is actually a classification of the original intent, in that the definition of occurrence excludes damages that can be said to be expected and intended." This evidence was not before the Pennsylvania Superior Court in *Techalloy*. See *Techalloy*, 338 Pa. Super. at 5, 487 A.2d at 827 ("Techalloy offers no alternative interpretation . . . which would render [the provision] ambiguous and capable of our interpretation"). The lessons of *Techalloy* have not gone unnoticed by policyholders. See, *e.g.*, *Broderick*, 3 Mealey's Litig. Rep. (Ins.) at 3 (Oct. 10, 1989) (introducing key drafting history documents into evidence). It will be a rare case, indeed, when substantial discovery or trial testimony does not concern these types of insurer representations, which, of course, bear no relationship to the location of the waste sites.

67. The CGL policy is triggered by the existence of, *inter alia*, "property damage" within the policy period. Because the CGL policies do not define what constitutes "property damage" in the context of environmental contamination, the courts have adopted various approaches to the trigger of coverage. Among the most prominent are the exposure theory—when the property is exposed to the deleterious substance, see, *e.g.*, *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 662 F. Supp. 71 (E.D. Mich. 1987); the "manifestation" theory—when the damage is discovered, is contained or becomes manifest, see, *e.g.*, *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986); and the continuous injury theory. See, *e.g.*, *Solvents Resources Service of New England, Inc. v. Midland Ins. Co.*, No. L-25610-83 (Nov. 17, 1986), reprinted in 1 Mealey's Litig. Rep. (Ins.) 3,609, 3,632 (Jan. 13, 1987). Under all three theories, but especially the exposure and continuous injury triggers, historic CGL policies may be on the risk for today's environmental liabilities.

68. Compare *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139 (W.D. Mich. 1988) with *New Hampshire Ins. Co. v. Hecla Mining Co.*, Nos. 87CA0082 & 87CA0092 (Colo. App. Oct. 19, 1989), reprinted in 3 Mealey's Litig. Rep. (Ins.) D-1 (Oct. 24, 1989).

69. See, *e.g.*, *Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co.*, 668 F. Supp. 1541 (S.D. Fla. 1987); *Bankers Trust Co. v. Hartford Accident & Indem. Co.*, 518 F. Supp. 371, vacated due to settlement, 621 F. Supp. 685 (S.D.N.Y. 1981); *Riehl v. Travelers Ins. Co.*, No. 83-0085 (W.D. Pa. Aug. 7, 1984), reprinted in 22 Env't Rep. Cas. (BNA) 1544, rev'd on other grounds, 772 F.2d 19 (3d Cir. 1985).

raise pure questions of policy interpretation that may be decided as a matter of law without site-specific discovery.<sup>70</sup> Moreover, much information regarding any residual factual issues (e.g., dates of shipment and the nature and degree of contamination) is developed in the underlying administrative proceeding and need not be repeated in the coverage litigation.<sup>71</sup>

As environmental insurance coverage litigation continues to unfold, it is becoming increasingly apparent that, contrary to the premise of the Site-Specific Approach, key discovery battles concern the drafting, marketing, and interpretation of the policy forms and policies at issue. Many courts have relied on the insurers' highly damaging statements in favor of coverage,<sup>72</sup> and it is not surprising that, for the most part, courts have permitted discovery into the meaning and interpretation of the key policy terms.<sup>73</sup> As policyholders pursue this discovery, a factual record drawn from the insurers' own words is being developed that undercuts their position on some of the most hotly contested coverage issues.<sup>74</sup> While it is true that, through broad

70. Nothing precludes a court from making its legal ruling prior to a full development of the factual record, an exercise that might prove unnecessary once the parties are enlightened as to the applicable law. See *Westinghouse*, 233 N.J. Super. at 478-79, 559 A.2d at 443 (advocating such an approach as a means for managing the case).

71. For example, the EPA's so-called § 104 CERCLA information request typically requires that the addressee provide the following information regarding its generation of hazardous wastes: (i) dates of transport; (ii) the identity of the transporter; (iii) the method of transport; (iv) the volume of hazardous materials per transport; (v) a general description of the types of materials transported, as well as (vi) documents evidencing the same. In *North American*, the court explained in the course of rejecting the Site-Specific Approach: "The EPA documents everything about the waste sites and stores these documents at a nearby regional office." *North American*, 3 Mealey's Litig. Rep. (Ins.) at G-10 (Oct. 25, 1988).

72. See, e.g., *Broadwell Realty Serv., Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super. 516, 528 A.2d 76 (1987); *Kipin Indus. v. American Universal Ins. Co.*, 41 Ohio App. 3d 228, 535 N.E.2d 334 (1987); *Claussen v. Aetna Casualty & Sur. Co.*, No. 46749 (Ga. June 22, 1989), reprinted in 3 Mealey's Litig. Rep. (Ins.) E-1 (June 27, 1989); *Specialty Coatings*, 535 N.E.2d at 1077; cf. *Asbestos Ins. Coverage Cases*, 1 Mealey's Litig. Rep. (Ins.) at 4463-68 (June 9, 1987) (relying on drafting history in adjudicating asbestos insurance coverage case).

73. See, e.g., *Boeing Co. v. Aetna Casualty & Sur. Co.*, No. C86-352D (W.D. Wash. July 24, 1989), reprinted in 3 Mealey's Litig. Rep. (Ins.) E-1 (Sept. 12, 1989) (hereinafter "*Boeing*"); *National Union Fire Ins. Co. v. Stauffer Chem. Co.*, 558 A.2d 1091 (Del. Super. 1989); *New Energy Co. v. CIGNA Ins. Co.*, No. 30C01-8805-CP-273 (Ind. Cir. Hancock County Sept. 28, 1988); *Stonewall Ins. Co. v. National Gypsum Co.*, No. 86 Civ. 9671 (S.D.N.Y. Sept. 5, 1988). But see, e.g., *Great Lakes Chem. Corp. v. Northwestern Nat'l Ins. Co.*, No. 23C01-8711-CP-263 (Ind. Cir. Fountain County 1989), reported in 3 Mealey's Litig. Rep. (Ins.) 19 (May 23, 1989).

74. For example, documents produced by Aetna Casualty and Surety Company in *Boeing*, 3

protective orders, the insurance industry has sealed from the public view many of its most damaging admissions,<sup>75</sup> the fact remains that *these* types of documents, and the witnesses who prepared them, are the focus of environmental insurance coverage litigation.<sup>76</sup>

Even granting the premise that some site-specific factual examination concerning each site is necessary in the coverage suit, the Site-Specific Approach is both an unnecessary and inadequate solution. It is unnecessary because many of the issues can be resolved largely through documentary evidence,<sup>77</sup> which can be photocopied and transported to the forum.<sup>78</sup> It is inadequate because the inquiry

Mealey's Litig. Rep. (Ins.) E-1 (Sept. 12, 1989), belie the contention regularly made by it and by other insurers that CERCLA responses costs are not "damages." See, e.g., Interoffice Communication from Commercial Department to Casualty Field Offices entitled "Hazardous Waste-General Liability Preliminary Underwriting Guidelines" at 4 (June 17, 1981) ("Damages may include . . . all costs of removal or remedial action."); Interoffice Communication from M. D. Coyle, Account Analyst, to R. L. Stenlake, Director of National Accounts Department at 2 (June 15, 1981) (in non-environmental context, advising "[d]o not define 'damages . . . ' [as it] is understood to mean money."); David R. Edwards, Counsel to Aetna, to Robert F. Braver, Vice President of Johnson & Higgins, at 3 (Dec. 18, 1972) ("As you recall, the definition of 'damages' in the 1966 policy was merely explanatory and was not designed to be a limiting definition."). For a fuller treatment of this interesting record, see Bradbury, *Original Intent, Revisionism, and the Meaning of the CGL Policies*, 1 ENVTL CLAIMS J. 279 (1989).

75. See, e.g., *Travelers Indem. Co. v. Allied-Signal, Inc.*, No. JFM-88-99 (D. Md. Apr. 28, 1989), reprinted in 3 Mealey's Litig. Rep. (Ins.) E-1 (May 9, 1989).

76. Perhaps the most illuminating statement on this issue comes, ironically, from a leading insurer, Travelers Indemnity Company:

Because of the way the insurance industry operates, most of the relevant policy language is found in standardized insuring forms, drafted by insurance associations or bureaus, and used industry-wide. Thus, questions of intent may be addressed on a standardized basis. Predictably, there will be precious little evidence of the negotiation of individual policies. The primary evidence on the intent of the parties drafting the contracts, and their expectations about scope of coverage, will be obtained through document productions from key industry-wide organizations, and depositions of their personnel.

Travelers' Reply Memorandum In Support of Coordination at 7-8 (filed Jan. 2, 1981), *Armstrong Cork Co. v. Aetna Casualty & Sur. Co.*, No. C 31567, consolidated into *Asbestos Ins. Coverage Cases*, 1 Mealey's Litig. Rep. (Ins.) 4,440 (June 9, 1987).

77. See, e.g., *Monsanto*, 2 Mealey's Litig. Rep. (Ins.) at F-10 (Oct. 25, 1988); see also *Owens-Illinois, Inc. v. Aetna Casualty & Sur. Co.*, No. 82-89, slip op. at 1 (D.D.C. Mar. 30, 1982) (making observation with respect to an asbestos insurance coverage action) (hereinafter "*Owens-Illinois*"); *Maremont Corp. v. Hartford Accident & Indem. Co.*, No. 83-1814, slip op. at 4 (D.D.C. Apr. 25, 1984) (hereinafter "*Maremont*"); *Monsanto*, 2 Mealey's Litig. Rep. (Ins.) at F-8 (Oct. 25, 1988) (relying on *Owens-Illinois* and *Maremont*) ("Because these actions concern[] insurance policies, there is no need for a view of the premises").

78. See *Central Nat'l Ins. Co. v. Purex Corp.*, No. 83-4077 (E.D.N.Y. Mar. 6, 1984) (declining to exercise jurisdiction, in part, because parties had already agreed to set up a depository in Los

into the underlying environmental liabilities may not be able to be confined to a particular site.<sup>79</sup> Insurers typically contend that a policyholder's alleged knowledge about, for example, the hazardous properties of chemicals at one site is chargeable against it as to all sites. Further, often there is no connection between the location of the particular site and the location of relevant documents and potential witnesses. Often, key personnel have relocated, many documents have been sent to storage facilities, and the EPA regional office is situated in a state other than where the site is located.<sup>80</sup>

The dispositive consideration is that there is no single jurisdiction or group of jurisdictions that is decisively and generally convenient.<sup>81</sup> The *Westinghouse* appellate court, in explaining its decision to reverse the trial court, observed that “[w]hether the entire action is tried comprehensively here or elsewhere or whether only a portion of this action is tried here, witnesses will have to travel and documentary proofs will have to be transported.”<sup>82</sup> Quoting approvingly from another decision, the court went on to express its satisfaction that neither forum was significantly more inconvenient than the other in “an age when air travel, express mail, electronic data transmission, and videotaped depositions are part of the normal course of business for companies such as these.”<sup>83</sup> It is true that these in-

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Angeles where a more comprehensive environmental insurance coverage action was proceeding); see also *North American*, 2 Mealey's Litig. Rep. (Ins.) at G-10 (Oct. 25, 1988) (“Documents from the EPA regional offices can be mailed to this Court for review. Since any information obtainable from the sites can be delivered to the Court in Delaware, this factor does not weigh overwhelmingly in favor of defendants.”).

79. “A waste-site can only offer a view of a ‘hole or a pile.’ The waste does not offer witnesses or documents.” *North American*, 2 Mealey's Litig. Rep. (Ins.) at G-10 (Oct. 25, 1988) (quoting transcript).

80. *Id.*

81. By siting the suit, the plaintiff, of course, has indicated the chosen forum is convenient for itself. See *Maremont*, No. 83-1814, slip op. at 3; *Maryland Casualty Co. v. Hercules, Inc.*, No. 84-716, (D. Del. May 9, 1985), reprinted in 1 Mealey's Litig. Rep. (Ins.) 529, 531 (citing, inter alia, *American Ins. Co. v. Crown Cork & Seal Co.*, 433 F. Supp. 333, 338 (E.D. Wis. 1977)).

82. *Westinghouse*, 233 N.J. Super. at 570, 559 A.2d at 438.

83. *Id.* (quoting *Travelers Indem. Co. v. Monsanto Co.*, 692 F. Supp. 90, 92 (D. Conn. 1988)); see also *W.R. Grace & Co. v. Admiral Ins. Co.*, No. 87-6624 (Mass. Super. Suffolk County Jan. 20, 1989), reprinted in 3 Mealey's Litig. Rep. (Ins.) H-1, H-4 (Feb. 14, 1989) (“many potential witnesses will not be subject to compulsory appearance in any state in which this action is brought”). Other courts have relied on the same factor in declining to dismiss on the basis of forum non conveniens. See *National Trust Co. v. American Home Assurance Co.*, No. 86-1406, slip op. at 4 (S.D.N.Y.

insurance disputes generally transcend the boundary of the forum state.<sup>84</sup> But it is precisely because the commercial transactions are national in scope that, as one court noted thirty years ago, the standard for forum non conveniens dismissals should be “exacting.”<sup>85</sup> The private interest factors do not support the forced fragmentation required by the Site-Specific Approach.

### B. Public Interest Factors

The Site-Specific Approach also relies on two sets of public interest considerations: (i) choice-of-law concerns and (ii) the burden purportedly imposed by comprehensive litigation on the forum, its

Jan. 22, 1987) (LEXIS, Genfed library, Dist file) (quoting *Overseas Programming Co. v. Cinematographische Commerz-anstalt*, 684 F.2d 232, 232 n.1 (2d Cir. 1982)) (“It is likely that witnesses and documents will have to be transported wherever this action goes forward; in any case, transportation problems are of diminishing importance in this age of ‘modern telecommunications and jet travel.’”); see also *SEC v. Hart*, 1978 Fed. Sec. L. Rep. (CCH) § 96,454, 93,645 (D.D.C. 1978) (“The record indicates that the witnesses in this action are located throughout a substantial portion of the United States and not exclusively in Connecticut. Travel by witnesses will be required regardless of the forum.”); *Ideal Basic Indus. v. American Home Assurance Co.*, 590 F. Supp. 1211, 1213 (D. Colo. 1984) (declining to dismiss on basis of forum non conveniens even though plaintiff had brought suit for underlying loss in Canada and “much of the physical evidence and many of the witnesses” were not located in forum); see generally *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1123 (S.D.N.Y. 1982) (retaining jurisdiction and noting “[i]n truth, actions of this variety are hugely inconvenient for everyone associated with them no matter where they are tried”).

84. See *Maremont*, No. 83-1814, slip op. at 4; see also *Owens-Illinois*, No. 82-89, slip op. at 3 (asbestos insurance coverage action “is actually a dispute that spills over state boundaries in terms of interest and, as such, it can just as appropriately proceed in the District of Columbia as Ohio” where the moving parties wished to transfer); cf. *National Trust Co. v. American Home Assurance Co.*, No. 86-1406, slip op. at 6 (S.D.N.Y. Jan. 22, 1987) (LEXIS, Genfed library, Dist file) (denying forum non conveniens motion where dispute is “truly international: the making of the Bond, the fraud, and the decisions concerning the claim all crossed the international boundary.”).

85. *Starr*, 25 N.J. at 587, 138 A.2d at 51. Furthermore, the inconvenience, if any, to insurance companies from litigating in a particular forum must be considered in light of their size and their decision to engage in nationwide business activities. See *North American*, 2 Mealey’s Litig. Rep. (Ins.) at G-8 (Oct. 25, 1988) (“[m]oreover, as a practical matter, the size and financial resources available to the defendants substantially attenuates the concern that the cost of marshalling evidence to litigate the suit in Delaware would place on them an undue burden”); *Monsanto*, 2 Mealey’s Litig. Rep. (Ins.) at F-8 (Oct. 25, 1988) (same in pertinent part); *Keene Corp. v. Insurance Co. of N. America*, No. 3152-82, slip op. at 3 (D.D.C. Nov. 22, 1982) (denying motion to transfer in the asbestos insurance coverage context and stating that “[i]t is undisputed that each Defendant [insurer] named herein does a substantial amount of business in this jurisdiction. Thus litigation herein may not be said to be burdensome to them.”); *Owens-Illinois*, No. 82-89, slip op. at 3 (“Both parties are huge corporations that will not be materially inconvenienced regardless of when the suit proceeds, and whose witnesses will be not be greatly disadvantaged if suit takes place in this forum.”); *Samson Cordage Works v. Wellington Puritan Mills, Inc.*, 303 F. Supp. 155, 162 (D.R.I. 1969).

taxpayers, its jurors, and—above all—the forum court itself. As we show below, neither factor supports the Site-Specific Approach.

### 1. Choice of Law

Fragmentation of a comprehensive environmental insurance coverage lawsuit has three consequences, all negative, relating to choice-of-law concerns. First, multiple forums are obligated to tangle with the complex choice-of-law exercise that the doctrine of forum non conveniens is designed to minimize.<sup>86</sup> Second, the choice of law rules of the relevant forums make likely the application of different states' law to the same insurance contracts and require many courts (not just one) to apply the law of a sister state.<sup>87</sup> Third, the risk of inconsistent interpretations of the same insurance contract (perhaps under the same substantive law) between identical or nearly identical parties is increased dramatically, as more courts are required to choose the applicable law and to apply it. Such inconsistencies, for example, on the issue of "trigger" could divest a policyholder of insurance coverage, to which it is indisputably entitled if the law of a single state, any state, is applied uniformly.<sup>88</sup> This result defies common sense and the applicable authority in West Virginia and elsewhere. The efficient and rational approach is for a single court to address the choice-of-law issue, weigh the relevant considerations, and select the appropriate law. While it is true that some environmental insurance coverage actions (involving one or at most a handful of sites) have applied the law of the state where the liability arose,<sup>89</sup> no comprehensive environmental or toxic tort insurance cov-

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86. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 251 (1981).

87. Under the law of many states, including West Virginia, an insurance contract must be interpreted in accord with the insured's reasonable expectations. See *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 488, 495 (W.Va. 1987); *Massachusetts Insurers Insolvency Fund v. Continental Casualty Co.*, 399 Mass. 598, 600, 506 N.E.2d 118, 120 (1987); see generally Keeton, *Insurance Law Rights at Variance With Policy Provisions*, 83 HARV. L. REV. 961, 966-74 (1970).

As *Westinghouse* noted, policyholders did not expect their rights to coverage to vary depending on where the claim arose. *Westinghouse*, 233 N.J. Super. at 476, 559 A.2d at 442.

88. See *infra* note 102 and accompanying text.

89. See, e.g., *Witco Corp. v. Travelers Indem. Co.*, No. 86-2997 (D.N.J. May 1, 1987); *Sharon Steel Corp. v. Aetna Casualty & Sur. Co.*, Nos. C-87-2306 & C-87-2311 (Utah Dist. Salt Lake County July 20, 1988), reprinted in 2 Mealey's Litig. Rep. (Ins.) B-1 (July 27, 1988).



erage action has done so.<sup>90</sup> In *Westinghouse*, an eighty-site environmental insurance coverage action, the New Jersey Appellate Division explained that the choice-of-law problems raised in support of the Site-Specific Approach could not justify fracturing the litigation:

In our view, the notion that the insured's rights under a single policy vary from state to state depending on the state in which the claim invoking the coverage arose contradicts not only the reasonable expectation of the parties but also the common understanding of the commercial community. It also seems to us anomalous, in conflict-of-law terms, to suggest that more than one body of law will apply to a single contract. The theme running through the federal mega-coverage cases is the assumption not only that state law will determine whose insurance law will govern the coverage dispute but also that it will be a single state's law, chosen in accordance with the applicable conflict principles of the forum.<sup>91</sup>

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90. Even where adopted, RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 193 (1971) does not suggest a contrary result. See *Compagnie des Bauxites de Guinee v. Argonaut-Midwest Ins. Co.*, Nos. 89-3025 and 89-3063, slip op. at 12 (3d Cir. July 26, 1989) ("By its terms, however, § 193 is limited to cases in which there is an understanding among the parties as to the location of the insured risk . . . . Comment b to [§ 193] further explains that the location of the insured risk has less significance 'where the policy covers a group of risks that are scattered throughout two or more states . . . .'"); see also *Arnotek*, 3 Mealey's Litig. Rep. (Ins.) at E-7—E-8 (Apr. 11, 1989). Even conceding arguendo a state's interest in the cleanup of its environment, to sacrifice a policyholder's ability to effect a consistent and economic determination of its insurance contract may raise serious questions regarding the extent to which a state may pursue its public purposes at the expense of a citizen's, even a corporate citizen's, rights. See generally Brilmayer, *Rights, Fairness and Choice of Law*, 98 YALE L.J. 1277 (1989).

91. *Westinghouse*, 233 N.J. Super. at 476, 559 A.2d at 442. See also *Carey-Canada, Inc. v. Aetna Casualty & Sur. Co.*, Nos. 84-3113 and 85-1640, slip op. at 9 (D.D.C. March 31, 1988), reprinted in 2 Mealey's Litig. Rep. (Ins.) C-1 (Apr. 13, 1988) (quoting *Asbestos Ins. Coverage Cases*, 1 Mealey's Litig. Rep. (Ins.) 4440 (June 9, 1987)) ("[a]s in all complicated coverage disputes, it is critical that we arrive at a decision 'which will be universally applicable to the insurance policies at issue.' " Applying a multitude of states' laws would be " 'confusing, burdensome, unfair to plaintiffs if it creates gaps in coverage,' and would be generally unwieldy"); see also *Firemen's Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71 (E.D. Mich. 1987) (applying Michigan law to insurance coverage action involving twenty-two different environmental sites in several different states); *Arnotek*, 2 Mealey's Litig. Rep. (Ins.) at E-9 (Apr. 11, 1989) (concluding that it was unlikely that the law of site would apply to environmental insurance coverage action and declining to dismiss suit on the basis of forum non conveniens); *Crown Cork & Seal Co. v. Aetna Casualty & Sur. Co.*, No. L-007456-88 at 15-16 (N.J. Super. Law Div. Aug. 8, 1989).

The *Westinghouse* court recognized that the theme running through the federal mega-coverage cases is that a single state's law will govern coverage disputes chosen in accordance with the applicable conflict-of-law principles in the forum. The result in *Westinghouse* is a logical one fashioned to avoid an otherwise chaotic situation and a multiplicity of litigation.

Moreover, "[o]ne of the factors which courts must consider in construing language of a policy is whether the use by the insurer of alternative or more precise language would have 'put the matter

Moreover, often many of the excess insurers have bound themselves contractually to the law of the forum chosen by plaintiffs.<sup>92</sup> In several environmental insurance coverage cases, courts have relied on, or alluded to, that premise in denying forum non conveniens motions.<sup>93</sup> Assuming that a true conflict of law issue exists<sup>94</sup> and

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beyond reasonable question.' " *Aetna Ins. Co. v. Weiss*, 174 N.J. Super. 292, 296, 416 A.2d 426, 428 (App. Div.), cert. denied, 85 N.J. 127, 425 A.2d 284 (1980) (quoting *Mazzilli v. Accident & Casualty Ins. Co.*, 35 N.J. 1, 7, 170 A.2d 800, 803 (1961)). Thus, it is arguable that the failure of the insurer-draftsman to insert a choice-of-law provision in the standard policy form language constitutes a latent ambiguity, which must be construed in favor of the insured and in light of the comprehensive insurance purposes of the policies themselves.

92. The standard consent-to-suit clause reads:

It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the insured (or insured), will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

*Monsanto*, 2 Mealey's Litig. Rep. (Ins.) at F-5—F-6 n.6 (Oct. 25, 1988) (quoting provision); see also *Perini Corp. v. Orion Ins. Co.*, 331 F. Supp. 453, 454 (E.D. Cal. 1971); *Euzzino v. London & Edinburgh Ins. Co.*, 228 F. Supp. 431, 433 (N.D. Ill. 1964); *General Phoenix Corp. v. Maylon*, 88 F. Supp. 502, 502 (S.D.N.Y. 1949).

In any event, the promise to consent to jurisdiction severely undermines the ability of the insurers to argue that the forum is inconvenient. See *Capital Bank & Trust Co. v. Associated Internat'l Ins. Co.*, 576 F. Supp. 1522, 1524 (M.D. La. 1984), quoted in *Lexington Ins. Co. v. Unionamerica Ins. Co.*, No. 85-9181, slip op. at 3 (S.D.N.Y. May 28, 1987) (LEXIS, Genfed library, Dist file).

93. *W.R. Grace & Co. v. Admiral Ins. Co.*, No. 87-6624, (Mass. Super. Suffolk County Jan. 20, 1989), reprinted in 3 Mealey's Litig. Rep. (Ins.) H-1, H-5 (Feb. 14, 1989) (quoting *Stewart Organization, Inc. v. Ricoh Corp.*, 108 S. Ct. 2239, 2244 (1988) ("[a]t the very least, the existence of a contractual forum selection clause is a 'significant factor that figures centrally' in the analysis of forum issues")); see also *Monsanto*, 2 Mealey's Litig. Rep. (Ins.) at F-6 (Oct. 25, 1988); *North American*, 2 Mealey's Litig. Rep. (Ins.) at G-6 (Oct. 25, 1988). Consistent with that premise, the United States Court of Appeals for the District of Columbia Circuit recently interpreted the consent-to-suit clause to constitute a "waiver of personal jurisdiction as well as a waiver of any venue objections." *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710, 718 (D.C. Cir. 1986), cert. denied sub nom. *Falcon Ins. Co. v. Eli Lilly & Co.*, 479 U.S. 1060 (1987); see also *Rokeby-Johnson v. Kentucky Agric. Energy Corp.*, 108 A.D.2d 336, 339, 489 N.Y.S.2d 69, 72-73 (1985) ("we hold that the traditional criteria utilized in the forum non conveniens analysis must defer to a freely negotiated, rational forum selection clause the enforcement of which will not work undue hardship on any party"); *Appalachian Ins. Co. v. Superior Court*, 162 Cal. App. 3d 427, 208 Cal. Rptr. 627 (1984), see generally *Herzog*, *Conflict of Laws*, 37 SYR. L. REV. 361, 375-76 (1986) (discussing *Rokeby-Johnson*). But see *Turner & Newall, PLC v. Canadian Universal Ins. Co.*, 652 F. Supp. 1308 (D.D.C. 1987); *Schmid Laboratories, Inc. v. Hartford Accident & Indem. Co.*, 654 F. Supp. 734 (D.D.C. 1986).

94. Where there is no conflict in the competing states' interpretation of an insurance contract, no choice of law decision need be made. See *Quintana v. Brambila*, 192 N.J. Super. 361, 364-65, 470 A.2d 22, 24 (1983); *Hartford Nat'l Bank & Trust Co. v. United Truck Leasing Corp.*, 24 Mass. App. 626, 630-31 n.8, 511 N.E.2d 637, 640 n.8 (1987). Some courts have stated that basic principles of insurance contract interpretation determine whether conflict exists. See *Asbestos Ins. Coverage*

further assuming that the law of forum would not govern, there is simply no reason why a state court cannot apply the substantive law of another state.<sup>95</sup>

## 2. Burden on the Forum Court

Without doubt, the aspect of the Site-Specific Approach that resonates most strongly with certain trial judges is its claim that fracturing the suit will relieve a single court of the staggering burden of adjudicating a "mega" coverage case. Notwithstanding its allure, the argument violates basic jurisprudential precepts, including the benefit of resolving disputes comprehensively and consistently. Its consequence is to impose a far greater cumulative burden on the judicial system, while at the same time diminishing the task of the trial court relatively little.

The premise that a comprehensive environmental insurance coverage case is too large for a single court to adjudicate stands accepted juridical practice on its head.<sup>96</sup> If any single consistent pattern can

*Cases*, Coordinated Proceeding No. 1072, slip op. at 9-10 Calif. Super. San Francisco County May 29, 1987). West Virginia falls within the mainstream of American jurisdictions in this regard. Compare *Huggins v. Tri-County Bonding Co.*, 337 S.E.2d 12, 18 (W.Va. 1985) with 13 J.A. & J. APPLEMAN, *INSURANCE LAW AND PRACTICE*, §§ 7385, 7401, 7403 (1976).

95. See, e.g., *Monsanto*, 2 Mealey's Litig. Rep. (Ins.) at F-6 (Oct. 25, 1988) ("If it were necessary to adjudicate some or all issues of coverage using the laws of other States, this possibility alone would not weigh overwhelmingly in favor of the defendants."); *Koenig v. Int'l Bhd. of Boilermakers*, 284 Pa. Super. 558, 575, 426 A.2d 635, 644 (1980) ("In itself, the requirement to interpret the laws of another jurisdiction should not cause a court to hesitate to exercise jurisdiction over the parties."); cf. *Jones Truck Lines v. Transport Ins. Co.*, No. 88-5723 (E.D. Pa. May 9, 1989), reprinted in 3 Mealey's Litig. Rep. (Ins.) A-1 (May 23, 1989) (applying Missouri law to environmental insurance coverage dispute).

96. The federal system possesses (and some argue that the state system should as well) a procedure for consolidating cases. See Note, *The Consolidation of Multistate Litigation in State Courts*, 96 YALE L.J. 1099 (1987). The federal tool of multi-district litigation—specifically designed to capitalize on the advantages of comprehensive litigation—consolidates cases with at least one common issue of fact for pretrial proceedings (including consideration and disposition of motions for summary judgment). Indeed a "mega" environmental insurance coverage case has been consolidated in the Eastern District of Pennsylvania. See *In re Texas E. Transmission Corp.*, No. 764 (Jud Pan. Mult. Lit. May 31, 1988), reprinted in 2 Mealey's Litig. Rep. (Ins.) F-1 (June 8, 1988) (consolidation "will best serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation").

Moreover, there is some question as to the legitimacy of even considering the supposed burden on the forum's judicial system. See *Starr*, 25 N.J. at 588, 138 A.2d at 52 ("We incline to the view that if as between the litigants justice dictates that plaintiff's choice of forum be upheld, such should

be discerned from the patchwork of insurance law, it is that coverage disputes should be resolved in comprehensive, rather than piecemeal, fashion.

Examples abound in both the toxic tort and environmental insurance coverage contexts. In *Liberty Mut. Ins. Co. v. Foremost-McKesson, Inc.*,<sup>97</sup> the United States Court of Appeals for the First Circuit stayed a piecemeal coverage lawsuit involving a sliver of the policyholder's insurance program and only one segment of its toxic tort liabilities—claims arising out of alleged ingestion of diethylstilbestrol (“DES”).<sup>98</sup> The circuit court deferred to a more comprehensive state court action brought against all of the manufacturer's liability insurers and encompassing its liabilities arising out of both DES and other pharmaceuticals.<sup>99</sup> The appellate panel emphasized that the state court action was “the more comprehensive, first-filed action brought against all of the manufacturer's liability insurers and encompassing its liabilities arising out of both DES and other pharmaceuticals.”<sup>100</sup> Therefore, the state court action “is the logical forum for the determination of the respective rights and obligations of the parties and serves to further the interests of judicial economy.”<sup>101</sup> The court also detected the “real possibility” that the courts might interpret the same standard policy language differently, thereby

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be the result notwithstanding its impact upon the economy of the judicial system.”); *Brown v. Clorox Co.*, 56 Cal. App. 3d 306, 313, 128 Cal. Rptr. 385, 391 (1976) (“Every lawsuit tried places a burden upon the courts, but at least one of the functions of the courts is to try lawsuits.”); see *Westinghouse*, 233 N.J. Super. at 468, 55 A.2d at 437 (“We must, as a judicial system, devote our efforts to determining how best to adjudicate controversies on their merits, not how to avoid adjudication.”). *But see Semanishin v. Metropolitan Life Ins. Co.*, 46 N.J. 531, 535, 218 A.2d 401, 403 (1966) (“[I]t would be unfair to the citizens of New Jersey to burden our courts with this imported litigation . . . .”); *United Technologies Corp. v. Liberty Mut. Ins. Co.*, No. 87-7172 (Mass. Super. Suffolk County Feb. 24, 1989), reprinted in 3 Mealey's Litig. Rep. (Ins.) H-1 (Feb. 28, 1989):

Adjudication of the claims including all non-Massachusetts sites will place a substantial burden on both the citizens of this county and the treasury of Massachusetts. The courts of this Commonwealth, already straining under the pressures of a staggering case load should more appropriately reserve their resources for controversies in which Massachusetts holds a real and substantial interest.

97. 751 F.2d 475 (1st. Cir. 1985).

98. *Id.* at 476.

99. *Id.* at 477.

100. *Id.*

101. *Id.*

leaving the manufacturer without sufficient liability coverage from insurers after paying premiums for many years.<sup>102</sup>

Comprehensive adjudication is a guiding principle in environmental insurance coverage cases as well. A California trial court recently decided both to enjoin a policyholder from pursuing a site-specific suit and to add the subject matter of such suit to "its ongoing stewardship" of a pending comprehensive action.<sup>103</sup> It did so by invoking, and referring to, the values underlying comprehensive adjudication—the "prevent[ion of] a multiplicity of judicial proceedings, the possibility of conflicting rulings and inconsistent results and the gross economic costs that would otherwise result. . . ."<sup>104</sup> For similar reasons, the court in *Travelers Indem. Co. v. Monsanto Co.*<sup>105</sup> stayed an insurer's forty-site coverage suit in deference to the policyholder's more comprehensive, later-filed action encompassing a much greater portion of the relevant insurance program.<sup>106</sup> The most significant factor, according to the court, was its "responsibility to discourage duplicative and piecemeal litigation. . . . It is essential that such large-scale complex litigation be managed comprehensively."<sup>107</sup> The court added that it was "not unmindful that to the extent that the dispute between Monsanto and its carriers,

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102. *Id.* See also *American Motorists Ins. Co. v. Philip Carey Corp.*, 482 F.Supp. 711 (S.D.N.Y. 1980) (deferring to more comprehensive toxic tort insurance coverage action involving substantially more of the underlying claims and insurers in order to avoid piecemeal litigation and perhaps conflicting policy interpretation). A similar result was reached in *Lumbermens Mut. Casualty Co. v. Connecticut Bank & Trust Co.*, 806 F.2d 411 (2d Cir. 1986), an asbestos insurance coverage action, even though all of the policyholder's insurers were not joined in the more comprehensive state court action until after the federal suit—with only the single insurer and insured's successor-in-interest as parties—was filed. In addition to the "critical factor[s]" offered by *Foremost-McKesson*, the court emphasized that "inconsistent judgments as to the respective obligations of Raymark's excess insurers would make the allocation of indemnity and defense costs and the handling and administration of over 30,000 asbestos-related claims against [the policyholder] . . . absolutely impossible." *Id.* at 415. Under the Site-Specific Approach, conflicting adjudication may be unavoidable on procedural as well as substantive issues. Each court has its own procedural and evidentiary rules, for example, with respect to the number of interrogatories that may be propounded, the scope of the work product doctrine, or the permissible period of discovery. Even under identical rules, however, it is quite conceivable that the same discovery disputes as to relevance or privilege will be resolved differently by different judges.

103. *Purex Indus. v. Procter*, No. C-446-935 (Cal. Super. Los Angeles County Aug. 20, 1987).

104. *Id.*

105. 692 F. Supp. 90 (D.Conn. 1988).

106. *Id.* at 93-94.

107. *Id.* at 92-93.

including Travelers, is fragmented, any effort to resolve the matter through settlement is likely to be frustrated.”<sup>108</sup> This preference for comprehensiveness is hardly limited to insurance coverage litigation. West Virginia, like many states, has a tradition of strong support for comprehensive adjudication of all types of suits.<sup>109</sup>

Quite apart from considerations of comprehensiveness, there is no basis under traditional forum non conveniens law for a dismissal where the alternative imposes a *far greater* burden on the public. Yet, that is precisely what happens when the Site-Specific Approach is adopted. Courts in multiple jurisdictions are required to preside over duplicative disputes. In *each* of these jurisdictions, the parties must file complaints, answers, interrogatories (and responses), requests for production (and responses), motions, briefs, and appendices—collectively duplicative of what would be filed in the comprehensive litigation *and* partially duplicative of each other. Instead of perhaps fifty sets of counsel for the various parties, there may be hundreds.

The judges burdened with these fractured lawsuits must also engage in duplicative factfinding. *Each* jurisdiction under the Site-Specific Approach is required to devote judicial resources to becoming familiar with the policyholder’s insurance program, including most of the brokers, the insurers’ representatives, the insurance industry’s expert drafting committees, the drafting history of key policy terms, and the claims handling procedures of environmental and insurance departments.

Compounding this overlap of judicial activity are the problems inherent in administering the production of the same documents and

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108. *Id.* at 93; *see also* General Reinsurance Corp. v. Ciba-Geigy Corp., 853 F.2d 78, 81 (2d Cir. 1988) (“As the New Jersey action embraces all these issues, the risk of piecemeal litigation is real and should be avoided.”); Central Nat’l Ins. Co. v. Purex Corp., No. 83-4077 (E.D.N.Y. Mar. 6, 1984) (staying site-specific in order to avoid “piecemeal litigation” and to avoid “forc[ing] the parties to litigate in at least two distinct forums”).

109. *See* Miller v. Robinson, 301 S.E.2d 610, 614 (W. Va. 1983) (“the general policy of the [West Virginia] Rules [of Civil Procedure] is to avoid multiple suits between the same parties”); *see also, e.g.*, Korff v. G. & G. Corp., 21 N.J. 558, 567, 122 A.2d 889, 893-94 (1956) (“[O]ur courts are firmly committed to the enlightened policy which points generally to the joinder of all matters in controversy between all of the parties in a single proceeding for just and expeditious disposition at one time and place.”).

coordinating the depositions and trial testimony of the same witnesses. This process is further complicated by the presence of hundreds of law firms, different discovery tracks, and conflicting state and local rules on the permissible scope of discovery, evidence, civil procedure, and privilege.

In return for imposing this enormous burden on the courts of multiple jurisdictions, the forum court spares itself very little. The task of piecing together all or almost all of the insurance program remains before the forum court. The contract interpretative discovery—including depositions of the insurers' expert draftsmen and production of the minutes of committees, articles, and drafting history of disputed policy language—is not lessened in any meaningful sense as a result of the court's dismissal of the non-forum sites.<sup>110</sup> As with the private interest factors, the Site-Specific Approach cannot be justified by application of the *Gulf Oil* public interest factors.

#### V. THE CASE LAW THUS FAR

The national strategy of AIG and Kemper has generated a growing body of case law consisting primarily of unpublished trial court decisions. *Westinghouse*, with eighty sites and more than 140 parties, was the first, and remains the most important, case to confront the Site-Specific Approach. Accepting the arguments of Kemper, the trial court in *Westinghouse*, as discussed above, dismissed the action on forum non conveniens grounds except to the extent that the policyholder sought coverage for its New Jersey environmental (and toxic tort) liabilities.<sup>111</sup> Emphasizing what it perceived to be the inevitable need for site-specific factfinding, the trial court believed the cases as filed placed an excessive burden on a single court retaining jurisdiction.

Several months later, *Westinghouse* was granted leave to appeal the trial court's interlocutory order. On May 15, 1989, New Jersey's

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110. Indeed, if the Site-Specific Approach were adopted in all states, the burden on the forum's judicial system could *increase* as coverage suits situated in other state court systems would be transferred, with respect to the forum's environmental sites, to the forum state.

111. The *Westinghouse* litigation actually consisted of two suits, one seeking coverage for toxic tort liabilities, the other for environmental liabilities.

appellate division issued its much-awaited opinion. Correcting what it considered a misguided use of forum non conveniens as a case management tool, the appellate court directed the trial court to determine whether the cases should proceed comprehensively in New Jersey or in Pennsylvania.<sup>112</sup>

In the opinion of the appellate division, Westinghouse's "litigation as presently postured is inordinately complex and . . . its conduct will pose formidable procedural problems which will surely challenge the outer limit of judicial case management as presently practiced."<sup>113</sup> Despite these difficulties, the court observed that "forum non conveniens is simply the wrong doctrine in these circumstances."<sup>114</sup> For, as the appellate division concluded:

[T]he one component of the overall circumstantial complex which is the most critical concern here was insufficiently considered in the trial court's analysis, and that is the factor of piecemeal litigation. This kind of fractionalization is a most potent weapon in the arsenal of the litigant whose primary and subversive aim is to impose both upon the judicial system and the adversary by endlessly delaying the day upon which the entire controversy will finally come to an end and the respective rights of the litigants resolved clearly, consistently, and finally. It is only the single comprehensive action, designed to adjudicate the entire controversy between litigants, which can protect both the court and the parties from that calculated imposition.<sup>115</sup>

The Site-Specific Approach, with certain exceptions, has not fared well in courts other than the *Westinghouse* trial court. Among the exceptions is *Union Carbide Corp. v. Aetna Casualty & Sur. Co.*,<sup>116</sup> in which a Connecticut trial court adopted the arguments supporting the Site-Specific Approach and dismissed on forum non conveniens grounds an environmental insurance coverage suit with sites in eight states.<sup>117</sup> On appeal, the Connecticut Supreme Court affirmed but did so on the narrow grounds that the trial court had not abused

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112. *Westinghouse*, 233 N.J. Super. at 468-71, 559 A.2d at 437-39. The New Jersey trial court subsequently retained jurisdiction of both lawsuits. *Westinghouse Elec. Corp. v. Liberty Mut. Ins. Co.*, Nos. L-069351-87 and L-069352-87 (N.J. Super. Law Div. Union County Sept. 18, 1989).

113. *Westinghouse*, 233 N.J. at 468, 559 A.2d at 437.

114. *Id.* at 470, 559 A.2d at 438.

115. *Id.* at 470-71, 559 A.2d at 438-39.

116. No. 294989 (Conn. Super. Danbury Dist. Feb.6, 1989), *aff'd*, 212 Conn. 311, 562 A.2d 15 (1989).

117. *Id.*



its discretion.<sup>118</sup> The Connecticut Supreme Court emphasized that, in contrast to the situation pertaining in *Westinghouse*, the policyholder in *Union Carbide* “concededly subscribed” to the fragmentary approach, had withdrawn its appeal, and had acquiesced in the filing of eight lawsuits throughout the country.<sup>119</sup>

Notwithstanding the results in *Union Carbide* and a few other cases, most courts to date have rejected the Site-Specific Approach. Shortly after the trial court’s decision in *Westinghouse*, West Virginia and California considered and rejected the arguments of AIG and Kemper. In *Joy Technologies Corp. v. Liberty Mut. Ins. Co.*,<sup>120</sup> a proponent of the Site-Specific Approach, Puritan Insurance Company, on the heels of its victory in *Westinghouse*, moved to dismiss Joy Technologies Corporation’s coverage action in Mercer County, West Virginia. The suit involved four sites located in West Virginia, Colorado, Maine, and Ohio. On August 29, 1988, the trial court denied the motion.<sup>121</sup>

The California case, *FMC Corp. v. Liberty Mut. Ins. Co.*,<sup>122</sup> is an environmental insurance coverage action pending against 174 insurance carriers and involving forty-six hazardous waste sites in twenty-two states (with only seven allegedly insignificant sites located in the forum state). FMC Corporation is not a citizen of California nor are the vast majority of defendants in that litigation.<sup>123</sup> The California trial court’s decision to retain jurisdiction over the entire controversy was endorsed by the California Court of Appeals, which observed: “it has not been demonstrated that granting petitioner’s

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118. *Union Carbide*, 212 Conn. at 320, 562 A.2d at 21.

119. *Id.* at 320, 562 A.2d at 20 (“This case . . . does not present the same risk of excessive fractionalizing of claims that concerned the New Jersey court in [*Westinghouse*].”); see also *Id.* at 320 n.6, 562 A.2d at 20 n.6. (“The plaintiff in [*Westinghouse*] was one of the parties pursuing the appeal.”). At least two other courts to date have adopted the Site-Specific Approach. See *Avnet, Inc. v. Aetna Casualty & Sur. Co.*, No. 11091/88 (N.Y.S. N.Y. County Feb. 1, 1989), reprinted in 3 Mealey’s Litig. Rep. (Ins.) J-1 (Feb. 14, 1989) and *United Technologies*, 3 Mealey’s Litig. Rep. (Ins.) H-1 (Feb. 28, 1989).

120. No. 88-C-96 (W. Va. Cir. Mercer County Aug. 29, 1988), reported in 2 Mealey’s Litig. Rep. (Ins.) 10 (Oct. 25, 1988).

121. *Id.*

122. No. 643058 (Calif. Super. Santa Clara County Mar. 11, 1988) (hereinafter “*FMC*”).

123. *Id.*

motion for dismissal *forum non conveniens* would foster judicial economy.”<sup>124</sup>

In addition to the *Joy* and *FMC* decisions, at least eight other trial courts—one in California,<sup>125</sup> one in Illinois,<sup>126</sup> two in New Jersey,<sup>127</sup> one in Ohio,<sup>128</sup> one in Rhode Island<sup>129</sup> and two in Delaware<sup>130</sup>—have declined to follow the Site-Specific Approach. The companion Delaware cases, *Monsanto* and *North American*, are particularly noteworthy because of their extensive exposition and analysis of forum non conveniens in the environmental insurance coverage context.<sup>131</sup> Among the notable aspects of the opinions was the vigor with which the court embraced comprehensive adjudication. In support, the three practical “considerations” offered by the court were (i) the existence of substantial precedent in other courts having adjudicated coverage actions concerning multiple environmental sites; (ii) the elimination of the possibility of inconsistent adjudications; and (iii) the benefits to judicial economy inhering in the comprehensive approach.<sup>132</sup> In summary, judges, whether favoring or opposing the Site-Specific Approach, have acknowledged the substantial challenges posed by multi-site environmental insurance coverage cases. Most, however, have rejected the Site-Specific Approach.

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124. *Id.*

125. *Fairchild Semiconductor Corp. v. Truck Ins. Exch.*, No. 850504 (Cal. Super. San Francisco County Aug. 4, 1988), *mandamus denied sub nom.* *Puritan Ins. Co. v. Superior Court*, No. A043322 (Cal. App. Dec. 2, 1988).

126. *Central Illinois Public Service Co. v. Allianz Underwriters Ins. Co.*, No. 87-L-39 (Ill. Cir. Morgan County Oct. 30, 1989), *reported in* 4 *Mealey's Litig. Rep. (Ins.)* 15 (Nov. 28, 1989).

127. *Allied-Signal, Inc. v. Abeille-Paix Reassurances*, No. MRSL-226-88, (N.J. Super. Law Div. Morris County Aug. 25, 1988); *Peabody Int'l Corp. v. Commercial Union Ins. Co.*, No. C-242-87, (N.J. Super. Ch. Div. Mercer County Aug. 10, 1988).

128. *Firestone Tire & Rubber Co. v. AIU Ins. Co.*, No. CV-89-01-0158 (Ohio Comm. Pl. Summit County Aug. 10, 1989), *reported in* 3 *Mealey's Litig. Rep. (Ins.)* 22-23 (Aug. 22, 1989).

129. *Avco Corp. v. Aetna Casualty & Sur. Co.*, No. 87-3496, (R.I. Super. Feb. 24, 1988).

130. *E.I. Du Pont de Nemours & Co. v. Admiral Ins. Co.*, No. 89-AU-99 (Del. Super. New Castle County Nov. 20, 1989), *reprinted in* 4 *Mealey's Litig. Rep. (Ins.)* C-1 (Nov. 28, 1989). The *Monsanto* and *North American Philips* opinions are virtually identical and are authored by the same Delaware trial judge.

131. Even though none of the underlying sites in *Monsanto* and *North American Philips* is located in Delaware and neither of the policyholder plaintiffs is headquartered in Delaware, the Delaware Superior Court refused to dismiss any portion of either case.

132. *Monsanto*, 2 *Mealey's Litig. Rep. (Ins.)* at F-14—F-15 (Oct. 25, 1988); *North American*, 2 *Mealey's Litig. Rep. (Ins.)* at G-12 (Oct. 25, 1988).

## VI. CONCLUSION: STATE COURTS ARE EQUIPPED TO MANAGE COMPREHENSIVE ENVIRONMENTAL INSURANCE COVERAGE CASES

Experience has taught that comprehensive environmental insurance coverage actions can be managed. Under the law of most states, arrangement may be made for out-of-state depositions that can be read at trial if necessary.<sup>133</sup> Videotaped depositions are by now almost commonplace in West Virginia and other states.<sup>134</sup> In many jurisdictions, a master can be appointed to preside over the discovery necessary at a particular site.<sup>135</sup> Both policyholders and insurers alike have found that a well-conceived case management order or series of such orders negotiated by the parties themselves can provide the stability and flexibility for an orderly piece of litigation.<sup>136</sup>

There is, of course, no single method for adjudicating a comprehensive suit. The appellate division in *Westinghouse* suggested a

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133. See e.g., *Mass. R. Civ. P. 32(a)(2)*; *W. Va. R. Civ. P. 32*; see also *American Home Assurance Co. v. Ins. Corp. of Ireland, Ltd.*, 603 F. Supp. 636, 641 (S.D.N.Y. 1984) (denying motion to transfer and observing that arrangements had been made to depose all foreign witnesses).

134. *Bennett v. Keadle*, 334 S.E.2d 643, 645 (W. Va. 1985) ("[d]ue to recent technological advances and diminished equipment costs, videotaped depositions have become a familiar component of pretrial practice in this State"); *Roche v. Massachusetts Bay Transp. Auth.*, 400 Mass. 217, 508 N.E.2d 614 (1987); *Mills v. Dortch*, 142 N.J. Super. 410, 415-17, 361 A.2d 606, 609 (App. Div. 1976).

135. See *Peabody Int'l Corp. v. Commercial Union Ins. Co.*, No. C-242-87 at 62-63 (N.J. Super. Ch. Div. Mercer County Aug. 10, 1988) (noting possibility as one reason supporting rejection of Site-Specific Approach). Numerous environmental insurance coverage cases have used a special master. See, e.g., *Boeing Co. v. Aetna Casualty & Sur. Co.*, No. C86-325D (W.D. Wash. July 24, 1989), reprinted in 3 Mealey's Litig. Rep. (Ins.) E-1 (Sept. 12, 1989); *J. T. Baker Inc. v. Aetna Casualty & Sur. Co.*, No. 86-4994 (D.N.J. Feb. 14, 1989), reprinted in 3 Mealey's Litig. Rep. (Ins.) C-1 (Feb. 28, 1989). The benefits of such masters can be especially significant in complex cases. See Hazard & Rice, *Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Managers*, 1982 AM. B. FOUND. RES. J. 375 (1982). Such a procedure is permitted under West Virginia law. See *W. Va. R. Civ. P. 16(c)(6)*; see also *Gardner*, 372 S.E.2d at 795 (Neely, J., dissenting) ("Such mechanisms as privately paid special masters, privately paid advisory juries to assist in determining damages for court supervised settlements, and other litigant-financed contributions to the courts' logistical support all seem to me entirely appropriate.").

136. In such orders, the parties may agree to a series of procedures that streamline the litigation including: (i) creation of steering committees; (ii) the phasing of discovery by issue or by location of site; (iii) requirement of coordinated, master sets of written discovery; (iv) selection of document depositories; (v) pre-designation of exhibits to be used in depositions; (vi) a jointly-created notebook summarizing all key policy information to which the parties may then refer. For examples of case management orders, see *Case Management Order No. 1*, *Northrop Corp. v. Evanston Ins. Co.*, No. C566129 (Cal. Super. Los Angeles County), reprinted in 3 Mealey's Litig. Rep. (Ins.) F-1 (Apr. 11, 1989) and *Case Management Order No. 2*, *Monsanto Co. v. Aetna Casualty & Sur. Co.*, No. 88C-JA-118 (Del. Super. New Castle County Mar. 6, 1989), reprinted in 3 Mealey's Litig. Rep. (Ins.) G-1 (Apr. 11, 1989).

three-step process, beginning with resolving choice-of-law problems, then moving to the legal interpretations of the policy language, and lastly deciding the residual factual disputes.<sup>137</sup> As to the last step, which would encompass the site-specific issues, the appellate division offered several illustrative methods for achieving an efficient resolution: (i) summary judgment after record is created; (ii) a trial as to certain prototypical claims; and (iii) fact-finding in other jurisdictions in light of the trial court's previously issued, and binding, interpretative principles.<sup>138</sup> Other courts have selected prototype sites as to which the parties conduct extensive discovery with the goal of reaching a coverage determination that may be applied to other sites.<sup>139</sup> Regardless of the method chosen, we nevertheless believe, as did the *Westinghouse* appellate court, that "trial courts have available to them both the basic techniques and the judicial skill"<sup>140</sup> without recourse to forum non conveniens to manage comprehensive environmental insurance coverage actions consistent with the interests of the litigants and of the judicial system as a whole.

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137. *Westinghouse*, 233 N.J. Super. at 475-79, 559 A.2d at 441-43.

138. *Westinghouse*, 233 N.J. Super. 479, 559 A.2d at 443.

139. *Allied Signal Inc. v. Abeille-Paix Reassurances*, No. MRSL-226-88 at 126-28 (N.J. Super. Law Div. Aug. 25, 1988); *Peabody Int'l Corp. v. Commercial Union Ins. Co.*, No. C-242-87 at 62-63 (N.J. Super. Ch. Div. Mercer County Aug. 10, 1988).

140. *Westinghouse*, 233 N.J. Super. 468, 559 A.2d at 437.

